IN THE CIRCUIT COURT OF COLE COUNTY, MISSOURI

In re MICHAEL POLITTE,	)	
	)	
Petitioner,	)	
	)	
v.	)	**Case No. _____**
	)	
EILEEN RAMEY, Warden,	)	
Jefferson City Correctional Facility,	)	
	)	
Respondent.	)	

PETITION FOR WRIT OF HABEAS CORPUS

COMES NOW, Petitioner Michael Politte, by and through counsel, and petitions this Court for a Writ of Habeas Corpus pursuant to the Missouri Constitution, Art. I, §12, Mo. Rev. Stat. § 532.430, and Mo. Sup. Ct. R. 91. In support of his petition, Mr. Politte states:

For over 20 years, Michael Politte and his sisters have been waiting to grieve their mother. They have been unable to come together to memorialize her because during that time, they have been fighting for Michael's life. Just hours after finding his mother's body burning on the floor of her bedroom, 14-year-old Michael was arrested and charged with her murder—a crime he did not commit.

Michael was convicted in 2002 on the basis of fire "science" that has now been debunked, and a gross mischaracterization of a traumatized kid's reaction to his mother's gruesome death as evidence of a guilty mind. A rash, incomplete, and biased police investigation led police to ignore compelling evidence pointing to an alternative suspect, and focus solely on building an unreliable case against Michael. As a result, the State based its case on false and misleading fire science evidence, attempting to tie Michael to his mother's death with (1) the scientifically unsupported testimony that the fire that killed Rita Politte was caused by gasoline,

(2) the false testimony that gasoline was found on Michael's shoes, and (3) the emotional statements and outbursts of a child made shortly after he woke up to find his mother dead and burning on the floor of their home and during a suicide attempt after he was accused of being her murderer.

New evidence overwhelmingly supports Michael's innocence and dismantles each of the key elements of the State's case. This new evidence includes, but is not limited to, the following:

1. The State's key expert at trial, Fire Marshal Jim Holdman, violated National Fire Protection Association ("NFPA") standards in concluding that a liquid accelerant was used in the fire that killed Rita based solely on a visual examination of the scene and despite laboratory evidence to the contrary. Paul Bieber, a certified fire and explosion investigator who has conducted hundreds of arson investigations, concludes that Holdman's testimony was misleading.
2. The State incorrectly asserted that gasoline was present on Michael's tennis shoes to tie him to their now-discredited theory that this was a gasoline fire. John Lentini, one of the country's foremost experts in chemical analysis, determines that the substance found on Michael's shoes was not gasoline, but an aromatic solvent commonly used in the manufacture of tennis shoes.
3. New evidence from Dr. Jeffrey Aaron, a juvenile psychologist who interviewed Michael and his family members and extensively reviewed Michael's mental health records, reveals that Michael's behavior and responses both before and after his mother's death were typical of that of a male adolescent, and that Michael's "outburst confession" following a suicide attempt was irrational and thus not a confession.

4. New evidence also underscores the viability of two alternative suspects: Johnnie Politte and Johnnie's close friend and cousin, Charles "Ed" Politte. Ed was Rita's ex-husband, who had threatened her just days before her murder. Neither was properly investigated, and new evidence places Johnnie Politte near Rita's house the morning of the crime.
5. New evidence from Josh Sansoucie—Michael's friend who spent the night at the Politte home when the murder occurred—corroborates Michael's version of events that Michael did not commit this crime, but that Josh and Michael woke up at the same time on December 5, 1998 to the smell of smoke and discovered Rita burning on the floor.

This compelling evidence, individually and collectively, proves what Michael has always said: Michael is innocent. Michael petitions this Court to grant a writ of habeas corpus, vacate his conviction, and permit his family to find justice for both Michael and their mother.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

I. The Crime

In the early morning of December 5, 1998, Rita Politte was found murdered inside her mobile home in Hopewell, Missouri. At the time of the crime, Rita's 14-year-old son, Michael "Bernie" Politte, and Michael's friend, Josh Sansoucie, were asleep on the other side of the family's trailer in Michael's room. Josh was asleep on the floor next to Michael's bed. After waking to the smell of smoke, Michael leaned from his bed and asked Josh if he was smoking a cigarette. (Ex. 58, Deposition of Joshua Sansoucie, at 52). When Josh responded no, the boys got up and opened the bedroom door to find the trailer filled with smoke. They ran and crawled to the front door to escape. (*Id.* at 55; Ex. 28, Washington County Sheriff's Office Investigative

Reports, at 6). As they were leaving, Michael went to his mother's bedroom to make sure she was awake. Instead, he found her body on the floor; she was on fire. (Ex. 28 at 6).

Michael ran immediately to get the water hose in front of the house, (*Id.* at 3), and when it would not reach far enough inside, Josh ran to Rita's neighbor, Leigh Ann Skiles, and begged her to call 911. (T. 197).[1] Neighbors Chuck Skiles and Mike Nixon ran into the home and attempted to stop the fire with a bucket of water. (Ex. 28 at 4). The fire department and first responders arrived shortly after. (*Id.*). The two boys were placed in separate police vehicles and questioned. (*Id.* at 3). They were then driven to the station, and were immediately considered suspects.

The pathologist later determined that Rita had died of carbon monoxide poisoning but also sustained blunt trauma to her head, (Ex. 25, Rita Politte Autopsy Report, at 1), and a dislocated shoulder.[2] (*Id.* at 8). She was found in the doorway to her bedroom, laying face-up on the floor, her legs spread apart, (Ex. 28 at 2, 10), wearing a negligee and underwear. (*Id.* at 10). Her body was burned from her pubic area to her head. (*Id.*). There was blood on her left thigh, on the floor beside her right leg, on the light switch next to her bedroom door, and on the carpet underneath the light switch; there were also a couple of drops of blood on the bed sheet in her room, close to where her body was discovered. (T. 284). The pathologist concluded that "The scene and autopsy suggest blunt trauma to the right [rear skull] with fracture and a concussion" and that there would have likely been a "great deal of blood" at the time of this injury. (Ex. 28 at

[1] Citations to Exhibit 62, the trial transcript, will be denoted by a "T." followed by the appropriate page number.

[2] There was disagreement about whether Rita's right arm and shoulder were dislocated. While the radiologist concluded her shoulder had been dislocated, the pathologist opined the damage was due to the fire. (T. 399).

7; T. 407-08). No blood was observed on Michael or Josh or their clothing on the morning of the fire.

II. The Fire

While Michael and Josh were questioned, Fire Investigator Jim Holdman began his examination of the scene at around 7:30 am. (Ex. 26, Fire Marshal's Investigative Reports, at 1). Holdman quickly decided on his theory of the case—that a liquid accelerant, gasoline in particular, had been poured onto Rita's body and the carpet below. (*Id.* at 4). This theory was based solely on Holdman's visual examination of the trailer and the extensive damage he observed on Rita's upper body. He wrote in his initial report, despite the lack of testing any samples from the scene, that a liquid accelerant had been poured onto the stomach, chest, shoulders, neck, and head of Rita and burned through the carpet underneath Rita's body, through the wood floor.[3] (*Id.* at 5).

This conclusion from Holdman, based only on his visual review of the scene, contradicts prevailing fire investigation standards developed by the NFPA[4]. (Ex. 2, Declaration of R. Paul Bieber, at 3). NFPA standards at the time specifically cautioned fire investigators that "fire patterns resulting from burning ignitable liquids are not visually unique," (*Id.* at 7), and laboratory confirmation of an ignitable liquid is recommended.[5] (*Id.*). This is because there are

[3] Three samples of carpet were taken from the scene for further testing—from the carpet northwest of Rita's body, from the carpet under Rita's back, and from the far northeast side of the room (as a control). (Ex. 25 at 4.)

[4] The National Fire Protection Association ("NFPA") is the premiere resource for fire data analysis, research, and analysis and sets the codes and standards for fire investigative agencies around the country. *See* NFPA, *NFPA Overview*, https://www.nfpa.org/About-NFPA/NFPA-overview.

[5] In 2004, the NFPA standards changed to *require* laboratory confirmation before concluding a liquid accelerant was used in a fire. *See* NFPA 921: Guide for Fire and Explosion Investigations, § 15.5.4.7.1 (2014), available at (hereinafter "NFPA 921").

other common household items that, when burned, would produce an irregular fire pattern like the pattern caused by an ignitable liquid. (*Id.*). When carpet samples from the scene of the fire were later tested, they were negative for an ignitable liquid, specifically gasoline. (*Id.* at 8). Yet Holdman's initial determination remained unchanged, despite evidence to the contrary.

III. The Boys

While Holdman conducted his visual inspection, Michael and Josh were interviewed in separate patrol cars by Detective Curt Davis. (Ex. 28 at 3). Davis interviewed Michael first, followed by Josh. (*Id.*) Both boys recounted the same set of facts. The evening before the fire, on Friday night, December 4, 1995, Rita was out with her friends.[6] Michael was supposed to be in St. Louis for the weekend with his dad, Rita's ex-husband, Ed Politte, and Ed's girlfriend, Christal. But Ed and Christal called that day to tell Michael they could not pick him up until Saturday. (Ex. 26 at 27). Instead, Michael spent time with Josh and some other friends from the neighborhood, playing pool at the Hopewell Store down the street and also playing video games at Michael's house. (*Id.* at 23). Michael asked Josh to spend the night and he agreed. (Ex. 28 at 3). Around 10 pm, Michael and Josh went to the railroad tracks near the trailer and tried to burn a railroad tie before returning to Michael's home around midnight.

Shortly after, Rita arrived home at the trailer. (Ex. 26 at 17). She had stopped by Subway in Potosi and bought a couple of sandwiches for her and Michael; Michael and Josh split a

[6] Tina and Francis Carter had a few beers with Rita at the Elk's Lodge on Friday, December 4, 1998, before they headed to Steve and Colleen's Bar. Tina remembered that Michael called Rita at around 9:00 pm that night. At 11:30 pm, Rita told Tina she needed to go get Michael something to eat and she went home. (Ex. 30, Statement of Tina Carter, at 1). Francis reported to police that Rita seemed to be having a good time and "everything was going fine." (Ex. 29, Statement of Francis Carter).

sandwich while Rita listened to her phone messages and went to bed shortly after.[7] (*Id.*). Michael and Josh decided to go to sleep only a short while later. (Ex. 28 at 5). Michael offered Josh a spot to sleep on the floor in his room or on the couch in the living room; Josh chose the floor. (Ex. 58 at 39).

In their initial interviews with Detective Davis, Michael also recalled waking up at the same time as Josh as the trailer began to fill with smoke the next morning. (Ex. 28 at 3). After the two ran out of Michael's bedroom and saw the fire in Rita's room, the boys tried to extinguish the fire with a hose before running to the neighbor's house for help. (*Id.*). Josh confirmed Michael's version of events. (*Id.*) Josh and Michael gave consistent explanations of what occurred from the evening of December 4 to the arrival of first responders on the morning of December 5. (*Id.* at 3).

During these interviews, Davis did not observe any blood, scratches, or defensive wounds on Michael or Josh—nor did he smell gasoline or any other sort of accelerant that would indicate Michael had come into direct contact with the fire. (*Id.* at 3-7).

IV. Physical Evidence

As Fire Marshal Holdman was reaching his unsupported conclusion about the origin of the fire that killed Rita Politte, Officer Tammy Belfield was dispatched to the scene to collect evidence. (*Id.* at 9). When she arrived at 7:50 am, Sheriff Ron Skiles informed Belfield "that there had been a report of a female that had been intentionally set on fire." (*Id.*). Belfield and Missouri State Highway Patrol officers conducted a thorough search of the residence. A fire poker, flashlight, and two baseball bats were collected and later tested by the Missouri State

[7] Rita's daughter, Melonie, who had been living at the trailer at the time of the murder but spent Friday, December 4, at a friend's house, reported to police that Rita never locked the doors of the home. (Ex. 26 at 28).

Highway Patrol Crime Lab, but all were excluded as the weapon that caused the blunt force trauma to Rita's head. (*See* Ex. 27, Missouri State Highway Patrol Evidence and Lab Reports, at 12, 20). No murder weapon was ever located, and no physical evidence at the scene pointed to Michael as the perpetrator.

V. Interrogations

After his initial interview of Michael at the scene, Detective Curt Davis drove Michael to the nearby Sheriff's Department facility to interrogate him further. Davis began noting Michael's distressed statements and behaviors, which he would later turn into evidence of guilt. Davis reported that Michael "became very agitated" and wondered why he was being taken to the station. (Ex. 28 at 4). Strangely, Davis asked the young boy, who had just lost his mother, "Don't you want the person that did this caught?" Michael responded, "Yes," and, after a moment, naively contemplated, "What's going to happen to my mom's truck?"[8] (*Id.*).

Later, when Davis and Michael made it to the Sheriff's Department, Davis told Michael he needed to ask him more questions and that they would have to wait for the juvenile officer and Fire Marshal to arrive to take further action. Exhausted and confused, Michael said, "When the heck are you going to take me home? I'm tired and I want to go back to bed. . . Man, I've already told you everything I know, so why do you got to talk to me some more for?" (*Id.*). Just a few hours prior, Michael suffered the shock and agony of discovering his mother burning on the floor of their home. Now, after only a few exchanges with police and no direct evidence against him, he was somehow becoming the sole suspect in her murder.

[8] Davis told Michael that it depended whose name was on the title. Michael replied, "My dad's name is on the title. I just wondered who gets it." (Ex. 28 at 4).

Indeed, Davis interpreted these statements from a traumatized 14-year-old boy as "lack of remorse" and requested that Michael take a Computer Voice Stress Analysis ("CVSA") test. (Ex. 54, Michael Politte CVSA Test Report).[9] The test, which occurred around 12:30 pm—approximately 6 hours after Michael discovered his mother's burning body—unsurprisingly indicated that Michael exhibited significant levels of stress, which police interpreted as "deception shown on all relevant questions."[10] (*Id.* at 2).

Fire Marshal Holdman and Juvenile Officer Jerry Chamberlain interviewed Michael yet again immediately after the CVSA test. (Ex. 28 at 5; Ex. 26 at 6). Michael, exasperated and exhausted during this third interview, expressed to Holdman once again that after school on Friday, December 4, he met up with Josh at the Hopewell Store and they hung out there until about 10:00 pm, when they walked back to Michael's house. Around 11:00-11:30 pm, Michael and Josh went down to the railroad tracks with some gasoline and burned a railroad tie, then went back to the trailer and went to bed around midnight.

[9] Michael's dad and alternative suspect, Ed Politte, (*see* Section X.B, *infra*), had arrived in Potosi, and was present for Michael's third interview. Ed lived about 90 minutes away in Hazelwood, Missouri with his then-girlfriend and later-wife Christal Sellers, and heard about Rita's death from a phone call from his sister, Patsy Skiles. (Ex. 26 at 27). *See* Section X.B, *infra.*

[10] The reliability of CVSA tests has been disputed. In determining deception related to drug use, the U.S. Department of Justice funded a study which found "that the average accuracy rate of these programs in detecting deception regarding drug use was approximately 50 percent—about as accurate as flipping a coin." Kelly R. Damphousse, *Voice Stress Analysis: Only 15 Percent of Lies About Drug Use Detected in Field Test, National Institute of Justice*, NATIONAL INSTITUTE OF JUSTICE (March 16, 2008), https://nij.ojp.gov/topics/articles/voice-stress-analysis-only-15-percent-lies-about-drug-use-detected-field-test. The DOJ study involved interviewing arrestees about their recent drug use and noted the difficulty of CVSA tests in determining if stress is deception-related or just stress. *Id.* This difficulty would be especially prevalent when testing Michael, who would naturally have been under significant levels of stress. Yet, this unreliable test tainted the rest of the police investigation.

Michael and Josh continued to give the same account to police that they had given from the start, from the moment they were first interrogated at the scene. Their accounts of the night before the fire and the morning of remained consistent despite repeated interrogation from officers. Yet, at the end of this third interview with Michael, Holdman reported that "Michael never showed any visible remorse that I detected. He was calm accept [sic] when I would inform him he was not telling the truth." (Ex. 26 at 8). Holdman never realized that while Michael was likely feeling all sorts of emotion at that moment, he had no reason to show remorse—he was innocent of harming his mother.

VI. Dog Sniff

After baselessly concluding that Michael "was not telling the truth," Holdman asked Investigator Bob Jacobsen and his canine to join him in the interrogation room. (*Id.*). Holdman requested that Michael turn over his tennis shoes so the dog could check them for accelerants. Jacobsen's dog was shown the shoes outside Michael's presence, where it alerted that an accelerant was present, and the shoes were immediately seized as evidence. (*Id.*). Holdman noted that after the dog alerted, Michael, who was realizing he had become a suspect in his mother's death, "became very irate, cussing and his dad calmed him down." (*Id.*). Michael's father, Ed—an alternative suspect—had been in the room during this interrogation. Holdman noted that "Michael's father was sitting behind Michael during the interview. He had his hand on Michael's shoulder. . . When I told [him] about someone setting [Rita] on fire, as soon as I said fire, Edward immediately pulled his hand away from Michael. He kept his hand away for about two minutes and returned it to [Michael's] shoulder." (*Id.*).

Following the dog sniff, Detective Davis interrogated Michael for yet a fourth time that day. Michael again had no counsel. Michael repeated his account of December 4-5 once more, giving the very same details. (Ex. 28 at 5-7).

VII. Arrest

There was no clear motive for Michael to have attacked his mother. No family member or friend offered any evidence of a tumultuous relationship between Rita and her son. Indeed, Michael's older sister, Melonie Politte, told police she knew of no problems between Michael and Rita. (Ex. 26 at 28). Instead, detectives focused on a story of an irritable teenager who was denied a request as evidence that Michael wanted to murder his mother. During an interview with Detective Davis, Derek Politte, an ex-boyfriend of Rita's with no relation to Michael's family, relayed a story about an evening at Rita Politte's in late November of 1995. During a dinner with Rita and Michael, Michael asked his mom for $500 for a part to fix his motorcycle, but Rita told Michael to ask his father. (Ex. 28 at 7). In response, fourteen-year-old Michael stared at his mom and "started playing with his mother's cigarettes and lighter" until Rita took them away. This made Derek feel uncomfortable. (*Id.*). The State turned this into a motive for Rita's death.

As a result, on December 7, 1998, only two days after Rita's murder, law enforcement obtained a 72-hour pick-up order for Michael. They completed no further investigation into Michael's relationship with Rita, confirmed none of their theories about the fire with laboratory tests, and investigated no alternative suspects.

Ed surrendered Michael to the Sheriff's Department. (*Id.* at 8). As Michael was read his Miranda rights once more, he became visibly upset and asked for an attorney. (*Id.*). As he was arrested and handcuffed, in a frantic state, Michael told the officers that he wanted them to take

his fingerprints because someone was trying to frame him. (Ex. 26 at 19). He repeatedly told law enforcement that he did not commit this crime, both in the days before his arrest and in the years following. After his arrest, Michael was transported to a juvenile detention facility. The next day, on December 8, 1998, Michael attended his mother's funeral with "leg irons" and an escort. (Ex. 60, Transcript of Detention Hearing, December 9, 1998, at 108).

At a detention hearing on December 9, 1998, Michael's then-public defender, Renee Murphy, accurately described the case against Michael during her closing argument: "This is a case where they have found out that this was a troubled child during the parent's divorce and they have brought in everything that could possibly make him look evil but that doesn't mean he killed his mother." (*Id.* at 108-09). Despite the Court's assessment that the case against Michael was "thin" and "circumstantial at the best," Michael was ordered to remain detained. (*Id.* at 109). He has been in custody ever since.

VIII. Suicide Attempt

On January 5, 1999, exactly one month after the death of his mother, Michael attempted suicide while detained at the St. Francois County Juvenile Detention Facility. Juvenile Detention Officer Jerri Johnson had informed Michael that he would be having a scheduled visit with family in a few days. Michael responded, "I won't be alive." (Ex. 61, Suicide Attempt Incident Report and Related Notes, at 5). At around 2:15 p.m., Michael was discovered standing on his toilet tying a sheet to a ceiling vent. (*Id.* at 3). Juvenile Detention Officers Jerri Johnson, Junior Greer, Cheryl Graham, and George Boyd got Michael down, removed Michael's bedding, and stripped him down to his shorts and t-shirt. (*Id.* at 1).

Michael's counselor from the Southeast Missouri Community Treatment Center, Karon Blankenship, came to the cell to speak with the distressed teen and witnessed the immediate

aftermath of the attempt. (*Id.* at 4). Fourteen-year-old Michael told Blankenship why he was upset: he believed he would be tried as an adult for the murder of his mother, he had to move to another room, and he had lost privileges. (*Id.* at 10). According to Blankenship's detailed notes, he did not mention anything about involvement in his mother's death as a cause for his distress. Indeed, Blankenship's initial notes of the suicide attempt did not include any inculpatory statements by Michael. Yet, later, "at the urging" of Deputy Officer Cheryl Graham, Blankenship amended her report.[11] (*Id.* at 13). Only in this amended report did she write that as she and Graham entered Michael's cell, he shouted, "I haven't cared since I killed my mom December 5th." (*Id.* at 10). Notes written by Detention Officer Johnson, also present during that incident, stated that Michael "spontaneously yelled," "I haven't cared since December 5th. That's when I killed my mom." (*Id.* at 12). Despite cameras and recorders in the facility, no audio recordings of what occurred in Michael's cell that day were ever disclosed.

This alleged outburst on the anniversary of his mother's death was the only time in the four years between the crime and Michael's trial when witnesses claim they heard Michael say anything besides that he was 100% innocent of the murder of his mom. Other than Blankenship, the witnesses who heard this statement from Michael were not mental health experts. If they were, they would have known that Michael's outburst could not have been characterized as a confession. Expert Dr. Jeffrey Aaron, who interviewed Michael and other witnesses and extensively reviewed Michael's mental health records, reports there are several possible explanations for Michael's statement, including "The statement could have signified feelings of

[11] In a letter from Blankenship to Graham on January 14, 1999, Blankenship explains: "You asked me to execute a witness statement documenting what Michael had shouted while we were on the way to his cell. I wrote a statement, which you asked me to re-write because you thought it was incomplete. I took the form back to my office and wrote a more complete statement. On January 6, 1999, I delivered to your office the re-written statement." (Ex. 61 at 13).

guilty for not protecting [Rita], as he was present in the home. It could have been a statement of what others clearly thought and were vigorously asserting." (Ex. 4, Report of Dr. Jeffrey Aaron, at 21). Because Michael was amid an emotional crisis, he was likely not rational, clear-headed, and logical when this incident occurred. Nor did the statement offer any verifiable details that only a true confession could. Dr. Aaron concludes, "[T]he statement could reasonably be seen as offering little in terms of definitive or supportable factual information." (*Id.* at 21).

At every point before and after this alleged confession, Michael continued to profess his innocence to his family and others. For example, just a few months later in April 1999, Michael was transferred from the Juvenile Detention Center to the Washington County Jail and placed on suicide watch once again. (Ex. 28 at 17). While at the jail, Michael told Sheriff's Officer Tammy Belfield, "I wish my mom was here. She would tell everyone that I didn't do it." (*Id.*).

IX. Josh Sansoucie

The only individual who could affirm Michael's account of events the night Rita died was fifteen-year-old Josh Sansoucie, who spent the night with Michael on December 4, 1998. From the night of Rita's murder to the time of Michael's trial in 2002, Josh was questioned on eight (8) separate occasions.[12] Two of these were under oath—his testimony at Michael's December 9, 1998, detention hearing and his deposition testimony shortly before Michael's trial. In each statement, Josh's account corroborated Michael's. Both boys stated that they had been smoking weed and hanging out at the Hopewell store. (Ex. 28 at 4-6; Ex. 26 at 6, 9, 17; Ex. 58 at

[12] Josh was questioned at least twice on the day of the crime—once at the scene and once at the Sheriff's Department. (Ex. 28 at 3-4). He also provided a written statement that day. (Ex. 57, Written Statement of Joshua Sansoucie). Two days later, Josh was part of two more interviews, one of which was video-recorded. (Ex. 28 at 7-8; Ex. 26 at 17-18). Two days after that, on December 9, 1998, Josh testified at Michael's detention hearing. Five days later, Josh was called back in for a polygraph interview. (Ex. 56, Joshua Sansoucie Polygraph Statement.) He was not questioned again until he was deposed before Michael's trial in 2002. (Ex. 58).

