IN THE MISSOURI SUPREME COURT

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

MOTION FOR TRANSFER

Petitioner Rodney Lincoln moves pursuant to Rules 83.04 to transfer this matter to this Court to review the following questions of general importance:

1. Whether suppressed evidence proving the State's sole witness, a seven-year-old girl, identified the prosecutor and others as the "bad man" and was coached extensively by state actors is material under *Brady* if no other evidence implicated the defendant in the crime. The Court of Appeals' holding that it was not material is contrary to this Court's opinion in *State ex rel. Engel v. Dormire*, 304 S.W.3d 120 (Mo. banc 2010).

2. Whether it is a miscarriage of justice to incarcerate a person after all evidence against him has been disproven and repudiated. The ruling below that innocence is not adequate grounds for habeas relief in a noncapital case is contrary to *Amrine v. Roper*, 102 S.W.3d 541 (Mo. 2003), and *State v. Terry*, 304 S.W.3d 105 (Mo. 2010).

STATEMENT OF THE FACTS AND CASE

Mr. Lincoln is innocent of the crime for which he was convicted 34 years ago. It took two trials to convict him, and even then, the jury found him guilty of manslaughter,

despite the severity of the crimes. The conviction rested on just two pieces of evidence: the identification testimony of a seven-year-old victim M.D. corroborated by microscopic hair comparison. The hair comparison was conclusively proven false by DNA testing. *Lincoln v, State,* 457 S.W.3d 800 (2014). In December 2015, M.D. admitted that her identification of Mr. Lincoln was wrong, and begged the St. Louis Circuit Attorney for Mr. Lincoln's release. Thus, no evidence connects Mr. Lincoln to this crime; the only evidence remaining from his trial is Lincoln's verified alibi.

Mr. Lincoln's petition for habeas corpus alleged that the State violated *Brady v. Maryland,* 373 U.S. 83 (1963), when it withheld evidence impeaching the child's identification, including evidence suggesting that she identified the prosecutor and others as her assailant. Further, the DNA exclusion of Mr. Lincoln as the source of any evidence at the crime scene and M.D.'s repudiation of her identification leave no evidence implicating Mr. Lincoln. Therefore, his continued incarceration is a manifest injustice. *Amrine, supra.*

The court below rejected Mr. Lincoln's *Brady* claim without identifying specific evidence withheld by the State or analyzing the cumulative effect of that evidence on the jury's decision to believe the State's only witness, and failed to note that a previous jury could not muster the votes to convict on the same evidence. In so holding, the panel chose not to follow *State ex rel. Engel v. Dormire,* 304 S.W.3d 120 (Mo. banc 2010).

The holding below that suppressed impeachment evidence cannot be material in an uncorroborated one-witness identification case presents a question of general importance because it conflicts with *State ex rel. Engel v. Dormire, supra,* and the

Supreme Court's decisions in *Wearry 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*). It further undermines *Brady's* purpose to protect the fairness, integrity and reliability of criminal judgments.

The Court of Appeals also rejected Mr. Lincoln's innocence claim "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 division chose not to follow *State ex rel Amrine v. Roper*, 102 S.W.3d 541 (Mo. banc 2003), and ignored *State v. Terry*, 304 S.W.3d 105 (Mo. 2010).

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 83.04.

SUGGESTIONS IN SUPPORT OF TRANSFER

I. THE STATE'S SUPPRESSION OF EXCULPATORY EVIDENCE.

Mr. Lincoln's is a rare case in which all of the State's evidence has been conclusively disproven or repudiated so that no evidence remains to support his conviction. The State's case was never strong. The first jury to hear the case could not reach a verdict, and the second jury's verdict finding Mr. Lincoln guilty of manslaughter reflects the likelihood of a compromise verdict. The court below 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. 10, and that DNA evidence proves that the only physical evidence, a hair found at the scene of the crime that microscopically "matched" Mr. Lincoln, "did not belong to [Mr. Lincoln]." Op. 8. 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 court 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 decision below departs from this constitutionally mandated 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, 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 trial counsel went only to inconsistencies in the details of M.D.'s story, and did not undermine her manufactured confidence in her identification of Mr. Lincoln.

In contrast, the concealed evidence, unmentioned by the court below, goes well beyond inconsistency of detail, and impugns the integrity of the identification itself, including: 1) Between December 1982, and March 1983, the prosecutor rehearsed M.D.'s testimony in the courtroom at least six times with detectives, DFS workers and a victim advocate present. Pet. Ex. 9, at 280, 287-90, 319, 321; 2) M.D.'s DFS treatment team was instructed to make M.D. and R.T. "love their attorney so that he could get anything he needed out of them." Resp. Ex. 9 at 3; 3) Assistant Prosecutor Joe Bauer "would make the girls say Rodney Lincoln's name" instead of saying "bad man." Pet. Ex. 10 at 3; 4) Coaching went so far as to point out to M.D., "*This is where Mr. Lincoln will be sitting*." Pet. Ex. 10, at 2 (emphasis added); 5) 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 6) When Bauer entered Victim Advocate Mary Flotron's office, "[M.D.] hid her head behind her arms, pointed at Bauer, and said, 'Bad Man! Bad Man!'" Ex. 39 at 3. M.D. reacted similarly on other occasions because "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 that she identified at least three men other

