IN THE CIRCUIT COURT OF DEKALB COUNTY, MISSOURI
43RD JUDICIAL CIRCUIT

STATE OF MISSOURI,	)	
ex rel.	)	
RICKY L. KIDD	)	
Petitioner,	)	
	)	
v.	)	**Case No. 18DK-CC00017**
	)	
SHERIE KORNEMAN,	)	
Superintendent, Western Missouri	)	
Correctional Center,	)	
Respondent.	)	

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND JUDGMENT GRANTING WRIT OF HABEAS CORPUS

Ricky L. Kidd petitions this Court for a Writ of Habeas Corpus pursuant to §532.430 R.S.Mo and Missouri Rule 91, asserting his innocence and challenging the constitutionality of his convictions for first degree murder and armed criminal action in the February 6, 1996, shooting deaths of George Bryant and Oscar Bridges in Jackson County, Missouri.

Mr. Kidd's Second Amended Petition for Writ of Habeas Corpus presented ten claims for relief. On August 27, 2018, the Honorable Thomas N. Chapman granted, in part, Respondent's Motion for Summary Judgment on Kidd's Claims 1-8. This matter proceeded to an evidentiary hearing on April 23 through April 26, 2019, on Kidd's Claim 9, that he is actually innocent of the crimes for which he is imprisoned, and Claim 10, that the prosecution withheld material, exculpatory evidence. At Petitioner's request, this Court left the hearing record open for Petitioner to supplement his evidence with the videotaped depositions of Dr. Allison Foster, an expert in the forensic interview of child witnesses, and Dr. Nancy Franklin, a cognitive psychologist and expert on eyewitness identification. Their depositions and curriculum vitae were provided to the Court on June 10, 2019. The parties thereafter requested, and were granted additional time to file any post-trial briefs and/or proposed

Findings of Fact, Conclusions of Law, and Judgment. The Court received these documents on July 29, 2019.

In addition to hearing witness testimony, the Court reviewed the transcript of Kidd's trial, the appellate and postconviction decisions in his case, the pleadings and arguments of the parties, Petitioner's Exhibits 1 through 196, and Respondent's Exhibits 1 through 9. Respondent presented no witnesses. Based on a careful consideration of the record and these proceedings, this Court finds that the evidence is clear and convincing that Kidd is innocent of the murders of George Bryant and Oscar Bridges, that the prosecution did not disclose exculpatory evidence that was material to the outcome of Kidd's case, that Kidd can show cause-and-prejudice for not having discovered his *Brady v. Maryland* claim earlier, and that Kidd has established a gateway claim of innocence that overcomes any alleged procedural default. Kidd is therefore entitled to the writ of habeas corpus.

PART 1. PROCEDURAL HISTORY

Mr. Kidd is incarcerated at Western Missouri Correctional Center in Cameron, Missouri,[1] pursuant to his convictions for two counts of first-degree murder, imposed May 9, 1997, after a plea of not guilty and trial by jury in Jackson County, Missouri.[2] The Missouri Court of Appeals affirmed Kidd's conviction on direct appeal, rejecting arguments that it was improper to join his trial with co-defendant Marcus Merrill's, to allow State's witness Richard Harris to refer to him as the "terminator," and to admit hearsay evidence that eyewitness Kayla Bryant identified Kidd from a video lineup after she testified that the man who killed her father was not in the

[1] Since the evidentiary hearing in this matter, Kidd was transferred from Crossroads Correctional Center to Western Missouri Correctional Center, both of which are located in Cameron, Dekalb County, Missouri.

[2] P. Ex. 141, Trial Transcript Vol. I and Vol II (combined), p. 1391.

courtroom.[3] Appellate counsel did not raise either of the claims presented to this Court, i.e., that the prosecution did not disclose material, exculpatory evidence, and that new evidence proves Kidd to be actually innocent.

On June 22, 1999, Kidd moved *pro se* under Rule 29.15 asserting his innocence and other arguments, including ineffective assistance of counsel. His appointed public defender added an additional claim that Kidd's appellate counsel was ineffective for not arguing that Kidd was improperly sentenced as a prior offender. Neither of the claims heard by this Court were alleged by Kidd's public defenders in those proceedings. The Rule 29.15 court found that Kidd did not qualify for sentencing as a prior offender because on February 6, 1996, the date of the offense for which he was tried, he had never been convicted of a crime.[4] The trial court set aside Kidd's sentences, allowed the State to dismiss both counts of armed criminal action, and resentenced Kidd to life without the possibility of parole on both homicide counts. The trial court denied relief on all other claims.[5]

Mr. Kidd subsequently petitioned the U.S. District Court for relief pursuant to 28 U.S.C. § 2254, alleging, among other things, that his trial lawyer was ineffective, and that pursuant to *Schlup v. Delo*, 513 U.S. 298 (1995), his actual innocence could overcome any procedural bars erected by the deficient performance of his counsel during his Rule 29.15 proceedings. The district court denied Kidd's *Schlup* petition because the Eighth Circuit standard is uniquely preclusive. The court explained that pursuant to *Amrine v Bowersox*, 128 F.3d 1222 (8th Cir. 1997) (*en banc*), "The difficulty for petitioner Kidd and his current counsel is that at this stage of the proceedings, Kidd must identify new reliable evidence that was not available at the time of

[3] *State v. Kidd*, 990 S.W.2d 175, 177-78 (Mo. Ct. App. 1999).
[4] *Kidd v. State*, 75 S.W.3d 804, 808 (Mo. App. 2002).
[5] *Id.*

his trial and that shows he is actually innocent of the crimes."[6] As discussed below, this standard differs from that required under Missouri law.

On appeal, Kidd challenged the Eighth Circuit's standard for "new evidence." The court of appeals panel acknowledged that other circuits have declined to follow *Amrine*'s strict rule, but concluded that it was powerless to overturn settled circuit precedent. Accordingly, the panel affirmed the denial of habeas relief.[7]

Mr. Kidd subsequently moved in the trial court for postconviction DNA testing that could prove his innocence pursuant to R.S.Mo §547.035.[8] While his DNA motion was pending and he was present in Jackson County, Missouri, Kidd filed a petition for writ of habeas corpus relief in the trial court. Pursuant to *State ex rel. Hawley v. Midkiff,* 543 S.W.3d 604 (Mo. 2018), Kidd's Petition for Writ of Habeas Corpus was transferred to this Court. The Honorable Thomas Chapman granted Respondent's Motion for Summary Judgment on Kidd's Claims 1 through 8, and denied summary judgment on Kidd's Claim 9, alleging actual innocence, and Claim 10, alleging, for the first time in any court, that the prosecution failed to disclose material, exculpatory evidence in violation of *Brady v. Maryland,* 373 U.S. 83 (1963). This Court on April 23-26, 2019, conducted an evidentiary hearing on these two claims.

PART 2. FINDINGS OF FACT

[6] Resp. Ex. 4, Dec. 8, 2009 Order Denying Writ of Habeas Corpus, pp. 10-11 (emphasis added). The district court was not unsympathetic to Kidd's position. During the hearing, the district judge observed that the "tragedy is that the Goodspeeds, and particularly of the Senior, … if he's getting off free, it would be terrible." P. Ex. 143, Federal Habeas Hearing Transcript Vol. II, p. 362. He also noted that, "Marcus Merrill…impressed me as a pretty truthful witness." *Id.* at 364.
[7] *Kidd v. Norman,* No. 10-1375 (8th Cir. Jan. 10, 2012) (unpublished), *cert. denied* 568 U.S. 838 (2012).
[8] *State v. Kidd,* Jackson County No. CR-9621370.

Mr. Kidd's Claim 9 (innocence) and Claim 10 (*Brady*) require an assessment of how new evidence might have affected the outcome of Kidd's trial. As a result, an assessment of the trial evidence is appropriate.

A. THE TRIAL EVIDENCE

On February 6, 1996, neighbors watched in broad daylight as three men fled George Bryant's residence at 7009 Monroe, Kansas City, Missouri, after robbing and murdering George Bryant and Oscar Bridges. George Washington and Shannon Harris heard gunshots and saw three black men wearing black skull caps and knee-length black leather coats jump into a new, white Oldsmobile Sierra and speed away.[9]

When Kansas City Police Officer Gary Cooley arrived at Bryant's home around 11:50 a.m., he found find Bryant's four-year-old daughter, Kayla Bryant, standing in the garage crying, still on the phone with the 911 operator.[10] George Bryant was lying in a pool of blood in the snow in his front yard, shot multiple times.[11] The body of Oscar Bridges was in Bryant's basement, his feet, hands and mouth bound with duct-tape. He had been shot twice in the back of his head.[12]

Although there were three perpetrators according to all accounts, only Ricky Kidd and Marcus Merrill were charged with the crime. Their cases were joined for trial. Kayla Bryant told officers that she was eating a McDonald's Happy Meal and watching television when men came to her house in a white car.[13] Her father opened the garage door to let them in, and as they were standing in the kitchen she heard a shot.[14] After her father fell to the floor, Oscar Bridges ran downstairs. One of the men followed and shot him.[15] The men searched her father's pockets, the

[9] P. Ex. 141, pp. 535-36, 550-51.
[10] *Id.* at 487-90, 494.
[11] *Id.* at 489.
[12] *Id.* at 492-93.
[13] *Id.* at 503-04.
[14] *Id.* at 505.
[15] *Id.* at 511.

bedrooms, and the rest of the house. Her father got up and ran, and they shot him again.[16] Kayla told the officers that "Daddy's brother" shot her daddy, "but it wasn't Daddy's brother."[17] When asked whom she meant by "Daddy's brother," Kayla shrugged her shoulders and said she didn't know.[18] She said the men who shot her daddy had come to her house two days before the shooting.[19] Detectives asked Kayla's mother, Connie Bryant, if she knew whom Kayla meant by "daddy's brother," and Connie did not know.[20] Sgt. Pruetting testified that detectives never determined who "daddy's brother" was.[21] Kayla also described one robber as "the fat one."[22] Kayla testified that "the fat one" told her, "It's okay."[23] The other perpetrator was described by Kayla as "the skinny one."[24]

Trial evidence revealed that Kidd became a suspect because he was one of ten men named in anonymous calls to police.[25] He was arrested on February 14, 1996, in the company of his girlfriend, Monica Gray.[26] They were transported to police headquarters and questioned.[27] In separate interrogations, Kidd and Gray told police that they were together all day on February 6, 1996, and they had gone to the Sheriff's Office at Lake Jacomo to apply for a gun permit.[28] Kidd agreed to participate in a video-taped line-up and signed multiple consents to search his car and belongings.[29]

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[16] *Id.* at 511-12.
[17] *Id.* at 528.
[18] *Id.* at 1024.
[19] *Id.* at 521.
[20] *Id.* at 1025.
[21] Evidentiary Hearing Transcript, *State ex rel. Kidd v. Pash*, 18DK-CC00017, p.197. Hereinafter, cited as "Hrg. Tr."
[22] P. Ex. 141, p. 513.
[23] *Id.* at 513, 1024.
[24] *Id.* at 506.
[25] *Id.* at 729, 770, 817.
[26] *Id.* at 1030-31.
[27] *Id.* at 1033, 1051-52.
[28] *Id.* at 1094-95, 1104.
[29] *Id.* at 1032, 1062, 1216.

Consistent with his statement to police, Kidd testified and called witnesses to establish the details of his alibi at trial. In February of 1996, he lived at 701 East Armour Boulevard in Kansas City with his girlfriend, Monica Gray.[30] On the evening of February 5, 1996, Kidd's sister, Nechelle "Nikki" Kidd, and her son D.J., spent the night with him because she had an argument with her roommate.[31] The next morning Nikki, a customer service representative for DST Mutual Funds, awoke early and drove to work in Kidd's black 1993 Toyota Corolla,[32] which he bought to replace his unreliable 1981 Oldsmobile Delta 88.[33] Kidd asked Lawson Gratts, his mother's fiancé, to help jump start the Delta 88,[34] then he, Gray, and D.J. drove to DST to pick up his Corolla.[35] Nikki's co-worker, Alina Wesley, testified that she saw Kidd collect the keys from his sister at DST around 11:00 or 11:30 a.m.[36]

Mr. Kidd drove the Oldsmobile home as Gray followed in the Corolla, then they drove together in the Corolla to the Jackson County Sheriff's Office at Lake Jacomo, where Kidd filled out an application for a gun permit.[37] Jackson County Sergeant Tim Buffalow identified a copy of the application, signed by Kidd and dated February 6, 1996. Computer files show that a criminal record check was run on Kidd at 1:37 p.m. that same day.[38] On cross-examination by the State, Sergeant Buffalow testified that Kidd's application could have been received on February 5, 1996.[39]

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[30] *Id.* at 1089
[31] *Id.* at 1130.
[32] *Id.* at 1131-32.
[33] *Id.* at 1193, 1198.
[34] *Id.* at 1119, 1199-1200.
[35] *Id.* at 1093, 1133, 1201.
[36] *Id.* at 1169. The trial transcript spells Wesley's name as "Alana." Kidd's counsel advised the Court that the correct spelling is Alina.
[37] *Id.* at 1093-95, 1201-04.
[38] *Id.* at 1160-62.
[39] *Id.* at 1164-65.

At trial, Assistant Prosecutor Amy McGowan sought to connect Kidd and Merrill to the crime through identifications made by Kayla Bryant and eyewitness Richard Harris. Ms. McGowan asked Kayla, "Can you look around and do you see either of those men that were at your house that day with your daddy?" She replied, "No."[40] Both Ricky Kidd and Marcus Merrill were in the courtroom. The prosecutor asked again, "You don't see them? You don't see them here?" Kayla again replied, "No."[41] Kayla never identified Kidd in court. Ms. McGowan then presented evidence of Kayla's out-of-court identification of Merrill. Kayla testified that she was shown a photo array and selected only No. 3 as the "fat one."[42] Ms. McGowan had previously asked Kayla, "Did you pick out the skinny guy?" to which Kayla replied, "No."[43] Ms. McGowan asked again, "You didn't pick out the skinny guy?" Kayla responded, "[H]e wasn't in none of the pictures."[44]

Ms. McGowan also sought to present evidence of an out-of-court identification of Kidd from a video made by Kayla Bryant from a video lineup.

> Q. Did you see a videotape on TV?
> A. Yes.
> Q. And did you pick somebody out on that?
> A. (No response.)
> Q. Do you remember picking somebody out on TV, Kayla?
> A. I said that was him on TV, but he's darker than him because they took a picture of him.
> Q. But you said you saw somebody on TV?
> A. Yes.
> Q. Okay. And which person was that?
> A. Him. [Indicating Marcus Merrill]
> Q. No. Did you see another person on TV?
> A. No.

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[40] *Id.* at 519.
[41] *Id.*
[42] P. Ex. 141, pp. 519-20, 994-95. A photo of Ricky Kidd was also in that photo array. Kayla did not select Kidd from the array. P. Ex. 86, Interview of Connie Bryant and Kayla Bryant, 2/11/96, p. 4.
[43] P. Ex. 141, p. 517.
[44] *Id.* at 518.

Q. No? Okay. Did you pick out more than one person, Kayla?
A. I only saw him.[45]

After failing to get an identification of Kidd from Kayla, Ms. McGowan made another attempt: "Okay. I'm going to ask you to look around again. Do you see anybody in here that might have been at your house that day?" Kayla replied, "No."[46] Ms. McGowan then approached the bench and advised the trial court that "given [Kayla's] confusion with the identification, I want to show the videotape. I just wanted to let everyone know I was going to do that."[47] The court took a recess. The record is unclear whether Kayla Bryant saw the videotape during the recess; Ms. McGowan testified at the evidentiary hearing that she did not show Kayla the tape;[48] Teresa Anderson, Kidd's trial counsel, after reviewing her trial notes to refresh her memory, testified at the hearing that Kayla was shown the video during the recess, and Kayla repeated her comment "about the difference in skin tone."[49] After the recess at trial, Ms. McGowan had no further questions for Kayla.[50] Detective Jay Thompson later told the jury that Kayla selected Ricky Kidd from a video lineup.[51]

The only witness at trial who linked Kidd to the crime was Richard Harris,[52] who lived with his mother down the street from George Bryant. At the time of the crime, Harris was wanted for violating his parole on a drug trafficking conviction,[53] and eluded capture until March

[45] *Id.* at 520 (Indications added).
[46] *Id.* at 520-21.
[47] *Id.* at 523.
[48] Hrg. Tr. 492, 494
[49] *Id.* at 605-06.
[50] P. Ex. 141, p. 527.
[51] *Id.* at 748-49. The trial court excluded from evidence a video tape of Kayla Bryant's post-lineup interview which omits any reference to her alleged identification of Kidd and demonstrates that she was a typical fidgety, distracted, and suggestible four-year-old being questioned by homicide detectives who admittedly had no training in the questioning of very young children. *Id.* at. 784, 797-98, 819; Hrg. Tr. 312, 380.
[52] Richard Harris is not related to Shannon Harris, who lived directly across the street from George Bryant.
[53] P. Ex. 141, p. 585,

11, 1996.[54] Upon arrest on March 11, Harris claimed that he spent the morning of February 6, 1996, watching "The Young and the Restless" at his friend, Michael Holland's house, also on Monroe. When the show was half over, he went home to get something to eat.[55] As he walked past Bryant's house, he saw Bryant run out of his garage, yelling "Somebody help!" Bryant was pursued by two men, one of whom carried a gold-plated pistol.[56] Harris testified at trial that he saw the first suspect grab Bryant and put him on the ground, and that he saw the second suspect walk up to Bryant and shoot him.[57] When the attackers saw Harris, he turned and fled.[58] Based on this brief encounter, Richard Harris identified Ricky Kidd at trial as the shooter.[59] He was the only witness to do so.

No physical evidence linked Kidd to the crime. The murder weapon was never found. A slice of bread on the kitchen floor and a piece of linoleum recovered from the crime scene bore shoe impressions that did not match the footwear of Ricky Kidd, George Bryant or Oscar Bridges.[60]

During the investigation, evidence was collected implicating alternative suspects Gary Goodspeed, Sr., and Gary Goodspeed, Jr., though neither was ever charged. Richard Harris identified Gary Goodspeed, Jr., from a video line-up as one of the three perpetrators—the man who tackled Bryant as he ran from his garage.[61] Marcus Merrill and Gary Goodspeed, Jr., shared an apartment in Decatur, Georgia, and airline and hotel records established that Merrill and the Goodspeeds flew together from Atlanta to Kansas City several days before the homicide, stayed

[54] *Id.* at 64-66, 585.
[55] *Id.* at p. 561.
[56] *Id.* at 561-64, 574.
[57] *Id.* at 567-68.
[58] *Id.* at 575.
[59] *Id.* at 580-87.
[60] *Id.* at 864-69.
[61] *Id.* at 625-27.

at the Adam's Mark Hotel, and returned to Georgia several days later.[62] At Alamo Rent-A-Car near the Kansas City airport, Gary Goodspeed, Sr., rented a white Oldsmobile Sierra that was believed to be the getaway-car.[63] Gary Goodspeed, Sr.'s, fingerprint was on a Carmex lip balm wrapper found in the rental car with a price tag from a "Good To Go" convenience store. There was a "Good to Go" convenience store a block and a half from the crime scene.[64]

Merrill's counsel argued to the jury that the Goodspeeds committed the crime, and since the police developed four suspects in a crime committed by three people, the issue was whether Merrill or Kidd was the third accomplice or the odd man out.[65] In support of this theory, Merrill's lawyer argued, incorrectly and without correction by the State, that Kidd's fingerprint was in Goodspeed Sr.'s get-away-car.[66] The only fingerprint identified as Kidd's was found on the window of Kidd's own car, a 1981 Delta 88.[67]

The jury found both Merrill and Kidd guilty of two counts of murder in the first degree, §565.020.1 R.S.Mo 2000, and two counts of armed criminal action. §571.015 R.S.Mo 2000. Ricky Kidd was sentenced to life imprisonment without the possibility of parole for each murder, and life imprisonment on each count of armed criminal action.[68]

B. EVIDENCE PRESENTED IN THIS PROCEEDING

This Court heard four days of testimony and evidence by transcript and video deposition.

i. Credibility Observations

[62] *Id.* at 736, 833-39, 1027.
[63] *Id.* at 969-71, 1028.
[64] *Id.* at 977-78, 1013, 1039-40.
[65] *Id.* at 1358-1370.
[66] *Id.* at 1364-65.
[67] *Id.* at 690-95, 1011-12.
[68] Merrill was sentenced to two terms of life without parole and two terms of life imprisonment. *State v. Merrill*, 990 S.W.2d 166 (Mo. Ct. App. 1999).

Mr. Kidd's charges were prosecuted by career prosecutor Amy McGowan and defended by then-assistant public defender Teresa Anderson. Kidd called both Ms. Anderson and Ms. McGowan to testify at the hearing in support of his claim that the prosecution did not disclose exculpatory information to the defense. The witnesses agreed on some of the key elements of Kidd's *Brady* claim, in particular the fact that there was evidence known to the prosecution and not disclosed to the defense in this case. Because Ms. Anderson and Ms. McGowan did not agree on many of the facts asserted, this Court must determine who is more credible.

At the time of Kidd's trial, Ms. Anderson had been a lawyer for three years, all of that time as an assistant Jackson County Public Defender. She believed Kidd to be innocent of the charges against him, and she appeared committed to presenting a truthful and complete defense. Her memory of the trial was corroborated by the record and documents in her file, and she answered questions sincerely and forthrightly. Ms. Anderson's demeanor while testifying was honest, sincere, and professional. This Court has observed that Ms. McGowan's and Ms. Anderson's testimony do not differ on key aspects of Kidd's *Brady* claim. For example, the prosecution did not disclose that the Goodspeeds, the alternative suspects in the case, were under police surveillance, that they were in Kansas City allegedly to threaten witnesses, that their depositions had been scheduled to take place in Ms. McGowan's office on Friday, March 14, 1996, and that transcripts of those depositions existed. This Court finds these facts to be true. As to any other matter on which their testimony might conflict, this Court finds Ms. Anderson to be a truthful, reliable witness.

Richard Harris's demeanor while testifying was evasive, profane, and disruptive. The hearing record reflects that Harris showed the same rudeness to Spillane on cross-examination

for which the trial court chastised him during Ms. Anderson's cross-examination.[69] The trial record supports Ms. Anderson's description of Harris as "hard to pin down," "difficult," "hostile," yet he portrayed himself as "just a, you know, good guy doing a good deed."[70] Ms. Anderson described his credibility as "questionable,"[71] but in the Court's view, it simply does not exist. By his own admission, he lied to detectives, he lied to the jury, he lied to the federal court about matters material to his believability, and in this Court, it was revealed for the first time that he was lying to cover up that he was dealing crack cocaine with George Bryant on the day of the murder. Richard Harris cannot be considered a credible witness at any point in these proceedings. This is especially true about his trial testimony, when he concealed evidence that, among other things, he was high on drugs and making crack cocaine deliveries at the time of the shooting, and he knew Gary Goodspeed, Jr., through George Bryant, from whom Harris had purchased an eight ball of crack that very morning. Harris now recants his identification of Kidd. Alvin Brooks' conversation with Harris in 2018 provides the simplest explanation for his wildly inconsistent testimony. When Harris called Brooks to tell him that Ricky Kidd is innocent,

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[69] P. Ex. 141, pp. 615, 624-25. On cross-examination at trial, Ms. Anderson asked Harris who was present at his pretrial deposition, and Harris responded, "And I got the same attitude as I had with you then. So come on." *Id.* at 615. Judge Shinn admonished Harris, "Well, yeah, I have been trying to be patient, but you need to listen to her and answer her questions. Don't volunteer this stuff. I know you're not happy, but…" *Id.* A short time later, Judge Shinn had to caution him a second time:

> Q. [By Ms. Anderson] Did you know which person in there he was?
> A. Lady, what are you getting at?
> THE COURT: Just answer her question.
> A. Yes. Whatever, yeah. I'm getting tired of this.
> THE COURT: No, well, I'm getting tired of it too. I'm not – I'm talking about him.
> MS. ANDERSON: I hope you're not talking about me.
> THE COURT: I was referring to him. You need to listen to the questions, answer the question, and that's all.

P. Ex. 141, pp. 624-25. This Court, too, had to caution Harris about decorum. Hrg. Tr. 97, 159.
[70] Hrg. Tr. 572, 645.
[71] Hrg. Tr. 645.

