INDEX OF APPENDIX

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 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. <u>New Evidence Substantiates that Cole and Asaro Were Known Unreliable Witnesses Who Would Lie to Help Themselves.</u>

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,

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

In Re: Prosecuting Attorney, 21st Judicial Circuit, ex rel. Marcellus Williams,	)	
Movant/Petitioner,	)	
v.	)	Case No. 24SL-CC00422
State of Missouri,	)	Division 13
Respondent.	)	

REQUEST FOR LEAVE TO AMEND INTERLINEATION AND RESPONSE TO ATTORNEY GENERAL'S MOTION IN LIMINE

COMES NOW Movant/Petitioner, the Prosecuting Attorney for St. Louis County (hereinafter the "Prosecuting Attorney"), by and through its counsel, and for its Request for Leave to Amend its Motion to Vacate or Set Aside Judgment and its response to the Motion *in Limine* filed by the Respondent Attorney General states as follows:

INTRODUCTION

The Attorney General seeks to prevent the Prosecuting Attorney from presenting evidence in support of its Motion to Vacate or Set Aside Judgment, filed in this court on January 26, 2024. The Attorney General's motion should be denied for several reasons. First, § 547.031, RSMo. does not grant the Attorney General authority to file this motion, through which it attempts to substantively limit the evidence that will be presented at the hearing in this matter, nor has any court interpreting the statute found that it has such authority. Second, this Court should allow amendments to the Prosecuting Attorney's pleadings or in the alternative, allow for the pleadings to conform to the evidence presented

at the hearing under Rule 55.33, including its witness and exhibit lists, in light of the recent developments in this case and in the interest of justice. Thus, in an attempt to resolve the issues raised in the Attorney General's Motion, despite their lack of merit, the Prosecuting Attorney requests leave to amend its Motion to Vacate or Set Aside Judgment, pursuant to Missouri Supreme Court Rule 55.33.

ARGUMENT

I. The Attorney General does not have statutory authority to file a motion *in limine* in this proceeding.

Section 547.031 allows the Attorney General to participate in the hearing in a limited manner. Specifically, the Attorney General "shall be permitted to appear, question witnesses, and make arguments" at the hearing. Section 547.031(2). Interpreting the statute, the Missouri Appellate Court in *State ex rel. Schmitt v. Harrell* held the Attorney General, who is a "hearing participant," is "permitted to file motions relating to his ability to meaningfully participate in that hearing." 633 S.W.3d 463, 466, 468 (Mo. Ct. App. 2021). The Court gave specific examples of the kinds of motions that relate to meaningful participation: the scheduling of the hearing and determining the judge who will hold the hearing. *Id.* at 467.

The Attorney General's motion *in limine* seeking to substantively limit the evidence presented at the hearing does not relate to his "ability to meaningfully participate." Rather, it seeks to further inhibit the due process rights of Marcellus Williams and the statutory rights of the Prosecuting Attorney by determining which evidence this Court should and should not hear. As discussed further below, this Court must consider all the evidence, "old

and new, incriminating and exculpatory, without regard to whether it would necessarily be admitted under rules of admissibility." *House v. Bell*, 547 U.S. 518, 538 (2006) (*quoting Schlup v. Delo*, 513 U.S. 298, 327 (1995)). On this basis alone, the Court should deny the Attorney General's motion.

Even so, the Attorney General argues in its Motion that it does not consent to try any issue not pleaded in the January 26, 2024 Motion to Vacate or Set Aside, but this (irrelevant) assertion is belied by the Attorney General's own actions in this case. Indeed, the Attorney General's Office *affirmatively entered into evidence* on August 21, 2024 the August 19, 2024 report from Bode laboratory detailing the DNA profiles of Keith Larner and Edward Magee,[1] the ***same*** new evidence upon which Movant's amended claim is based. The Attorney General cannot inform the court of new evidence, argue that it favors the Attorney General's position, and then prevent the Movant from doing the same. Accordingly, the Motion *in limine* should be denied.

II. The recent developments in this case warrant amendment to the pleadings.

New evidence received on August 20, 2024,[2] which was provided to the Attorney General the same day and which this Court was made aware of, warrants amendments to the Motion to Vacate or Set Aside Judgment. As indicated by the Attorney General's motion, the Prosecuting Attorney plans to amend its exhibit list and witness list to reflect the new evidence and testimony it will present at the hearing.[3] The Prosecuting Attorney

[1] Marked as Respondent's Exhibit FF.
[2] STLCPA000098-STLCPA000099.
[3] The Prosecuting Attorney made the Attorney General aware of its plan to amend on Thursday, August 22, 2024. *See* Attorney General's Motion *in limine*, ¶ 4.

further intends to amend its Motion pursuant to Missouri Supreme Court Rule 55.33(b), which allows an amendment of the pleadings to cause them "to conform to the evidence." (*See* **Exhibit A**, Amended Motion to Vacate or Set Aside Judgment, attached hereto.)

The statute permits the Prosecuting Attorney to file a motion pursuant to Section 547.031 "at any time." Unfortunately, the Attorney General's refusal to seek a stay of Williams' execution date (which is currently less than one month away) pending the resolution of this matter leaves the Prosecuting Attorney with no option but to amend its motion in the interest of justice. If the Attorney General would not object to a stay of Williams' execution date, the Prosecuting Attorney would consent to re-opening discovery for further fact-finding and investigation of these amended claims. However, the Prosecuting Attorney and Marcellus Williams have not been afforded the privilege of time.

Due to the compressed timeline created by the Attorney General and the Missouri Supreme Court, and in the interest of justice, this Court should permit the Prosecuting Attorney to amend its motion to conform to the evidence. *See Downey v. Mitchell*, 835 S.W.2d 554, 556 (Mo. Ct. App. 1992)("The nature of our pleading rules is to liberally permit amendments when justice so requires. Rule 55.33(a)."") Courts presiding over innocence cases "**must** consider 'all the evidence,' old and new, incriminating and exculpatory, without regard to whether it would necessarily be admitted under 'rules of admissibility that would govern at trial.'" *House v. Bell*, 547 U.S. 518, 538 (2006) (*quoting Schlup v. Delo*, 513 U.S. 298, 327 (1995)). (emphasis added) As such, it is imperative that

the Attorney General's motion be denied and the Prosecuting Attorney be permitted to present all evidence, old and new, at the hearing on August 28, 2024.

CONCLUSION

In the interest of assisting the Court in finding the truth, this Court should deny the Attorney General's motion *in limine* and grant leave to the Prosecuting Attorney to file its Amended Motion, attached hereto as **Exhibit A**.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that a true and correct copy of the foregoing was electronically filed using the Case.net system this 25th day of August, 2024. Under Rule 103.08, all counsel of record shall receive electronic service by operation of the Case.net system.

/s/Matthew A. Jacober
An Attorney for Movant/Petitioner

EXHIBIT A

CLAIM 5. THE STATE'S BAD-FAITH FAILURE TO PRESERVE EVIDENCE VIOLATED MARCELLUS WILLIAM'S RIGHT TO DUE PROCESS PURSUANT TO *ARIZONA V. YOUNGBLOOD*, 488 U.S. 51 (1988).

None of the forensic evidence collected from the crime scene and tested linked Mr. Williams to the crime. Not the bloody shoeprint or hairs found near the victim's body. Yet, knowing that forensic evidence exculpated Mr. Williams, the State inappropriately destroyed bloody fingerprints and any biological material left on the murder weapon before the defense could examine them. This destruction, done in bad faith and without any documentation or notice to the defense, violated Williams' right to Due Process.

In *Arizona v. Youngblood*, the United States Supreme Court made clear that the destruction of evidence in bad faith violates a defendant's right to due process where such evidence was "potentially useful." 488 U.S. 51, 58 (1988). It is undeniable that the bloody fingerprints lifted from the victim's house and the DNA left behind on the handle of the knife used to murder Ms. Gayle are "potentially useful;" if such testing of either piece of evidence excluded Mr. Williams as the source of the bloody fingerprints or the male DNA on the weapon, it would prove his innocence, particularly if such testing was able to identify an individual as the perpetrator. Yet, the bloody fingerprints, while collected, were never provided to the defense. No reports were written. No records of destruction were made. And it was only after the defense requested the fingerprints to conduct their own testing that they were informed that all the fingerprints had been destroyed—despite having given every indication that the fingerprints were being analyzed and were available. Indeed, in April 2001, just weeks before they announced the destruction, the State asked to retake Williams' fingerprints to assist with comparison. (T.

Vol I at 96). But when the defense asked to turn the fingerprints over to their experts in May, they learned the prints had been destroyed, without any notice before it happened. (Id.)

Similarly, the State destroyed DNA evidence on the knife handle when it failed to follow protocols to protect the integrity of the evidence. Prosecutor Keith Larner acknowledged in an affidavit that "the knife handle was not handled in a way that would preserve it for DNA testing years later after the trial." (Larner Affidavit at 1.) The evidence was not even handled in a way that would sufficiently preserve biological evidence for trial: Larner admits he "touched the knife handle without gloves several times prior to trial" and "met with many police witnesses prior to trial," who "may have touched the handle at that time." (Larner Affidavit at 2-3.) Despite knowing how critical this evidence was, the State acted in bad faith when it violated evidence handling protocols, destroying the potentially favorable evidence.

"Bad faith can be shown by proof of an official animus or a conscious effort to suppress exculpatory evidence." *Jimerson v. Payne*, 957 F.3d 916, 926 (8th Cir. 2019) (citing *United States v. Bell*, 819 F.3d 310, 318 (7th Cir. 2016)) (internal citations omitted); *United States v. Collins*, 799 F.3d 554, 569 (6th Cir. 2015) (internal citations omitted). This includes instances where, like with the fingerprints, "evidence was not made available before trial and was suppressed by the prosecution." *Id*. The State destroyed the fingerprints prior to trial without informing the defense and failed to inform the defense even though such evidence could identify the real perpetrator or at a minimum, exclude Mr. Williams as the source. It similarly failed to follow its own

protocols regarding handling and preserving biological evidence on a critical piece of evidence—the murder weapon. "Taken together, the uncontroverted evidence establishes bad faith." *Jimerson*, 957 F.3d at 930. Because the DNA evidence on the knife and the bloody fingerprints were potentially favorable evidence—inappropriately destroyed against protocols and in bad faith—this Court must overturn Mr. Williams' conviction.

Due process requires law enforcement to properly preserve evidence that it knows will play a significant role in a suspect's defense. *See California v. Trombetta*, 467 U.S. 479, 488 (1984). Unlike *Trombetta*, where the court found that there was no due process violation because the chances were extremely low that the destroyed evidence would be exculpatory, it is clear that the DNA results from a murder weapon and fingerprints found at the crime scene would have critical impact in identifying the perpetrator and excluding suspects.

