IN THE MISSOURI COURT OF APPEALS

WESTERN DISTRICT

Case No. _____

In re: RODNEY L. LINCOLN

Petitioner,

v.

JAY CASSADAY, Superintendent,
Jefferson City Correctional Center

Respondent.

PETITION FOR WRIT OF HABEAS CORPUS

Respectfully submitted,

TRICIA J. BUSHNELL#66818
Midwest Innocence Project
605 W. 47th Street, #222
Kansas City, MO 64112
816/221-2166 ● Fax 888/446-3287
tbushnell@themip.org

SEAN D. O'BRIEN #30116
4920 N. Askew
Kansas City, MO 64119
816/235-6152 ● Fax 816/235-5276
obriensd@umkc.edu

Counsel for Petitioner

TABLE OF CONTENTS

"My little sister, she couldn't speak and my mom was dead and it was up to me to tell them the bad man and make sure he went to prison."
--M.D., H.T. 3/17/16, p. 53.

"I always had my doubts about M.'s identification of Rodney."
Nathaniel Clenney, Ex. 36 at 3

"Melissa knew Rodney, and if he were the real killer, Melissa could have named him from the start. Instead, Melissa identified her mother's killer as Bill."
Abigail Wallace, Ex. 37 at 3

Q. Do you agree with Melissa's recantation?
A. Absolutely.
Q. Why?
A. Because we have all felt it. Well, I didn't feel it all along, but apparently our whole family felt it all along. And then looking at the -- reading the details of it, which I never allowed myself to do because I didn't want to believe. I wanted the comfort in knowing that the guy who did this was locked away somewhere, and we didn't have to worry about him coming and finishing the job.
Jacqueline Barton, H.T. 3/18/16 at 58

I told her [Kay Lincoln] I was sorry because I knew that Rodney did not kill my mom. I told her I was sorry for taking away her father.
--M.D., H.T. 3/17/16 at 74.

"Melissa hid her head behind her arms, pointed at [Assistant D.A.] Joe Bauer, and said, 'Bad Man! Bad Man!' …. to Melissa, every man of medium-build was the Bad Man."
Victim Advocate Mary Flotron, Ex. 39 at 1

"I think the rest of the closure for us and the closure for Rodney's family is to let him go home because there is not -- there wasn't one victim, one family that was victim to this whole thing, there were two families. It was our family and it was his family…"

Jaqueline Barton, H.T. 3/18/16 at 60.

IN THE MISSOURI COURT OF APPEALS
WESTERN DISTRICT

STATE OF MISSOURI	)	
ex rel.	)	
RODNEY L. LINCOLN,	)	
	)	
Petitioner,	)	
	)	
v.	)	**No. _____**
	)	
JAY CASSADAY, Superintendent,	)	
Jefferson City Correctional Facility,	)	
	)	
Respondent.	)	

PETITION FOR WRIT OF HABEAS CORPUS

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

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

credible retraction by M.D.[1] of her identification of Rodney Lincoln as the man who attacked and stabbed her, her sister, R.T., and her mother, JoAnn Tate. M.D.'s identification of Mr. Lincoln as the assailant "was the crux of [Mr. Lincoln's] convictions." *Lincoln v. State*, 457 S.W.3d 800, 801 (Mo. App. ED 2014). The only physical evidence corroborating M.D.'s identification at trial was a pubic hair that detectives found on a blanket at the scene of the crime: criminalist Harold Messer testified that the pubic hair "matched" hair samples taken from Rodney Lincoln. (T. 717-718.[2]) That testimony is now known to be false; "DNA testing showed that [the hair] did not belong to [Mr. Lincoln]." *Lincoln*, 457 S.W.3d at 804. In Mr. Lincoln's motion for DNA testing to prove his innocence, "the parties agreed that the various police reports gave no results that could place Movant at the scene of the crime." *Id*. Thus, with the retraction of the identification testimony that was the "'lynchpin' of [Mr. Lincoln's] conviction," *id.*, and the elimination of the sole piece of physical evidence to support it, Mr. Lincoln's case is indistinguishable from Joseph Amrine's, in which the Missouri Supreme Court held:

> This case thus presents the rare circumstance in which no credible evidence remains from the first trial to support the conviction. This

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

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

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

Amrine v. Roper, 102 S.W.3d at 548-49. The evidence of Mr. Lincoln's innocence is clear and convincing; further, Mr. Lincoln can show a reasonable probability that no fully-informed juror would find him guilty, and that constitutional violations rendered his trial fundamentally unfair.

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

PROCEDURAL HISTORY

1. Mr. Lincoln is in the custody of Jay Cassaday, the Superintendent of the Jefferson City Correctional Center, based on his convictions in the April 27, 1982, manslaughter of JoAnn Tate and assault on her two daughters. No evidence remains to connect Mr. Lincoln with the crimes for which he is incarcerated for life. None. No motive. No physical evidence. No witness. There is nothing that even suggests Mr. Lincoln as a suspect for the April 27, 1982 homicide of JoAnn Tate and assaults of her two young daughters, then ages four and seven.

2. The first jury to hear the case against Mr. Lincoln could not agree that Mr. Lincoln was guilty. A second jury found him guilty after being presented with only two pieces of evidence: 1) the identification testimony of then seven-year-old surviving victim M.D.; and 2) false "expert" microscopy testimony "matching" a

hair found at the crime scene to Mr. Lincoln. *State v. Lincoln*, 705 S.W.2d 576 (Mo. App. 1986).

3. The hair evidence has been completely discredited. Subsequent DNA testing proceedings pursuant to § 547.035 RSMo, definitively exclude Mr. Lincoln as the source of the hair. Nevertheless, the Eastern District Court of Appeals affirmed the denial of Mr. Lincoln's motion for release, reasoning that "[s]ections 547.035 and 547.037 do not give Movant the ability to attack M.D.'s credibility from the trial. Rather, those statutes give Movant the chance to show his innocence by DNA testing." *Lincoln v. State*, 457 S.W.3d 800, 807 (Mo. App. E.D. 2014), citing *Lowe-Bey v. State*, 272 S.W.3d 378, 384 (Mo. App. 2008).

4. Since that ruling, the identification evidence has also been eliminated. In November of 2015, M. D., now a mature 41-year-old woman, admitted that her identification of Mr. Lincoln was mistaken. She has repeatedly pleaded with prosecutors to free Mr. Lincoln because he is innocent. H.T. 3/17/16 at 16, 24-25[3]; Ex. 35 at 8, 25.

5. Mr. Lincoln promptly petitioned the Cole County Circuit Court for a writ of habeas corpus asserting his innocence. *See* Petition for Writ of Habeas Corpus.[4] Mr. Lincoln's claim of innocence was accompanied by three additional claims: that

[3] Citations to the March 17 and 18, 2016 evidentiary hearing transcripts are cited as "H.T." followed by the date and transcript page number.
[4] Relevant pleadings and orders filed in the Circuit Court of Cole County are included in a separate Appendix filed herewith.

his trial was unfair because the prosecution improperly overstated the probative value of the hair evidence; that the prosecution failed to disclose evidence that could have been used to challenge young M.D.'s identification; and that trial counsel failed to investigate and present evidence challenging the identification testimony.

6. On March 17 and 18, 2016, the Honorable Daniel Green conducted a hearing on Mr. Lincoln's Petition for Writ of Habeas Corpus. Counsel for Mr. Lincoln presented the testimony of M.D., admitting that her identification of Mr. Lincoln was mistaken, and that she had been manipulated by police to select him. H. T. 3/17/16 at 16, 33, 44-47; H. T. 3/18/16 at 9, 31-33, 39. M.D.'s testimony was corroborated by her cousin, Jacqueline Barton, the first person to whom M.D. recanted her identification, H. T. 3/17/16 at 20-21, H. T. 3/18/16 at 52-53, 55-60, and her uncle, Nathaniel "Nat" Clenney, who discovered Ms. Tate and her children at the crime scene and asked M.D. what had happened. Mr. Clenney told the court why he has long harbored nagging doubts about the reliability of M.D.'s childhood identification of Mr. Lincoln. H. T. 3/18/16 at 66-69, 72-75, 77-79, 81-82. Mr. Lincoln's daughter, Kassandra "Kay" Lincoln, testified about the emotional telephone call she received from M.D. admitting her identification of Ms. Lincoln's father was wrong. H. T. 3/18/16 at 95-99. Respondent presented no witnesses. The parties each submitted exhibits that were admitted by stipulation.

Prior to the hearing, the State submitted its proposed findings of facts. It made no alterations after the hearing. Mr. Lincoln submitted his proposed findings and conclusions on March 20, 2016.

7. On June 16, 2016, Judge Green denied Mr. Lincoln's petition, signing Respondent's proposed findings of fact and conclusions of law verbatim, including the same factual and grammatical errors, and making no reference to the evidence adduced at the hearing. Cf. Respondent's Proposed Order and the circuit court's Decision, Judgment, and Order (hereafter "Order"). Mr. Lincoln now petitions this Court for a Writ of Habeas Corpus discharging him from his manifestly unjust convictions and sentences.

STATEMENT OF FACTS AND CLAIM NO. 1: MR. LINCOLN IS INNOCENT

> *Q. If there is a retrial in this case, and Mr. Lincoln called you to testify, would you testify on his behalf that he is not the perpetrator?*
>
> *A. I certainly would.*
>
> *Q. What would you say as part of that testimony about whether or not Mr. Lincoln was the perpetrator of this crime?*
>
> *A. I would say he was not the perpetrator and he deserves to be free.*
>
> *--Testimony of victim/witness M.D., H.T. 3/18/16 at 40.*

Mr. Lincoln's assertion of innocence for the death of JoAnn Tate and the assault on her two children has never wavered. The State's case against him rested on just two pieces of evidence: the identification testimony of a seven-year-old girl, and microscopic hair comparison testimony that a pubic hair at the scene of

the crime came from Mr. Lincoln. DNA testing eliminated Mr. Lincoln as the source of the hair, *Lincoln v. State, supra.* On November 23, 2015, M.D. saw a television program about Mr. Lincoln's case that caused her to realize Mr. Lincoln is not the man who attacked her family. Ex. 1, Affidavit of M.D; H. T. 3/17/16 at 17-21. She called Assistant Circuit Attorney Ed Postawko to inform him that, "Rodney Lincoln did not kill my mother, and he is innocent." Ex. 1. at 4; H. T. 3/17/16 at 23.

The only evidence linking Mr. Lincoln to the crime has been eliminated, which entitles him to release pursuant to *State ex rel. Amrine v. Roper*, 102 S.W.3d 541 (Mo. 2003), and to habeas corpus review of the merits of his constitutional claims pursuant to *Clay v. Dormire*, 37 S.W.3d 214, 217 (Mo. 2000), and *Schlup v. Delo*, 513 U.S. 298 (1995). The State of Missouri has stipulated that DNA testing excluded Mr. Lincoln as the source of the hair used at trial to corroborate M.D.'s identification. *Lincoln v. State, supra,* at 803-04. It is also undeniable that "M.D.'s testimony was the key" to Mr. Lincoln's conviction. *Id.* at 808. Were Mr. Lincoln to be tried on the evidence now available, the trial court would be compelled to grant a motion for judgment of acquittal at the close of the State's case as there is not one piece of evidence to even whisper Mr. Lincoln's guilt.

A. The Police Investigation and Trial Record.

There is no dispute that this case involves a terrible crime. JoAnn Tate was brutally murdered, and her two young daughters were gravely wounded. M.D.'s description of the crime at the hearing before this Court was chilling; she said she was anally and vaginally raped with a knife, and her sister's throat was cut. H. T. 3/17/16 at 35. Both girls required extensive hospitalization and surgery. Nat Clenney, JoAnn Tate's brother and M.D.'s uncle, was the first person to enter the apartment after the commission of the crime. Upon realizing what had happened to his sister, he was angry and agitated. When he discovered M.D. under the covers of her bed, he screamed at her, "Who did this?" M.D. replied, "Bill." T. 402; H. T. 3/17/18 at 30. That same day, while still awaiting treatment in the emergency room, M.D. described the crime to social worker Wayne Munkel and again identified the perpetrator as "Bill." T. 512. She also told her sister, Melinda Parris, that her attacker was "Bill." T. 786-788. M.D. went into further detail about "Bill" during her stay in the hospital. M.D. also told detectives Bill had driven a yellow cab in 1981, but now drove a white Volkswagen and lived in Illinois with his drunk mother. T. 355, 513-14; Ex. 8 at 33; H.T. 3/17/16 at 31; H.T. 3/18/16 at 33. M.D. mentioned to her uncle that the perpetrator had recently moved or traveled to Hollywood, CA. Ex. 8 at 26, and "had black hair all the way to his ears." T. 516; Ex. 8 at 33. Bill had also been to their apartment three days before to fix her

mom's car. T. 516, 402. There is no evidence connecting any of these facts or characteristics to Mr. Lincoln.[5] M.D. testified at the hearing before Judge Green that these statements reflect her most reliable account of the crime, and they should be credited over her subsequent testimony at trial. H. T. 3/17/16 at 31-33.

1. The Suggestive "Magic Door" Photo Identification.

> *"But when you show a child pictures and tell them that one of these is the man that killed your mother and it's your responsibility, you're going to pick the one that you're supposed to pick and Rodney was the one."*
>
> *--M.D., H.T. 3/17/16 at 44.*

During her hospitalization, the State presented many photos to M.D., and she made no identification; her assertion that the perpetrator was "Bill" did not waiver. M.D. viewed "tons and tons of pictures" without making an identification. H. T. 3/17/16 at 43. In May of 1982, detectives took her from the hospital to a police sketch artist. M.D. had previously said that the perpetrator resembled Dennis Smith, a family friend of the Clenneys. *Id.* at 41. Using a photo of Smith as a reference, the sketch artist drew a likeness of Smith. Daniel Clenney, M.D.'s uncle, told St. Louis Detective Joseph Burgoon that the sketch resembled "Rod." Ex. 8 at 39. Entries in JoAnn Tate's diary reflected that she and Mr. Lincoln had a brief

[5] Indeed, the only other name M.D. ever provided came like Mr. Lincoln's identification –when M.D. was led to the conclusion. After waiting in the emergency room for hours, Melinda Parris, M.D.'s older sister, guessed, "Was it Gary?" T. 786-787; Ex. 8 at 23. M.D. confirmed, "Yes." *Id.*

romantic relationship about a year before the crime. Ex. 42, Pages from JoAnn Tate's Diary.[6]

Though there was nothing to suggest that Rodney Lincoln had either motive or opportunity to commit the crime, Detective Burgoon conducted a suggestive photograph identification procedure. Before showing her any pictures, he told M.D., "We got a magic door downtown, …and we have to go look through this magic door and see if you can find the bad man." T. 432. Detective Burgoon said, "If we get the wrong man, we let the bad man go." T. 432. Then he showed her just two photographs, one of which was a relative of M.D.'s:

> On May 23, 1982 Detective Burgoon showed me two photographs. The one on the left below of a man named Gary Parris, who was a man I knew as my sister Melinda's family member. It was one of her father's relatives. I was then shown the picture below on the right of a mug shot of Rodney Lincoln. Detective Burgoon told me that the man who murdered my mother was in the pictures and I had to pick out the bad man or he would go free. I picked the photograph of Rodney Lincoln.

H. T. 3/17/16 at 40; *see also* Ex. 26, State's Ex. 117 a, b; T. 440, 751; Ex. 8 at 212. It is difficult to imagine a more suggestive presentation, especially because M.D. had come to think of Detective Burgoon as her dad; "He was my protector. I loved him very much. I've always loved him." H.T. 3/17/16 at 51. M.D. testified before Judge Green that neither photograph looked like the killer. When asked if seeing

[6] Ms. Tate's brother, Daniel Clenney, who is now deceased, introduced Mr. Lincoln to Ms. Tate. Ex. 36, Affidavit of Nathaniel Clenney; Ex. 37, Affidavit of Abigail Wallace; H.T. 3/18/16 at 65.

the photograph of Mr. Lincoln gave her a bad feeling, M.D. replied, "No. I don't understand how Rodney got there." *Id.* at 47. She had met Rodney before, but did not think that Rodney was the bad man before she saw the picture. *Id.* She identified his picture "[b]ecause I felt like I had to pick one. I didn't feel like there could be a third one." *Id.* That's when she "started to think he was [the bad man] because I wasn't allowed another answer." *Id.* at 48. M.D. felt pressured to pick someone to please the police because her sister, then only four years old, was not verbal, so it was entirely up to M.D. to get justice for her mother. *Id.* at 53. She "wanted to please the police detectives." *Id.* at 54.

Within two hours of being shown Mr. Lincoln's picture, M.D. and R.T. were taken to a live line-up, which included Mr. Lincoln and three other men—all at least 16 years younger than Mr. Lincoln, larger, and with bushier hair. T. 771-772; Ex. 8 at 213. Only Rodney Lincoln's picture had been included in any previous photo line-up. H. T. 3/17/16 at 50. None of the other men resembled Mr. Lincoln or the composite sketch. *Id.* at 51. Police reports indicate that M.D. identified Rodney Lincoln, but her sister "viewed the show-up and did not identify anyone." Ex. 8 at 213; *see also* T. 755-766. M.D. describes the process as "biased," and testified, "I was very intimidated by the whole process, you know. I don't feel good about it. I'm not happy with it." H. T. 3/17/16 at 50-51.

2. The Hair Microscopy Evidence Is False.

> *"[T]he parties agreed that the various police reports gave no results that could place Movant at the scene of the crime."*
> *Lincoln v. State*, 457 S.W.3d 800, 804 (Mo. App. 2014)

The only physical evidence corroborating M.D.'s identification was a pubic hair that detectives found on a blanket at the scene of the crime. After his arrest, on May 24, 1982, Mr. Lincoln consented to providing blood and pubic hair samples, which were collected by Criminalist Donna Bechere. T. 631-632. Criminalist Harold Messler compared the pubic hair found on the blanket at the scene to a pubic hair from Rodney Lincoln and a pubic hair from JoAnn Tate. T. 643-644. Messler also compared the hair from the blanket to thirty-seven pubic hairs from other individuals, and concluded none of them were "comparable" to the hair at the scene. T. 649. Messler testified that out of the thirty-nine total hairs he compared to the hair on the blanket, only Rodney Lincoln's was a "match."[7] T. 717-718. When asked by the prosecutor at trial whether Messler had ever, in the 200 cases he had been involved in, "run across a circumstance where [he] had a hair from a scene that was matched to more than one person," he replied, "No, sir." T. 718.

The prosecution used the hair to corroborate the identification testimony. In opening statements, the prosecutor previewed for the jury that Messler "compared

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

[Mr. Lincoln's] pubic hair to the one found on the blanket at the scene of this crime, and they were found to be identical or comparable," and that there are "one in a hundred people that would share this type of pubic hair." T. 303-304. During closing arguments, the State argued, "[n]one, no hair that that other hair was compared with other than Rodney Lincoln's matched." T. 957. He continued, "Mr. Messler told you that in two hundred cases, he's never had more than two—more than one match. He's never had two people match one hair found at a scene." *Id.*

3. Mr. Lincoln's Plausible Alibi Defense

Mr. Lincoln presented an alibi defense consisting of his mother, Mary Marlow, his then-girlfriend, Diane Keenan,[8] and his employer, Robert Salzman, the Vice President of Mound City Grocery Company, Inc. T. 811-821, 836-883. Ms. Marlow lived with Mr. Lincoln in 1982.[9] Ms. Marlow and Ms. Keenan testified that the night before the crime, Mr. Lincoln drove them to his sister's, Frieda Montgomery's, home in north St. Louis. T. 850. They returned home around midnight, and Ms. Keenen stayed the night. T. 851, 874. Ms. Keenan testified that Mr. Lincoln did not leave during the night; if he had left the house at any time during the night, she would have known it. T. 874. The next morning,

[8] When she dated Mr. Lincoln, her name was Diane Packineau. Between the time of the offense and the time of trial, she married, and changed her name to Keenan. T. 840, 868. The trial transcript refers to her by her married name.

