IN THE CIRCUIT COURT OF PIKE COUNTY, MISSOURI
Circuit Judge Division No. 1

CHARLES TIMOTHY ERICKSON, Petitioner, vs. DAN REDINGTON, WARDEN, NORTHEAST CORRECTIONAL CENTER, Respondent.	)))))))))))	Case No. _____

FIRST AMENDED PETITION FOR WRIT OF HABEAS CORPUS

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I. INTRODUCTION

In the early spring of 2004, two teenaged boys, Charles Timothy Erickson and Ryan William Ferguson, were arrested for a crime they did not commit.

During the months following their arrest, the Columbia police and Boone County prosecutors took a no-holds-barred approach to convince a jury that those two boys acted together to attack, rob, and murder a man during the early morning hours of November 1, 2001. They withheld evidence. They fabricated evidence. And they unconstitutionally coerced Charles to falsely confess and plead guilty. As a direct consequence of the State's abuses and despite their innocence, Charles and Ryan were convicted of robbery and murder.

Ryan spent a third of his life in prison before the Court of Appeals found prosecutorial abuses required his release in 2013.

Now after almost fifteen years in prison,[1] Charles seeks the same justice as Ryan and petitions this Court for a Writ of Habeas Corpus, pursuant to section 532.430, RSMo 2000 and Supreme Court Rule 91.

II. JURISDICTION STATEMENT

Jurisdiction lies with this Court. Rule 91.02 requires any petition for writ of habeas corpus in the first instance be made "to a circuit or associate circuit judge for the county in which the person is held in custody if at the time of the petition, such judge is in the county." Charles, Department of Corrections number 1138775, is presently held at the Northeast Correction Center in Pike County. Therefore, this petition is properly brought before the Pike County Circuit Court.

Charles has not petitioned any higher court for a writ of habeas corpus.

[1] The Order sentencing Charles and placing him under the custody of the Department of Corrections was made as a docket entry to his case. (Ex. 52 (Criminal Docket).)

III. STATEMENT OF FACTS AND PROCEDURAL HISTORY

For almost fifteen years, Charles Erickson has languished in prison for a conviction that is not supported by any physical evidence or testimony. The *only* reason Charles became, and now remains, incarcerated is that aggressive police and prosecutors exploited his vulnerabilities, including his past experiences, psychological disorders, youth, cognitive dysfunction, and substance abuse, to coerce Charles to confess and plead guilty to a crime he did not commit. Some of the methods they used included: wrongfully withholding exculpatory evidence, unlawfully fabricating evidence they would use to deceive Charles into falsely believing he committed crimes, and applying unconstitutional pressure that deprived him of the volition and knowledge necessary to offer a constitutionally adequate guilty plea.

A. Charles' Frailties and Experiences Made Him Susceptible to Coercion.

Charles was born into a situation that would normally set a person up for a life of success. He was raised in an intact family. He did well in elementary school, played the viola in his school orchestra, sang in school choirs, was an active Boy Scouts, and played many sports.

1. Charles Suffers from Several Psychological and Cognitive Disorders that Made Him Susceptible to Coercion.

But something changed the year his family moved from Cincinnati, Ohio to Columbia, Missouri, when Charles began to exhibit many of the psychological and social weaknesses that would plague him for years. Charles' grades at school had started to decline before his family's move, but they declined even further afterward. (Ex. 1 (Aaron Rpt.), at 9.) This is also the year Charles started abusing substances: beginning with marijuana and alcohol and then escalating over time to include LSD, mushrooms, cocaine, and Ritalin or Adderall. (*Id.*) Charles often abused these substances with his peers and smoking marijuana became part of their everyday activities. (*Id.*)

Concerned for their son, Charles' parents made serious efforts to help him. When Charles was fifteen, they took him to a psychologist to address his poor behavior and drug abuse. (*Id.*) That psychologist determined Charles had "Adjustment Disorder with Mixed Anxiety and Depressed Mood." (*Id.*) Charles' parents also sent him to a substance abuse treatment center for six months of treatment. (*Id.* at 9-10.) In each case, those treating Charles were skeptical of his will to change. (*Id.*)

When Charles' attention problems and peer associations did not improve, Charles' parents sought another psychological evaluation when he was seventeen. (*Id.* at 10.) This time, the doctor found that Charles' memory was below normal, and substantially lower than his IQ and verbal reasoning. (*Id.*) This significant deficit yielded a diagnosis of a learning disorder that, according to the doctor, may have been caused by low effort, mild neurological impairment, or substance abuse. (*Id.*)

In addition to his anxiety, depression, cognitive disabilities, and other impairments caused by his excessive substance abuse, Charles was likely suffering from Obsessive-Compulsive Disorder, or "OCD," tendencies. Obsessive-Compulsive Disorder is a psychological disorder characterized by obsessions (recurrent, persistent unwanted thoughts or images) and/or compulsions (repetitive behaviors or mental acts that a person feels compelled to do in response to obsessions). (*Id.* at 13 n.1.) Risk for anxiety and OCD can be biologically based—as it appears was the case for Charles. (*Id.* at 13.) Charles' mother has reported suffering from OCD symptoms, and his younger sibling received treatment after anxiety and panic attacks developed into debilitating OCD inhibiting that sibling's ability to work. (*Id.*) Although Charles did not receive a formal OCD diagnosis and treatment until after his incarceration, (*id.*), many of the

details discussed *infra* demonstrate that Charles had a clear tendency toward obsessive thought that is indicative of OCD, (*id.*).

2. Charles' Youth and Childhood Experiences Made Him Susceptible to Believing He Could Act Out of Character While under the Influence of Drugs or Alcohol.

In addition to Charles' cognitive and psychological vulnerabilities, several childhood and adolescent experiences made him susceptible to believing that he could have done something so heinous and out of character as commit a serious felony while drunk and not remember anything.

The first of those examples is Charles' own father who, before Charles' twelfth birthday, suffered from alcoholism. (Ex. 1 (Aaron Rpt.), at 8, 10.) Prior to a DUI that ultimately caused Charles' father to end his alcohol problems, Charles recalls several incidents where his intoxicated father acted out of character and did things that he could not later recall. (*Id.* at 10-11.)

When Charles started abusing drugs and alcohol, he felt he also did things while under the influence that did not conform with his character and personality. As a youth, some of Charles' teachers described him as a shy introvert who was a "good kid," "sincere," and a "hard worker." (*Id.* at 12.) Nevertheless, Charles recounts episodes where, after abusing substances, he learned he had done several out-of-character things he could not remember such as allegedly stealing, damaging, or destroying things from his friends' homes, shooting a pellet gun out of a car, fighting, shoplifting, and urinating in a friend's laundry dryer. (*Id.* at 11; ex. 2 (Erickson Aff., Aug. 29, 2011 ("Erickson Aff. 4")), at 6.)

B. <u>Charles' Halloween Night in 2001 Was Filled with Poor Teenaged-Choices, but Was Otherwise Uneventful.</u>

On Halloween in 2001, seventeen-year-old Charles' vulnerabilities, as well as his youthful exuberance and poor decision-making, were on full display. He began that night at a

house party where he snorted Adderall and cocaine, drank beer from a keg, and played drinking games. (Ex. 2 (Erickson Aff. 4), at 1; ex. 3 (Ferguson Trial Tr. ("Trial Tr.")) 1776:11-1778:19; ex. 4 (Ferguson Habeas Tr. ("Habeas Tr."), at 271:3-7, 274:3-12.) After the party was broken up, (ex. 2 (Erickson Aff. 4), at 1-2; ex. 5 (Ferguson Dep.), at 55:1-6, 56:2-16, 59:12-19), Charles met with his friend Ryan Ferguson, and they decided to continue partying at By George, a downtown Columbia bar where Ryan's sister could get them in, (ex. 3 (Trial Tr.), at 1779:21-1780:12; ex. 5 (Ferguson Dep.), at 63:15-65:5; ex. 2 (Erickson Aff. 4), at 2; ex. 4 (Habeas Tr.), at 273:16-275:23). Charles estimates that by the end of the night, and in addition to the Adderall, he consumed twelve or more drinks and two lines of cocaine, causing him to "black out" and lose any recollection of what happened afterward. (Ex. 1 (Aaron Rpt.), at 14-15; ex. 2 (Erickson Aff. 4), at 2; ex. 6 (Erickson Aff., Feb. 9, 2011 ("Erickson Aff. 3"), at ¶14; ex. 4 (Habeas Tr.), at 277:2-5.) Although Charles does not recall, he and Ryan left the bar around closing time, 1:30 a.m., Ryan dropped Charles off at his house, and then Ryan went home. (Ex. 4 (Habeas Tr.), at 465:13-466:23; ex. 3 (Trial Tr.), at 1784:24-1785:17, 1786:20-24, 1788:21-1793:7; ex. 5 (Ferguson Dep.), at 85:7-86:25, 88:4-90:6, 92:4-6.)

While home for the night, Charles and Ryan were completely unaware that a journalist at the Columbia Daily Tribune was brutally murdered at the newspaper's offices, a short distance from By George.[2] Around 2:20 a.m., janitors Shawn Ornt and Jerry Trump noticed two men in the newspaper's parking lot ducking behind sports-editor Kent Heitholt's car. (Ex. 7 (Police Rpts.), at 000002.) One of the two, white, six-foot-tall, medium to muscular built twenty-

[2] By George was located at 63 East Broadway, in Columbia, Missouri—about one-third of a mile from the Columbia Daily Tribune's offices at 101 North 4th Street.

somethings shouted, "Somebody's hurt, man" and then they quickly left the site.[3] (*Id.*) When people went to investigate, they found Kent Heitholt's body lying in a pool of his own blood, having been beaten and then strangled to death. (*Id.*)

The next morning, Charles woke up without any memory of how the night had ended or any indication that anything extraordinary had occurred. (Ex. 2 (Erickson Aff. 4), at 2; ex. 4 (Habeas Tr.), at 277:14-278:20.) He even recalls bragging to his friends at school the next day about the highlight of his night—sneaking into a club while still underage. (Ex. 2 (Erickson Aff. 4), at 2; ex. 4 (Habeas Tr.), at 279:1-6.)

C. Charles' Vulnerabilities Led Him to Obsess over the Heitholt Murder Years Later.

Charles' bad habits and vulnerabilities spiraled out of control through the rest of high school and beyond. He "was probably addicted to Adderall" during his junior and senior years. (Ex. 2 (Erickson Aff. 4), at 3.) By graduation and into college, he smoked marijuana three to four times daily, snorted cocaine two to three times a week, used "hallucinogens, other drugs[,] and drank religiously every Friday and Saturday." (*Id.* at 3, 8; ex. 4 (Habeas Tr.), at 271:8-20.) And he closed himself off from healthy socialization by limiting his relationships to those acquaintances he could use to get drugs or who would get high with him. (Ex. 2 (Erickson Aff. 4), at 3.) In his words, Charles "lived to get messed up." (*Id.*)

Charles' obsessive compulsions and paranoia also intensified when he puzzlingly began to associate himself with the Heitholt murder. Although Charles first heard about the Heitholt murder shortly after it happened, he did not then suspect he had anything to do with it. (Ex. 2 (Erickson Aff. 4), at 3; ex. 4 (Habeas Tr.), at 281:20-282:12.) Two years later, after reading

[3] In 2001, Charles and Ryan were both 17-years-old. Both were only about 5' 6"-7". (Ex. 3 (Trial Tr.), at 630:19-631:3, 1780:13-17.) Neither would have been considered athletic or muscular in 2001. (*Id.* at 631:4-17, 1780:18-23.)

newly published newspaper stories about the unsolved murder, Charles thought he resembled a composite sketch of one of the suspects and began to obsess over his lack of memory of that night. (Ex. 2 (Erickson Aff. 4), at 4; ex. 1 (Aaron Rpt.), at 15; ex. 4 (Habeas Tr.), at 282:24-284:13.) Unable to definitively eliminate suspicions of his own participation, Charles researched the crime by devouring newspaper articles, driving by the scene of the murder, and watching crime shows on television. (Ex. 2 (Erickson Aff. 4), at 5, 10; ex. 1 (Aaron Rpt.), at 16; ex. 4 (Habeas Tr.), at 285:4-20.)

After ruminating constantly for two months, over, Charles resolved to try to settle his unsubstantiated concerns by asking Ryan. (Ex. 2 (Erickson Aff. 4), at 6; ex. 1 (Aaron Rpt.), at 16.) Charles had reasoned that if he was involved in the Heitholt murder, he would have done it with Ryan. (Ex. 2 (Erickson Aff. 4), at 8; ex. 1 (Aaron Rpt.), at 16; ex. 4 (Habeas Tr.), at 286:10-13.) So during a New Year's Eve party both were attending, and after consuming alcohol and using cocaine, (Ex. 2 (Erickson Aff. 4), at 6), Charles invited Ryan to join him outside to smoke and asked him if they had anything to do with the Heitholt murder, (Ex. 2 (Erickson Aff. 4), at 8; ex. 1 (Aaron Rpt.), at 16; ex. 5 (Ferguson Dep.), at 103:1-22; ex. 3 (Trial Tr.), at 1772:5-1773:13; ex. 4 (Habeas Tr.), at 286:16-287:2). Recognizing the absurdity of Charles' question, Ryan rebuffed him. (Ex. 3 (Trial Tr.), at 1773:7-1774:6; ex. 5 (Ferguson Dep.), at 103:4-105:16; ex. 2 (Erickson Aff. 4), at 8; ex. 4 (Habeas Tr.), at 287:3-22, 288:16-289:24.)

Ryan's response neither satisfied Charles, nor calmed his suspicions about their participation in the Heitholt murder. (Ex. 1 (Aaron Rpt.), at 17; ex. 2 (Erickson Aff. 4), at 9; ex. 4 (Habeas Tr.), at 290:9-19.) Charles' paranoia increased as he thought he heard an unidentified woman at his college shout "He's a murderer!" at him. (Ex. 2 (Erickson Aff. 4), at 9; ex. 4 (Habeas Tr.), at 290:18-22, 291:4-6.) With his suspicions unresolved, and as a form of self-

preservation, Charles pieced together how he thought the murder would have occurred and placed a larger portion of the blame on Ryan. (Ex. 4 (Habeas Tr.), at 291:7-18, 292:8-294:15; ex. 2 (Erickson Aff. 4), at 11.) Then, when he was high on cocaine and drunk, he tested his theories on friends. (Ex. 4 (Habeas Tr.), at 295:24-297:11; ex. 2 (Erickson Aff. 4), at 10-11.) Those who overheard Charles' and Ryan's New Year's Eve conversation or listened to Charles' drunk theories told the police. (*See* ex. 8 (Interrogation 1), at 25:21-26:8.)

D. The Police Arrested Charles and Exploited His Vulnerabilities to Coerce Him into Confessing to the Heitholt Murder.

March 10, 2004 began as uneventful day for Charles. He woke up around seven that morning, hungover after drinking and snorting cocaine the night before. (Ex. 2 (Erickson Aff. 4), at 12.) He likely smoked some marijuana shortly after that, as was his habit. (*Id.*) And then he smoked some more marijuana on his way to school. (Ex. 9 (Erickson Aff., Oct. 12, 2010 ("Erickson Aff. 1")), at ¶6; ex. 10 (Erickson Aff., Nov. 23, 2010 ("Erickson Aff. 2")), at ¶6; ex. 6 (Erickson Aff. 3), at ¶11; ex. 2 (Erickson Aff. 4), at 12.) When he exited his car to grab his books and head off to class around 9 a.m., Charles was arrested and taken "downtown." (Ex. 2 (Erickson Aff. 4), at 12.)

During the hours of interrogations that followed, it should have been apparent that Charles had no first-hand knowledge of the murder. Charles repeatedly told investigators that his memories were "foggy," "dreamlike," and were based on assumptions made after reading newspaper articles. (Ex. 8 (Interrogation 1), at 15:14-24; ex. 11 (Interrogation 2), at 9:1-10, ex. 12 (Interrogation 3), at 4:10-17, 5:4-6:11, 13:1-9.) And although Charles was supposedly confessing about a serious crime of his own free will, he told a story replete with internal conflicts and contradicting the actual known facts. Examples include: Charles repeatedly told the detectives that he vomited at the scene when no vomit was found. (Ex. 8 (Interrogation 1), at

13:2-18; ex. 12 (Interrogation 3), at 18:17-25.) Charles mentioned several times Ryan had a wallet stolen from Mr. Heitholt, (ex. 8 (Interrogation 1), at 8:19-9:1, 11:21-12:23, 22:19-24; ex. 11 (Interrogation 2), at 9:21-10:15), when reports show the police recovered Mr. Heitholt's wallet from the scene, (ex. 7 (Police Rpts.), at 000104-121). And Charles claimed he "blacked out" after first striking Mr. Heitholt and could not remember anything until Ryan got him "to get up and leave," although he still recounted details that occurred during that black out. (Ex. 8 (Interrogation 1), at 4:4-5:2; ex. 12 (Interrogation 3), at 15:12-16:5.)

Yet the police remained unrelenting in their efforts to obtain incriminating statements from Charles—regardless of his innocence. One tactic they used was to feed Charles information to "correct" his recollection about the murder. After Charles claimed he had struck Mr. Heitholt only once, a detective informed him that there were "multiple, multiple, multiple contusions, hits, and strikes on [Mr. Heitholt's] head." (*Compare* ex. 8 (Interrogation 1), at 19:13-20:10 *with* 26:9-25.) When Charles expressed that Ryan had strangled Mr. Heitholt with his hands, (ex. 8 (Interrogation 1), at 5:3-15), police revealed to Charles that Mr. Heitholt had been strangled with an object, (ex. 8 (Interrogation 1), at 20:24-21:2). Charles later guessed that Mr. Heitholt was strangled with a shirt, (ex. 8 (Interrogation 1), at 21:4-7), and then a bungee cord, (*id.* at 21:9), or possibly a rope, (*id.* at 21:9-10), but the police again corrected Charles by disclosing that the true perpetrator had strangled Mr. Heitholt with a belt, (*id.* at 21:11-16). And when Charles could not remember the site of the murder, a detective drove Charles around downtown Columbia and pointed out the exact spot. (Ex. 11 (Interrogation 2), at 6:12-7:15.) Using about forty-four different leading questions, the police crafted their crime narrative through Charles. *Ferguson v. Short* (*Ferguson 4*), No. 2:14-cv-04062-NKL, 2015 U.S. Dist. LEXIS 107131, at *62-*63

(W.D.Mo. Aug. 14, 2015) (denying a motion to dismiss after finding that the detectives' interrogation methods "constitute proof of fabrication of evidence").

In addition to unabashed suggestion, police also used force and intimidation to obtain the confession they sought. When Charles erred from their crime narrative and provided exculpatory information, his interrogators forcefully rejected Charles' statements. In one instance, where Charles expressed difficulty in remembering events (he had never experienced), a detective interjected:

> Q. Let's just stop right here. Okay? Now, one thing I'm not gonna do is I'm not gonna sit here and listen to this kind of gibberish. Okay? I'm not gonna waste my time doing that.
> A. I'm not trying to –
> Q. No, no, no, no. Wait. Wait. Wait. Wait. Wait. Now, listen. I'm gonna start talking –
> A. I'm sorry.
> Q. - and you're gonna start listening. Okay?

(Ex. 12 (Interrogation 3), at 6:6-20.) In another instance where Charles tried to explain his memory trouble, stating "I could have just flipped out, man. I don't know," he was stopped and told "[I]t's not a matter of flipping out and 'I don't know what's going on.' We know you know what's going on. Maybe you forgot some of it, but you didn't forget all that you're telling me." (Ex. 8 (Interrogation 1), at 25:19-26:8.)

Lastly, the police repeatedly threatened and intimidated Charles, using language conveying that he risked exposure to the death penalty, to coerce Charles into implicating Ryan. Apparently frustrated by Charles' inability to recall an event he never experienced, they told him he had "better start thinking very clearly. . . . Because it's you that is on this chopping block. Am I clear . . . to you?" (Ex. 12 (Interrogation 3), at 7:4-11.) More explicitly, Charles was told "I'm gonna be point blank with you, pal. Right now your hind end is the one that's hanging over the edge, and Ryan could care less [*sic*] about it," (ex. 12 (Interrogation 3), at 6:21-23), and "What I

want to hear is exactly what Ryan told you, because that's what's gonna keep you in a position to where you're not gonna be the sole individual out here responsible for what happened to Kent," (ex. 12 (Interrogation 3), at 7:19-22).

These tactics were effective. The police broke Charles and he provided them the confession they sought, although it was completely contrived.

E. Police and Prosecutors Exploited Charles' Vulnerabilities to Coerce Him into Pleading Guilty to a Crime He Did Not Commit and Testifying against His Ryan.

Over the months that followed Charles' arrest and coercion-induced false confession, police and prosecutors persisted in applying significant psychological pressure on Charles to coerce him into pleading guilty and testifying against Ryan. They employed three methods: bombarding Charles with false reports confirming his false memories; withholding important exculpatory evidence from Charles that would have contradicted the police's narrative; and, working to maximize Charles' view of his legal jeopardy.

