IN THE CIRCUIT COURT FOR THE CITY OF ST. LOUIS, MISSOURI
22nd JUDICIAL CIRCUIT

STATE OF MISSOURI	)	
	)	
Plaintiff,	)	
	)	
v.	)	**No. 22941-03706A-01**
	)	
LAMAR JOHNSON,	)	
	)	
Defendant.	)	

STATE'S MOTION FOR NEW TRIAL BASED ON NEWLY DISCOVERED EVIDENCE OF INNOCENCE, PERJURY, AND FALSE TESTIMONY AND MISCONDUCT SO PREJUDICIAL THAT THE OUTCOME OF THE TRIAL IS UNRELIABLE, OR IN THE ALTERNATIVE, MOTION FOR A HEARING ON THE NEWLY DISCOVERED EVIDENCE

COMES NOW St. Louis Circuit Attorney Kimberly Gardner, and moves this Court in equity and pursuant to Missouri Rule 29.11, for a new trial based upon evidence of prosecutorial misconduct that affected the reliability of the verdict and newly discovered evidence of actual innocence, or, in the alternative, for a hearing on the newly discovered evidence. The conviction against Lamar Johnson was obtained through perjured testimony, suppression of exculpatory and material impeachment evidence of secret payments to the sole eyewitness, and undisclosed *Brady*[1] material related to a jailhouse informant with a history of incentivized cooperation with the State. The violation of Johnson's constitutional rights enabled the State of Missouri to obtain a conviction and sentence of life without the possibility of parole against Johnson despite overwhelming evidence of innocence. The undisclosed secret payments to the sole eyewitness in a case that was undeniably thin fatally undermines the reliability of the verdict. Based on the record now known

[1] *Brady v. Maryland*, 373 U.S. 83 (1963).

and the professional[2], ethical, and constitutional duties of a prosecutor to seek justice, the Circuit Attorney moves this Court to grant her motion for a new trial.[3] In support of the motion the Circuit Attorney states:

I. STATEMENT OF FACTS[4]

The Crime

1. On October 30, 1994, Marcus Boyd was sitting on the front porch of his apartment with Greg Elking, a co-worker. (Exh. 9, p. 162, 220). Elking had come by to repay a small debt he owed Boyd for drugs and to purchase some crack. (Exh. 9, p. 157; Exh. 8, p. 1).

2. The porch was lit by a single light bulb fixed at the top of the stairs on the inside of the upstairs apartment's screen door; the exterior porch-level light was broken. (Exh. 9, p. 189-90; Exh. 10, p. 9-10; Exh. 8, p. 2). At the time of the shooting, Leslie Williams, Boyd's girlfriend, was inside their upstairs apartment tending to their baby. (Exh. 9, p. 158, 220-21; Exh. 11, p. 6).

3. As Boyd spoke with Elking on the dimly lit porch, two black men—Phillip Campbell and James Howard—ran up from the side of the house without warning. (Exh. 9, p. 159; Exh. 17, p. 2; Exh. 19, p. 2; Exh. 8, p. 2).

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[2] Standard 3-8.3 Responses to New or Newly-Discovered Evidence or Law

> If a prosecutor learns of credible and material information creating a reasonable likelihood that a defendant was wrongfully convicted or sentenced or is actually innocent, the prosecutor should comply with ABA Model Rules of Professional Conduct 3.8(g) and (h). The prosecutor's office should develop policies and procedures to address such information, and take actions that are consistent with applicable law, rules, and the duty to pursue justice.

[3] In 2018, the Circuit Attorney's Conviction Integrity Unit (CIU) began its review and reinvestigation of Johnson's case.

[4] *See* Exhibit 1, *Report of the Conviction Integrity Unit*, for a more extensive recitation of the record in this case as well as the subsequent investigation.

4. Campbell and Howard wore dark clothing and black ski masks, attire that concealed every physical feature but their eyes. (Exh. 9, p. 159, 222; Exh. 17, p. 2; Exh. 19, p. 2; Exh. 8, p. 2).

5. According to sworn affidavits by Campbell, Howard, Elking, and the trial testimony, the masks worn when Campbell and Howard shot and killed Boyd looked like this:

Id.

6. Elking was able to see the skin of the perpetrators and described one of them as "practically as black as the hood covering his face." (Exh. 8, p. 3). Each was armed with a gun. (Exh. 9, p. 159; Exh. 17, p. 2; Exh. 19, p. 2; Exh. 8, p. 2). Both masked men opened fire on Boyd. (Exh. 9, p. 163-64; Exh. 17, p. 2; Exh. 19, p. 3).

7. Elking was "in shock" and "feared for [his] own life." (2019 Elking Deposition, p. 48-49; 2003 Elking Affidavit, p. 1). He focused on the gun pointed at him, he was in shock and feared for his life. (Exh. 15).

8. Elking fled the scene on foot and went home, a few blocks away. (Exh. 9, p. 165-66; Exh. 8, p. 2).

The Police Investigation[5]

9. Boyd's girlfriend, Leslie Williams, who was inside the upstairs apartment when the shooting occurred, called 911 at 9:07 p.m. (Exh. 2, p. 62, 67). Boyd was transported to St. Louis University Hospital where he was pronounced dead at 9:55 p.m. (Exh. 2, p. 1, 62).

10. Responding officers questioned Leslie Williams and neighbors living in the immediate vicinity. One neighbor claimed to have seen two men running through the alleyway between the houses. (Exh. 2, p. 65). Leslie Williams informed the officers that that a white man named "Greg" was on the porch when Boyd was shot. (Exh. 2, p. 66). Leslie Williams knew "Greg" as a customer of Boyd's crack cocaine business. (Exh. 9, p. 225). None reported seeing a car arrive or flee the scene.

11. Leslie Williams informed Detectives Ronald Jackson and Clyde Bailey that she could not see the face of either shooter, both of whom wore some type of mask or hood over their faces. (Exh. 2, p. 66-67). Even though Leslie Williams was within feet of the gunmen, she could not make out any identifying characteristics because the masks concealed their faces. (*Id*.; Exh. 11, p. 15-16).

12. In a report dated October 30, 1994, the night of the homicide, police stated that Johnson was the primary suspect at the scene, before a single witness had been substantively interviewed and before the only eyewitness, "Greg," had been identified and located. (Exh. 2, p. 1).

[5] The summary of the police investigation is taken from the police report (Exh. 2). Subsequent investigation by Johnson's counsel and the CIU indicates that critical aspects of the following account are largely false. However, for the purpose of summarizing the complete record, the law enforcement investigation as it existed in 1994-1995 is summarized in this section.

13. Leslie Williams (who knew Johnson) further testified that she did not recognize the shooters. (Exh. 9, p. 222; Exh. 11, p. 8-9, 15-16). Leslie Williams testified under oath that she knew of no reason why Johnson would kill Boyd. (Exh. 11, p. 12).

14. Johnson learned of the shooting sometime between 9:00 p.m. and 10:00 p.m. on the night of Boyd's murder. (Exh. 21, p. 1; Exh. 20, p. 30-32). During that time, Johnson and his girlfriend, Erika Barrow, spent time at their friend Anita Farrow's apartment with Farrow and her boyfriend, Robert Williams. Farrow's apartment was located at 3907 Lafayette in St. Louis, at least 10 minutes by car from the scene at 3910 Louisiana. (Exh. 21, p. 1; Exh. 20, p. 30; Exh. 9, p. 312-13; Exh. 22, p. 1).

15. Johnson had previously arranged to meet a customer in the parking lot next to Farrow's house at 9:00 p.m. to make a drug sale. (Exh. 9, p. 312; Exh. 20, p. 31; Exh. 22, p. 1). Johnson, Barrow, and their child arrived at Farrow's apartment around 9:00 p.m. (Exh. 20, p. 30-31; Exh. 21, p. 1).

16. Shortly after their arrival, Johnson saw the customer arrive in the parking lot, got into the customer's car, and drove around the block to make the sale. (Exh. 20, p. 31). Within minutes, Johnson was back at Farrow's apartment where Johnson, Barrow, Robert Williams and Farrow continued to socialize until around 10:00 p.m. (Exh. 9, p. 313; Exh. 20, p. 31-32; Exh. 21, p. 1; Exh. 22, p. 1).

17. Shortly after Boyd was killed, Pamela Williams (the mother of Johnson's child and the cousin of Leslie Williams—Boyd's girlfriend) paged Johnson. (Exh. 2, p. 68; Exh. 9, p. 325; Exh. 20, p. 31; Exh. 21, p. 1; Exh. 22, p. 1).

18. Johnson returned Pamela Williams' page from Farrow's apartment. (Exh. 2, p. 68; Exh. 9, p. 325; Exh. 20, p. 32; Exh. 21, p. 1; Exh. 22, p. 1). On that telephone call, Pamela Williams

told Johnson that Boyd had been killed and that Leslie Williams wondered if Johnson had been involved. (Exh. 2, p. 68; Exh. 9, p. 314, 327; Exh. 20, p. 32; Exh. 21, p. 1; Exh. 22, p. 2).

19. Johnson asked Pamela Williams to add Leslie Williams into the call via three-way calling, which she did. (Exh. 2, p. 68; Exh. 20, p. 32; Exh. 11, p. 14). The three spoke for a short time and Johnson told Leslie and Pamela Williams that he was on Lafayette Avenue and that he was not involved in Boyd's death. Johnson became angry, asking Leslie Williams "Why would you think that?" (Exh. 2, p. 68; Exh. 20., p. 32; Exh. 11, p. 14; Exh. 21, p. 1; Exh. 22, p. 2.).

20. Sometime after the call from Pamela Williams, Johnson and Barrow went home with their baby where they remained for the rest of the evening. (Exh. 9, p. 315; Exh. 20, p. 32-33; Exh. 21, p. 1).

21. On October 31, 1994, Detective Joseph Nickerson began his investigation into Boyd's homicide (Exh. 2, p. 32).

22. Detective Nickerson interviewed Ed Neiger, who had purchased drugs from both Boyd and Johnson. *Id*. Detective Nickerson claimed that Neiger told him of a feud between the two and that the feud might be a reason Johnson would kill Boyd. (Exh. 2, p. 33).

23. Neiger disputed this account in his June 21, 1995 deposition, wherein he stated that he knew of no fights between Boyd and Johnson and he did not know of anyone who would want to kill Boyd. (Exh. 23, p. 6).

24. Detective Nickerson interviewed Dawn Byrd and Kristine Herrman on November 1, 1994. (Exh. 2, p. 36).

25. According to the police report, Byrd reported that she purchased drugs from both Johnson and Boyd and that she heard rumors that Johnson was selling bad drugs. *Id*. The report states that Byrd reported she confronted Johnson on October 29, 1994, and that Johnson said he

was going to see Boyd about the bad drugs. (Exh. 2, p. 37). According to the report, Byrd told Detective Nickerson she was worried about what was going to happen between Boyd and Johnson. *Id*. In the report, Detective Nickerson also wrote that Byrd told Detective Nickerson she had seen Boyd on the evening of October 30, 1994, at National Grocery and had given him a ride home. (Exh. 2, p. 38). While there, Boyd told Byrd that he had noticed Johnson's car around his house the last couple of days, *id*., and on the drive to Boyd's home, Boyd thought he saw Johnson's car. *Id*.

26. In her June 21, 1995, pretrial deposition, Byrd stated under oath that she knew of no disagreement between Boyd and Johnson and that the disagreement she had with Johnson on October 29, 1994 had "nothing to do with Marcus," directly contradicting the contents of Detective Nickerson's report. (Exh. 26, p. 5-6).

27. Detective Nickerson also interviewed Kristine Herrman on November 1, 1994, which he also wrote up in the same summary containing Byrd's interview. The report indicates Herrman confirmed to Detective Nickerson that she had been present for the October 29, 1994 conversation between Byrd and Johnson about bad drugs and that she had gone to visit Leslie Williams on October 30, 1994. (Exh. 2, p. 38).

28. On November 1, 1994, Detective Nickerson again interviewed Leslie Williams. (Exh. 2, p. 35).

29. The police report states that Leslie Williams told Detective Nickerson she believed Johnson was responsible for Boyd's murder and that there had been a dispute between them about missing drugs and stolen money. (Exh. 2, p. 35-36). On June 21, 1995, Leslie Williams gave a pretrial deposition, wherein she stated under oath that Boyd and Johnson were once very close and

that they had drifted apart, but she could think of no reason that Johnson would want to kill Boyd. (Exh. 11, p. 6, 12).

30. Leslie Williams further testified during that deposition that Boyd and Johnson had spoken about a week prior to the homicide when Johnson stopped by their apartment at 3910 Louisiana, and that there was no animosity between them nor words exchanged and there had never been any threats between them. (Exh. 11, p. 10-12). This contradicted Detective Nickerson's report.

31. From October 31-November 3, 1994, Detective Nickerson attempted to locate the only witness to the homicide, Elking. (Exh. 2, p. 34-35, 39). Detective Nickerson spoke with Elking's sister and his wife and asked them to persuade Elking to contact police and give a statement. (Exh. 2, p. 39). Detective Nickerson attempted to locate Elking through his employer. (Exh. 2, p. 34).

32. On November 3, 1994, Elking called Detective Nickerson and confirmed that he was present on the porch with Boyd was killed. (Exh. 2, p. 39).

33. Elking stated that each of the masked perpetrators was armed, one subject was "about 5'9" and the other was "taller," and both were wearing dark clothing and masks. (Exh. 2, p. 40). Elking gave no additional information about the suspects. *Id*.

34. At around 2:00 p.m. on November 3, 1994, Elking and his wife Kelly Elking met Detective Nickerson at a local diner. *Id*.

35. According to the police narrative about that meeting, Elking told Detective Nickerson that he had gone to Boyd's apartment on the evening of October 30, 1994, to pay a $40 drug debt. *Id.* Elking stated that as he and Boyd talked on the porch two black men, dressed in dark clothing and wearing masks ran onto the porch from the alleyway between the houses. (Exh. 2, p.

41). One subject appeared to be about 5'9" with a slim build, and the second was about 6'0" tall. *Id*. One of the gunmen, the taller of the two, grabbed Elking and told him to "Get the fuck up!" *Id.* The gunmen fired several shots into Boyd and then fled the scene on foot, leaving Elking unharmed. (Exh. 2, p. 41-42). Elking then ran home where he told his wife about the shooting. (Exh. 2, p. 42).

36. Detective Nickerson brought five department Law Enforcement Identification (LID) photographs with him to the meeting at the diner. Johnson and Phillip Campbell were among the photographs in the array. *Id*. Elking stated that the eyes in the photo of Johnson looked "similar" to the eyes of one of the gunmen. (Exh. 8, p. 3-4; Exh. 15, p. 77-79). According to the police report, Elking identified Johnson as one of the shooters from the five-photo array but refused to sign the back of Johnson's photograph. (Exh. 2, p. 42-43).

37. In actuality, Elking told Detective Nickerson that he did not know Boyd's associates, that he did not socialize with any of Boyd's friends, and that he did not recognize or know the gunmen. (Exh. 5, p. 5; Exh. 27, p. 3; Exh. 24, p. 2; Exh. 8, p. 3-4; Exh. 15, p. 15-16, 74-76).