The St. Louis County Prosecutor's Office's and St. Louis County Police Department's conduct in this case also violated the common law spoliation doctrine that clearly applies in Missouri trials. This doctrine is applicable where there is evidence that a party's destruction or alteration of material evidence was the result of fraud, deceit, or a desire to suppress the truth. *See DeGraffenreid v. R.L. Hannah Trucking Company*, 80 S.W.3d 866, 872-873 (Mo. App. W.D. 2002). As described, there is no question the DNA on the knife handle used to murder Ms. Gayle and the bloody fingerprints found at the crime scene were material evidence in this case.

Law enforcement's destruction of this critical evidence in this case violated Mr. Williams' constitutional due process rights, this Court must vacate his conviction.

CLAIM 6. THE COURT'S DENIAL OF THE DEFENSE'S MOTION FOR CONTINUANCE VIOLATED MARCELLUS WILLIAM'S RIGHT TO DUE PROCESS.

The trial securing Mr. Williams' capital conviction began on June 4, 2001. On May 7, 2001, defense counsel filed a Verified Motion for Continuance, outlining a number of reasons they needed more time, including a number of outstanding investigative tasks and new information that had been provided by the State on May 1. They also needed more time because one of Mr. Williams' counsel, Joseph Green, was scheduled to begin a two-week trial in another case where the death penalty was being sought, *State of Missouri v. Baumruk* and would be unavailable to assist in preparation for the defense. (Verified Mot. For Continuance, Legal File Vol III at 397.) On May 9, 2001, the Court denied the defense' motion with no justification. As a result, Mr. Williams' proceeded to trial with counsel unable to provide effective assistance, in violation of Mr. Williams' Sixth Amendment right to counsel.

"In determining whether a trial court has abused its discretion in denying a defendant's motion for a continuance, Missouri Courts have considered several factors including the implication of a defendant's constitutional rights, the seriousness of the offense charged, the nature of any potential defense defendant claims he was unable to prepare for and present at trial, and whether counsel had ample opportunity to prepare for trial." *State v. Brown,* 517 S.W.3d 617, 628-29 (Mo. Ct. App. E.D. 2017) (internal citations omitted); *see also*, *State v. Litherland*, 477 S.W. 3d 156, 165 (Mo. Ct. App. E.D.

2015) (implications of defendant's constitutional rights and offense charged), *State v. Kauffman*, 46 S.W.2d 843, 844-46 (1932) (seriousness of offense charged),

"[T]he denial of a motion for continuance is fundamentally unfair when it results in a denial of a defendant's constitutional rights." *Wade v. Armontrout*, 798 F.2d 304, 307 (8th Cir. 1986) (remanding for a hearing on due process and ineffective assistance of counsel claims). A defendant has a due process right to present a defense at trial and that constitutional right should not be overridden by a court's desire to efficiency resolve a case. *See Litherland,* 477 S.W.3d at 165 (citing *Crane v. Kennedy*, 476 U.S. 683, 690 (1986)). This is especially true when the defendant is charged with a serious offense. *See Id.* (classifying first-degree murder where the defendant faced a possible sentence of life in prison without the possibility of parole as serious).

Here, there is no question Mr. Williams was facing serious charges and the trial court's denial of the motion to continue resulted in a violation of Mr. William's due process right to present a defense. His trial counsel was forced to proceed without investigating critical guilt and sentencing evidence, including evidence related to the impeachment of Henry Cole and Laura Asaro (*see* Claim 2, *supra*) and mitigation evidence that would have caused at least one juror to return a life verdict. (*See* Claim 3, *supra*. *See also* Ex. 10, Affidavit of Joseph Green). The United States Supreme Court has found that a failure of trial counsel to conduct a reasonable investigation constitutes a breach of duty. *Strickland v. Washington*, 466 U.S. 668 (1984). The duty of investigation specifically includes potential witnesses or evidence as to which counsel has actual notice. *Wiggins v. Smith*, 539 U.S. 510, 523 (2003); *see also Chambers v. Armontrout*,

907 F.2d 825, 828 (8th Cir.) (en banc) (1990); *Hawkman v. Parratt*, 661 F.2d 1161, 1168 (8th Cir. 1981). Such a failure violates counsel's "essential duty to make an adequate factual investigation [which can] only be viewed as an abdication—not an exercise—of this professional judgment." *McQueen v. Swenson*, 498 F.2d 207, 216 (8th Cir. 1996).

The trial court's denial of the motion to continue also violated Mr. Williams' federal constitutional right to effective assistance of counsel at a point in the judicial process where he was most in need of it—just weeks before trial with key investigation needed in both the guilt and penalty phases. The trial court's denial was thus an abuse of discretion. "There are no mechanical tests for deciding when a denial of a continuance is so arbitrary as to violate due process. The answer must be found in the circumstances present in every case, particularly in the reasons presented to the trial judge at the time the request is denied." *Ungar v. Sarafite*, 376 U.S. 575, 589 (1964). Here, the record does not support denying the defendant's request for a continuance at such a critical juncture, particularly in a capital case, requiring heightened sensitivity to fairness and accuracy. *See Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) ("Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two. Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case"); *see also Lockett v. Ohio*, 438 U.S. 586, 604 (1978); *Gardner v. Florida*, 430 U.S. 349, 359 (1977). Because the trial court abused its discretion and violated Mr. Williams' constitutional due process rights, this Court must vacate his conviction.

Rev. Stat. Mo. § 547.031 (2021)

547.031. Information of innocence of convicted person — prosecuting or circuit attorney may file to vacate or set aside judgment — procedure. — 1. A prosecuting or circuit attorney, in the jurisdiction in which charges were filed, 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 charges were filed 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 a motion by the circuit clerk and shall be permitted to appear, question witnesses, and make arguments in a hearing of such a 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 proceedings, including state or federal habeas actions; 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 a 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.

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.	)

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TRANSCRIPT OF HEARING

AUGUST 21, 2024

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

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

Let the record reflect this matter was set for an evidentiary hearing this date, August 21, 2024.

On or about January 26, 2024, the Prosecuting Attorney's Office filed a motion to vacate or set aside judgment and suggestions in support pursuant to Section 547.031 RSMo.

Let the record further reflect that the Court's interpretation of the statute is that there must be a hearing on this matter, and the Court scheduled this for a hearing this date.

Is there an announcement?

MR. JACOBER: Good afternoon, Your Honor. Matthew Jacober. I, along with my colleagues, Alana McMullin and Teresa Hurla, are special counsel for Innocence for St. Louis County's Prosecuting Attorney's Office. In addition, Jessica Hathaway from the St. Louis County Prosecuting Attorney's Office is with us.

There is an announcement, Your Honor. There has been a resolution of the case. The Court

has been presented with a consent order and judgment signed by Mr. Williams. And I would like to make a record at this time, after all counsel have entered their appearance for the record, regarding the circumstances of this consent order and judgment.

THE COURT: Thank you. And that's an oversight on my part.

Let the record further reflect that the Attorney General is here and represented by Michael Spillane. And if there are any other attorneys that want to be acknowledged on the record I'll so note that.

MR. CLARK: Your Honor, I will be arguing today. Andrew Clark, assistant attorney general on behalf of the State of Missouri.

THE COURT: Thank you.

The Court has been presented with a consent order and judgment purportedly signed by Mr. Williams as relator to resolve all issues pertaining to this motion, which the Court actually has very little direction due to the fact that it's only been in existence since 2021. And this consent order and judgment has been furnished to the Court by the Prosecuting Attorney's Office and

by Mr. Williams. It's my understanding that the Attorney General believes that I don't have jurisdiction to enter this consent order and judgment and appropriate remedies will be pursued in obviously a different proceeding.

Let the record further reflect that in anticipation of this hearing today the following facts are not disputed. Following a jury trial the Circuit Court sentenced Mr. Williams to death for first degree murder. The Court affirmed Mr. Williams' conviction and affirmed the judgment, denying any post-conviction relief.

In December of 2014 the Court issued a warrant of execution setting a January 28, 2015, execution date. Mr. Williams then filed a petition for writ of habeas corpus in the Court alleging that he was entitled to initial DNA testing to demonstrate actual innocence. The Court vacated Mr. Williams' execution date and appointed a Special Master to ensure complete DNA testing and report the results of the additional DNA testing. The Special Master provided the Supreme Court with the results of additional DNA testing conducted on hair and fingernail samples from the crime scene and the knife used in the murder.

The parties fully briefed their arguments to the Special Master. After reviewing the Master's files, the Court denied Mr. Williams' habeas petition because the additional DNA testing did not demonstrate Mr. Williams' actual innocence.

In 2017 Mr. 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 Court denied said relief.

In 2023 Mr. Williams filed a petition for declaratory judgment alleging that the governor lacked authority to rescind an execution order appointing a board of inquiry pursuant to Section 552.070 and staying Mr. Williams' execution until a final clemency determination.

On June 4, 2024, the 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 Mr. Williams' petition for declaratory judgment.

Prior to the Court's order and warrant, the Prosecuting Attorney for the Twenty-First

Judicial Circuit filed a motion to vacate Mr. Williams' first degree murder conviction and death sentence pursuant to Section 547.031 authorizing the Prosecuting Attorney or Circuit Attorney to file a motion to vacate or set aside the judgment at any time upon information the convicted person may be innocent or may have been erroneously convicted.

This Court has reviewed probably close to 8,000 pages, which I am guided to do so under the statute, including the original trial transcript which lasted some 14 days, the post-conviction relief proceedings, and all the cases that have been decided previously by courts that are higher than this.

The Court finds that this statute is civil in nature. It is not post-conviction relief. The Court has been provided no authority to suggest that I cannot enter this consent order and judgment. And the Court is going to enter this consent order and judgment.

And further, Mr. Jacober, you may make a record with respect to this consent order and judgment.

MR. JACOBER: Thank you, Your Honor.

Is it okay if I stand here?

THE COURT: You can stand, sit, whatever is your preference.

MR. JACOBER: I'll stand.

Your Honor, just by way of record, again Matthew Jacober on behalf of the St. Louis County Prosecuting Attorney's Office.

The DNA evidence developed did not fully support our initial conclusions. Additional investigation and testing demonstrated the evidence was not handled in accordance with proper procedures at the time of Mr. Williams' charge and conviction. As a result, the additional testing was inconclusive and did not allow the St. Louis County Prosecuting Attorney's Office to rely on its theory Mr. Williams' exclusion as a contributor to the DNA on the murder weapon as a significant factor supporting his innocence.

It is clear, based on testing, Mr. Williams' DNA is not on the murder weapon which was tested in 2016, long after the crime occurred, and long after the trial was concluded. The murder weapon was handled without proper procedures then in place. As a result DNA was likely removed and added during the investigation and prosecution of

Mr. Williams during the time span of 1998 through 2001. The St. Louis County Prosecuting Attorney's Office regrets its failure to maintain proper protocols surrounding the key physical evidence in this heinous crime, the murder weapon.