Brooks asked, "Well, why did you testify in court that he did?"[72] Harris replied, "Because I was afraid. . . . I knew the Goodspeeds, and they knew that I had seen them. . . I was just afraid, and so I changed my story from what I said to you and what I testified to."[73] This Court finds, as in *Amrine v. Roper, supra,* at 550 (Wolff, J., concurring), that the central witness on whom Kidd's conviction depends is a liar. The Court will discuss specific details of his story as necessary to resolve Kidd's claims below.

Monica Gray testified at trial, in the federal hearing, and in this Court that she was with Kidd at all times during the commission of the offense. If her testimony is credible, Kidd could not have committed the crime. This Court observed that her demeanor was candid, sincere, and honest. Further, the substance of her testimony is corroborated by documents from the Jackson County Sheriff's Office and the testimony of independent witnesses in the record, including Deputy Susan Jordan and Alina Wesley, and the testimony of Kidd's sister, Nikki Kidd, and his mother's boyfriend, Lawson Gratts. Gray's account of her activities with Kidd on the day of the crime have been generally consistent since she was first questioned on February 14, 1996.[74] Gray told the police that she awoke with Kidd "between 0900/1000 hours," until she was dropped off at her aunt's house "between 1700-1800 hours," and that she was with him continuously between those times.[75] Minor discrepancies in her estimates of what time she and Kidd arrived and departed particular locations do not undermine the credibility of her testimony about the day's events. Having observed Gray's demeanor, the Court understands why the prosecutor argued to the jury that Kidd's alibi witnesses "are telling you the truth," but claimed they were telling the

[72] Hrg. Tr., 462.
[73] *Id.*
[74] P. Ex. 77, p. 2.
[75] *Id.*

truth about a different day.[76] This Court finds Gray's testimony very credible. Deputy Jordan's testimony during Kidd's federal habeas hearing clears up the confusion that the State created at trial about what day Kidd and Gray were at the Sheriff's Office.[77]

Kelley Harmon testified consistently with her trial testimony that Kidd and Gray, accompanied by Kidd's nephew, D.J., came to her home in Blue Springs around lunchtime on February 6, 1996. This Court finds that Harmon's testimony is credible corroboration of Gray's account that she and Kidd were at the Jackson County Sheriff's Office near Blue Springs, which was very close to Harmon's residence, around noon on that day.

Alvin Brooks is well known in the Kansas City area, and nationally, for his work supporting crime victims and the community. He is a former police officer and former president of the Board of Police Commissioners. He testified about his contact with Kidd and Harris, and about his intercession on Kidd's behalf with Detective Ron Russell and various Jackson County Prosecuting Attorneys over the last twenty years. This Court finds Brooks to be a truthful witness where relevant to Kidd's claims.

Detectives Jay Pruetting, Jay Thompson, and Ron Russell testified before this Court regarding their investigation. All three detectives relied heavily on their reports of witness interviews. With this limitation, the Court finds the detectives generally credible.

Petitioner presented the testimony of two expert witnesses via video deposition, Dr. Allison Foster and Dr. Nancy Franklin. The Court finds that this testimony is helpful in assessing police procedures and the eyewitness evidence of Richard Harris and Kayla Bryant and helpful in determining the weight of other evidence.[78]

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[76] P. Ex. 141, p. 1385.
[77] P. Ex. 114, Deposition of Susan Jordan, August 9, 2007; P. Ex. 114A, Exhibits from Deposition of Susan Jordan, August 9, 2007.
[78] It is within the discretion of this Court to permit expert testimony if it will assist the fact finder and

Dr. Allison Foster is an expert in child forensic interviewing.[79] She has conducted approximately 2500 forensic interviews herself,[80]and has testified as an expert many times before, including around 150 on behalf of the State.[81] Dr. Foster expressed the importance of training and experience in "protocols and guidelines for interviewing children, understanding child development, linguistics, suggestibility, and understanding what techniques are recommended."[82] After reviewing the video and transcript of Detective Russell's and Thompson's interview with Kayla Bryant on April 11, 1996, it was obvious to Dr. Foster and this Court that the detectives had no such training, and that their interview was rampant with many other issues, discussed further below. This Court finds Dr. Foster's testimony to be credible.

Dr. Nancy Franklin is an expert in human memory and eyewitness identification.[83] She has been studying cognitive science for 30 years,[84] has consulted on approximately 500 cases, and has testified in court regarding this issue somewhere between 60-70 times, including in Missouri.[85] Dr. Franklin testified that there have been significant developments in the scientific

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does not unnecessarily divert the fact finder's attention from the relevant issues or relate to the credibility of witnesses. *See State v. Lawhorn*, 762 S.W.2d 820, 822-23 (Mo. banc 1988). Neither Dr. Foster nor Dr. Franklin testified about any of the witnesses' credibility or whether such witnesses were truthful during his or her testimony at trial, in depositions, or in statements to the police. Rather, the experts testified about the training required for a proper child forensic interview, the ideal setting for a child forensic interview, what constitutes a good and bad child forensic interview, whether those good or bad hallmarks exists in this case, the error rates of eyewitness identification, the factors identified by social science that make an identification more or less reliable, and which, if any, of those factors exist in this case. All of these are proper tools to assist this Court in rendering its own findings as to the weight of the evidence presented and this Court has not based any witness credibility findings on the testimony of Dr. Foster or Dr. Franklin.

[79] P. Ex. 194, Allison Foster CV; P. Ex.196, Deposition of Dr. Foster, 5/24/19, pp.1-15.
[80] P. Ex. 196, p.19.
[81] *Id.* at 15.
[82] *Id.* at 20.
[83] P. Ex. 193, Nancy Franklin CV.
[84] P. Ex. 195, Deposition of Dr. Franklin, 5/24/19, p. 6.
[85] *Id.* at 11.

research underlying identification evidence since Kidd's trial in 1997, including research regarding variables that can make identification processes more or less reliable. Dr. Franklin reviewed the variables present in the identification procedures used with Kayla and Harris. These developments have affected our understanding of identification evidence and the causes of misidentifications and the weight such evidence should be given in a setting such as this. This Court finds Dr. Franklin's testimony to be credible.

Petitioner also presented the prior sworn testimony of several witnesses who testified in depositions and court hearings. The parties stipulated to the admission of transcripts and evidence from trial and previous proceedings, and therefore they are considered as substantive evidence by this Court. This Court will therefore assess this testimony in its findings and assign it the appropriate weight.

In the federal hearing, Marcus Merrill appeared and testified that he participated in the homicides of George Bryant and Oscar Bridges on February 6, 1996, giving a detailed account of the crime that is consistent with other testimony and the physical evidence. On the morning of the murders, he was at the home of Eugene Williams when Gary Goodspeed, Sr., and Gary Goodspeed, Jr., met him. The three men proceeded to George Bryant's house to rob him, stopping en route to buy duct tape.[86] Although this Court did not see Merrill testify, it can assess the consistency of his testimony in light of all the other evidence in the case. [87] The federal judge

[86] P. Ex. 142, Federal Habeas Hearing Transcript Vol. I, pp. 25-28.

[87] Merrill's description of the crime answers questions that the detectives never figured out. When George Bryant saw Gary Goodspeed, Jr., he called him by the nickname "Little Brother," *Id.* at 18, explaining Kayla Bryant's statement, "Daddy's brother shot Daddy." P. Ex. 83, Kayla Bryant Interview, 2/6/96, p. 2; P. Ex. 86, p. 2; P. Ex. 141, pp. 528-29. As Merrill and the Goodspeeds started to flee the scene, Goodspeed, Sr., told Merrill that the little girl inside Bryant's home had seen him, and told Merrill he "needed to do something about it." P. Ex. 142, p. 35. Merrill went back inside, and "I just told her it would be her okay and I put her to the side I shot a bullet in the wall." *Id.* He went outside and told Goodspeed, Sr., "That I basically took care of that." *Id.* Within the hour, Kayla told Sgt. Jay Pruetting that "one of the men told her it would be alright," P. Ex. 83. P. 2; P. Ex. 141, p. 513, and Detective Thompson

commented during the trial that Merrill "impressed me as a pretty truthful witness," although he had denied his involvement up to that point, but thereafter held in his Judgment that Merrill was not a credible witness.[88]

Respondent argues that Merrill had hoped that the State would reopen the case and use him as a witness and introduced letters between Kidd and Merrill discussing such a possibility.[89] Merrill himself clearly wished for some benefit, but was explicitly and clearly informed, after consultation with his own counsel, that by admitting his guilt he was waiving any claim he could make for actual innocence, and further that no promises were being made to him in return for his testimony.[90] Merrill's confession dashes any hopes that he might have had for further challenges to his conviction and he understood that.[91] On balance, this Court finds that Merrill's sworn confession, given in open court, coupled with his deposition given on May 28, 2009, is credible, particularly in light of independent evidence implicating him in the crime and corroborating his confession.

Merrill told the police that during the first week that he was in Kansas City in February of 1996, he stayed with Eugene Williams at 4404 Myrtle.[92] Police never interviewed Williams.[93] In

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found a corresponding bullet hole in the kitchen wall above the stove. Hrg. Tr. 408-11. Merrill testified that they left the scene, and collaborated on a false alibi that he and the Goodspeeds later gave to the police. P. Ex. 5, Marcus Merrill Statement, 4/4/96; P. Ex. 8, Statement of Gary Goodspeed, Sr., 6/28/96; P. Ex. 9, Statement of Gary Goodspeed, Sr., 2/29/96. The Goodspeeds repeated the false alibi in their depositions. P. Ex. 110, Deposition of Rahib Muwwakkil, a/k/a/ Gary Goodspeed, Jr., March 14, 1997; P. Ex. 111, Deposition of Abu-Rahman Muwwakkil a/k/a/ Gary Goodspeed, Sr., March 14, 1997. Like the Goodspeeds, Merrill testified that Ricky Kidd was not with them on the day of the crime; he was not involved at all. P. Ex. 142, pp. 44-45.

[88] P. Ex. 142, p. 364; Resp. Ex. 4, p. 11

[89] P. Ex. 12, Marcus Merrill letter to Ricky Kidd, 11/16/06; P. Ex. 13, Ricky Kidd letter to Marcus Merrill, 12/3/06; P. Ex. 15, Ricky Kidd letter to Marcus Merrill, 6/9/08; P. Ex. 16, Marcus Merrill letter to Ricky Kidd, undated.

[90] P. Ex. 11, Letter from Sean O'Brien to Marcus Merrill, 4/30/08; P. Ex. 18, pp. 71-79

[91] P. Ex. 142, p. 98.

[92] P. Ex. 5, p. 2.

[93] P. Ex. 142, p. 178.

Kidd's federal hearing, Williams testified that he and Merrill were good friends, and had robbed drug houses together before.[94] On February 6, 1996, Merrill was at Williams' home when Goodspeed, Sr. and Goodspeed, Jr. came to the house.[95] Williams testified that the Goodspeeds discussed robbing a drug house.[96] Williams said when they left, Goodspeed, Sr., was armed with a .45 automatic with a gold barrel, Goodspeed, Jr., was armed with Williams' .38 caliber revolver that did not work, and Merrill was armed with a 9mm Glock.[97] Ballistics investigation found evidence that both victims were shot with a .45 caliber bullet, a lead fragment from a second gun of indeterminable caliber was recovered in the garage,[98] and a spent 9mm shell casing was found in the garage.[99] Again, although the Court could not view Williams' demeanor while testifying, these objective indicia of reliability corroborate his statements. Williams' testimony weighs in favor of Kidd's innocence.

Kayla Bryant was only four years and ten months old when she witnessed her father's murder. Her only sworn testimony in the record is that Kidd is not one of the men who shot her father.[100] As Ms. Anderson pointed out, she failed to identify Kidd from the easiest lineup imaginable; "it's very suggestive, as you can imagine. You know, you had—here's a table full of, you know, white lady, white lady, black man, white lady, white lady, black man, you know."[101] In context, Kayla's testimony suggests not just a failure to identify, but an exclusion of Kidd as one of the perpetrators she saw in her home.[102]

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[94] *Id.* at 171-73.
[95] *Id.* at 173-75.
[96] *Id.* at 176-77.
[97] *Id.* at 179-80.
[98] P. Ex. 190, Reports related to 45caliber, p. 4.
[99] P. Ex. 189, Reports related to 9mm, p. 2.
[100] P. Ex. 141, pp. 519, 521.
[101] Hrg. Tr. 586.
[102] See Part 2.A *supra*, outlining Kayla's testimony at trial, and Part 2.B.iii.b, *infra*, outlining the identification procedures used.

Unlike other transcript evidence, this Court is able to assess Kayla Bryant's credibility based on observing the video of her April 11, 1996, interview.[103] She is clearly tired, hungry, and her attention span is short. The questions are pointed, leading and suggestive. She at times provides nonsensical answers, and at other times adopts answers suggested to her.

Based on viewing Kayla's behavior during her post-lineup interview, this Court finds that Kayla Bryant was a child of tender years, vulnerable to influence and suggestion. That is not to declare her unbelievable on every subject, but her statements that were obtained through suggestive procedures by untrained personnel are not reliable. The Court finds that the trial transcript of Kayla Bryant's testimony weighs in favor of Kidd's innocence. Kayla Bryant's statements to detectives that "daddy's brother" killed daddy, and that one of the men told her it would be all right," contained information unknown to detectives, and predated the suggestive procedures used to obtain her identification of Kidd. Similarly, her photo identification of Marcus Merrill and non-identification of Ricky Kidd on February 10, 1996, predated the suggestive interview. In contrast to the video lineup procedure, the officer showing the photo spread to Connie and Kayla Bryant placed them in separate rooms when conducting the photo lineup.[104] These statements and photo identification are trustworthy corroboration of Marcus Merrill's description of the crime, and Kayla's February 10 exclusion of Kidd as one of the suspects credibly supports Kidd's innocence.

ii. Evidence Supporting Kidd's Alibi

Monica Gray shared an apartment with Kidd before, during, and after the time of the homicide, and is the mother of Kidd's daughter, Infinity Gray.[105] She testified at the hearing

[103] P. Ex. 140, Video of Kayla Bryant Interview, April 11, 1996
[104] P. Ex. 86, p. 4.
[105] Hrg. Tr. 32.

before this Court that she was with Kidd from the moment he woke on February 6, 1996, continuously until the late afternoon on that day. *See* Section I.A. *supra*. In addition to the evidence presented at trial establishing Kidd's and Gray's movements on the day of the crime, additional evidence was offered at the hearing supporting the reliability of Kidd's alibi defense.

At trial, Kidd presented evidence about his whereabouts on the day of the crime. The night before the homicide, Kidd's sister, Nikki Kidd, and her four-year-old son, D.J., spent the night with Gray and Kidd in their apartment at 701 East Armour, Kansas City, Missouri. Nikki Kidd left for work around 5:00 or 6:00 a.m. on February 6, driving Kidd's 1993 Corolla, and leaving D.J. with Kidd and Gray for the day.[106]

Gray told Detective Jay Thompson on February 14, 1996, that on February 6, 1996, she and Kidd awoke between 9:00 and 10:00 a.m.[107] At trial, she estimated that she was awakened by Kidd around 10:00 or 10:30 a.m.[108] Before this Court she testified that it was closer to 9:00 a.m. She remembers the morning because she was embarrassed when Kidd's nephew, D.J., walked in on her and Kidd in an intimate moment.[109] Kidd on February 15, 1996, in a separate interview told Sgt. Pruetting that D.J. woke them up around 9:00 a.m., and that he got up and allowed Gray to sleep until 10:00 or 11:00 a.m.[110] Despite these slight discrepancies, the testimony is clear that Gray and Kidd woke up together and spent the morning together on the day of the homicides.

Mr. Kidd's and Gray's accounts were consistent about their activities together the remainder of the day. Kidd owned a 1980 Oldsmobile Delta 88 that was difficult to start on cold

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[106] *Id.* at 36.
[107] P. Ex. 77, Interview of Monica Gray by Det. Jay Thompson, 2/14/96, p. 2.
[108] P. Ex. 141, pp. 1090, 1104.
[109] Hrg. Tr. 36-37.
[110] P. Ex. 25, Report of Interview of Ricky Kidd, 2/16/96, p. 1.

days.[111] At trial, they both testified that the car needed to be jump started on the morning of February 6,[112] and Lawson Gratts verified Kidd's testimony that he helped Kidd jump start the car that morning.[113] Gray's testimony at the hearing was consistent with her trial testimony.[114]

Gray testified that after breakfast, she, D.J. and Kidd first went to DST mutual fund company, Nikki Kidd's place of work near 10th Street and Baltimore in downtown Kansas City, to pick up Kidd's Corolla.[115] Kidd double-parked in the street and went inside to collect the keys from Nikki while Gray and D.J. waited in the car.[116] Gray estimated that they left for DST around 10:00,[117] but she did not disagree with Nikki Kidd's trial testimony that Ricky arrived at DST around 11:30.[118]

From DST, Kidd, Gray and D.J. took Kidd's Oldsmobile back to his apartment, then went to a McDonald's drive-through near 85th and Holmes because D.J. was hungry.[119] From there they went to the Jackson County Sheriff's Office near Lake Jacomo, Missouri, so Kidd could apply for a gun transfer permit.[120] Gray testified that they got lost along the way and stopped at a bait and tackle shop for directions.[121] Kidd also recalled asking for directions at the bait shop in his trial testimony.[122] The parties do not dispute that the distance from DST to the Lake Jacomo Sheriff's office is nineteen miles, and that driving time is approximately half an

[111] P. Ex. 77, pp. 2-3; P. Ex. 25, p. 1.
[112] P. Ex. 141, pp. 1091, 1199-1200.
[113] *Id.*, pp. 118-121. Gratts remembered that the day he helped Ricky was the day that Ricky's sister, Nikki, had driven Ricky's Corolla to work. *Id.*, p. 1121.
[114] Hrg. Tr. 37.
[115] *Id.* at 39-40.
[116] *Id.* at 40, 65.
[117] *Id.* at 64.
[118] *Id.* at 65.
[119] *Id.* at 39-40; P. Ex. 141, pp. 1094, 1201-02.
[120] Hrg. Tr., pp. 41-43; P. Ex. 141, pp. 1095, 1202-03.
[121] Hrg. Tr. 43; P. Ex. 141, p. 1094.
[122] *Id.*, p. 1204.

hour, depending on traffic.[123] Of course, stopping at McDonald's for breakfast and the bait and tackle shop asking for directions would have required additional time.

At the Sheriff's Office near Lake Jacomo, Gray and D.J. waited in the car while Kidd went in to make his application for a gun permit.[124] It took between five and ten minutes for Kid to complete the application and return to the car.[125]

From the Sheriff's Office, Kidd drove with Gray and D.J. to the home of his ex-girlfriend, Kelley Harmon (then Kelley McGill), the mother of Kidd's daughter, Jasmine. Harmon lived at 943 Robin Circle in Blue Springs, about ten or fifteen minutes from the Sheriff's Office.[126] They arrived at lunch time, which Harmon stated was typically between 11:00 and noon.[127] They visited for about an hour.[128]

Gray remembers this day because she was angry with Kidd for not telling her in advance that he was taking her to see his ex-girlfriend and their daughter.[129] Gray testified she had not met Harmon before that day. Gray and Kidd left Harmon's residence in time to pick up Nikki Kidd at DST when she got off work at 2:00p.m.[130] Nikki detected some tension between Kidd and Gray; Gray was not speaking to Ricky Kidd.[131] Kidd then took Gray to her Aunt Lupe Henry's house, arriving around 4:30 p.m., and Kidd went to his grandmother's house.[132]

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[123] Hrg. Tr, 254.
[124] *Id.* at 43; P. Ex. 77; p. 2; P. Ex. 25, p. 2; P. Ex. 141, pp. 1095, 1204.
[125] *Id.* at 1095, 1204.
[126] *Id.* at 1174, 1176, 1205-06.
[127] *Id.* at 72.
[128] Hrg. Tr. 43-44, 73; P. Ex. 141, pp.1096, 1206.
[129] *Id.* at 1096; P. Ex. 77, p. 2.
[130] P. Ex. 141, pp. 1096, 1134, 1148, 1151, 1207.
[131] *Id.* at 1135.
[132] P. Ex. 141, p. 1097.

Later that afternoon, George Bryant's murder was reported on the television news, which prompted a phone call between Kidd and Gray.[133] Kidd returned to Aunt Lupe's and picked up Gray later that evening.[134]

Mr. Kidd and Gray were taken into custody for questioning on February 14, 1996. They were separated at the scene of arrest, transported separately to police headquarters at 1125 Locust, and questioned separately by different detectives.[135] Kidd and Gray gave substantially the same account of where they went together on February 6, 1997.[136]

Mr. Kidd was arrested on May 22, 1996,[137] and gave another statement to Detective Pruetting.[138] He again told Sgt. Pruetting that "he had been with his girlfriend on the day of the murder, and that he was telling the truth."[139] Kidd said that whoever identified him had "confused him for someone else," possibly his uncle, Gary Goodspeed, Sr.[140]

On July 11, Kidd was in custody awaiting trial when his sister, Nikki Kidd, went to police headquarters to tell Sgt. Pruetting that her brother is innocent.[141] She told Pruetting that Kidd was in his apartment when she woke around 5:30 or 6:00 a.m.; she drove Kidd's Corolla to work at DST, and she saw him again around 11:30 a.m. or 12:00 p.m. when he came to get his car.[142] She was uncertain whether she took the bus home or her brother Ricky picked her up that day, but "she thought Ricky did pick her up that day from work."[143] Pruetting asked Ms. Kidd if

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[133] Hrg. Tr., p. 49; P. Ex. 141, p. 1099.
[134] Hrg. Tr. p. 49.
[135] *Id.* at 204.
[136] P. Ex. 25; P. Ex. 77.
[137] Hrg. Tr., 56.
[138] P. Ex. 30, Interview of Ricky Kidd, 5/22/96.
[139] *Id.*
[140] *Id.*
[141] P. Ex. 79, Interview of Nikki Kidd, 7/11/96.
[142] Hrg. Tr. 250-51; P. Ex. 79.
[143] Hrg. Tr., 252.

Kidd had to sign a log indicating that he had been there. She replied, "No," but pointed out that there are security cameras outside the business.[144] Although DST was just a few blocks from police headquarters, no detective or officer attempted to collect and preserve the video that might have proven Kidd's innocence.[145]

The only police investigation into Kidd's alibi reflected in the record is Jackson County Sgt. Michael Buffalow's May 30, 1996, fax to the Kansas City Police Department including Kidd's Application to Transfer Handgun dated February 6, 1996, accompanied by computer print-outs of criminal record checks conducted in response to Kidd's application.[146] The first computer search was run at 1347 hours (1:47 p.m.), February 6.[147] The FBI record check was conducted February 7, 1996.[148] The application form filled out by Kidd reflected that the record checks were completed by the deputies assigned badge numbers 934 and 937.[149]

Ms. Anderson called Sgt. Buffalow to corroborate Kidd's testimony about Kidd's gun transfer application.[150] On cross-examination, Sgt. Buffalow testified that the Jackson County Sheriff's Office received 600 to 700 such applications a month, and speculated that Kidd might have faxed or mailed his application in on February 5, 1996.[151]

In a later deposition, Deputy Susan Jordan, Badge No. 937, testified that she conducted the computer record checks on Kidd's application,[152] and refuted Sgt. Buffalow's trial testimony that Kidd's application could have been received on February 5. Deputy Jordan explained that

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[144] *Id.*
[145] *Id.* at 251-53, 434-35.
[146] P. Ex. 114A.
[147] *Id*. at 2; P. Ex. 114, p. 14.
[148] *Id.* at 3.
[149] P. Ex. 21, Application to transfer handgun, 2/6/96, Ricky Kidd.
[150] P. Ex. 141, p. 1154-1163.
[151] *Id*, at 1163-65.
[152] P. Ex. 114, p. 8.

criminal record checks on such applications are conducted promptly.[153] Most applications are processed on the same day that they are received, although if the office was busy, an application might be processed over two days.[154] However, Deputy Jordan was adamant that the processing of an application "won't go to the third day."[155] This is important because the processing of Kidd's application began at 1:47 p.m. on February 6, 1996, and was completed on February 7, 1996.[156] She conceded that because she did not see Kidd fill out the form and handwrite the date, she could not confirm that the form was filled out and signed on February 6, 1996.[157] However, she excluded the possibility that Kidd submitted his application to the Sheriff's office on February 5 or 7, 1996, as Sgt. Buffalow suggested. It "couldn't have been the 7th" because processing began on February 6.[158] It also could not have been February 5 because the computer checks would be completed no later than February 6. Deputy Jordan testified that "It would have to be the 6th because of the Alert checks."[159]

The Court finds that Deputy Jordan's testimony confirms that Kidd's application was received on February 6, 1996, sometime before 1:47 p.m. This is a substantial, independent corroboration of Gray's testimony that she was with Kidd when he drove to the Sheriff's office in the late morning of February 6, 1996, to apply for a gun transfer permit.