38. At the diner, however, Detective Nickerson told Elking and his wife that the State would help them with money and expenses if he became a witness in the case. (Exh. 15, p. 83-84; Exh. 8, p. 4-5). Elking still did not make an identification at that time, even though the police report stated that he had.

39. After interviewing Elking at the diner on November 3, 1994, Detective Nickerson told Assistant Circuit Attorney (ACA) and Chief Warrant Officer Dwight Warren that Elking had identified Johnson as one of the shooters. (Exh. 2, p. 43). At approximately 4:30 p.m., a "wanted

for questioning" notice was issued for Johnson, even though Elking had not made an identification from the photo array. *Id*.

40. At approximately 5:45 p.m. on November 3, 1994, Johnson and Campbell were arrested and taken to the station for questioning. (Exh. 2, p. 44-45).

41. At approximately thirty minutes later, at 6:15 p.m., Detective Nickerson informed Johnson that he was a suspect in Boyd's homicide. (Exh. 2, p. 45). Johnson waived his *Miranda* rights and agreed to speak with Detective Nickerson. *Id*.

42. Johnson denied involvement in the shooting and told Detective Nickerson that Boyd was his friend and that "he had been with his girlfriend on Lafayette" when the shooting occurred. *Id*. Detective Nickerson ceased questioning of Johnson after he denied involvement in Boyd's death. *Id*.

43. The police did not attempt to investigate Johnson's alibi, even though he told Detective Nickerson immediately upon questioning that he had "been with his girlfriend on Lafayette" and even though Leslie Williams told detectives she had spoken to Johnson on the phone shortly after the homicide. (Exh. 2, p. 45, 68; Exh. 11, p. 14; Exh. 9, p. 224-25). The police made no attempts to collect pager or telephone records, nor did they interview a single alibi witness.

44. At approximately 8:00 p.m. Detective Ralph Campbell arrived for his shift, and according to the police report, asked Detective Nickerson if he could speak with Johnson about an unrelated matter. (Exh. 2, p. 46).

45. According to Detective Campbell's narrative in the police report, Johnson—unprompted and after just stating that he was not involved in Boyd's homicide and offering his alibi evidence to Detective Nickerson—made incriminating statements about the Boyd homicide

including that he "let the white guy live." (Exh. 2, p. 47). According to the police report, Johnson then refused to make a recorded statement about what Detective Campbell claimed he had said. (*Id.*; Exh. 9, p. 233).

46. From approximately 6:00-8:30 p.m. on November 3, 1994, Detective Nickerson attempted to locate Elking so that he could come to the station to view a lineup. (Exh. 2, p. 46).

47. At approximately 9:00 p.m., Elking contacted Detective Nickerson, who picked Elking up and transported Elking to the station. (Exh. 2, p. 47-48). During the drive to Police Headquarters, Detective Nickerson told Elking that Johnson was responsible for a number of unsolved homicides and that Elking's cooperation was critical to providing justice for Boyd and his family. (Exh. 15, p. 84-85, 88; Exh. 8, p. 7).

48. Upon arriving at Police Headquarters, Elking viewed a lineup (Lineup #1) containing Johnson at least three times. (Exh. 2, p. 48-49). Detective Nickerson and other detectives were present during each viewing. *Id.*

49. Elking was unable to make an identification after the first two viewings. (Exh. 2, p. 49).

50. On the third viewing, Johnson, Elking identified a man named Donald Shaw, a filler from the jail holdover, as the shooter. (Exh. 2, p. 18-19, 49; Exh. 6, p. 1).

51. Elking was then shown Lineup #2, which contained Campbell. (Exh. 2, p. 49) Elking was unable to make an identification in Lineup #2. (Exh. 2, p. 20-21, 49; Exh. 6, p. 2).

52. After Elking was unable to make an identification in either lineup, he and Detective Nickerson got into the elevator to go to a higher floor of police headquarters. (Exh. 2, p. 49).

53. According to the police narrative, during that elevator ride Elking told Detective Nickerson that he "wanted to do the right thing" but he was "scared" and "needed time to think about what [he] should do." (Exh. 2, p. 49).

54. Once they reached the homicide office, according to the report, Elking told detectives that he lied when he did not make an identification, and that he recognized the shooters but that he was afraid. (Exh. 2, p. 50). Elking then told Detective Nickerson that the shooters were in position #3 (Johnson) in Lineup #1 and position #4 (Campbell) in Lineup #2. *Id*.

55. Detective Nickerson's narrative states that Elking said he recognized the gunmen in the lineup because one had a lazy eye and the other had a scar on his forehead. *Id*. This is the first reference to these identifying features in the police report, and was not mentioned or recorded in any of the three earlier interviews Detective Nickerson had with Elking.

56. After this alleged identification, Detectives then assisted in crafting a statement for Elking indicating that he was afraid, that he knew who the shooters were all along, and that he was sorry he had lied. (*Id*.; Exh. 8, p. 6).

57. On the morning of November 4, 1994, Detective Nickerson drove Elking to the St. Louis Circuit Attorney's Office where Elking met with ACA Dwight Warren. (Exh. 2, p. 50; Exh. 15, p. 104). After interviewing Elking, ACA Dwight Warren issued warrants for Johnson and Campbell charging them with Murder First Degree and Armed Criminal Action. (Exh. 2, p. 24, 51).

58. On November 4, 1994, Johnson and Campbell were booked into the St. Louis City Jail and placed in the holdover unit, a crowded unit with several cells that hold a number of inmates. (Exh. 2, p. 50; Exh. 29).

59. William Mock, an informant with an extensive criminal history, was also in the St. Louis City Jail holdover unit. (Exh. 2, p. 25, 51).

60. On November 5, 1994, Mock claimed to have overhead an incriminating conversation between three inmates regarding a murder. He spoke with Detective Ronald Jackson[6], but this conversation was not recorded. *Id*.

61. On November 6, 1994, Mock claimed to have heard another incriminating conversation regarding Boyd's homicide, namely that Johnson and Campbell discussed "taking care of the white boy," interpreted as referring to Elking. (Exh. 2, p. 26, 51-52). Mock repeated this statement to Detective Jackson on November 7, 1994, which was recorded. (Exh. 2, p. 26, 52-53).

The Evidence at Trial

62. Johnson's trial was held on July 11-12, 1995 before the Honorable Booker T. Shaw. ACA Dwight Warren appeared for the State. (Exh. 9, p. 1). David Bruns of the Public Defender's Office represented Johnson. *Id*.

[6] Detective Ronald Jackson was charged by federal indictment on October 8, 2009, for his leadership role in a criminal scheme to steal seized property from persons he arrested. *See United States v. Ronald Jackson et al.*, Case No. 4:09-CR-00650-RWS. *See also United States v. Jackson*, 639 F.3d 479 (8th Cir. 2011) ("[A]n addendum to Jackson's Presentence Investigation Report (PSR) remarked that "Jackson had engaged in this type of illegal activity for quite some time, and he purposely conducted this type of illegal business armed with a weapon in order to intimidate the victims." Addendum to PSR at 1.")). Detective Jackson's 2009 criminal conduct occurred after his involvement in Johnson's case; however, in line with *Engel v. Dormire*, the Circuit Attorney considered all the evidence now known, including the subsequent criminal conduct of Detective Jackson. 304 S.W.3d 120, 126 (Mo. 2010). His federal indictment and subsequent guilty plea cast serious doubt on his character of truthfulness and credibility as a witness for the State.

63. During the State's opening statement, ACA Dwight Warren told the jury that Mock did not "want any special consideration" for his testimony against Johnson and just wanted to "tell the police what he heard." (Exh. 9, p. 153).

64. Elking testified that it was "dark" outside at the time of the shooting and that the only light was coming from inside the house. (Exh. 9, p. 189-90).

65. He testified that two men with solid black "pullover" masks came from the side of the apartment, each holding a gun, (Exh. 9, p. 159), and that one of the shooters had a lazy eye. Elking identified Johnson in the courtroom as the man with the lazy eye and as one of the shooters. (Exh. 9, p. 160-61).

66. According to Elking's trial testimony, Elking "didn't want to commit" to making any positive identification of the shooters during his first meeting with Detective Nickerson at the diner, (Exh. 9, p. 179), and that he walked away from Lineup #1 (containing Johnson) twice, unable to make an identification. (Exh. 9, p. 183). Elking testified that after leaving the lineup, however, he revealed to Detective Nickerson that he had identified the wrong person because "he was intimidated." (Exh. 9, p. 170-71).

67. Leslie Williams testified at trial that at the time of the murder, she was in the upstairs apartment drawing a bath for her daughter when she heard a series of quick pops that she believed were fireworks. (Exh. 9, p. 220-21). After hearing the pops, she ran downstairs and saw someone in all black firing a gun. (Exh. 9, p. 221-22). She could not see the face of either shooter because the black masks covered their faces. (Exh. 9, p. 222). She did not recognize the shooters. (Exh. 11, p. 8-9).

68. Leslie Williams testified that she knew Johnson because he was the father of her cousin's child, that he had a lazy eye, (Exh. 9, p. 222-23), and that Boyd and Johnson had been close friends and roommates. (Exh. 11, p. 5-6).

69. She also testified that she was on a three-way call between Johnson, herself, and her cousin Pamela Williams shortly after Boyd was killed. (Exh. 9, p. 224-25). This was consistent with Johnson's account of the evening.

70. Detective Ralph Campbell testified that he interviewed Johnson on November 3, 1994 and that the interview was not about Boyd's murder. (Exh. 9, p. 228). According to Detective Campbell, Johnson "turned the interview in that direction" and unprompted stated that he "let the white guy live." (Exh. 9, p. 229).

71. Mock testified that he overheard someone who identified himself as Johnson shouting from another cell and saying, "They didn't have the gun" or "the white boy." (Exh. 9, p. 246-47). Mock testified that he contacted the homicide detectives afterward and was interviewed by Detective Jackson. (Exh. 9, 247-48).

72. The following day, he overheard the man identified as Johnson talking about committing another murder on the south side involving the robbery of a white boy. (Exh. 9, p. 249). After investigation, however, the police could find no record of any robbery on the Southside resulting in the murder of a "white boy" on the Southside. (Exh. 9, p. 307).

73. Mock testified that the only thing he asked for in exchange for his testimony was a letter from ACA Dwight Warren to the parole board, which Warren provided. (Exh. 9, p. 249-50).

74. On cross-examination, Mock stated he was not in the same cell as either Johnson or Campbell and he could not say how far away they were from him in the unit. (Exh. 9, p. 251-52).

75. He testified that he had three felony convictions for burglary, tampering, and carrying a concealed weapon. (Exh. 9, p. 244, 261-62).

76. The defense called Erika Barrow, Johnson's girlfriend who testified that Johnson was with her on the night Boyd was killed. (Exh. 9, p. 309, 315). They were socializing with friends at the apartment shared by Anita Farrow and Robert Williams, located at 3907 Lafayette Avenue. (Exh. 9, p. 311-12).

77. Barrow testified that Johnson was with her from approximately 7:00 p.m. through the rest of the night with the exception of about five minutes when Johnson left Farrow and William's apartment at 3907 Lafayette. (Exh. 9, p. 315).

78. Johnson left the apartment and returned within a matter of minutes. (Exh. 9, p. 313).

79. Barrow testified that they learned Boyd was killed when Pamela Williams spoke with Johnson on the telephone sometime after 9:00 p.m. (Exh. 9, p. 314, 325). During that call, Pamela Williams added Leslie Williams via a three-way call. (Exh. 9, p. 224-25; Exh. 22, p. 1-2).

80. Evidence corroborating Johnson's alibi was not presented to the jury, including the testimony of Pamela Williams, Leslie Williams, Farrow and Robert Williams and pager and telephone records.

81. It was undisputed at trial that Johnson was at Farrow's between 9:00 and 10:00 p.m. It was undisputed at trial that Johnson left Farrow's and returned within minutes.

82. In rebuttal, the State presented evidence from Detective Nickerson in rebuttal, that Johnson could have traveled from 3907 Lafayette to the scene and killed Boyd in "no more than five minutes." (Exh. 9, p. 334).

83. During closing argument, ACA Dwight Warren stated that Mock had no motive to lie:

> What motive does Mock have? What is he gonna get of this a letter to the parole board? For that—and remember, he didn't have anything in the beginning. He came and said to the police I just got to go back there on this CCW. I'm not asking for anything. I'm tellin' you what happened because of some terrible event that's happened in his life. The man may be a burglar, he may be someone who carries a gun, I think he had another charge there too but he's a man that draws the line. This was a terrible waste of a life. It was cold-blooded murder and you draw the line. Even criminals, people in jail have got some morals say you know, enough is enough on this murder stuff. There's just too much murder. I can't keep my mouth shut and turn my face because of what has happened. Mock stood up and was counting, counting as a honest, God-fearing man to tell you the truth.

(Exh. 9, p. 352-53).

84. On July 12, 1995, a jury found Johnson guilty of murder in the first degree and armed criminal action. The judgment was entered on July 12, 1995. (Exh. 4, p. 3).

85. Johnson was sentenced to life without the possibility of parole on September 29, 1995. (Exh. 4, 2-3).

THE POST-TRIAL EVIDENCE AND INVESTIGATION NEWLY DISCOVERED EVIDENCE OF INNOCENCE

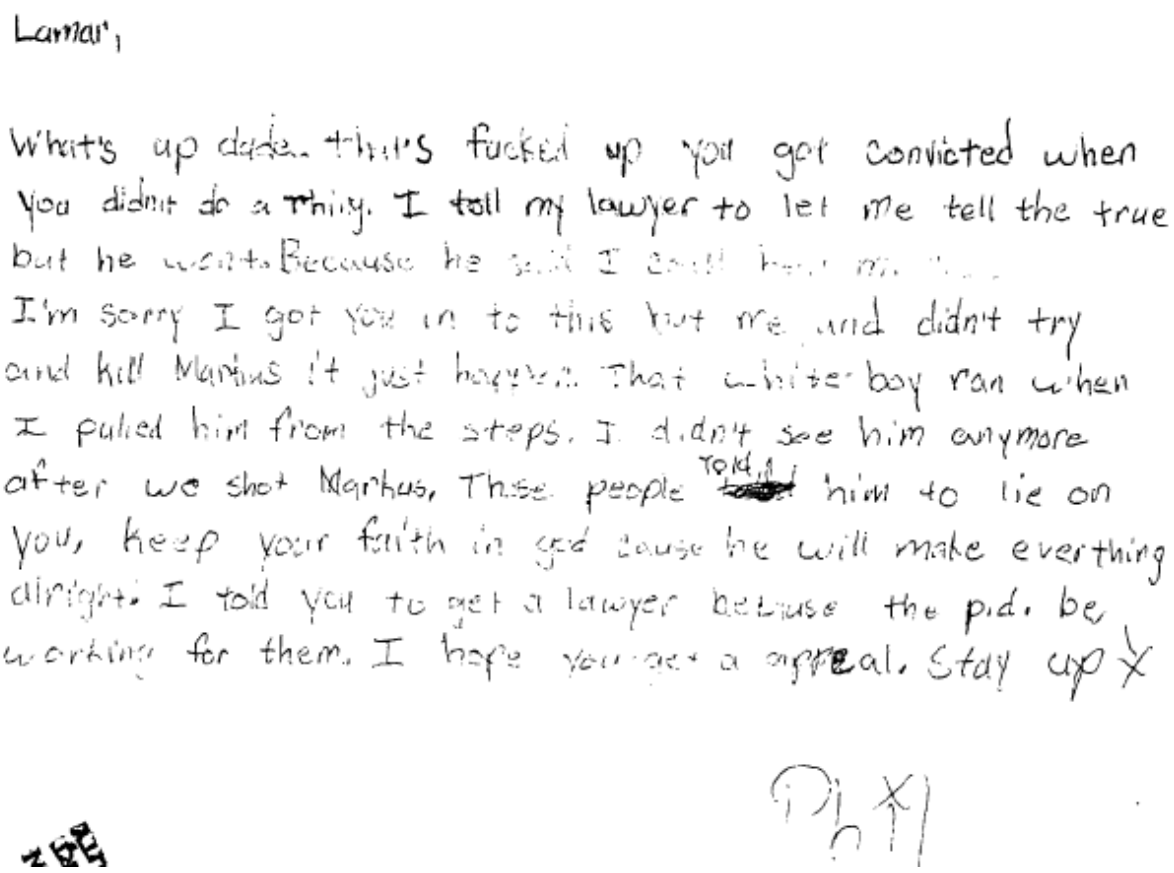
James "BA" Howard and Phillip Campbell Killed Boyd

86. As a result of investigation conducted after Johnson's trial, the State now believes that much of the evidence presented against Johnson was false and perjured. The police investigation was irreparably tainted and therefore is unreliable.

