Nos. 24-5606 & 24A826

In the Supreme Court of the United States

MARCELLUS WILLIAMS, PETITIONER,

v.

DAVID VANDERGRIFF, RESPONDENT.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

RESPONDENT'S APPENDIX TO BRIEF IN OPPOSITION

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SUPREME COURT OF MISSOURI

en banc

STATE OF MISSOURI EX REL. GOVERNOR MICHAEL L. PARSON,	)	
Relator,	)	
v.	)	No. SC100352
THE HONORABLE S. COTTON WALKER,	)	
Respondent.	)	

ORIGINAL PROCEEDING IN PROHIBITION

Marcellus Williams filed a petition for a declaratory judgment alleging Governor Michael L. Parson lacked authority to rescind an executive order issued by the former governor that stayed Williams' execution and appointed a board of inquiry pursuant to § 552.070.[1] After the circuit court overruled Governor's motion for judgment on the pleadings, Governor filed a petition for a writ of prohibition to bar the circuit court from taking further action other than sustaining the motion for judgment on the pleadings and denying Williams' petition for declaratory judgment. Governor is entitled to judgment on

[1] All statutory citations are to RSMo 2016.

the pleadings as a matter of law because the Missouri Constitution vests the governor with exclusive constitutional authority to grant or deny clemency and Williams has no statutory or due process right to the board of inquiry process. This Court makes permanent its preliminary writ prohibiting the circuit court from taking further action other than sustaining Governor's motion for judgment on the pleadings.

Facts and Procedural History

In 1998, Williams fatally stabbed Felicia Gayle while burglarizing her home. Following a jury trial, the circuit court sentenced him to death for first-degree murder. This Court affirmed Williams' judgment of conviction and sentence, *State v. Williams*, 97 S.W.3d 462 (Mo. banc 2003), and the judgment overruling postconviction relief. *Williams v. State*, 168 S.W.3d 433 (Mo. banc 2005).

Williams filed a petition for a writ of habeas corpus in federal court. The federal district court granted relief, but the court of appeals reversed the judgment and denied habeas relief. *Williams v. Roper*, 695 F.3d 825, 839 (8th Cir. 2012). The United States Supreme Court denied Williams' petition for a writ of certiorari. *Williams v. Steele*, 571 U.S. 839 (2013). This Court set a January 28, 2015, execution date.

On January 9, 2015, Williams filed a petition for a writ of habeas corpus in this Court. This Court vacated the execution date for additional DNA testing and habeas proceedings and appointed a special master to ensure complete DNA testing. After receiving the special master's report, this Court denied Williams' habeas petition. The United States Supreme Court denied Williams' petition for a writ of certiorari. *Williams v. Steele*, 582 U.S. 937 (2017). This Court set an August 22, 2017, execution date.

On August 14, 2017, Williams filed another petition for writ of habeas corpus, which this Court denied. The United States Supreme Court denied Williams' petition for a writ of certiorari. *Williams v. Larkins*, 583 U.S. 902 (2017).

On August 22, 2017, the former governor issued Executive Order 17-20 appointing a board of inquiry pursuant to § 552.070 and staying Williams' execution "until such time as the Governor makes a final determination as to whether or not he should be granted clemency." In 2023, Governor issued Executive Order 23-06 rescinding Executive Order 17-20, dissolving the board of inquiry, and removing "any legal impediments to the lawful execution of Marcellus Williams created by Executive Order 17-20, including the order staying the execution."

Williams filed the underlying declaratory judgment action alleging four counts: (1) Executive Order 23-06 violated his due process rights under the state and federal constitutions by denying his right to "a complete review of his claim of innocence" under § 552.070; (2) Executive Order 23-06 violated his federal due process rights under color of state law; (3) Governor lacked authority to dissolve the board of inquiry before the board provided Governor with a report and recommendation; and (4) Executive Order 23-06 violated the constitutional separation of powers.[2] Williams also filed discovery requests with the petition.

[2] In the introduction of his declaratory judgment petition, Williams offers a single, conclusory assertion he is entitled to challenge Governor's dissolution of the board of inquiry under the open courts provision of the Missouri Constitution. The open courts provision is not at issue because none of Williams' four counts allege he is entitled to relief thereunder, the circuit court did not address the open courts provision, and neither party's briefs raise the issue in this Court.

Governor filed a motion for judgment on the pleadings and a motion to stay discovery. Governor's motion for judgment on the pleadings asserted Williams had no protected due process interest in the clemency process. Governor also asserted Executive Order 23-06 did not violate § 552.070 and argues Williams's statutory claim fails as a matter of law.[3]

The circuit court overruled Governor's motion for judgment on the pleadings with respect to Counts I, II, and III, and stayed discovery for two weeks.[4] The circuit court concluded Williams had a due process right to demonstrate his innocence based on the former governor's Executive Order 17-20 appointing the board of inquiry pursuant to §552.070. The circuit court also concluded Governor had no authority to dissolve the board of inquiry. Governor filed a petition for a writ of prohibition or mandamus. This Court issued a preliminary writ of prohibition.

Prohibition

This Court has jurisdiction to issue original remedial writs. Mo. Const. art. V, § 4.1. This Court may issue a writ of prohibition:

> (1) to prevent the usurpation of judicial power when a lower court lacks authority or jurisdiction; (2) to remedy an excess of authority, jurisdiction or abuse of discretion where the lower court lacks the power to act as intended; or (3) where a party may suffer irreparable harm if relief is not granted.

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[3] Williams also named Attorney General Andrew Bailey as a defendant. The circuit court sustained Attorney General's motion to dismiss and removed him as a defendant.

[4] The circuit court concluded Williams consented to judgment on the pleadings on Count IV and did not address his separation of powers claim. Williams asserts, and Governor agrees, that Williams did not consent to judgment on the pleadings for Count IV. As shown below, Count IV fails because it is premised on Williams' erroneous claim Executive Order 23-06 violated § 552.070.

State ex rel. Tyler Techs., Inc. v. Chamberlain, 679 S.W.3d 474, 477 (Mo. banc 2023).

"Prohibition is an appropriate remedy to avoid irreparable harm when the plaintiff's petition does not state a viable theory of recovery" and the relator is entitled to prevail as a matter of law. *Id.* (internal quotation omitted). A "motion for judgment on the pleadings should be sustained if, from the face of the pleadings, the moving party is entitled to judgment as a matter of law." *Hicklin v. Schmitt*, 613 S.W.3d 780, 786 (Mo. banc 2020) (internal quotation omitted).

Executive Clemency

"Clemency is deeply rooted in our Anglo-American tradition of law, and is the historic remedy for preventing miscarriages of justice where judicial process has been exhausted." *Herrera v. Collins*, 506 U.S. 390, 411-12 (1993) (footnotes omitted). "The Due Process Clause is not violated where, as here, the procedures in question do no more than confirm that the clemency and pardon powers are committed, as is our tradition, to the authority of the executive." *Ohio Adult Parole Auth. v. Woodard*, 523 U.S. 272, 276 (1998). Therefore, "[w]hile traditionally available to capital defendants as a final and alternative avenue of relief, clemency has not traditionally been the business of courts." *Id.* at 284 (internal quotation omitted).

The Missouri Constitution enshrines the traditional understanding of clemency by granting "the governor complete discretion to grant pardons, commutations, and other

forms of clemency." *State ex rel. Dorsey v. Vandergriff*, 685 S.W.3d 18, 31 (Mo. banc 2024).[5] Article IV, § 7 provides:

> The governor shall have power to grant reprieves, commutations and pardons, after conviction, for all offenses except treason and cases of impeachment, upon such conditions and with such restrictions and limitations as he may deem proper, subject to provisions of law as to the manner of applying for pardons. The power to pardon shall not include the power to parole.

This constitutional text recognizes the governor's clemency power encompasses three distinct actions: reprieves, commutations, and pardons. A reprieve temporarily stays the execution of a sentence. *Lime v. Blagg*, 131 S.W.2d 583, 585 (Mo. banc 1939). A commutation reduces the severity of a sentence. *Id.* A pardon relieves an offender from the consequences of a specific crime. *Id.*

The distinctly different relief provided by reprieves, commutations, and pardons entails different limitations on the governor's ability to rescind previously granted clemency relief. Like a reprieve, "a pardon or commutation is a mere matter of grace[.]" *Reno*, 66 Mo. at 269. But unlike the temporary stay of the execution of a sentence granted by a reprieve, pardons and commutations permanently annul or alter the sentence itself.

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[5] Since statehood, the Missouri Constitution has vested the governor with exclusive authority to grant or withhold clemency. *See State ex rel. Lute v. Mo. Bd. of Prob. & Parole*, 218 S.W.3d 431, 435 (Mo. banc 2007) (quoting *Ex Parte Reno,* 66 Mo. 266, 269, 273 (1877)) (stating clemency "is 'a mere matter of grace' that the governor can exercise 'upon such conditions and with such restrictions and limitations as he may think proper'"); *Whitaker v. State*, 451 S.W.2d 11, 15 (Mo. 1970) (stating "the power of pardon lies in the uncontrolled discretion of the governor"); *State ex rel. Oliver v. Hunt,* 247 S.W.2d 969, 973 (Mo. banc 1952) (stating "a pardon issues upon *ipse dixit* of the governor" and is "conceived in mercy and is said to be in derogation of law"); *Lime*, 131 S.W.2d at 586 (explaining the governor's constitutional power to grant reprieves, commutations, and pardons "is beyond the range of judicial or legislative encroachment"); *State v. Sloss*, 25 Mo. 291, 294 (1857) (stating the Missouri Constitution vests "the power of pardoning in the chief executive officer of the state").

Once the governor grants a pardon or commutation, therefore, the "act of clemency is fully performed[,]" and "the grantee ... becomes entitled as a matter of right to all the benefits and immunities it confers, and of which he cannot be deprived by revocation or recall." *Id.* By contrast, because "[a] reprieve does not annul the sentence, but merely delays or keeps back the execution of it[,]" the recipient cannot "complain when such reprieve is revoked." *Lime*, 131 S.W.2d at 585. As a temporary, discretionary respite from a sentence, a reprieve creates no rights and carries only the necessary expectation that the governor may rescind it any time.

Given the governor's article IV, § 7 clemency power, Executive Order 17-20 was a reprieve because it expressly stayed Williams' execution "until such time as the Governor makes a final determination as to whether or not he should be granted clemency." Because Executive Order 17-20 was a reprieve, Governor was free to rescind it at his discretion. *Lime*, 131 S.W.2d at 586 (holding "a mere executive order, in the nature of a reprieve, ... was subject to revocation in the Governor's discretion").[6]

Section 552.070

Against this backdrop of the governor's absolute discretion to grant clemency relief and rescind a reprieve, Williams alleged in Count III of his declaratory judgment action that § 552.070 precluded Governor from rescinding Executive Order 17-20 and dissolving

[6] The fact a reprieve was issued by a former governor has no bearing on any successive governor's authority to rescind that reprieve. Irrespective of the individual who momentarily occupies the office, he or she exercises the article IV, § 1 "supreme executive power ... vested in a governor." Governor necessarily is free to exercise that supreme executive power to rescind a reprieve issued by himself or any prior governor.

the board of inquiry prior to receiving the board's report and recommendations. Section 552.070 provides:

> In the exercise of his powers under Article IV, Section 7 of the Constitution of Missouri to grant reprieves, commutations and pardons after conviction, the governor may, in his discretion, appoint a board of inquiry whose duty it shall be to gather information, whether or not admissible in a court of law, bearing upon whether or not a person condemned to death should be executed or reprieved or pardoned, or whether the person's sentence should be commuted. It is the duty of all persons and institutions to give information and assistance to the board, members of which shall serve without remuneration. Such board shall make its report and recommendations to the governor. All information gathered by the board shall be received and held by it and the governor in strict confidence.

"The goal of statutory interpretation is to give effect to the General Assembly's intent as reflected in the plain language of the statute at issue." *State ex rel. Fitz-James v. Bailey*, 670 S.W.3d 1, 6 (Mo. banc 2023) (internal quotation omitted). This Court avoids interpretations producing "unreasonable or absurd results." *Id.* (internal quotation omitted).

Williams concedes Governor has exclusive power over the final decision whether to grant clemency but claims Governor lacked authority to make a final clemency decision without the report and recommendations the board "shall" provide to the governor pursuant to § 552.070. Williams' argument rests on an inference that the board's statutory obligation to provide the governor with a report and recommendations limits the governor's constitutional authority to grant or withhold clemency in a death penalty case. This argument lacks merit.

The requirement that the board "shall make its report and recommendations to the governor" imposes an obligation on the board, not the governor. The only obligation

imposed on the governor, in addition to the board, is to hold any information gathered by board in strict confidence.[7] Section 552.070 imposes no other obligation or limitation on the governor and does not limit Governor's absolute discretion over clemency relief and to rescind the former governor's reprieve. Adopting Williams' argument that a governor's appointment of a board pursuant to § 552.070 imposes an indefinite procedural bar to the final clemency decision would be in derogation of the constitutional clemency power. This Court avoids interpreting a statute in a way "that would call into question its constitutional validity." *State ex rel. Praxair, Inc. v. Mo. Pub. Serv. Comm'n*, 344 S.W.3d 178, 187 (Mo. banc 2011). Section 552.070 does not limit Governor's authority to rescind Executive Order 17-20 and order the execution of Williams' lawfully imposed sentence.

Williams also claims § 552.070 authorized Governor to appoint the board but did not authorize him to dissolve it. Once again, Williams' interpretation of the statute impermissibly limits Governor's exclusive constitutional clemency power. Adopting Williams' interpretation means a board of inquiry appointed by a governor to assist with the exercise of the article IV, § 7 clemency power could prevent that governor, and his or her successors, from exercising that power by failing to produce a report and recommendation. Because the discretionary appointment of a board of inquiry pursuant to § 552.070 merely facilitates the governor's exercise of the exclusive constitutional

[7] In addition to the constitutional reservation of the clemency power to the governor, Williams' declaratory judgment action and proposed discovery are at odds with the statutory confidentiality requirement, further demonstrating the likelihood of irreparable harm and necessity of a writ of prohibition.

clemency power, the governor necessarily retains authority to rescind a reprieve or deny clemency irrespective of the board's action or inaction.

While the General Assembly cannot regulate the governor's ultimate clemency decision, article IV, § 7 authorizes regulation of "the manner of applying for pardons." Williams argues § 552.070 is such a law and precludes Governor's rescission of Executive Order 17-20 and dissolution of the board of inquiry. Construing § 552.070 as a law regulating the manner of applying for pardons yields the absurdly circular conclusion that the governor's appointment of a board of inquiry is a pardon application to himself on behalf of the capital offender. This Court will not construe a statute as requiring an absurd result. *Fitz-James*, 670 S.W.3d at 6. The governor's discretionary appointment of a board of inquiry to gather information to assist his exercise of the article IV, § 7 clemency power is not a provision "of law as to the manner of applying for pardons."[8]

Governor was entitled to judgment on the pleadings with respect to Count III because Williams' allegations fail as a matter of law to show Governor lacked authority to rescind the former governor's reprieve and order the execution of Williams' sentence. Count IV, alleging Executive Order 23-06 violated the separation of powers, fails because it is premised on Williams' erroneous claim Governor lacked authority to dissolve the board and order the execution of Williams' sentence.

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[8] Section 217.800 governs applications for a pardon, commutation, or reprieve. "When prisoners petition the governor for clemency, the [Missouri Board of Probation and Parole] investigates each case and submits a report of its investigation, along with its recommendations, to the governor." *Lute*, 218 S.W.3d at 435. "The Board must follow the governor's orders as he is granted the sole authority to commute sentences at his discretion." *Id.*

Due Process

In Counts I and II, Williams alleged Executive Order 23-06 violated his due process rights under the state and federal constitutions by denying state-created rights under Executive Order 17-20 and § 552.070, preventing a complete review of his claim of innocence during the clemency process. Williams further alleged this state-created right to the board of inquiry process could also create other rights to additional procedures, "including additional court filings, political pressure on [Governor] to commute his sentence, and potential action by other members of the executive branch." The circuit court erroneously declared the law when it concluded Williams alleged a protectible due process interest in demonstrating his innocence pursuant to Executive Order 17-20 and § 552.070.

"The Fourteenth Amendment's Due Process Clause protects persons against deprivations of life, liberty, or property; and those who seek to invoke its procedural protection must establish that one of these interests is at stake." *Wilkinson v. Austin* 545 U.S. 209, 221 (2005). While "[a] state-created right can, in some circumstances, beget yet other rights to procedures essential to the realization of the parent right ... the underlying right must have come into existence before it can trigger due process protection." *Conn. Bd. of Pardons v. Dumschat*, 452 U.S. 458, 463 (1981). The expectation of clemency relief from a lawfully imposed sentence is a "unilateral hope" that does not trigger due process protection. *Id.* at 465.

Neither Executive Order 17-20 nor § 552.070 provides a state-created right triggering due process protection. As Executive Order 17-20 illustrates, the board of inquiry process is initiated at the governor's sole discretion. Section 552.070 serves as an

additional, purely discretionary mechanism to assist the executive clemency decision vested constitutionally with the governor alone. Neither the statute nor Executive Order 17-20 vested Williams with an existing right triggering due process protection.[9] Governor's executive order dissolving the board and ordering the completion of Williams' sentence in no way denied Williams access to any process to which he was legally entitled.

Alternatively, Williams argues he alleged a due process interest in his own life under Justice O'Connor's concurring opinion in *Woodard*. *See Woodard*, 523 U.S. at 288 (O'Connor, J., concurring). Williams asserts Justice O'Connor's concurring opinion governs and establishes he is entitled to at least "minimal" due process protection during the clemency process.

In *Woodard*, an inmate sentenced to death challenged Ohio's clemency process. *Id.* at 277 (plurality opinion). Like Missouri, Ohio law provided the governor had discretion to grant or deny clemency. *Id.* at 276. But unlike §552.070, the Ohio law provided capital offenders with the right to request an interview and to have a mandatory clemency hearing. *Id.* at 276 - 77. The inmate did not challenge those procedures. *Id.* at 277. Instead, he claimed Ohio violated due process rights implicit in the state-created procedural rights by providing short notice and limiting the assistance of counsel. *Id.*

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[9] Williams' lack of any existing right under Executive Order 17-20 or § 552.070 disposes of the circuit court's reliance on *District Attorney's Office for Third Judicial District v. Osborne*, 557 U.S. 52 (2009). In *Osborne*, the Supreme Court held a state law allowing a state court to vacate a conviction based on clear and convincing, newly discovered evidence of innocence triggered some due protections that were satisfied in that case. *Id.* at 68-70.

Unlike the statutory right to seek postconviction relief in state court in *Osborne*, § 552.070 provides Williams with no right to the initiation or continuation of the board of inquiry process.

In a 4-4-1 opinion, the Supreme Court reversed the court of appeals' judgment, and held the inmate did not show a due process violation. Chief Justice Rehnquist, joined by three justices, concluded Ohio's clemency laws did not create any procedural or substantive rights implicating due process. *Id.* at 285. Justice O'Connor, also joined by three justices, reasoned an inmate sentenced to death retained a due process life interest requiring some "minimal" due process protection in the clemency process and decision, but concluded Ohio's process satisfied that minimal standard. *Id.* at 290 (O'Connor, J., concurring). While providing no analytical framework for assessing the contours of minimal due process, Justice O'Connor illustrated her concern by hypothesizing "[j]udicial intervention might, for example, be warranted in the face of a scheme whereby a state official flipped a coin to determine whether to grant clemency, or in a case where the State arbitrarily denied a prisoner any access to its clemency process." *Id.* at 289. Finally, writing alone, Justice Stevens filed an opinion concurring in part and dissenting in part, agreeing Ohio's procedures must meet minimum due process requirements, but dissenting because he would have remanded the case to the district court to determine "whether Ohio's procedures meet the minimum requirements of due process." *Ohio Adult Parole Auth. v. Woodard*, 523 U.S. 272, 118 S. Ct. 1244, 140 L. Ed. 2d 387 (1998) (Stevens, J., concurring in part and dissenting in part).

"When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds[.]" *Marks v. United States*, 430 U.S. 188, 193 (1977) (quoting *Gregg v. Georgia*,

428 U.S. 153, 169 n.15 (1976)). Chief Justice Rehnquist's opinion held Ohio's clemency procedures did not implicate due process. Justice O'Connor's opinion concluded those procedures triggered "minimal" due process protections against wholly arbitrary clemency procedures and decision making. A straightforward application of *Marks* shows Chief Justice Rehnquist's opinion controls because it is the position taken by those Justices who concurred in the judgment on the narrowest grounds.[10]

Chief Justice Rehnquist's controlling opinion in *Woodard* acknowledged a capital offender "maintains a residual life interest," but concluded the "interest in not being executed in accord with his sentence" does not trigger due process protections in the executive exercise of clemency authority. *Woodard*, 523 U.S. at 281. Because any expectation the discretionary executive clemency process will result in the commutation of a lawfully imposed death sentence is simply a "unilateral hope[,]" a capital offender retains no protectible due process interest within the clemency process. *Id.* at 282 (internal quotation omitted).

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[10] Some federal and state courts suggest Justice O'Connor's concurring opinion provides the Supreme Court's opinion on the specific issue of whether the Due Process Clause applies to clemency. *See, eg., Barwick v. Governor of Fla.*, 66 F.4th 896, 902 (11th Cir. 2023) (stating "Justice O'Connor's concurring opinion provides the holding in *Woodard*"); *Duvall v. Keating*, 162 F.3d 1058, 1061 (10th Cir. 1998) (holding Justice O'Connor's concurring opinion was the "narrowest majority holding" and establishes "some minimal level of procedural due process applies to clemency proceedings"); *Foley v. Beshear*, 462 S.W.3d 389, 394 (Ky. 2015) (applying Justice O'Connor's concurring opinion because it is the "narrower holding on the due-process question"); *Bacon v. Lee*, 549 S.E.2d 840, 848 (N.C. 2001) (holding "Justice O'Connor's concurring opinion represents the holding of the Court because it was decided on the narrowest grounds and provided the fifth vote"). This Court is not bound by "decisions of the federal district and intermediate appellate courts and decisions of other state courts[.]" *Doe v. Roman Cath. Diocese of St. Louis*, 311 S.W.3d 818, 823 (Mo. banc 2010). This Court concludes Chief Justice Rehnquist's opinion states the applicable law governing due process in discretionary state clemency proceedings.

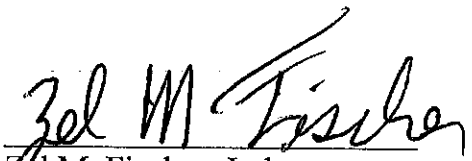
Chief Justice Rehnquist also concluded Ohio's clemency process did not trigger additional due process rights. Despite the delegation of some procedural authority to the parole board, the Ohio governor retained "broad discretion" that, "[u]nder any analysis ... need not be fettered by the types of procedural protections sought by" the inmate. *Id.* Unlike judicial proceedings to adjudicate guilt, executive clemency does "not determine the guilt or innocence of the defendant" and is "independent of direct appeal and collateral relief proceedings." *Id.* at 284. Because "[p]rocedures mandated under the Due Process Clause should be consistent with the nature of the governmental power being invoked[,]" Ohio's creation of some procedural rights for offenders in the discretionary executive clemency process did not entail additional due process protections. *Id.* at 285. Thus, "the executive's clemency authority would cease to be a matter of grace committed to the executive authority if it were constrained by the sort of procedural requirements that respondent urges." *Id.*

Woodard forecloses Williams' argument he retains a protectible due process interest during the clemency process following his lawfully imposed death sentence and the exhaustion of potential state and federal postconviction judicial remedies. Section 552.070 neither creates nor implies any procedural rights for the offender. Williams has nothing more than a "unilateral hope" for discretionary clemency relief from his lawfully imposed death sentence. *Id.* at 280 (quoting *Dumschat*, 452 U.S. at 465). His argument distills to a plea for an act of gubernatorial mercy, not a valid argument for recognizing due process rights in Governor's exercise of the discretionary clemency power. *Id.* at 285; *see also*

Dorsey, 685 S.W.3d at 31 n.12 (recognizing article IV, § 7 vests the governor with "absolute discretion over clemency relief").[11]

Conclusion

Section 552.070 cannot and does not limit Governor's clemency power. Williams alleged no cognizable liberty or life interest triggering due process protections during the clemency process or restraining Governor's absolute discretion to grant or deny clemency. Governor is entitled to judgment on the pleadings. The preliminary writ of prohibition is made permanent.



Zel M. Fischer, Judge

All concur.

[11] Applying Justice O'Connor's "minimal" due process standard does not change the conclusion. Justice O'Connor's minimal due process standard is premised on wholly arbitrary state action in both the clemency decision (flipping a coin) and the clemency process (denial of any access). *Woodard*, 523 U.S. at 289 (O'Connor, J., concurring). Williams agrees Governor "has the exclusive power over the final decision whether to grant clemency." His argument focuses on Governor's dissolution of the board of inquiry prior to it providing a report and recommendations. Williams' allegations, however, cannot meet Justice O'Connor's standard because he does not allege facts showing "the State arbitrarily denied a prisoner any access to its clemency process." *Id.* To the contrary, Executive Order 17-20 specifically acknowledges "Williams has submitted an application for clemency and requested appointment of a board of inquiry pursuant to Section 552.070 RSMo[.]" Williams alleges the former governor appointed a board of inquiry and he then presented "significant information" to the board, which had six years to consider the case before Governor exercised his constitutional authority to rescind Williams' reprieve. These allegations do not show an arbitrary denial of "any access" to the clemency process under Justice O'Connor's "minimal" due process standard.

21ST JUDICIAL CIRCUIT
ST LOUIS COUNTY
Case Summary
Date Generated:20-Sep-2024 04:33 PM

24SL-CC00422 (APPL)IN RE PROSECUTING ATTY 21ST JUDICIAL CIRCUIT

Case Type:	CC MOTION TO VACATE 547.031	**Security Level:**	**1 Public**
Status:	Judgment Entered	**Case Filing Date:**	01/26/2024
Disposition:	Other Final Disposition	**Disposition Date:**	09/12/2024
OCN:	Not Required	**Case Age:**	231
Law Enforcement Agency:		**Speedy Trial Date:**	No Date Entered
In Custody:			

Parties

		Amount Due	Reason	Change Date
Relator	**PROSECUTING ATTORNEY, 21ST JUDICIAL CIRCUIT OF MISSOURI,(S242962)**	$0.00		
Movant Post-Conviction Relief	**MARCELLUS WILLIAMS(S242963)**	$0.00		
Attorney for Relator	MATTHEW ALLEN JACOBER(51585)			
Judge	NICOLETTE A. KLAPP(62009)		Change of Judge	01/29/2024
Judge	JOSEPH L. WALSH(35969)		Change of Judge	01/31/2024
Assistant Attorney General	MICHAEL JOSEPH SPILLANE(40704)			

Assistant Attorney General	KELLY LYNN SNYDER(62575)
Assistant Attorney General	GREGORY MICHAEL GOODWIN(65929)
Assistant Attorney General	ANDREW JAMES CLARKE(71264)
Judge	BRUCE F. HILTON(36234)
Co-Counsel	JESSICA MARIE HATHAWAY(49671)
Attorney for Relator	TRICIA JESSICA BUSHNELL(66818)
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Assistant Attorney General	KATHERINE GRIESBACH(75883)
Assistant Attorney General	KIRSTEN MARIE PRYDE(76318)
Attorney for Petitioner	TERESA EVELYN HURLA(71729)
Attorney for Petitioner	ALANA MICHELE MCMULLIN(71072)
Officer Badge No:	

Hearings Scheduled

No Pending Hearings Scheduled.

Charges

No Charges Entered.

Sentence(s)

No Sentence(s) Entered.

Docket Entries

Filing Date	Description
01/26/2024	**Judge Assigned** DIV 33
01/26/2024	**Filing Info Sheet eFiling**
01/26/2024	**Note to Clerk eFiling**
01/26/2024	**Petition Filed - No Fees** 2199R-05297-01.
01/29/2024	**Entry of Appearance Filed** **Filed by:** TRICIA JESSICA BUSHNELL Entry of Appearance; Electronic Filing Certificate of Service.
01/29/2024	**Entry of Appearance Filed** **Filed by:** JESSICA MARIE HATHAWAY Entry of Appearance; Electronic Filing Certificate of Service.
01/30/2024	**Note to Clerk eFiling** **Filed by:** MATTHEW ALLEN JACOBER
01/30/2024	**CRIFS/Unredacted Document** **Filed by:** MATTHEW ALLEN JACOBER Exhibit 8 - Unredacted in associated to Exhibit filed on 01/30/2024.
01/30/2024	Exhibit Filed
01/30/2024	**Exhibit Filed** **Filed by:** MATTHEW ALLEN JACOBER Exhibit 8 - Redacted.
01/30/2024	CRIFS/Unredacted Document
01/30/2024	**CRIFS/Unredacted Document** **Filed by:** MATTHEW ALLEN JACOBER Exhibit 7 - Unredacted in associated to Exhibit filed on 01/30/2024.
01/30/2024	Exhibit Filed

Filing Date	Description
01/30/2024	**CRIFS/Unredacted Document** **Filed by:** MATTHEW ALLEN JACOBER Exhibit 6 - Unredacted in associated to Exhibit filed on 01/30/2024.
01/30/2024	Exhibit Filed
01/30/2024	**Exhibit Filed** **Filed by:** MATTHEW ALLEN JACOBER Exhibit 7 - Redacted.
01/30/2024	CRIFS/Unredacted Document
01/30/2024	**Exhibit Filed** **Filed by:** MATTHEW ALLEN JACOBER Exhibit 6 - Redacted.
01/30/2024	CRIFS/Unredacted Document
01/30/2024	**Note to Clerk eFiling** **Filed by:** MATTHEW ALLEN JACOBER
01/30/2024	**CRIFS/Unredacted Document** **Filed by:** MATTHEW ALLEN JACOBER Exhibit 5 - Unredacted in associated to Exhibit filed on 01/30/2024.
01/30/2024	Exhibit Filed
01/30/2024	**CRIFS/Unredacted Document** **Filed by:** MATTHEW ALLEN JACOBER Exhibit 4 - Unredacted in associated to Exhibit filed on 01/30/2024.
01/30/2024	Exhibit Filed
01/30/2024	**CRIFS/Unredacted Document** **Filed by:** MATTHEW ALLEN JACOBER Exhibit 3 - Unredacted in associated to Exhibit filed on 01/30/2024.
01/30/2024	Exhibit Filed
01/30/2024	**CRIFS/Unredacted Document** **Filed by:** MATTHEW ALLEN JACOBER Exhibit 2 - Unredacted in associated to Exhibit filed on 01/30/2024.
01/30/2024	Exhibit Filed

Filing Date	Description
01/30/2024	**CRIFS/Unredacted Document** **Filed by:** MATTHEW ALLEN JACOBER Exhibit 1 - Unredacted in associated to Exhibit filed on 01/30/2024.
01/30/2024	Exhibit Filed
01/30/2024	**Exhibit Filed** **Filed by:** MATTHEW ALLEN JACOBER Exhibit 5 - Redacted.
01/30/2024	CRIFS/Unredacted Document
01/30/2024	**Exhibit Filed** **Filed by:** MATTHEW ALLEN JACOBER Exhibit 4 - Redacted.
01/30/2024	CRIFS/Unredacted Document
01/30/2024	**Exhibit Filed** **Filed by:** MATTHEW ALLEN JACOBER Exhibit 3 - Redacted.
01/30/2024	CRIFS/Unredacted Document
01/30/2024	**Exhibit Filed** **Filed by:** MATTHEW ALLEN JACOBER Exhibit 2 - Redacted.
01/30/2024	CRIFS/Unredacted Document
01/30/2024	**Exhibit Filed** **Filed by:** MATTHEW ALLEN JACOBER Exhibit 1 - Redacted.
01/30/2024	CRIFS/Unredacted Document
01/30/2024	**Note to Clerk eFiling** **Filed by:** MATTHEW ALLEN JACOBER
01/30/2024	**Exhibit Filed** **Filed by:** MATTHEW ALLEN JACOBER Exhibit 26.

Filing Date	Description
01/30/2024	**Exhibit Filed** **Filed by:** MATTHEW ALLEN JACOBER Exhibit 25.
01/30/2024	**Exhibit Filed** **Filed by:** MATTHEW ALLEN JACOBER Exhibit 24 - Reserved.
01/30/2024	**Exhibit Filed** **Filed by:** MATTHEW ALLEN JACOBER Exhibit 23 - Reserved.
01/30/2024	**CRIFS/Unredacted Document** **Filed by:** MATTHEW ALLEN JACOBER Exhibit 22 - Unredacted in associated to Exhibit filed on 01/30/2024.
01/30/2024	Exhibit Filed
01/30/2024	**Exhibit Filed** **Filed by:** MATTHEW ALLEN JACOBER Exhibit 22 - Redacted.
01/30/2024	CRIFS/Unredacted Document
01/30/2024	**CRIFS/Unredacted Document** **Filed by:** MATTHEW ALLEN JACOBER Exhibit 21 - Unredacted in associated to Exhibit filed on 01/30/2024.
01/30/2024	Exhibit Filed
01/30/2024	**Exhibit Filed** **Filed by:** MATTHEW ALLEN JACOBER Exhibit 21 - Redacted.
01/30/2024	CRIFS/Unredacted Document
01/30/2024	**CRIFS/Unredacted Document** **Filed by:** MATTHEW ALLEN JACOBER Exhibit 20 - Unredacted in associated to Exhibit filed on 01/30/2024.
01/30/2024	Exhibit Filed

Filing Date	Description
01/30/2024	**Exhibit Filed** **Filed by:** MATTHEW ALLEN JACOBER Exhibit 20 - Redacted.
01/30/2024	CRIFS/Unredacted Document
01/30/2024	**CRIFS/Unredacted Document** **Filed by:** MATTHEW ALLEN JACOBER Exhibit 19 - Unredacted in associated to Exhibit filed on 01/30/2024.
01/30/2024	Exhibit Filed
01/30/2024	**Exhibit Filed** **Filed by:** MATTHEW ALLEN JACOBER Exhibit 19 - Redacted.
01/30/2024	CRIFS/Unredacted Document
01/30/2024	**Exhibit Filed** **Filed by:** MATTHEW ALLEN JACOBER Exhibit 18.
01/30/2024	**Exhibit Filed** **Filed by:** MATTHEW ALLEN JACOBER Exhibit 17.
01/30/2024	**Exhibit Filed** **Filed by:** MATTHEW ALLEN JACOBER Exhibit 16.
01/30/2024	**Exhibit Filed** **Filed by:** MATTHEW ALLEN JACOBER Exhibit 15.
01/30/2024	**Exhibit Filed** **Filed by:** MATTHEW ALLEN JACOBER Exhibit 14.
01/30/2024	**Note to Clerk eFiling** **Filed by:** MATTHEW ALLEN JACOBER

Filing Date	Description
01/30/2024	**Exhibit Filed** **Filed by:** MATTHEW ALLEN JACOBER Exhibit 13.
01/30/2024	**CRIFS/Unredacted Document** **Filed by:** MATTHEW ALLEN JACOBER Exhibit 12 - Unredacted in associated to Exhibit filed on 01/30/2024.
01/30/2024	Exhibit Filed
01/30/2024	**Exhibit Filed** **Filed by:** MATTHEW ALLEN JACOBER Exhibit 12 - Redacted.
01/30/2024	CRIFS/Unredacted Document
01/30/2024	**CRIFS/Unredacted Document** **Filed by:** MATTHEW ALLEN JACOBER Exhibit 11 - Unredacted in associated to Exhibit filed on 01/30/2024.
01/30/2024	Exhibit Filed
01/30/2024	**Exhibit Filed** **Filed by:** MATTHEW ALLEN JACOBER Exhibit 11 - Redacted.
01/30/2024	CRIFS/Unredacted Document
01/30/2024	**CRIFS/Unredacted Document** **Filed by:** MATTHEW ALLEN JACOBER Exhibit 10 - Unredacted in associated to Exhibit filed on 01/30/2024.
01/30/2024	Exhibit Filed
01/30/2024	**Exhibit Filed** **Filed by:** MATTHEW ALLEN JACOBER Exhibit 10 - Redacted.
01/30/2024	CRIFS/Unredacted Document
01/30/2024	**CRIFS/Unredacted Document** **Filed by:** MATTHEW ALLEN JACOBER Exhibit 9 - Unredacted in associated to Exhibit filed on 01/30/2024.
01/30/2024	Exhibit Filed

Filing Date	Description
01/30/2024	**Exhibit Filed** **Filed by:** MATTHEW ALLEN JACOBER Exhibit 9 - Redacted.
01/30/2024	CRIFS/Unredacted Document
01/30/2024	**Note to Clerk eFiling** **Filed by:** MATTHEW ALLEN JACOBER
01/30/2024	**CRIFS/Unredacted Document** **Filed by:** MATTHEW ALLEN JACOBER Exhibit 30 - Unredacted in associated to Exhibit filed on 01/30/2024.
01/30/2024	Exhibit Filed
01/30/2024	**CRIFS/Unredacted Document** **Filed by:** MATTHEW ALLEN JACOBER Exhibit 29 - Unredacted in associated to Exhibit filed on 01/30/2024.
01/30/2024	Exhibit Filed
01/30/2024	**CRIFS/Unredacted Document** **Filed by:** MATTHEW ALLEN JACOBER Exhibit 28 - Unredacted in associated to Exhibit filed on 01/30/2024.
01/30/2024	Exhibit Filed
01/30/2024	**Exhibit Filed** **Filed by:** MATTHEW ALLEN JACOBER Exhibit 30 - Redacted.
01/30/2024	CRIFS/Unredacted Document
01/30/2024	**Exhibit Filed** **Filed by:** MATTHEW ALLEN JACOBER Exhibit 29 - Redacted.
01/30/2024	CRIFS/Unredacted Document
01/30/2024	**Exhibit Filed** **Filed by:** MATTHEW ALLEN JACOBER Exhibit 28 - Redacted.
01/30/2024	CRIFS/Unredacted Document

Filing Date	Description
01/30/2024	**Exhibit Filed** **Filed by:** MATTHEW ALLEN JACOBER Exhibit 27.
01/30/2024	**Entry of Appearance Filed** **Filed by:** ANDREW JAMES CLARKE Entry of Appearance; Electronic Filing Certificate of Service.
01/30/2024	**Entry of Appearance Filed** **Filed by:** GREGORY MICHAEL GOODWIN Entry of Appearance - AGO Gregory Goodwin; Electronic Filing Certificate of Service.
01/30/2024	**Entry of Appearance Filed** **Filed by:** KELLY LYNN SNYDER Kelly L. Snyder...Entry of Appearance; Electronic Filing Certificate of Service.
01/30/2024	**Entry of Appearance Filed** **Filed by:** MICHAEL JOSEPH SPILLANE Entry of Appearance; Electronic Filing Certificate of Service.
01/30/2024	**Motion Denied** SCHEDULING CONFERENCE IN DIVISION 7 IS DENIED. CAUSE IS ASSIGNED TO DIVISION 17 FOR FURTHER PROCEEDINGS. SO ORDERED: JUDGE MARY ELIZABETH OTT
01/30/2024	**Judge/Clerk - Note** CASE REASSIGNED TO JUDGE WALSH IN DIV 17. ORIGINALLY ASSIGNED TO JUDGE KLAPP IN ERROR.
01/30/2024	**Judge Assigned** DIV 17
02/01/2024	**Judge Assigned** CASE RANDOMLY REASSIGNED TO JUDGE HILTON, DIV 13.

Filing Date	Description
02/01/2024	**Judge Recuses** SO ORDERED: JUDGE JOSEPH L. WALSH III
02/05/2024	**Notice** **Filed by:** ANDREW JAMES CLARKE States Notice of Intent to Oppose Motion; Electronic Filing Certificate of Service.
04/01/2024	**Certif Copies/Leg File Prepard** ONE REGULAR COPY OF DOCKET SHEET MAILED TO INMATE R. ROBINSON.
06/05/2024	**Motion to Dismiss** **Filed by:** MICHAEL JOSEPH SPILLANE Attorney Generals Motion to Dismiss the Motion to Vacate or Set Aside; Electronic Filing Certificate of Service.
06/06/2024	**Order** CAUSE SET FOR CASE MANAGEMENT CONFERENCE ON JULY 2, 2024 AT 10:00 AM. SO ORDERED: JUDGE BRUCE F. HILTON
06/06/2024	**Case Mgmt Conf Scheduled** **Scheduled For:** 07/02/2024 10:00 AM **Judge:** BRUCE F. HILTON ; **Room:**RM. 380 NORTH, DIV 13
07/02/2024	Order
06/26/2024	**Notc Change of Address Filed** **Filed by:** MATTHEW ALLEN JACOBER Notice of Change of Firm Address; Electronic Filing Certificate of Service.
06/26/2024	**Notice of Hearing Filed** **Filed by:** MATTHEW ALLEN JACOBER Notice of Hearing; Electronic Filing Certificate of Service.
06/26/2024	**Motion to Strike** **Filed by:** MATTHEW ALLEN JACOBER Motion to Strike Respondents Motion to Dismiss the Motion to Vacate or Set Aside; Exhibit A; Exhibit B; Electronic Filing Certificate of Service.

Filing Date	Description
06/28/2024	**Suggestions Filed** **Filed by:** MICHAEL JOSEPH SPILLANE Suggestions in Opposition to Movants Motion to Strike; Electronic Filing Certificate of Service.
06/28/2024	**Response Filed** **Filed by:** TRICIA JESSICA BUSHNELL Response to Attorney Generals Motion to Dismiss; Electronic Filing Certificate of Service.
06/28/2024	**Notice of Hearing Filed** **Filed by:** MATTHEW ALLEN JACOBER Notice of Hearing; Electronic Filing Certificate of Service.
06/28/2024	**Response Filed** **Filed by:** MATTHEW ALLEN JACOBER Response to Respondents Motion to Dismiss the Motion to Vacate or Set Aside; Exhibit B; Exhibit C; Electronic Filing Certificate of Service.
07/02/2024	**Proposed Order Filed** **Filed by:** TRICIA JESSICA BUSHNELL Proposed Order; Electronic Filing Certificate of Service.
07/02/2024	**Proposed Order Filed** **Filed by:** TRICIA JESSICA BUSHNELL Motion for Admission Pro Hac Vice; Rule 9.3 Statement; Supreme Court Receipt; Electronic Filing Certificate of Service.
07/02/2024	**Pre-trial Conference Scheduled** **Scheduled For:** 08/16/2024 02:00 PM **Judge:** BRUCE F. HILTON ; **Room:**RM. 380 NORTH, DIV 13
08/16/2024	Hearing Held
07/02/2024	**Order** AGREED SCHEDULING ORDER. SO ORDERED: JUDGE BRUCE F. HILTON

Filing Date	Description
07/02/2024	**Hearing Scheduled** **Scheduled For:** 08/21/2024 08:30 AM **Judge:** BRUCE F. HILTON ; **Room:**RM. 380 NORTH, DIV 13
08/21/2024	Hearing Held
07/02/2024	**Order** **Scheduled For:** 07/02/2024 10:00 AM **Judge:** BRUCE F. HILTON ; **Room:**RM. 380 NORTH, DIV 13 HEARING SET FOR AUGUST 21, 2024 AT 8:30 AM. SEE ATTACHED ORDER FOR ADDITIONAL CONDITIONS. SO ORDERED: JUDGE BRUCE F. HILTON
06/06/2024	Case Mgmt Conf Scheduled
07/03/2024	**Reply** **Filed by:** MICHAEL JOSEPH SPILLANE Reply Suggestions in Support of Motion to Dismiss; Electronic Filing Certificate of Service.
07/10/2024	**List of Witnesses** **Filed by:** TRICIA JESSICA BUSHNELL Relators Preliminary Witness List; Electronic Filing Certificate of Service.
07/10/2024	**List of Witnesses** **Filed by:** MATTHEW ALLEN JACOBER Preliminary Witness List of Prosecuting Attorney; Electronic Filing Certificate of Service.
07/12/2024	**Cert Serv Req Prod Docs Things** **Filed by:** ANDREW JAMES CLARKE Certificate of Service for Attorney Generals First Set of Requests for Production Directed to Marcellus Williams; Electronic Filing Certificate of Service.
07/12/2024	**Cert Serv Req Prod Docs Things** **Filed by:** ANDREW JAMES CLARKE Certificate of Service for Attorney Generals First Set of Requests for Production Directed to the St. Louis County Prosecuting Attorney; Electronic Filing Certificate of Service.