Respondent argues that time discrepancies in Gray's trial testimony and hearing testimony undermine her credibility, but this Court is not persuaded. None of Gray's statements

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[153] *Id.* at 16.
[154] Hrg. Tr. 18.
[155] *Id.*
[156] *Id.*at 25-26.
[157] P. Ex. 114, p. 24.
[158] *Id.* at 25.
[159] *Id.* at 26. Deputy Jordan also agreed that approximately 750 gun transfer applications were submitted each month, but mail-in applications were rare, typically only a couple a month, *Id.*at 6, and that applications were by fax were not accepted at the time. *Id.* at 23.

purport to fix an exact time that certain events happened; rather, she describes the sequence of events on that day, providing good faith estimates, within a range. Her testimony is generally consistent with what she told Detective Thompson and represents an honest estimate of that time she and Kidd started the day. Key elements of Gray's account are corroborated by other witnesses and the objective evidence of Kidd's application for a gun transfer permit. The probative value of her testimony is that she provides a credible, first-hand account of Kidd's whereabouts from the time he awoke on February 6, 1996, to late in the afternoon. If she is believed, Kidd had no opportunity to commit the crime. This is not a case in which precise measurements of time, distance and speed are necessary to foreclose Kidd's opportunity to have committed the crime. *Cf. Buchli v. State,* 242 S.W.3d 449 (Mo. Ct. App. 2007). If Gray is believed, then Kidd has an alibi, regardless of whether the murders happened when they were at DST picking up his Corolla, en route to Lake Jacomo, or at the Sheriff's Office.

This Court finds Gray to be a very credible witness, corroborated by the Jackson County Sheriff Office record of Kidd's application for a gun transfer permit. In light of the new, more reliable information from Deputy Jordan, this Court finds a reasonable likelihood that no reasonable juror would reject Gray's testimony beyond a reasonable doubt.

iii. Evidence of Ricky Kidd's Innocence

a. Richard Harris

The State's case against Kidd depended on the identification testimony of parole absconder Richard Harris, who now recants this testimony, and an out-of-court identification by four-year-old Kayla Bryant who did not identify Kidd at trial. It is undisputed that no physical evidence links Kidd to the shooting of George Bryant and Oscar Bridges. Without Richard

Harris' in-court identification and Kayla Bryant's out-of-court-identification, the State's case could not have withstood a motion for judgment of acquittal at the close of all the evidence.

Richard Harris is the State's most important witness against Kidd. He was the only person who testified in court that he saw Kidd commit the crime. This Court finds that Harris is not and never was a credible witness because his statements are riddled with inconsistencies, his description of the shooter excludes Kidd, the circumstances of his identification render it unreliable, he lied to hide his own drug trafficking crimes, and his recantation suggests that he has always been lying, or at the very least unsure.

Richard Harris' stories about the day of the crime varied wildly with each retelling. Richard Harris told police that he did not see George Bryant at all on February 6, 1996 until the moment of the murder; the only person he saw at Bryant's house that day was Oscar Bridges.[160] In his pretrial deposition, he testified that he saw Oscar and two other people whom he did not recognize in George Bryant's garage; George was not there.[161] In his 2007 deposition, Harris said he saw George Bryant smoking a "blunt" as Harris walked up the street to Michael Holland's house.[162] At the federal habeas corpus hearing, Harris said he had seen George that morning to arrange to purchase some marijuana.[163] At the hearing before this Court, Harris admitted for the first time that he had purchased an eight ball of crack cocaine from George Bryant that morning, and that he took it home to divide it up into individual doses, and made phone calls in order to sell it.[164] Harris also gave inconsistent stories about when he left his mother's house to go to Holland's and whom he saw when he walked past George Bryant's

[160] P. Ex. 88, Transcript of Richard Harris Video Statement, March 11, 1996, p. 2.
[161] P. Ex. 91, Pre-Trial Deposition of Richard Harris, March 11, 1997, p. 10.
[162] P. Ex. 92, Richard Harris Deposition, August 9, 2007, p. 17.
[163] P. Ex. 144, Federal Habeas Hearing Transcript Volume III, p. 475.
[164] Hrg. Tr. 126-27.

house to make numerous trips to deliver drugs to other neighbors.[165] It is also likely that Harris was high on marijuana and/or crack cocaine at the time of the murders.

Harris gave different reasons for identifying Kidd from the video lineup. He told the police and the jury that he identified Kidd from his "doofus walk" on the video, which prompted him to nickname Kidd "the Terminator," after the killer cyborg in the movie.[166] In his 2007 deposition, Harris testified that he selected Kidd because the killer had hair, and he thought Kidd shaved his head to change his appearance.[167] In Kidd's habeas corpus hearing in 2009, Harris stated that he selected Kidd because he had a gold tooth, and the killer kept his mouth closed, so the killer must have had a gold tooth, too.[168] The Court finds that this testimony further proves that Harris is a most unreliable witness.

Harris gave contradictory stories about whether he saw the shots fired. He told the police that he turned and ran before he heard the shots, and because he didn't actually see the shots, he said, he was "assuming" that the second suspect was the shooter.[169] At trial, he testified that he observed the shooting, and stood up and demonstrated the shooting for the jury.[170] In his 2007 deposition, Harris testified, "I thought they were shooting at me."[171] The Court finds that Harris was untruthful about seeing who shot George Bryant.

Harris denied to the police that he saw George Bryant's assailants earlier that day on his way to Michael Holland's house.[172] In his 2007 deposition, Harris said that he saw Oscar Bridges

[165] *Id.* at 125-27, 130-34.
[166] P. Ex. 88, p. 6; P. Ex. 141, p. 587.
[167] P. Ex. 92, pp. 81, 83.
[168] P. Ex. 144, p. 403.
[169] P. Ex. 88, p. 9.
[170] P. Ex. 141, pp. 570-71.
[171] P. Ex. 92, p. 106.
[172] P. Ex. 88, p. 2.

talking to two men as Harris was walking up to Michael Holland's house.[173] At the federal habeas corpus hearing, Harris testified that he saw the Goodspeeds walk up George Bryant's driveway on the morning of the crime.[174] In this Court, Harris testified that he did not see the men's faces, but he saw whom he believed to be the Goodspeeds already in George's garage as the automatic door was coming down.[175] The Court finds that these inconsistencies undermine Harris' credibility, and he is not a reliable witness.

When the police asked Richard Harris if he knew George Bryant's killers, he told them that he had never seen them before.[176] He also testified at trial that he did not know them.[177] He testified at a 2007 deposition that he met Gary Goodspeed, Jr., "a few times" at George Bryant's house[178], and he testified at Kidd's federal habeas corpus hearing that he had played football with Gary Goodspeed, Jr., in junior high school, and that he recognized Gary Goodspeed, Jr., from seeing him at Bryant's home.[179] The Court finds that Harris lied about knowing Gary Goodspeed, Jr., and that this lie undermines the credibility of his testimony. His concealment of his familiarity with Goodspeed, Jr., raises suspicions about the honesty of the balance of his testimony.

Harris also gave inconsistent stories about the description of the shooter. He first told detectives that the shooter wore a stocking cap.[180] In his 2007 deposition, Harris described the shooter as having long, curly hair protruding from a red do-rag.[181] He repeated the curly hair/red

[173] P. Ex. 92, p. 19.
[174] P. Ex. 144, p. 385.
[175] Hrg. Tr. 120.
[176] P. Ex. 88, p. 15; P. Ex. 89, Video Lineup Identification by Richard Harris, July 23, 1996, p. 4.
[177] P. Ex. 141, p. 573.
[178] P. Ex. 92, pp. 13-14.
[179] P. Ex. 144, p. 458.
[180] P. Ex. 88, p. 6.
[181] P. Ex. 92, pp. 83, 107.

do-rag statement at Kidd's federal habeas corpus hearing.[182] Because other credible evidence establishes that Kidd was bald at the time of the offense[183], Harris' description of the shooter that surfaced in 2007 eliminates Kidd as a suspect.

Similarly, the circumstances surrounding Harris' identification render it unreliable. Regardless of which telling of Harris' one were to believe, Harris was susceptible to several event-related factors that affect the formation and quality of an eyewitness's original memory, such as stress, weapons focus[184], the existence of multiple perpetrators, length of opportunity to view, and drug intoxication. All were present in Harris' viewing. Moreover, Harris did not speak to police until five or six weeks after the crime, during which time Harris may have interacted with multiple people who had outside knowledge about the homicides—including Connie Bryant and Speedy Ramsey. This Court finds that Harris's change of story about the shooter's curly hair and the circumstances of his viewing of the crime make his identification of Kidd unbelievable.

Further, Harris deliberately hid his drug trafficking crimes. Richard Harris testified in his pretrial deposition that he and George Bryant were "just neighbors on the block" and he did not associate with him.[185] He testified accordingly at trial.[186] In a 2007 deposition, Harris admitted that he dealt cocaine with George Bryant, and that the parole sentence that he was avoiding at the time of the offense was based on a conviction for this drug dealing.[187] In Kidd's federal habeas corpus hearing, Harris again admitted that he and George Bryant sold each other "weight,"

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[182] P. Ex. 144, p. 405.
[183] P. Ex. 171, Polaroid photo of Ricky Kidd with hoop earrings; P. Ex. 172, Polaroid photo of Ricky Kidd with chain necklace; P. Ex. 179, Video Lineup of Ricky Kidd, February 15, 1996; P. Ex. 185, Mug Show-up Folder With Photo of Ricky Kidd.
[184] Harris testified that he could see the "gold plated" gun. P. Ex. 141, pp. 561-64, 574.
[185] P. Ex. 91, pp. 4-5, 10-11.
[186] P. Ex. 141, p. 558.
[187] P. Ex. 92, pp. 14, 69.

meaning cocaine weighing as much as a quarter of a kilogram.[188] This Court finds that Harris lied about his drug trafficking with George Bryant and that these lies undermine the credibility of his testimony and raise suspicions about his entire account of what happened the morning of February 6, 1996.

Harris also withheld from the police and the jury the fact that he had gotten high on marijuana, or some other illegal substance, at Michael Holland's house the morning of February 6, 1996. He first admitted this in Kidd's federal habeas corpus hearings.[189] His friend, Michael Holland, testified at Kidd's federal habeas corpus hearing that Richard Harris was high on PCP the morning of the homicide.[190] The Court finds that Harris' lie about being high on drugs makes him an unreliable witness, and his drug intoxication raises significant questions about his ability to observe, remember and communicate accurately what he saw.

In addition to inconsistent statements, Harris admitted that he had motives to lie to the police. In his 2007 deposition, Harris admitted that he lied because he believed the police suspected him in George Bryant's murder[191], and he repeated that testimony in Kidd's federal habeas corpus hearing.[192] Harris also testified in this Court that he asked authorities about cash assistance for his testimony, and the police took him to a hotel, where he stayed at the police or prosecutor's expense for two to three weeks before the trial. The Court finds that Harris could have been motivated to give untruthful testimony to help the police out of fear of being charged, and in hopes of some financial benefit. These are additional reasons to find Harris' testimony untrustworthy.

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[188] P. Ex. 144, pp. 431-33.
[189] *Id.* at 394.
[190] *Id.* at 507.
[191] P. Ex. 92, p. 73.
[192] P. Ex. 144, p. 429-30.

Harris testified before this Court that shortly after the shooting, George Bryant's sister, Rita Bryant, told Harris that Ricky Kidd was one of the shooters.[193] This was early in the investigation, while Harris was still on the run from his parole warrant, before he ever spoke to police.[194]

When asked why he selected Kidd from the lineup, Harris said it was because he thought Kidd had changed his appearance by cutting his hair, and added, "Yes, and listening to Rita."[195] Harris testified, "If it—and if I had known he had—didn't have no hair, man, I would have told her, 'Man, you was wrong.'"[196] Harris told this Court that he identified Kidd because "I felt bad for Kayla, mostly, and Connie," and wanted to help.[197] Harris had never before testified about his conversation with Rita Bryant in any previous proceedings, and the Court finds that Harris' disclosure only further serves to undermine the credibility of his identification of Kidd. The Court concludes that Harris's identification of Kidd is completely unreliable.

Similar to Harris's description of Rita Bryant's influence on his identification of Kidd, Harris ambiguously recanted his identification of Kidd in Kidd's federal habeas corpus hearing. Harris testified that although he was "pretty sure" he had picked the right guy from Kidd's line-up, "After reading what Marcus Merrill said, I feel like Ricky Kidd really deserves another trial for real."[198] After expressing doubts about his identification of Kidd, on cross-examination, Harris inexplicably testified that he would stand by his identification at a retrial.[199]

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[193] Hrg. Tr. 92.
[194] *Id.* at 93.
[195] *Id.* at 153.
[196] *Id.* at 167.
[197] *Id.* at 155.
[198] P. Ex. 144, pp. 445-46.
[199] *Id.* at 474.

In this hearing, Harris recanted his identification without reservation, this time saying, "I made a mistake, plain and simple, man."[200] When challenged, he became angry, saying "that man is [expletive deleted] innocent….I thought I was being accurate, but I wasn't."[201] This time Harris attributes his change of heart to a former neighbor, Earl "Speedy" Ramsey, who saw the shooting, and told Harris that Goodspeed, Sr., and not Kidd shot George Bryant. Harris testified:

> A. [RICHARD HARRIS] It bothered me a lot to know that this man been in there for 23 years for something he didn't do, and Speedy told me exactly who it was and I felt bad because he had a daughter, man, he didn't get to see grow up.
> Q. [MR. O'BRIEN] Now, your voice is breaking a little bit.
> A. Yeah.
> Q. And your voice is low.
> A. Yeah.
> Q. So we want to make sure that we hear that. Could you say that again?
> A. After Speedy told me the truth, after he had—that car fell on him and I guess he had some feeling about telling the truth about stuff and he felt guilty about him being in there. And I called him and let him know I know he didn't do it.[202]

Unfortunately, Ramsey died before the hearing, and could not confirm Harris' account. Harris testified that he saw Ramsey after Harris's father died in 2012 and told Harris what he had seen on the day of the murder.[203]

Harris' testimony that Ramsey observed the shooting is corroborated by several sources. On the day of the offense, Sgt. Pruetting's area canvass produced several witnesses who were outside with Ramsey during the shooting; Ramsey had been in his driveway two houses south and across the street from George Bryant's house.[204] Sgt. Pruetting did not believe or recall if anyone in law enforcement had ever spoken to Ramsey.[205] Attorney Leslie Wine testified that

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[200] Hrg. Tr. 158.
[201] *Id.* at 159.
[202] *Id.* at 156.
[203] *Id.* at 156, 166-67.
[204] *Id.* at 200-202.
[205] *Id.* at 203.

while still a student at UMKC Law School, she located and interviewed Ramsey as part of a law school clinic working on Kidd's case.[206] When Wine located Ramsey at his residence, Ramsey told her that he was underneath the car working on some brakes on February 6, 1996, and that he saw the shooting, just as his neighbors had said.[207] He saw the men pull into George Bryant's driveway in a white car and go into Bryant's house.[208] Ramsey continued working on his brakes and when he heard gunshots, looked to see what was happening.[209] He saw George Bryant run out of his garage, and a man follow behind him and shoot him.[210] Ramsey said he got a good look at the men, that he knew Kidd well enough to recognize him on sight, and that Kidd was not one of the men he saw at George Bryant's house that morning.[211] Ramsey signed an affidavit consistent with Wine's testimony.[212]

After hearing Ramsey's version of the shooting in 2012, and that Ramsey named Goodspeed, Sr., and not Kidd, as the shooter, Harris called Brooks and recanted his identification of Kidd.[213] Harris testified that no one asked him to call Brooks; Harris explained, "Right is right and wrong is wrong, man."[214] He told Brooks, "[Ricky Kidd] didn't do it. I made a mistake."[215] Harris testified before this Court that if Kidd were to be retried, and Harris were called as a witness, he would testify that Kidd was not one of the men who shot George Bryant.[216]

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[206] *Id.* at 174-75.
[207] *Id.* at 175, 178-79.
[208] *Id.* at 179-80.
[209] *Id.* at 180.
[210] *Id.*
[211] *Id.* at 179, 182.
[212] P. Ex. 133, Earl "Speedy" Ramsey Affidavit, 11/11/15. Wine's testimony was accepted as an offer of proof over Respondent's objection that it was inadmissible hearsay. This evidence is admissible as corroboration that Ramsey did, in fact, tell Harris that Kidd was not one of the shooters.
[213] Hrg. Tr. 160, 156-157.
[214] *Id.* at 157.
[215] *Id.*
[216] *Id.*

At the evidentiary hearing Harris was adamant in his current version of events. His recantation makes this Court unable to view him as a credible witness at all. This Court doubts the reliability of Harris' original identification of Kidd, particularly given all the circumstances suggesting that he is simply not and never was a reliable witness.

Kayla Bryant

Without Harris, the only remaining evidence linking Kidd to the crime is the out-of-court identification of Kidd by four-year-old Kayla Bryant, who testified at trial that the man who shot her daddy was not in the courtroom. She also testified that the man who was in her house had darker skin than Kidd, who she saw in the pictures and in the videos. But Detective Thompson testified at trial that Kayla identified Kidd from a video line-up during the police investigation, however, the circumstances of that identification were highly suggestive.

In regard to the various identification procedures that Kayla Bryant experienced, the following observations are notable: On February 10, 1996, Kayla viewed a multiple suspect array photo line-up, including Kidd, Merrill, and Goodspeed, Jr. Kayla picked Merrill in this line-up, under circumstances that lend themselves towards reliability.[217] While the identification procedure was not without issue, she made a rapid identification of Merrill, with high confidence, very shortly after the crime.[218] During this same line-up, she did not pick Kidd.

On April 11, 1996, Kayla Bryant viewed a video line-up that included Kidd, who was in Position Number 1. There were several issues with this procedure. Kidd was at a greater risk of being identified because of mugshot exposure effect—Kayla had already seen him once before,

[217] The photographs in the record establish that Gary Goodspeed, Sr., has a much darker complexion than Kidd, P. Ex. 181, P. Ex. 187. In addition to the difference in complexion, Goodspeed, Sr., also weighed significantly less than Kidd, P. Ex. 115, p.569, meaning it is more likely that he was the "skinny one" that Kayla never identified, since she was never shown photograph of Goodspeed, Sr., as Kidd weighed more than Merrill, who she referred to as the "fat one."
[218] P. Ex. 195, pp 33-34.

during the February 10, 1996, photo array.[219] Kayla was in a room filled with people who knew who the suspect was, both law enforcement officers and her mother, and she was sitting in her mother's lap at the time, which presents additional risk for suggestion, given that her mom had reason to suspect that Kidd was involved.[220] Kayla was given biased instructions to pick out the man who was in her house on the morning of the murder.[221] The line-up does not contain enough fillers; the recommendation from the American Psychology Law Association is to have at least 6 people in an individual line-up.[222] The fact that several months have passed before this line-up occurs would mean that Kayla's memory could have faded.[223] While Kayla is alleged to have expressed emotion when Kidd appeared on the screen during the video line-up,[224] there is no reason to believe that emotion is tied to confidence or accuracy.[225]

Between the February 10, 1996, identification of Merrill and non-identification of Kidd, and the April 11, 1996, identification of Kidd in the video line-up, the February 10 results are more reliable because it was a rapid confident identification four days later versus an identification of Kidd weeks later after exposure to him and under potentially influential circumstances.[226]

Research also supports that the post-identification interview of Kayla on April 11, 1996, was fraught with problems, which is unsurprising considering the detectives that interviewed Kayla had no child forensic interviewing experience or training.[227] First, while a portion of

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[219] *Id.* at 35-36.
[220] *Id.* at 36.
[221] *Id.* at 39-40.
[222] *Id.* at 45.
[223] *Id.* at 47.
[224] Detective Thompson testified that Kayla appeared nervous and scared, grabbed ahold of her mother tightly, and was visibly upset. Hrg. Tr. 387-88.
[225] P. Ex. 195, pp. 43-45.
[226] *Id.* at 47-48, 50.
[227] None of the officers involved in Kayla's questioning had training or experience interviewing child

Kayla's interactions with law enforcement on April 11, 1996, was recorded, the police had had previous contact with Kayla, both several months before in February, and earlier that same day, that was not recorded.[228] Second, the setup of the interview with Kayla was not conducive to obtaining reliable information. Kayla was sitting on her mother's lap, and there were two detectives across the table from her—meaning three adults in the room total.[229] A potential problem is that children will look to their parents, or other adults, for signals, for cues about should they should feel or respond.[230] Third, the entire setup was authoritarian and did not lend itself to Kayla's comfort as the information holder.[231] There are clear instances in the video of Kayla's interview where we can see the material influence and maybe other people's influence showing up in Kayla's retrieval of information.[232] Ms. Anderson, who has specialized in family court abuse and neglect cases for nearly two decades, testified that child witness interview procedures call for questioning by trained professionals to avoid potential verbal and nonverbal influences over the witness.[233] And lastly, nearly all of the questions asked were close-ended and highly suggestive.[234] Because of the nature of the post-identification interview with Kayla, we will never know what information Kayla had that was untainted, uncontaminated, and accurate; instead, she was not properly oriented by law enforcement officers to tell the truth, detectives did

witnesses to traumatic events. Hrg. Tr. 311-12, 380-81. Detective Russell testified that this was his first child witness case and he had no training. Hrg. Tr. 311-12. He now knows that it is not proper to have a parent present while a child is questioned. Hrg. Tr. 318-19.

[228] P. Ex. 196, pp. 61-62.

[229] *Id.* at 62-63.

[230] *Id.* at 30-31.

[231] *Id.* at 63-64.

[232] *Id.* at 71.

[233] Hrg. Tr. 574-76.

[234] P. Ex. 196, p. 66.

not follow child forensic interview guidelines, and they used leading questions instead of inviting Kayla to give a narrative about what happened.[235]

The Court finds that Kayla Bryant's out-of-court identification of Kidd is unreliable.

b. Evidence implicating the Goodspeeds

Contrasting to the unreliable identifications used to convict Kidd, significant evidence existed indicating that the Goodspeeds, along with Merrill, are in fact the true perpetrators.

Police questioned Goodspeed, Sr., Goodspeed, Jr., and Merrill during the investigation about the murders of Bryant and Bridges.[236] In those interviews, Merrill and the Goodspeeds denied that any of them were at the scene of the crime, but alibied themselves together, claiming they met at Goodspeed, Sr.'s, room in the Adam's Mark Hotel around 11:00 a.m. on the morning of February 6, 1996, and drove together to Jean Bynum's house at 61st and Tracy in Kansas City, arriving around noon. They all stated they did not see Kidd that day.[237]

Airline and hotel records collected by police establish that Merrill and the Goodspeeds flew together from Atlanta to Kansas City several days before the homicide, stayed at the Adam's Mark Hotel, and returned to Georgia several days later.[238] Goodspeed, Sr., rented a white Oldsmobile Sierra from an Alamo Rent-A-Car near the airport that matched the

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[235] *Id.* at 68. The Court also notes that while Kayla was never questioned about the video line-up in her post-viewing interview, even though such an interview is intended to preserve the identification, *see* P. Ex. 82, Transcript of Video Statement of Kayla Bryant, 4/11/96, police asked Richard Harris about the identifications he had just made in his post-video lineup interview. *Cf.* P. Ex. 88 and P. Ex. 89

[236] Notably, Goodspeed, Jr., relayed to Sgt. Pruetting that his father had told him that George Bryant was killed at 11:45 a.m. Hrg. Tr. 239; P. Ex. 7, Statement of Gary Goodspeed, Jr., 7/1/96, p. 1; the first 911 call after the homicide was made at exactly 11:47 a.m. Hrg. Tr. 239. Even Detective Thompson admitted this was potentially incriminating:

> Q: Anywhere in any of the reports that said that [Bryant] was killed at 11:45 am?
> A: Not that I can remember.
> Q: How—how would a person know, other than if they were the shooter?
> A: That's a good question.