1. Police and Prosecutors Used Fabricated Evidence, or Evidence They Knew Was Unreliable, to Confirm Charles' False Recollections.

First, police and prosecutors created and gave Charles fabricated reports, or reports they should have known were false, to convince Charles that he murdered Mr. Heitholt. During their investigation, the police interviewed Dallas Mallory, Meghan Arthur, and Richard Walker and produced reports purporting to memorialize those interviews. Prosecutors turned those reports over to Charles' attorney, Mark Kempton, who gave them to Charles while he awaited his trial in jail. (Ex. 4 (Habeas Tr.), at 618:13-619:4.) Those reports proved instrumental in "convinc[ing]" Charles he was guilty of crimes he did not commit on a night he could not remember. (Ex. 2 (Erickson Aff. 4), at 16-17; ex. 6 (Erickson Aff. 3), at ¶¶12-17.) But they were false—either fabricated by the police or knowingly obtained from an unreliable source.

The most significant example of this deception is the bogus report that served to deceive Charles into believing his false memories of Halloween 2001 were true. During his interrogations, Charles claims he "thought" he remembered fleeing the scene and seeing an acquaintance named Dallas Mallory (Ex. 8 (Interrogation 1), at 6:10-7:12, 10:12-11:14; ex. 11 (Interrogation 2), at 4:11-6:11, 7:17-8:6.) As a result, police and prosecutors sought out Mr. Mallory to take his statement and prepare the report that they later presented to Charles while he was in jail pending trial. That report claims Charles saw Mr. Mallory the night of the murder and told Mr. Mallory he had "beat someone down," said something about a "fight," and was "figity [*sic*] and pushy." (Ex. 7 (Police Rpts.), at 000066-67.)

But that report was false. Mr. Mallory never said those things. (Ex. 13 (Mallory Dep.), at 59:10-16, 63:21-23, 66:1-25, 87:24-88: 20, 89:13-90:3, 123:11-125:11, 127:4-13, 136:14-138:12, 163:14-164:14.) The police interrogated Dallas in a small room for five hours without any food, water, bathroom breaks, or access to an attorney. (*Id.* at 71:1-18, 72:15-21, 75:24-76:16, 79:6-12.) They "scream[ed] at" him. (*Id.* at 67:2-13.) They shouted "in [his] face" to tell them what they wanted. (*Id.* at 67:2-13, 71:9-10.) They threatened to charge him with murder and implied they could take away his car if he did not confirm Charles' false memories.[4] (*Id.* at 77:4-19.) Although Mr. Mallory left that interrogation "crying" and "shooken up," (*id.* at 156:17-20), he never told them anything other than the truth: he did not see or speak to Charles or Ryan on Halloween 2001 after they went to By George,[5] (see *id.* at 34:10-35:2, 41:2-11). Mr. Mallory has confirmed twice, under oath, that the report prosecutors gave Charles was false. (Ex. 14

[4] According to Dallas Mallory, the police and prosecutors "didn't want to hear the truth, and that's what mattered, but they wouldn't let me speak that. They wanted to hear what they wanted." (Ex. 13 (Mallory Dep.), at 146:10-13.)

[5] Mr. Mallory also told of a second interrogation where a prosecutor also yelled at him and accused him of lying about seeing Charles after the murder. (Ex. 14 (PCR Tr.), at 295:4-296:3.)

(Ferguson Post-Conviction Relief Tr. ("PCR Tr.")), at 270:19-272:15, 287:1-24, 288:2-7, 289:8-23.)

Although the police did not take the same aggressive approach to create Meghan Arthur's report implicating Charles and Ryan, the product was still replete with falsehoods. The report conveyed a "disturbing" narrative where Ryan, drunk, high, and appearing "upity [*sic*] and jittery," told Ms. Arthur that Charles was trying to get them to "turn [them]selves in" for the Heitholt murder. (Ex. 7 (Police Rpts.), at 000044-46.) When Ms. Arthur later read that report, she found that it contained "a lot of speculation and things [she] just didn't say," (ex. 15 (Arthur Dep.), at 26:3-4, 39:9-11), including: Ryan "telling her that Chuck Erickson is trying to . . . get me to turn ourselves in," (*id.* at 40:10-13); that "he and [Charles] had done something stupid," (*id.* at 41:1-43:11); that "[Charles] is trying to pull him into this, and that he [Ryan] didn't want to turn himself in," (*id.* at 44:20-45:11); that Ryan "didn't even know what happened because he and Erickson left and he doesn't know how it turned out," (*id.* at 45:14-46:15); or that Ryan "talk[ed] about he and Erickson stealing someone," (*id.* at 47:8-51:13). Ms. Arthur also found that the report contains false details conveying a tone she never intended. She did not classify her conversation with Ryan as "disturbing." (*Id.* at 26:16-20, 27:21-28:10.) She did not say that it "upset" or "scar[ed] her." (*Id.* at 52:6-53:2.) She did not claim that Ryan was "really worked up" or "uppity" during their conversation. (*Id.* at 46:17-47:3.) And she did not tell the police that Ryan was on drugs when they spoke. (*Id.* at 33:5-34:13.)

Prosecutors did not have to fabricate their report of Richard Walker's[6] statements. Richard Walker was incarcerated in the Boone County Jail first with Ryan, and then with Charles. *Ferguson 4*, 2015 U.S. Dist. LEXIS 107131, at *74-*75. After sharing a cellblock with

[6] Mr. Walker died in prison on November 19, 2005. (Ex. 16 (Walker Death Notice).)

Ryan, police interviewed Mr. Walker, once in April and later in September in 2004, and told detectives conflicting accounts of how Ryan had described the Heitholt murder. *Id.* at *74. (Ex. 7 (Police Rpts.), at 000052-59, 000068-71.) Charles was provided at least the first of these reports. (Ex. 6 (Erickson Aff. 3), at ¶12.) When later placed in Charles' cellblock, Mr. Walker confirmed the report and told Charles that Ryan would do anything to get out, including blaming everything on Charles. (Ex. 2 (Erickson Aff. 4), at 17.)

But prosecutors knew, or should have known, that Mr. Walker's statements were unreliable. More important than the fact Mr. Walker confessed those statements may have been lies, (ex. 17 (Walker Interview), at 9-10), is that he began his discussions with investigators by telling them he would say whatever they wanted, (*id.* at 2). Furthermore, one investigator testified that Mr. Walker's "history would make one believe he's not credible. And then his final interview . . . at the Fulton Reception and Diagnostic Center removed all doubt that he had any court credibility." (Ex. 24 (Liebhart Dep.), at 154:13-21.)

By corroborating Charles' false memories, confirming a meeting with Dallas Mallory that never happened, and providing confessions from Ryan that he never made, these reports were critical in convincing Charles that he had to accept a plea deal. (Ex. 2 (Erickson Aff. 4), at 17.)

2. Prosecutors Did Not Disclose Exculpatory Evidence That Would Have Allowed Charles to Second-Guess the False Information Given to Him.

While prosecutors plied Charles with bogus reports that confirmed his false beliefs about his participation in the murder, they also withheld significant exculpatory evidence that would have allowed him to call those beliefs into question.

The worst example of prosecutors' failure to disclose (or intentional withholding of) exculpatory evidence is Shawna Ort's testimony. Ms. Ornt was the *only* person to get a good enough look at the two men found at the scene of the murder to assist the police in creating a

composite sketch, and then later update that sketch. (*Compare* ex. 7 (Police Rpts.), at 000004-5, 000034-37, *with* 000014, 000029.) However, after viewing pictures of Charles and Ryan, Ms. Ornt told prosecutors neither Charles or Ryan were the men she saw leaving the scene. (Ex. 14 (PCR Tr.), at 705:22-706:19.) *Ferguson v. Dormire* (*Ferguson 3*), 413 S.W.3d 40, 67 (Mo. App. 2013). Despite the exculpatory nature of the information, ***prosecutors made no record of it***. (Ex. 14 (PCR Tr.), at 710:14-711:15.) *Ferguson 3*, 413 S.W.3d at 68. The result is that Charles did not learn this information until *after* he had succumbed to the prosecutor's coercive pressure and pleaded guilty. *Ferguson 3*, 413 S.W.3d at 68.

In a similar manner, prosecutors held back the testimony of Melissa Griggs. Ms. Griggs saw Charles at By George on Halloween 2001, spoke to him, (ex. 3 (Trial Tr.), at 1591:5-17; 1713:15-1715:2), and knew that By George closed at 1:30 a.m. that night, (*id.* at 1591:13-18; 1715:9-16). That fact contradicted the false confession wrung from Charles—that he and Ryan had robbed Mr. Heitholt after 2 a.m. so they could have money to go back to By George and party, (*id.* at 516:22-517:24; 566:15-567:13). *See also Ferguson 3*, 413 S.W.3d at 67. But Charles never had access to this information prior to his guilty plea because ***prosecutors never made a record of it***. (Ex. 3 (Trial Tr.), at 1594:1-5 ("No report was generated.") *See also Ferguson 3*, 413 S.W.3d at 67-68.

Kim Bennett had similar testimony. Ms. Bennett told the police in May 2004 and again in 2005 that she had observed Charles and Ryan get into Ryan's car and drive away from By George between 1:15 and 1:30 a.m. (Ex. 4 (Habeas Tr.), at 465:13-466:23, 470:11-472:16, 473:20-475:10.) Although the detectives who spoke with Ms. Bennett ostensibly took notes of her account of watching Charles and Ryan leave By George at 1:30 a.m., (ex. 4 (Habeas Tr.), at 472:2-22), ***no record was made***.

3. Police and Prosecutors Maximized Charles' Belief that He Risked Severe Punishment.

Finally, police and prosecutors amplified their coercive by creating a realistic menace that Charles faced the death penalty.

The police worked to make clear, from the day of Charles' arrest, that he would face serious jeopardy if charged and convicted of first degree murder. Police told Charles that he was "on this chopping block," (ex. 12 (Interrogation 3), at 7:4-11), that his "hind end is the one that's hanging over the edge," (*id.* at 6:21-23), and that he needed to provide information about Ryan because he did not want to be left as the "sole individual . . . responsible for what happened to Kent," (*id.* at 7:19-22), because he would "take that hit," (ex. 8 (Interrogation 1), at 28:8-9).

At the same time, Charles was led to fear that prosecutors might amend his charges to seek the death penalty. Prior to his guilty plea, prosecutors made clear that they considered pursuing the death penalty against Ryan. *See, e.g.,* Nate Carlisle, *Punishment Option Hangs on High Court*, Columbia Daily Tribune (Mar. 12, 2005), at 1 (attached as Exhibit 18). In addition, Charles' attorney kept telling him "that [he] needed to try to keep [prosecutors] from charging [him] with first degree murder, like they had done with Ryan."[7] (Ex. 2 (Erickson Aff. 4), at 16.) Charles feared for his life while awaiting trial from his cell.

The police and prosecutors' coercive pressure had its intended effect—it broke Charles. He was convinced he was guilty, (ex. 4 (Habeas Tr.), at 624:22-625:19), and had no choice but to plead, (ex. 2 (Erickson Aff. 4), at 16-17; ex. 6 (Erickson Aff. 3), at ¶¶12-17). On November 4, 2004, Charles agreed to plead guilty and testify against Ryan in exchange for state recommended sentences of 15 years for one count of second degree murder and 15 years for one count of first

[7] Eight years after representing Charles, Mr. Kempton claimed he never told Charles that prosecutors threatened to charge him with first degree murder or seek the death penalty. (Ex. 4 (Habeas Tr.), at 630:20-631:9.)

degree robbery, to be served concurrently, and 10 years for one count of armed criminal action, to be served consecutively with the first two counts. (Ex. 19 (Plea Deal).)

F. Prosecutors Convicted Ryan of a Crime He Did Not Commit by Using False Testimony and Withholding Exculpatory Evidence.

The prosecutors' continued investigation should have made it clear to them that this was "not an ordinary case." *Ferguson 3*, 413 S.W.3d at 49. Charles' significant "memory problems," (ex. 4 (Habeas Tr.), at 595:7-10), already made it "tough," (*id.* at 595:18-19). But then "[n]o physical evidence tied [Charles] or [Ryan] to Mr. Heitholt's murder or the crime scene." *Ferguson 3*, 413 S.W.3d at 60, 46. In fact, "[p]hysical evidence found at the scene did not match to either [Charles] or [Ryan] as the source." *Id.* at 60, 46; *Ferguson v. State* (*Ferguson 2*), 325 S.W.3d 400, 419 (Mo. App. 2010). Nevertheless, they sought "another witness out there that could identify [Charles and Ryan]" as perpetrators of the crime. (Ex. 4 (Habeas Tr.), at 595:11-19.)

Jerry Trump should not have been able to provide any valuable information tying Charles or Ryan to the murder. Jerry Trump was one of two people who saw two male suspects at the crime scene. (Ex. 7 (Police Rpts.), at 000001-3.) But unlike his co-worker, Shawna Ornt, who clearly saw the suspects and provided detailed descriptions for investigators, (*id.* at 000002-3, 000005, 000025, 000035-37), Mr. Trump "backed up on a couple of occasions" and expressed uncertainty when describing the suspects the same day as the murder, (*id.* at 000014), and later stated that "he was not certain if he could identify the two individuals again," (*id.* at 000029). He also admitted to others that he could not identify or describe those suspects. (Ex. 20 (Trump Aff., Oct. 11, 2010 ("Trump Aff. 1")), at ¶¶7-9.)

But after prosecutors approached Mr. Trump in December 2004, while he was still incarcerated for unrelated crimes, he changed his story. During Ryan's trial he positively

identified Ryan as a suspect at the scene of the Heitholt murder, testifying that his memory was refreshed after his "wife sent [him] a copy of that article from the Columbia Daily Tribune" while he was in prison, which was folded just so, that "[i]n opening [his] mail, [he] first turned to the two pictures. And [his] mouth dropped" because he "remembered them as the ones that [he] had seen behind Kent's car." (Ex. 3 (Trial Tr.), at 1000:15-1001:8.)

Mr. Trump's testimony was paramount to the prosecution. Prosecutors found it "compelling," (ex. 4 (Habeas Tr.), at 593:18-594:1), and "a pretty big deal in a pretty big case," (*id.* at 665:13-666:22). The Court of Appeals observed that those prosecutors "repeatedly emphasized Trump's explanation for his identification . . . [o]n no less than seven occasions," and used his testimony to "dispel the damage done to the credibility of [Charles'] confession." *Ferguson 3*, 413 S.W.3d at 61-62. Ultimately, his testimony "effectively permitted the jury to case aside any doubts they had about [Charles'] seriously undermined credibility" and convict Ryan. *Id.* at 63.

But it was a lie. (Ex. 21 (Trump Dep.), at 58:17-59:15.) When prosecutors contacted Mr. Trump shortly after his release from prison, he "was still on parole . . . [and] scared out of his mind that something . . . would go wrong" because he "had had [his] probation revoked" before. (*Id.* at 28:18-22; ex. 22 (Trump Aff., Dec. 29, 2010 ("Trump Aff. 2")), at ¶13.) So when prosecutors told Mr. Trump that Charles and Ryan were certainly the murderers and that they needed his help to get convict Ryan, he was on board.[8] (Ex. 21 (Trump Dep.), at 115:17-116:3; ex. 22 (Trump Aff. 2), at ¶16.) Mr. Trump thus provided this false testimony, even though he

[8] Mr. Trump testified that prosecutors defined his testimony, consistently discussing it as they described it to him. (Ex. 21 (Trump Dep.), at 21:1-4; ex. 22 (Trump Aff. 2), at ¶19.) They also told him how to limit it, saying "it will be helpful if you hadn't seen the headline [of the newspaper] before the picutures [sic]." (Ex. 22 (Trump Aff. 2), at ¶17; ex. 21 (Trump Dep.), at 109:13-17.)

never received a newspaper article from his wife while he was in prison, (ex. 20 (Trump Aff. 1), at ¶16; ex. 21 (Trump Dep.), at 48:2-7), and could not positively identify Charles or Ryan as the two suspects he saw at the scene of the Heitholt murder, (ex. 22 (Trump Aff. 2), at ¶22; ex. 21 (Trump Dep.), at 70:17-23).

Troublingly, the prosecutors knew or should have known that Mr. Trump's sudden ability to recall faces that he had scarcely viewed three years earlier was a lie. One indication should have been a false statement Mr. Trump made on the stand—where he testified that law enforcement never showed him the newspaper article or photographs in question, (ex. 3 (Trial Tr.), at 1001:21-1002:8), when prosecutors had shown him the articles and photographs prior to trial. (Ex. 22 (Trump Aff. 2), at ¶¶20-21; ex. 20 (Trump Aff. 1), at ¶17; ex. 21 (Trump Dep.), at 21:5-8.) Another indication is that Barbara Trump, the woman Mr. Trump claimed sent him the newspaper article forming the basis of his identification of Charles and Ryan, told prosecutors she did not recall ever sending Jerry Trump any newspaper articles while he was in prison. (Ex. 4 (Habeas Tr.), at 667:18-668:12.)

Even more disturbing is that, just as when Shawna Ornt, Kim Bennett, and Meghan Arthur provided exculpatory evidence, ***the prosecutors made no report of their conversation with Barbara Trump***, (ex. 4 (Habeas Tr.), at 667:18-668:12), ***so no disclosure was made***. *Ferguson 3*, 413 S.W.3d at 57 ("[T]he State acknowledged that 'it is . . . not in dispute . . . that with respect of [*sic*] any witness interview for whom there was not a report generated there was not a disclosure of that interview.'").

G. Ryan Now Walks Free While Charles Remains Imprisoned for Crimes He Did Not Commit.

Following his conviction, Ryan worked relentlessly to cure his wrongful imprisonment. He directly appealed his case but lost. *State v. Ferguson* (*Ferguson 1*), 229 S.W.3d 612, 613

(Mo. App. 2007). He filed a Rule 29.15 motion for post-conviction relief but was denied. *Ferguson 2*, 325 S.W.3d at 405-06. He appealed that denial to the Court of Appeals which, although expressing that the lack of any physical evidence tying Ryan to the murder gave it "pause," determined Rule 29.15 was not the proper avenue for him to obtain relief. *Ferguson 2*, 325 S.W.3d at 419. Ryan petitioned the Cole County Circuit Court for a writ of habeas corpus but was denied. *Ferguson 3*, 413 S.W.3d at 49. Then finally, more than eight years after his conviction and almost ten years after he was first jailed, the Court of Appeals ordered Ryan's release after determining that prosecutors violated his constitutional rights by failing to disclose that Barbara Trump had told them she had never sent Jerry Trump the newspaper that formed the basis of his identification of Ryan and Charles. *Id.* at 73-74.

Without any physical evidence or witness testimony left to retry him, Ryan now walks free.[9]

And now it is Charles' turn. After recognizing that he has no memory of what happened on Halloween 2001, and that he has spent almost fifteen years in prison for crimes he did not commit, Charles petitions this Court for a writ of habeas corpus and an order requiring his immediate release because he is being held in violation of the United States Constitution and the Missouri Constitution.

IV. ARGUMENT

Having suffered almost fifteen years in prison for a crime he did not commit, Charles is entitled to a writ of habeas corpus because he is being held in violation of the United States and Missouri Constitutions. Regardless of any other procedural default caused by the circumstances

[9] After his release, Ryan was awarded an $11 million judgment against the police and prosecutors for violating his constitutional rights. *Ryan Ferguson, Wrongfully Convicted in Columbia Death, Wins $11 Million*, The Kansas City Star (July 11, 2017) (attached as Exhibit 50.)

that made Charles unable to contest his wrongful confinement in the past, he is still entitled to seek a writ of habeas corpus. *Brown v. State*, 66 S.W.3d 721, 722, 726 (Mo. banc 2002). The Supreme Court of Missouri recognizes that a petitioner is entitled to habeas corpus relief, even on claims not previously raised in a post-conviction motion, if he can prove either: (A) a manifest injustice or (B) his actual innocence. *State ex rel. Nixon v. Jaynes*, 63 S.W.3d 210, 215-17 (Mo. Banc 2001). Because overzealous police and prosecutors disregarded Charles' constitutional rights to coerce an innocent but vulnerable young man to plead guilty, he is entitled to a writ of habeas corpus under both of those standards.

A. Charles Erickson Is Entitled to Habeas Corpus Relief to Remedy a Manifest Injustice Because He Is Being Wrongfully Detained Pursuant to a Defective Guilty Plea.

First, Charles is entitled to habeas corpus relief because he remains imprisoned based on a defective guilty plea. Defendants that plead guilty waive three fundamental constitutional rights: "the privilege against compulsory self-incrimination," "the right to a trial by jury," and "the right to confront one's accusers." *Boykin v. Alabama*, 395 U.S. 238, 243 (1969). These rights are considered among "the most primal and elemental" of any rights or protections afforded to the accused. *State v. Reese*, 481 S.W.2d 497, 499 (Mo. banc 1972). Consequently, the deprivation of these "primal and elemental" rights "by means of a defective plea is itself *a manifest injustice*." *Id.* at 499 (emphasis added). Such a tragedy justifies a writ of habeas corpus as a remedy. *See Clay v. Dormire*, 37 S.W.3d 214, 217 (Mo. banc 2000); *State ex rel. Verweire v. Moore*, 211 S.W.3d 89, 91-93 (Mo. banc 2006) (where petitioner met manifest injustice standard for habeas relief, establishing the procedurally defaulted claim that his guilty plea was not knowingly and voluntarily entered).