7-8). Afterwards, they went back to Michael's house and played chess and videogames, (Ex. 28 at 4, 6; Ex. 26 at 6, 9, 17; Ex. 57 at 1; Ex. 58 at 18), then went to the train tracks nearby and tried to burn a railroad tie. (Ex. 28 at 4, 6; Ex. 26 at 6, 9, 17; Ex. 57 at 1; Ex. 58 at 20). They went back to Michael's house, and a few minutes later, Rita came home with a subway sandwich. (Ex. 28 at 3, 5-6; Ex. 57 at 1; Ex. 58 at 29). The boys split the sandwich while Rita listened to her messages on her answering machine and went to bed. (Ex. 28 at 5-6; Ex. 26 at 6, 17; Ex. 56 at 1; Ex. 58 at 29). Michael asked Josh where he wanted to sleep, and Josh chose the floor in Michael's room. (Ex. 56 at 1; Ex. 58 at 39). Josh woke up several times during the night when he heard a noise. (Ex. 28 at 5; Ex. 26 at 18; Ex. 56 at 1; Ex. 58 at 49). Josh went back to sleep and woke up in the morning because he couldn't breathe. Michael was leaning out of his bed and asked Josh if he was smoking a cigarette. (Ex. 28 at 5-6; Ex. 28 at 18; Ex. 56 at 1; Ex. 58 at 52). They got up, opened the door, and the house was full of smoke. (Ex. 26 at 5-6; Ex. 28 at 6, 9; Ex. 56 at 1; Ex. 58 at 53).

Nonetheless, investigators ignored the consistency of Josh's and Michael's statements and instead applied pressure to Josh in hopes that he would "flip" and provide evidence of Michael's guilt. Correspondence just weeks after the crime confirms the State's theory to focus in on Josh. In late December 1998, the National Center for the Analysis of Violent Crime, which houses the FBI's Behavior Analysis Unit, sent a fax to local authorities about themes or techniques to use in upcoming interviews with Josh. (Ex. 31, Fax from FBI to Washington County Sheriff's Department, December 21, 1998). Recommended techniques included "Minimization of the crime," "Projection of the crime onto others [Michael] or the victim herself," and "transference of evidence from Joshua to the crime scene where the evidence should not be." (*Id.* at 2). Nowhere in this fax was there any contemplation that the boys may not

have been involved. Indeed, even when the Missouri Attorney General's Office became involved in the investigation and prosecution of Rita's murder in June of 1999, investigators remained focused on applying pressure to Josh to get to Michael, despite evidence that Ed Politte and his friends may have been involved. *See* Section X and Claim III.F, *infra.*

In July 1999, seven months after the crime, Investigator Jim Weber asked an Assistant Attorney General, "Is Josh going to be certified as an adult? [Detective] Davis seems to feel strongly that if he is, he will spill his guts as to what happened that night." (Ex. 41, Emails from Attorney General's Office at 3). To advance this strategy, the State began to build a criminal case against Josh, and in October of that year, Josh was charged in juvenile court with Tampering with Physical Evidence for throwing a marijuana plant out of the window of the trailer before the arrival of law enforcement at the crime scene and Property Damage in the first-degree for "pouring accelerates [sic] on a railroad tire near the Politte home" for the attempt to burn the railroad tie with Michael. (*See* Ex. 19, Affidavit of Curt Davis, at 1; Ex. 44, Transcript of Joshua Sansoucie Witness Immunity Proceedings, at 7). In February 2000, Josh pleaded guilty to a misdemeanor charge of Property Damage in the second-degree and was given a suspended imposition of sentence; the tampering charge was nolle prossed. (Ex. 43, Objections to Witness Immunity, at 2). Through all of this, Josh's statements remained consistent.

In yet another effort to get Josh to turn on Michael, the Attorney General's Office offered Josh witness immunity to induce inculpatory statements—implying that Josh needed immunity because he was somehow involved in Rita's death. On the same day that Josh pleaded guilty to the misdemeanor charge, the State filed an Application for Witness Immunity. (Ex. 42, Application for Witness Immunity). The Attorney General's Office asked Investigator Jim Weber to "jump on Josh" after his immunity proceedings in March of 2000, along with Davis

and Holdman and "do a long interview with him." (Ex. 41 at 4). During the proceedings, Josh's attorney, Lisa Clover, made it clear that Josh had fully cooperated with law enforcement throughout the investigation and that he had no other information to share. (Ex. 44 at 6). What the State wanted was for Josh to testify to three key facts: that he and Michael had set fire to a railroad tie at the tracks on the evening of December 4, 1998; that Josh heard "a male voice and a thud" in the night and could not see Michael in bed; and that he then saw Michael in bed when he woke up to smoke. The prosecution argued, "From what I think circumstantially you can infer that Politte wasn't in bed, wasn't there the first time [Josh woke up]. If he was out, he certainly had an opportunity to commit the crime…" (*Id.* at 41). Despite Josh's insistence that he'd told law enforcement everything he knew, on April 3, 2000, the Court ordered full witness immunity and found that Josh had "expressly refused to testify or provide other information… on the basis of his privilege against self-incrimination" and that he "has information and testimony that is necessary to the continuing investigation and prosecution of Michael Politte and the information and testimony is otherwise unobtainable." (Ex. 45, Order Granting Witness Immunity).

The Attorney General's Office and Investigator Weber continued to e-mail about how to use this witness immunity for Josh to get more evidence against Michael. Weber wrote: "My opinion on the next meeting with Josh is that he should be pressed firmly on the issues we want the answers to (voices he heard when he woke up, etc.). We shouldn't accept, 'I don't remember' or 'I don't know.' Maybe [Fire Investigator] Jim Holdman should be there to question Josh." (Ex. 41 at 5).

Finally, in January 2002, shortly before Michael's trial, Josh was deposed—his eighth time being questioned by the State. Once more, Josh reiterated the facts he had told law enforcement from the very beginning, including that when he observed Rita and Michael on the

night before the fire, there was no arguing; Michael never mentioned he was mad at Rita. (Ex. 58 at 44-45). Michael was acting normal; he did not appear angry or agitated. (*Id.* at 69-70). When Josh woke up in the middle of the night, he didn't hear or smell anything. (*Id.* at 51-52). Most importantly, he was clear that he never saw Michael leave his bedroom that night. (*Id.* at 69). The police had previously "put words in Josh's mouth" about whether Josh could see Michael sleeping in his bed when he woke up during the night. (*Id.* at 77, 101-02). The next morning, after the boys realized that there was a fire in the trailer, and more specifically, that the fire was coming from Rita's bedroom, Michael looked "worried and scared." (*Id.* at 57). Michael looked upset as he told Josh that someone had killed his mom and he would find out who did it. (*Id.* at 61). Michael had no noticeable blood, cuts, or scratches on him that morning. (*Id.* at 61-62). Josh explained that the police had done everything they could to try to pressure him—questioning him multiple times, vacillating between being nice to him and screaming and cursing at him, and calling him a liar. (*Id.* at 73-74).

After this deposition, and after hoping for years that Josh would be the lynchpin of their case against Michael, the State did not call Josh as a witness at trial. Unfortunately, Michael's defense counsel also did not call Josh to the stand, despite the fact that Josh and Michael had told consistent accounts of the events of December 4th and 5th since the moment they were first questioned and that Josh could have further testified to how the behavior between Michael and Rita on the night before her murder seemed completely normal; Josh was the only witness other than Michael who could have presented a clear narrative of what occurred before and after the fire. *See* Claim III.B.ii.a, *infra*.

X. Alternative Suspects

From the beginning, the police concentrated all of their attention on Michael and disregarded facts pointing toward anyone else with opportunity or motive to harm Rita. But there was significant evidence implicating alternative suspects during the investigation, in particular, Rita's ex-husband and Michael's father, Edward Politte. New evidence also demonstrates that someone other than Michael committed this crime. *See* Section X.C, *infra.*

A. Physical Evidence

While processing the crime scene, law enforcement found a fresh boot print outside the Politte trailer on the path leading away from the back door of the home. The print did not match Michael's tennis shoes (the same shoes that the State erroneously claimed were covered in gasoline). (T. 349). Moreover, DNA from a sperm stain on a towel in Rita's bedroom matched Richard Jarvis,[13] a boyfriend of Rita's, and additional sperm and non-sperm stains found on Rita's bed sheet were consistent with a genetic mixture of at least three people. (Ex. 27 at 18). Yet the investigation remained focused only on Michael.

Other pertinent evidence which might have been examined or tested with new technology, such as Michael's clothing or Rita's rape kit, was or is in no condition suitable for testing as the items were inappropriately stored, comingled, covered with mold, and in some cases, eaten by rats. (Ex. 46, Washington County Evidence Photographs taken May 15, 2013). Indeed, even while they tried to build a case to prosecute Michael for Rita's murder,

[13] Jarvis was interviewed by Detective Davis on December 5, 1998. (Ex. 28 at 7). Jarvis stated that on December 4-5, he was on his way to Marion, Georgia as a commercial truck driver with a co-worker, Gary Gamble. Jarvis arrived home around 4:30-5:00 am and went to bed. (Ex. 33, Statement of Rick Jarvis). Jarvis had last been to Rita's house around Thanksgiving, about two to three weeks before Rita's murder. Rita had been to Jarvis's on December 2, only three days before her murder. (Ex. 26 at 12). After Jarvis showed "No Deception" during a CVSA test, law enforcement quickly disregarded him as a suspect.

investigators wondered about the location and collection of evidence. In emails between Jim Weber and the Attorney General's Office, it became clear no one was sure if fingernail scrapings from Rita had even been collected. In a July 12, 2000, email, an Assistant Attorney General commented, "Idea: How a bout [sic] checking with the ME and learn wether [sic] we can dig up Rita's body and get those fingernail scrapings? She wasn't cremated was she? Please call the ME and learn wether [sic] we can do this and fix his flub up." (Ex. 41 at 6). In another email, Weber noted that Detective Curt Davis was

> supposed [sic] to bring the bat and the fingerprints to the lab on more than one occasion, I went through the sheriff's dept evidence room Thursday looking for the latent prints from the crime scene….The prints are not in evidence, therefore I believe they have been misplaced by the sheriff's department…the blue baseball bat, with the red "specks" that was photographed and videotaped was in evidence. . . it had no chain of custody form and I have no idea how it got there. Correct me if I'm wrong, but when you and I reviewed the evidence, that blue bat wasn't in there… I don't even want to tell you how disorganized the evidence room is, not to mention our evidence.

(*Id.* at 7). As a result of this haphazard investigative approach, additional physical evidence that could have excluded Michael and included the real perpetrator was not collected or available for testing.

B. Ed Politte

The most likely and obvious suspect, and the one with the clearest motive at the time, was Ed Politte, Michael's dad and Rita's ex-husband with whom she'd had a history of domestic violence and a tumultuous divorce. Detective Davis spoke with Ed Politte on the day of the murder and inquired into Ed's alibi: On Friday, December 4, Ed checked into work at the Ford Motor Company in Hazelwood, Missouri, St. Louis County, where Ed also lived, at 4:45 pm. (Ex. 28 at 7). Ed took his lunch break and went home from 9:15-11:00 pm, then went back to work until he checked out at 2:18 am. (*Id.*). Ed washed his truck from 2:40-3:10 am and arrived

at home again around 3:30 am, where he chatted with his live-in girlfriend, Crystal Barnett, until about 4:30 am, when they went to sleep. (*Id.* at 2). Ed heard about the fire when he received a phone call from his sister, Patsy Skiles, at 7:00 am on December 5, and he headed to Hopewell.[14] (*Id.*). Davis took no action to verify Ed's alibi before arresting Michael. He also did not inquire further into Ed's relationship with Rita, including their past conflict, or Ed's possible involvement in her death.

During the four years Michael sat in juvenile detention awaiting trial, significant evidence accumulated to point toward Ed, but it was ignored by police. Rita's daughter, and Michael's older sister, Chrystal, told police early in their investigation that her mother was only scared of two people—Ed Politte and his friend Rick DeMaris, who worked with Ed at Ford. (Ex. 26 at 25). Ed had a history of domestic violence and abuse towards Rita. Michael himself had observed Rita and Ed physically fight; he recalled "an incident in which his mother badly burned herself cooking, and his father seemed strikingly unconcerned with her well-being and simply watched without helping while she crawled to the car." (Ex. 4 at 6). And the two had other relationship issues as well. Ed's brother, Michael "Mick" D. Politte, told police that Ed had encouraged Mick to have sex with Rita while Ed and Rita were still married, but Rita "wouldn't have anything to do with" him. (Ex. 26 at 21). Ann DeMaris, the wife of Ed's close friend and co-worker, Rick DeMaris, gave a revealing interview with law enforcement on December 23, 1999, where she said that Rita had once told her that Ed, Christal Barnett (Ed's later live-in girlfriend and wife) and her husband, and Rick DeMaris wanted to "swap wives and engage in sexual activity." (Ex. 34, Attorney General Interview with Ann DeMaris, at 2). Dr. Jeffrey Aaron

[14] It would have taken Ed around 1 hour and 30 minutes to drive from his home in Hazelwood down to the Hopewell area. (Ex. 32, Google Maps Drive Estimate from Ed Politte's Home to Rita Politte's Home).

notes that in his review of the Politte family dynamic, Michael and his sisters were aware of the problems in their parents' relationship, including "infrequent but significant domestic violence, and their father's extramarital sexual behaviors." (Ex. 4 at 5). Ed's and Rita's marital relationship was destructive and complicated, perhaps partially because Ed wanted Rita to have sex with other men. (Ex. 6 at 12).

Their complicated marriage unraveled completely in 1997, when Ed and Christal Barnett met in July of that year and began a relationship. Both were married at the time. Ed finally filed for divorce from Rita in April 1998. (Ex. 47, Dissolution Case Docket Sheet, at 1). After their separation, when Rita took Michael with her to retrieve items from the family home, Ed punched and choked Rita; Michael had to break up the fight and tell his dad to stop hurting his mom. (Ex. 4 at 7; Ex. 53, Domestic Violence Incident Report, 7/13/1997, at 3). The divorce was finalized on July 1, and Ed was required to pay to Rita—terminable only upon remarriage or *death*—$635 per month in child support, $300 per month in monthly maintenance, and a $2,000 one-time maintenance. (Ex. 52, Judgment and Decree of Dissolution of Marriage, at 3-5). Ed was also ordered to equally divide his Ford Motor Company pension with Rita, give Rita 40% of his 401k value, surrender ownership of the jointly owned land and mobile home to Rita, and transfer title of one motorcycle to Rita, even though Rita never held a steady job throughout the marriage. (*Id.* at 5-6). Unhappy with the division of marital property and monthly maintenance payment, Ed appealed the outcome of the divorce proceedings to avoid payment. Then, on the Tuesday before Rita's death, just days before she was attacked and murdered, Ed and Rita had their final court date. Ed was ordered to pay Rita $1,000 in attorney's fees. (Ex. 47 at 6). Ed promised Rita that she would "never see a penny of this." This statement disturbed Rita, as she understood it as a threat. (Ex. 20, Affidavit of Dan Grothaus). That same evening, December 1, 1998, just days

before the murder, Ed called Rita at her job at Steven and Colleen's Bar and threatened to kill her. (Ex. 40, Attorney General Interview with Rick Jarvis, at 2).

After Rita and Ed separated, Michael's relationship with his father had been "on and off," but it deteriorated further during the investigation into Rita's murder. During a visit between Michael and Ed at the Washington County Jail on June 6, 1999, officers and other inmates witnessed an argument between the two. (Ex. 28 at 19-22). Ed insisted on talking with Michael, but Michael was reluctant. He yelled at Ed, "Buzz off, […]. You set me up," and Ed left shortly after. (*Id.* at 19). Just a few days later, Michael told Officer Tammy Belfield how he really felt about his dad, relaying that he believed his dad was involved in his mother's murder. (*Id.* at 23). Michael told Belfield, "I know my dad had someone kill my mom." (*Id.*).

The State's e-mails reveal that they might have agreed with Michael that Ed had something to do with the murder. When the Missouri Attorney General's Office joined the Rita Politte investigation in the summer of 1999, Ed Politte was on their radar as an alternative suspect. In a June 1999 e-mail to Investigator Jim Weber, the Attorney General's Office explained, "We have [Michael] and two suspects we must investigate further. The suspects are [Josh Sansoucie] and the Defendant's father, Charles Edward Politte "Ed." (Ex. 41 at 1). He continued:

> Ed is a suspect because he had gone through a nasty divorce from Rita. [Michael] was wanting to live with his father but Rita got custody. Ed appealed and lost an [sic] regarding money he was to pay for child support or attorney fees of Rita. The Tuesday before the murder he had been in court regarding his appeal and the judge ordered him to pay Rita $1000. He made a remark something like, 'You will never see the day when you'll get the money' or something kinda threatening like that. Also interesting was a visit Ed had with his son in jail and Bernie was obviously pissed and yelled out, "You MF'er, you framed me." The relationships were not good among the members of this family. Apparently, Ed had abuse [sic] Rita reportedly physically and sexually.

(*Id.*). The Attorney General's Office continued to suspect Ed's involvement. Even so, despite the strong motive and Ed's history of violence and threats toward Rita, the State only pursued charges against Michael.

C. Johnnie Politte

Ed was likely discounted as the *sole* perpetrator of the crime because he received the call from his sister notifying him of the fire while he was home in St. Louis, meaning it not have been possible for him to have committed the murder himself and driven the hour and 30 minutes back to St. Louis that morning. (Ex. 26 at 27; Ex. 32). Evidence showed, however, that a few of Ed's close friends might have helped carry out the murder—in particular, Ed's cousin, Johnnie Politte.

On December 8, 1998, an uncle of Michael's came into the Sheriff's Department of his own accord. He handed a piece of paper to Sheriff Ron Skiles and Officer Tammy Belfield. (Ex. 28 at 11). "He then stated that another family member was in the residence removing clothing to wash and located the paper on a tire tool under a box in the closet in [Michael's] bedroom. The paper had a large stain in redish-brown [sic] in color." (*Id.*). This "other family member" was Johnnie Politte. (*See* Ex. 38, Attorney General Interview of John and Gretchen Politte). He and his wife, Gretchen, entered the crime scene without permission from the police, where they suddenly "discovered" an alleged murder weapon in Michael's closet. Officer Belfield returned to the Politte home to search the closet a second time after Michael's uncle walked the tire tool into the police department. (Ex. 26 at 11). She seized the tire tool and two pairs of boxers as evidence, (*Id.* at 12), but Belfield testified under oath that she had thoroughly searched the scene at the time of the crime and did not observe a tire tool in the trailer on the day of the murder—it was absolutely not there. (T. 545-46). According to Belfield, the tire tool found its way into the

Politte home sometime after the initial processing of the crime scene. (T. 546). In addition to evidence suggesting that Johnnie Politte attempted to plant evidence inside the Politte home in order to frame Michael, new evidence reveals that Johnnie was also seen near Rita's home on the morning of the murder, (Ex. 8, Affidavit of Larry Lee, at 1), and that he has threatened those he believes have information connecting him to the crime. (Ex. 9, Affidavit of Carolyn Lee, at 1). *See* Claim III.F, *supra*.

None of the evidence regarding Ed, his motive, or his connection to Johnnie was ever presented at trial.

XI. Michael's Conviction

As preparations for trial finally got underway, the State offered a plea bargain: a recommended 15-year sentence in exchange for a plea to voluntary manslaughter. Michael's public defender, Wayne Williams, advised Michael about the consequences of the plea, and explained that he'd receive time served for the almost four years he'd already spent in detention, but Michael rejected it summarily. (T. 759-60). Michael, who continued to proclaim his innocence, would not plead guilty. By the time the case went to trial in January 2002, Michael was 18 years old, 4 inches taller, 30 pounds heavier, and a far cry from the young boy he was when his mother died four years earlier. This older teenager—nearly a man—was the person the jury observed when it considered the statements and behavior of a terrified, fourteen-year-old Michael.

The State's theory at trial rested largely on evidence about the fire, as laid out by prosecutors John Rupp, of Washington County, and Richard Hicks, of the Missouri Attorney General's Office. In their opening statement they posited to the jury: "Somebody had taken some accelerants after having hit [Rita] in the head, rendering her unconscious, had taken some

accelerants and poured it over the area where she had been hit and then set her on fire." (T. 133-34). The evidence centered on three main themes: the fire evidence, Michael's attitude following the murder, and his alleged confession.

A. Fire Evidence

The State's most important witness was Fire Marshal Jim Holdman. Holdman testified that there was "clearly evidence that [the fire in the Politte trailer] was an intentionally set fire, what we call an incendiary fire." (T. 282). He based this conclusion on his visual examinations of the scene, noting "[w]ith the fire damage to the upper portion of the victim's body…and also the damage to the floor, it was clearly evident that someone had added a liquid accelerant" (*Id.*) because the fire burned very quickly, within 10-20 minutes. (T. 371). Holdman testified that he took carpet samples from the scene—one control sample and two from the carpet near Rita's body "because it was clearly evident that a liquid accelerant had been" used. (T. 295). Holdman was not question about the fact that the samples tested negative for an accelerant. (T. 643). Yet, Holdman noted that after he had made his determination about the accelerant, he interrogated Michael and accused the fourteen-year-old of killing his mother. (T. 353-54). In short, after simply walking the crime scene that morning, Holdman had already made his determination about who was responsible.[15]

Holdman tried to bolster this rash conclusion by focusing on Michael's curiosity around fire. Earlier in the evening on December 4, 1998, both Josh and Michael admitted to burning railroads ties out of boredom. With this admission in hand, Holdman attempted to argue that the

[15] Holdman also attempted to testify as to blood spatter evidence, and time/cause of death, despite having no training or background in blood spatter or pathology. (T. 283, 288-91). Although the trial court sustained the defense's objections to this testimony, the damage was done—Holdman had established himself to the jury as an expert on these subjects, even if he had no foundation for this expertise.

burns on the ties were the same as the burns on Rita's body because they were both "concentrated." (T. 322-23, 368-69). Holdman insinuated that Michael "played with fire" often (T. 360, 368), failing to note that Michael was honest about every one of his childhood antics involving fire—antics not uncommon in the rural community (Ex. 17, Affidavit of Michael Glore, Jr., at 1)—including burning the railroad ties and burning a bottle which had caught his own leg on fire the previous Tuesday. (T. 344, 346, 360-62). Indeed, Holdman testified that Michael was a "firebug," planting in the minds of the jury that Michael had some sort of obsession with fire without considering the commonality of these types of activities in Hopewell. (T. 368).

Holdman's testimony was followed by Fire Marshal Investigator Bob Jacobsen, who testified that on December 5, 1998, he brought in an accelerant sniffing dog that alerted to an accelerant on Michael's shoes. (T. 441). Jacobsen could not remember what the lab results said about Michael's shoes, but he made sure to tell the jury—without any support or evidence—that it was possible for a dog to detect accelerants that a lab cannot and that a dog is more sensitive than lab equipment.[16] (T. 444). But this assertion is false: an accelerant detecting canine's nose—while sensitive—commonly leads to false positives when the dog alerts to chemical properties in tennis shoes shown to contain compounds similar to gasoline in their manufacturing process. (Ex. 3 at 2). This lack of discrimination may lead to false positives when no ignitable liquid is present and shows why a lab test would be vital in determining whether any accelerates were present. (*Id.*). Notably, by the time Jacobsen had brought in the dog on the morning of the fire—

[16] This testimony exceeded Jacobsen's expertise and the bounds of science. (T. 446). In addition, NFPA standards require that dog sniffs be verified by testing—they are not more reliable than testing and in fact, can confuse ingredients used in manufacturing with an accelerant, as is the case here. (Ex. 3, Supplemental Report of R. Paul Bieber, at 2).

at Holdman's request (T. 314-15)—Holdman had already conducted his walkthrough and made his determination based on his visual examination that an accelerant had been used. No testimony was presented regarding the perils of reaching a conclusion before using a canine, including the possibility that a handler who believes an accelerant is present may unwittingly influence a dog, creating the potential for a false-positive alert. (Ex. 3 at 3-4).

The defense failed to challenge Holdman's conclusion that it was a gasoline fire based only on an on-scene observation of fire patterns. This conclusion contradicted the NFPA's requirement that a lab confirm a visual inspection to validate the presence or absence of an ignitable liquid. (*Id.* at 5). No testimony regarding NFPA recommendations or requirements was provided by the prosecution or defense.

Finally, Carl Rothove, a Missouri State Highway Patrol Lab Criminalist Supervisor, testified about Michael's tennis shoes.[17] Rothove said Michael's shoes were tested by the lab for liquid accelerants and were positive for gasoline. (T. 641). It was this gasoline—alleged by Holdman to be the cause of the fire and by Jacobsen and Rothove to be found on Michael's shoes—that the State used to tie Michael to Rita's murder. But science does not support this conclusion. Rothove testified that the carpet samples taken from the scene "did not yield the presence of an ignitable liquid" upon testing, (T. 643), but unfazed by the scientific evidence in front of him, Rothove provided an alternative theory—that the accelerant used must have "burned up," so it could not be detected: "If [the carpet] has burned excessively to a point where it's just charred residue, it's possible if an accelerant was present there to begin with, that it burned to a thorough enough degree that it's basically gone. It's totally burned up, and we would

[17] Rothove did not test the shoes himself. That was done by Dominic Miranda, a criminalist and chemist who worked in the trace evidence unit at the lab from 1995 to 1998. (T. 636-37). Rothove was Miranda's supervisor. (*Id.*).

not find residue at that point." (T. 643-44). The State provided no evidence in support of this theory other than Rothove's opinion. Nor did Michael's defense attorney present any evidence to the contrary.