The majority of the additional investigation was conducted in the last 60 days and promptly provided to Mr. Williams and the Attorney General's Office. As a result of this evidence and concerns regarding the investigation and trial of Mr. Williams impacting his rights as a charged individual, St. Louis County Prosecuting Attorney determined there were constitutional errors undermining our confidence in the judgment.

St. Louis County Prosecuting Attorney's Office engaged in settlement discussions with Mr. Williams and his counsel. These discussions began on August 20, 2024, and culminated on August 21, 2024, in which Mr. Williams is agreeing to plead pursuant to North Carolina vs. Alford in exchange for a sentence of life without the possibility of parole.

We have discussed with the victim's husband, Dr. Daniel Picus, who has indicated he does not support the application of the death

penalty to Mr. Williams. As the Court is aware, Dr. Picus expressed this sentiment to the Court and all counsel in chambers during a telephone call earlier today. Mr. Williams is further waiving all appellate and post-conviction remedies except those afforded via newly discovered evidence or a retroactively adopted and applied law. This brings much needed and deserved finality to this case and Mrs. Gayle's family.

Despite the above, it's our understanding the Attorney General's Office objects to this resolution. Taking the above record and everything that the Court has reviewed to date, which includes all of the documents in this matter and all of Mr. Williams' direct and indirect appeals to his conviction, the St. Louis County Prosecuting Attorney's Office requests the Court accept the consent order and judgment, accept Mr. Williams' plea pursuant to North Carolina vs Alford, and resentence Mr. Williams on Count II of the underlying indictment to life without the possibility of parole.

Ms. Hathaway will proceed forward with the allocution and the plea proceedings.

THE COURT: Thank you.

MR. JACOBER: Thank you, Your Honor.

THE COURT: Mr. Williams.

MARCELLUS WILLIAMS: Yes, sir.

THE COURT: Can you rise and raise your right hand.

MARCELLUS WILLIAMS,

having been sworn, testified as follows:

THE COURT: You may.

MS. HATHAWAY: Your Honor, as a preliminary matter, I prepared a memorandum that would withdraw the State of Missouri's previously filed notice of intent to seek the death penalty.

THE COURT: Thank you.

Mr. Williams, I have before me, which I guess we can mark as Circuit Attorney's Exhibit 1, a consent order and judgment. Circuit Attorney's Exhibit 1 references a signature signed by Marcellus Williams, relator. Did you sign this document?

MARCELLUS WILLIAMS: I did.

THE COURT: I'm going to ask you a series of questions. If at any time you don't understand any of my questions please get my attention and I'll rephrase.

MARCELLUS WILLIAMS: (Nods head.)

THE COURT: Can you please state your full legal name for the record?

MARCELLUS WILLIAMS: Marcellus Scott Williams.

THE COURT: Thank you. And how young a man are you?

MARCELLUS WILLIAMS: Fifty-five.

THE COURT: Highest level of education you've achieved?

MARCELLUS WILLIAMS: GED.

THE COURT: With that GED you're capable of reading, writing, and understanding the English language?

MARCELLUS WILLIAMS: I am.

THE COURT: You just heard the Circuit Attorney announce that you would like to enter an Alford plea with respect to the agreement that has been reached between you and the Circuit Attorney, is that accurate?

MARCELLUS WILLIAMS: Yes.

THE COURT: Any problems with your hearing today?

MARCELLUS WILLIAMS: None.

THE COURT: You are a U.S. citizen?

MARCELLUS WILLIAMS: Yes.

THE COURT: Are you under the influence of any drugs or alcohol today?

MARCELLUS WILLIAMS: No.

THE COURT: You understand that pursuant to this consent order and judgment you are agreeing to plead guilty to the charge of first degree murder pursuant to North Carolina vs Alford with the negotiated sentence of life without the possibility of parole?

MARCELLUS WILLIAMS: I understand.

THE COURT: Did you have enough time to review this consent order and judgment before you signed it?

MARCELLUS WILLIAMS: Yes.

THE COURT: Have any threats or promises been made to you to get you to go ahead and sign this?

MARCELLUS WILLIAMS: No.

THE COURT: Have any threats or promises been made to your family to entice you or intimidate you into signing this agreement?

MARCELLUS WILLIAMS: No.

THE COURT: You understand, Mr. Williams, that your agreement with the Prosecuting Attorney's Office will become the

sentence and judgment of the Court if I accept this consent order and judgment?

MARCELLUS WILLIAMS: I do.

THE COURT: You heard the prosecutor's statement regarding the issue of the sentence ordering the death penalty is being withdrawn by the Prosecuting Attorney --

MARCELLUS WILLIAMS: Yes.

THE COURT: -- in exchange for your agreement to plead under North Carolina vs. Alford to life without parole?

MARCELLUS WILLIAMS: Yes.

THE COURT: The additional counts remain unchanged.

MARCELLUS WILLIAMS: Yes.

THE COURT: Based upon the prosecutor's statement, do you believe that you will be found guilty by a jury or the trial court if you went to trial since you've already been found guilty?

MARCELLUS WILLIAMS: State that again, Your Honor.

THE COURT: You've already been found guilty, correct?

MARCELLUS WILLIAMS: Right.

THE COURT: And this was back in

2000 --

MARCELLUS WILLIAMS: -- 1.

THE COURT: 2001. And you've exhausted all of your remedies available under the law --

MARCELLUS WILLIAMS: Yes.

THE COURT: -- correct?

MARCELLUS WILLIAMS: (Nods head.)

THE COURT: Do you believe that it's in your best interest, given the evidence, to enter a plea of guilty pursuant to the case of North Carolina vs Alford?

MARCELLUS WILLIAMS: Yes, I do.

THE COURT: Have your attorneys explained to you the effect of your plea of guilty pursuant to the case of North Carolina vs. Alford?

MARCELLUS WILLIAMS: Yes.

THE COURT: What is your understanding of that case?

MARCELLUS WILLIAMS: My understanding of the case is that it's a no contest, I plead to no contest to the charge.

THE COURT: You understand that it has the same legal effect as a guilty plea?

MARCELLUS WILLIAMS: Yes.

THE COURT: Is the consent order and

judgment part of your reason for the Alford plea?

MARCELLUS WILLIAMS: Yes.

THE COURT: Do you have any questions about your Alford plea before we proceed?

MARCELLUS WILLIAMS: I don't.

THE COURT: Is it your desire under the effect of the Alford plea to continue this proceeding and accept the agreement -- the consent order and the agreement contained within the consent order and judgment?

MARCELLUS WILLIAMS: Yes.

THE COURT: You heard the Prosecuting Attorney through Mr. Jacober, that you understand that there is no DNA evidence that affects your claim of innocence?

MARCELLUS WILLIAMS: Yes.

THE COURT: Knowing all that do you wish to continue?

MARCELLUS WILLIAMS: Yes.

THE COURT: Mr. Williams, how do you plead to Count II, the charge of first degree murder?

MR. CLARK: Your Honor, sorry. At this point we would object that this Court has no authority in its civil case, in the 547 case to

take this plea. And in the criminal case it has no authority or jurisdiction to unsettle the previous conviction. These are the same arguments we raised in chambers.

Just for the record, Your Honor, as to the civil case, State ex rel. Bailey vs. Sengheiser, 2024, Westlaw 358 8726, indicates this Court has no authority in this case to resentence anyone. That in the criminal case, State ex rel. Zahnd vs. Van Amburg, 533 S.W.3d 227 Mo. 2017, State ex rel. Fike vs. Johnson, 530 S.W.3d 508, and State ex rel. Poucher vs. Vincent, 258 S.W.3d 62. Those are all Missouri Supreme Court cases that indicate that when a criminal court sentences someone like Mr. Williams for the first time in 2001 it's exhausted of its jurisdiction and authority to act over the criminal judgment.

Here that jurisdictional authority has not been reinvigorated. This Court does not have the authority to first - These are wrapped together - to first to enter the consent judgment in this case and then to use that consent judgment to unravel the sentencing of the first case, of the criminal case.

As for whether the civil case, the

post-conviction remedy, State ex rel. Bailey vs. Fulton, 659 S.W.3d 909, says that 547 actions are civil remedies in the nature of post-conviction and that this Court has the obligation and responsibility to enforce the post-conviction rules, the mandatory post-conviction rules to enforce the finality and the orderly administration of justice.

Now I have a record about the consent judgment. I don't know if you want me to make it now or make it later.

THE COURT: You can.

MR. CLARK: All right, Your Honor.

THE COURT: This goes to your issue that I raised earlier as to whether or not you even have standing to object, correct?

MR. CLARK: Well both. I think, Your Honor, we'd like to make a record about the DNA evidence and to make a record about who the parties are, which I think is the standing question. So with the Court's indulgence...

THE COURT: You may proceed.

MR. CLARK: As to the party question, civil cases are litigated by the parties in interest. No matter how they're captioned, no

matter how they're titled, no matter what the parties think they are, they are governed by the parties in interest, who has an interest in the case. And here it's clear who has an interest in the case; Marcellus Williams and the State of Missouri.

Now in enacting 547.031 the legislature gave the Prosecuting Attorney the authority to the representational capacity of Marcellus Williams to raise claims as he saw fit. It does not give him the authority to raise that claim and then concede it on the other side. 547 does not allow that. And in fact in the case of State vs. Planned Parenthood of Kansas, 66 S.W.3d 16, it says for one attorney to give instruction to both sides of litigation as to the claims and the remedies in the case may ensure a predictable outcome but it will not ensure a just outcome. And the Supreme Court said, to put it bluntly, the Attorney General there but here the Prosecuting Attorney, must choose a side regarding the legality of the contracts there - Here Marcellus Williams' conviction - and act consistently with that position in the Courts.

So here the Prosecuting Attorney cannot raise a claim on behalf of Marcellus Williams and

then put its prosecutor hat on and concede the claim. He's on both sides of the V at that point. So it is our position that the 547 action the parties are Marcellus Williams represented by the Prosecuting Attorney, not as his friend, not as, you know, his attorney, but he's been given representational capacity. Like I told you in chambers, under Randall Aluminum, that used to occur in employment discrimination cases.

Now the question is who is the judgment against. The State of Missouri. It has to be. Because this Court could not vacate a conviction if it wasn't -- or vacate the conviction if the judgment wasn't entered against the State. And here the Prosecuting Attorney can't represent both sides of the V. So that falls to the Attorney General. So whether this Court can enter a consent judgment or not, it can't under 547.031 both on authority here and jurisdiction and authority in the criminal case.

