IN THE MISSOURI COURT OF APPEALS
WESTERN DISTRICT

STATE OF MISSOURI	)	
ex rel.	)	
RODNEY L. LINCOLN,	)	
	)	
Petitioner,	)	
	)	
v.	)	**No. WD79854**
	)	
JAY CASSADAY, Superintendent,	)	
Jefferson City Correctional Facility,	)	
	)	
Respondent.	)	

MOTION FOR REHARING EN BANC OR IN THE ALTERNATIVE FOR TRANSFER TO THE SUPREME COURT

Petitioner Rodney Lincoln moves this Court pursuant to Rules 22.01 and 83.02 for rehearing en banc, or in the alternative to transfer this matter to the Missouri Supreme Court. In support of his motion, Mr. Lincoln states as follows:

1. Mr. Lincoln is innocent of the crime for which he was convicted 34 years ago. His conviction rested on the now recanted identification testimony of seven-year-old M.D. corroborated by disproven microscopic hair comparison. He petitioned for habeas corpus relief based in part upon two claims. First, in violation *Brady v. Maryland*, 373 U.S. 83 (1963), the State withheld evidence impeaching the child's identification, including evidence suggesting that she identified other men—including the prosecutor—as her assailant. Second, DNA test results excluding Mr. Lincoln as the source of any evidence at the scene of the crime and M.D.'s repudiation of her identification of Mr.

Lincoln leave no evidence from the original trial to implicate Mr. Lincoln in the crime. The only evidence remaining is Lincoln's verified alibi.

2. The panel opinion rejected Mr. Lincoln's *Brady* claim without identifying the specific items of evidence withheld by the State or analyzing the cumulative effect of the new evidence on the jury's decision to believe the State's only witness, and failed to mention that a previous jury that heard the same evidence could not muster the votes to convict. In so holding, the panel chose not to follow this Court's indistinguishable decisions in *Ferguson v. Dormire,* 413 S.W.3d 40 (Mo. App. WD 2013), and *State ex rel. Koster v. McElwain,* 340 S.W.3d 221 (Mo. App. WD 2011), and likewise chose not to follow the Supreme Court's decision in *State ex rel. Engel v. Dormire,* 304 S.W.3d 120 (Mo. banc 2010). Petitioner moves for rehearing en banc because the panel's opinion "chooses not to follow a previous decision of an appellate court of this state." Rule 22.01; *see also* WD Local Rule XXXI.

3. In the alternative, Mr. Lincoln moves to transfer this matter to the Missouri Supreme Court pursuant to Rule 83.02 because it presents a question of general importance in that the panel's analysis of the withheld *Brady* evidence sets a precedent in this district that conflicts with *State ex rel. Engle v. Dormire, supra,* and the Supreme Court's decisions in *Weary v. Cain,* __ U.S. __, 136 S. Ct. 1002; 194 L. Ed. 2d 78 (2016) (*per curiam*), and *Smith v. Cain,* 565 U.S. 73 (2012) (*per curiam*), and undermines *Brady's* purpose to protect the fairness, integrity and reliability of criminal judgments.

4. The panel opinion also rejected Mr. Lincoln's actual innocence claim, finding that "Because the Missouri Supreme Court has not recognized a freestanding claim of

actual innocence in cases where the death penalty has not been imposed, we are not at liberty to expand Missouri habeas jurisprudence to permit consideration of this claim." Op. 2. In so holding, the panel chose not to follow the directions of *State ex rel Amrine v. Roper*, 102 S.W.3d 541 (Mo. banc 2003) and *Ferguson v. State*, 325 S.W.3d 400 (Mo. App. W.D. 2010), and ignored *State v. Terry*, 304 S.W.3d 105 (Mo. 2010). Petitioner moves for rehearing en banc because the panel's opinion "chooses not to follow a previous decision of an appellate court of this state." Rule 22.01; *see also* WD Local Rule XXXI.