[9] M.D. told police that she had met "Bill's" mother, and that she was "fat" and drank beer. T. 366-367. In contrast, Ms. Marlow was five feet, four inches tall and weighed seventy pounds, and had never weighed more than ninety-eight pounds in her entire life. She did not drink beer. T. 836-837.

Tuesday, April 27, 1982, Mr. Lincoln followed his usual routine of getting up at 6:00 or 6:30 a.m. and leaving for work around 7:00 a.m. T. 849, 851. There was nothing unusual about him as he left for work. T. 852.

Mr. Salzman testified that Mr. Lincoln drove a delivery truck for the Mound City Grocery Company, Inc. T. 811. He is positive that on April 27, 1982, the morning of the crime, Mr. Lincoln showed up for work no later than 8:00 a.m. T. 812. There was nothing unusual about his appearance, demeanor, dress, speech or conduct. *Id.*[10] The company had only two trucks; Mr. Lincoln drove one, and Lee Curtis Jumper drove the other. Both drivers made deliveries that day. T. 816.

4. The Verdict

Mr. Lincoln was tried twice on one count of capital murder in the death of JoAnn Tate, and two counts of first degree assault in the assault of her two children. The evidence was far from overwhelming; the first jury to hear the evidence was unable to reach a unanimous verdict of guilt. A transcript of that trial is not available. The second trial resulted in a conviction on the lesser offense of manslaughter in the death of Ms. Tate, and two convictions for first degree assault of the two girls. *State v. Lincoln*, *supra*. The manslaughter conviction is curious given the nature of the crime.

[10] M.D. testified credibly before Judge Green that she remembers her attacker was young, unshaven, and that he smelled dirty and reeked of beer. H. T. 3/18/16 at 22, Ex. 35 at 15.

B. New Evidence Establishes Innocence

No physical evidence connects Rodney Lincoln to the crimes for which he was convicted. DNA testing proved that the hair used at trial to corroborate M D.'s identification testimony did not come from Mr. Lincoln. In prior DNA litigation in this matter, "the parties agreed that the various police reports gave no results that could place Movant at the scene of the crime." *Lincoln v. State*, *supra* at 804. Respondent never called the Court's attention to any evidence suggesting motive or opportunity. With the identification testimony and physical evidence nullified, there is nothing to suggest even a bare suspicion that Mr. Lincoln committed this crime.

1. M. D.'s Mistaken Identification Of Mr. Lincoln.

> *"My little sister, she couldn't speak and my mom was dead and it was up to me to tell them the bad man and make sure he went to prison."*
> *--M.D., H.T. 3/17/16 at 53.*

After the DNA testing excluded Mr. Lincoln as the source of the hair, the only evidence remaining was the identification testimony of seven-year-old M.D., who credibly repudiates that identification as an adult, and feels "a lot of guilt … because an innocent man has spent his life in prison because I wasn't strong enough." H. T. 3/17/16 at 70.

M.D.'s testimony before Judge Green is consistent with her video-recorded interview by Assistant Prosecuting Attorney Ed Postawko, which occurred on

December 4, 2015, after M.D. had first recanted to Postawko over the phone. M.D. told Postawko and police detectives who attended the interview that police manipulated her into falsely identifying Rodney Lincoln. Referring to the photograph and lineup the police showed her, M.D. told Postawko, "I don't understand how Rodney got to be there ... I want to know why Rodney was there in the first place. Because he wasn't in my house that night. He was not there. He was never there. And I would be willing to take a lie detector or whatever you want. But he was not in the house. He did not kill my mom." Ex. 35, Transcript of Respondent's Ex. 5, the video interview of M.D. by Assistant Prosecutor Ed Postawko at 8-9. M.D. could not be more clear and credible that "what [I] remember now is right. For the first time in my life, everything is lined up, my gut, my brain, all of it." *Id.* at 9. M.D. explained that she felt "like my brain was filling in who was supposed to be there. Who I thought was supposed to be there." *Id*. She explains:

> I don't know how Rodney got there. Because when this all happened I told the police that the man had worked on my mom's car, that he said his name was Bill, that he was from Hollywood, that he had a yellow Volkswagen, I told them all of that. So I don't know how Rodney got there. And that makes me very angry because I felt as my 7 year old self that my responsibility was to talk because my mama couldn't. You know, and I felt like I had to tell what happened, so I don't know why Rodney was there. He was never there. He didn't do this.

Id.

M.D.'s family provides persuasive corroboration that her childhood identification of Mr. Lincoln was unreliable. Her aunt, Abigail Wallace, has "always had [her] doubts about Rodney Lincoln's guilt," in part because "[M.D.] knew Rodney, and if he were the real killer, [M.D.] could have named him from the start. Instead, [M.D.] identified her mother's killer as Bill." Ex. 37 at 1, 3. M.D.'s uncle, Nat Clenney, agrees. Rodney was a friend of his brother Dan, who is now deceased. Ex. 36 at 2. "Dan had always said that Rodney just never seemed like the kind of guy who would commit this kind of brutal murder. I agree. Rodney's interviews and his testimony at parole hearings really moved me, and I felt that Rodney was telling the truth when he said he was innocent." Ex. 36 at 2; *see also* H.T. 3/18/16 at 74-75. However, the family kept their doubts to themselves to be supportive of M.D. Ex. 37 at 3, Ex. 36 at 2; H.T. 3/18/16 at 74, 78-79.

The court below adopted Respondent's proposed finding that "the passage of time makes the recantation less reliable." Order at 3, Respondent's Proposed Order at 3. In so finding, the court entirely ignored the improper procedures used to pressure M.D. into identifying Mr. Lincoln's picture when she was seven years old, and the evidence available at the time that indicated M.D.'s identification of Mr. Lincoln was incorrect—that it was "Bill" and not Rodney Lincoln who had committed the crime. The Court further ignored evidence that M.D. is currently

forty-one years of age, and has had a distinguished career in service of her country. For the five years she was enlisted in the United States Navy, she held a position in military intelligence which required her to satisfactorily complete screening for a Top Secret security clearance. H. T. 3/17/16 at 10-11. Following her honorable discharge from the Navy, she retained that security classification as a civilian employee of the Department of Defense for seven more years. *Id.* at 10. She also earned a college degree in criminal justice. *Id.* Unquestionably, she is an intelligent, mature woman.

Respondent's proposed findings that were rubber-stamped by the court below are further unpersuasive because they ignore the fact that the information M.D. gave to authorities and family members closest in time to her mother's death is not consistent with Rodney Lincoln's guilt. *See* Section A, *supra*. After the crime, M.D. was in the Intensive Care Unit ("ICU") for treatment of multiple stab wounds. Her injuries required her to have a colostomy bag and repeated surgeries. H. T. 3/17/16 at 35. M.D. was in horrible pain, medicated, and desperately wanted to be with her mother. *Id.* She could not make her sister stop crying and she was not able to attend her mother's funeral. *Id.* at 36. She testified, "I was trying to help the police, but the information I was giving them, they didn't match—because nobody matched it, you know. I felt so helpless and useless." *Id.*

M.D. perceived the police questioning as relentless. She spoke with police frequently, and "it seemed like every time [she] woke up, they were there." *Id*. M.D. believes she was interviewed "upwards of fifty times." *Id*. at 41. At first, M.D. bit the detectives and was combative with them, but then they started giving her candy, so she was nice to them. *Id*. at 37. She reports that she had an "amazing" relationship with detectives and "wanted to please them." *Id*. at 38; She testified that the detectives "were like dads," and they spent time together at dinners, barbecues and ice cream outings. *Id.* She loves them, and describes them as "part of who I am." *Id.* M.D. still loves lead investigator Joe Burgoon. Ex. 35 at 13. She stayed in touch with him after the trial and he came to her mother's candlelight vigil around the time of Mr. Lincoln's DNA hearings. H. T. 3/17/16 at 52. She had similar feelings toward Assistant Prosecutor Joe Bauer, crime victim assistant Mary Flotron, and others who looked out for her during this time. *Id.* at 54-55. These relationships, obviously important to M.D., make it highly unlikely that she would come forward with her current testimony if it were not true.

M.D. points to the nature and intensity of the police questioning as one explanation for her mistaken identification of Mr. Lincoln. She looked at "tons of pictures," and remembers "being so exhausted and not being able to help…" *Id.* at 43. While she wanted to please the police and cooperate, the photos she saw never matched the man in her mind. *Id.* at 44. Finally, on May 23, 1982 Detective

Burgoon showed M.D. two photographs. Of the two photos, M.D. could not choose Gary Parris "[b]ecause he was a family member." *Id.*at 47-48. M.D. chose the photograph of Rodney Lincoln "[b]ecause I felt like I had to pick one. I didn't feel like there could be a third one," even though she did not believe Rodney Lincoln to be the bad man. *Id*. at 47.

M.D. explained how she was able to weave Rodney Lincoln into her trial testimony: "And, of course, because I knew things about Rodney, I was a very smart child. I knew where he lived, I knew what his house looked like, it just seemed like it kind of fell into place rather easily." *Id*. at 45. During the investigation, M.D. was taken out of the hospital and shown lots of parks because she had associated the bad man with a park. In her original story, they met "Bill" at Hyde Park and he worked on her mother's car. *Id*. at 31. She testified at the hearing before Judge Green that she and her sister spent a lot of time at the houses of her mother's male friends and their relatives, and that they didn't have babysitters. H. T. 3/18/16 at 22. M.D. lived near Hyde Park, and so did so many of her mother's friends. *Id.* at 22-23. M.D. explained that "across from the park, to a seven year old was rather fluid." *Id.*

M.D. finally gave in to the Rodney Lincoln story because "[t]he police didn't seem impressed in my story of Bill." H. T. 3/17/16 at 32. She testified, "I can't say for certain how it happened. But one day Tommy was there and then he was

completely gone, and I can't explain to you why. And then the next thing I remembered, I was speaking about this and Rodney, and I guess I told the story so much I believed it." *Id.* at 33. Because of her tender age and condition, M.D. simply "did not have the strength to push back when I felt like people were not listening to me." *Id.* at 62. She described herself as "very gullible and very naive and traumatized" child. *Id*. Because of all the pressure, in the end, "[t]he information less related to Tommy Lynn Sells, which is Bill, and became about Rodney and how I knew him and when I had seen him." H.T. 3/18/16 at 33.

M.D. opposed Mr. Lincoln's previous appeals, explaining, "You grow up telling the same story over and over again and you start to believe it." *Id.* at 22. She and her family "banked on things that the investigator told us about the case which a lot of it turned out not to be true." *Id.* at 62. For example, they were told "Rodney had scratches on him when he was arrested and he didn't." *Id.* at 62-63; *see also* H.T. 3/18/16 71-72. They were also told that a bloody fingerprint from the scene matched Mr. Lincoln, and "quite a few" other things that were not true. H.T. 3/17/16 at 63; Ex. 35 at 32; Ex. 36 at 3. M.D. testified, "We didn't question the investigators." H.T. 3/17/16 at 63. She believes that her identification was produced by a process that "was very biased," *id*. at 50, and that she "was manipulated by police detectives to identify Rodney Lincoln as the person who committed this crime." *Id*. at 34.

Today, M.D. is adamant that "Bill" is not Rodney Lincoln. *Id*. at 34. There is no doubt that if she were to be called to testify at a retrial of Mr. Lincoln, she would testify without reservation that Rodney Lincoln is not the man who attacked her and her family in April of 1982. H.T. 3/18/16 at 40-42.

2. M.D's Family Has Always Doubted Mr. Lincoln's Guilt

> *"I always had my doubts about M.'s identification of Rodney."*
> *Nathaniel Clenney, Ex. 36 at 3*
>
> *"Melissa knew Rodney, and if he were the real killer, Melissa could have named him from the start. Instead, Melissa identified her mother's killer as Bill."*
> *Abigail Wallace, Ex. 37 at 3*
>
> *Q. Do you agree with Melissa's recantation?*
> *A. Absolutely.*
> *Q. Why?*
> *A. Because we have all felt it. Well, I didn't feel it all along, but apparently our whole family felt it all along. And then looking at the -- reading the details of it, which I never allowed myself to do because I didn't want to believe. I wanted the comfort in knowing that the guy who did this was locked away somewhere, and we didn't have to worry about him coming and finishing the job.*
> *Jacqueline Barton, H.T. 3/18/16 at 58*

Ms. Abigail Wallace and her brother, Nat Clenney, separately confirmed by affidavit that they had hesitations about their niece's childhood identification of

Rodney Lincoln, even before her admission that her identification of Mr. Lincoln was mistaken.[11]

Ms. Wallace met Mr. Lincoln when her brother, Dan Clenney, was competing with Mr. Lincoln in a pool tournament. Mr. Lincoln flirted with her, but she was not interested. Ex. 37 at 1. The next night, Dan took JoAnn to the tournament and introduced her to Rodney. *Id.* Ms. Wallace "never thought Rodney was the kind of guy capable of a crime like this." *Id.* She believes Mr. Lincoln was too small to overpower Ms. Tate. *Id*. Further, as noted above, M.D. knew Rodney, and if he were the attacker, she would have named him. *Id.* at 3. Ms. Wallace knows "[M.D.] is doing the right thing, and I back her up. I want to see Rodney Lincoln freed." *Id.* at 3.

Nat Clenney agrees that Mr. Lincoln was not the kind of person who would commit such a brutal crime. Ex. 36 at 2. His doubts about Rodney Lincoln's guilt "began at the scene when I found JoAnn's body and M. told me that 'Bill' had done this to her mother," and those doubts "never really went away." *Id.* at 2; *see also* H. T. 3/18/16 at 68, 72-73.

M.D.'s family had not expressed their uncertainty before because their chief concern has always been M.D.'s safety and well-being after the terrible trauma she suffered during her assault and the brutal murder of her mother. H. T. 3/18/16 at

[11] Ms. Wallace's testimony was presented by affidavit, Ex. 37, which was admitted by stipulation. Mr. Clenney testified at the hearing and also signed an affidavit, Ex. 36.

55, 78-79. Their support of M.D. has been expressed in large part by keeping silent about reservations they had about her identification of Mr. Lincoln. *Id.* They feared that openly questioning M.D.'s story would damage her emotionally. *Id.* at 56.

Nevertheless, there were times when Mr. Clenney perceived "cracks" in M.D.'s façade of certainty about the perpetrator. *Id.* at 73.Mr. Clenney related an event a short time after the trial when M.D. was out walking with her grandmother, Lou Clenney, and they came upon three men standing on the sidewalk. M.D. "turned ghostly white, and stopped in her tracks" because she "was clearly scared to death of the men." *Id.*; 36 at 3. This incident, never before known to Mr. Lincoln and his lawyers, "made [Mr. Clenney] wonder if Rodney had committed the crime." Ex. 36 at 3. Further, Mr. Clenney "always had [his] doubts about M.'s identification of Rodney" because his niece "was very much a 'people pleaser' when she was a child. [M.D.] wanted to make people around her happy, and would tell them what she thought they wanted to hear." *Id.*; H.T. 3/18/16 at 74.

Mr. Clenney's doubts surfaced again when he accompanied M.D. to a parole hearing for Mr. Lincoln in 2012. He watched and listened to Mr. Lincoln during the parole hearing, and Mr. Lincoln's testimony "really moved me, and I felt that Rodney was telling the truth when he said he was innocent." Ex. 36 at 2; H.T. 3/18/16 at 75. Mr. Lincoln was "so convincing" that after the hearing, Mr. Clenney took his niece aside and asked her, "Are you sure it's him?. . . this guy sounds like

an innocent man." H.T. 3/18/16 at 75; Ex. 35 at 32. She assured him that she was. *Id.*; Ex. 35 at 33.

M.D. testified before Judge Green that she did not feel free to express anything less than absolute certainty of Rodney Lincoln's guilt because "if I ever said, oh, I don't know if Rodney was the right guy, I felt like I would have been letting a lot of people down." H. T. 3/17/16 at 22. "Joe Burgoon, Ed Postawko, all the people that work in the judicial system, and my family. We were very invested in making sure Rodney stayed in prison." *Id*. at 23. She felt tremendous pressure; "if I didn't cooperate, then Rodney was going to get out. And I would have been, not in trouble, but people would have been disappointed in me for not doing my job." *Id*. at 61-62. "I was really the only one and I felt like I had the world on my shoulders." *Id*. at 53.

Given all the lingering doubts about M.D.'s childhood identification that the family has entertained from the beginning, Mr. Clenney has "far more confidence in her testimony today than I ever had when she was a terrified little girl." Ex. 36 at 4. Like every other relative of M.D., Mr. Clenney believes "100% that it wasn't Mr. Lincoln." H.T. 3/18/16 at 81; *See also* Ex. 36 at 4 ("Rodney Lincoln is innocent.")

3. M.D.'s Retraction Of Her Identification Of Mr. Lincoln.

> *I told her [Kay Lincoln] I was sorry because I knew that Rodney did not kill my mom. I told her I was sorry for taking away her father.*
> *--M.D., H.T. 3/17/16, p. 74.*

M.D.'s repudiation of her childhood identification of Mr. Lincoln was prompted by a *Crime Watch Daily* story she viewed on November 25, 2015, featuring Tommy Lynn Sells, who was executed in 2014 for multiple murders in Texas. Sells' face "triggered flash back memories of the attack inflicted upon me and my family." Ex. 1 at 1-2. M.D. realized that her identification of Rodney Lincoln was mistaken; he is not the man who attacked her and her family, and she wants to see him released from prison. *Id.* at 3-4; H. T. 3/17/16 96.

M.D. had given an interview to the producer of *Crime Watch Daily*, Ron Zimmerman, in which she stated emphatically that Rodney Lincoln was her assailant. The story aired on November 23, but M.D. recorded the program so that she could view it in the company of her cousin, Jacquie Barton, the next day. H. T. 3/17/16 17. When M.D. first attempted to watch the program with Ms. Barton, she was almost immediately driven from the room by crime scene photographs that showed her mother's body. *Id.* at 17-18, 94-95. On November 25, Jacquie flew to St. Louis to spend Thanksgiving with her family. M.D. went to work; she cleans for a tavern. Alone in the bar, she attempted to watch the program again. *Id.* at 19. She was "unsettled" as she watched. *Id*. at 19. "It was the mug shots of Tommy

Lynn Sells. It was in particular the baby fat on his face and the cheek line, the stubble. Because when I saw that, I like kind of had a flash of facial hair up against my face." *Id.* Although it was troubling to her, "I gave myself permission to go back" to her memory of the crime. *Id*. at 29. When she went back in her memory, Rodney Lincoln was not there. *Id*. at 22-23. She remembered her attacker was young, in his late teens or early twenties, he was unshaven, and she recalls "the beer smell in my nose." Ex. 35 at 15-16.[12]

Nat Clenney tuned into the *Crime Watch Daily* episode when it first aired. H. T. 3/18/16 at 75. He and his sister, Abigail Wallace, openly discussed their doubts about M.D.'s identification prior to a family Thanksgiving dinner at the home of Abigail's son in Rolla, Missouri. *Id*. at 77-78. Jacquie Barton also attended the dinner, and the subject of M.D.'s identification of Mr. Lincoln was discussed again. *Id.* at 55-56. Mr. Clenney decided that he would reach out to Mr. Lincoln's daughter, Kay, without M.D.'s knowledge, to see what could be done to explore Mr. Lincoln's possible innocence. On Saturday, November 28, 2015 Mr. Clenney sent Ms. Lincoln the following message through social media:

> Kay I would like to talk to u, I feel your pain my sister Abby and me deep down inside we feel Licoln [sic] is not guilty of this crime if you leave me your number and what is a good time to call u, are u can call

[12] M.D. had seen a mug shot of Tommy Sells on a prior television show, but that photograph was taken when Sells was older. H. T. 3/18/16 at 25 M.D. testified that this was the first time she had seen a photograph of Sells in his youth. *Id.*

> me, my number is [***-***-9209] I work in St. Louis Mon-Thurs. a good time for me is anytime on the weekends.

