

IN THE SUPREME COURT OF MISSOURI

KEITH CARNES,	)	
	)	
Petitioner,	)	
	)	
v.	)	No. SC98736
	)	21PH-CV00030
MICHELE BUCKNER	)	
	)	
Respondent	)	

**Suggestions in Opposition to Petitioner’s Motion for Immediate Conditional Release or in the Alternative to Eliminate or Accelerate Procedural Deadlines**

**I. Introduction**

Petitioner asks for immediate conditional release from confinement, or the elimination of objections to the master’s report, or shortening the time for such objections. He alleges that he meets the test for gateway actual innocence and can show cause and prejudice to permit review of his allegedly meritorious claim under *Brady v. Maryland*, 373 U.S. 83 (1963), which alleges non-disclosure of a police report. Motion at 1–2. Petitioner alleges that he should be released because he might catch the Omicron Covid-19 variation while in prison. Motion at 2. Petitioner also alleges that he does not intend to file exceptions to the Master’s Report. Motion at 3.

Respondent does intend to file objections to the Master’s Report. The standards for gateway innocence and cause and actual prejudice excusing the

default of the alleged *Brady* claim have not been met here. And the claim itself is without merit. Those are legal issues for this Court to consider in the normal cause of review, after objections to the Master’s Report, and after briefing and argument.

## **II. Petitioner does not meet the standard for gateway actual innocence.**

In Missouri, the manifest injustice exception, which permits review of defaulted claims in habeas corpus, in the absence of cause and prejudice excusing the default is, as in federal court, gateway actual innocence. *Duvall v. Purkett*, 15 F.3d 745, 747 n.3 (8th Cir.1994) (holding that the Missouri manifest injustice exception resembles the federal actual innocence standard); *Clay v. Dormire*, 37 S.W.3d 214, 217–218 (Mo. 2000) (holding that the Missouri manifest injustice exception permitting review of defaulted claims in habeas corpus is “essentially the same” as the federal gateway actual innocence standard set out in *Schlup v. Delo*, 513 U.S. 298 (1995)).

Missouri’s gateway actual innocence procedural default exception parallels the federal exception under *Schlup v. Delo*, 513 U.S. 298 (1995). See *Brown v. State*, 66 S.W.3d 721, 726 (Mo. 2002), *Clay v. Dormire*, 37 S.W.3d 214, 217 (Mo. 2000), and *Nixon v. Jaynes*, 63 S.W.3d 210, 216 (Mo. 2001). Under this exception, the offender must show that a constitutional violation has probably resulted in the conviction of one who is actually innocent. *Clay*, 37

S.W.3d at 217 (citing *Schlup*, 513 U.S. at 327). And the offender must show that it is more likely than not that no reasonable juror would have convicted him in light of “new evidence of innocence.” *Id.* (quoting *Schlup*, 513 U.S. at 298). Without new reliable evidence establishing innocence, even a meritorious constitutional claim is insufficient to establish a miscarriage of justice. *Id.* (quoting *Schlup*, 513 U.S. at 315–16).

The burden of proof under the *Schlup* standard is substantial.

To be credible, such a claim requires petitioner to support his allegations of constitutional error with new reliable evidence—whether it be exculpatory scientific evidence, trustworthy eyewitness accounts or critical physical evidence—that was not presented at trial. Because such new evidence is obviously unavailable in the vast majority of cases, claims of actual innocence are rarely successful.

*Schlup*, 513 U.S. at 324; see also, *State ex rel. Barton*, 597 S.W.3d 661 at 664 n.4 (noting the threshold requirement for *new evidence that was not available at trial*).

Some courts have adopted a due diligence requirement. “Evidence is ‘new’ only if it was ‘not available at trial and could not have been discovered earlier through the exercise of due diligence.” *State ex rel. Nixon v. Sheffield*, 272 S.W.3d 277, 284–85 (Mo. App. S.D. 2008) (quoting *Amrine v. Bowersox*, 238 F.3d 1023, 1029 (8th Cir. 2001)); *State ex rel. Clemons v. Larkins*, 475 S.W.3d

60 (Mo. 2015) (adopting the master’s finding that the due diligence requirement applies to new evidence in actual innocence). In the case of witness statements, even a previously unseen witness affidavit is not “newly discovered evidence” if the factual basis for it existed prior to the habeas litigation. *Meadows v. Delo*, 99 F.3d 280, 282 (8th Cir. 1996). Other Courts have not found that due diligence is required for evidence to be new. The distinction does not matter in this case, because even if one does not use a due diligence requirement the petitioner does not meet the standard for showing gateway innocence in this case by proving by new reliable evidence that no reasonable juror would now vote to convict.

