IN THE CIRCUIT COURT OF COLE COUNTY, MISSOURI

RODNEY L. LINCOLN,	)	
	)	
Petitioner,	)	
	)	
v.	)	**No. 15AC-CC00597**
	)	**Div. 2**
JAY CASSADAY, Superintendent,	)	
Jefferson City Correctional Facility,	)	
	)	
Respondent.	)	

REPLY TO RESPONSE TO SHOW CAUSE ORDER

In his zeal to preserve a fundamentally unjust and false conviction, Respondent overstates, understates or misstates virtually every material point of fact and law in the case. Petitioner will discuss Respondent's substantive and procedural arguments in connection with each claim that is properly before this Court.

CLAIM ONE: Rodney Lincoln Satisfies The *Amrine v. Roper* Actual Innocence Standard For Habeas Corpus Relief Because No Evidence Remains To Support his Conviction.

There is nothing left that suggests, let alone proves, that Mr. Lincoln committed the crime. There is no physical evidence. No identification. The only evidence on the question of who killed JoAnn Tate is that Rodney Lincoln is completely innocent. Ignoring this, the State desperately invents procedural technicalities, spurious legal theories, and manufactures evidence, never presented

to the jury, to maintain an unsupportable conviction. Under the principles established in *Amrine v. Roper*, 102 S.W.3d 541 (Mo. 2003), and *Schlup v. Delo*, 513 U.S. 298 (1995), the overwhelming evidence of Mr. Lincoln's innocence trumps all of these arguments. The State's Response is simply its last bad act to support a bad conviction.

A. M.D.'s credible recantation.

Respondent gives virtually no consideration to the sworn statement of surviving victim and witness M.D. that she made a terrible mistake that sent an innocent man to prison. In a video-recorded interview by Assistant Prosecuting Attorney Ed Postawko, M.D. explained her awareness that police manipulated her into falsely identifying Rodney Lincoln. Referring to the photograph and lineup she was shown, M.D. told Mr. 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. I am willing to take a lie detector or whatever you want. But he was not there. He did not kill my mom." Exhibit 35, Transcript of Respondent's Exhibit 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. repudiates her childhood identification of Rodney Lincoln, explaining:

> I feel like my brain was filling in who was supposed to be there. Who I thought was supposed to be there. And I'm not saying who was actually there. It's who I thought was supposed to be there. And, what I can explain that way is, it's like you grow up hearing a story and you can visualize it in your mind. And when someone says oh well this is what happened that's who your brain puts there, it's that character because that's how you think the story is supposed to go.

Id. at 9.

M.D.'s current testimony is all the more credible because it has roots in her initial memory of the crime, prior to the extremely suggestive process that—in her own words—"manipulated" her into selecting Rodney Lincoln's picture. *Id.* at 12. 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. at 9.

The foundation on which Rodney Lincoln's conviction rests has crumbled. M.D. describes the pressure the State has put on her to obtain and preserve Rodney Lincoln's unjust conviction.

> For years, felt like anything I did that would ever contrast with who was in prison , which was Rodney. . . I felt like anything I said against that would be betraying my family, would be betraying the detectives who 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 always had to always be steadfast in what I said, so that any doubts that would ever come up, I would squash them immediately.

Id. at 8.

M.D.'s family felt the same pressures. Nathaniel Clenney "always thought [M.D.'s] identification of Rodney was troublesome, but I wanted to support [M.D.], so I didn't say anything." Ex. 36, Nathaniel Clenney Affidavit at 3. Likewise, M.D.'s Aunt Abigail Wallace "never came forward before with my doubts about Rodney's guilt because I know my family would have been upset with me…If I had expressed my doubts…, I would probably have lost my relationship with my family." Ex. 37, Abigail Wallace Affidavit at 4. The pressure continues; detectives desperate to preserve an unjust conviction even now pepper M.D.'s family with false information—that Rodney Lincoln's body was covered in partially healed scratches when he was arrested for the crime, that his fingerprint was found on the murder weapon, that viable alternative suspects have been exhaustively investigated and excluded—in an attempt to dissuade them from supporting M.D. now that she has departed from the official script. *See* Ex. 35 at 37, 38; Ex. 36 at 3; Ex. 37 at 2.

The doubts shared by M.D.'s closest family are not frivolous questions, but serious concerns based on their familiarity with M.D. and the process by which the case was built. Mr. Clenney "always" had doubts; M.D. "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." Ex. 36 at 3. Mr. Clenney "just didn't trust the identification of Rodney" because "when she gave details about the Bad Man, Joe Burgoon told me people would give her candy." *Id.* While walking with her grandmother, M.D. cowered from strange men in the same way she allegedly cowered from Rodney Lincoln, which made her identification of Rodney Lincoln "troublesome" to her Uncle Nat. *Id.*

The new "funny finger" story is also "suspicious;" the prosecution would surely have used the finger to corroborate M.D.'s identification at trial, but it did not. *Id.* at 3. Mary Flotron agrees. *See* Exh. 39 at 2. Mr. Clenney's doubts of Rodney's guilt "began at the scene when I found JoAnn's body and [M.D.] told me that 'Bill' had done this to her mother." Ex. 36 at 2. Mr. Clenney also "thought about other suspects, such as Steve Yancey" and now, of course, Tommy Lynn Sells. *Id.* at 2. Mr. Clenney also mentioned Billy Hayes. *Id.* His "doubts about Rodney's guilt never really went away." *Id.*

Likewise, M.D.'s Aunt Abigail Wallace "never thought Rod was the kind of guy capable of a crime like this. He was small, and JoAnn definitely fought to protect herself and her children on the night she was killed." Ex. 37 at 1. When she asked Detective Burgoon "how such a little guy like Rodney had killed JoAnn," he told her "that Rodney Lincoln was high on PCP when he killed my sister," which she knows is not true. *Id.* Even M. D. herself experienced doubts, but she "would

squash them immediately." Ex. 35 at 8. She explains that "A long time ago, I thought it was my responsibility to keep Rodney in prison." *Id.* at 18.

B. Respondent misinterprets the science of mistaken identification.

In its efforts to continue to incarcerate a man where there is no longer any evidence to do so, the State misinterprets research that actually explains why M.D. misidentified Mr. Lincoln. Respondent attacks M.D.'s recantation with an article by perception and memory experts 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 11-17 (2013). Response at 5. The State argues that this article suggests that the Crime Watch Daily television program that prompted M.D. to disavow her identification of Rodney Lincoln affected M.D.'s memory, creating a false one. *Id.*

It is doubtful that Respondent would have cited Morgan, et al., had he actually read and understood their research. For the Court's convenience, Petitioner has submitted the article as Exhibit 43. While Morgan, et al, do indeed discuss the creation of false memories, a review of their study and the related empirical research establishes that M.D.'s initial photographic identification process was much more likely to have prompted a false identification—which is

exactly what M.D. herself now states. *See* Ex. 35 at 9 ("my brain was filling in who was supposed to be there.")

Morgan, et al., investigated the "misinformation effect," which "refers to the errors in recalling the details of a past event made by individuals who were subsequently exposed to *false or erroneous* information about the event." Ex. 43 at 11 (emphasis in original). Previous research indicated that "when people claim erroneously that they have seen the misinformation details, they seem to truly believe that they did." *Id.*, citing Loftus & Palmer, *Reconstruction of automobile destruction: An example of the interaction between language and memory*, 13 JOURNAL OF VERBAL LEARNING AND VERBAL BEHAVIOR 585 (1974); Scoboria, Mazzoni, & Kirsch, *Effects of misleading questions and hypnotic memory suggestions on memory reports: A signal-detection analysis*, 54 INTERNATIONAL JOURNAL OF CLINICAL AND EXPERIMENTAL HYPNOSIS 340 (2006).[1] This is similar to the numerous false pieces of information provided to M.D. during the months-long identification process, including multiple photo lineups and questionings.

[1] In examining this issue, Morgan, et al., conducted an empirical study of 800 military personnel confined in a stressful mock POW camp during a phase of Survival School training. The training placed soldiers in a realistic evasion-and-capture scenario, "modeled from the experiences of actual military personnel who have been prisoners of war," including coercive interrogation methods. Ex. 43 at 12. The researchers explored whether misinformation could affect memory for a "recently experienced, personally relevant, highly stressful event." *Id.* (emphasis added). These characteristics make the findings in the study far more relevant to M.D.'s susceptibility to the highly suggestive improper police identification procedures conducted immediately after the crime, *see* Petition for Habeas Corpus at pp. 5-11, than they were to her recantation decades later.