Ex. 50; H.T. 3/18/16 at 77. This was written before M.D. communicated to anyone that her identification of Rodney Lincoln was mistaken, and M.D. was not aware that Mr. Clenney had reached out to Ms. Lincoln. H. T. 3/18/16 at 77-78.

Jacquie Barton returned to Pennsylvania knowing her uncle's plans, and intending to talk with M.D.'s therapist about them. *Id*. at 56. Instead, Ms. Barton spoke directly to M.D., starting with "baby steps" and finally saying, "hon,. . . , none of us, we actually think that [Rodney Lincoln is] not the one who did it." *Id.* at 56-57. M.D. began crying, which "scared the mess out of [Jacquie]." *Id.* at 57. But then M.D. told Jacquie, "You've given me so much peace right now because I've been thinking the same thing, but I was so scared to say something." *Id*. M.D. told Jacquie it was good to know that she was not alone. M.D. disclosed to Jacquie and Nathaniel Clenney that her identification of Rodney Lincoln was mistaken, and that he is innocent of the crime. *Id.* at 82, 57-58, 59.

M.D. next reached out to Mr. Lincoln's daughter, Kay, by sending her a message on Facebook, saying only, "Hi, can we talk?" Ms. Lincoln replied, "Sure!" and they exchanged phone numbers. H.T. 3/17/16 at 74, Ex. 48,

Screenshot of Nov. 28, 2015, social media exchange.[13] Ms. Lincoln phoned M.D., who answered, crying. She said, "I'm sorry" over and over. *Id.* at 74, H.T. 3/18/16 at 97-98. Ms. Lincoln replied that no one faulted her for something she did when she was a seven-year-old, severely traumatized little girl, and M.D. vowed to help free Mr. Lincoln. *Id.* at 97. M.D. testified that reaching out to Kay Lincoln "was mortifying, but I wanted to give her the comfort and I wanted comfort as well, which is why I wanted to talk to her." H. T. 3/17/16 at 75. Since then, M.D. and Ms. Lincoln have had frequent, friendly, and mutually supportive communications. H. T. 3/18/16 97,

M.D. also contacted St. Louis Assistant Circuit Attorney Ed Postawko and "told him that it was not Rodney that killed my mother." H. T. 3/17/16 at 23. Before speaking to Postawko, she was "scared of "retribution." *Id*. 24. When she told him that Rodney Lincoln was not the killer, the news "did not go over well." *Id*. at 23. M.D. told Postawko she had long felt immense pressure to maintain her childhood story that Rodney was the perpetrator of this terrible crime:

> For years, I felt like anything I did that would ever contrast with who I said was in prison, which was Rodney… I felt like anything I said against that would be betraying my family, would be betraying the detectives that worked so hard on the case, and it would be betraying you guys (prosecutors) because you guys have stood behind me the whole time. And it sounds so dumb, but that's what I felt. I felt I

[13] Before this exchange, M.D. had resented Ms. Lincoln's efforts to free her father, and although Ms. Lincoln was empathetic toward M.D., they were not friends. H. T. 3/17/16 at 94-95. In fact, M.D. considered Ms. Lincoln her enemy. *Id*. at 94.

> always had to be steadfast in what I said, so that any doubts that would ever come up, I would squash them immediately. You know, and I feel guilty about that, you know.

Ex. 35 at 8.

A fact weighing in favor of crediting M.D.'s present recollection is that she "worshipped everyone that I came into contact with in the judicial system because to me, they were awesome people, they were safe people." Ex. 35 at 15. She loves Joe Burgoon; "He was like a dad to me." *Id.* at 14. These feelings were mutual; Mary Flotron said "they all just loved [M.D.] and [R.T.]." Ex. 39 at 2. The reality of M.D.'s emotional dependence upon them, and her eagerness to please, as described by her Uncle Nat Clenney, Ex. 36 at 3-4, made her more vulnerable to misidentification of Mr. Lincoln and more likely to adhere to it unconditionally. Empirical research cited by the court below explains the distorting influence of such relationships in identification procedures.[14] M.D. now feels that her identification of Mr. Lincoln was "manipulated" by Detective Joe Burgoon, though she doesn't think "he did it on purpose. It was terrible police work." Ex. 35 at 14. She testified at the hearing that she relied on the people she trusted to help her figure out who was the bad man.

---

[14] Soldiers undergoing life-like evasion, capture and interrogation training misidentified their interrogators with rates from 53% to 91%. The data indicated that "misinformation is more likely to be accepted when presented in association with persons perceived, by the recipients, to be in positions of authority." C.A. Morgan, Steven Southwick, George Steffian, Gary Hazlett, and Elizabeth Loftus, *Misinformation Can Influence Memory For Recently Experienced Highly Stressful Events*, 36 INTERNATIONAL JOURNAL OF LAW AND PSYCHIATRY 11, 16 (2013).

M.D.'s loyalty to the detectives, lawyers, and social workers made it all the more difficult for her to acknowledge her own persistent doubts over whether she had done the right thing in identifying Mr. Lincoln. This influence was so strong that, "It wasn't until Saturday when my cousin came back from Saint Louis, she told me my family had concerns, and I felt like I was finally able to like breathe and explore because up until then I felt like I would let a whole lot of people down if I ever went back on what I said." Ex. 35 at 21. M.D. very credibly says, "when something comes out of my mouth I want it to be the absolute 100% truth." Ex. 35 at 28. She explains her motivation for coming forward:

> I cannot let someone sit in prison for something they didn't do, not even one innocent person. It's just to me it's just one life too much. You know I mean that crushes me. I remember pointing him out in that courtroom. Every time I think about that it hurts. You know 'cause I took away his freedom, I just I was just a kid, but I still took away his freedom and I, I'm struggling with that. [Inaudible] I've lived without my mom, yeah I've been out here walking free but I've been in my own prison and I feel bad that I did that to somebody else. So whatever I can do that's why I'm here.

Ex. 35 at 29. Today, M.D. is adamant that Rodney Lincoln "wasn't in my house that night. He was not there. He was never there…. He did not kill my mom." *Id.* at 8-9. As a mature adult woman, M.D.'s current insight into her recollection of the crime is more reliable than the identification that was produced by the suggestive procedure employed by police when she was a little girl. M.D.'s recantation is

honest, credible and sincere, and there is no evidence that it is motivated by any improper purpose or outside influence.

4. The Other Bad Men.[15]

> *"Melissa hid her head behind her arms, pointed at [Assistant D.A.] Joe Bauer, and said, 'Bad Man! Bad Man!' …. to Melissa, every man of medium-build was the Bad Man."*
> *Victim Advocate Mary Flotron, Ex. 39 at 1*

In addition to M.D.'s repudiation of her childhood identification, Mr. Lincoln's innocence claim includes previously undisclosed information casting additional doubts upon the reliability of M.D.'s childhood testimony. At trial and on appeal, the State used the emotional reaction of M.D. and her sister to Mr. Lincoln's photograph to infer a strong identification.[16] The Division of Family Services and victim advocate records, withheld from the defense at trial, establish that such emotional reactions were not unique to Mr. Lincoln. These records were finally obtained through discovery during the DNA proceedings, and revealed to Mr. Lincoln's counsel for the first time that M.D. and her sister reacted emotionally to multiple adult male subjects. For example, the Circuit Attorney's Victim Assistance Coordinator Mary Flotron saw young M.D. cower when Prosecutor Joe Bauer entered her office. M.D. pointed at Mr. Bauer and said, "Bad

[15] The evidence discussed in this section is also relevant to Mr. Lincoln's Claim 3, that the State withheld material, exculpatory evidence that would have convinced a jury that M.D.'s identification of Mr. Lincoln was unreliable.

[16] Police reports describing the children's reaction to Mr. Lincoln at the police lineup simply noted that M.D.'s sister "viewed the show-up and did not identify anyone." Ex. 8 at 213.

man! Bad man!" Ex. 39 at 1.[17] Ms. Flotron reported similar episodes involving an African-American pedestrian, an Asian man working in a Chinese restaurant, and others. Ex. 39 at 1; Ex. 44 at 1; Resp. Ex. 9 at 3. Ms. Flotron told an investigator, "[I]t didn't matter if he was black, white, or Asian, she would hide her face and call him The Bad Man." Ex. 39; s*ee also* Resp. Ex. 9 at 4, 8. Ms. Flotron indicated that to M.D., every man of medium build was the bad man. *Id.*; *see also* Ex. 9, DFS Reports at 317-321.

Each of these instances raises questions about the reliability of M.D.'s identification of Mr. Lincoln, and could have been used effectively by defense counsel to impeach her testimony and to argue that her identification of Mr. Lincoln was mistaken. This evidence casts further doubt upon the pretrial and in-court identification of Mr. Lincoln, and supports M.D.'s sworn testimony that Rodney Lincoln is not guilty of this crime.

5. The Funny Finger Story.

Respondent argued in the court below that a never-before documented allegation that M.D. said the killer had a "funny finger" bolsters her childhood identification because Rodney Lincoln is missing the little finger of his right hand. Response to Order to Show Cause at 7-9, Respondent's Proposed Order at 4-6. The

[17] Ms. Flotron's involvement was partially documented in the DFS files disclosed during DNA proceedings.

Court adopted this argument verbatim, Order at 4-6, even though the record as a whole refutes this allegation.

Respondent alleges that Rodney Lincoln's missing little finger of his right hand is strong corroboration of M.D.'s childhood identification of Mr. Lincoln, but the evidence fails to support that argument. M.D. denies that she ever told anyone that her attacker was missing a finger, H. T. 3/17/16 at 64; she did not look at her assailant's hands as he stabbed her. *Id.* at 65. The absence of any documentation or consistent evidence to the contrary indicates her testimony is true. There is no mention in any of the police reports or DFS records that M.D. said her attacker was missing part of a finger. Further, there is no reference by the prosecution to the finger story in either direct or redirect examination at trial. T. 314-336; 384-389.

In fact, the defense at trial attempted to use Mr. Lincoln's missing finger, coupled with the child never having mentioned it, as a reason to doubt her identification. Knowing that his client was missing a finger, Mr. Lincoln's defense attorney, Robert Hampe, asked M.D.:

Q (By Mr. Hampe) Do you remember me asking you, "What's the most distinctive thing about Rodney Lincoln?"

A (M.D.) Yes.

Q Do you know what your answer was?

A Yes.

Q What was it?

A Mean.

Q You said dumb on that day.

A Yes.

T. 366. M.D. said nothing about Mr. Lincoln's missing finger during the trial.

In the defense case, Mr. Hampe presented testimony from Mr. Lincoln's mother, Mary Marlow, and his brother, Robert Lincoln, that Mr. Lincoln lost part of the little finger of his right hand in 1968 or 1969 when he was living in California. T. 841, 866. This set up Mr. Hampe's closing argument to the jury that, "The most distinctive feature about Rodney Lincoln, and he's a little kind of blend-into-the-woodwork guy, the most distinctive feature about him is the fact that he has a finger missing," and that M.D. "would have remembered that had she known Rodney Lincoln and had she known that Rodney Lincoln was the man that did this." T. 944-945. The prosecution never mentioned Rodney Lincoln's missing finger; it is difficult to imagine that they would have failed to do so if they ever had an indication prior to trial that the killer had a missing finger.

Similarly, the many versions of the "funny finger" story and the timing of their "discovery" call their very existence into question. The first story appeared nearly twenty-three years after the crime in a March 10, 2005 during an appearance by Detective Joseph Burgoon at a University of Missouri journalism class taught by Professor Steve Weinberg. According to Professor Weinberg:

> While talking to the class, Det. Burgoon told a story about Mary Flotron, which involved an anecdote about taking [M.] out for dinner. This story was news to me, and I was sure to write it down. In the

> story, the waiter serving them was missing a finger. [M.] noticed the missing finger and got agitated. Mary noticed [M.'s] behavior and asked why she was so agitated. [M.] told her it was because the man who killed her mother was missing a finger.

Ex. 44 at 1. The very next day, on March 11, 2005, Detective Burgoon e-mailed Professor Weinberg with Ms. Flotron's telephone number, and advised Professor Weinberg that he had "explained everything to [Ms. Flotron]." *Id.* at 4.[18]

In a subsequent phone call to Ms. Flotron by Professor Weinberg, she noted, "the girls were afraid of every man who looked like the perp." *Id.* In that version, Ms. Flotron said that she was dining with M.D. at a restaurant when [M.D.] got very quiet and commented that the waiter's hand was like the hand of the man who hurt her. *Id.* In another version, Ms. Flotron said M.D.'s disclosure happened while they were in a car when M.D. saw an African-American man at a stop sign. Ex. 39 at 1. More recently, Detective Burgoon telephoned Nat Clenney to tell him yet another version: that Ms. Flotron was giving M.D. and her sister a bath one day before Mr. Lincoln's trial, and while the girls were playing in the bathtub, she overheard M.D. tell her sister, "Remember, 'the Bad Man' is missing a finger." Ex.

[18] Detective Burgoon also beat Respondent's counsel to an interview with Joe Bauer. Mr. Bauer told Mr. Spillane, "when I talked to Joseph -- excuse me -- to Mr. – Detective Burgoon (ph) on the phone yesterday, he told me that he recalled that the victims did -- excuse me -- that the victims did tell the victims services people, who I would assume would be the Mary Flotron (ph) or Ms. McGee-Dressler (ph), that the fellow was missing a finger, so -- you know, that was the attacker. So -- and that's just his recollection. Yeah." Resp. Ex. 10 at 3.

36 at 3.[19] Finally, Assistant Circuit Attorney Ed Postawko has only a vague recollection that M.D. told him about Mr. Lincoln's missing finger sometime between 2002 and 2015, but he does "not recall the precise statements made by [M.D.] which led me to this conclusion." Ex. 16 at 1.

M.D., however, "has no memory of ever telling anyone that her attacker had a strange, funny or missing finger." Ex. 46. M.D. first learned that Mr. Lincoln was missing a finger when she read it on Kay Lincoln's Facebook page. H. T. 3/17/16 at 64. She testified that before the DNA hearing in Mr. Lincoln's case she "was very, very irritated because the funny finger was coming up frequently," and she and Postawko "actually had words about that." *Id*. at 64-65. She never told Detective Burgoon, Mary Flotron or anyone else that the killer had a funny finger because "I did not look at my attacker's hands while he was trying to kill me. I know nothing about a missing finger." *Id.* at 65. M.D. finds Postawko's claim about the funny finger "upsetting and untrue." Ex. 46.

Based on the record as a whole, Ms. Flotron's varied recollections about the "funny finger" do not corroborate M.D.'s childhood identification of Mr. Lincoln. M.D. is credible and confident in her assertion that she did not see her attacker's

[19] The common nexus of these stories is that they originate with Detective Burgoon, not Ms. Flotron. M.D. and her family have filed sworn statements and testified to the Court indicating that Detective Burgoon has made several false statements to persuade them to remain loyal to the prosecution's case, including that Rodney Lincoln had partially healed scratches on his body when he was arrested, Ex. 36 at 3; Ex. 37 at 1, H.T. 3/18/16 at 71, and that Rodney's fingerprints were at the scene of the crime but the court prohibited the prosecution from using it. Ex.36 at 3, Ex. 37 at 2; H.T. 3/18/16 at 71-72.

hand, and never told anyone that he was missing a finger. Clearly, Ms. Flotron's memory is not accurate. The funny finger story only further supports Mr. Lincoln's present claim of actual innocence, and highlights the State's attempts to support a foundationless conviction.

6. There Better Suspects for this Crime than Rodney Lincoln.

Rodney Lincoln was never a good suspect for this crime. There was no reason even to suspect him. JoAnn Tate had a brief romantic interest with him between April 5 and May 9, 1981 as reflected by her diary entries. Ex. 42 at 1-4. Her entries are only positive; she describes him as a truck driver who is "smart" and a "nice sexy person," with no negative references whatsoever. *Id.* at 1, 2. M.D. herself has only positive memories of her mother's relationship with Mr. Lincoln:

> Q. Do you know Rodney Lincoln?
> A. Yes, ma'am.
> Q. When was the first time you met him?
> A. I went to a barbecue at his house, my mother and I and my sister, and we played around with the animals there and we played at the park by his house. It was a really great time.

H. T. 3/17/16 at 12. She described her mother's relationship with Mr. Lincoln as "an informal date-thing situation. I don't think it was anything serious. They enjoyed each other's company." *Id*. at 13. Mr. Lincoln was a friend of M.D.'s Uncle Daniel Clenney, who thought well enough of him to encourage his sister to date him. Ex. 36; Ex. 37. M.D. testified, "that's always been one of my questions is

where did Rodney come into this?" H. T. 3/17/16 at 48; *see also* Ex. 35 at 8, in which M.D. told Postawko, "I don't understand how Rodney got to be there… I want to know why Rodney was there in the first place? Because he wasn't in my house that night. He was not there. He was never there."

Mr. Lincoln's inclusion in the photo array had nothing to do with any evidence connected to the crime. M.D. told a police sketch artist that the attacker resembled Dennis Smith, a friend of the Clenney family. T. 608-9; Ex. 32, State's Ex. 13, photo of Dennis Smith. A sketch was made using a photograph of Dennis; *see* Ex. 31, State's Ex. 10, Composite Sketch, and Daniel Clenney said the sketch resembled Rod. Ex. 8 at 550. Based on this alone, M.D. was pushed to select Mr. Lincoln from a two-person photo display. She could not have picked the photo of Gary Parris "[b]ecause he was a family member." H. T. 3/17/17 at 47-48. M.D. described the process as "biased," explaining:

> I was told that the bad man was one of the two guys, so I picked Rodney. And then I see the lineup, nobody else looks remotely like him. It was just weird. Then I'm told to pick a bad guy. So for me as a child, I'm going to pick the one that I know. And I was very intimidated by the whole process, you know. I don't feel good about it. I'm not happy with it.

Id at 50-51. That ended any investigation into alternative suspects.

a. Serial Child Sex Offender Steve Yancey Was on the Scene.

Other than the forced choice of Rodney Lincoln's picture, the only photograph to which M.D. reacted was that of Steve Yancey. T. 740-742; Ex. 29.

Although detectives called it a failure to identify Yancey, social worker Munkel noted: "Patient in much discomfort and interview stopped several times. Patient repeated many previous statements. Patient expressing anger toward [detectives] Burgoon and Munkel later. Patient also blocking painful experiences recalled earlier." Ex. 12, M.D.'s medical records at 50.

New evidence implicates Steven Yancey in the murder. In the early afternoon of April 27, 1982 police officers and investigators were still processing the scene of Tate's murder when a curious young by-stander approached them. His name was Steven Yancey, and he told Sergeant Riley he was friendly with Tate and her daughters. Ex. 8 at 9-10. Yancey explained to Sergeant Riley that Tate's ex-boyfriend, Tom, had been threatening and aggressive lately. *Id.* According to Yancey, he had been staying with Tate off and on at her request so that she and her children would feel safe. *Id.* Yancey also interviewed with a reporter for the St. Louis Post-Dispatch, and in the resulting article, is quoted saying that he knew JoAnn Tate, and that she was "perfect." Ex. 3, St. Louis Post Dispatch article. Nat Clenney saw Yancey's story to the police as a red flag; he knew that Yancey and JoAnn had a brief sexual relationship after she had broken up with her previous boyfriend, Tom, but that JoAnn had just started to date Jerry Woodward. Ex. 36 at 1, 2.