In habeas litigation, if a habeas petitioner adduces evidence that creates conflicting evidence about the crime, the new conflicting evidence is insufficient to show probable innocence under *Schlup*. “The existence of such a ‘swearing match’ would not establish that no reasonable juror would have credited the testimony of the prosecution witness and found [that petitioner] guilty beyond a reasonable doubt.” *Moore-El v. Luebbbers*, 446 F.3d 890, 902–03 (8th Cir. 2006); *Johnson v. Norris*, 170 F.3d 816, 818–19 (8th Cir. 1999) (reversing grant of habeas relief, finding that much of the evidence—witnesses’ memory loss and potentially conflicting testimony of witnesses—is not new and reliable); *Armstrong v. Kemna*, 590 F.3d 592 (8th Cir. 2010) (in the context of

an ineffective assistance of counsel raised as a habeas claim, finding no prejudice in failing to call witnesses who were related to the defendant and “patently impeachable”); *Gomez v. Jaimet*, 350 F.3d 673, 679–681 (7th Cir. 2003) (holding that petitioner’s own statements and statements of petitioner’s co-defendants were insufficient to warrant applying the extremely rare actual innocence exception); *Bosley v. Cain*, 409 F.3d 657, 665 (5th Cir. 2005) (rejecting a claim where new evidence consisted only of testimony from four relatives of petitioner); *State ex rel. Barton*, 597 S.W.3d at 664 (competing expert testimony, even if believed, did not show actual innocence). Merely putting a different spin on evidence that was presented to the jury does not satisfy the *Schlup* requirement. *Bannister v. Delo*, 100 F.3d 610, 618 (8th Cir. 1996). “Recanting testimony is inherently unreliable and treated with suspicion.” *State v. Manley*, 414 S.W.3d 561, 566 (Mo. App. E.D 2013) quoting *State v. Culkin*, 791 S.W. 2d 803, 814 (Mo. App. E,D. 1990). “It is the right and duty of the court to deny a new trial where it is not satisfied that such testimony is true.” *Culkin*, at 814 citing *State v. Galardo*, 654 S.W. 2d 360, 362 (Mo. App. S.D. 1983). Recantation by a prosecution witness does not necessarily entitle a defendant to a new trial, as recantations are especially unreliable where the recantation involves a confession of perjury. *State v. Harris*, 428 S.W. 2d 497, 501 (Mo. Div. 1 1968). In order to grant relief a court must review the recantation in light of all the circumstances of the case, need

not accept recanting affidavits at face value, and should not grant relief if it is not satisfied that the new testimony is true. *Id.*

Here, at trial two eyewitnesses identified Petitioner as a shooter, and the prior inconsistent testimony of a third eye witness, who had claimed at trial to have forgotten what she saw, was also used as evidence of guilt. Both the trial eyewitnesses later, recanted but one has repeatedly testified that she recanted because of threats of violence and actual violence used against her, and that her trial testimony was accurate. No plausible reason has been offered why she would stand by her trial testimony despite the threats if it was not true. New evidence of guilt includes testimony from a witness that Petitioner provided him with discovery in the case, through a man who was a professional killer, and directed to locate the witnesses and either bribe them or turn their locations over to the killer, so that he could kill them. A new eyewitness, who provides a contradictory version of the killing to the trial testimony, testified at the habeas hearing that it was still light outside when he saw the murder, but the murder occurred shortly before 9 p.m. in October, long after dark. Similarly, the ballistics expert who testified at the habeas hearing that the asphalt was fragmented by his test firing of a weapon nine inches from ballistic gel on the asphalt, did not plausibly explain why he chose that distance despite testimony by the medical examiner that the shot to the head was fired from at

least two and one half feet away. One cannot not say that no reasonable juror would vote to convict in light of the new evidence. Respondent sets out some of the evidence that demonstrates this below.