B. Michael's Behavior After Discovering His Mother

In addition to the fire evidence, the State also focused on Michael's behavior following his mother's death—the behavior of a fourteen-year-old who just witnessed his mother burning on the floor—to spin a narrative that Michael was cold, emotionless, and unremorseful. Eric Aubuchon, a volunteer firefighter who responded to the fire at the Politte residence, recalled that when he arrived on scene, Michael was not screaming or shouting, but he also noted that Michael was not "calm" and that Michael's eyes looked red, as if maybe he'd been crying.[18] (T. 234). Davis and Holdman testified about Michael's statements during his interrogations on the day of his mother's death, including the statements taken while Michael was held in the back of a police car about what would happen to his mother's truck, (T. 460), and the statements made at the Sherriff's Office when Michael asked when he could go home and go to bed. (T. 461). Davis theorized that Michael was "acting normal, not concerned about what had happened, no visible signs of remorse." (T. 460-61). Davis testified that Michael did not seem emotional until he realized he was a suspect and angrily exclaimed "Dad, this is a bunch of shit, they're trying to pin something on me that I didn't do." (T. 469.)

Holdman reiterated his belief that Michael was the perpetrator, testifying about Michael's interrogation. During Holdman's interrogation, Michael questioned whether an autopsy would show how his mother was killed or if his mother was injured before the fire, (T. 311-12), and

[18] Aubuchon did not provide an official statement to law enforcement about his alleged interactions with Michael on the morning of the fire, which occurred in 1998, until November of 2001, three years after the murder. (T. 237-38).

stated that if he had committed the crime, he would have let the fire burn up the blood and evidence. (T. 313). Holdman further opined about Michael's overall state of mind, testifying that Michael was calm during the interview and did not become angry until Holdman said he did not believe what Michael was telling him. (T. 314.). Finally, Holdman testified that Michael acknowledged he had problems with his mother in the past and that he had, as a kid, threatened her.[19] (T. 318.). Defense counsel left this character evidence, presented entirely without context, go completely unchallenged. No testimony was presented from a mental health expert, who could have reviewed these questions and statements.

C. Michael's Suicide Attempt

Finally, the State focused on Michael's suicide attempt at the juvenile detention center. Juvenile Officer Jerri Johnson testified that on January 5, 1999, Johnson told Michael his dad would be visiting soon. Shortly after, she found Michael in the middle of his cell trying to kill himself. At this point, counselor Karon Blankenship entered the room, (T. 656), and Michael allegedly confessed. Cheryl Graham, Chief Deputy Juvenile Officer, took the stand and reiterated Johnson's claims about the events of January 5, 1999. Graham stated her interpretation of Michael's outburst was that "[Michael] took ownership of this crime right then and there. That's what got my attention." (T. 675). But Graham had no explanation for why she felt this was Michael's "taking ownership," and she admitted Michael did not give any details following this statement about the crime; he only made this one "spontaneous utterance." (T. 690-91). Unfortunately, while there were video cameras recording inside the Detention Center at the time of Michael's attempted suicide, there was no audio of the events. (T. 664). With no juvenile

[19] As Dr. Aaron reports, this prior threat was not taken seriously by anyone treating Michael: "…[T[here was no indication that any clinician perceived an actual threat that [Michael] would act violently towards his mother." (Ex. 4 at 9).

expert from the defense to contradict these assertions, the conclusions made by Juvenile Detention Center staff about Michael's outburst thus went largely unchallenged.

D. Other State's Evidence

In addition to the testimonial themes of fire evidence, behavior evidence, and the "confession," the State also tried to present evidence of motive through Derek Politte, Rita's ex-boyfriend, who testified about Michael's argument with Rita about money for a motorcycle part and noted that afterward, Michael petulantly flicked a lighter in the corner. (T. 180).

Other State's witnesses included neighbors Leigh Ann and Chuck Skiles. Leigh Ann testified about calling 911 on the morning of December 5, 1998, and stated Michael had no cuts, scratches, or blood on him that day. (T. 204). Chuck Skiles corroborated Leigh Ann's account, recalling that Leigh Ann called him around 6:30 am, and he ran down to Rita's trailer and saw Josh and Michael. (T. 215). Chuck was there when Michael began to grasp the reality of what was happening. Michael told him, "There's my mom. She's on fire. She's dead." (*Id.*). Chuck later saw Michael fall over onto the couch at his relative's next door; Michael was screaming and obviously very upset. (T. 226-27). Like Leigh Ann, Chuck did not see any blood, scratches, or other wounds on Michael that morning. (T. 227). Chuck recalled that the water hose was lying on the floor in the house, consistent with Michael's and Josh's statements that they had tried to extinguish the fire before Chuck arrived. (T. 217).

Additionally, pathologist Dr. Michael Zaricor testified that he failed to take fingernail clippings or scrapings from Rita's body during her autopsy. (T. 394-97). Dr. Zaricor had previously testified under oath that he had taken fingernail scrapings during the initial autopsy

because he "thought [he] had," (T. 420), however, Rita's body had to later be exhumed[20] to collect samples. (T. 395-97).[21]

E. The Defense

Michael's attorney called just three witnesses in Michael's defense. The only witness who could corroborate Michael's account of the evening—Josh Sansoucie—was not one of them.

The first defense witness was Karon Blankenship, Michael's counselor at the Juvenile Detention Center. Blankenship was a critical witness as she was the first person to speak with Michael after his suicide attempt when he made his alleged confession. Blankenship took detailed notes of her conversation with Michael, but her initial notes of the suicide attempt did not include any inculpatory statements by Michael. It was only "at the urging" of Deputy Officer Cheryl Graham that Blankenship amended her report. (Ex. 61 at 13). Despite being such a critical witness, it was clear that defense counsel took no efforts to prepare Blankenship to testify. Blankenship was unable to recall much of the details related to Michael Politte and her interactions with him. Because she had not been prepared and did not have the time to adequately review her notes prior to taking the stand, when asked the critical question about

[20] Officer Charles Lalumondire testified about the exhumation of Rita's body in February 2001 to collect fingernail scrapings. (T. 548-49).

[21] Other State's witnesses included Roger LaChance, a first responder to the scene (T. 241-49); former Washington County Deputy Sheriff Tammy Belfield, who collected evidence at the crime scene (T. 504-46); Diane Bayes, from the St. Louis Division of the FBI's Evidence Response Team, who testified about the blood pattern evidence in Rita's room (T. 550-85); Deseree Herndon, a latent print examiner who testified that two prints in Michael's own home were matched to him (T. 586-600); and Carrie Maloney, who testified about the DNA evidence, including that several items were taken from the scene excluded as the murder weapon. (T. 600-33).

whether anyone had requested that she put false information into her report or progress notes, Blankenship responded, "Not that I can remember." (T. 718).[22]

Next, Michael's aunt, Patsy Skiles, testified and reiterated that Michael did not have any blood, cuts, or scratches on the morning of the fire. (T. 728). She observed that Michael was in shock that day, and quiet. (T. 728-29). Patsy also did not know of any problems between Michael and Rita. (T. 735). Illuminatingly, Patsy also testified that before Michael's detention hearing on December 9, 1998, Patsy observed Cheryl Graham and Attorney Shawn McCarver, who represented the State Juvenile Office at the hearing, approach Karon Blankenship in the courthouse. Graham pointed her finger at Blankenship and they "exchanged words" during a heated conversation. (T. 730-31).

Lastly, Mr. Williams called William Mal Gum, who was the Washington County Coroner in December 1998. (T. 745). Gum testified that Rita's time of death was likely between 6:00-6:15, though Gum could not give an exact range. (T. 748-49). The intent of this testimony was unclear.

Defense counsel presented no experts or witnesses to challenge the fire evidence or the State's theory of motive, to contextualize the outburst at the juvenile detention center, or to explain Michael's shock and grief response immediately following the murder. *See* Claim III, *supra*. No evidence was presented about alternative suspects—Ed Politte was not even mentioned. Instead, in closing, defense counsel focused on the fact that there was absolutely no

[22] Indeed, counsel was so unprepared for Blankenship's testimony, he forgot to ask her to identify her initial statement, which did not include any inculpatory outburst, and had to recall her to the stand to do so. (T. 740). In addition, Blankenship had previously testified at a hearing on prior defense counsel's motion to suppress Michael's statements, yet trial counsel made no use of this testimony to impeach Blankenship or refresh her memory.

physical evidence connecting Michael to the crime. And that although there was significant blood at the scene, Michael did not have any blood on him, "not one speck." (T. 784-85).

XII. Conviction & Sentencing

The fire evidence was critical to Michael's conviction. During its 4.5 hours of deliberation, the jury asked for several pieces of evidence: first, requesting all photographs, videos, and notes admitted into evidence, (T. 816), and second, asking to examine Michael's tennis shoes. (T. 817). Lastly, they asked for a clarification on whether there was a possibility of parole for several sentence options, but the Court responded that it could not give any further instruction. (T. 817). The jury ultimately returned with a guilty verdict. Michael was wrongfully convicted of the second-degree murder of his mother. (T. 818).

A few months later on April 19, 2002, Michael's older sisters, Chrystal and Melonie Politte, testified in support of Michael at his sentencing hearing. The sisters testified that from the very beginning—from the moment they found out that Michael was a suspect—they knew he was innocent and that their family would be denied justice. Michael's oldest sister, Melonie, addressed the Court first, telling the Court that she believed her mother's real killer was still at large. (T. 832). Chrystal Politte put it most succinctly, telling the court "[t]oday, you guys are putting an innocent person in jail." (T. 833). Despite Melonie's and Chrystal's powerful testimony on behalf of their younger brother, Michael was sentenced to life in prison. (T. 838).

XIII. Appeals

Just eighteen years old at the time of his conviction, Michael relied heavily on his family for support during his appeal. His father, Ed Politte, hired private counsel to handle Michael's direct appeal. Arthur Margulis of Margulis Grant & Margulis, P.C., in St. Louis filed a direct appeal on Michael's behalf challenging the admissibility of Michael's statements to law

enforcement both pre- and post-*Miranda* warning. *State v. Politte*, 122 S.W.3d 611 (Mo. Ct. App. E.D. 2003). In a one-page decision, the appellate court summarily denied Michael's claims. A later motion for rehearing and/or transfer to the Missouri Supreme Court was also denied. *Id.* Despite being told by his father, Ed, that the same firm was also handling Michael's post-conviction appeal, no appeal followed. Attorney Art Margulis confirms that he was never hired by Ed. (Ex. 23, Affidavit of Art Margulis).

ARGUMENT

CLAIM I:
MICHAEL'S RIGHT TO DUE PROCESS WAS VIOLATED WHEN THE PROSECUTION PRESENTED FALSE AND MISLEADING FIRE TESTIMONY

The State tied Michael to the crime with his shoes. The prosecution's trial theory was that the fire in the family's trailer had been intentionally set and that Michael set the fire. In opening argument, the prosecutor told the jury "[s]omebody had taken some accelerants after having hit [Rita Politte] in the head, rendering her unconscious, had taken some accelerants and poured it over the area where she had been hit and then set her on fire." (T. 133-34). In support of this theory, the State relied on two pieces of evidence: (1) evidence that Michael had gasoline on his shoes, purportedly proven both by lab tests and canine evidence; and (2) evidence that the fire had been started with an accelerant. All of this evidence has now been disproven.

The science debunking this evidence was known and available at the time of Michael's prosecution. The NFPA 921 was adopted in 1996, establishing the "standard of care" for fire investigations. *See, e.g.*, NATIONAL INSTITUTE OF JUSTICE, U.S. DEP'T OF JUSTICE, *Fire and Arson Scene Evidence: A Guide for Public Safety Personnel* 6 (2000), https://www.ncjrs.gov/pdffiles1/nij/181584.pdf ("[NFPA 921 is] a benchmark for the training and expertise of everyone who purports to be an expert in the origin and cause determination of

fires."). All of the State's testimony about the alleged evidence of arson and Michael's connection to the fire violated NFPA 921, as well as other scientific research and literature available at the time.

It is the duty of the prosecutor to seek justice, and not merely to convict. *Berger v. United States*, 295 U.S. 78, 88 (1932). The due process clause of the 14th Amendment protects criminal defendants from the prosecution's use of false evidence:

> As long ago as *Mooney v. Holohan*, 294 U.S. 103, 112 (1935), this Court made clear that deliberate deception of a court and jurors by the presentation of known false evidence is incompatible with "rudimentary demands of justice." This was reaffirmed in *Pyle v. Kansas*, 317 U.S. 213 (1942).

Giglio v. United States, 405 U.S. 150, 153-54 (1972). Here, the prosecutor not only had a duty to refrain from the use of testimony which he knew or should have known to be false, he also had an affirmative obligation to advise the trial court that the testimony from State's witnesses was false. "In *Napue v. Illinois*, 360 U.S. 264 (1959), [the Supreme Court] said, 'the same result obtains when the State, although not soliciting false evidence, allows it to go uncorrected when it appears.'" *Giglio*, 405 U.S. at 153. Rather than comply with their constitutional duty, the prosecutors sat silently by and exploited the windfall from false and misleading testimony by State law enforcement officers. See *United States v. Blade*, 811 F.2d 461, 465 (8th Cir. 1987) (noting the expert testimony enjoys an "aura of special reliability"); *see also Souliotes v. Grounds*, No. 1:06-CV-00667 AWI, 2013 WL 875952, at *41 (E.D. Cal. 2013) (recognizing that "a certain patina attaches to an expert's testimony unlike other witnesses: this is 'science,' a professional's judgment, the jury may think and give more credence to the testimony than it may deserve") (quoting *United States v. Hines*, 55 F. Supp. 2d 62, 64 (D. Mass. 1999) (citing *Michigan Millers Mut. Ins. Corp. v. Benfield*, 140 F.3d 915, 920 (11th Cir. 1998) ("The use of

'science' to explain something occurred has the potential to carry great weight with a jury.")). The admission and failure to correct this evidence violated Michael's right to due process.

The prosecution claimed that Michael set his mother on fire with a liquid accelerant, tying Michael to the fire with testimony that gasoline was found on his shoes. The prosecutor offered testimony from Fire Marshal Jim Holdman that the fire must have been started by an accelerant, testimony from Fire Marshal Bob Jacobsen that an accelerant-detecting canine had alerted to Michael's shoes, (T. 372, 441), and further solidified this already inadmissible evidence through the false testimony from Missouri State Highway Patrol Crime Laboratory Criminalist Supervisor Carl Rothove that testing revealed the substance found on Michael's shoes was gasoline. (T. 641, 649).

Each of these allegations was false. Lab testing did not reveal the shoes had gasoline on them, and without confirmation by a lab, a dog alert is not sufficient evidence of the presence of an accelerant. Moreover, Holdman's finding that the fire must have involved an accelerant—based solely on a visual inspection—was misleading, as NFPA standards specifically caution fire investigators not to base conclusions on the presence or absence of an ignitable liquid on the visual characteristics of fire patterns. (Ex. 2 at 7).

A. The State Failed To Correct Carl Rothove's False Testimony That Testing Revealed Gasoline Was Present On Michael's Shoes.

Crime Lab Supervisor Carl Rothove testified at trial that Michael's shoes had gasoline on them. He explained he was responsible for overseeing the trace evidence section of the lab, which analyzed the fire debris and ignitable liquids and performed the testing on Michael's shoes. (T. 635, 637, 641). He testified conclusively that "gasoline was found on the shoes," (T. 641), and that while he couldn't know "how much of this accelerant had soaked into the shoes," (T. 647), or if it was "leaded or unleaded," (T. 648), he was sure that it was gasoline. (*Id.*).

Holdman bolstered Rothove's testimony when he testified that, based upon his visual inspection, "it was clearly evident that a liquid accelerant had been" used. (T. 295).

We now know, however, that Michael's shoes did not contain gasoline, or any other ignitable liquid. Instead, the substances were simply compounds commonly used in the shoe manufacturing process. John Lentini, one of the country's foremost experts in chemical analysis, has reviewed the chromatography evidence produced by the police lab before trial. Lentini, who has served as Chair of the American Society for Testing and Materials Committee on Forensic Sciences, concluded that the substance on Michael's shoes was not gasoline, but an aromatic solvent used in the manufacture of tennis shoes. (Ex. 1, Affidavit of John Lentini, at 7). Lentini's analysis and conclusion are based on methods that were known and accepted at the time of Michael's trial. (*Id.* at 4). Moreover, Paul Bieber, a certified fire and explosion expert, confirmed Lentini's conclusions. (Ex. 3 at 3).

To be correctly identified as gasoline, a residue *must have alkanes*. (*Id.* at 4). Although gasoline is dominated by aromatics, if a substance does not contain alkanes, then it is not gasoline. (*Id.*). Here, Lentini reviewed the State's chromatogram testing and concluded that samples from Michael's shoes did not contain gasoline because (1) the shoes did not also contain alkanes and (2) the testing results showed the shoes contained approximately the same amount of aromatic solvent on each shoe. (*Id.* at 6). As Lentini explained, if the shoes contained gasoline, it is unlikely that the same amount would fall on each shoe. (*Id.*). If the compounds came from the manufacturing process, however, an equal number of compounds on each shoe would be expected. (*Id.*).

State witness Rothove testified falsely about information the State should have known. The issue of mistakenly identifying accelerants in shoes had been known since at least 1996—

well before Michael's 2002 trial. In 1996, the Michigan State Police noted this issue when one of their forensic analysts presented a paper titled, "Arsonists Shoes: Clue or Confusion?" (Ex. 1 at 5). In 2000, Lentini himself conducted research and co-authored a peer-reviewed paper entitled "The Petroleum-laced Background," which explained that tennis shoes are full of compounds from the manufacturing process that could be mistakenly identified as ignitable liquids. (*Id.* at 20). In 2002, it was false and misleading to testify that the compounds must have been gasoline, and Rothove knew or should have known this.

To infringe Michael's due process rights, the false testimony at issue need not rise to the level of perjury; it is enough that it was misleading or created a false impression. *See Alcorta v. Texas*, 355 U.S. 28, 31 (1957). Similarly, it need not be intentional. The United States Supreme Court has explained that "whether the nondisclosure [of the truth] is a result of negligence or design, it is the responsibility of the prosecutor." *Giglio*, 405 U.S. at 154. When, as here, the State's expert provides knowingly false or misleading "scientific" evidence, a defendant's due process rights are violated. *Miller v. Pate*, 386 U.S. 1, 7 (1967). It does not matter whether the defense knew about the false testimony and failed to object or to cross-examine the witness. Defendants "'c[an]not waive the freestanding ethical and constitutional obligation of the prosecutor as a representative of the government to protect the integrity of the court and the criminal justice system.'" *Sivak v. Hardison*, 658 F.3d 898, 909 (9th Cir. 2011) (quoting *N. Mariana Islands v. Bowier*, 243 F.3d 1109, 1122 (9th Cir. 2001)).

The results of the testing on Michael's shoes—the only physical evidence the prosecution used to connect Michael to the murder—does not in any way link him to the fire that caused Rita's death. The prosecution's presentation of scientifically inaccurate expert testimony that

Michael's shoes tested positive for gasoline, when the testing merely showed chemicals found in all shoes, entitles Michael to relief.

B. The State Violated Michael's Right To Due Process When It Presented Misleading Evidence That A Dog Sniff Alone Reliably Determines The Presence Of An Accelerant, And Identified Accelerants On Michael's Shoes.

At trial, the State corroborated the false testimony that lab testing indicated gasoline on Michael's shoes with dog sniff evidence. Bob Jacobsen testified that his dog made a positive alert, indicating the presences of accelerants, on Michael's shoes three different times. (T. 441). He further testified that dogs can detect accelerants that labs cannot. (T. 443, 444). This testimony, like the testimony about the lab testing, was misleading and inaccurate, and violated Michael's constitutional rights.

Accelerating-detecting canines ("ADC") are sensitive to identifying accelerants *when they are present*, however, they lack the ability to discriminate between the chemical compounds it is trained to detect, and similar household items. This inability to discriminate commonly leads to false positives. (Ex. 3 at 2). Because of that, it is well-established that a fire investigation *must* include verification of the presence of accelerants by a lab. (*Id*.). Verification was particularly essential here because, as explained *supra*, tennis shoes/sneakers are known to contain compounds similar to gasoline, and the investigators should have known that at the time of this crime. (*Id*.).

The issue of ADCs' lack of discrimination between compounds, the high rate of false positives for accelerants, and the need for lab confirmation is neither new nor novel. Studies and articles have addressed these issues since at least the early 1990s. (*Id.*). In 1994, the International Association of Arson Investigators released a position paper making "it clear that an unconfirmed ADC alert lacks the reliability to be of any value in a courtroom." (*Id.* at 2-3). The Canine Accelerant Detection Association (CADA)—the oldest dog sniff organization in the

United States—goes further, stating it neither supports nor recommends dog sniff handlers testify or encourage testimony on ignitable liquids without confirmation through laboratory analysis. (*Id.* at 3).

The International Association of Arson Investigators ("IAAI"),[23] NFPA, and CADA all warn against the admission of ADC alerts without laboratory confirmation due to a canine's inability to discriminate between ignitable liquids and the chemically-similar gasses released by the burning of ordinary household products. NFPA 921 § 15.5.4.7.1; S. Katz & C.R. Midkiff, *Unconfirmed Canine Accelerant Detection: A Reliability Issue in Court*, 43 J. FORENSIC SCI. 329 (1998); M. Kurtz et al., *Effect of Background Interference on Accelerant Detection Canines*, 41 J. FORENSIC SCI. 868 (1996).

In 1996—two years before the crime—the NFPA added to NFPA 921, which establishes the "standard of care" for fire investigators, to ratify this position with an emergency amendment that noted "[a]ny canine alert not confirmed by laboratory analysis should not be considered validated." (Ex. 3 at 3). The NFPA 921 reads:

> 16.5.4.7.1-In order for the presence or absence of an ignitable liquid to be scientifically confirmed in a sample. That sample should be analyzed in a laboratory.... Any canine alert not confirmed by laboratory analysis should not be considered validated.
>
> 16.5.4.7.2-Research has shown that canines have responded or have been alerted to pyrolysis products that are not produced by an ignitable liquid and have not always when an ignitable liquid accelerant was known to be present.

[23] The International Association of Arson Investigators is an international professional association of more than 8,000 fire investigation professionals, united by a strong commitment to suppress the crime of arson through professional fire investigation. *See About IAAI*, INTERNATIONAL ASSOCIATION OF ARSON INVESTIGATORS, https://www.firearson.com/About-IAAI/.

> 16.5.4.7.3-Specifically, the ability to distinguish between ignitable liquids and background materials is even more important than sensitivity for detection of any ignitable liquids or residues. Unlike explosive- or drug-detecting dogs, these canines are trained to detect substances that are common to our everyday environment.... [M]erely detecting [traceable] quantities [of these substances] is of limited evidential value.
>
> 16.5.4.7.5-The proper objective of the use of canine/handler teams is to assist with the selection of samples that have a higher probability of laboratory confirmation.
> 16.5.4.7.6-Canine ignitable liquid detection should be used in conjunction with, and not in place of the other fire investigation and analysis methods described in this guide.

NFPA 921.

In 2000, the U.S. Department of Justice formally endorsed NFPA 921 for fire investigations. *See Fire and Arson Scene Evidence*, *supra*, at 6 ("[NFPA 921 is] a benchmark for the training and expertise of everyone who purports to be an expert in the origin and cause determination of fires.").[24] Further, scholarly literature published in the *Journal of Forensic Science* and available at the time of the crime confirms this premise. *See* Katz & Midkiff, *supra* (noting the disagreement of courts and commentators on the sensitivity of canine detection of accelerants as compared with laboratory analysis); R. Tindall & K. Lothridge, *An Evaluation of 42 Accelerant Detection Canine Teams*, 40 J. FORENSIC SCI. 561 (1995) (concluding based on a Finellas County Forensic Laboratory Study that the accuracy and reliability of accelerant detection canines varies and identifying the significant possibility of false negatives from

[24] The reliability of NFPA's recommendations and guidelines has been widely recognized. In fact, three state legislatures have passed resolutions explicitly stating that convictions based on methods inconsistent with NFPA 921 require post-conviction judicial review. S. Res. 99, 52nd Leg., 2d Sess. (Okla. 2010); H. Con. Res. 2066, 49th Leg., 2d Reg. Sess. (Ariz. 2010); Leg. Res. 411, 101st Leg., 2d Reg. Sess. (Neb. 2010). In addition, the Kentucky Legislature expressly adopted the published standards of the NFPA for the "design, installation and construction of containers and pertinent equipment for the storage and handling of liquefied petroleum gases . . ." KY. REV. STAT. ANN. § 234.150 (LexisNexis 2019).

pyrolysis products); Kurtz et al., *supra* (concluding from a study of 34 accelerant detection canines that false alerts from burnt carpeting material, aerosol cans and other pyrolysis products require laboratory confirmation to ensure reliability).

Here, Jacobsen's false and misleading testimony regarding the accelerant detecting dog's alerts to Michael's shoes was particularly damning when coupled with the false testimony from Rothove. Other than the false and misleading expert testimony from Rothove and Jacobsen that incorrectly attributed accelerants on Michael's shoes, no physical evidence connected Michael to the crime. An uncorroborated alert by an accelerant-detection canine cannot support an opinion on fire causation—yet, Jacobsen testified to the contrary. This violated Michael's constitutional rights.