Charles' plea was defective. To comply with due process, a guilty "plea must be a voluntary expression of the defendant's choice and a knowing and intelligent act done with

sufficient awareness of the relevant circumstances and likely consequences of the act." *Roberts v. State*, 276 S.W.3d 833, 836 (Mo. banc 2009). Charles' guilty plea is defective for two reasons: it was not voluntary, and it was not a knowing act. First, police and prosecutors used coercive tactics to force Charles, a psychologically and physically vulnerable individual, to involuntarily plead guilty. Second, a combination of (1) his counsel's ineffective assistance, (2) prosecutors withholding of exculpatory evidence, and (3) the police and prosecutors plying him with false and fabricated evidence, deprived Charles of the information necessary to knowingly enter a guilty plea. Each of these issues independently entitles Charles to immediate habeas corpus relief.

1. Charles Erickson Is Entitled to Habeas Corpus Relief Because His Guilty Plea Was Not Voluntary.

This Court should grant Charles' petition and issue a writ of habeas corpus because his guilty plea was not voluntary. "A plea must be a voluntary expression of the defendant's choice . . . ." *Roberts*, 276 S.W.3d at 836 (citing *State v. Hunter*, 840 S.W.2d 850, 861 (Mo. banc 1992)). This is because imprisoning a person based on an involuntary plea "implicates the pleader's fundamental rights under the Missouri and United States Constitutions." *Chaney v. State*, 323 S.W.3d 836, 841 (Mo. App. 2010). Missouri gauges the voluntariness of a guilty plea in the same way it determines the voluntariness of a confession. *See State v. Shafer*, 969 S.W.2d 719, 731 (Mo. banc 1998) (citing *State v. Lytle*, 715 S.W.2d 910, 915 (Mo. banc 1986) to explain the standard courts look to for voluntariness in a guilty plea). *Gooch v. State*, 353 S.W.3d 662, 668 (Mo. App. 2011) (citing *Shafer*); *Dodd v. State*, 347 S.W.3d 659, 664 (Mo. App. 2011). "The test for 'voluntariness' is whether under the totality of the circumstances defendant was deprived of a free choice to admit, to deny, or to refuse to answer, and whether physical or psychological coercion was of such a degree that defendant's will was overborne" at the time of his guilty

plea.[10] *Lytle*, 715 S.W.2d at 915; *State v. Skillicorn*, 944 S.W.2d 877, 891 (Mo. banc 1997) (finding that the State sustained its burden by proving by a preponderance of the evidence under "the totality of the circumstances"); *Cole v. State*, 850 S.W.2d 406, 411 (Mo. App. 1993) ("We test the voluntariness of a plea by considering the totality of the circumstances.") This means that courts should look to "both the conduct of the officers and the characteristics of the accused" to determine the voluntariness of a plea. *See Wilson v. Lawrence County*, 260 F.3d 946, 952 (8th Cir. 2001) (referencing the voluntariness of a confession). Importantly, because the totality of the circumstances refers to all the subjective factors affecting as plea, "***state officials [cannot] cherry-pick cases that address individual potentially coercive tactics, isolated one from the other, in order to insulate themselves when they have combined all of those tactics in an effort to overbear an accused's will***." *Id.* at 953 (stated in the context of coerced confessions) (emphasis added). If, after subjectively examining a person and his treatment by the State the Court finds he "has been misled or induced to plead guilty by fraud, mistake, misapprehension, fear, coercion, or promises," he is entitled to relief. *Chaney*, 323 S.W.3d at 841 (citing *Samuel v. State*, 284 S.W.3d 616, 619 (Mo. App. 2009)); *Johnson v. State*, 318 S.W.3d 313, 317 (Mo. App. 2010) (quoting *Roberts*, 276 S.W.3d at 836 ("[a] guilty plea is not made voluntarily 'if the defendant is misled, or is induced to plead guilty by fraud or mistake.'").

[10] Other jurisdictions that examine the totality of the circumstances to determine the voluntariness of a guilty plea include: South Dakota, *Oleson v. Young*, 2015 S.D. 73, ¶15; Ohio, *State v. Baker*, 2005-Ohio-991, ¶ 17 (App.); Kentucky, *Rigdon v. Commonwealth*, 144 S.W.3d 283, 287-88 (Ky. App. 2004); Maryland, *State v. Daughtry*, 491 Md. 35, 51-52 (App. 2011); Washington, *In re Pers. Restraint of Mayer*, 117 P.3d 353, 357 (Wash. App. 2005); Colorado, *Sanchez-Martinez v. People*, 250 P.3d 1248, 1255 (Colo. 2011); Wyoming, *Kruger v. State*, 2012 WY 2, ¶30; and federal jurisdictions, *e.g.*, *Burket v. Angelone*, 208 F.3d 172, 190 (4th Cir. 2000) ("[C]ourts look to the totality of the circumstances surrounding the guilty plea" to determine "whether a guilty plea is constitutionally valid"); *Rinehart v. Brewer*, 561 F.2d 126, 130 (8th Cir. 1977) ("[T]he voluntariness of the plea must be determined by a comprehensive examination of the totality of the circumstances.").

a. Charles Did Not Voluntarily Plead Guilty Because Police and Prosecutors Exploited Charles' Psychological and Cognitive Vulnerabilities to Coerce His False Confession and Guilty Plea.

The totality of the circumstances shows that Charles involuntarily pleaded guilty only after succumbing to the police and prosecutors' coercion. When judging the voluntariness of a guilty plea, courts must consider both the conduct of law enforcement officers and the ability of the suspect to resist coercion. *Cf. United States v. Jorgensen*, 871 F.2d 725, 729 (8th Cir. 1989) (examined in the context of false confessions). With the benefit of hindsight, it is obvious that Charles, arrested as a teenager, suffering from psychological disorders, cognitive dysfunction, and Substance Abuse Disorder, was a vulnerable person that was susceptible to psychological and physical coercion. And it is also clear that the police and prosecutors exploited those weaknesses, employing forceful, deceptive, and sometimes unethical pressure tactics to coerce Charles into pleading guilty—regardless of his actual innocence.

(1) When He Was Arrested in 2004, Charles Was a Vulnerable Person That Was Susceptible to the Police and Prosecutors' Coercive Pressure.

When Charles was arrested in 2004, interrogated for hours, and then held for months pending his prosecution, he was incapable of withstanding the coercive pressure tactics the police and prosecutors used to obtain his false confession and false guilty plea. Key factors to consider in judging whether a guilty plea is involuntary, or the product of coercion, include the intelligence, mental state, or any other factors possessed by the defendant that might make him particularly suggestible, and susceptible to having his will overborne. *Cf. Colorado v. Connelly*, 479 U.S. 157, 165 (1986) (stating that mental condition is surely relevant to an individual's susceptibility to police coercion in the context of confessions); *Spano v. New York*, 360 U.S. 315, 321-22 (1959) (reversing conviction because psychological coercion on foreign-born suspect who completed only one-half year of high school and had a history of mental instability made

confession involuntary); *Fikes v. Alabama*, 352 U.S. 191, 196-98 (1957) (reversing a conviction because the coercion applied against a person who was "weak of will or mind" deprived him of due process of law). In Charles' case, his youth, combined with his psychological disorders, impeded cognitive functioning, and Substance Abuse Disorder rendered him physically and psychologically unable to resist the State's coercion to obtain his guilty plea.

(a) Charles' Youth Made Him Particularly Vulnerable to the Coercion and Manipulation of the Police and Prosecutors.

Still just a teenager when he was arrested, Charles' youth made him susceptible to the coercive tactics used by the police and prosecutors to obtain his guilty plea. The youth of a subject is always a factor to consider when determining the voluntariness of a guilty plea. *E.g.*, *Rinehart*, 561 F.2d 126, 131 (8th Cir. 1977). *Cf. Coney v. State*, 491 S.W.2d 501, 508 (Mo. 1973) (stating that "age is a factor to be considered in determining the question of voluntariness" of a confession). This is because adolescents "do not cope as well with interrogative pressure as adults." Gisli H. Gudjonsson, *The Psychology of Interrogations and Confessions* 381 (Graham Davies & Ray Bull, eds. Wiley 2003) (attached as Exhibit 25) . "[T]his immaturity manifests in impulsive decision making, decreased ability to consider long-term consequences, engagement in risky behaviors, and increased susceptibility to negative influences." Saul M. Kassin *et al.*, *Police-induced Confessions: Risk Factors and Recommendations*, 34 L. & Hum. Behav. 3, 19 (2010) (attached as Exhibit 26). "[*I*]*nterrogative suggestibility*, defined as the tendency of an individual's account of events to be altered by misleading information and interpersonal pressure within interviews, is negatively related to age and positively related to the likelihood of false confession." Jessica Owen-Kostelnik *et al.*, *Testimony and Interrogation of Minors: Assumptions about Maturity and Morality*, 61 Am. Psychol. 286, 291 (2006) (internal quotation marks and citations omitted) (attached as Exhibit 27). All of this occurs because "adolescents as a group

[are] overly focused on here-and-now concerns, more influenced by emotions, and . . . have poorer judgment, planning, and impulse control." (Ex. 1 (Aaron Rpt.), at 6.) These deficits are "understood to extend into the early to mid-twenties, when the brain is more fully developed." (*Id.* at 6.) The harrowing consequence is that adolescents are overrepresented among those who falsely confess in response to interrogation. *See* Steven A. Drizin & Richard A. Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C.L. Rev. 891, 944 (2004) (analyzing 125 recent cases of interrogation-induced false confessions) (attached as Exhibit 28). In one study, sixty-three percent of those who had falsely confessed to crimes they had not committed were under 25 years old. *Id.* at 945, Table 3. And those false confessions were concentrated among the most serious of offenses, the overwhelming majority for murder. *Id.* at 946. *See also* Allison D. Redlich, Alicia Summers, Steven Hoover, *Self-Reported False Confessions and False Guilty Pleas among Offenders with Mental Illness*, 34 L. Hum. Behav. 79, 80 (2009) (explaining how false admissions are significantly more prevalent among the most serious of crimes) (attached as Exhibit 29).

When the police arrested him in 2004, Charles Erickson was *merely a teenager*. He was held and interrogated throughout an entire day without any opportunity to speak to his parents or an attorney. He was later charged and confined for months with violent criminals while the prosecutors continued to apply pressure. Being "emotionally activated or stressed" under these conditions, teenaged Charles, "like other adolescents, would see a marked deterioration in his capacity to think in adult-like ways, and would be reactive, impulsive, and caught up in here-and-now concerns." (Ex. 1 (Aaron Rpt.), at 12.) But Charles' youth was only *one* vulnerability that the police and prosecutors exploited.

(b) Charles' Psychological Disorders Made Him Particularly Vulnerable to the Coercion and Manipulation of the Police and Prosecutors.

Charles' then-undiagnosed psychological disorder also made him particularly defenseless against police and prosecutorial pressure to plead guilty. The presence of some kind of psychological dysfunction or disorder "generally is associated with decreases in reliability in statements made during interrogations, *particularly when questioning is psychologically coercive*." (Ex. 1 (Aaron Rpt.), at 6 (emphasis added).) (Ex. 26 (Kassin, *supra*), at 30.) The result is that the "inherent vulnerabilities that typify mental disorders (e.g., proneness to confusion, lack of assertiveness)" combine with "psychologically manipulative police interrogation tactics [and] a complex legal system" to "make this population at risk for miscarriages of justice, including wrongful convictions." (Ex. 29 (Redlich, *supra*), at 81.) In one 2009 study, where researchers examined mentally ill individuals who pleaded guilty to crimes they did not commit, almost half of the subjects claimed they pleaded guilty because of pressure or threats they received from attorneys, prosecutors, police, or the judge, or that they felt that their situation was simply futile. (*Id.* at 85.) And 61% of those who falsely pleaded guilty stated they took the plea in the hopes of obtaining relief—either through a lesser sentence or by being freed from detention. (*Id.*)

In light of his current diagnosis and with the benefit of hindsight, it is likely Charles had some tendency toward obsessive thought in 2004 when he was coerced into pleading guilty, even though he had not yet been diagnosed with full-blown OCD. (Ex. 1 (Aaron Rpt.), at 13.) Obsessive-Compulsive Disorder is a psychological disorder characterized by obsessions (recurrent, persistent unwanted thoughts or images) and/or compulsions (repetitive behaviors or mental acts that a person feels compelled to do in response to obsessions). (*Id.* at 13 n.1.) This condition places Charles right in the middle of those statistically vulnerable individuals that are

at risk for a miscarriage of justice—especially in Charles' case where his condition tormented him for weeks with persistent, recurrent, and unwanted doubt about the events of a night he could not remember.

(c) Charles' Impeded Cognitive Functioning Made Him Particularly Vulnerable to the Coercion and Manipulation of the Police and Prosecutors.

The vulnerable state caused by Charles' youth and psychological disorder is intensified by his cognitive dysfunction. "There is a strong consensus among psychologists, legal scholars, and practitioners that juveniles and individuals with cognitive impairments or psychological disorders are particularly susceptible to false confession under pressure." (Ex. 26 (Kassin, *supra*), at 30; ex. 1 (Aaron Rpt.), at 6.) Cognitive impairments include much more than just a low IQ. (Ex. 1 (Aaron Rpt.), at 6.) Individuals without significant intellectual deficits can still have difficulty translating their intellectual potential into real world functioning as a result of learning disorders, attention deficit disorder, emotional impairments, or stress. *Id.*

From his youth, Charles was afflicted with several cognitive disabilities that not only made his adolescence a struggle, but also made it impossible for him to resist the police and prosecution's pressure to plead guilty. Only four years before his arrest, Charles was diagnosed with adjustment disorder and anxiety and received treatments for substance abuse. (*Id.* at 9.) And just two years before his arrest, Charles was diagnosed with a learning disorder related to his poor memory ability that was possibly caused by a neurological impairment. (*Id.* at 10.) According to his testing results, these represented "significant deficits relative to [Charles'] overall abilities." (*Id.* at 10.) Even when he is not being pummeled by questions, plied with false evidence, confined with criminals, and threatened with severe penalties, these disabilities often deprive Charles of the ability to think outside of the here-and-now. But when placed under the

pressure of hostile, threatening authority figures like the police and prosecutors, these cognitive impairments made it nearly impossible for Charles to resist.

(d) Charles' Substance Abuse Disorder and the Negative Effects of Withdrawal Made Him Particularly Vulnerable to the Coercion and Manipulation of the Police and Prosecutors

Lastly, in addition to the other layers of disorder, malady, and weakness that impaired Charles' ability to withstand the coercive pressure of a state seeking to convict him—notwithstanding his actual innocence—is Charles' substance abuse.

Research shows that individuals who consume illegal drugs within 24 hours of their arrest are more likely to falsely confess than those who had not. J. Pearse, G. H. Gudjonsson, I. C. H. Clare, & S. Rutter, *Police Interviewing and Psychological Vulnerabilities: Predicting the Likelihood of a Confession*, 8 J. Community& Applied Soc. Psychol. 1, 11-12 (1998) (attached as Exhibit 30). This is plausibly due to the fact that drugs can "make it difficult for suspects to think clearly" during custodial interrogations. Jon F. Sigurdsson & Gisli H. Gudjonsson, *Alcohol and Drug Intoxication during Police Interrogation and the Reasons Why Suspects Confess to the Police*, 89 Addiction 985, 994 (1994) (attached as Exhibit 31); S.E. Davison & D.M. Forshaw, *Retracted Confessions: Through Opiate Withdrawal to a New Conceptual Framework*, 33 Medicine, Science & L. 285, 285-90 (1993) (finding that drug withdrawal leads to mental states that limit the drug addict's ability for rational thinking and autonomy) (attached as Exhibit 32). *See also, generally*, Gisli H. Gudjonsson, *et al.*, *The Relationship of Alcohol Withdrawal Symptoms to Suggestibility and Compliance*, 10 Psychol. Crime & L. 169 (2004) (finding that those suffering from alcohol withdrawals "had impaired memory, and increased confabulation, suggestibility and compliance.") (attached as Exhibit 33).

Unfortunately for Charles, substance abuse defined his existence up to the day of his arrest. He smoked cannabis daily, often drank alcohol into oblivion at night, snorted cocaine on the weekends, and regularly experimented with LSD, mushrooms, and Adderall, among other things. (Ex. 2 (Erickson Aff. 4), at 3, 8; ex. 4 (Habeas Tr.), at 271:8-20.) Charles was already high when he was arrested and interrogated all day without counsel. (Ex. 9 (Erickson Aff. 1), at ¶6; ex. 10 (Erickson Aff. 2), at ¶6; ex. 6 (Erickson Aff. 3), at ¶11; ex. 2 (Erickson Aff. 4), at 12.) While he thus lacked full control of his faculties and was psychologically weakened by the drugs, Charles was pushed to provide the police the answers they wanted—regardless of their truth.

Charles' substance abuse, including on the night of Mr. Heitholt's murder, also increased the likelihood that his false confession would become a false guilty plea. Persons who abuse alcohol or drugs are especially at risk for internalized false confessions, *i.e.*, actually believing them to be true, as they can more easily accept the possibility that they committed a crime but cannot remember it. Jacqueline R. Evans, *et al.*, *Intoxicated witnesses and suspects: Procedures and prevalence according to law enforcement*, 15 Psychol., Pub. Pol'y, & L. 194, 198-99, 215 (2009) (attached as Exhibit 34). One researcher has proposed that two elements are required for internalization to occur: the presentation of false evidence by an interrogator and an untrustworthy memory. (Ex. 25 (Gudjonsson, *Psychology of Interrogations*, *supra*), at 214.) Both elements are present in Charles' case. As explained *supra*, Charles has no memory of what happened shortly after arriving at By George on October 31, 2001. This poor memory combined with Charles' psychological disorder and his previous life experience with people acting out of character, to cause him to begin internalizing the possibility that he participated in Mr. Heitholt's murder. The police and prosecutors exploited these weaknesses by presenting Charles with false

evidence of guilt—gaslighting him into internalizing his false confession and pleading guilty to crimes he did not commit.

(2) The Police and Prosecutors Used the Interrogation Process to Induce Psychological Pressure to Coerce Charles to Plead Guilty.

Of course, Charles' vulnerable state, by itself, would not have rendered his guilty plea involuntary had it not been for the forceful, deceptive, and sometimes unethical methods the police and prosecutors used to exploit those vulnerabilities and coerce that plea. This entire process began when the police, employing methods that have been repeatedly recognized as coercive, pushed Charles into accepting a narrative he did not recall and falsely confessing to crimes he did not commit. It continued as the prosecutors turned up the pressure to increase Charles' sense of hopelessness and further confirm the police's false narrative by withholding exculpatory and impeaching evidence from him and plying him with false and fabricated evidence while he was imprisoned. Finally, both State actors intensified their coercive tactics by working to convey upon Charles a sense of hopelessness regarding his case and the likelihood of severe punishment.

(a) Police Exploited Charles' Vulnerabilities and Goaded Him into Believing and Confessing to a Crime That He Had No Memory of Committing.

During their marathon interrogation, the police employed coercive methods to wrench a confession from Charles—even though he lacked any personal knowledge of Mr. Heitholt's murder. Many of the tactics police and prosecutors employed against Charles to accomplish this goal mirror the "Reid Technique"—a once widely used, and now widely criticized, interrogation protocol that relies on deceit and false evidence ploys to pressure interrogation subjects to

confess to crimes.[11] Miriam S. Gohara, *A Lie for a Lie: False Confessions and the Case for Reconsidering the Legality of Deceptive Interrogation Techniques,* 33 Fordham Urb. L.J. 791, 808 (2006) (attached as Exhibit 36); Saul M. Kassin, *The Psychology of Confession Evidence*, 52 Am. Psychologist 221, 223-24 (1997) (criticizing the Reid Technique's maximization methods, or scare tactics, such as the false evidence ploy, in addition to its minimization methods) (attached as Exhibit 37); Christian A. Meissner & Melissa B. Russano, *The Psychology of Interrogations and False Confessions; research and Recommendations*, 1 Can. J. Police & Sec. Servs. 53, 57-60 (2003) (discussing the "coercive" nature of the Reid Technique and particular concerns for minors and suspects with low intelligence) (attached as Exhibit 38). (*See also* ex. 1 (Aaron Rpt.), at 7.) Police and prosecutors used to justify these techniques based on the false premise that they would produce only voluntary confessions or pleas from the guilty. (*See* Ex. 28 (Drizin & Leo, *supra*), at 919.)