87. Campbell and Howard confessed to shooting Boyd and signed sworn affidavits stating that they killed Boyd and that Johnson was not involved. (Exh. 43; Exh. 18; Exh. 17, p. 3; Exh. 19, p. 4).

88. After Johnson's trial in July of 1995, but before sentencing on September 29, 1995, Campbell wrote letters to Johnson while both were being held in the City Jail. The letters were seized by jail officials pursuant to a search warrant and were the subject of an unsuccessful defense

motion for new trial. The letters explain what happened on the night Boyd was killed, that Johnson was not involved, and that Campbell and Howard committed the murder.



Lamar,

What's up dude. that's fucked up you got convicted when you didnt do a thing. I tell my lawyer to let me tell the true but he won't. Because he said I could hurt my [illegible]
I'm sorry I got you in to this but me and didn't try and kill Markus it just happen. That white boy ran when I pulled him from the steps. I didn't see him anymore after we shot Markus, These people told him to lie on you, keep your faith in god cause he will make everything alright. I told you to get a lawyer because the pd. be working for them. I hope you get a appeal. Stay up X

(Exh. 30).

89. These letters were the subject, in part, of a Motion for New Trial claiming that Johnson was innocent. The motion, filed on October 28, 1996, was based on newly discovered evidence, including the letters from Campbell stating that Johnson was not involved in the homicide and prosecutorial misconduct for the State's failure to disclose Mock's complete criminal history. (Exh. 4). The motion was filed out of time and the trial court denied the motion. (Exh. 4).

90. In addition to the letters Campbell wrote in 1995, Campbell also signed an affidavit in 1996, just one year after Johnson was convicted. (Exh. 18). Campbell signed another sworn

statement in 2009, again stating he was responsible for Boyd's death and that Johnson was not involved. (Exh. 19, p. 4).

91. James "BA" Howard signed affidavits in 2002, 2005 and 2009 stating Johnson was not involved. (Exh. 43; Exh. 16, p. 1; Exh. 17, p. 3). Howard and Campbell stated in their affidavits that on October 30, 1994, they were socializing at Howard's house located at 3944 Louisiana Avenue. (Exh. 17, p. 1; Exh. 19, p. 1). Howard's home was less than 400 feet from Boyd's apartment at 3910 Louisiana Avenue.

92. Howard told Campbell about a disagreement between Howard's friend, Sirone Spates (AKA "Puffy") and Boyd about a business transaction involving the "crumbs"[7] from drug sales. (Exh. 17, p. 1).

93. Boyd and Spates agreed that Boyd could keep the crumbs and when the crumbs accumulated Boyd could either give them to Spates or pay him for their value. *Id*.

94. At the time, Spates was recovering from a gunshot wound to the neck and needed the money. *Id*. Spates asked Boyd about the crumbs and Boyd continued to "put him off." *Id*. Because Spates was injured, Howard agreed to go to Boyd's house on the night of October 30, 1994 "to teach Marcus a lesson, and also rob him, so that I could get the money Marcus owed [] Puffy." (Exh. 17, p. 2).

95. The two put on dark clothing and masks that "were the 'Ninja' style masks, which covered the entire head, and had one large hole in the face for the two eyes." *Id; See also* Exh. 19, p. 2 ("The masks could be pulled up over the nose, revealing not much more than our eyes.").

[7] "Crumbs" result from the cutting of larger crack cocaine cakes. Crumbs are saved and eventually accumulate into a considerable amount of crack with significant street value.

96. Howard explained that "[he] had no intention of killing Marcus []" but things happened quickly and during the initial struggle, Campbell discharged his gun. *Id*.

97. Both Howard and Campbell panicked and fired shots into Boyd. (*Id*.; Exh. 19, p. 3). During the incident, Campbell, "t[ook] a few steps up the porch and pointed [his] gun at the white guy sitting to the left of Boyd and [] grabbed the man's shoulder." (Exh. 19, p. 3).

98. After fleeing the scene, Campbell and Howard "ran down the gangway between houses and then jumped fences through back yards all the way back to my mom's back door." (Exh. 17, p. 3; see also Exh. 19, p. 3 ("After the shooting, James and I ran back down the gangway to the alley and back to James' house.")).

99. Each of the affidavits unequivocally state that Howard and Campbell killed Boyd and provide details about the motive, and other information that is corroborated as summarized above. Howard state succinctly that "Lamar Johnson was not involved in the death of Marcus Boyd. I know Lamar Johnson is innocent of that crime because I was there and Lamar Johnson was not there." (Exh. 17, p. 3).

100. In 2009, Anthony Cooper, an associate of Campbell and Howard signed a notarized affidavit swearing:

> Soon afterwards [the shooting of Boyd] I began receiving letters from Phillip Campbell and James Howard referring to their involvement in the murder of Marcus Boyd, and discussing their concern that Lamar Johnson was being accused by the police of committing this crime. Both Campbell and Howard told me in their letters that Lamar Johnson had no involvement in Marcus Boyd's death.
>
> The day after I was released from prison in November 1995, I spoke to James Howard about the death of Marcus Boyd. Howard said that his cousin 'Puffy,' or someone he knew, had had a disagreement with Marcus Boyd. Howard told me that he and Campbell went over to pistol whip Marcus Boyd or rough him up and it got out of hand and Marcus got shot.
>
> (Exh. 31, p. 1).

101. In 2009, Lamont McClain, an associate of Campbell, Howard, and Johnson, signed a notarized affidavit swearing:

> On Oct 30, 1994, the night Marcus Boyd was shot and killed outside his house at 3910 Louisiana, I was locked up in St Louis City Jail. About a week later, I saw Phillip Campbell in City Jail. Campbell had been arrested on suspicion of his role in the death of Marcus Boyd. Campbell told me that he and James Howard had gone to rob Marcus Boyd, but Boyd didn't cooperate. Boyd put up a fight and BA shot Marcus. I can't recall what specific role Campbell played in Boyd's death, beyond his being there when Boyd was killed.
>
> At the time Campbell was telling me what happened to Marcus Boyd, Lamar Johnson was also in jail, suspected of killing Marcus Boyd. Campbell told me that Lamar Johnson was not there at Boyd's that night, and that Lamar had nothing to do with the killing of Marcus Boyd.
>
> (Exh. 32, p. 1-2).

102. On September 27, 2018, the CIU interviewed Howard at length regarding his role in the homicide of Boyd. His version of events is corroborated by Elking, Leslie Williams, Cooper, McClain, Campbell and the physical evidence, including the type of masks and clothing worn, the firearms used, how the shooters arrived on the porch at 3910 Louisiana, and how he and Campbell fled the scene.

103. After Johnson's trial, Campbell's counsel uncovered additional, undisclosed criminal history for Mock and Elking stopped cooperating with the Circuit Attorney's Office. The current Circuit Attorney finds is persuasive and clear evidence of materiality and prejudice that after Johnson's trial, Campbell plead guilty in a one-count indictment to voluntary manslaughter for his role in Boyd's homicide. (Exh. 42).

Johnson's Alibi Evidence Proves He Did Not Kill Boyd

104. Erika Barrow, Johnson's girlfriend, testified that Johnson was with her on the night Boyd was killed. (Exh. 9, p. 309, 315). They were socializing with friends at the apartment shared by Anita Farrow and Robert Williams, located at 3907 Lafayette Avenue. (Exh. 9, p. 311-12).

105. Barrow testified that Johnson was with her from approximately 7:00 p.m. through the rest of the night with the exception of about five minutes when Johnson left Farrow and Robert Williams' apartment at 3907 Lafayette. (Exh. 9, p. 315).

106. Johnson left the apartment and returned within a matter of minutes. (Exh. 9, p. 313; Exh. 20, p. 31; Exh. 21, p. 1; Exh. 22, p.1). Johnson had arranged to meet a customer at 9:00 p.m. in the parking lot of the liquor store next to Farrow and Robert Williams' apartment. (Exh. 9, p. 312; Exh. 20, p. 31; Exh. 22, p. 1).

107. When Johnson saw the customer arrive, he got into the customer's car, rode around the block with him and made the sale. The customer dropped Johnson back at Farrow and Robert Williams' apartment within a few minutes. (Exh. 20, p. 31).

108. Barrow testified that they learned Boyd was killed when Pamela Williams spoke with Johnson on the telephone sometime after 9:00 p.m. (Exh. 9, p. 314, 325). During that call, Pamela Williams added Leslie Williams via a three-way call. (Exh. 9, 224-25; Exh. 20, p. 31-32; Exh. 22, p. 1-2). Leslie Williams confirmed that she spoke with Johnson via a three-way call shortly after the homicide. (Exh. 2, p. 68; Exh. 11, p. 13-14; Exh. 9, p. 224-25).

109. Farrow and Robert Williams were also present in the apartment when the telephone call occurred. (Exh. 21, p. 1; Exh. 20, p. 32; Exh. 22, p. 2). The defense did not call Farrow, Robert Williams, Leslie or Pamela Williams, despite them being subpoenaed and available to testify about Johnson's alibi.

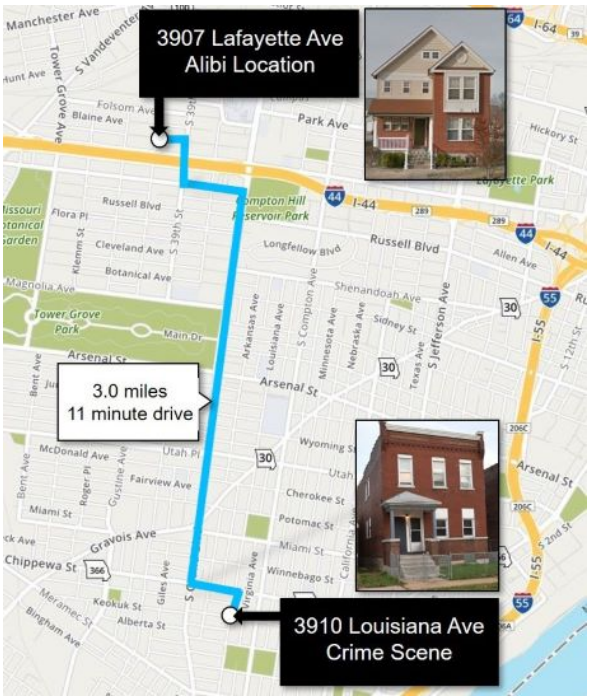
110. The police did not attempt to investigate Johnson's alibi, even though he told Detective Nickerson immediately upon questioning that he had been "with his girlfriend on Lafayette" and Leslie Williams told detectives she spoke to Johnson on the phone shortly after the

homicide. (Exh. 2, p. 45, 68; Exh. 11, p. 14). No attempt to collect pager or telephone records was made by the police, nor was a single alibi witness interviewed.

111. Although it was undisputed at trial that Johnson was at Farrow and Robert Williams' apartment between 9:00 and 10:00 p.m. and that Johnson left the apartment and returned within minutes, the State nonetheless presented false evidence, through Detective Nickerson in rebuttal, that Johnson could have traveled from 3907 Lafayette to the scene and killed Boyd in "no more than five minutes." (Exh. 9, p. 334). This is false testimony and the State knew it was false.

112. This false testimony offered by the State ignored undisputed evidence in the record: the witnesses testified the assailants arrived on foot and no witness testified to seeing a car arrive or flee the scene; and, Campbell was not with Johnson at Farrow's.

113. Simple time and distance calculations contradict the State's testimony in rebuttal of Johnson's undisputed alibi location. The one-way drive alone is approximately 11 minutes.



114. Thus, the testimony offered by the State that Johnson could have travelled to the scene, picked up Campbell, killed Boyd, dropped off Campbell, and returned to 3707 Lafayette in a matter of minutes was false and the State knew or should have known it was false.

The Motive Evidence was False and Manufactured

115. The State's theory was that Johnson killed Boyd because of a drug feud between them. The police report attempted to establish this motive, but subsequent investigation indicates that the motive evidence was false and fabricated.

116. Edward Neiger was contacted by Detective Nickerson on October 31, 1994. The police report indicates that Neiger told Detective Nickerson that Johnson and Boyd's drug business had severed as a result of Johnson selling bad drugs and that Johnson "was not happy about the split." (Exh. 2, p. 33).

117. After reviewing the police narrative attributed to him, Neiger signed a notarized affidavit swearing that he never told Detective Nickerson of any split between Johnson and Boyd because he had no knowledge of their relationship. (Exh. 7, p. 1-2).

118. Byrd was interviewed by Detective Nickerson on November 1, 1994. (Exh. 2, p. 36). According to the report, Byrd stated that she called Boyd on October 29, 1994, to warn him that Johnson was on his way to see Boyd. (Exh. 2, p. 37). Byrd's June 21, 1995, pretrial deposition contradicts the police account wherein she indicated that she knew of no disagreement between Boyd and Johnson and that the disagreement she had with Johnson on October 29, 1994 had nothing to do with Boyd. (Exh. 26, p. 5-6).

119. Byrd has reviewed the police narrative attributed to her and signed a sworn affidavit stating that Boyd never told her that Johnson had been hanging around his house in the days leading up to the homicide and that she and Boyd had not seen Johnson's car on the evening of October

30, 1994. (Exh. 13, p. 4-5). Byrd was never worried about what was going to happen between Boyd and Johnson because she knew of no animosity between them and that the above statements attributed to her in the police report are false. *Id*.