C. The State Violated Michael's Right To Due Process When It Permitted Holdman To Testify That He Could Identify The Use Of An Accelerant And An Incendiary Fire Based Solely On Visual Inspection.

Fire Investigator Jim Holdman testified that the fire was intentionally set, and that the visual evidence at the scene proved this. Specifically, he testified that through his visual inspections of the scene, it was "clearly evident that a liquid accelerant had been" used. (T. 295). This conclusion was based on "the fire damage to the upper portion of the victim's body" and "the damage to the floor." (T. 282). But his conclusions are directly refuted by NFPA 921, which was adopted and publicized two years before the fire investigation in this case. The prosecution's presentation of Holdman's testimony violated Michael's rights to due process.

The importance of NFPA 921 and its recommendations cannot be overstated. Every fire investigation must begin with the NFPA. The recommendations are so critical to making accurate findings that courts considering arson cases today will exclude expert opinions inconsistent with NFPA 921 methods and guidelines as unreliable at trial. *See, e.g., Travelers Cas. Ins. Co. of Am. ex rel. Palumbo v. Volunteers of Am. Ky., Inc.*, No. 5:10-301-KKC, 2012

LEXIS 117789, at *6-8 (E.D. Ky. 2012) (explaining that NFPA 921 requires deviations from its procedures to be justified and requires that the scientific method be used in every case); *Werth v. Hill-Rom, Inc.*, 856 F. Supp. 2d 1051, 1060-63 (D. Minn. 2012) (holding expert testimony inadmissible for failure to apply NFPA 921 methodology); *United States v. Myers*, No. 3:10-00039, 2010 U.S. Dist. LEXIS 67939, *7-9 (S.D. W.Va. 2010) (excluding evidence of a dog's alerts unconfirmed by laboratory tests, as required by NFPA standards); *Barr v. Farm Bureau Gen. Ins. Co.*, 806 N.W.2d 531, 534 (Mich. Ct. App. 2011).

Here, Fire Investigator Holdman did not follow the requirements of NFPA 921. He testified that an ignitable liquid was present based entirely on his visual examination and interpretation of the fire patterns and burn damage to the victim and the surrounding area. He testified that because of "the fire damage to the upper portion of the victim's body, the damage below the right ear, and also the damage to the floor, it was clearly evident that someone had added a liquid accelerant to introduce that to the scene and ignited the accelerant." (T. 282). But NFPA 921 specifically cautions fire investigators that "fire patterns resulting from burning ignitable liquids are not visually unique," and advises investigators not to base a conclusion about the presence or absence of an ignitable liquid on visual characteristics. (Ex. 2 at 7). NFPA 921 6.3.7.8 states that "Irregular, curved, or 'pool-shaped' patterns on floors and floor coverings should not be identified as resulting from ignitable liquids on the bases of visual appearance alone" and "the determination of the nature of an irregular pattern should not be made by visual interpretation of the pattern alone." (*Id.*).

Certified Fire and Explosion Investigator (CFEI) Paul Bieber reviewed Holdman's conclusions and testimony, as well as photographs and diagrams of the fire scene and noted that Holdman's conclusions about the presence of an accelerant "[are] contrary to the standards

expressed in NFPA 921, and not in keeping with the generally accepted techniques and methodologies within the field of fire investigation." (*Id.* at 8). As Bieber noted, "NFPA 921 lists several common household items, including thermoplastics and polyurethane foam that when burned or melted will produce irregularly shaped fire patterns that can be erroneously identified as ignitable liquid patterns." (*Id.* at 7). As a result, "fire patterns and burn damage created by an ignitable liquid are visually indistinguishable from those created by the melting and burning of other common items" and "NFPA 921 demands laboratory confirmation to validate the presence or absence of an ignitable liquid." (*Id.*). NFPA 921 explicitly states that "In order for the presence or absence of an ignitable liquid to be scientifically confirmed in a sample, that sample should be analyzed by a laboratory in accordance with 17.5.3." (*Id.* at 8).

Here, the State did do follow-up laboratory testing, as required by NFPA 921; the tests came back negative for an ignitable liquid. According to fire expert Paul Bieber, those results indicate that "fire debris analysis failed to reveal any evidence of the presence of gasoline." (*Id.* at 8). Without laboratory results confirming the presence of an accelerant, "there is no evidence on which to base a conclusion that an ignitable liquid was present at this fire." (*Id.*). Yet Holdman testified that an accelerant must have been used anyway.

Similarly, Holdman improperly classified the fire as "incendiary," testifying "it was clearly evident it was an intentionally set fire, what we call an incendiary fire." (T. 282). As his basis for classifying the cause of the fire as incendiary, Holdman cited "floor-level, burn-pattern, indicative of poured liquid accelerant burning under the victim on the carpet, through the wood flooring and heavily damaging a floor joist," and an "elimination of all available accidental and natural causes." (Ex. 2 at 9; Ex. 26 at 4). In other words, Holdman classified the cause as

incendiary based on his belief that an ignitable liquid was present even with no valid evidence that an ignitable liquid was present.

With no direct evidence to support his hypothesis, NFPA 921 precluded Holdman from drawing a specific conclusion: "It is improper to base hypotheses on the absence of any supportive evidence. That is, it is improper to opine a specific fire cause, ignition source, fuel or cause classification that has no evidence to support it even though all other such hypothesized elements were eliminated." (Ex. 2 at 9). As Bieber notes "Under the circumstances . . ., the only classification for the cause of this fire which is in compliance with NFPA 921 and the standards of generally accepted techniques and methodologies within the field of fire investigation is 'undetermined.'" (*Id.*).

This testimony that the fire was incendiary was not only incorrect, it highlights Holdman's recklessness with facts and his desire to prove Michael was the perpetrator at all costs—even with no direct evidence. As Bieber explains, "Understanding the difference between a 'fire cause classification' and a 'classification of a fire's cause' can be confusing but *is fundamental to understanding the fire investigator's role* in drawing expert conclusions based on the application of the scientific method." (*Id.* at 10) (emphasis added). "[T]he scientific method is the fundamental methodology required by NFPA 921 in developing a cause hypothesis, and requires that conclusions regarding each of the causal factors be based on: '...observation, experiment, or other direct data gathering means. The data collected is called empirical data because it is based on observation or experience and is capable of being verified or known to be true.'" (*Id.*).

Holdman did not rely on scientific evidence. Rather, he made his determinations about the fire based on Michael's behavior and he testified misleadingly to support this determination. In short:

> Fire Investigator Holdman's classification of the fire as incendiary requires him to push his expert conclusions well beyond the determination of the origin, cause or development of the fire. In classifying the cause of the fire, Fire Investigator Holdman must judge the *human intent* that was present or absent when the fire was first ignited. Fire Investigator Holdman's evaluation of the mental state of a person igniting a fire is far outside his expertise as a fire investigator and beyond the scientific methodologies provided by NFPA 921.

(*Id.* at 11). This observation is critical. Holdman was the first to investigate the fire on the scene and the first to determine that Michael was a suspect. From this moment on, everything Michael did was colored by Holdman's inaccurate analysis. *See* Keith A. Findley & Michael S. Scott, *The Multiple Dimensions of Tunnel Vision in Criminal Cases*, 2006 WIS. L. REV. 291, 292-93 (2006) (identifying police "tunnel vision" as common to almost all wrongful convictions and explaining that investigators and/or forensic scientists "aware of the desired result" "might be influenced-even unwittingly-to interpret ambiguous data or fabricate results to support the police theory").

Holdman's misleading testimony in violation of NFPA 921 was central to the State's trial theory that Michael intentionally set his mother on fire with an accelerant. Without Holdman's testimony, their case would have fallen apart. The State repeatedly presented evidence that an accelerant was used to burn Rita's body, from opening argument to closing. Holdman testified that fire patterns showed an accelerant was used. (T. 282). Pathologist Dr. Michael Zaricor testified that the fire *appeared* to be confined to a small area from an *accelerant*, (T. 384), and Jacobsen testified that based on the patterns and damage to the room, an accelerant had been utilized. (T. 446). Indeed, the State focused the jury on how strong this evidence was in closing, arguing that "everybody's been pretty consistent it was an accelerant." (T. 768). This was misleading, as visual inspections of fire patterns are not enough to determine whether an

accelerant was used and lab samples were negative for an accelerant, and violated Michael's due process rights.

D. Michael Politte Would Have Been Acquitted Absent The State's False Expert Testimony.

Under *Napue* and *Giglio*, Michael is entitled to relief if the false or misleading evidence could have affected the deliberations of the jury:

> A lie is a lie, no matter what its subject, and, if it is in any way relevant to the case, the district attorney has the responsibility and duty to correct what he knows to be false and elicit the truth. . . . That the district attorney's silence was not the result of guile or a desire to prejudice matters little, for its impact was the same, preventing, as it did, a trial that could in any real sense be termed fair.

Napue, 360 U.S. at 269-70.

That standard is met here, where the prosecution's case was built almost entirely on circumstantial evidence, and the only direct evidence was false expert testimony that claimed gasoline was used to burn Rita Politte and that gasoline was found on Michael's shoes. The introduction of this faulty scientific evidence at trial was fundamentally unfair under *Napue*. Because of the critical nature of the fire evidence and the State's lack of direct evidence, it is reasonably likely "that the false testimony could have affected the judgment of the jury." *United States v. Agurs*, 427 U.S. 97, 103 (1976).

Furthermore, lay jurors lack the ability to independently evaluate the accuracy of scientific evidence and rely upon experts to accurately interpret the results of the testing. "Expert evidence can be both powerful and quite misleading because of the difficulty in evaluating it." *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 595 (1993); *see also United States v. Frazier*, 387 F.3d 1244, 1263 (11th Cir. 2004) ("[E]xpert testimony may be assigned talismanic significance in the eyes of lay jurors, and, therefore, the district courts must take care

to weigh the value of such evidence against its potential to mislead or confuse."); *Hines*, 55 F. Supp. 2d at 64 ("[A] certain patina attaches to an expert's testimony unlike any other witness; this is 'science,' a professional's judgment, the jury may think and give more credence to the testimony than it may deserve."). Testimony regarding scientific testing of Michael's shoes, the use of an accelerant, and the reliability of dog sniffs are "precisely the type of scientific evidence that juries are likely to consider objective and infallible." Keith A. Findley, *Innocents At Risk: Adversary Imbalance, Forensic Science, and the Search for Truth*, 38 SETON HALL L. REV. 893, 943 (2008). The only proper determination for the ignition source involved in the fire at issue here should have been "unknown." (Ex. 2 at 6). The State's use of false and misleading testimony violated Michael's right to due process of law, and his conviction should be vacated.

E. This Court May Review These Errors.

This filing is the first instance in which this claim has ever been presented to a court. Because Michael did not have a post-conviction appeal, no court has before ruled on this issue, and thus it is entirely new and thus properly before this Court. Regardless, to the extent court believes there is any procedural bar, Michael can demonstrate cause and prejudice overcoming any such barrier. To demonstrate cause, the petitioner must show that something external to the defense resulted in the procedural default. *Coleman v. Thompson*, 501 U.S. 722, 753 (1991) (citing *Murray v. Carrier*, 477 U.S. 478, 488 (1986) ("We think that the existence of cause for a 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.")); *State ex rel. Engel v. Dormire*, 304 S.W.3d 120, 125-26 (Mo. banc 2010). To demonstrate prejudice, a petitioner must show a reasonable probability that, but for the alleged constitutional violations, the result of the proceeding would have been different. *See, e.g., Hunt*

v. Houston, 563 F.3d 695, 704 (8th Cir. 2009) (citing *Easter v. Endell*, 27 F.3d 1343, 1347 (8th Cir. 1994)).

Here, the State's use of false and misleading testimony was not known to Michael at the time of trial. Because of its exculpatory nature, Missouri law allows this evidence to be received and considered by this Court in support of his due process claim in habeas corpus proceedings pursuant to Rule 91. "If a habeas record establishes a showing of the gateway of cause and prejudice, then the habeas court is entitled to review the merits of constitutional claims associated with that showing." *State ex rel. Koster v. McElwain*, 340 S.W.3d 221, 245 (Mo. Ct. App. W.D. 2011). Further, the prosecutor's "failure to disclose evidence material to the defense can satisfy the cause and prejudice test to excuse a defendant's failure to raise a claim in an earlier proceeding." *Id.* at 248 (citing *Amadeo v. Zant*, 486 U.S. 214 (1988)).

Missouri cases follow the straightforward Supreme Court rule: corresponding to the second *Brady* line of cases component (evidence suppressed by the State), a petitioner shows "cause" when the reason for his failure to develop facts in state-court proceedings was the State's suppression of the relevant evidence; coincident with the third *Brady* component (prejudice), prejudice within the compass of the "cause and prejudice" requirement exists when the suppressed evidence is "material" for *Brady* purposes. *Banks v. Dretke,* 540 U.S. 668, 691 (2004) (citing *Strickler v. Greene*, 527 U.S. 263, 282 (1999)); *see also Ferguson v. Dormire,* 413 S.W.3d 40, 60 (Mo. Ct. App. W.D. 2013) (agreeing that "the prejudice prong of the gateway of cause and prejudice . . . is coextensive with the third element of a *Brady* violation").

As described above, the exculpatory evidence that the State was presented false evidence unknown to Michael at the time of his appeal. This establishes cause for his failure to assert this

claim previously in State court. All of this evidence was material, which also satisfies his obligation to show prejudice flowing from the State's use of false evidence.

Even if a prisoner cannot satisfy the cause-and-prejudice exception to the procedural bar rule, "the principles of comity and finality that inform the concepts of cause and prejudice 'must yield to the imperative of correcting a fundamental, unjust incarceration.'" *House v. Bell*, 547 U.S. 518, 536 (2006) (quoting *Murray*, 477 U.S. at 495). Thus, Michael's innocence also overcomes any potential procedural bar. For all these reasons, this Court should reverse Michael's conviction. *See* Claim IV, *infra*.

CLAIM II:
MICHAEL'S FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS WAS VIOLATED WHEN A CRITICAL CORROBORATING WITNESS WAS INTIMIDATED BY POLICE TO PREVENT HIM FROM TESTIFYING.

A defendant's right to offer the testimony of witnesses on his behalf is a right guaranteed by the Sixth and Fourteenth Amendments to the Constitution. *See generally Washington v. Texas*, 388 U.S. 14, 18 (1967); *State v. Allen*, 800 S.W.2d 82, 86 (Mo. Ct. App. W.D. 1990). It is fundamental that a criminal defendant has a right to present competent, material evidence in his defense, including the right to present witnesses. *Id.*; *see also Webb v. Texas*, 409 U.S. 95, 98 (1972); *State v. Campbell*, 147 S.W.3d 195, 200 (Mo. Ct. App. S.D. 2004); *State v. Brown*, 543 S.W.2d 56, 59 (Mo. Ct. App. 1976). In fact, "[f]ew rights are more fundamental than that of an accused to present witnesses in his own defense." *Chambers v. Mississippi*, 410 U.S. 284, 301 (1972).

Here, Michael's due process right to present witnesses in his defense was violated when police intimidated a crucial exculpatory witness—Josh Sansoucie. Josh gave an account consistent with Michael's from the very beginning: the moment they were both interviewed at

the scene of the crime. But in late December 1998, the Federal Bureau of Investigation's National Center for the Analysis of Violent Crime sent a memo to the Washington County Sheriff's Department detailing strategies and themes to be used to manipulate a confession out of Josh. (Ex. 31). Law enforcement became convinced they could use these strategies to pressure Josh into telling them some sort of new information and turn on Michael. They confronted him repeatedly, at first trying to catch him in small inconsistencies and talking to his parents in the hopes they could change Josh's mind.

Josh was interviewed twice on the day of the crime, December 5, 1998. (Ex. 28 at 3-5). That day, he also wrote out a statement and was given a CVSA—Computer Voice Stress Analyzer—test. (Ex. 55, Josh Sansoucie CVSA Test Report; Ex. 57). Even then, law enforcement was convinced Josh was not being truthful, so they approached Josh's mom to try to gain leverage. Fire Marshal Holdman reported: "We told [Josh's mom] Darla we felt her son was not being truthful and we were requesting her assistance, if she could talk to her son at home." (Ex. 26 at 15). On December 7, Josh was interviewed two more times. (Ex. 28 at 7-8). And then again on December 14, investigators pushed Josh to undergo a polygraph examination. The examiner concluded that Josh had lied about whether he knew who killed Rita Politte, so officers approached Josh after the test and attempted once again to get him to say more. But Josh could offer no new details about the murder of Rita or Michael's alleged involvement. Even with Josh's consistency and his persistent insistence that he had no additional facts to share, the State continued to strategize about how to bully Josh into becoming a witness against Michael.

This pressure on Josh culminated when the State decided to charge Josh with two crimes—Tampering with Physical Evidence and Property Damage in the first degree—as part of their plan to exert additional stress and intimidation on Josh. Months later, those charges were

resolved. On that same day, the State applied for witness immunity for Josh in the case against Michael. Shortly before the witness immunity proceedings, Attorney General's Office wrote to Investigator Jim Weber and asked that Weber, Detective Davis, Fire Marshal Holdman, and prosecutor Josh Rupp to "jump on Josh and do a long interview with him." (Ex. 41 at 4). They agreed that they would not accept "I don't remember" or "I don't know" as answers from Josh. (*Id.* at 5). Despite Josh's attorney's insistence that Josh had fully cooperated with law enforcement, knew nothing about what happened to Rita, and had nothing new to add, immunity was granted on April 3, 2000. (Ex. 45). And despite all of that, the State never called Josh as a witness at trial. That is because Josh never changed his account; he never gave them any evidence that pointed toward Michael's guilt, so he was of no use to them. But the games they played leading up to trial caused the defense to think that Josh was not available to them as a witness either. The State subdued Josh into silence.

Police conduct and intimidation need not include physical violence to violate the Constitution. *Crowe v. County of San Diego*, 608 F.3d 406, 432 (9th Cir. 2010) (holding the interrogation of two minors, aged 14 and 15, one of whom was related to victim, violated substantive due process). In *Crowe*, the two boys were isolated, "subjected to hours of interrogation, cajoled, threatened, lied to, and relentlessly pressured by teams of police officers." *Id.* at 432. Similar to here, the interrogations of the adolescent boys in Crowe were on the heels of the young suspects learning a family member was killed while they were in the house—in Crowe, it was 14 year-old Michael Crowe's 12 year-old sister who was murdered—leaving the young Michael Crowe and his friend reeling from the trauma of that horrific event. Also similar to this case, police repeatedly interrogated Michael Crowe and his friend, using psychologically coercive and manipulative tactics known to be wholly inappropriate for a child, as well as

deceptive tactics like a computer voice stress analyzer. *Id.* at 419. The police tricked the juvenile suspects in Crowe into believing the CVSA results proved that they were involved in the murder. *Id.* at 419, 423-24.

The FBI memo on interrogation tactics for interviewing Josh included some of the conduct which *Crowe* condemns, in addition to the deceptive use of the CVSA:

> 4. talking [to police or prosecutors] would clear the appearance of wrongdoing, 5. [Josh must have been] unwittingly pulled into the crime because of friendship, which may not be as true as one might think; 6. emphasis might be placed on [Josh's] upbringing; generally good child, but because of [Michael] wrong place at the wrong time; 7. emphasis on parents, who must also live with this.

(Ex. 31 at 2). Josh's own description of his interactions with police showed that, like the minors in *Crowe*, he felt threatened and relentlessly pressured. In his pretrial deposition, Josh explained that sometimes investigators were nice and caring "and then next thing they will, you know, be hollering at me and cussing at me. And then they will tell me that [Michael] said this and that. You know, he was saying I was a liar and then they would be telling me everything." (Ex. 58 at 74). Josh felt that the police put words in his mouth; while Josh was merely trying to say that when he woke up in the middle on the night he could not see whether Michael was in bed because of his perspective from the floor, the police twisted this statement. They instead chose to believe that Josh was telling them that Michael had left the room in the night. (*Id*. at 77; Ex. 5, Affidavit of Joshua Sansoucie, at 3).

Throughout the years of pressure and intimidation, Josh felt confused and scared, especially when he was questioned for hours at a time while tired and hungry. (Ex. 58 at 78-81; Ex. 5 at 2-3). Detective Davis, in particular, would get in Josh's face and place his hand on Josh's leg while interrogating him, which made Josh feel uneasy. (Ex. 58 at 82-83). Davis told Josh that Michael was in the next room "snitching" on him and that "whoever talked first was

going to get a deal." (Ex. 5 at 2). Even Juvenile Officer Kim Johnson treated Josh like a suspect—she was "mean," screamed in Josh's face, threatened Josh with a life spent in prison, and questioned Josh right along with investigators. (Ex. 58 at 86-88; Ex. 5 at 2).

And Josh Sansoucie was only fourteen years old during these relentless coercive interrogations. The police should have known better than to use such tactics on a child. There is now near-universal agreement that youth are particularly vulnerable to police pressure, S. Kassin et al., *Police-Induced Confessions: Risk Factors and Recommendations*, 34 L. & HUMAN BEHAV. 3, 19 (2010), and that the constitutionality of police tactics must be "judged by a higher standard when police interrogate a minor. *Crowe*, 608 F.3d at 431. The Supreme Court has found that "[i]t is beyond dispute that children will often feel bound to submit to police questioning when an adult in the same circumstances would feel free to leave," and, accordingly, that the "risk [of false confessions] is all the more troubling—and recent studies suggest, all the more acute—when the subject of custodial interrogation is a juvenile." *J.D.B. v North Carolina*, 564 U.S. 261, 275 (2011).[25] *See also* Christine Scott-Hayward, *Explaining Juvenile False Confessions: Adolescent Development and Police Interrogation*, 31 L. & PSCYHOL. REV. 53, 69 (2007) (explaining that juveniles are more susceptible than adults to external influences, and more compliant toward authority figures).

Law enforcement also recognizes this risk: "Over the past decade, numerous studies have demonstrated that juveniles are particularly likely to give false information—and even falsely

[25] *See also In re Gault*, 387 U.S. 1, 52. (1967) (explaining that "authoritative opinion has cast formidable doubt upon the reliability and trustworthiness of 'confessions' by children"); *Gallegos v. Colorado*, 370 U.S. 49, 54 (1962) (noting that "a 14-year-old boy, no matter how sophisticated, is unlikely to have any conception of what will confront him when he is made accessible only to the police").

confess—when questioned by law enforcement."[26] John E. Reid & Associates, the firm that markets the most commonly used interrogation technique in the country, agrees that "[i]t is well accepted that juvenile suspects are more susceptible to falsely confess than adult suspects,"[27] and warns that investigators must take great care when interviewing or interrogating a juvenile. Police clearly did not take such care when interviewing Josh.

It is a credit to Josh that he never falsely implicated his friend Michael under the crushing pressure applied by police. But the fact that he never confessed or gave information pointing to Michael does not cure the problem of the State's misconduct, and it does not mean that the police's improper tactics did not intimidate Josh and prevent him from assisting Michael's defense. The U.S. Supreme Court has long recognized that police tactics acceptable for an adult may not be for a child. *See Gallegos v. Colorado*, 370 U.S. 49 (1962) (noting that "a 14-year-old boy, no matter how sophisticated, is unlikely to have any conception of what will confront him when he is made accessible only to the police"); *Haley v. Ohio*, 332 U.S. 596, 599-600 (1948) (explaining "that which would leave a man cold and unimpressed can overawe and overwhelm a lad in his early teens"). More recently, the Supreme Court explicitly recognized that adolescents' interactions with police must be viewed through the lens of their youth. *See Miller v. Alabama*, 567 U.S. 460, 477-78 (2012) (recognizing the fundamental truth that "children are different" than adults and that "the incompetencies associated with youth [including] his inability to deal with

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[26] INT'L ASSOC. OF POLICE CHIEFS, *Reducing Risks: An Executive's Guide to Effective Juvenile Interview and Interrogation* at 1 (2012), https://www.theiacp.org/sites/default/files/all/p-r/ReducingRisksAnExecutiveGuidetoEffectiveJuvenileInterviewandInterrogation.pdf.

[27] JOHN E. REID & ASSOC., INC., *Take Special Precautions When Interviewing Juveniles or Individuals With Significant Mental or Psychological Impairments*. (March-April 2014), http://www.reid.com/educational_info/r_tips.html?serial=20140301&print=[print].

police officers" "put[s] them at a disadvantage" in interactions with law enforcement and criminal proceedings).

If Josh would have been allowed to testify without intimidation and suppression by the State, he could have served as an exculpatory witness on behalf of Michael. Josh's 2018 affidavit shows that he would have testified to the initial statement he gave law enforcement. He would have told the jury that Michael did not seem angry at his mother on the night before her death and that Josh was sleeping right next to Michael's bed and never noticed Michael leaving or re-entering the room. (Ex. 5 at 2, 4). He would have testified that Michael had no blood, cuts, scratches, or other injuries on the morning of the murder. (*Id.*). And he would have testified about the continual pressure the police placed on him and his family for years. Without the testimony of Josh Sansoucie, Michael Politte was substantially prejudiced as Josh's testimony would have corroborated Michael's account of the night before his mother's death and the morning of the fire. Josh could have negated the already weak motive evidence against Michael, and he could have given an alternative narrative of Michael as a normal, 14-year-old child with no motive or opportunity to kill his mother.