But that justification is misplaced, since those coercive police interrogation techniques "are so effective that . . . they can result in decisions to confess from the . . . innocent." Richard J. Ofshe & Richard A. Leo, *The Decision to Confess Falsely: Rational Choice and Irrational Action*, 74 Denv. U.L. Rev. 979, 985 (1997) (attached as Exhibit 35). In some cases, this is accomplished by "persuading [their targets] that they probably committed a crime about which they have no memory and that confessing is the proper and optimal course of action." (*Id.* at 985-86.) Empirical evidence supports this conclusions as a substantial amount of the murder convictions overturned by DNA evidence were based on false confessions. Welsh S. White,

[11]One of Charles' interrogators specifically identified "the John Reid School of Interrogation and Interview" as the place where he received interview training. (Ex. 43 (Short Dep.), 6:3-8.) Other officers that investigated the Heitholt murder also stated that they were trained to use the Reid Technique. (Ex. 51 (Stoer Dep.), at 193:17-194:4; ex. 49 (Westbrook Dep.), at 29:14-24.)

Confessions in Capital Cases, 2003 U. Ill. L. Rev. 979, 984 (attached as Exhibit 39); *See also* Barry Scheck *et al.*, *Actual Innocence: When Justice Goes Wrong and How to Make it Right*, 120 (2003) (finding false confessions or admissions in 27% of all DNA exonerations studied). Hugo A. Bedau & Michael L. Radelet, *Miscarriages of Justice in Potentially Capital Cases*, 40 Stan. L. Rev. 21, 58 (1987) (finding 14.3% of wrongful convictions for potentially capital crimes based on false confessions) (attached as Exhibit 40); Richard A. Leo & Richard J. Ofshe, *The Consequences of False Confessions: Deprivations of Liberty and Miscarriages of Justice in the Age of Psychological Interrogation*, 88 J. Crim. L. & Criminology 429 (1998) (discussing 60 cases in which the arrest was based on a false or likely false confession) (attached as Exhibit 41). Under these circumstances, there is no question as to why "certain interrogation techniques, either in isolation or *as applied to the unique characteristics of the particular suspect*, are so offensive to a civilized system of justice that they must be condemned under the Due Process Clause of the Fourteenth Amendment." *Miller v. Fenton*, 474 U.S. 104, 109 (1985) (emphasis added).

The transcripts of Charles' day-long interrogation display a vulnerable teenager without any personal knowledge about Mr. Heitholt's murder. For example, Charles consistently hedged on his responses, interjecting "I think," "I guess," "[c]ould have been," "I guess-I think," "I remember, I think," "I vaguely remember," and "I'm pretty sure" to express his uncertainty. (Ex. 8 (Interrogation 1), at 3:15-16, 5:13-15, 6:6-25, 8:19-9:1, 10:16-22, 11:1-5, 12:7-11; ex. 11 (Interrogation 2), at 2:15, 3:6-15, 5:15, 8:7-11, 13:21; ex. 12 (Interrogation 3), at 11:10-23, 13: 1-9, 16:16-20, 18:6-21.) And he would often tell detectives "I don't remember a lot of this," (ex. 8 (Interrogation 1), at 12:11), or "I don't remember most of what happened when it came down to it," (ex. 11 (Interrogation 2), at 7:3). As the day wore on and detectives relentlessly pushed him,

Charles would push back, saying "I could be just sitting here and fabricating all of this and not know. Like I don't know. I don't." (Ex. 12 (Interrogation 3), at 4:14.)

Charles' repeated *contradictory* "admissions" also reveal his lack of actual knowledge concerning the facts of the case. For example, Charles initially indicated that he blacked out after hitting the victim and did not regain his awareness until after the assault was finished. (*See* ex. 8 (Interrogation 1), at 9:2-20.) But then Charles claimed he saw Ryan strangle the victim with his hands. (Ex. 8 (Interrogation 1), at 5:3-15.) Later, when a detective asked Charles if the victim had been "choked . . . with something," Charles responded that he may have been, but that he did not know what that "something" was. (Ex. 8 (Interrogation 1), at 9:2-7.) When detectives asked Charles again about how Ryan had strangled Ryan, Charles guessed first that it was a t-shirt, and then bungee cord, before detectives corrected Charles and revealed that the victim was strangled with his own belt. (Ex. 8 (Interrogation 1), at 20:20-21:18.) Yet, even after that correction, and agreeing that he had seen his friend strangle the victim, Charles did not acknowledge seeing a belt used that way, concluding "I might not even know what I'm talking about." (Ex. 8 (Interrogation 1), at 23:4-15.)

Ultimately, Charles' responses should have tipped his interrogators to the fact that any knowledge he had about Mr. Heitholt's death came solely from newspapers and other public sources. Charles admitted during his day-long interrogation that he was "kind of just presuming what happened," or "making presumptions based on what [he] read in the newspaper."[12] (Ex. 12 (Interrogation 3), at 5: 18-6:1. *See also* ex. 8 (Interrogation 1), at 15:15-16:2; ex. 11 (Interrogation 2), at 13:3-8.) In Charles' *own words*, "I mean it's just a trip for me to have to sit

[12] Charles references the newspapers he read as a source of information several other times during his interrogations. (Ex. 8 (Interrogation 1), at 15:14-24; ex. 12 (Interrogation 3), at 12:22-13:9.)

here and look at something that happened that I read about and try to base what I remember off of that, you know? It's a mind fuck, you know?" (Ex. 12 (Interrogation 3), at 6:6-11.)

Disregarding these clues demonstrating Charles' innocence, the detectives continuously applied coercive questioning techniques to obtain a false confession and begin gaslighting Charles into accepting their narrative for Halloween night in 2001.

Some of those coercive tactics include the manner, environment, and duration of Charles' interrogations. The Supreme Court of the United States has recognized since 1966 that in-custody interrogation is inherently coercive. *Miranda v. Arizona*, 384 U.S. 436, 467, 470 (1966); *id.* at 533 (White, J., dissenting); ex. 1 (Aaron Rpt.), at 7 (stating that a police interrogation, by itself, can be stress-inducing for any subject). The length of an interrogation and whether the subject of the interrogation has any friends or attorneys present during the questioning also contribute to its coercive nature. *Blackburn v. Alabama*, 361 U.S. 199, 206-8 (1960) (finding that an eight to nine hour interrogation, in a small room, without the presence of an attorney or advocate was coercive). Records show that, Charles was held and interrogated for at least 8 hours without receiving any support from, much less even seeing, a friendly face. (Ex. 1 (Aaron Rpt.), at 17.)

Other coercive and manipulative techniques used by police in Charles' interrogations were also designed to psychologically "break down [Charles'] resistance" and accept his interrogators' theories. (*See* ex. 38 (Meissner & Russano, *supra*), at 57.) In some situations, Charles' interrogators observably worked to break him down and coerce him by interrupting him and aggressively pushing Charles until he accepted their false narrative. *E.g.*, *State v. Itoh*, No. 0-089/09-0811, 2010 Iowa App. LEXIS 306, at *25-*26 (Iowa App. April 21, 2010) (holding that the intelligent, well-educated defendant's confession was involuntary after interrogating officers

would push past and ignore defendant's answers to apply pressure). For example, after the police wrung from Charles the false admission that he hit the victim once before blacking out and walking away, the detectives pressed him:

> Q: There is no way in hell that you hit this guy once, turned around, and got sick. If you only hit him once, turned around and ran away and got sick, you had to hand the thing off to Ryan, because the guy's got head wounds all over his head. We're talking a minimum of 15 strikes.
> A: I must have done it then. I mean-
> Q: Okay.
> A: Either that or I stopped and he did. I don't know.

(Ex. 8 (Interrogation 1), at 26:12-21.) Charles' interrogators also prevented him from denying his involvement and explaining his foggy memory, telling him: "We know you know what's going on. Maybe you forgot some of it, but you didn't forget all that you're telling me." (Ex. 8 (Interrogation 1), at 26:6-8.)

In other situations, the police lied to Charles, telling him they were already convinced of his guilt and had evidence (which turned out to be false) to prove it. The use of lies and deception is one factor to consider when ascertaining the coercive nature of an interrogation. *Rodgers v. Commonwealth*, 318 S.E.2d 298, 303 (Va. 1984); *People v. Thomas*, 211 Cal. App. 4th 987, 1011-12 (4th Dist. 2012). The most explicit of these examples is when the police falsely told Charles that he was providing corroborative responses that only someone with firsthand knowledge of the crime could. They told Charles he had "told [them] something only people (inaudible) would know," (ex. 8 (Interrogation 1), at 23:14-17, and that "there's [*sic*] specifics about this whole thing that you have provided that there is no way for anyone, including yourself [*sic*], to even know," (ex. 12 (Interrogation 3), at 4:14-5:23). These details, however, were gleaned from newspapers Charles read, (ex. 8 (Interrogation 1), at 15:21-24; ex. 11

(Interrogation 2), at 13:1-6; ex. 12 (Interrogation 3), at 5:8-6:11, 13:1-7), or were fed to him over the course of the interrogation (compare ex. 8 (Interrogation 1), at 9:2-7 with 20:24-21:18).

The result of the police's coercive tactics was that they wrung out a false, inconsistent confession and initiated the process of gaslighting Charles into believing he committed a crime of which he had no memory.

(b) Prosecutors Continued to Exploit Charles' Vulnerabilities to Apply Coercive Pressure until He Pleaded Guilty to a Crime That He Had No Memory of Committing.

Unsatisfied with Charles' false confession, prosecutors continued hammering Charles with coercive pressure to obtain a guilty plea. Thus, while Charles and his early tendencies toward Obsessive-Compulsive Disorder ruminated in jail for months over crimes from a night he could not remember, prosecutors amplified Charles' false impression of guilt by withholding exculpatory evidence that challenged their narrative and giving him false, and falsified, evidence to support it.

(i) Prosecutors Applied Psychologically Coercive Pressure to Charles by Withholding Exculpatory Evidence That Would Have Allowed Charles to Have an Accurate Understanding of His Case.

There are several examples of exculpatory evidence that prosecutors knew about but *never* disclosed to Charles prior to executing a plea agreement with him. Prosecutors had an affirmative duty to disclose any information in their possession or control that tended to negate Charles' guilt. *Wallar v. State*, 403 S.W.3d 698, 707 (Mo. App. 2013); *State v. Myers*, 997 S.W.2d 26, 33 (Mo. App. 1999). A prosecutor's failure to disclose exculpatory information prior to guilty plea can render that plea involuntary. *See Williams v. Wallace*, No. 4:14-CV-00411-AGF, 2018 U.S. Dist. LEXIS 68149, at *7 (E.D. Mo. Mar. 20, 2018) (citing *White v. United*

States, 858 F.2d 416, 422 (8th Cir. 1988), stating a court must look to the totality of the circumstances to determine how they affect a plea).

In one instance, prosecutors never disclosed that the *only* witness to the crime that could identify either of the two young men seen leaving the scene, Shawna Ornt, told prosecutors that she would not verify that either Ryan or Charles was one of those men. (Ex. 14 (PCR Tr.), at 705:22-706:19.) *Ferguson 3*, 413 S.W.3d at 67. Charles did not discover this information until *after* Ryan had deposed Ms. Ornt in preparation for his trial—*after* he had succumbed to the prosecutor's coercive pressure and pleaded guilty. *Id.*

Prosecutors likewise withheld testimony contradicting their theory that Charles and Ryan had left By George to rob someone and then return to the club. (Ex. 3 (Trial Tr.), at 516:22-517:24; 566:15-567:13; ex. 8 (Interrogation 1), at 2:13-3:4.) Because evidence shows that Mr. Heitholt was murdered sometime after 2:10 a.m. and before 2:26 a.m.,[13] the prosecutors' theory requires Ryan and Charles to have left By George before that window and expect to go back to the club after. *Ferguson 3*, 413 S.W.3d at 47. However, Melissa Griggs told prosecutors that By George had closed at 1:30 a.m. that night—contradicting both the timing and motive prosecutors asserted through evidence and testimony. *See id.* at 67. (Ex. 3 (Trial Tr.), at 516:22-517:24; 566:15-567:13.) Furthermore, Kim Bennett told the police in 2004 and again in 2005 that she had actually observed Charles and Ryan get into Ryan's car and drive away from By George between 1:15 and 1:30 a.m. (Ex. 4 (Habeas Tr.), at 465:13-466:23, 470:11-472:16, 473:20-

[13] Mr. Heitholt logged off his computer at 2:08 a.m. the day of his death, (ex. 3 (Trial Tr.), at 1061:9-14), and Robert Thompson, a sports writer at the Daily Tribune saw Mr. Heitholt leave the building around 2:10 a.m., (*id.* at 1098:16-18). Michael Boyd, a sportswriter that worked with Mr. Heitholt, also saw Mr. Heitholt around 2:10 a.m., spoke with him for a few minutes, and then drove away around 2:20 a.m. (Ex. 7 (Police Rpts.), at 000016-17.) Records also show that Ms. Ornt and Mr. Trump called the police at 2:26 a.m. after finding Mr. Heitholt's body. (Ex. 3 (Trial Tr.), at 1061:2-9.)

475:10.) But neither of these exculpatory statements were made available to Charles before the State coerced Charles into pleading guilty.

Withholding this information, whether intentional or not, served to ensure that the coercive pressure first introduced by the police continued unimpeded during Charles' detention awaiting trial.

(ii) Prosecutors Applied Psychologically Coercive Pressure by Defrauding Charles with False and Fabricated Evidence Incriminating Him in Crimes He Had Not Committed.

Prosecutors intensified their coercive pressure by giving Charles false and fabricated reports, gaslighting him into believing their false version of the facts. A voluntary guilty plea cannot be induced by fraud, *Roberts*, 276 S.W.3d at 836, through the knowing use of false or unreliable evidence, see *Wilson*, 260 F.3d at 954-55. Yet the police and prosecutors disregarded Charles' constitutional rights in search of a guilty plea by giving him fabricated reports claiming to contain statements from Dallas Mallory and Meghan Arthur, people that Charles knew personally. Those reports claimed Charles admitted to Dallas that he had "beat someone down," or that Ryan had admitted to Meghan he "had done something stupid" with Charles.[14] (Ex. 7 (Police Rpts.), at 000044-45, 000066-67.) ***But both Dallas and Meghan deny that those reports accurately reflect what they told the police or what actually happened***. (Ex. 13 (Mallory Dep.), at 34:10-35:2, 41:2-11; ex. 14 (PCR Tr.), at 270:19-272:15, 287:1-24, 288:2-7, 289:8-23; ex. 15 (Arthur Dep.), at 26:3-4, 39:9-11, 44:20-46:15, 47:8-51:13, 26:16-20, 27:21-28:10, 52:6-53:2,

[14] The officer that interviewed Dallas Mallory and created the report agreed it served as "the key" to corroborating Charles' unreliable testimony. (Ex. 49 (Westbrook Dep.), at 161:11-162:5.)

46:17-47:3, 33:5-34:13.) Nevertheless, these reports were presented to Charles as though they contained facts incriminating him in crimes he did not commit.

Likewise, prosecutors plied Charles with the statement of Richard Walker, that they knew or should have known was false. Mr. Walker was incarcerated in the Boone County Jail with both Ryan, and then with Charles. *Ferguson 4*, 2015 U.S. Dist. LEXIS 107131, at *74-*75. After sharing a cellblock with Ryan, Mr. Walker was interviewed by the police on at least two occasions, once in April and later in September in 2004, where he told detectives that Ryan had described how he had murdered Mr. Heitholt. *Id.* at *74. (Ex. 7 (Police Rpts.), at 000054-59, 000069-71.) At least one of these reports was given to Charles. (Ex. 2 (Erickson Aff. 4), at 17.) The problem is that Walker admits he may have lied to the police about what he heard from Ryan, (see ex. 17 (Walker Interview), at 2, 9-10), and the State knew or should have known. According to one investigator that interviewed Mr. Walker, his "history would make one believe he's not credible. And then his final interview to me at the Fulton Reception and Diagnostic Center removed all doubt that he had any court credibility." (Ex. 24 (Liebhart Dep.), at 154:13-21.)

This type of coercion by fraud is especially pernicious in that individuals given bogus evidence of guilt are likely to falsely confess and then internalize that confession, *i.e.*, believe it to be true. *See* Saul M. Kassin & Katherine L. Kiechel, *The Social Psychology of False Confessions: Compliance, Internalization, and Confabulation*, 7 Psychol. Sci. 125, 127 (1996) (finding 69% of test participants signed confessions admitting to errors they did not commit in test where false evidence was produced against participant) (attached as Exhibit 42). This is exactly what happened to Charles, who was convinced of his guilt when he pleaded, (ex. 4

(Habeas Tr.), at 624:22-625:19), and identified these documents as a primary reason for taking a plea, (ex. 2 (Erickson Aff. 4), at 16-17; ex. 6 (Erickson Aff. 3), at ¶¶12-17).

Thus, through unconstitutionally deceptive tactics, prosecutors reinforced and intensified the gaslight set to coerce a psychologically vulnerable teenager into pleading guilty to a crime he did not commit.

(c) Police and Prosecutors Exploited Charles' Vulnerabilities and Apply Coercive Pressure to Convince Charles that His Situation Was Hopeless, Regardless of His Actual Innocence and That He Risked Severe Punishments If He Did Not Plead Guilty.

Evidence also shows that police and prosecutors maximized the effect of their heavy psychological pressure on Charles by exaggerating his actual jeopardy—both from the likelihood of a negative trial verdict and the possibility of a severe sentence—to coerce him into pleading guilty. This tactic, called "maximization," is done by presenting "evidence said to mean that a finding of guilt is all but certain" and emphasizing the bad outcomes that will follow. (Ex. 1 (Aaron Rpt.), at 7.) The goal is to lead suspects "to believe that their situation, though unjust, is hopeless and will only be improved by confessing." (Ex. 41 (Leo & Ofshe, *supra*), at 985-86 (analyzing interrogation transcripts and interviews from more than 125 cases).)

This scheme is clear throughout the interrogations, where police pushed Charles to confess and implicate Ryan in Mr. Heitholt's murder to avoid severe punishment.[15] They goaded: "You know you were involved, and you're ready to take that hit basically?" (Ex. 8 (Interrogation 1), at 28:8-9.) They prodded: "I'm gonna be point blank with you, pal. Right now,

[15] It is important to note that the use of maximization during interrogation, especially in circumstances where, like Charles was, the interrogee is under the influence of substances, may result in a suspect that is "excessively swayed by any implied positive consequences of confessing." (Ex. 34 (Evans, *supra*), at 215.)

your hind end is the one that's hanging over the edge, and Ryan could care less about it," (ex. 12 (Interrogation 3), at 6:17-23), and "it's you that's on this chopping block," (*id.* at 7:4-11). And they pushed, warning him that "Ryan's gonna talk. Don't let Ryan tell the story for you," (ex. 8 (Interrogation 1), at 27:24-25), and that "What I want to hear is exactly what Ryan told you, because that's what's gonna keep you in a position to where you're not going to be the sole individual out here responsible for what happened to Kent," (ex. 12 (Interrogation 3), at 7:19-22). Their implication was clear: Charles need to confess to what they wanted or perhaps face lethal penalties.

Prosecutors reinforced this maximization. They piled on false evidence (bogus reports from Dallas Mallory, Meghan Arthur, and Richard Walker) and withheld exculpatory evidence (Melissa Griggs', Kim Bennett's and Shawna Ornt's testimonies) to make Charles feel that a conviction was inevitable. And they openly discussed the prospect of executing someone for the Heitholt murder, announcing they could seek the death penalty against Ryan. *See, e.g.*, *Robbery Is Called Likely Motive in Slaying of Sports Editor*, St. Louis Post-Dispatch (Mar. 13, 2004) at 12 (attached as Exhibit 44). Charles' lawyer also counseled Charles to cooperate as best he could to avoid the death penalty. (Ex. 2 (Erickson Aff. 4), at 15-16.) It was obvious to Charles, he risked severe peril that he could avoid only by telling prosecutors what they wanted to hear.

The record is clear— the totality of the circumstances shows Charles' guilty plea is constitutionally unacceptable. When he was arrested, interrogated, prosecuted, and pleaded guilty in 2004, Charles was an extraordinarily vulnerable individual that succumbed to the mounting "pressure and coercion placed upon [him] by the police and Boone County prosecutor's office." (Ex. 10 (Erickson Aff. 2), at ¶5; ex. 9 (Erickson Aff. 1), at ¶5.) Therefore, Charles is entitled to a writ of habeas corpus.

2. Charles Erickson Is Entitled to Habeas Corpus Relief Because His Guilty Plea Was Not Knowingly Made.

Charles' guilty plea is also defective because it was not knowingly entered. *Boykin*, 395 U.S. at 240; *Roberts*, 276 S.W.3d at 836. Three primary issues worked to deprive Charles of his ability to knowingly plead guilty. First, Charles' attorney failed to ensure that Charles knew about the facts and circumstances underlying his charges as well as his legal options and alternatives. Second, by plying Charles with false and fabricated evidence, prosecutors deprived him of the ability to knowingly plead guilty by presenting a false picture of the evidence they had to support their case. Third, prosecutors' failure to disclose exculpatory evidence stripped away Charles' ability to knowingly plead guilty because he did not have full knowledge of the evidence that could acquit him.

a. The "Knowing" Standard Requires a Pleading Defendant to Be Fully Informed of His Available Legal Options and Alternatives, and the Facts Surrounding His Charges.

