IN THE CIRCUIT COURT OF ST. LOUIS COUNTY
STATE OF MISSOURI

PROSECUTING ATTORNEY,	)	
21ST JUDICIAL CIRCUIT	)	
OF MISSOURI,	)	**CAUSE NO. _____**
Ex rel. MARCELLUS WILLIAMS`	)	
Relator/Movant	)	

FIRST MOTION TO VACATE OR SET ASIDE JUDGMENT AND SUGGESTIONS IN SUPPORT

COMES NOW the Prosecuting Attorney of the County of St. Louis, by and through Special Counsel for Wrongful Convictions Matthew A. Jacober and, pursuant to Section 547.031, RSMo, moves to vacate or set aside the judgment by which the defendant, Marcellus Williams, was convicted of first-degree murder in the death of Felicia Gayle. Mr. Williams received a sentence of death.

Section 547.031(1) provides that the Prosecuting Attorney may move to vacate or set aside a conviction "at any time if he or she has information that the convicted person may be innocent or may have been erroneously convicted." Here, DNA evidence supporting a conclusion that Mr. Williams was not the individual who stabbed Ms. Gayle has never been considered by a court. This never-before-considered evidence, when paired with the relative paucity of other, credible evidence supporting guilt, as well as additional considerations of ineffective assistance of counsel and racial discrimination in jury selection, casts inexorable doubt on Mr. Williams's conviction and sentence.

On August 11, 1998, Felicia "Lisha" Gayle was found brutally murdered in her home. She had been a victim to a violent and bloody crime—her body was riddled with over 43 stab wounds. There was blood everywhere: blood on the stairs, on the wall, near Ms. Gayle's body, and in the upstairs bedroom.

The crime scene was rife with physical evidence. The weapon—a kitchen knife—was left lodged in Ms. Gayle's neck. Bloody shoeprints were present near a knife sheath in the kitchen, in the hallway leading to the front foyer, and on the rug near Ms. Gayle's body. Bloody fingerprints were found along the wall. And hairs believed to belong to the perpetrator were collected from Ms. Gayle's t-shirt, her hands, and the floor.

None of this physical evidence tied Mr. Williams to Ms. Gayle's murder. Mr. Williams was excluded as the source of the footprints, Mr. Williams was excluded by microscopy as the source of the hairs found near Ms. Gayle's body (which did not match Ms. Gayle or her husband, the home's only residents, and thus were presumably the perpetrator's), and Mr. Williams was not found to be the source of the fingerprints. Now, three DNA experts have reviewed the DNA testing performed on the knife and each has independently concluded that Mr. Williams is excluded as the source of the male DNA on the handle of the murder weapon. Ms. Gayle's murderer left behind considerable physical evidence. None of that physical evidence can be tied to Mr. Williams. Prosecutors are "bound by the ethics of [their] office to inform the appropriate authority of after-acquired or other information that casts doubt upon the correctness of the conviction." *Imbler v. Pachtman*, 424 U.S. 409, 427 n.25 (1976). In this respect, public confidence in the justice system is restored, not undermined, when a prosecutor is accountable for a wrongful or constitutionally infirm conviction.

As set forth in detail below, the indirect evidence used to convict Mr. Williams has become increasingly unreliable. This, when considered alongside the new DNA expert testimony, undermines confidence in Mr. Williams's conviction and accompanying death sentence. It is significant that, to date, no court has considered the new DNA evidence. Nor has any court

considered all of the evidence as it has developed in its totality and weighed it against the evidence presented against Mr. Williams at trial.

Based on a review of the evidence and additional investigation, the Prosecuting Attorney has concluded that: (1) new evidence suggests that Mr. Williams is actually innocent; (2) Mr. Williams's trial counsel was ineffective for failing to investigate and present evidence to impeach Henry Cole and Laura Asaro; 3) Mr. Williams's trial counsel was ineffective for failing to present mitigation evidence during the sentencing phase; and (4) The prosecution improperly removed qualified jurors for racial reasons during jury selection in violation of *Batson v. Kentucky*. In addition, the Prosecuting Attorney is undertaking additional review relating to the investigation of Mr. Williams that, if true, would demonstrate the investigation was intentionally or recklessly deficient, in violation of Mr. Williams's right to due process.

Additionally, the Prosecuting Attorney is undertaking additional investigation relating to an alternative perpetrator in this matter that may confirm or deny the involvement of a person other than Mr. Williams in this crime. That additional investigation will involve forensic testing and other investigation that will take some time.

Due to the evidence as it exists today as well as the ongoing investigation, the Prosecuting Attorney believes is incumbent upon this Office to begin the process of asking this Court to correct this manifest injustice by seeking a hearing on the newfound evidence and the integrity of Mr. Williams's conviction. This request is made all the more urgent because the Attorney General's office has requested an execution date for Mr. Williams.[1]

[1] On January 2, 2024, undersigned counsel communicated by letter to the Supreme Court of Missouri, asking the Court to refrain from setting an execution date in this matter for at least a period of six months to allow this additional investigation, and has not received a response.

STATEMENT OF FACTS

Dr. Daniel Picus knew something was wrong when he arrived home at 6946 Kingsbury Drive on the night of August 11, 1998. (T. 1711, 1753). As he walked to the house from the garage and up the stairs to the backdoor, he noticed the screen door was closed, but the back door was open—something he and his wife, Felicia Gayle, would never do, as they always kept their doors closed and locked, even when they were inside. (T. 1711).

Upon opening the door, his sense that something was wrong grew. The kitchen was a "mess": The freezer door was open, and everything inside had been rummaged through (T. 1711); one of the kitchen drawers was open; and a cardboard knife cover was strewn across the floor. (T. 1712). Concerned, Dr. Picus called out for his wife. He did not get a response. (T. 1712). As he walked out of the kitchen into the front hall, it became clear why.

There, on the floor of the hallway, was Ms. Gayle's body. She was unclothed but for a purple shirt, and from where he stood, he could see a kitchen knife lodged in her neck. (T. 1712). Dr. Picus ran immediately to call 911. (T. 1717). He did not disturb her or touch her body. (T. 1717). He learned later that his wife had been stabbed 43 times and ultimately died from 16 stab wounds to her head, neck, chest, and abdomen. (T. 2163).

Initial Investigation

Police arrived and processed the house for evidence. They found bloody shoeprints near the knife sheath in the kitchen, in the hallway leading to the front foyer, and on the rug near Ms. Gayle's body. (Ex. 1-University City Police Department Law Enforcement Offense Incident Report date 8/11/98 at 4). They collected bloody fingerprints from the wall (T. 2310) and detected blood on the stairs and wall near Ms. Gayle's body and in the upstairs bedroom. (Ex. 1, at 4). They found and collected hairs from Ms. Gayle's t-shirt, her hands, and on the floor near her body. (T. 2877). Two pubic hairs were discovered on the carpet where Ms. Gayle's body was found.

(T. 2878). They found blue fibers in Ms. Gayle's hands (T. 2871) and collected fingernail scrapings and a rape kit for DNA testing. (T. 2871).

Police asked Dr. Picus if anything was missing. He confirmed that the dining room, living room, and den on the first floor were not disturbed (T. 1722): the TV, VCR, and stereo were still in the den. (T. 1745).

But other things were unusual. The keys normally left in the deadbolts of the front and backdoor, inside the house, were missing. (T. 1719). The closet door in the office on the second floor was open, as was the drawer in Ms. Gayle's office desk. (T. 1722, 1724). A dresser drawer in the primary bedroom was open, (T. 1726), and the door of a small closet in the bedroom was also left open. (T. 1728). But Dr. Picus could not say whether anything from the bedroom was missing. (T. 1728). None of Ms. Gayle's jewelry was taken—her wedding ring remained in a dish in the walk-in closet, and $400 remained in a dresser inside the same walk-in closet. (T. 1729, 1731).

What he could tell was missing was Ms. Gayle's purse, which she kept in the kitchen closet (T. 1719); and Dr. Picus's Apple laptop, which was in a carrying bag on his desk in the office on the second floor. (T. 1725). The purse contained Ms. Gayle's Missouri identification card, a "whole lot" of coupons, a brown wallet, a small calculator, and a black coin purse. (T. 1777-80). Dr. Picus also believed that one of four canvas bags used for grocery shopping was missing. (T. 1719).

The Investigation Stalls

Despite the abundance of physical evidence, police were not immediately able to develop a suspect. Police investigated Ms. Gayle's activities on the day of her murder, but her routine did not appear to have been unusual. On most mornings, Ms. Gayle went for a run after her husband left for work. (T. 1706). When she returned, she would stretch, shower, put on her purple shirt, and comb her hair. (T. 1731). Kingsbury Drive was a private gated street in University City, and police

spoke with her neighbors, including her next-door neighbor, who saw Ms. Gayle in her running clothes at 9:30 a.m. that morning when Ms. Gayle stopped at the neighbor's house to share some bananas. (T. 2043). The neighbor had been at home all day doing yard work and did not notice anything out of the ordinary. (T. 2047). The mailman also saw Ms. Gayle at around 1:00 p.m. in front of her door. (Ex. 2-Supplementary Investigative and/or Disposition Report dated 8/14/98).

Two neighbors told police they saw a dark colored minivan driven by a white male on the street that morning and thought it was unusual. (Ex. 3-Supplementary Investigative and/or Disposition Report dated 8/11/98; Ex. 4-Supplementary Investigative and/or Disposition Report dated 8/12/98). But they did not see anything else. And although police believed the perpetrator entered through the front door because the pane of glass on the front door had been broken, none of the neighbors saw anyone at Ms. Gayle's door.

Police did not have any leads. Although they learned that there had been three other burglaries in the neighborhood,[2] they did not develop any evidence connecting them to Ms. Gayle's murder. Dr. Picus and Ms. Gayle's family were growing increasingly frustrated with the lack of progress in the investigation. (T. 1783). After speaking with police, who suggested they offer a monetary reward to help generate information, the family began advertising a $10,000 reward for any leads regarding who had killed Ms. Gayle. (T. 1783, 1814).

Press Coverage of the Murder

Ms. Gayle's murder received significant media attention over the next year. Ms. Gayle had been a journalist for the *St. Louis Post-Dispatch*, and her murder stunned the community. In addition to the family's continued request that individuals come forward with information in

[2] *See* Michael D. Sorkin, *Police Still Chase Clues in Three Unsolved Area Slayings*, ST. LOUIS POST-DISPATCH, Aug. 11, 1999.

exchange for reward money, there was significant television and newspaper coverage of the case. The news coverage emphasized the $10,000 reward (T. 2928) and included the following details about the murder:

- Ms. Gayle lived in a private subdivision in Ames Place, a gated community that kept out vehicle traffic. (T. 2821-22). Ms. Gayle was a former *Post-Dispatch* reporter. (T. 2822).

- Ms. Gayle had been showering when the perpetrator entered the house. (T. 2824). She had left her second floor bathroom and was walking downstairs when she encountered the perpetrator on the stairway landing. (T. 2825). She was wearing a long t-shirt. (T. 2825).

- The perpetrator entered the house through the front door which was partially hidden by a tree. (T. 2825). The perpetrator broke a small windowpane, reached inside, and unlocked the front door. (T. 2825. Dr. Picus cut down the trees in front of the door weeks after Ms. Gayle's murder. (T. 2825).

- Ms. Gayle had been stabbed in the upper body and head. The perpetrator used a knife from Ms. Gayle's home to murder her and left the murder weapon behind. (T. 2824).

- The perpetrator took an Apple Powerbook laptop computer, house and car keys on a yellow tab, and a canvas bag. (T. 2823).

Henry Cole Comes Forward

On June 4, 1999, ten months after Ms. Gayle's murder, police got their first real lead. Henry Cole had gone to court that morning for a probation violation. *State v. Henry Lee Cole* (City of St. Louis Cause Number 22941-04190-01). His probation was continued, and he was released from the City Workhouse, where he had been confined since February of 1999. (*Id.*) He called the University City Police Department and told them he had information on Ms. Gayle's murder. (Tr. 2421). Cole's call wasn't his first time interacting with the system—he had an extensive criminal history that included felony convictions and prison sentences all over the country, dating back to the mid-1960s. Cole had been convicted of offenses ranging from stealing, to robberies, to

weapons possession. (T. 2380-81). His most recent conviction involved a robbery of a bank, where he was sentenced to five years of probation, with ten years of prison suspended. (T. 2281-82). Cole ultimately violated his probation six times, including a violation for an arrest on a new charge. Cole knew a violation meant he could face potential prison time: in February 1999, Cole, now HIV-positive, wrote to prosecutors begging them for leniency, stating, "[i]f I go to prison I will surly [sic] die." (Ex. 5-February 17, 1999 letter). Cole ultimately was discharged early from probation after numerous violations on January 25, 2000. *Cole*, City of St. Louis Cause Number 22941-04190-01.

Cole had long struggled with drug addiction—he regularly used crack cocaine, marijuana, and heroin—and with mental illness; he had received psychiatric treatment and had been prescribed "psych medicine," which caused hallucinations and memory loss. (Ex. 6-Henry Cole 4/2/2001 Deposition at 138, 139, 171).

Cole had seen the news reports about $10,000 in reward money for anyone with information about Ms. Gayle's murder. (T. 2389). On the day he was released from the Workhouse, Henry Cole called the University City Police from a pay phone and told them he had information about Ms. Gayle's murder. (Tr. 2421).

Cole Talks to Police

Upon receiving Cole's call, police detectives picked him up from Downtown St. Louis and brought him to the police station. (T. 2423). They spoke with Cole about the murder during the car ride, but that conversation was not recorded. (T. 2423). After placing Cole in a holding cell for 20 to 30 minutes, Detectives interviewed him. (T. 2473). Only a portion of that interview was video recorded.

From the beginning, Cole admitted that he came forward to collect the reward money. (T. 2455). He told police he had been following the case in the news and knew that police had not arrested anyone for the murder. (T. 2459). He had read about the murder both in the paper and seen it on the news numerous times, and remarked at one point that authorities weren't going to stop until they busted somebody for the case, because it had been in the news all of the time. (T. 2390). Before providing any information to detectives, Cole asked them, "Ain't no way I can get any kind of money at all upfront?" (State's Ex. 126-Cole Interview). The detectives told him that an arrest would not get him the reward, but a conviction would. (*Id.*).