The study that Respondent endorsed explains M.D.'s misidentification of Mr. Lincoln. Morgan, et al., tested memory for a number of details about the participants' interrogation experience, including the presence of objects, such as weapons or telephones, and facial descriptors of the interrogators (facial hair, eye-glasses, etc.), in addition to identification of the interrogator. Not surprisingly, "participants who were exposed to misinformation were more likely to endorse false memories for their experience at Survival School." *Id.* at 15.The rate of error in the participants' attempts to identify a photograph of his or her interrogator was remarkable. In photograph identification procedures where the "target" (i.e. the interrogator, or in M.D.'s case, the real perpetrator) was absent, a majority of participants misidentified their interrogators: When participants were not fed misinformation, the False-Positive Endorsement Rate was 53% (84/158), but when false information was introduced, the False-Positive rate jumped to 91% (77/85). *Id.* at 15. Based on the suggestive pre-identification procedures conducted by St. Louis City police, M.D.'s experience is analogous to the group that experienced the 91% error rate in target-absent photographic identifications.

Although there are some caveats when comparing the reliability of an identification by a seven-year-old victim of a violent crime to "a population of military personnel who are trained to resist propaganda and misinformation," *Id.* at 16, those qualifications only further support the susceptibility of M.D. to

suggestion and the unreliability of her identification of Rodney Lincoln. For example, the study 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." *Id.* Adults are authoritative to a young seven-year-old, particularly law enforcement and those associated with the criminal justice system. M.D. herself recognized the importance of detectives in her life at the time. *See* Ex. 35 at15. ("I worshipped everyone that I ever came into contact with in the judicial system because to me, they were awesome people, they were safe people."); *id.* at 14 (Ed Postawko: "who do you feel manipulated you?" MD: "Joe Burgoon. … I don't think he did it on purpose, I think it was terrible police work. And I love him. He was like a dad to me.")

Also significant is the relatively greater opportunity of study participants to view the interrogator who was the subject of the attempted identification (i.e., the perpetrator) in comparison to the opportunities for M.D.:

> During the interrogation, the room is illuminated and the students are able to see and hear the instructor. Throughout the interrogation the student is required to face the instructor and must maintain eye contact. In addition, the student must always adopt a height that is less than that of the instructor by bending or straightening his or her knees. Failure to comply with this rule results in physical punishment to the student by the interrogator. Thus, students must be attentive to the face and relative height of the instructor. During this phase, the interrogator asks questions and physically confronts the student if he or she does not appear to be answering the questions or complying with the interrogator's requests.

Ex. 43 at 12. Interrogations in the study were approximately thirty minutes in duration. *Id.* By comparison, the conditions of M.D.'s encounter with the person who stabbed her and killed her mother were not as favorable as that of the trained soldiers, who even under better conditions could not reliably identify their interrogators.

Despite his reliance on this study, Respondent wholly fails to acknowledge the degree to which seven-year-old M.D. was coaxed into selecting a picture of Rodney Lincoln. The identification process lasted months, included questioning under stressful conditions[2] during M.D.'s month-long stay at the hospital while recovering from surgery, and included several photo line-ups, each with 10-13 photos. (T. 504-505); Ex. 27, State's Exhibits 113 a-j; (T. 505-506); Ex. 28, State's Exhibits 114 a-l; (T. 740-742); Ex. 29, State's Exhibits 115a-m; (T. 508-509, 511). Based solely on these conditions, it is unsurprising that M.D. made a faulty identification in those intervening weeks. The conditions were set up to create it.

[2] Research shows that "perceptual abilities actually decrease significantly when the observer is in a fearful or anxiety-provoking situation." Frederic Woocher, *Did Your Eyes Deceive You? Expert Psychological Testimony on the Unreliability of Eyewitness Identification*, 29 Stan. L. Rev. 969 (1977); 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 267, 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"), *available a*t http://www.nlada.org/Defender/forensics/for_lib/Documents/1150823205.44/Article-Intl%20J.%20L.%20Psy.-Accuracy%20of%20eyewitness%20memory...Morgan.pdf.

Nonetheless, M.D. did not identify the perpetrator while in treatment. *Id.* Instead, while recovering, her description of the individual changed based upon who was asking her the questions. When asked at the crime scene by Nathaniel Clenney "Who did this?" M.D. replied, "the man who worked on mama's car"—"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, 786-788). Hours later, still in the emergency room, Melinda Parris, M.D.'s older sister, guessed, "Was it Gary?" (T. 786-7); Ex. 8, Police Reports at 23. M.D. confirmed, "Yes." *Id.* Other observations by M.D. are not consistent with her childhood identification of Mr. Lincoln. *See* Petition at 6-7.

Through all of this time, when the State simply presented photos to M.D., she made no identification, and M.D.'s assertion that the perpetrator was "Bill" did not waiver. Instead, an identification came only after Detective Burgoon, who M.D. had come to know and trust, *see* Ex. 35 at 14, 35, performed a suggestive photo display, telling M.D. that the police had the "bad man" in custody behind a magic door, and that it was very important that they pick out the right man so the bad man would not go free. (T. 432, 441.) Detective Burgoon then showed the children just two photos: One was a five-year-old black and white mug shot of Rodney Lincoln and the other was a color photograph of Gary Parris, her cousin.

Ex. 26, State's Ex. 117 a,b; (T. 440, 751); Ex. 8 at 212. M.D. picked the picture of Rodney Lincoln. (T. 300, 752); Ex. 8 at 212.

Based upon the Morgan studies and more recent social science research, the result was inevitable. Studies show that when a witness believes that a culprit is in a lineup they may feel pressured to make an identification regardless of whether they actually recognize anyone in the lineup, such that "[m]istaken identifications from culprit-absent lineups are significantly higher when the witness is not given the pre-lineup instruction [that the culprit may not be in the lineup]." Gary L. Wells & Deah S. Quinlivan, *Suggestive Eyewitness Identification Procedures and the Supreme Court's Reliability Test in Light of Eyewitness Science: 30 Years Later*, 33 LAW & HUM. BEHAV. 1, 6 (2009). Coupled with the authority Detective Burgoon had over M.D. and M.D.'s general desire to please, *see* Ex. 36 at 3, there could be no other outcome. M.D., a child who had survived a brutal crime and the loss of her mother, was left with no real choice: pick "the bad man," or let him go free. M.D. knew her relative could not be the bad man, and so the only option was Mr. Lincoln. She could not disappoint Detective Burgoon, even if it altered her memory. *See* Ex. 43 at 17 ("Given the present data it is reasonable to believe that the social status of physicians and therapists may significantly facilitate–albeit unintentionally– the acceptance of misinformation and alter memories on the part of victims.")

Moreover, the presentation of these photographs was also problematic because it was administered by the lead detective who created the lineup and knew the suspect. The National Academy of Sciences Report on eyewitness identification endorses a double-blind procedure in which "an individual who does not know the identity of the suspect or the suspect's position in the photo array shows a photo array to the eyewitness." National Research Council, *Identifying the Culprit: Assessing Eyewitness Identification*, 24 (National Academy of Sciences 2014) (hereafter "NAS Report"). This procedure "prevent[s] conscious and unconscious cues from being given to the witness." *Id.* Such procedures are informed by "decades of scientific evidence [which] demonstrate that expectations can bias perception and judgment and that expectations can be inadvertently communicated." *Id.* at 106. Here, not only was the lineup not double blind, the detective overtly told M.D. that "the bad man" was included in the lineup and that she must pick him. As the Morgan study revealed:

> …physicians and psychotherapists who may work with victims of trauma and who may engage in associated legal advocacy or forensic work (i.e., Evaluations for Asylum; Forensic criminal evaluations; Debriefings) would be well advised to videotape their evaluations and to take great care to use non-leading, open ended information gathering interviewing techniques.

Ex. 43 at 17. Yet, Detective Burgoon did none of these. Instead, his leading, suggestive questions told M.D. she alone could keep the bad man locked up, and

giving only one real option of who the bad man could be: Rodney Lincoln. (T. 432, 441.) These compound errors eliminate any confidence in this identification.

The live lineup procedures fared no better. Within two hours of being shown Mr. Lincoln's picture, the children were taken to a live line-up, which included Mr. Lincoln and only three other men—all at least 16 years younger than him, larger, and with bushier hair. **(**T. 771-2); Ex. 8 at 213. Only Rodney Lincoln's picture had been included in any previous photo line-up. None of the men looked anything like Mr. Lincoln or the composite sketch. Police reports indicate M.D. identified Rodney Lincoln. (T. 754-5); Ex. 8 at 213. There again could be no other result. As studies have shown, "Witnesses who encountered an innocent person's photo in an initial identification procedure were more likely to misidentify a different photo of him in a second procedure even if they did not misidentify him in the first procedure, but the effect is especially strong if they also misidentified the person in the first procedure." Wells & Quinlivan, 33 LAW & HUM. BEHAV. 1 at 8. M.D.'s identification of Mr. Lincoln in the photo line-up falls squarely into this pattern, as she was subjected to not one, but two suggestive identifications where all procedures—rather than her memory—pointed squarely to Mr. Lincoln.