Courts have not always been clear on how to determine whether an accused has "knowingly" pleaded guilty. Since the United States Supreme Court's 1969 decision in *Boykin v. Alabama*, courts cannot constitutionally accept a guilty plea that was not entered "knowingly" and "intelligently." 395 U.S. 238, 240 (1969); *State v. Taylor*, 929 S.W.2d 209, 216-17 (Mo. banc 1996) (citing *Boykin*). Almost a decade after *Boykin*, the Southern District of Georgia observed that "[f]ew cases . . . have squarely faced the problem of defining and applying the 'knowingly' and 'intelligently' requirements" in the context of guilty pleas. *Mendenhall v. Hopper*, 453 F. Supp. 977, 981 (S.D. Ga. 1978). Even today, many courts in and outside of Missouri, have not provided considerably more clarity concerning those requirements. *Compare State v. Shafer*, 969 S.W.2d 719, 733-34 (Mo. banc. 1998) (finding that a guilty plea was "knowingly" entered because the defendant did it "with his eyes open, understanding the effect

of that plea on his legal options" and on the possible punishments); *with Shafer v. Bowersox*, 329 F.3d 637, 650 (8th Cir. 2003) (appearing to conflate standards by stating that a "knowing and voluntary" waiver consists of understanding the consequences of a particular decision).

Worse still, courts sometimes conflate the required findings for accepting a guilty plea by blurring the distinction between "knowingly" and "intelligently," stripping the terms of individual meaning. For example, the Supreme Court of Missouri has repeatedly defined the words together, stating that a guilty plea must be "a knowing and intelligent act done with sufficient awareness of the relevant circumstances and likely consequences." *Cooper v. State*, 356 S.W.3d 148, 153 (Mo. banc 2011) (quoting *State v. Roll*, 942 S.W.2d 370, 375 (Mo. banc 1997)); *Roberts*, 276 S.W.3d at 836 (citing *State v. Hunter*, 840 S.W.2d 850, 851 (Mo. banc 1992)) (same language).

But the constitutional standard requiring guilty pleas to be knowing, voluntary, and intelligent is intended to impose three separate conditions. This is visible in circumstances where defendants waive different constitutional rights under a verbally identical standard. For example, when defendants waive their right to a jury trial, the Court of Appeals distinguished "knowing" from "intelligent" by stating that the former relates to the individual's awareness of what he is doing while the latter related to his understanding. *State v. Ramirez*, 143 S.W.3d 671, 677 (Mo. App. 2004). When defendants waive the right to counsel, the Eighth Circuit and Supreme Court have made this same distinction. In *United States v. Unger*, the Eighth Circuit explained that defendants cannot knowingly waive their right without being specifically informed of the consequences of that waiver. 700 F.2d 445, 453-54 (8th Cir. 1983). At the same time, the U.S. Supreme Court explained that a waiver is intelligently made based on whether a defendant's

level of education or sophistication will allow him to grasp the nature of the charge. *Iowa v. Tovar*, 541 U.S. 77, 88 (2004).

Thus, the constitutional standard for determining whether Charles' "knowingly" pleaded guilty requires more than showing that it was intelligently done. It depends on whether he, when entering his plea, was "reasonably informed of the nature of the charges against him, the factual basis underlying those charges, and the legal options and alternatives that are available." *LoConte v. Dugger*, 847 F.2d 745, 751 (11th Cir. 1988) (citing *Boykin*, 395 U.S. 238 (1969)). This definition is consistent with the dictionaries Missouri courts often consult to find the meaning of a word. *See, e.g., Miss Dianna's Sch. Of Dance, Inc. v. Dir. Of Revenue*, 478 S.W.3d 405, 408 (Mo. banc 2016). Black's defines "knowing" or "knowingly" as "[h]aving or showing awareness or understanding; well-informed," *Black's Law Dictionary* 1003 (10th ed. 2014), while Webster's explains it as "having or reflecting knowledge, information, or insight." *Webster's Third New International Dictionary* 1252 (1993). Under any common definition of the word, Charles did not "knowingly" plead guilty.

b. Charles' Ineffective Counsel Deprived Him of the Ability to Knowingly Plead Guilty by Failing to Ensure Charles Was Fully Aware of the Facts Underlying the State's Charges and His Legal Options and Alternatives.

Charles did not knowingly plead guilty because his counsel, Mark Kempton, was ineffective—failing to adequately investigate Charles' so as to provide Charles a full awareness of the facts and his legal options.[16] The Sixth and Fourteenth Amendments of the United States

[16] Charles' guilty plea does not prohibit him from seeking habeas relief after Mr. Kempton failed to effectively represent him. Although defendants that plead guilty generally waive any claim of ineffective assistance, they do not waive an ineffective assistance claim "to the extent that the conduct affected the voluntariness and knowledge with which the plea was made." *Neal v. State*, 379 S.W.3d 209, 215 (Mo. App. 2012) (quoting *Worthington v. State*, 166 S.W.3d 566, 573 (Mo. banc 2005)).

Constitution, as well as article I, section 18(a) of the Missouri Constitution, guarantee every accused person the benefit of counsel in a criminal prosecution. *State ex rel. Mo. Pub. Defender Comm'n v. Waters*, 370 S.W.3d 592, 605-07 (Mo. banc 2012). To prove defense counsel has not provided the assistance guaranteed by the Constitution, a defendant must satisfy the two-pronged *Strickland* test, which requires: (1) that counsel failed to exercise the customary skill and diligence that a reasonably competent attorney would perform under similar circumstances; and (2) that counsel's failure prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 686, 691 (1984); *Deck v. State*, 68 S.W.3d 418, 425 (Mo. banc 2002). Mr. Kempton's ineffective work satisfies both of these prongs.

(1) Charles' Counsel Failed to Exercise the Customary Skill and Diligence of a Reasonably Competent Attorney by Not Adequately Investigating the Facts of Charles' Case or Charles' Psychological Condition.

Mr. Kempton failed to exercise the customary skill and diligence of a reasonably competent attorney under similar circumstances by not investigating: (a) the facts of Charles' case, including the details contained within his false confession to the police and the false reports used to convince him to plead guilty, and (b) whether any psychological condition that could have affected Charles' recollection as expressed during that confession. To show a counsel's failure to investigate constituted a deficient performance, the party seeking relief is

> required to: [i] "specifically describe the information his attorney failed to discover," [ii] "establish that a reasonable investigation by trial counsel would have resulted in the discovery of such information," and [iii] "prove that the information would have aided or improved his position at trial."

Cornelious v. State, 351 S.W.3d 36, 46 (Mo. App. 2011) (quoting *State v. Stewart*, 850 S.W.2d 916, 921 (Mo. App. 1993)). Mr. Kempton's actions, or failures, in representing Charles satisfy each of these conditions.

(a) Charles' Counsel Failed to Discover Important Facts in Support of Charles' Case.

First, Mr. Kempton failed to provide Charles effective assistance by neglecting to investigate two matters: whether Charles had psychological or mental conditions that affected his recollection of Halloween 2001, including the false confession he provided the police, and whether the details contained within Charles' confession corresponded with reality.

(i) Charles' Counsel Failed to Discover that Charles Suffered from Mental and Psychological Conditions that Affected His Ability to Recall Events.

When Charles was arrested and interrogated in early 2004, he was already suffering from psychological disorder, cognitive dysfunction, and drug addiction that affected his ability to recollect and recount what happened on Halloween 2001.

And yet, Mr. Kempton made no effort to determine whether Charles suffered from psychological or mental conditions that could affect his recollection. Charles was formally diagnosed with Obsessive-Compulsive Disorder shortly after his incarceration, after developing obsessive concerns about cleanliness and germ exposure in prison, and his symptoms became significant enough that Charles was prescribed medication. (Ex. 1 (Aaron Rpt.), at 13.) But having a mother that historically suffered from symptoms of OCD, and a sibling that received treatment after severe anxiety and OCD prevented that sibling from working, Charles had a biological tendency toward obsessive thought, even before his formal diagnosis. (*Id.* at 13, 31.) This is significant because psychological dysfunctions like OCD negatively affect the reliability of statements made during coercive interrogations—such as what Charles faced. (*Id.* at 6, 17-25.) But the forensic psychologist Mr. Kempton hired to examine Charles prior to entering his guilty plea only met with Charles for only three hours, (ex. 14 (PCR Tr.), at 333:2-7), and was tasked only with examining Charles' competency to stand trial and whether he suffered from mental

illness requiring treatment,[17] (*id.* at 316:15-318:17). Consequently, while she determined that Charles suffered from depression, she made no determination as to whether other conditions could have contributed to Charles' "spotty" memories of Halloween 2001, or why he would claim to recall events about which he did not have personal knowledge. (*Id.* at 305:14-19, 333:8-334:4.)

Nor did Mr. Kempton seek to determine how Charles' substance abuse could have affected his ability to recall events from Halloween 2001. Charles has repeatedly admitted that he had a serious substance abuse problem from before the night of Halloween 2001 until his arrest. (Ex. 2 (Erickson Aff. 4), at 3, 8; ex. 4 (Habeas Tr.), at 271:8-20.) Charles also confessed to waking up hungover from drinking alcohol and using cocaine then night before his arrest, and then smoking marijuana just minutes before he was approached by police at his school. (Ex. 9 (Erickson Aff. 1), at ¶6; ex. 10 (Erickson Aff. 2), at ¶6; ex. 6 (Erickson Aff. 3), at ¶11; ex. 2 (Erickson Aff. 4), at 12.) But Mr. Kempton admits that he never asked any experts about how drugs or alcohol could have affected Charles' confession or recollection. (Ex. 4 (Habeas Tr.), at 637:2-11.)

(ii) Charles' Counsel Failed to Discover Important Exculpatory Testimony.

Mr. Kempton failed to discover any of the considerable discrepancies between the details of Charles' coerced confession and the facts of Halloween night 2001—including critical exculpatory evidence. According to Charles' false confession, he and Ryan ran out of money, left By George to rob someone, and then returned to the club so they could buy more alcohol,

[17] Dr. Dean testified that Mr. Kempton also asked to "consult with [her] about his [Mr. Kempton's] understanding of issues related to memory, loss of memory, recovery of memory," but that pertains to Charles' competency to stand trial rather than he Charles suffered from conditions that would affect his recall of events. (Ex. 14 (PCR Tr.), at 317:16-23.)

and stayed until it closed. (Ex. 12 (Interrogation 3), at 8:3-9; ex. 11 (Interrogation 2), at 7:8-15, 15:12-24; 16:5-17:10.) After the robbery turned into a murder, they left the scene and saw Dallas Mallory. (Ex. 8 (Interrogation 1), at 6:12-7:15.) Because the police received a 911 call reporting Mr. Heitholt's murder at 2:26 a.m., (ex. 3 (Trial Tr.), at 1062:2-9.), and witnesses last saw Mr. Heitholt alive at 2:10 a.m. to 2:15 a.m., (ex. 7 (Police Rpts.), at 000016-17), Charles' testimony would have required the club to remain open after 2:30 a.m.

Had Mr. Kempton researched the facts of that confession, he would have found the facts were very different. Kim Bennett or Melissa Griggs would have told him that By George had closed by 1:30 a.m. on November 1, 2001, and that Charles and Ryan got into a car and left at that time—almost an hour before the murder. (Ex. 4 (Habeas Tr.), at 465:17-466:23, 470:11-472:16, 473:20-475:10; ex. 3 (Trial Tr.), at 1591:5-18; 1713:15-1715:16.) Dallas Mallory would have told him that he did not see Charles after he went to By George that night. (Ex. 13 (Mallory Dep.), at 34:10-35:2.) And Shawna Ornt, the *only* witness who could identify the two male suspects at the scene of the crime, (*supra* Part III.E.2.), would have excluded both Ryan and Charles as the suspects. (Ex. 14 (PCR Tr.), at 705:22-706:19.) *Ferguson 3*, 413 S.W.3d at 67. But Mr. Kempton did not interview any of them. (Ex. 48 (Kempton Aff.), at ¶¶4-5.)

(iii) Charles' Counsel Failed to Discover That Damning Police Reports Provided to Charles Were Fabricated.

Mr. Kempton also failed to discover that the police reports he had received and then furnished to Charles, placing Charles at the scene of the murder and claiming that Ryan had made a drunken confession, were false.

As explained, *supra*, the police provided Charles' with reports from at least three individuals purporting to provide damning information about Charles and Ryan. In one report, Dallas Mallory ostensibly claims to confirm Charles' false memory of seeing him after the Mr.

Heitholt's murder, and that Charles seemingly confessed the murder at that time. (Ex. 7 (Police Rpts.), at 000044-45.) Another report claims Meghan Arthur recounted a "disturbing" story of how a drunken Ryan claimed Charles was trying to convince him to "turn [them]selves in." (*Id.*) And in a third, Richard Walker claims that Ryan explained to him how he and Charles had murdered Kirk Heitholt.[18] (*Id.* at 000054-59.)

Obviously, these reports contained damning claims about Charles and Ryan that, if proven true and reliable, would have been terrible to their case at trial. As a consequence, it should have been essential to Charles' defense to challenge the testimony contained in those reports to determine their truth and limits. But again, Mr. Kempton *never* interviewed Dallas Mallory, Meghan Arthur, or Richard Walker. (*See* ex. 48 (Kempton Aff.), at ¶4.)

Mr. Kempton's failure to discover information about how Charles' psychological conditions could affect his recollection, the significant exculpatory evidence available, and whether the several incriminatory reports were true left Charles without knowledge concerning the factual basis underlying his charges and all of the legal options and alternatives available to him.

(b) A Reasonable Investigation by Trial Counsel Would Have Resulted in the Discovery of Facts Essential to Charles' Defense.

Charles' inability to provide a consistent, factual "confession" imposed upon Mr. Kempton a duty to pursue a reasonable investigation into the details of Charles' false confession. "[C]ounsel has a duty to make reasonable investigations . . . ." *Strickland*, 466 U.S. at 691. Over the course of Charles' day-long interrogation, the police pummeled him with questions,

[18] Despite the damning material found in their reports, the prosecution never called Meghan Arthur, Dallas Mallory, or Richard Walker as witnesses in their prosecution of Ryan Ferguson. (Ex. 3 (Trial Tr.).)

regardless of his responses or their truth, until he gave them the answers they sought. Consequently, Charles' false confession resembles a false confession—full of inconsistencies or contradicting reality where Charles had no memories and used information that was either contrived or suggested to fill in the gaps. For example, Charles told the police he vomited at the scene when no vomit was found. (Ex. 8 (Interrogation 1), at 13:2-18; ex. 12 (Interrogation 3), at 18:17-25.) He spoke about a wallet Ryan had stolen from Mr. Heitholt, (ex. 8 (Interrogation 1), at 8:19-9:1, 11:21-12:23, 22:19-24; ex. 11 (Interrogation 2), at 9:21-10:15), when the police recovered that wallet from the scene, (ex. 7 (Police Rpts.), at 000104-121). And when Charles' did not know how Mr. Heitholt had been strangled, he first claimed someone did it with his hands, then guessed a shirt or a bungee cord was used, before the police informed him that a belt was used. (Ex. 8 (Interrogation 1), at 20:24-21:18.) The blatant issues with Charles' confession and his willingness to accept the police's narrative, make an investigation into the facts of that situation not just reasonable, but imperative, and gave rise to Mr. Kempton's duty to investigate.

Charles' false confession and other information made available to Mr. Kempton also imposed upon him a duty to investigate Charles' mental or psychological state. "[W]hen dealing . . . with mental health evidence," an attorney's duty to execute reasonable investigations is triggered "based either upon information provided to counsel by the movant or upon counsel's own observations of the movant."[19] *Prince v. State*, 390 S.W.3d 225, 233 (Mo. App. 2013). As

[19] The State may claim that a more rigid standard controls, which excuses counsel from investigating his client's mental health when "the accused has the present ability to consult rationally with counsel and to understand the proceedings." *See, e.g.*, *Henderson v. State*, 977 S.W.2d 508, 511 (Mo. App. S.D. 1998). But the cases employing that standard are inapposite—applicable only where the defendant's competence to stand trial is (or should have been) in question. *E.g.*, *Clayton v. State*, 63 S.W.3d 201, 209 (Mo. banc 2001); *Roll*, 942 S.W.2d at 376; *State v. Richardson*, 923 S.W.2d 301, 328 (Mo. banc 1996).

Charles, however, does not claim he was not competent to stand trial. He claims that his mental dysfunction and psychological disorder affected his ability to recollect details concerning

noted above, Charles' accounts of Halloween 2001 provoke serious questions about his ability to recall events—whether from a substance abuse or psychological perspective. Mr. Kempton also admitted he knew that Charles: possibly had some organic brain damage, had only recently completed probation for drug abuse around the time of the Heitholt murder, and was a serious drug user. (Ex. 4 (Habeas Tr.), at 637:20-638:14.) This information, whether observed on its own or provided by Charles, is sufficient to impose a duty to investigate Charles' mental or psychological state.

(i) A Reasonable Investigation Would Have Uncovered the Psychological and Mental Conditions that Can Explain Charles' False Testimony.

A reasonable investigation would have revealed that Charles suffers from mental disabilities and psychological disorders that affected his ability to recall the events of Halloween 2001. Mr. Kempton had Dr. Dean meet with Charles months before his November 2004 guilty plea. (Ex. 45 (Dean Rpt.), at 1.) And while Dr. Dean claims that OCD symptoms can wax and wane, meaning they might be less present at any given time (ex. 14 (PCR Tr.), at 312: 14-24; 313:20-314:1), she also implies that her experience would have allowed her to diagnose Charles' OCD had she been looking, (*id.* at 329:17-330:2.) Had Mr. Kempton simply asked Dr. Dean to also examine whether Charles suffered from any disorders that could have affected his recall of the events of Halloween 2001, it is highly probable that Dr. Dean would have identified and diagnosed those, and possibly other, issues in Charles. The simple act of consulting with an expert on drug and alcohol abuse would have likely produced the same result—Mr. Kempton

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what happened on Halloween 2001, and that knowledge of those shortcomings was essential to his defense and ability to plead guilty, especially under the police and prosecutors' coercive pressure.

would have had essential evidence for his defense of Charles. But because Mr. Kempton failed to take these reasonable steps, none of this was discovered.

(ii) A Reasonable Investigation Would Have Uncovered Significant Exculpatory Evidence.

The exculpatory testimony of Shawna Ornt could have been found with minimal investigation from a competent attorney. Police reports about Mr. Heitholt's murder identify Ms. Ornt as the only witness who saw the two subjects of the investigation well enough to help them create composite sketches. (Ex. 7 (Selected Police Reports), at 000004-5, 000034-37.) Because she was already identified and her importance as witness was clear, it would have taken little effort for Mr. Kempton to reach out to her to determine whether she recognized Charles as one of the men she saw on Halloween 2001.

Dallas Mallory's contradictory testimony could have also been easily discovered. Again, Mr. Mallory was identified in a police report, and the contents of that false report is easily recognizable as important—since it provided key corroboration to Charles' false confession. (Ex. 49 (Westbrook Dep.), at 161:11-162:5; ex. 2 (Erickson Aff. 4), at 17.) But contrary to that report, Mr. Mallory told the police that he did not see Charles or Ryan after they went to By George on Halloween 2001, (ex. 13 (Mallory Dep.), at 34:10-35:2), and repeated that account to others shortly after the police forcefully interrogated him, (*id.* at ex. 8). It thus appears that obtaining Mr. Mallory's version of the story would have required little effort.

Likewise, it would likely have not taken significant effort to identify and question Kim Bennett and Melissa Griggs. Charles specifically told police on October 1, 2004 (a month before his guilty plea), that Melissa Griggs saw him at By George on Halloween 2001. (Ex. 3 (Trial Tr.), at 1594:10-19.) Kim Bennett, who told the police in May 2004 that Charles and Ryan left By George almost an hour before the murder, (ex. 4 (Habeas Tr.), 470:11-473:19), could have

plausibly been identified in the same manner, being an eye-witness acquaintance Charles already knew for two years, (*id.* at 463:1-12).

(iii) A Reasonable Investigation Would Have Determined That the Police and Prosecutors Were Giving Charles False Reports.

Lastly, a reasonable investigation would have allowed Mr. Kempton to discover that the police and prosecutors gave them false reports. The critical nature of these reports, purporting to confirm Charles' false confession and provide an account Ryan of confessing to his participation in the crime, made these reports important enough to elicit an investigation. (*See* ex. 2 (Erickson Aff. 4), at 17.) In the case of Meghan Arthur and Dallas Mallory—who have unequivocally disavowed the contents of those reports—an interview would have sufficed. (*See* ex. 14 (PCR Tr.), at 270:19-272:15, 287:1-24, 288:2-7, 289:8-23; ex. 15 (Arthur Dep.), at 26:16-20, 27:21-28:10, 33:5-34:13, 40:10-13, 41:1-43:11, 44:20-47:3, 47:8-51:13, 52:6-53:2.)