Cole claimed he had been locked up with a man named Marcellus Williams in the Workhouse for about two months,[3] and that as they were locked up together, the two men realized they were distantly related. (T. 2386). One day, according to Cole, Mr. Williams read an article about the murder in the *St. Louis Post-Dispatch* and upon reading it, confessed his involvement in Ms. Gayle's murder to Cole. (State's Ex. 126).

According to Cole, Mr. Williams said it all started because he needed money, so he took a bus to University City to look for a good house to rob. (T. 2392). Mr. Williams said he carried a backpack so he would look like a college student and fit into the predominantly white neighborhood. (T. 2392). He picked a house with a big tree because it would shield him from neighbors seeing the front door. (T. 2392). Cole told police Mr. Williams said he took a chip hammer and broke the pane out of the glass window in the door, stuck his hand through the door, and opened it. (T. 2394).

[3] Mr. Williams had been at the facility since August 31, 1998 for an armed robbery of a doughnut shop.

Once inside, according to Cole, Mr. Williams heard water running, went upstairs, and took an Apple computer, a pocketbook, and a wallet. (T. 2395). He then went downstairs to take more things, but the water stopped, and a woman yelled who was down there. (T. 2395). According to Cole, Mr. Williams said he went into the kitchen and took out a knife from the drawer, (T. 2396), and when the woman came downstairs, he stabbed her through the arm and took out a piece of her flesh. (T. 2398). The woman fought back. (T. 2398). According to Cole, Mr. Williams said he hit her on the neck, but she was not dead, so he stabbed her in the neck as hard as he could and twisted the knife. (T. 2399).

Cole also relayed that after Mr. Williams stabbed Ms. Gayle, he went upstairs, took off his bloody shirt and cleaned the blood off his boot and backpack. (T. 2400). Mr. Williams took one of Ms. Gayle's shirts from a dresser, put it on, (State's Ex. 126), and left through the front door. (T. 2401). Mr. Williams then walked down the street past some workers and took a bus back to where his girlfriend Laura Asaro was staying. (T. 2401).

Cole claimed no one else heard Mr. Williams talk because they were always watching TV (T. 2402), that Mr. Williams told him that the only other person he told was Laura Asaro (T. 2414), and that Cole wrote down everything that Mr. Williams told him because he didn't want to forget it. (T. 2404). Cole also told police that Mr. Williams had shot Asaro's ex-boyfriend in the Soulard district and that Mr. Williams had sold his brother $15,000 worth of computers. (State's Ex. 126).

Cole's Story Changes

Starting with his first call to the police after walking out of the Workhouse, through his testimony before the jury, Cole's story changed. With each retelling, Cole's initial statements he made with the assistance of his notes (State's Exhibit 114) evolved. For example:

- Cole told police on June 4, 1999, that Mr. Williams began talking to him about the murder after reading an article about it in the *St. Louis Post-Dispatch* (State's Ex. 126);

but in his deposition and at trial, Cole claimed Mr. Williams began talking about the murder after the two of them saw a story about it on the six o'clock news. (T. 2389)

- Cole told police on June 4, 1999, that Mr. Williams said he took a pocketbook that had credit cards and money, and the Apple laptop computer and bag for the computer. (State's Ex. 126). In his deposition and at trial, he expanded the list to include cheap jewelry, a coin purse, an I.D., wallet, and keys. (T. 2401).

- Cole told police on June 4, 1999, that Mr. Williams said he took a shirt from Ms. Gayle. (State's Ex. 126). In his later deposition and trial testimony, he testified that Mr. Williams told him he took a sweater. (T. 2400).

- Cole never told police on June 4, 1999, that Mr. Williams said he wore gloves when he committed the murder, but at trial he claimed that Mr. Williams said he wore gloves during the murder and was not worried about leaving behind prints. (T. 2400).

Cole's changing account also directly contradicted the evidence. For example:

- Cole claimed Mr. Williams said he went upstairs when Ms. Gayle was in the shower and took the Apple computer and purse (T. 2395), but Dr. Picus told police that Ms. Gayle kept her purse in the kitchen closet on the first floor. (T. 1719).

- Cole claimed Mr. Williams said he came downstairs to look for other things to steal (T. 2395), but Dr. Picus told police that the den, living room, and dining room did not look disturbed. (T. 1722).

- Cole did not say anything about Mr. Williams going through the kitchen, beyond getting the knife from the drawer, yet Dr. Picus described the kitchen as a "mess" with the freezer door open and items inside the freezer being shifted to the side. (T. 1711-12).

- Cole claimed that Mr. Williams targeted Ms. Gayle's house because there was a large tree that shielded the front door and porch from the across the street neighbors. (Ex. 7- Henry Cole 4/12/2001 Deposition at 53). Although the house did have a tree in front, it did not shield the front door or porch.

Despite the inconsistencies of Cole's story or his lengthy criminal history, use of drugs, and mental illness, police apparently looked only for evidence to support what he told them. During his interviews, Cole mentioned that Mr. Williams had taken the bus back to where his girlfriend, Laura Asaro, was staying. (T. 2401).

Police Contact Laura Asaro

Asaro was not unknown to police. She had spoken with them before—both when facing charges of her own and when acting as an informant. And it wasn't their first time talking to her in relation to Ms. Gayle's murder. On September 1, 1998, after being arrested for prostitution, Asaro told officers that she had information related to "the murder of the woman in U. City." (T. 1901; Ex. 8-Supplementary Investigative and/or Disposition Report dated 11/16/99 at 1). But when Detectives arrived to question her, she would not talk to them, stating she was "just trying to get out of the arrest." (Ex. 8, at 1). Police questioned her for two hours to no avail. *Id.*

Although Asaro was known to police, after their interview with Cole on June 4, 1999, police enlisted Cole as an informant for the next four months to try to make contact with Asaro. (T. 1818). Detectives provided him with a pager so she could contact him, but Cole's efforts to get Asaro to incriminate Mr. Williams were unsuccessful. (T. 2439-44).

But police had another method of contacting Asaro due to her having several outstanding warrants. On August 5, 1999, detectives visited Asaro in jail after an arrest, and told her that the charges would be dropped if she cooperated. (T. 1909; Ex. 8, at 6). She was not receptive, so Detectives then told her that Ms. Gayle's husband had posted a $10,000 reward in the case involving the death of his wife, and she would be eligible for some or all of the money if she helped out. (Ex. 8, at 6). Asaro continued to deny she had any information about the crime. (*Id.*)

By November, 1999, police had not uncovered any information at this point that would corroborate what Cole told them. On November 17, 1999, officers once again went to visit Asaro. (T. 1910). Asaro, who was then working as a sex worker and using drugs, believed the officers were there to arrest her on outstanding warrants. (T. 1923). The police offered once again to help Asaro with her warrants if she provided information about the murder of Ms. Gayle. (T. 1980). They told her she was guilty of withholding evidence if she did not cooperate. (T. 1910).

Asaro then told police the following: She had been dating Mr. Williams for two or three months before he was arrested on August 31, 1998 for robbing a doughnut shop, which was ten months before Cole first approached police, and fifteen months before police first questioned Asaro. They lived at times in Mr. Williams's car, an old blue Buick. (T. 1840-41). Asaro claimed that on the day of the murder, Mr. Williams drove her to her mother's house in South St. Lous City in the Buick around 9:00 a.m., left, and returned in his car at about 3:00 p.m. (T. 1841-43). When he picked her up, he was wearing a jacket zipped to the top, even though it was August, and the car did not have an operable air conditioner. (T. 1841-42). He also had a computer in the car, but took it to a house down the street and returned without the computer. (T. 1844, 1859-61).

According to Asaro, she saw blood on Mr. Williams's shirt and scratches on his neck when he removed his jacket, (T. 1843, 1855), which Mr. Williams explained were from a fight. (T. 1843). She then watched Mr. Williams take off his clothing, place it in his backpack, and throw it down a sewer. (T. 1845).

Asaro also told police that, the next morning, she went to retrieve her clothes from the trunk of Mr. Williams's car, and when she opened the trunk, she found a woman's purse that contained a woman's identification and coin bag. (T. 1846). She said she became angry because she believed Mr. Williams had another girlfriend and confronted him. (T. 1847). To diffuse Asaro's jealousy, Mr. Williams told her that the woman was not his girlfriend, but was, instead, a journalist at the *Post-Dispatch* whom he had just killed. (T. 1848).

The next day, on November 18, 1999, police seized Mr. Williams's Buick, which had been parked in front of his grandfather's house. While still at the home, Mr. Williams's grandfather opened the trunk for police. Police stated that during this viewing, they found a medical dictionary, which was not listed as missing and which was later confirmed to not belong to Dr. Picus.

(T. 1776). Upon taking the car back to the station, police indicated they also found a *St. Louis Post-Dispatch* ruler in the glove compartment of the car. (State's Exs. 97, 98). This item was never reported as belonging to Ms. Gayle or as missing from her home, and Asaro never mentioned seeing this ruler in any of her statements to police. Asaro had also been seen accessing the Buick in the fifteen months since Mr. Williams's arrest. (T. 2774, 2792).

The only physical evidence corroborating Asaro's story was a laptop found at the home of Glenn Roberts, to whom Asaro said Mr. Williams had pawned the laptop. When questioned, Roberts told police that Mr. Williams had brought the laptop in a carrying case, and Roberts paid him $150 or $250 for the laptop. (T. 2001-02). While selling it, Mr. Williams told Roberts that Asaro had given him the laptop and asked him to sell it for her. (Ex. 11- Glenn Roberts Affidavit dated 9/9/2020). The laptop was later confirmed as belonging to Dr. Picus, (T. 2011), making the person with the most direct connection to the crime Laura Asaro, and not Marcellus Williams. On November 29, 1999, police arrested Mr. Williams and charged him with murder.

Asaro's Story is Unreliable

Beyond how it was obtained, important aspects of Asaro's statements about what she was allegedly told about the murder did not fit other, known evidence and undermine the credibility of her testimony. For example:

- Asaro stated Mr. Williams said he entered the house through the back door, (T. 1851), but the windowpane of the front door had been broken and the break aligned with the deadbolt of the front door, indicating that the perpetrator entered through the front door. (T. 1736).

- Asaro claimed Mr. Williams said he rinsed the knife in the bathroom after he stabbed Ms. Gayle. (T. 1984). However, the knife was not cleaned and was left protruding out of Ms. Gayle's neck. (T. 1670, 2115).

- Asaro stated Mr. Williams said he did not go upstairs because Ms. Gayle came downstairs. (T. 1984). Yet, investigators detected Ms. Gayle's blood in the upstairs bathroom and upstairs closet. (T. 1671).

- Asaro told detectives that Mr. Williams had visible scratches on his neck. (T. 1926). But DNA testing under Ms. Gayle's fingernails did not detect the presence of any material other than Ms. Gayle's DNA. (T. 2964).

- Asaro claimed Mr. Williams said Ms. Gayle was wearing a bathrobe when he murdered her. (Ex. 12- Laura Asaro 11/17/99 interview transcript at 9). However, Ms. Gayle was wearing only a purple shirt. (T. 1718).

- Asaro claimed Mr. Williams said he had to hide after he murdered Ms. Gayle because a neighbor stopped by the house. (T. 1851). But police interviewed neighbors as part of their investigation, and no one said that they had stopped by Ms. Gayle's house that morning.

- Asaro also stated that Mr. Williams said he had picked through Ms. Gayle's belongings downstairs and never mentioned going through her refrigerator or other parts of the kitchen. (Ex. 12, at 9). According to Dr. Picus, however, the dining room and living room were not disturbed, but the kitchen was in obvious disarray. (T. 1722). The freezer door was open when Dr. Picus came home, the knife sheath was on the ground, and the kitchen drawers were open.

- Asaro claimed that she told her mother about what Mr. Williams told her about the murder (Ex. 9, at 109); however, when police spoke to her mother on August 6, 1999, she said she had not been told anything about the murder. (Ex. 8, at 7).

There were also significant differences between Asaro and Cole's statements, which included:

- Asaro stated that Mr. Williams said he entered the house through the back door (T. 1851), but Cole said that Mr. Williams said he entered through the front door. (T. 2394).

- Asaro said that Mr. Williams said he drove to the scene (T. 1841), but Cole said that Mr. Williams said he took the bus. (T. 2392).

- Asaro said that Mr. Williams said he never went upstairs, but Cole said that Mr. Williams said he went upstairs and washed himself off in the upstairs bathroom. (T. 2400).

- Asaro stated that Mr. Williams said he had to hide because a neighbor came to the door (T. 1851), but Cole never said Mr. Williams said any of this.

- Asaro claimed that Mr. Williams targeted Ms. Gayle's house after casing it for a "day or two" and knew that Ms. Gayle did not have any children and that no one would be home (Ex. 12, at 14), but Cole claimed that Mr. Williams targeted Ms. Gayle's house because a tree shielded the front door and porch from the neighbors across the street (Ex. 7, at 53).

Asaro's depiction of the crime also changed over time, including statements and testimony that were internally inconsistent. For example:

- Asaro initially told police in November 1999 that the backpack Mr. Williams was wearing came from Ms. Gayle's house. (Ex. 12, at 24). She later claimed at trial that she had seen Mr. Williams with the backpack before the murder. (T. 1929).
- Asaro initially told police Mr. Williams picked her up after the murder from her grandfather's house. (Ex. 12, at 6). In a later interview, she said that Mr. Williams picked her up from her mother's house. (T. 1842).
- Asaro initially claimed she saw the laptop in the trunk and Mr. Williams told her he committed the murder the day he sold the laptop. (Ex. 12, at 31). She later claimed she saw the laptop in the front seat of the car, (T. 1844), and in another statement claimed he sold the computer before he told her he committed the murder. (Ex. 12, at 6).
- Asaro initially told police Mr. Williams walked down the street with the computer and returned without it. She said she was not present during the sale but could show the house where it was sold. (Ex. 12, at 13-14). Later, her story changed to say she waited in a car parked in front of the house while Mr. Williams went inside to pawn the laptop, and that when he came out of the house, he did not have the computer, but had crack cocaine. (T. 1861).
- Asaro claimed that on the day Mr. Williams picked her up, she saw him throw away clothes in the sewer. (T. 1844). In another statement, she said a day or two after the murder, she found the purse in the trunk, and Mr. Williams emptied the contents of the purse into his backpack and then threw the backpack into the sewer (Ex. 12, at 10, 30).
- Asaro claimed that she had not been back to Mr. Williams's car since he was incarcerated at the end of August 1998 (Ex. 12, at 12), but later said that she had been to his car and that his grandfather opened the trunk for her and she did not see anything from the murder in the trunk. (T. 1888-89).