The coercive measures used to pressure Josh effectively drove him from the witness stand and deprived Michael of due process of the law. But for repeated intimidation, Josh would have served as a witness on Michael's behalf. (*Id.* at 3-4). As was the case in *Washington v. Texas*, the prosecution "arbitrarily denied him the right to put on the stand a witness who was physically and mentally capable of testifying to events he had personally observed, and whose testimony would have been relevant and material to the defense." 388 U.S. at 23. Similarly, in *State v. Brown*, the prosecutor informed a defense witness that he could later be charged with a crime, asked the witness if he had sought counsel, and asked if he was familiar with his *Miranda*

rights, which the court found was "clearly designed to dissuade the witness from testifying." 543 S.W.2d at 59. Just as in that case, the actions of the State were deliberately designed to confuse, intimidate, and dissuade Josh from supporting Michael and testifying on his behalf. They went as far as charging Josh with crimes of his own to pressure him. The State's intimidation of Josh led to the omission of Josh's testimony, prejudiced Michael, and deprived the jury of exculpatory evidence that corroborated Michael's testimony. Because the actions of the State prevented Michael from presenting a witness crucial to his defense, his due process rights were again violated.

Like with Claim I, *supra*, Michael has not previously presented this claim as he has never had a postconviction appeal. It is new and properly presented here. Nevertheless, Michael has also satisfied any potential procedural bar through his satisfaction of cause and prejudice and through his actual innocence. *Murray*, 477 U.S. at 485-87 (To overcome procedural default based on "cause and prejudice" a petitioner must show proof that there was both external "cause" that prevented him asserting the claim earlier and "prejudice" resulting from the constitutional violation); s*ee also* Claim IV, *infra*. Because Michael's rights were violated, this Court should grant him a new trial.

CLAIM III:
TRIAL COUNSEL WAS INEFFECTIVE IN VIOLATION OF MICHAEL'S SIXTH AMENDMENT CONSTITUTIONAL RIGHTS.

The State's case rested on (1) the false, misleading, and essentially unchallenged testimony regarding the fire, (2) the unchallenged testimony that Michael had exhibited guilty behaviors and made inculpatory statements that he had killed his mother, and (3) the unchallenged assertion that Michael had a motive to kill his mother because she refused to buy him a motorcycle part. A reasonable investigation and competent performance by Michael's

counsel, however, would have produced substantial information and evidence to cast doubt upon each of these key pieces of evidence. Competent counsel would have presented evidence that the State's fire evidence was false, that Michael's statements were not indicative of guilt but of a traumatized boy, and that Michael had a loving relationship with his mother. Trial counsel also would have investigated and presented evidence of alternative perpetrators, educating the jury on the lack of evidence against Michael and proving that just as much, if not more, evidence existed implicating Ed and Johnnie Politte.

The Sixth Amendment to the United States Constitution entitles Michael to effective assistance counsel at trial. U.S. CONST. amend. IV. To prove that he received ineffective assistance, Michael must show: (1) counsel performed deficiently and (2) this deficient performance prejudiced his defense. *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984); *Vaca v. State*, 314 S.W.3d 331, 335 (Mo. banc 2010).

To satisfy the first prong of deficient performance, Michael "must show that counsel's representation fell below an objective standard of reasonableness." *Strickland*, 466 U.S. at 688. Objective reasonableness of counsel's representation, in turn, is measured against prevailing professional norms. *Id.* The context and fact-specific circumstances of each case should guide any deficient-performance inquiry. *Wiggins v. Smith*, 539 U.S. 510, 522 (2003).

To satisfy the second prong, prejudice, the petitioner "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 695. In short, and as explained below, Michael's trial counsel provided constitutionally ineffective assistance when he failed to investigate and present:

- Fire science experts to testify that the fire evidence presented against Michael was false;
- An expert in juvenile development to testify that Michael's statements were not guilt-laden, but those of a traumatized boy;
- Evidence from Chrystal and Melonie Politte, Michael and Melinda Glore, and Derek Politte that Michael had a loving relationship with his mother;
- Additional evidence supporting Michael's statements regarding what had occurred on the evening in question, including:
    - Testimony from Janet Politte, Chrystal Politte, Melonie Politte, Patsy Skiles, and Chuck Skiles that Michael had no blood or defensive wounds on him when they responded to the fire;
    - Testimony from Michael and Melinda Glore that Michael was a heavy sleeper;
    - Testimony from the Glores, Josh Poucher, and Jerry Burch that many teens in Hopewell experimented with fire;
    - Testimony that Michael exhibited significant signs of distress over losing his mother to Josh Sansoucie, Tammy Belfield, and Chrystal and Melonie Politte; and
    - Testimony from the only other individual in the home at the time of the fire—Josh Sansoucie—that corroborated Michael's memory of events.
- Testimony that there was significant evidence pointing to alternative suspects Ed and Johnnie Politte, including:
    - Statements made by Ed Politte after his divorce from Rita;
    - Evidence of prior domestic violence from Ed towards Rita;
    - Evidence of Ed's and Johnnie's relationship;

- Evidence of Johnnie's strange interest in the case, including his own investigation of the trailer, which revealed a never before found tire iron; and
- Evidence that Johnnie Politte was seen in the area of Rita's trailer on the morning of the crime by Larry Lee, Carolyn Lee, and Kevin Politte.

Unfortunately, counsel investigated and presented none of this. These deficiencies, described further below, are not mere trifles. Independently and collectively, they prejudiced Michael. Because he received ineffective assistance of counsel, Michael is entitled to a new trial.

A. Trial Counsel Failed To Investigate Or Effectively Challenge The State's False Fire Evidence.

The only direct evidence connecting Michael Politte to the murder of his mother was the State's inaccurate assertion that he had accelerant on his shoes. *See* Claim I, *supra*. Because of the importance of this allegation and its inaccuracy, Michael's habeas petition should prevail solely under this point.

The science of fire is complicated. It is a science encountered infrequently for practitioners of the law and far more infrequently for the jurors tasked with analyzing it. When a case involves fire, it requires careful fact investigation, research into fire science, and a well-versed expert. Such an expert should have been presented here by the defense.

As explained in Claim I, *supra*, the State used misleading and false expert testimony to advance arguments that Michael's shoes had an accelerant on them. The State repeatedly relied on this testimony as it was the only physical evidence connecting Michael to Rita's murder. Despite the crucial importance of this expert testimony, trial counsel did not investigate the fire, failed to consult with a fire expert, and failed to provide a competent cross-examination of the State's witnesses regarding the fire. Had counsel investigated and retained one or more fire experts, evidence could have been brought forth at trial about problems with the State's lab

testing, the potential for accelerant detecting canines to alert to chemicals from the shoe manufacturing process, the potential for false-positives with dog alerts, and the national standards that require lab confirmation to identify accelerants, and prohibit a fire investigator from concluding an accelerant was used based solely on a visual inspection. *See* Section XI(A), *supra*.

The State's fire evidence—though false and without scientific merit—was entered into evidence without serious challenge. Had Michael been provided constitutionally effective counsel, the jury would have had serious doubts about the only physical evidence allegedly connecting Michael to the fire.

Trial counsel has a duty to investigate, particularly in unfamiliar areas. The duty of investigation specifically includes evidence of which counsel had actual notice, *Wiggins*, 539 U.S. at 523, and the duty to request discovery and investigate. *Kimmelman v. Morrison*, 477 U.S. 365, 385 (1986). The failure to investigate is not a matter of trial strategy; it is simply inept performance. *Chambers v. Armontrout*, 907 F.2d 825, 828 (8th Cir. 1990) (en banc). Fire evidence was key to the State's case, and counsel had a duty to investigate and rebut this crucial evidence.

Here, the State presented misleading testimony from Fire Marshal Jim Holdman that the fire was an incendiary fire ignited with an accelerant. (T. 282). Expert Carl Rothove said scientific analysis definitively determined gasoline was present on Michael's shoes. (T. 637-44). This testimony was bolstered by Jim Holdman, (T. 372), and Fire Marshal Bob Jacobsen, who told the jury that a dog alerted to an accelerant on Michael's shoes. (T. 441, 443-44). Without this testimony, the State had no direct evidence tying Michael to the fire.

Yet counsel did not adequately prepare for or challenge this critical evidence. Trial counsel never consulted an independent expert to review the chemical testing and, by failing to do so, was unable to adequately cross examine Holdman, Rothove, or Jacobsen. Such a failure violated counsel's "essential duty to make an adequate factual investigation [which can] only be viewed as an abdication—not an exercise—of his professional judgment." *McQueen v. Swenson*, 498 F.2d 207, 216 (8th Cir. 1974). The duty to investigate specifically embraces matters that would impeach a key state's witness, including testimony of others who would contradict the witness's testimony. *Hadley v. Groose*, 97 F.3d 1131 (8th Cir. 1996). While expert testimony is not required in every case, when expert testimony is at "the core of [the State's] case," it is ineffective not to challenge it, either with rebuttal expert testimony, impeachment, or both. *See, e.g.*, *Souliotes*, 2013 WL 875952, at *39; *see also Duncan v. Ornoski*, 528 F.3d 1222, 1235 (9th Cir. 2008) ("[W]hen the prosecutor's expert witness testifies about pivotal evidence or directly contradicts the defense theory, defense counsel's failure to present expert testimony on that matter may constitute deficient performance.").

i. *Defense Counsel Failed To Investigate And Properly Rebut The State's False Testimony That Gasoline Was Present On Michael's Shoes.*

Here, the State argued that gasoline was present on Michael's shoes. At trial, Lab Supervisor Carl Rothove testified that lab testing "yielded that gasoline was found on the shoes," (T. 641). This was false, and as explained in Claim I, *supra*, standard practices at the time of trial did not support this conclusion. Michael's counsel failed to investigate the accelerant and the results of the testing. Had he done so, he would have discovered that the substance on Michael's shoes was actually a chemical compound used in the manufacturing of the shoe itself. On cross-examination, rather than challenge Rothove's conclusion, defense counsel accepted it. Defense

counsel merely established that the State could not testify to the quantity of gasoline on Michael's shoes and could not distinguish whether the gas was leaded or unleaded:

> Q: And on the item you tested on the shoes, you don't know obviously how much of this accelerant had soaked into the shoes, right?
> A: That's correct.
> Q: You don't know how much gasoline had soaked in there?
> A: That's correct.
> Q: And this was gasoline, right?
> A: Yes.
> Q: Do you know if this was leaded or unleaded?
> A: No, we don't distinguish.
> Q: Okay. Just that it was gasoline?
> A: Yes.
> MR. WILLIAMS: All right. No further questions, judge.

(T. 647-48). This constituted deficient performance and prejudiced Michael because it allowed the jury to wrongly believe there was physical evidence linking Michael to the murder.

Scientific analysis known and accepted at the time of Michael's trial confirmed that his shoes did not contain gasoline. *See* Claim I, *supra.* John Lentini, one of the country's foremost experts in chemical analysis, has reviewed the chromatography evidence and determined that the substance on Michael's shoes was not gasoline but an aromatic solvent used in the manufacture of tennis shoes. (Ex. 1 at 7). Michael's counsel did not adequately cross-examine or rebut this testimony, by calling an expert like Lentini, who could have reviewed the lab results.

Courts have found such failure to investigate and challenge scientific evidence, and specifically arson evidence, can constitute ineffective assistance of counsel. The Sixth Circuit has held that a trial attorney's failure to properly attack arson evidence constituted ineffective assistance of counsel. *Richey v. Bradshaw*, 498 F.3d 344 (6th Cir. 2007). In *Richey v. Bradshaw* the defendant was convicted of intentionally setting a fire that killed a child. *Id.* at 346. While defense counsel consulted an expert, the expert had no special expertise in arson investigation

and had received little training on the matter. *Id.* at 347-48. Counsel also failed to determine what this expert's opinions would be prior to disclosing him as a trial witness. *Id.* at 348. When defense counsel did not ultimately call him, the State subpoenaed the expert to testify. *Id.* The expert testified that he agreed with the State's experts. *Id.* The Sixth Circuit eventually granted defendant's habeas corpus petition and found counsel's performance deficient:

> The scientific evidence of arson was [] fundamental to the State's case. Yet Richey's counsel did next to nothing to determine if the State's arson conclusion was impervious to attack. True, Richey's counsel retained [an expert] to review the State's arson evidence, so this case *does not exemplify that most egregious type, wherein lawyers altogether fail to hire an expert*. But the mere hiring of an expert is meaningless if counsel does not consult with that expert to make an informed decision about whether a particular defense is viable.

Id. at 362 (emphasis added). This is such an egregious failure, where no expert was hired, and counsel's cross-examination of State witness Rothove merely reinforced the incorrect testimony. Counsel did not consult with an expert and did not know whether a defense based on challenging the fire testimony was viable.

Additionally, in *Dugas v. Coplan*, the First Circuit found defense counsel's failure to consult an arson expert as part of his investigation to constitute ineffective assistance of counsel. 428 F.3d 317, 328 (1st Cir. 2005). Counsel's investigation only consisted of his "own visual assessment of the fire scene, his conversations with the state's experts, some limited reading, and his conversations with other defense attorneys after work." *Id.* The First Circuit also noted the lawyer "lacked any knowledge of arson investigation and had never tried an arson case . . . [y]et he decided to accept the characterization of the fire scene by the state's experts rather than conduct an independent investigation." *Id.* at 329-30. The First Circuit stressed that "the state's strongest evidence was its expert testimony on arson; the balance of the evidence was relatively

weak," just as in Michael's case. Ultimately, the First Circuit concluded that that there was an "inescapable need for expert consultation in this case," where the arson evidence was the "cornerstone of the state's case," there was little other evidence, and counsel had reason to believe the State's fire testimony may be flawed. *Id.* at 331. The First Circuit further held that counsel's decision not to consult with an expert and challenge the State's arson theory could not qualify as a reasonable trial strategy. *Id.* at 332.

This is exactly the case at issue here. In *Jackson v. McQuiggin*, a petitioner convicted of arson argued that counsel was ineffective at trial because counsel did not utilize expert testimony to refute the State's argument that petitioner used an accelerant to intentionally start a fire. 553 Fed. Appx. 575, 580 (6th Cir. 2014); *see also Souliotes*, 2013 WL 875952, at *44-46. Citing *Strickland*, the United States Court of Appeals for the Sixth Circuit affirmed the district court's denial of writ. 553 Fed. Appx. at 583-84. The Eighth Circuit later summarized the *McQuiggin* court's reasons for denial:

> (1) it was defensible for trial counsel not to present expert testimony as it might have confused the jury, undermined the defense's credibility, or biased the jury in favor of the prosecution's expert witness, and that (2) trial counsel adequately prepared and mounted a defense by (a) requesting a Daubert hearing, (b) seeking to attack the fire marshal report by showing he deviated from NFPA 921, (c) reading numerous articles about arson, studying resources from the Innocence Project on burn patterns, and reviewing NFPA 921 in anticipation of trial, (d) consulting several defense attorneys, one of whom represented a client charged with felony arson murder, (e) discussing with petitioner why foregoing expert testimony was prudent, and (f) eliciting important concessions from the fire marshal on cross-examination.

Booth v. Kelley, 2016 WL 7971197, at *11 (E.D. Ark. 2016). Here, counsel's decision not to investigate and properly rebut the State's witness about presence of an accelerant shares no commonality with the counsel's trial strategy in *McQuiggin*. The opposite is true. Counsel's

questioning of the State's only witness helped the State's case, counsel was not properly educated on the science behind arson or the NFPA, and counsel did not seek assistance from other defense attorneys.

Thus, Michael's counsel performed deficiently when counsel failed to adequately cross-examine Rothove to show that the substances found on Michael's shoes were simply manufacturing solvents. This sort of confusion of mistakenly identifying accelerants in tennis shoes had been known since at least 1996—well before Michael's 2002 trial. *See* Claim I, *supra*. It should have been known by Rothove and Michael's counsel and would have been known by an arson expert like John Lentini.

Michael's counsel should have consulted a fire expert to independently analyze the laboratory results. Research available well before the trial outlined the issue of petroleum-based compounds present on shoes that may be mistakenly identified as ignitable liquids. Consulting a fire expert—especially where, as here, fire played a central role in the case—is imperative in understanding such potential for misidentification. Michael's counsel could have cross-examined Rothove on the absence of alkanes on Michael's shoes, which would have proved gasoline was not on Michael's shoes.

Here, the prosecution's "scientific evidence" does not prove what it purports to. Michael's counsel performed deficiently when counsel failed to properly investigate and cross-examine the State's witness about the one piece of physical evidence pointing to Michael. Michael's counsel accepted this false testimony and allowed scientifically inaccurate expert testimony to be presented to the jury. This prejudiced Michael and violates his Sixth Amendment rights.

ii. ***Defense Counsel Failed To Investigate And Properly Rebut The State's False Testimony That A Dog Sniff Alone Reliably Determines The Presence Of An Accelerant And Identified An Accelerant On Michael's Shoes.***

Here, the State brought forward testimony indicating a dog sniff alone may reliably determine the presence of an accelerant, and that a positive dog sniff identified an accelerant on Michael's shoes. The State called Bob Jacobson, who claimed that an accelerant sniffing dog "hit" Michael's shoes three separate times. (T. 441). Jacobson further claimed that a dog can detect accelerants that a lab cannot. (T. 443-44). These propositions are not supported by science and violated widely accepted standards of fire investigation that applied at the time of the trial. *See* Claim I.B, *supra*. As explained above in Claim I.B, and incorporated herein, accelerating-detecting canines (ADC) are sensitive to identifying accelerants when they are present, however, they lack ability to discriminate between the chemical compounds and similar household items, leading to false positives. (Ex. 3 at 2). In this case, it is particularly concerning because tennis shoes are commonly known to contain compounds similar to gasoline in the manufacturing process. (*Id*.). Because of ADCs' high level of false positives, a competent investigation must include verification of the presence of accelerants by a lab. (*Id*.). The risk of false positives from dog sniffs, as well as the need for lab confirmation, has been recognized since at least the early 1990s through NFPA 921, as well as peer-reviewed scientific articles.[28]

Despite this, Michael's defense counsel never challenged these false claims and faulty science. On cross-examination, the only topic addressed with Jacobson was that the dog could not determine what type of accelerant was on Michael's shoes. (T. 444-46). A proper investigation and retention of a fire expert would have shown the jury why this testimony was inaccurate and would have provided the support necessary to cross-examine and rebut the State's

[28] Katz & Midkiff, *supra*; Kurtz et al., *supra*; Tindall & Lothridge, *supra*.

witness on the accuracy of dog alerts. *See Richey*, 498 F.3d at 362; *Dugas*, 428 F.3d at 328; *Souliotes*, 2013 WL 875952, at *42-45. This deficient performance prejudiced Michael because it allowed the jury to wrongly believe there was physical evidence linking him to the murder.

Cross-examination, especially deficient cross-examination, is not a proper substitution for independent investigation or a defense's own expert. In *Souliotes*, the court noted that when forensic evidence is the centerpiece of the state's case or there are gaps in proof—just like here—then cross-examination may not be a sufficient substitution. 2013 WL 875952, at *42-45.

Michael's counsel did not cross-examine Jacobsen on dogs' inability to detect certain chemicals, or lack of discrimination leading to false positives, or the necessity of a lab confirmation what a dog has alerted on.

An adequate cross-examination would have revealed the issues with the State's analysis and undermined the State's key themes and arguments against Michael, and a fire expert could have refuted the State's evidence. Michael's counsel performed deficiently, which prejudiced his defense; this violated Michael's Sixth Amendment rights.

iii. *Defense Counsel Failed To Investigate And Properly Rebut The State's False Testimony That Holdman Could Identify The Use Of An Accelerant And An Incendiary Fire Based Solely On Visual Inspection.*

Jim Holdman testified that he could determine the issues of whether a fire was incendiary and whether an accelerant was used based on visual inspection. Neither is possible, and this violated standards in NFPA 921. *See* Claim I.C, *supra*. Despite this, Michael's counsel did not cross-examine the State's witness on this issue nor consulted experts on this issue. Because Michael's counsel did not properly rebut these propositions, the jury was allowed to believe that the fire was an intentional fire started by an accelerant. This deficient performance prejudiced Michael's defense and violated his rights under the Sixth Amendment of the Constitution.

Holdman testified that because of the damage at the scene, it was clear a liquid accelerant was utilized. (T. 282). He further testified that the fire scene was the result of a fire that "burned very fast and for not a long period of time" due to the presence of an ignitable liquid. (T. 371). As noted above in Claim I, *supra*, NFPA 921 cautions fire investigators that "fire patterns resulting from burning ignitable liquids are not visually unique," (Ex. 2 at 7) and not to base a conclusion about the presence or absence of an ignitable liquid on the visual characteristics of the fire patterns alone. *See* Claim I.C, *supra*; NFPA 921 § 6.3.7.8

Certified Fire and Explosion Investigator Paul Bieber determined that Holdman's conclusions about the presence of an accelerant "[are] contrary to the standards expressed in NFPA 921, and not in keeping with the generally accepted techniques and methodologies within the field of fire investigation." (Ex. 2 at 8). NFPA 921 explicitly states that "In order for the presence or absence of an ignitable liquid to be scientifically confirmed in a sample, that sample should be analyzed by a laboratory in accordance with 17.5.3." (*Id.*). Here, the carpet samples taken by Holdman and submitted for laboratory testing came back negative for an ignitable liquid. Without laboratory results confirming the presence of an accelerant, "there is no evidence on which to base a conclusion that an ignitable liquid was present at this fire." (*Id.*) Yet Holdman testified that an accelerant must have been used anyway, and counsel did not adequately challenge this proposition.

Holdman also violated widely accepted standards of fire investigation when he improperly classified the fire as "incendiary". (T. 282); *see* Claim I, *supra*. As expert Paul Bieber notes "Under the circumstances . . ., the only classification for the cause of this fire which is in compliance with NFPA 921 and the standards of generally accepted techniques and methodologies within the field of fire investigation is 'undetermined.'" (Ex. 2 at 9).

Defense counsel never challenged the issue of Holdman's claim that he could identify the fire as an incendiary, accelerant-fueled fire. NFPA 921 was never mentioned or referenced. Indeed, counsel asked *not one* question on cross-examination about the standards for fire investigation, whether those standards were followed, or how those standards conflicted with Holdman's determination that the fire was incendiary and an accelerant was used based solely on a visual examination. He also did not hire his own expert to refute Holdman's testimony. Had counsel adequately challenged the fire evidence and Holdman's conclusions that violated NFPA 921, it would have undercut the State's theme throughout trial that Michael intentionally set the fire with an accelerant. Michael's defense counsel's failure to investigate, retain a fire expert, and adequately cross-examine the State's witnesses on the fire evidence was deficient and prejudiced Michael.

Lay jurors lack the ability to independently evaluate the accuracy of scientific evidence and rely upon experts to accurately interpret the results of the testing. "Expert evidence can be both powerful and quite misleading because of the difficulty in evaluating it." *Daubert*, 509 U.S. at 595. The expert evidence brought forward by the State regarding the tie between Michael and the crime scene was both powerful and misleading. The testimony of the State's witnesses on this subject is "precisely the type of scientific evidence that juries are likely to consider objective and infallible." Findley, *supra*, at 943. Because of this, it was imperative Michael's counsel consulted with a fire expert and independently investigated the State's claims, but this scientific evidence was allowed to go unchallenged.

Likewise, trial counsel may lack the ability to independently evaluate the accuracy of scientific evidence and must also rely upon experts to accurately interpret results. *Dugas* was an arson case where the court applied the *Strickland* standard on appeal and found counsel

ineffective where counsel failed to consult an arson expert and failed to thoroughly investigate the "not arson" defense and seek expert assistance or educate himself. *Id.* at 328-29. Here, fire evidence, as in *Dugas*, was a cornerstone of the State's case against Michael. And like in *Dugas*, Michael's counsel "never gave the jury any reason to think that the [S]tate's experts were wrong." *Id.* at 330-31. As was the case in Dugas, counsel's need to investigate and present expert testimony was "inescapable." *Id.* at 331; *see also Richey*, 498 F.3d at 344. "Given the level of practical experience of [the fire investigators], two individuals who had dedicated their professional careers to public service, and the strength of their convictions that the fire was intentionally set, reasonably effective counsel would have anticipated their testimony having a very strong impact on the jury." *Souliotes*, 2013 WL 875952, at *39.

Fire cases involve specialized science most lawyers never encounter in their practice. An adequate defense of a case involving fire requires research, investigation, a careful scrutiny of the opposition's witnesses, confidence in the NFPA standards, and the use of a fire expert. Failing to investigate and research such science or hire an expert constitutes ineffective assistance of counsel. Michael's defense counsel's deficient representation prejudiced his defense, and violated his constitutional rights. Indeed, without the arson evidence, the State had no case and nothing to connect Michael to the crime. Had trial counsel performed effectively, this evidence would have been rejected and Michael would not have been convicted.