Filing Date	Description
07/12/2024	**Cert Serv of Interrog Filed** **Filed by:** ANDREW JAMES CLARKE Certificate of Service for Attorney Generals First Set of Interrogatories Directed to Marcellus Williams; Electronic Filing Certificate of Service.
07/12/2024	**Cert Serv of Interrog Filed** **Filed by:** ANDREW JAMES CLARKE Certificate of Service for Attorney Generals First Set of Interrogatories Directed to the St. Louis County Prosecuting Attorney; Electronic Filing Certificate of Service.
07/12/2024	**Cert Serv Req Prod Docs Things** **Filed by:** TRICIA JESSICA BUSHNELL Certificate of Service; Electronic Filing Certificate of Service.
07/12/2024	**Cert Serv Req Prod Docs Things** **Filed by:** MATTHEW ALLEN JACOBER Certificate of Service; Electronic Filing Certificate of Service.
07/12/2024	**Notice** **Filed by:** MICHAEL JOSEPH SPILLANE Notice of Recent Authority; Signed majority opinion; Electronic Filing Certificate of Service.
07/17/2024	**Order** PRO HAC VICE OF ATTORNEY ADNAN SULTAN IS GRANTED. SO ORDERED: JUDGE BRUCE F. HILTON
07/22/2024	**List of Witnesses** **Filed by:** TRICIA JESSICA BUSHNELL Relators Expert Witness List; Electronic Filing Certificate of Service.
07/22/2024	**Certificate of Service** **Filed by:** TRICIA JESSICA BUSHNELL Certificate of Service; Electronic Filing Certificate of Service.
07/22/2024	**Cert Serv Resp Req Prod Doc Th** **Filed by:** ANDREW JAMES CLARKE Certificate of Service for Attorney Generals Response to Williamss First Set of Requests for Production; Electronic Filing Certificate of Service.

Filing Date	Description
07/22/2024	**Cert Serv Resp Req Prod Doc Th** **Filed by:** ANDREW JAMES CLARKE Certificate of Service for Attorney Generals Response to Prosecuting Attorneys First Set of Requests for Production; Electronic Filing Certificate of Service.
07/22/2024	**Cert Serv of Rspns to Interrog** **Filed by:** ANDREW JAMES CLARKE Certificate of Service for Attorney Generals Response to Williamss First Set of Interrogatories; Electronic Filing Certificate of Service.
07/22/2024	**Cert Serv of Rspns to Interrog** **Filed by:** ANDREW JAMES CLARKE Certificate of Service for Attorney Generals Response to Prosecuting Attorneys First Set of Interrogatories; Electronic Filing Certificate of Service.
07/22/2024	**List of Witnesses** **Filed by:** MATTHEW ALLEN JACOBER Expert Witness List of Prosecuting Attorney; Electronic Filing Certificate of Service.
07/22/2024	**Cert Serv of Rspns to Interrog** **Filed by:** MATTHEW ALLEN JACOBER Certificate of Service; Electronic Filing Certificate of Service.
08/02/2024	**List of Witnesses** **Filed by:** ANDREW JAMES CLARKE Attorney Generals Expert Designation; Electronic Filing Certificate of Service.
08/05/2024	**Writ Ordered** WRIT ORDERED. HAND DELIVERED TO CRIMINAL DEPARTMENT ON THIS DATE. SO ORDERED: JUDGE BRUCE F. HILTON
08/13/2024	**Entry of Appearance Filed** **Filed by:** ALANA MICHELE MCMULLIN Entry of Appearance of Alana McMullin; Electronic Filing Certificate of Service.

Filing Date	Description
08/13/2024	**Entry of Appearance Filed** **Filed by:** TERESA EVELYN HURLA Entry of Appearance of Teresa Hurla; Electronic Filing Certificate of Service.
08/13/2024	**Entry of Appearance Filed** **Filed by:** KIRSTEN MARIE PRYDE Entry of Appearance; Electronic Filing Certificate of Service.
08/13/2024	**Entry of Appearance Filed** **Filed by:** KATHERINE GRIESBACH Entry of Appearance - AGO Kat Griesbach; Electronic Filing Certificate of Service.
08/14/2024	**Exhibit Filed** **Filed by:** TRICIA JESSICA BUSHNELL Relators Exhibit List; Electronic Filing Certificate of Service.
08/14/2024	**List of Witnesses** **Filed by:** TRICIA JESSICA BUSHNELL Relators Final Witness List; Electronic Filing Certificate of Service.
08/14/2024	**Exhibit Filed** **Filed by:** ALANA MICHELE MCMULLIN Prosecuting Attorneys Exhibit List; Electronic Filing Certificate of Service.
08/14/2024	**List of Witnesses** **Filed by:** ALANA MICHELE MCMULLIN Prosecuting Attorneys Final Witness List; Electronic Filing Certificate of Service.
08/15/2024	**Motion Filed** **Filed by:** TRICIA JESSICA BUSHNELL Motion to Appear in Civilian Clothing; Proposed Order; Electronic Filing Certificate of Service.

Filing Date	Description
08/15/2024	**Motion to Compel** **Filed by:** MATTHEW ALLEN JACOBER Motion to Compel the Attorney General to Provide Certain Discovery; Exhibit 1; Exhibit 2; Exhibit 3; Exhibit 4; Electronic Filing Certificate of Service.
08/16/2024	**Hearing Held** **Scheduled For:** 08/16/2024 02:00 PM **Judge:** BRUCE F. HILTON ; **Room:**RM. 380 NORTH, DIV 13
07/02/2024	Pre-trial Conference Scheduled
08/16/2024	**Motion Filed** **Filed by:** MATTHEW ALLEN JACOBER Motion in Limine to Exclude the Affidavit of Dr. Daniel Picus; Exhibit 1; Exhibit 2; Exhibit 3; Exhibit 4; Electronic Filing Certificate of Service.
08/16/2024	**CRIFS/Unredacted Document** **Filed by:** ANDREW JAMES CLARKE CRIF; Exhibit A- Unredacted; Exhibit C- Unredacted; Exhibit D- Unredacted; Exhibit E- Unredacted; Electronic Filing Certificate of Service in associated to Opposition filed on 08/16/2024.
08/16/2024	Suggestions in Opposition
08/16/2024	**Suggestions in Opposition** **Filed by:** ANDREW JAMES CLARKE Suggestions in Opposition to Movants Motion to Compel Discovery; Exhibit A Motion for Rehearing; Exhibit B- Order Motion for Rehearing; Exhibit C- Petition for Declaratory Relief; Exhibit D- Email; Exhibit E- Email; Electronic Filing Certificate of Service.
08/16/2024	CRIFS/Unredacted Document
08/19/2024	**Order** IT IS ORDERED THAT MR. WILLIAMS IS PERMITTED TO WEAR CIVILLIAN CLOTHING. SO ORDERED: JUDGE BRUCE F. HILTON
08/21/2024	**Judgment Entered** SEE ATTACHED JUDGMENT FOR SPECIAL CONDITIONS. SO ORDERED: JUDGE BRUCE F. HILTON Court Reporter: Rhonda Laurentius JUDGEMENT SET ASIDE PER ORDER ON 8-22-24

Filing Date	Description
08/21/2024	**Hearing Held** **Scheduled For:** 08/21/2024 08:30 AM **Judge:** BRUCE F. HILTON ; **Room:**RM. 380 NORTH, DIV 13
07/02/2024	Hearing Scheduled
08/21/2024	**Writ Ordered** HAND DELIVERED TO DOC. SO ORDERED: JUDGE BRUCE F. HILTON
08/21/2024	**Filing:** DOC COURT RETURN
08/22/2024	**Motion In Limine** **Filed by:** MICHAEL JOSEPH SPILLANE MJS Motion in Limine; Electronic Filing Certificate of Service.
08/22/2024	**Judge/Clerk - Note** NO TAX
08/22/2024	**Writ Ordered** WRIT ORDERED. HAND DELIVERED TO DOC. SO ORDERED: JUDGE BRUCE F. HILTON
08/22/2024	**Order to Vacate/Set Aside** JUDGMENT ON 8-21-24 IS SET ASIDE. CAUSE SET FOR EVIDENTIARY HEARING ON AUGUST 28, 2024 AT 8:30 AM. SO ORDERED: JUDGE BRUCE F. HILTON Court Reporter: Rhonda Laurentius
08/22/2024	**Hearing Scheduled** **Scheduled For:** 08/28/2024 08:30 AM **Judge:** BRUCE F. HILTON ; **Room:**RM. 380 NORTH, DIV 13 EVIDENTIARY HEARING EVIDENTIARY HEARING
08/28/2024	Hearing Held
08/23/2024	**List of Witnesses** **Filed by:** TRICIA JESSICA BUSHNELL Relators Final Witness List; Electronic Filing Certificate of Service.

Filing Date	Description
08/23/2024	**Hearing Scheduled** **Scheduled For:** 08/26/2024 09:00 AM **Judge:** BRUCE F. HILTON ; **Room:**RM. 380 NORTH, DIV 13
08/26/2024	Hearing Held
08/23/2024	**Request for Notc of Hrg Filed** **Filed by:** ANDREW JAMES CLARKE Notice of Hearing; Electronic Filing Certificate of Service.
08/25/2024	**Motion for Leave** **Filed by:** MATTHEW ALLEN JACOBER Request for Leave to Amend Interlineation and Response to Attorney Generals Motion in Limine; Exhibit A; Electronic Filing Certificate of Service.
08/25/2024	**List of Witnesses** **Filed by:** MATTHEW ALLEN JACOBER Prosecuting Attorneys Final Witness List; Electronic Filing Certificate of Service.
08/26/2024	**CRIFS/Unredacted Document** **Filed by:** MATTHEW ALLEN JACOBER CRIFS; Unredacted Return of Service on Edward Magee; Electronic Filing Certificate of Service in associated to Service (notice) filed on 08/26/2024.
08/26/2024	Notice of Service
08/26/2024	**Notice of Service** **Filed by:** MATTHEW ALLEN JACOBER Redacted Return of Service on Edward Magee; Electronic Filing Certificate of Service.
08/26/2024	CRIFS/Unredacted Document
08/26/2024	**CRIFS/Unredacted Document** **Filed by:** MATTHEW ALLEN JACOBER CRIFS; Unredacted Return of Service on Keith Larner; Electronic Filing Certificate of Service in associated to Service (notice) filed on 08/26/2024.
08/26/2024	Notice of Service

Filing Date	Description
08/26/2024	**Notice of Service** **Filed by:** MATTHEW ALLEN JACOBER Redacted Return of Service on Keith Larner; Electronic Filing Certificate of Service.
08/26/2024	CRIFS/Unredacted Document
08/26/2024	**Hearing Held** **Scheduled For:** 08/26/2024 09:00 AM **Judge:** BRUCE F. HILTON ; **Room:**RM. 380 NORTH, DIV 13
08/23/2024	Hearing Scheduled
08/28/2024	**Hearing Held** **Scheduled For:** 08/28/2024 08:30 AM **Judge:** BRUCE F. HILTON ; **Room:**RM. 380 NORTH, DIV 13 EVIDENTIARY HEARING
08/22/2024	Hearing Scheduled
08/28/2024	**Order** CAUSE CALLED, HEARD, AND SUBMITTED. PARTIES SHALL SUBMIT PROPOSED FINDINGS OF FACT AND CONCLUSION OF LAW BY SEPTEMBER 4, 2024. SO ORDERED: JUDGE BRUCE F. HILTON
08/28/2024	**Order** USE OF TECHNOLOGY GRANTED. SO ORDERED: JUDGE BRUCE F. HILTON
09/04/2024	**Certificate of Service** **Filed by:** MATTHEW ALLEN JACOBER Certificate of Service; Electronic Filing Certificate of Service.
09/04/2024	**Propsd/Sugg Findings of Fact** **Filed by:** MATTHEW ALLEN JACOBER Movants and Relators Joint Proposed Findings of Fact and Conclusions of Law; Electronic Filing Certificate of Service.

Filing Date	Description
09/04/2024	**Proposed Order Filed** **Filed by:** ANDREW JAMES CLARKE Respondents Proposed Findings of Fact, Conclusions of Law, and Judgment; Certificate of Service; Electronic Filing Certificate of Service.
09/11/2024	**Correspondence Filed** CORRESPONDENCES FROM CONCERNED CITIZENS
09/12/2024	**Judgment Entered** Judgment Against: Judgment Entered MOVANT'S MOTION TO VACATE OR SET ASIDE WILLIAMS' CONVICTION AND SENTENCE IS HEREBY DENIED. SO ORDERED: JUDGE BRUCE F. HILTON
09/12/2024	**Other Final Disposition**
09/16/2024	**Receipt Filed** APPEAL FEE PAID W/REC#21SL5568703
09/16/2024	**Notice of Appeal Filed** **Filed by:** MATTHEW ALLEN JACOBER Notice of Appeal to Supreme Court of Missouri; Electronic Filing Certificate of Service.
09/16/2024	**Judge/Clerk - Note** NO TAX
09/17/2024	**Judge/Clerk - Note** COPY OF ST. LOUIS COUNTY, MARCELLUS WILLIAMS, APPEALLANT NOTICE OF APPEAL EMAILED TO SUPREME COURT OF MISSOURI WITH RECEIPT # 21SL5568703. COPY OF APPEALLANT'S NOTICE OF APPEAL TRANSMITTED TO ATTY. MICHAEL J. SPILLANE, ATTY. KELLY L. SNYDER, ATTY. ANDREW J. CLARKE, ATTY. KRISTEN PRYDE, ATTY. GREGORY M. GOODWIN, AND ATTY. KATHERINE GRIESBACH THROUGH THE E-FILING SYSTEM.
09/18/2024	**Ackn Notice of Appeal Filed**

Filing Date	Description
09/20/2024	**Exhibit Filed** **Filed by:** ALANA MICHELE MCMULLIN Respondent Exhibit T; Electronic Filing Certificate of Service.
09/20/2024	**Exhibit Filed** **Filed by:** ALANA MICHELE MCMULLIN Respondent Exhibit S; Electronic Filing Certificate of Service.
09/20/2024	**Exhibit Filed** **Filed by:** ALANA MICHELE MCMULLIN Respondent Exhibit FF; Electronic Filing Certificate of Service.
09/20/2024	**Exhibit Filed** **Filed by:** ALANA MICHELE MCMULLIN Respondent Exhibit C-3; Electronic Filing Certificate of Service.
09/20/2024	**Exhibit Filed** **Filed by:** ALANA MICHELE MCMULLIN Movant Exhibit 42 - Part 14; Electronic Filing Certificate of Service.
09/20/2024	**Exhibit Filed** **Filed by:** ALANA MICHELE MCMULLIN Movant Exhibit 42 - Part 13; Electronic Filing Certificate of Service.
09/20/2024	**Exhibit Filed** **Filed by:** ALANA MICHELE MCMULLIN Respondent Exhibit A - Part 3; Electronic Filing Certificate of Service.
09/20/2024	**Exhibit Filed** **Filed by:** ALANA MICHELE MCMULLIN Respondent Exhibit A - Part 2; Electronic Filing Certificate of Service.
09/20/2024	**Exhibit Filed** **Filed by:** ALANA MICHELE MCMULLIN Respondent Exhibit A - Part 1; Electronic Filing Certificate of Service.
09/20/2024	**Exhibit Filed** **Filed by:** ALANA MICHELE MCMULLIN Movant Exhibit 80; Electronic Filing Certificate of Service.

Filing Date	Description
09/20/2024	**Exhibit Filed** **Filed by:** ALANA MICHELE MCMULLIN Movant Exhibit 42 - Part 19; Electronic Filing Certificate of Service.
09/20/2024	**Exhibit Filed** **Filed by:** ALANA MICHELE MCMULLIN Movant Exhibit 42 - Part 18; Electronic Filing Certificate of Service.
09/20/2024	**Exhibit Filed** **Filed by:** ALANA MICHELE MCMULLIN Movant Exhibit 42 - Part 17; Electronic Filing Certificate of Service.
09/20/2024	**Exhibit Filed** **Filed by:** ALANA MICHELE MCMULLIN Movant Exhibit 42 - Part 16; Electronic Filing Certificate of Service.
09/20/2024	**Exhibit Filed** **Filed by:** ALANA MICHELE MCMULLIN Movant Exhibit 42 - Part 15; Electronic Filing Certificate of Service.
09/20/2024	**Exhibit Filed** **Filed by:** ALANA MICHELE MCMULLIN Movant Exhibit 42 - Part 15; Electronic Filing Certificate of Service.
09/20/2024	**Exhibit Filed** **Filed by:** ALANA MICHELE MCMULLIN Movant Exhibit 42 - Part 14; Electronic Filing Certificate of Service.
09/20/2024	**Exhibit Filed** **Filed by:** ALANA MICHELE MCMULLIN Movant Exhibit 42 - Part 13; Electronic Filing Certificate of Service.
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09/20/2024	**Exhibit Filed** **Filed by:** ALANA MICHELE MCMULLIN Movant Exhibit 42 - Part 9; Electronic Filing Certificate of Service.
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09/20/2024	**Exhibit Filed** **Filed by:** ALANA MICHELE MCMULLIN Movant Exhibit 42 - Part 4; Electronic Filing Certificate of Service.
09/20/2024	**Exhibit Filed** **Filed by:** ALANA MICHELE MCMULLIN Movant Exhibit 42 - Part 3; Electronic Filing Certificate of Service.
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Filing Date	Description
09/20/2024	**Exhibit Filed** **Filed by:** ALANA MICHELE MCMULLIN Movant Exhibit 42 - Part 1; Electronic Filing Certificate of Service.
09/20/2024	**Exhibit Filed** **Filed by:** ALANA MICHELE MCMULLIN Movant Exhibit 34; Electronic Filing Certificate of Service.
09/20/2024	**Exhibit Filed** **Filed by:** ALANA MICHELE MCMULLIN Movant Exhibit 23; Electronic Filing Certificate of Service.
09/20/2024	**Exhibit Filed** **Filed by:** ALANA MICHELE MCMULLIN Movant Exhibit 16 - Part 3; Electronic Filing Certificate of Service.
09/20/2024	**Exhibit Filed** **Filed by:** ALANA MICHELE MCMULLIN Movant Exhibit 16 - Part 2; Electronic Filing Certificate of Service.
09/20/2024	**Notice** **Filed by:** ALANA MICHELE MCMULLIN Notice of Filing Hearing Exhibits; Movant Exhibit 12 - Part 1; Movant Exhibit 12 - Part 2; Movant Exhibit 16 - Part 1; Electronic Filing Certificate of Service.

Associated Cases

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; 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). 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,

WESLEY BELL
PROSECUTING ATTORNEY

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Chief, Conviction and Incident
Review

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

In re: Prosecuting Attorney, 21st Judicial Circuit, ex rel. Marcellus Williams,	)	
	)	Case No. 24SL-CC00422
vs.	)	
State of Missouri,	)	Division 13

ORDER

By the Court's own request cause is set for a case management conference at 10:00 AM on July 2, 2024. Attorneys can appear in-person or WebEx.

SO ORDERED:

DIV. 13

Judge BRUCE F. HILTON
DIVISION 13

In the
CIRCUIT COURT
of St. Louis County, Missouri

In re: Prosecuting Atty. 21st Judicial Circuit, ex rel. Marcellus Williams
Plaintiff(s)

vs.

State of Missouri
Defendant(s)

2 July 2024
Date

24SL-CC00422
Case Number

13
Division

For File Stamp Only
FILED
JUL 02 2024
JOAN M. GILMER
CIRCUIT CLERK, ST. LOUIS COUNTY

Order

Hearing on Prosecuting Attorney's Motion filed pursuant to RSMo § 547.031(1) shall be heard on August 21, 2024, beginning at 8:30 am. Parties are given leave to present evidence via live testimony & affidavit.

Motion to Dismiss, filed by State of Missouri Attorney General's Office & Motion to Strike, filed by St. Louis County Prosecuting Attorney's Office are taken with the Case.

Parties are to meet & confer on a Scheduling Order for Discovery. Expedited discovery is hereby permitted.

SO ORDERED

Judge

ENTERED: 7/2/2024
(Date)

for St. Louis County 51585
Attorney — Prosecuting Attorney — Bar No.

Address

Phone No. — Fax No.

Mitchell Buchanell for Marcellus Williams, 66818
Attorney — Bar No. — # 65929

Address

Phone No. — Fax No.

CCOPR47-WS Rev. 02/14

In the
CIRCUIT COURT
of St. Louis County, Missouri

For File Stamp Only
FILED
JUL 02 2024
JOAN M. GILMER
CIRCUIT CLERK, ST. LOUIS COUNTY

In re: Pros. Attorney 21st Judicial Cir.
Plaintiff(s) ex rel. Marcellus Williams

vs.

State of Missouri
Defendant(s)

2 July 2024
Date

24SL-CC00422
Case Number

13
Division

Agreed to Scheduling Order

Following the Parties Meet & Confer the Scheduling Order for this matter is as follows:

Preliminary Witness List ~~of Prosecuting Attorney & Marcellus Williams~~ to be produced by July 10, 2024.

Written discovery to be served by July 12, 2024, responses to be served on July 22, 2024.

Expert Designations of Prosecuting Attorney & Marcellus Williams to also be served on July 22, 2024.

State of Missouri's Expert Designations to be served August 2, 2024

Depositions to occur between August 2 - 14, 2024.

Request for Admissions to be served by August 9, 2024 & Answered on August 16, 2024.

Pretrial Conference tentatively set August 14, 2024 at 2:00 pm.

Exhibit
~~Final~~ Witness list to be served on August 19, 2024.

SO ORDERED:

DJW 13
Judge

7/2/2024
ENTERED: (Date)

/s/ for Prosecuting Atty 51585
Attorney Bar No.

Marcia J. Buchheit for Williams 66081
Address

Phone No. Fax No.

Asst Atty Gen 71264
Attorney Bar No.

Address

Phone No. Fax No.

CCOPR47-WS Rev. 02/14

IN THE 21ST JUDICIAL CIRCUIT, COUNTY OF ST. LOUIS
STATE OF MISSOURI, FAMILY COURT

In re the matter of:

Prosecuting Attorney, 21st Judicial Circuit, ex rel. Marcellus Williams

Movant/Petitioner,

v.

State of Missouri

Respondent.

Cause No. 24SL-CC00422

Division 13

FINDINGS OF FACT, CONCLUSIONS OF LAW, ORDER AND JUDGMENT

The Court having called this matter for hearing on August 28, 2024, Movant Prosecuting Attorney appears through counsel, Matthew Jacober, Realtor; Marcellus Williams appears in person and with special counsel, Tricia J. Rojo Bushnell and Jonathan Pott;, State of Missouri appears through Assistant Attorneys General, Michael Spillane, Kelly Snyder, Andrew Clarke, Katherine Griesbach and Kirsten Pryde.

The Court having considered the record consisting of over 12,000 pages; heard the evidence presented by the Prosecuting Attorney, Attorneys General, and Relator; given proper weight and credibility to the evidence, admitted exhibits and heard arguments; reviewed Proposed Findings of Fact and Conclusions of Law submitted by the parties; None of the parties requested specific Findings of Fact and Conclusions of Law. All fact issues upon which no specific findings are made shall be considered as having been found in accordance with the results reached. Rule 73.01(c). Any finding of fact herein equally applicable as a conclusion of law is adopted as such and any conclusion of law herein equally applicable as a finding of fact is adopted as such. The Court now being fully advised in the premises, hereby makes the following Findings of Facts, Conclusions of Law, Order and Judgment pursuant to § 547.031.2 R.S.Mo.

PROCEDURAL HISTORY

Following a 14-day jury trial, the Circuit Court for St. Louis County on August 27, 2001 entered its judgment finding Marcellus Williams guilty of first-degree murder for the August 11, 1998 killing of F.G., as well as first-degree burglary, two counts of armed criminal action, and robbery and fixing punishment at death. The Missouri Supreme Court affirmed Williams' conviction, *State v. Williams,* 97 S.W.3d 462 (Mo. banc 2003), and affirmed the judgment denying postconviction relief. *Williams v. State,* 168 S.W.3d 433 (Mo. banc 2005).

Williams filed a petition for a writ of habeas corpus in federal court. The federal District Court granted relief, but the 8th Circuit Court of Appeals reversed the judgment and denied habeas relief. *Williams v. Roper,* 695 F.3d 825, 839 (8th Cir. 2012). The United States Supreme Court denied Williams' petition for a writ of certiorari. *Williams v Steele,* 571 U.S. 839 (2013).

In December of 2014, The Missouri Supreme Court issued a warrant of execution setting a January 28, 2015 execution date. Williams then filed a petition for a writ of habeas corpus in the Missouri Supreme Court alleging he was entitled to additional DNA testing to demonstrate actual innocence. That same Court vacated Williams' execution date and appointed a special master to ensure complete DNA testing and to report the results of the additional DNA testing.

The special master provided the Missouri Supreme Court with the results of additional DNA testing conducted on hair and fingernail samples from the crime scene and of the knife used in the murder. The parties fully briefed their arguments to the master. The Missouri Supreme Court, after reviewing the master's files, denied Williams' habeas petition because the additional DNA testing did not demonstrate Williams' actual innocence. The United States Supreme Court denied Williams' petition for a writ of certiorari. *Williams v. Steele,* 582 U.S. 937, 137 S.Ct. 2307, 198 L.Ed.2d 737 (2017).

In 2017, Williams filed another petition for writ of habeas corpus, again alleging DNA testing demonstrated his actual innocence by excluding him as a contributor of DNA found on the knife used in the murder. The Missouri Supreme Court denied relief. The United States Supreme Court denied Williams' petition for writ of certiorari. *Williams v. Larkin,* 583 U.S. 902, 138 S.Ct. 279, 199 L.Ed.2d 179 (2017).

In 2023, Williams filed a petition for a declaratory judgment alleging Governor Parson lacked authority to rescind an executive order issued by Governor Greitens on August 22, 2017 appointing a board of inquiry pursuant to § 552.070 RSMo and staying execution until the final clemency determination. On June 29, 2023 Governor Parsons rescinded said executive order, thereby dissolving the Board of Inquiry established therein. On June 4, 2024, the Missouri

Supreme Court issued a permanent writ of prohibition barring the Circuit Court from taking further action other than granting the governor's motion for judgment on the pleadings and denying Williams' petition for declaratory judgment. *State ex rel. Parson v. Walker,* No. SC100352, ___S.W.3d ___ at 2-3. (Mo. banc June 4, 2024).

On June 4, 2024 The Missouri Supreme Court issued its order and warrant for execution setting a September 24, 2024 execution date for Williams.

Williams filed a motion to withdraw the Missouri Supreme Court's June 4, 2024 warrant of execution setting the September 24, 2024 execution date, claiming the warrant was premature because on January 26, 2024 the St. Louis County Prosecutor filed a motion to vacate Williams' first-degree murder conviction and death sentence pursuant to § 547.031, R.S.Mo. Supp. 2021. The Missouri Supreme Court overruled said motion. *State of Missouri v. Marcellus Williams,* No. SC83984 (Mo. banc July 12, 2024).

LEGAL STANDARD

Does this Court have jurisdiction or authority to hear a Motion to Vacate or Set Aside Judgment pursuant to §547.031.1 R.S.Mo (2021), if the Supreme Court issues its order and warrant for execution before the motion is heard and ruled on?

The Legislature has expressly provided that a § 547.031 R.S.Mo (2021) motion collaterally attacking a judgment may be filed at any time in circuit court, and the statute likely does not impermissibly conflict with controlling Supreme Court rules pertaining to capital crimes for which a sentence of death has been imposed.

In 2021, due in part to Judge Draper's concurrence in *State v. Johnson,* 617 S.W.3d 439, 446 (Mo. banc 2021), the Legislature enacted § 547.031 R.S.Mo (2021) which provides:

1. A prosecuting or circuit attorney, in the jurisdiction in which the person was convicted of the offense, may file a motion to vacate or set aside the judgment at any time if he or she has information that the convicted person may be innocent or may have been erroneously convicted. The circuit court in which the person was convicted shall have jurisdiction and authority to consider, hear, and decide the motion.

2. Upon the filing of a motion to vacate or set aside the judgment, the court shall order a hearing and shall issue findings of fact and conclusions of law on all issues presented. The attorney general shall be given notice of hearing of such motion by the circuit clerk and shall be permitted to

appear, question witnesses, and make arguments in a hearing of such motion.

3. The court shall grant the motion of the prosecuting or circuit attorney to vacate or set aside the judgment where the court finds that there is clear and convincing evidence of actual innocence or constitutional error at the original trial or plea that undermines the confidence in the judgment. In considering the motion, the court shall take into consideration the evidence presented at the original trial or plea, the evidence presented at any direct appeal or post-conviction proceeding, including state or federal habeas action; and the information and evidence presented at the hearing on the motion.

4. The prosecuting attorney or circuit attorney shall have the authority and right to file and maintain an appeal of the denial or disposal of such motion. The attorney general may file a motion to intervene and, in addition to such motion, file a motion to dismiss the motion to vacate or to set aside the judgment in any appeal filed by the prosecuting or circuit attorney.

By its express terms, this statute not only authorizes the appropriate circuit court to decide the motion, but also requires said court to hold a hearing and to issue findings of fact and conclusions of law. Nothing in the statute excepts capital death sentence cases from the circuit court's authority, even those for which the defendant has exhausted all right to seek relief before both the Missouri State Supreme Court and United States Supreme Court. Thus, in order for the Circuit Court to dismiss for lack of authority in the instant case, it would have to find that a conflict exists between the statute and Supreme Court rules requiring exclusive Supreme Court jurisdiction, and that the Supreme Court rules prevail over the statute. *See, Brick v. Koeppen,*672 S.W.3d 62, 65-66 Mo. App. 2023).

Only three cases have interpreted this statute and none addresses a circuit court's authority to hear the motion under the facts presented in the instant case. In *State v. Johnson,* 654 S.W.3d 883 (Mo. banc 2022), none of the parties raised the issue in what was an arguably more compelling case for restraining the circuit court's authority. In *Johnson,* unlike in the case at bar, the Supreme Court's warrant for execution was issued well before the § 547.031 motion was filed in the circuit court. Ultimately, the circuit court denied the last-minute motion on the grounds that it had insufficient time to conduct a meaningful hearing on the merits. However, rather than addressing the circuit court's authority to act after issuance of its warrant for execution, the Supreme Court denied the motion for stay of execution on the grounds that even if remanded for hearing, defendant could not make the required showing of likely success on the merits under the injunctive relief analysis also applicable when a stay is sought. *Id.* at 892-93. But in doing

so, a majority of the Supreme Court appears to have given at least tacit approval for a circuit court to proceed with such a motion, notwithstanding the high court's prior issuance of warrant for execution in that case. Judge Breckenridge wrote in dissent that the circuit court in her view was in error in not scheduling the § 547.031 hearing as required by statute. *Id.* at 903. Defendant Williams likely titled his Supreme Court filing as a "Motion to Withdraw Warrant of Execution" in his direct appeal case to avoid confronting the uphill "likelihood of success on the merits" argument faced when filing a motion to stay execution.

In its Motion to Dismiss the § 547.031 motion, the Attorney General submits three colorable, but far from definitive, citations of authority in support of its contention that the Supreme Court has exclusive jurisdiction over this matter. Although not directly argued, the brief implicitly makes the argument that the Supreme Court rules cited prevail over the conflicting statute, requiring the motion to be heard by the Supreme Court.

The first is **Article V, § 2** of the Missouri Constitution. However, that section simply states that the decision of the Supreme Court shall be controlling in all other courts. The second citation is Supreme Court Rule 30.03(b), which provides:

> (b) A date of execution set pursuant to Rule 30.30(a) shall be stayed upon the receipt in this Court of proof of filing of a timely appeal or petition for writ of certiorari in the Supreme Court of the United States. No other filing in this or any other Court shall operate to stay an execution date without further order of this Court or other competent authority.

However, none of the parties have requested that the Circuit Court stay the execution, as it is conceded that it lacks authority to do so. Accordingly, this rule does not expressly preclude a circuit court from hearing a § 547.031 motion.

Next, the Attorney General cites **Supreme Court Rule 91.02(b)**, which provides that, in capital convictions involving a sentence of death, any habeas corpus petition may be filed in the Supreme Court in the first instance and, if first filed in another court, shall be deemed to have been filed in the Supreme Court. Although akin to a habeas petition, a § 547.031 motion is made pursuant to specific legislative enactment to prevent a prosecutor or circuit attorney to seek relief in addition to, or apart from, the convicted defendant's right to seek post-conviction and habeas relief. Thus, the statute does not directly conflict with the mandate contained in Rule 91.02(b), requiring a capital defendant to file his or her habeas petition exclusively in the Supreme Court.

Finally, the Attorney General cites the following **two cases**, neither of which directly supports its contention of exclusive Supreme Court jurisdiction in

this matter. *State ex rel. Nixon v. Daugherty,* 186 S.W.3d 253 (Mo. banc 2008) involved a defendant's unprecedented use of a Supreme Court civil practice rule, Rule 74.06(d), to collaterally attack the judgment denying his Rule 24.035 post-conviction relief motion. In that case, the court held that Rule 74.06(d) applied solely to civil actions and that permitting such a motion would eviscerate a post-conviction relief motion's purpose of promptly and finally adjudicating claims concerning the legality of the conviction or sentence of a defendant. In particular the court stated:

> In a death penalty case, a Rule 74.06(d) motion also frustrates the purpose of Rule 91.02(b), Rule 29.08(d), and the Court's order of June 16, 1988. All of these make clear that matters affecting a sentence of death, once it is affirmed on direct appeal and except for a motion filed under Rule 24.035 or Rule 29.15, are to be filed in this Court and not another state court.

Id. at 254.

As an initial matter, it should be noted that the above quote expressly exempts post-conviction relief motions from having to be filed directly in the Supreme Court. Moreover, glaringly absent from the Attorney General's brief is any mention that *Daugherty*, which was decided long before enactment of § 547.031, permits **only** (emphasis added) prosecuting attorneys to file a motion to vacate/set aside a conviction if the defendant may be innocent or that constitutional error at trial undermines the confidence in the judgment. Also of significance is the provision in § 547.031 for appellate review of a circuit court's determination, meaning that the Supreme Court would have the last word in a capital death sentence case in any event.

The second case cited is *State ex rel. Amrine v. Roper,* 102 S.W.3d 541 (Mo. banc 2003), which allowed capital offenders to raise free-standing claims of actual innocence via habeas corpus. The *Amrine* court pointed to the death penalty statute § 565.035.2 R.S.Mo., as charging it with exclusive authority to review the sentence as well as any errors enumerated by way of appeal. The Attorney General argues that *Amrine* and § 565.035 provide for exclusive Supreme Court review in death penalty cases.

However, the statute does not give the Supreme Court exclusive authority to hear collateral attacks on the judgment and sentence, such as those filed under Rule 29.15 or 24.035. *See, e.g. Anderson v. State,*190 S.W.3d 28(Mo. banc 2006)(Post-conviction relief motion filed pursuant to Rule 29.15 in death sentence case overruled by circuit court and reversed and remanded by supreme court for re-trial of penalty phase.) And, in *State ex rel. Bailey v. Fulton,* 659 S.W.3d 909 (Mo. banc 2023), the Supreme Court recently held, "As previously stated,

however, like motions filed under Rules 29.15 and 24.035, a motion to vacate or set aside a conviction under '§ 547.031 is a new civil action' representing a 'collateral attack on the conviction and sentence'" (*quoting*, *State v. Johnson,* supra 654 S.W.3d at 891 n.10).

Accordingly, § 547.031 does not conflict with any of the Supreme Court rules cited by the Attorney General (24.035; 29.15; 29.08(d); 30.30(b); or 91.02(b)), because it is a legislatively created additional means for a prosecutor to collaterally attack the judgment and sentence under a narrow set of circumstances.

For the foregoing reasons Attorney General's Motion to Dismiss is hereby **DENIED.**

FINDINGS OF FACT

1. More than twenty-six years ago, on August 11, 1998, Williams murdered F.G.. *State v. Williams,* 97 S.W.3d 462, 466 (Mo. banc 2003).

2. After a 14-day trial, a jury convicted Williams of one count each of first-degree murder, first-degree burglary, and first-degree robbery, and two counts of armed criminal action. *Id.* This Court sentenced Williams to death for the first-degree murder conviction. *Id.*

3. While the Court has reviewed all of the relevant court records, the principle cases affirming Williams' convictions and sentences are as follows:

   Trial:
   State v. Williams, 99CR-005297 (Judge Emmett O'Brien St. Louis County Circuit Court 21st Judicial Circuit);

   Direct Appeal:
   State v. Williams, 97 S.W.3d 462 (Mo. banc 2023);

   Direct Appeal Petition of Certiorari:
   Williams v. Missouri, 539 U.S. 944 (2013);

   Post-Conviction Motion Court Proceedings:
   Williams v. State, 03CC-2254 (Judge Emmett O'Brien St. Louis County Circuit 21st Judicial Circuit);

   Post-Conviction Appeal:
   Williams v. State, 168 S.W.3d 433, 438 (Mo. banc 2005);

   2015 State Petition for Writ of Habeas Corpus:

Williams v. Steele, SC94720 (Mo.);

2017 State Petition for Writ of Habeas Corpus:
Williams v. Larkin, SC96625 (Mo.);

Declaratory Judgment Action:
State ex rel. Parson v. Walker, 690 S.W.3d 477 (Mo. banc 2024).

4. Following the unanimous opinion denying Williams' appeal and affirming this Court's judgment of conviction, *Williams,* at 466, 475, Williams petitioned the United Supreme Court for a writ of certiorari to review the decision of the Supreme Court of Missouri affirming the circuit court's judgment of conviction. *Williams,* 539 U.S. at 944. The petition was denied. *Id.*

5. Williams then filed a motion for post-conviction relief under Supreme Court Rule 29.15. *Williams,* 168 S.W.3d at 139. In his amended motion Williams asserted in excess of thirteen claims for post-conviction relief. *Id.* at 438-47. The motion court denied Williams' motion for post-conviction relief. *Id.* at 439. The Missouri Supreme Court, in a unanimous opinion, affirmed the circuit court's denial of Williams' post-conviction motion. *Id.* at 447.

6. Williams then filed a petition for a writ of habeas corpus in the United States District Court for the Eastern District of Missouri. Resp. Ex.2.

7. After the federal District Court initially granted Williams' habeas relief, the United States Court of Appeals for the Eighth Circuit reversed the District Court's judgment and denied Williams' federal habeas relief. *Williams v. Roper,* 695 F.3d 825, 839 (8th Cir. 2012).

8. Williams petitioned the United States Supreme Court for a writ of certiorari to review the decision of the United States Court of Appeals for the Eighth Circuit denying his petition for a writ of habeas corpus. *Williams v. Steele,* 571 U.S. 839 (2013).

9. On December 17, 2014, the Missouri Supreme Court issued an execution warrant scheduling Williams to be executed on January 28, 2015.

10. On January 9, 2015, Williams filed a petition for a writ of habeas corpus in the Missouri Supreme Court. Resp. Ex. I-1. Williams alleged that further DNA testing could demonstrate that he was innocent of the murder of F.G..

11. The Missouri Supreme Court appointed a special master to "insure DNA testing of appropriate items at issue in this cause and to report to this Court the results of such testing." Res. Ex. I-14 at 2.

12. On January 31, 2017, after reviewing the special master's report, the Supreme Court of Missouri denied Williams' petition for a writ of habeas corpus. Resp. Ex. I-15 at 1.

13. On April 20, 2017, the Supreme Court of Missouri issued an execution warrant scheduling Williams to be executed on August 22, 2017. Resp. Ex. K3 at 2.

14. Williams sought review of the Supreme Court of Missouri's denial by filing a petition for a writ of certiorari with the United States Supreme Court. On June 26, 2017, the petition was denied. *Williams v. Steele,* 582 U.S. 937 (2017).

15. On August 14, 2017, Williams filed another petition for a writ of habeas corpus in the Supreme Court of Missouri. Resp. Ex. N-1.

16. On August 15, 2017, the Supreme Court of Missouri denied Williams' petition for a writ of habeas corpus. Resp. Ex. N-5.

17. William again sought review of the Supreme Court of Missouri's denial by filing for a writ of certiorari with the United States Supreme Court. *Williams v. Larkin,* 583 U.S. 902 (2017). On October 2, 2017, the petition was denied. *Id.*

18. On August 22, 2017, former Governor Eric Greitens issued Executive Order 17-20, which included an executive stay of Williams' execution and created a board of inquiry to investigate Williams' conviction. It is unknown whether the Board of Inquiry reached a conclusion or issued a report or recommendation.

19. On June 29, 2023, some 5 years and 10 months after former Governor Greitens issued his executive order, Governor Michael L. Parson issued Executive Order 23-06, which dissolved the board and lifted the executive stay of Williams' execution.

20. On June 30, 2023, the Attorney General filed a renewed motion to set Williams' execution date in the Supreme Court of Missouri. Resp. Ex. P-1.

21. On August 23, 2023, Williams filed a petition for declaratory judgment in the Cole County Circuit Court, naming Governor Parson and the Attorney General as defendants. Resp. Ex. Q-1.

22. After the Cole County Circuit Court denied Governor Parson's motion for judgment on the pleadings, Governor Parson sought a permanent writ of prohibition or, in the alternative, a permanent writ of mandamus from the Supreme Court of Missouri directing Judge S. Cotton Walker, Circuit Judge of Cole County Circuit Court, to grant the motion for judgment on the pleadings. Resp. Ex. Q-14.02.

23. After briefing and argument, the Supreme Court of Missouri made its preliminary writ of prohibition permanent on June 4, 2024, and directed Judge Walker to grant Governor Parson's motion for judgment on the pleadings. Resp. Ex. Q-14.17.

24. Clemency gives the Governor the power to extend mercy to prisoners, but it is not another round of judicial review. *See Ohio Adult Parole Authority v. Woodard,* 523 U.S. 272, 284 (1998). Missouri's Constitution gives Governor Parson the sole power to decide how he will consider clemency applications and whether he will grant them. Governor Parson can grant clemency "for whatever reason or for no reason at all." *Olim v. Wakinekona,* 461 U.S. 238, 250 (1983).

25. On January 26, 2024, Movant filed a motion under § 547.031 R.S.Mo. 2021, to vacate the first-degree murder conviction and death sentence of Marcellus Williams.

26. Four claims were raised: (1) that Williams may be actually innocent of first-degree murder; (2) that Williams' trial counsel provided ineffective assistance in failing to better impeach two witnesses for the State who testified that Williams confessed to them; (3) that Williams' trial counsel provided ineffective assistance in failing to present different mitigating evidence "contextualizing" Williams '"troubled background"; and (4) that the State committed *Baston v. Kentucky,* 476 U.S. 79 (1986) violations by allegedly exercising preemptory strikes of jurors on the basis of race.

27. It is of utmost importance to this Court, that in denying Williams' motion to withdraw the most recently issued execution warrant, the Missouri Supreme Court held that it has already considered and rejected these four claims. *State of Missouri v. Williams,*2024 WL 3402597 at 3 n.3.

28. During the pendency of this case, the parties received a DNA report dated August 19, 2024, from Bode Technology. Resp. Ex. FF. That report

indicated that Bode Technology had developed DNA profiles from Keith Larner (the assistant prosecuting attorney now retired who prosecuted Williams' criminal case), and Edward Magee (a former investigator for the St. Louis County Prosecuting Attorney's office). The August 19, 2024 report, when reviewed in conjunction with the previous DNA reports from the handle of the knife used in the murder of F.G., indicated that the DNA material on the knife handle was consistent with Investigator Magee (matching 15 of 15 loci found by Fienup, who did the DNA testing on the knife handle), and 21 of 21 loci found by Dr. Norah Rudin in her subsequent review of Fienup's results. Resp. Ex. I-13.27 at 4 & Resp. Ex. I-13.29 at 20-23. Rudin and Fienup were Williams' retained experts. Resp. Ex. I-13.25 at 1; Resp. Ex I-13.29 at 2.

29. This new evidence is not consistent with the Movant's theory that the results found by testing the knife handle for Y-STR "touch DNA" in 2015 matched or could match an unknown person or that the results could exculpate Williams.

30. In addition, the report is consistent with trial testimony by a crime scene investigator, who indicated that the suspect wore gloves.