Despite these critical contradictions with the evidence, Asaro's testimony helped secure Mr. Williams's arrest and was key to his prosecution. At trial, she pointed to her drug use to explain the inconsistencies in her statements. (T. 1928-31).

Trial

The State's case at trial rested primarily on the testimony of Henry Cole and Laura Asaro. They described Cole as having "been consistent all the way through" his various statements. (T.

3023) and that Asaro had "one little inconsistency": That she had been inconsistent about when she supposedly saw Ms. Gayle's purse in relation to when she said she saw Mr. Williams dump out the contents of the bookbag. (T. 3024). The State vouched for Cole's reliability because Cole supposedly knew facts only the murderer would know: that the murderer cut a "big chunk of meat out of [Ms. Gayle's] arm" (T. 3024); that the murderer stabbed Ms. Gayle in the neck twice (T. 3024); and that the murderer twisted the knife and left it in her neck (T. 3024). The detectives, who were actively looking for leads in this case, also knew these facts when they questioned Cole, with much of their interaction with Cole being unrecorded. On the stand, Cole told the jury that Mr. Williams confessed the crime to him while in the Workhouse, and, for the first time, added that Mr. Williams said he wore gloves during the murder because Williams said he was not worried about leaving prints. (T. 2400). This, of course, was inconsistent with the fact that police did find bloody fingerprints—that were never connected with Mr. Williams—at the murder scene.

Cole also testified about various benefits he received in exchange for his testimony both in court and at a pretrial deposition. He explained he told the prosecution he would not attend his deposition in April, 2001 unless he received a portion of the reward money, which typically is not provided until a case concludes. (T. 2459). He had been paid $5,000 at the time of trial and hoped to get the other $5,000 after his testimony if he could. (T. 2555). Dr. Picus confirmed this when he told the jury that prosecutors had advised him to pay Cole $5,000 before trial to ensure his cooperation, which he did. (T. 1817-18).

In addition to Cole and Asaro, the State called Glenn Roberts, who testified about how he obtained Dr. Picus's stolen laptop. But when Roberts was asked on cross-examination about what, if anything, Mr. Williams told him when he gave Roberts the laptop, the State objected strenuously on hearsay grounds. (T. 2028-30). The trial court sustained the objection and prevented Roberts

from answering the question, meaning the jury never heard the full explanation for how Mr. Williams came to be in possession of the laptop. (T. 2030).

Mr. Williams presented a defense and argued that Cole and Asaro were not credible, and that none of the forensic evidence connected Mr. Williams to the crime. The defense called Jeanette Bender, Cole's probation officer, who testified that nearly half of Cole's probation file was missing (T. 2769).

The defense also poked holes in Asaro's testimony that Mr. Williams had sold the laptop and provided evidence that would have supported Glenn Roberts's testimony, if he had been allowed to give it, that Asaro was the person who supplied the stolen laptop to Mr. Williams. Jimmy Williams, Mr. Williams's older brother, testified that Asaro contacted him in August 1998 to see if he would buy a laptop computer that she had for $100. (T. 2773). Mr. Williams's cousin Tramel Harris testified that in August 1998, he saw Asaro get off a bus near his grandfather's home carrying the laptop and a purse. (T. 2805).

Witnesses also challenged Asaro's testimony that she did not have access to Mr. Williams's car. Jimmy Williams testified he had seen Asaro go into Mr. Williams's car many times after August 31, 1998, and that she would use a screwdriver to open the trunk. (T. 2774). Mr. Williams's first cousin Latonya Hill also testified that she saw Asaro go into the trunk of Mr. Williams's car after August 31, 1998, (T. 2792), though she did not know how Asaro accessed it. (T. 2794).

The defense presented evidence that none of the forensic evidence implicated Mr. Williams. Victor Granat, a technical service chemist for Brenntag, HCI Chemtech and consultant for Genetic Technologies, testified that police collected hairs from Ms. Gayle's shirt and from the rug where her body was found, (T. 2871-72, 2920), including two pubic hairs found on the rug near Ms. Gayle that did not belong to Ms. Gayle or Dr. Picus. (T. 2876-77). All of the collected

hairs were analyzed using hair microscopy, and none of them matched Mr. Williams.[4] (T. 2871-72, 2920). Granat also testified that the bloody shoeprints found in the house did not belong to Mr. Williams or any of the first responders, (T. 2882, 3140), nor did fingerprints collected from the medical dictionary found in the trunk of Mr. Williams's Buick. (T. 2319). All of them excluded Mr. Williams as the source. Granat also testified that investigators collected bloody fingerprints from upstairs, but did not think the prints were viable, so they were destroyed. (T. 1695, 2310, 2332, 2342). Mr. Williams never had the opportunity to have them analyzed.

Finally, Jami Harman, the scientific director at Genetic Technologies, testified about the DNA analysis in the case. He testified that the only DNA collected was from under Ms. Gayle's fingernails. (T. 2964). Like with the rest of the forensic evidence, Mr. Williams was excluded as the source of the DNA found in those clippings. (T. 2961, 2964).

Despite having no direct evidence linking Mr. Williams to the crime, the jury convicted Mr. Williams of first-degree murder, first-degree burglary, armed criminal action, and robbery. (T. 3073-74). At the penalty phase, the State presented witnesses who testified regarding Mr. Williams's criminal history. This included testimony concerning a doughnut shop robbery (T. 3107-20, 3122-30, 3132-40), a Burger King robbery (T. 3143-67), and a residential burglary (T. 3184-87, 3188-92). A correctional officer recounted Mr. Williams's alleged verbal threat to him while he was in jail. (T. 3168-72). The State also introduced certified copies of Mr. Williams's convictions. (T. 3167, 3193-3200; State's Exs.174, 174(a), 228-32). Trial counsel's mitigation case consisted of brief testimony of a few family members that Mr. Williams was a good father to his children. (T. 3312, 3341, 3367, 3375, 3401-09, 3418-25, 3426-33). But the jury heard no

[4] Some of the hairs matched Ms. Gayle or Dr. Picus, but others did not match Ms. Gayle, Dr. Picus, or Mr. Williams. (T. 2871-72, 2920).

evidence regarding Mr. Williams's troubled background, social, familial, or psychological history, and after deliberating less than two hours, the jury recommended a death sentence, which the court imposed on August 27, 2001. (T.3517-18).

New Evidence

Since Mr. Williams's conviction, new evidence has continued to amass that undermines the State's case as it existed in 2001. Testimony from three DNA experts would now exclude Mr. Williams as the source of male DNA found on the knife left in Ms. Gayle's body. Family and friends of both Henry Cole and Laura Asaro would testify they were known liars who worked as informants for police. Indeed, Mr. Williams specifically asked his defense counsel to contact Cole's son, but defense counsel failed to do so. New evidence would establish that, had defense counsel contacted Cole's son, he would have testified that while Cole was in custody with Mr. Williams, Cole wrote to his son about "something big"—a caper he had in the works. And Glenn Roberts would today confirm what the jury never heard—that there was evidence Laura Asaro was the source of Dr. Picus's laptop according to what he was told at the time he received it. None of this evidence was presented to the jury. This Motion represents the first time it has been taken all together.

DNA Testing Excludes Mr. Williams as the Source of Male DNA Left on the Murder Weapon.

In 2015, the Supreme Court of Missouri ordered DNA testing on crime scene evidence, including the knife left in Ms. Gayle's neck, her fingernails clippings, and hairs recovered from her hand. (Ex. 13- Bode Cellmark Forensic Case Report dated 4/8/16). Bode Laboratory performed Y-STR testing, which focuses on the presence of male DNA on a sample. (*Id.*). This type of testing is especially effective on evidence that may have a low amount of DNA, or evidence with an overwhelming amount of female DNA.

Bode swabbed the knife handle and detected genetic markers at fourteen of the twenty-three loci. (*Id.*).[5] Based on the number of genetic markers detected at each location, Bode determined there was a mixture of at least two males on the knife handle. (*Id.*). The lab compared Mr. Williams's Y-STR profile to the DNA mixture developed on the knife handle and determined that Mr. Williams's Y-STR profile did not match the profiles from the knife at nine of the twenty-three loci. (Ex. 14-Bode Cellmark Supplemental Forensic Case Report dated 8/12/16). Despite these exclusions, Bode would not draw any conclusions about Mr. Williams's presence in the mixture because of the possibility of allelic drop out. (*Id.*). The lab detected some peaks below their analytical threshold and were not sure if those peaks were actual genetic markers or artifacts developed during testing. (Ex. 15-Jennifer Fienup 11/29/2016 Deposition at 40). Bode acknowledged that this was a "close call." (*Id*. at 60). The lab would not look below their analytical threshold to determine, assuming those peaks were genetic markers, whether they matched Mr. Williams's profile. (*Id*. at 59).

Expert 1: Dr. Norah Rudin

Mr. Williams's post-conviction counsel consulted with independent DNA experts to further analyze the testing results. Dr. Norah Rudin, a respected DNA expert who has consulted with the San Diego Sheriff's Office DNA Laboratory, San Francisco Police Department Criminalistics Laboratory, and Idaho State Department of Law Enforcement DNA Laboratory, reviewed Bode's reports, their lab notes, and the raw data from the testing. Dr. Rudin is a fellow at the American Academy of Forensic Science (AAFS) and has written several books, book chapters, and scholarly articles on forensic DNA testing and analysis. Dr. Rudin concluded that Mr. Williams was not the

[5] Bode also conducted Y-STR testing on Ms. Gayle's fingernail clippings and did not detect the presence of any male DNA on them. (*Id.*). Bode concluded that the hairs in Ms. Gayle's hands were Ms. Gayle's. (*Id.*).

source of the DNA found on the knife handle. (Ex. 16-Dr. Norah Rudin Affidavit dated 12/28/2016). She found that "it is clear that he could not have contributed the profile" reported by Bode because his profile differed from the DNA profile on the knife handle at 11 of the 15 loci. (*Id*.). Dr. Rudin even looked at the peaks below Bode's analytical threshold and found that the peaks below the threshold, whether true alleles or not, were not consistent with Mr. Williams's profile. (*Id*.).

Dr. Rudin disagreed with Bode's hesitation to draw a conclusion in this case due to possible allelic drop out because "the alleles present in [Mr. Williams's] profile would have to be assumed present but not detected (dropped out) in at least 13 of the 21 detected loci." (*Id*. at 3). If allelic drop out were present in this case, "alleles from a second contributor would have to replace his missing alleles at each of those loci. A better explanation is that Marcellus Williams is not a contributor to the profile(s) found on the knife." (*Id*.).

Expert 2: Dr. Greg Hampikian

A second DNA expert, Dr. Greg Hampikian, a professor of biology and criminal justice at Boise State University, also reviewed Bode's report, Bode's bench notes, and Bode's electronic raw data. Dr. Hampikian is the director of the Idaho Innocence Project, and a member of the International Society for Forensic Genetics, American Academy of Forensic Science, and International Society for Computational Biology. In addition to teaching undergraduate and graduate courses on forensic biology, Dr. Hampikian has published numerous scholarly articles in peer-reviewed publications on forensic DNA testing.

Like Dr. Rudin, he concluded that Mr. Williams was not the source of the DNA found on the knife handle. (Ex. 17-Dr. Greg Hampikian Affidavit). Dr. Hampikian explained that even incomplete Y-STR profiles, such as the profiles developed in this case, can be used to exclude a contributor. (*Id*. at 1). He illustrated this by analogizing a partial social security number to a partial

DNA profile. If only four numbers are visible on the hypothetical social security card, anyone whose social security number does not include those digits can be eliminated as a match. (*Id*.). Because several of the "called alleles" on the profile developed from the knife handle do not match the alleles on Mr. Williams's profile, he is clearly excluded as the source of the DNA on the knife handle. (*Id*. at 2).

Expert 3: Dr. Charlotte Word

A third DNA expert, Dr. Charlotte Word, also reviewed Bode's report, their lab notes, the raw data from the testing, as well as Bode's standard operating procedures (SOPs). Dr. Word worked as the Laboratory Director at Cellmark Diagnostics from 1990 to 2005. Cellmark Diagnostics offered DNA testing and analysis to crime laboratories, prosecutors, law enforcement, the military, defense attorneys, and state and local government agencies. Dr. Word has testified in over 300 criminal and civil trials in 25 state, federal, and military courts. She has testified in over 40 *Frye* and *Daubert* hearings concerning the admissibility of forensic DNA evidence. She has testified for both the state and defense. She is on the editorial board of the *Journal of Forensic Sciences*, the premier forensic journal in the United States. She is a board member of the Biological Data Interpretation and Reporting Subcommittee of the Biology/DNA Scientific Area Committee of the Organization of Scientific Area Committee (OSAC) and a member of the DNA Consensus Body of the AAFS. She was a member of the Reporting and Testimony Subcommittee of the National Commission of Forensic Science.

Dr. Word noted that Bode's SOPs allowed lab analysts to look below the analytical threshold to make exclusions, but they failed to do so in this case. Like Dr. Rudin, she also looked at the peaks below the analytical threshold and concluded that if she assumed that those peaks were true alleles, Mr. Williams was excluded as the source of the DNA on the knife handle. (Ex. 18-Dr. Charlotte Word Affidavit dated 5/31/2018).