B. Trial Counsel Failed To Obtain A Child Development Expert Or In Any Way Challenge The Substance Of Michael's Statements And Alleged Confession.

At trial, the State used Michael's reactions to witnessing his mother's death against him. Law enforcement presumed his guilt because he did not react to his mother's death in the way they expected. They concluded not only that Michael must have killed his mother, but that he clearly had no remorse doing so. Michael's counsel could have prevented this exploitation of

Michael's grief and trauma by presenting evidence to the jury explaining that Michael's statements and conduct were not abnormal or surprising for a fourteen-year-old in his situation. Trial counsel should have consulted with and presented an adolescent psychologist who could have contextualized Michael's statements to the police on the day of the crime and the purported "confession" he made during a suicide attempt on January 5, 1999. The failure to do so constituted ineffectiveness.

It is well-known and widely accepted that "children are different;" their brains are different and, as a result, they behave differently. *See Miller*, 567 U.S. at 471. It is not uncommon for the actions, words, and even facial expressions of youth to be misinterpreted by adults. When this happens in the context of a criminal investigation by law enforcement, the consequences can be devastating. A common initial mistake in a wrongful conviction is "misclassification," when police "erroneously decide that an innocence person is guilty." *See* Richard A. Leo, *False Confessions: Causes, Consequences, and Implications*, 37 J. AM. ACAD. PSYCHIATRY & L. 332, 334-35 (2009). Police are trained to believe that they are "human lie detectors capable of distinguishing truth from deception at high, if not near perfect, rates of accuracy." *Id.* at 334. For example, they are taught that a person who averts his gaze, slouches, shifts his body posture, chews his fingernails is lying and must be guilty. *Id.* (internal citation omitted). Similarly, a person who is guarded, uncooperative, or offers broad, general denials is also lying and must be guilty. *Id.* While scientific studies have consistently debunked this practice—showing that people, even specially trained people—are poor lie detectors and unable to evaluate truth verses deception any better that a rate of 50% (a coin toss), *id.* [29], police still

[29] *See also* C.F. Bond & B.M. DePaulo, *Accuracy of Deception Judgments*, 10 PERS. SOC. PSYCHOL. REV. 214 (2006); Maria Hartwig et al., *Police Officers' Lie Detection Accuracy: Interrogating Freely vs. Observing Video*, 7 POLICE Q. 429 (2004); Saul M. Kassin & Christina

maintain and rely on this practice in their investigations. *See generally* Fred Inbau et al., CRIMINAL INTERROGATION AND CONFESSIONS (5th ed. 2011). For kids, a police investigator's belief that he is a human lie detector is particularly problematic. Many of the behavioral and verbal cues that police are trained to believe indicate deception, such as slouching, silence, and nail chewing, are instead normal conduct by any adolescent.[30] But such normal teenage behavior can make a kid a suspect, meaning the investigation focuses on that person and police are then prone to tunnel vision, wherein all evidence is filtered through the presumption of guilt, rather than the presumption of innocence, and contrary evidence, such as evidence pointing to other suspects, is ignored. *See* Findley & Scott, *supra*, at 293-95. In this way, the entire police investigation and all resulting evidence, including any statements made by the youth, becomes tainted by the erroneous misclassification of the youth as guilty. *Id.*

A youth's expression and behavior is further altered by trauma. Witnessing your mother burn to death is an unimaginable trauma, and thus any statements or conduct following such an event must be evaluated in the context of that trauma.[31] Moreover, trauma affects each person differently; an individual's reaction to trauma will depend on baseline mental state, including age and stage of cognitive and emotional development, mental health history, and any prior history

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T. Fong, *"I'm Innocent!": Effects of Training on Judgments of Truth and Deception in the Interrogation Room*, 23 L & HUM. BEHAV. 499 (1999).

[30] *See* Megan Crane et al., *The Truth About Juvenile False Confessions*, 16.2 INSIGHTS ON L. & SOC. 10, 13 (Winter 2016).

[31] *See* Samantha Buckingham, *Trauma Informed Juvenile Justice*, 53 AM. CRIM. L. REV. 641, 669, 681 (2016); Jessica Feierman & Lauren Fine, *Trauma and Resilience* 26, JUVENILE LAW CENTER (2014), available at https://jlc.org/resources/trauma-and-resilience (last viewed Mar. 1, 2020). *See also* Megan Glynn Crane, *Childhood Trauma's Lurking Presence in the Juvenile Interrogation Room and the Need for a Trauma-Informed Voluntariness Test for Juvenile Confessions*, 62 S.D. L. REV. 626 (2017).

of trauma which may negatively impact one's ability to cope with new stressors and decrease one's resiliency. None of this was considered in this case.

It was incumbent upon trial counsel to contextualize 14-year-old Michael's behavior and statements to police. An expert adolescent psychologist, particularly one experienced in childhood trauma, could have explained to the jury that Michael's behavior was not at all abnormal for an adolescent his age, particularly in the aftermath of such a traumatic event. This type of evaluation should have included a thorough psychological evaluation of the juvenile suspect, as well as a historical investigation of his social history, including any mental health or trauma issues. At a minimum, trial counsel needed to cross-examine the State witnesses on their malevolent assumptions about Michael's behavior and how it departed from what one might expect from any kid his age under the circumstances.

The American Bar Association Standards for Criminal Justice require that defense counsel conduct a prompt investigation of the circumstances of the case and "explore appropriate avenues that reasonably might lead to information relevant to the merits of the" case. CRIMINAL JUSTICE STANDARDS FOR THE DEFENSE FUNCTION § 4-4.1(c) (AM. BAR ASS'N 2017). The Supreme Court has held that the reasonableness of counsel's decision not to introduce evidence of a defendant's background must be determined based on a context-dependent examination of counsel's perspective at the time of trial to determine. *Wiggins*, 539 U.S. at 523. In *Wiggins*, trial counsel had access to records detailing Wiggins' life in foster care, including records kept by Baltimore City Department of Social Services. *Id.* at 524. These notes revealed that Wiggins's mother was an alcoholic, resulting in shuffling from foster home to foster home, his truancy, and parental neglect. *Id.* at 525. However, trial counsel abandoned further investigation after gaining only surface-level knowledge of Wiggins's social history from a scarce number of sources, so

the full picture of Wiggins background remained unknown to the jury. *Id.* at 524. The Court ruled that in assessing the reasonableness of an attorney's investigation, the court must consider not only the evidence already known to counsel, but whether this evidence would lead a reasonable attorney to investigate further. *Id.* at 527. In *Wiggins*, the Court held that "any reasonably competent attorney would have realized that pursuing these leads was necessary to making an informed choice among possible defenses." *Id.* at 525. Here, a full investigation of Michael's cognitive and mental state, as well as his background was "necessary to making an informed choice" about how to rebut the State's damaging narrative of Michael as a remorseless killer. But the full picture of Michael's background and emotional state after discovering his mother's body remained hidden from the jury because trial counsel did nothing to investigate and thus failed to present any such evidence at trial.

Here, the fact of Michael's youth alone required trial counsel to investigate and present evidence about how his developmental status affected his reactions to his mother's death, and the police's extremely negative interpretation of them. The records available to defense counsel prior to trial also created an obligation to investigate Michael's statements to law enforcement, including Michael's school records, medical and mental health records, police records, including DFS and criminal records regarding violence between his parents, and records of their divorce. Yet trial counsel failed to hire an expert to review and explain how this background mitigated any statements by Michael. Had counsel done so, the jury would have learned that Michael was not a callous killer, but rather, that as young adolescent with his background, Michael "did not deal well with emotional distress both as a consequence of his developmental status and his own family experiences, and he was vulnerable to making impulsive and reactive statements." (Ex. 4 at 4).

A full investigation into Michael's background with the help of a mental health expert could have combatted the State's evidence.[32] At trial, the State offered testimony about Michael's "lack of remorse," as well as an alleged confession statement. Assistance from a mental health expert would have refuted the State's description of these statements and instead revealed them as what they are: "the expressions of a frightened and angry young teenager who tended to react with bravado in situations in which he felt unfairly challenged or mistreated." (Ex. 4 at 20). This information would have affected the outcome of the trial.

i. ***The State Exploited Michael's Reaction To His Mother's Death.***

a. Prosecution Testimony That Michael Acted Guilty

At trial, the State presented testimony that Michael seemed guilty, both because of the way he acted and things he said. First responders testified that Michael showed a lack of emotion on the day of the crime, bolstering the idea that he was guilty. Eric Aubuchon, a volunteer firefighter who responded to the fire, recalled that when he arrived on scene, Michael was not screaming or shouting. (T. 234). Curt Davis testified that Michael was "acting normal, not concerned about what had happened, no visible signs of remorse," (T. 460-61), and that Michael did not seem emotional until he realized he was a suspect and angrily exclaimed "Dad, this is a bunch of shit, they're trying to pin something on me that I didn't do." (T. 469).

[32] A cursory investigation is not enough to support counsel's chosen strategy; a reviewing court needs to contemplate the reasonableness of the investigation that led to the chosen strategy. *Wiggins*, 539 U.S. at 527. The decision to leave an investigation incomplete is reasonable only to the extent that reasonable professional judgment would support the limitation on the investigation. *Id.* at 533 (citing *Strickland*, 466 U.S. at 690-91). In *Wiggins*, the Court found that counsel's decision to end his investigation was neither consistent with professional standards of the time, nor reasonable in light of evidence counsel uncovered in previous social services records as those records would have spurred a reasonably competent attorney to further investigate. *Id.* at 534. Counsel's failure to investigate Michael's life was equally unreasonable here.

Similarly, Jim Holdman believed Michael was the perpetrator because of statements Michael made during his interrogation that Holdman believed were incriminating. Detective Davis also testified at trial to Michael's statements and behavior on the morning of his mother's death, noting Michaels' question about what would happen to his mother's truck, (T. 460), his question to Davis about when he would get to go home because he was tired, (T. 461), his anger after being accused of committing the crime, (T. 469) ("Dad, this is a bunch of shit, they're trying to pin something on me that I didn't do."), and his irritation with officers who continued to question him hours later, telling law enforcement officials that they were all "stupid" because they didn't know that "gas doesn't burn down, but chemicals do." (T. 473).

b. Michael's Reaction To His Mother's Death Was Normal For A Traumatized Adolescent

Dr. Jeffrey Aaron, a clinical and forensic psychologist with extensive experience with adolescents,[33] evaluated Michael and reviewed the same records available to counsel. He concluded that Michael's reaction, behavior, and statements the day of his mother's death, and in the aftermath, were not abnormal or surprising. As a threshold matter, an innocent person would have no reason to show remorse. (*See* Ex. 4 at 20) ("[a]s a simple matter of psychology, an expression of guilty feelings would not be expected from someone who was not guilty" and so the lack of remorse is not a sign of guilt.). That is common sense, but police and prosecutors ignored this obvious explanation and charged ahead to exploit every detail of Michael's reaction that they could. As Dr. Aaron explained, "[a]n accurate, or at least reasonable appraisal of Mr.

[33] Dr. Aaron has served as the Clinical Director of an adolescent unit, the Forensic Coordinator, and the Chair of the Ethics Committee of the Commonwealth Center for Children & Adolescents in Virginia. He is also an Assistant Clinical Professor of Psychiatry & Neurobehavioral Sciences at the University of Virginia Medical School, Clinical Assistant Professor of Psychology at the University of Virginia, and associate faculty at the Institute of Law, Psychiatry & Public Policy at the University of Virginia. His CV is appended to Exhibit 4. (Ex. 4 at 23-33).

Politte's statements and behaviors proximal to the time of his mother's death would require an understanding of his psychological state as well as the developmental and situational context from that point in time." (*Id.* at 14).

First, Michael's alleged lack of emotion is a common reaction to trauma. (Ex. 4 at 20). Emotional flatness, numbing, and disengagement are to be expected in the immediate aftermath of a trauma, and often persist when people suffer from Posttraumatic Stress Disorder. (*Id.*). Dr. Aaron explains that "adolescents' emotional expression is often quite difficult for others to decipher" and "that adults frequently misunderstand or misread adolescents' emotions—both in meaning and intensity," particularly when the adolescents are in emotionally intense or activating situations, which Michael indisputably was. (*Id.* at 18, 19 n.1).

Second, while Aubuchon and Davis testified that Michael was acting "calm" and "normal," Dr. Aaron explains that "[i]t is not uncommon for people who are distressed, angry, or frightened to attempt to mask those feelings, …particularly male adolescents." (*Id.* at 20). Based on his review of Michael's records, Dr. Aaron concluded that Michael was immature and reactive, like most kids his age. Dr. Aaron opines that Michael was actually "less" mature "in some ways" than peers but because of his lack of parental involvement and his relative independence, he had a "'pseudomaturity' in which he presented and perhaps thought of himself as more mature and capable than he in fact was." (*Id.* at 12). This pseudomaturity and masking would not have served Michael well in his interrogations with police.

Third, Michael had a history of depression and emotional distress that resulted, at least in part, from his troubled childhood and family life. (*Id.* at 13). At the same time, he was raised in a "family culture of managing emotional distress through avoidance rather than overt expression, masking distress, and acting as if the problems did not exist even when they were glaring." (*Id.* at

14). His mental health issues would have made Michael even less equipped to cope with both his mother's death and the subsequent demands of police. Simultaneously, his depression may have made him seem muted or non-reactive.

Dr. Aaron's conclusions and opinions are critically relevant to an appropriate evaluation of Michael's conduct and statements the day of his mother's death and after. As Dr. Aaron pointed out, "at the time of Rita Politte's death, [Michael] was facing a convergence of circumstances that would have strongly influenced his emotions and their expression," (*Id.*), including, but not limited to, the immaturity and diminished control over emotions and judgment of a typical adolescent; the chronic stress of his family problems and his resulting depression; the impact of the childhood trauma of witnessing his father abuse his mother; and, most immediately, the shocking trauma of witnessing his mother burn to death.

The police further claimed that Michael's statements were inconsistent, indicating deception, but, according to Dr. Aaron, "[i]naccuracies . . . would be expected in such a situation," where Michael was understandably experiencing intense emotions (described by Michael as "panic") and trauma, "further magnified by [Michael's] developmental status." (*Id.* at 18). Police also believed that Michael made statements indicative of guilt and motive. But Michael was just trying to figure out what had happened to his mother. (*Id.* at 18) ("it would make sense that a boy who knows his mother has been killed by someone else would want to know whether the killer might be identified"). More generally, Dr. Aaron explained that a "14-year-old who had just witness his mother burning to death might exhibit responses that would be difficult to accurately interpret." (*Id.*); *see also id.* (Michael's statements that day "would be difficult to accurately interpret" since "emotionally activated adolescents' emotional expression is often quite difficult for others to decipher.").

Finally, some of Michael's statements were elicited during police interrogation. By that point, the police had already honed in on Michael as the prime suspect. Michael was "frightened, deeply distressed, and tired;" he had not slept since he awoke in the middle of the night and he had been held by police for hours at the scene and then in the police station. (*Id.*). He just wanted to come home, a reaction common to almost every juvenile when interrogated. (*Id.*) He was understandably "angry" and "agitated." (*Id.* at 18-19). He had learned that "whatever he said and whatever explanation of his behavior he offered, the police would not listen to him and persisted in accusing him of murdering his mother." (*Id.* at 19).

The police interrogations of both Michael and Josh Sansoucie demonstrate law enforcement's willingness to use psychologically coercive interrogation tactics widely accepted to be inappropriate and problematic for youth. *See* Section II, *supra* (explaining the science and case law establishing that standard police interrogation tactics are unacceptable for use with youth). Police honed in Michael and aggressively treated him a suspect, as he reacted to and grieved his mother's death. They accused and confronted him, deceived him with junk science (telling him he failed the CVSA test, indicating deception), deceived him with a false story that his friend was "spilling the beans" on him, and implied that the only way to save himself was to confess. (*Id.* at 19). They even threatened him, by encouraging him to think about "what happens to kids in prison." (*Id.*). Each of these tactics are common to the most widely used police interrogation tactic—the Reid Technique—and none should be used on children. *See* Crane et al., *supra*, at 14; *Colorado v Connelly*, 479 U.S. 157, 166 (1986) (holding police unconstitutionally "overreach" when their questioning "exploit[s]" known weaknesses of a vulnerable suspect). If and when they are used by police on kids, unreliable results should be expected. As Dr. Aaron highlighted, "the police, who understood the system and presumably had training in interrogation

techniques, were simply outsmarting and manipulating a vulnerable 14-year-old by offering comments to elicit responses." (Ex. 4 at 19-20). Dr. Aaron concluded, "[i]n that context, especially given the expected impact of intense emotional activation on a 14-year old boy, the idea that [Michael] could have simply wished for the ordeal of police questioning to be over and to be home and with family rather than in a police station seems both credible and consistent with known information." (*Id.*).

c. Trial Counsel's Failure To Rebut Prosecution's Narrative Of Michael As A Remorseless Killer Prejudiced Michael

Had counsel investigated and presented an expert to explain Michael's state of mind following his mother's death, he could have powerfully rebutted the State's implication that Michael did not grieve his mother and that his reaction was evidence of his guilt. Indeed, with "nearly seventeen more years of experience under [his] belt," defense counsel is now clear that he "would have handled Michael's post-arrest statement while in juvenile detention differently" and "should have cross examined the officers further about how Michael's statement came about in order to provide context for the jury." (Ex. 24, Affidavit of Wayne Williams). He thus concedes that he did not have any strategic reason for not doing consulting an expert and giving context to Michael's behavior. This violated Michael's right to counsel.

Absent testimony from an expert like Dr. Aaron, the jury was left with the impression that Michael was a remorseless cold-hearted killer. The damage of this deficient performance was profound. Expert testimony would have changed the narrative, accurately showing the jury that Michael was an extremely vulnerable, traumatized adolescent. Instead of fearing Michael, the jury would have sympathized with him. And the result of trial likely would have been different.

ii. *The Alleged Confession.*

In addition to Michael's behavior and statements immediately following the murder, the State also used his suicide attempt and alleged confession against him at trial. Confession evidence is so powerful to juries that it almost ensures conviction.[34] *See Connelly*, 479 U.S. at 182 ("Triers of fact accord confessions such heavy weight in their determinations that the introduction of a confession makes the other aspects of a trial in court superfluous."). For this reason, defense counsel must do everything possible to prevent a client's confession from admission at trial. Where the client is a juvenile, this duty is heightened. Like with Michael's earlier comments made after finding his mother burning, a mental health expert also could have assisted the jury in understanding Michael's mental state during this time. Counsel had no strategic reason for not investigating this alleged confession, or consulting with a psychologist about it. Counsel's decision not to further investigate the confession or obtain a mental health expert is unreasonable under *Wiggins*.

During cross-examination of the State's witnesses about Michael's confession, counsel tried to establish Michael's emotional state by asking Jerri Johnson, Cheryl Graham, and Karon Blankenship whether Michael seemed upset on the day of the outburst. Each of these witnesses confirmed that Michael was upset that day. (T. 658, 708, 677). But trial counsel failed to go further and hire an expert witness who would have explained not only that Michael was "upset" at the time of his attempted suicide, but would have analyzed the apparent confession. Dr. Aaron would have testified that Michael's outburst after his suicide attempt could not have come from a

[34] As of 2004, 81% of false confessors whose cases went to trial were wrongfully convicted. This statistic is under-representative because it does not include the significant number of false confessors who plead guilty, foregoing a trial that is extremely likely to end in conviction. Steven A. Drizin & Richard A. Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C. L. REV. 891, 960 (2004).

calm or rational place, making it difficult for the surrounding staff to interpret and record his statement correctly, but even if it was correct, there are many explanations beside guilt for such an outburst. (Ex. 4 at 21).

In fact, Michael has always maintained that he said "I haven't cared since *they* killed my mom," not since "*I* killed my mom." This makes sense. After interviewing and evaluating Michael, Dr. Aaron reported: "Mr. Politte['s] assert[ion] that someone else committed the crime is consistent with the statement of his friend, Joshua Sansoucie, who was present at the time of Rita Politte's death. Mr. Politte reported to me that he had suspicions that his father was responsible from the murder from the day of his mother's death, and struggled with acknowledging that thought even to himself. He indicated that internal conflict was in part the reason for the use of the word "they," as well as the thought that there might have been more than one culprit." (*Id.*) (internal citation omitted).

The State's exploitation of Michael's suicide attempt and mischaracterization of what he said in its aftermath is apiece with its handling of the investigation of this case and prosecution of Michael is striking. The tunnel vision and cognitive bias of the state actors involved and reveals a willingness to overlook exonerating evidence, or even fabricate incriminating evidence. The initial report on the suicide did not include any mention of inculpatory statements by Michael—an inexplicable omission if this was really said. (*See* Ex. 61). There was no mention in any report of Michael's "confession" until ten days later when Michael's psychologist, who met with him immediately after the suicide attempt, amended her report "at the urging" of police. (Ex. 61 at 13). This suspicious amended report and the testimony of other juvenile officers are inconsistent with Michael's assertion that he is innocent, which has maintained from the day of his mother's death to today. The report and testimony should not be trusted.

In any event, even if Michael said what the State claims, there are still innocuous explanations. As Dr. Aaron explains:

> There are still a variety of possible explanations, considering Mr. Politte's likely mental state at the time. The statement could have signified feelings of guilt for not protecting her, as he was present in the home. It could have been a statement of what others clearly thought and were vigorously asserting. It could have been a statement of guilt over an act he did in fact commit. Those are speculations and there is not a way to determine from the statement itself which if any of these was the meaning, if in fact that was the statement that was uttered. However, a common element of an emotional crisis is the lack of rational, clear-headed, and logical reasoning, and thus the statement could reasonably be seen as offering little in terms of definitive or supportable factual information.

(*Id.*). In short, the statement as offered has no value in determining guilty. An expert at trial could have explained this to the jury. Counsel's failure to investigate and present such evidence prejudiced Michael at trial.

Counsel had the opportunity and the resources to hire a mental health expert to explain Michael's behavior and undercut the State's presentation of Michael's statements to the jury. When counsel failed to hire a mental health expert, he failed to provide adequate counsel for Michael. In *Johnson v. United States*, 860 F. Supp. 2d 663 (Dist. N.D. 2012), the defendant was originally convicted of five counts of conspiracy to commit murder during a continuing criminal enterprise, and the defendant eventually filed a federal habeas petition claiming ineffective counsel for failing to confront the prosecution's theory which focused on the defendant's mental state. At trial, the State had presented a motive of pure revenge based on Johnson's past romantic and abusive relationship with one of the victims. *Id.* at 818. Trial counsel did not provide an expert witness to explain "Battered Women's Syndrome", which would have been pivotal to determining the penalty. *Id.* at 820. The court in Johnson found that defense counsel's failure to

confront the State's theory of revenge was not strategy. *Id.* Because counsel failed to procure readily available evidence, including an expert, his performance was ineffective. *Id.* In so finding, the court made clear that trial counsel had an obligation to make a sincere effort to confront the State's theory at trial, as is the case here.

C. Trial Counsel Failed To Present Evidence That Michael Had A Loving Relationship With His Mother.

The prosecution devoted significant trial time to the illusion that Michael was unremorseful and emotionally unaffected by his mother's death—yet, counsel did nothing to contradict this, despite significant evidence depicting Michael's loving relationship with his mother.[35] Indeed, trial counsel wholly failed to investigate and did interview at least five people who were close to Michael and could have testified on his behalf: Chrystal and Melonie Politte, Melinda and Michael Glore, Sr., and Joshua Poucher. Each of these people knew Michael well and would have rebutted the negative inference that Michael did not care about his mother. Further, had defense counsel interviewed the other witnesses regarding the incident with Derek Politte that gave the State its theory of motive, including Michael's two sisters, he would have been able to discount the credibility of the State's theory.

[35] Similarly, the jury also was not given the opportunity to learn about Michael's life, especially from people that knew him well. Dr. Aaron interviewed both his sisters, Chrystal and Melonie, as well as Michael and Melinda Glore, parents of Michael's close childhood friend, and looked at school records to evaluate Michael's background. (Ex. 4 at 5). Prior to his parents' separation he was described in school records and by his peers as very active, socially engaged, and a generally happy boy. (*Id.*). Had the jury heard from other witnesses about Michael and his attitude and relationship with his family, and also from a mental health expert like Dr. Aaron, the jury would have been able to understand Michael's statements to law enforcement and his alleged confession, and put these incidents in context. Instead, counsel's feeble attempt to introduce mitigating evidence during cross-examination of the State's witnesses was flattened by the State's uncontested narrative. This prejudiced Michael.

A reasonably competent attorney under the same or similar circumstances would have interviewed those close to Michael for character evidence to show Michael's loving relationship with his mother. Trial counsel's failure to present character witnesses to rebut the prosecution's allegation of Michael's supposed lack of remorse or sadness over his mother's death runs counter to counsel's duties. In *Strickland*, a situation arose where "[c]ounsel's strategy . . . decision not to seek more character or psychological evidence than was already in hand was . . . reasonable." 466 U.S. at 699. Here, trial counsel failed to consult with or call character witnesses who spent a substantial amount of time with Michael and could have told the jury about his relationship with his mother. These character witnesses were not tenuous leads amounting to cumulative testimony, but first-hand accounts of Michael's character and love for Rita. The failure to investigate and present these witnesses amounts to an "error[ ] so serious that [trial counsel] was not functioning as the counsel guaranteed [Mr. Politte] by the Sixth Amendment [.]" *Id*. at 687.