5. In the alternative, a decision that the *Amrine* actual innocence standard is inapplicable to non-death cases implicates public respect for the integrity of the Missouri judicial process, and irrationally and arbitrarily distinguishes between similarly situated innocent prisoners based solely on the sentence imposed. This presents a question of general importance justifying transfer to the Missouri Supreme Court pursuant to Rule 83.02. In addition, to the extent the Court finds the panel's opinion is consistent with the law, transfer is requested for the purpose of reexamining existing law. *Id.*

SUGGESTIONS IN SUPPORT OF REHEARING EN BANC OR TRANSFER TO THE SUPREME COURT

I. THE STATE'S SUPPRESSION OF EXCULPATORY EVIDENCE.

Mr. Lincoln's is a rare case in which all of the State's evidence from his trial has been conclusively disproven or repudiated so that no evidence remains to support his conviction. Further, the State's case was never very strong. The first jury to hear the case was unable to reach a verdict, and the second jury's verdict finding Mr. Lincoln guilty of

manslaughter on the facts of this crime reflects the likelihood of a compromise verdict. The panel noted that the only witness implicating Mr. Lincoln was "impeached by questions that highlighted M.D.'s initial identification of her assailant as 'Bill,' with attributes Relator did not satisfy," Op. at 10, and that DNA evidence proves that the only corroborating physical evidence, a hair found at the scene of the crime that was microscopically "matched" to Mr. Lincoln, "did not belong to [Mr. Lincoln]." Op. 8, citing *Lincoln v. State*, 457 S.W.3d 800, 803-04 (2014). Even though "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," *Strickland v. Washington*, 466 U.S. 668, 696 (1984), the panel concluded that DFS records, which concededly "include information that could have been used to impeach M.D.," Op. 9, were not material because "they cumulate with other, substantial evidence available to Relator on the same subjects raised by the records." Op. 10. In so holding, the panel strays from Supreme Court precedent modeling the proper application of *Brady*. "We evaluate the tendency and force of the undisclosed evidence item by item; *there is no other way*. We evaluate its *cumulative effect* for purposes of materiality separately and at the end of the discussion." *Kyles v. Whitley,* 514 U.S. 419, 437, n. 10 (1995) (emphasis added). The reasoning of *Engel, Ferguson* and *Koster v. McElwain*, which the panel chose not to follow, is faithful to this duty. The panel's decision departs from this constitutionally mandated *Brady* analysis in both respects.

First, the panel failed to mention a single item of the withheld evidence, let alone evaluate it "item by item" for its "tendency and force." *Kyles*, at 437, and n. 10. As

Respondent noted, Mr. Lincoln's trial counsel "pointed out numerous inconsistencies between [M.D.'s] pretrial statements and trial testimony about where "Bill" lived, the appearance and characteristics of his mother, the number of his pets, the vehicle he drove, and when and where she met him among, other things." Resp. to Show Cause Order, pp. 34-35, citing T. 366-374. Respondent also noted that "defense counsel argued the victim was unreliable because she had not mentioned the killer had a missing finger as his most distinctive characteristic." *Id.*, p. 35, citing T. 944-45. The evidence available to defense counsel went only to inconsistencies in the details of M.D.'s story, and did not undermine her apparent confidence in her identification of Mr. Lincoln.

In contrast, the evidence withheld by the State, and not even mentioned by the panel, goes well beyond inconsistency of detail, and impugns the credibility of the identification itself, including:

- Between December, 1982, and March, 1983, Assistant Prosecutor Joe Bauer rehearsed M.D.'s testimony in the courtroom at least a half dozen times, with detectives, DFS workers, and victim advocates present. Pet. Ex. 9, at 280, 287-90, 319, 321;
- M.D.'s DFS treatment team was instructed to make M.D. and R.T. "love their attorney [Assistant Prosecutor Joseph Bauer], so that he could get anything he needed out of them." Resp. Ex. 9 at 3;
- Assistant Prosecutor Joe Bauer "would make the girls say Rodney Lincoln's name" instead of saying "bad man." Pet. Ex. 10 at 3;