As early as October 1982, the prosecutor, law enforcement, psychologist and DFS workers met to plan role-playing scenarios to prepare M.D. and R.T. for court. According to Mary Flotron, their "job was to make [M.D.] and [R.T.]

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." Resp. Ex. 9 at 3 (emphasis added.) And that is exactly what they did, reinforcing the false memory imprinted in M.D. by the earlier suggestive identification procedures. DFS records reveal that over a period of at least nine months, the girls were coached through at least four courtroom role-playing rehearsals, with additional preparation and role-play between those sessions. DFS notes specifically refer to meetings between the Circuit Attorney, DFS social workers, and psychologists as helping to "prepare children for court appearances." Ex. 9 at 329, 10/14/82 notes of Family Counselor Carol Corgiat. At a meeting attended by Assistant Prosecuting Attorney Joe Bauer, Crime Victim Assistant Mary Flotron, Psychologist An Carberry, Counselor Carol Corgiat, Juvenile Officer Mary Ladish, and DFS social worker Connie Radvin, it was decided that M.D. "would come to the courtroom for role play to help her prepare the face to face confrontation with the defendant," and that Carol Corgiat would continue regular counseling through this process. Ex. 9 at 280, notes of 10/14/82 meeting.

Pursuant to these and other joint meetings with the prosecutor, DFS records document that courtroom testimony rehearsals took place on December 28, 1982, and on February 9, and March 28, 1983. *Id.* at 317, 319, 289-90. DFS social worker Shelia Marion transported the children to these court rehearsals, and wrote

that she "worked with both [M.D.] and [R.T.] to prepare them for court." *Id.* at 319. At least one rehearsal outside the courtroom produced memories of events that neither Joe Bauer nor Mary Flotron knew about. *Id.* at 320. Additional role playing sessions took place outside the courtroom; Shelia Marion worked with the girls "to prepare them for court" on multiple occasions. *Id.* at 320-321, 290, 325-26.

All of these sessions only solidified M.D.'s role in her mind. As Mary Flotron acknowledged: "It's hard to work with children because you never know when they're telling something that they heard in a fairy-tale book or what. And so that was always up to the lawyers to figure out. But it always made you, you know, very cautious when you were working with children, not to say or do anything that might push them in any one direction." Resp. Ex. 9 at 6. Unfortunately, despite any potential cautions, M.D. was pushed in only one direction – to identify Mr. Lincoln.

Indeed, the United States Supreme Court, relying on this well-developed body of scientific research, has recognized the "problem of unreliable, induced, and even imagined child testimony." *Kennedy* v. *Louisiana*, 554 U.S. 407, 443 (2008); *see also id.* at 443-444 (referencing studies concluding "that children are highly susceptible to suggestive questioning techniques like repetition, guided imagery, and selective reinforcement"); *see Arizona* v. *Youngblood*, 488 U.S. 51, 72 n.8

(1988) (Blackmun, J., dissenting) ("Studies show that children are more likely to make mistaken identifications than are adults, especially when they have been encouraged by adults."); *Idaho* v. *Wright*, 497 U.S. 805, 819 (1990) (recognizing that the avoidance of leading questions ''may well enhance the reliability of out-of-court statements of children regarding sexual abuse"); *Maryland* v. *Craig*, 497 U.S. 836, 868 (1990) (Scalia, J., dissenting) (noting "special reasons" to be suspicious of child testimony in light of "studies show[ing] that children are substantially more vulnerable to suggestion than adults, and often unable to separate recollected fantasy (or suggestion) from reality").

Eyewitness testimonies are already particularly susceptible to error, and "the influence of improper suggestion upon identifying witnesses probably accounts for more miscarriages of justice than any other single factor—perhaps it is responsible for more such errors than all other factors combined." *United States v. Wade*, 388 U.S. 218, 229 (1967). As the present case now solely relies on recanted eyewitness identification, the suggestiveness of the lineup and the subsequent coaching for trial is exceptionally dangerous, as it corrupted identifications made throughout the trial. *See id.* at 218 (noting suggestive lineups are particularly dangerous as they can taint later proceedings). For all of these reasons, the State's attempt to bolster the words of a terrified, coached seven-year-old are laughable. M.D. is now a

grown woman, with no susceptibility to their influences, and has now come to recognize the truth—that Mr. Lincoln was not the perpetrator.

C. Tommy Sells' bogus alibi is irrelevant to Mr. Lincoln's innocence.

Respondent alleges that M.D.'s persuasive assertion that Rodney Lincoln is innocent must be completely discounted because Mr. Lincoln has not built an airtight case against Tommy Sells, whom M.D. has identified as her assailant. Response at 5-6. Respondent's argument is both legally and factually unpersuasive.

First, Respondent overstates the "evidence" implying that Sells has an alibi for the crime. Respondent's defense of Sells is not the first time his office has stretched the facts to create an alibi for a realistically alternative suspect. *See State ex rel. Woodworth v. Denney*, 396 S.W.3d 330, 346 (Mo. App. WD 2013) (granting a new trial in part because the assistant attorney general specially prosecuting the case failed to disclose *Brady* which would have "cast doubt on [an alternative suspect's] alibi and on the thoroughness and lack of bias of the investigation.") Respondent similarly claims that Sells' biography and court records establishing that Sells spent two weeks in jail in Paragould, Arkansas, refutes M.D.'s present account of the crimes against her. Response at 5-6. That argument falls short on two counts. First, it completely ignores the significant fact

that M.D. credibly repudiates her childhood identification that the police manipulated out of her. *See* Section A, *supra*. Second, Sells' alibi leaks.

Respondent claims that "Tommy Lynn Sells' book[3] and Arkansas records indicate he had returned to Arkansas before the murder and he was in fact in custody at the time of the murder." Response at 5-6. However, Respondent provides no evidence that Sells was in custody after April 14, 1982.

And that is because he cannot. Although records reflect that Sells was arrested on April 3, 1982 for auto theft and that he 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, the State has produced not one shred of evidence that Sells ever served that time or even entered the youth correctional facilities. Not one record. Not one witness. In fact, evidence states to 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. Further, when Jonesboro, Arkansas police officers asked Sells where he was going in the stolen truck, he told

[3] The author of the book is not Tommy Sells, it is Tori Rivers. *See* Tori Rivers, TOMMY LYNN SELLS: A PROLIFIC SERIAL KILLER, IN HIS OWN WORDS (Riverbend Press, 2008).

them, "I was headed towards Illinois."[4] Resp. Ex. 4 at 27. The continuation of Sells' northward journey is also consistent with the fact that upon his arrest he reported his residence as 8720 Shirley Street, St. Louis, Missouri, with his brother, Terry Levins. Resp. Ex. 4 at 14, 26.

Investigator Michael West reviewed Sells' casefile and court records and was unable to find anything placing Sells at the correctional facility after his hearing. Exhibit 41, Affidavit of Michael West. Beyond the court file, no person could place Sells in the correctional facility either. Investigator West spoke with Greene County Clerk and Recorder Jan Griffith, who advised him that that 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 there. *Id.*[5] According to the clerk, the offender is free to walk out of court after his sentencing, so Sells probably walked out of court in Jonesboro on April 14, 1982, with only a promise to appear later at the youth center. *Id.* Investigator West spoke with Greene County employees

[4] Under Missouri law, Sells' statement is admissible as a hearsay exception to show that upon his release he continued his northward journey. "The state of mind exception to the hearsay rule also allows the admission of statements to show a future intent of the declarant to perform an act if the occurrence of that act is at issue." *State v. Rios*, 234 S.W.3d 412, 423 (Mo. App. WD 2007). *See also, State v. Newson*, 898 S.W.2d 710, 716 (Mo. App. W.D. 1995) ("A declaration indicating a present intention to do a particular act in the immediate future, made in apparent good faith and not for self-serving purposes, is admissible to prove that the act was in fact performed.")

[5] 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.