Now as for the DNA evidence, just to be clear about what happened in this case, what's been marked as Respondent's Exhibit FF is a supplemental DNA case report from BODE Technology dated August 19, 2024. And in that report provided by

Mr. Williams' counsel BODE was asked to consider an analysis of Short Tandem Repeat loci on the Y chromosome - Y-STR - for two individuals, Keith Larner, the individual who prosecuted this case, and Edward Magee, the chief investigator at the time. And they returned that, those standards with the information, and when I believe the parties compared that BODE Technology report to the reports of Fienup from the Special Master report and from Dr. Rudin, which was the Prosecuting Attorney's witness both in this action and Marcellus Williams' witness in other actions. When he compared there, Dr. Fienup, 15 of 15 loci are Edward Magee, the chief investigator. And when you compare it to Dr. Rudin's it's even worse; 21.

So what happened here is the Prosecuting Attorney made an allegation about the DNA evidence. They made an allegation that the DNA evidence exonerated or may exonerate Marcellus Williams. After investigating that they found out that the DNA on the knife swab is consistent with Edward Magee. And rather than do the right thing and dismiss the case they asked this Court to do something by consent that it can't do by consent and couldn't do after a hearing.

As the Missouri Supreme Court said in its opinion on the motion to recall the mandate -- or recall the warrant filed by Mr. Williams, it said this Court is equally aware prosecutor's motion is based on claims this Court previously rejected in Williams' unsuccessful direct appeal, unsuccessful Rule 29.15 motion for post-conviction relief, and its unsuccessful petitions for writ of habeas corpus. Moreover, there is no allegation of additional DNA testing conducted since the Master oversaw DNA testing and this Court denied Williams' habeas petitions.

What happened here is that the Prosecuting Attorney's raised claims have been denied many times, again and again and again. And they raised a DNA claim that upon further investigation didn't pan out, and rather than dismiss it because it didn't exonerate Mr. Williams they asked this Court to do it by consent. It can't. And it violates Article 5, Section 2 of the Missouri Constitution which makes the Supreme Court the Supreme Court of Missouri. That court has denied these claims many times.

And on that, Your Honor, we'd ask both that the consent judgment not be entered and that

Mr. Williams not be resentenced because this Court lacks authority in the civil case, authority and jurisdiction - I'm sorry - authority in the civil case, authority and jurisdiction in the criminal case, and the actions of this Court violate Article 5, Section 2 of Missouri's constitution.

THE COURT: Thank you, Mr. Clark. You're not suggesting the Court upon a hearing and obviously by stipulation of counsel couldn't make a finding that there may be error in the original trial?

MR. CLARK: Yes, well, the Court could by stipulation find an error. Well, not by stipulation of two parties on the same side of the V.

THE COURT: Okay. Thank you. Any response?

MS. HATHAWAY: State of Missouri would take issue with the characterization that we do not represent the interest of the State of Missouri in this matter.

I would also suggest to the Court that the consent order has the effect of reopening the original criminal case. So for purposes of the record the Court might want to at least -- or note

that. And when we proceed with the plea the State of Missouri is prepared to make a factual basis for the plea as would, you know, happen normally in a plea.

THE COURT: So it's my understanding that, and pursuant to the consent judgment, you are asking me to make findings that the Prosecuting Attorney concedes that constitutional errors did occur in the original trial that undermine confidence in the original judgment?

MS. HATHAWAY: Yes, Your Honor.

THE COURT: The Court also finds, following discussions between representatives of the victim's family both with the Prosecuting Attorney's Office and the Attorney General's Office regarding this consent judgment, the Court held a telephonic conference in chambers with that representative on August 21, 2024, wherein the representation expressed to the Court the family's desire that the death penalty not be carried out in this case, as well as the family's desire for finality.

The Court having been informed that Mr. Williams acknowledges, understands, and agrees that being resentenced pursuant to this judgment he

voluntarily waives the right to appeal or collaterally attack the judgment sentencing him following the entry of this judgment except on grounds of newly discovered evidence or changes in the law made retroactive to the cases on collateral review.

The Court further finds that the State of Missouri through the St. Louis County Prosecuting Attorney and Mr. Williams are the proper parties to this negotiated settlement of this matter pursuant to Section 547.031, noting your objection for the record. The Court finds the consent judgment is a proper remedy in this case.

The Court further finds in accordance with Section 547.031(2) the Attorney General has been given notice of the motion to vacate previously filed and enters their appearance and has participated in all proceedings to date, including providing its objections to the consent order and judgment.

The Court has taken judicial notice of the entire consents of its files and notes that the Attorney General filed a very well written and argued motion to dismiss which the Court took with this case.

The Court, after taking judicial notice of the motion to vacate the evidence presented in the original trial, direct appeal, and post-conviction proceedings, including all state or federal habeas actions, finds the consent order and judgment is supported by the record.

The Court further finds that other pending matters or motions before the Court in this proceeding are hereby denied.

The Court will defer sentencing of Mr. Williams until 8:30 a.m. tomorrow so we can hear from the victim's family.

Any additional record need to be made?

MR. CLARK: For the record, Your Honor, as discussed in your chambers, I request at this time a stay of the consent judgment. The Attorney General demonstrated all four database factors that a stay is necessary and needed; namely, that the likelihood of success on any appeal or writ is high and that this Court should issue a stay.

THE COURT: The Court will grant your request. Obviously the dilemma the Court has been under since the inception of this matter being assigned to me is the timing of all of this. So that's why I'll grant your stay. And I hope this

is expedited by the Supreme Court.

It's also this Court's opinion that the Supreme Court should have original jurisdiction on all these matters. But of course that's not what the statute says. Subject to anything further?

MS. HATHAWAY: Your Honor, was it Your Honor's intention that Mr. Williams plead guilty to murder in the first degree?

THE COURT: It is.

MS. HATHAWAY: Do you believe there needs to be an additional record made more like a standard plea of guilty since the original conviction and sentence has been vacated?

THE COURT: Well I think in order to make the record clear and Mr. Williams' rights are protected I believe that he's already indicated to the Court that he does plead guilty.

MS. HATHAWAY: Your Honor, some of the other lawyers are mentioning that we think it could have been interrupted by an objection.

THE COURT: Oh.

MS. HATHAWAY: Maybe just to make the record extra clear.

MS. HURLA: Your Honor, if I may, I believe also in addition to what the Attorney

General is arguing, at this moment in this proceeding, in the civil proceeding the Court is vacating the conviction, but I believe we may then have to end this proceeding and call up the original criminal case in order to take a plea.

THE COURT: That's my understanding.

MS. HURLA: So we are not currently in the criminal case so the plea would have to be taken.

THE COURT: In that case, that's correct.

MR. CLARK: Just procedurally, Your Honor - I'm sorry - you granted the stay. The effect of granting the stay would mean that the Court cannot take up the plea because the civil consent judgment doesn't take effect under the stay, unless that's not the intent of the stay.

THE COURT: That's not the intent of the stay.

MR. CLARK: Okay. Just so the record is clear, the stay is denied as to resentencing and conviction?

THE COURT: Correct. So I guess with that said, I guess you'll present to me tomorrow the criminal file so that I can resentence and take

the plea? Or you want to do that now?

MS. HATHAWAY: I think what we envisioned is we would do the guilty plea today and defer sentencing until tomorrow.

THE COURT: All right.

MS. HURLA: Your Honor, I do just want to clarify that we been hearing the words guilty plea but this is an Alford plea, a no contest plea, and that is what Mr. Williams has agreed to.

THE COURT: Right. Let me pull that up.

In Cause 99CR-5297 - Again I'll remind you, Mr. Williams, you're under oath - how do you plead to the charge of first degree murder under North Carolina vs. Alford.

MARCELLUS WILLIAMS: No contest.

THE COURT: Anything further?

MR. CLARK: Your Honor, we've switched case numbers here. The Attorney General would just reassert its prior objection in full. I won't restate it, but the prior objection in the civil case and stipulate this Court has no jurisdiction or authority in the criminal case.

THE COURT: I appreciate that, Mr. Clark. We'll go ahead and do sentencing first

thing in the morning after I hear from the victim. At that time I'll also do my examination under Rule 24.035.

MS. HATHAWAY: Thank you, Your Honor.

THE COURT: Anything further from anyone?

MR. CLARK: Your Honor, just to make the record clear, I would ask that Exhibit FF be admitted in these proceedings.

THE COURT: Any objection?

MS. HATHAWAY: No, Your Honor.

THE COURT: Exhibit FF will be received. Any objection to I guess Exhibit 1 being received, which is the consent?

MR. CLARK: Other than the objection we raised, no.

THE COURT: Thank you. That will also be received. That will conclude the record. Anything further? Thank you. Court will be in recess until tomorrow morning at 8:30.

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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 21st 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 pages contain a true and accurate reproduction of the proceedings had that day.

I further certify that this transcript contains pages 1 through 30 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
(314) 615-8070

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

United States Court of Appeals
For the Eighth Circuit

No. 24-2907

Marcellus S. Williams,

Appellant,

v.

David Vandergriff,

Appellee.

Appeal from United States District Court
for the Eastern District of Missouri - St. Louis

Filed: September 21, 2024

Before COLLOTON, Chief Judge, SHEPHERD and KELLY, Circuit Judges.

ORDER

Appellant Williams's application for a certificate of appealability has been considered by the court and is denied. Williams has not shown that jurists of reason could disagree with the district court's conclusion that his motion under Federal Rule of Civil Procedure 60(b) was an unauthorized successive habeas application or that the issues presented are adequate to deserve encouragement to proceed further.

A Rule 60(b) motion advances a "claim" that was presented in a prior habeas application, and thus constitutes a successive application, if it "present[s] new evidence in support of a claim already litigated" or "attacks the federal court's previous resolution of a claim on the merits." *Gonzalez v. Crosby*, 545 U.S. 524, 531-32 (2005). In his Rule 60(b) motion, Williams presented new evidence in support of a claim under *Batson v. Kentucky*, 476 U.S. 79 (1986), that was already litigated in 2010, and he attacked the district court's previous resolution of that claim on the merits. Williams maintains that the district court's ruling in 2010 denying his *Batson* claim did not resolve the claim on the merits because the district court applied 28 U.S.C. § 2254(d) and the deference required by the statute. That argument is contrary to *Gonzalez*, where the Supreme Court explained that "resolution of a claim on the merits" refers to "a determination that there exist or do not exist grounds entitling a petitioner to habeas corpus relief under 28 U.S.C. §§ 2254(a) and (d)." 545 U.S. at 532 & n.4; *see Ward v. Norris*, 577 F.3d 925, 933 (8th Cir. 2009).

The appeal is dismissed. *See United States v. Lambros*, 404 F.3d 1034, 1036-37 (8th Cir. 2005). The motion for stay of execution is denied. The State's motion to dismiss is dismissed as moot.

Any petition for rehearing must be filed by 12:00 noon on September 22, 2024. If a petition is filed, then a response is ordered and must be filed by 5:00 p.m. on September 22, 2024.

KELLY, Circuit Judge, concurring.