31. On August 21, 2024, the date on which the evidentiary hearing was originally scheduled, Movant and Williams entered into a consent judgment vacating Williams' first-degree murder conviction and death sentence in exchange for a *North Carolina v. Alford* 400 U.S. 25 (1970) plea to first-degree murder in exchange for a sentence of life without parole.

32. The Attorney General objected after participating in discussions with this Court, which included a phone conversation with a member of F.G.'s family.

33. The Missouri Supreme Court issued a preliminary writ of prohibition overturning the consent agreement and *Alford* plea and directing this Court to conduct a hearing in this matter.

34. On August 25, 2024, Movant filed a motion for leave to amend the motion to vacate or set aside in an attempt to advance two additional claims. Claim 5 alleged a claim of bad-faith evidence destruction under *Arizona v. Youngblood,* 488 U.S. 51 (1998). Claim 6 asserted a claim that the original trial judge's denial of a motion for a continuance violated Williams' right to due process.

35. Over the State's objection, this Court granted Movant leave to amend the motion to advance the *Youngblood* claim (Claim 5) of bad-faith destruction

of fingerprints and bad-faith destruction of DNA evidence on the handle of the knife that was used in the murder of F.G.. This Court denied Movant's motion for leave to amend as to the claim of a violation of due process through the denial of a continuance (Claim 6). The Missouri Supreme Court held that the trial court did not abuse its discretion in denying the continuance. *Williams v. State,* 168 S.W.3d 433, 444-45. Under the law of the case doctrine, the decision of a court is the law of the case for all points presented and decided. *State v. Graham,* 13 S.W.3d 290 (Mo. banc 2000).

AUGUST 28, 2024 HEARING FINDINGS

36. The Prosecuting Attorney called six witnesses in support of its Motion to vacate, including expert David Thompson; Judge Joseph L. Green, Williams' lead penalty phase counsel at his original trial; Dr. Charlotte Word, an expert witness in DNA testing; Judge Christopher E. McGraugh, Williams' lead guilt phase counsel at his original criminal trial; Prosecutor Keith Larner, the prosecuting attorney at Williams' original criminal trial; and Patrick Henson, an investigator for Movant's Conviction and Incident Review Unit.

DAVID THOMPSON

37. Thompson testified over the State's objection concerning the reliability of witnesses H.C. and L.A. Hrg. Tr. At 25-64.

38. Thompson concluded, based upon evidence-based standards, that H.C. and L.A. gave unreliable information to investigating officers. *Id.*

39. Thompson acknowledges that he did not review the trial transcript, which included the trial testimony of the officers who interviewed H.C. or L.A., or the trial testimony of H.C. or L.A. themselves. *Id.* 53-55. Had he done so he would have had the opportunity to confirm trial counsels' exemplary efforts to discredit the testimony of H.C. and L.A in the presence of the jury. Despite trial counsels' efforts the jury found the testimony of H.C. and L.A. credible.

40. Thompson's testimony does not aide in deciding the issues currently before this Court.

The Hon. Joseph L. Green

41. Judge Green testified that roughly one month before the Williams' trial, he was co-counsel in another capital case representing Ken Baumruk, who was also tried in the 21st Judicial Circuit. *Id.* at 69. He participated in a half-day

sentencing proceeding in the Baumruk capital case during Williams' trial. *Id.* at 69-70.

42. Judge Green testified, which is supported in the record from the trial, his complaints about the prosecutor's purported failure to disclose information and evidence in a timely manner, including witness notes and the mental history of H.C and Williams' MDOC records that were used by the State in the penalty phase. These issues were memorialized in a Verified Motion for Continuance and a Supplemental Motion for a continuance filed and argued on the record and denied by the trial court. *Id.* at 78-79.

43. Judge Green testified that he did not recall one way or the other whether anyone touched the knife without gloves during trial. *Id.* at 82-83.

44. This Court finds that Judge Green testified earnestly, compassionately, honestly, and to the best of his recollection, but as he admitted his memory was better at the time he testified in Williams' post-conviction relief case in 2004.

45. Despite Judge Green's testimony that he believes Williams "did not get our best". *Id.* at 82, this Court disagrees. Based upon review of the trial transcript, PCR transcript, and Judge Green's affidavit, Judge Green without reservation performed his duties as trial counsel in an exemplary fashion.

46. Judge Green's testimony before this Court does not support either of the claims of ineffective assistance of counsel raised in Movant's motion to vacate, which were already rejected by the Supreme Court of Missouri. *Williams,* 168 S.W.3d at 440-42 (rejecting claim that counsel was ineffective for not better investigating and impeaching H.C. and L.A.), 443 (rejecting claim that counsel was ineffective for not presenting more or different mitigation evidence).

47. With respect to Movant's motion to amend his motion regarding the trial court's denial of the motion for continuance which this Court denied, the Missouri Supreme Court has already found that the trial court did not abuse its discretion in denying a continuance. *Id.*

Dr. Charlotte Word

48. Dr. Word, an expert witness in DNA testing, testified for Movant, Hrg. Tr. At 98-152. This Court finds that Dr. Word's testimony established three important facts, none of which were helpful to Movant.

49. First, the DNA material found on the knife handle likely belongs to Investigator Magee (and also possibly Larner), and not to some other yet identified individual alleged by Williams and Movant to actually be responsible for the murder of F.G.. *Id.* at 152.

50. Second, if DNA material from the murderer was ever present on the knife handle, any such material could have been removed by individuals subsequently touching the knife handle without gloves. *Id.* at 152-53.

51. Third, Dr. Word has no idea what the procedures for evidence handling were in the St. Louis Prosecuting Attorney's Office, or in any crime lab for any St. Louis law enforcement entity at the time of the investigation into F.G.'s murder or at the time of Williams' trial. *Id.* at 151.

52. This Court finds that Dr. Word's testimony did not bolster Movant's claim of actual innocence.

53. Movant claimed that the DNA material of the "actual" killer was on the knife handle. This theory was clearly refuted by Dr. Word's testimony. In addition, Dr. Word's testimony provides no support for the theory of bad-faith destruction of evidence. *State v. Deroy,* 623 S.W.3d 778, 791 (Mo. App. E.D. 2021).

Judge Christopher E. McGraugh

54. Judge Christopher E. McGraugh is a circuit judge for the City of St. Louis and was Williams' lead guilt-phase counsel along with the Hon. Joseph Green. Hrg. Tr. at 158-66.

55. Judge McGraugh testified he does not remember anyone touching the evidence "outside the evidence bag" without gloves. *Id.* at 162.

56. Judge McGraugh testified that he was not told prior to trial that an "investigator" had been handling the knife without gloves. *Id.* at 164.

57. This Court finds that Judge McGraugh testified credibly as to his recollection of events. But the Court notes that he had difficulty remembering the events of the trial in 2001, roughly twenty-three years ago. Resp. Ex. D-1 at 47-48, 50, 59, 63, 67, 71, 83. This Court also finds that his memory, that no one handled the knife without gloves, is not consistent with the record and the evidence before this Court, including the fact that he was present in the courtroom when the knife handle was held without gloves. Resp. Ex. A at 2262-64, 2314.

Keith Larner

58. Keith Larner was the lead prosecutor in the Marcellus Williams case. Hrg. Tr. at 166-67. Larner testified that the two- informant witnesses, H.C and L.A., were the "strongest" witnesses he ever had in a murder case. *Id.* at 172. Larner testified that H.C. knew things that only the killer could know. *Id.* at 239. Larner testified that H.C. knew the knife was jammed into F.G.'s neck, that the knife was twisted, and that the knife was left in F.G.'s neck when the murderer left the scene, details which were not public knowledge. *Id.*

59. Larner testified that L.A. was "amazing." *Id.* Larner testified that she led police to where Williams pawned the computer taken from the residence of the murder scene, and that the person there identified Williams as the person who pawned it. *Id.* at 240. Larner testified that L.A. also led police to items stolen in the burglary in the car Williams was driving at the time of the murder. *Id.* at 240-41.

60. Larner testified that he knew from talking to Detective Vaughn Creach that the killer wore gloves. *Id.* at 183-85.

61. Larner testified that he believed it was appropriate to handle the knife without gloves after the crime laboratory had completed their testing, after he was informed that no one wanted any more testing on the knife, and after he was informed the laboratory found there were no fingerprints and nothing to link any individual to the crime. *Id.* at 192-93.

62. Larner testified he handled the knife without gloves at least five times prior to trial. *Id.* at 180-87. He showed the knife to four witnesses (two detectives, F.G.'s husband, and the medical examiner) and affixed an exhibit sticker on the knife for use at trial. *Id.* at 180-81.

63. Larner testified credibly that he had never heard of touch DNA in 2001 and probably did not hear of it until 2015. *Id.* at 241. Larner testified that the standard procedure in the St. Louis Prosecuting Attorney's Office at the time of Williams' trial was not to wear gloves when handling fully tested evidence because there was no reason to. *Id.*

64. Larner testified that he did not open untested fingernail clippings at trial without gloves because he did not want to contaminate them. *Id.* at 246.

65. Larner recalled that he had used three peremptory challenges on African Americans because the Missouri Supreme Court opinion listed three *Baston* challenges addressed in Williams' direct appeal. *Id.* at 220. The additional

3 preemptory strikes of Black jurors were not challenged in Williams' direct appeal. *State v. Williams,* 97 S.W.3d 462, 471-72 (Mo. banc 2003).

66. Larner denied systematically striking potential Black jurors or asking Black jurors more isolating questions than White jurors.

67. This Court finds that Larner had a good faith basis and reasons for handling the knife without gloves, despite Dr. Word's testimony that agencies that collected evidence at or near the time of this murder knew about the importance of properly collecting evidence to preserve any biological substance. (PA's Ex.80).

Patrick Henson

68. This Court heard testimony from Patrick Henson, an investigator for Movant's Conviction and Incident Review Unit. Hrg. Tr. at 263-71.

69. Henson testified that he did not find Larner's notes from jury selection in the file retained by the St. Louis Prosecuting Attorney's Office during his review of the file sometime in 2024. *Id.* at 266.

70. Henson testified he had no knowledge of where or how long the file was stored, nor what the file did, or did not contain, at anytime prior to 2024. *Id.* at 268.

71. Henson reviewed the Williams file and did not find any notes from the prosecutor pertaining to voir dire. *Id.* at 265-66.

72. Henson also testified that he never reviewed the State's trial exhibits, which were in the possession of the Missouri Supreme Court, and that no attorney from Movant's office ever asked him to retrieve those exhibits. *Id.* at 270-72.

73. This Court finds that Henson testified credibly and to the best of his ability, but that his limited knowledge of relevant facts with what procedures were in place for file retention during the years in question, undercuts the probative value of his testimony as to any issue presently before this Court.

CONCLUSIONS OF LAW

This Court makes the following conclusions of law:

74. In his first claim on behalf of Williams, Movant asserts that Williams' "may be" actually innocent of first-degree murder. Mot. at 29-36.

75. Generally, in support of his claim that Williams is innocent, Movant alleged that DNA testing excludes Williams as the person whose DNA was found on the knife used in the murder. Mot. 22-24; that members of H.C.'s family would provide testimony that H.C. is a liar and "known" informant, Mot. at 24; that L.A.'s friends would provide testimony that she is a liar and "known informant [,]" *Id.*; and that G.R., to whom the stolen laptop was sold, was prevented "from testifying about where he learned Mr. Williams obtained the laptop." *Id* at 35.

76. Prior to the enactment of § 547.031, offenders who were sentenced to death could raise a freestanding claim of innocence in the Supreme Court of Missouri. *State ex rel. Armine v. Roper,* 102 S.W.3d 541, 547 (Mo. banc 2003). Williams asserted such a claim before the Supreme Court of Missouri. *Williams v. Steele,* SC94720 (Mo. 2017), Resp. Ex. I-1 at 6. The Supreme Court of Missouri has heard the majority of the DNA evidence Movant now asks this Court to consider, with the exception of the recent DNA results that weakens Movant's claim and demonstrates that Investigator Magee is the likely source of the DNA on the knife. Further, the Supreme Court has already denied that claim. *Williams* 2024 WL 3402597 at 3 n.3. Further, the Supreme Court of Missouri has already determined that the other evidence underpinning Movant's first claim allegations of the existence of impeachment material concerning H.C. and L.A. was at least in part not admissible at Williams' trial. *Williams v. State,* 168 S.W.3d 433, 439-42 (Mo. banc 2005). The same is true about the self-serving hearsay concerning the location of the laptop. *Williams v. State,* 97 S.W.3d 462, 468-69 (Mo. banc 2003).

77. In his second claim on behalf of Williams, Movant asserted that Williams' trial counsel provided ineffective assistance of counsel by failing to investigate and impeach witnesses H.C and L.A.. Mot. at 41-43. Williams has raised these claims before. The Supreme Court of Missouri rejected Williams' claims that his counsel provided ineffective assistance regarding investigating and impeaching H.C. and L.A.. *Id.* at 440-43. After considering the entire record, the Supreme Court of Missouri denied each of these claims. *Id.*

78. In his third claim, Movant alleges on behalf of Williams that penalty-phase counsel provided ineffective assistance by not presenting a penalty-phase defense based on Williams' allegations that he experienced an abusive childhood. Mot. at 44-53.
79. At the post-conviction hearing, Judge Green testified that it was the trial team's defense strategy to present Williams in a positive light as a person who had good qualities and was a positive influence on his children, rather

than an "inhuman beast," and to combine that strategy with a residual doubt strategy. Resp. Ex. D-1 at 122-23.

80. Once again Williams presented this claim to the Supreme Court of Missouri during his Rule 29.15 post-conviction proceedings. *Williams v. State,* 168. S.W.3d 433, 443 (Mo. banc 2005). And, as with the other claims, the Supreme Court of Missouri denied Williams' claim of ineffective assistance and affirmed the motion court's decision that presenting an abusive childhood strategy would have been contrary to the chosen defense strategy and would not have changed the outcome. *Id.* The Court went on to hold that the motion court did not clearly err in denying this claim without an evidentiary hearing. *Id.*

81. In relation to claims two and three, the Missouri Supreme Court has already rejected these claims when it considered them under *Strickland v. Washington,* 466 U.S. 668 (1984). Movant cannot repackage these claims into actual innocence claims to receive relief for Williams, especially when the actual innocence standard is much harder to meet than the *Strickland* prejudice standard. *Id.* at 703.

82. In his fourth claim, Movant alleges two *Baston* challenges on behalf of Williams. Mot. at 53-63. Specifically, Movant alleges that the State exercised discriminatory peremptory strikes of two members of the venire. Venireperson 64 and Venireperson 65. Mot. at 53-62.

83. The Supreme Court of Missouri rejected Williams' *Baston* challenges to these same venirepersons on direct appeal. *State v. Williams,* 97 S.W.3d 462, 471-72. The Supreme Court of Missouri found that the State had provided race neutral reasons to support its strikes of Venireperson 64, *Id.,* and Venireperson 65. *Id.* at 472.

84. Our Missouri Constitution vests the State's judicial power in "a supreme court, a court of appeals…and circuit courts." Mo. Const. art. V, § 1. It further provides, "The supreme court shall be the highest court in the state…. Its decisions shall be controlling in all other courts." Mo. Const. art. V, § 2; *see also State ex rel. Strong v. Griffith,* 462 S.W.3d 732, 734 (Mo. 2015) (stating that it is not appropriate to raise a post-conviction claim in habeas corpus that the court has already rejected in ordinary course). This Court, therefore, cannot reverse, overrule, or otherwise decline to follow the previous decisions of the Supreme Court of Missouri that populate the long procedural history in Williams' case. *See* Mo. Const. rt. V. § 2; *see also Strong,* 462 S.W.3d at 734.

85. Because Movant's first, second, third, and fourth claims before this Court have previously been denied by the Supreme Court of Missouri when the very same claims were raised by Williams in his § 547.031 motion, this Court must now deny them. *See State v. Williams,* 2024 WL 3402597 at 3 n.3; *see also State v. Johnson,* 654 S.W.3d 883, 891-95 (Mo. 2023).

86. Movant's fifth claim in his amended motion which this Court granted leave to file shortly before the hearing, over the States objection, alleged that the State had engaged in bad-faith destruction of evidence under *Arizona v. Youngblood,* 488 U.S. 1051 (1988).

87. Movant alleged that the bad faith destruction of evidence occurred when police destroyed fingerprint lifts determined to be without evidentiary value, and when the prosecutor and his investigator touched the handle of the murder weapon without wearing gloves.

88. The United States Supreme Court has "held that when the State suppresses or fails to disclose material exculpatory evidence, the good or bad faith of the prosecution is irrelevant: a due process violation occurs whenever such evidence is withheld." *Illinois v. Fischer,* 540 U.S. 544, 547 (2004). "[I]n *Youngblood,* by contrast, [the Court] recognized that the Due Process Clause 'requires a different result when [a court] deal[s] with the failure of the State to preserve evidentiary material of which no more can be said than that it could have been subject to tests, the results of which might have exonerated the defendant." *Id. quoting Youngblood,* 488 U.S. at 57). The Court stated that the "failure to preserve this potentially useful evidence does not violate due process '*unless a criminal defendant can show bad faith on the part of the police.*'" *Id.* at 547-48.

89. Our state courts have similarly applied *Youngblood,* finding that when the State fails to preserve evidence that "might have exonerated the defendant [,]" a defendant must show that the State acted in "bad faith" in order to establish a due process violation. *State v. Deroy,* 623 S.W.3d 778, 790 (Mo. App. 2021). When the State acts in good faith in accordance with its normal practice, no due process violation lies when potentially useful evidence is destroyed. *Id.* at 791. The requirement to show that bad faith has no exceptions. *See Id.* (citing cases from the Missouri Supreme Court holding that there is a bad faith requirement and holding that those cases must be followed).

90. Movant and Williams have made arguments before this Court indicating that the knife handle was central to the State's case or that, without additional unblemished testing, Williams has no avenue to prove his actual innocence. The United States Supreme Court has specifically refuted

similar arguments that have also attempted to change or remove the bad faith requirement of *Youngblood. See Illinois v. Fisher,* 540 U.S. at 547.

91. Here, neither Movant nor Williams presented any evidence from which this Court could find that the State destroyed potentially useful evidence in bad-faith, let alone clear and convincing evidence of the same.

92. The record before this Court refutes the allegation of bad-faith destruction of latent fingerprints. Indeed, the trial transcript indicates that latent fingerprints of insufficient quality for comparison were destroyed. Resp. Ex. A at 95-96, 3241. Specifically, Detective Thomas Krull testified that he received fingerprint lifts that were of insufficient quality to be used for comparison and those were destroyed after it was determined that the lifts were useless. *Id.* at 2324, 2340-41. No evidence was presented that this was done in bad faith. Because Movant has failed to met his burden of proof, this Court finds the claim of bad-faith destruction of fingerprint evidence to be without merit.

93. In addition, Movant did not carry his burden to demonstrate bad-faith destruction of whatever genetic material, if any, was present on the handle of the murder weapon prior to the knife handle being touched by Larner, Investigator Magee, and any other individuals.

94. Larner testified that he believed it was appropriate to handle the knife without gloves after the crime laboratory had completed their testing, he was informed that no one wanted any more testing on the knife, and the laboratory found there were no fingerprints and nothing on the knife to link any individual to the crime. *Id.* at 192-93. Larner stated that this belief was bolstered by the information provided by Detective Creach indicating that the killer had worn gloves, which, in turn was supported by the testimony of H.C. *Id.* at 192-93.

95. Larner testified that he carried the knife around without gloves during Williams' trial and handed it to a witness who was not wearing gloves and "[n]o one said anything." *Id.* at 247.

96. This Court finds that Larner testified credibly concerning the touching of the knife and that his testimony, as well as the other evidence in the state court record, refutes a claim that he, or any other State-actor, acted in bad faith by touching the knife handle without gloves and Movant's theory has no probative value.

97. Because Movant failed to prove his claim by clear and convincing evidence, this Court finds Movant's fifth claim to be without legal merit.

See Fisher, 540 U.S. at 547-48; *see also Youngblood,* 488 U.S. at 57-58; *Deroy,* 623 S.W.3d at 790. Movant's fifth claim is denied.

98. The State argues that Movant is judicially estopped from proceeding on Movant's first claim, which alleges Williams may be actually innocent of first-degree murder. This Court rejects this argument as the State has failed to show that Movant's position is clearly inconsistent with his earlier position. In addition, Movant's attempt to enter an *Alford* plea did not create an unfair advantage or impose an unfair detriment on the State if not estopped. *Vacca v. Mo. Dep't of Labor & Ind. Rels.,* 575 S.W.3d 233, 236-37 (Mo. 2019).

99. "To make a free-standing claim of actual innocence, [Movant] must make a clear and convincing showing of [Williams'] innocence. *State ex rel. Dorsey v. Vandergriff,* 685 S.W.3d 18, 25 (Mo. 2024). Clear and convincing evidence "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.* (*quoting Armine,* 102 S.W.3d at 548). In *Dorsey,* the Supreme Court of Missouri found that new expert opinions that Dorsey could not deliberate did not meet this test in light of the facts of the crime. *Id.* at 25-26.

100. The Supreme Court of Missouri has emphasized that the first step in actual innocence analysis is considering whether the "new" evidence is new in the sense that it was "not available at trial." *State ex rel. Barton v. Stange,*597 S.W.3d. 661 n.4 (Mo. 2020); *accord Dorsey,* 685 S.W.3d at 24-25 (Both gateway and freestanding claims of actual innocence require "new evidence to support the claim that was not available at trial…."). Other appellate courts have expressed a similar requirement. *State ex rel. Nixon v. Sheffield,* 272 S.w.3d 277, 284-85 (Mo. App. 2008) (stating evidence is only "new" if not available at trial and could not have been discovered through the exercise of due diligence.) Additionally, when considering whether excluded evidence supports innocence only, evidence "tenably claimed to have been wrongfully excluded" may be considered in a claim of innocence. *Schlup v. Delo,* 513 U.S. 298, 328 (1995).

101. A claim that cannot meet the gateway standard of showing by a preponderance of the evidence that no reasonable juror would convict in light of new evidence, necessarily cannot meet the higher freestanding innocence standard of proof by clear and convincing evidence. *Barton,* 597 S.W.3d 661, 665 (Mo. 2020) ("Because the evidence is insufficient to make a gateway claim of actual innocence by a preponderance of the evidence, it necessarily is also insufficient to support a freestanding claim of actual innocence, which requires clear and convincing evidence of actual

innocence."); *State ex rel. McKim v. Cassady,* 457 S.W.3d 831, 843 (Mo. App. 2015).

102. Here, Movant's evidence regarding Williams' freestanding innocence claim fails.

103. As herein above described, the freestanding innocence claim pled in Movant's original motion unraveled during the pendency of this case, when the parties received a DNA report, dated August 19, 2024, from Bode Technology. Resp. Ex. FF.

104. In light of this report, Movant cannot demonstrate that the genetic material on the knife handle can form a basis for "a clear and convincing showing" of Williams' innocence. *Dorsey,* 685 S.W.3d at 25. Movant failed to present "clear and convincing evidence of actual innocence…that undermines the confidence in the judgment [,] and his claim must be denied. § 547.031.3 R.S.Mo.

105. Movant's remaining evidence amounts to nothing more than re-packaged arguments about evidence that was available at trial and involved in Williams' unsuccessful direct appeal and post-conviction challenges. That repackaged material cannot form the basis for relief under § 547.031.3 or the *Armine* standard. *See Johnson,* 554 S.W.3d at 895 (denying a stay for claims that were "largely just re-packaged versions of claims [the convicted individual] ha[d] brought (and seen rejected) many times before"); *see also Barton,* 597 S.W.3d at 664 n.4 (describing the required threshold showing that the proffered evidence is new).

106. As stated above, in support of his claim of innocence on behalf of Williams, Movant alleged that members of H.C.'s family would provide testimony that H.C. is a liar and "known informant." Mot. at 24. Movant alleges that L.A.'s friends would provide testimony that she is a liar and "known informant." *Id.* Movant further alleged that G.R., to whom the stolen laptop was pawned, was prevented by objection "from testifying about where he learned Mr. Williams obtained the laptop." *Id.* at 35. Movant asserted that Williams "had not himself secured the laptop, but rather had gotten it from his 'girl'[L.A.]." *Id.* Movant alleges that this information makes a clear and convincing showing of actual innocence. It does not.

107. None of this evidence is "new" as it was available at trial. And, in relation to the evidence found to be inadmissible by the Missouri Supreme Court, Movant cannot now claim that the purported evidence was wrongfully excluded under Missouri law because the Missouri Supreme Court, the

highest authority on Missouri law, has held that the evidence was properly excluded. Mo. Const. art. V, § 2; *Schlup,* 513 U.S. at 328.

108. Movant alleged in his motion that Williams' trial counsel provided ineffective assistance in not presenting the evidence he inconsistently alleged was new. *See* Mot. at 29-36, 36-43. But setting that aside, the record demonstrates that the evidence allegedly impeaching H.C. and L.A. was available at the time of trial. *See Williams v. State,* 168 S.w.3d at 440-42. And Movant's assertions that L.A.'s purported unreliability, "was similarly not presented to the jury [,]" Mot. at 34, is summarily refuted by the Supreme Court of Missouri. *See Williams v. State,* 168 S.W.3d at 441. In denying Williams' ineffective-assistance-of-counsel, the Supreme Court of Missouri stated: "As the motion court correctly found, this testimony would have been cumulative to the evidence at trial because the record contained evidence of [L.A.]'s drug addiction, prostitution, and that she might receive reward money for testifying at trial. Counsel will not be found ineffective for deciding not to introduce cumulative evidence." *Id.*

109. As for G.R.'s laptop testimony, the Supreme Court of Missouri found the circuit court properly excluded the evidence as self-serving hearsay. *State v. Williams,* 97 S.W.3d at 468. Movant has not explained why this Court should now consider evidence that remains inadmissible in considering whether Williams has made a showing of innocence, and this Court may not second-guess the Supreme Court of Missouri's ruling on the issue of admissibility. *See* Mo. Const. art. V, § 2; *see also Strong,* 462 S.W.3d at 734.

110. Further, contrary to Movant's argument that the jury did not hear this evidence, the Missouri Supreme Court, in discussing the rule of completeness objection from Williams, found that, "Williams was not precluded from showing that [L.A.] once had possession of the laptop. He introduced evidence from two witnesses who said they saw [L.A.] with the laptop during the summer of 1998." *State v. Williams,* 97 S.W.3d at 468-69. The substance of the evidence concerning G.R. was before the jury in Williams' trial and they nevertheless found him guilty. *Id.* Thus Movant cannot now use that same evidence to mount a freestanding innocence challenge. *Barton,* 597 S.W.3d at 664 n. 4; *Sheffield,* 272 S.W.3d at 284-85.

111. Movant's remaining evidence in support of Williams' claim of freestanding innocence amounts to nothing more than old evidence, self-serving hearsay, and evidence the jury could never hear. The evidence presented fails under the standard enumerated in § 547.031.3 or in *Amrine.* Movant has failed to demonstrate any basis for this Court to find Williams actually innocent of first-degree murder.

112. As the Supreme Court of the United States recognized nearly fifty years ago, the trial occupies a special role in our constitutional tradition:

> A defendant has been accused of a serious crime and this is the time and place set for him to be tried by a jury of his peers and found either guilty or not guilty by that jury. To the greatest extent possible all issues which bear on this charge should be determined in this proceeding: the accused is in the court-room, the jury is in the box, the judge is on the bench, and the witnesses, having been subpoenaed and duly sworn, await their turn to testify. Society's resources have been concentrated at that time and place in order to decide, within the limits of human fallibility, the question of guilt or innocence of one of its citizens.

Wainwright v. Sykes, 433 U.S. 72, 90 (1977).

113. Every claim of error Williams has asserted on direct appeal, post-conviction review, and habeas review has been rejected by Missouri's courts.

114. There is no basis for a court to find that Williams is innocent, and no court has made such a finding. Williams is guilty of first-degree murder, and has been sentenced to death.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that:

Movant's motion to vacate or set aside Williams' conviction and sentence is hereby **DENIED.**

SO ORDERED:

DIV. 13

Honorable Bruce F. Hilton
Circuit Judge, Division 13
September 12, 2024

Cc: Attorneys of record e-filed pursuant to Rule 103

IN THE CIRCUIT COURT OF THE COUNTY OF ST. LOUIS
TWENTY-FIRST JUDICIAL CIRCUIT
Division No. 13
The Honorable Bruce F. Hilton, Presiding

IN RE:	)	
PROSECUTING ATTORNEY,	)	
21ST JUDICIAL CIRCUIT,	)	
ex rel. MARCELLUS WILLIAMS,	)	
	)	
MOVANT/PETITIONER,	)	
	)	
vs.	)	CAUSE NO. 24SL-CC00422
	)	
STATE OF MISSOURI,	)	
	)	
RESPONDENT.	)	

TRANSCRIPT OF HEARING

Volume 1 of 2

AUGUST 28, 2024

Reported By:
Rhonda J. Laurentius, CCR, RPR
Official Court Reporter
Twenty-First Judicial Circuit

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I N D E X

THE COURT: Good morning. Welcome to Division 13.

We're on the record in Cause Number 24SL-CC00422, Prosecuting Attorney for the Twenty-First Judicial Circuit, ex rel. Marcellus Williams, Movant/Petitioner vs State of Missouri.

Let the record reflect this matter was previously set last Wednesday and rescheduled for today on the prosecutor's motion to vacate Mr. Williams' first degree murder conviction and death sentence pursuant to Section 547.031 RSMo. Sub 2021.

Let the record further reflect that Prosecuting Attorney appears through lead counsel Matthew Jacober. Mr. Williams appears by lead counsel Ms. Trisha Jessica Bushnell. State of Missouri appears through lead counsel Michael Joseph Spillane.

A couple of administrative procedures. Pursuant to my earlier orders, it is strictly prohibited pursuant to our local rule that any recording of these proceedings do not take place to maintain the integrity of these proceedings given the sensitive nature of these proceedings. In the event that it is brought to my attention that

anyone is recording these proceedings without my permission you will be asked to leave.

In addition, pursuant to pretrial conferences with counsel, I have limited this proceeding to six hours. I have allocated two hours to the Prosecuting Attorney, two hours to Mr. Williams' counsel, and two hours to the State of Missouri.

With that said, Mr. Jacober, you may proceed, unless there's any proceedings that need to take place prior to the start of the proceedings.

MR. SPILLANE: I have a couple of objections, Your Honor.

First of all, I would object to any evidence being heard or considered under actual innocence on the basis of judicial estoppel. And I have a case if I may approach.

THE COURT: You may.

MR. SPILLANE: The line is at page 235 in Vacca. What it says in Missouri judicial estoppel the only requirement is taking inconsistent positions. There isn't a four part test like there is in other states. If you take inconsistent positions you're stuck because of the

dignity of the Court. It is impugned. The Supreme Court says no playing fast and loose with the Court.

I can't imagine any more inconsistent positions than last week saying there's a factual basis for a plea and then coming in this week if they want to and saying no clear and convincing evidence shows his actual innocence. So I believe under Vacca that's out by judicial estoppel.

THE COURT: Thank you. That request will be denied.

MR. SPILLANE: Okay. The other thing I have is they have new witnesses that were not on the original list. I would ask that they be limited to testifying on the new claim because they were announced to us well after the time for witnesses were closed. So if they have something to say about the supplemental claim five that's fine, but I don't think they can bring in new witnesses two days before to testify about the other claims. So I would object to them testifying to anything except claim five, and I believe that would be Judge Green, Judge McGraugh, and Mr. Henson.

THE COURT: And I'll take up your

objection at the time those witnesses may or may not be called.

MR. SPILLANE: And the other two things I have. They have a report from Dr. Budowle and from Dr. Napatoff, and as far as I know those were never in the record anyplace so I don't think they are before this Court by affidavit or report alone. I don't know if you have any thoughts on that.

THE COURT: Well as I indicated previously, it's the Court's position that this statute has created unchartered waters. Nowhere in the statute is there a definition for information and that is what this Court is struggling with. So having said that, I'll go ahead and rule accordingly when the proffered evidence is attempted to be introduced.

MR. SPILLANE: Thank you, Your Honor. And I think all of our exhibits are in except for Dr. Picus which they objected to because they're already in the record. And I think their exhibits are in except for what I just talked about. Is that fair?

MR. JACOBER: I believe that's an accurate representation.

THE COURT: Thank you, Mr. Jacober. So

can you just identify just for the record the exhibits that are being received without objection.

MR. SPILLANE: Someone got the list here? I can read it, Your Honor, or I can just tell you if you've got a list. But I can read it in the record if you want.

THE COURT: Please.

MR. SPILLANE: A is the trial transcript. B is trial transcripts exhibits. C is the direct appeal legal file. C-1 being the direct appeal legal file. C-2 being the supplemental legal file. C-3 being the supplemental transcript on appeal. C-4 being Appellant's brief. C-5 being the Respondent's brief. C-6, Appellant's brief. C-7, the direct appeal opinion.

D is the post-conviction legal file, with D-1 being the evidentiary hearing transcript, D-2 being the post-conviction relief legal file, D-3 being Appellant's brief, D-4 being Appellant's appendix, D-5 being Respondent's brief, D-6 being Respondent's appendix, D-17 being Appellant's reply brief, D-8 being the post-conviction appeal opinion.

E is the federal habeas petition file. E-1 is the docket sheet. E-2 is the petition. E-3

is Petitioner's motion for discovery. E-4 is Petitioner's motion for evidentiary hearing. E-5 is Respondent's reply. E-6 is Petitioner's traverse. E-7 is order denying evidentiary hearing. E-8 is Petitioner's supplemental traverse. E-9 is response to the show cause order. E-10 is the memorandum and order. E-11 is the judgment. E-12 is the motion to alter or amend. E-13 is the suggestions in opposition to the motion to alter or amend. E-14 is the reply to the suggestions in opposition to the motion to alter or amend. E-15 is the order denying the motion to alter or amend. E-16 is the notice of appeal. E-17 is the order of dismissal after remand.

F is the federal habeas appeal file. F-1 is the application for certificate of appealability. F-2 is the suggestions in opposition to the certificate of appealability. F-3 is the order dismissing the application. F-4 is Petitioner's petition for rehearing en banc. F-5 is Respondent's suggestion in opposition to rehearing en banc. F-6 is the order denying rehearing en banc. F-7 is petition for writ of certiorari. F-8 is a brief in opposition to petition for certiorari. F-9 is an order denying

petition for certiorari.

G is the federal habeas appeal file. G-1 is the Appellant's brief. G-2 is Appellee's brief. G-3 is Appellant's reply brief. G-4 is the opinion. G-5 is the judgment. G-6 is the petition for certiorari. G-7 is the brief in opposition to petition for certiorari. G-8 is the Petitioner's reply brief. G-9 is the order denying certiorari.

H is execution proceedings in case SC83934. H-1 is motion to set execution date. H-2 is suggestions in opposition to motion to set execution date. H-3 is the order setting an execution date. H-4 is the warrant of execution.

I is the habeas file from SC94720. I-1 is the petition for habeas corpus. I-2 is the motion for stay of execution. I-3 is exhibits in support of petition. I-4 is suggestions in opposition to petition for habeas corpus. I-5 is the reply suggestions. I-6 is exhibits in support of Petitioner's reply. I-7 is an order vacating an execution order. I-8 is an order for stay. I-9 is suggestions in opposition to petition for writ of habeas corpus. I-10 is Petitioner's reply. I-11 is a letter to the Special Master. I-12 is the oath of the Special Master. I-13 is the file

before the Special Master. I-13.1 is the docket sheet. I-13.2 is a status report. I-13.3 is a status report. I-13.4 is a joint proposed protocol. I-13.5 is a status report. I-13.6 is a status report. I-13.7 is a status report. I-13.8 is a status report. I-13.9 is a status report. I-13.10 is a joint status report. I-13.11 is a joint status report. I-13.12 is a joint timeline. I-13.13 is the BODE forensic case report. I-13.14 is the April 18, 2016, status report. And Petitioner's response to a show cause order is I-13.15. I-13.16 is a joint status report. I-13.17 is a joint status report. I-13.18 is a status report. I-13.19 is a forensic case report. I-13.20 is a status report and motion for scheduling conference. I-13.21 is suggestions in opposition to the scheduling conference. I-13.22 is a status report. I-13.23 is a status report. I-13.24 is a prehearing brief. I-13.25 is the deposition of the expert Jennifer Fienup. I-13.26 is a Deposition Exhibit 1. I-13.27 is Deposition Exhibit 2. I-13.28 is Deposition Exhibit 3. I-13.29 is Petitioner's post-hearing brief. I-13.30 is Respondent's post-hearing brief. I-13.31 is a post-hearing order. I-13.32 is the

docket entry of dismissal. I-15 is the order denying petition for the writ of habeas corpus.

J is state habeas certiorari file. Petition for certiorari is J-1. Appendix is J-2. Motion for stay of execution is J-3. Brief in opposition to certiorari is J-4. Supplemental appendix is J-5. And order denying certiorari is J-6.

K is the 2017 execution proceedings. K-1 is the renewed motion to set execution date. K-2 is suggestions in opposition. K-3 is the order and warrant of execution.

L is a federal habeas motion file. L-1, motion for relief from judgment. L-2, suggestions in opposition to motion for relief from judgment. L-3, reply in support of motion for relief from judgment. L-4, order denying motion for relief from judgment.

M is a federal habeas appeal on that motion. M-1 is the notice of appeal. M-2 is the application for certificate of appealability. M-3 is a motion for stay. M-4 is suggestions in opposition. M-5 is Petitioner's reply in support. M-6 is judgment. M-7 is mandate. M-8 is petition for certiorari. M-9 is petition for stay. M-10 is

brief in opposition to petition for certiorari. M-11 is Respondent's supplemental appendix. M-12 is Petitioner's reply. M-13 is order denying certiorari.

N is the file -- state habeas file in SC96625. N-1 is the petition for certiorari. N-2 is the exhibits in support of the petition. N-3 is the motion for stay. N-4 is suggestions in opposition to the habeas corpus petition and motion for stay. N-5 is order denying petition for writ of habeas corpus and motion for stay.

O, state habeas certiorari file in case number 17-5641. O-1, petition for certiorari. O-2, appendix. O-3, brief in opposition to certiorari. O-4, supplemental appendix. O-5, order denying certiorari.

2023 execution proceedings, P. P-1 is the motion to set execution date. P-2 is suggestions in opposition. P-3 is reply in support of motion to set execution date. P-4 is notice of proceedings. P-5 is suggestions in opposition to notice of proceedings and attached exhibits. P-6 is reply suggestions in support of notice of proceedings. P-7 is an order and warrant of execution. P-8 is a motion to withdraw warrant of

execution. P-9 is suggestions in opposition to the motion to withdraw. P-10 is reply in support of the motion to withdraw. P-11 is supplemental suggestions in support of motion to withdraw execution warrant. P-12 is opinion overruling motion to withdraw execution warrant. P-13 is counter motion for rehearing. P-14 is order for overruling motion for rehearing.

Q, declaratory judgment file. Q-1, petition for declaratory judgment. Q-2, Petitioner's Exhibit 1. Q-3, Petitioner's Exhibit 2. Q-4, answer. Q-5, motion to dismiss by Attorney General. Q-6, defendant's motion for judgment on the pleadings. Q-7, defendant's motion to stay discovery. Q-8, suggestions in opposition to motion to dismiss Attorney General. Q-9, suggestions in opposition to motion for judgment on the pleadings. Q-10, suggestions in opposition to motion to stay discovery. Q-11, order dismissing Attorney General. Q-12, order denying motion for judgment on the pleadings. Sub-file of proceedings before the Missouri Court of Appeals, Western District is Q-13. Q-13.1 is the writ summary. 13.2 is the petition for writ of prohibition. 13.3 is -- Q-13.3 is suggestions in opposition in

support of petition. Q-13.4 is Relator's exhibit index. Q-13.5 is Relator's exhibits. Q-13.6 is Relator's certificate of service. Q-13.7 is order denying writ of prohibition or mandamus. The next thing is sub-file of writ of proceedings before the Missouri Supreme Court, Q-14. Q-14.1 is writ summary. Q-14.2 is petition for writ of prohibition or mandamus. Q-14.3 is suggestions in support of petition. Q-14.4 is Relator's exhibit index. Q-14.5 is Relator's exhibits. Q-14.6 is certificate of service. Q-14.7 is a preliminary writ. Q-14.8 is an order to show cause. Q-14.9 is a return. Q-14.10 is Relator's brief. Q-14.11 is Relator's appendix. Q-14.12 is Relator's Exhibit W. Q-14.13 is Respondent's brief. Q-14.4 is Respondent's - 14 - I'm sorry - is Respondent's appendix. Q-14.15 is Relator's reply brief. Q-14.16 is docket entries setting oral argument. Q-14.17 is opinion granting the petition for writ of prohibition. Q-14.18 is Respondent's motion for rehearing. Q-14.19 is order overruling the motion for rehearing. Q-14.20 is writ of prohibition made permanent. Q-14 -- Excuse me.

R is the Daniel Picus affidavit which has not been accepted by the Court. S is the Mr.

Magee affidavit. T is the Mr. Larner affidavit. U is Mr. Williams' criminal priors. V is Mr. Williams' DOC conduct violations. That's V. W is Johnifer Griffen criminal priors. X is Ronnie Cole criminal priors. Y is Durwin Cole criminal priors. Z is a map which is a demonstrative exhibit. P-8 is the -- I think that's it.

Last page. AA is the Brentwood Police Department report and attachments. BB is a Kansas City Police Department investigative report and attachments. CC is St. Louis Metropolitan Police Department report and attachment. DD is the prosecutor's file excerpts. And EE is prosecutor's file excerpts. And FF is the BODE supplement that I believe Mr. Clarke put in last Friday. And we're done.

THE COURT: Thank you. Mr. Spillane, the Attorney General has previously provided in an app I think called The App Box most of those exhibits, is that an accurate statement?

MR. SPILLANE: Yeah, I think everything is in there. Am I accurate?

MS. PRYDE: Yes, Your Honor.

THE COURT: I don't think I had FF until last Wednesday.

MS. PRYDE: That's correct. Nor did we.

THE COURT: With that notation, do you have any idea of the number of pages that you have submitted to this court for review?

MS. PRYDE: Yes, Your Honor. It is 12,000 pages is one copy of the record.

THE COURT: Thank you. Anything further, Mr. Spillane?

MR. SPILLANE: No, Your Honor. I think we're ready for opening if they're ready.

THE COURT: An opening is not necessary but if you would like to make one that's fine.

MR. JACOBER: Your Honor, we would not like to take our time by making an opening statement but would ask the Court to invoke the rule and exclude any witnesses from the courtroom who may testify today.

THE COURT: I don't believe there are any witnesses present except Mr. Williams and he has a right to be here.

MR. SPILLANE: The only thing, Your Honor, is they're going to call the evidence custodian, so I'm not sure he can custode the evidence and be a witness at the same time here

unless someone else can watch it.

THE COURT: That's part of your opening?

MR. SPILLANE: No, that's just you asking about excluding witnesses.

THE COURT: Right. I'll go ahead and invoke the local rule and any witnesses that are going to be called will be excluded during opening, unless you want to go ahead and not make an opening, Mr. Spillane.

MR. SPILLANE: No, I will make an opening, Your Honor.

I will talk about the evidence, but this case is about the rule of law. And every claim except the new claim, which is claim five that was raised earlier this week about bad faith destruction of evidence, has already been rejected by the Missouri Supreme Court.

The first thing I want to say about the new claim on bad faith destruction of evidence is that Missouri law requires there actually be bad faith. Here this happened in 2001. I suspect you're going to hear testimony from Mr. Larner and from Mr. Magee that in 2001 they had no idea what touch DNA was. I know it existed someplace in the

world but it wasn't in St. Louis where they knew about it. So they did absolutely nothing wrong. There's no bad faith, there's no negligence. And we can talk a little bit about how they handled the evidence and how the transcript shows that.

The transcript shows - I believe it's 2203 - that whoever broke in and committed the murder wore gloves because they left glove marks on both sides of the pane that was removed. So it's a reasonable inference, even if anybody knew about touch DNA, which they didn't, that the killer wouldn't have taken off their gloves after breaking in and then killed someone.

We also know that there were no fingerprints on the knife. That was Detective Krull's testimony. And there's a new complaint about fingerprints being destroyed. But if you look at both page 95 and 96 in the opening, those were prints that were useless. And if you look at Detective Krull's testimony about when he destroyed prints he said, We destroyed prints that we couldn't use, that's what we do, that's our normal practice. Under Missouri case law if they're following the normal practice that's not a bad faith violation.