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.* None of the employees remembered Tommy Lynn Sells attending the center, even though all reported to have excellent memories. *Id.*

Sells' attorney, H.T. Moore, also states there is no evidence to support Sells entered the youth facility. Moore represented Sells during his April 14, 1982 hearing. Exhibit 40, Affidavit of H.T. Moore. Mr. Moore states that he would have advised Sells to take a plea to stay in the juvenile system because "The Greene County jail was a hell hole for young kids." *Id.* According to Mr. Moore, after taking the plea, it is likely that Sells did not in fact serve any time: "The court file does not reflect that Mr. Sells was delivered to CYS, and I doubt that was done." *Id.* Moore describes the Sheriff as having been "very lax" in those days, and that the court file "did not contain a court order directing the sheriff to deliver him to CYS." *Id.* at 1. In fact, it was quite likely that "When 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.* And that 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.*

In short, much like they did with M.D.'s identification, the State is relying on an unsupported inference to equal a conclusion. All that the State has proven is that Tommy Lynn Sells was in Arkansas two weeks before JoAnne Tate's death. That was more than enough time for Sells to drive to Missouri and commit the murder.

Notably, the State also fails to cite to Assistant Attorney General Michael Spillane's phone call with Sells' brother, Timmy Sells, Resp. Ex. 7, and it is no wonder—the conversation with Timmy supports the facts alleged in Mr. Lincoln's petition. In his phone call with Mr. Spillane, Timmy said that he and his family had moved to St. Louis in the early 80s, and that Tommy Sells would join them intermittently. *Id*. Timmy also stated that Sells would run off a lot "and steal a car or whatever and then be gone a month or whatever and be gone and then, you know, a month or two or whatever, however many months or days or whatever, he would show up or call or whatever." *Id.* at 8. Timmy repeated this again, stating "it was like, you know, '80, '81, '82 because he stole cars out of the driveway and he just pulled so much, so many shenanigans and stuff." *Id.* at 14.

According to Timmy, 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. claimed that the man who worked on her mother's car was the one that hurt her. (T. 402.) She also told detectives that her mother had met the killer in Hyde Park near their home, and that he drove a white Volkswagen. (T. 355, 513-14); Ex. 8 at 33; Ex. 1 at 2. In his deposition, social worker Wayne Munkel also read his notes and said 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. 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 never owned a white Volkswagen. Ex. 8 at 42-43.

Timmy's memories are consistent with Sells travelling between St. Louis and Arkansas, and getting caught for stealing a car as he headed back north to St. Louis before JoAnne Tate was murdered. Sells' arrest record also supports this. When picked up in Arkansas, he told police that his mother lived in Eolia, MO, Resp. Ex. 4 at 20, and that he was heading up to Illinois when he was arrested, *id*. at 27. It would follow that upon his release—two weeks before JoAnne Tate's murder—that is the same direction Sells headed.

The State ignores all of this, and instead focuses 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. Response at 7. The State further relies on a photo of Sells from two years later, in 1984, for the notion that Sells could not have had a beard at the time of Tate's murder in 1982. *Id*. In doing so, the State ignores other key clues that Timmy provides about the timing of Sells activities and his facial hair: Timmy states that he last saw Sells when he took Sells to Los Angeles to drive a vehicle for him. Resp. Ex. 8 at 3. At that time, "well, he did have a lot of facial hair at that time." *Id.* at 4. The State relies on Timmy's memory for the idea that this event must have occurred in the mid-90s. Response at 7. However, Timmy's recollection of events, coupled with his admitted difficulty remembering dates, *see* Resp. Ex. 7 at 10, 14, support the notion that in fact Sells *did* have a beard at the time of Tate's murder. Shortly after the crime, M.D. mentioned to her uncle that the perpetrator had recently moved or traveled from Hollywood, CA. Ex. 8 at 26. If Sells did commit the crime after returning from his trip to Los Angeles with Timmy, he would have had a beard, regardless of Timmy's memory of the year.

The cumulative effect of the DNA testing that eliminated Mr. Lincoln as the source of hairs collected at the crime scene and M.D.'s persuasive recantation renders Respondent's argument about Sells immaterial. Never has the law

premised the exoneration of an innocent prisoner on apprehension of the true perpetrator. In this very court, the Honorable Richard Callahan ordered the release of Joshua Kezer, noting that the evidence identified several plausible alternative suspects, including Ray Ring, Mark or Matt Abbott,[6] Kevin Williams, and Leon Lamb. *Findings of Fact, Conclusions of Law and Judgment*, Kezer v. Dormire, Cole County No. 08AC-CC00293, pp. 3, 11-15, 19-21 (Feb. 17, 2009), available online at justicedenied.org/cases/kezer_v_dormire_2-17-2009.pdf. Judge Callahan explained:

> Neither the *Schlup* nor the *Amrine* burden of proof requires Josh Kezer to prove that Mark Abbott or someone else other than Josh Kezer killed Mischelle Lawless, even though the evidence suggesting that Abbott may have committed the crime is probative on the issue of Josh Kezers's guilt. *House v. Bell, supra* at 552-553 (new evidence that killer may have been the victim's husband, including his confession to witnesses). Josh Kezer's burden is only to demonstrate to the applicable standard and in light of all the evidence, including the trial evidence, that he is innocent of that crime.

Id. at 38. Mr. Kezer satisfied his burden of proving innocence "by offering new evidence to [sic] negating evidence of guilt presented at the trial," not by proving the guilt of any one of five alternative suspects. *Id.* at 40.

Then-Judge Callahan's analysis is harmonious with the Supreme Court's law on the actual innocence standard. The Supreme Court's confidence in Paul House's conviction was undermined by evidence pointing to the victim's spouse, even

[6] The Abbotts are identical twins.

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 *Amrine v. Roper*, evidence suggested, but did not conclusively prove, that Terry Russell was the actual killer. 102 S.W.3d at 544-545. The same is true of Mr. Lincoln's case.

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. Similarly, the evidence implicating Steve Yancey as a viable suspect is a likelihood too feasible to ignore, s*ee* Petition at 22-24, although Respondent says virtually nothing about it.

Mr. Lincoln need not prove Tommy Sells' guilt to prove Mr. Lincoln's innocence. City Attorney Ed Postawko himself has acknowledged that Mr. Lincoln need not "fill his seat in prison in order for him to be released." Exhibit 45, Affidavit of Quinn O'Brien regarding Ed Postawko. On December 4, 2015, counsel for Mr. Lincoln, Tricia Bushnell, and investigator Quinn O'Brien met with Mr. Postawko to discuss M.D.'s recantation. *Id.* Mr. Postawko had just finished his videotaped interview with M.D. *Id.* At this meeting, Mr. Postawko stated that while he himself could not know if Mr. Lincoln was innocent, he agreed that the conviction was "bad" and could not stand. *Id.* Mr. Postawko also said his office

may be open to stipulating to release. *Id.* Mr. Postawko, undersigned counsel, and St. Louis City Prosecutor Jennifer Joyce had continued discussions about how to secure Mr. Lincoln's release until Respondent informed the parties that only its office had jurisdiction.

In its scramble to find evidence to exclude Sells as a viable suspect, Respondent ignores what Ed Postawko could not—M.D. has affirmed Mr. Lincoln's innocence and there is no possible evidence left to support his guilt.

D. Respondent's Newly-Minted "Funny Finger" Story is Fabricated.

The State's efforts to place Sells in Arkansas at the time of the crime are not the only facts they invented. In addition to arguing that Sells could not have committed the crime, the State also asserts that it must have been Mr. Lincoln because it now has evidence of a never-before presented story—that M.D. told Mary Flotron the perpetrator had "a funny finger." The State argues that this is conclusive "evidence" because Mr. Lincoln is missing a finger (and Sells is not). Response at 6. However, to the extent that there is any evidence at all, that evidence instead shows that not only did the State withhold exculpatory information that M.D. identified all men as the "bad man", it also worked to fabricate evidence against Mr. Lincoln of an event that never occurred.

Respondent alleges that M.D. told victim advocate Mary Flotron about a "funny finger." According to the State, Ms. Flotron conveniently never passed it

along to the police or prosecutor. Response at 7. In a phone call between counsel for Respondent and Mary Flotron, counsel states that Detective Joe Burgoon believed Ms. Flotron may have information. Resp. Ex. 9 at 2. Ms. Flotron immediately asks, "You want to hear the story about the bad man?" *Id.* at 3. Ms. Flotron went on to explain that one time, *shortly before trial*, she was driving with M.D. to dinner, when M.D. saw a black man at a stop sign and became agitated. *Id.* at 4. M.D. stated "That guy was the bad guy." *Id*. According to Ms. Flotron, M.D. said she knew it was the bad man because "He's got the funny finger." *Id*. Ms. Flotron said *that next Monday*, she went to Joe Bauer and asked, "Joe, does Rodney Lincoln have a funny finger?" *Id*. at 5. Nonetheless, none of this was ever presented at trial. Similarly, nowhere—not the thousands of pages of police reports, DFS reports, and transcripts, is the alleged description of the perpetrator as having a "funny finger" documented. That is because it never occurred.