On the narrow issue before us, I agree that neither a certificate of appealability nor a stay is warranted. Williams' requests do not satisfy the stringent standards required for this type of relief, and I concur in the court's judgment. However, I write separately because the concerns surrounding this case are not limited to the issues

presented here. Rather, they are much broader in scope and call into question the fundamental fairness of Williams' proceedings.

Starting with the issue raised in the requests for a certificate of appealability and a stay, Williams' allegation—a violation of *Batson v. Kentucky*, 476 U.S. 79 (1986)—raises the prospect that racial bias infected his trial from the start. Williams cites to August 2024 testimony from the original prosecuting attorney as evidence that race was a factor in striking at least one Black juror. This comes just a few months after the St. Louis County Prosecuting Attorney's Office filed a motion, pursuant to section 547.031 of the Missouri code,[1] to vacate judgment in Williams' case based in part on the assertion that there was "clear and convincing evidence" that the original prosecution team purposely and unconstitutionally excluded other potential Black jurors as well. As the Supreme Court has expressly stated, "[d]iscrimination on the basis of race, odious in all aspects, is especially pernicious in the administration of justice." *Buck v. Davis*, 580 U.S. 100, 124 (2017) (quoting *Rose v. Mitchell*, 443 U.S. 545, 555 (1979)). And "[r]elying on race to impose a criminal sanction 'poisons public confidence' in the judicial process." *Id.* (quoting *Davis v. Ayala*, 576 U.S. 257, 285 (2015)). The fact that both St. Louis County and Williams have raised this issue in more than one proceeding tells us it is a matter that—but-for the procedural bar—warrants further and careful examination. *See Buck*, 580 U.S. at 124; *see also Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 864 (1988) ("We must continuously bear in mind that 'to perform its high function in the best way justice must satisfy the appearance of justice.'" (citations omitted) (quoting *In re Murchison*, 349 U.S. 133, 136 (1955)).

[1]Pursuant to this recently enacted statute, a prosecuting or circuit attorney "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." Mo. Ann. Stat. § 547.031.1 (West 2024). The prosecuting attorney or circuit attorney has the "right to file and maintain an appeal of the denial" of such a motion, and "[t]he attorney general may file a motion to intervene." *Id.* § 547.031.4.

According to the parties, the evidence in this case also looks different today than it did at the time of trial. Williams was not arrested until a year after the murder, when the only two witnesses to place Williams at the scene of the crime came forward. St. Louis County has pointed to recently discovered evidence that undermines the reliability of these witnesses, as well as to additional DNA testing results on the physical evidence. It asserts that this new evidence "casts inexorable doubt" on Williams' convictions and sentence and has represented that it is in the process of investigating "an alternative perpetrator in this matter."

As to a motion for stay,[2] we look to, among other things, any delay in seeking the requested relief. *See Hill v. McDonough*, 547 U.S. 573, 584 (2006) ("A court considering a stay must also apply 'a strong equitable presumption against the grant of a stay where a claim could have been brought at such a time as to allow consideration of the merits without requiring entry of a stay.'" (quoting *Nelson v. Campbell*, 541 U.S. 637, 650 (2004))). The request here comes late. The Missouri Attorney General blames Williams for the delay; and Williams counters that the Attorney General "engaged in dilatory tactics," at least as it relates to his section 547.031 litigation. But both parties have been involved in a complicated array of state and federal motions, petitions, and appeals. In a procedurally complex case such as this one, it would be difficult to conclude that delay is a reason to deny a stay here.

Nor does the threat of harm necessarily support denying a stay. It is true that we must "be sensitive to the State's strong interest in enforcing its criminal judgments without undue interference from the federal courts." *Hill*, 547 U.S. at 584. Here, however, the harm to the State's interest in less clear. As noted, in January 2024, St. Louis County filed a motion to vacate Williams' convictions and death sentence.

[2]The court denies Williams' motion for a stay because it denies his request for a certificate of appealability, but the considerations necessary to support a stay provide context for the proceedings in Williams' case.

When that motion was denied, St. Louis County and Marcellus Williams reached an agreement whereby Williams would enter an *Alford* plea to one count of first-degree murder and receive a sentence of life imprisonment without parole. According to the record, it is the victim's "family's desire that the death penalty not be carried out." The Attorney General then successfully challenged the parties' agreement. These circumstances do not portray a unified State interest. The threat of irreparable harm to Williams, in contrast, is "necessarily present." *See Wainwright v. Booker*, 473 U.S. 935, 935 n.1 (1985) (Powell, J., concurring) ("The [] requirement [] that irreparable harm will result if a stay is not granted [] is necessarily present in capital cases."). The harshest punishment available in our criminal justice system is at stake here. *Gregg v. Georgia*, 428 U.S. 227, 230 (1976) (Brennan, J., dissenting) ("Death is [] an unusually severe punishment, unusual in its pain, in its finality, and in its enormity[.]"). And I am not convinced that proceeding forthwith properly accounts for the real threat of irreparable harm.

I agree that we are foreclosed from granting Williams the relief he seeks in this court. While I remain deeply troubled by many aspects of the proceedings that have taken place thus far, there is nothing about our ruling today that rules out other potential avenues of relief for Marcellus Williams.

I reluctantly concur.

Order Entered at the Direction of the Court:
Acting Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Maureen W. Gornik

SUPREME COURT OF MISSOURI
en banc

PROSECUTING ATTORNEY, 21ST JUDICIAL CIRCUIT, EX REL. MARCELLUS WILLIAMS, Movant/Petitioner, v. STATE OF MISSOURI, Respondent. and STATE OF MISSOURI, Respondent, v. MARCELLUS WILLIAMS, Appellant.	)	*Opinion issued September 23, 2024* No. SC100764 No. SC83934

APPEAL FROM THE CIRCUIT COURT OF ST. LOUIS COUNTY
The Honorable Bruce F. Hilton, Judge

MOTION FOR STAY OF EXECUTION

Introduction

Despite nearly a quarter century of litigation in both state and federal courts, there is no credible evidence of actual innocence or any showing of a constitutional error undermining confidence in the original judgment. Like every other court that reviewed

every appeal and every habeas petition, the circuit court in this case correctly concluded there is no basis for setting aside Marcellus Williams' conviction and sentence. By proposing findings of fact and conclusions of law abandoning the claim of actual innocence and not appealing the circuit court's merits determination, the St. Louis County Prosecuting Attorney ("Prosecutor") irrefutably demonstrates what every court has found – that there is no clear and convincing evidence that Williams is actually innocent.

Prosecutor appeals a civil judgment overruling his motion to set aside or vacate Williams' first-degree murder conviction and death sentence pursuant to § 547.031, RSMo Supp. 2021. The circuit court's judgment is supported by substantial evidence, is not against the weight of the evidence, and does not erroneously declare or apply the law. The judgment is affirmed.

An appeal from a judgment denying relief under § 547.031 does not automatically stay an execution date. *See State ex rel. Bailey v. Sengheiser*, 692 S.W.3d 20, 24 (Mo. banc 2024) (holding this Court's rules do not provide for an automatic stay of a judgment disposing of a § 547.031 motion). Williams filed a motion to stay his September 24, 2024, execution date during the pendency of this appeal from the judgment overruling Prosecutor's § 547.031 motion.[1] Further, as explained in this Court's opinion, because this Court rejects this appeal on the merits, the motion for stay of execution is overruled as moot. Because Prosecutor failed to demonstrate by clear and convincing evidence Williams' actual innocence or constitutional error at the original criminal trial that

[1] Prosecutor's appeal from the judgment overruling the § 547.031 motion is denominated as SC100764. The direct appeal from the criminal judgment convicting Williams of first-degree murder and sentencing him to death is denominated as SC83934. Both pending matters are resolved by this opinion, and all other pending motions are overruled.

undermines the confidence in the judgment of the original criminal trial, the judgment overruling Prosecutor's § 547.031 motion is affirmed.

Facts and Procedural History

In 1998, Williams fatally stabbed Victim while burglarizing her home. Victim's purse and her husband's laptop were found in Williams' vehicle. Further, Williams' girlfriend and cellmate both testified Williams confessed to them. Following a jury trial in 2001, the circuit court entered a judgment finding Williams guilty of multiple criminal offenses, including first-degree murder, and sentencing him to death. During the ensuing 23 years, this Court and the federal courts have repeatedly rejected Williams' claims of actual innocence and constitutional error at trial.

Prosecutor filed the underlying § 547.031 motion in January 2024, following Williams' direct appeal, postconviction relief appeal, multiple unsuccessful habeas petitions, and the Governor's denial of executive clemency. Section 547.031.1 authorizes a prosecuting or circuit attorney to file a motion to vacate or set aside the judgment "at any time" upon information "the convicted person may be innocent or may have been erroneously convicted." The statute further provides the circuit court "shall issue findings of fact and conclusions of law on all issues presented" and shall "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." § 547.031.2.3.

Prosecutor initially raised four claims: (1) Williams may be actually innocent of first-degree murder; (2) Williams' trial counsel was ineffective for failing to impeach the State's witnesses; (3) Williams' trial counsel was ineffective for failing to provide different

mitigation evidence regarding Williams' background; and (4) the State exercised peremptory strikes of two venirepersons on the basis of race in violation of *Batson v. Kentucky*, 476 U.S. 79 (1986).

On August 19, 2024, Prosecutor and Williams received the results of further DNA testing on the murder weapon. The report indicated that DNA material found on the knife was consistent with the DNA profiles of the original prosecutor from Williams' original criminal trial and a criminal investigator. Prosecutor and Williams provided the report to the attorney general the next day.

The attorney general filed a motion in limine, which opposed Prosecutor trying any claims by consent that were not included in the original motion. In response, Prosecutor filed a motion for leave to amend the motion to vacate or set aside to advance two additional claims: (1) that the State had engaged in bad-faith destruction of fingerprints and DNA evidence on the handle of the knife in violation of *Arizona v. Youngblood*, 488 U.S. 51 (1988); and (2) that the circuit court at Williams' original criminal trial violated Williams' due process right when it overruled his motion for a continuance.

The circuit court sustained Prosecutor's recent motion to amend the pleadings to allege a claim of bad-faith destruction of fingerprint and DNA evidence found on the murder weapon, but it overruled Prosecutor's motion to amend the pleadings regarding Williams' due process claim.

Following an evidentiary hearing, the circuit court issued a 24-page judgment with extensive findings of fact and conclusions of law rejecting all of Prosecutor's claims and

overruling the motion to set aside or vacate Williams convictions and sentence.[2] Prosecutor filed a notice of appeal from this civil judgment directly with this Court, claiming this Court has exclusive appellate jurisdiction because "[t]he punishment imposed is death."