120. Byrd's sworn affidavit also states that she never called Boyd and Leslie Williams the day before Boyd was killed in attempt to warn him that Johnson would be visiting. (Exh. 13, p. 3). Byrd credibly claims that the entire police narrative that claims her as a source of the information relating to Johnson's motive to kill Boyd is false. (Exh. 13, p. 3-5).

121. Detective Nickerson's police narrative indicates that Herrman confirmed that she had been present for the October 29, 1994 conversation between Byrd and Johnson about bad drugs and that she had gone to visit Leslie Williams on October 30, 1994. (Exh. 2, p. 38).

122. In a sworn statement, Herrman stated that the account attributed to her in the police report is largely false: she was not present for any conversation between Johnson and Byrd about bad drugs. (Exh. 14, p. 2-3). She had never met Johnson, and consequently had never heard Johnson say he was going to see Boyd about the bad drugs. (Exh. 14, p. 2-4).

123. On November 1, 1994, Detective Nickerson interviewed Leslie Williams. (Exh. 2, p. 35). The police report indicates that Leslie Williams told Detective Nickerson that she believed Johnson was responsible for Boyd's murder and that there had been a dispute between them about missing drugs and stolen money. (Exh. 2, p. 35-36).

124. Leslie Williams' pretrial deposition on June 21, 1995, however, contradicts the above police account during which she stated that Boyd and Johnson were once very close and that they had drifted apart but she could think of no reason that Johnson would want to kill Boyd. (Exh. 11, p. 5-6, 12).

125. Leslie Williams further testified during that deposition that Boyd and Johnson had spoken about a week prior to the homicide when Johnson stopped by their apartment at 3910 Louisiana, and that there was no animosity between them, they exchanged no words, and there had never been any threats between them. (Exh. 11, p. 10-12).

126. Further, in two interviews in 2011, Leslie Williams viewed the police report and the statements attributed to her. (Exh. 33, p. 1). She told the investigator that information within the reports suggesting a severed drug business between Boyd and Johnson as the motive for the murder was false. (Exh. 33, p. 2-4).

127. All four witnesses the State claimed offered evidence of motive—Neiger, Leslie Williams, Herrman, and Byrd—have reviewed the statements attributed to them regarding the alleged motive for Johnson to kill Boyd and all four credibly claim that the statements attributed to them by Detective Nickerson are false. (Exh. 7, p. 1-3; Exh. 33, p. 2-4; Exh. 14, p. 2-4; Exh. 13, p. 2-5).

Greg Elking's Identification of Johnson was Manufactured and False

128. Even with the information known to the State at trial, the identification by Elking was unreliable. Elking stated on numerous occasions that he did not know Johnson and had never met him. (Exh. 10, p. 4-5; Exh. 9, p. 191; Exh. 27, p. 3; Exh. 24, p. 2; Exh. 8, p. 3; Exh. 15, p. 16, 21).

129. The crime was committed at night by two black men wearing full ski-type masks that covered their heads, including their ears, necks, eyebrows, foreheads, cheeks, mouths, chins, and most of their noses. (Exh.15, p. 50-52; Exh. 9, p. 190).

130. The masked men wore dark clothing that covered all but their hands and each carried a firearm. (Exh. 10, p. 21-22; Exh. 15, p. 50, 55-56). Elking testified at his 1995 deposition

that the porch light was not on and that "it was dark." (Exh. 10, p. 9-10; Exh. 9, p. 189-90). Elking was in shock, his mind went "blank" and he feared being shot during the shooting. (Exh. 10, p. 22, 26; Exh. 9, p. 165-66; Exh. 15, p. 48).

131. The circumstances of the crime make a reliable and accurate identification of a person unknown to the witness implausible. *See Manson v. Braithwaite*, 432 U.S. 98, 114 (1977).

132. Elking told Detective Nickerson that he did not know Boyd's associates, that he did not socialize with any of Boyd's friends, and that he did not recognize or know the gunmen. (Exh. 5, p. 5; Exh. 27, p. 3; Exh. 24, p. 2; Exh. 8, p. 3-4; Exh. 15, p. 15-16, 74-75).

133. Despite Elking's repeated statements that he could not make an identification because he could not see the gunmen, Detective Nickerson wrote into the police report that Elking identified Johnson from the five-photo array. (Exh. 2, p. 42-43).

134. When Elking and his wife met with Detective Nickerson at the diner on November 3, 1994, Detective Nickerson told Elking that the State could help him with money and expenses if he became a witness in the case. (Exh. 15, p. 83-84; Exh. 8, p. 4-5).

135. After the meeting at the diner, Johnson and Campbell were arrested and taken to Police Headquarters for questioning. (Exh., p. 43-45). Detective Nickerson attempted to locate Elking so that he could view an in-person lineup. (Exh. 2, p. 46-47).

136. Later, on November 3, 1994, Detective Nickerson picked up Elking and drove him to the Police Headquarters so that he could view the lineups. (Exh. 2, p. 48). During the drive to the station, Detective Nickerson told Elking that the police had apprehended Johnson and that Johnson was responsible for Boyd's death. (Exh. 15, p. 85-87). Detective Nickerson further told Elking that Johnson was responsible for a number of unsolved homicides and that the police needed Elking's testimony. (Exh. 15, p. 88; Exh. 8, p. 7).

137. Elking viewed the lineup containing Johnson at least three times. (Exh. 2, p. 48-49). He was unable to make an identification during the first two viewings. (Exh. 2, p. 49). On the third viewing, Elking identified a man name Donald Shaw, a filler from the City Jail holdover, as one of the gunmen. (Exh. 2, p. 18-19, 49). In the lineup containing Campbell, Elking was unable to make an identification. (Exh. 2, 20-21, 49).

138. Elking testified that at the time, he felt if he "had to pick" anyone it would be position #4, the position of Donald Shaw because he looked most like one of the photographs in the array shown to him earlier in the day on November 3, 1994. (Exh. 15, p. 95).

139. Elking states that he "did not recognize anyone" in the lineups and wanted badly to help but he simply was unable to make an identification because he was unable to see the gunmen's faces or other identifying features. (Exh. 15, p. 91-92, 97; Exh. 8, p. 5).

140. Elking felt "pressured" and "intimidated" by the police during the lineup. (Exh. 27, p. 3; Exh. 24, p. 2; Exh. 8, p. 6; Exh. 15, p. 93).

141. Elking was intimidated and worried that he would be charged if he did not make the identifications that Detective Nickerson wanted him to make. (Exh. 27, p. 4; Exh. 24, p. 3; Exh. 15, p. 103). Elking believed that Detective Nickerson knew who was responsible and he trusted Detective Nickerson. (Exh. 15, p. 99-100). He wanted justice for Boyd and needed the money and assistance promised to him. (Exh. 15, p. 100-01; Exh. 8, p. 5).

142. When Elking was unable to identify Johnson, Detective Nickerson's "mood changed" and was in a "foul" mood. (Exh. 15, p. 93, 96). Elking felt like he "let everyone down." (Exh. 15, p. 94, 96; Exh. 8, p. 5).

143. When Elking and Detective Nickerson got into the elevator after Elking was unable to make an identification, Elking asked Detective Nickerson to tell him the lineup position numbers

of the men that Detective Nickerson believed killed Boyd. (Exh. 8, p. 6; Exh. 15, p. 98, 127-28). Detective Nickerson then told Elking the men were in position #3 and position #4. (Exh. 5, p. 6; Exh. 27, p. 4; Exh. 24, p. 2-3; Exh. 8, p. 6; Exh. 15, p. 98, 127-28).

144. In 2019, Elking reiterated that he did not recognize anyone and that he had "no idea" who the shooters were:

Q. Did he indicate that he knew that you knew them?
A. Yeah. I -- it gets so -- it gets somewhere right as soon as we get on the elevator that hey, look, I don't -- I was scared that -- you know, that's -- that's -- I think that's what it came out as like I'm scared. I'm -- I was scared. I didn't -- I didn't feel comfortable, you know, down there.
And him going -- he goes yeah, so do you know who they were? And I'm like well, you tell me the numbers in the line-up and I'll tell you if you're right. And he then said three and four. And I said that's who they were.
Q. If he would have said one and two, would you have said yes, that's who they were?
A. Oh, yeah.
Q. So you were -- had no idea who they were?
A. I had no idea.

(Exh. 15, p. 98-99).

145. When they reached the higher floor at Police Headquarters, Detectives Nickerson, Stittum, and Bailey crafted the statement that Elking said he lied when he did not identify anyone during the live lineups and that he did so because he was scared. (Exh. 2, p. 50; Exh. 8, p. 6). Elking needed the money promised to him because he was not working regularly. He trusted the

detectives when they told him that they knew Johnson was responsible for Boyd's death. (Exh. 15, p. 100).

146. Elking succumbed to the impermissible pressure and the undisclosed promise of funds to "help him get back on his feet" and ultimately testified against Johnson despite having no opportunity to see or identify the shooters.

147. As early as 2003, the State's key witness, Elking, recanted his identification and trial testimony in a letter to Reverend Rice of St. Louis. The letter was found years later by Johnson's counsel after Elking told Johnson that he had been trying to tell the truth about his false testimony. In part, Elking's 2003 letter to Reverend Rice states:

> When they [police] talked to me they showed me some photos of suspects, but could not identify no one, because I did not know them or seen [sic] their faces. Then when they [police] showed me a line-up in City Jail, I still could not pick out the suspects. Then the detectives and me had a meeting with the Prosecutor Dwight Warren and convinced me, that they could help me financially and move me & my family out of our apartment & and relocate use [sic] in the County out of harms [sic] way. They also convinced me who they said they knew who murdered Marcus Boyd.
>
> They [police] had me say the suspects numbers in the lineup, and told me to say the reason I didn't pick them out while the lineup was going on, was because I was scared & terrified. The reason I'm telling you this now is my consiance [sic]. I regret not coming to you or anyone else sooner. I don't believe it was [the] right thing to do then & more so now.

(Exh. 5, p. 5-6).

148. This 2003 account by Elking is corroborated by the record. On December 6, 1996, at Johnson's 29.15 PCR hearing Detective Nickerson testified:

> [T]he witness [Elking] had known Mr. Johnson prior to this incident…I felt at the time Mr. Elking knew who we were looking for. *We knew who was responsible.* Anything even by name anything more was -- at that time it wasn't necessary. It

might have been done. It might not have been done, but he knew who we wanted. *There was no question in my mind who was responsible.*

(Exh. 20, p. 23-24) (emphasis added).

149. After Detective Nickerson informed ACA Dwight Warren that Elking had identified Johnson and Campbell in the lineups, they were charged with First-Degree Murder and Armed Criminal Action and booked into the City Jail. (Exh. 2, p. 24, 50-51). Without Elking's manufactured identification, Johnson would not have been charged or even arrested for Boyd's death.

The State Paid Greg Elking to Identify Johnson

150. During the November 4, 1994, meeting at the diner, Detective Nickerson told Elking and his wife that the State could help them with housing and expenses. (Exh. 15, p. 83-84; Exh. 8, p. 4-5). Elking's financial situation was unstable and he needed the money. (Exh. 15, p. 100-01).

151. In 2010, Elking and his ex-wife both signed sworn affidavits indicating that they received several monetary payments from the State. (Exh. 8, p. 4-5, 7; Exh. 35, p. 2).

152. After the Elkings revealed that they had been paid by the State, Johnson's counsel repeatedly requested documentation of the payments to Elking from various entities, including the Circuit Attorney's Office, but the documentation evidencing payments to Elking was never disclosed. In fact, the documents were not only withheld, their existence was denied in writing. (Exh. 12, p. 8; Exh. 36).

153. A summary of Johnson's requests for documentation relating to Elking and the payments he received is below:

Date of Request	Documents Requested	Agency	Response
2009-03-25	"[A]ny and all records pertaining to the incidents including all original investigative and supplement reports" relating to the homicide of Marcus Boyd.	St. Louis Police Department	Investigative reports received, no records related to payments to Elking were included in the response to Johnson's request.
2010-02-05	"[A]ll records that relate to any monies paid out from the Crime Victim's Compensation Fund to recipient James Greg Elking (DOB: [redacted]) or Kelly Elking (DOB: [redacted]) including, but not limited to, any other reward recipients and applicants and victim payouts in connection with the prosecution and conviction of Lamar Johnson, Case No. 941-3706A, in the 22nd Judicial District by prosecutor Dwight Warren. The lead St. Louis Police Department detective was Joseph Nickerson."	Dept. of Public Safety, Crime Victims Compensation Fund	2010-06-03 "In response to your request for all financial records and checks written to Mr. Elking, please be advised that our office does not have a record of a compensation claim nor any checks written to him."
2010-02-02	"Any and all records related to trial witness James Greg Elking, DOB [redacted]; SSN [redacted], including any prior conviction, plea agreements, and financial compensation paid by any state agency to Mr. Elking from this case."	Missouri Attorney General	2010-03-03 "After reviewing the records of this office, we have found nothing which is responsive to your Request."
2010-02-17	"[A]ll records that relate to any compensation given to recipient James Greg Elking (DOB: [redacted]) or Kelly Elking (DOB [redacted]) including, but not limited to, any other reward recipients and applicants and victim payouts in connection with the prosecution and conviction of Lamar Johnson, Case No. 941-3706A, in the 22nd Judicial District, by prosecutor Dwight Warren. The lead St. Louis Police Department detective was Joseph Nickerson."	St. Louis Circuit Attorney	No response noted.

Date of Request	Documents Requested	Agency	Response
2010-06-18	"[A]ll financial records and checks written to James Elking (DOB [redacted]). Mr. Elking has stated that he received funds through the Circuit Attorney in 1994-1995."	St. Louis Circuit Clerk	2010-06-20 "Based on our conversation today, it is my understanding that you think Mr. Elking received an amount of money that ordinarily exceeds a witness fee. We will check Mr. Lamar Johnson's case, cause number 22941 -03706A-01, and provide you any financial information regarding that file." No further response noted or records disclosed.
2010-09-17	"[A]ll financial records and checks that were written stemming from the death of Marcus Boyd (DOB: [redacted])."	Department of Public Safety, Crime Victims Compensation Fund	2010-09-24 "In response to your request for all financial records and checks written on behalf of and stemming from the death of Marcus Boyd, please be advised that our office is unable to reproduce a copy of his file. Since his claim was archived in 1996, the file no longer exists as files are destroyed after ten (10) years. However, we were able to print computer screens from his claim showing a few of the details such as the payments that issued." **NOTE**: Thirteen pages of payments made from the Crime Victim's Compensation Fund were provided but none related to Elking. All documented payment for Boyd's funeral and burial services.
2010-03-12	"[A]ny and all records that relate to expenses reported by prosecutor Dwight Warren in connection with the prosecution and conviction of Lamar Johnson, Case No. 941 *70GA*, in the 22nd Judicial District, between October 30, 1994 and September 30, 1995."	St. Louis Circuit Attorney	2012-04-11 Response "After reviewing our files and records, we are unable to locate any records that relate to expenses reported by prosecutor Dwight Warren in connection with the prosecution and conviction of Lamar Johnson, Case No. 22941-3706A, between October 30, 1994 and September 30, 1995." 2012-04-26 Supplemental Response "After reviewing our files and records, we are unable to locate any records that relate to expenses reported by prosecutor Dwight Warren, another prosecutor or any employee of the Circuit Attorney's Office in connection with the prosecution and conviction of Lamar Johnson, Case No. 22941-3706A, between October 30, 1994 and September 30, 1995."