Hrg. Tr. 444.

[237] P. Ex. 5; P. Ex. 6, Marcus Merrill Statement, 5/21/96; P. Ex. 7; P. Ex. 8; P. Ex. 25.

[238] P. Ex. 141, pp. 736, 833-39, 1027.

description of the get-away car used by the shooters,[239] and was believed by police to have been the getaway-car.[240] Goodspeed, Sr.'s, fingerprint was identified on an empty Carmex container found in that rental car. The Carmex container had a tag indicating it was purchased from a "Good To Go" store one block from the scene of the crime.[241]

In post-trial proceedings Merrill confessed to participating in the robbery and murders of Bryant and Bridges. This Court has discussed his confession and corroborating evidence in detail above. His confession is corroborated by the credible testimony of Williams, who identified the make and caliber of guns he provided to Merrill and the Goodspeeds. Those guns are consistent with the make and caliber of the guns identified in ballistics reports as used in the murder. Both Merrill and Williams confirm that they did not see Kidd on the day of the murders. Merrill's credible confession implicates the Goodspeeds and exonerates Kidd. This Court finds that Merrill's confession, as corroborated by Williams and evidence known at the time of trial, is persuasive evidence that Kidd is innocent.

d. Lack of Physical Evidence

No evidence connected Kidd to the crime. A bloody footprint on a piece of Congoleum flooring and another footprint on a piece of bread were found in Bryant's kitchen. Forensic examination excluded the shoes worn by both shooting victims and six pairs of shoes collected from Kidd.[242] Goodspeed, Sr., consented to the search of his apartment, but detectives did not attempt to collect his footwear for comparison with the crime scene evidence.[243] An application for a warrant to search the apartment shared by Merrill and Goodspeed, Jr., did not request

[239] *Id.* at 504, 535-36.
[240] *Id.* at 969-71, 1028.
[241] *Id.* at 979; Hrg. Tr. 424-25.
[242] Hrg. Tr. 213; P. Ex. 23, Regional Crime Lab Summary of Results, William T. Newhouse Firearms/Toolmark Examiner, 3/13/97.
[243] Hrg. Tr. 237-38.

authorization to search for and seize footwear, and no shoes were collected.[244] If shoes had been collected, they could have been compared to the footprints at the scene of the crime, and they could have been tested for traces of blood that could be compared to the bloody footprint found in the victim's kitchen.[245]

iv. Suppressed Evidence of Kidd's Innocence

a. The State Failed To Disclose Evidence Implicating the Goodspeeds

Ms. Anderson relied on police reports in preparing her defense. In her attorney-client meetings, "Mr. Kidd always—he always asserted that he did not do it, he was innocent and he was not present."[246] Ms. Anderson testified that Kidd had "a pretty straightforward alibi that we were going to use,"[247] and she did present that defense at trial.

Kidd had other avenues of defense available to him that were harmonious with his alibi. Ms. Anderson and Kidd discussed his desire to prove who really did the crime—the Goodspeeds—as part of his defense. Kidd knew the Goodspeeds had committed the crime because the Goodspeeds had asked him to be part of it. On February 5, Goodspeed, Sr., paged Kidd, who went to the Adam's Mark to visit with Goodspeed, Sr. Goodspeed, Sr., told the police there was some discussion of Kidd and Goodspeed, Sr., "squelching" their differences[248], but Goodspeed, Sr., turned the topic to his intent to rob George Bryant. He asked Kidd to join him in the robbery, and Kidd declined.[249]

The next day, February 6, 1996, Kidd and Gray talked about how they could warn George Bryant without Goodspeed, Sr., figuring out that Kidd was the one who tipped him

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[244] *Id.* at 425-26, 457
[245] *Id.* at 238.
[246] *Id.* at 544.
[247] *Id.* at 638.
[248] P. Ex. 8, p. 4.
[249] P. Ex. 143, pp. 261-62; Hrg. Tr. 675-76.

off.[250] Kidd explained that this was how they knew Goodspeed, Sr., was responsible when they saw George Bryant's murder on the news that night; "I was devastated because I had knew the day before that Gary, Sr. and them had talked about robbing him, so. . . . I had knew in my heart that they did it."[251]

The day after the murder, Goodspeed, Sr., paged Kidd and asked to meet at a house at 54th and Jackson. Kidd complied "because after I became a living witness to what he was going to do, I wanted to try to convince Gary, Sr. that I wasn't going to be a threat. So, once he told me February 5th and they carried it out February 6th, I knew that I was a loose link to their puzzle."[252] He took Gray with him and left her in the car with the engine running so that Goodspeed, Sr., would know there was another witness in case he intended to harm Kidd.[253] During this meeting, Goodspeed, Sr., admitted to Kidd that he had killed George Bryant, and Kidd did his best to convince Goodspeed, Sr., "[t]hat I wasn't going to tell the police or anything."[254] Kidd faked a phone call to try to extricate himself from the situation, at which time Gray came to the door, and the two of them left.[255] Both Kidd and Gray were afraid of Goodspeed, Sr., who had a previous homicide conviction, and they believed he had just killed George Bryant.[256] While it is curious that neither Kidd nor Gray mentioned this meeting with Goodspeed, Sr., when they first talked to police, it is reasonable to believe they were afraid of Goodspeed, Sr.[257]

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[250] P. Ex. 143, p. 265.
[251] *Id.* at 282.
[252] *Id.* at 286.
[253] *Id.* at 285.
[254] *Id.* at 287.
[255] *Id.* at 288-89.
[256] *Id.* at 287; Hrg. Tr. 51.
[257] P. Ex. 143, pp. 287, 299-300.

In early discussions before Kidd's arraignment on the charge, Ms. Anderson had informed Kidd that defending him against the charge was more important than pursuing charges against the Goodspeeds.[258] Kidd wrote Ms. Anderson, "I've thought long and hard. I've heard what you said how you don't care who did it and that your job is to get me off…. Well I care."[259] Kidd explained, "they killed those guys, and I feel like they killed me, too," blaming them for taking away his freedom.[260] Ms. Anderson affirmed that Kidd wanted authorities "to understand I didn't do it, but I also want them to know who did it—which…makes a lot of sense to me because…you do have people who were killed who have a right to know who did that to their family. And I think Ricky felt that way."[261]

This was a frequent discussion throughout her representation of Kidd, and she agreed with Kidd that presenting evidence implicating the real killers could be a viable defense.[262] On June 10, 1996, Kidd told Ms. Anderson, "I'm ready to tell everything I know. The prosecution can only twist and turn so much around when your [sic] innocence and know who did it."[263] Kidd had already talked to Brooks at the AdHoc Group Against Crime and told Ms. Anderson, "He said the same. How are they putting me and Markest [sic] together and not the other two. They can't keep ignoring that fact!"[264] He asked Ms. Anderson to "go to the prosecution and let them know what the deal is and they need to drop these charges."[265] Kidd told Ms. Anderson that

[258] Hrg. Tr. 546.
[259] P. Ex. 31, Ricky Kidd letter to Teresa Anderson, June 10, 1996, p. 1; Hrg. Tr. 547.
[260] P. Ex. 31, p. 1.
[261] Hrg. Tr. 548.
[262] *Id.*
[263] P. Ex. 31, p. 1.
[264] *Id.* at 2.
[265] *Id.* at 3.

"Detective Pruetting wanted to help me. He went to the prosecution. They said you have to do that."[266] He signed the letter, "Sincerely, your innocent client, Ricky Kidd."[267]

Kidd's June 10, 1996 letter to Ms. Anderson[268] followed a June 5, 1996, discussion that he initiated with Sgt. Pruetting.[269] Consistent with what Kidd told Ms. Anderson in his letter, Sgt. Pruetting testified that Kidd told him that "he had the wrong person in jail."[270] Kidd repeated his account of where he had been that day, and he also told Sgt. Pruetting that "he knew who killed George and the other victim. He stated it was Abu, which is Gary Goodspeed, Sr., Gary Goodspeed, Jr., and Marcus Merrill."[271] Kidd told Sgt. Pruetting that Goodspeed, Sr., "had called him and told him that they had killed the victims."[272] When Sgt. Pruetting asked him why he had not provided this information when questioned earlier, Kidd said, "It was because he was scared for himself and his family, and he thought that detectives would figure it out themselves. He kept telling the reporting detective that he had an innocent man in jail and the reporting detective to help him."[273] Kidd said he wanted charges dismissed against him, and that he would give information about the Goodspeeds.[274] Sgt. Pruetting told Kidd that he would have to have his lawyer work that out with the prosecutor.[275]

Ms. Anderson represented Kidd at the time that he gave his June 5, 1996, statement to Sgt. Pruetting.[276] She was unaware that he approached Pruetting and was upset that Kidd

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[266] *Id.*
[267] *Id.*
[268] Kidd's letter is undated, but it was stamped "Received" by the Public Defender's Office on June 10, 1996.
[269] P. Ex. 32, Interview of Ricky Kidd, Det. Jay Pruetting, 6/5/96.
[270] Hrg. Tr. 217.
[271] *Id.* at 218.
[272] *Id.*
[273] *Id.* at 219.
[274] *Id.* at 219-20, 241.
[275] *Id.* at 220.
[276] *Id.* at 549.

continued to talk to Pruetting against legal advice.[277] Ms. Anderson scolded Kidd about initiating the June 5, 1996, meeting with Pruetting, and on September 23, 1996, she added a handwritten P.S. to a letter telling Kidd to "quit calling Detective Pruetting" because Kidd continued reaching out to him about his innocence.[278]

Ms. Anderson testified that the Goodspeeds' involvement in the crime "was common knowledge on the street—always was my impression."[279] Ms. Anderson confirms Kidd's testimony that he visited Goodspeed, Sr., at the Adam's Mark Hotel on February 5, 1996, and that he went to see Goodspeed, Sr., again the day after the homicide on February 7.[280] Kidd testified in the federal hearing, "I told my attorney everything [about] the 5th, 6th and 7th," and that he wanted her to accompany him to talk to the police."[281] Ms. Anderson also confirms that she and Kidd discussed presenting a defense based on telling the jury everything involving the Goodspeeds, including Kidd's past relationship with them and his contacts with Goodspeed, Sr., in early February, 1996.[282]

Ms. Anderson investigated evidence that would give her the means to present a credible case that the crime was committed by Goodspeed, Sr., Goodspeed, Jr., and Merrill. Ms. Anderson intended to put on such a defense and concluded that the only way she could do so with any credibility was to have the Goodspeeds under subpoena.[283] She testified that "we

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[277] *Id.* at 551.
[278] P. Ex. 42, Teresa Anderson letter to Ricky Kidd, 9/23/96; Hrg. Tr. 558-59.
[279] Hrg. Tr. 552.
[280] *Id.* at 553, 641.
[281] *Id.* at 654.
[282] *Id.* at 637, 641. Kidd testified that his lawyer advised him to deny meeting with Goodspeed, P. Ex 143, pp. 351-52, which, of course, Anderson did not do. However, Anderson did say that she and Kidd discussed his meetings with Goodspeed, and told him that, "'We're not going to go there," or similar terms." Hrg. Tr. 638.
[283] Hrg. Tr. 594.

always wanted to find the Goodspeeds, my investigator and I. And they were pretty elusive."[284] "Kenny[285] and I talked about that a lot. I think we met with Ricky and talked about it, trying to figure out, you know, how we could locate them. I wanted to put them under subpoena. I would have called them to testify if I—if I could."[286]

Ms. Anderson explained that the defense team believed the Goodspeeds were involved, "and so it made some sense for the jury to be able to lay eyes on who we believed did it."[287] The defense tried to get the Goodspeeds in Atlanta, they looked for them at Bynum's house, and they were still searching for them on the morning of trial.[288] She and her investigator were "trying to figure out where we might find them even that morning. But at some point in time you kind of have to go, okay, we just got to go with what we have."[289] The Court finds this testimony to be truthful.

Ms. Anderson informed Assistant Prosecutor McGowan that she wanted to call the Goodspeeds as witnesses. She had "multiple conversations with the prosecutor" about it, and Ms. Anderson "was always wanting to know where the Goodspeeds were."[290]

The defense filed a discovery request that included a request for all exculpatory information.[291] Ms. Anderson's file contained an unserved original subpoena for Goodspeed, Jr., that Kenny Dozier had attempted to serve, unsuccessfully.[292] "[I]t seemed to us, anyway, that if we could find Gary, Jr., we could find Gary, Sr."[293] They also explored the Interstate subpoena

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[284] *Id.*
[285] Kenneth "Kenny" Dozier was Ms. Anderson's investigator, now retired.
[286] Hrg. Tr. 594.
[287] *Id*. at 595.
[288] *Id*. at 594.
[289] *Id.*
[290] *Id.* at 594-95.
[291] P. Ex. 155, Request for Discovery by Defense, 06/20/96.
[292] P. Ex. 132A, Subpoena for Gary Goodspeed, Jr., 3/20/97; Hrg. Tr. 599-600.
[293] Hrg. Tr. 600.

process, but they did not have a current address for the Goodspeeds in Atlanta.[294] This Court finds that Ms. McGowan knew that Kidd's defense counsel wanted to subpoena the Goodspeeds for trial.

The police received information during the pendency of Kidd's trial that the Goodspeeds were coming to Kansas City to potentially intimidate witnesses in the fall of 1996. Kansas City police officers were assigned to conduct surveillance, and they tracked Goodspeed, Sr., to a residence at 3601 E. 67th Street, Kansas City. On September 12, 1996, they followed Goodspeed, Sr., from the residence to various locations throughout the day, and then back to the residence in the evening.[295] The police notified Ms. McGowan that they had Goodspeed, Sr., under surveillance, and they gave her copies of their surveillance logs.[296] Petitioner's Exhibit 135 is a copy of the surveillance log that came from her file; Ms. McGowan recognized a folder bearing the label, "miscellaneous intimidation," in her own handwriting.[297] Ms. Anderson had never before seen this surveillance log from Ms. McGowan's file.[298] She testified that it would have been helpful to know that Goodspeed, Sr., was in town so that the defense could serve him with a subpoena.[299] Ms. McGowan testified before this Court that she did not remember if she disclosed the surveillance information to Ms. Anderson,[300] but in her deposition, she stated that she did disclose the surveillance of Goodspeed, Sr.[301] Ms. McGowan told this Court that she did not consider it relevant to the homicide.[302] This Court finds that the prosecution did not disclose that

[294] *Id.*
[295] P. Ex. 135, Goodspeed Surveillance Logs, pp. 3-7.
[296] Hrg. Tr. 497-98.
[297] *Id.* at 495-96, 498.
[298] *Id.* at 601.
[299] *Id.* at 602.
[300] *Id.* at 498.
[301] *Id.* at 530.
[302] *Id.* at 499.

Goodspeed, Sr., was under "miscellaneous intimidation" surveillance at a known location in Kansas City.

Merrill was represented in this matter by Assistant Public Defenders Kate Ladesh and Mona Spencer. Merrill's counsel deposed Goodspeed, Jr., and Goodspeed, Sr., in the prosecuting attorney's office on March 14, 2019, the Friday before trial.[303] Ms. McGowan noted that Ms. Anderson was not present for either deposition.[304] Ms. McGowan did not know and apparently did not ask whether Ms. Anderson had been notified of the deposition. She testified at the hearing before this Court, "It wasn't my deposition, so it wasn't—at least under the rules, wasn't my obligation to notify the other side. I don't know why she wasn't [present]. I can't speak to that."[305] Ms. McGowan was unequivocal, "I did not notify anyone because it was not my deposition."[306] It should be noted that before Goodspeed, Jr., answered any questions he was read his Miranda rights by detectives present at the depositions.[307] Because the cases of Merrill and Kidd were joined for trial, Rule 57.07 obligated counsel for the party taking the deposition to give notice of the deposition to "every other party to the action."[308] Ms. McGowan testified that it did not occur to her to inquire about Ms. Anderson's absence from the deposition of a suspect in this case.[309] She also did not recall sending Ms. Anderson transcripts of either deposition.[310] Ms. Anderson testified that she was not given notice of either deposition.[311] This Court finds that

[303] P. Ex. 110; P. Ex. 111; Hrg. Tr. 504, 509.
[304] Hrg. Tr. 505, 512.
[305] *Id.* at 513.
[306] *Id.* at 514.
[307] Hrg. Tr. 511 The Court does not find Ms. McGowen's testimony credible that Mona Spencer would invite two KCPD detectives to a deposition she was taking to read *Miranda* rights to potential co-defendants. Page 511, lines 16-18
[308] *Id.* at 533; P. Ex. 157, Mo Sup. Ct. Rule 57.03(b)(1) (1994).
[309] Hrg. Tr. 515.
[310] *Id.* at 523.
[311] *Id.* at 608-09, 611.

neither Merrill's counsel nor the prosecution gave Ms. Anderson notice of the Goodspeed depositions or the transcripts.

Ms. Anderson testified that she first saw the depositions two or three years ago during a meeting with Kidd's present counsel.[312] She described her reaction to the news:

> I was—I don't know. It was a mixed reaction because, one, I was really surprised. I think I even was like, "What are you talking about?" if I'm not mistaken, because it was really news to me that this had gone on. Then I think I was kind of angry because I felt like—I mean, how do you spend—literally, this case lasted five, six, seven days. How do we send—spend seven days in such close quarters, all of us crammed into two tables, and nobody bothers to mention it or let me know about it or – there's – you know, I think there was reference to it when you talked about the transcript. I don't remember that being discussed in any way, shape, or form other than some – some word. But there was absolutely no discussion about it in – in – to me, no provision of these transcripts, nothing.[313]

Ms. Anderson's estimation of when this occurred indicates that Kidd promptly amended his petition for writ of habeas corpus to include this claim after learning that the Goodspeed depositions were not taken in compliance with Missouri notice rules.[314] This Court credits Ms. Anderson's uncontradicted testimony that she did not know that these depositions took place until March of 2017.

c. Disclosure of Evidence Of Harris' Reward Money And Drug Trafficking With Bryant

Kidd's petition alleges that the State failed to disclose evidence that Harris was involved in George Bryant's drug trafficking activities and that Harris received a cash reward for his cooperation with the prosecution. Harris' evasiveness and the lack of memory of the assistant prosecutor and detectives make it difficult for this Court to pin down what was known to the

[312] *Id.* at 611.
[313] *Id.*
[314] *See* Amended Petition for Writ of Habeas Corpus, pp. 126-149 (filed March 20, 2017).

police and disclosed or not disclosed at the time of trial. There is substantial evidence undermining Harris' credibility that was not known to the jury, much of it coming from Harris himself. For example, he testified in federal habeas corpus proceedings that he and George Bryant conducted drug transactions with one another. He said, "Me and George used to sell each other weight," meaning, ounces and half ounces of crack cocaine.[315] But he told the police that he and George were just neighbors; "You just don't tell the police, man, you sold dope and bought dope from nobody. You, I mean, you just don't do that."[316] It was known that Harris was a parole absconder at the time of the offense because he admitted in his videotaped interview of March 11, 1996, that he did not come forward as a witness "because I had a parole violation. . . . and I didn't want to go back to jail,"[317] so this information was disclosed to defense counsel. However, Kidd claims that the State did not disclose other impeaching information, including that Harris had an ongoing drug-trafficking relationship with George Bryant that included the time of the offense; again, Harris has admitted to this relationship.[318] Similarly, Harris discussed a reward with several people. When he first called Brooks at the AdHoc Group Against Crime regarding the homicides, a reward was discussed,[319] and Harris' friend and neighbor, Holland, testified that Harris "was like going around telling like, you know, he got some—he got like money and he was on parole or probation and they got his parole or his probation like expunged or taken off of him or something. But he did mention, you know, that he got some money for like testifying."[320] When Harris was asked during the hearing before this Court what he spoke with Brooks about in February, 1996, Harris replied, "about the money thing"; he expected a check

[315] Hrg. Tr. 83.
[316] P. Ex. 144, p. 428.
[317] P. Ex. 88, p. 16.
[318] P. Ex. 144, pp. 398-99, 428-33; P. Ex. 92, pp. 63-67
[319] Hrg. Tr. 459-60.
[320] P. Ex. 144, p. 505

after the trial to help him move.[321] Harris also testified that Kansas City Police Detectives took him to a hotel, where he was housed for two to three weeks before trial.[322]

Ms. Anderson testified that it was difficult to pin down Harris on the details of his testimony,[323] and this Court agrees. Petitioner certainly had a good faith basis for alleging that Harris had other interests in the case that were not disclosed to the defense, and it was reasonable for Ms. Anderson to be upset upon learning the extent of impeachment material that the jury did not hear.[324] For example, during the hearing before this Court, the parties learned for the first time that in the hours leading up to the shootings Harris was making deliveries of crack cocaine that he received from George Bryant just that morning.[325]

Harris testified that he withheld his drug activities from the police, including his drug trafficking relationship with George Bryant because "it just wasn't they business."[326] Ms. McGowan testified that she provided no benefits to Harris,[327] although she also admitted putting Harris up in a hotel before trial.[328] Brooks could not establish whether Harris had actually been paid reward money, nor did he know the source of any money that Harris received.[329] The record does not support a finding that a State agency or actor had possession of evidence of Harris' crack cocaine transactions with the victim of the crime, or evidence that he received reward money. Although such evidence is clearly exculpatory, the record does not support a finding that the State was aware of it and failed to disclose it.

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[321] Hrg. Tr. 101.
[322] *Id.* at 104.
[323] *Id.* at 572.
[324] *Id.*
[325] *Id.* at 125-33.
[326] P. Ex. 144, p. 429.
[327] Hrg. Tr. 530-32.
[328] *Id.* at 521-22.
[329] *Id.* at 471-72.

c. The State Failed To Disclose That It Paid To House Harris In A Hotel

Kidd also alleges that the prosecution failed to disclose to the defense that for two to three weeks before trial, Richard Harris lived in a hotel at the State's expense.[330] Harris testified that Detective Ron Russell called him and told him it was urgent that he come to the station. Once there, police told him that the Goodspeeds were in Kansas City intending to kill him, and they took him to a hotel, where he stayed for a period of time before trial.[331] Ms. Anderson testified that she never had notice that Harris had been put up in a hotel at State's expense.[332] But Ms. McGowan confirmed that Harris was housed for at least one night "paid for by our office or the police department," and that she "wouldn't be surprised" if it were as long as two or three weeks.[333] She speculated that it was not relevant and testified that it was a common practice. "But it's something that we did for witness safety, because we asked them do—I mean, we're talking in general here—and we asked them to really put their lives on the line in some cases, and so we do what we can to help them out. Also, it assists sometimes if they don't have a place to stay."[334] She also said that she would not normally disclose this to the defense.[335]

Respondent contests the exculpatory value of this evidence based on his claim that Harris was put in a hotel for his safety from the Goodspeeds. Even if true, that does not neutralize the exculpatory value of the evidence in this case. Coupled with other nondisclosed evidence that would have given Kidd the information to argue that the Goodspeeds committed the crime with Merrill, the evidence that a witness was being secretly housed to protect him from the Goodspeeds would have bolstered that defense. In addition, the evidence that the State housed

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[330] *See* Second Amended Petition, pp. 74-76.
[331] Hrg. Tr. 103-04.
[332] *Id.* at 615.
[333] Hrg. Tr. 521-22.
[334] *Id.* at 522.
[335] *Id.*

Harris in a hotel would have been useful impeachment evidence to show that he received something of value for his cooperation. Further, the witness intimidation that prompted the police surveillance of the Goodspeeds is consistent with Kidd's defense that the Goodspeeds are Marcus Merrill's accomplices. This Court finds that the State paid for a hotel room for Richard Harris for some length of time before trial, that this information is admissible impeachment evidence, and therefore exculpatory, and that this fact was not disclosed to the defense.

d. Non-Disclosure Limited Kidd's Defense

Ms. Anderson explained how she believed her defense was limited by the State's failure to disclose the foregoing evidence. As has already been noted, Ms. Anderson and Kidd wanted to pursue a two-pronged defense, one focusing on Kidd's alibi, and the other tying the Goodspeeds to the crime and to co-defendant Marcus Merrill. As explained in further detail below, this second avenue of defense could not be pursued because the prosecution did not disclose evidence to support it.