At 17 years old, Steven Yancey lived just a few doors down from JoAnn Tate at 1411 Farrar, Apartment A. Ex. 8 at 9. Just two years later, Yancey would be arrested for the first of many child sex offenses. *State v. Yancey*, No. 21CCR-514750 (May 17, 1985, St. Louis Co., Mo.) (Guilty plea to Sodomy). The years that followed would include more arrests and convictions for sexually assaulting minors. *See e.g.*, *State v. Yancey*, No. 2007CR000114 (May 28, 2008, Labette, Kan.) (Guilty Sexual Battery/Intentional Touching of Minor Under 16 and Kidnapping); *State v. Yancey*, No. 23CR192-1436 (Jan. 19, 1993 Jefferson Co., Mo.) (Guilty plea to 1st Degree Sexual Abuse and Forcible Sodomy). Yancey is currently housed with the Kansas Department of Corrections at Norton CF-Central, serving a sixteen year sentence for the kidnapping and rape of a child under the age of fourteen. *State v. Yancey*, No. 2007CR000114 (May 28, 2008, Labette, Kan.).

Yancey's wife, Tara Yancey, has also served time for being complicit in one of Yancey's crimes. *State v. Yancey*, No. 2007CR000113 (Feb. 20, 2008, Labette, Kan.). In an emotional conversation, Tara told Midwest Innocence Project Staff Investigator Nadia Pflumm of Yancey's violent behavior. Tara was afraid of Yancey, especially after Yancey confessed to her that he had, years earlier, killed a woman. Ex. 2, Affidavit of Nadia Pflumm at ¶7. That woman had walked in on Yancey "doing something" to one of the children while their caretaker was away, and he "had to kill her." *Id.* Yancey told Tara that "he took his aggression out on

her. He said it was a real bloody mess." *Id*. Tara also told Ms. Pflumm about Yancey's alleged history of raping his siblings. According to Tara, Yancey's mother called her and told her that was why she had kicked him out of her home as a teen. *Id.* at ¶8.

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

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

b. M.D. Identified Serial Killer Tommy Lynn Sells.

Similarly, more evidence connects the crime to Tommy Lynn Sells than Mr. Lincoln. As discussed above, M.D.'s repudiation of her childhood identification of Mr. Lincoln was prompted by a November 23, 2015 television show that suggested Tommy Lynn Sells was a viable suspect in her mother's murder. Ex. 1 at 1-2. Sells

is a known serial murderer who was executed in Texas in 2014. *See* Roxanna Sherwood & Lauren Effron, *Convicted Serial Killer Tommy Lynn Sells Executed in Texas*, ABC News (Apr. 3, 2014), http://abcnews.go.com/US/convicted-serial-killer-tommy-lynn-sells-executed-texas/story?id=23184667. Sells has been linked to at least 17 other killings and claimed he killed dozens more. *Id.*

In her recantation of her identification of Rodney Lincoln, M.D. points to Tommy Lynn Sells as the man she believes committed the crime. Ex. 1 at 1, 2. ("The more I learned about Tommy Lynn Sells the more convinced I was that he was the one who killed my mother.").

Evidence suggests that Tommy Lynn Sells also could be responsible for the death of JoAnn Tate and the assaults on her two children. Sells tended to target single mothers with young children, attacking them with multiple knives in their homes, late at night, leaving cylindrical objects protruding from the genitals of his adult victims, Ex. 5, Texas Rangers Report re Tommy L Sells at 2, which perfectly describes the crimes against M.D., her mother and her sister. Further, Sells lived in Missouri at the time of Tate's death, and many of the facts provided by M.D. at the time of the crime coincide with facts in Sells' biography.

On Nov. 15, 2014, a volunteer investigator for the Madison County Public Defender's office conducted an interview of Sells' brother, Timmy Sells. Ex. 6, Interview report of Timmy Sells. Timmy said that in late 1981, their mother Nina

Jean Sells moved from Wolcott, Arkansas to St. Louis. *Id.* He and his siblings, including Tommy, moved to 8720 Shirley Ave Bel-Ridge St. Louis, MO the home of their older half-brother, Terry Joe Lovins. *Id.* at 2.

Timmy also said that he and Tommy, along with Terry, all worked for their cousin Chester Woodall, who owned a Volkswagen repair shop in Berkley, MO, a suburb of St. Louis, in late 1981 and 1982. They ran parts to nearby locations and repaired Volkswagens. *Id.* Timmy said he took over the shop in 1983 and his brother Tommy continued to work there part-time throughout that time period. *Id.* Timmy's ex-wife, Tracy, also placed Sells in St. Louis in 1982. She reported that Tommy Lynn Sells worked for Chester when he was 18 years old. Ex. 4 at 14. According to Tracy, the Volkswagen repair shop was located on Hanley Road in St. Louis, and that in addition to fixing cars, Chester sent Tommy out to perform repairs on apartments that he owned. *Id.*

Tommy's work as a mechanic and access to Volkswagens is relevant to the description of the perpetrator provided by M.D. During the investigation of Tate's murder, M.D. claimed that the man who worked on her mother's car was the one who hurt her. T. 402. She also told detectives her mother had met the killer in Hyde Park near their home, and that he drove a white Volkswagen. 513-14; Ex. 8 at 33, Ex. 1 at 2. In his deposition, social worker Wayne Munkel also read his notes and says the following: **"**Patient still saying assailant is named Bill, She also

states she went to his place in 1981 in a Yellow Cab. The man now drives a white Volkswagen." Ex. 11, Deposition of Wayne Munkel at 11. This is significant because [M.D.] gave this account on April 28, 1982, the day after the assault, when her memory was the freshest. Police noted when they arrested Rodney Lincoln that he did not own a white Volkswagen. Ex. 8 at 42-43 ("Arrested Subject #1 stated that he does not have a white Volkswagen and has never had one."). Additionally, Tommy Lynn Sells' father was named "William" and went by "Bill." *See* Diane Fanning, *Through The Window* 20 (St. Martin Press 2007).

The court below adopted Respondent's argument that M.D.'s present testimony is not credible because Tommy Sells was in custody in Jonesboro, Arkansas without acknowledging that Respondent's evidence falls short of giving Sells an alibi for this murder. Further, the question of whether M.D.'s identification of Mr. Lincoln is reliable is a separate issue from whether her identification of Mr. Sells is reliable. Mr. Lincoln need not prove who committed the crime in order to establish his innocence—a fact Postawko acknowledged to undersigned counsel. Ex. 45. There is substantial evidence in the record independent of M.D.'s identification of Tommy Sells that establishes her identification of Mr. Lincoln is unreliable. It is true that M.D. honestly believes, "It was Tommy Sells. He absolutely entered our home and tried to kill R.T. and I. He

murdered my mom." Ex. 35 at 15. M.D. is equally adamant and sincere that Rodney Lincoln "did not do this. He was not there." *Id.* at 9.

Respondent's proposed judgment adopted by the court below contends that M.D.'s repudiation of her identification of Rodney Lincoln cannot be credible unless she is correct about Tommy Sells, Order at 3-5, Respondent's Proposed Order at 3-5, but that is a false dichotomy. M. D.'s video interview indicates that she does not make that link even in her own mind. Revisiting the memory of her trauma was painful for her, and admitting that Rodney Lincoln is innocent was not something she did lightly. "It was horrible" for her to go back in her memory to the night her mother died, but when she saw Sells' mug shot and the "stubble on his face," she "had a flash of facial hair up against my face." H. T. at 3/17/16 19; *see also* Ex. 35 at 8. She watched from under her sister's bed as the killer sat and smoked a cigarette and washed a bloody knife in the sink, and recalls that "he had bushy hair." *Id.* She remembers that the killer "sat on top of me and used this (gestures using right) hand to stab me. And I told the cops that. Rodney Lincoln is left-handed." Ex. 35 at 9. The killer was "a younger man. He was so strong….strong enough to overpower my mother and hurt all of us." Ex. 35 at 16. She described her mother as a "hellcat," and given Rodney Lincoln's small stature, he would have been no match for her. *Id.* The physical characteristics M.D.

describes do not match Rodney Lincoln, whose hair is straight and whose face was clean shaven at the time.

Judge Green's rejection of M.D.'s testimony is based only on Respondent's assertion that Mr. Sells was in custody in Greene County, Arkansas at the time of JoAnn Tate's murder. Respondent claims that "Tommy Lynn Sells' book"[20] and Arkansas records indicate he had returned to Arkansas before the murder and he was in custody at the time of the murder." Order at 5-6. However, nothing in the record accounts for Sells' whereabouts after his release from the Greene County Jail on April 14, 1982, thirteen days before the homicide of JoAnn Tate.

Greene County, Arkansas court records reflect that Sells was arrested on April 3, 1982, and appeared at a hearing before a judge on April 14, 1982, where he was placed on probation and ordered to spend two months in a youth services center. Resp. Ex. 4. However, there is no evidence that Sells ever entered the youth correctional facilities, and substantial evidence states the contrary. The Missouri Department of Corrections Classification and Assignment Unit Report, made in connection with a September 1984 incarceration, reflects that for his 1982 auto theft charge in Paragould, Arkansas, Sells "spent 2 weeks in a jail in Arkansas," Resp. Ex. 4 at 20, which corresponds with his pretrial detention from April 3 until April 14, 1982. *Id.* at 6, 26. If he had been taken into custody or voluntarily

[20] *See* Tori Rivers, TOMMY LYNN SELLS: A PROLIFIC SERIAL KILLER, IN HIS OWN WORDS (Riverbend Press, 2008).

reported to custody after his plea, the record would more likely reflect that he spent a little over two months in custody. It does not.

Arkansas Investigator Michael West reviewed Sells' casefile and court records and was unable to find anything placing Sells at the correctional facility after his hearing. Ex. 41, Affidavit of Michael West. Investigator West spoke with Greene County Clerk and Recorder Jan Griffith, who told him the usual procedure is for the offender to work it out with the youth center himself as to when he shows up to start his term. *Id.* According to the clerk, the offender is free to walk out of court after his sentencing. Sells walked out of court in Jonesboro on April 14, 1982 with only a promise to appear later at the youth center. *Id.* Investigator West also spoke with Greene County employees Bonnie Smith, Sue Clayton, Gary Tritch, Lynn Morris, Bill Prince, and Ben Branch and determined that there are no existing records establishing that Tommy Sells ever showed up at the center. *Id.* [21]

Sells' attorney, H.T. Moore, also states there is no evidence to support the contention that Sells entered the youth facility. Moore represented Sells during his April 14, 1982 hearing. Ex. 40 at 1. According to Mr. Moore, after taking the plea, Sells probably did not serve any time: "[t]he court file does not reflect that Mr. Sells was delivered to CYS, and I doubt that was done." *Id.* Mr. Moore describes

[21] Tommy Sells' attorney, Harry Truman "HT" Moore, states, "From my own personal knowledge, I can state that the individuals referenced-Bonnie Smith, Sue Clayton, Gary Tritch, Lynn Morris, Bill Prince and Ben Branch- were all employed by the Greene County juvenile office in 1982." Ex. 40 at 2.

the Sheriff as having been "very lax" in those days, and states that the court files "did not contain a court order directing the sheriff to deliver him to CYS." *Id.* It was likely that "[w]hen the judge put Mr. Sells on probation with a special condition, they might have released him from custody with a directive that he report to CYS." *Id.* at 2. "It would be wrong to assume that Mr. Sells was delivered to juvenile custody." *Id.* According to Mr. Moore, even if Sells had been delivered to CYS, "the program was about as secure as a sieve." *Id.* at 2. "Teenagers walked away all the time and authorities would rarely pursue them," *id.*, especially "if they had reason to think he was leaving the state." *Id.* In short, "the only conclusion that one can definitively reach from the court file in *State v. Sells* is that he was released from Greene County Jail on April 14, 1982. Anything beyond that is speculation." *Id.* The court below unreasonably ignored the account of Mr. Moore, a former President of the Arkansas Bar Association, and the affidavit of Investigator West.

In short, the State has proven only that Tommy Lynn Sells was in Arkansas two weeks before JoAnn Tate's death, leaving more than enough time for Sells to travel to Missouri and commit the murder.

The telephone call between Assistant Attorney General Michael Spillane and Sells' brother, Timmy Sells, Resp. Ex. 7, does nothing to undermine M.D.'s identification of Sells as her mother's killer. Timmy told Spillane that he and his

family had moved to St. Louis in the early 80s, and that Tommy Sells would join them intermittently. *Id*. at 5, 7-8. Respondent's interview with Timmy also confirmed that Tommy Sells sometimes worked at their cousin's Volkswagen repair shop, *id.* at 6-7. Sells' work as a mechanic and access to Volkswagens is relevant because during the investigation of Tate's murder, M.D. told police that the man who worked on her mother's car was the one that hurt her, T. 402, and that he drove a white or yellow-white Volkswagen. T. 513-14; Ex. 8 at 33; Ex. 1 at 2. M.D. gave this account on April 28, 1982, the day after the assault. Police noted when they arrested Rodney Lincoln that he never owned a Volkswagen. Ex. 8 at 42-43.

Despite the fact that Timmy Sells' memory is consistent with M.D.'s identification of Tommy Sells, the court below focused on only one comment from Timmy Sells in a separate phone call, Resp. Ex. 8, wherein Timmy did not remember Sells having a beard at the time. Order at 6. The court below further relied on a photo of Sells from two years later, in 1984, to conclude that Sells could not have had a beard at the time of Tate's murder in 1982. *Id*., Resp. Ex. 8 at 3-4. Before Mr. Lincoln's trial, M.D. told her uncle Nat Clenney that the perpetrator had recently moved or traveled from Hollywood, CA. Ex. 8 at 26. The trip to California—and Tommy's beard—predate the crime.

The important point, however, is that regardless of whether Tommy Sells is guilty, no evidence implicates Mr. Lincoln in the crimes committed against JoAnn Tate and her daughters on April 27, 1982. No physical evidence places him at the scene. He had no motive for the attack. The identification by a seven-year-old girl is the sole evidence against Mr. Lincoln, and as a mature adult woman, she has retracted that identification. H. T. 3/17/16 at 96. Zero evidence of guilt remains. When M.D. replays the memory of the crime in her own mind, Rodney Lincoln is not there. *Id.*

C. Mr. Lincoln's Innocence Justifies Habeas Corpus Review and Relief.

Evidence that a prisoner is innocent can serve two roles in Missouri habeas corpus jurisprudence. First, clear and convincing evidence that a prisoner is innocent "make[s] the petitioner's continued incarceration and eventual execution manifestly unjust even though the conviction was otherwise the product of a fair trial." *State ex rel. Amrine v. Roper,* 102 S.W.3d 541, 547 (Mo. banc 2003). Missouri has always adhered to the common law rule that a prisoner can obtain a new trial by demonstrating newly discovered evidence that is likely to produce a different result on retrial. *State v. Terry,* 304 S.W.3d 105, 109 (Mo. banc 2010). Second, evidence supporting a reasonable probability that no reasonable juror would find guilt beyond a reasonable doubt overcomes procedural barriers to adjudication of the merits of a habeas petitioner's constitutional claims. *Clay v.*

Dormire, 37 S.W.3d 214, 217 (Mo. banc 2000); *Schlup v. Delo*, 513 U.S. 298, 316 (1995). Evidence that satisfies the greater burden under the *Amrine* standard will also inevitably trigger the lesser *Schlup* standard as well.

1. Mr. Lincoln Meets The *Amrine* Innocence Standard.

The objective of this Court's inquiry is to determine, as reliably as possible, the truth of whether Mr. Lincoln is in fact innocent of the crime. In order to obtain a new trial based upon newly discovered evidence, Mr. Lincoln must show that:

> (1) the facts constituting the newly discovered evidence came to his knowledge after the trial; (2) his lack of prior knowledge was not owing to want of due diligence on his part; (3) the newly discovered evidence is so material that it is likely to produce a different result at a new trial; and (4) the evidence is not merely cumulative evidence or evidence impeaching a witness's credibility.

State v. Stewart, 313 S.W.3d 661, 665 (Mo. banc 2010), *citing Terry*, 304 S.W.3d at 105. These elements are flexible; whether to grant a new trial based on newly discovered evidence is committed to the sound discretion of this Court, *State v. Rutter*, 93 S.W.3d 714, 730 (Mo. banc 2002), which will be disturbed only if its ruling "is clearly against the logic of the circumstances then before the court and is so arbitrary and unreasonable as to shock the sense of justice and indicate a lack of careful consideration." *State v. Stewart, supra* at 665, *citing Fleshner v. Pepose Vision Inst.*, 304 S.W.3d 81, 87 (Mo. banc 2010). The flexibility permitted under this standard is reflected in the *Amrine* case, in which all other considerations were eclipsed by "the rare circumstance in which no credible evidence remains from the

first trial to support the conviction." *State ex rel. Amrine v. Roper, supra* at 548. Mr. Lincoln's case is factually and legally similar to *Amrine* because no credible evidence remains from Mr. Lincoln's trial to support the verdict of guilt.

M.D.'s revelation that her trial testimony against Mr. Lincoln was mistaken qualifies as newly discovered evidence. "While the defendant's counsel had the opportunity to cross-examine and to impeach [M.D.] at trial, it is unrealistic to assume that the defense attorneys could have elicited the recantation at trial. Thus, the defendant, exercising reasonable diligence, could not have discovered and produced this evidence at trial." *United States v. Ramsey*, 762 F.2d 601, 604-605 (10th Cir. 1984). Further, recantation on the part of the prosecution's sole witness is an exceptional circumstance in which this Court has the inherent power to grant a remedy "in order to prevent the perversion of justice which would have occurred had we ignored the newly discovered evidence." *State v. Menteer*, 845 S.W.2d 581, 587 (Mo. App. 1992).

Respondent argues that this Court should simply find M.D.'s recantation not to be credible, and deny the Writ. That simplistic approach incorrectly applies the newly discovered evidence standard, which assesses the evidence holistically and from the viewpoint of reasonable jurors. To respect the critical role that juries play in the American system of criminal justice, this Court must determine "whether the newly discovered evidence is so material that it is *likely to produce a different*

result on retrial." *State v. Stewart*, *supra*, at 666 (emphasis added). Further, evidence which "does not exonerate" the prisoner may nevertheless satisfy the standard if it "cast[s] serious doubt on the validity of the conviction." *State v. Terry*, *supra* at 109. Viewed in this light, a conviction such as Mr. Lincoln's cannot be allowed to stand if it is clear from the record as it is now that the prosecution at retrial would not win twelve votes for conviction. The Missouri Supreme Court said as much:

> In light of the resulting lack of any remaining direct evidence of Amrine's guilt from the first trial, Amrine has already met the clear and convincing evidence standard, for our confidence in the outcome of the first trial is sufficiently undermined by the recantation of all the key witnesses against him in the first trial to require setting aside his conviction and sentence of death. There would be no purpose to a preliminary determination of credibility by this Court sitting as a habeas court, either directly or through a master.