The circuit court's judgment, and Prosecutor's appeal, arise from a litigation history as lengthy as it is thorough. In 2003, this Court affirmed the judgment on direct appeal, specifically rejecting Williams' claim the prosecutor exercised discriminatory peremptory strikes on two venirepersons in violation of *Batson*. *State v. Williams*, 97 S.W.3d 462, 471-72 (Mo. banc 2003). This previously adjudicated *Batson* issue is essentially the same as the fourth claim in Prosecutor's § 547.031 motion.

In 2005, this Court affirmed the denial of postconviction relief. *Williams v. State*, 168 S.W.3d 433 (Mo. banc 2005). This Court specifically rejected Williams' claim his trial counsel was ineffective for failing to adequately investigate and impeach two witnesses whose testimony tied Williams to Victim's murder. *Id*. at 440-43. This Court also specifically rejected Williams' claim his trial counsel was ineffective for failing to provide adequate mitigation evidence during the penalty phase. *Id*. at 443. These previously adjudicated claims essentially are the same as the second and third claims in Prosecutor's § 547.031 motion.

Following the resolution of his direct appeal and his postconviction relief appeal, 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.

[2] The circuit court's judgment is attached as an Appendix to this opinion.

Williams v. Roper, 695 F.3d 825, 839 (8th Cir. 2012).[3] The United States Supreme Court denied Williams' petition for a writ of certiorari. *Williams v. Steele*, 571 U.S. 839 (2013). This Court then set a January 28, 2015, execution date.

On January 9, 2015, Williams filed a petition for a writ of habeas corpus in this Court. Out of an abundance of caution, this Court vacated the execution date, ordered additional DNA testing and habeas proceedings, and appointed a special master to ensure complete DNA testing. 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 then set an August 22, 2017, execution date.

On August 14, 2017, Williams filed another petition for a writ of habeas corpus. This Court denied relief, as did the United States Supreme Court. *Williams v. Larkins*, 583 U.S. 902 (2017). As the circuit court found, the net result of Williams' habeas litigation is that this Court has heard and rejected all of his actual innocence claims based on DNA evidence, except for his most recent claim that "touch DNA" testing matches an unknown person and excluded Williams as the source.

On August 22, 2017, the Governor issued an executive order appointing a board of inquiry pursuant to § 552.070 and staying Williams' execution pending an executive

[3] On September 17, 2024, Williams filed a motion pursuant to Federal Rule of Civil Procedure 60(b)(6) to set aside that judgment in the district court, asking the court to relitigate his *Batson* claim based on the prosecutor's testimony at the § 547.031 hearing. *Williams v. Vandergriff*, Case No. 4:05-CV-1474-RWS (E.D. Mo. Sept. 19, 2024). The district court had already rejected Williams' identical *Batson* claim on the merits in the original judgment. *Id.* at *3. The district court rejected the motion as successive habeas petition. *Id.* at *3-4. The district court further noted that Williams "mischaracteriz[ed]" the prosecutor's testimony at the § 547.031 hearing. *Id.* at *5. Williams filed an application for a certificate of appealability, which the court of appeals denied. *Williams v. Vandergriff*, No. 24-2907 (8th Cir. Sept. 21, 2024).

clemency decision. In 2023, the Governor rescinded the prior executive order, dissolved the board of inquiry, and removed "any legal impediments to the lawful execution of Marcellus Williams" arising from the prior executive order.

Williams filed a declaratory judgment action challenging the Governor's rescission of the executive order appointing a board of inquiry and staying the execution. *State ex rel. Parson v. Walker*, 690 S.W.3d 477, 482 (Mo. banc 2024). In June 2024, this 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. This Court held § 552.070, the statute authorizing the board of inquiry process, does not limit the Governor's constitutional clemency power. *Id*. at 489. This Court further held Williams alleged no cognizable liberty or life interest restraining the Governor's absolute discretion to grant or deny clemency. *Id*. This Court then set a September 24, 2024, execution date.

The only claims in Prosecutor's §547.031 motion not previously adjudicated on appeal or in a habeas proceeding are his claims that recent touch DNA testing demonstrates Williams' actual innocence and that trial prosecutors and investigators engaged in the bad-faith destruction of DNA and fingerprint evidence found on the murder weapon. The circuit court rejected the actual innocence claim in part because Prosecutor's own expert testified the DNA on the murder weapon was consistent with and likely from a St. Louis County investigator and the trial prosecutor rather than an alternate perpetrator. In his proposed findings of fact, conclusions of law, and judgment, Prosecutor expressly acknowledged this new DNA report and testimony further undermined any claim of actual innocence. In fact, Prosecutor's proposed judgment filed with the circuit court after the

close of all the evidence expressly requested a finding that, "As a result of additional DNA testing indicating that [the trial prosecutor's] and [an investigator's] DNA profiles were consistent with the DNA left on the knife, [Prosecutor] abandoned the claim of actual innocence. Thus, this Court need not address it here." Furthermore, the circuit court also found, as a factual matter, the credible evidence demonstrated the killer wore gloves. The circuit court rejected the fingerprint claims because a police detective credibly testified the fingerprint lifts were of insufficient quality to be used for comparison and were destroyed because they were "useless." This appeal follows.

Jurisdiction

This Court has "exclusive appellate jurisdiction … in all cases where the punishment imposed is death." Mo. Const. art. V, § 3. But, more importantly, a § 547.031 motion "'is a new civil action' representing a 'collateral attack on the conviction and sentence.'" *State ex rel. Bailey v. Fulton*, 659 S.W.3d 909, 914 (Mo. banc 2023) (quoting *State v. Johnson*, 654 S.W.3d 883, 891 n. 10 (Mo. banc 2022)). This civil judgment overruling Prosecutor's § 547.031 motion does not impose a death sentence. It simply rejects a collateral, civil attack on the original 2001 judgment finding Williams guilty of first-degree murder and sentencing him to death. Prosecutor's appeal from the circuit court's judgment overruling the § 547.031 motion does not invoke this Court's exclusive appellate jurisdiction under article V, § 3 of the Missouri Constitution.

Because Prosecutor's appeal does not invoke this Court's article V, § 3 jurisdiction, this Court issued an order to show cause why the appeal should not be dismissed or transferred to the court of appeals. In response, Prosecutor requested this Court assume jurisdiction in light of the important issues presented. Article V, § 10 of the Missouri

Constitution authorizes this Court to transfer an appeal and assume jurisdiction "before or after opinion because of the general interest or importance of a question involved in the case[.]"[4] This Court accepted and has jurisdiction because of the general interest or importance of the questions involved in the case.[5]

Prosecutor's Appeal Does Not Automatically Stay Execution of the Judgment

Before turning to the merits, this Court must address Williams' motion asserting Prosecutor's pending appeal requires this Court to stay the September 24, 2024, execution date. It does not. As established, Prosecutor's § 547.031 motion is a civil action to collaterally attack the final judgment entered against Williams in 2001. *See Fulton*, 659 S.W.3d at 914. As this Court made clear in *Sengheiser*, 692 S.W.3d at 24, no rule of civil procedure provides for automatic stay of a judgment disposing of a § 547.031 motion.[6] *Sengheiser* further explained, because there is no authority "providing for an automatic stay of a judgment entered pursuant to section 547.031[,]" the judgment in that case was

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[4] *See also* Rule 83.01(a) (providing this Court "on its own motion or on application of a party may transfer to this Court from the court of appeals a case in which there has been no disposition … for any of the reasons stated in Rule 83.02[,]" which authorizes transfer "because of the general interest or importance of a question involved").

[5] The attorney general correctly points out this Court would have to waive its rule regarding the time limits pertaining to what constitutes a final judgment for this Court to have jurisdiction at this early date. Because neither Prosecutor nor Williams have or would have been able to make a showing sufficient for a stay of execution, the Court's only alternatives were (1) waive its own rule to allow for such appellate review **or** (2) carry out the execution with the appeal pending. In the interest of justice, this Court chose the former.

[6] In *Sengheiser*, this Court explained:

> Rule 81.09 broadly applies to civil proceedings and provides for the circumstances in which an appeal stays the execution of a civil judgment. Subdivision (a)(1) provides an appeal shall stay the execution of judgment in certain enumerated cases, not relevant here. Subdivision (a)(2) provides for the filing of a supersedeas bond to stay the execution of a judgment. Rule 92 governs actions seeking injunctive relief, and Rules 92.03 and 92.04 provide that either a circuit court or an appellate court *may* stay injunctive relief pending appeal.

692 S.W.3d at 24-25 (footnotes omitted).

"immediately operative and enforceable." *Id.* at 24-25. Consequently, the "circuit court's judgment [was] not automatically stayed during the pendency of the attorney general's appeal[.]" *Id.* at 25.

The same is true here. The circuit court's judgment overruling Prosecutor's § 547.031 motion leaves Williams' murder conviction and death sentence undisturbed, and Prosecutor's pending appeal does not automatically stay the scheduled execution.[7]

Further, the provisions of Rule 30 governing procedure in death penalty cases do not change this result. Rule 30.15(a) provides, "A sentence of death shall be stayed if an appeal is taken." But this mandatory stay provision plainly refers to the direct appeal from the judgment imposing a sentence of death, not an appeal from a judgment denying a collateral attack.

Similarly, Rule 30.30(b) provides:

> 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.

Rule 30.30(b) imposes an automatic stay of the "date of execution set pursuant to Rule 30.30(a)[.]" Rule 30.30(a) provides:

> The initial date of execution shall be set following the review of the sentence required by statute and the affirmance thereof. If no timely motion for rehearing is filed, the execution shall be set not fewer than 95 days from the date of the opinion affirming the sentence. If a timely motion for rehearing is filed, the execution shall be set not fewer than 95 days from the date the motion is overruled.

[7] This Court, out of an abundance of caution in the show cause order regarding jurisdiction, notified the parties so they would not operate under the mistaken assumption an automatic stay of execution was in effect.

Because Rule 30.30(a) governs the "initial date of execution … following the review of the sentence required by statute[,]" the automatic stay imposed by Rule 30.30(b) is triggered by a "timely appeal" from the judgment imposing a death sentence, not an appeal from a judgment overruling a civil § 547.031 motion collaterally attacking the judgment decades after it was imposed.

More importantly, Rule 30.30(b) provides: "[N]o 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." The plain language of Rule 30.30(b) confirms Prosecutor's appeal of the judgment overruling the § 547.031 motion does not stay the execution date automatically.[8] This Court now turns to the merits of Prosecutor's appeal.

Standard of Review

The circuit court conducted an evidentiary hearing on Prosecutor's civil § 547.031 motion collaterally attacking the final criminal judgment. When reviewing a civil judgment entered after a bench trial, this Court will affirm the judgment "unless there is no substantial evidence to support it, unless it is against the weight of the evidence, unless it erroneously declares the law, or unless it erroneously applies the law." *Lollar v. Lollar*, 609 S.W.3d 41, 45-46 (Mo. banc 2020) (quoting *Murphy v. Carron*, 536 S.W.2d 30, 32 (Mo. banc 1976). If the issue is one of law, this Court's review is *de novo* to determine if the circuit court misapplied the law. *Murphy*, 536 S.W.2d at 31.