The next thing I want to talk about is other evidence that was handled. The fingernail clippings were tested, were in a plastic case, and Prosecutor Larner, if you look at the transcript there, he said, I'm not going to open these because I'm not wearing gloves and I don't want to contaminate them. He had no reason to believe he could contaminate the handle of the knife. I'm not even sure if he could if the fella wore gloves and if they weren't set up to do touch DNA in 2001. But he did nothing wrong and nothing in bad faith.

You're also going to hear evidence that the stuff did come in sealed containers which I think is inconsistent with what Mr. Larner first remembered, that the handle was sticking out. But I think since then he's read the transcript and looked at the evidence this morning and he now recalls it was in a sealed container. So there's no problem there.

He handed the knife, according to the transcript, to Detective Wunderlich and then to fingerprint examiner Krull and he said on the record, I'm holding the knife in my hand. Nobody thought there was anything wrong with that. Defense counsel didn't jump up and down and say,

You're holding the knife, because there was nothing wrong with holding the knife. There's not even negligence there. And I think both Larner and Magee, if I'm not mistaken, will likely testify that they've done many dozens of cases where after evidence was tested and everything that could be done to it was done they handled the knife all the time. That was normal practice. I believe that will be their testimony.

I'm going to talk a little bit about the Batson because at page 55 of their motion they allege that Mr. Larner was involved in Batson violations in McFadden. That's not true. There were four McFadden cases in the trial court. Two were overturned for Batson and two weren't. The two that Mr. Larner worked on there were no Batson violations. As far as I know he's never had a Batson violation sustained all the way up in his career. My belief is that he had one violation in Purkett vs Elem that wasn't a violation at all, and the U.S. Supreme Court issued a writ overturning it and saying he did nothing wrong.

So I don't like him being accused of Batson violations because he didn't. And the Missouri Supreme Court found he did not in this

case in the direct appeal. And I don't like him being accused of sloppy evidence practices because he didn't.

Something else that's important is both Larner and Magee are going to testify that Laura Asaro never asked for a reward. And if it comes in Mr. Magee will testify that she gave it away after she got it. So I don't like her character being attacked for supposedly testifying based on a reward.

That's essentially it. Every claim they have made except the new one has already been rejected by the Missouri Supreme Court.

I'll talk a little bit about their original witnesses. Marcellus Williams already testified by deposition. I'm sure you read the PCR legal file, end of Volume 3, beginning of Volume 4. At that point he admitted to lying under oath to get what he wanted in a court proceeding. And then he was asked, Are you lying in this case, and he said, You would know that better than I do. So that's not a real credible thing there. And I think you have to look at that in accord with whatever he says today.

Also, if you look at Judge McGraugh's

testimony back in the PCR hearing it was I think five or six times he said, That was too long ago, I don't remember. And that was 20 years ago. If you look at Judge Green's testimony he said, I had a strategy for penalty phase which was residual doubt as well as saying he was well involved with his family and he was a benefit to his children and was staying in contact with them even in prison. So that testimony is in. And the Missouri Supreme Court found there was no ineffectiveness either on prejudice or on reasonable conduct in not putting in the different strategy that he now alleges he should have put in which was one of an abusive childhood strategy, 180 degrees from what he alleged before.

So I think that's about all I have to say in opening is to say that Mr. Larner and Mr. Magee did absolutely nothing wrong. And it's not a nice thing to say that they did when there's no evidence to support it. And they'll testify that Ms. Asaro didn't want a reward. So I think that's what I have to say, Your Honor.

THE COURT: Thank you, Mr. Spillane. In reference to the direct appeal and the PCR, it's my understanding those opinions were written by

Judge Richard Teitelman.

MR. SPILLANE: I think so. I have it in my pile here, but I don't remember.

THE COURT: That's my recollection. Thank you.

Wish to proceed, prosecuting attorney?

MS. MCMULLIN: Yes. Our first witness -- the prosecution's first witness is David Thompson. For the record, he'll be appearing via Webex.

THE COURT: Great. Is there any objection to him appearing by Webex?

MR. CLARKE: Your Honor, at this point there would be two objections, one to the Webex appearance, Your Honor, and the second to, as I understand it Mr. Thompson's testimony will go solely to the credibility of other witnesses and that sort of testimony is categorically inadmissible. It's this Court's job to determine the credibility of witnesses, not experts.

THE COURT: So what is your legal objection to him appearing by Webex?

MR. CLARKE: That the rule allows for him to appear by Webex with the consent of the parties, and this case, Your Honor, is a very

serious case and that Mr. Thompson should appear in person.

THE COURT: Out of the abundance of fairness I'm going to overrule your objection.

Will you please raise your right hand.

DAVID THOMPSON,

having been sworn, testified via Webex as follows:

THE COURT: You may inquire.

DIRECT EXAMINATION

BY MS. MCMULLIN:

Q. Will you please introduce yourself?

A. Yes. The name is Dave Thompson. I'm a certified forensic interviewer and president of a training firm Wicklander-Zuwalski & Associates.

Q. And what is a certified forensic interviewer?

A. A certified forensic interviewer is a designation that I've earned over a decade ago where you pass a test that qualifies your knowledge in the field of investigative interviewing, requires continuing education credits to complete such designation, and that's part of my qualifications that I currently have at Wicklander-Zuwalski.

Q. Besides the certification you just

talked about and the test, do you have any other qualifications that would allow you to be a certified forensic interviewer?

A. Sure. A combination of both practical experience and academic experience. So my formal education, my undergrad, my bachelor's degree is in psychology in criminal justice. And I received a secondary degree, a master's in forensic psychology. And over the last over ten years working at Wicklander-Zuwalski in that capacity I routinely work with the academic communities, either contribute to their studies, consult on their studies, or have also brought them into our firm to be a part and recipient of training for continuing education.

Q. Mr. Thompson, do you have what I'm marking now as State's Exhibit 18A? Which is at Tab 3 in your binder, Judge. Do you have your CV in front of you?

A. Yes, I have an electronic version of that in front of me.

Q. Okay. And can you take a look at it. Does it have in the lower right-hand corner a Bate stamp that says STLCPA30?

A. Yes, it does.

Q. Can you take a look through that and let us know if this is your -- an accurate and true copy of your CV?

A. Yes, it appears to be. Yes.

MS. MCMULLIN: Judge, we offer Exhibit 18A.

MR. CLARKE: No objection.

THE COURT: That will be received.

Q. Mr. Thompson, are you being paid for your time here today?

A. I been retained by The Innocence Project and paid an hourly rate for my time that I contribute to this case.

Q. Do you typically get paid for your time when you're an expert in cases like this?

A. Yes, I do.

Q. And how much are you being paid?

A. I have an hourly rate of $300 per hour.

Q. Briefly can you explain what training you have involving investigative interviews and if you do any training as a forensic interviewer?

A. Yes. My training outside of my formal education as I mentioned and my master's program I had a capstone in false confessions --

Q. You have to slow down for the court

reporter.

A. Sure. Sorry about that.

Q. So you were talking about your training that you have.

A. Yes. To recap the last part of that answer, in the completion of my master's degree I did a capstone project on false confessions which was a focus on investigative interviewing. In addition to that I'm a member of several associations and attend several conferences including the Academy of Criminal Justice Sciences, the International Investigative Interviewing Research Group, and, as I mentioned earlier, routinely bring in the academic community on a monthly basis to train myself and my other instructors specifically on evidence-based investigative interviewing.

Q. And you said that you train others on investigative interviewing. Do you train law enforcement?

A. I do, and we do collectively as an organization as well. My primary full-time job is leading a training firm that teaches both benefactor organizations and law enforcement professionals across the globe. We've trained

groups like the Chicago Police Department's criminal investigations divisions, some agencies in the State of Missouri specifically on investigative interviewing techniques in a variety of types within them.

MS. MCMULLIN: Judge, at this time we move to enter David Thompson an expert in evidence based investigative interview practices.

MR. CLARKE: Judge, we would just ask that the objection to the categorical inadmissibility be continuing. But besides that, no objection, Your Honor.

THE COURT: Thank you. He will be received as an expert based upon his training and expertise on investigative based interviewing.

BY MS. MCMULLIN:

Q. Dr. Thompson, did you write a report in this case?

A. I did write a report, yes.

Q. And do you have that report in front of you?

A. I do.

Q. Okay. I'm marking it as Prosecutor's Exhibit 18B.

That's also at Tab 3 in your binder,

Judge.

Can you take a look at this report and make sure it's complete. It starts with Bate stamp STLCPA75.

A. Yes, this looks complete.

Q. What were you asked to do in this specific case?

A. I was asked to review statements obtained through investigative interviews of Henry Cole and Laura Asaro and opine on the reliability of the information gained based off of my experience and expertise.

Q. And why is the reliability of witnesses important in criminal cases?

A. The reliability of information gained can be instrumental in identifying further steps to take in an investigation. That process, the evaluation process of an interview is something that we focus primarily on when we teach evidence-based interview practices is assessing the reliability of statements obtained through those conversations or the investigation.

Q. And how do you typically go about analyzing the reliability of a witness statement?

A. As I mentioned, part of our process is

what we call an evaluation stage. At the end of the investigative interview or the interaction with that witness one of the first things that we would look at is any potential incentive or reason that the witness or subject interviewee may come forward with information. An incentive does not necessarily mean that information is untruthful but it would be something that we would want to consider as to the reliability of that information.

We would also look at the details provided throughout that engagement with the investigator, were those details verifiable, were they consistent with potential evidence, consistent with their own story, and then was there any contamination present in advance of those details being shared by the interviewer themselves.

Q. And through those factors that you mention that you analyze reliability through did you come to conclusions in this case about Henry Cole and Laura Asaro?

A. I did. I found both witnesses appear to have an incentive to provide information, which again does not immediately render it as untruthful but something I would consider in the totality of the reliability.

I also determined that there were several assertions made by both Cole and Asaro that either conflicted with each other, conflicted with evidence if it was available, or were assertions made that I could not verify and, therefore, it didn't add any weight on its reliability.

And lastly found that the majority of the information that both Cole and Asaro provided was susceptible to contaminating factors, meaning it was maybe either available publicly or previously known to law enforcement before it was disclosed by either witness.

Q. We'll get into that in a second. But are your conclusions contained in your report?

A. Yes, they are.

MS. MCMULLIN: Judge, we offer Exhibit 18B, Mr. Thompson's expert report.

MR. CLARKE: Your Honor, objection. Cumulative. Mr. Thompson is here, he can testify about the findings of his report.

THE COURT: Thank you. It will be received.

BY MS. MCMULLIN:

Q. Let's talk about reliability. So you mentioned four different factors, but is body

language, physical behavior or demeanor affecting reliability as well?

A. Body language is something that is I would say amiss in the investigative world that is often used improperly to classify somebody's statement as being truthful or untruthful. The research shows us there were actually about 54 percent accurate in identifying truth versus a lie based on physical behavior.

The problem with that, however, to your question of reliability is often on the surface people might observe body language and assume truth or guilt based off of these kind of gut feelings which may not necessarily be accurate.

Q. Let's start with the first factor in your report and that you mention, incentive to cooperate. Can you describe this factor and how it would affect reliability?

A. Incentive to cooperate could be something that we see, whether it's a witness interview or even maybe the interview or interrogation of a suspect. If somebody has an incentive, meaning it could be a financial reward, it could be avoiding of, you know, perceived consequences, an incentive could even be a person

who is in custody has an incentive to escape that situation.

And so what the research has shown us is that when there is an incentive to provide information it could undermine the reliability of the information that is obtained.

Q. And from the documents that you reviewed in this case, including the statements of Henry Cole and Laura Asaro, did Henry Cole have an incentive to cooperate in your opinion?

A. Yes, in my opinion, and what I reviewed in Mr. Cole's deposition and his statements is that he was very persistent on obtaining a financial reward throughout this process and seemed to weigh heavily on his decision to cooperate.

Q. Does timing play a role in the reliability and incentive to cooperate in your analysis, the timing of the statement?

A. Yeah, I might need you to clarify if I'm not answering correctly what you're...

Q. That's a good point. If a witness were to bring up an incentive before providing information would that affect your analysis about reliability of their statement?

A. Yes. I would say obviously the

knowledge of the incentive or the immediacy of needing such incentive creates desperation for somebody to provide information. We see the same thing in false confession research is that a person, an interviewee who is in custody has a more immediate need, whether it's to escape the room or to obtain some type of deal, it increases the likelihood they're going to provide information.

Q. And did you find that incentive to cooperate here with Henry Cole?

A. Yes, I did. With Henry Cole I believe there was multiple times in which he requested or asked about the reward money. And then I was also made aware through what I reviewed that in advance of I believe it was a deposition that he provided that he requested half the reward money at that time or was potentially refusing or not going to be available to testify.

Q. What about Laura Asaro, what did you conclude as to her potential incentive to cooperate?

A. Yes, Laura Asaro also was aware of the reward money. And it also appeared from what I reviewed that Laura had multiple times in which she was engaged with law enforcement and was questioned

about her knowledge about this case and provided little to no details until I believe it was over a year later. I may have the exact time wrong. But at that time the incentive appeared to be avoiding perceived consequences or other charges unrelated to this case.

And then I believe there was also a few witness statements that I was made aware of through what I reviewed that Laura Asaro had a history of being an informant or providing information in lieu of preventing other consequences, which was similar here. And the other incentive again potentially is that there was another statement that a key piece of evidence, a laptop, is something that Laura Asaro was implicated in having either possession or prior knowledge of which would also give her incentive to implicate somebody else.

Q. Does this factor alone, the incentive to cooperate, necessarily mean a witness statement is untruthful or unreliable?

A. No. No, it does not.

Q. What's the next step in your analysis?

A. Once we identify what type of incentives or the context of the situation then we're going to look at the specific details or

assertions that were provided by the witness or the interviewee, and then we can measure those against if they're reliable - I'm sorry - if they're verifiable, if there are things that we can even substantiate to prove or disprove, if they're consistent with known evidence or with each other, if there's any contaminating factors present in those specific assertions.

Q. Let's talk about verifiability first. In your analysis did you determine whether any facts provided by Henry Cole to the police -- that Henry Cole provided to the police were facts that the police or the public did not already know?

A. Umm, the only information -- No, the facts that the police or public did not know, no, I did not. The information that Henry Cole provided was either publicly available, whether it was through media reports, newspaper, or news coverage, or was information that was known to investigators prior to their interaction with Mr. Cole.

Q. Did you determine whether there were any facts provided by Henry Cole that were unverifiable?

A. Yes, there's a variety of assertions. For example, I believe Mr. Cole alleged that the

victim made some verbal remarks to the intruder, What are you doing, who's down there, things to that nature that I have no way to verify if that was true or untrue. So there's a variety of assertions in that capacity that again could be truthful, could be untruthful, but without the ability to substantiate it it's unverifiable and doesn't impact the reliability in my opinion.

Q. Let's move onto Laura Asaro and verifiability. In your analysis did you determine whether there were any facts provided by Asaro to police that the police or the public did not already know?

A. Yes. I believe the sole fact that I identified was the location of a stolen or missing laptop that I believe police were then able to chase down or further investigate that lead.

Q. If the location of the laptop was provided by Asaro does that automatically make her statements reliable in your opinion?

A. No. On the surface it could. And on its surface in my review of that information she's providing something that was previously unknown to police which would suggest reliability. On review of all the documents I was provided it also

appeared that there is conflicting statements from other witnesses that suggest Laura Asaro may have had prior knowledge or even possession of that laptop outside of implicating directly Mr. Williams. And so I take that into account that, yes, she had that information, that information could have come from other sources and potentially even given her an incentive to falsely implicate somebody else.

Q. Next let's talk about consistency with evidence and potential contamination. Do you have the chart from your report handy, Mr. Thompson?

A. Yeah, I do.

MS. MCMULLIN: Judge, the chart is at Tab 4 if you want to look.

Q. Mr. Thompson, can you briefly describe what you mean by consistency in the context of reliability?

A. Yes. When I put consistency in the chart which you'll see is a change in story. So what I'm looking for kind of between the second and third column there is the change in the story, meaning did a witness or interviewee have an evolution of their statements whether it was between an interview and a deposition or further

conversations with law enforcement. And then that third column, again to consistency, is was it consistent with either known evidence if there was any forensic evidence to match it up against or even consistent with other witness testimony.

Q. We won't go through all of these, but let's take a look at the first one for Henry Cole. Williams told Cole about the murder after reading the article in the St. Louis Post-Dispatch. So is that a verifiable fact?

A. The way for that to be verifiable is if you interviewed any other parties that were involved. But to my ability, no.

Q. Then you have in the second column, Change in story: Cole testified that this discussion happened after he and Williams watched news coverage of the story. So does that go to your opinion that there are potential inconsistencies with his own statements?

A. Correct.

Q. Let's go to the bottom of the -- or the middle of the chart there where it says -- Or I'm sorry. Yes, the bottom. Williams went upstairs in the Gayle residence during the incident. Is that a verifiable fact?

A. Again, it could be if there was forensic evidence that either supported or disproved that, but without that ability then, no, I wouldn't have the ability to verify that.

Q. And then the third column you have Conflict with evidence/Asaro and you have: Asaro claims that Williams never went upstairs. What does that mean for your reliability analysis?

A. Again, when you don't have any other either forensic evidence or video surveillance when comparing witness statements against each other what happens often is investigators may have confirmation bias or may fall kind of victim to the believability of one person over another for a variety of reasons. So looking at this objectively we have two different witnesses providing two conflicting statements, and so it undermines the reliability of each. We don't know what's truthful or untruthful in that capacity.

Q. When it comes to this chart did you put every single fact that Henry Cole or Laura Asaro had in their statements in these charts?

A. No, I did not. There was a variety of assertions or facts that I thought were either duplicative to what was already in the report,

ambiguous, unverifiable. You know, for example, I know Mr. Cole described some of the layout of the property, including the landing and the floors were squeaky. And so I felt like those types of statements were again, in the totality of my review, either previously known to investigators or potentially unverifiable or from other sources. And so I did not provide every assertion within either chart but wanted to give a visual to the Court of the totality of my review.

Q. Next let's move on to the chart of Laura Asaro. So if we go down to the third box you have: Williams entered the Gayle residence through the back door. Now what is your analysis of consistency with that statement?

A. In this specific statement, as you see in the chart, we have both the conflict with the potential forensic or actual crime scene evidence that looked like forced entry was through the front door. And we also have a conflicting statement with Mr. Cole's opinion or assertion asserting or alleging that Mr. Williams entered through the front door. So we've got multiple conflicts here in the story.

Q. You also mention potential sources of

contamination and that's on your chart here as well in the fourth column. What do you mean by that?

A. Contamination is -- When you are trying to determine reliability the most reliable of information is something that a interviewee provides an investigator that was completely unknown to investigators, such as the location of a murder weapon, that they were then able to go out and investigate and discover.

Contamination would be, or potential sources of contamination could be news reports, revealing of crime scene photos, witnesses talking to each other, which happens in the leap of time. Contamination can also be unintentional by good investigators, and there's a history of that occurring across the country where investigators, just through simple questioning, story-telling, or interactions with subjects may reveal details about the crime that are then simply regurgitated or assumed by the interviewee as a truthful piece of information.

Q. In this case in the time since Henry Cole and Laura Asaro gave their statements from when the murder happened can we know all the potential sources of contamination that could have

occurred?

A. No. And to my knowledge I believe this case was covered publicly in some news coverage and I had the opportunity to review a few news articles. So between the public release of information, between unknowing who was involved or not involved in the situation that could have discussed it, witnesses engaging with each other, multiple investigators involved, it's hard to keep track of what information was intentionally withheld from the public.

Q. You mentioned multiple witnesses talking to each other. What's your understanding of that happening in this case?

A. Specific to what I reviewed I know in the interaction that law enforcement had with Mr. Cole and in their pursuit of the investigation was hopeful that Mr. Cole could potentially leverage a relationship or connection with Ms. Asaro and tried to obtain any type of evidence to substantiate the story. So whether it was -- I believe they even quoted a backpack, it was a $10,000 backpack, and kind of reasserting that there's an incentive tied to if you're able to retrieve this information. So I believe Mr. Cole had attempted contact. I don't

know what the extent of those conversations were.

Q. Were you also aware or made aware of contact between law enforcement and Henry Cole prior to his statement in this case?

A. Yes. I reviewed -- I believe the origination of that was a letter written by Mr. Cole that suggested he had information about the case and inquiring about next steps. I don't have again the knowledge. If there's information or if there's interactions that are not recorded or fully documented I don't know what those interactions look like. But I know there was some type of interaction between that point and the first recording I believe in June of '99 of the interview of Mr. Cole with law enforcement.

Q. That was my next question. Do you know if -- To your knowledge was the statements or the calls between Henry Cole and Laura Asaro, the two witnesses in this case, recorded by law enforcement?

A. I reviewed transcripts and recordings of engagements that they had with both Cole and Asaro, but to my knowledge not every engagement was recorded or fully documented so I'm unable to make an opinion on what happened during those

conversations.

Q. And I should clarify. What I meant was the conversations between Laura Asaro and Henry Cole, were those recorded to your knowledge?

A. Sorry if I misheard you there. No, I don't believe so. I wasn't given any report of what those conversations would have looked like or what information was shared.

Q. So in terms of the reliability of Henry Cole's statements in this case what did you conclude?

A. I concluded again, based off of the main objective of looking for actionable, reliable information that could be independently corroborated, meaning he provided information that investigators did not know, was consistent with evidence they were to investigate, I did not see that in the statement provided by Mr. Cole, and so I felt like the information he provided and the way in which it was provided undermines the reliability of that information.

Q. And in terms of reliability for Laura Asaro and her statements in this case, what was your conclusion about the reliability of those statements?

A. Same context for that response. And I did not find that Laura Asaro was able to provide any information other than location of the laptop that was independently verifiable by investigators. And then that piece of information, as I mentioned earlier, has some conflicting statements as to maybe what the source of that information actually was. So again, I believe her statement, based on the qualifications I looked at or the criteria I looked at, undermines the reliability of it in its totality.

Q. When it comes to inconsistent and potentially unreliable statements like you said that there might be in this case, as a trainer of law enforcement what would you have recommended the investigators in this case do?

A. Umm, further investigate, which I know sounds like a very superficial and simple answer. But often witness statements or circumstantial evidence should require investigators to further investigate to either substantiate, disprove, or perform the same type of evaluation I did to determine the reliability of that information.

Q. Thank you, Mr. Thompson.

A. Yes.

THE COURT: Mr. Spillane, Mr. Clarke.

MR. CLARKE: Yes, Your Honor.

CROSS EXAMINATION

BY MR. CLARKE:

Q. Mr. Thompson, can you hear me?

Mr. Thompson, can you hear me?

A. Yes, I can.

Q. Okay. If you can't hear me just tell me to stop and we'll ask you again. All right.

So Mr. Thompson, in this case I want to talk to you about what you reviewed. You reviewed interviews of Henry Cole and related transcripts, is that right?

A. Correct.

Q. And your report didn't identify which interviews or how many interviews. Do you know how many you reviewed?

A. They were broken down into a handful of video segments. I don't have the number of those interviews.

Q. Okay, they were broken down into a handful of video segments. How did you receive those video segments?

A. I believe it was through either a Dropbox file or some type of electronic sharing.

Q. And that was given to you by Mr. Williams' counsel?

A. Correct.

Q. Okay. And same goes for the interviews of Laura Asaro?

A. Correct.

Q. And your report says you reviewed Exhibit 5, Henry Cole letter; Exhibit 6, Henry Cole deposition 4/2/01; Exhibit 7, Henry Cole deposition 4/12/01; Exhibit 9, Laura Asaro's deposition 4/11/01, is that right?

A. Yeah, that's correct.

Q. And you reviewed those documents?

A. Yes, correct.

Q. And you also reviewed Exhibit 10, interview Laura Asaro notes?

A. Correct.

Q. And Exhibit 12, Laura Asaro 11/17/99 transcript?

A. Yes, correct.

Q. And a Henry Cole deposition from 4/3 of 2001?

A. Correct.

Q. You reviewed the prosecuting attorney's motion to vacate filed --

A. I did.
Q. -- 1/26/2024?
A. Yes.
Q. And you identified unidentified Henry Cole handwritten notes, is that right?
A. Yes, correct.
Q. How many notes?
A. I believe it was one page of a note with a number of bullet points on that note.
Q. So that's the entirety of what you reviewed in this case?
A. The only other information that's not listed here was three or four articles from I think it was St. Louis Post-Dispatch that I requested from counsel as potential sources of contamination.
Q. Okay, from which counsel did you request that?
A. Umm, from Mr. Williams' counsel, from Alana or Mr. Adnan Sultan.
Q. Okay, and you said three or four newspaper reports?
A. Correct.
Q. Were those contemporaneous newspaper reports or reports from the day? What were those reports?

A. They were copies of the St. Louis Post-Dispatch articles relating specifically to this case. I believe they were referenced or cited within the motion to vacate.

Q. Okay. So with those three or four newspaper reports and everything I just listed that's the entirety of what you reviewed in this case, is that right?

A. Yes. From what I recall, yes, I believe so.

Q. Okay. So when you're doing your review do you find it worthwhile to speak to individuals who were involved in cases?

A. It can depend on the type of review.

Q. So would you normally want to talk to the police officer who did the investigation?

A. No, normally I'm not.

Q. You don't want to talk to the police officer at all?

A. The request that I was given to review these statements was not to have engagement with the police officer about their opinion about the statements.

Q. Okay. So you were -- just obtained these things that Williams' counsel gave you,

right? And to give an answer, is that right?

A. Yeah, I was asked to review the information that was given to me and look objectively at the reliability based on the factors I mentioned earlier.

Q. So you spoke to no police officer who interviewed Williams' case, correct?

A. Correct.

Q. Okay. You spoke to no witness in Williams' case, is that right?

A. That's correct.

Q. You didn't speak to Henry Cole?

A. Correct.

Q. Or Laura Asaro?

A. Correct.

Q. Do you know if you could have spoken to Henry Cole?

A. No, I don't believe so.

Q. So you know nothing about Henry Cole at all except what you were given?

A. I don't -- I'm not sure if Henry Cole is still with us, but I don't have any other information about Mr. Cole.

Q. Okay. So do you have an idea about how many pages approximately you reviewed when you did

your report?

A. No, I don't have an approximate number.

Q. Would it be a thousand, would that be fair?

A. Probably less than a thousand.

Q. Less than a thousand. Okay. So if I were to tell you that there are more than 12,000 pages in the state court record, or approximately 12,000 pages in the state court record, you reviewed less than a thousand of those, is that right?

A. Yeah, approximately. I don't have a specific page count but --

Q. Okay. So do you know that Mr. Williams went to trial?

A. Yes.

Q. Then you know that there were witnesses who testified in that case?

A. Yes.

Q. And that those witnesses were police officers and other people?

A. Yes, I would assume.

Q. Okay. But you didn't review the trial transcript in this case?

A. Correct.

Q. So if the police officers talked about the interview of Henry Cole or Laura Asaro you wouldn't know, is that right?

A. Right, outside of the depositions I reviewed.

Q. And those are depositions of Henry Cole and Laura Asaro, is that right?

A. Correct, yes, sir.

Q. And those are the ones that Williams' counsel gave you?

A. Correct.

Q. So you didn't do any independent investigation in this case?

A. No.

Q. Okay.

A. Not outside of what I was provided.

Q. All right. So if the trial transcript shows that an individual -- that the defense, Mr. Williams' counsel called a contamination witness from the St. Louis Post-Dispatch you would have no idea?

A. Correct.

Q. Okay. And if that witness made similar arguments to what you're making today about contamination in the media you wouldn't know would

you?

A. Not outside of what I reviewed.

Q. And you didn't review the trial transcript, right?

A. Correct.

Q. Okay. So if that testimony was presented at trial -- Do you know Mr. Williams was convicted, right?

A. Correct.

Q. So the jury didn't believe the contamination witness, is that correct?

A. I don't know. I can't speak to the mind of the jury.

Q. Okay. So now you spoke about what the investigators may have done when you talked about contamination, about what they may have said or may have done. You didn't speak to any investigator, correct? You said that many times now, right?

A. Correct.

Q. So you don't know what the investigators knew at the time?

A. I knew investigators -- it was clear what information investigators did know, such as there was a victim who was stabbed in the house and what the crime scene would have looked like would

be general knowledge investigators would have had.

Q. Okay. So I'm looking at your report here on the first page of what you reviewed. You did not include police reports, is that right?

A. Correct.

Q. So you didn't review any of the police reports in this case beside the interviews?

A. Correct. And the -- wouldn't be a police report but interview Laura Asaro notes were I believe notes prepared by investigators in preparation of engagement with Laura Asaro.

Q. But if there were other police reports you have no idea what they say?

A. Correct.

Q. Okay. Because Mr. Williams didn't give them to you?

A. That's correct.

Q. Okay. Now you said that Laura Asaro was aware of the reward money. Did she request the reward money?

A. If I may just go back to my chart that you're referring to?

Q. Sure.

A. I believe there was -- Ms. Asaro was aware of the reward money at the time it was made.

It was public knowledge at the time.

Q. Okay. Did she request the reward money?

A. Not that I can recall or that's within my report.

Q. Okay. So your recommendation -- When you were asked about a recommendation about what the investigator should have done and you said further investigate, but you hadn't reviewed the police reports, is that right, in this case?

A. Correct.

Q. So you don't know what the police did?

A. Umm, not the full extent of their investigation.

Q. Or what they didn't do?

A. Correct.

Q. You've never spoken to a police officer about Marcellus Williams?

A. That's correct.

Q. You've never spoken to any witness about Marcellus Williams, is that right?

A. That is correct.

Q. The only people you've spoken to are Mr. Williams' counsel, is that right?

A. Correct.

Q. Okay. So your report is based on what Mr. Williams' counsel gave you entirely, is that correct?

A. My report is based on the information that I listed that was provided to me and then my opinion on that information.

Q. So Mr. Williams has paid you in this case, is that right?

A. I been retained by The Innocence Project.

Q. Okay. And I have a number that as of 7/22 you made $1,200, is that correct?

A. I haven't collected any funds at this point. That was probably the approximate number of hours spent at that time.

Q. How many hours do you think you spent through today?

A. Roughly 20 I would say.

Q. Okay. And what's your hourly rate?

A. $300 an hour.

Q. So 20 times 300 is what you're going to be paid by The Innocence Project, is that right?

A. Yes, correct.

Q. Any other payments coming your way from The Innocence Project?

A. Not relative to this case, no.
Q. Relative to other cases?
A. I been retained on cases in the past or other legislative work with The Innocence Project.
Q. How many cases?
A. I believe I can recall one case I was retained by The Innocence Project in which there was billing involved.
Q. Okay. Now how many cases when there weren't billing involved?
A. I don't recall any off the top of my head. I've been called to discuss cases and sometimes I'm not retained. So there was only one case that I can recall that I was retained on by The Innocence Project out of New York in which I invoiced for.
Q. To date how much do you think that you are either owed or have been paid by The Innocence Project?
A. Just to clarify, when you say Innocence Project, there's a variety of innocence projects across the country so a variety of jurisdictions that are not necessarily connected together. So I just want to clarify when I answer your questions.
Q. Okay. Earlier you said The Innocence

Project and you said New York Innocence Project. So how much has The Innocence Project, the New York Innocence Project paid you?

A. I believe the only other case I had invoiced and worked with that innocence project was a case out of Texas and that would have been invoiced probably two or three years ago.

Q. Okay. So it's fair to say you've worked with The Innocence Project before?

A. Yes, correct.

Q. All right.

MR. CLARKE: One moment, Your Honor.

Q. Now if witnesses gave statements about the victim's ID in this case and a type font ruler, do you know anything about that?

A. Umm, I know that there was -- there were statements made by Mr. Cole I believe that there was an assertion that Mr. Williams took an ID and pocketbook and few other things if that's what you're referring to.

Q. Do you know anything about a type font ruler, about a ruler that an editor would use for a paper?

A. I don't recall that.

Q. So you have no idea about that?

A. I don't recall that.

Q. Okay.

MR. CLARKE: Nothing further, Your Honor.

THE COURT: Thank you.

MS. MCMULLIN: Just a brief couple of questions.

THE COURT: Redirect.

REDIRECT EXAMINATION

BY MS. MCMULLIN:

Q. Mr. Thompson, just to clarify a couple of things that you just went through with the Attorney General's Office. Did you review the motion to vacate that was filed in this case as part of your analysis?

A. Yes, I did, correct.

Q. In that motion did you see quotes and citations to other documents in the record including police reports?

A. Correct. That's where I sourced a lot of information from, including the request for the St. Louis Post-Dispatch articles, from those citations.

Q. And for purposes of your analysis you assumed that those quotes and citations to the

record documents were accurate, right?

A. Yes, correct.

MS. MCMULLIN: Nothing further, Judge.

RECROSS EXAMINATION

BY MR. CLARKE:

Q. Mr. Thompson, so you're going on faith that the prosecuting attorney's office and Marcellus Williams' counsel accurately summarized the exhibits and trial transcripts in this case?

A. In reviewing quotes directly from the motion to vacate I would assume those quotes were directly taken from the trial transcript or other respective sources.

Q. Didn't want to read it yourself?

A. I assume that information was accurate and true and was enough information for me to provide the opinion I provided. I'd be open to review contradictory information to those direct quotes that were in the motion to vacate if that's the case.

MR. CLARKE: Nothing further.

THE COURT: Thank you. Can this witness stand down? Oh.

MR. POTTS: Yes, Your Honor. I just was going to stand up for the record. No questions

on behalf of Mr. Williams.

THE COURT: Thank you.

MS. MCMULLIN: Thank you, Mr. Thompson.

THE COURT: The witness can stand down. You can go ahead and log out of Webex.

THE WITNESS: Thank you. Thank you for the Court allowing me to testify remotely. Appreciate that. Thank you.

THE COURT: Next witness.

MR. JACOBER: Your Honor, at this time the State would call Judge Joseph Green.

THE COURT: Judge Green, you're an officer of the Court, I don't think it's necessary for me to swear you in but I will for the sake of this record.

JUDGE JOSEPH GREEN,

having been sworn, testified as follows:

THE COURT: Would you please have a seat in the witness chair. When the witness is comfortable you may inquire.

THE WITNESS: Judge Hilton, is it okay if I have this (indicating)?

THE COURT: As long as there's nothing illicit in there.

THE WITNESS: There isn't.

MR. JACOBER: Your Honor, may I stand here instead of sitting at counsel table?

THE COURT: The problem with that is we have an overflow room and they can't hear you without the microphone. You're more than welcome to keep your voice up. I can move the podium over if you would prefer. Would you prefer the podium?

MR. JACOBER: I would prefer the podium if possible, Judge, if it's not too much trouble.

THE COURT: Mr. Jacobs.

(Podium positioned.)

THE COURT: You may inquire.

MR. JACOBER: Thank you, Your Honor. Is that picking me up?

THE COURT: Yes.

MR. JACOBER: Okay.

DIRECT EXAMINATION

BY MR. JACOBER:

Q. Good morning. Could you state your name for the record, please?

A. Joseph Green.

Q. And you're an attorney, correct?

A. I am.

Q. You're licensed to practice law in the State of Missouri?

A. I am.
Q. Anywhere else?
A. United States Supreme Court, multiple federal jurisdictions.
Q. No other states besides Missouri?
A. No.
Q. How long have you been an attorney?
A. Since 1988.
Q. And presently you're employed as an associate circuit court judge in St. Louis County, Missouri, correct?
A. I am.
Q. How long have you been on the bench?
A. Eight years.
Q. Prior to taking the bench what type of law did you practice?
A. My practice had several different areas. About 50 percent of my practice was made up of federal capital litigation, I did employment law, and then I represented professionals such as judges and attorneys and doctors and nurses and accountants before various licensing boards when complaints were filed against them.
Q. And you've referenced that at some point early in your career you were on the capital

litigation unit for the Eastern Division of Missouri, is that correct?

A. That's correct.

Q. And you were also a public defender for a period of time?

A. Couple years before that, yes.

Q. During your time on the capital litigation team how many capital murders did you handle?

A. Handle?

Q. Yes.

A. Somewhere between 30 to 40 I think. We were overwhelmed at that time.

Q. And for purposes of the record, a capital murder case is one in which the government has to plead certain elements and the only available punishment under Missouri law is either life without the possibility of parole or execution, is that correct?

A. Yes.

Q. While you were on the capital litigation team did you represent Marcellus Williams?

A. No.

Q. That was outside of the capital

litigation team?

A. I had already left the capital litigation office, was in private practice with my own firm in St. Charles, and Chris McGraugh was a member of another firm called Leritz, Plunkert & Bruning.

Q. How is it that you came to represent Mr. Williams?

A. Some conflict that I'm unaware of occurred in the public defender system and then we were called by, I'm not sure, I think it was Barbara Hoppe but I'm not sure, to see if we would take it as a contract case.

Q. So you were paid by the State of Missouri, not by Mr. Williams?

A. That's correct.

Q. And Mr. Williams had appointed counsel because, to the best of your knowledge, he wasn't able to retain his own counsel?

A. He was indigent, yes.

Q. During this period of time while you were representing Mr. Williams did you have any other capital murder cases that you were --

MS. SNYDER: Your Honor, at this time I'm going to object. I don't believe this witness

should be permitted to testify to anything other than claim five because this witness was not disclosed prior to the addition of claim five and that's what he's trying to testify to now.

MR. JACOBER: Your Honor, Judge Green was always on our witness list.

THE COURT: I appreciate that, counsel. Your objection is overruled. Let's go ahead and limit the inquiry. You know how much time you have.

MR. JACOBER: I do, Judge, and I'm just trying to lay the groundwork here.

BY MR. JACOBER:

Q. Do you need me to repeat the question?

A. No. I had several death penalty cases pending.

Q. Did you have any that were pending right around the same time where you were in trial near in time to Mr. Williams' case?

A. Yes, the Ken Baumruk case.

Q. Tell us briefly what the Ken Baumruk case was.

A. Ken Baumruk was the gentleman who was -- during divorce proceedings brought two weapons into the courthouse, executed his wife, shot a

couple of bailiffs and the attorneys, took shots, tried to kill the Judge, a shootout occurred on the second floor I believe of this courthouse. And again, I was in private practice and because there were public defenders in the courthouse they were conflicted out so it was a contract case from the Public Defender's Office.

Q. Did that case take a significant amount of your time?

A. Of course it did.

Q. Was it finished -- The Baumruk matter, was it finished when you started the Marcellus Williams matter?

A. No.

Q. Had a verdict been reached?

A. A jury had returned a verdict of death -- of not only guilt but also death.

Q. When was the death sentence reached by the jury?

A. The month before we started Marcellus's trial or a couple weeks. I don't know, somewhere between 30 days and three weeks.

Q. During the Marcellus Williams trial there was a recess wasn't there?

A. There was.

Q. And what was that recess for?

A. Judge Seigel had asked Judge O'Brien if he could borrow me for half a day so we could finish the judgment and sentence in the Baumruk case.

Q. And did that require time for you to prepare for that case as well?

A. Yes. Judge O'Brien suspended the proceedings in Marcellus's case and then I had to attend the proceedings in the Baumruk case.

Q. Thank you. So I want to make sure the record is clear. During Mr. Williams' trial you were required to take a break and presumably prepare at some point in time for a hearing in another capital murder case, leave Mr. Williams' case, and go deal with a hearing in another capital murder case?

A. Yes.

Q. Did that make your time even more precious than what it already was?

A. Of course it did.

Q. Did it prohibit you from preparing Mr. Williams' trial in your typical fashion?

A. Of course it did.

Q. And I know it's been some time, Judge,

but if we could, kind of explain to the Court your normal approach to defend a capital murder case. How would you approach those cases?

A. That's a --

THE COURT: Mr. Jacober, you are well aware that I have reviewed the entire contents of the file, including Judge Green's verified motion with respect to his testimony here today, in addition to the PCR file and the testimony there, so don't belabor this.

MR. JACOBER: Okay. Thank you, Judge.

A. Am I to answer?

THE COURT: No. I'm sorry. I just...

BY MR. JACOBER:

Q. You don't have to answer that question. I'll move on to something else.

There were two primary witnesses in this case who weren't law enforcement, correct?

A. Correct.

Q. Henry Cole and Laura Asaro?

A. Yes.

Q. I want to focus a little bit on Henry Cole. Do you recall when you first received handwritten notes that Henry Cole prepared in this case?

A. I don't recall independently but I've been provided transcripts that helped refresh my memory on that, and it appears that we received them in April, the April before the June trial.

Q. So pretty close in time?

A. Yes.

Q. Were you able to approach those notes and do what you would normally do with notes from a witness in preparation for the trial?

A. No.

Q. And what would you normally do?

A. When we represent a client, or when I say we I mean Chris McGraugh and I but also when I had cases without Chris, every available defense as is professional is available to my client, even regardless of what conversations I may have with my client. Otherwise the client should be representing themselves. I'm the professional. So I let the evidence through my investigation dictate what is the most credible defense to put before a fact-finder.

Q. And in this case were you able to evaluate Mr. Cole's notes against what he had previously provided in statements, what he testified to in his deposition, and --

A. No, because I was also preparing for the Baumruk trial.

Q. We've now learned that there were bloody fingerprints at the crime scene that were --

MS. SNYDER: Objection, Your Honor. That misstates the record. Nowhere in the record does it show there were bloody fingerprints anywhere.

MR. JACOBER: I believe Mr. Spillane argued that this morning.

THE COURT: Partial prints. Just so the record is accurate.

MR. JACOBER: I'll correct my statement.

THE COURT: Thank you.

BY MR. JACOBER:

Q. We've now learned that there were partial bloody fingerprints --

MS. SNYDER: Your Honor, objection. No, we did not. There are not bloody fingerprints present in the record or the photographs at all.

THE COURT: Yeah, the opening statement was that there was glove smudges or something I recall. Is that what you're referring to?

MR. JACOBER: That's what I'm referring

to.

MS. SNYDER: Which is different than blood of course.

THE COURT: Correct.

MS. SNYDER: Thank you, Judge.

THE COURT: Sustained.

BY MR. JACOBER:

Q. Judge Green, we've now learned that there were smudges from a glove that were left somewhere on the second floor of the victim's home.

MS. SNYDER: Your Honor, I'm gonna object. I think there's a misunderstanding here about how fingerprints are collected and not smudges from a glove, as smudges being dusted for prints. The testimony about the glove would be from the glass from the front door that was taken out.

THE COURT: Overruled. I'll allow it. Let's move on.

Q. Were you aware of that during your representation of Mr. Williams?

A. About a glove print on a piece of glass, no, I was not. This is the first I'm hearing of it.

Q. Okay. I'm sorry, I think I've confused

it and I didn't get a chance to finish my question before it was objected to by the State.

We've now learned that there were smudges allegedly from a glove on the second floor of the victim's home.

A. Okay.

Q. Were you aware of those?

A. No. The information I had at the time of trial that we received less than 60 days before trial was that there were fingerprints that were obtained from the second floor, and I wanted our forensic examiner to have an opportunity to look at them but they couldn't produce any record to that. I also wanted to know what the procedure was for destroying such evidence that was seized.

Q. So whatever they were - And we don't know 'cause they've been destroyed - they were destroyed before they were provided to the defense?

A. Right. So all we have is the word of whoever gave us that information.

Q. In addition to that, those points of evidence, there were other burglaries in this area of St. Louis right around this time, is that correct?

A. Yes.

Q. Did you have time to investigate those burglaries?

A. No.

Q. Why not?

A. There's only so many hours in a day. I had multiple cases I was working at the time, including the Baumruk case.

Q. I want to shift your focus a little bit, Judge, and talk to you about the penalty phase for Mr. Williams.

Were Marcellus Williams' prison records used by the State of Missouri in the penalty phase, at least in part to support the death penalty?

A. Yes.

Q. Did you attempt to get those prison records in advance of the penalty phase?

A. Yes.

Q. In advance of the trial?

A. Yes.

Q. Were you able to do so?

A. No.

Q. Why not?

A. Different reasons were given at different times. At first I believe the Department of Corrections had said that they were sent to the

Justice Center here in St. Louis County. I believe - And I'm -- this is based in part on some of the testimony that I just read in preparing for this testimony - that Keith Larner had told me that -- 'cause they at one time told me Keith -- that they were assigned out to Keith and that Keith said he had sent them back. But while all that was going on we were never given access to them.