In sum, three DNA experts reviewed the court-ordered Bode DNA analysis. All three concluded that, using reliable, scientifically-accepted methods, the data permits a DNA expert to definitively exclude Mr. Williams as a source of the male DNA on the knife. In other words, DNA evidence now shows Mr. Williams did not likely wield the knife that was used to murder Ms. Gayle. With this evidence, Mr. Williams can now be reliably excluded as the source of all of the physical evidence at the crime scene: the fingerprints, the hairs, the footprints, and now the murderer's DNA on the knife.

Cole's Family Affirms, Under Oath, that He was a Liar and Known Informant.

As part of his state post-conviction proceedings, Mr. Williams's counsel obtained affidavits from several members of Henry Cole's family, including his children, who confirmed that Cole often lied and lied to police in exchange for leniency on his cases.

Johnifer Griffin, Henry Cole's son, described in an affidavit, under oath, Cole's reputation for dishonesty, his criminal activities, and his history of providing law enforcement with false information for his own benefit. (Ex. 19- Johnifer Griffin Affidavit dated 8/14/2003). He affirmed that "during the time Henry and Marcellus were in jail together, I got a letter from Henry indicating to me that he had some kind of caper going on because he said he had 'something big coming.'" (*Id*. at ¶ 34).

Cole's nephews, Ronnie and Durwin Cole also provided affidavits, where they described, under oath, Cole's penchant for lying and his drug addiction that led to erratic behavior. (Ex. 20- Ronnie Cole Affidavit dated 8/12/03; and Ex. 21- Durwin Cole Affidavit dated 8/21/03). Durwin Cole affirmed that "everyone in the family knew that Henry made up the story about Marcellus committing the Felicia Gayle homicide." (Ex. 21 at ¶ 13). He made up the story because "he wanted the money and wanted to leave town and go to New York." (*Id*.).

Asaro's Friends Affirm that She was a Liar and Known Informant.

Mr. Williams's counsel also obtained affidavits from a person who had known Asaro for a long time: Ed Hopson. (Ex. 22- Edward Hopson Affidavit dated 8/20/2003); Hopson was the live-in boyfriend of Asaro's mother and had known Asaro since childhood. (*Id.* at ¶ 2). Asaro wanted to testify against Mr. Williams because she anticipated receiving a substantial amount of money for her testimony. (*Id*. at ¶ 15). Hopson affirmed that Asaro was a known police informant and had engaged in a pattern of lying to the police to get herself out of trouble in the past. (*Id*. at ¶ 10).

Mr. Williams told Glenn Roberts that Asaro gave him Dr. Picus's laptop.

On September 9, 2020, Mr. Roberts provided an affidavit to Mr. Williams's counsel where he affirmed, under oath, that "when Marcellus brought the computer to my house, he told me the computer belonged to his girlfriend, Laura Asaro. If I had been asked at trial what Marcellus told me about the computer, I would have told the jury that Marcellus told me the computer belonged to a girlfriend, Laura Asaro, when he dropped it off at my house." (Ex. 11 at ¶¶ 11, 12).

* * * * *

None of this new evidence has been heard by a court. This presents the first time a court could consider this evidence in its totality. The St. Louis County Prosecuting Attorney's office, when viewing this evidence in its totality has determined its duties under Section 547.031(1) have been triggered and a hearing is required to determine if Mr. Williams was wrongfully convicted and sentenced to death.

PROCEDURAL HISTORY

Mr. Williams continued to maintain his innocence and sought relief through every avenue available to him. In 2003, the Supreme Court of Missouri affirmed Mr. Williams's conviction and sentence on direct appeal, *State v. Williams*, 97 S.W.3d 462 (Mo. banc 2003); and the United States

Supreme Court subsequently denied Mr. Williams's petition for a writ of certiorari, *Williams v. Missouri*, 539 U.S. 944 (2003).

Mr. Williams subsequently filed a *pro se* motion for post-conviction relief pursuant to Rule 29.15, and appointed counsel filed an amended motion on September 8, 2003. The circuit court denied Mr. Williams an evidentiary hearing on all his claims except that trial counsel was ineffective for failing to allow petitioner to testify in the penalty phase. On May 14, 2004, the circuit court entered an order denying the Rule 29.15 motion. The Supreme Court of Missouri subsequently affirmed the denial of post-conviction relief with no further evidentiary hearing on June 21, 2005. *Williams v. State*, 168 S.W.3d 433 (Mo. banc 2005).

On August 29, 2006, Mr. Williams filed a federal habeas corpus petition, alleging, *inter alia*, that he received ineffective assistance of counsel, that the State presented perjured testimony, and that he was actually innocent. He also requested further DNA testing. The federal district court granted Mr. Williams penalty phase relief after finding trial counsel was ineffective for failing to conduct an adequate investigation and present evidence regarding Mr. Williams's background and social and medical history, and his sentence was vacated. But on September 18, 2012, in a 2-1 vote, the Eighth Circuit reversed the federal district court's decision and reinstated his death sentence. *Williams v. Roper*, 695 F.2d 825 (8th Cir. 2012).

On December 17, 2014, the Supreme Court of Missouri set an execution date for Mr. Williams of January 28, 2015. On January 9, 2015, Mr. Williams filed a habeas corpus petition in the Supreme Court of Missouri again asserting his actual innocence and specifically seeking access to DNA testing. *State ex rel. Williams v Steele*, Case No. SC94720.

While his state habeas petition was pending, on January 12, 2015, Mr. Williams filed a civil action pursuant to 42 U.S.C. § 1983 in the United States District Court of the Eastern District of

Missouri, which was promptly denied. *Williams v. McCulloch*, No. 4:15CV00070 RWS, 2015 WL 222170 Jan. 14, 2005 (E.D.Mo.). On January 22, 2015, the Supreme Court of Missouri stayed Mr. Williams's scheduled execution, however, and issued an order referring Mr. Williams's matter to a special matter to supervise further DNA testing.

On January 5, 2017, after the DNA testing, but without conducting a hearing or making any findings, the appointed special master sent Mr. Williams's case back to the Supreme Court of Missouri. On January 31, 2017, the court summarily denied Mr. Williams's habeas petition, despite the new DNA evidence, without briefing or oral argument. At that time, the Court had in its possession an initial report relating to the DNA testing, but no further interpretation or analysis of the data in that report. The United States Supreme Court denied Mr. Williams's petition for writ of certiorari.

Lawyers for Mr. Williams then petitioned the governor's office to stay Mr. Williams's execution and convene a board of inquiry to investigate the case. On August 22, 2017, by Executive Order, then-Governor Greitens stayed Mr. Williams's execution and convened a board of inquiry. The board began its investigation. On June 29, 2023, Governor Parson dissolved the board of inquiry. On June 30, 2023, Attorney General Andrew Bailey moved the Supreme Court of Missouri to set an execution date.

ARGUMENT

Pursuant to Section 547.031, the new DNA evidence, when combined with new evidence discrediting the remaining indirect evidence, is evidence that would tend to demonstrate Mr. Williams's actual innocence. Three DNA experts have concluded that Mr. Williams is excluded as the source of the male DNA found on the knife handle used to murder Ms. Gayle and found lodged in her neck. Had Mr. Williams stabbed Ms. Gayle 43 times with this knife, as the prosecution argued at trial, his DNA would have likely been found on it. Instead, the DNA results tend to prove

that another man, not Mr. Williams, deposited his DNA on the knife handle when he murdered Ms. Gayle.

These exculpatory DNA results buttress other exculpatory evidence that establish the presence of another person, not Mr. Williams, inside Ms. Gayle's house when she was murdered. Police discovered bloody footprints in the hallway of Ms. Gayle's house and on the rug near her body. They collected pubic and head hairs near her body. The bloody footprints and hairs were not left by Mr. Williams, but by another unidentified person—the true perpetrator. Indeed, this DNA and forensic evidence contradicts Cole's and Asaro's testimony that served as the foundation of the prosecution's case. Post-conviction affidavits from Cole's and Asaro's family and friends further show that they were known fabricators who lied in this case for their own benefit. Moreover, Glenn Roberts' post-conviction affidavit not only severs the lone link between Mr. Williams and Ms. Gayle's murder, but also connects Asaro to Ms. Gayle's murder.

Mr. Williams's trial counsel also performed ineffectively because they failed to investigate and present impeachment evidence against Cole and Asaro, and because they failed to investigate and present mitigation evidence at the sentencing phase. They neglected to interview Cole's and Asaro's family and friends who would have undermined Cole's and Asaro's credibility at trial. And they failed to contact key mitigation witnesses, including Mr. Williams's immediate family, or obtain expert testimony that would have contextualized Mr. Williams's troubled background and his familial, social, and psychological history.

Finally, the prosecution improperly removed qualified jurors for racial reasons. Their jury selection tactics in this case were consistent with their historic pattern and practice of removing qualified Black jurors in death penalty cases. Individually and collectively, the evidence of innocence and constitutional violations entitle Mr. Williams to a hearing under Section 547.031.

CLAIM I: NEW DNA EVIDENCE, IN LIGHT OF THE UNDERMINED WITNESS TESTIMONY, SUGGESTS MR. WILLIAMS MAY BE ACTUALLY INNOCENT

The Prosecuting Attorney submits this motion under Section 547.031(1) because "he . . . has information that the convicted person may be innocent or may have been erroneously convicted." First, the new sworn testimony from three DNA experts excluding Mr. Williams as the man who stabbed Ms. Gayle is compelling evidence that Mr. Williams may be innocent. But in addition to the new DNA evidence, this Court must also consider the additional evidence the jury did not hear—that the laptop pawned by Mr. Williams originated with Asaro, and evidence that Asaro and Cole, the backbone of the State's case, were known liars beyond being incentivized by the reward money. Together, this evidence raises serious questions about the soundness of Mr. Williams's conviction and death sentence.

None of the physical evidence left behind by the perpetrator ever matched Marcellus Williams–not the bloody shoeprints or the foreign hairs. Instead, the case against Mr. Williams relied on the testimony of Henry Cole, who, in an effort to obtain reward money, claimed that Mr. Williams confessed to him in the workhouse, and Laura Asaro, who–in an effort to avoid arrest–claimed she saw Mr. Williams after the crime and accompanied him to sell a laptop taken from Ms. Gayle's home. While this tenuous evidence was enough to secure Mr. William's conviction, it gives way in light of the new evidence. Three separate experts would offer sworn testimony that DNA testing on the murder weapon found lodged in Ms. Gayle's body eliminates Mr. Williams as the source. Moreover, additional evidence from Asaro and Cole's loved ones confirms what their ever-changing testimony suggested—that they were known liars and informants who would knowingly provide false information to save themselves. Taken together with previously unpresented evidence from Glenn Roberts that it was Asaro, not Mr. Williams, who provided Dr. Picus's laptop for sale, the last link between Mr. Williams and Ms. Gayle's death is severed. As a

result, the lack of credible evidence of Mr. Williams's guilt significantly undermines confidence in his conviction such that a hearing on this new evidence is necessary. Section 547.031(2).

In *Amrine v. Roper*, the Supreme Court of Missouri recognized a free-standing claim of actual innocence where no credible evidence remained to convict the defendant. 102 S.W.3d 541, 543 (Mo. banc 2003). In *Amrine*, the defendant was convicted of murdering an inmate at Jefferson City Correctional Center based solely on the testimony of three fellow inmates: Terry Russell, Randy Ferguson, and Jerry Poe. At trial, Amrine presented evidence of his own innocence, including evidence that Terry Russell committed the crime and alibi evidence from six witnesses that Amrine was playing poker in a different part of the room at the time. The jury nonetheless found Amrine guilty, and he was sentenced to death.

In the course of Amrine's state and federal appeals, all three State's witnesses eventually recanted, though at different times. Ferguson and Russell recanted their identifications during Amrine's postconviction hearing. However, Poe did not appear, leaving his trial testimony intact. As a result, the court denied Amrine's petition for relief and the Supreme Court of Missouri affirmed. *Amrine v. State*, 785 S.W.2d 531 (Mo. banc 1990).

During Amrine's federal habeas appeal, Poe offered an affidavit in which he recanted completely his trial testimony, stating that he did not see Amrine stab the victim and that he falsely implicated Amrine. As a result of that recantation, the Eighth Circuit Court of Appeals ordered a limited remand for the district court to conduct an evidentiary hearing, however, relief was again denied because the recantations of Russell and Ferguson was no longer "new" under the Eighth Circuit standard. *Amrine v. Bowersox*, 238 F.3d 1023 (8th Cir. 2001).

Amrine petitioned the Missouri Supreme Court for habeas corpus relief, which granted the petition, on the basis of Amrine's innocence, finding that the incarceration of an innocent person

is a manifest injustice. *Amrine*, 102 S.W.3d at 548. Thus, clear and convincing evidence of innocence provides a freestanding ground for habeas corpus relief, whether or not a petitioner received a fair trial. *Id.* at 547–48 ("Having recognized the prospect of an intolerable wrong, the state has provided a remedy."). The "lack of any remaining direct evidence of [the defendant's] guilt from the first trial" is sufficient to "[meet] the clear and convincing evidence standard." *Id.* at 544. Evidence is clear and convincing when it "instantly tilts the scales in the affirmative when weighed against the evidence in opposition, and the fact finder's mind is left with an abiding conviction that the evidence is true." *Id.* at 548 (*quoting In re T.S.*, 925 S.W.2d 486, 488 (Mo. App. 1996)). Under this standard, evidence supporting the conviction must be viewed and reassessed in light of all the evidence now available. *Id.*

New evidence significantly undermines confidence in the soundness of Mr. Williams's conviction. The sworn testimony of three DNA experts excludes Mr. Williams as the one who wielded the knife that killed Ms. Gayle. At the same time, the remaining indirect evidence which supported Mr. William's conviction is significantly compromised. The credibility of Cole and Asaro has been further undermined by sworn statements from their friends and family regarding their credibility. And Glenn Roberts's sworn affidavit stating that it was Asaro who brought the laptop to Mr. Williams suggests the person with the strongest connection to the crime was not Mr. Williams, but rather Asaro, a known liar who was offered a financial incentive to incriminate Mr. Williams.

New Evidence Undermines the Evidence Used to Convict Marcellus Williams.