Date of Request	Documents Requested	Agency	Response
2010-03-12	"[A]ny and all records that account for expenses paid out of the Circuit Attorney's crime victim's fund between October 30, 1994 and September 30, 1995."	St. Louis Circuit Attorney, Victim Services Unit	2012-04-16 "After reviewing our files and records, we are unable to locate any records that account for expenses paid out of the Circuit Attorney's crime victim's fund (or any of the Circuit Attorney's Office fund) between October 30, 1994 and September 30, 1995."
2014-09-16	"[R]equest access to the physical law enforcement investigation and legal file for viewing, inspecting and copying	St. Louis Circuit Attorney	2014-11-18 400 pages of records, including the legal file, were turned over to Johnson. No records relating to payments to or on behalf of Elking were included in Johnson's record request.
2014-09-30	Records of payments [including but not limited to monetary and in-kind payments] to victims, witnesses any other party connected with this investigation and prosecution	St. Louis Police Department	Investigative reports received. No records related to payments to Elking were included in the response to Johnson's record request.

154. As part of the joint investigation between the Circuit Attorney's Office and Johnson's counsel, in February of 2019, the CIU searched for and located 63 pages of documents related to payments to Elking and services procured by the State on his behalf. (Exh. 12).

155. Concealed payments to and on behalf of Elking, totaling at least $4,241.08, began on November 4, 1994, including cash payments, payment of back utilities, moving and living expenses, and rent[8]. (Exh. 12, p. 7). These payments continued for months leading up to Johnson's trial. *Id*. These payments were never disclosed to the defense.

156. In addition to secret payments to the only witness to the crime who repeatedly told police that he did not recognize the gunmen and that he was unable to see the gunmen because of the masks and because it was dark, the Circuit Attorney's Office "took care of" a number of traffic

[8] Accounting for inflation, the total payments would amount to $7,330.11 in 2019.

violations for Elking in exchange for his identification. (Exh. 15, p. 119-23; Exh. 40). This assistance was not disclosed to the defense.

157. The documents discovered by the CIU include copies of cancelled checks, correspondence with movers and successful efforts to locate and pay for Elking's housing. (Exh. 12). The payments began on the day Detective Nickerson presented Elking to ACA Dwight Warren and continued for months thereafter, including undocumented cash payments before Elking testified. *Id.*

158. The documentation in the State's file describes Elking as an "essential witness" and there can be no doubt that he was—without Elking there was no case against Johnson. (Exh. 12, p. 53).

William Mock's Criminal History and Informant History Was Not Disclosed to Johnson

159. William Mock, a man with an extensive criminal history and history of cooperating as a jailhouse informant, was incarcerated in the City Jail holdover unit at the same time Johnson and Campbell were housed there. (Exh. 2, p. 25, 51). The holdover unit is a series of cells that house multiple inmates.

160. On November 5, 1994, just two days after Elking made a false identification of Johnson and gave a manufactured statement, Mock notified a jailer that he had information to share with the homicide unit. *Id*.

161. Mock claimed that he overheard an incriminating conversation involving three inmates about a murder. Mock shared the details with Detective Jackson, but this statement was not recorded. *Id*.

162. On November 6, 1994, Mock claimed to overhear another conversation regarding the Boyd homicide, namely that Johnson and Campbell discussed "taking care of the white boy" to cover their tracks. (Exh. 2, p. 26, 51-52).

163. Mock was never in the same cell as Johnson or Campbell. (Exh. 28). The cells are loud and crowded. (Exh. 29).

164. Mock, a material witness, testified falsely in a number of instances. The State argued at trial that Mock had no motive to lie and that he expected little for his testimony against Johnson. (Exh. 9, p. 352-53). That testimony by the State was false, and ACA Dwight Warren knew it was false.

165. Mock expected much in return for his testimony. In an undisclosed letter from Mock to ACA Dwight Warren dated June 3, 1994, he stated

> I don't believe that anyone in the legal system will disagree with the value of my testimony in this trial as opposed to the conviction that I am now serving. I am willing to testify as long as I don't have to return to the Department of Corrections once I testify. I can't I won't live in protective custody or any institution after I testify. I am serving a five year sentence for CCW, which I have been serving since 1993. I feel my testimony is worth a pardon by Mr. Carnahan or a reduction in my sentence…I will uphold my end of the situation as I am certain you will fulfill your obligations to me.
>
> (Exh. 37, p. 1-2).

166. In a series of undisclosed, exculpatory, and impeaching correspondence between Mock and ACA Dwight Warren, several letters were written by ACA Dwight Warren on Mock's behalf: to remedy disciplinary incidents involving Mock, to request transfers within the DOC to preferred prisons, and to make recommendations for release to the parole board. (Exh. 37). None of these considerations or favors were disclosed to the defense.

167. In one of the letters to ACA Dwight Warren, Mock referred to Johnson as a "two-bit nigger," a clear indication of witness bias, prejudice, and racial animus that bears directly to

Mock's credibility and motivation to testify against Johnson. *Id*. These letters were hidden from the defense.

168. Mock testified falsely about his criminal history and the State did not correct the false record offered to the jury. A summary of Mock's criminal history is attached at Exhibit 34 and includes a number of arrests and convictions, both felony and misdemeanor, that were concealed from the defense. Among them: forgery, fraud, burglary, assault, multiple DUIs, larceny, escape, and stealing. *Id*.

169. The State did not disclose that Mock was an incentivized jailhouse informant for the State in 1992 in the prosecution of Joseph Smith. Mock testified, in exchange for a reduction in sentence, that he overheard a jailhouse murder confession while housed in the Jackson County jail. (Exh. 38).

170. When William Mock was specifically asked whether he had been a witness or testified in a criminal case—he lied—and the State did not correct the record:

> Q. Have you ever testified before?
>
> A. No, I haven't.
>
> Q. Have you ever given a deposition?
>
> A. No, I haven't.
>
> Q. Have you ever been a witness in a criminal case before?
>
> A. No, I haven't.

(Exh. 25, p. 5).

171. The State did not disclose this history of informing and the jury did not know that Mock was a career informant. *Banks v. Dretke*, 540 U.S. 668, 702-03 (2004) (Brady violation when government failed to disclose witness status as an informant); *Giglio v. United States*, 405

U.S. 150 (1972) (Brady violation where government failed to disclose nonprosecution agreement with cooperating witness); DAG Guidance Memo, Step 1.B.7 (requiring disclosure of benefits to any testifying witness including but not limited to: "[d]ropped or reduced charges, [i]mmunity, [e]xpectations of . . . reduce[d] . . . sentence[s], [a]ssistance in. . . [other] criminal proceeding[s], [c]onsiderations regarding forfeiture of assets, [s]tays of deportation or other immigration status considerations, S-Visas, [m]onetary benefits, [n]onprosecution agreements, [l]etters to other law enforcement officials (. . . [including] parole boards), setting forth the extent of a witness's assistance or making substantive recommendations on the witness's behalf, [r]elocation assistance, [c]onsideration or benefits to. . . third parties").

172. This evidence is material, it bears directly on Mock's motivation to lie and credibility, and it shows his experience trading information for self-benefit.

173. Such information was critical to Mock's credibility as a disinterested, reliable witness, yet the State failed to disclose any of this information to Johnson at trial. Had Mock's full criminal history and his history as an informant been disclosed, as well as his stated motive to assist in Johnson's case, his testimony would have been discredited entirely.

174. The post-trial investigation uncovered facts that render Johnson's conviction fundamentally unjust. No credible evidence to support the verdict remains. *See State ex rel. Amrine v. Rope*r, 102 S.W.3d 541, 547 (Mo. banc 2003).

II. ARGUMENT

THE CIRCUIT ATTORNEY IS DUTY-BOUND TO MOVE FOR A NEW TRIAL

175. After the Circuit Attorney learned of the newly discovered evidence of innocence, investigated, and confirmed that repeated instances of government misconduct had occurred in Johnson's trial, legal ethics expert Lawrence Fox of Yale Ethics Bureau was contacted and asked

to give an expert opinion regarding the Circuit Attorney's ethical and professional obligations in the face of such evidence. His report is attached as Exhibit 39.

176. As public servants and officers of the criminal justice system, prosecutors have a special duty to "represent the interest of society as a whole." *Ferri v. Ackerman*, 444 U.S. 193, 202-03 (1979); Missouri Rules of Prof'l Conduct r. 4-3.8 cmt. 1 (noting that a prosecutor "has the responsibility of a minister of justice and not simply that of an advocate").

177. Prosecutors, as state actors, have legal, ethical, and professional obligations to uphold a defendant's constitutional right to a fair trial and due process of law. *See* U.S. Const. amend. XIV ("[N]or shall any State deprive any person of life, liberty, or property, without due process of law."); *Delaware v. Van Arsdall*, 475 U.S. 673, 681 (1986) ("[T]he Constitution entitles a criminal defendant to a fair trial.").

178. A prosecutor is obligated to remedy a conviction when there is "clear and convincing evidence" of a defendant's innocence. Model Rules of Prof'l Conduct r. 3.8(h).[9] Under Missouri law, "clear and convincing evidence" of a defendant's innocence exists when a witness' recantation leaves the prosecution with no evidence to link a defendant to a crime. *See State ex rel. Amrine v. Roper*, 102 S.W.3d 541, 548-49 (Mo. 2003).

179. Johnson's conviction resulted from past misconduct by the Office of the Circuit Attorney and its law enforcement partner, the St. Louis Police Department. The current Circuit

[9] The ABA Model Rules of Professional Conduct are nationally recognized standards. Missouri is one of the 37 states that have generally adopted both the rules and the comments to the ABA Model Rules. In Missouri, the Comments are intended as guides to interpretation of the Model Rules. *See* State Adoption of the ABA Model Rules of Professional Conduct and Comments, Am. Bar Ass'n (June 15, 2017), https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/adoption_mrpc_comments.authcheckdam.pdf. Although the state of Missouri has not specifically adopted Model Rules 3.8(g) and 3.8(h), the ABA model rules make explicit what is implicit in the obligations of prosecutors if Model Rules 3.8(g) and 3.8(h) had been adopted.

Attorney is uniquely situated to bring the past abuses of her office to light. As a result of longstanding prosecutorial and law enforcement wrongdoing, Johnson was convicted in a trial that violated his constitutional rights.

180. The Missouri Rules of Professional Conduct and the ABA Criminal Justice Standards require that prosecutors only seek to maintain criminal convictions when evidence in support of guilt continues to exist. *See* Missouri Rules of Prof'l Conduct r. 4-3.8 cmt. 1 ("A prosecutor has the responsibility . . . to see that . . . guilt is decided upon the basis of sufficient evidence"); ABA Standard 3-4.3(b) (stating that prosecutors should only maintain criminal charges if they "continue[] to reasonably believe" that evidence is "sufficient to support conviction beyond a reasonable doubt").

181. Since the State no longer believes that Johnson's conviction is valid, the Circuit Attorney is obligated to seek to remedy the error.

182. As a "minister of justice," a prosecutor has an ethical duty to remedy wrongful convictions. Missouri Rules of Prof'l Conduct r. 4-3.8 cmt. 1. Unlike other lawyers, prosecutorial duties do not end after a conviction. Prosecutors have continuing responsibility to act upon any evidence that may surface to cast doubt upon the justness of a past conviction. *See generally* Daniel S. Medwed, *The Prosecutor as Minister of Justice: Preaching to the Unconverted from the Post-Conviction Pulpit*, 84 Wash. L. Rev. 35 (2009).

183. This responsibility is at its apex where a prosecutor learns of new evidence that suggests an earlier conviction may have been unjust. The U.S. Supreme Court has held that prosecutors are "bound by the ethics of [their] office to inform the appropriate authority of after-acquired or other information that casts doubt upon the correctness of the conviction." *Imbler v. Pachtman*, 424 U.S. 409, 427 n.25 (1976). The Supreme Court of Missouri has also recognized

that a state attorney's "role is to see that justice is done—not necessarily to obtain or to sustain a conviction." *State v. Terry*, 304 S.W.3d 105, 108 n.5 (Mo. 2010).

184. When a prosecutor becomes aware of clear and convincing evidence establishing that a defendant in the prosecutor's jurisdiction was convicted of a crime that the defendant did not commit—the position in which the Circuit Attorney now finds herself—the prosecutor is obligated to seek to remedy the conviction. Model Rules of Prof'l Conduct r. 3.8(h). Prosecutors must not only "promptly disclose that evidence to an appropriate court," Model Rules of Prof'l Conduct r. 3.8(g), but "must seek to remedy the conviction." Model Rules of Prof'l Conduct r. 3.8 cmt. 8. A prosecutor's duty is not circumscribed by time or place.

185. A prosecutor's duty is to maintain the integrity of our justice system as a whole, *see* Missouri Rules of Prof'l Conduct r. 3.8 cmt. 1, obligates her to act to correct injustices, whether caused by her own actions or past actions of other lawyers in her office.

186. Because the Circuit Attorney has become aware of evidence of government misconduct, perjured testimony, concealed exculpatory and impeachment evidence that is clearly material, and evidence of innocence, she is duty-bound to move for a new trial.

187. The Circuit Attorney raises four grounds in her motion for a new trial:

GROUNDS FOR RELIEF

GROUND I:
NEWLY DISCOVERED EVIDENCE OF INNOCENCE RENDERS THE VERDICT IMPROPER AND MANIFESTLY UNJUST

Phillip Campbell and James "BA" Howard Credibly Confessed to Killing Boyd

188. The State realleges and incorporates the facts in Paragraphs 1 through 187 as if fully set out herein. *See also* Exhibit 1, Report of the CIU.

189. Campbell and Howard confessed to shooting Boyd and signed sworn affidavits stating that they killed Boyd and that Johnson was not involved. (Exh. 43; Exh. 16; Exh. 18; Exh. 17, p. 3; Exh. 19, p. 4).