Although the police investigated four suspects, and all evidence pointed to three perpetrators[336], the prosecution charged only two, Kidd and Merrill.[337] Two other suspects, Gary Goodspeed, Jr., and Gary Goodspeed, Sr., were never charged. Ms. McGowan testified that Gary Goodspeed, Sr., was "never presented to me as a defendant."[338] Ms. McGowan believed that Gary Goodspeed, Jr., was involved[339], but claimed Richard Harris' identification of him was tainted when Connie Bryant showed him a photograph of Gary Goodspeed, Jr., before he saw the videotaped lineup.[340]

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[336] *Id.* at 568.
[337] *Id.* at 538, 568.
[338] *Id.* at 532.
[339] *Id.* at 484.
[340] *Id.* at 528.

Merrill's defense was antagonistic to Kidd. Ms. Anderson testified that Merrill's counsel, Kate Ladesh, essentially argued, "My guy didn't do it, but that guy looks better for it than my guy."[341] Ms. Ladesh used the fact that there were four suspects and three perpetrators to suggest that Kidd's former ties to the Goodspeeds made him more likely to be the Goodspeeds' accomplice.[342] Ms. Ladesh argued that evidence as innocuous as Kidd's telephone bill showing his account in his Muslim name, Rashad Muwwakkil, linked Kidd to the Goodspeeds in lieu of Merrill, telling the jury that Muwwakkil "is a name that has been adopted by Gary Goodspeed, Jr., and Gary Goodspeed, Sr., Rashad, Raheem, Abu—one, two, three."[343]

Ms. Anderson explained Kidd's actual relationship to the Goodspeeds:

> [Kidd and the Goodspeeds] lived together in Atlanta and—and Ricky had…changed his name, or they had changed his name. And it is true Ricky knew the Goodspeeds. The Goodspeeds, when his own childhood was kind of in flux, the Goodspeeds did help him and take him in when he was much younger. So that is all true. And Ricky wasn't denying any of that, but I think she tried to tie that together as being something that was much more recent than it actually was, whereas she did not in any way put out what was the reality, which is that Marcus Merrill was actually, you know, with them and very close all the time with them and—and lived in Atlanta, even in closer proximity for sure, even—even during this timeframe.[344]

Ms. Anderson testified that taking Merrill's approach would have been a useful defense to Kidd—arguing to the jury that Merrill, not Kidd, was closely associated with Kidd at the time of the murders—but when asked if she had the means to pursue it at trial, she replied:

> Not really. Not effectively, in my opinion. It would dilute the defense we had and make it almost seem like it wasn't true, you know, if we tried to pursue, you know, this other. And also, we just

[341] *Id.* at 568.
[342] *Id.* at 568-69.
[343] *Id.* at 618 (quoting P. Ex. 141, p. 1358).
[344] *Id.* at 569.

> didn't have an avenue in which—at that time it wasn't known to me—we didn't have an avenue in which we could have elicited the testimony in an effective way...regarding the Goodspeeds.[345]

This "odd man out" approach would have been consistent with Kidd's alibi.[346] The statements that the Goodspeeds made to the police connected them to Merrill and the crime, and distanced them from Kidd, in multiple ways. However, everything Ms. Anderson had at the time of trial "would have been classified as hearsay" according to Ms. Anderson's assessment.[347]

Gary Goodspeed, Jr., on June 27, 1996, told Sgt. Pruetting a number of things that Ms. Anderson wanted to use in Kidd's defense, including the following:

- Merrill denied to detectives that he had seen George Bryant while he was in Kansas City[348], but Goodspeed Jr., stated that he had gone to Bryant's house twice, and Marcus Merrill had been with him on at least one of these occasions.[349] Kayla Bryant said that the men who shot her daddy had been at her house two days before the shooting.[350] Ms. Anderson could have used this fact to implicate Merrill and the Goodspeeds in the murder.[351] The jury only heard Merrill's story—that he denied going to George Bryant's while he was in town.[352] With the alternate version that Gary Goodspeed, Jr., gave, Ms. Anderson could have argued that Merrill's lie showed consciousness of guilt, in addition to corroborating Kayla's statements that the men who shot her daddy had been there before.[353]

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[345] *Id.* at 571.
[346] *Id.* at 619.
[347] *Id.* at 571.
[348] P. Ex. 5, p. 2; P. Ex. 6, p. 1.
[349] P. Ex. 7, p. 18.
[350] P. Ex. 141, p. 521.
[351] Hrg. Tr. 619-20.
[352] P. Ex. 5.
[353] Hrg. Tr. 621.

- Gary Goodspeed, Jr., told Sgt. Pruetting that he knew Ricky Kidd, but that they had not been on speaking terms for a year before the homicide.[354] Ms. Anderson explained that this evidence would have helped Ricky because "it separates Ricky from the three people who we believe were responsible for this homicide, and it would have…created a clear picture for the jury."[355]
- Gary Goodspeed, Jr., told Sgt. Pruetting that he spent the night before the homicides with a girlfriend, Tonya Merritt, and that he was with Gary Goodspeed, Sr., and Marcus Merrill at Jean Bynum's house the morning of the murders.[356] Ms. Anderson explained that this would have helped Ricky Kidd's defense because it acknowledges that the Goodspeeds and Merrill were together on that day when the murder was committed, "absent Ricky Kidd."[357]
- Gary Goodspeed, Jr., told Sgt. Pruetting that he "wasn't having any contact with [Kidd] at the time."[358] Again, Ms. Anderson testified that this would have distanced Kidd from the three who were involved in the crime, and it ties the other three suspects together.[359]
- Gary Goodspeed, Jr., told Sgt. Pruetting that he had spoken to Merrill after he was charged with the crime, but he had not spoken with Kidd.[360] Ms. Anderson would have used this to connect Goodspeed, Jr., to Merrill.[361]
- Gary Goodspeed, Jr., told Sgt. Pruetting that George Bryant was "messing around"

[354] P. Ex. 7.
[355] Hrg. Tr. 622.
[356] P. Ex. 7.
[357] Hrg. Tr. 624.
[358] P. Ex. 7.
[359] Hrg. Tr. 625.
[360] P. Ex. 7.
[361] Hrg. Tr. 625.

with Jean Bynum, the ex-wife of Gary Goodspeed, Sr.[362] Ms. Anderson testified that George Bryant's affair with Jean Bynum could have been used to argue that Goodspeed, Sr., had a possible motive to kill George Bryant, in addition to the robbery motive. "[C[learly, that does at least put into some perspective what the possible motivation would be for Goodspeed, Sr."[363]

Ms. Anderson could not use any of Goodspeed, Jr.'s, admissions in Exhibit 7 without Gary Goodspeed, Jr., as it was all hearsay. Without Goodspeed, Jr., being under subpoena to testify, or having his sworn testimony properly preserved in some other way, Ms. Anderson could not have presented this information to the jury.[364]

This Court finds that Gary Goodspeed, Jr.'s, deposition was not disclosed to Ms. Anderson. This failure to disclose had substantial evidentiary impact on Kidd's defense. Ms. Anderson explained what she would have done if she had been given notice that Goodspeed was giving a deposition in a case in which her client was a party:

> [I]f I had been notified of a deposition and been present in person, I would have given a subpoena to both the Goodspeeds at that time. I would have participated in asking questions at that time that were relevant to my—my client's case. And—and so then I would have expected them to attend the trial as witnesses and, based upon their testimony, you know, I would have either asked questions specifically about what they said tying them to Marcus Merrill. Or if they elected to, say, plead the Fifth or something, I mean, there's an adverse inference from that that I can use and the deposition testimony that I could use.[365]

The Court has no doubt that this is true.

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[362] P. Ex. 7.
[363] Hrg. Tr. 627.
[364] *Id.* at 622-27.
[365] *Id.* at 629.

Ms. Anderson compared Goodspeed, Jr.'s, statement[366], with his March 14, 1996, deposition.[367] She observed, "They're generally consistent because the Goodspeeds kind of basically stick to their…statement that they made to the police that they were all three together, and they were relatively specific about the time and the place and the location and who was with them."[368] Exculpatory information that Ms. Anderson could have presented if she had known about the deposition includes:

- Gary Goodspeed, Jr., said his father had dropped him off at George Bryant's house on the Saturday before the homicide with Marcus Merrill. Ms. Anderson testified that this is helpful because of Kayla Bryant's statement that he men who shot her father had been there recently. This "creates a defense for Ricky that didn't exist without that."[369]
- Gary Goodspeed, Jr., testified that he and Marcus Merrill were cousins.[370] Ms. Anderson testified that she could have used this to connect Merrill with the Goodspeeds.[371]
- Gary Goodspeed, Jr., testified that Gary Goodspeed, Sr., was not talking to Ricky Kidd during the time period leading up to the murders.[372] Ms. Anderson would have used this testimony to show that Rick Kidd and Gary Goodspeed, Sr., "were no longer talking or friendly with one another" when the homicides were committed.[373]
- Gary Goodspeed, Jr., testified that his father stayed at the Adam's Mark Hotel the

[366] P. Ex. 7.
[367] P. Ex. 110.
[368] Hrg. Tr. 627.
[369] *Id.* at 628 (citing P. Ex. 110, p. 28).
[370] P. Ex. 110, p. 11.
[371] Hrg. Tr. 630.
[372] P. Ex. 110, p. 29.
[373] Hrg. Tr. 630.

night before the shooting. Marcus Merrill picked Goodspeed Jr., up at the Village Green Apartments at 10:00 a.m., then they went to the Adam's Mark to pick up his father. They were there around forty-five minutes, and "left about 11:00, 11:30, something like that."[374] Goodspeed Jr., then claimed that they drove to his mother's house, arriving around 12:00 or 12:15.[375] Sgt. Pruetting testified Shannon Harris made the first 911 call at 11:47 a.m., telling the dispatcher, "70th and Monroe. Somebody just got shot."[376] Ms. Anderson testified that "it becomes a much clearer picture that three people, without controversy, committed a murder, and those are the very three people that are hanging around together all—that entire day."[377] With the additional testimony that Goodspeed Jr., did not see Kidd at all while he was in town, "it disconnects Ricky from the three of them."[378]

- Ms. Anderson testified that Gary Goodspeed, Jr.'s, deposition testimony that he talked to Marcus Merrill, but not Kidd, after he was arrested[379], is also helpful to Kidd because it ties Merrill and the Goodspeeds together.[380]

The Court finds that Goodspeed, Jr.'s, deposition testimony puts him, Gary Goodspeed, Sr., and Marcus Merrill together, and without Kidd, at the time of the shooting. The Court agrees with Ms. Anderson that this, and other evidence regarding the relationship between the Goodspeeds and Marcus Merrill and the lack of relationship between the Goodspeeds and Kidd, is substantial, material, exculpatory evidence.

[374] P. Ex. 110, p. 13.
[375] *Id.*
[376] Hrg. Tr. 230-31; P. Ex. 145.
[377] Hrg. Tr. 633.
[378] *Id.*
[379] P. Ex. 110, pp. 22-23.
[380] Hrg. Tr. 633.

Gary Goodspeed, Sr., also made statements to police that Ms. Anderson believed were exculpatory to Kidd. Goodspeed, Sr., made the following admissions to the police in his statement of June 26, 1996:

- Ms. Anderson testified that Gary Goodspeed Sr., admitted that he and Ricky Kidd "were not in good standing. They weren't—they weren't friendly at the time."[381] This evidence would have been helpful to "disconnect [Kidd] from their association."[382]
- Gary Goodspeed, Sr., told the police that he did not see Ricky Kidd on the day of the crime, and that "at the time of the homicides he did not know where Ricky was."[383] Ms. Anderson testified that this would have been helpful to Kidd "because, again, you know, it disconnects Ricky from the three main suspects."[384]
- Gary Goodspeed, Sr., told the police he met with Ricky Kidd at 54th and Jackson the day after the murder to try to resolve their differences.[385] Ms. Anderson testified that this is consistent with conversations she had with Kidd, and with Kidd's June 5, 1996 statement to Sgt. Pruetting.[386] "Ricky had a certainty about who had committed this crime."[387] Ms. Anderson explained that she had concerns about the idea of Ricky testifying regarding his certainty about who committed the homicides:

> We had a lot of limitations…if I had the case file today, knowing all the things that I now know, then we most definitely could have made that an issue. It would have…been a bigger part of the case than it could be in this instance…..[G]iven that we didn't have—we couldn't have the Goodspeeds, we couldn't get them under subpoena, we didn't have the opportunity to participate in a

[381] *Id.* at 635 (quoting P. Ex. 8).
[382] *Id.* at 635.
[383] P. Ex. 8; Hrg. Tr. 640.
[384] Hrg. Tr. 640.
[385] P. Ex. 8, p. 4.
[386] Hrg. Tr. 637.
[387] *Id.*

> deposition, I couldn't call them as witnesses—I couldn't call Marcus Merrill as a witness either. I was limited by the fact that he was a co-defendant, certainly. And so, you know, we were not—it wasn't going to be—we weren't able—able to connect the lines very well, and that seemed sort of out in left field in a way, and I think it created more questions than answers when we had a pretty straightforward alibi that we were going to use.[388]

In preparing Kidd for his direct examination, Ms. Anderson told him, "We're not going to go there," or words to that effect, in reference to talking about the Goodspeeds.[389] She testified, "If I had all the information today—then that I have today, I would have done it differently. There's no doubt about it."[390] When asked if she would present Ricky's testimony about his knowledge of the Goodspeeds' guilt had she had additional context and corroboration, Ms. Anderson testified:

> I think we absolutely could have done that…because…we would have had, you know, the connectors between Marcus Merrill and the two Goodspeeds and–in a way–even though they are disconnecting themselves for the crime, they connected themselves together in a way that made it seem, you know, incriminating. And that separated Ricky from the three of them.[391]

This Court finds Ms. Anderson's testimony believable and truthful. For the same reasons that Ms. Anderson believed she could not use Gary Goodspeed, Jr.'s, statements to the police, she could not use Gary Goodspeed, Sr.'s, police interview because it was also hearsay. Ms. Anderson needed sworn testimony from the Goodspeeds to present this theory in a credible manner to the jury.[392]

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[388] *Id.* at 637-38.
[389] *Id.* at 638.
[390] *Id.* at 639.
[391] *Id.*
[392] *Id.* at 642.

Ms. Anderson read the entirety of Gary Goodspeed, Sr.'s, deposition[393], and found that it contained a number of things helpful to Kidd's defense, including:

- Goodspeed, Sr., visited Marcus Merrill in the jail before Merrill's trial.[394]
- Goodspeed, Sr., testified that he was with Marcus Merrill and Gary Goodspeed, Jr., at the time of the homicide.[395]
- Goodspeed, Sr., testified that "Ricky and myself had a fallout in Georgia when he was there."[396]
- Goodspeed, Sr.'s, testimony that he saw Ricky Kidd at the Adam's Mark on Monday, the day before the murders, and again at 54th and Jackson on Wednesday, and that this was their only contact, would have been helpful to Kidd's defense.[397] This corroborated Kidd's own account of his contact with Goodspeed, Sr. Ms. Anderson noted that in his deposition Goodspeed, Sr. "does not in any way say that he was with Ricky on—Ricky Kidd on the day of the murder."[398]

Ms. Anderson testified that Kidd's testimony in the federal habeas corpus hearing that he told Ms. Anderson about his meetings with Goodspeed, Sr., is true.[399] With access to the Goodspeeds' sworn testimony, Ms. Anderson could have prepared and advised Kidd to testify about his interactions with the Goodspeeds before and after the crime. Kidd could have told the jury why he was so certain that it was the Goodspeeds who committed this crime with Marcus

[393] P. Ex. 111.
[394] Hrg. Tr. 640.
[395] *Id.*
[396] *Id.*
[397] *Id.* at 641.
[398] *Id.*
[399] *Id.*

Merrill. Gray could have testified to her knowledge about Kidd's conversation with Goodspeed, Sr., on February 7, 1996 as well.[400]

If Ms. Anderson had been given access to the depositions of the Goodspeeds she also would have cross-examined the detectives who testified at trial about the statements they obtained from the Goodspeeds, and she would have challenged the shortcomings of their investigation. For example, the police never showed a photo of Goodspeed, Sr., to Kayla Bryant; Kayla did not view the video line-up, taken in Atlanta, that included both Goodspeeds.[401] Ms. Anderson elaborated:

> [I]t just seemed strange to me at the time. You know, we have three people. To me, the Goodspeeds were into it up to their eyebrows and somehow or another we were dancing around the issue the entire trial and—and trying to keep the jury from knowing as much as we could about them, which seemed strange to me. At—it was frustrating, because it was hard for me to get into it and nobody else seemed to want to, really. So, yes, that could have been a good impeachment tool. I mean, why wouldn't they have shown, you know, Kayla. They knew they were suspects. It seemed, again, strange to me that we would be avoiding implicating them in something that we all felt pretty strongly that they were involved in.[402]

Additionally, Ms. Anderson could have explored why the police did not attempt to collect footwear from the Goodspeeds that might have been compared to footprints at the scene of the crime.[403]

Ms. Anderson testified that if she had been notified in advance of the depositions, she would have appeared at the depositions on Kidd's behalf and asked questions of the Goodspeeds and she would have brought a trial subpoena to serve them, and then called them as witnesses at

[400] P. Ex. 143, pp. 216, 222-24.
[401] Hrg. Tr. 642.
[402] *Id.* at 642-43.
[403] *Id.* at 644.

trial. If the Goodspeeds had taken the stand at Kidd's trial and asserted their Fifth Amendment privilege against self-incrimination, Ms. Anderson would have been able to admit the depositions as sworn testimony subject to cross-examination by an unavailable declarant.[404] Similarly, if the Goodspeeds had testified and changed their stories, she could have used the deposition to impeach them.[405] This Court credits Ms. Anderson's testimony that access to the Goodspeeds' depositions, or transcripts of said depositions would have enabled her to give Kidd's defense a new, persuasive dimension in addition to his credible alibi.

Ms. Anderson's testimony also addressed how she would have used information about Richard Harris being put up in a hotel at the State's expense leading up to trial:

> I would have been able to impeach him more effectively. There's no question about that. His credibility—I always thought his credibility was questionable anyway. But, you know, the way he kind of portrayed himself, although hostile, you know, he—he also kind of made it seem like, well, I'm just a, you know, good guy doing a good deed. And so that would have been in question at that point in time.[406]

Kidd has presented transcripts, testimony and evidence confirming Ms. Anderson's impression "that [Harris] was a player….my impression or my gut feeling about Richard Harris was that he was more than just a guy who was an innocent bystander, a do-gooder who wanted to come forward for the benefit of the community."[407] Ms. Anderson testified that "based upon [Harris's] demeanor when I questioned him and deposed him, was that he was hiding something, that he—there was more to him than he was revealing."[408] This Court observed Richard Harris

[404] *Id.*
[405] *Id.* at 644-45.
[406] *Id.* at 645-46.
[407] *Id.* at 663.
[408] *Id.*

and listened to his testimony and received other evidence that confirms Ms. Anderson's impressions of Harris.

PART 3. CONCLUSIONS OF LAW

A. THE BRADY CLAIM

Petitioner alleges that the prosecutor did not disclose material, exculpatory evidence, including the fact that alternative suspects Gary Goodspeed, Sr., and Gary Goodspeed, Jr., were under police surveillance for having threatened witnesses, that both Goodspeeds were in the Office of the Prosecuting Attorney giving depositions on the Friday before trial, and that State's witness Richard Harris was housed in a hotel at the prosecution's expense a period of time before trial.[409] Petitioner argues that the prosecutor's nondisclosure deprived him of the opportunity to supplement his alibi defense with persuasive evidence that the three men who killed George Bryant and Oscar Bridges are Marcus Merrill, Gary Goodspeed, Sr., and Gary Goodspeed, Jr., to demonstrate Richard Harris' interest in misidentifying Kidd, and to attack the thoroughness of the investigation.

i. Procedural history

Habeas corpus is "the last judicial inquiry into the validity of a criminal conviction and serves as 'a bulwark against convictions that violate fundamental fairness.'"[410] The Missouri Supreme Court recognized, "There is a balance that must be struck between the need for finality

[409] Petitioner also alleged that Harris received cash for his cooperation with the prosecution. Although Harris admitted at the evidentiary hearing to receiving $400 relating to his cooperation in this case, Petitioner concedes that the record does not indicate that he received funds from the State, or that the State was aware that Harris received funds from nongovernmental sources. Hrg. Tr. 101, 459-60, 531.

[410] *State ex rel. Amrine v. Roper*, 102 S.W.3d 541, 545 (Mo. banc 2003) (quoting *Engle v. Isaac*, 456 U.S. 107, 126 (1982)).

of judgments and the need to accommodate the claims of a purportedly innocent defendant wrongfully convicted."[411]

In affirming the grant of habeas corpus relief by a judge of this circuit, the Missouri Court of Appeals, Western District, summarized the conditions under which the writ of habeas corpus is available to a petitioner such as Kidd:

> The cumulative effect of *Simmons*, *Clay*, and *Jaynes* is to permit review of procedurally barred claims in a habeas proceeding if: (1) the claim relates to a jurisdictional (authority) issue; or (2) the petitioner establishes manifest injustice because newly discovered evidence makes it is more likely than not that no reasonable juror would have convicted the petitioner (a "gateway of innocence" claim); or (3) the petitioner establishes the presence of an objective factor external to the defense, which impeded the petitioner's ability to comply with the procedural rules for review of claims, and which has worked to the petitioner's actual and substantive disadvantage infecting his entire trial with error of constitutional dimensions (a "gateway cause and prejudice" claim). Thus "[a] showing either of cause and prejudice or of actual innocence acts as a 'gateway' that entitles the prisoner to review on the merits of the prisoner's otherwise defaulted constitutional claims." *Amrine,* 102 S.W.3d at 546.[412]

This Court must apply these principles to the procedural issues raised by Respondent.

Respondent argues that this Court should not consider evidence or claims that were not presented on appeal or in post-conviction proceedings, and that Kidd is not the victim of a manifest injustice. Kidd contends, and this Court so finds, that he has been diligent in asserting his innocence and challenging his conviction, and that innocence is the ultimate equity justifying the grant of habeas corpus relief.[413]

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[411] *State ex rel. Nixon v. Jaynes*, 63 S.W.3d 210, 215 (Mo. banc 2001).
[412] *State ex rel. Koster v. McElwain*, 340 S.W.3d 221, 244-45 (Mo. Ct. App. 2011).
[413] These issues were argued and briefed in previous litigation herein. Judge Chapman's August 27, 2018 Order denying summary judgment on Kidd's Claim 9, alleging actual innocence, and Claim 10, alleging violations of *Brady v. Maryland*, and setting the matter for evidentiary hearing, necessarily

ii. The "Cause-and-Prejudice" Gateway

Kidd presents both "cause-and-prejudice" and "actual innocence" as gateways through which this Court may reach his claims for relief. The Missouri Court of Appeals has noted that where a petitioner satisfies the "cause-and-prejudice" standard for reaching a claim, and the merits of the claim justify habeas corpus relief, that in itself is sufficient to issue the writ of habeas corpus.[414] Therefore, this Court begins its analysis with the less demanding cause-and-prejudice issue with respect to Kidd's *Brady v. Maryland* claim.

The Missouri Supreme Court described the cause-and-prejudice standard as follows:

> The United States Supreme Court explained that the "cause" of procedural default "must ordinarily turn on whether the prisoner can show that some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule." *Murray v. Carrier*, 477 U.S. 478, 488 (1986).
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> To establish the "prejudice" necessary to overcome procedural default, a petitioner seeking to vacate, set aside, or correct a conviction or sentence in federal habeas bears the burden of showing, not merely that errors at his trial created possibility of prejudice, but that they "worked to his actual and substantial disadvantage, infecting his entire trial with error of constitutional dimensions." *United States v. Frady*, 456 U.S. 152, 170 (1982). *See also, Strickland v. Washington*, 466 U.S. 668, 695 (1984) and *Schlup v. Delo*, 513 U.S. at 332-334 (O'Connor, J.).[415]

Kidd has met this standard with respect to his *Brady* claim.