(c) Information Concerning Charles' Psychological and Mental Conditions, Significant Exculpatory Evidence, and the Falsity of Damning Police Reports Would Have Improved Charles' Defensive Position.

A reasonable investigation into Charles' mental and psychological state, and the details of his confession, would have drastically improved Charles' defensive position by allowing him to know all his options, including the factual basis of his charges and their possible consequences.

Even after months of investigation and preparation, prosecutors falsely convicted Ryan without any "physical evidence t[ying] [Charles] or [Ryan] to Mr. Heitholt's murder or the crime scene. Physical evidence found at the scene did not match to either [Charles] or [Ryan] as the source." *Ferguson 3*, 413 S.W.3d at 60; *Ferguson 2*, 325 S.W.3d at 419. Other than Charles,

only *one* eyewitness placed Charles and Ryan at the scene, *Ferguson 3*, 413 S.W.3d at 60, and that witness later fully recanted his testimony, *id.* at 49 n.14.

Under these circumstances, any evidence that could have allowed Charles to gain a better grasp of what actually happened on Halloween 2001 and call into question the false narrative formed during his ruminations and aggressively reinforced by police and prosecutors, would have immensely improved his position.

(2) The Failure of Charles' Counsel to Investigate the Details Contained within Charles' Coerced Confession Prejudiced His Defense by Removing His Ability to Knowingly Plead Guilty.

Ultimately, Mr. Kempton's failure to investigate the facts of Charles' coerced confession prejudiced Charles' defense by depriving him of the ability to knowingly plead guilty. Demonstrating prejudice for ineffective assistance of counsel requires showing there was a reasonable probability that, but for his counsel's errors, Charles would not have pleaded guilty. *Hao v. State*, 67 S.W.3d 661, 663 (Mo. App. 2002). In early 2004, the combination of Charles drug-abuse, cognitive disabilities, psychological disorders, confirming false reports, and the fact that he had no recollection of what happened on Halloween 2001 after blacking out before the end of the night, made him remarkably susceptible to the coercive tactics employed by the police and prosecutors. *See* Part III.D. Charles was so susceptible, that the police and prosecutors convinced him for a time that he had participated in Mr. Heitholt's murder. (*See* ex. 4 (Habeas Tr.), at 624:22-625:19.) Had Charles been provided with information to counter that coercion, including facts about that night and the reason he had trouble recalling them, there is certainly a reasonable probability that Charles would not have pleaded guilty.

In sum, because Charles' Sixth Amendment rights were violated when his attorney failed to adequately investigate Charles' case in a manner that would make Charles fully aware of the

facts undermining the State's charges and his legal options, he did not knowingly plead guilty and he is entitled to a writ of habeas corpus.

c. The Police and Prosecutors Deprived Charles of the Ability to Knowingly Plead Guilty by Withholding Important Exculpatory Evidence.

Charles' did not knowingly plead guilty because the police and prosecutors failed to disclose exculpatory evidence essential to Charles' ability to know the facts surrounding his charges. Under *Brady v. Maryland*, 373 U.S. 83 (1963), and its progeny, an individual has the right to know of all the evidence the State holds—both supporting and refuting their charges.[20] This means that for a defendant to knowingly plead guilty, he must be fully aware of any evidence the government has that is favorable to him. *See United States v. Avellino*, 136 F.3d 249, 255 (2d Cir. 1998) ("The government's obligation to make [*Brady*] disclosures is pertinent to an accused's preparation for trial *but also to his determination of whether or not to plead guilty*." (Emphasis added.)).

The prosecutors' failure to disclose significant exculpatory evidence prior to Charles' guilty plea deprived him of the ability to knowingly plead guilty. The Court of Appeals has already identified two examples of exculpatory material that the State never affirmatively disclosed to Charles while seeking his conviction: the testimonies of Shawna Ornt and Melissa Griggs.[21] *See Ferguson 3*, 413 S.W.3d at 67-69. The Court of Appeals noted that *only* prosecutors were aware of this testimony until it was either discovered during Ryan's trial, *id.* at

[20] This claim is distinct from arguments made under *Brady v. Maryland*, 373 U.S. 83 (1963). *See, infra* Part IV.B.2.a.

[21] In addition to the testimonies of Shawna Ornt and Melissa Griggs, the Court of Appeals in Ryan's case found that the State possessed but failed to affirmatively disclose the testimony of Barbara Trump, which impeached the critical (but false) testimony of her husband Jerry Trump. *Ferguson 3*, 413 S.W.3d at 69-70. This *Brady* violation ultimately led to Ryan's release. *Id.* at 73-74. However, because Mr. and Mrs. Trumps' testimonies were not discovered until after Charles pleaded guilty, they are inapplicable here. *See* Parts III.F-III.G.

67 (explaining that Melissa Griggs information was unknown until trial), or shortly before, *id.* at 68-69 (stating that Ryan did not learn of Shawna Ornt's testimony until October 2005 when he deposed her). Because Charles pleaded guilty *before* Ryan's trial, he had no knowledge of this evidence until long *after* he had entered his guilty plea.

Two additional examples of withheld *Brady* evidence exist in the testimonies of Kim Bennett and Dallas Mallory. Like Melissa Griggs' testimony, Kim Bennett actually observed Charles and Ryan get into Ryan's car and drive away from By George between 1:15 and 1:30 a.m. and provided this information to investigators, (ex. 4 (Habeas Tr.), at 465:13-466:23, 470:11-472:16, 473:20-475:10), it was never disclosed. And rather than ever disclosing that Dallas Mallory denied ever seeing Charles after he and left By George on Halloween 2001, (ex. 13 (Mallory Dep.), at 34:10-35:2), investigators left him to draw conclusions for his guilty plea based on their false report.

The effect of the prosecutors' failure to disclose this evidence on Charles' ability to know the facts of his case cannot be understated. As explained *supra* in Parts III.E.2, IV.1.a(2)(b)(i), and 1.a(2)(b)(i)c, Mses. Ornt, Griggs, Bennett, and Mr. Mallory's testimony directly contradicts the narrative the police and prosecutors imposed upon Charles by excluding him from the scene of the crime.

In the end, Charles could not have knowingly pleaded guilty to Mr. Heitholt's robbery and murder because police and prosecutors withheld evidence. Their actions deprived Charles of the ability to know the factual basis underlying his charges. *See Miller v. Angliker*, 848 F.2d 1312, 1320 (2d Cir. 1988) ("We conclude that even a guilty plea that was 'knowing' and 'intelligent' may be vulnerable to challenge if it was entered without knowledge of material evidence withheld by the prosecution."). This Court should, therefore, grant Charles' petition.

d. The Police and Prosecutors Deprived Charles of the Ability to Knowingly Plead Guilty by Plying Him with Fabricated Evidence that They Knew, or Should Have Known, Was False.

The police and prosecutors' decision to ply Charles with evidence they fabricated or knew was unreliable, also prevented Charles from knowingly pleading guilty. As described *supra*, in Part III.E.1, prosecutors and police gave Charles ***false*** or ***fabricated*** reports, or reports they should have known were false. These reports were integral in convincing Charles to plead guilty to a crime he did not commit. (Ex. 2 (Erickson Aff. 4), at 17.) But because those reports, which were presented to Charles as reliably collected evidence, contained falsehoods instead of facts, they deprived Charles of a knowledge of the "the factual basis underlying [his] charges." *See LoConte*, 847 F.2d at 751. This deception made Charles' plead defective.

Thus, just as Charles' Due Process rights were violated when the trial court accepted a guilty plea that was not voluntary, see Part IV.1, Charles' rights were also violated when the court accepted a guilty plea that was not knowingly entered. Here, Charles could not have known the facts and circumstances underlying the charges brought against him when his counsel failed to investigate matters essential to the case, nor could he have had an accurate picture when police and prosecutors were withholding evidence and deceiving him with false reports.

3. Charles' Prior Statements Concerning the Heitholt Murder Do Not Affect His Entitlement to Habeas Relief Pursuant to His Defective Guilty Plea.

None of Charles' prior statements about this matter defeat his entitlement to habeas relief because of his defective guilty plea. Charles' lack of memory combined with his intellectual, psychological, and substance abuse issues, as well as the coercive pressure placed upon him by state authorities and their constitutional violations to temporarily convince him that he was guilty. (Ex. 4 (Habeas Tr.), at 624:22-625:19; ex. 2 (Erickson Aff. 4), at 16-17; ex. 6 (Erickson Aff. 3), at ¶¶12-17.) The product of these unique factors is that, over the course of Charles'

prosecution and incarceration, he offered false confessions and in-court testimony that his guilty plea was voluntarily and knowingly entered.

Those prior statements do not diminish Charles' entitlement to a writ of habeas corpus.

a. Charles' False Confession Does Not Make Him Any Less Entitled to Habeas Relief When He Was Convicted Pursuant to a Defective Guilty Plea.

First, Charles' coerced false confession has no bearing upon whether he entitled to relief from his defective guilty plea.[22] "The ultimate question" in determining whether a prisoner is entitled to relief from a sentence imposed following a guilty plea is whether "the plea was voluntary, and knowingly, and understandingly made." *Schuler v. State*, 476 S.W.2d 596, 598 (Mo. banc 1972). This is because an individual who is convicted pursuant to a defective plea is deprived "of safeguards which are rightfully and properly his, ***no matter whether he is in fact innocent or guilty of the crime charged***." *Reese*, 481 S.W.2d at 499 (emphasis added). Courts considering whether to grant a prisoner habeas relief pursuant to a defective plea must, therefore, do so "without inquiry as to whether [the prisoner] is in fact innocent or guilty." *Id.* This allows an accused to have his guilt or innocence decided through "the appointed and appropriate place" for such a determination: "a trial on the merits." *Id.* at 500.

b. Charles' In-Court Testimony Concerning of His Guilty Plea Does Not Make Him Less Entitled to Habeas Relief Because It Does Not Make His Plea *Per Se* Voluntary or Knowing.

Charles' responses during his guilty plea colloquy also do not diminish his entitlement to habeas relief. Courts generally afford the statements in a plea colloquy a "presumption of

[22] Nor does Charles' false confession constitute absolute proof of his guilt. The National Registry of Exonerations has found that of the 1,810 exonerations for which it has collected data, 227 people had falsely confessed to crimes, including 25% of homicide exonerations. Samuel Gross et al., *Exoneration in the United States, 1989-2012*: Report by the National Registry of Exonerations, 58, 60 (June 12, 2016) (attached as Exhibit 46).

correctness." *Marshall v. Lonberger*, 459 U.S. 422, 437 (1983). This is because "'[s]olemn declarations in open court carry a strong presumption of verity.'" *United States v. Green*, 521 F.3d 929, 932 (8th Cir. 2008) (quoting *United States v. Fitzhugh*, 78 F.3d 1326, 1329 (8th Cir. 1996)). *Smith v. Lockhart*, 921 F.2d 154, 157 (8th Cir. 1990) (internal quotation marks and citation omitted). Nevertheless, this presumption is not "invariably insurmountable." *Blackledge v. Allison*, 431 U.S. 63, 74-75 (1977) (superseded by statute on other grounds as recognized by *Mulder v. Baker*, No. 3:09-cv-00610-PMP-WGC, 2014 U.S. Dist. LEXIS 125019, at *4-*5 (D. Nev. Sept. 8, 2014)). This is because "no procedural device for the taking of guilty pleas is so perfect in design and exercise as to warrant a *per se* rule rendering it 'uniformly invulnerable to subsequent challenge.'" *Id.* at 73 (quoting *Fontaine v. United States*, 411 U.S. 213, 215 (1973)). *Contra Lynn v. State*, 417 S.W.3d 789, 797-98 (Mo. App. 2013) (finding that a court's plea colloquy with a defendant was "more than sufficient to establish that [the defendant] made a voluntary and intelligent choice among the options available to him" in the circumstances of an *Alford* plea). Thus, courts will not prohibit the naïve detainee from challenging his guilty plea because he answered in the affirmative after a judge blandly asked: "Are you making this plea knowingly, voluntarily, and understandingly?"

Because significant evidence demonstrates that he did not enter his guilty plea voluntarily or knowingly, Charles' in-court statements do not foreclose his entitlement to habeas corpus relief. It is true that Charles answered a series of questions posed by the judge during his plea colloquy, (ex. 47 (Erickson Plea Tr.), at 3:16-5:25, 7:10-8:24, 9:7-13:13), that ultimately led the court to find that Charles' plea had been voluntary and knowing, (see *id.* at 14:3-10). It is also true that Charles was specifically asked whether anyone had coerced him to plead guilty. (*id.* at 8:7-9.) Nevertheless, mounting evidence demonstrates the contrary—that Charles' guilty plea

was involuntary, due to coercion, and unknowing, due to his ineffective attorney and the prosecutor's actions.

This Court should, therefore, only consider Charles' guilty plea testimony in conjunction with all other contrary evidence presented to ultimately determine the voluntariness of his guilty plea.

B. Charles Erickson Is Entitled to Habeas Corpus Relief because He Is Actually Innocent and Was Convicted after State Authorities Violated His Constitutional Rights to Obtain His Guilty Plea.

If, despite the evidence to the contrary, this Court finds that Charles' guilty plea was not defective, Charles is entitled to habeas corpus relief because he is actually innocent and the police and prosecutors violated his constitutional rights to obtain that plea. Prisoners are entitled to seek a writ of habeas corpus when, without the writ, there would be "manifest injustice," *State ex rel. Simmons v. White*, 866 S.W.2d 443, 446 (Mo. banc 1993)—even where his claims are otherwise procedurally barred, see *Jaynes*, 63 S.W.3d at 215-17. A manifest injustice may occur is when "'a constitutional violation has probably resulted in the conviction of one who is actually innocent.'" *Clay*, 37 S.W.3d at 217 (quoting *Schlup v. Delo*, 513 U.S. 298, 327 (1995)).

1. Charles Is Actually Innocent of the Crimes for Which He Is Currently Incarcerated.

Charles is entitled to habeas relief because he is actually innocent. Because "'[r]easonable doubt . . . marks the legal boundary between guilt and innocence,'" showing "actual innocence" requires a petitioner only to "show that it is more likely than not that 'no reasonable juror would have found the defendant guilty' beyond a reasonable doubt" in "light of newly discovered evidence." *Jaynes*, 63 S.W.3d at 216 (quoting *Schlup*, 513 U.S. at 328-29).[23]

[23] Because "actual innocence only refers to the crime for which a prisoner was convicted, it "does not require a showing that the petitioner has 'led an entirely blameless life.'" *Jaynes*, 63 S.W.3d at 216 (quoting *Schlup*, 513 U.S. at 328-29).

New evidence has arisen since Charles pleaded guilty in November 2004 that demonstrates it is more likely than not that no reasonable juror would have convicted Charles for crimes leading to the death of Kirk Heitholt. Under Missouri law, "new" evidence includes any evidence that was unknown or unavailable at the time of trial, regardless of whether it could have been discovered or developed with reasonable diligence. *See State ex rel. Engel v. Dormire,* 304 S.W.3d 120, 126 (Mo. banc 2010) (reviewing "new evidence" that was developed and unknown or unavailable during previous efforts to obtain relief); *McKim v. Cassady,* 457 S.W.3d 831, 846 (Mo. App. 2015) ("[A]s actual innocence habeas claims are grounded in the concept of 'manifest injustice,' there is a logical underpinning for viewing 'new evidence' as suggested in *Schlup* as any evidence '*that was not presented at trial.*'"). In the context of a petitioner who pleaded guilty prior to trial, like Charles, new evidence would include anything that was unknown or unavailable to the petitioner at the time of his guilty plea. *See Orre v. Prudden,* No. 4:10 CV 518 DDN, 2013 U.S. Dist. LEXIS 24392, at *8-*9 (E.D. Mo. Feb. 22, 2013).

Because Ryan Ferguson was the only person tried for Mr. Heitholt's death, and because the prosecutors' theory in trying Ryan was based on his cooperation with Charles, it is helpful to look at the new evidence demonstrating Charles' actual innocence through the prism of Ryan's trial and subsequent exoneration. Furthermore, the fact that Charles succumbed to the police and prosecutors' coercive pressure and pleaded guilty does not impede him from seeking relief based on his actual innocence. "A person who pleaded guilty is not somehow 'more' guilty, or less deserving of a chance to show actual innocence, than one who went to trial." *Weeks v. State,* 140 S.W.3d 39, 46 (Mo. banc 2004). Therefore, upon a showing of actual innocence, Charles is entitled to the same habeas relief as any other prisoner that was convicted following an unconstitutional trial proceeding.

a. No Reasonable Juror Would Have Found Charles Guilty beyond a Reasonable Doubt Because No Physical Evidence Tied Charles or Ryan to the Heitholt Murder.

First, it is more likely than not that no reasonable juror would find Charles was guilty of Mr. Heitholt's death and robbery because ***no physical evidence*** exists to tie him to the crime. As the Court of Appeals observed when granting Ryan's habeas petition, this is not an "ordinary case." *Ferguson 3*, 413 S.W.3d at 60. One of the most unique aspects of the case is that "[n]o physical evidence tied [Charles] or [Ryan] to Mr. Heitholt's murder or the crime scene. Physical evidence found at the scene did not match to either [Charles] or [Ryan] as the source." *Id.* at 60. That means that "DNA evidence from the scene was not a match to either [Ryan] or [Charles]. The bloody footwear impressions did not match either [Ryan's] or [Charles'] shoe sizes. The fingerprints at the scene did not belong to [Ryan] or [Charles]." *Id.* at 46 n.7. These facts were so glaring, so troubling in light of Charles' and Ryan's convictions, that even when refuing to grant Ryan relief during his early appeal, the Court of Appeals remarked "that the issues of this case . . . give us pause." *Ferguson 2*, 325 S.W.3d at 419.

b. No Reasonable Juror Would Have Found Charles Guilty beyond a Reasonable Doubt Because New Evidence Overcomes Any Other Evidentiary Connection between Charles and the Heitholt Murder.

In addition to the fact that no physical evidence ties Charles to the Heitholt murder, the only proof that prosecutors presented to convict Ryan falls apart in light of new evidence that was either withheld or unavailable at the time that Charles pleaded guilty. When the Court of Appeals granted habeas relief to Ryan, they found the mounting examples of newly discovered evidence troubling.

> In reaching the conclusion that Ferguson's conviction is not worthy of confidence, we have not been required to consider "newly discovered evidence" beyond the undisclosed evidence in the State's possession. It is nonetheless appropriate to highlight that the lack of confidence in Ferguson's conviction caused by the

> State's material *Brady* violation is only enhanced by the existence of newly discovered evidence outlined in the habeas record. That evidence includes: (i) Trump's recantation of his eyewitness identifications of Erickson and Ferguson and of his story that the identifications were triggered by a newspaper he received from his wife (or from any other source) while he was in prison; (ii) Trump's allegation that he was first shown a newspaper with an account of Mr. Heitholt's murder by the State, and felt intimidated and pressured into identifying Erickson and Ferguson based on real or perceived threats that he would suffer repercussions following his release from prison if he did not; (iii) the related fact that Trump was contacted by the State one week before he was set to be released from prison; (iv) Erickson's recantation of his "seriously undermined" trial testimony implicating himself and Ferguson in the murder of Mr. Heitholt; (v) Ornt's testimony that she is confident that neither Ferguson or Erickson are the man she saw well in the parking lot on the night of Mr. Heitholt's murder; (vi) Kim Bennett's testimony that she visited with Ferguson, then witnessed Ferguson and Erickson get into Ferguson's car and drive away from By George at 1:30 a.m. on the night of Mr. Heitholt's murder, consistent with Ferguson's trial testimony and inconsistent with the State's hypothesized theory of its case; and (vii) [Michael] Boyd's testimony during the habeas proceedings which, when compared to statements Boyd gave to the police immediately after the murder or to investigators in the months before Ferguson's trial, reveals a curiously evolving and, in some instances, inconsistent recollection of events.[24]

Ferguson 3, 413 S.W.3d at 72-73. Most of this new evidence, in addition to other evidence identified in this petition and a new analysis examining how Charles' mental and psychological conditions affected his recall of the events of Halloween 2001, combine to create a situation where no reasonable juror would convict Charles in the face of a complete lack of physical evidence tying him to the Heitholt murder. Specifically, this includes: (1) the withheld exculpatory testimonies of Mses. Ornt, Bennett, Griggs, and Mr. Mallory; (2) the circumstances of Mr. Trump's trial testimony and his complete recantation; and, (3) information demonstrating

[24] The Court of Appeals refers to Mr. Boyd's shifting testimony over the course of his several interviews. For example, Mr. Boyd stated that he last saw Mr. Heitholt in the parking lot of the Daily Tribune. (Ex. 7 (Police Rpts.), at 000016-17, 000019-21, 000072-73.) But in one interview he exited his car to speak with Mr. Heitholt, (*id.* at 000016-17), and in the other he spoke through his rolled down window, (*id.* at 000019-21). In another instance, Mr. Boyd claimed that he drove down an alley to leave the parking lot, but did not see anything suspicious, (*id.* at 000016-17, 000019-21), and then years later claimed he saw two white men standing in the alley as he pulled away, (*id.* at 000072-73; ex. 4 (Habeas Tr.), at 513:10-514:14).

that Charles' previous statements and testimony claiming any knowledge of the events leading up to the Heitholt murder (*i.e.*, any information about his or anyone else's participation in the crime) are simply false.