190. The accounts of Campbell and Howard are summarized above at Paragraphs 86 through 102. Their affidavits unequivocally state that they killed Boyd and that Johnson was not involved. Further both Campbell and Howard have offered motive evidence that is independently corroborated by the statements of other witnesses including Lamont McClain and Anthony Cooper regarding a dispute over crumbs between Boyd and Howard's friend, Spates. Campbell and Howard's accounts are consistent in the way the masks were worn on their faces, the clothing they wore, the route the took to Boyd's apartment and the route they travelled when they fled the scene. The evidence supporting the fact that Campbell and Howard killed Boyd is extensive and credible:

a. Campbell wrote letters in July of 1995 while in the City Jail before he was convicted describing his role and Johnson's innocence in Boyd's murder; (Exh. 30)

b. Campbell signed affidavits in 1996 and 2009 swearing under oath that he killed Boyd with Howard and that Johnson was not present or involved in the crime; (Exh. 18; Exh. 19)

c. Howard signed affidavits in 2002, 2005 and 2009 swearing under oath that he killed Boyd with Campbell and that Johnson was not present or involved in the crime; (Exh. 43; Exh. 16; Exh. 17)

d. The affidavits of Howard and Campbell provide details that are corroborated by the physical evidence including the type of masks worn, motive, types of guns used, the clothing they wore during the crime, the route they travelled to and from the

scene, and the location of Howard's house where they fled after the crime; (Exh. 17, p. 1-3; Exh. 19, p. 1-4).

e. The accounts of Howard and Campbell are further corroborated by Elking and Leslie Williams who were present at the scene;

f. The CIU interviewed Howard at length regarding his role in the homicide of Boyd. The CIU found him credible and his version of events is corroborated by Elking, Leslie Williams, Campbell and the physical evidence, including the type of masks and clothing worn, the firearms used, how the shooters arrived on the porch at 3910 Louisiana, and how they left the scene; and,

g. Anthony Cooper and Lamont McClain signed affidavits in 2009 corroborating Campbell and Howard regarding the motive evidence and statements that Howard and Campbell made to them that Johnson was not involved in the crime. (Exh. 31, p. 1; Exh. 32, p. 1-2)

Johnson Was With Erica Barrow At Anita Farrow And Robert Williams' Apartment When Boyd Was Killed.

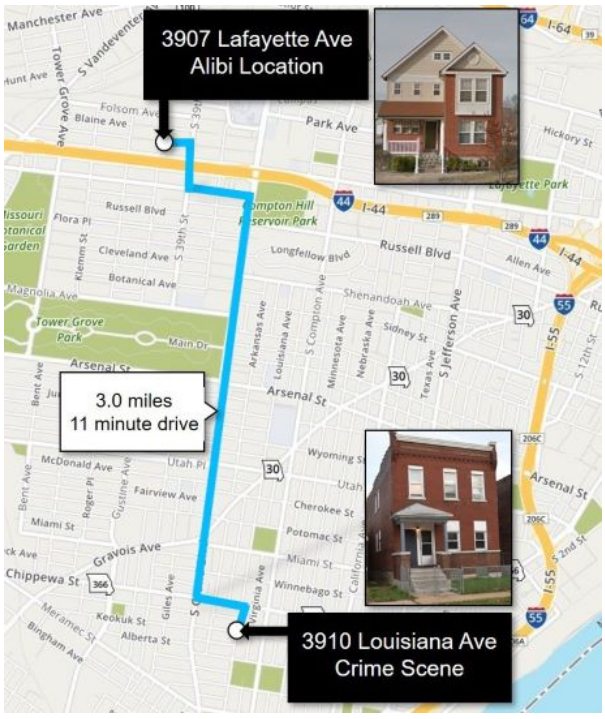
191. The evidence supporting Johnson's alibi is detailed above at Paragraphs 1 through 189. The Circuit Attorney finds the alibi evidence persuasive and finds that the evidence proves it was impossible for Johnson to kill Boyd.

192. It is undisputed that Johnson was at Farrow and Robert Williams' apartment the night that Boyd was killed. It is undisputed that Johnson arrived at the apartment sometime before 9:00. It is undisputed that Johnson was at Farrow and Robert Williams' apartment until approximately 10:00 p.m. when he and Barrow left with their child and returned home where they remained for the rest of the evening. It is undisputed that Johnson left Farrow and Robert Williams' apartment for a few minutes and immediately returned.

193. Boyd's neighbors, Leslie Williams, and Elking all testified that the assailants arrived and left on foot. No witness saw a car arrive or flee the scene. Howard and Campbell corroborate the witnesses and stated that they ran from Howard's home at 3944 Louisiana to Boyd's apartment at 3910 Louisiana (less than 400 feet) and returned through the alleyway on foot.

194. Despite those undisputed facts, the State, through Detective Nickerson, presented false testimony that it was possible for Johnson to travel from Lafayette Avenue to 3910 Louisiana to kill Boyd and return to Farrow and Robert Williams' apartment in "no more than five minutes." (Exh. 9, p. 334)

195. Simple time and distance calculations contradict the State's testimony in rebuttal of Johnson's undisputed alibi location:



The roundtrip alone would have taken a minimum of 22 minutes by car.

196. Further, both Leslie Williams and Pamela Williams were on the phone with Johnson shortly after the homicide. (Exh. 9, p. 224-25; Exh. 20, p. 31-32; Exh. 22, p. 1-2). Johnson was in Farrow and Robert Williams' apartment when this telephone call occurred and Johnson learned of Boyd's death in the presence of Farrow, Robert Williams, and Barrow. (Exh. 9, p. 314, 325; Exh. 20, p. 32; Exh. 22, p. 2; Exh. 21, p. 1).

197. In 2019, the CIU interviewed Johnson regarding the police investigation, trial, and the post-conviction investigation. The State finds Johnson credible and his account is supported by the alibi evidence and the witness accounts of Herrman, Byrd, McClain, Cooper, Howard, Campbell, Farrow, Robert Williams, Pamela Williams, and Leslie Williams.

198. Although State's motion for a new trial is untimely under Rule 29.11(b), an exception to the rule exists under case law. The time limit under Rule 29.11 is 15 days after the verdict is returned, except upon application of the defendant within those 15 days and for good cause the court may extend the time for filing by an additional period not to exceed 10 days.

199. *State v. Mooney* carved out an exception to the time limit for filing motions for new trial embodied in Rule 29.11 "to prevent a miscarriage of justice." 670 S.W.2d 510 (Mo. App. E.D. 1984).

200. In *Mooney*, the defendant was convicted of sex crimes involving a child and sentenced to prison. The evidence presented against Mooney was the testimony of the fifteen-year-old victim. Six months after Mooney's time for filing a new trial had expired under Rule 29.11, the victim told one of Mooney's alibi witnesses that "he had made up the story." *Id.* at 511-12. Mooney's counsel filed a motion with the Eastern District Court of Appeals, (because Mooney's appeal was pending), requesting permission to supplement the record with the "newly discovered evidence of Mooney's innocence." *Id.* Mooney requested leave to file the evidence supporting his

claim of innocence, including a recording of the alleged victim recanting his testimony and affidavits attesting to the recording's authenticity. *Id*. The State in opposition argued that Mooney was out of time to file a motion for new trial. *Id*. at 512-13. The Court of Appeals acknowledged the time constraints of Rule 29.11, but remanded Mooney' case for a new trial holding:

> We believe this is a "proper case" [for a new trial out of time] because the recantation, if such it is, came too late for the defendant to file a timely motion for new trial on the grounds of newly-discovered evidence. Although the judgment of the trial court is final for purposes of appellate review, and the trial court is without jurisdiction to entertain appellant's motion because the case is on appeal, we believe upon remand a motion for new trial should be permitted to be filed where the appellate process has not been completed, there is no evidence connecting the appellant with the crime other than the testimony of the victim who has allegedly recanted, and whose testimony is uncorroborated by any other evidence, where said newly discovered evidence did not become available during trial, and the recanting occurred under circumstances reasonably free from suspicion of undue influence or pressure from any source.

Id. at 516. The court remanded with instructions that Mooney be permitted to file a motion for new trial. The *Mooney* opinion recognized, as here, "[t]he victim whose testimony was the only evidence to establish the crime of which appellant was convicted has allegedly recanted." *Id*. at 514-515.

201. Elking was the only witness to the homicide. Leslie Williams was upstairs at the time of the shooting. Without Elking's manufactured identification there would not have been any evidence connecting Johnson to the crime and an arrest warrant would not have issued. Elking was the center of the State's gossamer thin case against Johnson.

202. Similarly, in *State v. Williams,* 673 S.W.2d 847 (Mo. App. E.D. 1984), the Court determined under circumstances like those presented here, that Williams was entitled to file a motion for a new trial out of time and receive a hearing on the motion. Williams' evidence was "detailed" and "if believed, the newly discovered evidence would completely exonerate the defendant of any complicity in the crime for which he was convicted." *Id.* In *Williams*, like here,

the prosecutor agreed that the "information contained" in the motion "is true and accurate" and further agreed that the motion should be heard in the trial court. *Id*. at 848. Further, the Attorney General filed an affidavit agreeing that the motion should be returned to the trial court to conduct a hearing on the newly discovered evidence. The Court held:

> ***Under the unique circumstances of this case, we are willing to overlook the time constraints of Rule 29.11 as they relate to the newly discovered evidence.*** The basis of the granting of relief for such reason is that it was not known, or could not reasonably have been discovered earlier. That this evidence was not discovered before the expiration of the time for the filing of a motion for new trial should not defeat the laudable concept of a new trial based on such evidence. This ruling may be subject to future limitation, but ***we see no reason for limitation where the State joins in the request for release.*** Mindful though we are of the exclusivity of this Court's jurisdiction once a notice of appeal has been properly filed, ***we are equally cognizant of the perversion of justice which could occur if we were to close our eyes to the existence of the newly discovered evidence…[I]in light of the State's concession that the evidence exists, it should be heard."***
>
> *Id.* (emphasis added).

203. The unique circumstances in *Mooney* and *Williams* exist here. The newly discovered evidence exonerates Johnson. The State has reviewed the evidence and conducted its own investigation and is convinced that Johnson is innocent and that repeated and prejudicial government misconduct occurred. These exceptional circumstances and the interests of justice warrant the granting of a new trial for Johnson or a hearing despite the motion being out of time.

204. While the requests for a new trial in *Mooney* and *Williams* were first made to the Court of Appeals during the pendency of a direct appeal, it is the view of the Circuit Attorney that these holdings give at least implied authority for the State to move for a new trial in the trial court under the exceptional circumstances present here: the newly discovered evidence exonerates the defendant and where the conviction was obtained through the use of perjured testimony that affected the reliability of the verdict. *Id.*

205. Additionally, Rule 29.12 states that "plain errors affecting substantial rights may be considered in the discretion of the court when the court finds that manifest injustice or miscarriage of justice has resulted therefrom." Plain errors may be considered "if it appears on the face of the record that the error alleged so substantially affected defendant's rights that a miscarriage of justice or manifest injustice would occur if the error was not corrected." *State v. Mayes*, 63 S.W.3d 615, 624 (Mo. banc 2001).

206. Plain error review is used sparingly and is limited to those cases where there is a "clear demonstration of manifest injustice or miscarriage of justice." *State v. Parker*, 208 S.W.3d 331, 335 (Mo. App. S.D. 2006). Claims of plain error are reviewed "under a two-prong standard." *State v. Roper*, 136 S.W.3d 891, 900 (Mo. App. 2004). "In the first prong, we determine whether there is, indeed, plain error, which is error that is 'evident, obvious, and clear'" *Id*. (quoting *State v. Scurlock*, 998 S.W.2d 578, 586 (Mo. App. 1999)). If so, then we look to the second prong of the analysis, which considers whether a manifest injustice or miscarriage of justice has, indeed, occurred as a result of the error." *Roper*, 136 S.W.3d at 900.

207. Here, the errors are "evident, obvious, and clear." *Id*. Elking was never able to identify the masked assailants and his identification was manufactured. Johnson's alibi evidence was credible and proves it was impossible for Johnson to have killed Boyd. It would be manifestly unjust to ignore the overwhelming evidence of innocence and government misconduct affecting the reliability of the verdict.

208. Further, a prosecutor is obligated to remedy a conviction when there is "clear and convincing evidence" of a defendant's innocence. Model Rules of Prof'l Conduct r. 3.8(h). Under Missouri law, "clear and convincing evidence" of a defendant's innocence exists when a witness'

recantation leaves the prosecution with no evidence to link a defendant to a crime. *See State ex rel. Amrine v. Roper*, 102 S.W.3d 541, 548-49 (Mo. 2003)

209. The U.S. Supreme Court has held that prosecutors are "bound by the ethics of [their] office to inform the appropriate authority of after-acquired or other information that casts doubt upon the correctness of the conviction." *Imbler v. Pachtman*, 424 U.S. 409, 427 n.25 (1976). The Supreme Court of Missouri has also recognized that a state attorney's "role is to see that justice is done—not necessarily to obtain or to sustain a conviction." *State v. Terry*, 304 S.W.3d 105, 108 n.5 (Mo. 2010).

210. When a prosecutor becomes aware of clear and convincing evidence establishing that a defendant in the prosecutor's jurisdiction was convicted of a crime that the defendant did not commit—the position in which the Circuit Attorney now finds herself—the prosecutor is obligated to seek to remedy the conviction. Model Rules of Prof'l Conduct r. 3.8(h). Prosecutors must not only "promptly disclose that evidence to an appropriate court," Model Rules of Prof'l Conduct r. 3.8(g), but "must seek to remedy the conviction." Model Rules of Prof'l Conduct r. 3.8 cmt. 8. A prosecutor's duty is not circumscribed by time or place. It would be manifestly unjust, illogical, and a profound distortion of the justice system if the Circuit Attorney had a duty to remedy a conviction as patently unjust as Johnson's, yet have no procedural mechanism under Missouri law to fulfil that duty.

211. Rule 29.11(a) states that "[t]he court may grant a new trial upon good cause shown." Missouri courts have recognized that one "good cause" for which a new trial will be granted is the post-trial discovery of new evidence. *State v. Whitfield*, 939 S.W.2d 361, 367 (Mo. banc 1997).

212. The question of whether to grant a motion for new trial is left to the "sound discretion of the trial court." *State v. Mayes*, 63 S.W.3d 615, 625 (Mo. banc 2001). The trial court abuses its discretion when its ruling is clearly against the logic of the existing circumstances and is so arbitrary and unreasonable as to shock the sense of justice and indicate a lack of careful consideration. *State v. Christeson*, 50 S.W. 3d 251, 261 (Mo banc 2001).

213. A new trial based on newly discovered evidence is warranted if the movant establishes that:

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

State v. Whitfield, 939 S.W.2d 361, 367 (Mo. banc 1997).

214. Evidence is "new" if it was "`not available at trial and could not have been discovered earlier through the exercise of due diligence." *Osborne v. Purkett*, 411 F.3d 911, 920 (8th Cir. 2005) (quoting *Amrine v. Bowersox*, 238 F.3d 1023, 1029 (8th Cir. 2001).

215. The Circuit Attorney has offered new evidence that was not available to the defense at trial and could not have been discovered by the current Circuit Attorney earlier. Furthermore, Johnson has attempted to collect newly discovered evidence for years, and the State concealed and failed to disclose at nearly every opportunity. Neither Johnson nor the Circuit Attorney can be faulted for failure to be diligent.

216. The affidavits of Campbell, Howard, McClain, Cooper, and Elking as well as the personal writings of Campbell and Elking could not have been known to the current Circuit Attorney nor Johnson at trial.

217. If a credible showing of actual innocence is made and is "strong enough to undermine the basis of the conviction" the continued imposition of the sentence is "manifestly unjust." *State ex rel. Amrine v. Rope*r, 102 S.W.3d 541, 547 (Mo. banc 2003). The Missouri Supreme Court has provided a standard "to account for those rare situations…in which a petitioner sets forth a compelling case of actual innocence independent of any constitutional violation at trial." *Id*. The evidence of innocence must "make a clear and convincing showing of actual innocence that undermines confidence in the corrections of the judgment." *Id.* Evidence is clear and convincing when it "instantly tilts the scales in the affirmative when weighed against the opposition, and the fact finder's mind is left with an abiding conviction that the evidence is true." *Id*. At 548.