At a minimum, defense counsel should have interviewed Michael's two sisters, Chrystal and Melonie Politte, who would have testified about the family's close relationship, including Michael's relationship with his mother. Both sisters told police about Michael's relationship with Rita in statements available in police reports, putting counsel on notice. Melonie told investigators that "[Michael] and his mother had a good relationship," and that she "had never heard any threats between them," and "they rarely fought." (Ex. 26 at 28; Ex. 39, Attorney General Interview of Melonie Politte, at 2). Chrystal Politte stated that Michael had no problems with his mother. (Ex. 35, Attorney General Interview of Chrystal Politte, September 1, 1999, at 1; Ex. 36, Attorney General Interview of Chrystal Politte, December 16, 1999, at 1).[36]

[36] Other witnesses in the police file also account for Michael's relationship with his mother. Cristal Barnett, Ed Politte's then-fiancée, stated she was not aware of any problems between

Counsel also did not speak with Melinda Glore—the mother of Michael's close friend, Mikie Glore—who played a large role in Michael's life and knew Rita as well. (Ex. 15, Affidavit of Melinda Glore, at 1). Michael spent a lot of time at the Glore household, riding his bike over and sometimes staying for days. (*Id*.). Had trial counsel completed a thorough investigation, he would have learned from Melinda that Michael was "a respectful young man, and he loved his parents." (*Id*. at 2). Melinda described Michael as "even more respectful than my son, Mikie, sometimes." (*Id*.), and she wished "someone from the defense would have questioned [her]," because she would have testified on Michael's behalf and combatted the impression that Michael was cold and emotionless. (*Id*. at 3). Melinda's husband, Michael, Sr., also would have testified on Michael's behalf at trial or a retrial, stating Michael was "a respectful young man" and he had "never heard a cross word out of that young man the whole time I knew him." (Ex. 16, Affidavit of Michael Glore, Sr., at 1). Because the Glore family played such a large role in Michael's life, trial counsel should have interviewed them and presented them as witnesses to the jury. (*Id.* at 2).

Joshua Poucher was another close friend of Michael. He rode dirt bikes, played video games, and hung out with Michael often, especially after Rita began working following her divorce from Ed. (Ex. 18, Affidavit of Josh Poucher, at 1). Josh said Michael would tell him "he missed his mother when she was away at work," and Josh thinks "it was hard on [Michael], having her gone." (*Id*.). Josh was interviewed by the police, but trial counsel never spoke with him. (*Id*. at 3). He also would have testified on Michael's behalf about Michael's relationship with his mother, refuting the State's insinuation that Michael did not care about Rita. (*Id*.).

Michael and his mother. (Ex. 37, Attorney General Interview of Cristal Barnett, at 1). Yet counsel did not speak with her either.

A reasonably competent attorney under the same or similar circumstances would have interviewed those close to Michael for character evidence. Trial counsel's failure to present character witnesses to rebut the prosecution's theory that Michael wished to harm his mother and was not sad about her death constitutes deficient performance.

D. Trial Counsel Failed To Investigate And Present Evidence Supporting Michael's Statements About What Had Occurred On The Evening Before And Morning Of The Crime.

Trial counsel breached his duty to both conduct a reasonable investigation into Michael's defense and call vital witnesses of which trial counsel had actual notice. Missouri Courts have found that the right to effective counsel granted by *Strickland* imposes a duty on counsel to both perform reasonable investigation and present witnesses vital to the accused's defense. *See State v. Butler*, 951 S.W.2d 600, 610 (Mo. banc 1997) (reversing movant's conviction based on an ineffective assistance of counsel claim for failure to investigate); *Hutchison v. State*, 150 S.W.3d 292, 304 (Mo. banc 2004). A failure to investigate is not a matter of trial strategy; it is simply inept performance. *Chambers*, 907 F.2d at 828. Such a failure violates counsel's essential duty to make an adequate factual investigation "which can only be viewed as an abdication—not an exercise—of [counsel's] professional judgment." *McQueen*, 498 F.2d 216. The duty to investigate specifically embraces matters that would impeach a key state's witness, *Nixon v. Newsome*, 888 F.2d 112, 115-16 (11th Cir. 1989); *State v. Wells*, 804 S.W.2d 746, 748-49 (Mo. banc 1991), or with testimony of others who would contradict the witness' testimony. *Hadley*, 97 F.3d at 1136. Trial counsel failed to investigate adequately when he did not interview witnesses who saw Michael on the morning of the murder, challenge the only physical evidence allegedly tying Michael to the crime, or challenge the State's assertion that Michael could not have slept through the crime.

i. *Failure To Investigate*.

Besides the State's misleading and incorrect fire evidence, *see* Claim I, *supra*, no physical evidence linked Michael to the death of his mother. Curt Davis, a Washington County Highway Department detective with nearly fourteen years' experience, believed there had been a struggle in the room where Rita died, and that Rita may have attempted to fight off her attacker. (Ex. 59, Deposition of Curt Davis, at 9-10). An autopsy revealed that Rita suffered not just from the fire, but also from blood loss, and there was blood on the floor and wall near Rita. (*Id.* at 8-9). This was consistent with Dr. Zaricor's determination that the wound inflicted to the back of Rita's head would have produced "a great deal of blood," (T. 407-08), blood that was sure to splatter back at least in part on the person who inflicted the wound. It created a large trail of splatter on the bedroom wall. (Ex. 59 at 8). Yet, no blood was found on Michael's person or clothing in the immediate aftermath of the murder.

Additionally, Michael had no scratches on him or any tears or burns on his clothing when interviewed at the crime scene—a fact that Davis readily admitted. (*Id.* at 16-17). Nothing about Michael's appearance indicated that he had committed the crime. A reasonable investigation and competent performance by defense counsel would have produced evidence casting doubt upon any physical connection between Michael and the murder. (*See* Ex. 12, Affidavit of Janet Politte, at 1) ("Bernie did not have any scratches on him"). But trial counsel failed to call these witnesses.

Further, trial counsel failed to present evidence that Michael was a sound sleeper. The State's insinuation that it would have been impossible for Michael and Josh to sleep through Rita's murder was incorrect. Melinda Glore, the mother of Michael's best friend, knew Michael well; he stayed over to spend the night with her son, Mike Jr., quite often. (Ex. 15 at 1). Melinda

said she didn't even "try to stay quiet" when Michael was staying over with her son, because "you could turn on the smoke alarm at one end of the house and [the boys] would sleep right through it." (*Id.*). Further, Melinda's husband Mike, Sr. worked odd hours and would regularly come home late. (Ex. 16 at 1). Mike, Sr. stated that "[t]he kids would never wake up when I would come home," even though he would "have to step over [them] to get to my bedroom." (*Id.*). Mike, Sr. and Melinda would talk in the same room as Michael while he was asleep, yet it did not wake him up. (*Id.*). But trial counsel never spoke to the Glores, and this evidence was never presented to the jury. All of this would have been important because Holdman's testimony at trial implied that there was no way that Michael and Josh could have slept through the attack on Rita because "sound moved easily throughout the trailer." (T. 368). This was simply not true.

Attacking the State's theory of what occurred inside the home on the morning of Rita's murder was crucial to Michael's defense of innocence. A reasonably competent attorney would have realized as much and turned to those that knew Michael's sleeping habits best—his friends and family—to disprove the State's case and present evidence that it was possible Michael slept through the attack and murder of his mother by someone else. Because "the state's case was entirely circumstantial," besides the erroneous fire investigation which linked Michael's shoes to the crime, *Butler*, 951 S.W.2d at 610, evidence supporting the idea that a third-party killed Rita would have affected the outcome of Michael's trial, when taken in conjunction with over evidence. The State was openly skeptical of Michael's claim that he slept through the murder, asking the jury during closing argument to use their common sense and ask, "'Is that really possible?'" (T. 768). Taken alone, the fact that Michael was a heavy sleeper may have been of little consequence to the jury. However, when combined with Michael's clear assertion of innocence, this seemingly trivial fact would have mattered a great deal. Evidence from the Glore

family about the number of times that Michael slept over at their home and ability to sleep through loud noises would have given Michael's claim of innocence more weight in the jury's consideration. Thus, combined with the other investigative routes that counsel failed to go down, the jury's evaluation of the evidence presented by the State would have been severely impacted and the outcome of the trial likely different.

ii. *Failure To Call Vital Witnesses.*

Even more alarming was trial counsel's failure to fully present at trial the only line of investigation that he developed. Although an attorney's decisions regarding trial strategy are typically given a large amount of deference, claims of ineffective assistance of counsel for failure to call a specific witness may succeed when certain elements are satisfied. *Worthington v. State*, 166 S.W.3d 566, 577 (Mo. 2005). In cases involving the failure to call a witness, a defendant may succeed on ineffective assistance of counsel where he can demonstrate that "1) trial counsel knew or should have known of the existence of the witness, 2) the witness could be located through reasonable investigation, 3) the witness could testify, and 4) the witness's testimony would have produced a viable defense." *Hutchison*, 150 S.W.3d at 304; *see also Jackson v. State*, 465 S.W.2d 642, 646 (Mo. 1971) (utilizing a similar analytical framework to the same claim). A witness would have provided a viable defense if their testimony would have negated an element of the crime for which a movant was convicted. *Ferguson v. State*, 325 S.W.3d 400, 416-17 (Mo. Ct. App. W.D. 2010). Here, defense counsel's failure to call two key witnesses, Josh Sansoucie and Michael Politte himself, constitute ineffective assistance of counsel under *Hutchinson*.

a. Failure To Call Josh Sansoucie

The failure to call Josh Sansoucie as a defense witness went beyond a mere matter of trial strategy; it amounted to ineffectiveness under the clear boundaries of *Hutchinson*. As far as the first prong of the test is concerned, counsel clearly knew not only about Josh's existence, but also about the importance of Josh's potential testimony. Josh was deposed by defense counsel on January 18, 2002, just 11 days before trial. His testimony at that deposition was entirely consistent with the content of his prior recorded statements to law enforcement and with Michael's account of the night leading up to and morning of the murder.

An ineffective assistance of counsel claim brought for failure to call a witness requires next that the witness could have been located through reasonable investigation. Even the most cursory of research into Josh's whereabouts at the time of the trial reveals that hardly any investigation would have been required to locate him. An affidavit signed by Josh in April 2018 reveals that during the trial, he was sitting in the hallway, waiting to be called to testify. (Ex. 5 at 3). This element of the test is clearly satisfied.

The third element of the *Hutchinson* test is closely related to the second. Josh's ability to testify at the trial was never in dispute. There was no indication that his testimony at the deposition on January 18 was given reluctantly or against his will. Additionally, Josh was not only able to testify at the trial, he was judicially compelled to do so. After an application for immunity was filed by the state under MO. REV. STAT. § 491.205, the Court both granted Josh immunity from prosecution and ordered that he must "give testimony" in the proceeding against Michael. (Ex. 45). Despite this order, the State chose not to call Josh as one of their witnesses, likely because his recent deposition testimony did not support their theory of the case. The order,

combined with Josh's statement that he was in the courthouse during the trial, is evidence of his ability to testify.

The final and most important prong of the *Hutchinson* test requires that the potential witness's testimony would have provided a viable defense, and not merely impeach the testimony of another witness. Josh's testimony undoubtedly meets this requirement, as he was the only person, aside from Michael, that was inside the trailer at the time of Rita's death. His testimony would have illuminated for the jury the mystery of what happened inside the trailer in the final hours of Rita's life and provided a more complete story to the jury that exculpated Michael.

As *Ferguson* points out, a witness's testimony would have provided a viable defense if it negated an element of the crime for which the defendant was charged. *Ferguson,* 325 S.W.3d at 416-17 A comparison of Josh's unutilized testimony to the elements of both crimes that Michael was charged with, first- and second-degree murder, reveals that Josh's testimony would have met the burden required under *Ferguson*. A central element of the state's case at trial revolved around their conjured motive for Michael, that his mother had refused to give him money for a replacement motorcycle part after an argument weeks before the murder (T. 769). This minor argument between a parent and their child was the state's only basis for arguing premeditation, the distinguishing element in their first-degree murder charge. Because there was no one at trial who testified about the interactions between Michael and Rita in the hours leading up to the murder, Josh would have negated this element simply by virtue of his retelling of his time spent with Michael in the hours leading up to the crime, where he noticed no strange behavior between Rita and Michael.

His testimony would have unqualifiedly negated any notion of premeditation by pointing out that Michael and his mother did not speak once about his motorcycle in the hours leading up to her death. During the entirety of the afternoon and evening that the two boys spent together, Michael did not say anything to Josh, or anyone else, about being angry with his mother in the final hours before her death. (Ex. 58 at 44-45). Further, prior to going to sleep, Michael gave Josh the option of sleeping on the floor of his bedroom, or on the couch in the living room—which is inconsistent with someone who had premeditated plans to commit murder that night. (*Id.* at 39). This evidence instead went unheard by the jury, giving Michael no opportunity to defend himself against the allegations of premeditation which the state argued at trial. Josh's testimony would have negated the State's theory that Michael killed his mother as a result of some minor argument that they'd had weeks earlier.

The failure to call Josh also meant that counsel failed to provide a viable defense against the charge for which Michael was ultimately convicted, second-degree murder. The State's case hinged not just on the motive which they conjured up for Michael, but also on their unchallenged notion of opportunity for him to have committed the murder. The defense did not, and in fact could not, argue that Michael was not in the trailer at the time that Rita was killed. The State used the lack of witnesses who were inside the home at the time of the murder and its resulting ambiguity to its advantage, as it added to the theory that Michael was the sole person with the opportunity to commit the murder. But as he testified in his deposition, Josh was asleep in Michael's room when he woke up because he was having trouble breathing. After he woke up, he testified that he witnessed Michael rising up from his bed as well. The timing of this string of events would have been critical information for the jury to hear and weigh against the weak evidence of opportunity presented by the state. Josh was the *only* witness, save for Michael

himself, with the ability to testify about the crucial seconds between waking up to smell the smoke and realizing that Rita had been murdered. His testimony would have informed the jury that at the time that Michael was allegedly attacking Rita, he was asleep in the same room as Josh.

The State acknowledged that Michael and Josh were present in the home at the time of the murder, meaning their theory worked only if the jury believed that Michael lied about sleeping through the night. Josh would have testified that at no point during the entire night did he ever see or hear Michael leave the bedroom, and Michael would have nearly had to step over Josh in order to exit the room. (Ex. 5 at 1). That testimony was thus vital to Michael's defense of innocence and negated elements of both first- and second-degree murder as submitted to the jury, meeting the standard required by *Hutchinson* and *Ferguson*.

b. Failure To Call Michael Politte

The second critical witness that defense counsel failed to call was Michael himself. Under the *Hutchinson* analysis, the first three prongs of the test are clearly met. Counsel knew of Michael's existence and he was present throughout the entire trial. As to the third element of the test, Michael was not only able to testify—he wanted to testify. As he told the presiding judge during his sentencing hearing, Michael had specifically requested that he testify on his own behalf prior to the trial. Rather than help prepare him for his testimony, defense counsel waited until the third day of the trial to inform Michael that he should not testify because he wasn't ready. (T. 842).

The most important element of the *Hutchinson* test is satisfied because the effects of counsel's decision not to call Josh on the viability of Michael's defense were compounded by the decision not to call Michael himself. Michael's testimony would have also negated the key

element of premeditation in the state's first-degree murder charge, as he was the *only* witness that could have testified to his own mindset and relationship with Rita in the hours leading up to the murder. The State's theory of premeditation hinged solely on the jury believing that Michael was so upset after his argument over the motorcycle part with his mother from weeks earlier that he continued to stew over it until finally deciding to kill her on December 5, 1998. Michael's testimony would have informed the jury about the interim period between the argument and the murder, and negated any notion of premeditation.

More importantly, Michael's testimony would have been wholly consistent with the statements from the only other eyewitness in close proximity to the crime as it occurred, Josh. Both boys gave a consistent recounting of events when interviewed at the scene: they woke up, realized the house was on fire, ran outside, and attempted to extinguish it with the hose while Josh ran to the neighbor's home get help. (Ex. 28 at 3). The statements made over the following days never wavered from their original assertions; rather, their statements became more specific as the questioning became more specific. The fact that the stories of Michael and Josh matched without the boys having time to meet and corroborate their versions of events would have been a strong indication to the jury that it was the truth. Yet the jury was not able to conduct their own comparison between the testimonies of the only witnesses in the home during the crime.

The effects of counsel's failure to conduct reasonable investigation were aggravated by his decision not to call the two witnesses most vital to Michael's innocence defense. They prevented the jury from hearing and considering all the evidence relevant to the ultimate factual issue of his guilt. The only remedy is the constitutionally-required reversal of his conviction, so that he may have the opportunity to present an adequate defense at a new trial.

E. Trial Counsel Failed To Investigate And Present Evidence Negating The State's Motive Evidence.

Trial counsel was also ineffective when he failed to investigate and present evidence that there was no motive for Michael to have attacked his mother. No family member or friend offered any evidence of a tumultuous relationship between Rita and her son. Instead, in an attempt to bolster the thin and false evidence that gasoline linked Michael to the crime, the State also introduced equally unreliable motive evidence through the testimony of Rita's ex-boyfriend, Derek Politte. A wealth of evidence existed that would have not only contradicted this evidence, but firmly established the opposite: that Michael got along with and loved his mother and that he was deeply distressed by her death. Moreover, had trial counsel interviewed Derek Politte, he would have learned that Derek Politte himself did not believe the activities he testified about to be threatening, undercutting any use by the State.

At trial, Derek Politte testified that he was at Rita's home when she and Michael got into an argument about money for a motorcycle part that Michael wanted. Rita told Michael to ask his father for the money, after which Michael petulantly flicked a lighter in the corner. (T. 180). Derek testified that this made him "uncomfortable." (*Id.*). The State asserted this was motive for Rita's death.

Yet, that was not the complete story. Had counsel interviewed Derek Politte, counsel would have learned that Derek thought Michael was a good kid and did not believe that Michael was threatening his mother. (Ex. 11, Affidavit of Derek Politte). On the contrary, Derek believed that Michael was "upset that his mother was dating other men and that he did not want [Derek] there." (*Id.*) That is what made Derek feel uncomfortable. (*Id.*). Because counsel failed to conduct this investigation, he was unable to elicit this vital testimony on the stand. That prejudice Michael.

In *Wiggins*, defense counsel failed to present mitigation evidence at a sentencing hearing, although he intended to do so as evidenced by explaining the mitigation evidence in opening arguments. 539 U.S. at 522. The Supreme Court found that defense counsel's failure to investigate mitigation evidence constituted ineffective assistance of counsel which prejudiced defendant, stating: "Strategic choices made after less than complete investigation are reasonable only to the extent that reasonable professional judgments support the limitation on investigation." *Id.* at 533. Like in *Wiggins*, Michael's defense counsel wholly failed to investigate the evidence or absence of motive, which was unreasonable, not a matter of trial strategy, and unduly prejudicial to defendant, thus, constituting ineffective assistance of counsel.

At a minimum, defense counsel was on notice to investigate the incident alleged by the State to have established motive—an argument between a 14-year-old boy and his mother which resulted in him flicking a lighter. Yet not only did the defense fail to investigate the November 18 incident or interview Derek Politte at all, counsel also failed to investigate or produce evidence of Michael's good relationship with his mother, *see* Claim III.C, *supra*, failed to produce testimony from Joshua Sansoucie about Michael's interactions with his mother prior to her death, *see* Claim III.D.ii.a, *supra*, and failed to produce any testimony that Michael had, in fact, exhibited significant signs of distress over losing his mother. Josh Sansoucie, Tammy Belfield and Chrystal and Melonie Politte all could have testified as to Michael's state upon finding his mother burning on the floor of her bedroom. Josh would have testified that Michael ran back into the trailer to try and save his mom, and that when he came out, he was "breathing heavy and his eyes were wide." (Ex. 5 at 2). Michael told Josh that someone had killed his mom and he was going to find out who. (*Id.*). Tammy Belfield would have testified that while at the jail, Michael told Officer Belfield, "I wish my mom was here. She would tell everyone that I

didn't do it." (Ex. 28 at 17). Melonie Politte saw Michael in the police car shortly after he escaped the trailer, still in the shorts and shirt he wore to bed. (Ex. 7 at 3). She remembered that he had been crying and she could see the tear streaks on his soot-covered face. (*Id.*; Ex. 6 at 7-8).

Further, counsel should have investigated how common it was for teens in Hopewell to experiment with fire. At trial, the State sought to depict Michael as a firestarter in order to advance its theory that Michael killed his mother. The truth was quite different: that Michael was instead a regular kid, participating in a common past-time in Hopewell. Had counsel investigated, he would have uncovered a breadth of evidence proving that fire was part of teen culture in the town.

Indeed, the Glores would have testified that their own son, Mikie Glore and Michael played with fireworks and set things on fire together.[37] (Ex. 17 at 1). Jerry Burch, Josh Hulsey's grandfather, would have testified that Josh Hulsey and other boys in Hopewell would ride their bikes by the railroad tracks and play with fireworks. (Ex. 13, Affidavit of Jerry Burch, at 2). They were "[j]ust doing the things boys their age do in the country." (*Id.*). Josh Poucher, who was just a few years older than Michael, would have testified that "All us Hopewell boys played with fireworks." (Ex. 18 at 2). They would "shoot bottle rockets at cars and other things" and have "bottle rocket wars." (*Id.*). Sometimes the grownups would participate, too. (*Id.*).

Similarly, counsel should have investigated and presented evidence that Michael was not violent. At trial, the pathologist testified that "[t]he scene and autopsy suggest blunt trauma to the right [rear skull] with fracture and a concussion" and that there would have likely been a "great deal of blood" at the time of this injury. (T. 407-08). There was blood on her left thigh, on the

[37] Mikie Glore later had a tragic accident with fire. His family was burning trash and there was an aerosol can in the trash that exploded and his face, neck, and everything not covered by his t-shirt was burned. (Ex. 17 at 1-2).

floor beside her right leg, on the light switch next to her bedroom door, and on the carpet underneath the light switch; there were also a couple of drops of blood on the bed sheet in her room, close to where her body was discovered. (T. 284). Yet, no one ever knew Michael to be a violent person. The Glores always knew Michael to be "a respectful young man" that "loved his parents." (Ex. 15 at 2; Ex. 17 at 1). They "never heard a cross word out of [him]" the whole time they knew him, and he was over quite often. (Ex. 17 at 1). Dr. Aaron further noted that throughout all the reports about Michael, "[h]e was not violent toward others," though he may be "crass" or "join[] with peers to cause disruption." (Ex. 4 at 15). Instead, there was "an absence of indicators suggesting the likelihood of significant interpersonal violence, emotional disengagement from or a callous disregard for others, or planned serious criminal activity." (*Id.* at 22). Had the jury heard this critical information, it would have discounted the State's attempts to paint Michael as a callous deviant with motive to kill.

This lack of investigation into motive, Michael's close relationship with Rita and reaction to her death, the commonality for teens to play with fire in Hopewell, and Michael's reputation as a non-violent person was not a matter of trial strategy. Similar to *Wiggins,* counsel's failure to conduct even minimal investigation into evidence of motive excluded him from making a fully informed and deliberate decision about whether to challenge the State's motive theory. And even if failure to investigate was a deliberate decision, it was unreasonable in light of prevailing professional norms. *See Strickland,* 466 U.S. at 688 (stating standards for ineffective assistance of counsel claims to be viewed in light of prevailing professional norms such as ABA's guidelines); STANDARDS FOR THE DEFENSE FUNCTION, *supra,* § 4-1.1(b) (stating that such standards may be relevant "in judicial evaluation of constitutional claims regarding right to counsel").

Defense counsel's failure to challenge the State's theory of motive was important to Michael's conviction because it left the jury with no evidence to challenge the idea that Michael had killed his mother over motorcycle parts. Michael's motive was a key piece of evidence for the jury considering the rest of the case against him was largely circumstantial. The jury needed a reason to believe that a 14-year old boy would suddenly decide to brutally murder his mother while having a friend spend the night. Had defense counsel conducted a reasonable investigation and attacked the State's theory of motive and the insinuation that Michael was obsessed with fire, there is a reasonable probability that the jury would have returned a different verdict based upon the totality of the evidence.

F. Michael's Sixth And Fourteenth Amendment Right To Effective Assistance Of Counsel Was Violated When Trial Counsel Failed To Investigate Or Present Evidence Of Alternative Suspects.