Amrine v. Roper, *supra*, at 544. In the rare circumstance that all of the witnesses implicating the defendant recant their testimony, "if there is a credibility determination to be made, it will be made by a jury." *Id.* at 550 (Wolff, J., concurring).[22] That is exactly the case here, where the *only* witness to implicate

---

[22] In assessing evidence of innocence, the reviewing court must account for the jury's vital role as the final arbiter of guilt or innocence:

> We must assess, among other things, the admissibility and credibility of the evidence presented, but as to credibility, the issue is not whether the district court or this court would find the new evidence credible, but whether the evidence possesses sufficient credibility that it should be heard by the real factfinder: the jury.

Walker v. Lockhart, 763 F.2d 942, 949 (8th Cir. 1985).

Mr. Lincoln has recanted, and no other witness or evidence supports motive, opportunity, or presence at the scene.

Amrine's reasoning was not an aberration in the application of the newly discovered evidence standard, nor is its logic limited to death penalty cases.[23] To the contrary, for more than a century, newly discovered evidence has been measured by the likely effect that it would have on the jury that will hear the case if a new trial were granted. For example, in the 1905 case *State v. Speritus*, the Missouri Supreme Court granted a new trial based on new evidence consisting of out-of-court recantations of the State's key witness. The court assessed the impact of the new evidence based on how it expected the evidence to unfold at a new trial, stating, "[t]hat the newly-discovered evidence *would* produce a different result *in the event a new trial were granted* we think possible, if not highly probable." *State v. Speritus*, 90 S.W. 459, 465 (Mo. 1905) (emphasis added). Thus, Missouri courts have long taken the forward-looking view of measuring what impact the new evidence would have on a jury in the event of a retrial.[24]

---

[23] Although this Court has observed in dicta that it is not entirely clear that *Amrine* applies in non-capital cases, *State ex rel. Koster v. McElwain,* 340 S.W.3d 221, 230, n. 9 (Mo. App. 2011), nothing in Missouri law suggests such a dichotomy on the question of innocence. Noting that "death penalty cases are different," Judge Wolff observed that "relief by habeas based on actual innocence and manifest injustice is not limited to death penalty cases." *Amrine, supra,* at 549. (Wolff, J., concurring).

[24] The Supreme Court requires federal courts to view the evidence from the jury's perspective. "It is not the district court's independent judgment as to whether reasonable doubt exists that the standard addresses; rather *the standard requires the district court to make a probabilistic*

Judge Green simply adopted, verbatim, Respondent's argument that "Recantations are generally to be regarded with suspicion," Response at 5, Order at 3, citing *State v. Harris*, 428 S.W.2d 497, 501 (Mo. Div. 1 1968). In *Harris*, the defendant was convicted of receiving the earnings of a prostitute based on the testimony of two prostitutes, one of whom, according to Harris, recanted her testimony after Harris was sentenced. Before Harris' hearing, that witness obtained counsel who advised her not to incriminate herself. 428 S.W.2d at 498-499. The recantation in *Harris* is understandably viewed with suspicion, as are other cases in which recantations come from criminals or jailhouse informants. However, a credible recantation from a material witness "is substantial evidence." *United States v. Ramsey, supra* at 601, 604 (10th Cir. 1984). Further, if independently corroborated, even recantations by jailhouse informants can trigger the *Schlup* gateway, *Reasonover v. Washington*, 60 F. Supp. 2d 937, 961, n. 24 (E.D.Mo. 1999), or independently justify a new trial, *State ex rel. Amrine v. Roper*, *supra.*

M.D.'s recantation is corroborated by substantial evidence supporting its credibility, including her original description of events and the suggestive circumstances of her original identification, as detailed above. In addition, Mr. Lincoln's lack of motive, the total absence of physical evidence, and the circumstances surrounding her recantation lend credence to M.D.'s current

---

determination about what reasonable, properly instructed jurors would do." *Schlup v. Delo, supra*, at 329 (emphasis added).

testimony. Furthermore, unlike *Harris*, *Ramsey*, *Reasonover*, and *Amrine*, all of which involved informants, inmates or otherwise shady characters, the recantation in Mr. Lincoln's case comes from a reputable, law-abiding citizen with no motive to lie in Mr. Lincoln's favor. It is inconceivable that a victim of a crime as horrible as this one would testify falsely in favor of Mr. Lincoln if he were truly guilty. Such a recantation stands on completely different footing. *See e.g.*, *State ex rel. Koster v. McElwain, supra* (Granting a new trial based in part on the recantation of a Missouri State Highway Patrol Officer who admitted that he made a mistake in testifying at trial that Mr. Helmig had tacitly admitted guilt.). All of the circumstances surrounding M.D.'s spontaneous recantation weigh heavily in favor of her credibility.

Finally, assessing witness recantations based on the impact that they would have on a jury at retrial is the only way to protect the weighty liberty interest protected by the Great Writ. As a Tenth Circuit Court of Appeals judge explained:

> Where . . . the recanting affidavit is from the critical witness in the case, great danger lies in letting the verdict stand even if the recantation is subsequently recanted. . . The danger of an erroneous conviction based on such unreliable testimony is great indeed. As the Supreme Court has indicated, "the dignity of the United States government will not permit the conviction of any person on tainted testimony."

United States v. Ramsey, supra, at 606 (McKay, J., concurring), quoting *Mesarosh v. United States*, 352 U.S. 1, 9 (1956). The fact that the only witness who gave

testimony linking Mr. Lincoln to the crime has recanted "undermines confidence in the correctness of the judgment." *State ex rel. Amrine v. Roper*, 102 S.W.3d 541, 543 (Mo. 2003). In *Amrine,* three of three essential prosecution witnesses recanted; in *Ferguson*, two of two essential prosecution witnesses recanted, *Ferguson v. Dormire*, 413 S.W.3d 40 (Mo. Ct. App. 2013). The same result would ensue if there is only one essential prosecution witness, and that person recants. *See State v. Mooney,* 670 S.W.2d 510 (Mo. App. 1984) (finding newly discovered evidence standard was triggered when defendant produced a tape-recorded statement of the State's sole witness, the complainant in a child sex case, admitting that she lied under oath at Mooney's trial.).

Mr. Lincoln need not find someone to take his place to demonstrate his entitlement to relief. Never has the law premised the exoneration of an innocent prisoner on apprehension of the true perpetrator. This is clear from the Supreme Court's application of *Schlup* to subsequent cases. Confidence in Paul House's conviction was undermined by evidence pointing to the victim's spouse, even though "the evidence pointing to Mr. Muncey is by no means conclusive." *House v. Bell,* 547 U.S. 518, 552 (2006). Though the Court was not convinced of Mr. Muncey's guilt, it reasoned that "the evidence pointing to Mr. Muncey likely would reinforce other doubts as to House's guilt." *Id.* at 553. In *State ex rel. Amrine v. Roper*, evidence suggested, but did not conclusively prove, that Terry

Russell was the actual killer. 102 S.W.3d at 544-545. Likewise, Dale Helmig was granted habeas corpus relief based in part upon new evidence linking the victim's estranged husband to evidence taken from the crime scene. *State ex rel. Koster v. McElwain, supra,* at 239-241. M.D.'s sworn statement that she recognizes Tommy Lynn Sells as the perpetrator is powerful evidence that her identification of Mr. Lincoln was erroneous, regardless of whether she is correct about Sells. Assistant Circuit Attorney Ed Postawko has acknowledged that Mr. Lincoln need not "fill his seat in prison in order for him to be released." Ex. 45. Mr. Lincoln's innocence leaves no void of plausible suspects; as noted above, both Steven Yancey and Tommy Sells could have killed JoAnn Tate.

M.D.'s recantation and DNA testing excluding Mr. Lincoln as the source of physical evidence at the scene of the crime negate any link between Mr. Lincoln and the brutal assault on Ms. Tate and her children. Not even a suspicion of guilt remains. Even if Mr. Lincoln had a fair trial, "the evidence of actual innocence [is] strong enough to undermine the basis for the conviction so as to make the petitioner's continued incarceration and eventual execution manifestly unjust." *State ex rel. Amrine v. Roper, supra* at 547. Accordingly, this Court should issue the writ of habeas corpus, unconditionally discharging Mr. Lincoln from his conviction and sentence, and ordering his immediate release.

2. Mr. Lincoln Meets *Schlup's* Innocence Gateway.

Under Missouri law, innocence also serves a procedural role in Habeas Corpus jurisprudence. Even if Mr. Lincoln's claims are procedurally barred, this Court may hear and decide them if his new evidence shows "that it is more likely than not that no reasonable juror would have convicted him." *Clay v. Dormire, supra*, at 217, quoting *Schlup v. Delo*, 513 U.S. 298 (1995). Because "habeas corpus is, at its core, an equitable remedy," *id*. at 319, "the ultimate equity on the prisoner's side [is] a sufficient showing of actual innocence." *Withrow v. Williams*, 507 U.S. 680, 700 (1993) (O'Connor, J., concurring in part and dissenting in part). *Schlup*'s purpose is to protect innocent prisoners from procedural technicalities, not create new ones. *Schlup*'s objective is to reach a reliable, truthful determination of whether the prisoner is guilty of the crime in question, keeping in mind that "the line between innocence and guilt is drawn with reference to a reasonable doubt." *Schlup v. Delo, supra*, at 328. The Supreme Court recently admonished, "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, supra* at 539 (emphasis added); *see also Reasonover v. Washington, supra* at 948. Therefore, under *Schlup*, this Court must consider "'all the evidence,' old and new, incriminating and exculpatory, without regard to whether it would necessarily be admitted under 'rules of admissibility

that would govern at trial.'" *House v. Bell, supra*, at 538, quoting *Schlup v. Delo*, 513 U.S. at 327. If, after considering all the evidence, this Court concludes that Mr. Lincoln is probably innocent under *Schlup*, then his conviction cannot stand unless this Court finds that it "was free of nonharmless constitutional error." *Schlup*, at 316. This is accomplished by ruling on the merits of the constitutional claims he has presented in his petition for writ of habeas corpus.

If this Court agrees that Mr. Lincoln can satisfy the standard for obtaining a new trial under *Amrine* because the evidence of his innocence is clear and convincing, it should also find that Mr. Lincoln's evidence of innocence establishes a reasonable probability, based on all the evidence, that no reasonable juror would find him guilty. *Schlup v. Delo, supra* at 329. In prior proceedings, Mr. Lincoln was conclusively excluded as the source of the hair used at trial to corroborate M.D.'s identification of Mr. Lincoln. *Lincoln v. State*, 457 S.W.3d 800, 804 (Mo. App. 2014). Further, in those proceedings, "the parties agreed that the various police reports gave no results that could place Movant at the scene of the crime." *Id*. No contrary evidence exists. After the DNA exclusion, the *only* evidence remaining against Mr. Lincoln was the identification of M.D.; she is the "'lynchpin' of [Mr. Lincoln's] conviction," *Id.* The sole reason that the court denied relief on Mr. Lincoln's DNA motion was that "[t]he child's testimony never wavered that it was in fact movant/defendant who attacked the family." *Id.* at 803.

New evidence before this Court establishes that, not only had the child's testimony wavered, but as a mature adult she has now repudiated it in a way that is harmonious with all the evidence and circumstances in the case.

For the foregoing reasons, this Court should find there is new evidence establishing a reasonable probability that no reasonable juror would find Mr. Lincoln guilty, and review the merits of Mr. Lincoln's constitutional claims two, three, and four, discussed in further detail below.

CLAIM 2. FALSE TESTIMONY "MATCHING" MR. LINCOLN TO A GUILTY HAIR

Mr. Lincoln alleges that his right to due process was violated by the prosecutor's use of false evidence that a hair found at the scene of the crime "matched" Mr. Lincoln. Although DNA testing has conclusively proven that Mr. Lincoln was not the source of the hair in question, *Lincoln v. State*, 457 S.W.3d 800 (Mo. App. 2014), the thrust of Mr. Lincoln's claim is that his right to due process was violated by the unfair use of discredited pseudo-science to obtain his conviction.[25] At trial, the testimony of the State's expert. Harold Messler, exceeded the limits of science—both those known at the time and those newly discovered—when he testified that the hair found at the crime scene "matched" Mr. Lincoln. Limitations on identifications made through hair microscopy evidence were

[25] A November 3, 2010 report from Serological Research Institute (SERI) indicates that a hair from the perineum of R.T. and the hair from a blanket at the scene of the crime "could not have originated from [R.T.], [M.D.], JoAnn Tate or Rodney Lincoln." Ex. 19 at 8.

acknowledged by the FBI in 1982, but have more recently been repudiated and completely discredited by the Federal Bureau of Investigations (FBI) and the Department of Justice (DOJ). To the extent the limits of the science were already known, testimony that the hair "matched" Mr. Lincoln violated Mr. Lincoln's due process rights under *Napue v. Illinois*, 360 U.S. 264, 272 (1959). To the extent that these limitations have only since become widespread and known, the discrediting of hair evidence by the DOJ and FBI is newly available evidence.

In his opinion, Judge Green avoided addressing this issue by declaring it procedurally barred, but that assertion is incorrect. Judge Green failed to acknowledge that to the extent the limits of hair microscopy were known at the time of Mr. Lincoln's trial, it was impossible for Mr. Lincoln to foresee in 1982 that the analyst's testimony would be thoroughly discredited in 2015. *See* Order at 7. And to the extent the limitations were unknown in 1982, the change in science is newly available evidence.

This Court can and should reach the merits of Mr. Lincoln's claim, even if the errors were known at the time, for two reasons. First, as discussed above, Mr. Lincoln presents new evidence establishing a reasonable probability that no reasonable juror would find him guilty, and he is therefore entitled to adjudication of the merits of his constitutional claims even if they are otherwise procedurally barred. *Schlup v. Delo*, 513 U.S. 298, 316 (1995).

Second, "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," even if they were or could have been raised in prior proceedings. *State ex rel. Koster v. McElwain, supra* at 229, n. 6. In *Reed v. Ross*, 468 U.S. 1, 16 (1984), the Court held that the cause-and-prejudice exception to procedural default rules applies to claims based on *new developments* in the law because there is no purpose to be served in requiring prisoners to raise claims that are certain to be rejected under the law then in effect. This rule serves pragmatic concerns regarding professional ethics and judicial resources:

> If novelty were never cause, counsel on appeal would be obliged to raise and argue every conceivable constitutional claim, no matter how far-fetched, in order to preserve a right for post-conviction relief upon some future, unforeseen development in the law. Appellate courts are already overburdened with meritless and frivolous cases and contentions, and an effective appellate lawyer does not dilute meritorious claims with frivolous ones. Lawyers representing appellants should be encouraged to limit their contentions on appeal at least to those which may be legitimately regarded as debatable.
>
> Accordingly, we hold that where a constitutional claim is so novel that its legal basis is not reasonably available to counsel, a defendant has cause for his failure to raise the claim in accordance with applicable state procedures.

Reed v. Ross, supra, at 15-16. That rationale applies to Mr. Lincoln's circumstances. Any challenge to microscopy testimony, such as was used in Mr. Lincoln's trial, was doomed to failure in Missouri courts after *State v. White*, 621

S.W.2d 287, 292 (Mo. 1981) (rejecting defendant's argument that "microscopic comparison of hair lacks sufficient scientific acceptance and that the opinion of the state's witness was incompetent."). Respondent points to no successful Missouri appellate challenge to hair microscopy testimony suggesting that diligent counsel in 1982 should have raised such a claim. It serves no legitimate jurisprudential purpose to hold Mr. Lincoln to the burden of foreseeing in 1982 that more than twenty years in the future, DNA technology would expose errors in microscopy testimony, or that the Department of Justice would issue an authoritative ruling condemning the type of testimony given by criminalist Harold Messler against Mr. Lincoln. Further, the new admissions by the DOJ and FBI regarding microscopic hair comparisons constitute newly discovered evidence, not previously available. This Court should reach the merits of Mr. Lincoln's claim that the State presented false hair microscopy testimony.

A. The False Testimony

At trial, the prosecution developed and presented testimony of criminalist Harold Messler that a hair recovered from a blanket at the scene of the crime was compared to hair seized from Rodney Lincoln and found to be a "match," which exceeded the limits of empirical science. Messler testified on direct examination

that the hair from the blanket could be associated with Mr. Lincoln to the exclusion of all others:

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

T. 717-718 (emphasis added). The prosecutor reiterated this point during closing, arguing that the pubic hair from the blanket had been compared to thirty-nine people and, "[n]one, no hair that that other hair was compared with other than Rodney Lincoln's matched," T. 957, clearly suggesting the absence of any other plausible source of the hair.

Messler was further asked, "And in the other two hundred cases that you have dealt with, concerning yourself with the Caucasian hairs that you've dealt with in the past, have you ever run across a circumstance where you had a hair from a scene that was matched to more than one person?" He replied, "No, sir." T. 718. In stating this, Messler side-stepped the scientific limitations on hair comparison testimony by reaching to his Messler's own experience to imply that microscopic hair comparison can match a hair to a particular individual. On cross-examination, Mr. Messler explained that when he said a hair matched, he meant

that "it compared favorably and had more or less the same characteristics." T. 718. When asked if he could tell that a particular hair came from a particular person, Mr. Messler said, "Not usually, no. *If a hair had very many individual characteristics, you could*. But it's not very common at all." T. 718 (emphasis added). The claim that microscopy could ever match a hair to particular subject misstated the capability of the procedure.

The transcript of Mr. Lincoln's first trial in which the jury could not reach a verdict is unavailable, so it cannot be determined what role, if any, the hair evidence played in that trial. However, in Mr. Lincoln's second trial, Mr. Messler initially declined to give an opinion, *see* T. 649-651, but was recalled to say that he had never, in all the cases he had worked on, matched a hair to more than one person. The prosecutor told Mr. Lincoln's second jury that the hair was damning evidence:

> And I think Mr. Hampe has mischaracterized the pubic hair in this case. [Criminalist Joseph] Crow told you that he was looking for hairs different from JoAnn Tate's. Now, we're talking about a pubic hair. JoAnn Tate had pubic hair. [M.D.] does not. [R.T.] does not. He separated out the pubic hairs that were not JoAnn Tate's. There was one of them that matches that man's pubic hair. That was compared to thirty-seven others in addition to JoAnn Tate. That's thirty-nine people. One out of thirty-nine people. None, no hair that that other hair was compared with other than Rodney Lincoln's matched.
>
> Mr. Messler told you that in two hundred cases, he's never had more than two -- more than one match. He's never had two people match one hair found at a scene. And yet he tells you there's absolutely no corroboration.

T. 957. The argument relied heavily on Messler's overstatement of the capability of hair microscopy, as discussed below.

B. Limits Of The "Science" Known At The Time.

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

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

Ex. 23, US DOJ FBI Microscopy – Hairs and Fibers manual at 82 (emphasis added). Indeed, in 1984, "The FBI acknowledged that such analysis cannot

positively determine that a hair found at a crime scene belongs to one particular person." Hsu, *supra* ("[In 1996], the FBI lab stopped declaring matches based on visual comparisons alone and began requiring DNA testing as well."). Nonetheless, Harold Messler testified on direct examination in a manner suggesting that the blanket hair could be uniquely associated with Mr. Lincoln.