A. Three DNA Experts Exclude Mr. Williams as the Individual who Stabbed Ms. Gayle.

Three independent DNA experts have excluded Mr. Williams as the source of the male DNA found on the handle of the knife used in the homicide. His exclusion as the source of the male DNA on the knife is compelling evidence that Mr. Williams did not handle the knife and did not commit this murder. During testing, the lab detected male DNA on the knife, suggesting that someone handled the knife without gloves during the perpetration of this crime. There were, further, bloody fingerprints upstairs at the crime scene, suggesting the murderer did not wear gloves. There is a strong likelihood that had Mr. Williams been the person who stabbed Ms. Gayle forty-three times, his genetic material would have been deposited on the knife, and the lab would have matched his DNA profile to the DNA on the knife. Yet none of the three experts who have reviewed the DNA testing data has concluded that Mr. Williams matched the DNA profile on the knife.

Mr. Williams's exclusion as the source of the DNA on the knife handle is consistent with his exclusion as to the other biological evidence collected from the crime scene, including hairs, bloody shoeprints, and fibers. None of the hairs came from Mr. Williams. The bloody shoe prints could not have been made by Mr. Williams, who wore a different sized shoe. And the fibers did not match Mr. Williams's clothing. Nor were the bloody fingerprints connected to Mr. Williams.

While the forensic evidence does not prove who did actually commit the crime at this time, with that investigation ongoing, it does add a compelling piece to this case demonstrating that Mr. Williams did not handle the knife, and thus, did not commit the crime. The new evidence suggests that someone, not Mr. Williams, left their DNA on the handle of the murder weapon. The remaining evidence establishes that someone, not Mr. Williams, left bloody shoe prints inside Ms. Gayle's house near her body. Someone, not Mr. Williams, left their head and pubic hairs on the rug near Ms. Gayle's body. Pursuant to Section 547.031(1), together this constitutes compelling evidence

that someone, not Mr. Williams, committed this murder. Given the nature of this forensic evidence, there is no explanation for why this unidentified person or persons left this evidence inside Ms. Gayle's house unless they committed the murder.

B. New Evidence Substantiates that Cole and Asaro Were Known Unreliable Witnesses Who Would Lie to Help Themselves.

Cole and Asaro were key to securing Mr. Williams' conviction. No other witnesses or evidence placed Mr. Williams inside Ms. Gayle's house or directly connected him with the murder. However, Cole and Asaro were not reliable, and new evidence of that unreliability would have resulted in them not being presented by the State at trial.[6] Despite the prosecution's characterization of their stories being "consistent" and "incontrovertible," that was an overstatement and not consistent with the facts. The State claimed at the time of trial that Cole and Asaro had information only the perpetrator would know, but other, important details in their story were inconsistent with each other, with their own statements, and with the crime scene evidence.

While Cole and Asaro's testimony was already tenuous, new evidence from Cole and Asaro's family and friends further damages their credibility. Had a jury heard this evidence, particularly in conjunction with the new DNA evidence, they likely would have discredited Cole and Asaro's testimony and found Mr. Williams not guilty.

Cole and Asaro's unreliability was known to everyone around them. Cole's son and nephews have all provided sworn statements and would provide evidence regarding his penchant for lying, particularly when he needed something. And that was particularly true at the time of

[6]Cole and Asaro fit the profile of unreliable, incentivized witnesses who lead to wrongful convictions. *See* Jeffrey S. Neuschatz, et. al., *The Truth About Snitches: An Archival Analysis of Informant Testimony*, 28 PSYCHIATRY, PSYCH., & L. (508-30) (2001) (finding that informants in wrongful conviction cases often deny receiving an incentive, were friends/acquaintances of the defendant, and had testimonial inconsistencies).

trial. As Cole's son Johnifer Griffin laid out clearly: "[D]uring the time Henry and Marcellus were in jail together, I got a letter from Henry indicating to me that he had some kind of caper going on because he said he had 'something big coming.'" (Ex. 19 at ¶ 34). Cole's nephew went even further, stating that "everyone in the family knew that Henry made up the story about Marcellus committing the Felicia Gayle homicide." (Ex. 21 at ¶ 13). He made up the story because "he wanted the money and wanted to leave town and go to New York." (*Id.*). Had the jury been presented with this evidence from Cole's loved ones that he was a liar and could not have been trusted, it would have discredited his claim that Mr. Williams had confessed to him, particularly when taken in consideration with the fact that he only came forward when he knew there was a reward and that Cole's account conflicted with Asaro's, as well as known facts from the crime.

Asaro's unreliability was similarly not presented to the jury. New evidence from Ed Hopson, who knew Asaro her entire life, verifies that Asaro wanted to testify against Mr. Williams because she anticipated receiving a substantial amount of money for her testimony. (Ex. 22 at ¶ 15). Hopson also stated that Asaro was a known police informant and had engaged in a pattern of lying to the police to get herself out of trouble in the past. (*Id.* at ¶10). Had the jury heard this, in conjunction with the fact that she only made statements when threatened with arrest and that her testimony conflicted with Cole's and the facts of the crime, and that she was the one who provided the laptop to Mr. Williams, it would have discounted her testimony and found Mr. Williams not guilty.

This evidence erodes any credibility Cole and Asaro had to begin with. Had the jury heard this, coupled with the DNA evidence and their history of lying for their own benefit, it would have discredited their testimony. And without their testimony, there was little to no evidence remaining

to secure Mr. William's conviction. As a result, inexorable concerns about the soundness of Mr. Williams's conviction must be addressed.

C. Evidence Not Heard by the Jury Reveals That the Laptop is Linked to Laura Asaro, Not Marcellus Williams.

At trial, the prosecution tried to connect Mr. Williams to the laptop taken from Ms. Gayle's house to support Cole and Asaro's weak testimony and prove their case. However, new evidence from Glenn Roberts reveals that it was not Mr. Williams who initially had the laptop – it was Laura Asaro. Mr. Williams only possessed the laptop by virtue of Asaro—the same Asaro who took the stand to pin this murder on Mr. Williams.

To establish a link between the laptop and Mr. Williams, the prosecution presented testimony from Glenn Roberts, who possessed the laptop 15 months after Mr. Gayle's murder. Roberts testified that Mr. Williams pawned the laptop to him shortly after the time of the crime. However, Roberts was prevented, through objection from the State, from testifying about where he learned Mr. Williams obtained the laptop. Mr. Williams had not himself secured the laptop, but rather had gotten it from his "girl" – Laura Asaro. Roberts has since provided that information in a sworn affidavit, establishing that Mr. Williams stated to him he acted only as a conduit for the laptop. The jury did not hear it was Asaro who had the connection to the item, and thus to the crime. Had the jury heard this evidence, as well as all the other new evidence outlined above, including the DNA evidence excluding Mr. Williams from the murder weapon and the evidence further undermining Cole and Asaro's credibility, it would not have credited Asaro's testimony and would have discredited the laptop evidence.

* * * * *

Cole and Asaro's testimony, which was unreliable from the start, along with the laptop, were the sole pieces of evidence tying Mr. Williams to the crime. Cole and Asaro's testimony has

been refuted not only by circumstances of when each witness came forward and the inconsistent stories they provided, but also by evidence from their friends and family that they were known liars and evidence that investigators engaged in tactics known to create unreliable evidence. And the laptop–the only physical link tying Mr. Williams to the crime–more reliably points towards Asaro, not Williams. Critically, new DNA evidence never before heard by a court excludes Mr. Williams as the individual who wielded the murder weapon. Nor was Mr. Williams the person who left behind the bloody footprints or hairs or fibers. Together, this new evidence creates the possibility that "no credible evidence remains from the first trial to support the conviction." *Amrine v. Roper,* 102 S.W.3d at 548-49. As such, the Prosecuting Attorney is compelled, pursuant to Section 547.031(1), to request an evidentiary hearing where this new evidence may be considered by this Court.

CLAIM 2: TRIAL COUNSEL WAS CONSTITUTIONALLY INEFFECTIVE IN FAILING TO INVESTIGATE AND PRESENT AVAILABLE EVIDENCE TO IMPEACH THE CREDIBILITY OF THE STATE'S WITNESSES

This claim turns on the application of *Strickland v. Washington*, 466 U.S. 668 (1984). Under *Strickland*'s well-established two-prong test, ineffectiveness consists of deficient performance by counsel and resulting prejudice. *Id.* at 694.

Counsel's performance was deficient if it "fell below an objective standard of reasonableness." *Id.* at 688. "The proper measure of attorney performance remains simply reasonableness under prevailing professional norms." *Id.* at 689. Mr. Williams "must indulge a strong presumption that [his] counsel's conduct [fell] within the wide range of reasonable professional assistance." *Id.* However, counsel's strategic choices are granted deference only insofar as they are based on "thorough investigation of law and facts relevant to plausible options[.]" *Id.* "Strategy resulting from lack of diligence in preparation and investigation is not protected by the presumption in favor of counsel." *Antwine v. Delo*, 54 F.3d 1357, 1367 (8th Cir.

1995); *see Wiggins v. Smith*, 539 U.S. 510, 521-22 (2003). The various editions of the ABA Criminal Justice Standards and Death Penalty Guidelines may assist the consideration of counsel's competence. *See id.* at 524; *Padilla v. Kentucky*, 559 U.S. 356, 366–67 (2010) (citing *Bobby v. Van Hook*, 558 U.S. 4, 7 (2009) (per curiam)).

Deficient performance is prejudicial if "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* The totality of counsel's errors or omissions bear on *Strickland*'s prejudice prong. *See Kimmelman v. Morrison*, 477 U.S. 365, 386 (1986); *Williams v. Taylor*, 529 U.S. 362, 397-98 (2000). Prejudice exists where, based on a consideration of the totality of the evidence, there is "a reasonable probability that at least one juror would have struck a different balance." *Wiggins*, 539 U.S. at 537.

Here, trial counsel performed ineffectively at the guilt phase[7] by failing to investigate and present impeachment evidence for the State's primary witnesses, Henry Cole and Laura Asaro. Most notably, counsel failed to contact readily available family and friends of both Cole and Asaro who knew of their untrustworthiness and could have testified as much. Counsel also failed to investigate and present evidence of Cole's mental illness or to seek testing of Asaro for comparison to the crime-scene evidence.

A. Trial Counsel Was Ineffective for Failing to Investigate and Impeach Henry Cole.

Deficient Performance

Prior to trial, Mr. Williams provided his counsel with the names of several members of Cole's family and indicated that they could provide information about Cole that could be used for

[7] Trial counsel's penalty-phase ineffectiveness is addressed in Claim 3, *infra*.

impeachment. (Ex. 25-Joseph Green Affidavit dated 5/28/04 at ¶14). More than once, Mr. Williams specifically told counsel that he wanted them to interview Cole's son, Johnifer Griffin Cole; his niece, Dexine Cole; and his sister. (*Id.*). Defense counsel was informed that Cole's family members had personal knowledge of Cole's character and his "propensity to lie." (*Id.* at ¶ 15).

Trial counsel knew that Cole would be the "most damaging" witness the State had against Mr. Williams. (*Id.* at ¶ 13). Counsel was also aware that to effectively present Mr. Williams's defense of actual innocence, counsel "had to discredit Cole with relevant, credible evidence that he was untrustworthy and that the jury should discount his testimony entirely." (*Id.*).

And yet, counsel did not interview any of the family members. (*Id.* at ¶ 15). Counsel had no strategic reason for failing to interview Cole's family members—they "simply ran out of time." (*Id.*).

The ABA Guidelines require capital counsel to thoroughly investigate, prepare and present all avenues of factual inquiry relevant to the defense:

> A. Counsel at every stage have an obligation to conduct thorough and independent investigations relating to the issues of both guilt and penalty.
>
> 1. The investigation regarding guilt should be conducted regardless of any admission or statement by the client concerning the facts of the alleged crime, or overwhelming evidence of guilt, or any statement by the client that evidence bearing upon guilt is not to be collected or presented.

ABA Guideline 10.7.

The commentary to this guideline explains the vital importance that the investigation plays in a capital case: "At every stage of the proceedings, counsel has a duty to investigate the case thoroughly. This duty is intensified (as are many duties) by the unique nature of the death penalty." ABA Guideline 10.7 cmt.; *see also Powell v. Alabama*, 287 U.S. 45, 57 (1932) (noting "thorough-going investigation" as "vitally important"). The commentary goes on to specify that "[c]ounsel

should investigate all sources of possible impeachment of defense and prosecution witnesses." ABA Guidelines 10.7 cmt.

Counsel's unreasonable failure to contact these witnesses resulted in their failure to discredit Cole with compelling impeachment testimony. Had counsel contacted these witnesses, they would have discovered evidence leading to an inference that Cole was lying about Mr. Williams and could not be believed. Mr. Williams specifically requested that counsel speak to Cole's son, Johnifer. Had he been interviewed by counsel, Johnifer would have revealed that Cole wrote to Johnifer while Cole was in jail with Mr. Williams. (*See* Ex. 19 at ¶ 31). Cole told Johnifer that he had a "caper" going on and something "big" was coming. (*Id.*). Johnifer knew that his father had made false allegations against others in the past, beginning in the 1980s and continuing throughout his life. (*Id.* at ¶¶ 19, 22, 30, 36). Indeed, Cole even served as an informant against Johnifer, his own son, to secure leniency from the authorities. (*Id.* at ¶ 22).

Cole's nephews, Ronnie and Durwin, would have provided additional corroboration that Cole had made false allegations in the past and was unreliable. (*See* Exs. 20, 21). According to Cole's family members, Cole plotted and carried out scams, lied to and about others, and then left town. (*Id.*).

The throughline of the information Cole's family members could have provided had they been interviewed by trial counsel was that Cole would do or say anything for money. (Exs. 19, 20, 21). All of this could have been discovered had trial counsel interviewed these witnesses before trial.

Missouri courts are receptive to impeachment of witnesses through the testimony of acquaintances concerning the witness's reputation in the community for truthfulness. *See Wolfe v. State*, 96 S.W.3d 90, 92 (Mo. banc 2003) ("Wolfe's counsel also presented four impeachment

witnesses who testified against Cox's reputation in the community for truthfulness"); *Kuehne v. State*, 107 S.W.3d 285, 295 (Mo. banc 2003) (finding ineffective assistance of counsel for failing to call impeachment witnesses where the jury's decision rested solely on the credibility of the state's witnesses); *Strickland*, 466 U.S. at 687.