(1) No Reasonable Juror Would Convict Charles for the Heitholt Murder in Light of New Exculpatory and Impeaching Testimony.

As explained *supra*, three important pieces of previously withheld evidence serve to exonerate Charles from any participation in the robbery and murder of Kent Heitholt by removing him from the scene. According to Kim Bennett and Melissa Griggs, they were present when By George closed at 1:30 a.m. on November 1, 2001 and then saw Ryan drive away with Charles—almost one hour before Mr. Heitholt died. (Ex. 3 (Trial Tr.), at 1591:13-18; 1715:9-16; ex. 4 (Habeas Tr.), at 465:13-466:23, 470:11-472:16, 473:20-475:10.) Then Shawna Ornt, the only person to see the two suspects at the scene of the Heitholt murder well enough to help police create composite sketches, (Ex. 7 (Police Rpts.), at 000004-5, 000034-37), excluded both Charles and Ryan as being at the scene around 2:20 a.m., (ex. 14 (PCR Tr.), at 705:22-706:19); *Ferguson 3*, 413 S.W.3d at 67.

While the lack of physical evidence at the site of the crime served to undermine the possibility that Charles or Ryan were at or near the Columbia Daily Tribune at the time of Mr. Heitholt's death, these other pieces of evidence affirmatively exclude them.

(2) No Reasonable Juror Would Convict Charles for the Heitholt Murder Based on Jerry Trump's Newly Debunked and Recanted Testimony.

Next, no reasonable juror would use Jerry Trump's wholly-debunked testimony to convict Charles of the Heitholt murder.

The significance of Jerry Trump's trial testimony cannot be understated. The *only* evidence prosecutors produced directly tying Ryan and Charles to the crime were the testimonies

of Jerry Trump and Charles. *Ferguson 3*, 413 S.W.3d at 60; *Ferguson 2*, 325 S.W.3d at 419. The State even admitted during oral argument for Ryan's habeas hearing that "Erickson and Trump's testimony 'were the two most important pieces of evidence in the case.'" *Ferguson 3*, 413 S.W.3d at 60. But when Charles' testimony proved to be simply unreliable, *Ferguson 2*, 325 S.W.3d at 417; (ex. 4 (Habeas Tr.), at 595:4-10), even the prosecutors, themselves, felt his testimony turned out to be "compelling," (ex. 4 (Habeas Tr.), at 593:18-594:1), and "a pretty big deal in a pretty big case," (ex. 4 (Habeas Tr.), at 665:13-666:22). The Court of Appeals observed that those prosecutors "repeatedly emphasized Trump's explanation for his identification . . . [o]n no less than seven occasions," and used Mr. Trump's identification to "dispel the damage done to the credibility of [Charles'] confession." *Ferguson 3*, 413 S.W.3d at 61-62, and "effectively permit[ ] the jury to case aside any doubts they had about Erikson's seriously undermined credibility" to convict Ryan, *id.* at 63.

But the background of Mr. Trump's testimony made it questionable from the start. Although Mr. Trump told police in 2001 that he had not seen the faces of the two men present at the scene well enough to describe or identify them, (ex. 7 (Police Rpts.), at 000014, 000029), prosecutors sought him out anyway three years later, pursuing testimony linking Charles and Ryan to the crime, (ex. 4 (Habeas Tr.), at 595:11-19; ex. 21 (Trump Dep.), at 28:18-22; 29:4-18; ex. 20 (Trump Aff. 1), at ¶¶12-13.). The prosecutors found him in prison finishing a sentence for felony endangerment of a child and preparing for supervised parole. (Ex. 7 (Police Rpts.), at 000077-79.)

By Ryan's trial, Mr. Trump overcame his inability to identify the suspects and provided a tenuously plausible story allowing him to positively identify Charles and Ryan as the men observed at the scene on Halloween 2001. Mr. Trump testified that his wife sent him a

newspaper containing photographs of Charles and Ryan, while he was still in prison. (Ex. 3 (Trial Tr.), at 1000:14-1001:8.) He claimed that the paper was precisely folded to display photographs of the boys without showing the accompanying headline, and that as he pulled the paper out of the envelope he immediately recognized their faces from the night of the murder. (*Id.* at 1000:15-1001:8.) With this testimony, Mr. Trump became the *only* eyewitness to place Charles and Ryan at the scene. *Ferguson 3*, 413 S.W.3d at 60.

But it was a lie. Fearing the prosecutors would revoke his parole if he could not help them, Mr. Trump told them what they wanted to hear—lies supporting their theory that Charles and Ryan had murdered Mr. Heitholt. (*Compare* ex. 3 (Trial Tr.), at 1000:15-1001:8, *with* ex. 22 (Trump Aff. 2), at ¶¶5-11, 20-22; ex. 20 (Trump Aff. 1), at ¶¶16-17; ex. 21 (Trump Dep.), at 9:4-22:8.) Six years after lying in support of the prosecutors, Mr. Trump testified that his wife never sent him a copy of a newspaper while he was in prison, (ex. 21 (Trump Dep.), at 48:2-17, 51:15-25, 56:21-57:10), that prosecutors gave him the first pictures he saw of Charles and Ryan, (ex. 20 (Trump Aff. 1), at ¶¶12-17; ex. 21 (Trump Dep.), at 48:2-17), and that he could not positively identify either Charles and Ryan as the men he saw at the scene of the crime, (ex. 21 (Trump Dep.), at 57:15-59:15).

But even without Mr. Trump's later recantation, this testimony should never have been used to convict Ryan. Following a decade in prison, Ryan was granted a writ of habeas corpus after showing that prosecutors had violated his Fourteenth Amendment rights by not disclosing that Mr. Trump's wife told them she had never sent a newspaper to Mr. Trump,[25] *Ferguson 3*,

[25] Prosecutors also never affirmatively disclosed to Ryan that Mr. Trump "had announced the sudden ability to identify [Charles] and [Ryan] as to the two men he saw on the night of Mr. Heitholt's murder, or that his identification was triggered by the receipt of a newspaper from his wife." *Ferguson 3*, 413 S.W.3d at 69. Ryan's defense did not discover any of that material until they took Mr. Trump's deposition. *Id.* Prosecutors admitted they had intentionally withheld this

413 S.W.3d at 73-74, material evidence that debunked the foundation of Mr. Trump's false testimony.

(3) No Reasonable Juror Would Have Found Charles Guilty beyond a Reasonable Doubt Based on His False Testimony or Confession.

Once Jerry Trump's false testimony is eliminated, the *only* evidence prosecutors produced placing Charles or Ryan at the scene of the crime was Charles' false testimony and confession. But no reasonable juror would find Charles guilty beyond a reasonable doubt based on his false admissions because: (a) none of them have been credible, (b) new evidence impeaches and undermines Charles' story placing him at the site of the murder, and (c) new evidence demonstrates that Charles' testimony is likely a product of the coercive pressure applied by the police and prosecutors, and Charles' own psychological disorders and cognitive dysfunction.

(a) No Reasonable Juror Would Have Found Charles Guilty beyond a Reasonable Doubt Based on His Testimony Alone Because His Testimony and Confession Were Never Credible.

Charles' early accounts of Halloween night 2001 are obviously unreliable and a reasonable jury would not give them any consideration. Three details from Charles' first confession show he lacks personal knowledge concerning anything that happened that night: First, his confession is replete with provably false and internally inconsistent details. Second, he often changed his story to conform to his interrogators' suggestions. And, third, even after confessing he was unwilling to assume blame for the murder in his conversations with others.

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information because they were not certain Mr. Trump would identify Charles and Ryan in front of the jury—a reason the Court of Appeals deemed "facially absurd." *Id.* at 69-70.

The inconsistent and provably false information Charles gave during his day-long interrogation is the most blatant signal that he did not have any personal knowledge about the Heitholt murder. In one instance, Charles claimed he witnessed Ryan strangling Mr. Heitholt, when in another he claimed to have blacked out when that strangulation would have occurred. (Ex. 8 (Interrogation 1), at 9:2-18; ex. 12 (Interrogation 3), at 15:12-16:5.) Charles also said that Ryan took a wallet from Mr. Heitholt when the police recovered that wallet from the scene. (Ex. 8 (Interrogation 1), at 8:19-9:1, 11:21-12:23, 22:19-24; ex. 11 (Interrogation 2), at 9:21-10:15.)

Charles' willingness to conform his account to his interrogators' suggestions also demonstrates his lack of personal knowledge. For example: Charles initially indicated that Ryan strangled the victim with his hands. (Ex. 8 (Interrogation 1), at 5:3-15.) When the police later attempted to correct Charles by disclosing that the victim had been strangled "with something," Charles accepted their correction but stated that he did not know what that "something" was. (*Id.* at 9:2-7.) When pushed further, Charles guessed that the victim was strangled with a shirt, and then a bungee cord before a detective definitively told Charles that the victim had been strangled with his own belt. (Ex. 8 (Interrogation 1), at 21:4-16.) In the end, the only accurate details Charles gave during his confession were "I don't remember," (*e.g.*, ex. 11 (Interrogation 2), at 7:3), and "I don't know," (*e.g.*, ex. 12 (Interrogation 3), at 4:14)—because he had no personal knowledge of the Heitholt murder.

Even after he confessed to his interrogators, Charles' lack of personal knowledge about the Heitholt murder was still apparent in his continued reticence to definitively admit to any involvement in the crime. According to one man who was jailed with Charles, "[Charles] told him that he was not sure whether he had committed the murder," "stated that he had dreamed that he and [Ryan] had committed the murder," and "confessed to the murder merely because 'he

wanted to go home' and the police promised him he could go home after giving a statement, and he eventually took the plea agreement to 'get it over with.'" *Ferguson 2*, 325 S.W.3d at 416. (Ex. 14 (PCR Tr.), at 84:24-85:7, 85:18-86:6.) A second inmate "similarly testified that [Charles] told him that 'he didn't know if he had done it' and that 'it was all a dream,'" and confessed "he was high on marijuana when he admitted to committing the crimes to the police, and that ultimately he 'never gave a hundred percent answer if [he or Ryan] had done it." *Ferguson 2*, 325 S.W.3d at 416. (Ex. 14 (PCR Tr.), at 94:10-95:12.) And a third "testified that [Charles] told him that he 'had a dream that him [*sic*] and [Ryan] did it' and that he did not say 'whether he knew if he actually committed that murder or not.'" *Ferguson 2*, 325 S.W.3d at 416. (Ex. 14 (PCR Tr.), at 77:16-78:2.)

Ryan's trial defense counsel was "successful in illustrating that [Charles] had made various prior statements that seriously undermined [his] credibility" by attacking Charles' lack of personal knowledge. *Id.* at 417. Charles admitted "on cross-examination that from November 2, 2001 until spring 2003, he did not have any conscious memory that he was involved in the death of Kent Heitholt." *Id.* He "conceded . . . that for a period of many months after he was first investigated by the police for the murder, he stated to friends, the police, his parents, and even a nurse in the jail, that he was uncertain whether he and [Ryan] had murdered the victim." *Id.* (*e.g.*, ex. 3 (Trial Tr.), at 768:16-769:16, 786:14-787:1.) And he confessed he did not "'even remember' the murder; that he might be 'confusing [memories] with dreams'; that he was 'not sure that he had been involved in the death of Mr. Heitholt'; 'Like, I could just be sitting here

and fabricating all of it and not know. Like, I don't know. I don't.'"[26] *Ferguson 2*, 325 S.W.3d at 471. (*e.g.*, ex. 3 (Trial Tr.), at 633:24-634:10; 707:9-708:10.)

When Charles later recanted his earlier confession to assume sole responsibility for Mr. Heitholt's robbery and murder, his lack of personal knowledge about the murder made that recantation highly problematic. Although this recantation was offered to benefit Ryan, it directly contradicted Ryan's narrative—claiming that rather than going home for the night, Ryan watched Charles commit the murder and even "pushed [Charles] off of the victim." (*Compare* ex. 3 (Trial Tr.), at 1784:24-1785:17, 1786:20-24, 1788:21-1793:7; ex. 5 (Ferguson Dep.), at 85:7-86:25, 88:4-90:6, 92:4-6 *with* ex. 23 (Erickson Dep.), at 11:18-19.) If Ryan had been wholly innocent of any violence against Mr. Heitholt while still a direct witness of all events that had occurred, it is irrational that he would *never* tell that story himself, especially when it would have been benefitted him. Furthermore, Charles littered his recantation with words expressing doubt, often hedging this second supposed confession with words like "I believe," "I don't remember," "I'm not sure" about specific facts, and "I lied about remembering taking items from the victim, though I believe I did." (Ex. 23 (Erickson Dep.), at 9:8-10, 9:14-15, 12:15-16, 12:5-7, 12:15-16, 12:20-23, 13:1-3.)

Most recently, Charles produced several affidavits recanting any previous false confessions and explaining the pressure he faced to confess and plead guilty. While a jury may find it difficult to take all the assertions they make at face-value after every other statement Charles has made, those affidavits strengthen the *only consistent admissions he has made since*

[26] Even prosecutors recognized that "Charles' confession was problematic," admitting that Charles "had some memory problems." *Ferguson 3*, 413 S.W.3d at 61. The Court of Appeals implies that the jury likely cast aside Charles' unreliable false testimony to convict Ryan based solely on Mr. Trump's lies. *Ferguson 3*, 413 S.W.3d at 63.

*he was arrested in 2004—**that he does not have any personal memory of anything that happened on Halloween 2001***. (Exs. 2, 6, 9, 10 (Erickson Affs.).)

Charles' "changing stories make his self-report at any point in time unreliable as a stand-alone indicator of the truth," (ex. 1 (Aaron Rpt.), at 2), and reveal one important fact: The *only consistent* story that Charles has provided since 2004 is that he does not remember anything that happened on Halloween 2001 after he began drinking at By George. Under these circumstances, no reasonable juror would have found Charles guilty beyond a reasonable doubt.

(b) No Reasonable Juror Would Have Found Charles Guilty beyond a Reasonable Doubt Because New Evidence Impeaches Charles' Prior Accounts Placing Him at the Scene of the Murder.

New evidence also impeaches Charles' testimony, contradicting any narrative placing him at the scene of the Heitholt murder. During Ryan's trial, Charles claimed that as he and Ryan fled the scene of the murder, they saw Dallas Mallory pull up in his car, accompanied by "a couple of girls," and that he told Mr. Mallory that they had just attacked someone.[27] (Ex. 3 (Trial Tr.), at 560:18-561:21.) That never happened. Dallas never saw Charles after he went to By George on Halloween 2001. (Ex. 13 (Mallory Dep.), at 34: :10-35:2.) Moreover, Mr. Mallory's driver's license had been suspended, he did not own a car, and could not drive anywhere, (*id.* at 15:15-16:23), and does not recall ever being in a vehicle with two females that night, (*id.* at 62:24-63:1). At the end of the night, Mr. Mallory took a cab home. (*Id.* at 39:25-40:21.)

[27] As explained, *supra*, the police and prosecutors gave Charles a report purporting to contain the testimony of Dallas Mallory that provided essentially the same story that became Charles' trial testimony. (Ex. 7 (Police Rpts.), at 000066-67.) That report was fabricated. (Ex. 13 (Mallory Dep.), at 59:10-16, 63:21-23, 66:1-25, 87:24-88: 20, 89:13-90:3, 123:11-125:11, 127:4-13, 136:13-138:12, 163:14-164:14.; ex. 14 (PCR Tr.), at 270:19-272:15, 287:1-24, 288:1-8, 289:8-23.)

This impeaching evidence makes Charles' narrative more completely incredible and any conviction even less likely.

(c) No Reasonable Juror Would Have Found Charles Guilty beyond a Reasonable Doubt Because New Evidence about Charles' Cognitive Dysfunction and Psychological Disorder Justifies His Previous False Testimony.

A reasonable juror's conclusion to acquit Charles would be further justified by new evidence showing that Charles' changing accounts were a product of his youth, psychological dysfunctions, mental disorder, substance abuse, and the pressure applied by the prosecutors and the police. When the police arrested Charles to interrogate him all day, and the prosecutors plied him with false and fabricated evidence for months to pressure him into cooperating with them, Charles was only a nineteen-year-old boy, suffering through addiction, and was likely also coping with the effects of Obsessive-Compulsive Disorder and impeded cognitive functioning. *See*, *supra*, Parts III.A. and III.C. In the lead up to Charles' guilty plea hearing, no one explored how those conditions affected his ability to recall past events in the face of coercive pressure, much less even diagnose them in Charles. *See, supra*, Part IV.A.2.b(1)(a)(i). But these conditions made Charles particularly susceptible to the coercive pressure applied by the police and prosecutors as they pressured him to provide them the answers they sought, regardless of their veracity. (*See* ex. 1 (Aaron Rpt.), at 8-18.) And when considering Charles' several statements—including his consistent hedging or admissions of lack of knowledge—in light of these psychological and mental disorders, no reasonable juror would have used Charles' statements to find him guilty beyond a reasonable doubt.

c. No Reasonable Juror Would Have Found Charles Guilty beyond a Reasonable Doubt Because Previously Withheld Evidence Demonstrates Charles' Innocence.

Lastly, without any physical evidence linking Charles or Ryan to Mr. Heitholt's murder, and without Mr. Trump's lies or Charles' coerced false testimony, the prosecutors would not have any case at all against Charles in the light of additional exculpatory evidence they failed to disclose prior to his guilty plea. As explained *supra* in Parts III.E.2, IV.A.1.a(2)(b)(i), and A.1.a(2)(b)(i)A.2.c., Mses. Ornt, Bennett, Griggs and Mr. Mallory each had testimony that directly contradicted the narrative the police and prosecutors imposed upon Charles.

Ms. Ornt's testimony would have convincingly excluded Charles from the scene of Mr. Heitholt's murder. According to police reports, Ms. Ornt was the *only* person able to identify the two young men observed at the scene. (*Compare* Ex. 7 (Police Rpts.), at 000004-5, 000035-37, *with* 000014, 000029). But she refused to identify Charles or Ryan as one of those men. (Ex. 14 (PCR Tr.), at 705:22-706:19.) *Ferguson 3*, 413 S.W.3d at 67.

Ms. Griggs' testimony would have also spoiled the prosecutors' case narrative. Their theory, as expressed through Charles' coerced confession and testimony, was that Charles and Ryan had run out of money at the club, so they accosted Mr. Heitholt to rob him and return to By George to buy more alcohol. (Ex. 12 (Interrogation 3), at 8:3-9; ex. 11 (Interrogation 2), at 7:8-15, 15:12-24; 16:6-17:10.) As explained, *supra*, because Mr. Heitholt was not attacked until sometime between 2:10 a.m. and 2:26 a.m., By George would have had to remain open after 2:30 a.m. Ms. Griggs, however, would have testified that By George had closed at 1:30 a.m. on November 1, 2001. *Ferguson 3*, 413 S.W.3d at 67. And Kim Bennett would have also testified that Charles and Ryan left By George by its closure, 1:30 a.m., to go home. (Ex. 4 (Habeas Tr.), at 465:13-466:23, 470:11-472:16, 473:20-475:10.)

Assuming that the State produced its best evidence when it tried and convicted Ryan for crimes he did not commit, and that the State would have had to use the same evidence at trial to convict Charles, there is nothing left upon which a reasonable juror could rely to find Charles guilty beyond a reasonable doubt. No physical evidence ties Charles to the site. No eyewitnesses claim to have seen him there. One eyewitness affirmatively excludes Charles from those observed at the scene (Ms. Ornt), and another offers testimony that calls into question why he would even have been present at the time of the murder/robbery (Charles). In the end, the *only* evidence left that ostensibly connects Charles to Mr. Heitholt's death is Charles' coerced, convoluted, inconsistent, recanted, and false confession and testimony. And new evidence now shows this testimony was more likely a product of Charles' ruminating obsessions over the crime, his lack of memory concerning that night, his Obsessive-Compulsive Disorder (among other things), his substance abuse, his cognitive impediments, and the pressure applied by the police and prosecutors rather than any actual memories.

Therefore, because Charles is actually innocent of any crimes against Mr. Heitholt, and no reasonable juror could find Charles guilty beyond a reasonable doubt based solely on his own justifiably unreliable confession, this Court should consider the constitutional violations that ultimately led to Charles' illegal incarceration.

2. Charles and Is Entitled to Habeas Corpus Relief because State Authorities Violated His Constitutional Rights to Obtain His Guilty Plea.