- The coaching went so far as to specifically point out to M.D., "*This is where Mr. Lincoln will be sitting*." Pet. Ex. 10, at 2 (emphasis added);
- M.D. referred to the attacker as "the bad man," and "Whenever any man came into the room to ask M.D. questions, M.D. would constantly ask: 'Is that the bad man?'" Pet. Ex. 10, at 3; and
- When Joe Bauer entered Victim Advocate Mary Flotron's office, "[M.D.] hid her head behind her arms, pointed at Joe Bauer, and said, 'Bad Man! Bad Man!'" Ex. 39 at 3. Ms. Flotron saw M.D. react similarly to men on other occasions, and "to Melissa, every man of medium-build was the Bad Man." *Id.*, Pet. Ex. 10 at 3.

This evidence demonstrates that M.D. was uncertain of her identification of Mr. Lincoln, and the defense could have argued forcefully that she identified at least three men other than Mr. Lincoln as her assailant. This is far more powerful than defense counsel's impeachment of M.D.'s testimony with inconsistent details in her story. The panel concluded that the suppressed evidence "would have provided Relator with even more ammunition to support the line of questioning in fact undertaken at trial," Op. 10, but failed to acknowledge that the defense had no evidence suggesting that M.D. had ever selected someone else as her attacker. The suppressed evidence belies the Eastern District's reason for rejecting Mr. Lincoln's motion for release based on DNA testing—that M. D. "never wavered that it was in fact movant/defendant who attacked the family." *Lincoln v. State*, 457 S.W.3d 800, 803-04. By failing to acknowledge "the tendency and force" of the evidence that was suppressed by the State, the panel's decision failed to

account for the fact that the suppression of evidence deprived the defense of evidence impeaching the core elements of M.D.'s testimony, which inescapably "undermines confidence in the outcome of the trial," *Ferguson,* at 55, quoting *Kyles v. Whitley,* at 434. *Accord Koster v. McElwain,* at 252.

Second, the panel failed to evaluate the impact of the suppressed evidence on the jury's likely behavior. The question is not whether, in light of the new evidence, the jury *could* have convicted Mr. Lincoln, but whether "it *would* have done so." *Smith v. Cain,* 565 U.S. at 76 (court's emphasis). Without the benefit of the suppressed evidence, one jury who heard this case could not reach a verdict. More to the point, the panel's analysis is incomplete; "'[t]he fact that a witness was impeached in other ways does not conclude the materiality inquiry required under Brady' because the witness's credibility is not a collateral issue." *Engel*, at 128, quoting *Taylor v. State*, 262 S.W.3d 231, 244 (Mo. banc 2008). *Engel* follows the proper standard for determining materiality of suppressed impeachment evidence in a one-witness case such as Mr. Lincoln's. In the identical situation, the Supreme Court held that impeachment evidence is material as a matter of law if the witness is "the *only* evidence linking [the defendant] to the crime." *Smith v. Cain,* at 76, citing *United States v. Agurs,* 427 U.S. 97, and n. 21, (1976) ("[T]he omission must be evaluated in the context of the entire record."). As in *Smith,* M.D. is the *only* witness at trial who implicated Mr. Lincoln in the crime. *See also Wearry v. Cain,* 136 S. Ct. at 1006 ("[I]f the verdict is already of questionable validity, additional evidence of relatively minor importance might be sufficient to create a reasonable doubt.")

Finally, the panel's unfair "aside" claiming a "significant passage of time" between the discovery of the *Brady* evidence and Mr. Lincoln's petition "militate[s] against" a finding of prejudice, Op. 11, should be given no weight in the determination of Mr. Lincoln's motion for rehearing en banc or transfer to the Supreme Court. Because Respondent never asserted a defense of laches, Mr. Lincoln had no opportunity to establish how and when he obtained the suppressed evidence in his DNA litigation that persisted through 2014. Even if there were an actual time bar, Mr. Lincoln's actual innocence, which the panel refused to address, would suffice to overcome it. *McQuiggin v. Perkins,* 133 S. Ct. 1924 (2013).