Indeed, M.D. "never ever told Ed Postawko that Rodney Lincoln or her attacker was missing a finger." Ex. 46, Affidavit of Quinn O'Brien regarding M.D. And although Ms. Flotron states she remembers this story, she does so only after discussing it with detective Joe Burgoon. Resp. Ex. 9 at 7 ("Then years later it came up somewhere, and Joe Burgoon asked me about it, and I told him."), In fact, nowhere in the volumes of notes that Ms. Flotron took does this story appear, even though, according to Ms. Flotron, she took careful records of everything that

happened in her file. Exhibit 39, Affidavit of Quinn O'Brien regarding Mary Flotron at 1.

Instead, the only other instances where a "funny finger" is mentioned comes not from M.D. or Ms. Flotron, but from Joe Burgoon. Det. Burgoon has told several variations of this story. For example, Nathaniel Clenney, JoAnn Tate's brother, stated that since M.D. has recanted her identification of Mr. Lincoln, Burgoon has called him and other family members to try to persuade them back into thinking that Mr. Lincoln is Tate's killer. Ex. 36 at 3. Burgoon recently called Clenney and told him a story about how M.D allegedly told one of the ladies from the prosecutor's office that her mother's killer was missing a finger. *Id.* Burgoon said that the lady who had bought the girls clothes for the trial was giving M.D, and R.T. a bath together one day before Mr. Lincoln's trial, and that while the girls were playing in the bathtub, she overheard M.D. tell R.T, "Remember, the Bad Man is missing a finger." *Id.* Nathaniel was immediately suspicious of this story as such a statement was never brought up by the prosecution at trial. *Id.* Nor was it ever documented in any of the voluminous DFS records.

Abigail Wallace, M.D.'s aunt, also received a call from Burgoon. In it, Burgoon mentioned Mr. Lincoln's missing finger. Ex. 37 at 3. Abigail told Burgoon she didn't even know Rodney was missing a finger until he just told her.

Id. Abigail also does not remember M.D. ever saying anything about a missing finger or a cut off finger before or during Mr. Lincoln's trial. *Id.*

Finally, Burgoon also shared the story of the funny finger with a journalism class at the University of Missouri in 2005. Professor Steve Weinberg had invited Detective Burgoon to speak to his class as they investigated the case from a journalistic perspective. While talking to the class, Det. Burgoon told a story about Mary Flotron, which involved an anecdote about Ms. Flotron taking the girls to dinner. Ex. 44, Affidavit of Steve Weinberg at 1. This story was news to Prof. Weinberg, and he was sure to write it down. *Id.* In the story, the waiter serving them was missing a finger. *Id.* M.D. noticed the missing finger and became agitated. Mary noticed M.D.'s behavior and asked why she was so agitated. M.D. told her it was because the man who killed her mother was missing a finger. *Id.* Upon hearing this story, Prof. Weinberg contemporaneously emailed this information to Rodney Lincoln's daughter, Kay Lincoln. *Id.*at 1, 3. In the interim, Det. Burgoon contacted Mary Flotron and e-mailed Prof. Weinberg to state she confirmed the account. *Id.* at 4, 1. Prof. Weinberg then called Mary Flotron, who repeated Burgoon's version of the incident. *Id*. at 1.

Despite the State's reliance on this fabricated evidence, there is no reliability to the story. To the extent that it has been told at all, it was told years after trial and

varied wildly. Truthfully, the only consistency between these stories is that they all lead back to Burgoon.

Moreover, this is not the first instance in which the police misstate the evidence. Nathaniel Clenney recalls police telling him during the investigation that Mr. Lincoln had scratches all over his body when he was arrested. Ex. 36 at 3. For Nathaniel, when he heard that before the trial, "it sealed the deal" for him because he and Abigail had found JoAnn's fingernails when cleaning the apartment after the police had left. *Id*. Nathaniel figured Tate had really "got her claws" into whoever had done this to her. *Id.* But, as Nathaniel now realizes, the police misled him when they told the family that Mr. Lincoln had healing scratches and claw marks all over his body.

Similarly, Burgoon also told Nathaniel that the fingerprints found at the scene of the crime matched Rodney Lincoln, but because of court rules, they were not allowed to use them as evidence in trial. *Id.* Nathaniel now knows that to be false: the fingerprints found were never good enough to declare a match at all, which is why they could not be used in court. They were inconclusive. *Id.* He feels betrayed by the police. *Id.*

M.D. and her family are not the only one betrayed by the State's stretch of the truth. To the extent that M.D. was going around identifying other men as "the

bad man," Mr. Lincoln has also been betrayed. Such evidence that the young victim was identifying other individuals as the perpetrator was exculpatory, and if the State learned of it at all—even well after trial—disclosure was required because it exposes the unreliability of M.D.'s identification, and undercuts the inference that the children's alleged emotional reaction to Mr. Lincoln had any probative value at all. Each of these instances reflects a time in which M.D. identified a suspect, who unlike Tommy Lynn Sells or Steven Yancey, could not have committed the crime and the police did not arrest them. Such evidence is pivotal in a case like here, where Mr. Lincoln himself could not have committed the crime because of his alibi. *See* Petition at 13-14. Notably, the DFS records do reflect that such fear from the girls was common. Connie Radvin reported on September 28, 1982, that Rachel "said the girls like Dr. Carberry and she feels that it helps them to see a woman psychologist as they are both afraid of men." Ex. 9 at 276. And Carol Corgiat wrote on November 11, 1982, that Mr. Jamison, the school counselor who met with [M.D.] twice a week, said that she "uses her past experiences to get attention from him. seems jealous when he sees other students. Responds by telling teacher a man is waiting to get her." Ex. 9 at 335.

Finally, as Nathaniel Clenney notes, it is inconceivable to believe that this event and statement about a "funny finger" could have occurred and the State not used such evidence at trial. Ex. 36 at 3. Mary Flotron also finds it "unbelieveable"

that the State did not use this evidence at trial. Ex. 39 at 3. Respondent himself highlights the fact that this evidence was never presented by the State, noting that it was defense counsel who raised Mr. Lincoln's missing finger as a defense. Response at 18. Respondent mischaracterizes that event as well, stating, incorrectly, that "In closing argument, defense counsel argued the victim was unreliable because she had not mentioned the *killer* had a missing finger as his most distinctive characteristic. (T. 944-45.)" Response at 18. 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.) Thus, M.D. did not know that Mr. Lincoln had a missing finger, and never said the killer had a missing finger. Were either of these facts otherwise, the trial would have played out much differently. This whole story is yet another concoction created by investigators looking to close a case regardless of the cost.

E. Rodney Lincoln Is Innocent Under Any Standard.

The legal standard for adjudicating Mr. Lincoln's innocence, now that no evidence whatsoever connects him to the crime, is accurately set out in Mr. Lincoln's Petition for Writ of Habeas Corpus at pp. 2-4, and need not be repeated here. Respondent begins his defense of Mr. Lincoln's wrongful conviction with a misstatement of the standard to establish a prisoner's actual innocence. First, Respondent misstates the scope of the evidence on which this Court must resolve Mr. Lincoln's innocence, claiming: "'New' evidence in this sense means evidence that was unknown or unavailable at the time of trial." Response at 4, citing *McKim v. Cassady*, 457 S.W.3d 831, 846 (Mo. App. W.D. 2015). This significantly misstates *McKim*'s recognition that the Missouri Supreme Court "has signaled a willingness to treat *any* evidence that was unknown or unavailable to a defendant at the time of trial as 'new evidence,' *without regard to whether the evidence could have been discovered or developed with reasonable diligence at the time of trial*." *McKim v. Cassady*, 457 S.W.3d 831, 846 (Mo. Ct. App. 2015) (emphasis added), citing *State ex rel. Engel v. Dormire,* 304 S.W.3d 120, 126 (Mo. 2010) (en banc). *McKim* accepts that the innocence standard is first and foremost a search for truth and justice, which "requires a *holistic* judgment about '*all the evidence*,' 513 U.S. at 328, and its likely effect on reasonable jurors applying the reasonable-doubt standard." *House v. Bell*, 547 U.S. 518, 539 (2006) (emphasis added). The *Schlup*

standard defines a colorable claim of actual innocence as one supported by "new reliable evidence—whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence—*that was not presented at trial*." 513 U.S. at 324 (emphasis added). The Court of Appeals has observed that Missouri law allows a habeas court to revisit a prisoner's rejected claims in cases where cumulating evidence reveals the prior rejection was ill-informed. *State ex rel. Koster v. McElwain*, 340 S.W.3d at 229, n. 6, citing *State ex rel. Engel v. Dormire*, 304 S.W.3d 120. Thus, the standard this Court must apply does not preclude any of the evidence of innocence Mr. Lincoln now presents, and Respondent's invitation to cordon off *any* relevant and material evidence from consideration should be rejected.