[8] The fact Prosecutor's appeal does not automatically stay enforcement of the underlying criminal judgment and scheduled execution date further justified this Court granting transfer prior to opinion by the court of appeals due to the general interest and importance of the issues in this appeal.

"If the issue to be decided is one of fact, this Court determines whether the judgment is supported by substantial evidence and whether the judgment is against the weight of the evidence." *JAS Apartments, Inc. v. Naji*, 354 S.W.3d 175, 182 (Mo. banc 2011) (citing *Murphy*, 536 S.W.2d at 31). This Court views "the evidence in the light most favorable to the circuit court's judgment and defer[s] to the circuit court's credibility determinations." *Ivie v. Smith*, 439 S.W.3d 189, 200 (Mo. banc 2014). "Appellate courts should exercise the power to set aside a decree or judgment on the ground that it is 'against the weight of the evidence' with caution and with a firm belief that the decree of judgment is wrong." *Murphy*, 536 S.W.2d at 32.

In an action brought by a prosecuting attorney pursuant to § 547.031, the prosecuting attorney must prove his or her allegations by clear and convincing evidence. § 547.031.3. "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." *State ex rel. Amrine v. Roper*, 102 S.W.3d 541, 548 (Mo. banc 2003) (internal quotations omitted).

The circuit court is free to believe any, all, or none of the evidence presented at trial. *J.A.R. v. D.G.R.*, 426 S.W.3d 624, 627 (Mo. banc 2014). The circuit court in this case made extensive findings of fact and conclusions of law. In addition, Rule 73.01(c) provides: "All fact issues upon which no specific findings are made shall be considered as having been found in accordance with the result reached."[9]

[9] The circuit court cited this rule in the judgment and specifically found all credibility issues in accordance with the judgment.

Abandoned Claim of Actual Innocence Has No Merit

Prosecutor originally claimed Williams was actually innocent. Prosecutor makes no claim on appeal that Williams is actually innocent. After the evidentiary hearing, Prosecutor submitted proposed findings of fact, conclusions of law, and judgment to the circuit court stating there is no clear and convincing evidence of actual innocence. Prosecutor's proposed judgment states, "As a result of additional DNA testing indicating that [the trial prosecutor's] and [an investigator's] DNA profiles were consistent with the DNA left on the knife, [Prosecutor] abandoned the claim of actual innocence. Thus, this Court need not address it here." Despite Prosecutor's concession earlier this month that there is no clear and convincing evidence of actual innocence, the circuit court, nonetheless, fully adjudicated Prosecutor's claim on the merits. As the circuit court found, this Court had repeatedly rejected Williams' DNA-based actual innocence claims in prior habeas proceedings. The circuit court found the only new evidence relevant to Prosecutor's actual innocence claim are recently developed DNA profiles developed by Prosecutor's own expert, which are consistent with the DNA on the murder weapon of the trial prosecutor and a police investigator. This evidence undermined Prosecutor's claim of actual innocence and fully supports the circuit court's finding that this evidence neither shows the existence of an alternate perpetrator nor excludes Williams as the murderer.[10]

[10] Prosecutor no longer claims the evidence shows trial counsel violated Williams' Sixth Amendment right to effective assistance of counsel and that this constitutional error undermines confidence in the judgment. Specifically, Prosecutor had previously claimed trial counsel was ineffective for failing to impeach two witnesses and for failing to provide different mitigation evidence during the penalty phase. These claims of ineffective assistance of trial counsel were rejected nearly 20 years ago. *Williams,* 168 S.W.3d 433. The circuit court's judgment denying relief on these claims is supported by substantial evidence, is not against the weight of the

Batson Claim

Prosecutor claims the circuit court erred in failing to make statutorily required findings of fact pursuant to § 547.031. In particular, Prosecutor alleges the circuit court did not address Prosecutor's *Batson* claim because the circuit court did not make a factual finding about the trial prosecutor's § 547.031 evidentiary hearing testimony regarding the peremptory strike of Venireperson No. 64. But Prosecutor did not file a Rule 78.07(c) motion to amend the judgment. Because this claim of error concerns the form and language of the circuit court's judgment, Prosecutor waived this claim of error.

Rule 78.07(c) provides, "In all cases, allegations of error relating to the form or language of the judgment, including the failure to make statutorily required findings, must be raised in a motion to amend the judgment in order to be preserved for appellate review." "The party appealing must object at the trial level to the failure to make a finding so the circuit court has an opportunity to correct the error." *T.T.G. v. K.S.G.*, 530 S.W.3d 489, 495 n.4 (Mo. banc 2017). In the absence of a Rule 78.07(c) motion, "the failure to make such required findings is waived." *Id.* "[I]t would not be appropriate to criticize the circuit court for failing to make any required finding." *J.A.R.*, 426 S.W.3d at 626 n.5.

In any event, Prosecutor tacitly admits the circuit court issued findings of facts and conclusions on law on his *Batson* claim but now claims these findings were not sufficient because the circuit court did not make any explicit credibility findings or any findings about the trial prosecutor's testimony. But the circuit court specifically found the trial prosecutor

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evidence, and is not based on an erroneous declaration or application of the law. *See Lollar*, 609 S.W.3d at 45-46.

"denied systematically striking potential Black jurors." This Court presumes the circuit court found the trial prosecutor's testimony to be credible. *See* Rule 73.01(c).

Further, the circuit court correctly found this Court already rejected on direct appeal this *Batson* challenge to the same venirepersons. *Williams*, 97 S.W.3d at 471-72. There, this Court rejected Williams' argument "that striking the venireperson based upon physical appearance was inherently race-based because both he and Williams are African–American." *Id.*

Prosecutor did not present any new evidence on this claim. Now, Prosecutor attempts to twist the original prosecutor's race-neutral explanation into a showing of purposeful discrimination. Prosecutor claims the original prosecutor testified at the evidentiary hearing that "part of the reason" the original prosecutor struck that potential juror was because of race. But that argument mischaracterizes that portion of the trial prosecutor's testimony. He stated that "part of the reason" he struck that particular venireperson was because the venireperson looked similar, had the same glasses, and the same "piercing eyes" as Williams.[11] When Prosecutor specifically asked if part of the reason he struck juror number 64 was because he was black, the trial prosecutor replied: "No. Absolutely not." The circuit court was entitled to give that testimony weight, and this Court presumes it did based on the judgment entered. And again, this Court already rejected this argument with nearly identical testimony from the original prosecutor on direct appeal. *See Williams*, 97 S.W.3d at 471-72.

[11] As previously stated, the federal district court also found Williams "mischaracteriz[ed]" the prosecutor's testimony at the § 547.031 hearing. *Williams v. Vandergriff*, Case No. 4:05-CV-1474-RWS (E.D. Mo. Sep. 19, 2024).

In sum, Prosecutor's *Batson* argument cherry-picks the record, ignores the circuit court's factual findings, and offers no persuasive justifications for reversing this Court's previous merits determination of this claim. The circuit court's judgment denying relief of the *Batson* claim is supported by substantial evidence, is not against the weight of the evidence, and is not based on an erroneous declaration or application of the law. *See Lollar*, 609 S.W.3d at 45-46.

Spoliation of Evidence Claim

Prosecutor argues the circuit court erred in denying Williams' *Youngblood* claim because Prosecutor presented "clear and convincing evidence" that "proved the Prosecuting Attorney's Office engaged in the destruction of potentially favorable evidence in bad faith violation of Williams' due process rights." Generally, "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. Fisher*, 540 U.S. 544, 547 (2004). "In *Youngblood*, by contrast, [the Supreme 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 subjected to tests, the results of which might have exonerated the defendant.'" *Id.* (quoting *Youngblood*, 488 U.S. at 57). In that scenario, the Supreme 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 (emphasis omitted) (quoting *Youngblood*, 488 U.S. at 58).

Common law spoliation of evidence occurs "when there is intentional destruction of evidence, indicating fraud and a desire to suppress the truth." *Brown v. Hamid*, 856

S.W.2d 51, 56-57 (Mo. banc 1993). "A party who intentionally destroys or significantly alters evidence is subject to an adverse evidentiary inference under the spoliation of evidence doctrine." *State ex rel. Zobel v. Burrell,* 167 S.W.3d 688, 691 (Mo. banc 2005). The circuit court's decision to not apply the spoliation doctrine is reviewed for abuse of discretion. *Brown*, 856 S.W.2d at 57.

Prosecutor argues the circuit court erred by not applying the spoliation doctrine because the DNA evidence was allegedly contaminated by the trial prosecutor, who handled the murder weapon without gloves. A threshold problem with Prosecutor's spoliation argument is that it glosses over the necessity of showing intentional mishandling of evidence aimed at suppressing the truth. While the trial prosecutor testified he handled the murder weapon without gloves in 2001, he did so only after the laboratory found there was nothing of evidentiary value on the knife. The trial prosecutor further testified he had been informed that "no one wanted to do any further testing on the knife." The evidence showed that, in the 23 years since trial, the understanding of and the ability to develop touch DNA profiles from trace amounts has advanced significantly. Thus, as the circuit court found, the trial prosecutor credibly testified that, as of Williams' trial in 2001, he had never heard of touch DNA. Williams' argument incorrectly imputes the current understanding of DNA transmission back to 2001 in order to equate the necessary, intentional act of handling the murder weapon with intentional spoliation. The fact the protocols for handling evidence in 2001 differs from protocols today shows only that the scientific understanding of DNA transmission has evolved over the last 23 years. On this record, the circuit court did not abuse its discretion by declining to find spoliation of evidence.

Further, Prosecutor's DNA spoliation argument also fails because it hinges on the factually untenable proposition that the uncontaminated DNA evidence would have shown it belonged to an alternate perpetrator. As the circuit court found, the actual evidence clearly refuted Prosecutor's claim the DNA on the murder weapon belonged to the actual killer, not Williams. *Prosecutor's own expert* testified the only touch DNA on the murder weapon likely came from a St. Louis County investigator. But more importantly for purposes of this claim, the circuit court found the trial prosecutor credibly testified the killer wore gloves, thus severely undermining any argument that the lack of a conclusive DNA match to Williams undermines confidence in the judgment. In sum, none of Prosecutor's evidence regarding the supposed mishandling of evidence suggests an alternate perpetrator or excludes Williams as the killer. Instead, it only supports the unremarkable fact that the original prosecutor and an investigator handled the murder weapon during the course of the investigation and trial.

Williams also argues the circuit court erred by not applying the spoliation doctrine to discarded fingerprint evidence. The record refutes this claim. A police detective testified he received fingerprint lifts that were of insufficient quality to be used for comparison and that they were destroyed because they were "useless." As with the DNA evidence, there was no evidence of bad-faith spoliation. The circuit court did not abuse its discretion by declining to apply the spoliation doctrine.