Q. Did Mr. Larner ever give you a copy of them if he had checked them out?

A. No.

Q. Did you at some point in time -- I'm sorry, let me back up.

Based on your recollection of the trial and the penalty phase, were those incarceration records impactful to the jury in reaching a sentence of death?

A. Well I can't -- I don't know what was in the minds of the jurors so I can't speak to that. But were they impactful to the case, absolutely.

Q. And why is that?

A. Well it's a standard procedure, especially for any -- when the government is seeking death that they are going to -- in order to

obtain death they have to put on what are called aggravating circumstances. And the State in this case was using the behavior of Marcellus in the penitentiary as aggravating factors that would promote an argument for future dangerousness.

From the defense standpoint what you want to do is look at the underlying facts that they're relying upon or the underlying incident that they're relying upon for the future dangerousness to see who was the initial aggressor if there was an assault or what were the surrounding circumstances that could be mitigating with respect to the incident they are putting forth before the jury.

Q. So, in other words, you needed the records to put them into context?

A. Correct.

Q. And you did not have the records in advance of the penalty phase?

A. Correct.

Q. Or in advance of the trial at all?

A. Correct.

Q. Now at some point in time did you file a motion and then an amended motion for continuance?

A. I did.

MR. JACOBER: And, Your Honor, these are at Tab 31 which contain the verified motion for continuance, order denying the motion for continuance, supplemental verified motion for continuance, and order denying the supplemental motion for continuance.

Q. I'm going to show you --

MS. SNYDER: Your Honor, at this point can I have a continuing objection to this witness testifying to anything outside of claim five so I don't have to stand up every time?

THE COURT: You may. And just for the record, the Court has taken judicial notice of the entire contents of the underlying file, including the records that you just handed Judge Green which are part of that court file.

MR. JACOBER: I just have one question that I need to ask on this point, Judge.

BY MR. JACOBER:

Q. During the argument on these motions the record reflects that you made reference, as you do in the motion, to your inability to get the incarceration records of Mr. Williams, is that correct?

A. Correct.
Q. Do you recall if Mr. Larner at that time said, I have them, you can -- here they are?
A. I don't have a recollection of that.
Q. And, in fact, you know you didn't get them before trial?
A. That I do know.
Q. Were you shocked to learn at the sentencing hearing that the State actually had those records and used them as evidence?
MS. SNYDER: Objection, relevance, as to the witness's state of mind.
THE COURT: Sustained. Can you turn your microphone on though, please.
Q. When the State used those records at the sentencing hearing were you able to effectively put those records into context?
A. No.
Q. Is there anything else that was going on at this time that impacted your ability to provide Mr. Williams with a defense?
A. There was a lot going on during that period of time. Are you talking professionally, personally?
Q. Well let's break them down.

Professionally first.

A. Yeah. As I say, and as I made the Court aware at the time, this murder had happened several years beforehand but there was a flurry of activity that was occurring just months before the trial with -- especially in the forensic area that we were just learning for the first time even though the investigation had supposedly been concluded years ago. And so given all that new information, especially the forensic information that late in the game, while I'm also preparing for another death penalty case in the same courthouse that had a national impact on how we run security in courthouses, now limited the amount of time to dedicate to this case.

Q. How much did it limit your time?

A. I can't quantify it. I just know there's only so many hours in a day, there's only so many days in the week, and if I -- especially during April and May when all this was occurring, and I was trying the Baumruk in May, I'm preparing for that one also while also trying to, you know, raise a family and take care of day-to-day activities, you know. So no matter what I did some aspect of either case was going to suffer because

of the time.

Q. And did Mr. Williams' case suffer as a result of that timing?

A. I believe it did.

Q. Do you believe that you were able to effectively represent him in this case?

A. I don't believe he got our best.

Q. Do you believe he got what you would think is a constitutionally sufficient defense?

MS. SNYDER: Objection, Your Honor. Calls for a legal conclusion.

THE COURT: Sustained.

Q. Are you satisfied that the job you performed for Mr. Williams was the best you could do?

MS. SNYDER: Objection. Relevance.

THE COURT: Sustained.

MR. JACOBER: One second, Your Honor.

BY MR. JACOBER:

Q. I do want to go back to one issue. During the trial do you recall anyone touching the murder weapon, the knife, without wearing proper protective gloves?

A. I don't.

Q. You don't recall that one way or the

other?

A. I don't.

Q. Do you recall if gloves were used during the trial?

A. I don't.

MR. JACOBER: That's all I have, Judge.

THE COURT: Thank you. Cross.

MS. SNYDER: Yes, Your Honor.

CROSS EXAMINATION

BY MS. SNYDER:

Q. Judge Green, I think it's fair to say that you were a very experienced criminal defense attorney, is that right?

A. I have my good days and bad days.

Q. I know you said you handled 30 to 40 capital cases while you were with the capital unit in the public defender system. But overall, regardless of what system you were with, how many capital cases did you try?

A. About 25 I think.

Q. And for this particular case for Mr. Williams, you were there, you filed pretrial motions, you made objections, you had the trial, is that right?

A. Well, yeah, all that's right.

Q. And the defense also called witnesses and had hired experts, is that right?

A. We called witnesses, we hired experts, but we didn't call our expert.

Q. Okay. And this trial happened of course over 20 years ago?

A. Yes, over half -- or a quarter century.

Q. So if there are things in the trial transcript or in your testimony from the PCR or in your affidavit that are different than what you remember today would your memory then have been more accurate?

A. Yes, it would have been.

Q. You were asked a number of questions about your investigation into this case, and one of those was about whether you had time to investigate other burglaries in the University City area. Do you remember that?

A. Yes.

Q. Do you also remember that witness Henry Cole had said that your client, Mr. Williams, had committed several burglaries in that area?

A. I just read the transcripts. Umm, I remember the robbery. I don't remember -- Oh, I think I do remember burglaries, yes. Yes. Okay,

yes.

Q. Okay. You were also asked some statements about what happened during trial, very few, but let me ask you this as a trial attorney. There's things you read on paper and that can be different than how a person appears on the stand, is that fair to say?

A. Sure. We as judges, all the time we have to -- if we're determining the credibility of a witness we have to take into account their demeanor.

Q. So I want you to assume that everything that Henry Cole and Laura Asaro said is true. I know you probably don't agree with that but we're going to assume that for right now, okay?

A. Okay.

Q. For the things that Henry Cole was testifying to, most of what he said came from Marcellus Williams, right?

MR. JACOBER: I'm going to object to the form of the question. It's a hypothetical question.

MS. SNYDER: Your Honor, this particular one is not a hypothetical.

THE COURT: Overruled.

Q. Most of the things that Henry Cole said he attributed to hearing directly from Marcellus Williams, is that right?

A. I don't know how you define most, but his position was, and why he wanted the reward money was because of what he said Marcellus told him.

Q. So if Henry Cole says something on the witness stand, like calls something a sweater that maybe someone else would call a zip-up hoodie, that's information that Marcellus Williams would have told him, assuming Henry Cole is telling the truth, right?

A. Say that again. I don't understand the question.

Q. In other words, any discrepancies that might have come out of Henry Cole's mouth --

A. Okay.

Q. -- if he's telling the truth would be discrepancies that really came from Marcellus Williams?

A. Not necessarily.

Q. Okay. Now for Laura Asaro, a number of things that she testified to were actually her direct observations, right?

A. Not necessarily.

Q. Well, like when she claimed that she saw the purse that had the victim's ID inside the defendant's car, that's something she said that she saw herself, right?

A. Well that's in the record, yes.

Q. Okay. And sometimes Laura Asaro would testify to things that she claimed Marcellus Williams had told her, right?

A. Yes, she did do that.

Q. Okay, same point there.

You were asked questions about Missouri Department of Corrections records. Do you remember those questions?

A. Um-hum.

Q. Is that a yes?

A. I'm sorry. Yes. Broke my own rule. Yes.

Q. So my understanding of the record is that there were two binders that the Missouri Department of Corrections said they sent to St. Louis County Justice Center. Do you remember that detail?

A. Yeah, I do remember -- I think I read that in one of the transcripts, yes.

Q. And that ultimately Mr. Larner, the prosecutor, had received some of those records, one binder full, do you remember that?

A. That I do not remember.

Q. But if it's in the transcript it's in the transcript, right?

A. Yeah. I'm not going to dispute the transcript.

Q. And ultimately what Mr. Larner himself had received was disclosed to the defense, right?

A. No, 'cause there's a lot of things that was not disclosed to defense during that trial by Mr. Larner.

Q. But you again will defer to the transcript?

A. I will.

Q. And you understand that these ineffective assistance of counsel claims that are being discussed, it's already been denied during the PCR hearing for this case years ago, right?

A. Right, I understand that.

Q. And the Supreme Court has already affirmed that denial, is that fair to say?

A. They did.

Q. Do you also recall saying at all during

trial - And this would be outside of the presence of the jury - I'm not criticizing the State for the late production of these things. In fact, Keith came to the case late and I'm not criticizing them, we got them at this time, I'm just laying it out as a fact. If anything, they should be commended for being so thorough. That would be on page 93. Do you remember saying that at all?

A. I do not.

Q. You were asked questions about fingerprints and fingerprint samples from the residence, do you remember that?

A. Yes.

Q. Okay. Do you have any independent recollection at all of bloody fingerprints anywhere in this case?

A. Bloody? Independent, no. Independent, no.

Q. So it's possible -- Well you know that the house was dusted for fingerprints in some locations, right?

A. Yes.

Q. And you know that there were partial lifts found in certain locations, right?

A. Yes.

Q. All right. And then isn't it also true that you wanted Laura Asaro's prints to be compared to that, right?

A. Right.

Q. And Mr. Larner represented on the record that he had taken Ms. Asaro's prints and had that done, right?

A. He may have. I don't recall that.

Q. During trial you weren't the one who cross-examined Ms. Asaro or Mr. Cole, is that correct?

A. At trial Chris McGraugh cross examined Mr. Cole, that's correct.

Q. I have no further questions.

THE COURT: Thank you. How do you want to play this? You've also listed him as a witness.

MR. POTTS: I'm happy to jump in right now and I'm happy to go round-robin, if that makes sense, Your Honor.

THE COURT: It does.

MR. POTTS: I just have a few questions.

THE COURT: You may proceed.

CROSS EXAMINATION

BY MR. POTTS:

Q. Good morning, Judge Green.
A. Morning.
Q. The Baumruk case was a pretty notorious case at the time wasn't it?
A. All capital murder cases are notorious.
Q. Yeah, but especially in this courthouse. It would be hard to find someone who was working in this courthouse who wasn't aware of it, right?
A. We were appointed because all the public defenders were excused.
Q. Before Mr. Williams' trial you made the prosecution aware that you were essentially double booked between the Baumruk case and the Williams case, right?
A. Yeah.
Q. When you decided to ask for a continuance did you approach the prosecution before you filed your motion?
A. Typically that would be my practice.
Q. Yeah. Did the prosecution voluntarily agree to that continuance?
MS. SNYDER: Your Honor, at this point I'm going to object to relevance as to what's in the motion.

THE COURT: Sustained.

Q. As you were barrelling towards trial in those last few months was the prosecution providing the information you needed in a cooperative and timely fashion?

MS. SNYDER: Objection to the characterization. Calls for improper conclusion.

THE COURT: I'll allow it. Overruled.

A. As I said in the motion for the continuance, there was a flurry of activity. And if the record says -- You know, I wasn't there to criticize the actions of my adversaries. I just wanted to make sure that Mr. Marcellus was given a fair trial consistent with his constitutional rights under Missouri and the United States.

The prosecution always doesn't have control over how they receive evidence. There's other law enforcement agencies that are involved and I recognize that. But it still prevented us I believe, the defense team, from being adequately prepared to defend him like we typically could do.

Q. A few minutes ago I think you testified - And I wrote this down - that there were a lot of things that weren't disclosed to the defense by Mr. Larner. Could you explain that, please?

A. Well, for example, the medical records, the medical records of Cole that there -- was in the depositions, and we were arguing over that, we were making motions for that. That goes obviously to his credibility, his ability to remember, whether or not he was suffering delusions or whatever. But we were never able to investigate that.

The forensic evidence with respect to -- We may have been told by Mr. Larner what things happened, but that's not how it's done. We're allowed to do our own independent investigation when it comes to forensic evidence. We didn't have that opportunity in this case.

There was news statements that Mr. Cole made after we did the depositions that Mr. Larner tried to get in that he didn't disclose to us until at trial. That's not even an exhaustive list.

I just know that we were doing our best in trying to meet the evidence in the late time period it was being given to us.

Q. Thank you. And during this -- Just very roughly speaking, at this point in your career how experienced were you with forensic evidence, using it at trials?

A. Pretty experienced. Marcellus's case was probably my -- As I said, I had already handled 30 or 40 death penalty cases before his. At that time I believe I was going around the country giving seminars with a doctor from Emory University called Diane Lavett in DNA evidence. But what they used back then is completely different than what they use today. I was giving seminars in front of the Florida Criminal Bar Association, the Colorado Criminal Bar Association, Missouri Public Defender's Office.

Q. And at that time were you aware of the risk of contamination of forensic evidence as a defense attorney?

MS. SNYDER: Objection. Relevance.

THE COURT: Counsel?

MR. POTTS: This goes to the ungloved claim, Your Honor.

THE COURT: I'm sorry?

MR. POTTS: This is going directly to the ungloved claim. If you give me little bit of leeway here I promise it will make sense.

THE COURT: Sustained.

BY MR. POTTS:

Q. Judge Green, at any time before this

trial did the prosecution tell you that they had been handling the murder weapon without gloves?

A. No.

Q. At any time before this trial did the prosecution tell you that investigators had been handling the murder weapon without gloves?

A. No.

Q. As an experienced defense attorney were you aware of Arizona vs Youngblood?

A. Yes.

Q. If you had learned that the prosecution was handling the murder weapon without gloves is that the type of argument that you would have raised on behalf of your client?

MS. SNYDER: Objection. Relevance and speculation.

THE COURT: Sustained.

MR. POTTS: No further questions.

THE COURT: Thank you. Recross.

MS. SNYDER: No, Your Honor.

THE COURT: No cross?

MS. SNYDER: No.

THE COURT: Any redirect?

MR. JACOBER: No redirect, Your Honor.

THE COURT: Judge Green, I have one

question. Difficult question.

EXAMINATION

BY THE COURT:

Q. You were a contract attorney through the Public Defender's Office. Knowing that you had another high profile case that you had to get prepared for, could you have rejected or not accepted that contract?

A. Not -- I didn't know the trial setting at the time that I took the contract. So I had no way of knowing that the two would be scheduled right behind each other like that at the time I took the contracts.

Q. Okay. And just so that I'm clear, upon your entry of appearance you didn't file a motion for continuance at that time. Did you know when the Baumruk case was set when you accepted this?

A. I don't remember.

Q. Okay. That's all.

THE COURT: Any questions based upon mine?

MR. POTTS: No, Your Honor.

MS. SNYDER: No, Your Honor.

THE COURT: Thank you. Can this witness stand down?

MR. JACOBER: Yes, Your Honor.

THE COURT: Thank you. This is probably a great time to take our morning recess. It is 11:45ish. So let's come back at five after.

(A recess was taken.)

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(The proceedings returned to open court.)

THE COURT: We're back on the record in Cause Number 24SL-CC00422.

Again, I apologize, I sound like a broken record. Several members of the public have come in and come out. I just want to make sure that everybody understands the Court's ruling with respect to recording these proceedings or taking photographs. I know that it may seem onerous, but for the integrity of these proceedings that is the ruling of the Court. So please refrain from recording or taking photographs with those marvelous little computers that we all own. If someone sees you from this office or otherwise you will be asked to leave. So please make sure you turn your phones off, there's no recording allowed.

With that said, Mr. Jacober, you want to call your next witness.

MS. SNYDER: Judge, if I may, I would like to ask the Court to please take judicial notice of the CaseNet docket entries in State v. Kenneth Baumruk, 2198R01736.

THE COURT: Any objection?

MR. JACOBER: No objection, Your Honor.

THE COURT: The Court will take judicial notice of the Kenneth Baumruk case.

MR. JACOBER: Your Honor, at this time the State would call Dr. Charlotte Word.

THE COURT: Dr. Word, good morning. Could you raise your right hand for me.

DR. CHARLOTTE WORD,

having been sworn, testified as follows:

DIRECT EXAMINATION

BY MR. JACOBER:

Q. Good morning, Dr. Word.

A. Good morning.

Q. How are you currently employed?

A. I'm currently self-employed as a consultant.

Q. And what is your educational background?

A. I have a bachelor's of science in biology from the college of William & Mary in

Virginia. I have a Ph.D. in molecular biology with specialities in immunology and -- Sorry. I said that wrong. A Ph.D. in microbiology with specialties in molecular biology and immunology from the University of Virginia. I did post-graduate fellowship work at the University of Texas Southwestern Medical School in Dallas, Texas for approximately three and a half years, again in the areas of molecular biology and immunology. And I was on the faculty of the University of New Mexico School of Medicine for approximately five and a half years.

Q. Thank you, Dr. Word. I'd like to briefly go through your work history as well. After you left the faculty at University of New Mexico School of Medicine where did you go next?

A. I moved to Germantown, Maryland and I was employed by a new private lab doing DNA testing called Cellmark - C-E-L-L-M-A-R-K - Diagnostics.

Q. And I think you've already kind of answered this, but what did Cellmark Diagnostics do?

A. It was a company that was doing DNA testing for paternity, biological relationship, and for criminal cases, so any forensic application of

DNA.

Q. And what did you do while you were employed at Cellmark Diagnostics?

A. One of my major responsibilities was to review the work that was being done by the analysts in the laboratory, review their testing, review their data, and see that things were done according to our standard operating procedures and co-sign the reports with them stating the results and conclusions of the testing. I was also responsible for going to court and testifying to those findings.

I was responsible for some of the training in the laboratory, for managing a number of contracts that we had for doing testing in various types of situations. I was responsible for some of the validation studies that we did bringing on new DNA tests and whatever other job responsibilities that were necessitated.

Q. Thank you. Are you being paid to be here today?

A. I charge a consulting fee, yes.

Q. And what is your hourly rate?

A. $300 an hour.

Q. Who's paying you for your appearance in

this matter and your work in this matter?

A. The Innocence Project I believe.

Q. Do you have an estimate of how much time you've already billed in this matter?

A. I don't recall. I certainly have it on a computer, but I have no idea.

Q. Have you testified -- You mentioned that one of your job duties at Cellmark was to testify in court. Have you testified before before a court?

A. Yes, I have.

Q. If you could estimate the number of times?

A. Well over 300.

Q. And in those well over 300 - I'm not asking for a breakdown of cases - but can you generally break down between your testimony for the prosecution or for the defendant in a criminal case?

A. The bulk of my testimony in criminal cases was while I was working at Cellmark Diagnostics and most of that was for the prosecution.

Q. And have you also done -- Have you also testified in other exoneration cases?

A. Yes. I've testified in other post-conviction cases and in civil cases that have resulted after the exonerations in those cases as well.

Q. Do you have an estimate of how many of those cases you testified in?

A. I actually haven't thought about it. I don't know, 10, 20 maybe. I don't know.

Q. In all of those -- Strike that.

In those cases did you testify for the -- either the person seeking an exoneration, seeking post-conviction review, or who had been exonerated, or did you testify for the government?

A. I believe most of those times it's been on behalf of the defendant or the former defendant. I don't track this because who I work for is negligible. I work for the science. So I don't keep those numbers. I don't know the answers.

Q. Thank you. Separate from your work as an expert who's testified in court, have you ever done work on any forensic DNA commissions or national studies or anything of that nature?

A. Yes, sir.

Q. Could you tell us about that?

A. Yes. In the late nineties I was on a

working group under Janet Reno's National Commission of the Future of DNA that met to go over issues on post-conviction DNA testing and was one of the co-authors of a publication that came out of the National Institute of Justice regarding post-conviction testing recommendations for the community.

And then in, I guess it was right before COVID, so the 2016, '17, '18, '19, somewhere in there, there was another national commission on forensic sciences that I also participated in several of those working groups writing documents to provide recommendations and advisory to the Attorney General of the United States regarding DNA testing in federal labs and was on a number of those panels. The group I was in I believe was called Reporting and Testimony working group.

Q. And The National Commission on the Future of DNA Evidence, that ran from 1998 to 2000?

A. Yes, sir.

Q. The work was completed in 2000?

A. That's my recollection, yes.

Q. And it resulted in multiple publications?

A. Yes. There were a number of working

groups each working on their own project and publication.

Q. What was the purpose of this commission?

A. My understanding it was formed by Attorney General Janet Reno under the Bill Clinton administration to look at what was going on in the world of DNA and how it impacted the judicial system based on the number of exonerations that had come out in the early to mid 1990's.

Q. And the working group that you referenced, was it called The Post-Conviction DNA Testing: Recommendations for Handling Requests?

A. That was the name of the publication that came out of our working group. I think we were just called a post-conviction working group.

Q. But that's the publication?

A. Yes, sir.

Q. And you were a co-author of that publication?

A. I was. I was the DNA expert on that and the laboratory representative on that working group.

MR. JACOBER: May I approach the witness, Your Honor?

THE COURT: You may.

Q. Dr. Word, I'm handing you a document that is captioned Post-Conviction DNA Testing: Recommendations for Handling Requests. Are you familiar with that document?

A. Yes, I am. This is the document that I was one of the co-authors of.

Q. And was this document published by the National Institute of Justice?

A. Yes, sir, it was.

Q. And distributed nationally as far as you're aware?

A. It is on their website. You can download it any day.

Q. Now referencing Attorney General Janet Reno. In the foreword there's a message from the attorney general and at least in part it says --

MS. PRYDE: Objection. Hearsay, Your Honor. Mr. Jacober hasn't entered this into the record.

THE COURT: Sustained.

MR. JACOBER: Your Honor, we would move for admission of the Post-Conviction DNA Testing: Recommendations for Handling Requests as Exhibit 80, Your Honor.

THE COURT: Any objection?

MS. PRYDE: No objection to its being entered into the record, Your Honor.

THE COURT: Thank you. Exhibit 80 will be part of the record.

BY MR. JACOBER:

Q. And actually, while we're dealing with exhibits, Dr. Word, you provided an affidavit in this matter, is that correct?

A. Uh, yes.

Q. And your affidavit is dated May 31st of 2018, is that correct?

A. I know it's 2018. I don't recall the date but...

Q. Attached to your affidavit is Exhibit A, that being your curriculum vitae?

A. Yes, sir.

Q. And at least as of the time that you signed your affidavit was that CV a true and correct copy of your CV?

A. Yes, sir.

MR. JACOBER: Judge, we would also move for admission of the affidavit of Dr. Word and the CV which is attached. That is in the record already as Exhibit 1.

THE COURT: Tab 1, Exhibit 13, the CV will be received.

MS. PRYDE: Your Honor, for clarification, does this also include her updated report from August 15th?

MR. JACOBER: Not yet.

MS. PRYDE: Thank you.

BY MR. JACOBER:

Q. Now there were other -- As you reference, there were other working groups and other reports prepared as part of this commission formed by Attorney General Reno, correct?

A. Yes, sir.

MR. JACOBER: May I approach the witness, Your Honor?

THE COURT: You may.

MR. JACOBER: Thank you.

THE COURT: Is this 81?

MR. JACOBER: It will be 81, Your Honor.

BY MR. JACOBER:

Q. Dr. Word, I've handed you a document captioned The Future of Forensic DNA Testing. Was this prepared by the working group that you were on?

A. No, it was not. It was prepared, as the title says, by the research and development working group.

Q. And have you reviewed this document?

A. I have briefly, yes.

Q. Do you agree with the statements that are made in this document?

A. Certainly to the extent that they were making predictions of what was going to likely happen in the next two to ten years in DNA testing they were certainly appropriate.

MR. JACOBER: Judge, we would move for admission of The Future of Forensic DNA Testing as Exhibit 81.

MS. PRYDE: Your Honor, we have several objections.

THE COURT: Okay.

MS. PRYDE: The first is a lack of foundation. The second is a lack of authenticity. The third is relevance. The fourth is hearsay. As the witness has testified, she had nothing to do with these experts, and they don't meet the definition of a learned treatise.

THE COURT: Did the witness rely on this information in forming her opinions?

MR. JACOBER: I thought I asked her that but I think I missed that question on my outline.

MS. PRYDE: That was not disclosed to the State, Your Honor.

THE COURT: Objection as to lack of foundation sustained.

MR. JACOBER: We'll move forward.

MS. PRYDE: Thank you, Your Honor.

MR. JACOBER: Your Honor, at this time we would move for Dr. Word to be recognized as an expert and to be allowed to provide her expert testimony in this matter.

MS. PRYDE: Your Honor, we would just request that Mr. Jacober confirm what she's being certified as an expert in.

THE COURT: I can't predict what questions Mr. Jacober is going to ask, but I will find that she is qualified to testify as an expert in these proceedings.

MR. JACOBER: Thank you, Your Honor.

BY MR. JACOBER:

Q. And Dr. Word, to address that last issue, are you an expert in the forensic handling of biological samples in DNA testing?

A. Certainly as it applies to any testing of biological fluids and generating DNA, yes.

MR. JACOBER: To make the record clear, Judge, we would move for her to be admitted as an expert in forensic handling of biological samples in DNA testing.

MS. PRYDE: And, Your Honor, we would object to the instance of -- the term handling. It was -- It's our understanding that Dr. Word does DNA testing in the lab, in laboratory conditions, as in she has a sample, she tests it, and not necessarily handling, which might confuse the issue, because one of the issues in this case, as Your Honor is well aware, is the use and -- the use and handling of evidence in the field.

In addition -- So strike that. I'm sorry. We just request that handling be clarified for the sake of the record.

THE COURT: Mr. Jacober, I agree. Could you clarify.

BY MR. JACOBER:

Q. Yes. Dr. Word, are you an expert in how the forensic handling -- Strike that.

Are you an expert in how evidence should be collected and maintained --

MS. PRYDE: Objection, Your Honor.

MR. JACOBER: -- throughout --

THE COURT: Let him finish his question.

MR. JACOBER: Your Honor, I can't even finish my question without an objection.

THE COURT: Thank you.

Q. Are you an expert in how evidence should be collected in criminal cases to maintain the integrity of the DNA evidence that may be on that evidence?

A. Yes.

MR. JACOBER: Judge, we would move for her to be admitted as an expert in that area.

MS. PRYDE: Objection, Your Honor. There's been no foundation for that series of expertise. We've heard from Dr. Word. She clearly has extensive knowledge and expertise in the use and delineation of DNA testing and how that process is taken through in the lab. We've heard no testimony from Dr. Word about whether or not she has any experience or qualification in the preparation of samples for being taken into the lab, whether or not she's ever talked to law enforcement agencies about these sorts of issues as

far as trainings, et cetera. We would just object that we're putting the cart before the horse, Your Honor.

THE COURT: And that will be subject to cross-examination. I'll allow some leeway here, counsel.

MR. JACOBER: Thank you.

THE COURT: Objection is overruled.

MR. JACOBER: I'm sorry?

THE COURT: I'm making the record clear that the objection is overruled.

MR. JACOBER: Thank you, Judge.

BY MR. JACOBER:

Q. And Dr. Word, have you testified as an expert across the country in forensic DNA testing?

A. I have, yes.

Q. In fact, have you ever not been qualified as an expert when you been presented as one?

A. I have not.

Q. As part of your testimony through these 300-plus cases did you provide testimony as to the preservation of biological samples for DNA testing?

A. In many cases, yes.

Q. Now I think we should start kind of at

the beginning and not deal with the preservation just yet just to get a background for the Court. What is DNA?

A. DNA stands for Deoxyribonucleic Acid. It's the genetic material that's present in each of the nucleated cells of our body. It makes us human, gives us all of our characteristics. It's inherited from our parents. Half of our DNA comes from our mother, half comes from our father. And there are portions of the DNA that are highly variable in the population, and these are regions that we focus in on for forensic DNA testing because they allow us to differentiate the DNA from one individual to another.

Q. Where can you find DNA on an individual? I think you answered but I want to make sure we're clear.

A. Pretty much any bodily fluid or any tissue. So saliva, semen, blood, perhaps sweat, tissue, fingernail, skin cells, bone. Any portion of our body.

Q. I want to focus specifically on skin cells. Do we have DNA on our hands?

A. Yes, we do.

Q. Would my DNA on my hand as I stand here

right now be just my DNA?

A. It depends. It might be just yours or it may be DNA from other individuals that you been in contact with or items that you have handled that other individuals have been in contact with.

Q. So if I pick up this pen and someone else had used this pen I could have their DNA on my hand as well as my DNA and maybe DNA that they got from touching something else?

A. Certainly. Research studies have shown any of those variables are possible and have been demonstrated.

Q. Now is this kind of DNA commonly called touch DNA?

A. Yes.

Q. Is that a nomenclature or designation that you necessarily agree with?

A. I agree with the use of the term that the type of DNA recovered from a handled item is a little bit different than the type of DNA we get from nucleated cells and in that context it's appropriate to call it touch DNA.

There is a movement to stop using that word in the field because the word touch implies an activity that would get associated with the DNA

that may not necessarily be associated with that DNA. I don't have to touch something to deposit DNA on an item. And so the mixing of the DNA results with the possible activity that allowed to the deposition of that gets complicated with the use of that term and can be misleading.

Q. To make sure we're clear though, when you touch something you could be leaving your DNA behind or leaving other DNA that's on your hands behind. Could you also be taking DNA off of the item that you're touching?

A. Yes, sir, that's correct, that's been demonstrated in research studies as well.

Q. If you -- So if you touch a piece of evidence without wearing proper protection or attempting to not disturb the DNA could you be destroying the DNA that's on that piece of evidence?

A. It's possible it could be removed or certainly contaminated with that individual's DNA that isn't directly associated with the crime.

Q. I want to direct your attention to kind of a specific period of time in history and it's the late 90's to the early 2000's. Were there policies and protocols that were in existence at

that period in time regarding the collection, preservation, and handling of forensic evidence in law enforcement?

MS. PRYDE: Objection, Your Honor. Vague.

THE COURT: Can you lay a better foundation for her to give that opinion?

MR. JACOBER: I can attempt to, yes, Judge.

THE COURT: Thank you.

BY MR. JACOBER:

Q. As part of your work as a scientist is it important for - I'm sorry - as a scientist focusing on DNA evidence and DNA analysis, is it important for you to understand how that evidence is collected?

A. To do the testing the answer is no. But to understand the test results that are generated and the meaning of those results the whole prior chain of custody and information about who may have knowingly or unknowingly handled those items or been involved in those items becomes very, very important to know what the meaning of the DNA test results are. So because of that it is critical to know every individual that's come in

contact with a particular item, when it was collected, how it was collected, what method was used, was it collected individually by an individual wearing gloves, wearing a face mask and not talking over it or sneezing over it, was it properly labeled and sealed in a tamper evidence envelope with evidence tape, was it stored properly in the appropriate dried room temperature or frozen conditions for that type of biological sample. All of that occurs before it comes into the DNA lab.

So any issues or problems with the manner of collection, contamination, mislabeling, improper storage under the wrong conditions all is going to impact what comes out of those DNA results and the ability for us to get usable, interpretable profiles and be able to evaluate and provide any meaning regarding the DNA data that are obtained.

MS. PRYDE: Objection, Your Honor. Mr. Jacober has not laid a foundation for this individual's expertise as to these before-the-lab policies.

THE COURT: That's my concern.

MR. JACOBER: And I was --

THE COURT: And that wasn't responsive to the question that you asked.

MR. JACOBER: It was a long answer.

BY MR. JACOBER:

Q. I want to back up a little bit, Dr. Word. As a DNA scientist I think you answered more of why the policies and procedures that we want to talk about are important. What I want to focus on first as opposed to the why is are scientists such as yourself -- Actually let me ask it more specifically.

Were you involved in helping to develop policies and procedures that would be used for the collection of DNA evidence?

A. Not directly, no.

Q. Were other scientists involved in the development of policies and procedures for the collection of DNA evidence?

A. Certainly, yes.

Q. Did you have occasion to review those policies and procedures as part of your work as a DNA scientist?

A. Yes.

Q. And was that part of how you would eventually analyze DNA evidence as a scientist?

A. To some degree, yes.

Q. Did you come to rely on those policies

and procedures as part of what you were doing in analyzing DNA evidence?

A. Yes.

MR. JACOBER: Your Honor, I think this addresses the foundational aspects that these are things developed by other scientists, Dr. Word relied on them in part of her work as a DNA scientist.

THE COURT: The objection is sustained.

MR. JACOBER: Your Honor, if I could, on what basis? I want to make sure I can address the Court's concern.

THE COURT: I don't think the proper foundation has been laid for this witness to opine, despite her area of expertise, as to what the protocols were in the late 90's, early 2000's.

MR. JACOBER: Thank you, Judge. I'll continue to inquire and try to satisfy the Court.

THE COURT: Thank you.

BY MR. JACOBER:

Q. During this period of the late 90's or early 2000's as part of your work as a DNA scientist were you -- did you actively review and take into consideration the policies and procedures that were being developed regarding the handling of

DNA?

MS. PRYDE: Objection. Vague, Your Honor.

THE COURT: Overruled.

A. Well I know Cellmark Diagnostics had a multipage document that we sent out to offices or individuals interested in sending evidence to us that documented what we advise as procedures that should be followed for collection, packaging, labeling, storage, and then mailing the evidence to us. So we had a document that I wasn't a part of writing but it was from our company that certainly was written by scientists documenting the proper way to handle all of those different procedures.

And as part of my interaction with various individuals in the field throughout my career I've been to meetings, I've met with police officers, crime scene investigators who have talked to me about the policies and the procedures they use. Some in the early 90's and mid 90's had very detailed policies. They would wear, you know, the full body suit and masks and head gear and everything because they were aware that they could be leaving evidence behind.

So throughout the 90's there were

certainly agencies that were well-informed on procedures that needed to be followed and had those in place for the preservation and risk of contamination of evidence at that time.

Q. And Dr. Word, the document that you were a co-author on, the Post-Conviction DNA Testing: Recommendations for Handling Requests, does this have any -- does this include any discussion about the policies and procedures, or policies and protocols rather for the DNA evidence collection and handling?

A. I don't think directly. It does comment in multiple situations about the proper preservation of evidence that has been collected, that it be stored appropriately to preserve the integrity of that evidence.

Q. So it doesn't lay out specific steps but it does reference that it's important that DNA be preserved in a way to maintain its integrity?

A. That's correct. The collection of evidence was not a part of the focus for that particular working group. But I think there were clearly procedures in laboratories, in all laboratories about how evidence had to be handled. And in many jurisdictions many crime laboratory

personnel were training the police officers and the crime scene investigators in those different procedures. And this would be not just for DNA but for fingerprint collection, guns, ballistics, cartridges. Any other type of evidence that was being collected the laboratory personnel were training individuals based on the policies they used in the laboratory on how to do those procedures correctly to maintain the integrity of the evidence.

Q. If the evidence isn't maintained in a way that maintains its integrity what are the results from a scientific perspective?

A. They may be impacted in a way that the information obtained is useless or it may -- in the case of DNA it may lead to a presence of a mixture of DNA that becomes more complicated to interpret and evaluate. So knowing what happened and knowing some of that information may help with the evaluation of the data, but depending on what occurred it may invalidate the use of those results in any way.

Certainly if an item has been stored inappropriately such as the DNA is totally degraded or contaminated to an extent that the original DNA

can't be observed, that significantly impacts the testing outcome because no results can be observed from whomever's DNA was on that original item. So it depends on, you know, whatever the scenario is.

Q. So you again focused on the integrity of the DNA. What are the best ways to ensure that the DNA evidence that is on an item of evidence is preserved for future testing?

MS. PRYDE: Objection. Lack of foundation.

THE COURT: Overruled.

A. So in the lab the procedures that we follow are very similar to the procedures that would need to be followed in the field as well.

THE COURT: Doctor, I appreciate your narrative response, but if you could just answer the question that was posed by Mr. Jacober, please.

A. So each item should be handled singly, one at a time and wearing gloves, and if not wearing a face mask no one should be talking over that item so that DNA won't be deposited on that item. Gloves should be changed in between the handling of each of those items. Each item should be individually packaged in the appropriate container depending on what that item is. If the

item has blood or semen or saliva and it's wet that needs to be dried first and then stored in a dried manner.

Generally paper bags or boxes are the best way to preserve evidence. Storing wet items in plastic promotes bacterial and other micro-organism growth which will destroy the DNA. The items need to be individually labeled - I think I already mentioned this - with tamper evidence tape stored properly.

And then, you know, in the lab the same procedure happens. They have to be opened individually, handled one at a time, changing gloves in between. If we use scissors or a knife or a cutting tool to cut a swab off, for instance, that's a one-time use instrument, that all gets thrown away and we start fresh with a new item of evidence.

THE COURT: Thank you.

Q. Now you mentioned gloves several times in that answer, Dr. Word. If you touch an item of evidence without gloves does it impact the integrity of the DNA for future testing?

A. It can. It can remove DNA from that item as well. So individuals handling an item with

gloves need to be very careful of where they touch. The same concept of, you know, touching an item that might have fingerprints on it. You want to be very careful that you don't handle it in an area that may have fingerprints or biological materials. If the gloves are contaminated or haven't been changed from the last item there may be DNA from the person wearing those gloves or from a previous handled item that now gets deposited on the next item.

Q. Thank you. And at least as of 1999 when Attorney General Reno formed this commission it was recognized by law enforcement that DNA testing could become -- already was and could become even more of part of future exoneration matters, correct?

A. Oh absolutely, yes.

Q. So if the evidence is not handled at the time of the crime in a way that preserves that DNA that takes away a future exoneration chance -- or it could take away a future exoneration chance, correct?

A. Potentially, yes.

Q. In the 1990's and going forward was there anything happening that would caution people

against touching items of evidence that had blood on them?

A. Well certainly in the early 90's the discovery of the HIV virus and its resulting AIDS epidemic put everyone on note about touching items that had blood on them. And, you know, by the very early 90's all law enforcement, hospitals, first responders, medical individuals --

MS. PRYDE: Objection, Your Honor. Lack of foundation. We're talking about something --

THE COURT: How is this helping me, Mr. Jacober?

MR. JACOBER: I'll move forward, Judge.

THE COURT: Thank you.

BY MR. JACOBER:

Q. We've learned in this case that the prosecutor and the special investigator for the prosecutor's office have now testified to or have signed an affidavit indicating that they touched the murder weapon in this case without any evidence preservation techniques, is that correct?

A. That's -- I been informed of that, yes.

Q. And further DNA testing has shown that the DNA that was left on the knife could be matched

to either of those two gentlemen, is that correct?

A. The results can be explained by their profiles, yes.

Q. Based on the results that you reviewed are you able to determine if Mr. Williams -- Marcellus Williams' DNA is on that knife?

A. He's excluded as the DNA that was detected from the knife. He cannot be a source.

Q. Because of what we've learned now can you make a definitive determination though as to Mr. Williams and the DNA that's on that knife?

A. For the DNA that was recovered it is not his DNA. No DNA recovered and tested includes him as a possible source. He's excluded as either of the two sources.

Q. You don't know though if that means his DNA was never on the knife because of what we've now learned, is that correct?

A. That's correct.

MR. JACOBER: And, Your Honor, in support of that I would -- Your Honor, I misspoke earlier. I didn't realize that the August 19, 2024 test results from BODE Technology were also part of Exhibit 1, and we would move for that to be admitted into evidence as well. That's Exhibit B

of Exhibit 1.

THE COURT: Is that the same as FF?

MR. JACOBER: Yes. Yes, Your Honor.

MS. PRYDE: Just for clarification, Mr. Jacober, you said Exhibit 1. Are you talking about Tab 1, Exhibit 16?

MR. JACOBER: Tab 1. Tab 1. I'm sorry.

MS. PRYDE: Great. Just want to be sure. Thank you.

THE COURT: The Court's confused too. Tab 1 and then it's got exhibit numbers on there. I've already received -- Is this under Exhibit B?

MR. JACOBER: Yes, Your Honor.

THE COURT: Any objection?

MS. PRYDE: No objection, Your Honor.

THE COURT: So Exhibit B will be received.

MR. JACOBER: One second, Your Honor.

(Pause.)

Judge, at this point I have no further questions.

THE COURT: Thank you. Does someone mind checking the halls.

MR. JACOBER: We're supposed to be

getting a text message when he shows up.

THE COURT: Very good. I appreciate that. Cross.

MR. JACOBER: Judge, when Judge McGraugh is here I'll just give you a sign.

THE COURT: Thank you. You may inquire.

MS. PRYDE: Thank you, Your Honor. I'm just going to get set up for a moment if that's okay with the Court.

CROSS EXAMINATION

BY MS. PRYDE:

Q. Good morning, Dr. Word.

A. Good morning.

Q. You have an extensive history and an extensive scientific background, would you agree with that? Not to toot your own horn.

A. It's relative, yeah. I have a background.

THE COURT: She got her Ph.D. when she was 21.

A. Not.

Q. And as part of that history you have become very familiar with the grunt work of obtaining data, would you agree?

A. I don't actually know what that even means.

Q. Okay, I'll rephrase. When you are doing your scientific testing I notice that in your CV you do -- your early work appears to be in immunoglobulin, if that's correct.

A. Yes.

Q. It's been awhile since I took biology.

So when you were doing those tests were you -- were you producing data to support the conclusions that you were hypothesizing about?

A. Well the molecular biology aspect of what I was doing at that point was actually generating DNA sequences, so we didn't really have a hypothesis under the classical biology; you know, form a hypothesis, do the testing. We were simply isolating DNA from organisms and sequencing that DNA to determine what the sequence of the DNA was for the immunoglobulin genes at that time.

Q. And when you isolated those genes did you use just one sample or did you replicate it?

A. Well for that particular project some of it was replicated. We tried to get overlapping sequences but not always.

Q. Fair enough. Would you agree that

during the scientific process your result can only be just as good as what you have to determine that result?

A. Absolutely, yes.

Q. And in this case you were hired as an expert witness, would you agree?

A. Well as a consultant. I wasn't part of the process at that point. I was consulting on the data.

Q. Thank you for the clarification.

And you were approached by The Innocence Project, is that correct.

A. Yes, I believe so.

Q. And so The Innocence Project hired you in this case?

A. Yes.

Q. And at least in my experience with experts, experts are often asked to answer a question. We heard it in earlier testimony with an earlier expert today, he was answering a particular question by The Innocence Project. Were you also asked to answer a particular question?

A. I was -- I don't know if I was asked a question per se. I was asked to review the case file and form my independent conclusions based on

the results they obtained.

Q. And what was involved in that case file?

A. I got the entire case file from the BODE laboratory. So all of their testing notes, the data, their reports, anything that they had in their file.

Q. And would you agree that that's what's been described as the BODE supplemental report? It was those bench notes, is that correct?

A. Well the bench notes and the report are independent. The bench notes are the whole file that contains all the documentation from the lab; you know, what evidence they received, what testing procedures they followed, how much of the material they used for testing, so their whole testing process. The original report and the supplemental report are the reporting of their findings and their conclusions based on the data that they obtained. And those - I believe there were two reports - were part of that case file.

Q. Thank you, Dr. Word. If you don't mind my moving around a bit. I'm so sorry, there's so much paper. I'm going to hand you a really big binder but I'm going to try to put it on your

surface.

I just handed you what's been previously marked as Respondent's Exhibit I-13.27. Does that look accurate to you? It's under the 27 tab in that binder.

A. Yes.

Q. Great. And does that look like the notes that you reviewed in this case?

A. Oh, I just looked at the report. The report, yes.

THE WITNESS: May I stand up --

THE COURT: Yeah, whatever makes you comfortable.

THE WITNESS: -- so I can look at this easier?

THE COURT: Sure.

BY MS. PRYDE:

Q. And please take all the time that you need.

A. I'm just going to flip through it.

Q. Of course.

A. Yes, this looks like the materials that I received. I'm sorry.

Q. Thank you very much. And was that the only data that you were given with this case?

A. No. There was a subsequent submission to the evidence -- of evidence from Mr. Williams' known reference sample.

Q. Okay. So that wasn't contained in the bench notes that you're looking at there?

A. Oh. Well I didn't see the second report in the second part of that. Because for me it came as a separate file so I was expecting it to be in a separate place.