Second, Respondent fails to accord sufficient respect to M.D. and her sworn statement that her original identification of Mr. Lincoln was the product of suggestive police procedures, and that her three-decade adherence to her mistake was driven by pressure to maintain her loyalty to the false narrative constructed by the adults she depended upon for protection. M.D. knows better than anyone the doubts that have plagued her for years. Her family is also coming forward with the doubts and questions they have had over the years. These doubts were shared by the first jury that heard the evidence and could not reach a verdict on Mr. Lincoln's guilt. In response to M.D.'s heartfelt, sincere and spontaneous revelation that

Rodney Lincoln's prosecution was a mistake, Respondent merely argues, "Recantations are generally to be regarded with suspicion," Response at 5, and cites *State v. Harris*, 428 S.W.2d 497, 501 (Mo. Div. 1 1968). In *Harris*, the defendant was convicted of soliciting a prostitute, and the recanting witness had testified at trial that she had sex with him for money. Analogizing M.D.'s recantation to the *Harris* case is as insulting as it is unpersuasive. The recantation in *Harris* is understandably viewed with suspicion, as are other cases in which recantations come from criminals or jailhouse informants.

On the other hand, a recantation by a law-abiding citizen with no reason to lie for the defendant 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 his original trial testimony). The State's Response ignores context important to M.D.'s persuasive explanation for spontaneously coming forward to correct a fundamental miscarriage of justice. Since it comes from a material witness, "the recantation is substantial evidence." *United States v. Ramsey,* 726 F.2d 601 (10th Cir. 1984). If independently corroborated, even recantation 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. *Amrine v. Roper, supra.*

The evidence that Mr. Lincoln is innocent is too compelling to ignore. 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, 700 (1993) (O'Connor, J., concurring in part and dissenting in part). Thus, where the evidence established a reasonable likelihood that no reasonable juror would convict based on all the evidence now available, a habeas court must decide the merits of the petitioner's claims, even if they are procedurally encumbered. *Schlup v.Delo*, 513 U.S. 298, 329 (1995). Further, the analysis of such a claim "must incorporate the understanding that proof beyond a reasonable doubt marks the legal boundary between guilt and innocence." *Id.* at 328. Thus, demonstrating actual innocence does not require "a case of conclusive exoneration." *House v. Bell*, 547 U.S. 518, 553 (2006). In *Schlup*, the Court noted that there were two prison officials whose identification of Mr. Schlup as one of the three perpetrators of the murder "stands unrefuted except to the extent that Mr. Schlup now questions its credibility." 513 U.S. at 331. Nevertheless, *Schlup* was allowed to pass through the innocence gateway to get relief on the merits of his claim of ineffective assistance of trial counsel. *Schlup v. Bowersox*, 1996 U.S. Dist. LEXIS 8887 (1996).

Unlike *Schlup* and *House*, not a scintilla of evidence remains to support even a bare suspicion that Mr. Lincoln committed this terrible crime. DNA testing has

proved beyond question, and in prior proceedings the parties agreed, that no physical evidence places Mr. Lincoln at the scene of the crime. *State v. Lincoln,* 457 S.W.3d 800 (Mo. App. 2014). With M.D.'s acknowledgment that Mr. Lincoln is NOT the man who attacked her family, no evidence remains to support a charge against Mr. Lincoln, just as in *Amrine v. Roper,* 102 S.W.3d 541 (Mo. 2003) (en banc). This Court must therefore reach the merits of Mr. Lincoln's constitutional claims and release him if he did not have a fair trial, *State ex rel. Koster v. McElwain, supra,* or if the evidence is clear and convincing that he is innocent. *Amrine v. Roper, supra.*

CLAIM TWO: Mr. Lincoln's Fourteenth Amendment Right To Due Process Was Violated When The Prosecution Presented False Evidence That A Hair From The Crime Scene "Matched" Rodney Lincoln.

Long before the advent of DNA evidence in criminal cases, the defense bar attacked microscopic hair evidence as empirically unsubstantiated pseudo-science. *See 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.") The visual comparison of hairs under a microscope for identifying characteristics is inherently subjective. The statistical inferences derived from combinations of characteristics were based on a small sample not normed to the population at large.

Proficiency testing of police criminologists conducting hair comparisons was non-existent. Advances in DNA technology made it possible to extract mitochondrial DNA from the shaft of a hair and compare it with known samples, which revealed alarmingly high error rates in prosecution expert testimony including or excluding the defendant from a suspect hair sample. The entire field of microscopic hair comparison was finally exposed as foundationless, if not outright fraud on the courts, which had virtually ignored the sound scientific criticism of microscopic hair testimony. Spencer S. Hsu, *FBI Admits Flaws in Hair Analysis Over Decades*, THE WASHINGTON POST, Apr. 18, 2015. Rodney Lincoln is but one victim of decades of police crime lab fraud and incompetence.

Respondent argues that Mr. Lincoln's claim is barred for not having been raised on direct appeal or in his Rule 27.26 motion, Response at 16, even though at the time of Mr. Lincoln's trial and appeal courts would have turned a blind eye to his meritorious argument that microscopic hair testimony should be excluded from criminal trials. *State v. White, supra.* The courts' uncritical acceptance of fraudulent hair testimony was so complete and unconditional that the Department of Justice took the unprecedented step of announcing not only that hair microscopy should never be used to "match" a known person to suspect sample, but also recommending that courts allow postconviction challenges to proceed in spite of

procedural barriers. In an open letter to all prosecuting agencies, the Department of Justice states:

> In the event that the Defendant seeks post-conviction relief based on the Department's disclosure that microscopic hair comparison reports or testimony used in this case contained statements that exceeded the limits of science, we provide the following information to make you aware of how we are handling such situations in federal cases. In such cases under 28 USC § 2255, in the interest of justice, the United States is waiving reliance on the statute of limitations under Section 2255(f) and any procedural default defense in order to permit the resolution of legal claims arising from the erroneous presentation of microscopic hair examination laboratory reports or testimony.

Ex. 47, Department of Justice Letter to Prosecuting Attorney George Perrot, Sept. 30, 2014, at 2-3.[7]

The Government's admission that hair microscopy evidence is discredited science is new, previously unavailable evidence that triggers the cause-and-prejudice standard for reaching the merits of new claims. It is hornbook law that "procedurally defaulted claims can be resurrected in a habeas corpus proceeding under a gateway claim of cause and prejudice or a gateway claim of innocence," 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

[7] Mr. Perrot was recently granted a new trial based solely on erroneous hair comparison testimony. *See* Spencer Hsu, *In a First, Judge Grants Retrial Solely on FBI Hair Match*, WASHINGTON POST (Feb. 3, 2016).

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:

> In addition, if we were to hold that the novelty of a constitutional question does not give rise to cause for counsel's failure to raise it, we might actually disrupt state-court proceedings by encouraging defense counsel to include any and all remotely plausible constitutional claims that could, some day, gain recognition. Particularly disturbed by this prospect, Judge Haynsworth, writing for the Court of Appeals in this case, stated:
>
> > 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. It is fundamentally unfair and serves no legitimate jurisprudential purpose to hold Mr. Lincoln to the burden of foreseeing in 1982 that twenty years in the future mitochondrial DNA technology would debunk hair microscopy evidence once and for all. This Court should reach the merits of Mr. Lincoln's claim that the State presented false hair microscopy testimony.

Moreover, Respondent's attack on the merits of Mr. Lincoln's claim relies on the same fraudulent pseudo-scientific reasoning that misled juries and judges for decades and that has since been abandoned. He offers no analysis of error, but repeats analyst Messler's misleading testimony that he compared thirty-seven hairs submitted in connection with the homicide of JoAnn Tate, improperly affirming the prosecutor's claim that only "one out of those, Rodney Lincoln's hair, matched." Response at 12. This testimony constitutes "an opinion as to the likelihood or rareness of the positive association that could lead the jury to believe that valid statistical weight can be assigned to a microscopic hair association," which "exceeded the limits of the science." Ex. 47 at 2. Respondent also quotes Messler's testimony that out of two hundred cases he dealt with, he had never "run across a circumstance where [he] had a hair from a crime scene that was matched to more than one person." Response at 12-13. The DOJ expressly condemns testimony about "the number of cases or hair analyses worked in the laboratory 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," because it "exceeded the limits of the science." *Id.* Respondent's statement that Messler's testimony was "based on the available science at the time," Response at 14, is false. Respondent simply digs his hole deeper.