The foregoing discussion demonstrates that the panel chose not to follow this Court's decisions in *Ferguson v. State* and *State ex rel. Koster v. McElwain* and the Supreme Court's decision in *Engel* in determining the materiality of the evidence that was withheld from Mr. Lincoln at his trial. Further, the panel's misapplication of *Brady* and its progeny presents a question of general importance because it raises serious questions about the integrity of criminal judgments in Missouri. Therefore, the Court should grant Mr. Lincoln's motion for rehearing en banc, including oral argument, or in the alternative, the Court should order this matter transferred to the Missouri Supreme Court.

II. IS IT A MISCARRIAGE OF JUSTICE TO IMPRISON THE INNOCENT?

Mr. Lincoln has presented new evidence that shows clearly and convincingly that he is innocent; there is no evidence left to support his conviction and the sole surviving victim has begged authorities and this Court for his release. In holding it would not reach

Mr. Lincoln's claim of innocence "no matter how compelling," Op. at 17, the panel opined that an *Amrine* actual innocence claim is reliant on a defendant's death sentence and does not reach those sentenced to die in prison as a term of years. Op. at 2, 12. The panel found that "Because the Missouri Supreme Court has not recognized a freestanding claim of actual innocence in cases where the death penalty has not been imposed, we are not at liberty to expand Missouri habeas jurisprudence to permit consideration of the claim in this case." Op. at 2. This misinterprets *Amrine* and ignores this Court's direction in *Ferguson v. State*, 325 S.W.3d 400, 406 (Mo. App. W.D. 2010) that Rule 29.15 "is not the proper vehicle for relitigating [Ferguson's] guilt or innocence," and that "Newly discovered evidence, if available, may better serve [Ferguson] in a Petition for a Writ of Habeas Corpus under Rule 91." *Id.* This instruction echoes the Missouri Supreme Court's denial of Johnny Lee Wilson's Rule 24.035 motion because his newly discovered evidence of innocence should have been raised in a habeas petition. *Wilson v. State*, 813 S.W.2d 833, 834-35 (Mo. banc 1991).

At the heart of an actual innocence claim and the decision in *Amrine* is the authority of the Courts to correct a "manifest injustice." Entitlement to habeas relief has been recognized in Missouri "in extraordinary circumstances, when the petitioner can demonstrate that a 'manifest injustice' would result unless habeas relief is granted." Op. at 4, citing *Amrine*, at 545-47, citing *State ex rel. Nixon v. Jaynes*, 63 S.2.3d 210, 213 (Mo. banc 2001); *State ex rel. Simmons v. White*, 866 S.W.2n 443, 446 (Mo. banc 1993). It is the correction of manifest injustice that forms both the basis of the gateway claim

noted in *Clay v. Dormire*, 37 S.W.3d 214, 217 (Mo. banc 2000) and the basis of the actual innocence claim itself in *Amrine*, at 545-47.[1]

The panel misapplied the manifest injustice standard in two regards. First, it erroneously found that actual innocence alone is insufficient to establish a manifest injustice without a violation of "the constitution or laws of the state or federal government." Op. at 16. This misinterpretation is based on the incorrect assumption that *Amrine* was conditioned upon the defendant's sentence to death and the application of section 565.035.3. Op. at 15. Both conclusions are contradicted by a plain reading of the opinion. The *Amrine* court made clear that the new evidence proving Amrine's innocence alone was enough to order his release because "confidence in his conviction and sentence are so undermined that they cannot stand and must be set aside." *Amrine*, at 549.