C. New Developments Regarding Flawed Forensics.

In recent years, the entire practice of "matching" a suspect to evidence through microscopic hair comparison has been revealed to be deeply flawed. The FBI has publicly conceded that the only appropriate conclusion by hair examiners concerning an association between a known and questioned hair is that "a contributor of a known sample *could* be included in a pool of people of unknown size, as a possible source of the hair evidence (without in any way giving probabilities, as an opinion to the likelihood or rareness of the positive association, or the size of the class)." *Microscopic Hair Comparison Analysis*, U.S. Dept. of Justice, FBI, Nov. 9, 2012, http://www.mtacdl.org/attachments/CPE/Nelson/FBI_Limits_of_Science__%20Microscopic_Hair_Comparison.pdf (emphasis added). Any testimony beyond a

conclusion that the defendant could have been the source of the hair—i.e., that the hair was a "match"—is absolutely false.[26]

The use of this false testimony was widespread. After the exonerations of three men who were convicted, at least in part, because of testimony by three different FBI hair examiners whose testimony was scientifically flawed, the FBI and the DOJ agreed to work in partnership with the National Association of Criminal Defense Lawyers and the Innocence Project to conduct a review of criminal cases involving microscopic hair comparison. *FBI Testimony on Microscopic Hair Analysis Contained Errors in at least 90% of Cases in Ongoing Review* FBI (Apr. 20, 2015), https://www.fbi.gov/news/pressrel/press-releases/fbi-testimony-on-microscopic-hair-analysis-contained-errors-in-at-least-90-percent-of-cases-in-ongoing-review. The review was initiated in 2012 and the government identified almost 3,000 cases where "FBI examiners may have submitted reports or testified in trials using microscopic hair analysis." *Id.* As of March 2015, when the FBI had reviewed approximately 500 cases, 268 cases were identified in which examiners provided trial testimony to inculpate a defendant. *Id.* In over 90% of

[26] Similarly, in 2009 the National Academy of Sciences (NAS) released a report concerning the state of forensic science testimony throughout the country. In regard to hair comparison testimony, they concluded, "There appear to be no uniform standards on the number of features on which hairs must agree before an examiner may declare a 'match'… The categorization of hair features depends heavily on examiner proficiency and practical experience." National Research Council, *Strengthening Forensic Science in the United States: A Path Forward*, August 2009, at 160, https://www.ncjrs.gov/pdffiles1/nij/grants/228091.pdf. The report continued: "[T]estimony linking microscopic hair analysis with particular defendants is highly unreliable." *Id*

those cases, the analyst made erroneous statements. *Id.* Crow was trained by the FBI in hair and fiber. T. 633.

Since then, at least two defendants have been released solely on the basis that the new understandings regarding microscopic hair evidence indicate that the testimony introduced at trial was fraudulent. George Perrot was released in Massachusetts after the Superior Court ordered a new trial in *Commonwealth v. Perrot*, Nos. 85-5415, 5416, 5418, 5420, 5425 (Hampden Super. Ct. Jan. 26, 2016), available at https://www.scribd.com/document/296872520/New-Trial-Ordered-for-George-Perrot. Mr. Perrot was convicted in 1987 of aggravated rape, burglary, and assault based largely on microscopic hair and serology evidence and the defendant's admission that he had at one time been in the victim's home. In its analysis, the court focused on the hair evidence and held "Perrot and his counsel cannot be reasonably charged with knowing that [the analyst] lacked any scientific basis for determining the range of individuals who could have possessed hair." *Id.* at 61. It similarly found that it was not until 2009 that the National Academy of Sciences issued its report rejecting a hair analyst's ability to opine on the statistical significance of a hair, and it was not until 2012 that the FBI agreed that such statements "could not be squared with the limits of science." *Id.* at 64. Thus, the new understandings constituted "newly available evidence." *Id.*

In North Carolina, prosecutors agreed to a motion for a new trial and ultimately dismissed the indictments against Timothy Scott Bridges after reviewing the erroneous testimony regarding hair evidence. Joe Marusak, *Prosecutors dismiss indictments in 27-year-old Charlotte rape case*, Charlotte Observer (Mar. 2, 2016), http://www.charlotteobserver.com/news/local/crime/article63609507.html. Bridges served over 25 years after he was convicted of a 1989 rape. The State was found to have relied on "improper testimony" about microscopic hair evidence. *Id.*

Here, the analysts made exactly the same kinds of errors noted by the FBI in its joint review. In outlining their review, the DOJ, FBI, Innocence Project, and NACDL agreed on three error types in hair comparison testimony where the testimony was inappropriate and exceed the limits of sciences. *Microscopic Hair Comparison Analysis*, U.S. Dept. of Justice, FBI, Nov. 9, 2012, http://www.mtacdl.org/attachments/CPE/Nelson/FBI_Limits_of_Science__%20Microscopic_Hair_Comparison.pdf. Two of those error types are apparent in Mr. Lincoln's case.

The first is Error Type 1, where "The examiner stated or implied that the evidentiary hair could be associated with a specific individual to the exclusion of all others." *Id*. Messler committed this type of error when he testified that the hair "matched" Rodney Lincoln.

The FBI's third error type was also present at Mr. Lincoln's trial. Error Type 3 occurs when:

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

Id. As outlined above, Messler explicitly relied on his experience "in the other two hundred cases" he handled as statistical proof no hair could ever match more than one person. T. 718. This improperly allowed Messler to use his own experience to bolster his claims.[27]

Again, as with Error Type 1, the prosecutor highlighted this portion of Messler's testimony during his closing argument. *See* T. 957. Although Messler's claim is completely without empirical scientific validity, it was presented to the jury as such.

The science available at the time precluded Messler from being able to "match" a hair to Mr. Lincoln. The science developed since then, including DNA testing on the hair, has revealed the testimony to be completely false. Because

[27] This type of bolstering can sometimes be attributed to the fact that an analyst might believe he or she has never falsely matched a hair because "he or she has never undertaken to make a comparison where it would be possible to say there was a false match." Clive A. Stafford Smith & Patrick D. Goodman, *Forensic Hair Comparison Analysis: Nineteenth Century Science or Twentieth Century Snake Oil?*, 27 COLUM. HUM. RTS. L. REV. 227, 260 (1996) ("Unless it is conclusively proven by other means that the suspect is innocence—an unlikely occurrence if the hair analysis is being performed in a case where the police have already made a preliminary showing of probable cause to a magistrate in order to secure a hair sample—the false result may never be exposed.")

Messler's testimony was fraudulent, it violated Mr. Lincoln's right to due process and seriously undermines the reliability of his conviction. *Alcott v. Texas*, 355 U.S. 28 (1957). As one federal court observed:

> [R]ecognizing such a claim [based on discredited forensic principles or other junk science] is essential in an age where forensics that were once considered unassailable are subject to serious doubt. And it's particularly important to permit claims of constitutional error grounded in faulty science in a second or successive petition. After all, flawed analytical methods may not be debunked until well after the expiration of a petitioner's one-year deadline to file a habeas petition under AEDPA.

Gimenez v. Ochoa, 2016 U.S. App. LEXIS 8511 (9th Cir. May 16, 2016). Due process requires that a conviction based largely on the use of now-discredited science should be vacated. *Id.*, citing *Lee v. Houtzdale SCI*, 798 F.3d 159, 162 (3d Cir. 2015), and *Lee v. Glunt*, 667 F.3d 397, 403 n.5 (3d Cir. 2012).

Judge Green signed Respondent's proposed finding, which stated, "without the hair the State had a strong case." Order at 12, Respondent's Proposed Order at 12. The record fails to support this finding, particularly in conjunction with the *Brady* evidence that would have enabled the defense to argue that M.D. identified multiple other men as the "bad man" who attacked her, and that she had been coached before trial to point to the chair in which Mr. Lincoln would be sitting. *See* Claim 3, *infra*. Further, the prior mistrial suggests that this was a close case, and the hair evidence, as the only physical evidence that tied Mr. Lincoln to the crime scene, played an important role in the corroboration of M.D.'s testimony. The State

emphasized this invalidated hair comparison evidence in their opening statement, T. 303-304, during their case-in-chief, T. 717-18, and again in closing argument. T. 957. The evidence played a pivotal role in the jury's deliberations.

Mr. Lincoln is entitled to relief on the prosecutor's use of false evidence if it "may have had an effect on the outcome of the trial." *Napue v. Illinois*, 360 U.S. 264, 272 (1959). The use of false, scientific-sounding evidence to corroborate a questionably obtained identification satisfies this standard. Lay jurors lack the ability to independently evaluate the accuracy of scientific evidence. "Expert evidence can be both powerful and quite misleading because of the difficulty in evaluating it." *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 595, 113 S. Ct. 2786 (1993); *see also U.S. v. Frazier*, 387 F.3d 1244, 1263 (11th Cir. 2004) ("[E]xpert testimony may be assigned talismanic significance in the eyes of lay jurors, and, therefore, the district courts must take care to weigh the value of such evidence against its potential to mislead or confuse."); *U.S. v. Hines*, 55 F. Supp. 2d 62, 64 (D. Mass. 1999) ("[A] certain patina attaches to an expert's testimony unlike any other witness; this is 'science,' a professional's judgment, the jury may think and give more credence to the testimony than it may deserve.") The type of testimony given by criminalists Crow and Messler is "precisely the type of scientific evidence that juries are likely to consider objective and infallible." Keith

A. Findley, *Innocents At Risk: Adversary Imbalance, Forensic Science, and the Search for Truth*, 38 Seton Hall L. Rev. 893, 943 (2008).

In addition, the NAS report, FBI and DOJ findings, and the FBI agreement regarding error types, also constitute newly discovered evidence, which reveals the improper nature of Crow and Messler's testimony. "'[N]ew evidence' in the context of an actual innocence claim [is described as] 'new reliable evidence'—whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence—*that was not presented at trial*." *McKim v. Cassady*, 457 S.W.3d 831, 846 (Mo. Ct. App. 2015) (Court's emphasis), quoting *Schlup v. Delo*, *supra* at 324. New evidence may be raised at any time: "[I]n *McQuiggin*, the United States Supreme Court held that 'new evidence' in connection with an actual innocence habeas claim is any evidence that was 'unavailable' at the time of trial without regard to whether the evidence could have been discovered with reasonable diligence at the time of trial." *Id.*; *See also Han Tak Lee v. Glunt*, 667 F.3d 397 (3d Cir. 2012) (Finding that using discredited science to support a conviction violates the Due Process Clause of the Fourteenth Amendment). Mr. Lincoln's right to due process was violated by the prosecutor's presentation of false testimony that a hair corroborated the testimony of the only witness who put Mr. Lincoln at the scene of the crime. The writ of habeas corpus should issue with respect to Mr. Lincoln's Claim Two.

CLAIM 3. THE STATE CONCEALED MATERIAL, EXCULPATORY EVIDENCE

The prosecution of Mr. Lincoln was built entirely on the testimony of traumatized seven-year-old M.D., supported only by a dubious microscopic hair "match." Even as a child, M.D. was acutely aware of the fact that the entire case rested on her. "It was horrible," she said, "My little sister, she couldn't speak and my mom was dead and it was up to me to tell them the bad man and make sure he went to prison." H. T. 3/17/16 at 53. Her identification of Rodney Lincoln was practically forced upon her. "Detective Burgoon told me that the man who murdered my mother was in the pictures and I had to pick out the bad man or he would go free." *Id*. at 40. Because M.D.'s testimony was "pivotal," the "key to [a] conviction[]," the "crux," the "lynchpin," the "determinative factor" of the prosecution case, *Lincoln v. State,* 457 S.W.3d 800, 801-807 (Mo. App. ED 2014), it was important to buttress her testimony so a jury would convict, and a reviewing court decades later might still conclude that "[t]he child's testimony never wavered that it was in fact [Rodney Lincoln] who attacked the family." *Id.* at 804. Achieving that result required concealment of the child's constant wavering and substantial coaching of the child in order to produce a façade of certainty and reliability that unjustly robbed Rodney Lincoln of more than thirty years of his life.

The Cole County Circuit Court rejected Mr. Lincoln's Brady claim, accepting verbatim Respondent's proposed findings "the prosecutor was not aware

that DFS personnel had prepared reports about his two pretrial preparation sessions with the witnesses or that they had prepared other reports about the crime," and that DFS was not "part of the prosecutorial team." Order at 15, Respondent's Proposed Order at 15. Neither finding is supported by the record. Respondent and the court below completely ignored the pivotal role DFS workers and victim advocates played in preparing M.D. and R.T. to testify, the presence of police and prosecutor at key points, and the important evidence that was developed once the records of their activities surfaced.

A. The Undisclosed Evidence.

The records generated during the extensive coaching of M.D. and her sister were produced by the St. Louis Circuit Attorney through discovery during the litigation of Mr. Lincoln's DNA motion.[28] They reveal significant evidence that not only was M.D. far from certain of her identification of Mr. Lincoln, but also that this uncertainty was concealed through extensive coaching and rehearsal where M.D. was told to point when identifying Mr. Lincoln in court. Had the State complied with its obligation under *Brady v. Maryland*, 373 U.S. 83 (1963), to

[28] The *Brady* material suppressed by the State is found in Exhibit 9 to Mr. Lincoln's Petition for Writ of Habeas Corpus, in the interviews of victim advocate Mary Flotron, Ex. 10, Ex. 39, Respondent's Exhibit 9, and the testimony of M.D., which set forth the information that would inevitably have been developed by the defense had proper disclosure been made. *See Kyles v. Whitley*, 514 U.S. 419, 439-442, and 440, n. 13 (1995), explaining that proper application of the *Brady* standard requires the court to consider what the defense "could have" done with the undisclosed material.

disclose exculpatory information contained in these records, the defense could have persuaded jurors to reject the flimsy case against Mr. Lincoln.

1. Concealed Evidence Of M.D.'s Other Misidentifications.

The foundation of Mr. Lincoln's unjust conviction—that M.D. "never wavered" in her identification of him—is false. Compliance with the State's constitutional obligation to disclose exculpatory information would have enabled Mr. Lincoln's trial counsel to disprove this false assumption which has kept Mr. Lincoln wrongly imprisoned for thirty-four years. The unreliability of M.D.'s identification is discussed extensively in connection with the issue of Mr. Lincoln's innocence, *see above* at pp. 8-12, 15-33, and will not be repeated here. It is sufficient for purposes of this claim to focus on the occasions in which M.D., in the presence of State actors, recognized people other than Mr. Lincoln as her attacker.

In the month following the crime, the perpetrator was known only as "Bill," based on M.D.'s very first statement about her attacker to her uncle, Nat Clenney. Ex. 36 at 2. However, "Bill" soon became known as the "bad man" when the search for suspects named Bill did not produce results. Thus, when Detective Burgoon came to M.D. with his suggestive two-photo "magic door" speech, he told her to pick out "the bad man" so that he would not go free. T. 432-431; *see also* H.

T. 3/17/16 at 40, 44-48, 50, 53. As the prosecution team was rehearsing with R.T. and M.D. for their trial testimony, Assistant Circuit Attorney Joe Bauer worked to get the girls to say "Rodney Lincoln" instead of "bad man." Ex. 10 at 3. It was therefore extremely important for the jury to know that while Mr. Lincoln was in jail awaiting trial, DFS workers, victim advocates, police and prosecutors knew that M.D. made multiple sightings of the "bad man."

The reliability of M.D.'s identification is undercut by the fact, known to the prosecution but concealed from the defense, that M.D. identified other men as "the bad man." Ms. Flotron told UMKC Law student David Miller that M.D. called almost every man "the bad man;" whenever a man would walk into the room, M.D. would ask her, "Is that the bad man?" Ex. 10 at 3. Notably, one of these misidentifications happened with the trial prosecutor himself, Joe Bauer. Ms. Flotron was sitting in her office with M.D. when Joe Bauer came in. M.D. "hid her head behind her arms, pointed at Joe Bauer, and said, 'Bad Man! Bad Man!'" Ex. 39 at 1. To. M.D., virtually every man of medium build was the bad man. *Id.* [29] This behavior predated Mr. Lincoln's first trial. Only by the second trial had she stopped identifying every man of average height as the bad man. *Id.* at 2. Ms.

[29] Other people also witnessed M.D.'s identification of various men as her attacker. Shortly after Mr. Lincoln's trial, M.D.'s maternal grandmother, Lue Clenney, was walking with her when they encountered a group of men, and M.D. "turned ghostly white, and stopped in her tracks." Ex. 36 at 3. DFS records indicate that prior to trial, on November 11, 1982, M.D. told her teacher that "a man is outside waiting to get her." Ex. 9 at 250.

Flotron's experiences are substantiated by the DFS records which indicated M.D.'s reluctance to be around men, often afraid they were "the bad man." Ex. 9 at 219 ("She no longer expresses her fear that strange men will hurt her.").

Ms. Flotron was an important nexus between the prosecution and M.D.'s support team. The DFS records reveal the significant role played by Ms. Flotron, who became like a grandmother to M.D. H. T. 3/17/16 at 54. "She'd take me and buy paper dolls or we'd go to the movies or go get ice cream or go do something, like go to [a] park. It was just -- I was starved at that time for some nurturing and she gave it to me. It was really sweet." *Id.* DFS records establish that Ms. Flotron attended a meeting on October 15, 1982 with Assistant Circuit Attorney Joe Bauer, psychologist Ann Carberry, social worker Connie Radvin and Juvenile Officer Mary Ladish. During this meeting, it was decided that M.D. and R.T.'s treatment team would help the prosecution prepare the children to testify by bringing them to the courtroom to role play and rehearse their testimony. Ex. 9 at 197, 244. Ms. Flotron brought the little girls to multiple role playing and rehearsal sessions. *See* Ex. 9 at 202, 203, 205-206, 232-234, 236. Had the DFS records been disclosed, any reasonably competent lawyer would have interviewed Ms. Flotron about her observations during the development of M.D.'s testimony and discovered M.D.'s other misidentifications.

2. Concealment of the Nature and Degree to Which M.D. Was Coached.

To get M.D. in shape to testify, the police and the prosecution worked hand-in-hand with the Department of Family Services and victim advocates. Working as a team, prosecutors, detectives, victim coordinators, and DFS staff interviewed the girls for clues about the crime. Once Mr. Lincoln was identified as a suspect, they coached the girls in order to build the case against him. Hundreds of pages of DFS records documented the lengths the State went to secure the conviction, including statements from M.D. and the fact that prosecutors conducted as many as half a dozen courtroom rehearsals in which detectives, victim advocates, and DFS staff participated.[30] These records could have been used effectively to undermine the reliability of M.D.'s identification and testimony. Yet, the State did not disclose these records to the defense.

Victim advocate Mary Flotron establishes that the children's DFS support network functioned as part of the prosecution team:

> [I]t seems like it was a year or maybe two before the trial, our job was to make Melissa and Renee comfortable in the courthouse surroundings*; love their attorney, so that he could get anything he needed out of them*; be comfortable in a courtroom with a judge and that.

[30] Role-playing sessions occurred on January 4, 1983, Ex. 9 at 203, February 9 and March 8, *Id.* at 205, March 24, *Id.* at 234, 236, and March 28, 1983. *Id.* at 206. In its order, the court below erroneously states that only "two pretrial familiarization sessions" occurred. Order at 2, 15, Respondent's Proposed Order at 2, 15.

Resp. Ex. 9 at 3 (emphasis added). By "their attorney," Ms. Flotron meant Assistant Circuit Attorney Joe Bauer. One DFS caseworker "stressed the importance of [R.T.'s] testimony to counter Rodney's own protestations of innocence." Ex. 9 at 326. That same DFS employee noted that R.T. "seemed to understand and have some investment in making sure that Rodney was put in jail so he could not hurt anybody else." *Id.* M.D. testified at the hearing on Mr. Lincoln's habeas petition that police, prosecutors, DFS counselors, social workers and victim advocates worked intensively to make her understand that "[i]f I didn't cooperate, then Rodney was going to get out. And I would have been, not in trouble, but people would have been disappointed in me for not doing my job." H. T. 3/17/16 at 61-62. As an adult, reflecting back on how she was prepared for Mr. Lincoln's trial, M.D. says, "It makes me feel terrible." *Id*. at 61. She explained, "I was very gullible and very naive and traumatized as a child. I did not have the strength to push back when I felt like people were not listening to me." *Id*. at 62.