**Wendy Lockett Cahill**

Wendy Cahill, who was previously known as Wendy Lockett (Lockett), provided a statement to police (Pet. Ex. 4), testified at Petitioner's jury trial (Resp. Ex. 33, Deposition Ex. 12), testified at a deposition (Pet. Ex. 79), testified at Petitioner's bench trial (Resp. Ex. 4, pages 183-238), signed an affidavit (Pet. Ex. 3), testified at a deposition for the habeas case (Resp. Ex. 30), and also testified at this Court's evidentiary hearing. (Evid. hearing, page 203).

Lockett told police on October 14, 2003, that she was standing on the corner of 29<sup>th</sup> and Olive streets with Felicia and Red. She observed a confrontation between the victim, Larry White (Victim), and a male known to her as "Tre," with Tre telling Victim he couldn't sell drugs on the corner. She said that Tre went into the house and came back out with a gun, the kind that has a banana clip, and started shooting at Victim. Victim ran up 29<sup>th</sup> street, up the alley, and across the church parking lot, with Tre chasing him. Victim collapsed at the Fish Town parking lot. After Victim collapsed, Tre walked up and shot Victim in the head. She indicated that Tre had a patch on his eye. She stated that two individuals were with Tre, Fuzzy and Debo. She was

shown photos and identified Debo as Damon Rhodes and Fuzzy as Mitchell Powell. She indicated that all of them had guns. She identified Petitioner as Tre in a photo line-up provided by police with 6 black males with similar features. (Pet. Ex. 4). Lockett initialed the back of the photograph in which she identified Petitioner. None of the individuals in the lineup were wearing eyepatches. (Resp. Ex. 4, page 286, line 12 – page 287, line 13).

At the jury trial that ended in a mistrial, Lockett testified that she had previous convictions for stealing, sale of drugs, and possession, as well as a pending tampering charge. (Resp. Ex. 33, Deposition Ex. 12, page 6, line 9 – page 7, line 7). She testified that she knew Petitioner as “Tre” because she bought drugs from him, and had known him for about four years. She noted that he always wore an eye patch. (*Id.*, page 7, line 8 – page 8, line 11). On the night of the murder, she was on the corner of 29<sup>th</sup> near the buildings between Olive and Wabash with Felicia Jones, Red, and Victim. (*Id.*, page 11, line 5). She had smoked crack in the early morning of October 6<sup>th</sup> that she had purchased from Petitioner, and was selling drugs around 8:30pm-9:00pm. She heard Petitioner and Victim argue about people not being able to stand on the corner and sell dope. (*Id.*, page 12, line 2 – page 13, line 11). Red left as the argument escalated. (*Id.*, page 23, line 14 – page 24, line 2). Lockett saw Petitioner on the porch balcony with another person and when they came out,



she saw both had guns. She recognized Petitioner by the eyepatch he wore. Shots were fired from the porch. (*Id.* page 13, line 6 – page 14, line 13). Lockett, Jones, and Victim all dropped to the ground, and then Victim took off running up 29<sup>th</sup> Street. Lockett and Jones took off running, too, up Olive, to get behind the buildings. They ran behind the buildings, through the alley, past the house, and came out at the church parking lot. Lockett saw Victim run through the lot, across Prospect and collapse at Fish Town. She saw Petitioner, wearing black clothing, cross Prospect Street coming up on Victim. Someone was behind him, dressed in dark blue or black, but Lockett didn't know who it was. She saw Petitioner raise his gun and say something to the effect of "Die, motherfucker. You're going to die." She then saw Petitioner shoot Victim. (*Id.*, page 14, line 15 – page 17, line 22). Lockett described the gun Petitioner used as having a handle or clip. She had no doubt in her mind that it was Petitioner that shot Victim. (*Id.*, page 20, lines 1–10) She then fled, and several days later police found her and she went to the station to give her statement. (*Id.*, page 17, line 23 – page 19, line 12)