than Mr. Lincoln as her assailant. This is far more powerful than impeaching M.D.'s testimony with inconsistent details in her story. Although the suppressed evidence "would have provided Relator with even more ammunition to support the line of questioning in fact undertaken at trial," Op. 10, the court failed to acknowledge that the defense had no evidence suggesting that M.D. had ever selected someone else as her attacker, belying 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 suppressed evidence, the panel's decision failed to acknowledge that the State deprived the defense of evidence impeaching the core elements of M.D.'s testimony, which "undermines confidence in the outcome of the trial." *Engel*, at 128, quoting *Kyles v. Whitley*, at 434.

Second, the court below 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. Without the benefit of the suppressed evidence, one jury could not reach a verdict. Thus, 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. *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 impeachment evidence is material if the witness is "the *only* evidence linking [the

defendant] to the crime." *Smith v. Cain*, at 76. 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 court'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 transfer. Because Respondent never asserted a defense of laches, Mr. Lincoln had no opportunity to establish how and when he obtained the suppressed evidence in Mr. Lincoln's 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).

Because the court below chose not to follow the *Engel* standard for determining the materiality of withheld exculpatory evidence and because the court's misapplication of *Brady* and its progeny presents a question of general importance regarding the integrity of criminal judgments in Missouri, this Court should grant transfer.

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

Mr. Lincoln's new evidence shows clearly and convincingly that he is innocent; no evidence remains to support his conviction and the victim has begged for his release. In holding it could not reach Mr. Lincoln's claim of innocence "no matter how compelling," Op. at 17, the court below 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. 2. This misinterprets *Amrine* and ignores this Court's direction that habeas corpus is the proper forum for innocence claims. *See Wilson v. State*, 813 S.W.2d 833, 834-35 (Mo. banc 1991) ("Newly discovered evidence, if available, may better serve Wilson in a Petition for a Writ of Habeas Corpus under Rule 91.")

At the heart of the *Amrine* decision is the authority of the courts to correct a "manifest injustice." Missouri recognizes entitlement to habeas relief "in extraordinary circumstances, when the petitioner can demonstrate that a 'manifest injustice' would result unless habeas relief is granted." Op. 4 (internal citations omitted). 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*, *supra*, 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. 16. This misinterpretation incorrectly assumes that *Amrine* was conditioned upon the defendant's death sentence and the application of section 565.035.3.

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[1] Notably, the lower court correctly cites the standard for a freestanding claim of innocence on page 5, while contradicting that test on pages 16-17. *Compare* Op. 5 and Op. 16-17.

Op. at 15. Both conclusions are contradicted by *Amrine*'s plain languge: the *Amrine* court made clear that Amrine's new innocence evidence 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 court below contradicted *Amrine* when it cherry-picked language to argue that actual innocence claims can only apply in a death penalty case. The panel relies on language discussing 565.035.3, describing a court's increased duty in death penalty cases, Op. 13-14, to conclude that actual innocence constitutes a manifest injustice only in death cases. *Id.* at 14. In doing so, the panel noted *Amrine*'s language that both "the continued imprisonment and ***eventual execution*** of an innocent person is a manifest injustice," Op. 13. Yet, the *Amrine* court's emphasis on the unbearable possibility of executing 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).

Amrine stands for no such proposition. This Court 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 court below could find to support such a limitation occur as this Court examined the procedural landscape from the United States Supreme Court as set forth in *Hererra v. Collins*. This Court explained, "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." *Amrine*, at 546. This Court found "Missouri has left a state avenue open to process such a claim.'" *Id.*, citing *Herrera.* Recognizing both incarceration and execution as "an intolerable wrong," this Court found "the state has provided a remedy… 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 regardless of punishment. *Id.* at 547, n. 4, [citations omitted].

Additionally, the court below failed to address *State v. Terry*, 304 S.W.3d 105, 112 (Mo. banc 2010), which Mr. Lincoln cited to support his claim for a new trial based on newly discovered evidence of innocence. Pet. 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; Pet. 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 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 opinion below failed to 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 in the absence of any evidence of guilt is a fundamental miscarriage of justice. In spite of this Court's statutory duty to review death sentences on direct appeal for the strength of the evidence, it is clear 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* 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. This Court should grant transfer.

WHEREFORE, for the foregoing reasons, Petitioner prays this Court to transfer this matter to the Missouri Supreme Court, and grant such further relief as the Court deems just and equitable.

Respectfully submitted,

_/s/_*Tricia J. Bushnell*_____
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CERTIFICATE REGARDING SERVICE

I hereby certify that a copy of this Motion For Transfer with exhibits was served on counsel for Respondent Mike Spillane via email at mike.spillane@ago.mo.gov on this 7th day of December, 2016.

/s/ *Tricia J. Bushnell*
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