Q. Fair enough.

A. Is it in this Tab 27?

Q. So there were two reports in this case. The first one was the case forensic report which has been previously marked as I-13 --

THE COURT: Counsel, can we have a stipulation that both those reports --

A. Oh, here it is. Yeah, it's under tab -- As I suspected, it's under Tab 28 is the supplemental report.

Q. Great. So you reviewed that as well?

A. Yes.

Q. So you reviewed Respondent's Exhibit I-13.27 and I-13.28, would you agree?

A. To the best of my knowledge, yes.

Q. And were you given any other

information about this case?

A. At the time I did the first review?

Q. Um-hum.

A. No. I was given no information about the case. They were very careful to make sure I knew nothing about it; just look at the case file, look at the data, and we'll talk later. Which is how I handle pretty much all of my cases.

Q. And when you talked later what sorts of questions were you asked about this particular data?

A. Oh, I have no idea. I was certainly asked what my opinion was and could I make any conclusions regarding Mr. Williams and the knife handle, Item O3B.

Q. And while you were talking to Mr. Jacober - And I realize I gave you a bit of guff and I apologize - you talked a lot about how the protocols that are used to collect the evidence that you're talking about matter, correct?

A. Certainly, yes.

Q. And here were you told any of those sorts of protocols from the St. Louis County Police Department or the University City Police Department? Were you told any of those sorts of

protocols?

A. At some point -- No, not for collection, no.

Q. And were you told whether or not that evidence was handled before by any other individuals or -- Were you told whether or not that evidence was, specifically the knife, whether it was handled by individuals with or without gloves?

A. I don't believe in 2018, which is when I was first involved in this case, that I knew anything about that. I just -- I simply don't recall. It was way too long ago.

Q. Understandable. So initially you just were given these bench notes, these reports, and asked to come to a conclusion about Mr. Williams, correct?

A. I was given the case file to review to come to an independent conclusion. Then I looked at the reports. And then I talked to the attorneys. But I formed -- I didn't look at the reports prior to doing any of my review. I formed my independent evaluation of the information without knowing what BODE had done and reported.

Q. And the reports don't make it entirely clear, but were you made aware that the case itself

had occurred -- the murder itself had occurred not in 2016 when this testing, when all the reports were dated but much earlier?

A. May or may not have known that, I don't know. To me it doesn't -- In terms of what I was asked to do that doesn't directly impact my initial review of the file.

Q. But it might impact a later review, is that what you're implying?

A. Well it may impact understanding of the information about the test results.

Q. Understood. And when you were evaluating this data and these notes and this file you also -- you supplied a little bit of data as well in the form of assumptions, is that correct?

A. Well data are not assumptions. I made assumptions to evaluate the data which is required. For any type of DNA testing one of the first things that has to be done is to make decisions about what allele peaks are going to be interpreted, what data are there, and then based on that data assumptions have to be made regarding whether there's DNA from one individual, two individuals, three individuals. Then the comparisons can be done to state what the meaning of those results might be.

Q. Understandable. Now I'm going to hand you what's previously been marked as Petitioner's Exhibit 16A is what we're calling the original report, is that correct? 16A. And I would like you to turn to page 5 of that report, paragraph specifically 12 and 13. I'm sorry, 13 and 14.

A. Page 5 is my CV.

Q. I'm sorry. Page 5 of the affidavit if that helps you. I believe it's the end of the -- your initial -- or it's at the end.

A. Page 5 of the affidavit?

Q. Yes, page 5 of the affidavit.

A. I have that. Thank you.

Q. Can you turn to page -- And so the paragraphs 13 and 14. So paragraph 13 starts: Under the assumption that the DNA profile from sample EO3B1 is from a single contributor. Did I read that correctly?

A. Yes.

Q. And so when you made that assumption was that something that you introduced into this interpretation method or were you told that by someone from The Innocence Project or otherwise?

A. No, that's a normal part of any DNA analyst's first thing they do is this profile; does

it look like it's from a single individual or does it look like it's a mixture and if so what are the number of individuals.

So based on the DNA profile that was obtained I independently said this could be a single source profile with some artifacts present or it might be a mixture, and I can interpret it under both of those two starting assumptions. And this is done in every single DNA case.

Q. Of course. And when you said it looked like a single sample, what sorts of factors are you looking at when you determine whether or not it looks like a single sample or more?

A. So it might be helpful to start with what a mixture looks like because a single sample doesn't have those characteristics. But for a single sample for y-str testing which was done here we expect to see only one peak at each of the loci that are tested. Once we see two peaks that suggests that there may be a mixture in that sample, with the exception of one locus that complicates everything because it gives two peaks. So I have to qualify that.

The y-str testing, however, does have a higher propensity for introducing some artifacts.

And so when smaller peaks are occasionally seen, particularly in certain positions, it has to be considered whether those are in fact artifacts of the testing and aren't contributing to the sample being a mixture and therefore it's a single source profile, or if they might be true alleles from a second individual.

So looking for a single peak at each locus would be consistent with a single source profile. A single peak at each locus with one or two peaks that we call stutter are common and we expect those to be there in single source samples. But those extra peaks may also be indicative of mixture from a second individual. Because that wasn't clear in this sample I chose to evaluate it under both of those starting assumptions, if it's a single source or if it's a mixture of two individuals.

Q. And before we get to the -- I do want to come back to the peaks in just a moment. But now you're talking about this as if it's only one or two individuals. Is there ever an instance where there might be three or more profiles in a mixture?

A. Oh, certainly.

Q. And how would you tell if there are three people or four people?

A. To know definitive there are three or four people I would have to see indication in the DNA of each of those individuals.

Q. And what counts as an indication? I don't --

A. So for y-str testing to know that there were four individuals I would have to see four peaks at at least one, if not multiple locations. That would tell me I know there are DNA from at least four males in this sample. And we only ever know what the minimum number is. There could be more individuals, but their profile isn't distinguishable enough from the other individuals.

Q. Great. And so when you're talking about these peaks it's my understanding that there are about three different thresholds that are applicable in DNA testing; the analytical threshold - I'm sorry - the peak detection threshold - Let's start out with that first - would you agree?

A. If you're talking about BODE's procedures, yes.

Q. Okay.

A. What they do is not common. So following their procedures, yes, they have three thresholds.

Q. Okay. And those are the peak detection threshold at 30RFU or relative reactive fluorescence units, is that correct?

A. I think theirs is 35.

Q. Thank you for the clarification. And then the analytical threshold and that's at 70, correct?

A. I think it was 75.

Q. Okay. And then there's the --

(Reporter asks for clarification.)

A. Wrong word.

Q. Oh, I'm sorry. In the BODE procedures it appears they call it a --

A. Stochastic, S-T-O-C-H-A-S-T-I-C, threshold.

Q. And at stochastic threshold that's where we know that there's no DNA missing, is that correct? There's nothing missing from the sample?

A. No.

Q. Okay.

A. Well, no.

Q. Okay. Fair enough.

A. I can explain if you'd like.
Q. So at the analytical threshold that just means that there's something there, would you agree?
A. The analytical threshold is used to say anything we see above this level we have pretty high confidence this is real data, this is probably a true allele, or it could be an artifact. It's separating background noise from what we think are true data that can be interpreted.
Q. And the analytical threshold in this case is set by BODE, correct?
A. Yes, for their procedures they set what they use to interpret their data.
Q. And they set that based on what you were calling earlier validation studies, is that correct?
A. That's correct.
Q. And those are unique to the lab, correct?
A. Each lab does their own validation studies and based on those sets their own protocols, yes.
Q. Great. So using the data that you were given and these assumptions that are a normal part

of your process you came to a result in this case, is that correct?

A. I stated some conclusions.

Q. Okay. And you concluded that according to the evidence that you reviewed and the data that you reviewed you believe that Mr. Williams could be excluded as a source of this DNA mixture or profile, is that correct?

A. That's correct.

Q. And that's under your assumption -- Let's throw out the single contributor for the moment. That's under the assumption that there are only two people who touched who were DNA contributors to this knife, is that correct?

A. Under the assumption that there are only two DNA contributors, which is all the data support, he is not either of those two contributors.

Q. And at this point in time the contributors to a DNA is a little bit hard to define in practical -- in practicality. So if an individual were to touch something, if I were to hold this pen am I a contributor to this DNA? If this pen is later DNA tested would I be a contributor?

A. If your DNA is detected and it matches to your profile, yes, that would be consistent with you being a contributor to the DNA detected.

Q. But there might be plenty of other people that have touched this pen, would you agree?

A. I have no idea. Under the assumption that other people touched it, yes.

Q. And other people -- Just by touching something other people can also leave DNA, is that correct?

A. Certainly.

Q. Great.

A. Or not. I mean, it's variable.

Q. Fair enough. There are lots of factors, and sometimes these results are just inconclusive, would you agree? When you are looking at DNA results and you're evaluating all of the data that you're given sometimes the answer is just inconclusive, is that right?

A. In some limited situations the quality of the data are so inadequate and/or the limited information available makes it either impossible to make any conclusions or it's inconclusive for certain individuals in the comparison to certain individuals.

Q. And does the effort that an individual interpreter will go to to not result in any conclusive results, does that depend on the interpreter or is that industry standard.

(The reporter requests that the question be restated.)

Q. When you are determining what is inconclusive do you -- is there a point when you stop looking for data, when you stop seeing data as being important even if there's data there, or do you just keep looking; as long as it was detected it's not inconclusive?

A. I don't think I understand your question. To me all data are important.

Q. Okay.

A. Whether they are useful and sufficient to make the type of comparison that we need to do is what determines whether a conclusion can be made or whether no conclusion can be made and, therefore, inconclusive. If we do testing and we get absolutely no data there's no conclusion that can be made because there's nothing for comparison.

If only a single allele is recovered many labs call that inconclusive. My position is, well, if you've got one allele and you think it's

true data you could use that to say, This is an 11; the person I'm comparing it to doesn't have an 11 so therefore they are excluded as the source of that single allele.

Whereas, another individual who has that 11 technically isn't excluded but that "inclusion" really has no meaning because you're only looking at a single allele, and for that reason many labs will call that an inconclusive finding. And it varies from lab to lab and data to data.

Q. And that might be based on their validation studies, would you agree?

A. Well in theory they -- all interpretations should be based on their validation studies. Unfortunately BODE and other labs leave this analyst discretion where the analyst get to decide what they want to do and the procedures are not sufficiently detailed such that everyone in the lab would be assured of getting the same results.

Q. And --

A. Sorry, reaching the same conclusion off of the same results.

Q. Did you review anything in this case that indicates that these results were not reviewed

or signed off on by multiple people in BODE?

A. No. There's a requirement for a technical review on each of the reports and that's documented.

Q. So multiple people do sign off on, you know, whether or not that data should be interpreted in that particular way?

A. That's correct. In theory, assuming the policies were followed, yes. If the appropriate technical review was done it should mean that a second individual agreed with what was in that report.

Q. Great. And in this instance just matching up one allele to the next, that's how you do inclusion exclusion, is that correct? In just basic, basic terms, yes or no?

A. Basic terms you compare the data at one locus from the evidence to the data at that same locus from a known individual and then you step down each locus of the data.

Q. And in 2024 you did that with Ed Magee and Keith Larner as compared to the sample that was produced back in 2016, is that correct?

A. I did, yes.

Q. And at every site where there's data --

(The reporter asks for repeat of question.)

THE WITNESS: I'm missing it too.

Q. At every point, at every locus where there was data from the original sample, that allele number matches Ed Magee, is that correct?

A. I don't recall. It matched one of the individuals. The primary data I'm calling either the single source or the major contributor did match one of those individuals. I don't remember who it was.

Q. Okay.

A. But I need to clarify. That doesn't mean he's the source.

THE COURT: There's no question.

Q. Now let's move on to the DNA, the transfer situation. So you talked about with Mr. Jacober there's a lot of factors --

A. Can you -- I'm having a really hard time following you. You're flying and I'm -- I can't hear and process and think. Thank you.

Q. When you're talking about DNA transfer on an object after years or any period of time there are factors that you discussed with Mr. Jacober that affect how -- what DNA is left behind

and how much of that DNA is left behind, would you agree?

A. I think -- I'm not sure I understand the question. But, yes, transfer is the process of moving DNA from one area to another either by putting it on or removing or both.

Q. And that depends on things like storage. You talked a lot about storage with Mr. Jacober, is that correct? Storage could affect how DNA is preserved over time?

A. How DNA is preserved, not how it's transferred, unless it's stored in close contact with some material that the DNA then gets transferred off of that original item onto the storage packaging for instance. But storage and transfer are two --

Q. Just yes or no on the storage. Where it's stored could affect what DNA is preserved? Just yes --

A. Yes.

Q. And in this case were you told how the St. Louis County Prosecuting Attorney's Office or any other individual stored this sample?

A. Not to my recollection. I don't know.

Q. And were you told where it was kept?

A. Again, if I was I don't remember. I don't know.

Q. And you mentioned before you didn't note the timeline so you didn't know the time between the depositing the DNA and the collection of the DNA, is that correct?

A. When I did the analysis of the data?

Q. Um-hum.

A. I don't recall whether I knew any of that or not. I don't know.

Q. So there were a lot of factors that you talked about being important with Mr. Jacober that you didn't know about in this case, would you agree?

A. Well I think your question is misleading, but the answer is yes.

Q. Okay. Were you told anything in this case about the St. Louis County Prosecuting Attorney's Office protocol with regard to evidence handling or testing?

A. I don't believe so. I'm not aware they have a protocol. If I knew about it I don't recall it at this point.

Q. And were you told anything about the St. Louis County crime lab, what protocols they had

for keeping evidence?

A. I don't recall. I don't believe so.

MS. PRYDE: No further questions, Your Honor.

THE COURT: Thank you. You may inquire.

MR. POTTS: Thank you, Your Honor.

CROSS EXAMINATION

BY MR. POTTS:

Q. Good afternoon, Dr. Word.

A. Good afternoon.

Q. Quick reset. The DNA profiles that were just found on the knife can be explained by two people - Keith Larner and Ed Magee, right?

A. That's correct.

Q. When you were -- I don't want to close the loop on this. When you were speaking with Mr. Jacober a few minutes ago I think one of the concepts that came out was that we don't know if Mr. Williams' DNA was on the knife because it may have been removed by those men handling the knife without gloves, right?

A. I don't know anything about whose DNA was on it. I can only tell you who might be the sources based on the data that were obtained by

BODE.

Q. And I think you're jumping right in front of me. And here's all I want to ask. Whoever committed this murder we don't know if their DNA was on the knife because it may have gotten removed by their handling of the evidence, right?

A. That's certainly a possibility. I don't know.

Q. Thank you.

MR. JACOBER: No redirect, Your Honor.

THE COURT: Thank you.

MS. PRYDE: Nothing.

THE COURT: Thank you. Can this witness stand down?

MR. JACOBER: Yes, Your Honor.

THE COURT: Safe travels.

MR. JACOBER: Your Honor, I'm going to step out to see if one of the witnesses is available.

(Pause.)

MR. JACOBER: Judge McGraugh is parking right now, so we expect him to be here momentarily.

THE COURT: We're switching out court reporters, so we'll be in temporary recess.

(A recess was taken.)

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REPORTER'S CERTIFICATE

I, Rhonda J. Laurentius, a Certified Court Reporter and Registered Professional Reporter, hereby certify that I am the official court reporter for Division 13 of the Circuit Court of the County of St. Louis, State of Missouri; that on the 28th day of August, 2024, I was present and reported all the proceedings had in the case of IN RE: PROSECUTING ATTORNEY, 21ST JUDICIAL CIRCUIT, ex rel. MARCELLUS WILLIAMS, MOVANT/PETITIONER, VS. STATE OF MISSOURI, RESPONDENT, CAUSE NO. 24SL-CC00422.

I further certify that the foregoing 154 pages contain a true and accurate reproduction of the proceedings had that day.

I further certify that this transcript contains pages 1 through 155 inclusive and that this reporter takes no responsibility for missing or damaged pages of this transcript when same transcript is copied by any party other than this reporter.

/s/ Rhonda J. Laurentius, CCR #0419
Official Court Reporter
Twenty-First Judicial Circuit
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IN THE CIRCUIT COURT OF THE COUNTY OF ST. LOUIS
TWENTY-FIRST JUDICIAL CIRCUIT
Division No. 13
The Honorable Bruce F. Hilton, Presiding

IN RE:		
PROSECUTING ATTORNEY,	)	
21ST JUDICIAL CIRCUIT	)	
ex rel, MARCELLUS WILLIAMS	)	**Cause #24SL-CC00422**
	)	
	)	
MOVANT/PETITIONER,	)	
	)	
vs.	)	
STATE OF MISSOURI,		
RESPONDENT.		

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TRANSCRIPT OF HEARING

Volume 2 of 2

AUGUST 28, 2024

Susan Lucht, CCR#332
Official Court Reporter
Twenty-First Judicial Circuit
St. Louis, Missouri

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VOLUME 2

MOVANT'S EVIDENCE

VOLUME II

(The Court reconvened at 12:35 on August 28, 2024, and the further following proceedings were had:)

THE COURT: We're back on the record in Cause Number 24SL-CC00422. Let the record reflect we took a brief recess in order to take a witness.

Again, I need to remind everyone here and in the overflow room about the prohibition against any recording or photographing any of these proceedings.

If it happens, you will be asked to leave. Just a reminder.

Mr. Jacober, with that you may call your next witness.

MR. JACOBER: Thank you, Your Honor. The State would call Judge Christopher McGraugh.

THE COURT: You're an officer of the Court. I don't think it's necessary, but for the record... (Witness sworn.)

JUDGE CHRISTOPHER MCGRAUGH,

Having been sworn, testified as follows:

DIRECT EXAMINATION

BY MR. JACOBER:

Q. Thank you, Judge McGraugh. You're an

attorney licensed in the State of Missouri, correct?

A. I am.

Q. Are you licensed in any other state or jurisdiction?

A. I'm licensed in a number of federal jurisdictions, but no other state.

Q. Thank you. You're presently a circuit court judge for the City of St. Louis, correct?

A. I am.

Q. How long have you been on the bench?

A. I was appointed November of 2012.

Q. Prior to your appointment in 2012 what type of law did you practice?

A. Right before I was appointed I had a general criminal, civil, appellate practice in private practice. I was in private practice.

Q. Thank you. At some point in your career you were on the Capital Litigation Unit for the Eastern Division of Missouri, is that correct?

A. I was from 1990 to 1992.

Q. Once you were off the Capital Litigation Unit did you take capital cases from a capital unit when they would have a conflict or some other reason why they couldn't handle it?

A. I would.

Q. And was one of those cases Marcellus Williams?

A. It was.

Q. I want to direct your attention, Judge McGraugh, to the trial in this case. Specifically the handling of the evidence.

The record will reflect what the record will reflect, but do you recall at any time during the trial anyone touching the murder weapon without wearing gloves?

A. Outside the container or the bag, the evidence bag? No.

Q. If you had seen that, what would you have done?

MS. SNYDER: Objection. Speculation.

THE COURT: Sustained.

Q. (By Mr. Jacober) Would someone touching the knife without wearing gloves have stuck out in your mind?

MS. SNYDER: Objection. Relevance.

THE COURT: I'm sorry?

MS. SNYDER: Objection. Relevance.

MR. JACOBER: Well, Judge, I would ask for a little bit of leeway because I think

Judge McGraugh was an experienced trial attorney at that time who had tried a lot of these types of cases, and handling of evidence is something that trial lawyers would keep in mind as they were going through the trial.

THE COURT: This case was tried how many years ago?

MR. JACOBER: Twenty-four years ago, give or take.

THE COURT: Judge McGraugh's memory is better than mine. Sustained.

Q. (By Mr. Jacober) Specifically do you recall if Keith Larner or Ed Magee touched the murder weapon without wearing gloves?

A. Not outside the evidence bag.

Q. Based on your knowledge at the time was it important to maintain the integrity of the evidence so any future testing could be done for DNA evidence on the murder weapon?

A. Yes.

MS. SNYDER: Objection. Calls for improper conclusion.

THE COURT: I will allow it. Overruled.

A. Yes, it would.

Q. (By Mr. Jacober) Why is that?

A. Well, not only particularly for biological evidence, it was always sort of protocol that --

MS. SNYDER: Objection as to any protocol is hearsay and lack of foundation.

THE COURT: Nonresponsive. Sustained. Rephrase.

Q. (By Mr. Jacober) Was it your understanding at the time that touching the knife without wearing gloves would contaminate it?

A. Yes.

Q. Would it surprise you to learn, Judge, that Revised Statute of Missouri 547.035, the Missouri statute that allows for post-conviction DNA testing, became effective on August 28th, 2001?

MS. SNYDER: Your Honor, at this time I'm going to object to the relevance of this witness' emotional response to that statute.

THE COURT: Counsel? Sustained.

MR. JACOBER: I'll rephrase the question.

Q. (By Mr. Jacober) Are you aware that Revised Statute of Missouri 547.035 became -- that's the statute allowing for post-conviction

DNA testing -- became effective on August 28th, 2001?

MS. SNYDER: Objection. Relevance.

THE COURT: Court will take judicial notice of the statute.

Q. (By Mr. Jacober) Are you aware of that?

A. I was aware it was enacted, but I couldn't give you the date in which it was enacted.

Q. And that's right around the time of the Marcellus Williams trial, isn't it?

A. I believe it was the summer of 2001.

Q. Based on your understanding that touching the murder weapon without wearing gloves would contaminate the DNA, was that option taken away by what we have now learned was the touching of the murder weapon by Mr. Larner and Mr. Magee prior to trial?

MS. SNYDER: Objection. Speculation and improper opinion from this witness.

THE COURT: Sustained.

MR. JACOBER: One second, Your Honor.

Q. (By Mr. Jacober) When you reviewed the physical evidence in this case, were you required to wear gloves?

MS. SNYDER: Objection. Relevance.

THE COURT: I'll allow it. Overruled.

A. Yes.

Q. (By Mr. Jacober) And did you?

A. Yes.

MR. JACOBER: Judge, I have no further questions.

THE COURT: Thank you.

MS. SNYDER: No cross-examination.

THE COURT: Thank you.

CROSS-EXAMINATION BY MR. POTTS:

Q. Good afternoon, Judge McGraugh.

A. Good afternoon.

Q. At any time prior to trial did the prosecution ever inform you that they had been handling the murder weapon without gloves?

A. No.

Q. At any time prior to trial did the prosecution inform you that investigators had been handling the murder weapon without gloves?

A. No.

MR. POTTS: Thank you.

MS. SNYDER: Nothing further.

THE COURT: Mr. Jacober?

MR. JACOBER: Nothing further.

THE COURT: Thank you. Can this witness stand down?

MR. JACOBER: Yes, Your Honor.

THE COURT: Thank you, Judge McGraugh. Get back to your jury trial.

JUDGE MCGRAUGH: Thank you, Judge Hilton.

THE COURT: Given the hour and so that everyone can reenergize, or not, by having some lunch, the Court is going to be in recess for lunch.

It is almost 12:45. Let's come back, would that be 1:45, an hour? Is an hour enough time to get Mr. Williams something to eat and everything? Will that be okay with DOC? Okay. So the Court will stand in recess until 1:45.

(A recess was taken at 12:45 p.m. The court reconvened at 1:50 p.m., and the further following proceedings were had:)

THE COURT: Again, I'd like to remind any new members of the gallery against the prohibition of recording any of these proceedings or taking photographs. That also is germane to the overflow room. And I appreciate you complying with that order.

With that said, let's go back on the record. We're back on the record in Cause 24SL-CC00422. According to the clock on my computer it's approximately 1:50 p.m. this 28th day of August 2024. With that said, Mr. Jacober.

MR. JACOBER: Your Honor, at this time the State would call Keith Larner. Mr. Potts will be taking the lead on that examination.

THE COURT: Thank you.

STATE'S EVIDENCE

KEITH LARNER,

Having been sworn, testified:

DIRECT EXAMINATION BY MR. POTTS:

Q. Good afternoon.

A. Good afternoon.

Q. One last time, would you mind stating your name for the record?

A. Keith Larner.

Q. Mr. Larner, you're a former assistant prosecuting attorney for St. Louis County; correct?

A. That's correct.

Q. What years were you an assistant prosecutor?

A. June 7th, 1982, until May 1st, 2014.

Q. You were also the trial prosecutor in the Marcellus Williams case when he was tried for the murder of Felicia Gayle?

A. Correct.

Q. Ms. Gayle was murdered in August of 1998. Does that sound right?

A. August 11th.

Q. When were you first assigned on this case?

A. After the case was indicted in 1999. I'm guessing November or December of '99. Whenever the indictment occurred. I was not involved prior to that time.

Q. So by November or December of 1999 how many murder cases have you tried in your career?

A. Between two and three dozen.

Q. By that point in your career how many felony cases had you tried?

A. Well, I tried between 95 and 100. Back then I would have tried probably more than half of those trials. So 50 or more.

Q. Let's talk about Laura Asaro and Henry Cole. As you have been preparing to testify today have you gone back and looked through any of your records?

A. I have looked at the trial transcript for Henry Cole. I have not looked at the trial transcript for Laura Asaro.

Q. Beyond the trial transcript have you reviewed anything to prepare for your testimony today?

A. I read Ed Magee's statement that he made back in two thousand -- I don't know when he made it -- 2015, 2018. 2018 he made it.

Q. Anything else?

A. No. Just the trial transcript and that.

Q. Ms. Asaro and Mr. Cole weren't the two strongest witnesses you've ever had in a murder case, right?

A. I think they were probably the two strongest witnesses I've ever had in a murder case. Yes, they were.

Q. They were?

A. And I'll tell you why if you want to know. Whenever you want.

Q. We'll get there. Now, Ms. Asaro was a crack cocaine addict, right?

A. Yes.

Q. And Ms. Asaro was also a sex worker?

A. She was a prostitute.

Q. Mr. Cole had about 12 criminal convictions?

A. I'd say that's a fair amount. True.

Q. Those convictions included robberies, possession of stolen property, and carrying concealed weapons?

A. I don't think he had any robbery first degrees. I don't think he was one that would carry knives and guns. Robbery second degree maybe. He had a drug problem. He did crimes to pay for his drug addiction. Lots of them, like you said.

Q. Lots of them. Right. And he was facing a robbery charge when he was released in June of 1999 right before he went to the police department about this case, right?

A. What kind of robbery are you talking about? Robbery what, first or second?

Q. Well, it was a robbery charge. Right?

A. Well, I told you it wasn't a robbery first. I wasn't aware that he was facing any charges. I knew he had been in the city jail and he had been released on June 4th, 1999. He immediately went to the police with his story. I don't know what the crimes he was charged with.

Somehow he got out on bond that day or he was released that day for different reasons.

Q. Okay. And Mr. Cole also had a history of drug addiction, correct?

MR. SPILLANE: I'm going to object to asked and answered.

THE COURT: Overruled.

A. Yes.

Q. (By Mr. Potts) Both of the witnesses expressed interest in the family's monetary reward?

A. At some point -- not Laura Asaro at the beginning. Then she found out about the reward. And when she found out about it, yes, she was interested. But that's not why she came forward. Henry Cole on the other hand came forward predominantly for the reward.

Q. Yeah.

A. And to tell the truth.

Q. And he was promised $5,000 for his deposition testimony in April of 2001, right?

A. After he did his deposition in New York, he had to come back -- that was a deposition conducted by the defense. And then we were going to do a deposition to preserve testimony in

St. Louis, which was going to be video recorded. And we did do that. And he was promised the 5,000 after he did that.

Q. And so he did get the $5,000?

A. After the trial.

Q. Okay. And you actually approached Dr. Picus, the victim's husband?

A. I'm sorry. I think he got it before the trial.

Q. Oh, he got it before the trial?

A. I think he got it after the deposition that he did in St. Louis a month or so prior to the trial. We gave him the $5,000. That was a promise we made to him. And we said, please come back for the trial.

Q. Yeah.

A. We've given you the money. Please come back. And he did.

Q. So he had that $5,000 in his pocket before he showed up to testify?

A. No. He testified under oath twice, but not testified at trial. He had the money before he testified at trial. That's correct.

Q. And you approached Dr. Picus about giving that portion of reward money to Mr. Cole

about four to six weeks before the deposition?

A. Probably so. I had to get his permission. It was his money, I believe.

Q. Yeah. And Dr. Picus actually met with Mr. Cole at the St. Louis Prosecuting Attorney's Office to physically hand him that $5,000 in cash, right?

A. That's true.

Q. And those were the two strongest witnesses you've ever had in a murder trial?

A. Informants? Absolutely.

Q. Now, there were no eyewitnesses -- Excuse me. Strike that. There were no eyewitnesses to the murder, right?

A. That's correct. That's correct.

Q. The murder weapon in the Gayle case was a knife. Right?

A. Yes. It was a butcher knife.

Q. It was a violent murder, right?

A. The most violent murder I've ever seen in 40 years. That is correct.

Q. And that knife was examined and tested by the St. Louis County Laboratory personnel for fingerprints and other evidence before you were involved in the case. Right?

A. That's correct. It was tested by Detective Krull for fingerprints one day after the murder. It was brought there from the autopsy by Dr. Wunderlich. He seized it from the body. Dr. Nanduri took the knife out of Ms. Gayle's neck, handed it to Detective Wunderlich. Detective Wunderlich put it in an envelope, sealed it, and signed his name. He hand carried that over to Detective Krull, who is the fingerprint expert for St. Louis County. And Detective Krull looked at that knife handle, and he found no fingerprints whatsoever on that knife handle. The knife blade had blood on it.

It was then sent over to the County Lab to test for blood. It tested positive for blood. It was Ms. Gayle's blood. The knife was all the way into her neck.

Then that knife was packaged by the St. Louis County Lab in a box, and it was sent then over to U City to wait until they found someone that committed the crime.

So this was all within two or three days. That knife had been fully forensically tested. Sufficient for me and sufficient for the defense attorneys. We were all satisfied with the

testing. Neither side asked for any additional testing at any time prior to that trial.

Q. You said that was all within three days?

A. I know the fingerprints was within one day. And I know that it went from there to the -- to the lab to test for blood. And I don't know for sure that it was within three days.

If you show me the box that it was in, it's probably labeled and dated by the lady or the man that tested it at the lab. I'm guessing between within three days. I'm pretty darn sure it was within a week. There was a rush on this. This was not something to sit and wait.

Q. And so that would have been back in when? What month and year?

A. August of two thousand -- I'm sorry, August of 1998.

Q. So as far as you were concerned the forensics were finished in August of 1998?

A. I wasn't going to ask for any more forensic testing. The St. Louis County Lab are the experts, and they did what they could do. I was satisfied with that. I was not going to ask for any more testing.

However, I always knew that the other

side, whoever they may be, and they were appointed shortly after indictment too, may want to test it. And so I kept it pristine. I had not taken it out of that box. It was sealed. That box was sealed from the St. Louis County Lab with tape. And I waited until I knew that they were not going to ask for any further testing, that they were satisfied with the tests that were done. Yes, I knew that to be the case before I touched the knife.

Q. When did you touch the knife?

A. Well, I got the evidence, I'm guessing, I said in my affidavit about a year before the trial. The trial occurred two years and ten months after the murder. So you can do the math. But I would like to see the evidence receipt which is State's Exhibit 91 to see what date my investigator brought that from U City Police Department to the prosecutor's office. I'm thinking it was sometime approximately a year before the trial I had possession of that knife, enclosed in the box from the lab, sealed. Completely. One hundred percent enclosed in that box. Not sticking out of the box in any way, shape, or form.

Q. Okay. Mr. Larner, who is Ed Magee?
A. My investigator at the time.
Q. When you say your investigator, what do you mean?
A. He was assigned to help me on this case.
Q. What does an investigator -- so who employed Mr. Magee?
A. St. Louis County Prosecuting Attorney's Office.
Q. So he wasn't a police detective, right?
A. I don't know if they were licensed police officers. I know he carried a gun. I don't know if he was licensed by St. Louis County. He came from the City where he had a career in the City as a lieutenant with the Metropolitan Police Department. Then he came out to the prosecutor's office to work until he retired.
Q. So what are the types of duties that an investigator had with the St. Louis County Prosecuting Attorney's Office?
A. Basically anything I asked him to do. Talk to witnesses, locate witnesses, handle evidence, discuss strategy with me. Anything that could help me, he was going to do, within the law.
Q. Was it you or Mr. Magee who originally

took possession of the knife?

A. I think it was Magee. He got it from the U City Police Department. Brought it to me in the prosecutor's office. We lock it in a room right down the hall from my office. I had a key and Magee had a key, and I believe that's all.

Q. All right. So let's back this up a little bit. So Mr. Magee took possession of the evidence from University City Police Department?

A. I believe that's correct.

Q. And then he brought it directly to the St. Louis County Prosecuting Attorney's Office?

A. That's what I asked him to do, yes.

Q. All right. And would Mr. Magee have been the one who walked it into the building personally?

A. Yes.

Q. Okay. And then Mr. Magee would have taken it to this locked room that you're describing, right?

A. That's right.

Q. And you said that both you and Mr. Magee had keys to that room?

A. Mr. Magee gave me a key, and so I had a key. He was the chief investigator. Although, at

that time he was probably not the chief investigator in the prosecuting attorney's office. Maybe he was. I don't recall when he became the chief.

Q. So that was a locked room?

A. It was.

Q. There were only two keys?

A. That I knew of, yes.

Q. One key for you, and one key for Mr. Magee?

A. I believe that's true.

Q. Now everything that we're talking about, you've already disclosed this in an affidavit. Correct?

A. Not everything. Are you kidding? We're going to talk for an hour. My affidavit is a page and a half.

Q. Well, what I'm saying is you've at least previewed these issues for everyone in your affidavit, correct?

A. Some of them. I don't know which issues you're talking about. Could you be more specific?

Q. Yeah. Well, I mean, we were talking about how the evidence actually made its way to the St. Louis County Prosecuting Attorney's

Office, right? Talked about that in your affidavit?

A. Well, I know I didn't get it from U City. I believe it was Mr. Magee.

Q. And you were truthful in your affidavit, correct?

A. With regard to what point? I made a mistake in there, and I'm willing to admit it right now. Let's talk about it.

Q. Are you aware of any subsequent DNA testing on the knife?

A. Yes. I think testing was done by, I don't know, the defendant's -- I say, the defendant. I mean Mr. Williams, his attorneys, in around 2015.

Q. Okay.

A. Approximately.

Q. Are you aware of additional testing that came out last week?

A. I was told that Mr. Magee's DNA is on the knife handle, and that's all I know.

Q. What did you learn about your DNA?

A. I don't know if my DNA is on there or not. I would like to know. Was it? I'd love to know. I touched the knife. I touched the knife

at some point before two thousand -- before the trial.

Q. And when you touched the knife before trial, you touched it without gloves?

A. Yes.

Q. How many times before trial did you touch the knife without gloves?

A. I touched it when I put the Exhibit 90 sticker on there. I touched it when I showed it to State's witnesses before they testified. That's about all I can recall, touching it twice -- or not twice, but there were many witnesses that I showed it to and touched it in preparation for their testimony a month or two before trial.

Q. Okay. So you're saying that there are two different categories of occasions when you were handling the murder weapon without gloves. The first is when you were affixing the exhibit sticker, and the second is when you were discussing the weapon with witnesses. Correct?

A. Yes.

Q. And that process started approximately two months before the trial?

A. Hard to say. I just don't want to be so

definite. I know I met with witnesses before trial. Several times I met with each witness, I would say, in the case. I would have showed the knife to Detective Krull. I would have shown it to Dr. Picus. I would have shown it to Detective Wunderlich, and I would have showed it to Dr. Nanduri, the medical examiner. I would have showed it to them. Whether I handed it to them at that time, I can't say for sure. I know I touched it at that time, and I'm sitting across the table from them, and I'm holding the knife. Did I hand it to them at that time? I do not recall.

Q. So I want to make sure I got this list correct. So I heard that you handled the knife without gloves when you were with Detective Krull, Dr. Picus, Detective Wunderlich, and Dr. Nanduri. Is that right, those four people?

A. That's right.

Q. All right. How many times did you meet with Detective Krull when you were handling the knife?

A. Just the one time to show him the knife. I met with him several times about his testimony.

Q. How many times did you meet with

Dr. Picus when you were handling the knife without gloves?

A. One time, and I did not have him touch the knife. It would have been too painful to have him touch his wife's murder weapon. I showed it to him because I wanted him to identify it in court, if he could.

Q. And how many times when you met with Detective Wunderlich did you handle the knife without gloves?

A. Once. Again, with Krull and Wunderlich I was going to have them identify it if they could at court in trial. So I wanted to show it to them before they testified.

Q. And then how many times did you meet with Dr. Nanduri when you were handling the knife without gloves?

A. One time.

Q. So I want you to --

A. She also identified the knife in court. I wanted her to be able to do that. And so I met with her and showed her the knife. I don't remember if I handed it to her or not.

Q. Okay. So I just want to make sure I got this right. I've got five different occasions

where you handled the knife without gloves. Once with Detective Krull, once with Dr. Picus, once with Detective Wunderlich, once with Dr. Nanduri, and once when you were affixing the exhibit sticker. Is that correct?

A. Yes.

Q. Can you think of any other times when you were handling the knife without gloves?

A. Not until the trial.

Q. Okay.

A. Again, the defense attorneys at that point had said they didn't want any testing on the knife. The knife was fully tested. I also knew at that time that the killer wore gloves. So whether -- I knew the killer's DNA and the killer's fingerprints would never be found on the knife because the killer wore gloves. And I knew the killer wore gloves before I touched the knife. So I knew that that knife was irrelevant in that regard.

Q. That's really interesting.

A. In my opinion. In my opinion.

Q. So you knew or it was your opinion that the killer wore gloves?

A. Oh, I knew because I had talked to

Detective Creach. He laid it out in his trial testimony. And I met with him before trial. On Page 2001, 2002, 2003, and 2004 of the trial transcript Detective Creach tells you exactly how he knew that the person that broke into the house wore gloves. And you let me know when you want me to tell you what he said.

Q. So you say you knew --

A. I also knew --

Q. Excuse me.

A. -- for other reasons.

Q. Excuse me one second. We'll get there.

A. Okay.

Q. You weren't an eyewitness to the murder?

A. I beg your pardon?

Q. You were not an eyewitness to the murder, correct?

A. Correct.

Q. You did not see what happened inside that house? Correct?

A. No. Not when it happened I didn't. No.

Q. So what you're saying is, you just decided that your opinion gave you the right to handle the knife?

A. You know --

MR. SPILLANE: I'm going to object to that. That's misstating his testimony.

A. Detective Creach --

Q. (By Mr. Potts) Fair question --

THE COURT: Hold on. Hold on. Let me rule. Overruled.

A. Detective Creach is the one that told me that the killer wore gloves. He was a crime scene investigator for the St. Louis County Police Department. On the day of the crime he did the crime scene investigation on this case along with other crime scene investigators. But he looked at the window that was broken out, the glass pane of window, which was the point of entry. He looked at the glass that was broken, and he found no fingerprints on the glass whatsoever.

He did find two clear marks on -- if this phone was a piece of glass. There was a piece of glass -- you mind if I go into this now?

Q. (By Mr. Potts) Let's stop right there.

MR. SPILLANE: Your Honor, can he answer the question?

MR. POTTS: It was not responsive.

MR. SPILLANE: He's been stopped twice from explaining why he believed that the killer

wore gloves. Each time he tries to answer he's stopped.

MR. POTTS: That wasn't the question.

THE COURT: You can rehabilitate him. Next question.

Q. (By Mr. Potts) I want to go back to when you were handling the knife without gloves prior to trial.

Now, I can tell you the knife is right there. I'm not going to get it out because I don't think we need to do that.

What I'm interested in is --

MR. POTTS: You mind if I -- may I approach the witness? May I approach the witness, Your Honor?

THE COURT: For what purpose?

MR. POTTS: I was going to have him show how he was handling the knife.

THE COURT: I'm sorry?

MR. POTTS: I was going to have him show us how he handled the knife.

THE COURT: All right.

Q. (By Mr. Potts) Just, will you show me, when you were handling -- I'm just going to hand you this.

A. I touched the knife handle. I did not touch the knife blade.

Q. Okay.

A. How did I touch it? I don't even have any idea how I touched it. But I touched it enough to be able to hold it.

Q. Did you lift it up?

A. To show, yes.

Q. How long would you hold it for in your hand?

A. Well, when I took it to put the State's Exhibit 90 sticker on there, I pulled it out of the box. That would have been the first time I took it out of the box.

Q. Okay.

A. And I probably set it down on the table.

Q. Okay.

A. I got out State's Exhibit Number 90, wrote the word -- numbers 90 on it, and I stuck that sticker onto the knife handle. And I did see the knife this morning. I know exactly what it looks like just from today.

Q. And what about with Detective Krull, would you hold it up again?

A. About the same.

Q. Yeah. Hold it up? With Dr. Picus did you hold it up?

A. That's correct.

Q. With Detective Wunderlich you picked it up, held it in your hand by the handle?

A. Correct, before he testified at trial.

Q. With Dr. Nanduri, picked it up, held it in your hands with the handle?

A. Same way, same place, on the end, on the handle end.

Q. And for each of those people you were also open to them handling the knife if they wanted to?

A. At that point in time, yes, I was open to it. I didn't give it to Dr. Picus for the reason I stated. I didn't let him touch it.

Q. You didn't make them wear gloves?

A. Not that I recall.

Q. Did you ever see anyone handle the knife with gloves?

A. I did handle it with gloves with a witness during the trial.

Q. During trial?

A. During the trial. One of the witnesses I did. That would have been Dr. -- I'm sorry,

would have been Detective Wunderlich. I gave him gloves not to handle the knife, but because after he handled the knife he was going to handle the State's Exhibit 93, which was the bloody purple shirt that the victim was wearing. That had dried blood on it, and I thought he wouldn't want to touch that, and neither did I. So we both put on gloves for his testimony. And I state that in the record when I say "put these on". I'm saying gloves, in case you didn't know.

Q. Now, by the time of the Williams trial you had been a prosecutor for about 17 years, right?

A. That's the math.

Q. Okay. Before then have you ever had a trial that resulted in a hung jury?

A. Yes.

Q. Had you ever had a judge declare a mistrial for any other reason?

A. I think the very first case I ever tried was a misdemeanor DWI. And I asked the defendant, because he said he didn't drink, and I said, well, you just got out of inpatient treatment for alcoholism. He was trying to imply that he never drank. And I said that. And the judge said,

that's a mistrial. And you know what? I retried it and won. That's the way it goes. That's the only time other than hung juries.

Q. Have you ever had a case reversed on appeal?

A. Not for anything that I did personally, but yes, I've had two.

Q. Okay.

A. I recall two. One of them we didn't instruct down to voluntary manslaughter. I convicted him of murder second. The Supreme Court said you should have instructed down one more time to voluntary manslaughter, and they reversed it for that.

The second one was a case where the judge -- I won the motion to suppress regarding the defendant's statement. And the Court -- the Supreme Court said the judge -- you should have lost that motion to suppress.

By the way, I didn't try that motion to suppress. That was another prosecutor in the office that did that. I didn't get on the case until after that. That prosecutor left the office. Then I got on the case. But that was the case I was involved with that was reversed.

Q. In all those instances the end result is you have to go retry the case, right?

A. That's right.

Q. You ever had a defendant seek post-conviction or habeas corpus relief after one of your trials?

A. I'm sorry. What was that?

Q. Have you ever had a defendant seek post-conviction --

A. Seek it?

Q. Yeah.

A. Yes. They all do.

Q. Yeah. They all do?

A. They all do, yeah.

Q. Have you ever had defense counsel ask for a trial continuance?

A. Of course.

Q. All the time, right?

A. Not all the time, but sometimes.

Q. Yeah. And sometimes those are granted, right?

A. Not in this case they weren't. They asked for a continuance. They didn't get it. So no, it was not in this case. In some other case -- I mean, I tried a hundred cases so I'm

sure.

Q. But in other cases they are granted, right?

A. They can be, and they have.

Q. So at what exact point of these proceedings did you believe that it was appropriate for you to contaminate the murder weapon?

MR. SPILLANE: I'm going to object to the form of the question, Your Honor. There's been no foundation he contaminated the murder weapon. He said he held it after it was tested.

THE COURT: Sustained.

Q. (By Mr. Potts) So what exact point of these proceedings did you believe that it became appropriate for you to handle the murder weapon without gloves?