Williams also asserts there was evidence that the trial prosecutor's *voir dire* notes were destroyed intentionally, and that the circuit court, therefore, should have applied an adverse inference supporting Williams' *Batson* claim. The circuit court, however, expressly found the witness who testified at the evidentiary hearing regarding file retention

procedures credibly testified he had little recollection of file retention procedures during Williams' trial. The circuit court, therefore, concluded the testimony had little "probative value … as to any issue presently before this Court."

Finally, in his brief on appeal, Prosecutor now alleges the State suppressed certain evidentiary materials before trial—including an additional statement made by the jailhouse informant, the jailhouse informant's medical records, and Williams' Department of Corrections file—and this demonstrates a pattern of "animus or a conscious effort to suppress exculpatory evidence." Prosecutor did not include any of these claims in his amended § 547.031 motion. "This Court generally will not convict a lower court of error on an issue that was not put before it to decide." *Star v. Burgess*, 160 S.W.3d 376, 378 n.2 (Mo. banc 2005) (citing *Lincoln Credit Co. v. Peach*, 636 S.W.2d 31, 36 (Mo. banc 1982)). As such, the circuit court did not err in failing to address a claim that was not properly before it.

Weight Given to Current St. Louis County Prosecutor "Concessions"

Prosecutor now asks this Court to disregard all of the circuit court's findings of facts and conclusions of law because Prosecutor conceded "constitutional error" resulting from "mishandling the evidence" at Williams' trial. In other words, Prosecutor now alleges that he has conceded that his own claim is correct. Prosecutor filed his § 547.031 in support of Williams; he cannot also represent the party with the burden of proof and satisfy that burden by merely asserting his own claims are correct. This type of one-sided proceeding cannot be squared with § 547.031 or this Court's case law.

This Court has repeatedly rejected the State's attempts to concede questions of law. "[P]arties cannot stipulate to legal issues, and this Court is not bound by the [State's]

confession of error." *State v. Hardin*, 429 S.W.3d 417, 421 n.4 (Mo. banc 2014); *see also State v. Clark*, 490 S.W.3d 704, 716 n.4 (Mo. banc 2016) (Wilson, J., concurring); *State v. Biddle*, 599 S.W.2d 182, 186-88 (Mo. banc 1980); *State v. Tipton*, 271 S.W. 55, 61 (Mo. 1925). A prosecutor's confession of error is "entitled to and given great weight", but does not "relieve [a] Court of the performance of the judicial function." *Sibron v. New York*, 392 U.S. 40, 58 (1968) (quoting *Young v. United States*, 315 U.S. 257, 258 (1942)).[12]

Section 547.031.4 reinforces the conclusion that Prosecutor cannot concede constitutional error. That provision grants the attorney general the right to participate in this appeal. "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." § 547.031(4). And Prosecutor's notice of appeal listed the respondent as "State of Missouri." "The attorney general shall appear on behalf of the state in the court of appeals and in the supreme court and have the

[12] Prosecutor asserts *Glossip v. Oklahoma*, No. 22-7466 (2024), which is currently pending before the United States Supreme Court, involves an identical issue. *Glossip* is readily distinguishable. In *Glossip*, the Oklahoma attorney general conceded that constitutional errors undermined the integrity of the petitioner's trial. Brief of Respondent Oklahoma in Support at 1, *Glossip v. Oklahoma*, No. 22-7466 (July 5, 2023). Oklahoma framed the question presented to the United States Supreme Court as: "Whether due process of law allows a capital conviction to stand where a thorough and independent review of previously unavailable information compels the **State's chief law enforcement officer** to confess error and conclude that a capital conviction was secured through potentially outcome-determinative prosecutorial misconduct." *Id.* at i (emphasis added). But here, the attorney general—Missouri's chief law enforcement officer—has defended and continues to defend Williams' original criminal conviction as permitted by statute. Further, Glossip abandoned his claim that Oklahoma's confession of constitutional error was dispositive in his merits brief. Brief of Petitioner, *Glossip v. Oklahoma*, No. 22-7466 (Apr. 23, 2024). Glossip now argues his case presents a straightforward case of prosecutorial misconduct. *Id.* at 21. Similarly, Oklahoma does not argue its confession of error is dispositive or violates the Due Process Clause of the Fourteenth Amendment. Brief of Respondent in Support of Petitioner, *Glossip v. Oklahoma,* No. 22-7466 (Apr. 23, 2024). Indeed, Oklahoma admits its confession of error is entitled only to "great weight." *Id.* at 32.

management of and represent the state in all appeals to which the state is a party other than misdemeanors and those cases in which the name of the state is used as nominal plaintiff in the trial court." § 27.050.

Prosecutor alleges the circuit court did not even consider Prosecutor's concession of constitutional error, but that claim is refuted by the record. The circuit court's judgment stated that the circuit court reviewed the parties' proposed findings of fact and conclusions of law. Prosecutor and Williams' joint proposed judgment stated that Prosecutor "acknowledged that the prior administration destroyed [DNA] evidence in bad faith in violation of Williams's constitutional rights." Additionally, the circuit court's judgment discussed Prosecutor and Williams' voided August 21, 2024, consent judgment.[13] In that agreement, Prosecutor again attempted to concede his own claims.

The circuit court's judgment denying relief on Prosecutor's spoliation claim is supported by substantial evidence, is not against the weight of the evidence, and is not based on an erroneous declaration or application of the law.

Due Process Claim

Finally, Prosecutor asserts that the circuit court violated Williams' right to due process because Prosecutor and Williams were not given adequate time to prepare for the § 547.031 evidentiary hearing and that Prosecutor and Williams were not given adequate time to prosecute Prosecutor's § 547.031 motion at that hearing.[14] But Prosecutor and

[13] In that agreement, Prosecutor made his first attempt to concede his own claims. This Court entered a permanent writ ordering the circuit court to set aside that agreement and hold the hearing required by statute. *State ex rel. Bailey v. Hilton*, SC100707 (Mo. banc Aug. 21, 2024).

[14] This Court assumes, without deciding, that Williams has some due process rights once Prosecutor filed the motion pursuant to § 547.031. Prosecutor's point relied on only raises a claim relating to the length of the hearing, not the timing of the hearing. The argument section of this

Williams never presented these distinct constitutional claims to the circuit court and, therefore, waived appellate review.

"It is firmly established that a constitutional question must be presented at the earliest possible moment 'that good pleading and orderly procedure will admit under the circumstances of the given case, otherwise it will be waived.'" *Callier v. Dir. of Revenue, State*, 780 S.W.2d 639, 641 (Mo. banc 1989) (quoting *Meadowbrook Country Club v. Davis*, 384 S.W.2d 611, 612 (Mo. 1964)). To properly raise a constitutional question, one must:

> (1) raise the constitutional question at the first available opportunity; (2) designate specifically the constitutional provision claimed to have been violated, such as by explicit reference to the article and section or by quotation of the provision itself; (3) state the facts showing the violation; and (4) preserve the constitutional question throughout for appellate review.

United C.O.D. v. State, 150 S.W.3d 311, 313 (Mo. banc 2004).

Prosecutor and Williams did not present to the circuit court any claim of error relating to the time or manner of the evidentiary hearing. Prosecutor claims these arguments were preserved by its motion for leave to amend his pleading. That motion provided:

> The statute permits the Prosecuting Attorney to file a motion pursuant to Section 547.031 "at any time." Unfortunately, the Attorney General's refusal to seek a stay of Williams' execution date (which is currently less than one month away) pending the resolution of this matter leaves the Prosecuting Attorney with no option but to amend its motion in the interest of justice. If the Attorney General would not object to a stay of Williams' execution date, the Prosecuting Attorney would consent to re-opening discovery for further

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point, however, presents both claims of error. "Claims of error raised in the argument portion of a brief that are not raised in a point relied on are not preserved for our review." *Hale v. Burlington N. & Santa Fe Railway Co.*, 638 S.W.3d 49, 61 (Mo. App. 2021) (internal quotation omitted). This Court, nonetheless, elects to exercise its discretion and review both claims of error. *See Griffitts v. Old Republic Ins. Co.*, 550 S.W.3d 474, 478 (Mo. banc 2018).

> fact-finding and investigation of these amended claims. However, the Prosecuting Attorney and Marcellus Williams have not been afforded the privilege of time.
> Due to the compressed timeline created by the Attorney General and the Missouri Supreme Court, and in the interest of justice, this Court should permit the Prosecuting Attorney to amend its motion to conform to the evidence.

Nothing in this pleading arguing why Prosecutor should have been allowed to amend his pleadings—which the circuit court permitted—preserves the argument made in the appellant's brief. Prosecutor did not object to the time or manner of the hearing anywhere in the motion. Further, the motion never mentioned any specific constitutional provisions the circuit court allegedly violated. Prosecutor's constitutional claims of error are unpreserved. Nevertheless, the circuit court provided for meaningful participation by both Prosecutor and Williams. Section 547.031 does not dictate the time or manner of the hearing. The statute merely requires the circuit court to hold a hearing, provide notice to the attorney general of that hearing, and then issue findings of facts and conclusions of law "on all issues presented." § 547.031.2.[15]

Prosecutor's own conduct at the evidentiary hearing undercuts his claim that he was not given enough time to present evidence at the evidentiary hearing. Neither Prosecutor, who was given two hours, nor Williams, was given two hours, used their full allotted time. In fact, a substantial amount of the combined time allotted was not used. And even then,

[15] Additionally, Prosecutor's motion for leave expressly told the circuit court that Prosecutor was not seeking a continuance. Rather, the motion for leave only asked for leave to file an amended motion because of the circumstances surrounding the impending hearing. A party cannot complain on appeal when he or she receives all the relief requested, and that party may not assert the circuit court failed to do more than requested. *McConnell v. Stallings*, 955 S.W.2d 590, 594 (Mo. App. 1997).

Prosecutor does not allege on appeal what additional evidence he would have presented to the circuit court.

The circuit court did not err, plainly or otherwise, as to setting the date and the duration of the Prosecutor's § 547.031 evidentiary hearing in this case.

Conclusion

The circuit court's judgment is affirmed and the motion to stay execution is overruled as moot. No Rule 84.17 motions shall be filed in this matter, and the clerk of the Court is instructed to issue the mandate immediately.[16]

_____
Zel M. Fischer, Judge

All concur.

[16] Attorney General's motion regarding Prosecutor's failure to properly redact is overruled as moot.

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).

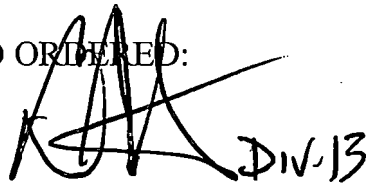
113. Every claim of error Williams has asserted on direct appeal, post-conviction review, and habeas review has been rejected by Missouri's courts.

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:



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

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