The balance of Respondent's argument is likewise without merit, and ignores the critical corroborating role the hair evidence played in Mr. Lincoln's trial. One jury was unable to convict on the testimony of young M.D., and the prosecutor told the second jury that the hair was damning evidence:

> And I think Mr. Hampe has mischaracterized the pubic hair in this case. Mr. Crow told you that he was looking for hairs different from Joanne Tate's. Now, we're talking about a pubic hair. Joanne Tate had pubic hair. [M.D.] does not. [R.T.] does not. He separated out the pubic hairs that were not Joanne Tate's. There was one of them that matches that man's pubic hair. That was compared to thirty-seven others in addition to Joanne 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). Although the Court of Appeals ruled that standing alone, the DNA exclusion of Mr. Lincoln does not satisfy the "preponderance of evidence" standard of RSMo. § 54.037, *Lincoln v. State*, 457 S.W.3d 800 (Mo. App. ED 2014), 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). Given the refusal of one jury to convict, and the prosecutor's heavy reliance on the hair evidence in the rebuttal portion of his closing argument, Mr. Lincoln clearly satisfies the due process standard.

Respondent's argument that "[w]ithout the hair, the State had a strong case," Response at 14, is also meritless and simply highlights the materiality of the *Brady* violation discussed in connection with Mr. Lincoln's Claim III. Respondent's claim that M.D. "never wavered in her identification of Lincoln" is not true; the prosecutor's victim advocate, Mary Flotron, saw M.D. and her sister react emotionally to several men, including an Asian waiter, a black pedestrian, and prosecuting attorney Joe Bauer. *See* Resp. Ex. 9 at 4; Ex. 39 at 1. Previously undisclosed social service records finally released during DNA litigation in Mr. Lincoln's case establish that M.D. mistook many adult males for "the bad man" who attacked her, and that she was taken to the courtroom to rehearse and "role play" her testimony to identify Mr. Lincoln. Ex. 9 at 276, 335, 280, 317, 287, 319. Further, Mr. Lincoln's brief relationship with Ms. Tate is not the least bit suspicious; her diary contains only positive statements about several dates she had with Mr. Lincoln in April and May, 1981, nearly a year before the crime. Ex. 42, Pages from JoAnn Tate's diary. The fact that Ms. Tate's killer and Mr. Lincoln were both cigarette smokers in 1982 is hardly remarkable. Respondent's claim that the evidence is "strong" lacks any shred of integrity.

Because the State of Missouri used false evidence against Mr. Lincoln to obtain his conviction, relief should be granted. *Alcorta v. Texas*, 355 U.S. 28 (1957).

CLAIM THREE: The State's Failure To Turn Over Exculpatory Department of Family Services Records Violated Brady v. Maryland.

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). In addition, counsel 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.* Pursuant to Mo. Rule 25.03 and *Brady v. Maryland*, 373 U.S. 83 (1963), this was more than was necessary to trigger the State's obligation to disclose the DFS documents revealing the coaching of M.D. by assistant prosecuting attorney Joe Bauer in the presence of DFS workers, and the prior inconsistent statements of M.D. identifying various men as the "bad man" who attacked her. *See* Ex. 9. The documents reveal that the State's conduct went well beyond acclimating M.D. to the courtroom; state actors 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.* at 2; *see also* Resp. Ex. 9 at 3.

There is no merit to Respondent's bare allegation that Mr. Lincoln's claim is procedurally defaulted. Response at 16. Respondent's reliance on *State v. Wise*,

879 S.W.2d 494 (Mo. 1994), has no similarity to Mr. Lincoln's case because the prosecutor in *Wise* spontaneously disclosed possible *Brady* material and moved for a hearing prior to the direct appeal. Mr. Lincoln had no such opportunity. Further, since *O'Neal v. Bowersox*, 73 F.3d 169 (8th Cir. 1995), the Supreme Court has clarified a habeas petitioner's duty of diligence, holding that unless the prisoner is on notice of the underlying facts, there is no lack of diligence in his failure to investigate the claim. *Williams v. Taylor*, 529 U.S. 420, 434 (2000). Thus, a habeas petitioner was able to show cause to present a *Brady* claim in a habeas corpus petition under Rule 91 where "no indication that the State ever informed the defense" about the exculpatory evidence in question. *State ex rel. Clemons v. Larkins*, 475 S.W.3d 60 (Mo. banc 2015). Respondent points to no evidence which would have put a reasonable attorney on notice that exculpatory evidence was contained in the DFS records. *Id.* Therefore, there is no procedural default.

Respondent's procedural bar argument offends all notions of justice, fairness and integrity. In the context of a *Brady* violation, Respondent urges, "in effect, that 'the prosecution can lie and conceal and the prisoner still has the burden to . . . discover the evidence,' so long as the 'potential existence' of a prosecutorial misconduct claim might have been detected." *Banks v. Dretke*, 540 U.S. 668, 696 (2004). In *Banks*, the Court concluded, "A rule thus declaring 'prosecutor may hide, defendant must seek,' is not tenable in a system constitutionally bound to

accord defendants due process." *Id.* Contrary to Respondent's request, "Prosecutors' dishonest conduct or unwarranted concealment should attract no judicial approbation." *Id.*, quoting *Kyles v. Whitley*, 514 U.S. 419, 440 (1995).

There is also no merit to Respondent's argument that *Brady* imposed no duty to disclose documents generated by DFS who were helping the prosecution prepare M.D. to testify against Mr. Lincoln. Response at 16. Employees of the prosecuting attorney's office and St. Louis City Police detectives worked hand-in-hand over time to prepare M.D. to be the star witness in the State's case against Mr. Lincoln. It is not acceptable for the State now to disavow responsibility for disclosing exculpatory evidence known to state actors. "[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." *Kyles v. Whitley*, 514 U.S. 419, 437 (1995). 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. The suppressed *Brady* material shows that the prosecution worked together with DFS social workers to prepare M.D. to testify. In October 1, 1982, Assistant Circuit Attorney Joe Bauer communicated with Juvenile Officer Mary Ladish regarding a pretrial hearing about the conditions of M.D.'s testimony. Ex. 9 at 279-80. Beginning in January 1983, DFS records document that Mr. Bauer, Victim Assistant Mary Flotron, and Detective Burgoon were working closely with M.D.

and her sister, and were all present during courtroom rehearsals. *Id.* at 287. The records document multiple role-playing exercises (i.e., testimony rehearsals) with Joe Bauer in December 1982, and January, February and March 1983. *Id.* at 280, 287-90, 319, 321. DFS records also reveal that when M.D. disclosed for the first time on February 9, 1983, that she was sexually assaulted during the attack, this "previously undisclosed information was forwarded to the circuit attorney." Ex. 9 at 304. That DFS and the circuit attorney were working hand-in-hand is apparent from such DFS record entries as, "counseling efforts will focus on helping both [M.D.] and[R.T.] cope successfully with the demands of the courtroom proceedings." *Id.* at 329. Those records also document meetings between Joe Bauer, Psychologist Ann Carberry, DFS Case Manager Connie Radvin, Juvenile Court Officer, Mary Ladish and Victim Assistance Advisor Mary Flotron. *Id.* at 330. One entry reflects that a DFS caseworker "stressed the importance of [R.T.'s] testimony to counter Rodney's protestations of innocence." *Id.* at 326. That same entry 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.*

Given the extensive interaction between the prosecutor and DFS, and the supporting role that DFS played in investigating, preparing and presenting the State's case, it is inconceivable that the prosecutor did not have a "duty to learn," *Kyles v. Whitley, supra,* what the DFS records contain in order to determine the

scope of his *Brady* obligation. "The individual prosecutor is presumed to have knowledge of all information gathered in connection with the government's investigation." *United States v. Payne*, 63 F.3d 1200, 1208 (2d Cir. N.Y. 1995), citing *Kyles v. Whitley*, *supra*. A prosecutor's constructive knowledge extends to individuals who are "an arm of the prosecutor" or part of the "prosecution team." *United States v. Gil*, 297 F.3d 93, 106 (2d Cir.2002); *see also United States v. Morell*, 524 F.2d 550, 555 (2d Cir.1975); *United States v. Bin Laden*, 397 F.Supp.2d 465, 481 (S.D.N.Y.2005). Whether someone is part of the prosecution team depends on the level of interaction between the prosecutor and the agency or individual. *Morell*, *supra* at 555; *see also United States v. Diaz*, 176 F.3d 52, 106–07 (2d Cir.1999) (circumstances that make someone part of the prosecution team include whether the individual actively investigates the case, acts under the direction of the prosecutor, or aids the prosecution in crafting trial strategy).