A. When I knew that I wanted no more testing of this knife. I thought all the testing -- I didn't even know of any other tests that could be done. I didn't. And I assumed the lab did the most thorough job that they could. So I didn't ask for any, and I knew I wasn't going to ask for any tests. There were no fingerprints on there. There was nothing to link anybody to the

crime on that knife.

And I also knew before I touched that knife that Detective Creach gave his opinion to me. And why -- what formulated his opinion, what facts were there for him to conclude, not me, but for him to conclude that the person that entered the home wore gloves.

Second, Henry Cole testified at the trial that the defendant, Mr. Williams, told Henry Cole -- they were cellmates in the city jail. That's how Henry Cole got all the information. They were cellmates. He -- Henry Cole testified that the defendant told Henry Cole that the defendant wore gloves when he committed the crime so that he would not leave fingerprints in the house. Those were -- that's how Henry Cole testified at trial. And I knew he was going to testify that way in trial.

And the third reason I felt I could touch the knife was because there were no prints on it. There was nothing there. There was nothing to link anybody to the crime. It was worthless in my view at that time.

Q. And so I think that what you just said, though, is that it would have been within seven

days of this murder being committed that forensic evidence testing had been finished, right?

A. I mean, if you're going to hold me to seven, it could have been two, three days. It could have been ten days. If you give me that box that I looked at this morning, there's a date on it, I'm sure.

Q. Let's just say that roughly three- to ten-day window. Any time after that three- to ten-day window had elapsed that's when it became appropriate for you to handle the knife without gloves?

A. No. I didn't even get involved in the case until 15 months later. And I told you, it wasn't until I talked to Detective Creach and he told me his opinion, that based on his knowledge, his training, and what he saw that night that the person wore gloves. And that was real close to the trial. That was closer to the trial. Not closer to the murder. Closer to the trial.

Q. In this case the defense counsel was specifically requesting continuances of the trial date, right?

A. I know that they requested a continuance at some point. I don't know when they asked for

it. Maybe they asked for more than once. But I don't think the judge gave it to them, is my recollection.

Q. And they were asking for continuances because they wanted to conduct further forensic testing, right?

A. Wrong.

Q. Wrong?

A. Wrong.

Q. Okay. Why do you think that's wrong?

A. Because they never asked for any forensic testing. If they had asked me for forensic testing, I would have said, sure. And if I didn't say sure, the judge would have said yes, they may do it.

Q. Did you oppose the continuance in this case?

A. I don't remember. I probably did. I was ready to go.

Q. So you didn't -- when you told them that you wouldn't agree to the continuance, did you tell them that you had been handling the evidence without gloves?

A. I said I probably opposed it. I know the judge would have none of it. Judge O'Brien

would have none of it.

Q. And so you took that position to oppose the continuance after you had already contaminated -- I'm sorry. I want to strike that. I don't want an objection here. You took that position that you were going to oppose the continuance after you had already been handling the knife without gloves?

A. Well, you tell me when I opposed the continuance. It should be in the Court record.

Q. Does around early May sound right?

A. May of what year?

Q. Well, it was right before trial, wasn't it? You said --

A. The trial was in June. I think it started on June 4th of 2001. So May. That sounds -- that could -- if you say I opposed it, it very well could have been in May.

Q. Yeah. And, in fact, they filed a supplemental request for continuance on May 25th, right?

A. I don't know. If it's in the record, then it was.

Q. Yeah. And when they filed that supplement, you still opposed the continuance?

A. If the record says that, then I did.
Q. In seeking the continuance, defense counsel was also trying to get copies of Mr. Williams' incarceration records from the Department of Corrections, right?
A. I have no idea what the reasons were for their continuance.
Q. Well, was that one of the -- Okay. You had those records, didn't you?
A. Incarceration records?
Q. Yes.
A. I wanted to prove that he was in jail, the same cell as the informant. I wanted to show that they were together in jail so that the information could have been transferred as the informant said it was.
Q. I appreciate that. That's not quite the question. I'm saying, you had possession of those records, didn't you?
A. Was that an exhibit that I used in the case? If it was, I had possession of them. I don't know when I got possession of them. I might have got -- I don't know when I got possession of those records. They're probably dated by the person that made those records at the jail.

They're official records. They're dated.

Q. Now, this case involved a stolen laptop, right?

A. That was one of the things stolen, yes.

Q. Yeah. And Dr. Picus had to also look at the laptop that was recovered, correct?

A. That's correct.

Q. And Dr. Picus had to wear gloves when he was handling the laptop, right?

A. I don't recall that one way or the other. The laptop was never forensically tested like the knife was. I don't believe the laptop was ever -- any testing was done on it. I don't recall any being done. I don't see any reason to have used gloves on that if it wasn't going to be tested. And I don't know whether gloves were used. I just don't remember.

Q. Now, did you allow the jurors to handle the knife at trial?

A. Absolutely not.

Q. Why not?

A. The judge wouldn't have allowed that.

Q. Okay. But I mean, would you have had a problem with the jurors handling the knife at trial?

A. That calls for speculation on my part, and I guess I don't really know. I do not want the jurors touching any piece of evidence other than maybe a photograph or something that they would need to touch. So I don't think in any case a juror should touch a knife or a gun. After all, they might stab each other. Who knows.

Q. You said that doctor -- I mean, Detective Wunderlich was wearing gloves when he handled the knife at trial?

A. I handed him gloves, yes. I said, Put these on. Those were my exact words.

Q. But you didn't hand them to him when he was handling the purple shirt. You handed them to him when he was handling the knife. Correct?

A. I handed him those gloves before he touched any exhibit. It was right at the beginning of his testimony. I thought, why not start him with gloves. Why interrupt his testimony with putting on gloves right in the beginning. And the beginning was the knife. That's when I started talking about the knife. And then from the knife I went into the bloody purple shirt he seized at the autopsy. He seized the knife and the purple shirt. And those were

the items that I was going to talk to him about when he testified. That's when I gave him the gloves, and that's why I put them on too.

Q. And that's because evidence with blood on it should be handled wearing gloves, right?

A. That's a matter of personal opinion. I just thought, you know, I don't know if I discussed it with him in advance, but the purple shirt was just loaded, drenched in blood. You could imagine. It was dried blood. And I didn't really care to touch it, and I knew or figured he didn't either.

Q. Let's talk about jury selection.

A. All right.

Q. There were over 100 potential jurors who responded to their summonses and showed up for this case, right?

A. Probably so. In fact, I think you're right. Had to have been a hundred. It was a death penalty case.

Q. Exactly. I'll tell you, does 131 sound right for a death penalty case?

A. Yeah.

Q. Okay. Of more than a hundred potential jurors, only a handful of them were black?

A. I don't know how many were black.
Q. You don't?
A. You tell me.
Q. Through alternates who went through selection of seven black members of the veneer. Did that sound right?
A. I know how many I struck. I had nine peremptory strikes. I struck three. Three of nine blacks -- not three of nine blacks. Three of nine people were black. Six of nine people were white. I struck six whites, three blacks. Leaving one black on the jury is the way it came out.
Q. We'll get to that, but I think you have those numbers reversed.
A. No. I think you have them reversed, actually.
Q. Okay. All right.
A. I know for a fact -- I read the Supreme Court opinion. I struck Juror Number 64, 65, and 72. Those were my peremptory strikes. And you know what a peremptory is?
Q. Yes.
A. Okay. I have nine strikes I can use. Okay? I got to strike nine. And I struck three

African Americans, and I struck six whites, leaving one African American on the jury.

And the Supreme Court has outlined my strikes. And they said that my strikes were lawful, the Missouri Supreme Court.

Q. So would it bother you if the numbers were reversed and you struck six black instead of --

A. Peremptory?

Q. Yeah.

A. I read the Supreme Court case. I think I have it with me right here.

Q. Okay.

A. And it's three. It's Number 64, 65, and 72. Now, were other blacks struck along the way because they couldn't consider -- for example, if you couldn't consider the death penalty as one of the options in the case, then you were automatically struck by -- whether you're black or white because you couldn't follow the law. The law was you had to be able to consider both penalties.

If someone said, I would only vote for death, they were struck by the court. If someone said, I can only consider life without parole,

then they were struck by the court.

Then after that's all done, if they couldn't follow the law for any reason, then they're struck by the court.

I don't know how many of them -- people, black or white, were struck on that basis. But once we got everyone that was qualified, there were apparently there were four left. I struck three of the four. And I gave my reasons to the Supreme Court, or the Attorney General represented those reasons -- well, the record showed what the reasons were, the three that I struck. And the Supreme Court affirmed the case and said there was no constitutional error. I struck properly.

In other words, I had race neutral reasons to strike the African Americans, which is required by the Kentucky v. Batson 19 -- I believe -- 84 case.

Q. Now, that was a very long answer, but I want to circle back to what my actual question was. And that was, would it be a problem if you had used six of the nine strikes on black jurors instead of white jurors?

A. You didn't say peremptory, did you?

Q. Would it have been a problem if you had

used six of your nine peremptory strikes on black jurors instead of white jurors?

A. Would it have been a problem? Well, if I did it, which I didn't, but if I did and the Supreme Court says it was lawful, then no, that's not a problem.

Q. Okay. Does that sound like a high number to you?

A. I struck three. Number 64, 65, and 72, and I have the case right here.

Q. Let's talk about those potential black jurors that you struck. You struck one of those jurors because she was an unwed mother, right?

A. Wait a minute. I struck -- why I struck them? Okay. Why I struck, I don't know. Look at the Supreme Court case. It outlines my -- it quotes me, I believe.

Q. Yeah.

A. Read it.

Q. Did you read the Supreme Court case?

A. Let me look at it now.

Q. No, no. I don't want you to read it right now. We'll do the questions. Did you read the Supreme Court case before you came in today?

A. Not today I didn't read it.

Q. Well, I mean as you prepared for today did you reread the case?

A. I read it last week. And that's how I remember that 64, 65, and 72, those numbers. You know, there's a 133. You said a 131. Each juror has a number, one, two, three, four, five. Well, we were already up to, you know, we used a lot of those jurors.

Q. All right. So one of the ones you remember was Juror Number 64?

A. I don't remember why I struck Juror Number 64. Nor do I remember why I struck 65. Nor do I remember why I struck 72. It's right there in the opinion, and it's in the record. It's in the record of the trial.

Q. Do you remember telling the Court that you struck Juror Number 64 because he looked very similar --

MR. SPILLANE: I'm going to object.

Q. (By Mr. Potts) -- to the defendant?

MR. SPILLANE: Objection.

Q. (By Mr. Potts) He reminded you of the defendant?

THE COURT: Let him finish his question. Then you can object.

MR. POTTS: I will say it again so we can get it on the record.

THE COURT: Thank you.

Q. (By Mr. Potts) Do you remember that you struck Juror Number 64 because he looked very similar to the defendant and reminded you of the defendant?

MR. SPILLANE: Are you done with your question?

MR. POTTS: Yes.

MR. SPILLANE: I'm going to object. The reasons are in the trial transcript. They're in the Missouri Supreme Court opinion. They're in the 8th Circuit opinion, and the witness has already said he doesn't remember.

THE COURT: Maybe he's using it to refresh his recollection.

A. If you show me the case, it will refresh my recollection. Show me that Supreme Court case, and I'll read it. It will tell you exactly why I did. Whatever I did, the Supreme Court said it was lawful. Not a violation of the defendant's constitutional rights. On all three jurors. And you know what? If one of them was messed up, if I made a mistake on one of those three, this case

would have been reversed in 2003.

THE COURT: Mr. Larner, wait for a question, please.

MR. POTTS: May I approach the witness, Your Honor?

THE COURT: You may.

Q. (By Mr. Potts) So I'm going to hand you -- this is just an excerpt from the trial transcript which is already in the record. This is Page 1586. I'm going to direct you to Lines 12 through 20. And you can read that quietly.

A. Are you talking about Juror Number 64?

Q. I am indeed.

A. Well, it starts on the previous page, actually. So I'm not going to read part of what I said.

Q. Well, you're more than welcome to read all of it. I was just directing you to the part where --

A. No. I'm going to read it all.

THE COURT: Let's not have a conversation. Let's have a question and an answer.

MR. POTTS: No problem, Your Honor.

Q. (By Mr. Potts) You're more than welcome

to read all of that.

A. Can I read it out loud?

Q. No.

A. I give many reasons, many reasons for striking that juror.

Q. Yes. And so one of those reasons, though, that you gave was that Juror Number 64 looked very similar to the defendant. Right?

A. Wrong. I want to read what I said on that one reason. You stated like part of it, you know, just like half of it or not even half of it. I know what it says. I see it right here. So you're wrong.

I said -- that's part of what I said. I said, He also to my view looked very similar to the defendant. He reminded me of the defendant, in fact. He had the very similar type glasses as the defendant. He had the same piercing eyes as the defendant. And I went on and on with additional reasons. That was one reason. But I gave many other reasons why I didn't like that juror and why I struck that juror. And the Supreme Court said, No problem.

Q. So when you said that he looked very similar to the defendant, these were two younger

black guys who looked alike. Right?

MR. SPILLANE: I'm going to object to mischaracterization of the testimony. He said that he had the same glasses and he had basically the same demeanor. Not that they were black guys that looked alike. He's mischaracterizing the testimony.

THE COURT: Thank you. Overruled. The transcript is the best evidence of what was said at trial. So I would prefer, Mr. Potts, if you could identify the page number and the line numbers of that transcript so the record is clear.

MR. POTTS: All right. Thank you, Your Honor. So right now I am talking about Page 1586 Lines 12 and 13.

Do you see where you say, He also in my view looked very similar to the defendant? Do you see that.

A. Read the rest of Line 13. You said you were going to read 12 and 13. You haven't done that.

Q. I promise we'll get there. I'm just going one sentence at a time.

A. Okay. One sentence at a time?

Q. Yeah.

A. To my view, he also to my view looked very similar to the defendant. That is a sentence I said.

Q. Okay. And so these were both young black men, right?

MR. SPILLANE: I'm going to object again. He said he was going to get there. He didn't get there. He started talking about both young black men.

MR. POTTS: How can I not explore what he meant by that statement, Your Honor?

THE COURT: We can't have a stipulation that they were both young black men at the time of the trial?

MR. SPILLANE: Yeah, I think that's fine.

THE COURT: I mean, I don't know how it's relevant but --

MR. SPILLANE: Yeah.

THE COURT: Okay. So why are we objecting? You may answer.

MR. SPILLANE: He's saying that's the reason why he struck him, and he's never said that.

A. So he did look very similar to the

defendant, yes.

Q. (By Mr. Potts) And by that, they were both young black men; right?

A. They were both young black men.

Q. Okay.

A. But that's not necessarily the full reason that I thought they were so similar. Not because he was black and the defendant was black. I mean, if the juror, potential juror was black and the defendant was black and I struck him, that would have been kicked out by the Supreme Court in a second. That would have come back for a complete retrial.

Q. They both wore glasses?

A. Similar type glasses. Not just glasses. They looked to me like they were identical. They were similar type glasses, yes. That was the second reason.

Q. So they liked the same brand of glasses potentially. Is that right?

A. I don't know what they liked. All I know is the glasses were very similar. And I said something more about their similarities, several things.

Q. And they both had goatees, is that

right?

A. I don't know what page you're referring to on that. I said he reminded me of the defendant. Had similar type glasses. He had the same piercing eyes as the defendant. I said that juror had piercing eyes, and so did the defendant. I thought they looked like they were brothers.

Q. They looked like brothers?

A. Familial brothers.

Q. Okay.

A. I don't mean black people. I mean, like, you know, you got the same mother, you got the same father. You know, you're brothers, you're both men, you're brothers.

Q. So you struck them because they were both young black men with glasses?

A. Wrong. That's part of the reason. And not just glasses. I said the same type glasses. And I said they had the same piercing eyes.

Q. So part of the reason was that they had piercing eyes, right?

A. The same piercing eyes.

Q. Same piercing eyes. Part of the reason was they had the same piercing eyes? Right?

A. Yes, part of the reason.

Q. Part of the reason was that they both had the same type of glasses, right?

A. That's part of the reason.

Q. Part of the reason is that they were both young. Right?

A. I didn't say about the age. I said in my view he looked very similar to the defendant. I didn't talk about age. But I think they were about the same age, they looked to me. They looked like they were brothers.

Q. And part of the reason is that they were both black?

A. No. Absolutely not. Absolutely not. If I strike someone because they're black, under the Supreme Court of the United States Batson and other cases, then the case gets sent back for a new trial. It gets reversed if I do that.

Q. Now I want to direct you to the same page, 1586. Do you see Lines 8 through 11? And I'll let you read those.

A. Yes.

Q. So that juror was wearing a shirt with an orange dragon and Chinese or Arabic letters on it. Right?

A. That's right.

Q. All right. Was the defendant also wearing that type of shirt at trial?

A. No.

Q. No. Okay. Now, I want to now direct you to Page 1586. Let's look at Lines 9 through 11. I'm going to let you read those.

A. To myself or out loud?

Q. You can read it to yourself.

A. All right. I see it.

Q. Okay. The juror was wearing a large gold cross outside of his shirt. Right?

A. That's part of the sentence. But you got to read it all. You're taking it out of context.

Q. No. No.

A. He had a large gold cross very prominent outside his shirt, which I thought was ostentatious looking.

Q. Yeah.

A. That was my reason. That was another reason why I didn't like him.

Q. Was Mr. Williams wearing a large gold cross outside of his shirt?

A. No.

Q. Okay. Now, let's also look at Lines 18

through 20. The juror was wearing gray shiny pants, right?

A. With that wild shirt, yes.

Q. Yeah, with the wild shirt. Was the defendant wearing gray shiny pants at trial?

A. No. But the juror was similar in the other ways that I said.

Q. Okay.

A. Not every single way. Didn't have the same shoes on. It's not every single way were they the same.

Q. And let's actually go back to Page 1585, and let's look at Lines 22 through 25. Juror Number 64 also had two earrings in his ear. Right?

A. In his left ear.

Q. Yeah?

A. Which I went on to describe why I don't like that.

Q. Did Mr. Williams have two -- let's see. I want to make sure -- two earrings in his left ear?

A. I don't think so. I don't have any reason to believe that. If he did, I would have said they both had two earrings.

Q. Okay. So to summarize, this was a young black man --

A. I'm sorry, but you didn't finish the sentence about the earrings. You cut it off right in the middle.

Q. You can have the State ask you some more questions.

MR. SPILLANE: I ask he be allowed to finish his answer, Your Honor.

THE COURT: He answered the question. Overruled.

MR. POTTS: To summarize, Juror Number 64 was a young black man who was wearing a shirt with an orange dragon and either Chinese or Arabic letters with a large gold cross on his chest, gray shiny pants, glasses and had a goatee, and he reminded you of the defendant.

A. There was more than that. You haven't hit all the reasons. I told you about the piercing eyes the same as the defendant. I said the glasses were similar-type glasses as the defendant. I said that the cross, the large gold cross, very prominent, which I thought was ostentatious. And I also said that -- I gave a lot more reasons, actually. A lot more.

Q. Now, during voir dire in this case did you take notes?

A. Very few notes. Very few, but yes, I took a few. I was busy talking to people. It's hard to write and talk, but I took a few.

Q. You did? Okay. I mean, at the same time, you have a 131 people potentially whose answers you have to be managing to these questions. Right?

A. As best you can, yeah.

Q. Best you can. What did you do with those notes?

A. Saved them. You probably have them.

Q. Would you be surprised if the prosecuting attorney's office could not find those notes in their box?

A. I haven't been with the prosecutor's office in ten years. Since then you've done DNA. I wasn't involved in any of that DNA in 2015. I have no idea what happened to that file since May 1st, 2014. I have been gone, retired. That's over ten years. I have no idea what happened to that. I would like to see it, though. I'm curious myself about those notes. Actually, the prosecutor's office is the one trying to overthrow

the conviction. You guys should have the notes.

Q. Have you ever been found to have violated Batson v. Kentucky in another case?

A. Now let me say this perfectly clear. Never.

Q. Never?

A. Never.

Q. So no judge has ever found that you have failed to provide a race neutral reason for using a peremptory strike on a black juror?

A. I thought you said have I ever been reversed.

Q. I said, Has any judge ever found you have violated Batson in another case?

A. Oh, okay. Okay.

Q. So different answer?

A. Yeah.

Q. Okay. So you have been found to have violated Batson?

A. Yes and no. It depends what -- can you be more specific?

Q. Well, you were the trial prosecutor in McFadden case, right?

A. Yes.

Q. Judge Ross was the trial judge in that

case, right?

A. That's right.

Q. And Judge Ross found that you had failed to provide race neutral reasons for exercising peremptory strikes on black jurors, correct?

A. On three black jurors, that's right. I disagreed with him, but he's the judge. And we put those jurors back on the jury. And they were on that case, and they voted death. They were put back on that jury. But yes, I was wrong on that. But it was not by a -- I've never been reversed on Batson. And that's what I thought you were asking. I tried all those cases. Most of them I won, almost all. And they were all appealed on Batson. If any black was struck, they appealed on Batson.

In all those cases, and I'd say there's probably 25 to 50 that were appealed on Batson, none of those by any court, appellate court, reversed me on Batson.

On that one case Judge Ross, he thought I didn't have sufficient reasons. He actually, he told me that, he says, before I even struck them he said, if you strike them, I'm going to put them back on. And I struck them anyway because I

thought I was right. And you know what? He put them back on, and they stayed on, and they voted for death.

Q. You struck them anyway?

A. Yeah, because I thought he was wrong. But he's the judge, and he ruled that I was wrong. And I don't have a problem with his ruling at all. I mean, I did at the moment, but it is what it is.

Q. So as we have been sitting here talking, you know, is it still your memory that you only used six of your nine peremptory strikes on black jurors in the Williams case?

A. No, no. Three.

Q. Sorry. I actually did not mean to do that. It's still your memory that you only used it on three black jurors in this case, right?

A. That's what the Supreme Court opinion says.

Q. Okay. So I want to talk about how you selected the jury in this case. Okay. So we already went through this a little bit, but the reason the potential jury pool is so large in this case is because it's a death penalty case. Right?

A. Correct.

Q. And it's more difficult than other

felony cases to get a proper jury pool in a death penalty case, right?

A. That's correct.

Q. Because some people have pretty strong feelings about capital murder, right?

A. One way or the other.

Q. One way or the other. There's a name for the type of jury that's eligible to get seated, right?

A. To get what, sir?

Q. That's eligible to get seated in a capital murder case, right?

A. There's a name for it?

Q. A death-qualified jury, right?

A. I would say that's -- I've used that term.

Q. Okay. So typically jury selection in a death penalty case goes through a couple different phases, right?

A. Tell me what you mean.

Q. Yeah. So starting out first you need to eliminate jurors who have potential conflicts, you know, for example, work or family conflicts that are going to prevent them from being able to serve on the jury; right?

A. That's right. It was a sequestered jury.

Q. Okay. And then next you move on to death qualification with the remaining jurors, right?

A. If that was the second thing the judge did, it could very well be.

Q. Fair enough. That's what they did here, they moved on to death qualification for the remaining jurors.

A. Okay.

Q. And then finally after that, after any more strikes for cause you moved on to a more general voir dire with the remaining jurors; right?

A. That's right.

Q. Okay. So what does it mean to have a death-qualified jury?

A. That meant that the jurors could consider death or life without parole. Both. If they could only consider death, if that's the only one -- some people say an eye for an eye and if you kill someone you're going to get death. You know what I say to that? You're not on the jury. I don't say it to them, but I tell the judge, get

rid of them. And so does the defense attorney. They don't want a juror like that either. That's against the law.

Q. That means all jurors, including black jurors, have to be death qualified. Right?

A. All jurors must be able to consider both punishments. That's the law.

Q. And you're kind of getting into this, but there's a sequence of questions that you typically ask jurors to figure out whether they're fit to serve on a death penalty jury. Right?

A. I mean, there's a ton of questions that you ask them.

Q. Yeah.

A. And you ask every juror the same question.

MR. POTTS: And if you'll give me one moment, Your Honor. I'm thinking this will help. Don't worry, it's just a standup chart. Can you see that, Your Honor?

THE COURT: I can.

MR. POTTS: You might have to go in the jury box, Mr. Spillane. I'm sorry. I'm not trying to do that to you.

Q. (By Mr. Potts) All right. So let's go

through how you pick jurors for a death penalty case. Okay? I'm going to put a title up here jury selection. Okay?

So first of all, to serve on a jury in a death penalty case a juror can't be categorically opposed to the death penalty; right?

A. Right. They have to be able to consider both punishments.

Q. Okay. I put death right there. Next, a juror alternatively can't believe that the death penalty should be imposed in every capital murder case, right?

A. Correct.

Q. Meaning they have to be able to consider life without parole?

A. They have to be able to consider both punishments. If they're only going to vote death, even though I might like that juror as a prosecutor, that's illegal, and I know that. I ask them if they can consider both punishments. I always ask every juror, can you consider this one and can you consider that one. Both of them. I don't just pick one.

Q. Okay. So in other words, a death-qualified juror must be willing to consider

both types of potential punishment?

A. Two punishments that are allowed under the law for murder first degree.

Q. Now, also the juror needs to be willing to weigh aggravating and mitigating factors to determine whether the death penalty is appropriate, right?

A. That's right.

Q. Okay. There's some other problems that can happen with jurors. Jurors must be willing to -- must agree to follow the Court's instructions at trial. Right?

A. Every juror in every case, that's correct.

Q. Yep. And jurors must be willing to hold the prosecution to its burden of proof, right?

A. Beyond a reasonable doubt is the burden of proof, and you are right.

Q. Okay. Okay. Also jurors need to wait to hear all the evidence before they make up their minds?

A. Yes.

Q. Right?

A. Yes.

Q. Now, as a prosecutor do you generally

want more or fewer death-qualified jurors?

A. Well, depends what you mean by death qualified. What I mean by death qualified is they can consider both punishments and they'll keep their mind open on both punishments until the absolute very end. They can't make up their mind before that which way they're going to go.

Q. Yeah. So maybe another way to put that is you don't want it to be automatic one way or the other?

A. Correct.

Q. Right?

A. That would be illegal.

Q. That would be illegal. Now, throughout jury selection there are certain ways to protect the jurors that you potentially want, right?

A. You'll have to give me an example.

Q. Well, for example, you can ask those jurors leading questions instead of open-ended questions. Right?

A. I think both sides can do that.

Q. Yeah. No, I'm saying both sides can do it.

A. Yeah.

Q. Okay. And also you can rehabilitate --

A. I don't know what you mean by leading. Are you, like, putting words in their mouth? Is that what you mean by leading? You don't put words in the juror's mouth. You want to hear their honest opinion whether they can do it or not.

Q. You can ask them a direct yes or no question, right?

A. Yes.

Q. Like the one I just asked you?

A. Yes.

Q. Okay. Now also you can rehabilitate those jurors afterwards if they potentially give an answer that's not favorable to you when they're being asked questions by defense counsel, right?

A. I question the jurors first, and I'm done. Then the defense attorney questions the jurors, and they're done. I don't get another shot at the jurors. I don't get another chance.

Q. You're absolutely right. I misspoke. You can rehabilitate jurors after they give you a question that maybe wasn't the perfect answer but you still think they might be a good juror for you, right?

A. I don't know what you mean. You have to

give me example.

Q. Okay. No. That's totally fine. So let's start by looking at your questioning of Juror Number 8.

MR. POTTS: Your Honor, this is just an excerpt from the trial transcript Pages 205 and 206.

Q. (By Mr. Potts) Are you able to see up on that screen?

A. No.

Q. Okay. I do have a courtesy copy for you right here. There you go.

A. Thank you.

Q. So I have blacked out the names of the jurors for the ones I'm putting up on the screen.

A. Okay.

Q. But you should have the un-redacted copy in front of you. Now, let's go ahead and walk through these questions. So one of the things that you're doing here is with Juror Number 8 you're asking can you legitimately consider imposing the death penalty. Right?

A. In the proper case.

Q. Yeah, in the proper case?

A. Yes.

Q. Yes?

A. Yes.

Q. So that's the very first question up here on the chart, right? I'm talking about the chart that's right here. Whether they're willing to sentence someone to death?

A. Okay. Your question is what, please? I'm sorry.

Q. All right. And so --

A. Oh, yeah. Okay.

Q. Yeah, that's Line 7 through 9. Sorry. And then later in Line 17 through 22 you're asking whether the juror can also consider life without the possibility of parole. Right?

A. Yeah.

Q. Okay. You clarify on -- at the bottom of the Page 24 and 25, you consider both punishments. Right? Then you ask the juror whether she could stand up in open court and announce the verdict if that was the death penalty. And that's Lines 2 through 4. Do you see that?

A. Yes.

Q. Then in Lines 6 through 11 you're clarifying that the burden of proof is always with

the State. That's one of these questions right here. Right?

A. That's right.

Q. Burden of proof?

A. I clarified that.

Q. Okay. Now, did you ask -- you didn't ask any specific questions about following the judge's instructions that you can see, did you?

A. I don't know. I'd have to read all the testimony from that witness -- that jury, I mean.

Q. I thought you said that once you're done with the juror, you're done; right?

A. I ask questions until I decide I have gotten answers from the jury, juror, that are -- that we know what they meant.

Q. Okay.

A. Sometimes they equivocate. You have to dig a little deeper.

Q. Did you ask the juror whether she'd be able to weigh aggravating against mitigating factors?

A. If there's more aggravating than mitigating, could you still consider life without parole. Yes, I asked her that.

Q. You asked whether she could weigh.

A. Do I use the word weigh?
Q. No, you don't. Right?
A. No. I use -- I compare them. If there's more aggravating -- even if there's zero mitigating. Only aggravating could you still vote for life without parole. And she says, Yes.
Q. Okay. And did you ask the juror whether she would wait to hear all the evidence before making up her mind?
A. What line?
Q. I'm asking you. You can review that. Did you ask her?
A. About weighing?
Q. No. About whether she would wait to hear all the evidence before making up her mind.
A. The judge instructs her of that. I don't have to instruct her. But I don't know that I said it to that juror. The judge instructs the entire panel. There's an instruction of law on that, and the judge gives it to the jury.
Q. And I'm just asking whether you asked her the question?
A. I don't see that I did with that --
Q. Okay.
A. -- particular case. I did say, If

there's only bad stuff and that is only aggravating circumstances and zero mitigating, you still have to be able to consider life even if there's nothing on the defense side, even if they got nothing, you still got to consider life without parole, and she said, Yes.

Q. Did you ask her whether she would automatically decide one way or the other?

A. I asked her if she could consider both punishments, and she said, Yes. So that to me means she wasn't automatic either way.

Q. I can give you a checkmark on that one. So after looking at that do you know whether Juror Number 8 was a black or a white juror?

A. No clue.

Q. Do you remember whether Juror Number 8 made the jury?

A. No. I don't know.

Q. Well, I'll actually go ahead and represent to you Juror Number 8 was a black juror.

A. Okay.

Q. All right. And we can agree that you do know how to ask some of the right questions to black jurors. Right?

A. No. I know all the right questions to

ask for every juror or I wouldn't have been trying this magnitude of a case, in my opinion.

Q. Let's go ahead and look at some of the other jurors. Now, as part of your presentation to the jury in this case you gave them an analogy about three doorways. Is that an analogy that you've used in other cases?

MR. SPILLANE: I'm going to break in now that his question is finished and object to this whole line of questioning. It has nothing to do with Batson. The Batson questions were asked and answered. The Missouri Supreme Court found he did nothing wrong. There's nothing that can be done about that. Asking about death qualification is just irrelevant.

MR. POTTS: Under Flowers v. Mississippi and Foster v. Chapman I'm allowed to ask him about his method of questioning jurors to determine whether there's a discriminatory purpose.

THE COURT: Thank you. The Court has reviewed 1,936 pages of voir dire. The Court has reviewed all the opinions in this case. This is not helping this Court with your motion. Objection is sustained.

Q. (By Mr. Potts) When you were

questioning black jurors, did you ask them more frequently than white jurors whether they would be willing to stand up and announce their verdict in open court?

A. No. The reason I would ask that is because if someone can stand up in open court and say that they're voting for death, then they would be a good juror for the State. Because some people say, oh, I could never do that. But, you know, if you're the foreman, you have to do that. So if they can't do that, then they can't follow the law. So I don't want someone that can't stand up and announce in open court in front of everybody that they could vote for death.

THE COURT: Your answer no stands. The rest of it I didn't need.

A. Okay. Sorry.

Q. (By Mr. Potts) Out of 100 plus non-black jurors do you know how many you asked whether they would be willing to stand up in open court and announce the verdict of death?

A. No, I don't.

Q. Would five sound right to you?

A. I have no clue.

Q. Juror Number 2, Juror Number 13, Juror

Number 31, Juror Number 44, and Juror Number 53.

MR. SPILLANE: I'm going to object to counsel testifying. He says he has no clue. So counsel gives him the answer. That's leading as well as counsel testifying.

THE COURT: I know he's trying to refresh his recollection. I'm giving him a little leeway. I'm sure his answer is going to be the same as he did just a minute ago.

A. I don't know who those jurors were. It doesn't say whether they're black or white or another race.

Q. By contrast, when you were questioning white jurors did you reassure them more frequently than black jurors that there would be 12 people who needed to agree on the verdict?

A. I have no idea how many times or to whom I asked that particular question.

Q. Do you know the specific number of white jurors that you reassured about needing 12 people to agree on the verdict?

A. I told every juror in voir dire that all 12 had to vote the same way to have a verdict. It's call unanimity of the jury. There's an instruction of law that they got that specifically

says that. When they went back to the jury room they had that instruction in their hand.

Q. Did you tell that specifically to Juror Number 11, Juror Number 18, Juror Number 21, Juror Number 22, Juror Number 26, Juror Number 27, Juror Number 29, Juror Number 30, Juror Number 32, Juror Number 34, Juror Number 35, Juror Number 41, Juror Number 43, Juror Number 50, Juror Number 63, Juror Number 67, Juror Number 70, Juror Number 71, Juror Number 106, and Juror Number 126?

MR. SPILLANE: Now that the question is finished, I'm going to object. He already said he doesn't remember. Reading a list of numbers isn't going to change that.

MR. POTTS: I asked him whether he knew the specific number, Your Honor.

A. I do not.

THE COURT: Answer stands. Objection overruled.

Q. (By Mr. Potts) How many black jurors did you reassure that there would be 12 people who had to vote that way?

A. I have no idea. I don't know who the blacks and the whites were.

Q. Well, you were asking them questions;

right?

A. But I didn't know if they were black or white. I mean, I didn't care. I could care less if they're black or white.

Q. Would it surprise you if you didn't tell a single black juror that there would be 12 people who had to agree on the verdict when you were questioning them individually?

A. If the record reflects that, then I would agree. If not, I don't agree.

Q. Okay. So the record would reflect that the message to the non-black jurors was that there was safety in numbers. Right?

A. Wrong. All 12 had to agree for a verdict whether it's death, whether it's life, or whether it's not guilty. All 12 have to agree. The jurors were all told that at one point or another during voir dire by me, every one of them.

Q. And the message to the black jurors was that they were all on their own?

A. No. Are you kidding? What are you talking about? I don't have any idea. So the answer is no.

MR. POTTS: I'll pass the witness.

THE COURT: Cross-examination.

MR. SPILLANE: Yes, sir.

CROSS-EXAMINATION BY MR. SPILLANE:

Q. Thank you for coming in, sir. I was going to ask you about Laura Asaro. Could you tell me about your interaction with her in relation to the reward? Tell me what happened when she asked for it, if she ever asked for it, that sort of thing.

A. I don't recall talking about the reward with her. I don't know when, at some point it came up. I think she got $5,000 afterwards, but that wasn't the focus of my conversations with her. I don't recall whether I mentioned it or not. She didn't know about the reward when I first talked to her, as I recall.

Q. I'll ask you a better question. Do you recall her ever asking you for a reward?

A. Never.

Q. Do you recall how Dr. Picus ended up giving her a reward?

A. Yeah. I think he gave her $5,000. It was after the trial.

Q. Right. But I mean, did you or Mr. Magee say, hey, give her a reward because she earned it by showing us the things?

A. I thought she earned it. I thought the other fellow earned it as well. So they got five. That was my opinion. But ultimately it was up to Dr. Picus. It was his money.

Q. Right. But you didn't feel that it was a motivating factor for Ms. Asaro, if I understand you correctly, because she came forward before the reward was ever discussed?

A. That's correct.

Q. Let me ask you something that he never got back to that he said he was going to. Why did you think Mr. Cole and Ms. Asaro were such good witnesses?

A. They knew things that the killer told them that no one else knew. For example, Henry Cole said that the defendant told him that he jammed the knife in her neck and he twisted it and left it in her neck. And that's exactly how they found the body. And the knife was bent. And no one knew that. That was not on the news. That was not in the newspapers. The only people that knew that were the police. And Cole had written it on a piece of paper while he was in the jail. He wrote down a list of facts that the defendant said. And every one of those facts, as I recall,

and there were a dozen of them approximately, were true.

I couldn't catch Cole in anything that wasn't true. I couldn't catch him. I was trying to catch him if I could, because they were going to catch him. I couldn't find anything that Cole said, nothing, that was false. I'll continue with what Cole said.

Q. And why was Ms. Asaro such a good witness?

A. She was amazing. She said -- first of all, she was with the defendant when he sold the computer to Glenn Roberts. She was there in the car. He walked up to Glenn Roberts' house and he sold him the computer. She took the police to the house where the computer was. She said, The guy that lives in that house has the computer. And the police knock on the door. Glenn Roberts comes to the door and says, What can I do for you? Officers say, Do you have a computer? He says, Yes, I do. The police said, Bring it to me. He brought it to them, and it was the computer. They said, Who gave it to you. And he said, Roberts said Marcellus Williams.

Marcellus was staying about three houses

down living out of his car. Inside his car was Mrs. Gayle's calculator and Post Dispatch ruler in his car 15 months later. The computer, these are the things taken at the crime. The computer was found at Glenn Roberts' house about three doors down from his grandfather's house where he was staying in a car, a Buick, on the front yard or the side yard.

Q. In 2001 had you ever heard of touch DNA?

A. No.

Q. When was the first time you heard of it?

A. In this case. Probably about 2015 maybe when they asked for additional DNA. They asked for DNA testing on the handle. And I thought, what DNA? And someone said, well, there's possibly something called touch DNA. If you touch something, you might leave DNA. Used to not be that way.

Q. Let me ask you this: What was your procedure in the prosecuting attorney's office for dealing with evidence, particularly weapons, that had already been fully tested in your view? Did you wear gloves?

A. No. No reason to.

Q. How many cases besides this one did you

do where you handled the murder weapon or some other evidence that you didn't wear gloves because testing was done?

A. Probably all of them.

Q. And how many would all of them be?

A. Well, I don't know how many cases had guns and knives, but the majority of my -- most of my cases, I would say, were homicides. So they could have very well involved a knife or a gun. And if it had been tested -- sometimes there's no issue that you can touch it. There's no reason not to touch it. Who knows that someone is going to come in 17 years later or 15 years later and ask for a DNA test when they knew the killer wore gloves?

Q. Let me ask you this. Even if you hadn't known that he wore gloves, the standard procedure wouldn't have been to wear gloves after everything was fully tested. Am I understanding you correctly?

A. You are absolutely correct.

Q. Let me ask you about the packaging. You looked at it earlier today in the evidence. I guess, I say the evidence room, but it was basically the jury room. And did that refresh

your recollection of what the evidence looked like when you saw it?

A. Yes, it did.

Q. Tell me how?

A. Well, if you read the transcript on Page 2261, Detective Wunderlich talks about how it was packaged in front of the jury. He said that when the knife was pulled out of victim's neck, it was handed to Detective Wunderlich. Wunderlich put it in an evidence envelope, sealed it, and took it over to the fingerprint Krull.

Krull then opened up the package and tested the handle for fingerprints and found none on that knife handle anywhere.

He then sent it over to the lab, St. Louis County Lab, and they then tested it for blood, which they found.

Then the lab put the knife in a new package, a box. So when it was -- first you had Detective Wunderlich putting it in an evidence envelope, and then you had the lab transferring that knife after they had tested it into a box. I saw that box today. That refreshed my recollection. I remember the box. The box was longer than the knife. The whole knife was

inserted into the box and sealed. Also in the box was the evidence envelope that was brought by -- it was put -- initially used by Detective Wunderlich. It was all there. The box is what I saw today. And that refreshed my memory about the box. I forgot about the box until I read it in the transcript. And I said to the witness at the trial, I said to Detective Wunderlich, What's this box? And he said, That's the box that the lab repackaged the knife in after they tested it. And that's how I got it from U City Police.

Q. Am I understanding your testimony correctly that the knife was inside a sealed package inside a sealed box when you got it? Is that accurate?

A. The package, the evidence envelope was folded. It wasn't inside the evidence envelope. The evidence envelope was in the box, and the knife was in the box.

Q. And the box was sealed?

A. The box was sealed.

Q. And the knife was completely inside the sealed box?

A. Completely. Completely concealed.

MR. SPILLANE: Would it be any use to you if I showed you the box and the package or everything or not? Would that be any use to the Court?

THE COURT: No.

MR. SPILLANE: All right.

THE COURT: I saw it this morning.

MR. SPILLANE: That's what I wanted to know.

Q. (By Mr. Spillane) As far as preservation of evidence at trial, did you make an effort to preserve every piece of evidence that you thought could possibly be used in the future?

A. No. Everybody touched that laptop, for example.

Q. Okay. Well, let me see about things that could be tested. Did you make an effort to preserve the fingernail clippings?

A. They were put in a package by the medical examiner that cut the fingernail clippings off the victim and put them in some kind of a package. And the defense asked for half of those to test them for DNA. And we gave them half. And the DNA came back being the victim's DNA only. It was her nails. It was her DNA. There was nothing

else on those nails.

My half of the nails I didn't do anything with them. I didn't test them. I figured they tested them. Why do I need to retest them?

Q. Well, my recollection of the testimony, and you tell me if I'm wrong, is that when you were looking at your fingernail clippings, you said, I'm not going to open those because I'm not wearing gloves and I don't want to contaminate them?

A. That's true. I did say that.

Q. And so you were making an effort to preserve evidence that you thought might be useful in the future?

A. If they would have let me open those nails without gloves, I would have done so. But the defense attorney said, Don't do it. Don't open those nails. And then he asked the judge about that. And I said, Well, I'll ask the witness, the expert witness on the DNA what her opinion is. And she said, You really shouldn't open those nails unless you've got gloves on. And I said, Fine.

Q. Let me ask you this: Your testimony is

you were walking around that trial holding the knife. I think at one point you said, The knife is in my left hand. You handed it to Detective -- well, to Detective Krull. Did defense counsel at any point jump up and say, no, bad, why aren't you wearing gloves?

A. On Page 2313 Line 17 and 18, I walk up to Detective Krull and I ask him, I say, Let me hand you State's Exhibit 90, comma, a wood-handled knife. I handed it to him. I said, Let me hand you. He didn't have gloves on, and neither did I, on that witness.

Q. And nobody said anything?

A. No one said anything.

Q. And they could see your hands that you weren't wearing gloves?

A. That's correct. And they didn't ask for any tests as well.

Q. And it was always your practice -- I hate to beat ground that's already been plowed here -- that you never wore gloves on a weapon after it was tested in all of your trials because there was no point in it?

A. That's correct.

MR. SPILLANE: Does the Court have any

questions in case I missed something?

THE COURT: No.

MR. SPILLANE: Oh, maybe I did miss something. Oh, okay. I am told that I did miss something.

Q. (By Mr. Spillane) You talked earlier on direct about a mistake in the affidavit. And I think they were going to come back to that, and I'm not sure they did. Could you tell me about the mistake in the affidavit and what the actual truth is?

A. I referenced that in my testimony. I said I made a mistake. When I did the affidavit I said that when I received the knife it was -- the handle, the knife handle was exposed, not completely concealed but exposed so that anyone could pick it up. You know, the knife handle was just there. I confused that with another death penalty case I had where a guy used a knife in the kitchen to stab a woman, and he's been executed.

Q. Roberts?

A. Roberts. Michael Roberts. About five or ten years before this murder Michael Roberts took a knife from the kitchen, a butcher knife, just similar to this knife, and he killed a woman

who lived in the house, similar to this case. And that knife was exposed. When I got that -- but it wasn't a question of who did it. That was not a who did it. That was a psychiatric case. Not a whodunit case. That knife was never tested, period. But it was sticking out of the container that it was in. It was an evidence envelope, and the handle was sticking out. I thought that was very odd.