Deficient and prejudicial assistance of counsel occurs when counsel fails to investigate and present evidence of alternative suspects. *See Butler*, 951 S.W.2d at 609-10 (Mo. 1997); *Henderson v. Sargent*, 926 F.2d 706, 714 (8th Cir. 1991); *but see Wolfe v. State*, 446 S.W.3d 738, 747-49 (Mo. Ct. App. S.D. 2014) (holding that counsel was not ineffective when they made a *thorough* investigation into alternative suspects and chose to not present alternative suspects as a matter of reasonable trial strategy). Here, trial counsel was ineffective when he conducted no meaningful investigation and presented no evidence of alternative suspects, despite readily available leads.

From the beginning, even after honing in on Michael, police and prosecutors believed Ed Politte may have been involved. On the same day that he interrogated Michael, Detective Curt Davis spoke with Ed Politte and inquired into Ed's alibi. (Ex. 28 at 7). E-mails between members of the Attorney General's Office reveal that they also believed that Ed had something to do with

the murder. When the Missouri Attorney General's Office joined the Rita Politte investigation in the summer of 1999, Ed Politte was on their radar as an alternative suspect. In a June 1999 e-mail from Assistant Attorney General Michael Hendrickson to Investigator Jim Weber, Hendrickson explained, "We have [Michael] and two suspects we must investigate further. The suspects are [Josh Sansoucie] and the Defendant's father, Charles Edward Politte 'Ed.'" (Ex. 41 at 1). He continued:

> Ed is a suspect because he had gone through a nasty divorce from Rita. [Michael] was wanting to live with his father but Rita got custody. Ed appealed and lost an [sic] regarding money he was to pay for child support or attorney fees of Rita. The Tuesday before the murder he had been in court regarding his appeal and the judge ordered him to pay Rita $1000. He made a remark something like, 'You will never see the day when you'll get the money' or something kinda threatening like that. Also interesting was a visit Ed had with his son in jail and Bernie was obviously pissed and yelled out, "You MF'er, you framed me." The relationships were not good among the members of this family. Apparently, Ed had abuse [sic] Rita reportedly physically and sexually.

(*Id.*). Hendrickson and Weber continued to suspect Ed's involvement throughout their investigation. Even so, despite the strong motive and Ed's history of violence and threats toward Rita, the State only pursued charges against Michael and defense counsel never pursued these investigative leads as a defense either. As a result, the jury never heard the significant motive evidence that existed for Ed to kill Rita nor did it hear any evidence suggesting that Ed had committed the crime with someone else. This was deficient performance.

Ed had a history of domestic violence and abuse towards Rita, much of which was documented and available to defense counsel in the divorce proceeding file. (Ex. 47). Moreover, Michael himself had observed Rita and Ed physically fight, both before and during their divorce, and could have told counsel and the jury about this evidence. (Ex. 4 at 6) (Michael had seen "an incident in which his mother badly burned herself cooking, and his father seemed strikingly

unconcerned with her well-being and simply watched without helping while she crawled to the car.") Had he investigated, counsel would have uncovered a wealth of information about the violent and sexual abuse Rita suffered at the hands of Ed and Ed's extreme shame and embarrassment he felt from much of this information being revealed during their divorce proceedings, a proceeding that ended just before Rita's death.

Had he investigated, counsel would have uncovered that on numerous occasions Ed forced Rita to engage in sexual acts with other persons while he watched, only to belittle Rita about these actions afterwards. (Ex. 20 at 1; Ex. 6 at 3). Counsel could have learned this information just from speaking with Michael and his family; Ed did little to hide this from their children. (Ex. 4 at 5).

Indeed, Ed's brother, Michael "Mick" D. Politte, told police that Ed had encouraged Mick to have sex with Rita while Ed and Rita were still married, but Rita "wouldn't have anything to do with" him. (Ex. 26 at 21). Ann DeMaris, the wife of Ed's close friend and co-worker, Rick DeMaris, told law enforcement that Rita had once told her that Ed, Christal Barnett and her husband, and Rick DeMaris wanted to "'swap wives' and engage in sexual activity." (Ex. 34 at 2). Chrystal Politte, Michael's sister, recalls that his father forced Rita to have sex with two black males while he watched and then he later used the incident to belittle Rita. (Ex. 6). Rita's brother, Steven Smith, told Sheriff Skiles that Ed had told Steve that if Rita ever left or divorced him, she would be dead before she ever saw any of his money (Ex. 14, Affidavit of Steve Smith, at 1). The Judgment and Dissolution of Marriage issued on June 8, 1998, also describes how Ed had improper relations with other women outside the marriage, which the court pointed to as a factor in their breakup. (Ex. 52 at 2).

Their complicated marriage unraveled completely in 1998, when Ed and Rita divorced after Ed had an affair with his co-worker, Christal Sellers, for the last three years of his marriage with Rita. Word of Ed's mistress had spread throughout the community, (Ex. 16 at 1-2), and after discovering the affair, Rita and Ed separate in March 1997. (Ex. 48, Petition for Dissolution of Marriage, at 1). Michael's defense counsel had access to Michael's parents' divorce file, which included restraining orders and a clear history of violent conflict between Ed and Rita Politte. This history includes a Temporary Restraining Order ("TRO") granted to Rita Politte on June 16, 1997, during their separation. (Ex. 51, Dissolution Preliminary Injunction). Although no longer living together, the violence continued. After she moved out, Rita took Michael with her to retrieve some items from the family home, and Ed was there. He punched and choked Rita; Michael had to break up the fight and tell his dad to stop hurting his mom. (Ex. 4 at 7; Ex. 53 at 3).

Ed filed for divorce in April 1997, (Ex. 47 at 1; Ex. 48), and was then humiliated during divorce proceedings with photos of his adulterous activities including photos of him having sex with other men. (*See* Ex. 6 at 3). The divorce was finalized on July 1, 1998, and Ed was required to pay to Rita—terminable only upon remarriage or death—$635 per month in child support, $300 per month in monthly maintenance, and a $2,000 one-time maintenance. (Ex. 52 at 3-5). He was also ordered to divide his pension and 401k, give up the mobile home, land, and a motorcycle to Rita, even though Rita never held a steady job throughout the marriage. (*Id.* at 5-6). Ed appealed to avoid payment, and just days before she was attacked and murdered, promised Rita that she would "never see a penny, " a statement Rita understood it as a threat. (Ex. 20 at 1). That same evening, December 1, 1998, just four days before the murder, Ed called Rita at her job at Steven and Colleen's Bar and threatened to kill her. (Ex. 40 at 2). Had counsel investigated

and looked into available records, he would have seen a pattern of domestic violence and infidelity that not only led to the Polittes' divorce but served as significant motive for Ed Politte to have Rita killed.

Indeed, Michael himself suspected this and told others about this concern. During a visit between Michael and Ed at the Washington County Jail on June 6, 1999, officers and other inmates witnessed an argument between the two. (Ex. 28 at 19-22). Ed insisted on talking with Michael, but Michael was reluctant. He yelled at Ed, "Buzz off, […]. You set me up," and Ed left shortly after. (*Id.* at 19). Just a few days later, Michael told Officer Tammy Belfield how he really felt about his dad, relaying that he believed his dad was involved in his mother's murder. (*Id*. at 23). Michael told Belfield, "I know my dad had someone kill my mom." (*Id.*). Michael's sister Chrystal also suspected Ed's involvement in their mother's murder. (Ex. 6 at 1).

Despite this readily apparent belief and motive evidence, counsel did nothing to investigate Ed Politte's motive and critically, the possibility that Ed worked with someone else to have Rita killed. Had he done so, he would have uncovered significant evidence that suggests that Ed may have elicited the help of his cousin of close friend, Johnnie Politte, in order to pull off the murder. After Rita Politte was murdered, Ed and Johnnie Politte quickly formed an even closer friendship. Additional evidence also connects Johnnie to the area of the crime at the time of Rita's murder.

First, at 6:30 am on the morning of the murder, near the time the fire was set, a witness named Larry Lee saw Johnnie Politte walking up the railroad tracks to Hopewell Road, coming from the direction of Rita's trailer. (Ex. 8 at 1). Larry, who left for work every morning around 6:30, easily recognized Johnnie Politte because he had known Johnnie for 20 years. Johnnie was wearing blue jeans and a light-colored shirt and appeared to be wet from the mid-torso down,

which Larry found odd. (*Id.* at 2) Larry also thought it was strange that Johnnie was so far from where he lived. Johnnie would come to the area for Politte family gatherings sometimes, but it was unusual for him to be on Hopewell Road so early in the morning for no apparent reason. When Larry pulled over to talk to Johnnie and say hello, as the flashing lights of first responders were coming from Rita's trailer, Johnnie mentioned that something had happened to Rita. Larry also thought this was strange, because of how far away Johnnie was from where he lived.

A second witness placed Johnnie Politte near Rita's home on the morning of the murder. Kevin Politte, Johnnie's uncle, saw Johnnie's two-tone Ford pickup truck parked in the lot by the church near The Hopewell Church of God. (Ex. 10, Affidavit of Kevin Politte, at 1). Kevin knew the truck because Johnnie had bought it from his brother. Like Larry, Kevin found it peculiar that Johnny's truck was parked there because Johnnie lived on Highway U, three or four miles from Rita's trailer. (*Id.* at 2). Kevin saw the truck on his way to work near daybreak, close to the time that Michael discovered Rita's body. (*Id.* at 1).

Carolyn Lee, Larry's wife, got a visit from Johnnie shortly after Rita's death. (Ex. 9 at 1). Johnnie told Carolyn that he and Ed were mounting their own investigation into Rita's death and that he'd heard she'd seen something and had been talking in town. (*Id.*) He demanded that Carolyn tell him what she saw and became very angry and threatening after Carolyn told him that she had not seen anything.

Johnnie Politte also illegally entered the crime scene and, although Tammy Belfield had previously searched the residence, Johnnie allegedly and suddenly found a tire iron in Mike's closet, this evidence clearly pointed to Johnnie as an alternative suspect. (Ex. 28 at 11; *see* Section X.C, *supra*).

Had the jury been informed of evidence implicating Ed and Johnnie Politte and the behavior of each following Rita's murder, there "is a reasonable probability that . . . [they] would have had a reasonable doubt." *Strickland*, 466 U.S. at 695. In closing argument, the State ridiculed the defense theory as relying on a "phantom intruder," (T. 773), and calling this phantom intruder the "luckiest man in the world." (*Id.*). Had defense counsel introduced evidence of alternative suspects Ed and Johnnie Politte, and presented actual evidence of their suspicious behavior, their theory of the crime would have been much more than a "phantom intruder." As it stood at the end of the trial, the jury had no other plausible theory to believe regarding someone else killing Rita. They'd heard about no one else who had the means or motive or opportunity to do so. But Ed had plenty of motive to kill his ex-wife; their relationship had always been contentious, and he'd just threatened her over their divorce decree a few days earlier. And Johnnie had means and opportunity; he was near the crime scene on the morning of the murder, and he easily could have entered the Politte home that morning to hurt Rita through their unlocked door. Defense counsel's failure to present evidence of an alternative suspect to the jury clearly prejudiced Michael.

No court has ever been presented with the failures of Michael's trial counsel and the many ways counsel's performance prejudiced Michael's trial. It is nonetheless clear that Michael's defense was insufficient and violated his constitutional right to counsel. This petition represents the first time that Michael's rights can be vindicated by any court on these new claims and they are thus properly presented. Moreover, Michael's actual innocence overcomes any potential procedural bar. *See* Claim V, *infra*. Had Michael's counsel investigated and presented evidence both corroborating Michael's account and making clear the very real alternative

suspects, Michael would not have been convicted. For all these reasons, this Court should reverse Michael's conviction and grant a new trial.

CLAIM IV:
MICHAEL'S RIGHT TO DUE PROCESS WAS VIOLATED WHEN THE COURT IMPROPERLY INTERFERED WITH THE JURY'S DECISION-MAKING

Michael's right to due process of law under the Sixth and Fourteenth Amendments was violated when the trial judge interfered with the jury's deliberations. *See also* MO. CONST. art. I, § 10. The Supreme Court has held repeatedly that a jury's verdict "must be based upon the evidence developed at the trial." *Irvin v. Dowd*, 366 U.S. 717, 722 (1961). The Court has made clear that "trial by jury in a criminal case necessarily implies at the very least that the 'evidence developed' against a defendant shall come from the witness stand in a public courtroom where there is full judicial protection of the defendant's right of confrontation, of cross-examination, and of counsel." *Turner v. Louisiana*, 379 U.S. 466, 472-73 (1965). Addressing specifically the constitutional effect of juror misconduct the Court well over a century ago made clear, in the broadest terms,

> [i]t is vital . . . that the jury should pass upon the case free from external causes tending to disturb the exercise of deliberate and unbiased judgment. Nor can any ground of suspicion that the administration of justice has been interfered with be tolerated.

Mattox v. United States, 146 U.S. 140, 149-50 (1892) (citing Wharton Crim. Pl. and Pr. §§ 821, 823-24). And for those reasons, "[p]rivate communications . . . between jurors and third persons" render the verdict unconstitutional "unless their harmlessness is made to appear." *Id.* at 150.

Missouri courts have long emphasized the necessity of a jury's independence, particularly after retiring to deliberate. *See State v. Meagher*, 49 Mo. App. 571 (1892); *Chinn v. Davis*, 21 Mo. App. 363 (1886). In order to preserve the defendant's right to "be present in court at every

stage of trial," any additional or supplemental jury instructions must be delivered in open court. *Meagher*, 49 Mo. App. at 590 (reversing defendant's conviction when judge gave jury an additional instruction after deliberations had begun without the presence or knowledge of either party). "'No matter how honest the purpose of the judge,'" such private communications between the court and the jury are improper. *State v. Cooper*, 648 S.W.2d 137, 141 (Mo. Ct. App. W.D. 1983) (quoting *Sullivan v. Union Elec. Light & Power Co.*, 56 S.W.2d 97, 103 (Mo. 1932)).

As the Western District held in *Cooper*, "the mere opportunity for improper influence" after deliberations have begun is grounds for reversal. 648 S.W.2d at 140. There, one juror approached the judge of their own accord and expressed that they did not want to deliberate further because their mind would not be changed. The judge issued an instruction to only that juror, urging them rejoin the jury and attempt to reach a verdict. *Id.* at 139. On appeal, Cooper's conviction was overturned not because the instruction was substantively improper, but because private communication between the judge and the juror required the state "'affirmatively show[]'" that there was no "'improper influence'" exercised. *Id.* (quoting *State v. Edmonson*, 461 S.W.2d 713, 723 (Mo. 1971)). The state failed to present any evidence on the matter and the presumption of prejudice held fast to uphold Cooper's constitutional right to a just trial.

At Michael's trial, the judge initiated a private conversation with a juror who was hesitant to vote Michael guilty. After presiding Judge Pratte read the jury their instructions, he sent them to deliberate. (T. 816). According to the jury foreman, Victor Thomas, it took several votes, approximately four or five, for the jury to finally come to a unanimous decision. (Ex. 22, Affidavit of Victor Thomas, at 1). Prior to their ultimate determination of guilt, there were

several hold-out jurors. One was a woman who empathized with Michael because she had a son around his age—but she was eventually "pressured" into a guilty vote by other jurors. (*Id.*).

One of the other dissenters in the group was a man named Jonathan Ray Peterson. Even at the time of trial, Mr. Peterson believed that Michael could not have killed his mother by himself and he did not want to convict. (Ex. 21, Affidavit of Jonathan Peterson, at 1). In a recent sworn affidavit, Mr. Peterson explained that for this reason, he was also one of these hold-out jurors, and he frustrated his fellow jury members by voting against a guilty verdict several times. (*Id.*). After several rounds of discussion and voting, Judge Pratte called Mr. Peterson out of the jury room to speak privately in his chambers. (*Id.*). There, in a one-on-one conversation, Judge Pratte told Mr. Peterson that he needed to come to a decision about Michael's guilt and make up his mind. (*Id.*)

This situation is nearly identical of that of the interaction at issue in *Cooper*, if not more extreme. Just as in that case, the judge issued an instruction to an individual dissenting juror an instruction to return to deliberations to make further attempts to reach a unanimous verdict. (*Id.*). In Michael's case, however, it was the judge who specifically initiated the communication with the juror. (*Id.*). Even more concerning is the fact that counsel for neither the state nor Michael were ever informed on the record of the conversation. Even if the instruction given was well-intentioned and far from a blatant misstatement of the law, reversal is the default solution "no matter how honest the purpose[.]" *Sullivan*, 56 S.W.2d at 103.

When a showing of private communications between a juror and third party are shown, prejudice is presumed and the State then carries the burden of "affirmative[ly] show[ing]" that no harm was done. *Edmonson*, 461 S.W.2d at 723. Given the strong similarity between the two instructions at issue in this case and in *Cooper*, that burden cannot be met factually. On the

contrary, "[i]t was the conversation with Judge Pratte that convinced [Peterson] to vote with the rest of the jury. [He] felt pressured by the judge to make a decision." (Ex. 21 at 1). This directive from Judge Pratte led Mr. Peterson to vote for Michael's guilt, and condemned Michael Politte to life imprisonment for a crime he did not commit, a clear violation of Michael's due process rights.

While a juror's testimony typically may not be used to impeach a jury's verdict, an exception extends to cases where misconduct occurs outside the jury room. *Storey v. State*, 175 S.W.3d 116, 130 (Mo. banc 2005). It's this very exception which encompasses the foregoing rule imposing a burden on the state when the moving party makes a showing of private communications with jurors during deliberations. *Id.* It matters not that this claim is first asserted by the movant in a post-conviction proceeding rather than on direct appeal. *Koster*, 340 S.W.3d at 256.

Assuming that a typical determination of prejudice must apply here, Judge Pratte's behavior directly affected the result of Michael's trial and prejudiced him. But for this conversation with Judge Pratte, Mr. Peterson would have continued to dissent from the other jury members and Michael's trial may have resulted in a hung jury. "[D]ue process means a jury capable and willing to decide the case solely on the evidence before it, and a trial judge ever watchful to prevent prejudicial occurrences and to determine the effect of such occurrences when they happen." *Smith v. Phillips*, 455 U.S. 209, 217 (1982). The trial judge in Michael's case was not watchful to prevent prejudice, he himself caused the prejudice—and because of this, Michael is entitled to relief.

When Judge Pratte pulled Mr. Peterson out of the jury room and spoke to him privately in chambers, he was not only violating Michael's right to due process but also the judicial code he

had sworn to uphold. In addition to well-established case law regarding the integrity of the jury's verdict from outside interference, the Missouri Code of Judicial Conduct also guarantees certain protections to defendants by requiring appropriate judicial behavior. Judicial communication with jurors must "be patient, dignified, and courteous," Mo. Sup. Ct. R. 2-2.8(B), while also providing that the judge "shall not commend or criticize jurors for their verdict." *Id.* at 2-2.8(C). Additionally, the rules dictate that the judge "shall not *initiate*, permit, or consider ex parte communications, or consider other communications made to the judge outside the presence of the parties or their lawyers." *Id.* at 2-2.9(A) (emphasis added). Missouri rules dictate that a fair and impartial judge must refrain from discussing any information which bears upon the substance of the matter at hand with any juror in that case, before, during, or after deliberation.

Yet Judge Pratte's instruction to Mr. Peterson that Mr. Peterson "needed to make a decision about Michael Politte's guilt" can only be seen to insinuate that Mr. Peterson needed to change his "nay" vote and stop dissenting from the rest of the jurors. (Ex. 21 at 1). The rules were further violated by the judge's own initiation of the communication with the juror. Mr. Peterson had already made a decision that Michael Politte was innocent and had been voting accordingly in the deliberations up to that point. For the court to interfere in that process, and to pressure a juror to find guilt against a defendant, is a complete desertion not only of the judicial code he was supposed to follow but also the due process rights of all defendants in criminal prosecutions

Juries are "'essential in the administration of justice and the protection of individual freedom, and any undue interference therewith, no matter by whom, will be rebuked[.]'" *In re Williams*, 128 S.W.2d 1098, 1106-07 (Mo. Ct. App. 1939) (quoting 2 Thornton on Attorneys at Law 1243 (1914)). Respecting this sanctity requires a reversal "[i]f a single juror is improperly

influenced," because "the verdict is as unfair as if all were." *United States v. Delaney*, 732 F.2d 639, 643 (8th Cir. 1984) (quoting *Stone v. United States*, 113 F.2d 70, 77 (6th Cir. 1940)). The jury's independence and traditional notions of acceptable judicial contact were directly violated here through Judge Pratte's ex parte communications with Juror Peterson.[38] Thus, Michael's constitutional right to due process may only be preserved through a reversal on this claim.

CLAIM V:
MICHAEL POLITTE IS INNOCENT.

Missouri law recognizes that the incarceration of an innocent person is a manifest injustice; innocence alone justifies habeas corpus relief. *State ex rel. Amrine v. Roper*, 102 S.W.3d 541, 548 (Mo. banc 2003). Because Michael Politte supplements his claims with persuasive evidence that he is actually innocent of the murder of his mother, this Court may freely reach the merits on all of his constitutional claims:

> [I]f a petitioner . . . presents evidence of innocence so strong that a court cannot have confidence in the outcome of the trial unless the court is also satisfied that the trial was free of nonharmless constitutional error, the petitioner should be allowed to pass through the gateway and argue the merits of his underlying claims.

Schlup v. Delo, 513 U.S. 298, 316 (1995). Missouri courts apply the *Schlup* standard to claims for habeas corpus relief under Rule 91, *Clay v. Dormire*, 37 S.W.3d 214, 217 (Mo. banc 2000), and also recognize that clear and convincing evidence of innocence justifies habeas corpus relief even if the petitioner had a fair trial. *Amrine*, 102 S.W.3d at 548. Determining if Michael is innocent may require the court to revisit previous credibility determinations and may include evidence that someone else committed the crime, as in *Amrine*, 102 S.W.3d at 545, and *Schlup*,

[38] Like Claims 1-3 above, this Claim has also never been presented to or heard by any Court as Michael did not have a post-conviction appeal. Because of this and because of Michael's innocence, this Court may reach this claim.

513 U.S. at 330 (noting that new evidence "may indeed call into question" previous credibility determinations). *See also House*, 547 U.S. at 540. The evidence of Michael's innocence is clear and convincing. No reliable evidence connects him to the crime. Michael Politte can show, to a reasonable probability, that no fully informed juror would find him guilty and constitutional violations rendered his trial fundamentally unfair.

Moreover, Michael's innocence plays two roles. If this Court holds there is a reasonable likelihood that no reasonable jury would find Michael guilty in light of the new evidence, then it should review the merits of Michael's claims for relief even if this court finds they have been procedurally defaulted in earlier proceedings. *House*, 547 U.S. at 536-37; *Schlup*, 513 U.S. at 316 (granting habeas relief to an innocent prisoner who was denied a fair trial). Second, if this Court finds that the evidence of Michael's innocence is clear and convincing, then it should grant the writ of habeas corpus even if Michael had a fair trial. *Amrine*, 102 S.W.3d at 548.

"'[N]ew evidence' in the context of an actual innocence claim [is described as] 'new reliable evidence'—whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence—that was not presented at trial." *McKim v. Cassady*, 457 S.W.3d 831, 846 (Mo. Ct. App. W.D. 2015). New evidence may be raised at any time: "[I]n *McQuiggin*, the United States Supreme Court held that 'new evidence' in connection with an actual innocence habeas claim is any evidence that was 'unavailable' at the time of trial without regard to whether the evidence could have been discovered with reasonable diligence at the time of trial." *Id.* (quoting *McQuiggin v. Perkins*, 569 U.S. 383 (2013)). When newly discovered evidence is analyzed along with evidence not presented to the jury at trial, Michael's innocence becomes clear: 1) No fire evidence connects Michael to the crime and any testimony purporting that it did was false and misleading; 2) Michael's statements were not a confession, but rather the

statements made by an emotionally vulnerable boy made during times of extreme duress; 3) law enforcement did nothing to investigate the very real alternatives suspects of Ed and Johnnie Politte. In short, there is nothing left with which to convict Michael Politte. As a result, this Court should correct this manifest injustice and grant Michael a new trial.

CONCLUSION

Michael Politte is innocent. WHEREFORE, for all of the foregoing reasons, Petitioner respectfully prays that this Court:

A. Grant the Writ of Habeas Corpus discharging Michael Politte from custody based upon Michael's illegal confinement and the record before the court; or

B. In the alternative, enter its order Requiring Respondent to Answer Michael Politte's Petition for Writ of Habeas Corpus;

C. Allow counsel for Petitioner a reasonable time within which to respond to Respondent's Answer;

D. Expand the record to include the exhibits set forth in the appendix submitted herewith;

E. Conduct an evidentiary hearing on the allegations of Michael's Petition, including his colorable claim of actual innocence;

F. Granting such further relief as the Court deems consistent with the ends of justice.

Respectfully submitted,

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CERTIFICATE REGARDING SERVICE

I hereby certify that it is my belief and understanding that counsel for Respondent, Eileen Ramey and Office of the Attorney General are participants in the Court's e-filing program and that separate service of the foregoing document is not required beyond the Notification of Electronic Filing to be forwarded on March 06, 2020 upon the filing of the foregoing document.

/s/ *Tricia J. Bushnell*

TRICIA J. BUSHNELL