This case, in many respects, is not unlike *Cargle v. Mullin*, 317 F.3d 1196 (10th Cir. 2003). In *Cargle*, the court held that defense counsel's performance in the guilt phase of Cargle's capital trial was constitutionally deficient. *Id.* at 1217. Cargle, like Mr. Williams, was convicted on the testimony of two incentivized witnesses. *Id.* at 1211, 1212-13. The Tenth Circuit granted habeas relief because Cargle's trial counsel failed to investigate and interview a number of witnesses who could have been called to impeach the credibility of the incentivized witnesses. *Id.* at 1213-14. As the court found:

> Over and above the incremental benefit each of these six witnesses would have added to the defense in impeaching the government's two central witnesses . . . , there is the larger point that they could have, collectively, provided an effective overall defense strategy (*particularly in a case resting almost entirely on the credibility of these two inherently vulnerable prosecution witnesses*) that counsel utterly failed to see, much less effectively employ: showing the case involved such a tangle of inter- and intra-witness inconsistency that the jury could not be confident enough in any person's word to justify holding petitioner responsible for first degree murder beyond a reasonable doubt.

Id. (emphasis added); *see also Benn v. Lambert*, 283 F.3d 1040, 1054 (9th Cir. 2002), *cert. denied*, 537 U.S. 942 (2002).

Trial counsel also believed before trial that Cole "may have suffered from some type of mental illness," but they did not contact Cole's family who had observed Cole's symptoms—and again, without strategic reason. (Ex. 25 at ¶ 19). Had counsel conducted a reasonable investigation and interviewed members of Cole's family, significant evidence regarding his mental illness could have been presented to the jury to further erode his credibility. Cole's nephew Durwin reported

that Cole often hallucinated, recounting one incident where Cole claimed to see non-existent bugs in his hair and drinking glass. (Ex. 21 at ¶ 7). Again, counsel has conceded that there was no strategic reason for failing to contact Cole's family members who could have provided information regarding his mental health. (Ex. 25 at ¶ 19).

Prejudice

Cole was an essential piece in an otherwise circumstantial case against Mr. Williams. His credibility was front and center. Had trial counsel taken reasonable steps in interviewing Cole's family members, defense counsel would have been. sufficiently equipped with powerful impeachment evidence to completely discredit Cole's testimony. *See Banks v. Dretke*, 540 U.S. 668, 672 (2004) (considering whether evidence was "crucial to the prosecution" when determining materiality). Without Cole's testimony, the State's case was hardly viable. The State's only other source of incriminating evidence against Mr. Williams was Asaro's testimony, which was fraught with weaknesses itself. Both individually, and when aggregated with counsel's failures regarding the State's other main witness, Asaro, counsel's failure to interview Cole's known family members prejudiced Mr. Williams.

B. Trial Counsel was Ineffective for Failing to Investigate and Impeach Laura Asaro.

Deficient Performance

Trial counsel knew that Asaro and Cole "were the only witnesses who could connect Marcellus with the charged crime." (Ex. 25 at ¶ 10). Nevertheless, counsel failed to contact several "sources of possible impeachment," ABA Guideline 10.7 cmt., who could have spoken to Asaro's credibility—including her own mother and her mother's live-in boyfriend from Asaro's adolescence. Counsel's unreasonable failure to contact such witnesses resulted in their failure to impeach Asaro with available evidence.

Edward Hopson could have testified that Asaro wanted to testify because she anticipated receiving a substantial amount of money for her testimony, that Asaro desperately needed this money to feed her crack cocaine addiction, and that she had made prior false allegations against others. (Ex. 22).

Trial counsel also failed to interview witnesses who would have established that Asaro lied when she testified at trial that Mr. Williams drove his car on the day of the murder. (Ex. 29- Walter Hill Affidavit dated 3/12/2004, Ex. 30-Latonya Hill Affidavit dated 5/28/2004*).* All of these witnesses could have testified that Mr. Williams's car was not running on that day. (*Id.*). These witnesses could have also testified that Asaro had a set of keys to the car and that she could have gotten into the trunk. (Ex. 29 at ¶4). This would have allowed for defense counsel to argue that Asaro had the means and opportunity to plant incriminating evidence linking Mr. Williams to the murder of Ms. Gayle.

Finally, with respect to trial counsel's constitutionally infirm investigation into Asaro, reasonably competent counsel would have sought testing of Asaro's blood and hair for comparison to evidence collected from the crime scene that could not be matched to the victim, her husband, or Mr. Williams. If testing had revealed that none of the crime scene evidence could be scientifically linked to Asaro, Mr. Williams would be in no worse of a position. In contrast, had any of this evidence been linked to Asaro, it would have destroyed her credibility by establishing that she was present at the scene when the victim was killed. *See Wolfe v. State*, 96 S.W.3d 90 (Mo. banc 2003).

The defense had already employed a DNA expert Jami Harmon. Asaro testified at trial that she would consent to testing her blood and hair. (T. 1985). Trial counsel recognized the potential significance of this evidence when counsel pointed out in his opening statement that the police

failed to take testable samples of hair and fibers from Asaro. (T. 1699). Because trial counsel did not request testing of Asaro's known samples, the issue was never developed. Trial counsel has acknowledged he was aware of the importance of attempting to match crime scene evidence to known suspects but did not have time to do it. (Ex. 25 at ¶ 22).

Prejudice

Although the jury heard that Asaro was a prostitute and a drug addict and had expectations of receiving reward money for testifying at trial, they never heard the powerful information that Hopson and Bailey provided: Asaro had essentially admitted to testifying against Mr. Williams for the reward money. This bias/motive evidence, indicating that Asaro perjured herself for money, is significantly different from general impeachment evidence presented regarding her lifestyle and her expectation of receiving reward money.

This bias impeachment is distinct from the prior-inconsistent-statement evidence that was elicited on cross-examination. "A colorable showing of bias can be important because, unlike evidence of prior inconsistent statements—which might indicate that the witness is lying—evidence of bias suggests why the witness might by lying." *Cargle*, 317 F.3d at 1215 (quoting *Stephens v. Hall*, 294 F.3d 210, 224 (1st Cir. 2002)).

Because Asaro was such a vital witness to the State's case, exposure of Asaro's motivation in "framing" Mr. Williams would have amplified any attack on Asaro's credibility to the point of no return. *See Jones v. Gibson*, 206 F.3d 946, 956-57 (10th Cir. 2000) (discussing counsel's inability to question witness regarding pending charges against her). The individual and cumulative impact of trial counsel's failures with respect to investigating Asaro result in a reasonable probability that, but for counsel's professional errors, the outcome would have been different.

CLAIM 3: TRIAL COUNSEL WAS INEFFECTIVE IN FAILING TO INVESTIGATE AND PRESENT AVAILABLE MITIGATION THAT WOULD HAVE CAUSED AT LEAST ONE JUROR TO RETURN A LIFE VERDICT

Mr. Williams's trial counsel also performed ineffectively at the penalty phase by failing to investigate and present mitigation evidence that would have rebutted the State's aggravators and compelled at least one juror to return a verdict of life in prison without parole. *See Wiggins*, 539 U.S. at 537; *Antwine,* 54 F.3d at 1365. Counsel failed to obtain expert testimony that would have explained and contextualized Mr. Williams's criminal history that the State presented as an aggravating factor; such expert testimony would have also served as independent mitigation contextualizing Mr. Williams's troubled background and his familial, social, and psychological history. Counsel also failed to contact key witnesses who could have provided mitigating evidence, including Mr. Williams's immediate family. The cumulative effect of counsel's deficient performance undermines confidence in the reliability of Mr. Williams's death verdict and requires vacating his sentence. *See Strickland*, 466 U.S. at 694.

Deficient Performance

Capital counsel has "an 'obligation to conduct a thorough investigation of the defendant's background.'" *Porter v. McCollum*, 558 U.S. 30, 39 (2009) (quoting *Williams*, 529 U.S. at 396). Such an investigation is necessary to develop information that will humanize the defendant in the eyes of the sentencing jury, *see Porter*, at 41, which has already determined that the defendant is guilty of a capital offense. "Given the severity of the potential sentence and the reality that the life of the defendant is at stake," courts have considered counsel's "duty to collect as much information as possible about the defendant for use at the penalty phase of his state court trial." *Antwine*, 54 F.3d at 1367.

This duty was well established by the year 2000 when counsel was appointed. *See Rompilla v. Beard,* 545 U.S. 374, 387 n.7 (2005) (citing the 1982 ABA Criminal Justice Investigation

Standards on Investigation in support of finding trial counsel ineffective for failing to conduct a thorough mitigation investigation); *Wiggins*, 539 U.S. at 524-25 (citing the 1982 ABA Criminal Justice Investigation Standards and the 1989 ABA Capital Guidelines for a representation that occurred in 1989); *Williams*, 529 U.S. at 396 (citing the 1980 ABA Criminal Justice Investigation Standards for a representation that occurred in 1986); *Antwine*, 54 F.3d at 1367.

Regarding counsel's duty to investigate and present mitigating evidence, the ABA Guidelines state in pertinent part:

> Counsel's duty to investigate and present mitigating evidence is now well established. The duty to investigate exists regardless of the expressed desire of a client. Nor may counsel sit idly by, thinking that investigation would be futile. Counsel cannot responsibly advise a client about the merits of different courses of action, the client cannot make informed decisions and counsel cannot be sure of the client's competency to make such decisions unless he has first conducted a thorough investigation with respect to both phases of the case.
>
> Counsel needs to explore:
>
> [1] Medical history, (including hospitalizations, mental and physical illness or injury, alcohol and drug use, prenatal and birth trauma, malnutrition, developmental delays and neurological damage);
>
> [2] Family and social history, (including physical, sexual or emotional abuse, family history of mental illness, cognitive impairments, substance abuse or domestic violence; poverty, familial instability, neighborhood environment and peer influence; other traumatic events such as exposure to criminal violence, the loss of a loved one or a natural disaster; experiences of racism or other social or ethnic bias cultural or religious influences. . . .);
>
> [3] Educational history (including achievement, performance, behavior and activities), special educational needs (including cognitive and limitations and learning disabilities and the opportunity or lack thereof and activities.

ABA Guideline 10.7 cmt.; *see also* 1989 ABA Guideline 11.4.1. Here, counsel's unreasonable failure to conduct a competent investigation resulted in their failure to present critical mitigating evidence.

Clinical psychologist Dr. Donald Cross conducted an extensive post-conviction investigation into Mr. Williams's background, including interviews with family, childhood records, and criminal history records. (Ex. 26- Dr. Donald Cross Report). If expert evidence like Dr. Cross's had been presented to the jury, they would have heard that Mr. Williams grew up in an extremely violent household. (*Id.*). His family moved often, so he was shuffled to various schools. (*Id.*). School records reflected Mr. Williams's borderline intelligence. His IQ in the ninth grade was 80. (*Id.*). Mr. Williams struggled and found school very difficult, failing nine classes in seventh grade; and he was frequently absent. (*Id.*). By the tenth grade, his last year of school, he received all failing grades, had 35 absences, a cumulative GPA of 1.1, and his ending class ranking was 339 out of 390. (*Id.*).

Dr. Cross could have offered testimony regarding Mr. Williams's emotional and behavioral issues. (*Id.*). He acted out as early as kindergarten, having been suspended for fighting. (*Id.*). Because of the severe discord in his home environment, he developed mental impairments which remained untreated. Dr. Cross discovered at least eight separate risk factors.[8] First, Mr. Williams had a poor relationship with his parents. (*Id.*). His mother viewed her pregnancy as a mistake, the result of a one-night stand. (*Id.*). She never showed her son affection, concern or care. (*Id.*). Mr. Williams's father completely abandoned him. (*Id.*). He saw his father only three times in his life. At their first meeting, his father beat him. (*Id.*).

[8] Specifically, Dr. Cross enumerated risk factors summarized as: (1) the violence and lack of support from adult role models in Mr. Williams's childhood; (2) the multiple sexual abuses he experienced; (3) pervasive family conflict; (4) consistent and extreme poverty; (5) alienation and rebelliousness; (6) his family's favorable attitudes towards delinquent and violent behavior; (7) academic failure; and (8) his father's drug addiction and criminal histories. (*See* Ex. 26 at ¶¶ 45-57).

Mr. Williams and his brother Jimmy were sexually abused by their Uncle James Hill when Mr. Williams was seven or eight years old. (*Id.*). He was also sexually abused by a maternal aunt, and when he turned to the church for help, he was sexually abused by an older church deacon. (*Id.*). Dr. Cross could have explained to the jury that victims of child sexual abuse frequently develop feelings of anger and confusion in conjunction with a desire to re-establish the control in their lives that was taken away by the abuser. This anger is easily channeled into violence because Mr. Williams was abused in early stages of childhood development and was very vulnerable, confused, and emotionally fragile because family members violated his trust by abusing him. (*Id.*).

Dr. Cross could have explained to the jury how Mr. Williams was affected emotionally by intense family conflict. Mr. Williams grew up in a violent household, where his grandfather beat his grandmother in front of the children. (*Id.*). His mother and stepfather frequently beat Mr. Williams and his brothers. (*Id.*). They stripped him naked and beat him with tree branches and belts. As a result, he could not sleep and had terrifying nightmares. (*Id.*). With no safe haven, he thought of suicide and turned to drugs to cope with his turbulent home life. (*Id.*).

Mr. Williams also grew up in extreme poverty. (*Id.*). At times, 15-17 family members lived in a cramped, squalid apartment. (*Id.*). Mr. Williams's neighborhood was plagued by high unemployment, crime, and drugs. (*Id.*). Mr. Williams, from an early age, often witnessed his uncles use drugs and commit crimes. (*Id.*).

Dr. Cross could have explained that all of Mr. Williams's acting out in school and attempts to gain his mother's attention were essentially cries for help that were, in turn, met with beatings. (*Id.*). To make matters worse, his family actively promoted his delinquent and violent behavior, encouraging him to steal, fight, and commit violent acts. (*Id.*).