At a deposition on October 28, 2005, Lockett testified at length about her arrests, convictions and sentences. She testified that prior to the murder, she purchased drugs from Mitchell Powell, Reggie, and Petitioner and had known them all for about almost a year. At the time of the murder, she had a different

source, and was selling drugs on 29<sup>th</sup> between Wabash and Olive. Felicia, Red, and Victim were on the street that night. (Pet. Ex. 79, page 30, lines 11–12). Lockett said she saw Petitioner on the porch of 2404, the middle building. (*Id.*, page 31, line 9 – page 33, line 11). Someone else was standing with him. Petitioner was dressed in a black sweat suit with a hoody. (*Id.* Page 33, lines 20–24). The other person had on dark colored clothing, but no hoody (*Id.*, page 33, line 25 – page 34, line 5). Petitioner was wearing a patch on his eye. (*Id.*, page 34, lines 6–18). Red was trying to get high and Felicia was trying to pick up a date. (*Id.*, page 35, line 20 – page 36, line 10). Victim was talking to Lockett and selling drugs (*Id.*, page 36, lines 14–25). Petitioner told Victim he couldn't stand out there. Victim did not respond to Petitioner, and then Lockett heard two shots from the first floor porch, but did not see who fired the shots (*Id.*, page 37, line 16 – page 38, line 20). When Lockett looked at the porch, she saw people coming off the porch, but couldn't tell who they were. (*Id.*, page 38, line 23 – page 40, line 1). Lockett said she and Victim hit the ground, and isn't sure where Felicia or Red were. (*Id.*, page 40, lines 2–19). Lockett said she then took off running one way while Victim went another way. Lockett described her route as headed toward Prospect Street, running behind buildings, going through holes in the fence and between fences, crossing Wabash and an alley. Lockett testified that Victim ran up 29<sup>th</sup> Street toward Prospect. Lockett said she lost sight of Victim, but she saw him going through

the church parking lot. (*Id.*, page 41, line 1 – page 48, line 17). Lockett said she saw Victim cross Prospect Street (*Id.*, page 66, lines 2–8). Lockett said that when she got to the church, Victim was in the Fish Town parking lot, but no one was behind him. (*Id.*, page 49, lines 2–7). Two figures were crossing Prospect. (*Id.*, page 66, lines 6–8). Lockett said she then saw someone who must have come straight up 29<sup>th</sup> Street and not through the church lot by the corner and their backs were turned toward her. (*Id.*, page 49, lines 8–17). There were two people, and the one with a hoody had a gun. She couldn't tell if the other had a gun (*Id.*, page 51, line 16 – page 53, line 8). She said she heard words to the effect 'die mother fucker, you're going to die' and she recognized the voice. Police had never asked her if she recognized the voice, but she did. (*Id.*, page 49, line 24 – page 50, line 8). She said that person then fired the gun at Victim while he lay on the ground. When the shooter turned in her direction, Lockett said she could see it was Petitioner. (*Id.*, page 50, line 16 – page 51, 15). Lockett said she took off on foot to her sister's. (*Id.*, page 54, line 7 – page 56, line 23). She not only saw the patch and hoody, but also the shooter's facial features. (*Id.*, page 68, lines 3–20)

At the bench trial, Lockett testified that she had been convicted of selling and possessing drugs, tampering in the first degree, and was in the State's custody at the time of trial. She testified that she was both a user of drugs and

sold drugs at the time of Victim's murder, and was living with "Dollar Bill," also known as Felicia Jones. She initially stated that she had not used drugs on that particular day, but on cross-examination, she confirmed that she had smoked crack and marijuana in the early morning hours of the day of the murder. She testified that she had known Petitioner for several years and had purchased drugs from him. She testified that in all prior encounters with him, Petitioner had worn an eyepatch, and that no other drug dealer that she had interactions with wore an eyepatch. She said that on the day in question, she was in the area selling drugs. She identified Victim, Felicia, and Red as people that were present. She said that she and Victim were standing on the corner, and that Petitioner and another person were on the porch in the middle building on 29<sup>th</sup> Street. She stated Petitioner was dressed in all black, and the other was in dark colored clothing. She heard Petitioner yell to Victim about not being allowed to sell drugs there, and she recalled seeing his eyepatch. (Resp. Ex. 4, page 183–238).