The suppressed DFS records show that, in addition to observing the children's home life and educational placements, the prosecution worked together with DFS social workers to prepare M.D. to testify.[31] As one entry explained, "counseling efforts will focus on helping both [M.D.] and [R.T.] cope successfully

[31] M.D. also remembered these practice sessions. At the evidentiary hearing, she testified to remembering meeting with Mary Flotron, Joe Burgoon, Joe Bauer and other DFS workers to prepare for trial. H.T. 3/17/16 at 55-56. They would point to where the defendant would sit and practice what she would say. *Id*. at 56. The bailiff would sit in Mr. Lincoln's spot. *Id.* at 57.

with the demands of the courtroom proceedings." Ex. 9 at 220. Subsequent records reveal the extent of the measures taken to reach that goal. On October 1, 1982, for example, Assistant Circuit Attorney Joe Bauer communicated with Juvenile Officer Mary Ladish about a pretrial hearing concerning the conditions of M.D.'s testimony. *Id.* at 196. Beginning in January 1983, DFS records document that Mr. Bauer, Victim Assistant Mary Flotron, and Detective Burgoon were present during courtroom rehearsals. *Id.* at 203. Again, the records document half a dozen or more role-playing exercises and testimony rehearsals with Joe Bauer in December 1982, and January, February and March 1983. *Id.* at 203, 206, 232, 234-236.

The documents reveal that the State's conduct went well beyond acclimating M.D. to the courtroom. In addition to explaining the layout of the courtroom, Ex. 9 at 232, the prosecution rehearsed the details of the crime with M.D. in the courtroom on February 9, March 10, March 24, and March 28, 1983. Ex. 9 at 234-236. Ms. Flotron said that M.D. practiced answering questions while she was sitting in the chair on the witness stand. Ex. 39 at 2. Detectives and attorneys from the circuit attorney's office would fill-in and role-play the judge or other persons. *Id.* Ms. Flotron said that M.D. thought it would be funny to have Joe Burgoon sit where the bad man would be during the trial, and she got a real kick out of having Joe Burgoon pretend to be the bad man. *Id.* Further, Ms. Flotron specifically pointed out to M.D. the very chair in which Mr. Lincoln would be sitting, assuring

that she could identify him at trial. *Id.*; *see also* Ex. 10 at 3 ("During this role-playing session, she told the girls, 'This is where Mr. Lincoln will be sitting. This is where his lawyer will be sitting.'"). This was not simply "making the girls comfortable;" this was rehearsing a witness to ensure she would not deviate from the pre-established script at trial. Defense counsel could have used this evidence to great effect in support of a defense that M.D.'s identification of Mr. Lincoln was not reliable.

B. The State's Concealment Deprived Mr. Lincoln of Due Process of Law.

To prevail on a *Brady* claim, a movant "must show each of the following: (1) the evidence at issue is favorable to him, either because it is exculpatory or because it is impeaching; (2) the evidence was suppressed by the State, either willfully or inadvertently; and (3) he was prejudiced." *State ex rel. Koster v. Green*, 388 S.W.3d 603, 608 (Mo. Ct. App. 2012), quoting *State ex rel. Engel v. Dormire*, 304 S.W.3d 120, 126 (Mo. banc 2010). The evidence satisfies every element of Mr. Lincoln's *Brady* claim.

1. The Suppressed Evidence Was Favorable to Mr. Lincoln.

This is a case of misidentification. At trial, Mr. Lincoln's counsel weakly challenged M.D.'s identification. Counsel cross-examined her about the fact that she did not identify any prominent physical characteristics of Mr. Lincoln which pointed to him as the attacker, T. 366, and introduced evidence that his client was

missing a finger, which the jury could clearly see. T. 841. Counsel argued in closing that M.D. "would have remembered [the missing finger] had she known Rodney Lincoln and had she known that Rodney Lincoln was the man that did this." T. 944-945. Counsel also challenged M.D. about naming her attacker as "Bill," and about inconsistent details in her story. T. 336-337, 352-356. Further, Mr. Lincoln presented the testimony of his mother, Mary Marlow, T. 836-854, his former girlfriend, Diane Keenan, T. 868-878, and his employer, Robert Salzman, T. 810-814, to support his defense that he was with his family the night of the homicide and arrived at work on time early that morning.

M.D. had a ready response to questions about her "Bill" statements: "I was so sick of hurting, and everybody was bugging me for a name, so I gave them a name, Bill."[32] T. 355. Prosecutor Joe Bauer countered Mr. Lincoln's argument by emphasizing M.D.'s tender age and the trauma she had experienced, arguing that she had given a 60-page deposition, and that "if [Mr. Hampe] couldn't find inconsistencies in this much material from an adult, I would be disappointed in his ability as a lawyer." 959. Mr. Bauer also argued that R.T. reacted emotionally to Mr. Lincoln, and that "there's only one person who is going to have that kind of effect on a four-year-old whose had her throat slit by them." T. 956.

[32] This explanation ignored the fact that from the very first time she was questioned by her uncle Nat, before police ever arrived, M.D. told her uncle that "Bill" did this. *See* T. 402.

In determining whether evidence is favorable to the accused, the Supreme Court analyzed the potential impact of "disclosure of the suppressed evidence to competent counsel." *Kyles v. Whitley, supra*, at 441. The State argued at trial, on appeal, and in its response in this proceeding that R.T.'s alleged emotional reaction to Mr. Lincoln's photograph was evidence of his guilt. *See* T. 956; *State v. Lincoln*, 705 S.W.2d 576, 577 (Mo. App. 1986); Response at 14. Judge Green also relied on R.T.'s emotional reaction as evidence of Mr. Lincoln's guilt. Order, 12, Respondent's Proposed Order at 12. The non-disclosed evidence of such reactions by M.D. and R.T. to men other than Mr. Lincoln, including the assistant prosecutor, undercuts that inference completely, and demonstrates the failure of the court below to properly apply the *Brady* standard. Defense counsel could have used these many episodes of emotional reactions to strangers, coupled with the suppressed evidence of Mary Flotron's observations that "the girls were scared of everyone and especially men," and that they had this reaction to the prosecutor himself, Ex. 10 at 3, to take the wind out of the prosecutor's sails. Further, M.D. and R.T.'s emotional reaction to different men of average height and build supports a compelling argument of misidentification, Ex. 39 at 1-2, just as the prosecutor used R.T.'s emotional reaction to infer an identification by her of Mr. Lincoln. The defense also could have used Ms. Flotron's testimony that M.D. was told which chair Mr. Lincoln would occupy to argue not only that her in-court

testimony was no test of her ability to identify her attacker, but also as evidence of the extent of coaching necessary to produce a case against Mr. Lincoln. The suppressed DFS records were favorable to Mr. Lincoln because they impeached M.D.'s coaxed identification and revealed the full extent of the State's participation in the development and coalescing of her trial testimony. The conclusion that Respondent wrote for Judge Green, that "[t]here is nothing exculpatory here," Order at 16, Respondent's Proposed Order at 16, is not supported by the record.

2. The State Concealed Evidence Favorable To Mr. Lincoln.

Prior to trial, defense counsel requested discovery of "any material or information within the possession or control of the State, which tends to negate the guilt of the Defendant as to the offense charged, mitigate the degree of the offense charged, or reduce the punishment." Request for Discovery, *State v. Lincoln*, St. Louis City No. 821-2021 (Jul. 8, 1982). Counsel also requested "the names and last known addresses of persons whom the State intends to call as witnesses at any hearing or at the trial, together with their written or recorded statements, and existing memoranda reporting or summarizing part or all of their oral statements." *Id.* During a pre-trial motions hearing on July 5, 1982, counsel also asked for the discovery of counseling and psychiatric reports. Ex. 34, Pretrial Motion Transcript at 104. In response, the State turned over a 14-page medical report. None of the

hundreds of pages of DFS records, which include counseling reports from psychologist Ann Carberry, juvenile officer Mary Ladish, and DFS workers Carol Corgiat and Shelia Marion, were provided to the defense.

Respondent does not dispute that the DFS and victim advocate's information was not disclosed. Joseph Bauer told Respondent's counsel in a recorded telephone call that he is "pretty sure" he did not turn over the DFS records. Resp. Ex. 10 at 10. Further, the State had ample notice of the records. Notes contained within the records make clear that the prosecution was meeting with DFS employees during their sessions with M.D.[33] The prosecutor's rehearsal sessions with the children included Detective Burgoon, DFS employees and victim advocates. Ex. 9 at 197, 203, 205-206, 232-236. Mr. Bauer was in Ms. Flotron's office when M.D. misidentified him as the bad man, Ex. 39 at 1, and he was in the courtroom when M.D. was told where the bad man would be sitting during the trial. *Id.* at 2. The State cannot now plead ignorance. *See Kyles v. Whitley*, 514 U.S. 419, 437 (1995) ("[T]he individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police.")

[33] For example, DFS records reveal that on October 1, 1982, Mr. Bauer communicated with Juvenile Officer Mary Ladish about a pretrial hearing regarding M.D.'s testimony. Ex. 9 at 196. DFS records also document that when M.D. disclosed for the first time on Feb. 9, 1983 that she was sexually assaulted during the attack, this "previously undisclosed information was forwarded to the circuit attorney." Ex. 9 at 219.

Ignorance is no excuse; whether the failure to disclose is in good faith or bad faith, the prosecutor's responsibility "is inescapable." *Id.* at 438.

This is not a case in which the prosecutor can plausibly claim ignorance of the exculpatory information. Respondent wrote in the Cole County Circuit Court's findings that "The prosecutor was not aware that DFS personnel had prepared reports about his two pretrial preparation sessions with the witnesses or that they had prepared other reports about the crime." Order at 15, Respondent's Proposed Order at 15.[34] Even if the DFS employees had made no written reports at all, their connection with the prosecution was so intimate that the State was obliged to inform the defense about M.D.'s inconsistent identifications and coaching sessions during which she was told where Mr. Lincoln would be sitting. Mr. Bauer was personally present when these things happened.

These circumstances are like those in *State ex rel. Koster v. McElwain*, 340 S.W.3d 221 (Mo. App. WD 2011), in which a sheriff neglected to document or disclose domestic violence and stalking complaints by a murder victim against her estranged husband. *Id.* at 247. The absence of documentation in the prosecutor's hands did not defeat the *Brady* claim; to the contrary, it supported a finding that the evidence "was not reasonably available to [the habeas petitioner] at the time he filed his Rule 29.15 motion" thereby overcoming the State's defense of procedural

[34] The DFS records make clear that far more than two, sessions occurred. Ex. 9 at 232-236.

bar, *id.* at 248, just as it should here. Further, *Koster v. McElwain* explicitly states that "*Brady* provides that 'the individual prosecutor has a duty to learn of any favorable evidence known to *the others acting on the government's behalf* in the case, including the police.'" 340 S.W.3d at 251 (Court's emphasis), quoting *Engel v. Dormire*, 304 S.W.3d 120, 127 (Mo. banc 2010). It is impossible to argue on this record that DFS employees and victim advocate Mary Flotron were not acting on the government's behalf in Mr. Lincoln's case. The Cole County Circuit Court's findings that the DFS employees were not part of the "prosecution team," and that the State was unaware of the exculpatory evidence, Order at 15, Respondent's Proposed Order at 15, are not supported by the record. The breach of the State's duty to disclose evidence favorable to Mr. Lincoln is established beyond dispute.

3. The Concealed Evidence Is Material.

The suppression of these documents prejudiced Mr. Lincoln because "the evidence at issue is material to [Mr. Lincoln's] case." *State ex rel. Engel v. Dormire*, 304 S.W.3d 120, 128 (Mo. banc 2010). It is beyond dispute that M.D.'s now-repudiated identification is the only evidence against Mr. Lincoln. "When the 'reliability of a given witness may well be determinative of guilt or innocence,' nondisclosure of evidence affecting credibility falls within the general [*Brady*] rule." *Giglio v. United States*, 405 U.S. 150, 154 (1972) (quoting *Napue v. Illinois*, 360 U.S. 264, 269 (1959)). Beyond any doubt, the newly revealed evidence

undermines the reliability of M.D.'s identification, and without it the case could not have gone to the jury. In fact, a previous jury did not agree that she was sufficiently credible to support a conviction. Further, the jury that convicted Mr. Lincoln rejected both first and second degree murder, apparently compromising on manslaughter. "[I]f the verdict is already of questionable validity, additional evidence of relatively minor importance might be sufficient to create a reasonable doubt." *United States* v. *Agurs*, 427 U.S. 97, 113 (1976); *see also Strickland v. Washington*, 466 U.S. 668, 696 (1984) ("a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support").

As noted above, without the benefit of the DFS records and the testimony of the victim advocate, the defense could only challenge inconsistencies in the details of M.D.'s story. M.D. now admits those details do not match Mr. Lincoln because he was not the assailant. H. T. 3/17/16 at 31-32. The prosecution easily turned defense arguments aside, suggesting that it simply showed that "Mr. Hampe is obviously very good at what he does," and is "the master of misdirection." T. 955, 959. Mr. Bauer suggested that "Mr. Hampe has shown you that as an experienced attorney he can come up with inconsistencies" in M.D.'s story, T. 955, but in spite of that, he asked the jury rhetorically, "Do you really think in your hearts that [M.D.] doesn't know who did this and that [R.T.] doesn't know who did this?" T.

961. Bauer urged the jury to request all the evidence, arguing disingenuously, "I hope you ask for it all. I'm not hiding anything." T. 960.

To the contrary, Mr. Bauer was hiding evidence that M.D. and R.T. had cowered repeatedly from other men whom they called "the bad man," including Mr. Bauer himself, that M.D.'s testimony was rehearsed repeatedly, and that she even had to be told where Mr. Lincoln would be sitting so she would be sure to point him out at trial. Concealment of the DFS records effectively prevented Mr. Lincoln from challenging the State's misleading arguments.

In assessing the materiality of evidence, this Court must consider how a competent defense lawyer would have used the evidence to defend the client. *See, e.g., Kyles v. Whitley*, 514 U.S. 419, 442-451 (1995) (noting in considerable detail how the defense could have used undisclosed exculpatory evidence to "attack[] the investigation as shoddy," *id.* at 442, n. 12, to "fuel[ ]a withering cross-examination" of an alleged eye-witness, *id.* at 443, to "severely undermine" identification testimony," *id.* at 444, to "undercut" the prosecution's theory of guilt, *id.* at 445, to attack "the thoroughness and even the good faith of the investigation," *id.*, to infer the "possible guilt" of a police informant, *id.* at 446, or to raise "possibilities that incriminating evidence had been planted," *id.*). Therefore, in assessing materiality, "additional evidence to which a skillful counsel would be led by careful investigation" must be taken into account. *State v.*

Thompson, 610 S.W.2d 629, 633 (Mo. 1981) (quoting *Lee v. State*, 573 S.W.2d 131, 134 (Mo. Ct. App. 1968)). Not only was Mr. Lincoln's counsel unable to use DFS records to undermine M.D.'s identification on the stand, he was also denied critical leads which would have prompted further investigation into M.D.'s credibility, including interviews or depositions of M.D.'s aunt Rachel King, DFS social workers Shelia Marion and Connie Radvin, and victim advocate Mary Flotron. These interviews, along with the substance contained in the records, would have allowed Mr. Lincoln to present devastating impeachment evidence against M.D.'s manufactured and scripted identification of Mr. Lincoln. This evidence would have exposed the flaws in M.D.'s inconsistent version of events, as well as the influence Mr. Bauer exercised over M.D. during their courtroom rehearsals leading up to her deposition and trial testimony. *Buchli v. State*, 242 S.W.3d 449, 454 (Mo. App. 2007), quoting *State v. Parker*, 198 S.W.3d 178, 180 (Mo. App. 2006) ("the United States Supreme Court would have us ask whether or not the undisclosed evidence would have been significant to the defendant in the way that he tried his case: Would it have provided him with plausible and persuasive evidence to support his theory of innocence…?")

The materiality inquiry includes the observations of Mary Flotron, even those not reduced to writing, and especially those known to Assistant Circuit Attorney Joe Bauer. This Court in *State ex rel. Koster v. McElwain, supra*, found

there was suppression of material, exculpatory evidence when the sheriff failed to disclose that the homicide victim had made stalking and domestic violence complaints against her estranged husband that were never documented by police. This Court found that "there is absolutely no indication in the record that Sheriff Fowler ever volunteered his knowledge to [habeas petitioner] Dale Helmig." 340 S.W.3d at 247. However, the sheriff testified at Helmig's trial that "neither he nor his deputies had ever been called out to investigate a report of domestic abuse involving [the victim and her estranged husband]." *Id.* This Court found that the sheriff's knowledge constituted exculpatory evidence that satisfied *Brady*, but also that the failure to document this evidence triggered the cause-and-prejudice exception to this procedural default because the victim's "numerous reports of abuse [were] not reasonably available to him at the time he filed his Rule 29.15 motion." *Id.* at 248. Further, withholding the victim's complaints enabled the sheriff to testify, without contradiction, "that no reports of domestic violence had ever been received by Sheriff Fowler or his Department regarding [the victim and her estranged husband." *Id.* at 252. This Court observed, "At worst, Sheriff Fowler's trial testimony was patently false, if not perjury. At best, it was seriously misleading." *Id.* The evidence was therefore material under *Brady* because the defense could have used it as "an effective rebuttal" to the State's evidence. *Id.*

Similarly, the evidence of M.D.'s extensive coaching and her identification of other men constitute effective rebuttal to the prosecutor's argument that, "Without the hair, the State had a strong case. The state presented the eyewitness testimony of the victim, *who never wavered* in her identification of Lincoln as the perpetrator." Order at 12 (emphasis added); Respondent's Proposed Order at 12. Contrary to this representation, Ms. Flotron stated that when any man came into the room to ask M.D. questions, M.D. would constantly ask, "Is that the bad man?" Ex. 10 at 3; *see also* Ex. 39 at 1. With the benefit of the concealed information, Respondent's argument is at best misleading, if not patently false.

Evidence qualifies as material when there is "'any reasonable likelihood'" it could have "'affected the judgment of the jury.'" *Giglio v. United States*, *supra*, at 154 (quoting *Napue* v. *Illinois*, 360 U. S. 264, 271 (1959)). The evidence concealed in Mr. Lincoln's case would likely tip the balance toward acquittal. This Court should issue the Writ of Habeas Corpus discharging Mr. Lincoln from his unconstitutional convictions and sentences.

CLAIM 4. TRIAL COUNSEL'S INEFFECTIVENESS

The importance of M.D.'s testimony in convicting Mr. Lincoln is undisputed. The hair evidence—questionable even at the time, *see* Claim II, *supra*—was meaningless without the coached identification of M.D. As a result,

trial counsel rightly focused on attacking this "pivotal" piece of evidence, the "key to the conviction." *Lincoln v. State*, 457 S.W.3d 800, 801-807 (Mo. App. ED 2014). Although additional suppressed evidence now definitively proves M.D.'s identification was unreliable, *see* Claim III *supra*, even evidence available at the time of trial called M.D.'s testimony into question, yet trial counsel introduced little or none of it. Evidence of M.D.'s fragile state, of her certainty that the perpetrator was named "Bill" and of all his other identifying characteristics, and of her coached identification was never presented to the jury. The United States Supreme Court has found that trial counsel's conduct constitutes ineffective assistance of counsel where: "(1) [ ] trial counsel failed to exercise the customary skill and diligence of a reasonably competent attorney under similar circumstances and (2) that counsel's deficient performance prejudiced the defense." *Deck v. State*, 68 S.W.3d 418, 425 (Mo. 2002), citing *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064 (1984). Here, defense counsel's failure to introduce this critical evidence was not the result of a strategic choice; it was a failure to prepare. Not only did counsel fail to introduce this evidence at trial, he failed to investigate it. *See Chambers v. Armontrout*, 907 F.2d 825, 828 (8th Cir.) (en banc), *cert. denied*, 111 S.Ct. 369 (1990) (Failure to investigate is not a matter of trial strategy; it is simply inept performance.) Had the jury heard the evidence of the

circumstances surrounding M.D.'s identification, it would have discredited her testimony and found Mr. Lincoln not guilty.