218. The evidence discovered since Johnson's trial exonerates him as explained more fully above. *See* paragraphs 86 to 173.

219. The evidence of innocence was unavailable to Johnson because the State failed in its duty to investigate the crime, presented false testimony relating to the alibi, and because he received constitutionally deficient representation.

220. For the aforementioned reasons, this Court should grant the Circuit Attorney's Motion for New Trial, or in the alternative, grant the Circuit Attorney's request for a hearing to present evidence in support of the Motion.

GROUND II:
NEWLY DISCOVERED EVIDENCE OF PERJURY BY MATERIAL WITNESSES RENDERS THE VERDICT IMPROPER AND MANIFESTLY UNJUST

Greg Elking Was Never Able To Make An Identification

221. The State realleges and incorporates the facts in Paragraphs 1 through 220 as if fully set out herein. *See also* Exhibit 1, Report of the CIU.

222. The State's star witness at trial, Elking, perjured himself at Johnson's trial. (Exh. 5, p. 5-6; Exh. 27, p. 1-5; Exh. 24, p. 1-4; Exh. 8, p. 1-8; Exh. 15, p. 9, 124-32). Elking recanted his identification—an identification that was manufactured and false. The evidence pertaining to Elking's false identification and perjured testimony is summarized above at Paragraphs 127 to 157.

223. Elking has admitted in personal writings, affidavits, and deposition testimony that he was never able to make an identification because the gunmen wore masks that covered their heads, foreheads, mouths, cheeks, ears, most of their noses. (Exh. 15, p. 50-52; Exh. 9, p. 190). It was dark and the porch light was not on. (Exh. 10, p. 9-10; Exh. 9, p. 189-90).

224. Elking told Detective Nickerson that he could not see the faces of the gunmen and was would not be able to make an identification. (Exh. 5, p. 5; 2003 Letter from Elking to Johnson, p. 3; 2003 Elking Affidavit, p. 1-2; 2010 Elking Affidavit, p. 3-4; 2019 Elking Deposition, p. 71, 74-75, 82-83, 85). Elking continued to tell the police that he did not know any of Boyd's associates and did not recognize or know the gunmen. (Exh. 5, p. 5; 2003 Letter from Elking to Johnson, p. 3; 2003 Elking Affidavit, p. 1-2; 2010 Elking Affidavit, p. 3-4; 2019 Elking Deposition, p. 71, 74-76, 82-83). Despite all evidence to the contrary, Detective Nickerson believed that Elking knew the gunmen and pressured him to make an identification. (2003 Letter from Elking to Johnson, p. 3; 2003 Elking Affidavit, p. 2; 2010 Elking Affidavit, p. 3-6; 2019 Elking Deposition, p. 74, 77, 85, 93).

225. Detective Nickerson promised Elking money if he agreed to be a witness against Johnson even though Elking told him he was unable to make an identification. (Exh. 5, p. 6; 2003 Letter from Elking to Johnson, p. 4; 2003 Elking Affidavit, p. 3; 2010 Elking Affidavit, p. 5, 7; 2019 Elking Affidavit, p. 100).

226. Elking did not recognize anyone in the lineup containing Johnson and after impermissible pressure finally identified a filler from the City Jail as one of the men who shot Boyd. (Exh. 2, p. 18-19, 49; 2019 Elking Deposition, p. 92-93).

227. Elking finally succumbed to the pressure, intimidation, and promise of money and agreed to a statement identifying Johnson that was crafted by Detectives Nickerson, Stittum, and Bailey. (Exh. 2, p. 50; Exh. 5, p. 6; 2003 Letter from Elking to Johnson, p. 4; 2003 Elking Affidavit, p. 3; 2010 Elking Affidavit, p. 6; 2019 Elking Deposition, p. 100-03).

228. Elking testified falsely against Johnson and he knew it was false at the time he testified. (Exh. 5, p. 5-6; Exh. 27, p. 1-5; Exh. 24, p. 1-4; Exh. 8, p. 1-8; Exh. 15, p. 9, 124-32).

229. The newly discovered evidence that Elking committed perjury when he identified Johnson is overwhelming:

a. In 2003, Elking wrote a letter to Reverend Rice admitting that he testified falsely against Johnson (Exh. 5, p. 5-6);

b. In a series of letters to Johnson, Elking admitted that his identification was coerced and false (Exh. 27);

c. In 2003, Elking signed an affidavit stating that he testified falsely (Exh. 24);

d. In 2010, Elking signed an affidavit stating that he testified falsely (Exh. 8);

e. In 2019, Elking met with the CIU and admitted that he could not see the assailants, never had any ability to identify the assailants, and testified falsely when he identified Johnson;

f. In 2019, Elking testified under oath that his identification of Johnson was false and manufactured (Exh. 15); and,

g. Receipts of payment from the State to Elking, never disclosed to the defense, corroborate Elking's account. (Exh. 12).

230. Without Elking's identification of Johnson there would have been no arrest and no charges filed against Johnson. Elking was the only witness to the crime. His importance and the prejudice resulting from his identification cannot be overstated.

Detective Nickerson Testified Falsely and the State Knew Or Should Have Known The Testimony Was False

231. The testimony of Detective Nickerson regarding Johnson's alibi was false, Detective Nickerson knew it was false, and ACA Dwight Warren knew or should have known it was false.

232. The evidence supporting Johnson's alibi and describing the impossibility of Detective Nickerson's testimony is summarized at Paragraphs 103 to 113.

233. Detective Nickerson testified before the jury that Johnson could have traveled from 3907 Lafayette to the scene and killed Boyd in "no more than five minutes. (Exh. 9, p. 334).

234. Simple time and distance calculations prove that this testimony is false. See Paragraphs 112 to 113. A *one-way* trip from 3907 Lafayette to 3910 Louisiana would take *ten minutes or more*.

235. Detective Nickerson testified that he'd driven the route anywhere from "20-50 times," and he specifically drove it for this case just two weeks prior to trial. (Exh. 9, p. 335). He believed the route was only two miles one way. *Id*. Interestingly, the police report does not contain any narrative, investigation summary, or notes about the investigation that Detective Nickerson claimed to have completed.

236. Detective Nickerson's testimony was false and he knew it was false.

237. "[E]ven where the time for filing a motion for new trial has expired, there is authority for the trial judge to grant a new trial in any case where the accused was found guilty of a crime on the basis of false testimony, where the trial court is satisfied that perjury had been committed, and that an improper verdict or finding was occasioned thereby." *State v. Mooney*, 670 S.W. 2d 510, 514-15 (Mo. App. E.D. 1984). The court reaffirmed a court's duty to correct a manifest unjust when one is presented through a motion for new trial:

> It would be patently unjust for a trial judge to refuse to grant a new trial in any case in which the accused was found guilty of a crime on the basis of false testimony, and the court "if satisfied that perjury had been committed and that an improper verdict or finding was thereby occasioned," would be under a duty to grant a new trial. That is to say "where it appears from competent and satisfying evidence that a witness for the prosecution has deliberately perjured himself and that without his testimony the accused would not have been convicted, a new trial will be granted."

Id., citing *State v. Harris*, 428 S.W.2d 497, 500 (Mo. 1983); *see also Donati v. Gualdoni*, 216 S.W.2d 519, 521 (1948) ("No verdict and resultant judgment, in any case, could be said to be just if the result of false testimony. The trial court had the duty to grant a new trial if satisfied that perjury has been committed and that an improper verdict or finding was thereby occasioned.").

238. Successful motions for a new trial on the ground of perjury require a showing that the witness willfully and deliberately testified falsely. *M.E.S. v. Daughters of Charity Servs. Of St. Louis*, 975 S.W.2d 477, 482 (Mo. App. 1998). The court "if satisfied that perjury had been committed and that an improper verdict or finding was thereby occasioned" could grant a new trial. *Donati v. Gualdoni*, 216 S.W.2d 519, 521 (Mo. 1949). In *State v. Coffman*, 647 S.W.2d 849, 851 (Mo. App. 1983) the motion was not granted due to a finding of no perjury, but the court indicated that, if the court had found perjury, a new trial could have been granted even though the motion was filed out of time. *State v. Terry*, 304 S.W.3d 105, 108 n.5 (Mo. 2010).

239. Perjured testimony is "illegal testimony, and the court may grant a new trial when illegal testimony has been admitted, Mo. R. Crim P. 27.19(a)(1)[.]" *State v. Harris*, 428 S.W.2d 497 (Mo. 1968). In order to vacate a judgment claimed to have been procured by false testimony under the rule, it is a requirement that it "be alleged and proved that the State knowingly used false testimony or knowingly failed to correct testimony it knew to be false." *Id.*

240. As the Circuit Attorney has shown, Detective Nickerson and Elking knowingly testified falsely at Johnson's trial. Accordingly, the Court should grant the State's Motion for a New Trial or in the alternative grant the State's request for a hearing on the evidence.

GROUND III:
THE STATE REPEATEDLY FAILED TO DISCLOSE MATERIAL EXCULPATORY AND IMPEACHING EVIDENCE CAUSING PREJUDICE TO JOHNSON IN VIOLATION OF *BRADY V. MARYLAND* AND JOHNSON'S RIGHT TO DUE PROCESS AND A FAIR TRIAL UNDER THE U.S. AND MISSOURI CONSTITUTIONS

241. The State realleges and incorporates the facts in Paragraphs 1 through 240 as if fully set out herein. *See also* Exh. 1, Report of the CIU.

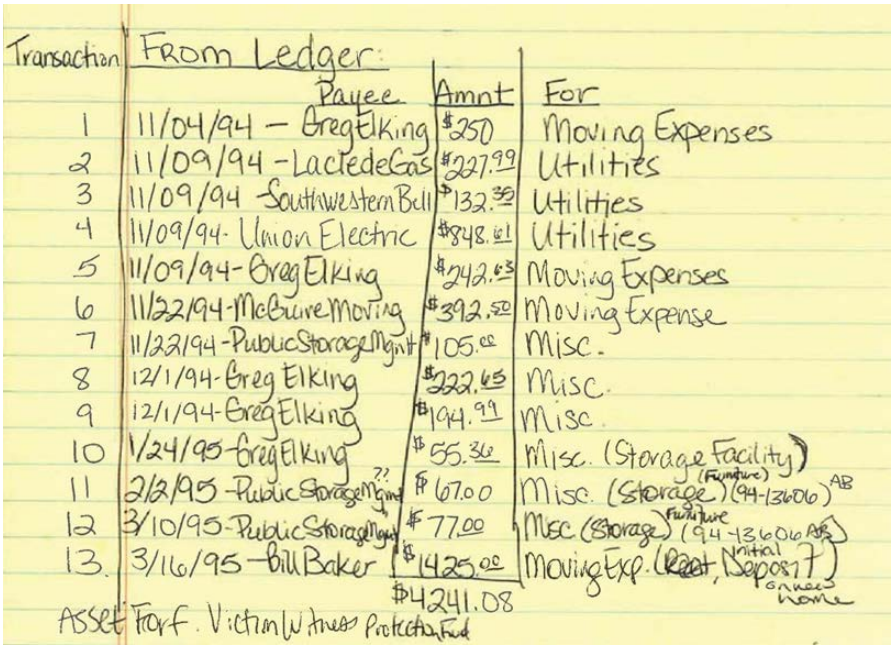
The Only Witness To The Crime Was Paid To Identify Johnson

242. In 2003, Elking wrote a letter to Reverend Rice in St. Louis in an attempt to clear his conscience about testifying falsely against Johnson. (*See* Exh. 5, p. 6 ("[T]he detectives and me had a meeting with Dwight Warren and convinced me, that they could help me financially and move me & my family out of our apartment & relocate us in the County out of harm's way…They had me say the suspect numbers in the lineup, and told me to say the reason I didn't pick them out when the lineup was going on, was because I was scared & terrified.")).

243. That letter was obtained years later by Johnson's counsel. In 2010, Elking and his ex-wife signed affidavits stating they had received several monetary payments from the State as well as assistance with housing and other expenses. (Exh. 8, p. 4-5, 7; Exh. 35, p. 2). Johnson's

counsel then began requesting documentation of the payments from various entities, including the Circuit Attorney's Office. From 2009-2014, Johnson's counsel submitted ten written requests for documents evidencing the payments to Elking to various agencies, including the Attorney General, the St. Louis Police Department, and the Victim's Compensation Fund. Not a single agency disclosed the records, and in fact, the existence of the records was denied. (Exh. 36, p. 2-3) ("After reviewing our files and records, we are unable to locate any records that relate to expenses reported by prosecutor Dwight Warren, another prosecutor or any employee of the Circuit Attorney's Office in connection with the prosecution and conviction of Lamar Johnson, Case No. 22941-3706A, between October 30, 1994 and September 30, 1995.").

244. The State concealed more than $4,000 in payments to Elking, the only witness to the homicide. (Exh. 12, p. 7). The payments began on November 4, 1994—the day Elking was presented to the Circuit Attorney's Office by Detective Nickerson—and continued for months thereafter, including undocumented cash payments before Elking testified. A ledger recently discovered by the current Circuit Attorney shows the payments:



Transaction	From Ledger: Payee	Amnt	For
1	11/04/94 – Greg Elking	$250	Moving Expenses
2	11/09/94 – Laclede Gas	$227.99	Utilities
3	11/09/94 – Southwestern Bell	$132.39	Utilities
4	11/09/94 – Union Electric	$848.61	Utilities
5	11/09/94 – Greg Elking	$242.63	Moving Expenses
6	11/22/94 – McGuire Moving	$392.50	Moving Expense
7	11/22/94 – Public Storage Mgmt	$105.00	Misc.
8	12/1/94 – Greg Elking	$222.65	Misc.
9	12/1/94 – Greg Elking	$194.99	Misc.
10	1/24/95 – Greg Elking	$55.36	Misc. (Storage Facility)
11	2/2/95 – Public Storage Mgmt	$67.00	Misc. (Storage) (Furniture) (94-13606) AB
12	3/10/95 – Public Storage Mgmt	$77.00	Misc. (Storage) (Furniture) (94-13606 AB)
13	3/16/95 – Bill Baker	$1425.00	Moving Exp. (Rent, Deposit, Initial owner home)
		$4241.08	

ASSET Fr of Victim/Witness Protection Fund

(Exh. 12).