Having satisfied the gateway threshold of proving his actual innocence, Charles is entitled to habeas corpus relief because prosecutors and police violated his Due Process Rights, under the Fourteenth Amendment of the U.S. Constitution and article I, section 10 of the Missouri Constitution by failing to disclose exculpatory evidence and plying him with false or fabricated evidence to secure his guilty plea.

a. Charles Is Entitled to Habeas Relief Because Prosecutors Violated His Fourteenth Amendment Due Process Rights under *Brady v. Maryland*.

Charles is entitled to habeas relief because prosecutors violated his Due Process rights under *Brady v. Maryland*, 373 U.S. 83 (1963), resulting in the conviction of an actually innocent man. Under *Brady* "the suppression by the prosecution of evidence favorable to an accused" is a violation of "due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." 373 U.S. at 87. Furthermore, a prosecutor's "duty to disclose *Brady* material . . . is not conditioned on a defendant's request for such material." *State ex rel. Clemons v. Larkins*, 475 S.W.3d 60, 78 (Mo. banc 2015) (citing *Banks v. Dretke*, 540 U.S. 668, 696 (2004)). Rather, "[p]rosecutors must disclose, even without a request, exculpatory evidence, including evidence that may be used to impeach a government witness." *Middleton v. State*, 103 S.W.3d 726, 733 (Mo. Banc 2003).

(1) Prosecutors Had an Affirmative Duty to Disclose Exculpatory Evidence Prior to Charles' Guilty Plea.

The prosecutors violated Charles' rights under *Brady* when they received exculpatory information about Charles but failed to disclose it to him prior to his guilty plea. The Fourteenth Amendment duty to affirmatively disclose exculpatory evidence under *Brady* extends to any evidence discovered prior to the entry of a guilty plea.[28] *Scroggins v. State*, 859 S.W.2d 704,707 (Mo. App. 1993).

[28] The State may cite *Lee v. State*, 573 S.W.2d 131, 134 (Mo. App. 1978), to claim that Charles' guilty plea requires him to show that the state intentionally acted to suppress exculpatory evidence. While *Lee* correctly shows that *Brady* applies at the guilty plea stage of proceedings, its characterization of a defendant's burden of proof was colored by early views of *Brady*'s requirements and does not demonstrate the current state of the law. *Compare State v. Eaton*, 561 S.W.2d 541, 546 (Mo. App. 1978) (following and quoting *Brady* to identify the constitutional violation as being in the suppression of evidence) *with Larkins*, 475 S.W.3d at 78 (explaining how prosecutors violate the Constitution under *Brady* by not fulfilling their affirmative duty to disclose).

The State may try to argue that under *United States v. Ruiz*, 536 U.S. 622 (2002), *Brady* imposes no duty upon prosecutors to disclose exculpatory evidence prior to a guilty plea. This argument would be erroneous. Missouri Courts have already taken the position that "[t]he principles of *Brady* are applicable to the entry of a guilty plea." *Scroggins*, 859 S.W.2d at 707. *See also Wallar*, 403 S.W.3d at 707 (explaining how Missouri's *Scroggin*'s decision applies under *Ruiz* to still impose an affirmative duty to disclose material exculpatory evidence).

But even without Missouri courts' clear position, *Ruiz* does not create a blanket excuse for prosecutors to not disclose *Brady* evidence before a guilty plea. *Ruiz*'s holding, restricting a prosecutor's affirmative duty to disclose, is limited to *impeachment information* and does not apply to *exculpatory evidence*. *Id.* at 629. This is because impeachment information "is more closely related to the *fairness* of a trial than to the *voluntariness* of the plea," and the Court did not wish to interfere with a prosecution's ability to prepare its best case. *Id.* at 633. Justice Thomas specifically referenced that limitation in his concurrence, where he agreed to the Court's ultimate findings. *Id.* at 633-34 (Thomas, J., concurring).

Several courts outside of Missouri have also have reasoned that, in spite of *Ruiz*, *Brady* applies at the guilty plea stage.[29] *See McCann v. Mangialardi*, 337 F.3d 782, 788 (7th Cir. 2003) (stating that, given *Ruiz*'s distinction between exculpatory and impeachment evidence, "it is highly likely that the Supreme Court would find a violation of the Due Process Clause if prosecutors . . . have knowledge of a criminal defendant's factual innocence but fail to disclose such information to a defendant before he enters into a guilty plea"); *United States v. Persico*, 164 F.3d 796, 804-5 (2d Cir. 1999) ("The Government's obligation to disclose *Brady* materials is

[29] Neither the Supreme Court, nor the Eighth Circuit have opined on whether *Ruiz* excludes exculpatory evidence from mandatory pre-guilty plea disclosures under *Brady*. *Williams v. Wallace*, No. 4:14-CV-412-SNLJ-SPM, 2017 U.S. Dist. LEXIS 28823, at *22 n.6 (E.D. Mo. Jan. 23, 2017)

pertinent to the accused's decision to plead guilty; the defendant is entitled to make that decision with full awareness of favorable [exculpatory and impeachment] evidence known to the Government."). The Tenth Circuit offered a well-reasoned argument in favor of applying *Brady* prior to guilty pleas when it maintained that a refusal to apply *Brady* early in the process would allow prosecutors to escape all fault for abuses committed prior to eleventh-hour pleas, when an individual accepts a guilty plea following or during a trial where the government continues to withhold exculpatory evidence. *United States v. Ohiri*, 133 Fed. App'x 555, 562 (10th Cir. 2005). *Contra Alvarez v. City of Brownsville*, No. 16-40772, 2018 U.S. App. LEXIS 26469, at *25 (5th Cir. Sept. 18, 2018) (en banc) (reaffirming its own precedent by refusing to extend *Brady* to any pre-trial context); *Carter v. Hobbs*, No. 5:10CV00346 JMM/JTR, 2013 U.S. Dist. LEXIS 54959, at *18 (E.D. Ark. Mar. 25, 2013) (finding no clearly established right to *Brady* exculpatory evidence prior to a guilty plea, because a few courts "have concluded [after *Ruiz*] that there is no federal constitutional right to the disclosure of *Brady* information prior to the entry of a guilty plea, regardless of whether it is exculpatory evidence, as opposed to impeachment evidence.").

Significant exculpatory material withheld from Charles' is wholly dissimilar to that examined in *Ruiz* since it did not deal with Charles' ability to ensure that witnesses and evidence put forward against him was reliable and properly admitted, or the State's ability to prepare its prosecution. Rather, the evidence prosecutors withheld directly contradicted their case and worked to prove Charles' innocence.

(2) Prosecutors Violated Charles' Fourteenth Amendment Rights under *Brady* When They Failed to Disclose Exculpatory Evidence prior to His Guilty Plea.

The prosecutors violated Charles' Due Process rights under *Brady* when they failed to disclose exculpatory evidence prior to his guilty plea. To prevail on a *Brady* claim, a defendant must show that

> (816) the evidence at issue is favorable to him . . . because it is exculpatory . . . ; (2) the evidence was, either willfully or inadvertently, suppressed by the State; and (3) he suffered prejudice as a result of the State's suppression.

Larkins, 475 S.W.3d at 78. A defendant must also establish that he had no knowledge of that exculpatory material prior to his guilty plea. *State v. Choate*, 639 S.W.2d 906, 909 (Mo. App. 1982).

Importantly, the required "prejudice" finding does not mandate that the disclosure of the suppressed evidence would have ultimately resulted in a defendant's acquittal. *State ex rel. Woodworth v. Denney*, 396 S.W.3d 330, 338 (Mo. banc 2013); *Kyles v. Whitley*, 514 U.S. 419, 434 (1995). A defendant is "prejudiced" by suppressed evidence if it is "material," *i.e.*, "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Kyles*, 514 U.S. at 433 (internal quotations omitted). This is "shown when the government's evidentiary suppression undermines confidence in the outcome of the trial." *Id.* at 434 (internal quotations omitted); *Scroggins*, 859 S.W.2d at 707 (citing *United States v. Bagley*, 473 U.S. 667, 682 (1985)). *See also Denney*, 396 S.W.3d at 338.

In the presence of a *Brady* violation, Charles' false confession and testimony, or any other supposed evidence of guilty, has no bearing on his entitlement to release.

> [O]nce a *Brady* violation has been found, "there is no need for further harmless-error review." [Citation.] Such an error cannot "be treated as harmless, since [there is] a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different," which

> "necessarily entails the conclusion that the suppression must have had substantial and injurious effect or influence in determining the jury's verdict."

Larkins, 475 S.W.3d at 85-86 (quoting *Kyles*, 514 U.S. at 434-35).

It is indisputable that the prosecutors held exculpatory evidence, directly contradicting the crime narrative they imposed upon Charles and used to prosecute Ryan, and they either withheld it or failed to disclose it to Charles before his guilty plea. The Court of Appeals has already identified two examples of exculpatory material that the State never affirmatively disclosed to either Ryan or Charles while seeking their convictions: the testimonies of Shawna Ornt and Melissa Griggs.[30] *Ferguson 3*, 413 S.W.3d at 67-69. *Only* prosecutors were aware of these testimonies until they were discovered during Ryan's trial, *id.* at 67 (explaining that Melissa Griggs information was unknown until trial), or shortly before, *id.* at 68-69 (stating that Ryan did not learn of Shawna Ornt's testimony until he deposed her in October 2005). Because prosecutors never disclosed this exculpatory evidence, and Ryan was not aware of it until his own trial neared, Charles had no knowledge of this evidence until *after* he had entered his guilty plea.

One additional example is Kim Bennett's exculpatory testimony.[31] Although Ms. Bennett told police that she saw Charles and Ryan leave By George around 1:30 a.m., and they took

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[30] As noted, *supra*, note 21, the Court of Appeals identified *three* examples of material information that the State possessed but failed to affirmatively and timely disclose, but one is not inapplicable here.

[31] Because *Ruiz* and its progeny appear to limit pre-guilty plea *Brady* evidence to that which is purely exculpatory, see *Wallar*, 403 S.W.3d at 707, Dallas Mallory's account contradicting Charles' false confession would not qualify as a *Brady* violation. Using a fabricated report to hide evidence contradicting the false confession of a teenager with obvious memory problems may shock the conscience. However, Mr. Mallory's testimony reasonably only (1) makes Charles' account of meeting Mr. Mallory after leaving By George less likely; and (2) places doubt on the entirety of his confession. (*Compare* ex. 8 (Interrogation 1), at 6:10-7:12, 10:12-11:14; ex. 11 (Interrogation 2), at 4:11-6:11, 7:17-8:6., *with* ex. 13 (Mallory Dep.), at

notes of her account, (ex. 4 (Habeas Tr.), at 470:14-472:16), no record was ever produced. Thus, Charles did not have any knowledge of it until *after* he had pleaded guilty.

The materiality of Mses. Griggs, Bennett, and Ornt's suppressed testimonies brings them under the purview of *Brady*. As explained *supra* in Parts III.E.2, IV.A.1.a(2)(b)(i), and A.1.a(2)(b)(i)A.2.c, their testimonies directly contradict the narrative the police and prosecutors imposed upon Charles and remove him from the scene of the murder. It is more than reasonable that Charles, had he known about eyewitness testimony directly contradicting the narrative the Columbia police imposed upon him, he would have not pleaded guilty to a crime he did not commit or accepted a plea agreement with the prosecutors to provide testimony of events about which he had no memory. Thus, Mses. Ornt, Bennett, and Griggs' exculpatory testimonies undermine confidence in whether Charles would have pleaded guilty or even been convicted had the case gone to trial.

Prosecutors violated Charles' Due Process rights, as recognized by *Brady*. Therefore, Charles is entitled to immediate habeas corpus relief.

b. Charles Is Entitled to Habeas Relief Because Police and Prosecutors Violated His Fourteenth Amendment Due Process Rights When They Fabricated Evidence to Secure His Guilty Plea.

Charles is also entitled to habeas corpus relief after the prosecutors and police violated his Due Process Rights, under the Fourteenth Amendment of the United States Constitution and article I, section 10 of the Missouri Constitution, by deceiving him into pleading guilty by bombarding him with false or fabricated evidence.

34:10-35:2.) Mr. Mallory's testimony does not otherwise directly clear Charles from any alleged crime.

As officers of the court and agents of the government, the prosecutors owed Charles a duty of honesty and candor. Prosecuting attorneys are the representatives,

> not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a very peculiar and very definitive sense the servant of the law, and twofold aim of which is that guilty shall not escape or innocence suffer. He may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

Berger v. United States, 295 U.S. 78, 88 (1935). Pursuant to that duty, and preserved through the Fourteenth Amendment's substantive due process guarantees, state actors are barred "from engaging in conduct that shocks the conscience or interferes with rights implicit in the concept of ordered liberty." *Weiler v. Purkett*, 137 F.3d 1047, 1051 (8th Cir. 1998) (en banc) (citing *United States v. Salerno*, 481 U.S. 739, 746 (1998)). That prohibition includes "conduct that is so outrageous that it . . . offends 'judicial notions of fairness.'" *Id.* (quoting *Weimer v. Amen*, 870 F.2d 1400, 1405 (8th Cir. 1989)) (alteration in original).

By working to deceive Charles into pleading guilty by plying him with false and fabricated evidence, as well as evidence that they knew or should have known was false, the prosecutors violated Charles' Fourteenth Amendment Due Process rights. A constitutionally valid guilty plea cannot be the product of prosecutorial deception. *Brady*, 397 U.S. at 757 (stating that deceptive conduct by prosecution may invalidate pleas); *Walker v. Johnson*, 312 U.S. 275, 286 (1941) ("If [the defendant] was deceived or coerced by the prosecutor into entering a guilty plea, he was deprived of a constitutional right."); *Smith*, 312 U.S. at 334 (unanimously affirming that a guilty plea induced through deception would be invalid); *Angliker*, 848 F.2d at 1320 ("We conclude that even a guilty plea that was 'knowing' and 'intelligent' may

be vulnerable to challenge if it was entered without knowledge of material evidence withheld by the prosecution."). In other words, state actors that fabricate evidence to secure a conviction violate their target's due process rights. *Cf. Winslow v. Smith*, 696 F.3d 716, 732 (8th Cir. 2012).

In this matter, the police and prosecutors employed "foul" methods, outrageously aimed at securing Charles' guilty plea regardless of his actual guilt. As described *supra*, in Parts III.E.1, prosecutors and police gave Charles ***false*** or ***fabricated*** reports, or reports they knew or should have known were false, that were attributed to Dallas Mallory, Meghan Arthur, and Richard Walker. Through these reports, Charles was deceived concerning the evidence the state had against him and his own participation in a crime he has no memory of committing. Thus deceived, and under the threat of execution if he did not fully cooperate with prosecutors and plead guilty, Charles succumbed to the pressure and gave them the plea they sought. (Ex. 19 (Plea Deal).) Manipulating and deceiving a vulnerable person into pleading guilty by using false and fabricated, and without actual evidence otherwise linking him to the crime, shocks the conscience and offends judicial notions of fairness.

Equally pernicious is that, in producing a fabricated report attributed to Dallas Mallory, police and prosecutors also concealed evidence contradicting Charles' coerced confession. Dallas Mallory both disavowed the fabricated police report, (ex. 13 (Mallory Dep.), at 59:10-16, 63:21-23, 66:1-25, 87:24-88: 20, 89:13-90:3, 123:11-125:11, 127:4-13, 136:14-138:12, 163:14-164:14), and testified that he told investigators he did not see Charles or Ryan on Halloween 2001 after they went to By George, (*id.* at 34:10-35:2). Thus, through the Dallas Mallory false report, police and prosecutors worked to cause Charles to further internalize their crime narrative, (ex. 42 (Kassin & Kiechel), at 127), while suppressing evidence that would have undermined their coercive tactics.

Consequently, because prosecutors violated Charles' Fourteenth Amendment Due Process rights to obtain his guilty plea, he is entitled to habeas relief and should be released from custody.

C. Charles Erickson Is Entitled to Habeas Corpus Relief Because He Is Actually Innocent.

Lastly, even if Charles' guilty plea was constitutionally voluntary and knowing, Charles is also entitled to habeas corpus relief because his continued restraint, in spite of his actual innocence, is constitutionally abhorrent. Charles' actual innocence is not just a gateway allowing this Court to review Charles' otherwise procedurally barred claims that entitle him to habeas relief. *State ex rel. Amrine v. Roper*, 102 S.W.3d 541, 546 (Mo. banc 2003). Under the Missouri Constitution, an individual is entitled to habeas corpus relief under a freestanding claim of actual innocence when new evidence clearly and convincingly undermines confidence in the correctness of a judgment.[32] *Id.* at 548.

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[32] Since the Supreme Court of Missouri held that a prisoner who can prove by clear and convincing evidence his actual innocence is entitled to habeas relief, an opinion from Judge Martin of the Missouri Court of Appeals for the Western District has purportedly limited such relief to cases where the petitioner is "under sentence of death." *In re Lincoln v. Cassady*, 517 S.W.3d 11, 21-23 (Mo. App. W.D. 2016).

This opinion appears aberrational and does not merit this Court's deference. Notably, all other opinions examining a freestanding claim of actual innocence in the context of a prisoner not facing the prospect of execution—which were coincidentally also authored by Judge Martin at the Western District—never took the same position when given the opportunity to do so. Just twenty-two months before *Lincoln*, Judge Martin offered no comment about the availability of another inmate's freestanding claim of actual innocence even though he did not face execution. *See generally McKim v. Cassady*, 457 S.W.3d 831 (Mo. App. W.D. 2015). Instead, she provided a full analysis of his claims before denying them. *Id.* at 852. Likewise, Judge Martin authored another opinion in 2011 where, although the trial judge found that a man sentenced to life in prison without parole could be released based on a freestanding claim of actual innocence, she made no effort to correct the lower court's decision. *State ex rel. Koster v. McElwain*, 340 S.W.3d 221, 227 (Mo. App. W.D. 2011). Rather, while speaking for the Court, she found that there was no reason to reach the higher "clear and convincing" standard when meritorious cause and prejudice" claims were established. *Id.* at 227, 230, 258.

Furthermore, the Supreme Court of Missouri does not appear to have imposed the same hardline limitation to its *Amrine* decision. In *Denney*, 396 S.W.3d at 336, 337 n.5 (Mo. banc

New evidence described *supra* clearly and convincingly undermines confidence in the correctness of Charles' conviction. In addition to the known fact that *no physical evidence ties Charles or Ryan to the scene of the crime*, this Court can now consider that (1) the *only* person at the site of the crime that saw any suspects who could later describe them eliminated Charles and Ryan from among those she saw at the scene, (ex. 14 (PCR Tr.), at 705:22-706:19); (2) withheld bystander witness testimony has nullified the crime narrative imposed by the police and prosecutors by proving that Charles and Ryan had left the area of the crime long before it occurred, (ex. 3 (Trial Tr.), at 1591:13-18; ex. 4 (Habeas Tr.), at 465:13-466:23, 470:11-472:16, 473:20-475:10); (3) and new psychological analysis, combined with the evidence of police and prosecutorial pressure in the form of falsified reports and interrogation pressure tactics, demonstrate that Charles' earlier confession and guilty cannot be granted any evidentiary weight, (ex. 1 (Aaron Rpt.), at 2). Under these circumstances, and viewing Charles' case through the prism of Ryan's trial, the only remaining evidence that ties Charles to Mr. Heitholt's death is his false confession—which was untrustworthy when it was given. *See Ferguson 2*, 325 S.W.3d at 417. With new evidence, that confession is wholly unreliable.

Without any reliable evidence remaining to convict him of a crime, confidence in Charles' conviction is now severely undermined. This Court should, therefore, correct fourteen years of injustice by granting Charles' petition for habeas corpus.

2013), the Court discussed the possibility of a freestanding claim of actual innocence in the context of man serving four life sentences and an additional fifteen years. In that matter, rather than discounting the possibility of a freestanding claim of actual innocence, the Court determined it was not even necessary to consider whether new evidence met the "clear and convincing evidence standard" because sufficient evidence already supported the "cause and prejudice" standard by way of his *Brady* claims. *Id.*

V. CONCLUSION

Almost fifteen years ago, Charles Erickson and Ryan Ferguson were imprisoned for the robbery and murder of Kent Heitholt—crimes that they did not commit. Since 2013, Ryan has walked free after successfully showing that his incarceration was ultimately the result of the Columbia police and Boone County prosecutors' misconduct. Now, Charles seeks that same justice and respectfully requests this Court GRANT his petition for a writ of habeas corpus.

Dated: December 13, 2018

By: */s/ Landon W. Magnusson*

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CERTIFICATE OF COMPLIANCE

In compliance with Local Rule 3.3.A., I certify that the attached petition complies with the limitations contained in Supreme Court Rule 84.06(b), and that, excluding any required portions identified by Rule 84.06(b), this petition contains 30,978 words.

/s/ Landon W. Magnusson

CERTIFICATE OF SERVICE

I hereby certify that the foregoing First Amended Petition was mailed to the respondent, Dan Redington, Warden of the Northeast Correction Center, via US Mail, First Class, on Thursday, December 13, 2018.

/s/ Landon W. Magnusson
Attorney for Petitioner