The court below relied on procedural bar grounds to deny Mr. Lincoln's claim of ineffective assistance of trial counsel. Order at 16. However, Mr. Lincoln's innocence overcomes any potential procedural bar. As explained above, the law is clear that 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 210, 215 (Mo. banc 2001) (emphasis added). Here, Mr. Lincoln previously raised this issue in his postconviction appeal, including trial counsel's error in failing "to contend and/or properly preserve for appeal" the "'independent recollection' of [M.D.'s] testimony," "the 'mental capacity' of [M.D.] at the time of the occurrence to observe and register the act," and "the tainted line-up in which movant was allegedly identified." Motion for Post-Conviction Relief, PCR 1730, Cir. Ct. of the City of St. Louis (Apr. 10, 1987) at 2-3. Unfortunately for Mr. Lincoln, his postconviction counsel, like his trial counsel, also performed deficiently when he dropped all of these claims on appeal. Appellant's Brief, Mo. Ct. App. E.D. No. 54378 (May 16, 1988). Because of his innocence, however, any of Mr. Lincoln's "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, n. 6. *See* Claim I, above. This Court should find that Mr. Lincoln's claims of ineffectiveness are not subject to procedural bar.

Similarly, postconviction counsel's unauthorized waiver of these claims constitutes ineffective assistance of postconviction counsel and meets the cause-and-prejudice standard. Under Missouri law, even if a claim was omitted or defaulted in an initial Rule 27.26 or 29.15 proceeding, it can be adjudicated on the merits in habeas corpus proceedings under Rule 91 if the prisoner can satisfy the federal cause-and-prejudice doctrine. *See, e.g., State ex rel. Engel v. Dormire*, 304 S.W.3d at 122; *State ex rel. Koster v. McElwain*, *supra*. The United States Supreme Court held in *Martinez v. Ryan* that a court may still reach the merits of a claim that is otherwise defaulted because of inept representation in the first proceeding in which a defendant could have litigated his claim of ineffective assistance of trial counsel. 132 S. Ct. 1309, 1318 (2012) ("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).")

Mr. Lincoln's ability to prove that he was prejudiced by the deficient performance of his Rule 27.26 counsel is self-evident. Postconviction counsel conducted no investigation even though Mr. Lincoln asserted factually-grounded assertions of innocence, and abandoned every claim except one—a jury instruction issue. As *Martinez v. Ryan* makes clear, ineffective assistance of postconviction counsel "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. Because Missouri did not provide Mr. Lincoln with competent counsel, postconviction counsel's ineffectiveness constitutes cause-and-prejudice.

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

The death of JoAnn Tate and the assault on M.D. and R.T. was violent and brutal. M.D. suffered significant injuries, including stab wounds on her arms and chest and a cut from the top of her vagina past her rectum. T. 497-8; H. T. 3/17/16 at 35. M.D. underwent surgery immediately after the attack and remained in the hospital for seventeen days. T. 486. She was readmitted to the hospital on multiple occasions for additional procedures, remaining in the hospital from July 28-30, 1982, T. 486-7; August 3-6, 1982, T. 487-8; and September 14-23, 1982, T. 488. At the evidentiary hearing, M.D. testified that she was in "Horrible pain. I wanted to be with my mom and I couldn't take the physical pain. It was horrible.

Horrible." H. T. 3/17/16 at 35. The doctors gave her medication, "but it wasn't strong enough." *Id.* As a result, she was in a particularly suggestive state.

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

Ample evidence was available indicating M.D. was in a suggestive state throughout the identification process. Hospital records note, "Child stated, 'I can't sleep because I have nightmares." Ex. 15, Cardinal Glennon Records at 4. She was

"[c]rying frequently this evening and speaks of mom's death. States she is 'worried,' 'lonely,' etc. and afraid that she won't be going home. Often very distressed. Also voices frequently determination to 'get better' resting quietly in bed, grandmom at bedside, policeman freq. at bedside on pt's request." *Id.* at 5.

Additional notes from psychologist Ann Carberry corroborate M.D.'s emotional state and her constant nightmares: "[M.D.] is still having nightmares, last night she dreamed that a man came into the hospital and shot her, I reassured her that the policeman would stay close to her door to protect her." Ex. 13 at 197; "[M.D] continues to have nightmares," *Id.* at 198; "still having nightmares… another dream that she was in a deserted ghost town and we talked about how she might be feeling deserted/abandoned since her mother died." *Id.* Notes from the treating physician indicate these nightmares continued all the way up to trial: "[M.D.] cont. to have bad dreams @ night wakes up screaming. Needs to be reassured." *Id.* at 201.

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

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

Ex. 9 at 215.

Additionally, M.D.'s physical pain was significant. H.T. 3/17/2016 at 35. On May 4, 1982, the day M.D. viewed several photographs of possible suspects, social worker Wayne Munkel noted M.D.'s pain and anger towards Det. Burgoon and himself, writing, "Patient repeated many previous statements." Ex. 12 at 50. M.D. testified that this entry was consistent with her memory of her time at the hospital. These circumstances go to the heart of the reliability of M.D.'s identification of Mr. Lincoln. H.T. 3/17/2016 at 42-43.

Tragically, none of this evidence regarding M.D.'s physical and emotional state during police interviews was presented at trial. Although trial counsel attempted to show the unreliability of M.D.'s identification by asking her about Mr. Lincoln's most distinguishing characteristic, *see* Claim I, *supra*, he failed to present even one piece of evidence regarding the vast amount of physical and emotional pain M.D. faced, and to explain to the jury how that pain and accompanying stress would have affected M.D.'s ability to make an accurate identification.

Counsel's failure was not the result of strategy: in fact, counsel requested discovery of M.D.'s medical documents and sought the ability to bring in an expert to testify as to the circumstances of the identification, which was later denied. Motion for New Trial, *State v. Rodney Lincoln*, Cir. Ct. of the City of St. Louis

(Oct. 28, 1983). It is clear that defense counsel understood the importance of challenging the identification, yet the jury heard none of it.

Trial counsel's complete failure to introduce this evidence constitutes deficient performance. Had counsel clarified for the jury the extreme nature of the circumstances surrounding the purported identification of Mr. Lincoln, it would have discredited M.D.'s testimony and found the testimony implicating Mr. Lincoln was not a true and reliable identification, but an identification formed by a fragile young girl who was pressured by the State. Had the jury heard this evidence, it would have found Mr. Lincoln not guilty.

2. Evidence That The Perpetrator Was "Bill."

From the moment she was found by her uncle, Nat Clenney, on the morning after the attack, M.D. identified the perpetrator as "Bill." T. 402. That same day, while still awaiting treatment in the E.R., M.D. described the crime to social worker Wayne Munkel, and again identified the perpetrator as "Bill." T. 512. At the evidentiary hearing, Nat Clenney again testified that M.D. told him the perpetrator was Bill. H.T. 3/18/16 at 68. M.D. also testified that her original account was the most accurate. H. T. 3/17/16 at 30-32. In a trial that hinged upon identity, it was also important for trial counsel to show that M.D. was familiar with Mr. Lincoln, and that if he had been the assailant, she could have named him. Ex. 37 at 3.

After M.D.'s initial statements, investigators focused exclusively on Bill: On April 28, detectives questioned M.D. while she was recovering from surgery in the ICU, bringing several photos of men named Bill, William, Billy, and Will. T. 504-505; Ex. 27. M.D. did not see the perpetrator in any of the photos. T. 505. M.D. again named Bill, telling detectives he had driven a yellow cab in 1981 but now drove a white Volkswagen and lived in Illinois with his drunk mother. T. 355, 513-14; Ex. 8 at 33. Two days later, on April 30, detectives returned to M.D.'s hospital room with ten more photos. T. 505-506; Ex. 28. M.D. again looked through the photos but did not identify the perpetratorl. T. 506; *See* pp. 15-22, above.

At trial, M.D.'s story changed. She disputed many of her prior statements about Bill, T. 352-358, including that she had said she met him at the park, T. 354. In closing, the prosecution exploited this, asserting that M.D. made up the name "Bill" because of pressure: "Well, if you look at her reason, and you look at what she told you, she said to [defense counsel], 'I was so sick and hurt, and everybody's bugging me for a name. I gave them Bill.'" T. 928. They continued: "If she were older, the only difference would be that she wouldn't have just given the name Bill to shut up her inquisitors." T. 956.[35] But M.D.'s identification of "Bill" was not a one-time event. Her identification of Bill continued throughout the

[35] The *Brady* evidence discussed in Claim 3, above, would also have enabled counsel to argue convincingly that these were coached responses; M.D. confirmed as much in her testimony at the hearing before Judge Green—her first story, implicating "Bill," is the closest to the truth. H. T. 3/17/16 at 31, Ex. 1 at 2.

investigation, throughout trial, and even now today. H. T. 3/17/16 at 30-32. An effective trial attorney would have investigated and produced the many prior statements in which M.D. consistently referred to the perpetrator as Bill, and would have introduced those statements at trial.

Trial counsel could have called the nurses and doctors who heard M.D.'s statements about her mental and physical state and about Bill, as well as introducing these statements effectively through Detective Burgoon, psychologist Dr. Ann Carberry, and social worker Wayne Munkel. Notably, counsel endorsed the doctors and nurses at the hospital as witnesses, but did not call them. The evidence these witnesses would have provided was plentiful. For example, in the emergency room, M.D. explained what happened to first responders. Several sources documented this conversation. Emergency room notes summarize the assault: "The assailant is identified as a man named Bill from Illinois, who formerly drove a yellow cab. Has visited the house on two to three occasions formerly." Ex. 13 at 175-176. Social worker Wayne Munkel noted M.D.'s comments in his emergency report as follows:

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

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

Ex. 12 at 48.

Other emergency room notes also corroborate M.D.'s initial identification: "Child states 'Bill' did this to her about 4:30 this am. States he came to the family residence pounding on the door for her Mom to let him in, and when she wouldn't, he kicked the door in and started stabbing her mother. " Ex. 13 at 173.

Additional ICU notes later that evening also recorded statements from M.D. that "Bill" was the perpetrator:

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

Id. at 235.

The following day, April 28, the ICU records continue to note references to Bill: "Aunt and grandma at bedside intermittently - patient talking about 'Bill' and asking where her Mom is." *Id.* at 238. M.D.'s aunt, Abigail Wallace, succinctly explains the significance of M.D.'s persistence that the attacker was "Bill." Her affidavit reveals an important source of her own doubts about Mr. Lincoln's guilt: "[M.D.] knew Rodney, and if he were the real killer, [M.D.] could have named him

from the start. Instead, [M.D.] identified her mother's killer as Bill." Ex. 37 at 3. H.T. 3/17/16 at 12-14.

Mr. Munkel's notes reflected that M.D. continued to identify the perpetrator as Bill. "She also states she went to his place in 1981 in a yellow cab. The man now drives a white Volkswagen. She states he lives in Illinois and lives with his mother who is always drunk. She stated knife was a butcher knife 'big as a cat's tail' and that the knife didn't come from their house." Ex. 12 at 49.

All of this evidence could have been presented to the jury. Trial counsel's failure to investigate and present this evidence was not the result of strategic reason, and constituted deficient performance. Had counsel presented this evidence, the jury would have questioned the credibility of M.D.'s identification and found Mr. Lincoln not guilty. In a case like this, where the first trial resulted in a hung jury and the case hinged on M.D.'s identification, trial counsel's failure to present M.D.'s prior inconsistent statements constitutes ineffective assistance of counsel.

Judge Green signed off on the State's assertion that trial counsel "did an outstanding job" cross-examining the victim, Order at 16, Respondent's Proposed Order at 16, but his judgment fails to engage the evidence of what trial counsel did not do. The Supreme Court "ha[s] never held that counsel's effort to present some mitigation evidence should foreclose an inquiry into whether a facially deficient

mitigation investigation might have prejudiced the defendant." *Sears v. Upton*, 561 U.S. 945, 954 (2010). The State relies on just seven pages of cross-examination in which defense counsel brought out only two inconsistent statements from M.D.—that she had previously described Rodney Lincoln as dumb rather than mean, T. 366, and that she had previously described Mr. Lincoln's mother as "really fat" rather than "medium." T. 367. To the extent that defense counsel at all addressed the suggestive lineup procedure used to manipulate the identification out of M.D., counsel asked only about the number of times M.D. had seen a photograph of Mr. Lincoln, T. 368-72, and how many men were in the live line-up, T. 372-73. Tragically, trial counsel also failed to elicit evidence that the other picture presented with Mr. Lincoln's was of a relative, a fact that closing argument reveals was not the result of strategy: Hampe argued, "Then they take her two, somebody she knows and a black and white photo." T. 940. Bauer objected, stating "There's no evidence that she knew that person." *Id.* And indeed, there was none presented at trial. Because he had not investigated, Hampe was unable to establish that the second photo was of M.D.'s relative, Gary Parris. Upon cross-examination, Lue Clenney stated she did not know if the man in the photo was a relative. T. 441. Joe Burgoon testified that he did not know if Gary Parris was a relative. T. 752. And most importantly of all, Hampe failed to elicit the information from M.D.:

> Q: Okay, and they showed you a picture of a man who is related to you.

A: Yes, sir.

Q: Okay. Who was that other photograph of, by the way? It was an uncle, wasn't it?

A: No, I thought at first it was my sister's dad or my – or he was married to my Aunt Abbey at first. I don't really know.

T. 372. Had he investigated, trial counsel would have been able to bring in Gary Parris' relationship to M.D.'s family through a number of relatives, including Nat Clenney, Abigail Wallace, and Melinda Parris. Instead, the very theory he attempted to argue was left unsupported. Nowhere did trial counsel ask any of the pivotal questions illuminating the numerous times M.D. identified "Bill" as the perpetrator or the many ways in which her identification was flawed, nor did counsel present any impeaching evidence to the jury.

3. M.D.'s Coaching.

Trial counsel also failed to investigate and obtain records from DFS regarding M.D.'s treatment. Although trial counsel asked for psychiatric and counseling reports, *supra* Claim 3, trial counsel made no effort to obtain the DFS reports in particular. Had counsel made those efforts, he would have discovered a wealth of information regarding the near dozen times M.D. had rehearsed the trial and was coached through her testimony. Trial counsel's failure to request these documents was not trial strategy, as he asked the State for related counseling records. Had counsel fully investigated and obtained these documents, he would

have been able to impeach M.D.'s credibility with this information and cast doubt upon the identification. Because the jury did not hear this critical evidence, it was unable to question the key evidence against Mr. Lincoln. This prejudiced Mr. Lincoln.

*****

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

The court below adopted wholesale the State's argument that trial counsel performed more than adequately, stating, "Defense counsel also cleverly asked the victim what the most distinguishing characteristic of the killer was, to which the victim replied that he was mean." Order at 17; Respondent's Proposed Order at 17. This misstates the evidence. The transcript reflects that defense counsel did ask M.D. about *Mr. Lincoln's* distinctive characteristics, but *not* about the "killer."

> Q: (By Mr. Hampe) Do you remember me asking you, "What's the most distinctive thing about Rodney Lincoln?"
>
> A: Yes.
>
> Q: Do you know what your answer was?

A: Yes.

Q: What was it?

A: Mean.

Q: You said dumb on that day.

A: Yes.

T. 366. The lower court's analysis is not supported by the record. Trial counsel failed to introduce any of the evidence available to him at the time indicating M.D.'s identification was unreliable. In a case where her identification was the "lynchpin" of the State's case, such performance is below constitutional standards.

Based upon the facts discussed above, this Court should find trial counsel breached his duty to conduct a reasonable investigation into Mr. Lincoln's defense. *Strickland v. Washington*, 466 U.S. 668 (1984). The duty of investigation specifically includes evidence of which counsel had actual notice. *Wiggins v. Smith*, 539 U.S. 510, 523 (2003). It also includes the duty to request discovery and investigate. *Kimmelman v. Morrison*, 477 U.S. 365, 385 (1986). The failure to investigate is not a matter of trial strategy; it is simply inept performance. *Chambers v. Armontrout*, 907 F.2d 825, 828 (8th Cir.) (en banc), *cert. denied*, 111 S.Ct. 369 (1990). Such a failure violates counsel's "essential duty to make an adequate factual investigation [which can] only be viewed as an abdication – not an exercise – of his professional judgment." *McQueen v. Swenson*, 498 F.2d 207, 216 (8th Cir. 1974). The duty to investigate specifically embraces matters that would impeach a key State's witness, including prior inconsistent statements of the

witness, *Nixon v. Newsome*, 888 F.2d 112 (11th Cir. 1989); *State v. Wells*, 804 S.W.2d 746 (Mo. banc 1991), or with testimony of others who would contradict the witness' testimony, *Hadley v. Groose*, 97 F.3d 1131 (8th Cir. 1996).

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

CONCLUSION

> *"I think the rest of the closure for us and the closure for Rodney's family is to let him go home because there is not -- there wasn't one victim, one family that was victim to this whole thing, there were two families. It was our family and it was his family…"*
>
> *Jaqueline Barton, H.T. 3/18/16 at 60*

As a whole, the record in Mr. Lincoln's case establishes clear and convincing evidence that he is innocent of the homicide of JoAnn Tate and the assaults upon her two young daughters. Further, Mr. Lincoln was denied a fair trial

because the State presented false testimony that a hair from the scene of the crime matched Rodney Lincoln, because the State withheld material, exculpatory evidence that the defense could have used to challenge M.D.'s identification of Rodney Lincoln as the perpetrator of the crime, and because the performance of Mr. Lincoln's defense counsel was prejudicially deficient. Therefore this Court should unconditionally grant the writ of habeas corpus and order Mr. Lincoln's immediate release from custody.

WHEREFORE, for the foregoing reasons, Petitioner respectfully petitions this Court to issue the writ of habeas corpus discharging Mr. Lincoln from his conviction and sentence.

Respectfully submitted this 12th day of July, 2016.

/S/ Tricia J. Bushnell
Tricia J. Bushnell #66818
Midwest Innocence Project
605 W. 47th Street, #222
Kansas City, MO 64112
(816) 221-2166
FAX (888) 446-3287
tbushnell@themip.org

/S/ Sean D. O'Brien
Sean D. O'Brien #30116
Professor
UMKC School of Law
500 E. 52nd Street
Kansas City, MO 64110
816-235-6152
816-235-5276 (fax)
obriensd@umkc.edu

CERTIFICATE REGARDING SERVICE

I hereby certify that it is my belief and understanding that counsel for Respondent, Jay Cassaday and Missouri Attorney General Chris Koster are participants in the Court's e-filing program and that separate service of the foregoing document on counsel is not required beyond the Notification of Electronic Filing to be forwarded on July 12, 2016 upon the filing of the foregoing document. A CD-Rom of the amended exhibits will be delivered in person to the court clerk and attorneys for Respondent on July 12, 2016, and by U.S. Mail to counsel for respondent. Further, a copy of the foregoing Petition for Writ of Habeas Corpus was sent by U.S. Mail this 12th day of July, 2016, to Respondent Jay Cassaday, at the Jefferson City Correctional Center, 8200 NMV Road, Jefferson City, MO 65102.

/s/ *Sean D. O'Brien*
SEAN D. O'BRIEN