I confused that case with this case. In my affidavit I said that the knife was exposed, the handle. I'm wrong, and I admit I'm wrong. I saw what it was exposed in today. The box. I read the testimony from Detective Wunderlich, and it was the box.

Q. And the triangular box that's in that bag on the table is what it was in when it came to you and it was sealed?

A. That very box.

Q. You recognize the same box?

A. Absolutely do. I can look at the writing on the box too.

Q. It's not necessary. I don't want to take it out and be accused of --

A. Same box.

Q. That sounds good. Let me ask you about Purkett v. Elem, your St. Louis US Supreme Court case. Tell me about that.

A. Well, that was a Batson issue. It was -- in fact, it happened in this courthouse in Division 6 back in around 1990 or so. It was a -- I struck two African Americans, and the defense attorney objected to that. It went all the way up to the United States Supreme Court on two witnesses that were black.

The United States Supreme Court affirmed me, affirmed the case and said those strikes are proper. The US Supreme Court, on a robbery second degree case. With Batson it's that important that it had to be -- it went all the way to the Supreme Court. I won that one.

Q. Do you remember what reasons you struck them for?

A. Well, the one African American had long hair, unkempt long hair, shoulder length or longer and he had a goatee. And I said that that hair looks suspicious to me.

Back in the day people didn't wear -- men didn't wear their hair shoulder length. And the other juror, as I recall, he had a goatee as

well and his hair, I don't remember what I said about his hair, but I said that it looks --

Q. I think it was unkempt.

A. Unkempt.

Q. I'm not sure.

A. I didn't like the hair. There was no one else in the courtroom on that case that had facial hair. I picked the two people that had the beard, the goatee. I didn't like the way that looked. And it looked suspicious to me. And the long, unkempt hair looked suspicious to me. And Supreme Court said, That's fine.

Q. Because it's race neutral?

A. It's race neutral. It had nothing to do with race.

Q. Earrings, glasses, I'm jumping around, don't have to do with race. Unkempt hair doesn't have to do with race. That's race neutral.

A. And the Supreme Court said that.

MR. SPILLANE: I think I'm done if I haven't missed anything else.

THE COURT: Mr. Jacober, do you have anything else?

CROSS-EXAMINATION BY MR. JACOBER:

Q. Hi, Mr. Larner. Matthew Jacober on

behalf of the prosecuting attorney's office.

You testified earlier that you didn't have a clear recollection of the reasons behind the motions for continuance that were filed by the defense in the month prior to trial. Is that correct?

A. Yes.

Q. I would like to read from the motion for you. Specifically this is Paragraph 4(B). On May 1st, 2001, the State advised defense counsel -- I'm sorry. This is the verified motion for continuance filed on May 7th, 2001. I'm actually looking at 4(C), not 4(B). I apologize.

Defense counsel has made numerous requests to the Missouri Department of Corrections for a complete copy of defendant's incarceration records. These incarceration records contain both psychiatric and medical records needed for the preparation of the penalty phase by defendant. These records are particularly important for mitigation and experts retained by defense counsel for consultation and preparation for the penalty phase.

I know you don't have it in front of you, but do you have any reason to doubt that I

read that accurately?

A. I'll trust you on that.

Q. Okay. This was argued at the hearing on the motion for continuance. Do you recall that?

A. If you say so. I don't dispute what you're saying. I mean, it could have happened that way.

Q. Do you recall telling the defendant's counsel at that time, Well, I have those records. You can just come get a copy from me?

A. No, I don't remember that. I probably had them, if that's what the record says.

Q. And you just didn't volunteer that you could produce them to the defendant at that time?

A. If they knew I had them, all they had to do was ask for them. They came to my office and looked at every single exhibit that I had. I had 350 or more exhibits. And the defense attorneys, Green and McGraugh, two gentlemen who are now judges, came to my office and they looked through all my exhibits that they wanted to. They had permission. That's under the law. I have to do that. Supreme Court Rule 25.03, the rules of discovery, I have to let them come and examine or look at my exhibits.

I also gave an exhibit list which listed every single exhibit. Number 90 happens to be the knife. I had 1 through 350. I gave a copy to him, defense attorneys. I gave a copy to the judge.

So they looked at all my exhibits. They would have seen my -- if I had a serial record, they would have seen it.

Q. And if you could answer my question. My question is: Did you say, I have those records. You can have them? Not whether they could come and get them. I'm asking if you volunteered them?

A. If that's what the record says. I don't recall if I said what you just quoted. If you say so, okay.

Q. That motion was denied by the court on May 9th, 2001. Then a supplemental verified motion was filed on May 25th, 2001. And in that supplemental motion on Paragraph 4 -- I'm sorry. Paragraph 5 at the time of the drafting of this motion Department of Correction records on defendant still remain lost. Volume 2 of defendant's Department of Correction records cannot be found by the custodian of the Missouri Department of Corrections. The last entry for the

whereabouts of the records are that they were last checked out to St. Louis County Justice Center. The absence of these records has prejudiced the defendant in that they would contain information not only to defendant's behavior and conduct while in the custody of the Department of Corrections but would also contain mental and psychological evaluations of the defendant.

I'm not going to read the rest of it. Well, I will. This information is not only relevant to rebut the aggravating circumstance of the State whereby it alleges the defendant does not adjust well to incarceration and future dangerousness but would be relevant as proof of mitigation the defendant does, in fact, adjust well to a structured environment as necessary for defense expert Dr. Cunningham to evaluate and offer opinions as to the character and mental makeup of the defendant.

That motion was heard and denied on --

MR. SPILLANE: Is there -- I'm going to object, Your Honor. Is there a question here someplace? He's just reading.

THE COURT: Oh, I think he's trying to aid the witness. I mean, he doesn't have the

motion in front of him so I think he's just trying to circumvent handing it to him and having him read it.

MR. JACOBER: That's correct, Your Honor.

THE COURT: Overruled.

Q. (By Mr. Jacober) That was heard and denied on May 25th. Do you recall at that time telling the defendant, defendant's counsel, I have those records, you can just come and get them from me?

A. No. You'll have to show me that.

MR. SPILLANE: I'm going to object now that the question is over. This is completely irrelevant. The Court struck the continuance claim from the pleading. This has nothing to do with anything except the claim about the continuance.

MR. JACOBER: Judge, this still weighs into the ineffective assistance of counsel claim which remains before the Court. It was pled in the original motion. And under the statute every claim that is still before the Court is one that the Court can rule on in this matter.

MR. SPILLANE: If I could respond, Your

Honor.

THE COURT: You may.

MR. SPILLANE: The ineffective assistance of counsel claim is two things. Not better impeaching Ms. Asaro and Mr. Cole with their family members and friends and not putting on different mitigating evidence. It has nothing to do with this.

MR. JACOBER: This goes directly to mitigating evidence, Judge. They reference mitigation a number of times in this motion.

THE COURT: As I have indicated before, I'm not happy with the verbiage in this statute, especially when there's no definition of what information means. So I'm going to go ahead and allow it. But you're close on running out of your time.

MR. JACOBER: I understand, Your Honor, and I'm being conscious of that.

Q. (By Mr. Jacober) Do you recall if at that point in time you told them, I have those records, you can come get them whenever you want?

A. No. I never had those records. I don't know what you're talking about. The records I had I thought you were talking about were serial

records which are records of his incarceration. It says what crimes he committed, when he was received by the Department of Corrections, and when he got paroled. Those are serial records. I had those, because I wanted to know what his prior convictions were.

Q. You didn't use the records of his incarceration and alleged escape attempt and alleged assault while he was in prison as part of your penalty phase?

A. That's a different question. You asked me a different question. You wanted to know about records of his mental health and all of that. I never saw any of that. I would have liked to have seen that.

Q. No --

A. I never saw that.

Q. It also contained the mental and psychological evaluations?

A. I really don't know.

Q. The Missouri Department of Corrections records.

A. If I had it, the defense had it. I will swear to that. Everything I had, the defense had it. And if I didn't have it, they would have made

a big stink, and they would have made a big record and would have appealed on that basis. They had everything that I had. I didn't have one thing that they didn't have.

Q. Well, they made a record here that they didn't have it?

A. Well, if I had it, they had it. I didn't have it then. I did introduce evidence that he tried to break out of the city jail. I absolutely introduced that at trial. That's evidence of guilt. I could go into that. That was very devastating evidence against him.

Q. And the defense didn't have those records before --

A. I don't know what records you're talking about. I had witnesses come in and testify that the defendant hit him over the head with a barbell and almost killed him. And then he took the barbell and tried to bash out the window of the city jail to break out, but it only scratched the window because it's unbreakable glass. And he did that right after he got sentenced to 20 years for the armed robbery of the donut shop in the City. That night he tried to break out of the jail, the way I just described it. That was the evidence at

trial. That was no surprise to the defense that that evidence was coming in.

Q. Again, what I'm asking is, did you let the defense know that you had those records when they were telling the Court weeks before the trial that you had those records?

A. When you say "those records", I don't know what you're talking about. You talked about mental health records. I didn't have any mental health records of the defendant.

Q. Sir, I'm not talking about mental health records. I'm talking about Department of Correction records.

A. Well, he didn't try and break out of the Department of Corrections. He tried to break out of the city jail. So there were records from the city jail about that breakout, about that escape attempt. The defense attorneys had that. I had that. They had that. That's the only records I'm talking -- I know about. I don't know any Department of Corrections records. That's not where he tried to break out.

Q. One additional reason the defense noted that they needed a continuance is counsel is also still waiting for the forensic test results from

its own experts with regard to forensic evidence seized by the State.

Did that flag for you at all that maybe it was important to keep pristine evidence in the case so further testing could be done?

A. They never had possession of the knife. So I don't know what forensic testing you're talking about. They never asked for testing of the knife.

The only forensic testing they did was on the nails, the fingernail clippings. They wanted to know if there was anything other than the victim's under his nails -- under her nails in case she during the altercation, if you want to call it, she somehow got his DNA under the nails, the killer's DNA. So it was tested for that, and there was no other DNA under their nails except hers. And that was all testified to. Those were your witnesses.

MR. JACOBER: No further questions, Your Honor.

THE COURT: Thank you. I'm not sure who gets to go now.

MR. POTTS: Nothing further.

THE COURT: Thank you. Mr. Spillane.

MR. SPILLANE: I just wanted to thank you for your service to St. Louis, sir. Thank you.

MR. LARNER: Thank you very much.

THE COURT: I have one question, and I apologize. I know this was several years ago.

Did the trial court give you a reason as to why you couldn't consent to the continuance requested by defense counsel?

A. We had a policy in our office that we didn't agree to continuances. I couldn't agree to that without permission of Bob McCulloch, and he was not going to give that permission.

Our witnesses were ready to go. A month later I don't know where our witnesses -- one came in from New York on a bus, and the other was a prostitute who was living all over town. Anywhere.

So we were not in any mood, and there was no additional evidence that anyone was going to produce by a continuance is my recollection.

THE COURT: Thank you. Any questions based upon my question?

MR. POTTS: No, Your Honor.

THE COURT: Thank you. Can this witness

stand down?

MR. POTTS: Yes, Your Honor.

MR. JACOBER: Yes, Your Honor.

THE COURT: I think we need to take a little bit of recess, if you don't mind. We will be in temporary recess until quarter to 4:00.

(At 3:32 a recess was taken. The Court reconvened at 3:45 and the further following proceedings were had:)

THE COURT: We are back on the record in Cause Number 24SL-CC00422. We finished our afternoon recess. It is now approximately 3:45 p.m. Mr. Jacober?

MR. JACOBER: Yes. Thank you, Your Honor. We have one final witness. Patrick Henson.

PATRICK HENSON,

Having been sworn, testified:

DIRECT EXAMINATION

BY MR. JACOBER:

Q. Good afternoon, Mr. Henson.

A. Good afternoon.

Q. For the record, where are you currently employed?

A. At the St. Louis County Prosecuting

Attorney's Office.

Q. And what is your position there?

A. I am an investigator in the Conviction & Incident Review Unit.

Q. How long have you been employed in that position?

A. Three years and ten months.

Q. So sometime in the year 2020?

A. Yes, sir.

Q. Are part of your duties to maintain and supervise the maintenance of various files in the prosecuting attorney's office?

A. Yes, sir, with the caveat of those under the auspices of the Conviction & Incident Review Unit.

Q. So you don't -- if it's a case that's being presently tried by an assistant prosecutor, you don't have any supervision over those files?

A. That's correct.

Q. Only the files in the CIU?

A. That is correct.

Q. Are one of those files the file in the Marcellus Williams matter?

A. Yes, sir.

Q. Can you tell us briefly about when the

Marcellus Williams file came back into the St. Louis County Prosecuting Attorney's Office?

A. Certainly I have to refresh my memory, but I believe we received those files sometimes perhaps in February of 2024.

Q. And since February of 2024 have those -- has that file been under your care, custody, and control?

A. Yes, sir.

Q. Where has it been stored in the St. Louis County Prosecuting Attorney's Office?

A. We have an evidence room that's locked, that's locked, and that's where it's stored.

Q. Who has access to that evidence room?

A. Certainly myself, the chief investigators -- or chief investigator and other investigators because they also store their evidence there as well.

Q. Anyone else besides investigators?

A. No, sir, not to my knowledge.

Q. And did I ask you to review that file?

A. Yes.

Q. Have you done so?

A. Yes, sir.

Q. Did I specifically ask you to review

that file to see if you could find any notes relating to voir dire in the underlying criminal trial which happened in 2001?

A. You did.

Q. And did you do that?

A. I did.

Q. Did you find any notes relating to voir dire?

A. I did not.

MR. JACOBER: No further questions, Your Honor.

THE COURT: Thank you. Mr. Clarke?

MR. CLARKE: Yes, Your Honor.

CROSS-EXAMINATION BY MR. CLARKE:

Q. Mr. Henson, you said you received the Marcellus Williams file in February of 2024. Is that correct?

A. I believe that's right, sir. Yes, I said that.

Q. Okay. So you didn't have the file when the motion to vacate was filed?

A. I'd have to go back and look. I'm not sure.

Q. Okay. But you said February 2024, is that correct?

A. I believe so, yes.

Q. Okay. Now you said it came from somewhere, the file came from somewhere. The file was always in the St. Louis County Prosecutor's Office, isn't that correct?

A. It's my understanding, sir, that those files or cases are kept in the basement in a secure area. I don't have access to that so we had to have the then assistant chief investigator retrieve those and bring them up where I took custody and put them in that room.

Q. You say it's a secure room downstairs, is that right?

A. Yes, sir.

Q. Referred to as the vault sometimes?

A. Yes, sir.

Q. Okay. The vault can't just be accessed by any person off the street, right?

A. Correct.

Q. It has to be accessed by the St. Louis County Prosecuting Attorney's Office, employees, officers, investigators; is that correct?

A. Well, to be specific and my understanding, only the chief investigator and the assistant chief have access to that room.

Q. Okay. So the chief investigator and the assistant chief investigator. If an attorney wants a record, they have to go down and grab it?

A. They have to ask the assistant chief to retrieve it for them.

Q. Okay. So no one else has access to that room?

A. Yes, sir.

Q. Okay. So someone couldn't come off the street and pull notes out of a file?

A. No, sir.

Q. Couldn't destroy them?

A. No, sir. I couldn't even go and retrieve a record. So we know a person off the street couldn't do that.

Q. Okay. But from -- how long were they in the file at that point? I'm sorry. How long from before 2024 was the Marcellus Williams file in the vault?

A. I don't have direct knowledge of that. I would only be guessing to say -- I just -- I don't know the answer to that.

Q. Okay.

A. I did not know about the Marcellus Williams file until this came about, this case,

and they were brought to us. That's the only time I knew about it.

Q. Okay. But files are stored in the vault or in your CIU storage. Is that right?

A. Correct.

Q. Only one of a few places?

A. Evidence room.

Q. Okay. And you said for files stored in the vault the chief investigator or his deputy -- I don't know his title.

A. The assistant chief investigator.

Q. Has to go down there. They're the only ones who have access?

A. And retrieve them, yes.

Q. Now, in your CIU file storage, who has access there?

A. As I said, myself, chief investigator, the assistant chief investigator, and the other investigators within the prosecuting attorney's office.

Q. So no attorneys whatsoever?

A. No, sir, not to my understanding, no.

MR. CLARKE: One moment, Your Honor.

Q. (By Mr. Clarke) Now, the Attorney General's Office, myself, and individuals from the

AG's office came to review the file. Is that correct?

A. Correct, sir.

Q. And you sat with us during that review?

A. Yes, sir.

Q. Okay. Now when we reviewed that evidence, we didn't see the physical evidence. Is that right?

A. To my understanding that's correct.

Q. Okay. Where was the physical evidence stored?

A. The physical evidence was stored in the room that is secured within the prosecuting attorney's office.

Q. Okay. So is there a reason the physical evidence wasn't brought up at that time?

A. I can't answer that, sir.

Q. Now, the State's trial exhibits were in the possession of the Supreme Court. Did you ever seek to review those trial exhibits?

A. No, sir.

Q. At any time did any attorney from the St. Louis County Prosecuting Attorney's Office ask you to retrieve those in the Supreme Court?

A. No, sir.

MR. JACOBER: I object. It calls for speculation as to what other people did.

THE COURT: If he knows. Overruled.

A. No, sir.

Q. (By Mr. Clarke) So at the time the motion to vacate was filed you had never gone, retrieved the trial exhibits from the Supreme Court?

A. That's correct.

MR. CLARKE: Thank you. No further questions.

MR. POTTS: No questions, Your Honor.

THE COURT: Thank you.

MR. JACOBER: No redirect, Your Honor.

THE COURT: Thank you. Can this witness stand down?

MR. JACOBER: Yes, Your Honor.

THE COURT: Thank you. Any additional evidence on behalf of the prosecuting attorney's office.

MR. JACOBER: On behalf of the prosecuting attorney's office we have no further witnesses to call or evidence to present.

We would ask the Court to conform the evidence to the pleadings of the evidence that was

submitted today.

In addition, Judge, Ms. McMullin is going to address our exhibits to make sure that they're all in the record as Mr. Spillane did at the beginning of the day.

MS. MCMULLIN: Your Honor, in lieu of listing off every single exhibit, we have prepared a box file for you similar to the prior box file that you had gotten before that will have all the prosecuting attorney's exhibits and the index for the record, if that's all right.

THE COURT: So I have prosecuting attorney's exhibit list.

MS. MCMULLIN: Yes, those exhibits.

THE COURT: That has been shared with the Attorney General's Office.

Is there any specific objections to any of these exhibits?

MR. SPILLANE: Just the ones that I brought up at the beginning, Your Honor. Dr. Bodowle, Dr. Napatoff.

Anything I'm missing? Those weren't in the record before.

THE COURT: Thank you. Then Petitioner's Exhibits 1 through -- didn't we have

an 81 too?

MS. MCMULLIN: We have an 80, Your Honor.

MR. JACOBER: I believe we had an 80 and an 81.

THE COURT: 1 through -- There was an 81. It was that additional forensic DNA testing.

MR. JACOBER: Yes.

THE COURT: Those will be received.

MR. SPILLANE: I have an objection. I heard someone say that the pleadings should be conformed to the exhibits or the exhibits conformed to the pleadings. I have no idea what that means.

THE COURT: I'm not sure either, but I'll go ahead, as I indicated earlier, I'm allowing everything to come in so I can have a complete record of these proceedings.

MR. JACOBER: Your Honor, if I said exhibits, I misspoke, and I apologize. I meant to say --

THE COURT: You mean the evidence to conform to the pleadings?

MR. JACOBER: Yes.

THE COURT: Your request will be

granted.

MR. JACOBER: Thank you.

MR. SPILLANE: And that doesn't mean they're getting any new claims. That just means something else.

THE COURT: Correct.

MR. SPILLANE: Okay.

THE COURT: With that said, Mr. Potts?

MR. POTTS: Nothing further from us, Your Honor.

MR. SPILLANE: If you want, I can do closing. If you don't, I won't.

THE COURT: Wax poetically for the Court.

MR. SPILLANE: Okay. You guys want to go first?

MR. JACOBER: I think you should go first. We bear the burden.

MR. SPILLANE: Oh, okay. Well, yeah, you bear the burden so you get to go first.

MR. JACOBER: Your Honor, could we take a recess to maybe prepare for a few minutes?

THE COURT: Sure. Not a problem. The court will be in recess for ten minutes. How does that sound?

MR. JACOBER: Thank you.

THE COURT: We will go off the record.

(A recess was taken. The Court reconvened at 4:15 and the further following proceedings were had:)

THE COURT: We're back on the record in Cause Number 24SL-CC00422.

The evidence and exhibits have been received. Closing statement, Mr. Jacober.

MR. JACOBER: Thank you, Your Honor.

CLOSING ARGUMENT BY MR JACOBER:

MR. JACOBER: Initially, Your Honor, we want to thank the Court for the significant amount of work today. We know the Court has spent considerable time reviewing the record to ensure it's prepared for the hearing today. And on behalf of the prosecuting attorney's office we appreciate that heavy lift that you've been asked to do, Judge.

This case is about contamination. I'm going to go through some of the evidence. Certainly not all of it.

We heard from David Thompson, an expert in forensic interviewing, that there was potential witness contamination. While we've heard from

every other witness here today that there was potential evidence contamination. Both of which occurred prior to and during Mr. Williams' trial.

Dr. Word provided detailed technical testimony to the Court supporting the need and the well-known knowledge at the time of the need to keep evidence in attestable state.

Mr. Larner admitted to multiple instances of his touching the knife because he decided no further testing needed to be accomplished.

Given the backdrop of the known state of art at the time, it is impossible to believe a seasoned prosecutor who tried as many cases as Mr. Larner said he did was unaware of the rapidly advancing technology around DNA.

In addition, evidence in the record shows fingerprints were collected from the scene. And Ms. Asaro testified in the underlying case that Williams allegedly told her he washed his hands and the knife, demonstrating there was evidence that gloves may not have been worn.

To make the record clear, the initial motion to vacate filed pursuant to Revised Statute of Missouri 547.031 remains part of the record.

In addition, the Court granted our request to amend the claim per Youngblood v. Arizona and again today granted our request to conform the evidence to the pleadings -- the pleadings to the evidence. I keep flip flopping those, Judge. I apologize.

All claims contained in the original motion to vacate as well as in the Youngblood claim and any claims supported by the evidence today are before the Court.

When reviewing the evidence adduced today, the Court should not only focus on its extensive knowledge of the file, 547.031, which I will read in part into the record. The Court shall grant the motion of the prosecuting or circuit attorney to vacate or set aside the judgment where the Court finds that there's clear and convincing evidence of actual innocence or constitutional error at the original trial and plea that undermined the confidence in the judgment.

In considering the motion the Court shall take into consideration the evidence presented at the original trial or plea, the evidence presented at any direct appeal or

post-conviction proceeding, including state, federal habeas actions, and the information and evidence presented at the hearing on the motion. The court should also consider the evidence adduced today, obviously.

Beginning with 547.031, the AGO would have the Court believe if a court has previously ruled on a claim it is excluded from consideration. But that is not a conclusion the Court can reach on the plain reading of the statute that I just put into the record.

Indeed, it is the opposite of what the statute provides. Given the prior record of all post-conviction proceedings should be taken into consideration. All claims and information are available for the court to review.

Turning back to the evidence a little bit, Judge. Today we heard from Judge Green and Judge McGraugh, trial counsel for Mr. Williams in the underlying criminal case.

Judge Green was very candid in that he had insufficient time to adequately prepare for Mr. Williams' trial and asked the Court on at least two separate occasions for a continuance to cure that issue.

This was compounded, of course, by Judge Green's other capital murder case which was scheduled immediately before and shockingly during Mr. Williams' trial.

And the failure of the prosecutor to timely disclose numerous pieces of evidence, including Henry Cole's notes, Henry Cole's medical records, the DOC record prosecutor used to support its request for a death sentence, and fingerprint evidence taken from the crime scene which were destroyed before the defense was able to independently analyze the evidence as they had the right to do.

Williams' attorneys were also never told that either the prosecutor or his investigator touched or handled the knife without gloves prior to trial.

Judge McGraugh was required to wear gloves and did so while handling the murder weapon in this case.

Going back to Dr. Word. She told us that the DNA profiles found on the murder were consistent with Investigator Magee and Prosecutor Larner, demonstrating their mishandling of the evidence.

She also told us that touching or handling evidence without gloves can destroy and remove, both add and remove DNA that might otherwise be there. Which could take away a future exoneration.

That's the whole reason that Attorney General Janet Reno formed the commission, which Dr. Word sat on, and the Court has accepted at least one of those papers into evidence.

In addition to all of this evidence, St. Louis Prosecuting Attorney's Office has conceded the constitutional error of mishandling the evidence in the Marcellus Williams trial.

Finally, the Court heard from Mr. Larner who admitted to touching the knife and thereby robbing Mr. Williams of his ability to conduct effective testing of the knife as DNA technology continues to develop and was rapidly developing at that time.

In addition to this, Mr. Larner's testimony was instructive as to the jury selection process. Mr. Larner in addressing pointed questions from Mr. Potts relating to race-neutral reasons for his venire strikes was unable to explain the difference in how questions were posed

to different jurors of different races.

He also admitted to striking a juror for looking similar to defendant, which in his own words looked like a brother to Mr. Williams.

In addition, the prosecutor's voir dire notes, as we learned from Mr. Henson, are missing from the file. Making it impossible to determine whether his true intentions on strikes were race neutral.

When all the evidence both in the file and as presented to the Court today, the motion to vacate is well taken. Clear and convincing evidence has been presented to the Court of numerous constitutional errors in the prosecution of Mr. Williams. Evidence was mishandled.

Mr. Williams' trial counsel was placed in a shockingly difficult position of having to prepare for two capital murder cases simultaneously.

Judge Green provided convincing testimony of how unprepared his team was in lead up to the trial.

And all of those reasons were noted in the motions for continuance that were denied by Judge O'Brien.

Given the constraints on his time, including having to recess this case and finish the Baumruk matter, this alone is sufficient and we would request that the Court grant the motion to vacate in this matter.

THE COURT: Thank you, Mr. Jacober.

MR. JACOBER: Thank you, Your Honor.

THE COURT: Mr. Potts?

MR. POTTS: Your Honor, if it's all right with you and considering the State, I would like to go last, consistent with the sequence we have been doing today.

THE COURT: Any objection?

MR. SPILLANE: They're kind of on the same side so I would kind of like to go last.

THE COURT: Mr. Potts.

CLOSING ARGUMENT BY MR. POTTS:

MR. POTTS: Thank you, Your Honor.

Like Mr. Jacober, I do want to sincerely thank you. I think we all know that this wasn't the ideal thing to land on your desk, and we all really appreciate the amount of effort that you've put into this.

There's nothing triumphant about the DNA test results that we received last week. Those

results only serve as the newest round of proof that Mr. Williams received a death sentence without a fair trial.

This case was originally filed because of Mr. Williams' factual innocence. From the inception of this case Mr. Williams has had nothing to hide, and we've always welcomed every round of DNA testing because we've always known that there was going to be no chance that his DNA would be found on the murder weapon. On that point we were right.

At the same time, everyone believed that the DNA on the knife must belong to the killer because no one could fathom a prosecutor who showed that level of disregard and disrespect for the law. There we were wrong.

Last week's test results were infuriating. Even a crystal clear constitutional violation like this with clear contamination of the evidence is not the result that anyone on this side of the table wanted.

This was a horrible and tragic crime that Mr. Williams did not commit.

These DNA results were a sobering revelation that for more than 20 years the full

extent of the State's disregard for Mr. Williams' rights has been lying in wait. That disregard for his rights has destroyed what is likely the last and best chance for him ever to prove his innocence.

What's worse, after contaminating the trial evidence, we're somehow still before this court debating whether he received a fair trial.

This wasn't a fair trial. It never was. These DNA test results only represent the final blow.

Here's what we've always known. Trial evidence was weak. There were no eyewitnesses. Then and now there's no forensic evidence connecting Mr. Williams to the crime scene. Bloody footprints didn't belong to Mr. Williams. Even before the contamination we're talking about today there's always been a destroyed fingerprint where we just have to take the prosecution's word for it about what that fingerprint was and what it represented.

The only two material witnesses were unreliable people with a host of baggage, no prospects, and a desire for a reward.

On that evidence there are a lot of

prosecutors who would have declined to prosecute or maybe charge him for a lesser crime.

Instead, the State sought the death penalty.

Leading up to trial Williams' defense team was met with gamesmanship. While Mr. Williams' trial counsel was hamstrung with back-to-back death penalty trials.

People cannot be in two places at once. It is quite literally impossible to simultaneously defend one client in one courtroom while adequately preparing another client in a different courtroom right down the hall.

As the court heard today, defense counsel was unprepared for this trial. Didn't have the information they needed and needed more time. That wasn't because they were bad lawyers. They're great lawyers.

Every single person in this room has the greatest respect for Judge Green and Judge McGraugh. We hold them in the highest regard. But sometimes circumstances get in the way.

Then jury selection began. Mr. Williams didn't receive a jury of his peers. Prosecution

made sure of that by eliminating six of seven black jurors.

When you heard Mr. Larner today, he couldn't even, evidently couldn't even believe that he had eliminated six of seven black jurors. He kept insisting that it must have been three out of seven. Because when you have over a hundred people show up and only seven are black and you get rid of six of them, we all know what's going on.

Most notably, Mr. Larner made sure to eliminate the only black juror who seemed to be Mr. Williams' actual peer precisely because they looked alike.

When you review the transcript, and I made sure that we listed this, he admits that he exercised the peremptory strike on that juror in part because he was black. That's in the record. That is a Batson violation.

Now, the Supreme Court upheld the jury selection on direct appeal. But the Supreme Court was operating with a different record. It was based purely on representations the Court made 23 years ago. There's never been a time when Mr. Larner actually had to sit on the stand under

oath and be subjected to cross-examination. Basically, 23 years ago he got to provide whatever silver lining coating that he wanted to put on his justification. But then when he had to be actually subjected to cross-examination, he made that crucial admission.

When the Court reviews the record, and we're going to help the Court with our findings, you're going to see that it was a lot more nefarious than systematic. That will jump off of the page when you're reading it, directly start to finish.

What actually is happening, and as I tried to talk about with Mr. Larner, is that there were very subtle ways of discouraging black people from being willing or being qualified to serve on this jury and at the same time there were subtle ways of shepherding white people onto the jury with his methods of questioning.

There were closed-ended questions. There were easy yeses to white people. There were open-ended questions with difficult answers for black people.

And what that does is it opens up the opportunity for pretext to find those

justifications that at least seem valid for those six or seven people.

At the same time that doesn't necessarily matter because we heard that admission today. And as the Supreme Court said, one juror who's struck for racially discriminatory reason is one juror too many and requires a reversal of the conviction.

That brings us back to the DNA. While the prosecution was playing those games with the jury, the prosecution knew that it had spent the past two months contaminating the critical trial evidence. None of that was known 23 years ago.

You heard that from both Judge Green and Judge McGraugh who said Mr. Larner never told them that he was handling the murder weapon without gloves for trial.

Any seasoned defense lawyer would have jumped up on the table if they had heard that the prosecutor was walking around without gloves, handing it to witnesses, contaminating evidence.

The reason that we haven't heard about this until last week is because for 23 years the reasonable people in this room thought that that was impossible.

Whether in 2000 or today, there is no good faith basis for a prosecutor to handle a murder weapon without wearing gloves. Period. Full stop.

That principle is even more true in a case in which that prosecutor is asking a jury to sentence the defendant to death.

Now, we asked Dr. Word to come in here to tell us what, frankly, everyone in the courtroom already knows. That handling the knife without gloves was a flagrant violation based on protocols. It really doesn't matter who you ask, though. You can ask a forensic expert like Dr. Word. You can ask a stranger at the supermarket. You can ask a middle schooler. Everyone knows. The prosecutors cannot contaminate crime scene evidence.

Remarkably, Mr. Larner was unrepentant. On one level he showed us a level of candor that I, frankly, didn't expect. He told us that there were five separate occasions when he was handling that weapon without gloves. Two months leading up to trial, the same time that the defense is fighting for a continuance, including when they're asking to conduct additional forensic testing.

He's handling it when he's putting the exhibit sticker on. He's handling it when he's working with Detective Krull. He's handling it when he's working with Detective Wunderlich. He's handling it when he's talking to Dr. Picus. He's handling it when he's talking to Dr. Nanduri. Five times.

And he never told the defense about that, and that speaks for itself. Because his actions are completely inconsistent and show constant dissidence. He knows that you need to wear gloves but just not when he wants to do it.

His hubris just does not square with any notion of fairness. His supposed justification is that touching the knife without gloves made sense to him. According to his own personal theory of the case the killer wore gloves. That is an admission that he has total disregard for the rights of the defense. Pure nonsense.

Prosecutors don't find facts. Prosecutors do not have special powers that allow them to decide what did or did not occur at the crime scene. And courts can't condone this behavior or look away from it, especially when someone's going to be executed in a month.

It is quite literally the position the prosecutors are above the rest of the justice system. They're not. This is bad faith. It violated Mr. Williams' right to due process, and it must be corrected.

That brings us to the new statute. Mr. Jacober was just saying under plain reading of the law it requires the Court to vacate Mr. Williams' conviction upon finding a constitutional violation. And there were several violations that were shown today.

Nevertheless, over the past few weeks we've spent a lot of time debating these uncharted waters, I think is what the Court's term is, and what this law is trying to tell us.

Here's what the law is saying. This case belongs to this community, St. Louis County. The crime occurred just a few miles away from where we're standing. The charges against Mr. Williams were filed in this courthouse. It was members of this community who responded to their jury summons, and it was members of this community who rendered that verdict and death sentence more than 20 years ago.

In the new law the legislature could

have granted the right to file this motion to Mr. Williams itself. It didn't. In the law the legislature could have granted that right to the Attorney General. But it didn't. Instead, when the legislature enacted this law, they placed decision-making power in two representatives of the people of this community, the prosecuting attorney and this court.

The law reaffirms that the prosecuting attorney is a minister of justice in this community with responsibility that's broader than securing criminal convictions.

Ninety years ago the US Supreme Court wrote that a prosecutor's interest is not that it shall win a case but that justice shall be done.

The point of this law is that the local prosecutor, and only the local prosecutor, has the ability to come forward, admit that an injustice has occurred in his own community, and ensure that he restores his community's favor in the justice system.

Now the attorney general gets the opportunity to appear, question witnesses, state his peace. But then the attorney general drives back to Jefferson City, and the rest of us are

left with what this decision represents today.

That's why the statute doesn't give the attorney general the right to appeal Your Honor's decision.

Over the past few days we've heard the attorney general talk about respecting the decision of the jury. The problem is that the jury -- the State didn't respect the jury 25 years ago.

Members of this community were excluded because of their race. The State certainly never told those people on the jury that they were quietly contaminating evidence, including the murder weapon that was being passed around.

Setting aside this decision is how we show respect for the jury and the other members of our community who show up in this courthouse and participate in our criminal justice system.

Today there's only one voice clamoring for death, and that's the attorney general. That's a stark reminder that the attorney general is only a participant and not an advocate for anyone in this case.

The attorney general represents the different constituency from St. Louis County.

I am acutely aware that I do not speak for Ms. Gayle's family. But everyone else in this room has listened to their wishes as of last week. And this entire problem began because the prosecution decided to seek the death penalty over their wishes.

And as we all heard Dr. Picus tell us on the phone, that decision only led to years of pain. And last year, last week it looked like we had a resolution. And again there was only one dissenting voice that departed from the family's wishes.

I expect that the attorney general is going to continue to criticize Mr. Williams for his willingness to take that Alford plea last week.

As everyone knows, a no contest plea doesn't represent the culpability of Mr. Williams. It only represents what Mr. Williams was forced to accept in an imperfect world, in an imperfect system.

When you hear the attorney general claim that no innocent person would take this deal, it shows a point of view that's divorced from the real decisions that real people have to make.

Mr. Williams is scheduled for execution less than a month from now. He was given a Hobson's choice. Live in prison or die next month.

Whether you're staring down the barrel of a gun or the needle of a syringe, it's an understandable choice. Largely, the attorney general is just an advocate for an abstract concept that office calls finality. Finality has nothing to do with the justice system. It's about bureaucracy. Finality is a code word that it's better to get it over with than to get it right.

Mr. Williams' execution doesn't represent finality, much less closure. It only leaves lingering questions about the unfairness impacting this trial. There's no court opinion that can persuade the community that this was a fair trial after what we heard today.

Here's the biggest takeaway from this new law and why we're here today. The law symbolizes an opportunity for our local justice system to recognize its mistakes and rebuild trust with the community.

You don't build trust by denying your mistakes. You build trust by owning them.

Admitting your mistakes is not a sign of weakness. It's a sign of strength. That our justice system is strong enough to fix itself.

Today when you heard from Judge Green, he could have come in here and testified that he did his best. That justice system is tough but fair, that it always reaches the right result, and then he could return to his own courtroom. He didn't.

It took courage for him to come in here voluntarily and admit that 23 years ago he fell short. But even if he fell short, the truth of the matter is that no one in this courtroom respects him less. We only respect him more.

So here's where we stand. Mr. Williams didn't receive the defense he deserved. The prosecution deliberately tainted evidence. The prosecution deliberately ensured that he wouldn't be judged by a jury of his peers, including the prosecutor who admitted that he struck a black juror in part precisely because he was black.

As a result of those errors, Mr. Williams isn't scheduled to wake up on September 25th unless this court acts.

In the meantime, there are a million

other people in this community who are going to wake up that day. We're all going to have an opportunity to understand how our justice system works and whether it really is as strong as we believe it is.

So on that, Your Honor, we ask that you set aside Mr. Williams' conviction. And we thank you again for your time.

THE COURT: Thank you, Mr. Potts. Mr. Spillane.

MR. SPILLANE: Thank you, Your Honor.

CLOSING ARGUMENT BY MR. SPILLANE:

MR. SPILLANE: May it please the court, Your Honor.

THE COURT: It does.

MR. SPILLANE: This case is about the rule of law. We've heard a lot of things here about the community and this and that. We didn't hear one thing about Article V Section 22 of the Missouri Constitution that says a lower court must follow the decisions of a higher court. 547.031 if it tried to overrule that, which it couldn't, would be unconstitutional.

The only claim left in this case is the bad faith destruction of evidence. And not only

was that not proved by clear and convincing evidence, it was not proved by any evidence.

The prosecutor came here and testified today that it was always his practice to once the evidence was tested not to use evidence-saving techniques.

And if you look at State v. Deroy 623 S.W.3d 778, 791 it says: When he acts in good faith and in accord with their normal practice, no due process violation lies when potentially useful evidence is destroyed.

There is no bad faith here. There's been argument after argument attempting to impune the character of the prosecutor, and that's terrible.

They said that he admitted he struck somebody because he was black. You heard the same testimony I heard today. He never said that. They just say it like it's true. And that's kind of offensive.

Let's talk about they mention the bloody footprint. I think it didn't come in any evidence on it, but the bloody footprint didn't match the shoes that Williams was wearing when he was arrested because he was arrested long after the

crime.

We know from the trial transcript that the clothing he wore that day went in a backpack and into the sewer. We also know from testimony that sewer workers went to look for it, but it was too late because it had already been vacuumed up and put in a dump.

So saying it doesn't match his shoes doesn't tell the whole story. It didn't match the shoes he was wearing much later.

Let me talk about Mr. Thompson who came in and testified. He didn't read the transcript of any of the investigating officers that was in the trial transcript. He had no idea about the ruler or the ID or the purse.

The only thing that they told him about was the laptop. And then he says, well, there's nothing to back up her story because it's only the laptop and other people say that she had the laptop. Just ignores everything else that was in the car. His testimony is useless.

Dr. Word come in and she actually helped, I mean, us, not them. She said a couple of things that were important. She had no idea what the protocol was in the St. Louis County

Prosecutor's Office for testing evidence -- for preserving evidence that had already been completely tested and was done. She had no idea. That was an important question.

And another important question is that she indicated a couple of times that Marcellus Williams' DNA could have been on the knife. I don't think it was because of the gloves. But she said it could have been taken off by the prosecutor. So she's actually weakened their earlier argument that he could be excluded.

Let's talk about Prosecutor Larner. He came in and did everything right. He didn't do anything wrong. He didn't do anything in bad faith. And I don't even know, you know, why they say that he did. There's no evidence.

And they refer to the evidence in this case as being weak. It was overwhelming. Read the Missouri Supreme Court decision. You have over and over, and you've read the transcript. This isn't weak evidence. This isn't evidence on which no reasonable jury could convict by -- prove by pure -- excuse me, clear and convincing evidence, which is evidence that instantly tilts the balance in their favor and overcomes

everything else.

Even if the actual innocence claim was still in this case, which I think it isn't, it loses horribly.

And something else, Martin Footnote 4 says: Actual innocence has to be based on new evidence. And the Missouri Supreme Court defined that as evidence that wasn't available at trial.

They've got really nothing going to innocence that wasn't available at trial. They just restate the thing that was rejected about the computer testimony that was excluded and the stuff about ineffective assistance of counsel that already lost in the Missouri Supreme Court.

So they have nothing that can win under the standard.

Judge McGraugh and Judge Green, I don't think they said anything that was untrue. But this was a quarter century ago. One could read the transcript and listen to Mr. Larner and see that he handled the evidence without gloves. They don't remember that, and I think their memories are flawed in the sense of that. Because he didn't wear gloves and they didn't jump up and down and scream because everybody didn't wear

gloves then because nobody -- I won't say nobody in the world had ever heard of touch DNA, but people in St. Louis County didn't know about it. And that's the standard. Did he use bad faith? He didn't. He wasn't even negligent. And if he was negligent, we would still win. But he certainly didn't use bad faith because he used the protocol that his office always used. He did what he always does. Which is, if there's nothing to test, he doesn't use evidence-saving techniques. And we know that from the testimony in the transcript about the fingernail clipping. Because when he thought maybe that could be tested, he wore gloves -- well, he didn't open the package.

Something else we learned today that was helpful is that this didn't come in an unsealed package with the handle sticking out like was the former memory of Mr. Larner because he went and he read the transcript and he looked at the package and he remembered this thing was completely sealed.

And so I think the fingerprints -- excuse me, the fact that he wore gloves is a good reason. But if you listen to the question I asked him about, even if he didn't wear gloves, would

you have done the same thing because the evidence was tested? And the answer is, yes, that's what I always do.

There's no bad faith here. And they can't win without bad faith. I mean, something could be invented, be in some laboratory right now in 20 years that's going to help some case in your court, but nobody is responsible for knowing that now. And that judge wasn't responsible for knowing that. No one knew. There was no bad faith.

That's essentially it. This is about the rule of law. I don't like the disparagement of the prosecutor. That's not the way you win a case. You argue what the law is and what the facts are. You don't call the prosecutor names.

The Missouri Supreme Court has already rejected everything in its place except the bad faith claim, and that loses. They present no evidence that shows bad faith.

Like I say, where it helped us on that, and I just wanted to say that everybody here should appreciate the crime victims because, you know, this is about them. And I don't think dragging this out for year after year on claims

that they know or should know are legally meritless does anything for the crime victims.

Thank you, Your Honor.

THE COURT: Thank you, Mr. Spillane.

I would like to thank the attorneys for their professionalism throughout this process. This is very difficult procedure for everyone.

This is going to be a decision that I will weigh heavily.

Our court reporters indicate that they will try to expedite a copy of the transcript as humanly possibly, which I think will be sometime Monday or early Tuesday morning. And we will e-mail copies of the transcripts to everyone.

Again, I want to thank you for your patience with the court and your understanding of how difficult this matter has been for this particular division.

With that said, the Court will be -- I need a memo that the matter has been heard and submitted and indicate to me that you will submit proposed findings of fact and conclusions of law pursuant to the statute by next Wednesday, which is September 4th.

And as I indicated off the record, those

can be submitted to me both by e-filing and to my direct e-mail address in Word. Appreciate it. The court will be in recess. Court is not in recess. We're done. Thank you.

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Reporter's Certificate

I, Susan M. Lucht, a Certified Court Reporter, hereby certify that I was the official court reporter for Division 13 of the Circuit Court of the County of St. Louis, State of Missouri; that on August 28, 2024, I was present and reported the proceedings had in the case of In Re: Prosecuting Attorney, 21st Judicial Circuit, ex rel Marcellus Williams v. State of Missouri, Cause Number 24SL-CC00422; and I further certify that the foregoing pages contain a true and accurate reproduction of the proceedings had on that date.

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