Kidd's *Brady* claim is based on evidence that was known to the prosecution and not disclosed to Kidd or his counsel, including evidence that the alternative suspects, Gary Goodspeed, Sr., and Gary Goodspeed, Jr., were under police surveillance and had given sworn

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rejected Respondent's procedural arguments. Respondent proposed a summary judgment order which both Judge Chapman and this Court declined to adopt.

[414] *McElwain*, 340 S.W.3d at 257-58.

[415] *Jaynes*, 63 S.W.3d at 215-16.

depositions in which the prosecuting attorney participated, and that State's witness Richard Harris was being housed at the State's expense for two to three weeks before trial. The fact that trial counsel had not been given notice that co-defendant Merrill and the State had conducted depositions of Gary Goodspeed, Sr., and Gary Goodspeed, Jr., came to light during these habeas proceedings when present counsel for Kidd met with his trial counsel, Teresa Anderson, to discuss the previously undisclosed surveillance and hotel arrangements. During the course of that meeting with Ms. Anderson, present counsel learned, for the first time, that she had neither been told about the State's surveillance records of the Goodspeeds, its efforts to house Harris, or the depositions of the Goodspeeds as she had not been provided formal notice, nor provided copies of the transcripts.[416] Until this happened, neither Ms. Anderson nor Kidd knew or had any reason to know that the Goodspeed depositions had been taken the Friday before trial. This Court believes Ms. Anderson's testimony that she was surprised when she found out about the depositions:

> I was—I don't know. It was a mixed reaction because, one, I was really surprised. I think I even was like, "What are you talking about?" if I'm not mistaken, because it was really news to me that this had gone on. Then I think I was kind of angry because I felt like—I mean, how do you spend—literally, this case lasted five, six, seven days. How do we send—spend seven days in such close quarters, all of us crammed into two tables, and nobody bothers to mention it or let me know about it or—there's—you know, I think there was reference to it when you talked about the transcript. I don't remember that being discussed in any way, shape, or form other than some—some word. But there was absolutely no discussion about it in—in—to me, no provision of these transcripts, nothing.[417]

[416] Hrg. Tr. 611.
[417] *Id.*

This Court finds Ms. Anderson's testimony credible; nothing in the record suggests that the State had informed Ms. Anderson at the time of trial that the Goodspeeds' depositions had been taken or, more importantly that transcripts of their sworn testimony existed before trial. Nor was Ms. Anderson informed that the police had the Goodspeeds under surveillance while charges were pending against Kidd[418] and that the State paid for key witness Richard Harris to stay in a hotel for some period before trial.[419]

The essence of Respondent's argument is that because Kidd did not raise his *Brady* claim on direct appeal or in post-conviction proceedings, he may not do so now, even "absent some negligence on his part."[420] Respondent's no-excuse position is inconsistent with the equitable nature of habeas corpus review.[421] In adopting the cause-and-prejudice standard for habeas cases, the Supreme Court observed that "equity has always been characterized by its flexibility and regard for the necessities of each case."[422] Further, imposing an obligation to raise a claim based on the suppression of evidence of which neither Kidd nor his counsel had notice would be unfair and potentially disruptive to the judicial system. "Proper respect for state procedures counsels against a requirement that all possible claims be raised in state collateral proceedings, even when no known facts support them."[423] The notion of "cause" is consistent with these principles.

The law is clear that the concept of procedural default and cause cannot be divorced from the petitioner's duty of diligence. The doctrines of abuse of the writ and procedural default "both invoke equitable principles to define the court's discretion to excuse pleading and procedural

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[418] S*ee* P. Ex. 135; Hrg. Tr. 601-02.
[419] Hrg. Tr. 615.
[420] Respondent's Reply in Support of Motion for Summary Judgment on Petition for Writ of Habeas Corpus, p. 5 (filed May 26, 2017).
[421] *See Schlup v. Delo*, 513 U.S. 298, 319 ("[H]abeas corpus is, at its core, an equitable remedy.").
[422] *Wainwright v. Sykes,* 433 U.S. 72, 96 n.4 (1977) (Stevens, J., concurring).
[423] *Strickler v. Green,* 527 U.S. 263, 286 (1999).

requirements for petitioners who could not comply with them in the exercise of reasonable care and diligence."[424] Omission of a claim in prior proceedings is not a procedural default absent some failure on the prisoner's part; "in its customary and preferred sense, 'fail' connotes some omission, fault, or negligence on the part of the person who has failed to do something."[425]

McCleskey and *Williams* make clear that "[t]he question is not whether the facts could have been discovered but instead whether the prisoner was diligent in his efforts."[426] Diligence requires the pursuit of claims and evidence as to which the petitioner has notice. A procedural default does not occur if "[t]he trial record contains no evidence which would have put a reasonable attorney on notice" of the factual basis for the prisoner's claim.[427]

In arguing that Kidd defaulted his *Brady* claim, Respondent points to no evidence in the record putting Kidd on notice. Without such notice, appellate and post-conviction counsel could only rely on "[t]he presumption, well established by 'tradition and experience,' that prosecutors have fully 'discharged their official duties.'"[428] Respondent established that there was no reason to believe that the Goodspeed depositions had been withheld from Kidd's defense; Ms. McGowan presumed that Merrill's counsel, Ms. Spencer, had complied with Missouri Rule 57.03 and informed Ms. Anderson of the Goodspeed depositions.[429] However, that did not absolve Ms. McGowan of her duty to disclose.[430] Ms. McGowan knew that Ms. Anderson was not at the deposition, and that under the ordinary operation of the rules Ms. Spencer would not

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[424] *McCleskey v. Zant*, 499 U.S. 467, 493 (1991) (emphasis added); *see also Merriweather v. Grandison*, 904 S.W.2d 485, 489 (Mo. Ct. App. 1995).
[425] *Williams v. Taylor*, 529 U.S. 420, 431 (2000).
[426] *Id.* at 435.
[427] *Id.* at 442.
[428] *Strickler*, 527 U.S. at 287 (quoting *United States v. Mezzanatto*, 513 U.S. 196, 210 (1995)).
[429] Hrg. Tr. 533-34.
[430] Rule 57.03(g)(4) which was then in effect provided, "Upon request and payment therefore, the officer shall furnish a copy of the deposition to any party or to the deponent." P. Ex. 157, Mo. Sup. Ct. R. 57.03 (1994).

provide Ms. Anderson a copy of the depositions. Further, she had actual knowledge of Ms. Anderson's intention to subpoena the Goodspeeds and use them in Kidd's defense. Ms. McGowan knew or should have known that she had an obligation under *Brady* to disclose the depositions and most importantly the transcripts.

Ms. McGowan does not dispute Ms. Anderson's testimony. Ms. McGowan testified that she did not recall turning over the Goodspeed surveillance logs to Kidd. Further, that if her office paid for a witness to stay in a hotel she would not normally disclose that to the defense, and that she did not give Ms. Anderson notice of the Goodspeed depositions "because it was not my deposition," nor did she recall disclosing the deposition transcripts to Ms. Anderson.[431] This Court finds that neither Kidd nor his counsel had notice of constitutional claims arising from the fact that Ms. Anderson was not notified of the Goodspeed depositions or transcripts, the police surveillance of the Goodspeeds, or Richard Harris' hotel bills that were paid by the police. This Court finds that there is adequate cause to overcome Respondent's claim that Kidd defaulted Claim 10.

Of course, Kidd must also meet the prejudice prong of the cause and prejudice test. Because that assessment requires a detailed analysis of the evidence supporting Kidd's *Brady* claim and the potential impact of the evidence on the verdict, this Court will discuss the prejudice issue in connection with the substantive claim below.

This Court finds that Kidd has satisfied his burden to show that the State failed to disclose exculpatory evidence to the defense, and that the undisclosed evidence is material to the outcome. There is more than a reasonable probability that the totality of the undisclosed evidence would have altered the outcome of Kidd's trial.

[431] Hrg. Tr. 498, 514, 522-23, 536.

iii. The Evidence is Exculpatory

Kidd has identified specific items of evidence known to the prosecution and not disclosed, including the depositions of Gary Goodspeed, Jr., and Gary Goodspeed, Sr.[432], records of police surveillance of the Goodspeeds[433], who were in town to intimidate witnesses, and Richard Harris' hotel stay at the State's expense just before Kidd's trial. Kidd argues that these items, viewed collectively, are exculpatory because they support Kidd's assertion that the true perpetrators of the homicides were Gary Goodspeed, Sr., Gary Goodspeed, Jr., and Marcus Merrill, and that Richard Harris is not a believable witness. Respondent argues that the evidence is not exculpatory because the Goodspeed depositions and Goodspeed surveillance information are "not helpful" to Kidd, and because Harris' testimony was already impeached at trial by his parole status.[434]

Respondent's position makes no allowance for Ms. Anderson's persuasive explanation for why and how these materials are exculpatory. Ms. Anderson testified, and this Court has found, that Gary Goodspeed, Sr., and Gary Goodspeed, Jr., are viable alternative suspects for the murders for which Kidd was on trial. She explained in detail how she would have used the depositions to further a defense that the crime was committed by Gary Goodspeed, Sr., Gary Goodspeed, Jr., and Marcus Merrill, with no involvement by Ricky Kidd. Kidd knew that the Goodspeeds were responsible for the crime, but Ms. Anderson could not present that evidence in her case-in-chief without the context provided by the Goodspeeds' depositions and the fact that they were being surveilled by law enforcement. Both Goodspeed, Jr., and Goodspeed, Sr., attempt to alibi the obviously guilty co-defendant, Marcus Merrill, but not Kidd. The

[432] P. Ex. 110, 111.
[433] P. Ex. 135.
[434] Motion for Summary Judgment, p. 11 (filed April 17, 2017).

Goodspeeds connect themselves with Marcus Merrill through family ties, employment, residence, travel plans, and association with one another while in Kansas City. At the same time, the Goodspeeds establish that they did not associate with Kidd on the day of the offense, and that Kidd and the Goodspeeds had been estranged for about a year over a conflict that occurred when Kidd lived in Atlanta, Georgia. Thus, this Court finds that the evidence implicating the Goodspeeds is exculpatory. Further, the record establishes that Ms. Anderson made her desire to locate and subpoena the Goodspeeds known to Ms. McGowan, and in addition to the depositions that took place the week before Kidd's trial, the surveillance logs would have enabled her to find them, and helped to convince a jury of their guilt

Additionally, Respondent's argument that the surveillance logs and hotel payments are not helpful to Kidd is equally unpersuasive. With the ability to establish the complete context of the Goodspeeds' connection to the crime through their sworn testimony, it would have been Merrill, not Kidd, who suffered the potential prejudice flowing from evidence that the Goodspeeds attempted to intimidate witnesses. Further, Ms. Anderson had little material to impeach Richard Harris; instead, the State was able to portray him as a good neighbor, coming forward for no reason other than to do the right thing. Demonstrating that he received a tangible benefit for his testimony could have opened up the opportunity to attack his credibility. The rule stated in Brady applies to evidence undermining witness credibility.[435] Because Harris' identification of Kidd as the one of the perpetrators was already weak[436], a further attack on his credibility would have helped Kidd create the perception of Harris as unreliable.

[435] *Giglio v. United States*, 405 U. S. 150, 153–154 (1972).
[436] *See* PART 2.b.III.a, *supra*

Respondent's position ignores the fact that determining the exculpatory nature of evidence requires this Court to consider the use which defense counsel would have made of the evidence. "It appears to us…that the United States Supreme Court would have us ask whether or not the undisclosed evidence would have been significant to the defendant in the way that he tried his case: Would it have provided him with plausible and persuasive evidence to support his theory of innocence?"[437] The trial prosecutor's testimony supports this principle:

> Q. [by Ms. Dodge] So if three suspects out of the four suspects that are developed in a case are alibiing themselves together on the date of the crime and they leave the fourth man out in their own testimony repeatedly, do you think that that evidence would be beneficial to the odd man out?
>
> A. I guess it could be. It would be up to the attorney to make that decision.[438]

Ms. McGowan finally conceded, "Once it's handed over, any evidence that we give to the defense, yes, it's up to the defense to decide and to frame their case accordingly."[439]

This Court has credited Ms. Anderson's explanation for how this evidence would have been helpful to her case. Kidd has more than met his burden of showing that the evidence is exculpatory.

iv. The Evidence Was Not Disclosed

The record establishes conclusively that Ms. Anderson did not receive advance notice of the Goodspeed depositions. She was not told they were going to be taken, she was not told when they were happening, she was not told that they had occurred, and, most importantly, she was not told that a transcript of the depositions existed. There is no dispute that the Goodspeed

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[437] *Buchli v. State*, 242 S.W.3d 449, 454 (Mo. Ct. App. 2007) (quoting *State v. Parker*, 198 S.W.3d 178, 180 (Mo. Ct. App. 2006)).
[438] Hrg. Tr. 538.
[439] *Id.* at 539.

depositions were taken by Merrill's counsel, Mona Spencer, in noncompliance with the notice provisions of Rule 57.03 (1994). However, Ms. McGowan was also present for the depositions, knowing that Ms. Anderson intended to subpoena the Goodspeeds, and Ms. McGowan noted Ms. Anderson's absence from the depositions. The prosecution had actual knowledge of the depositions and had a duty to disclose the presence of the Goodspeeds and a duty to provide the transcripts. Further, the State admits that the other two pieces of *Brady* material, the surveillance records and Harris' hotel stay were not disclosed.[440] The only defense posed by Respondent to the nondisclosure element is one that is not supported in the law: that some other person or entity also had a duty to disclose information that was within the prosecutor's actual knowledge. The fact that the nondisclosed evidence was produced by a codefendant taking depositions of alternative suspects without notice to Kidd's counsel makes the prosecutor's nondisclosure no less troubling. The record establishes that Ms. McGowan had direct knowledge of Ms. Anderson's interest in the Goodspeeds, and of the content of the information that was not disclosed. Prudence dictates disclosure:

> This means, naturally, that a prosecutor anxious about tacking too close to the wind will disclose a favorable piece of evidence. See *Agurs,* 427 U.S. at 108 ("The prudent prosecutor will resolve doubtful questions in favor of disclosure"). This is as it should be. Such disclosure will serve to justify trust in the prosecutor as "the representative...of a sovereignty...whose interest...in a criminal prosecution is not that it shall win a case, but that justice shall be done."[441]

This Court concludes that the prosecution failed in its duty to disclose exculpatory evidence to Kidd's defense prior to trial.

v. The Undisclosed Evidence Was Material to Kidd's Defense

[440] Hrg. Tr. 514, 523, 536.
[441] *Kyles*, 514 U.S. 419, 439 (1995) (quoting *Berger v. United States*, 295 U.S. 78, 88 (1935)).

By any measure, the course of justice in the deaths of George Bryant and Oscar Bridges remains incomplete. Two people, Marcus Merrill and Ricky Kidd, were convicted of a crime that was unquestionably committed by three people, and two suspects who admitted that they were with Merrill at the time of the offense, without Ricky Kidd, have never been charged. This Court credits Ms. Anderson's testimony that the nondisclosure of exculpatory evidence prevented her from pursuing a defense that was based on the complete truth about who committed the homicides. Even on the morning of trial, Ms. Anderson had her investigator go by Jean Bynum's, Goodspeed, Sr.'s wife and Goodspeed, Jr.'s mother, house again, looking for the Goodspeeds to subpoena them to testify; "You know, just trying to figure out where we might find them even that morning. But at some point in time you kind of have to go, okay, *we just got to go with what we have*."[442] Without the Goodspeeds, "we weren't able…to connect the lines very well, and that seemed sort of out in left field in a way, and I think it created more questions than answers when we had a pretty straightforward alibi that we were going to use."[443]

To determine "whether…evidence meets the test for Brady prejudice, this Court must assess whether the evidence at issue is material to [Kidd's] case."[444] In assessing whether the undisclosed evidence is material under the *Brady* standard, this Court must consider how a competent defense lawyer would have used the evidence in defense of her client.[445] Respondent argues that Kayla Bryant's out-of-court identification of Kidd and Richard Harris's in-court identification precludes a finding of materiality, but that is not a correct application of *Brady's* materiality standard. In *Kyles,* for example, the *Brady* evidence established "that two out of the four eyewitnesses testifying were unreliable," but the existence of two unimpeached

[442] Hrg. Tr. 594 (emphasis added).
[443] *Id.* at 638.
[444] *State ex rel. Engel v. Dormire,* 304 S.W.3d 120, 128 (Mo. banc 2010).
[445] *See, e.g., Kyles,* 514 U.S. at 442-51.

eyewitnesses did not prevent Kyles from satisfying *Brady's* materiality standard.[446] The materiality element of *Brady* "is not a sufficiency of evidence test."[447] The question is not whether, in light of the new evidence, the jury could have convicted Kidd, but whether "it would have done so."[448] Thus, to prevail on a *Brady* claim, Kidd need not show that he "more likely than not" would have been acquitted had the new evidence been admitted.[449] He must show only that the new evidence is sufficient to "undermine confidence" in the verdict.[450] "Given this legal standard, [the defendant] can prevail even if…the undisclosed information may not have affected the jury's verdict."[451] This Court finds that Kidd has met that standard.

The State's case against Kidd is a logical starting point for this Court's analysis of the evidence. "[I]f the verdict is already of questionable validity, additional evidence of relatively minor importance might be sufficient to create a reasonable doubt."[452] Kidd's conviction rests primarily upon Richard Harris, an unreliable witness whose identification of Kidd has always been questionable in motive and content, and an out-of-court identification of four-year-old Kayla Bryant that she could not, and did not repeat at trial. Harris's testimony is unreliable and riddled with inconsistencies[453] and there is substantial reason to credit young Kayla's in-court testimony over her out-of-court identification of Kidd under highly suggestive circumstances.[454] No other evidence, physical or circumstantial, connected Kidd to the crime. Against this evidence, Kidd offered credible alibi testimony, corroborated by multiple, independent sources,

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[446] *Id.* at 454.
[447] *Id.* at 434.
[448] *Smith v. Cain*, 565 U.S. 73, 76 (2012) (Court's emphasis).
[449] *Id.* at 75.
[450] *Id.*
[451] *Weary v. Cain*, 577 U.S. __, 136 S. Ct. 1002, 1006, n.6 (2016) (per curiam).
[452] *United States* v. *Agurs*, 427 U. S. 97, 113 (1976).
[453] *See* Part 2.B.iii.a.
[454] *See* Part 2.B.iii.b.

that he was with Monica Gray during the commission of the crime. As previously stated, this Court finds Ms. Gray's testimony credible.

The Court has discussed issues of witness credibility in connection with Kidd's Claim 9 alleging actual innocence. Because Kayla Bryant virtually recanted her identification of Kidd in front of the jury and because the procedure used to establish the out-of-court identification was unreliable[455], the prosecution's case comes down to Richard Harris, who claimed that he was walking home from a friend's house when he saw George Bryant run out of his house pursued by two men, one of whom he identified as Ricky Kidd.[456] The prosecution portrayed Harris as a heroic neighbor in its closing argument to the jury:

> And when you return guilty verdicts on both these men, you will tell them also that you believe Richard Harris, a man who has lived in fear, and that his living in fear will not be in vain because he's come in here, and he's brave enough to be one of the people in the neighborhood who come forward. You heard other people in the neighborhood who saw what happened but they just won't do anything about it.[457]

The prosecution argued that Harris "has been consistent since day one," and that the anger he displayed during his cross-examination by Ms. Anderson "makes him even more credible" because "because he thought they were trying to make him sound like a liar, and he knew what he saw."[458] Ms. Anderson, on the other hand, invited the jury to compare and contrast Harris's testimony with that of Kidd's alibi witnesses, arguing, "The State doesn't want you to believe [Kidd's] witnesses' minor discrepancies. Okay, if that makes them a liar, what does that make Richard Harris?"[459] A review of the whole record makes it clear that Kidd's conviction rests

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[455] *See id.*
[456] P. Ex. 141, pp. 562-77.
[457] *Id.* at 1389.
[458] *Id.* at 1372
[459] *Id.* at 1345.

primarily on the credibility of Richard Harris' in-court identification, and the only available counter-narrative presented was Kidd's alibi. The *Brady* analysis requires this Court to assess how this contest would have been altered by disclosure of the Goodspeed depositions, their witness threats and resulting surveillance, and Richard Harris' extended hotel stay at the State's expense. This analysis includes what a reasonably competent attorney such as Ms. Anderson would have done had proper disclosure been forthcoming.

Following the directive in *Buchli* and *Kyles,* this Court finds that the new evidence would have been "'significant to the defendant in the way that he tried his case.'"[460] Further, in determining the materiality of the evidence, this Court "evaluate[s] the tendency and force of the undisclosed evidence item by item," and then "evaluate[s] its cumulative effect for purposes of materiality."[461] Ms. Anderson testified truthfully that her lack of access to the Goodspeeds, the surveillance records, evidence of their threats against witnesses that had the prosecution hiding witnesses in hotels limited her defense. She wanted to pursue a defense that supplemented her alibi with an assertive, well-founded evidence that this crime was committed by Gary Goodspeed, Sr., Gary Goodspeed, Jr., and Marcus Merrill, and that Richard Harris "was a player,"[462] which the evidence of his hotel stay would have helped her do.[463]

Had Ms. Anderson been given notice of the Goodspeed depositions, she would have come to the depositions armed with a trial subpoena to assure their attendance.[464] She would have gained additional information in order to question the Goodspeeds further. For example, Ms. Anderson could have inquired as to whether George Bryant ever called Goodspeed, Jr., his

[460] *Buchli*, 242 S.W.3d at 454 (quoting *Parker*, 198 S.W.3d at 180).
[461] *Kyles*, 514 U.S. at 436 n.10 (emphasis added).
[462] Hrg. Tr. 663
[463] *Id.* at 664.
[464] *Id.* at 629.

"brother" or 'little brother."[465] Ms. Anderson could have used the Goodspeeds' testimony to establish that the Goodspeeds and Merrill gave the police the same obviously phony alibi.[466] A map of the area showing places of interest on February 6, 1996, makes it clear that their weak alibi has holes, leaving them plenty of time to commit the crime between meeting at the Adam's Mark that morning and arriving at Bynum's house around noon. Far from being an alibi, this evidence is incriminating, as the three perpetrators place themselves together with the rental car used in the homicide.[467] Ms. Anderson could have used this information to tie Merrill and the Goodspeeds together and point towards the three of them as the actual killers[468], explaining that with these depositions, "it becomes a much clearer picture that three people, without controversy, committed a murder, and those are the very three people that are hanging around together all—that entire day."[469]

Other details in the deposition transcripts corroborate Kayla's statements immediately following the crime and distance Ricky Kidd from the crime. Kayla Bryant stated that the men who shot her daddy were at her house two days before the crime. Detective Russell agreed that this is an important fact "because she's recognizing [the shooters]."[470] Gary Goodspeed, Jr., testified in his deposition that he and Merrill visited George Bryant at his house on the Friday

[465] Marcus Merrill testified at Kidd's federal habeas that George Bryant called Goodspeed, Jr., "Little Brother," P. Ex. 142, p. 18, which explains Kayla Bryant's statement to police that "Daddy's brother" shot her daddy, "but it wasn't Daddy's brother." P. Ex. 141, p. 528. Sgt. Pruetting testified that no one figured out who "Daddy's brother" was. Hrg. Tr. 197. Detectives asked Richard Harris if he had ever before seen the perpetrator he had identified as Gary Goodspeed, Jr., and Harris replied, "No, sir, but, I thought it was one of George's cousins or brothers or something, 'cause he looked, you know 'em to me." P. Ex. 89, p. 4.
[466] Hrg. Tr. 627
[467] *Id.* at 225-26, 627.
[468] *Id.* at 622-24.
[469] *Id.* at 633.
[470] *Id.* at 335-36.

and Saturday before the murder.[471] Ms. Anderson could have argued that it was the Goodspeeds and Merrill who Kayla Bryant saw in the days before her father's death, and not Kidd. Further, in Marcus Merrill's statement to police he denied that he had been to Bryant's house earlier, so Ms. Anderson could have used this lie to impeach him and infer consciousness of guilt.[472] Ms. Anderson also could have established that George Bryant was having an affair with Goodspeed, Sr.'s ex-wife, Jean Bynum, and argued that this was part of the motive for him to kill Bryant.[473] Curiously, Gary Goodspeed, Jr. told Sgt. Pruetting that his father had told him that George Bryant was killed at 11:45 a.m.[474]; the first 911 call after the homicide was made at exactly 11:47 a.m.[475] Such precise knowledge of the time of the offense could have been used to raise a powerful inference of guilt, as Detective Jay Thompson admitted during the evidentiary hearing.[476]

In addition to tying Merrill and the Goodspeeds together at the time of the crime and establishing circumstances consistent with their commission of the crime, Ms. Anderson could have used the Goodspeed depositions to distance Kidd from the three robbers and exclude him as a participant in the crime. Both Goodspeeds had a falling out with Kidd a year before the crime.[477] Merrill, Goodspeed, Jr., and Goodspeed, Sr. all told police and testified that they did not see Ricky Kidd at all on the day of the offense.[478] Ms. Anderson could have used this information to break the connection between Kidd and the true perpetrators. Merrill's defense—that Kidd and the Goodspeeds committed the crime together, and that Merrill was the odd man

[471] P. Ex. 110, pp. 19-20.
[472] P. Ex. 5; Hrg. Tr. 667.
[473] Hrg. Tr. 627; P. Ex. 8, p. 3; P. Ex. 111, p. 19; P. Ex. 142, p. 77.
[474] Hrg Tr. 239; P. Ex. 7, p. 1.
[475] Hrg. Tr. 239.
[476] *Id.* at 433-34.
[477] Hrg. Tr. 625; P. Ex. 110, pp. 29-30; P. Ex. 111, pp. 21-22.
[478] P. Ex. 5, p. 3; P. Ex. 7; P. Ex. 8, p. 4; P. Ex. 110, p. 22; P. Ex. 111, pp. 24-25.

out—could have been turned back around against him effectively. In a crime committed by three people, one of the four suspects must be innocent, and a fully informed jury would likely find that Ricky Kidd is that man.