Mr. Williams's descent into a life of crime also resulted from his academic failures and his addiction to drugs. Unable to succeed in school, like many youths living in poverty, he became a criminal. His addiction to drugs compelled him to steal to support his habit. Because of his turbulent background, he was mentally and emotionally unstable and was suicidal. (*Id.*). Dr. Cross diagnosed Mr. Williams as suffering from significant mental illness including depression, drug dependence, and Post-Traumatic Stress Disorder (PTSD). (*Id.* at ¶79). PTSD is a serious anxiety disorder that develops "following exposure to an extreme traumatic stressor involving direct personal experience of an event that involves actual or threatened death or serious injury, or a threat to the physical integrity of another person." Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition, 1996, 309.81, p. 424 (DSM IV). Child sexual abuse is well recognized as a cause of PTSD by both the DSM-IV and the psychiatric community. *See* DSM-IV at 424. A person suffering from PTSD experiences "impaired affect modulation; self-destructive and impulsive behavior; dissociative symptoms; somatic complaints; feelings of ineffectiveness, shame, despair, or hopelessness; feeling permanently damaged . . . hostility; social withdrawal; feeling constantly threatened[.]" *Id.* at 425. Mr. Williams's background and impairments would have provided powerful evidence to explain to the jury his descent into a life of crime.

Dr. Cross, in his affidavit, summarized his findings and conclusions from his evaluation of Mr. Williams, interviews with friends and family, and review of his records; in part as follows:

> In summary, Mr. Williams was at risk for violent delinquent behavior at conception. He was helpless to manifest anything but dysfunctional behavior with nine clearly delineated risk factors and no buffers available. His drug dependency clearly reduced his social inhibitions to a level that increased the probability that some form of violence would manifest.
>
> Resources for social bonding to positive role models was non-existent, no teacher reached out to him, he had no opportunity to be coached by a caring and supportive male figure nor were youth leaders made available to this young male during his developmental years. When he attempted to reach out to the church he was once

again sexually assaulted by the church deacon. He simply did not have a chance to live a healthier and more functional life. His violent drug infested neighborhood, his dysfunctional family, family housing instability, absence of a father or an appropriately supportive father figure and the childhood trauma made it impossible for him to develop effective strategies to resolve his emotional, interpersonal conflicts and to realize a definitive resolution of his adolescent identity crisis.

Mr. Williams learned that violence is the only solution available to him. It got the attention of others, the attention he longed for from his mother, however negative, when he was a child.

This vicious cycle is not easily broken. Early intervention is essential to deter this process that was so well established in Mr. Williams' behavior by the time he reached kindergarten. But the [mental health] referral did not occur until the third grade. Apparently no significant follow-up was made to this referral probably due to his school change or transfer.

Inadequate resources and no hope for a better life is what he was left with as he decided to drop out of high school. Again, he reached out for help landing in a psych ward at Christian Hospital following two fainting episodes. His report of suicide ideation at the age of fourteen and again at the age of fifteen is symptomatic of adolescent depression.

Thus, the mental health problem was never uncovered and addressed even though the symptoms were ever-present and people were reacting to them regularly. The final mental disorder diagnosis considering a more complete symptom picture is Post-Traumatic Stress Disorder. The defiance, ignoring of rules, anger and subsequent violence, current intrusive thoughts, self doubt and self effacing thoughts, adolescent depression, physical and sexual abuse experience were all ignored and left unabated and untreated. Mr. Williams currently and has for many years suffered from this mental disorder.

These disorders constitute a significant mental illness or defect, impairing Mr. Williams' ability to conform his conduct to the requirements of the law. But for Mr. Williams' mental illnesses and defects intensified by multiple risk factors, Mr. Williams would not have been involved in any of the criminal activities that were used as aggravating circumstances in this case.

The culmination of each of these disorders and risk factors contributed to his inability to cope with stressful situations and contributed to Mr. Williams' behavior during his prior criminal history. Based on the mental illnesses, their combined symptoms and the above identified risk factors; Mr. Williams was under the influence of extreme mental or emotional disturbance and circumstantial conditions that his ability to appreciate the wrongfulness of his actions and conform his behavior to the law were substantially impaired.

(Ex. 26 at ¶¶ 72-73, 76, 77, 78-79, 81, 84).

Further, trial counsel neglected to obtain mitigating evidence from Mr. Williams's immediate family. Compelling mitigation evidence could have been discovered and presented if trial counsel had bothered to interview Mr. Williams's family members, including his brother Jimmy, his cousin Latonia, his grandfather, his mother, and his aunt. These witnesses could have corroborated life history information that Dr. Cross later discovered and were ready and willing to testify regarding Mr. Williams's upbringing and the trauma and abuse he suffered at an early age. (*Id.*). His family could have recounted the physical and sexual abuse he suffered, his attack by a vicious dog, and the serious head injury he suffered when he fell from a second-floor balcony. (*Id.*). These witnesses also chronicled a family environment permeated with drugs, violence, and instability. (*Id.*). Mr. Williams's brother corroborated the fact that they both were sexually abused by their Uncle James. (*Id.*). Because of Mr. Williams's traumatic home life, school officials referred him to a psychiatrist in the third grade. (*Id.*). Teachers called his mother, but she simply ignored their requests to seek help for her son. (*Id.*).

Trial counsel stated that because of his training in handling capital cases, he knew the importance of conducting a thorough social history investigation of defendants facing the death penalty. (Ex. 25 at ¶¶ 26-29). However, despite knowing the importance, he was unable to conduct an adequate investigation because he was penalty-phase counsel in another capital trial less than a month before Mr. Williams's. (*Id.* at ¶ 23). Because of his obligations in that case and the fact that the trial court denied a continuance, Williams's counsel stated that he did not have sufficient time to prepare for Mr. Williams's trial. (*Id.* at ¶ 24).

Williams's counsel reviewed the social history and reports prepared by Dr. Cross. He indicated that "had I obtained the diagnosis that Dr. Cross came up with during the post-conviction

case, I would have put this evidence on at trial. This evidence would have been important to Marcellus' penalty phase defense in that it would have provided explanations for his prior criminal history." (*Id.* at ¶ 31). Williams's counsel also indicated that this evidence would have given the jury a more sympathetic picture of Mr. Williams and would have bolstered the testimony of his family. (*Id.* at ¶ 32, 34). Williams's counsel explained that he did not conduct a social history simply because "we ran out of time because of problems we had in getting discovery from the State and, my inability to work on Marcellus' case because of my obligations in [my other capital trial.] I believe testimony like Dr. Cross' would have been very mitigating and could have saved Marcellus' life." (*Id.* at ¶ 35).

Despite the red flags in Mr. Williams's history that made apparent the need for such expert and family investigation, counsel allowed these areas of potential mitigation to remain unexplored. *See Wiggins*, 539 U.S. at 525 (holding that counsel's investigation was unreasonable where he failed to pursue important social history evidence of which he had notice).

Prejudice

Because Mr. Williams's jury did not hear any of the above mitigating evidence, they were deprived of the information needed to assess his individual character and record and "to accurately gauge his moral culpability." *Porter*, 558 U.S. at 41; *see Eddings v. Oklahoma*, 455 U.S. 104, 112 (1982). This procedure recognizes "the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse." *Penry v. Lynaugh*, 492 U.S. 302, 319 (1989). Consequently, consideration of a capital defendant's life history is a "constitutionally indispensable part of the process of inflicting the penalty of death." *Eddings*, 455 U.S. at 112.

Trial counsel's failure to present mitigation therefore "undermine[s] confidence in the outcome" of the proceedings when the sentencer is deprived of this type of evidence because of deficient performance. *Strickland*, 466 U.S. at 694; *see also Eddings*, 455 U.S. at 112. In assessing prejudice in this context, the Court "reweigh[s] the evidence in aggravation against the totality of available mitigating evidence." *Wiggins*, 539 U.S. at 534. The addition of mitigation not presented at trial may be sufficient to warrant leniency even where the circumstances of the crime themselves give rise to substantial aggravation. *See Williams*, 529 U.S. at 398.

As the foregoing discussion demonstrates, "[t]his is not a case in which the new evidence 'would barely have altered the sentencing profile presented to the [sentencing entity].'" *Porter*, 558 U.S. at 41 (quoting *Strickland*, 466 U.S. at 700). Rather, the jury "heard almost nothing that would humanize [Mr. Williams] or allow [them] to accurately gauge his moral culpability." *Id.* Indeed, because counsel failed to investigate and present the above mitigation, Mr. Williams's jury was left with the false impression that his social, familial, and psychological history were relatively normal. Despite counsel's presentation of minimal mitigation evidence, the jury was deprived of the kind of explanation that can make a difference. *See*, *e.g.*, *Sears v. Upton*, 561 U.S. 945, 954 (2010) (per curiam) (finding that state court unreasonably declined to find prejudice from failure to present additional mitigation even where counsel presented "a superficially reasonable mitigation theory").

Moreover, the evidence which could have been presented is relevant as "the kind of troubled history [the Supreme Court has] declared relevant to assessing a defendant's moral culpability." *Wiggins*, 539 U.S. at 535; *Burger v. Kemp*, 483 U.S. 776, 779 n.7 (1987) (noting that the defendant's "mental and emotional development were at a level several years below his chronological age could not have been excluded by the state court" as mitigating evidence (internal

quotations omitted)). Had the jury been able to place Mr. Williams's life history on the mitigating side of the scale, there is a reasonable probability that at least one juror would have struck a different balance. *See Wiggins*, 539 U.S. at 538; *Antwine*, 54. F.3d at 1365.

CLAIM 4: IMPROPER REMOVAL OF QUALIFIED JURORS FOR RACIAL REASONS VIOLATED MR. WILLIAMS'S CONSTITUTIONAL RIGHTS AND *BATSON*

Race should never be a factor in jury selection. "The Constitution forbids striking even a single prospective juror for a discriminatory purpose." *Foster v. Chatman*, 578 U.S. 488, 499 (2016). The Supreme Court has consistently and roundly sought to eliminate the improper exercise of a peremptory for a racially pretextual reason. *See Batson v. Kentucky*, 476 U.S. 79 (1986); *Powers v. Ohio*, 499 U.S. 400 (1991); *Miller-El v. Cockrell*, 537 U.S. 322, 339 (2003) (*Miller-El I*); *Miller-El v. Dretke*, 545 U.S. 231, 252 (2005) (*Miller-El II*); *Johnson v. California*, 545 U.S. 162 (2005); *Snyder v. Louisiana,* 552 U. S. 472, 481-84 (2008); *Foster*, 578 U.S. 488; *Flowers v. Mississippi*, 139 S.Ct. 2228 (2019).

Pursuant to Section 547.031(3), there is "clear and convincing evidence of . . . constitutional error" in Mr. Williams' trial because there is clear and convincing evidence that the state unconstitutionally excluded potential jurors on the basis of race. The evidence establishes in this case both that 1) the prosecutors who tried Mr. Williams had an apparent pattern and practice of unconstitutionally excluding Black potential jurors, and, 2) in keeping with this pattern and practice, the state excluded two qualified Black jurors on the basis of their race.

St. Louis County Prosecutors' Pattern and Practice

St. Louis County's pattern or practice of excluding Black jurors both predates and follows *Batson*. In 1990, attorneys representing Missouri death row inmate Maurice Byrd submitted nine affidavits from criminal defense lawyers who regularly practiced in St. Louis County. All nine

stated that Black jurors were systematically excluded from service in St. Louis County by the prosecution's use of peremptory strikes. (Ex. 27-St. Louis County attorney affidavits).

The St. Louis County prosecutors' history of excluding Black veniremembers is no secret to the public. When former assistant prosecutor Rick Barry ran for the Prosecuting Attorney's office in 1990, he campaigned on ending the St. Louis County Prosecutor's policy of peremptorily striking Black jurors from criminal cases.[9] Mr. Barry stated that his more experienced colleagues in the prosecutor's office urged him to strike Black people from juries.[10]

In a 1971 hearing conducted on a motion for new trial in the case of *State v. Collor*, two former St. Louis County prosecutors acknowledged their jurisdiction's practice of excluding Black jurors. (Ex. 28- Excerpts of *Collor* transcript). Donald Wolff testified, "[W]hen I prosecuted a Black defendant I systematically excluded Black members of the panel because I felt that they would be more sympathetic to the defendant than perhaps white upper class or white middle class members of the panel would[,] particularly if I had no other reason for exercising my right to a peremptory challenge." (*Id.* at 615). Wolff added that such stereotyped beliefs were "utilized by most Prosecutors with whom I was associated." (*Id.* at 614). William Shaw likewise acknowledged his participation in "systematic[ally]" striking Black panelists, and believed his colleagues did so because of the "general prejudice" against Black people in St. Louis County. (*Id.* at 579, 588-89). *Miller-El II*, 545 U.S. at 263 ("We know that for decades leading up to the time this case was tried prosecutors in the Dallas County office had followed a specific policy of systematically excluding blacks from juries.").

[9] *See* Tim Poor, "Barry Stresses Minority Hiring," ST. LOUIS POST DISPATCH, Jun. 29, 1990, at 8A.
[10] *Id.*

The practice that continued before Mr. Williams' trial was also apparent after his trial. The Supreme Court of Missouri reversed two death penalty cases out of St. Louis County for *Batson* violations, and in both cases they were the same prosecutors from Mr. Williams's trial. In *State v. McFadden,* 216 S.W.3d 673, 674-77 (Mo. banc 2007), the court found that *Batson* was violated when the prosecutor used five of nine peremptory strikes against minority prospective jurors, and that his explanation for one strike—"crazy red hair"— was implausible and race-based. Additionally, McFadden's other murder conviction and death sentence was also reversed because the same prosecutor from Mr. Williams's case provided explanations for striking five Black prospective jurors that were pretexts for purposeful racial discrimination. *State v. McFadden,* 191 S.W.3d 648, 656, 657 (Mo. banc 2006). The *McFadden* cases are not anomalies.