Second, the panel further contradicted *Amrine* when it cherry-picked language to argue that actual innocence can only apply as a claim in a death penalty case. The panel relies on language regarding a court's increased duty in death penalty cases, Op. at 13-14, to conclude that actual innocence only constitutes a manifest injustice as it relates to section 565.035.3, which applies only in death cases. *Id.* at 14. In doing so, the panel noted *Amrine*'s language that both "the continued imprisonment ***and eventual execution***

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[1] Notably, the panel correctly cites the standard for a freestanding claim of innocence on page 5, while contradicting that test on pages 16-17. *Compare* Op. at 5 ("A freestanding claim of innocence presumes that a petitioner received a constitutionally adequate trial, but argues that it would nonetheless be manifestly unjust to continue to restrain the petitioner because newly discovered evidence clearly and convincingly shows 'actual innocence that undermines confidence in the correctness of the [trial] judgment.'") and Op. at 16-17 ("*Amrine* clearly discredits this proposition, holding that habeas relief requires a demonstration that 'the constitution or laws of the state or federal government' have been violated.") (Internal citations omitted.)

of an innocent person is a manifest injustice," Op. at 13. Yet, the *Amrine* court's effort to underscore the unbearable possibility of the execution of an innocent prisoner does not mean it did not intend for *Amrine* to apply to defendants such as Mr. Lincoln who is sentenced to die in prison by natural causes. Amrine and Lincoln are similarly situated, and even if Mr. Lincoln is a "class of one," he is still entitled to equal protection of the law where "there is no rational basis for difference in treatment." *Willowbrook v. Olech*, 528 U.S. 562, 564 (2000). As the late Chief Justice William Rehnquist noted, "It would be a rather strange jurisprudence, in these circumstances, which held that under our Constitution he could not be executed, but that he could spend the rest of his life in prison." *Herrera v. Collins*, 506 U.S. 390, 405 (1993).

On the contrary, *Amrine* stands for no such proposition. The Missouri Supreme Court itself recognized the breadth of its holding for all inmates, stating "This case thus presents the first impression issue of whether and upon what showing a petitioner who makes a freestanding claim of actual innocence is entitled to habeas corpus relief from his conviction and sentence." *Amrine*, at 545. Nowhere did the Court limit its holding to death sentences. Rather, the only passages which the panel could find to support such a limitation occur as the Court examined the procedural landscape from the United States Supreme Court as set forth in *Herrera v. Collins*. Importantly, the Court goes on to explain the contours of *Herrera v. Collins* ***in Missouri*** and again makes no such limitation. It held:

> In other words, as *Herrera* recognized, even if a federal court were found not to have jurisdiction to review a state conviction and sentence in

> the absence of a federal constitutional issue, this would not deprive a state court from reviewing the conviction and sentence if its own state habeas law so permitted. The issue now before this Court, then, is whether, in the words of *Herrera*, Missouri has left a "state avenue open to process such a claim." *Id.* This Court finds that it has done so.
>
> Having recognized the prospect of an intolerable wrong, the state has provided a remedy. As noted, it is not the remedy set out in *Clay*, for, while the *Clay* standard is appropriate for cases involving procedurally defaulted constitutional claims, it fails to account for those rare situations, such as Amrine's, in which a petitioner sets forth a compelling case of actual innocence independent of any constitutional violation at trial.

Id. at 546-47. The court noted that in so holding, Missouri law is in line with other states that grant relief based on free-standing claims of innocence in all cases, regardless of punishment. *Id.* at 547, n. 4, citing *State v. Washington*, 171 Ill. 2d 475, 665 N.E.2d 1330, 1337, 216 Ill. Dec. 773 (Ill. 1996) (Sentence of 25 years); *State ex rel. Holmes v. Court of Appeals*, 885 S.W.2d 389, 397 (Tex. Crim. App. 1994) (Sentence of death); *Summerville v. Warden, State Prison*, 229 Conn. 397, 641 A.2d 1356, 1369 (Conn. 1994) (manslaughter conviction, term of years); *In re Lindley*, 29 Cal. 2d 709, 177 P.2d 918 (Cal. 1947) (Sentence of death).

Additionally, the Court fails to address *State v. Terry*, 304 S.W.3d 105, 112 (Mo. banc 2010), which Mr. Lincoln cited to support his claim that Missouri law authorizes a new trial based on newly discovered evidence of innocence. Petition at 52, 54. 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, supra*. A new trial is required where a movant shows:

> 1. The facts constituting the newly discovered evidence have come to the movant's knowledge after the end of the trial; 2. Movant's lack of prior knowledge is not owing to any want of due diligence on his part; 3. The evidence is so material that it is likely to produce a difference result at a new trial; and 4. The evidence is neither cumulative only nor merely of an impeaching nature.