The other impact of the Goodspeed depositions is that Ms. Anderson could have presented Kidd's complete testimony about how he knew who committed this crime. While Kidd told police in his first statement on February 15, 1996, that he had no contact with Gary Goodspeed, Sr., the first week of February[479], Kidd later revealed that he said this only because he was scared for his safety.[480] On June 5, 1996, against Ms. Anderson's advice, Kidd initiated another interview with Sgt. Pruetting, this time admitted to Sgt. Pruetting that he knew Gary Goodspeed, Sr., committed the crime because Goodspeed Sr., confessed to him.[481]

Kidd and Ms. Anderson communicated about the Goodspeeds' involvement throughout the time period leading up to Kidd's trial.[482] Kidd testified in federal court about visiting with Gary Goodspeed, Sr., on February 5 and 7, 1996. Goodspeed, Sr., told Kidd of his intent to rob George Bryant and asked Kidd to join him in the robbery.[483] Kidd declined.[484] The next day, February 6, 1996, Kidd and Monica Gray talked about how they could warn George Bryant without putting themselves in danger with Goodspeed, Sr.[485] Kidd "was devastated" when he heard the news of Bryant's murder "because I had knew the day before that Gary, Sr. and them had talked about robbing him, so…I had knew in my heart that they did it."[486] The day after the murder, Goodspeed, Sr., again paged Kidd, who met with him at a house at 54th and Jackson.

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[479] P. Ex. 25, p. 2.
[480] P. Ex. 32, p. 1.
[481] *Id.*; Hrg. Tr. 549, 552.
[482] Hrg. Tr. 548 ("We would frequently talk about this.").
[483] P. Ex. 143, p. 261.
[484] *Id.* at 262; *See also* Hrg. Tr. 675-76.
[485] P. Ex. 143, p. 265.
[486] *Id.* at 282.

Gray went with him and waited in in the car with the engine running so that Goodspeed, Sr., would know there was another witness in case he intended to harm Kidd.[487] During this meeting, Goodspeed, Sr., admitted to Kidd that he had killed George[488], and Kidd faked a phone call to try to extricate himself from the situation, at which time Gray came to the door, and the two of them left.[489] Both Kidd and Gray were afraid of Goodspeed, Sr., who had a previous homicide conviction, and they knew he had just killed George Bryant.[490] Neither Kidd nor Gray mentioned this meeting with Goodspeed, Sr., when they first talked to police because they were afraid.[491] Kidd admitted that he lied to the police[492], and he denied seeing the Goodspeeds when he was cross-examined by Ms. McGowan at trial.[493]

Ms. Anderson testified that Kidd's testimony in the federal hearing regarding his meetings with Goodspeed, Sr., is true. With disclosure of the Goodspeed depositions, testimony about how Kidd knew that the Goodspeeds were guilty could have been part of the defense case.[494] Ms. Anderson testified that the Goodspeed depositions are consistent with her conversations with Kidd.[495] The depositions also corroborate Ricky's assertions that he knew who had committed the homicide.[496] Without the undisclosed evidence, the decision was made to simply present the alibi defense instead of presenting an incomplete picture of the Goodspeeds'

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[487] *Id.* at 285.
[488] *Id.* at 287.
[489] *Id.* at 288-89.
[490] *Id.* at 287; Hrg. Tr. 51.
[491] P. Ex. 143, pp. 287, 299-300.
[492] *Id.* at 300.
[493] P. Ex. 141, pp. 1222-23; P. Ex. 143, p. 342. Respondent alleges that Kidd's denial of his meetings with Goodspeed is fatal to his *Brady* claim, but the Court disagrees. The opposite is true; this Court believes Ms. Anderson's testimony that if full disclosure had been made, Kidd's meetings with Goodspeed, Sr., would have been brought out of direct examination and he would not have been in this vulnerable position where he felt like he had to omit the full truth on the stand.
[494] Hrg. Tr. 641.
[495] *Id.* at 667.
[496] *Id.*

involvement to the jury.[497] Kidd wanted to tell the jury everything, but without the Goodspeeds as witnesses, Ms. Anderson felt that "we just didn't have a way to do that."[498]

If the Goodspeed depositions, surveillance records, and the State's protection of Harris to hide him from the Goodspeeds had been disclosed, Ms. Anderson would have had the information to present a complete defense. She would have presented Ricky Kidd's testimony about who committed the crime in her case-in-chief; "I think we absolutely could have done that," she testified.[499] Ms. Anderson explained:

> I think what it could have done is it could have cleared up the entire picture. Instead what we got was a little piece here and a little piece there, and I couldn't—I did not have access or the ability to put all of the pieces together without those depositions or without the Goodspeeds testifying. So I just had to go with the piece that I was most confident in.[500]

Ms. Anderson testified that she also would have cross-examined the testifying detectives differently. She would have asked them about the Goodspeeds' police statements.[501] She would have elicited testimony that Goodspeed, Jr., said he had been at Bryant's house a couple of days before the murders.[502] She would have elicited testimony from Sgt. Pruetting's about his conversations with Kidd.[503] Ms. Anderson described Kidd's conversations with Sgt. Pruetting as, "He literally is like, 'I am actually a witness for you, and I'll be happy to provide that testimony and you can get the right guys.'"[504]

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[497] *Id.* at 638.
[498] *Id.* at 639.
[499] *Id.*
[500] *Id.* at 681.
[501] *Id.* at 642.
[502] *Id.*
[503] *Id.* at 637, 669, 681.
[504] *Id.* at 555

In assessing materiality, the Court must also consider how a reasonably competent defense attorney such as Ms. Anderson could have used the evidence to attack "the thoroughness and even the good faith of the investigation."[505] Highlighting the Goodspeeds' involvement in the crime would have opened up another avenue for "attack[ing] the police investigation as shoddy."[506] The police reports should have made the Goodspeeds targets of intense law enforcement investigation, yet leads implicating them were overlooked. Kidd's sister, Nikki Kidd, told police that he had come to her place of employment on February 6, 1996, and she informed Sgt. Pruetting that there may have been video surveillance cameras at DST.[507] Ms. Anderson could have cross-examined Sgt. Pruetting about the fact that he took no steps to collect this potentially exonerating evidence.

In addition to the depositions, this Court must assess the "cumulative effect" of all the undisclosed evidence.[508] The undisclosed evidence that Gary Goodspeed, Sr. was under police investigation for alleged witness threats, and that Richard Harris was housed in a hotel at the State's expense for a period of time before trial, would have given Ms. Anderson additional reason to dig further into Harris' credibility. At a minimum, she could have used his hotel stay to demonstrate that he was receiving consideration for his testimony. Ms. Anderson testified, "I would have been able to impeach him more effectively. There's no question about that."[509] It also would have opened up inquiry into his fear of the Goodspeeds. In a 2007 deposition, Harris admitted under oath that he knew Gary Goodspeed, Jr., because he "…met him a few times…over at George's house."[510] Armed with the surveillance logs and information about

[505] *Kyles*, 514 U.S. at 445.
[506] *Id.* at 442 n.13.
[507] Hrg. Tr. 252-53; P. Ex. 79, p. 1.
[508] *Kyles*, 514 U.S. at 421.
[509] Hrg. Tr. 645.
[510] P. Ex. 92, p. 13.

Harris' placement in a hotel, Anderson could have questioned Harris about whether he knew the shooters in order to suggest that he may have recognized the Goodspeeds, and purposely misidentified Ricky Kidd because he was more afraid of them. Ms. Anderson's investigation revealed that "a lot of people" were afraid of Goodspeed.[511] Harris himself admitted to Al Brooks that this is exactly why he falsely identified Ricky Kidd as the shooter—he knew Goodspeed, Jr. had seen him, and he was afraid to make an honest identification.[512]

Having the ability to point the finger at Goodspeed, Sr., as the shooter would also open the way for Ms. Anderson to press Harris for description details that more closely match Gary Goodspeed, Sr., as opposed to Kidd. The employees at Alamo Rent-A-Car nick-named Goodspeed, Sr., "blender head" because when he returned the rental car, his hair was wild and messed up as if it had been in a blender.[513] Harris insisted that the man who shot George Bryant had long hair[514], although Kidd is totally bald, as verified by photos of Kidd the police found in his car[515]; the police line-up[516]; and the photograph used in the February 11, 1996, photo array, which had been taken the previous August.[517] Harris is adamant that the person who shot George "had a head of hair," long enough to hang out the back of a red satin do-rag. Defense counsel could have used the nondisclosed evidence of Harris's hotel stay at the State's expense and related evidence that the Goodspeeds were a threat to him to expose his motivation for testifying falsely: the person he saw kill George Bryant was Gary Goodspeed, Sr., but it was safer for Harris to identify Ricky Kidd. This is a case in which undisclosed evidence could have been used

[511] Hrg. Tr. 552.
[512] *Id.* at 462.
[513] *Id.* at 986-87.
[514] P. Ex. 144, p. 404.
[515] P. Ex. 171; P. Ex. 172.
[516] P. Ex. 179.
[517] P. Ex. 185.

to "fuel[ ] a withering cross-examination" of an alleged eye-witness and to "severely undermine" identification testimony.[518] Full disclosure by the prosecution would have enabled Ms. Anderson to rebut the prosecutor's portrayal of Harris as simply a "brave neighbor" who came forward to help the police.[519] The evidence affecting Harris's credibility is clearly material, since he is "the only evidence linking [the defendant] to the crime."[520] Richard Harris "was the State's key trial witness. His accuracy, veracity, and credibility were, by their very nature, material issues."[521]

Finally, Respondent argues that Kayla Bryant's out-of-court identification precludes a finding of materiality. As noted above, the existence of two adult eyewitnesses whose identification testimony was unaffected by the prosecutor's *Brady* violations in *Kyles* did not preclude a finding of materiality. Further, Kayla Bryant's trial testimony is that the man who shot her daddy was not in the courtroom during Kidd's trial. She testified that the perpetrator was darker, and that she never saw a picture of him.[522] The only testimony that she ever identified Kidd is based on an unreliable out-of-court identification from a video lineup made under suggestive circumstances.[523] Further, any alleged identification was not preserved in the video-recorded post-identification interview of Kayla Bryant.[524] The video itself reveals that she was a tired, hungry, and fidgety toddler who was being prompted throughout the interview with

[518] *Kyles*, 514 U.S. at 443-44.
[519] P. Ex. 141, p. 1389.
[520] *Smith*, 565 U.S. at 76.
[521] *State ex rel. Hawley v. Beger*, 549 S.W.3d 507, 512-13 (Mo. Ct. App. 2018) (citing *Taylor v. State*, 262 S.W.3d 231, 244 (Mo. banc 2008) and *Engel*, 304 S.W.3d at 129 (nondisclosure of impeachment evidence prejudicial per *Brady*; witness was prosecution's key witness and defense hinged on undermining his credibility).
[522] P. Ex. 141, pp. 520-21.
[523] *See* Part. 2.B.iii.b, *supra*.
[524] P. Ex. 86; Hrg. Tr. 359-60.

leading, suggestive questions and directives to change some statements back to what she had supposedly said on a prior occasion.[525]

This Court concludes that Kidd is entitled to relief on his *Brady* claim. The prosecution did not disclose evidence to support Kidd's defense that Richard Harris is not a believable witness. Ms. Anderson could have shown that Harris had something to gain by his testimony, and she could have inquired further in his deposition about his concerns about the Goodspeeds. Perhaps the inquiry would have unraveled Harris' connections to Bryant and opened the window into Harris' drug trafficking activities on the day of the murder.

Even more compelling is the evidence of the Goodspeed depositions that would support a defense that the true killers of George Bryant are Marcus Merrill, Gary Goodspeed, Sr., and Gary Goodspeed, Jr. The Court is persuaded by Ms. Anderson's testimony that if these materials had been disclosed, she would have made effective use of them in Kidd's defense. She could prove that the Goodspeeds were with Marcus Merrill when he committed the robbery. She could prove that Kidd had previously been estranged from the Goodspeeds, and was not with Merrill and the Goodspeeds on the day of the crime. She could have used admissions by Goodspeed, Jr. that he was at George Bryant's house in the days before the crime, just as Kayla Bryant said her father's killer had been. Ms. Anderson could have shown that George Bryant was having an affair with Goodspeed, Sr.'s ex-wife, Jean Bynum, a possible motive for murder in addition to the robbery. She could have presented her client's testimony about his meetings with Goodspeed, Sr., to corroborate the fact of Goodspeed's admissions to Kidd, and how Kidd came to know of Goodspeed's guilt of the crime even though he was not involved. She could have turned back

[525] This Court heard testimony from experts in child witness interview standards and eyewitness procedure. P. Ex. 195; P. Ex. 196.

around the argument of Merrill's counsel that Kidd, not Merrill, was the third man at the robbery committed by the Goodspeeds.[526]

Ms. Anderson also testified that having access to this evidence would give her stronger reasons and information to attack the thoroughness of the police investigation—for not obtaining footwear from the prime suspects to compare with the bloody shoe print at the scene, and for not showing Kayla Bryant a photospread or video lineup with the Goodspeeds. And she would have expanded the scope of her client's testimony to include Goodspeed's confession to the crime.

This Court concludes that Ms. Anderson's use of the undisclosed evidence would have changed the complexion of the whole trial. Ms. Anderson testified that without competent evidence of the Goodspeed's involvement, the trial

> just seemed strange to me at the time. You know, we have three people. To me, the Goodspeeds were into it up to their eyebrows and somehow or another we were dancing around the issue the entire trial and—and trying to keep the jury from knowing as much as we could about them, which seemed strange to me. At—it was frustrating, because it was hard for me to get into it and nobody else seemed to want to, really.[527]

Ms. Anderson is correct that "it would have been beneficial to my client if everything had come in. I mean, if the jury could have access to every piece of information I had, I think it would have painted a much clearer picture of—of what exactly occurred and who was responsible."[528] The Court agrees; it is clear that the Goodspeeds were involved in the crime, and the nondisclosure of evidence deprived Ms. Anderson of the tools to prove it. This Court concludes that Kidd has shown "a reasonable probability of a different result; i.e., that the evidentiary nondisclosure

[526] Merrill testified that he and his attorney decided not to call Gary Goodspeed, Sr., and Gary Goodspeed, Jr., as alibi witnesses because it would backfire on him; it would make him look more guilty. P. Ex. 142, 95-96.
[527] Hrg. Tr. 642-43.
[528] Hrg. Tr. 681.

undermines confidence in the trial's outcome."[529] Kidd has also established both cause and prejudice and, as discussed below, a *Schlup* gateway claim overcoming any potential procedural bar. Therefore, the Writ of Habeas Corpus will issue directing the State to release Kidd or give him a new trial.

B. THE INNOCENCE CLAIM

i. The Actual Innocence Gateway

Kidd has consistently asserted his innocence from his very first interview with police on February 15, 1996. In separate interviews, Kidd and his then-girlfriend Monica Gray gave consistent accounts of Kidd's whereabouts on February 6, 1996, the day that George Bryant and Oscar Bridges were shot to death at 7009 Monroe.[530] Gray testified at trial and before this Court that she woke up that morning with Kidd, and was with him continuously until well after the time of the crime.[531] If her testimony is true, which this Court believes is the case, then Kidd is innocent of any involvement in the crime. All investigation by police and defense counsel into Kidd's alibi corroborated it.[532] This Court finds that Gray is credible.

The case against Kidd rests entirely on the now-recanted testimony of Richard Harris identifying Kidd as the shooter, and testimony of Detective Jay Thompson that victim George Bryant's four-year-old daughter, Kayla, selected Kidd from a video lineup after failing to identify him in a photo spread.[533] At trial, young Kayla twice failed to recognize Kidd.[534] No

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[529] *Beger*, 549 S.W.3d at 512.
[530] *See* P. Ex. 25; P. Ex. 77.
[531] Hrg. Tr. 32-63.
[532] Kidd and Gray told police they had been to the Jackson County Sheriff's Office at Lake Jacomo to apply for a gun transfer permit. An inquiry of the Sheriff's office produced a copy of the permit dated February 6, 1996, processed in the early afternoon the same day. *See* P. Ex. 114A. Further, Kidd's counsel, Teresa Anderson, presented testimony of Lawson Gratts, Nikki Kidd, and Alina Wesley corroborating portions of Kidd's and Gray's alibi testimony.
[533] Hrg. Tr. 317, 404-05.
[534] P. Ex. 141, pp. 518-19; Hrg. Tr. 490.

physical evidence implicated Kidd; he was excluded as the source of a bloody shoe print at the scene of the crime.

This brief overview of the evidence is a useful starting point for discussing standards that govern Kidd's actual innocence claim, which he presents both as a procedural gateway to defaulted claims, pursuant to *Clay v. Dormire* and *Schlup v. Delo*, and as a substantive claim for relief under Missouri law, pursuant to *State ex rel. Amrine v. Roper*. It is important to note the trial evidence implicating Kidd in the crime is not strong, and his alibi defense was not weak. Further, based on the record that this Court received, subsequent investigation and developments bolster the alibi defense and substantially weaken the evidence against Kidd. All of the evidence, considered cumulatively, indicates that Gary Goodspeed, Sr., Gary Goodspeed, Jr., and Marcus Merrill traveled from Atlanta to Kansas City the week before the crime, went to George Bryant's house in Gary Goodspeed, Sr.'s, rental car, shot Bryant and his handy-man Oscar Bridges while robbing Bryant of drugs and cash, then returned to Atlanta at the end of the week. As the murder was taking place, Kidd was running errands with Monica Gray and his nephew DJ. They drove downtown to pick up the car that he had loaned his sister, Nikki, drove to Lake Jacomo to file a gun transfer application, visited Kidd's former girlfriend Kelly McGill, then returned downtown to pick up Nikki Kidd from work. As discussed in further detail in Part 3.B, *infra*, the evidence now available establishes that Kidd is innocent of these crimes.

Missouri has equated its "manifest injustice" threshold for habeas corpus relief to encompass, among other doctrines, the "fundamental miscarriage of justice" standard applied by federal courts in habeas corpus proceedings under 28 U.S.C. § 2254.[535] Accordingly,

[535] *Clay v. Dormire*, 37 S.W.3d 214, 217 (Mo. banc 2000) (citing *Duvall v. Purkett*, 15 F.3d 745, 747 (8th Cir. 1994)).

Respondent's procedural defenses are overcome if Kidd can show "that 'a constitutional violation has probably resulted in the conviction of one who is actually innocent'….To establish the requisite probability, the petitioner must show that it is more likely than not that no reasonable juror would have convicted him in the light of the new evidence."[536] The parties agree that *Clay* incorporates the *Schlup* doctrine into Missouri law, but disagree on the scope and weight of the evidence that this Court must consider in determining whether Kidd has met his heavy burden of proving his actual innocence. Therefore, this Court will set out its understanding of the actual innocence doctrine before spelling out its findings of fact and conclusions of law regarding Kidd's innocence claims.

"[T]he fundamental miscarriage of justice exception seeks to balance the societal interests in finality, comity, and conservation of scarce judicial resources with the individual interest in justice that arises in the extraordinary case."[537] In striking this balance, the Court "has adhered to the principle that habeas corpus is, at its core, an equitable remedy."[538] The Court observed that "the individual interest in avoiding injustice is most compelling in the context of actual innocence," and therefore concluded, "The overriding importance of this greater individual interest merits protection by imposing a somewhat less exacting standard of proof on a habeas petitioner alleging a fundamental miscarriage of justice than on one alleging that his sentence is too severe."[539]

These principles led the Court to fashion a standard unburdened by technicalities that might impair this Court's ability to arrive at a truthful resolution of Kidd's innocence claim. The

[536] *Schlup*, 513 U.S. at 327 (quoting *Murray v. Carrier*, 477 U.S. 478, 496 (1986)).
[537] *Schlup*, 513 U.S. at 324.
[538] *Id.* at 319.
[539] *Id.* at 324-25.

Schlup standard "is intended to focus the inquiry on actual innocence."[540] To give courts the greatest latitude in making this important determination, hearing courts "[are] not bound by the rules of admissibility that would govern at trial."[541] Consideration of all the evidence is essential to achieving a just and reliable result:

> The habeas court must make its determination concerning the petitioner's innocence "in light of *all the evidence*, including that alleged to have been illegally admitted (but with due regard to any unreliability of it) and evidence tenably claimed to have been wrongly excluded or to have become available only after the trial."[542]

Analysis of innocence gateway claims "must incorporate the understanding that proof beyond a reasonable doubt marks the legal boundary between guilt and innocence."[543] This preliminary discussion of the *Clay/Schlup* doctrine is necessary to resolve three arguments advanced by Respondent in these proceedings.

First, Respondent argues that this Court should not consider evidence that could have been presented at trial by the use of due diligence, relying on *Amrine v. Bowersox*, 238 F.3d 1023, 1029 (8th Cir. 2001), which changes *Schlup's* standard by adding that innocence evidence proffered in support of a *Schlup* claim is not "new" if trial counsel could have discovered it through the use of due diligence.[544] This Court is skeptical of such a rule, as restricting the scope of evidence in this manner would inevitably diminish the reliability of the innocence determination, which is why this modification has been rejected in every other federal circuit to

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[540] *Id.* at 327.
[541] *Id.*
[542] *Id.* at 327-28 (emphasis added).
[543] *Id.* at 328 (citing *In re Winship*, 397 U.S. 358 (1970)). The "no reasonable juror" language of the *Clay*/*Schlup* standard makes Kidd's burden of proof incrementally higher than showing mere prejudice, i.e., a reasonable likelihood that the outcome would have been different. *Schlup*, 513 U.S. at 329.
[544] Response to Amended Petition for Writ of Habeas Corpus, p. 10 (filed April 17, 2017).

consider it.[545] These courts reason that "a requirement that new evidence be unknown to the defense at the time of trial would operate as a roadblock to the actual innocence gateway."[546] Further, if the Supreme Court intended "new evidence" to be interpreted in this fashion, *Schlup* would have been decided in the opposite manner. Lloyd Schlup was granted habeas corpus relief because trial counsel failed to use due diligence to discover and present virtually all the evidence supporting his innocence claim.[547]

The Missouri Court of Appeals for the Western District has observed that the Missouri Supreme Court "has signaled a willingness to treat any evidence that was unknown or unavailable to a defendant at the time of trial as 'new evidence,' without regard to whether the evidence could have been discovered or developed with reasonable diligence at the time of trial."[548] Further, Respondent's argument is inconsistent with the Supreme Court's explicit admonition that "the *Schlup* inquiry, we repeat, requires a holistic judgment about 'all the evidence,' 513 U.S., at 328, and its likely effect on reasonable jurors applying the reasonable-doubt standard."[549] This Court concludes the standard that it must apply does not preclude consideration of any evidence of innocence Kidd now presents. Indeed, *Schlup* defines a colorable claim of actual innocence as one supported by "new reliable evidence—whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence—that was not presented at trial."[550] This Court will abide by *Schlup's* directive to consider all the evidence that Kidd tenders in support of his innocence.