In 2005, another murder conviction from St. Louis County was reversed because the trial court improperly accepted a proposed remedy (the strike of a similarly situated white juror) from a St. Louis County prosecutor in exchange for his racially discriminatory strike of a Black prospective juror. *State v. Hampton,* 163 S.W.3d 903, 904-05 (Mo. banc 2005). Missouri's intermediate appellate courts have also reversed a number of other St. Louis County convictions because prosecutors struck Black prospective jurors for racially discriminatory reasons. *See State v. Hopkins,* 140 S.W.3d 143 (Mo. App. 2004) (prosecutor's explanations for striking three minority prospective jurors were pretexts for purposeful racial discrimination); *State v. Holman,* 759 S.W.2d 902 (Mo. App. 1988) (rejecting prosecutor's explicit explanation for striking Black female prospective juror because she was a "woman" and "black"); *State v. Robinson,* 753 S.W.2d 36 (Mo. App. 1988) (prosecutor struck the only three Black prospective jurors and failed to rebut defendant's *Batson* challenge); *State v. Williams,* 746 S.W.2d 148, 157 (Mo. App. 1988)

(prosecutor struck the only three Black prospective jurors; his explanation for one such strike, that the juror was same age as the defendant, was a pretext for purposeful racial discrimination).

This pattern and practice evidence regarding a county's prosecutor's peremptory strikes against Black prospective jurors constitutes persuasive relevant evidence to a reviewing court's *Batson* analysis. *Miller-El I,* 537 U.S. at 347 (pattern and practice evidence "is relevant to the extent it casts doubt on the legitimacy of the motives underlying the State's actions in petitioner's case"); *Miller-El II,* 545 U.S. at 253 ("the appearance of discrimination is confirmed by widely known evidence of the general policy of the Dallas County District Attorney's Office to exclude Black venire members from juries at the time Miller-El's jury was selected."), at 263 ("for decades leading up to the time this case was tried prosecutors in the Dallas County office had followed a specific policy of systematically excluding Blacks from juries").

The State violated *Batson* during Mr. Williams's trial

There is clear and convincing evidence of unconstitutional race-based exclusion in Mr. Williams case.

To establish a *Batson* violation:

> First, a defendant must make a *prima facie* showing that a peremptory challenge has been exercised on the basis of race[; s]econd, if that showing has been made, the prosecution must offer a race-neutral basis for striking the juror in question[; and t]hird, in light of the parties' submissions, the trial court must determine whether the defendant has shown purposeful discrimination.

Snyder, 552 U.S. at 476-77 (citations omitted).

The third *Batson* element, pretext, focuses on the plausibility, persuasiveness, and credibility of the State's explanations for its peremptory strikes of Black prospective jurors. Implausible explanations by the State, such as those asserting reasons applicable to similarly situated non-Black prospective jurors it did not strike, suggest the reasons are pretext for purposeful discrimination. *Miller-El II,* 545 U.S. at 246, 252, 258 n.17; *Purkett v. Elem,* 514 U.S.

765, 768 (1995); *Ford,* 67 F.3d at 169 (under *Swain*); *Walton v. Caspari,* 916 F.2d 1352, 1361-62 (8th Cir. 1990) (under *Swain*); *Garrett v. Morris,* 815 F.2d 509, 513-14 (8th Cir. 1987) (under *Swain*). In *Miller-El II,* the "reasonable inference" from different questioning was because race was the major consideration in the way they exercised their strikes. 545 U.S. at 260.[11]

In Mr. Williams's case, the St. Louis County Prosecutor used six of nine peremptory strikes (67%) against six of seven (86%) of the Black prospective jurors. (T. 1568) (listing State's peremptory strikes against Prospective Jurors 8, 14, 18, 53, 58, 64, 65, 69, and 72); (T. 1569) (listing Prospective Jurors 8, 12, 58, 64, 65, 69, and 72 as Black); (T. 3202; 3210). As the Supreme Court noted in *Miller-El I,* 537 U.S. at 342, "statistical evidence alone raises some debate as to whether the prosecution acted with a race-based reason when striking prospective jurors," where prosecutors used 10 of 14 peremptory strikes (71%) against Black prospective jurors. *See also Miller-El II,* 545 U.S. at 239, 240-41 ("[t]he numbers describing the prosecution's use of peremptories are remarkable"); *Ford v. Norris*, 67 F.3d 162, 164, 167 (8th Cir. 1995) (affirming grant of habeas relief under *Swain v. Alabama*, 380 U.S. 202 (1965), (where prosecutor struck all Black prospective jurors); *Devose v. Norris*, 53 F.3d 201, 203-05 (8th Cir. 1995) (affirming grant of habeas relief under *Batson* where prosecutors used all peremptory strikes to strike 60 percent of Black prospective jurors).

Under the *Miller-El* line of cases, evidence of systematic discrimination by a prosecutor over a period of time also can persuasively demonstrate pretext. Consistent with St. Louis County's pattern and practice of racial discrimination in jury selection, and the statistical evidence of the

[11] The Conviction and Incident Review Unit of St. Louis County Prosecuting Attorney has reviewed the trial files of capital cases originating in this office, including a search for *voir dire* notes when investigating various claims raised in this case and other cases alleging racial discrimination in jury selection. In each capital case, including this one, there are no *voir dire* notes in the file.

state's exclusion of Black jurors in Mr. Williams' case, the state's pretextual proffered justifications for striking two jurors in Mr. Williams's case establish that the state violated *Batson* on at least two occasions during Mr. Williams's trial.

The State exercised preemptory challenges against two Black potential jurors—Henry Gooden and William Singleton. As discussed below, the state's proffered reasons for excluding Gooden and Singleton were either explicitly race-based (in the case of Gooden) or revealed in context to be a mere pretext for race-based exclusion (in the case of both Gooden and Singleton).

Further, examination of the prosecutor's *voir dire* in Mr. Williams's case reveals a "broader pattern of practice" to exclude black jurors through patterns of questioning. *Id.* at 253; *Snyder,* 552 U.S. at 481-84. The United States Supreme Court in *Miller-El II* and *Snyder* condemned a state's use of disparate lines of questioning with white and Black veniremembers. A comparative review of the *voir dire* between white and Black veniremembers in Mr. Williams' case demonstrates similar disparate questioning.

Henry Gooden is the first potential Black juror unconstitutionally stricken by the state in Mr. Williams's trial. The main reason the prosecutor struck potential Mr. Gooden was because he looked similar to Mr. Williams. This was an exclusion on the basis of race—both men are Black. Gooden "looked very similar to the defendant [Williams]" and "reminded [the prosecutor] of the defendant [Williams]." (T. 1586). Mr. Gooden was struck, in part, because he was Black. *See, e.g.*, *Georgia v. McCollum,* 505 U.S. 42, 59 (1992) ("the exercise of a peremptory challenge must not be based on . . . the race of the juror"). The prosecutor's purportedly "neutral" explanation cannot be based upon the race of the juror. *Hernandez v. New York*, 500 U.S. 352, 360 (1991). Absolutely no legal authority supports an overtly race-based explanation as race neutral. *State v. Hopkins,* 140 S.W.3d 143, 156-57 (Mo. App. 2004) (reversing conviction where trial court held prosecutor's

partial explanation of strike against Black prospective juror as not liking juror's hair was race-based).

The state then offered that Mr. Gooden was "weak" on the death penalty. (T. 1586). The record rebuts this pretextual explanation. Mr. Gooden not only said he could impose death but that he could sign a death verdict. (T. 762-63). This record reflects that Gooden could consider imposing the death penalty, could sign the verdict of death, and had previously favored the death penalty in appropriate cases. These facts directly contradict the prosecutor's assertion that Juror Gooden was "weak" on the death penalty. As the Eighth Circuit has held, where a Black prospective juror answers "yes" to whether she "could and would impose the death penalty in a proper case," a prosecutor's subsequently-asserted explanation for striking her on the basis that "she was not strong on the issue of the death penalty" can constitute a pretext for purposeful racial discrimination. *Ford,* 67 F.3d at 167, 168-69.

The State's claim that Mr. Gooden was "weak" on the death penalty was a mischaracterization of the record; a prosecutor's "mischaracterization of the record" can also demonstrate racial animus. *Foster*, 578 U.S. at 510; *see also Miller-El II*, 545 U.S. at 244 (a prosecutor mischaracterizing a juror's testimony when giving a facially race-neutral reason for the peremptory strike tends to show discriminatory intent). This mischaracterization also supports a finding of pretext because the state did not strike white jurors who gave similar responses to Gooden—indeed, these white jurors were seated. (T. 663-64, 666) (Juror McCarthy); (T. 564-65) (Juror Taylor). *See Ford,* 67 F.3d at 168-70 (granting habeas relief under *Swain* because prosecutor's explanation that Black prospective juror "was not strong" on death penalty was contradicted by record and also applied to other non-Black prospective jurors not stricken). In sum, the St. Louis County prosecutors' alleged explanation for striking Mr. Gooden for being "weak

on" the death penalty was not credible because it applied equally to similar white prospective jurors who were not stricken. *Miller-El II,* 545 U.S. at 246, 252, 258 n.17.

The state then offered that potential Juror Gooden should be disqualified because he is a postal employee. (T. 1494, 1586). He stated, "I find that postal service employees are very liberal. I'm talking about mail handlers and clerks. People who work in the post office in that capacity, especially, are that way, it's been my experience when I go into the post office, seeing the people that work there. And on other juries, I tend to strike postal service employees." (T. 1596-97). But the prosecutor did not strike a white juror who was also an employee of the postal service, albeit a mechanic. (T. 1587); *Miller-El II,* 545 U.S. at 246, 252, 258 n.17. Gooden's employment was not a genuine concern, and rather a pretext to exclude him based on his race. [12]

The State also violated *Batson* when it struck potential Black juror William Singleton. The state then offered that Singleton was "weak" on the death penalty. Mr. Singleton said that he could vote for the death penalty, keep an open mind throughout the process, make a decision based on the evidence and the law, and follow the State's burden of proof beyond-a-reasonable-doubt. (T. 763, 768, 775-76, 778). He did not think that either of the two sentencing options (the death penalty or life imprisonment) was more lenient than the other: "Either way, [the defendant]'s gone for the rest of his life." (T. 766). Significantly, the prosecutors chose not to strike three similarly situated white prospective jurors—Prospective Juror 70 (Brueggerman), sat on Mr. Williams's jury despite his statement at *voir dire* that life without the possibility of parole is "as bad as or worse than the

[12] The Supreme Court of Missouri, in 2003, encountered a similar issue in another death penalty case out of St. Louis County where a venireperson was struck for being an employee of the postal service. The Court, in *State v. Edwards*, strongly cautioned against courts allowing employment-related reasons in future cases, especially the tenuous "postal worker" reason offered by the State again and again to support peremptory strikes against potential Black jurors. 116 S.W.3d 511, 528 (Mo. banc 2003).

death penalty." (T. 789; 1611). Jurors McCarthy and Taylor (both white) also sat on Mr. Williams' jury despite providing similar answers. (T. 663-64, 666) (Juror McCarthy); (T. 564-65) (Juror Taylor). Implausible explanations by the State, such as those asserting reasons applicable to similarly situated non-Black prospective jurors whom it did not strike, are pretexts for purposeful discrimination. Further, a prosecutor's "mischaracterization of the record" demonstrates racial animus. *Foster*, 578 U.S. at 510; s*ee also Miller-EL II*, 545 U.S. at 244 (a prosecutor mischaracterizing a juror's testimony when giving a facially race-neutral reason for the peremptory strike tends to show discriminatory intent).

The State then offered that potential Juror Singleton should be disqualified because he was court martialed in 1988. (T. 1420-21). However, this ignores that Singleton was honorably discharged, and at the time of being removed, continued to serve in the reserves. Further, the trial prosecutor accepted a white juror who sat despite a conviction for receiving stolen property, (T. 1413-14, 1420-21, 1611) (Juror Vinyard); and did not strike a white juror who had been convicted of indecent exposure (T. 1425, 1427) (Juror McDermott). Again, implausible explanations applicable to similarly situated non-Black prospective jurors whom the state did not strike are pretexts for purposeful discrimination. *See Miller-El II,* 545 U.S. at 246, 252, 258 n.17.

In sum, there is clear and convincing evidence that Mr. Williams's trial was tainted by constitutional error because the state violated *Batson* and purposefully excluded potential Black jurors. St. Louis County—including the very same prosecutors who tried Mr. Williams—has a history of systematically excluding Black potential jurors. Mr. Williams' trial was no different. Potential Black jurors Gooden and Singleton were stricken on account of their race, and the evidence bears out that the state's proffered "race neutral" reasons were either not race-neutral (in

the case of Gooden), or plainly pretext for racial discrimination as evidenced by the state's refusal to exclude similarly-situated white jurors on the same grounds.

CONCLUSION

To date, no court has considered the compelling testimony by three separate DNA experts excluding Mr. Williams as the individual who wielded the knife found in Ms. Gayle's body. And no court has considered this evidence in the context of the lack of evidence placing Mr. Williams at Ms. Gayle's home, and the increasing lack of credibility of Cole and Asaro's testimony, which, beyond Mr. Williams having possessed stolen property, the laptop, is the only evidence underlying Mr. Williams's conviction.

As such, the Prosecuting Attorney hereby petitions this Court to review Mr. Williams' conviction in light of the compelling evidence that Mr. Williams "may be innocent or may have been erroneously convicted." Section 547.031(1); *see also Imbler*, 424 U.S. at 427 n.25 (prosecutors are "bound by the ethics of [their] office to inform the appropriate authority of after-acquired or other information that casts doubt upon the correctness of the conviction.").

Further, beyond the evidence suggesting Mr. Williams's actual innocence, the Prosecuting Attorney likewise has outlined compelling evidence of constitutional errors during Mr. Williams's trial, including an investigation so deficient it violated due process, ineffective assistance of counsel, and the state's unconstitutional exclusion of Black jurors based on race. This evidence "of constitutional error at the original trial . . . undermines the confidence in the judgment." Section 547.031(3).

Both the new DNA evidence and the evidence of constitutional errors constitutes supports this Court concluding "that the convicted person may be innocent or may have been erroneously convicted." Section 547.031(1). The Prosecuting Attorney through its Special Counsel therefore requests a hearing on this Motion pursuant to Section 547.031(2).

Respectfully Submitted,

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