Id. at 109; Petition at 52. M.D.'s recantation, the concealed *Brady* evidence, and the DNA test results excluding Mr. Lincoln satisfy all of these requirements, and thus compel the same result. Although *Terry* is a direct appeal case, newly discovered evidence of innocence was allowed even though the time limit for filing a motion for new trial had long passed. *See also State v. Mooney,* 670 S.W.2d 510 (1984) ("If it is "patently unjust" for a trial judge to refuse to grant a new trial in a case where the finding of guilt was based upon false testimony, is it any less unjust to deprive an appellant of an opportunity to present that issue to the trial court because he did not learn of the fact that the victim's testimony was false until after the time for filing a motion for new trial has expired?") Yet, the panel opinion does not address *Terry* in any way.

Finally, this Court should note that the dispositive question is whether incarceration of a clearly innocent person is a "manifest injustice" under Missouri law. *Simmons v. White*. *supra.* It would be anomalous to reject innocence as a miscarriage of

justice in light of cases finding that excessive sentences for guilty offenders can constitute a fundamental miscarriage of justice. *See, e.g.*, *State ex rel. Zinna v. Steele*, 301 S.W.3d 510 (Mo. banc 2010); *State ex rel. Dutton v. Sevier*, 83 S.W.2d 581, 582 (Mo. 1935); *State ex rel. Koster v. Jackson*, 301 S.W.3d 586 (Mo. App. W.D. 2010); *State ex rel. White v. Davis*, 174 S.W.3d 543 (Mo. App. WD 2005); *State ex rel. Limback v. Gum*, 895 S.W.2d 663, 664 (Mo. App. WD 1995); *State ex rel. Heberlie v. Martinez*, 128 S.W.3d 616, 616 (Mo. App. 2004); *State ex rel. Moyer v. Calhoun*, 22 S.W.3d 250, 251 (Mo. App. ED 2000); *State ex rel. Brown v. Combs*, 994 S.W.2d 69, 70 (Mo. App. WD 1999); *State ex rel. Wright v. Dandurand*, 973 S.W.2d 161, 161 (Mo. App. WD 1998); *In re Thornton v. Denney*, 467 S.W.3d 292, 467 S.W.3d 292 (Mo. Ct. App. 2015). Habeas corpus is an equitable remedy, and "the ultimate equity on the prisoner's side [is] a sufficient showing of actual innocence," *Withrow v. Williams*, 507 U.S. 680 (1993) (O'Connor, J., concurring in part and dissenting in part). Surely the incarceration of a prisoner whose innocence is clear and convincing is a fundamental miscarriage of justice. In spite of its discussion of its statutory duty to review death sentences on direct appeal for the strength of the evidence, it is clear the Court believed that "Amrine's petition for habeas relief turns on the application of the manifest injustice standard to his claim of actual innocence." *Amrine*, at 545.

All of this highlights the panel's choice not to follow Missouri Supreme Court precedent in *Amrine*, *Ferguson*, and *State v. Terry*. Further, the panel's misapplication of *Amrine* presents a question of general importance because it raises serious questions about the integrity of criminal judgments in Missouri. Therefore, the Court should grant

Mr. Lincoln's motion for rehearing en banc, including oral argument, or in the alternative, order this matter transferred to the Missouri Supreme Court.

WHEREFORE, for the foregoing reasons, Petitioner prays this Court to grant rehearing en banc, including oral argument, or in the alternative to transfer this matter to the Missouri Supreme Court, and grant such further relief as the Court deems just and equitable.

Respectfully submitted,

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CERTIFICATE REGARDING SERVICE

I hereby certify that it is my belief and understanding that counsel for Respondent, Jay Cassaday and Missouri Attorney General Chris Koster are participants in the Court's e-filing program and that separate service of the foregoing document is not required beyond the Notification of Electronic Filing to be forwarded on October 26, 2016 upon the filing of the foregoing document.

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