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[545] *See Houck v. Stickman,* 625 F.3d 88, 94 (3d Cir. 2010); *Perkins v. McQuiggin*, 670 F.3d 665, 673 (6th Cir. 2012); *Gomez v. Jaimet*, 350 F.3d 673, 679-80 (7th Cir. 2003); *Griffin v. Johnson*, 350 F.3d 956, 962-63 (9th Cir. 2003); *Lopez v. Trani*, 628 F.3d 1228, 1230-31 (10th Cir. 2010).
[546] *Gomez*, 350 F.3d at 680.
[547] *Schlup v. Bowersox*, 1996 U.S. Dist. LEXIS 8887, *57-58 (E.D. Mo. 1996).
[548] *McKim v. Cassady*, 457 S.W.3d 831, 846 (Mo. Ct. App. 2015) (citing *Engel,* 304 S.W.3d at 126).
[549] *House v. Bell*, 547 U.S. 518, 539 (2006).
[550] 513 U.S. at 324 (emphasis added).

Second, Respondent argues that because Kayla Bryant identified Kidd in the video line-up, and because Richard Harris "has not wavered on the core of his testimony,[551]" Kidd's innocence claim must be rejected. Even if Respondent's description of Harris as "unwavering" were accurate, which it not, this Court disagrees that his testimony precludes relief. If the existence of un-recanted eye-witness testimony alone required denial of a *Schlup* actual innocence claim, *Schlup* itself would have reached a different result. In *Schlup*, two corrections officers identified Schlup as one of three assailants. They did not recant their testimony, although Schlup produced evidence impeaching their credibility.[552] Inasmuch as the evidence against Schlup consisted of identifications by two law enforcement witnesses, as opposed to a parole absconder and a toddler, the evidence against Schlup was far stronger than the evidence against Kidd, yet Schlup was allowed to pass through the innocence gateway and obtain habeas corpus relief.[553] Further, as discussed in detail in Part 3, *infra*, Harris has been anything but steadfast and consistent in his testimony. "Though the [*Schlup*] standard requires a substantial showing, it is by no means equivalent to the standard of *Jackson v. Virginia*, 443 U.S. 307 (1979), that governs review of claims of insufficient evidence."[554]

Finally, Respondent places heavy reliance on the rejection of Kidd's actual innocence claim by the U.S. District Court during his federal habeas proceedings. Respondent contends that because the federal court rejected Kidd's alibi and the testimony of Marcus Merrill, this Court must do likewise.[555] This is incorrect; "[a]t common law the doctrine of *res judicata* did not extend to a decision on habeas corpus refusing to discharge the prisoner."[556] Instead, the

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[551] Response to Amended Petition for Writ of Habeas Corpus, p. 40 (filed April 17, 2016).
[552] *See Schlup*, 513 U.S. at 303-04.
[553] *Schlup v. Delo*, 912 F. Supp. 448, 455 (E.D. Mo. 1995).
[554] *Schlup*, 513 U.S. at 330.
[555] Response to Amended Petition for Writ of Habeas Corpus, pp. 6, 26-27, 38, 44 (filed April 17, 2017).
[556] *Salinger v. Loisel*, 265 U.S. 224, 230 (1924).

Supreme Court "has consistently relied on the equitable nature of habeas corpus to preclude application of strict rules of *res judicata*."[557]

Respondent's argument fails even under traditional doctrines of collateral estoppel and *res judicata*. This identical argument was rejected by the Court of Appeals, Western District, which explained that "because the [federal court's] decision was based on procedural requirements and limitations that do not exist under Missouri law, 'the decision of the Eighth Circuit Court of Appeals does not preclude habeas corpus review in a Missouri Court.'"[558] Collateral estoppel does not apply to a prior decision if the party was required to meet a higher burden of proof in those proceedings. The Western District Court of Appeals explained:

> Rule 91.22 provides that "[w]hen a petition for a writ of habeas corpus has been denied by a higher court, a lower court shall not issue the writ unless the order in the higher court denying the writ is without prejudice to proceeding in a lower court." We believe the reference in Rule 91.22 to "higher court" means a higher state court, and not a federal court. Even if "higher court" can be construed to include federal courts, Rule 91.22 would have no application here, as the Eighth Circuit applied different legal principals to dispose of Dale Helmig's writ of habeas corpus than those applicable in a state habeas corpus proceeding.[559]

The district court in Kidd's case was bound by *Amrine*, 238 F.3d 1023, to ignore any evidence that could have been discovered earlier by the use of due diligence. The district court concluded that "The only evidence that Kidd has presented to this Court that was not available to him at the time of his trial is the testimony of Marcus Merrill, claiming that Merrill committed the murders with the Goodspeeds."[560] Under *Amrine,* the federal district court was required to ignore all

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[557] *Schlup*, 513 U.S. at 319 (citing *Sanders v. United States*, 373 U.S. 1 (1963)).
[558] *McElwain*, 340 S.W.3d at 253-54 (citing *Shelton v. City of Springfield*, 130 S.W.3d 30, 36 (Mo. App. 2004)).
[559] *McElwain*, 340 S.W.3d at 254 n.30.
[560] Resp. Ex. 4, p. 11.

newly presented evidence that corroborated Merrill's testimony, including Eugene Williams, who testified that Merrill and the Goodspeeds met at his house the morning of the crime, and left together with the stated intention of robbing a drug house. The district court was also forced to dismiss the testimony of Susan Jordan, the Jackson County Deputy who processed Kidd's application for a gun transfer permit on February 6, 1996."[561] *Amrine* itself is proof that the Eighth Circuit's actual innocence standard is substantially higher than Missouri's; after the federal court ignored most of Joseph Amrine's evidence and ruled that he had failed to prove that he was probably innocent, the Missouri Supreme Court found that the evidence of his innocence was clear and convincing based on the same body of evidence that Amrine tendered to the federal courts.[562]

For the foregoing reasons, this Court applies the actual innocence standard as articulated in *Schlup*. It will determine whether "'it is more likely than not that no reasonable juror would have convicted [Kidd]' in light of newly discovered evidence of innocence."[563] In making this determination, this Court will consider "all the evidence, including that alleged to have been illegally admitted (but with due regard to any unreliability of it) and evidence tenably claimed to have been wrongly excluded or to have become available only after the trial."[564] This Court will consider evidence that "may call into question the credibility of the witnesses presented at trial," and "make some credibility assessments."[565] Finally, this Court will give no effect to the judgment of the United States District Court denying Kidd's actual innocence claim.[566]

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[561] *Id.* at 9.
[562] *Compare Amrine*, 238 F.3d 1023, *and Amrine*, 102 S.W.3d at 545.
[563] *Schlup*, 513 U.S. at 332.
[564] *Id.* at 328.
[565] *Id.* at 330.
[566] This Court notes that Kidd's Claim No. 10, alleging that the prosecution failed to disclose exculpatory evidence, was not part of the federal habeas corpus proceedings.

This Court concludes that all the evidence, including the evidence presented at trial and the evidence obtained after the trial, more than establishes a reasonable probability that no reasonable juror would find Kidd guilty. The evidence establishes innocence from multiple angles. The conviction rests heavily on the credibility of Richard Harris; he was the only witness to testify at trial that he saw Kidd commit the crime. The weight of the evidence that the jury did not hear—Harris' drug trafficking with the victim the morning of the crime that he hid from the police, his original description of the shooter as wearing a red do rag covering long, curly hair, his expectations of consideration for the his testimony, his susceptibility to influence by others, the factors that rendered his identification inherently unreliable, his recantations of his identification, his general demeanor during this hearing, and his drug intoxication at the time of the murders—all renders his identification testimony unworthy of belief.

The only other evidence linking Kidd to the crime is the out-of-court identification of four-year-old Kayla Bryant, but that testimony, too, is suspect. First, it is offset by her failure to identify Kidd on two occasions: First, only days after the crime and before she was subjected to repeated, unskilled questioning and influence, she did not identify Kidd's photo in the photospread; she did accurately identify Marcus Merrill. She then twice did not identify Kidd in court, stating that she had never seen a picture of the "skinny guy" who was one of the shooters. Her first communications about the crime—that daddy's brother shot daddy, that the men who shot her daddy had been to her house two days before the crime, and that the man said she would be alright—corroborate admissions made by Gary Goodspeed, Jr., and details in Marcus Merrill's confession.

Merrill's confession, though rejected by the federal district court under restrictive standards designed to insulate state convictions from federal review, is very persuasive. It is

detailed, self-incriminating, and corroborated by the testimony of Kayla Bryant, the Goodspeed depositions, travel documents and receipts, and the physical evidence of the bullet hole he put in the wall when Goodspeed, Sr. sent him back in the house to kill Kayla Bryant. Eugene Williams also provides significant corroboration, placing Merrill in the company of the Goodspeeds within an hour of the crime armed with guns matching the description of those used in the crime, and leaving Williams' house with the stated intention of robbing a drug house. Merrill's confession adds to the considerable weight of evidence that Ricky Kidd is innocent.

Kidd's alibi defense, given by himself and Gray the first time they were questioned by police, has substantial indicia of reliability. Kidd and Gray were transported separately to the police station and questioned in separate rooms about the crime. There was no opportunity to collaborate on an alibi, yet they told the same basic story then, which was later corroborated by other witnesses and by Kidd's gun transfer permit. Finally, the complete story of Kidd's relationship with the Goodspeeds, including his meetings with Goodspeed, Sr., on February 5 and 7, 1996, provide a credible explanation for how he knew to name Gary Goodspeed, Sr., in his police interrogations on May 22 and June 5, 1996. Kidd's letters to his counsel, Ms. Anderson, further corroborate that at a fair trial, Kidd's own testimony would have added to the substantial weight of evidence that he is innocent.

In conclusion, the State's case against Kidd is lacking in weight and credibility. Police overlooked simple investigative steps that could have verified Kidd's alibi, uncovered physical evidence shedding light on the source of the bloody footprint in George Bryant's kitchen, or determined who Kayla Bryant really saw the day her father was shot. The identification testimony against Kidd is not believable, and pales in comparison to the evidence establishing that the crime was committed by Marcus Merrill, Gary Goodspeed, Sr., and Gary Goodspeed, Jr.,

while Kidd spent the day with Monica Gray. Kidd has carried his burden to produce new, reliable evidence establishing "more likely than not no reasonable juror would have found [Kidd] guilty beyond a reasonable doubt."[567] Because Kidd can satisfy the *Schlup*/*Clay* actual innocence standard, he is entitled to review of the merits of his *Brady v. Maryland* claim, irrespective of any procedural default.[568]

ii. Kidd's Amrine Claim

In addition to *Schlup's* procedural gateway, Kidd has produced sufficient evidence to establish "a clear and convincing showing of actual innocence that undermines confidence in the correctness of the judgment."[569] Like in *Amrine*, it would be difficult to imagine that the State could muster any evidence to prove Kidd's guilt beyond a reasonable doubt based on the evidence now available. In applying the *Amrine* standard, the Missouri Supreme Court requires a thorough analysis of all the evidence, including evidence of innocence that has grown with the passage of time and evidence of guilt that has been proven false. After thorough review, this Court finds that the evidence establishing Kidd's innocence is clear and convincing.

Kidd's conviction rested on just two threads—the testimony of an unreliable witness, Richard Harris, and the alleged out-of-court identification of Kayla Bryant. As discussed above, new evidence severs both of those threads, leaving no reliable evidence upon which Kidd could be convicted. Further, new evidence not presented at trial, including previously suppressed

[567] *Schlup*, 513 U.S. at 327.

[568] Kidd suggests that this finding should reopen Judge Chapman's order granting summary judgment on eight of his ten claims for relief. In light of the order granting habeas corpus relief, reopening additional claims would involve considerable delay in the administration of justice, and add months to Kidd's unconstitutional incarceration. In addition, this Court need not address additional claims where it has already found a basis for relief. This Court declines to revisit the order granting, in part, summary judgment in favor of Respondent.

[569] *Amrine*, 102 S.W.3d at 543.

evidence, identifies the real perpetrators, establishing Kidd's actual innocence. As a result, the evidence of Kidd's innocence is clear and convincing.

Respondent argues that the Missouri Court of Appeals, Western District, declined to extend *Amrine* claims to prisoners not under sentence of death in *State ex rel. Lincoln v. Cassaday,* 517 S.W.3d 11 (Mo. Ct. App. 2017), and that this decision precludes this Court from granting relief to Kidd, who is serving a life sentence. The *Lincoln* decision concludes that because *Amrine* referenced the death penalty sentencing statute as part of its holding[570], it is not a manifest injustice to imprison someone who is innocent by clear and convincing evidence if they are not sentenced to death. The statute in question requires the Missouri Supreme Court to review death sentences for proportionality, evidence of prejudice, and strength of the evidence, and, using these criteria, replace a questionable death sentence with a sentence of life without parole.[571] The *Lincoln* court found that "Because the Missouri Supreme Court has not recognized a freestanding claim of actual innocence in cases where the death penalty has not been imposed, we are not at liberty to expand Missouri habeas jurisprudence to permit consideration of this claim."[572] However, *Lincoln*'s observation that the Missouri Supreme Court has never applied *Amrine* to a prisoner not under sentence of death and thus an innocent prisoner sentenced to a term of years is not entitled to relief under *Amrine* is incongruent with the Missouri Supreme Court's actions in *In re Robinson v. Cassady,* SC No. 95892 (Mo. May 1, 2018). In *Robinson,* the petitioner asserted an *Amrine* actual innocence claim along with a due process violation claim

[570] In granting relief to Joseph Amrine, the Missouri Supreme Court said, "under Missouri's death penalty statute, section 565.035.3, this Court is charged with determining not merely the sufficiency but also the 'strength of the evidence.'" *Amrine,* 102 S.W.3d at 546-47.

[571] *Amrine,*102 S.W.3d at 549 (citing *State v. Chaney,* 967 S.W.2d 47 (Mo. banc 1998) (vacating Chaney's death sentence, but affirming his conviction and commuting his sentence to life without parole)).

[572] 517 S.W.3d at 15.

regarding perjured testimony.[573] In its reply, the State cited to *Lincoln* and argued that Robinson's *Amrine* claim should be denied. The Missouri Supreme Court nonetheless appointed a special master to hear evidence on Robinson's claims, including his *Amrine* innocence claim, on February 10, 2017.[574] If the Court's logic in *Lincoln* were to hold, the Supreme Court would not have directed the special master to hear evidence on a claim it could not grant.[575]

Petitioner argues that *Lincoln* misinterprets *Amrine* and ignores the well-settled precedent that habeas corpus is the proper forum for innocence claims.[576] At the heart of the *Amrine* decision is the authority of the courts to correct a "manifest injustice." Missouri recognizes entitlement to habeas relief "in extraordinary circumstances, when the petitioner can demonstrate that a 'manifest injustice' would result unless habeas relief is granted."[577] It is the correction of manifest injustice that forms both the basis of the gateway claim noted in *Clay,* 37 S.W.3d at 217, and the basis of the actual innocence claim itself in *Amrine*, 102 S.W.3d at 545-47.

The court in *Lincoln* misapplied the manifest injustice standard in two regards. First, it erroneously found that actual innocence alone is insufficient to establish a manifest injustice without a violation of "the constitution or laws of the state or federal government."[578] This

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[573] *Robinson,* No. 95892.

[574] *Lincoln* was decided October 11, 2016. *Lincoln,* 517 S.W.3d,at 11.

[575] The Special Master's report in Robinson recommended relief on all claims, including the *Amrine* claim. *Robinson v. Cassady*, No. 95892, Master's Report to the Supreme Court of Missouri and Findings of Fact and Conclusions of Law (Mo. filed May 1, 2018) (unpublished). The Missouri Supreme Court issued the Writ based on the master's finding that Robinson proved his "'gateway' claim of innocence in light of the constitutional violations that occurred during his trial," and dismissed all other claims. *Robinson,* No. 95892. The final order is not a rejection of the court's original exercise of jurisdiction; rather, it is an application of the principle that the habeas court will "address no more than that which is necessary to conclude that the habeas court's issuance of the writ of habeas corpus must be upheld." *McElwain,* 340 S.W.3d at 258.

[576] *See Wilson v. State*, 813 S.W.2d 833, 834-35 (Mo. banc 1991) (Where defendant moved pursuant to Rule 24.035 to vacate a guilty plea and sentence of life without parole because he was innocent, the court that newly discovered evidence of innocence is not a cognizable claim under Rule 29.15 and directed Wilson to file a habeas corpus petition).

[577] *Lincoln,* 517 S.W.3d at 16 (internal citations omitted).

[578] *Lincoln,* 517 S.W.3d at 20.

misinterpretation incorrectly assumes that *Amrine* was conditioned upon the defendant's death sentence and the application of section 565.035.3.[579] Both conclusions are contradicted by *Amrine*'s plain language: the *Amrine* court made clear that Amrine's new innocence evidence alone was enough to order his release because "confidence in his conviction and sentence are so undermined that they cannot stand and must be set aside."[580]

Second, *Lincoln* contradicted *Amrine* when it cherry-picked language to argue that actual innocence claims can only apply in a death penalty case. The panel relies on language discussing 565.035.3, describing a court's increased duty in death penalty cases to conclude that actual innocence constitutes a manifest injustice only in death cases.[581] In doing so, the panel noted *Amrine*'s language that both "the *continued imprisonment* and eventual execution of an innocent person is a manifest injustice."[582] The *Amrine* court's emphasis on the unbearable possibility of executing an innocent prisoner does not mean it did not intend for *Amrine* to apply to defendants such as Kidd, who is sentenced to die in prison by natural causes. Amrine and Kidd are similarly situated, and thus Kidd is entitled to equal protection of the law where "there is no rational basis for difference in treatment."[583] As the late Chief Justice William Rehnquist noted, "It would be a rather strange jurisprudence, in these circumstances, which held that under our Constitution he could not be executed, but that he could spend the rest of his life in prison."[584]

This Court recognizes the breadth of *Amrine*'s holding for all inmates: "This case thus presents the first impression issue of whether and upon what showing a petitioner who makes a freestanding claim of actual innocence is entitled to habeas corpus relief from his conviction and

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[579] *Id.* at 21.
[580] *Amrine*, 102 S.W.3d at 549.
[581] *Lincoln*, 517 S.W.3d at 21.
[582] *Id.* at 20.
[583] *Willowbrook v. Olech*, 528 U.S. 562, 564 (2000).
[584] *Herrera v. Collins*, 506 U.S. 390, 405 (1993).

sentence."[585] Nowhere does the court state its holding is limited to death sentences. Instead, the Missouri Supreme Court examined the procedural landscape from which to examine an innocence claim as set forth by the United States Supreme Court in *Hererra*. In its review, the *Amrine* court found that "even if a federal court were found not to have jurisdiction to review a state conviction and sentence in the absence of a federal constitutional issue, this would not deprive a state court from reviewing the conviction and sentence if its own state habeas law so permitted."[586] As such, "Missouri has left a state avenue open to process such a claim.'"[587] Recognizing both incarceration and execution as "an intolerable wrong," the court held that "the state [of Missouri] has provided a remedy…for those rare situations, such as Amrine's, in which a petitioner sets forth a compelling case of actual innocence independent of any constitutional violation at trial."[588] In so holding, Missouri is in line with other states that grant relief based on free-standing claims of innocence regardless of punishment.[589]

Finally, this Court notes that the dispositive question is whether incarceration of an innocent person is a "manifest injustice" under Missouri law.[590] It would be anomalous to reject innocence as a miscarriage of justice in light of cases finding that excessive sentences for guilty offenders can constitute a fundamental miscarriage of justice.[591] Habeas corpus is an equitable

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[585] *Amrine*, 102 S.W.3d at 545.
[586] *Id.* at 546.
[587] *Id.* (citing *Herrera*, 506 U.S. at 417).
[588] *Id.* at 546-47.
[589] *Id.* at 547 n.4 (citations omitted).
[590] *State ex rel. Simmons v. White*, 866 S.W.3d 443 (Mo. banc 1993).
[591] *See, e.g.*, *State ex rel. Zinna v. Steele*, 301 S.W.3d 510 (Mo. banc 2010); *State ex rel. Dutton v. Sevier*, 83 S.W.2d 581, 582 (Mo. 1935); *State ex rel. Koster v. Jackson*, 301 S.W.3d 586 (Mo. Ct. App. 2010); *State ex rel. White v. Davis*, 174 S.W.3d 543 (Mo. Ct. App. 2005); *State ex rel. Limback v. Gum*, 895 S.W.2d 663, 664 (Mo. Ct. App. 1995); *State ex rel. Heberlie v. Martinez*, 128 S.W.3d 616, 616 (Mo. Ct. App. 2004); *State ex rel. Moyer v. Calhoun*, 22 S.W.3d 250, 251 (Mo. Ct. App. 2000); *State ex rel. Brown v. Combs*, 994 S.W.2d 69, 70 (Mo. Ct. App. 1999); *State ex rel. Wright v. Dandurand*, 973 S.W.2d 161, 161 (Mo. Ct. App. 1998); *In re Thornton v. Denney*, 467 S.W.3d 292, 467 S.W.3d 292 (Mo. Ct. App. 2015).

remedy, and "the ultimate equity on the prisoner's side [is] a sufficient showing of actual innocence."[592] Surely the incarceration of a prisoner in the absence of any substantial or persuasive evidence of guilt is a fundamental miscarriage of justice. In spite of the Missouri Supreme Court's statutory duty to review death sentences on direct appeal for the strength of the evidence, it is clear that "Amrine's petition for habeas relief turns on the application of the manifest injustice standard to his claim of actual innocence."[593] This Court concludes that *Lincoln's* premise is no longer substantiated, and that the Supreme Court's decisions in *Wilson* and *Robinson* indicate that habeas corpus relief is indeed available in Missouri to a prisoner who can prove innocence by clear and convincing evidence.

The evidence in this case is comparable to the evidence in *Amrine,* where the record established that "no credible evidence remains from the first trial to support the conviction."[594] The only eye-witness who testified at trial that Kidd committed the crime is Richard Harris, who has recanted his testimony, and other evidence establishes that his original identification of Kidd lacks any integrity whatsoever. Respondent argues that the out-of-court identification of Kidd by Kayla Bryant, a four-year-old girl, supports Kidd's conviction. This Court disagrees. Kayla's testimony at trial explicitly rejected her identification of Kidd, and the Court has found the circumstances under which she viewed Kidd in a video lineup were suggestive. The most reliable testimony from Kayla are her in-court repudiation of her identification of Kidd, and her refusal to identify Kidd's photo in a photospread presented to her relatively soon after the commission of the crime.

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[592] *Withrow v. Williams*, 507 U.S. 680 (1993) (O'Connor, J., concurring in part and dissenting in part).
[593] *Amrine,* 102 S.W.3d at 545.
[594] *Id.* at 548.

Against this recanted and unreliable identification testimony, Kidd presents a multi-pronged and credible defense of alibi, coupled with direct and circumstantial evidence identifying Marcus Merrill, Gary Goodspeed, Jr., and Gary Goodspeed, Sr., as the actual perpetrators of the crime. The evidence establishing the guilt of Merrill, Goodspeed, Sr., and Goodspeed, Jr., is corroborated by Merrill's confession, Eugene Williams' testimony, travel documents placing the three men in Kansas City together at the time of the crime, and the Goodspeeds' own sworn testimony placing themselves in Merrill's company when he robbed and shot George Bryant. This Court finds and concludes that Kidd has proven his innocence by clear and convincing evidence, and that he is entitled to the writ of habeas corpus.

JUDGMENT

Based on the foregoing, this Court finds that Kidd is entitled to the Writ of Habeas Corpus. It is therefore ordered that the Writ of Habeas Corpus will issue directing Respondent and the State of Missouri to discharge Kidd unless he is brought to trial within 30 days of this order.

Dated this 14th day of August, 2019.

Daren L. Adkins, Assigned Judge