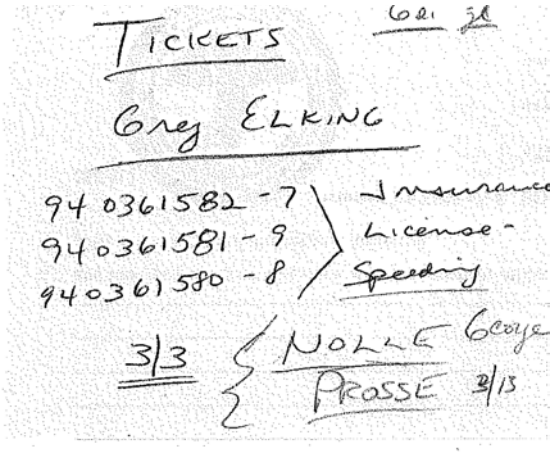
245. The documents discovered by the current Circuit Attorney include copies of cancelled checks, correspondence with movers, and successful efforts to locate and pay for Elking's housing costs. Additionally, the State paid the balance of back utility and telephone bills for Elking, as well as provided cash payments to Elking. *Id.*

246. Finally, the State "took care of" a number of tickets, driving, and license violations for Elking. None of these considerations, favors, or payments were disclosed to Johnson or the jury. Elking testified in 2019 that he had a number of outstanding traffic violations, outstanding bench warrants, and as a result his license was suspended and his car tags were not legal. ACA Dwight Warren assisted him by resolving those outstanding warrants and tickets:

> And anyway, so I had quite a few tickets. And I remember at one point calling Dwight Warren and telling him say, hey, look, they're going to put an arrest warrant out for me or they already have. They got -- they got, you know, bench warrants out on me. Can I get these, you know, wiped off so I don't have to go to -- go to jail, you know…[]… And -- and can I get these taken care of? And -- and can you help me on them? And he -- he set me up with somebody. I don't know who it was, but it was a male. And talked to him, told him -- told him what the tickets, you know -- or -- or pretty much what the tickets were, which they were all traffic. And he said yeah, let me call you back. And I remember him calling me back later on, maybe a couple days or whatever, maybe even that day and being like hey, look, they're taken care of. Stay out of trouble.

(Exh. 15, p. 120-21).

247. In July of 2019, as the review of Johnson's case continued, additional documentation regarding the favors to Elking were discovered, including independent corroboration that the State did in fact "take care of" a number of tickets for Elking:



(Exh. 40).

248. Johnson's counsel previously requested permission to view and copy the State's file in 2014, and was granted limited access. The physical file that counsel was permitted to inspect at that time did *not* include the notes, proof of Mock's criminal history, or other exculpatory and impeachment information that has recently been unearthed by the current Circuit Attorney.

249. The above-described documentation with withheld from Johnson at trial and the State continued to conceal the impeaching documentation until the current Circuit Attorney reviewed Johnson's case. A failure to disclose evidence that has been specifically requested is "seldom, if ever, excusable." *United States v. Agurs*, 427 U.S. 97, 106 (1976).

250. The case hinged on Elking's testimony and whether the jury believed his identification. By all accounts, Elking was a reluctant witness who needed the money that the State provided to him. When the "reliability of a given witness may well be determinative of guilt or innocence, nondisclosure of evidence affecting credibility falls within [Brady]." *Giglio v. United States*, 405 U.S. 150, 154 (1972).

The State Failed To Disclose Mock's Extensive Criminal History
And His History As An Incentivized Informant

251. Mock had a 200-page-long criminal history spanning several states and a history as a jailhouse informant which was not disclosed to Johnson.

252. Shortly after Johnson's trial, counsel for Campbell gave additional details of Mock's criminal history to Johnson's counsel. Subsequent investigation uncovered a lengthy criminal history, including both felony and misdemeanor convictions involving crimes of dishonesty, among them theft, burglary, and fraud. This criminal history should have been disclosed by the State before trial as it falls squarely into the rule of *Brady*[10] as impeachment evidence.

253. Given the prior cooperation between Mock and law enforcement, ACA Dwight Warren knew or should have known of Mock's full criminal history and status as an incentivized jailhouse informant. The claim by a jailhouse informant that he could hear these conversations in a crowded holdover unit that housed many individuals is in itself highly questionable.

254. Further, Mock was an incentivized witness in 1992 under bizarrely similar circumstances. He was an inmate in the Jackson County jail when claimed to overhear another inmate admit to a homicide while housed in the jail together. Mock sought a reduction in sentence as a result of his cooperation in the Joseph Smith prosecution. (Exh. 38).

255. Such information was critical to Mock's credibility as a disinterested, reliable witness, yet the State failed to disclose any of this information to the defense. Had Mock's full

[10] The Supreme Court's opinions decades after *Berger* aligned the criminal defendant's due process rights with the prosecutor's obligations to ensure justice. "[S]uppression by the prosecution of [material] evidence favorable to an accused" is a due process violation, regardless of the good or bad faith of the prosecutor's withholding of such evidence. *Brady v. Maryland*, 373 U.S. at 87. The duty to disclose encompasses evidence which is either directly exculpatory or would impeach a state witness. *United States v. Bagley*, 473 U.S. 667, 676 (1985); *Giglio v. United States*, 405 U.S. 150, 154 (1972).

criminal history and his history as an informant been disclosed, as well as his stated motive to assist in Johnson's case, his testimony could have been discredited entirely.

The State Concealed The Details Of The Deal With Mock

256. Mock testified at trial that he expected ACA Dwight Warren to write a letter to the parole Board on his behalf. ACA Dwight Warren knew that Mock requested release and expected far more than a letter to the parole board: "I propose that Judge Mason reduce my five-year sentence to time served with pass for my testimony or that Governor Carnahan pardon me with time served thus guaranteeing my safety away from the Department of corrections….I am positive this can be worked out for the good of all. I will uphold my end of this situation as I am positive you will fulfil your obligation to me." (Exh. 37, p. 1-2).

257. ACA Dwight Warren and ACA Ed Sweeney wrote a number of letters to authorities on Mock's behalf, requesting that early release be granted, that Mock be transferred to preferred institutions, that the DOC ignore disciplinary violations, and that Mock be accepted into rehabilitation programs. (Exh. 37).

Mock Was Biased Against Johnson
Which Provided A Motive For Him To Lie

258. Mock's racial animus and bias against Johnson appears on the face of his letters to ACA Dwight Warren, correspondence, including referring to Johnson as a "two bit nigger[]." Witness bias and motive to lie is prototypical *Brady* material. *Brady* evidence includes impeachment evidence that demonstrates a witnesses' bias, credibility, or motive to lie. *See generally United States v. Abel*, 469 U.S. 667 (1985). *Brady* evidence can include impeachment evidence that demonstrates a witnesses' bias, credibility, or uncertainty. *See generally United States v. Bagley*, 473 U.S. 667 (1985). Before trial, Mock wrote to ACA Dwight Warren "I pray we succeed in our endevor (sic) to convict these two. I will do my best," (Exh. 37).

259. The State repeatedly failed to disclose exculpatory and impeachment evidence. The persistent and prejudicial violations of Johnson's constitutional rights resulted in a verdict that is not worthy of confidence. *State ex rel. Amrine v. Rope*r, 102 S.W.3d 541, 547 (Mo. banc 2003). The Circuit Attorney has "ma[de] a clear and convincing showing of actual innocence that undermines confidence in the corrections of the judgment." *Id.* Evidence is clear and convincing when it "instantly tilts the scales in the affirmative when weighed against the opposition, and the fact finder's mind is left with an abiding conviction that the evidence is true." *Id*. At 548. For these reasons and all those included herein, the Circuit Attorney moves this Court to grant the Motion for New Trial, or in the alternative, to set the Motion for a hearing.

GROUND IV:
THE STATE KNOWINGLY PRESENTED FALSE AND PERJURIOUS TESTIMONY, IN VIOLATION OF JOHNSON'S RIGHT TO DUE PROCESS AND A FAIR TRIAL UNDER THE 5TH, 6TH, AND 14TH AMENDMENTS TO THE US CONSTITUTION AND ARTICLE I, § 10, 18(A), 19 OF THEMISSOURI CONSTITUTION

260. The State realleges and incorporates the facts in Paragraphs 1 through 259 as if fully set out herein. *See also* Exhibit 1, Report of the CIU.

261. The State knowingly presented false testimony at Johnson's trial through Mock and Detective Nickerson, and the testimony was referenced during closing argument. At each instance, the State knew the testimony was false and failed to correct the false testimony. *See* Paragraphs 83, 167 to 170 and 230 to 239.

262. The State argued that incentivized jailhouse informant Mock had no motive to lie:

> MR. WARREN: What motive does Mock have? What is he gonna get out of this a letter to his parole board? For that - and remember, he didn't have anything in the beginning. He came and said to the police I just got to go back there on this CCW. I'm not asking for anything. I'm tellin' you what happened because of some terrible event that's happened in his life. The man may be a burglar, he may be somebody that carries a gun, I think he had another charge there too but he's the man that

> draws the line…[]...Mock stood up and was counting, counting as an honest, God-fearing man to tell you the truth.
>
> (Exh,. 9 p. 352-53)

263. This is false testimony. ACA Dwight Warren knew that Mock asked for, expected, and would ultimately receive substantial benefit for his testimony against Johnson.

264. A series of letters between Mock and ACA Dwight Warren beginning before Johnson's trial leave no question about what the State knew about Mock's reason for testifying and his expectation of benefit. (*See* Exh. 37).

265. ACA Dwight Warren and ACA Edward Sweeney wrote a number of letters to the Board of Probation and Parole on Mock's behalf requesting transfers to preferred institutions, attempted to intervene on Mock's behalf regarding disciplinary incidents, requested entry into programs for early release, and requested that the Board grant Mock parole. *Id.* None of those additional letters were disclosed to Johnson and the correspondence continued after trial and during the pendency of Johnson's direct appeal in 1996.

Detective Nickerson Testified Falsely About Johnson's Alibi Evidence And The State Knew Or Should Have Known The Testimony Was False

266. Detective Nickerson testified—falsely—that Johnson could have travelled from 3907 Lafayette to 3910 Louisiana in "no more than five minutes." (Exh. 9, p. 334). As explained above in Paragraphs 110 to 113, this is patently false testimony and ACA Dwight Warren knew or should have known it was false.

267. The undisputed evidence at trial was that Johnson was at Farrow and Robert Williams apartment with his girlfriend, Barrow, and their infant child from 9:00 p.m. until at least 10:00 p.m. on October 30, 1994. It was undisputed that Johnson left the apartment for a few minutes to make a drug sale. (Exh. 9, p. 313; Exh. 20, p. 31; Exh. 22, p. 1; Exh. 21, p. 1).

268. It was further undisputed at trial that the assailants arrived and left on foot. No witnesses reported seeing or hearing a getaway car.

269. The witnesses (Elking, Leslie Williams, and the neighbors) are corroborated by the actual perpetrators—Campbell and Howard—as well as by Cooper and McClain. Despite there being no evidence to support Detective Nickerson—indeed there was overwhelming evidence contradicting him—the State nevertheless presented his false testimony that is was not only possible for Johnson to travel from Lafayette to 3910 Louisiana, kill Boyd, and return to Lafayette in a matter of minutes but that Detective Nickerson had driven the route "20-50 times" and the route took no more than "5 minutes." (Exh. 9, p. 334-35). This is false testimony and the State knew or should have known that it was false.

Mock Testified Falsely About His Criminal History And His History As An Informant; The State Knew Or Should Have Known That Testimony Was False

270. Mock was deposed before trial and further testified to the following criminal history:

a. Carrying a Concealed Weapon—Kansas City, Missouri

b. Burglary in the First Degree--California

c. Tampering with a Motor Vehicle—Platte County, Missouri; and,

d. "several" other misdemeanors including resisting arrest and harassment.

(Exh. 25, p. 38-39).

271. In reality, Mock's criminal history was far more extensive, and the State knew or should have known his complete criminal history. (Exh. 34).

272. Mock's extensive criminal history spanned seven (7) states, including Missouri, Florida, California, New York, Kansas, Oregon, Arizona. (*See* Exh. 34). Mock's history includes charges and convictions for fugitive from justice, felony theft, larceny, forgery, burglary (several),

assault (several), receiving stolen property, stealing, resisting arrest (several), giving false information, grand theft, and multiple DWI/DUIs. *Id.*

273. Prosecutors have a duty to ensure that they are not knowingly presenting false evidence to the jury. *Napue v. Illinois*, 360 U.S. 264, 269 (1959). It matters not that the false evidence merely goes to the credibility of a witness rather than the substance of the crime(s) charged. *Id*. While the law recognizes that false evidence may be unintentionally elicited from witnesses, in such a scenario, *Napue* imputes upon the prosecutor a duty to correct such testimony. *Id*.

274. Mock's testimony about his expectation of benefit was false and ACA Dwight Warren knew it, imposing on the prosecutor a duty to correct the false testimony. "A lie is a lie, no matter what its subject, and if it is in any way relevant to the case, the district attorney has the responsibility to correct what he knows is false and elicit the truth." *Napue v. Illinois*, 360 U.S. 264 (1959) (internal quotations and citations omitted).

The State Knew The Only Witness To The Crime Was Paid To Identify Johnson

275. The State concealed more than $4,000 in payments to Elking, the only witness to the homicide. (Exh. 12, p. 7). *See also* Paragraphs 149 to 156.

276. Even though the payments were arranged for by the Circuit Attorney's Office, ACA Dwight Warren argued to the jury that Elking had no reason to lie:

> What reason does Greg have to tell you anything? He's telling you what he saw. He is positive of his identification. Do you think he wants to send -- here's this murderer out there and he's going to send an innocent man to jail? He's positive of his identification based primarily on that eye and that area of the defendant's face that he saw. Ladies and gentlemen, Greg saw, came in here, told you exactly what he saw, what he heard, what happened there...[]… He told you the God's honest truth and that is that the defendant right there is the one that he saw along with the other person shoot and kill Marcus.
>
> (Exh. 9, p. 351-52).

277. Elking never had the ability to make an identification as is clear from the record. He was paid to identify Johnson, the State concealed that information, presented an identification that was false, and then lied to the jury that Elking had no reason to testify against Johnson.

278. "A conviction which results from the deliberate or conscious use by a prosecutor of perjured testimony violates due process and must be vacated." *State v. Mims*, 674 S.W. 2d 536, 538 (Mo. banc 1984); *See also Napue v. Illinois*, 360 U.S. at 269; *United States v. Agurs*, 427 U.S. 97, 103 (1976).

279. Johnson's conviction is manifestly unjust because it rests on "perjured testimony, knowingly used by the State authorities to obtain his conviction, and the deliberate suppression by those same authorities of evidence favorable to him." *Pyle v. Kansas*, 317 U.S. 213, 216 (1942).

CONCLUSION

280. The Circuit Attorney asks this court to take notice of "the perversion of justice which could occur if we were to close our eyes to the existence of newly discovered evidence" and moves this court to grant the State's motion for new trial because "in light of the State's concession that the evidence exists, it should be heard." *Williams*, 673 S.W.2d at 848.

281. For the forgoing reasons, the State requests that this Court:

a. Grant the State's Motion for a New Trial, or in the alternative,

b. Set the motion for a hearing; and,

c. Grant further relief that the Court deems just and proper.

/s/ Jeffrey Estes
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St. Louis Circuit Attorney
1114 Market St., #602
St. Louis, MO 63101

CERTIFICATE REGARDING SERVICE

I hereby certify that it is my belief and understanding that counsel for defendant, Lindsay Runnels, Tricia Bushnell, and Rachel Wester, are participants in the Court's e-filing program and that separate service of the foregoing document is not required beyond the Notification of Electronic Filing to be forwarded on July 19, 2019 upon the filing of the foregoing document.

/s/ Jeffrey Estes
Jeffrey M. Estes