The case for imputing knowledge of DFS employees to the prosecutor in this case is at least as strong as other cases in which Missouri courts have done so. In *State ex rel. Clemons v. Larkins*, 475 S.W.3d 60 (Mo. 2015), the habeas petitioner alleged that his confession to police was beaten out of him and the police denied it. A bail officer, an employee of the Missouri Department of Probation and Parole, interviewed Clemons as he was checked into the jail within hours of his interrogation and noted in writing that Clemons had a bruised lump on his face

larger than a golf ball. The prosecution spoke with the probation officer but never disclosed his observations or report. The prosecutor in *Clemons* knew of the existence of the witnesses. So, too, did Mr. Bauer know that DFS social workers were helping to coach M.D. Indeed, he was an active participant in the sessions. Mary Flotron, a Victim Witness Coordinator employed by the prosecutor, was also present during M.D.'s rehearsal sessions and worked closely with DFS social workers as well. She personally observed occasions when M.D. cowered from men she thought might be the "bad man," and she even witnessed her cowering from Mr. Bauer. Resp. Ex. 39 at 1; Ex. 10 at 3. The defense could have used such evidence to test the credibility of M.D., on whom the entire weight of the prosecution case depended, and to undermine the prosecutor's argument that the girls' cowering behavior was probative of Mr. Lincoln's guilt.

Because a prosecutor has a duty to disclose evidence known by police officers, even if not known by the prosecutor, "a prosecutor has an attendant duty to learn of such evidence." *United States v. Tyndall*, 521 F.3d 877, 882 (8th Cir. 2008). This attendant duty to learn of material and exculpatory or impeachment evidence "necessarily anticipates that a prosecutor will have an opportunity to discover such evidence through the exercise of reasonable diligence." *United States v. Robinson*, 809 F.3d 991 (8th Cir. 2016). It is also important to note that even if Mary Flotron's exculpatory knowledge of exculpatory events described in

Petitioner's Exhibits 10 and 39 and Respondent's Exhibit 9 was not documented, the State was obliged to disclose them. *State ex rel. Koster v. McElwain,* 340 S.W.3d 221 (Mo. App. WD 2011) (*Brady* violation found where State failed to disclose murder victim's many complaints to the sheriff about her abusive estranged husband's threats, even though the sheriff never documented them).

Respondent's claim that "there is nothing exculpatory here," Response at 17, is based on a blatant mischaracterization of the evidence. Mary Flotron told M.D. during one of the prosecutor's role-playing sessions, "This is where Mr. Lincoln will be sitting. This is where his lawyer will be sitting." Ex. 10 at 3; Ex. 39 at 2. This goes well beyond "familiarize[ing] the child victims with the court room." Response at 17. Further, Ms. Flotron observed the children reacting emotionally to random men, including the prosecutor. 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; Ex. 39 at 1. In assessing the materiality of evidence, this Court must consider how a competent defense lawyer would have used the evidence in defense of 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 "attacked 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," i*d.*). Respondent's argument not only ignores the evidence, but also the use to which it could have been made. The State argued at trial, on appeal and in its response in this proceeding that R.T.'s emotional reaction to Mr. Lincoln is evidence of his guilt. *See* (T. 977); *State v. Lincoln*, 705 S.W.2d 576, 577 (Mo. App. 1986); Response at 14. The non-disclosed statements that such reactions by M.D. and R.T. to other men, including the assistant prosecutor, undercuts that inference completely. Further, the defense could reasonably argue these many episodes of emotional reactions to strangers each constituted a prior inconsistent identification of men other than Mr. Lincoln. Further, evidence that the child witness had been told where Mr. Lincoln would be sitting during the trial would have supported an argument that she had been coached to identify him, thus casting doubts on the integrity and honesty of the state's evidence. The jury may well have concluded that "eyewitness had been coached," *Kyles, supra* at 454, thus undermining the reliability of the sole witness whose testimony was the "lynchpin" of the state's case.

In conclusion, *Brady* requires a "cumulative evaluation" of all the non-disclosed exculpatory evidence, *Kyles v. Whitley, supra* at 441. Contrary to

Respondent's suggestion, "the question is not whether the State would have had a case to go to the jury if it had disclosed the favorable evidence, but whether we can be confident that the jury's verdict would have been the same." *Id.* at 453. Given that one jury could not reach a verdict of guilt, and the second jury lacked the benefit of significant exculpatory evidence in the possession of the State, this Court should have no confidence in the jury's verdict. This is yet another case in which the State's violation of its *Brady* obligations contributed to the conviction of an innocent man.

CLAIM FOUR: Trial counsel was ineffective for failure to present evidence of the child witness' suggestible state, that M.D. identified the killer as "Bill" numerous times, and that the children's testimony was coached.

Like the false evidence created above, Respondent's arguments that Mr. Lincoln's trial counsel was effective is both indefensible and built upon a misrepresentation of the facts. In support of the notion that trial counsel "did an outstanding job" cross-examining the victim, the State highlights just seven pages of the trial transcript. (T. 366-374). In that cross-examination, defense counsel brought in just 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 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). Nowhere did trial counsel ask any of the pivotal questions illuminating the numerous times M.D. identified "Bill" as the perpetrator, the circumstances surrounding how Mr. Lincoln even came to be a suspect (including the creation of the composite sketch, the reading of Tate's diary, and M.D.'s identification), the fragile state of M.D. at the time, or the close nature of the relationship between M.D. and employees of the State. As outlined in Mr. Lincoln's Petition for Habeas Corpus, M.D.'s statements could have and should have been attacked on all these issues, not just through M.D., but through the numerous other witnesses who could have testified to these issues, including Nathaniel Clenney, Abigail Wallace, Detective Joe Burgoon, psychologist Dr. Anne Carberry, social worker Wayne Munkel, Victim Services Coordinator Mary Flotron, and the nurses and doctors who heard inconsistent statements at the hospital. *See* Petition at 49-57. It is no wonder the State describes such inept performance as "outstanding," as it was certainly outstanding for their case.

Further, the State severely misstates the evidence when it states "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." Response at 18. Counsel did *not* ask about the killer, which would have been more useful, but

instead asked about the most distinguishing characteristic of Rodney Lincoln. (T. 366.) In its effort to make any argument bolstering the performance of trial counsel, the State is again forced to reach for evidence that is just not there.

Finally, Respondent asserts that Mr. Lincoln's ineffective assistance of counsel claims are barred because "there is no good reason Lincoln could not have placed his current attacks on counsel in the Rule 27.26 motion." Response at 18. Respondent does not cite any authority for this contention. Moreover, Mr. Lincoln did raise such issues in his appeal, including trial counsels 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. Tragically, just like trial counsel, post-conviction counsel also failed Mr. Lincoln when he dropped all of these claims on appeal. Appellant's Brief, Mo. Ct. App. E.D. No. 54378 (May 16, 1988). None of this, however, bars these claims from this Court's review.

Missouri has incorporated the federal cause-and-prejudice and miscarriage of justice standards into its own dual system of postconviction review; even if a claim was omitted or defaulted in an initial Rule 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 these federal doctrines. *See, e.g., State ex rel. Engel v. Dormire*, 304 S.W.3d at 120; *State ex rel. Koster v. McElwain*, 340 S.W.3d 221 (Mo. Ct. App. 2011). The Missouri Supreme Court explained that incorporating federal cause-and-prejudice standards is appropriate because "Inasmuch as this Court has discretion to issue writs of habeas corpus and a duty to protect the rights afforded prisoners under the Constitution of the United States, it is at least arguable that this Court should not defer habeas corpus jurisdiction to the federal courts." *Reuscher v. State*, 887 S.W.2d 588, 591 (Mo.1994) (en banc).

To that end, the United States Supreme Court has found 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 Mr. Lincoln could have litigated his claim of ineffective assistance of trial counsel:

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

Martinez v. Ryan, 132 S. Ct. 1309, 1318 (2012). Thus, ineffective assistance of postconviction counsel, while not an independent claim for relief from a conviction, will allow a reviewing court to reach the merits of a claim that was defaulted by postconviction counsel's deficient performance.

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

claim of cause and prejudice or a gateway claim of innocence." *State ex rel. Koster v. McElwain*, 340 S.W.3d at 229.

CONCLUSION

Because Mr. Lincoln's continued incarceration is a fundamental miscarriage of justice that must be corrected, counsel for Mr. Lincoln respectfully pray that this Court:

A. Immediately release Mr. Lincoln on bail;

B. Conduct a hearing on the allegations of this petition;

C. Issue the writ of habeas corpus discharging Mr. Lincoln from his unconstitutional conviction and sentence; and

D. Grant such further relief at the Court deems just and equitable.

Respectfully submitted,

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

_/s/_*Sean D. O'Brien*_____
Sean D. O'Brien #30116
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 is not required beyond the Notification of Electronic Filing to be forwarded on February 22, 2016 upon the filing of the foregoing document.

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