Lockett stated that gunfire began from the direction of the porch while she was still standing on the corner. She heard two shots. Everyone initially hit the ground, then scattered and ran. She did not see who started the shooting. She headed down Olive Street to cut between houses to get behind the buildings. She stated that while there were fences, that there were gaps

in the fences that allowed people to get in and out, even when the fence was locked. When provided a photo from defense counsel, Lockett commented that the fence in the photo wasn't the same that it had been "all tore up" or forcibly opened on the night of the murder, and the photo depicted the fence as fixed. She indicated that photos of fences intact were not as they were on the night of the murder because "We specifically tore them down. Those are our escape routes." (*Id.*, page 218, line 15–17).

Lockett stated she came out at the alley, then kept going behind the houses until she got to the church parking lot near Prospect Street. She then again saw Victim running through the church parking lot, crossing the street, and saw him stumble in the Fish Town parking lot and fall down. Lockett saw two figures approach, one in a black outfit with a hood, and the other in dark clothing. She recognized that the black sweat suit was the same one she had seen Petitioner wearing. She saw one of the figures shoot the victim once as he lay on the ground. When the shooter turned around, she recognized the shooter as Petitioner, who was wearing his eyepatch. Even though she saw the shooter's face for a short amount of time, Lockett was positive it was Petitioner. She said that the gun she saw wasn't a long gun, it was similar to a pistol. She then ran to her sister's. Lockett was picked up by the police a couple of days later and she gave them a statement. (*Id.*)

In an affidavit signed by Lockett on December 3, 2014, she averred that she could not positively identify Petitioner as the person who shot the victim. The affidavit goes on to indicate that she was picked up by Officer Huth and taken to Prosecutor Amy McGowan's office. She further averred that at this meeting, she was intimidated into identifying Petitioner by McGowan with threats of incarceration. (Pet. Ex. 3).

In a deposition conducted on April 21, 2021, Lockett testified that an investigator working for Petitioner, Latahra Smith, "pursued me, harassed me, befriended me, and coerced me" into making the affidavit recanting, and that she has had to move and change jobs due to harassment "by Keith Carnes' people". (Resp. Ex. 30, page 7, lines 4–16) She went on to describe being hit by a car driven by "a part of Keith's crew" as well as being jumped and harassed by Petitioner's people, particularly given her family situation. (*Id.*, page 9, line 13 – page 10, line 3). Lockett said that she signed the recanting affidavit because she was in fear of her life and that McGowan did not intimidate or threaten her into testifying falsely. (*Id.*, page 11, lines 15–23). She mentioned fliers posted everywhere on 27<sup>th</sup> Street with her name, resulting in people contacting her and her husband, leading to harassment. (*Id.*, page 14, lines 1–16; page 16, lines 8–23).

Lockett testified at the evidentiary hearing on September 23, 2021. She confirmed that her statement to police and her trial testimony were accurate. (Evid. Hearing, page 204, line 15–page 205, line 2). Lockett confirmed that she had signed the “recanting” affidavit, but that she had done so only after a number of events. Lockett described being struck by a car shortly after she provided a statement to police about what she saw the night of the murder. She also described being jumped a couple of times by people who called her a snitch. She also described being approached by Petitioner’s cousin who offered a bribe. (*Id.*, page 205, line 8 – page 207, line 5). Lockett stated that Latahra Smith showed up at her residence one day, claiming to be doing surveys, and the two became friends. Lockett described seeing paperwork and confronting Smith about the real reason Smith had befriended her. She began to “pull away” from Smith after this encounter. (*Id.*, page 207, line 9 – page 208, line 8). Lockett went on to describe having to move and change jobs multiple times to avoid people associated with Petitioner. Lockett described fliers that kept popping up calling her a snitch and a liar and that these fliers frightened her. (*Id.*, page 208, line 9 – page 209, line 19). One of these fliers is admitted as an exhibit. (Resp. Ex. 17). She described fliers other than the one admitted as an exhibit as having her photo on them. (*Id.*, page 213, line 22 – page 214, line 4). Lockett denied being a confidential informant for Det. Huth and denied being the confidential informant that gave Huth information. (*Id.*, page 224, line 4 –

page 225, line 2). Lockett clarified that she was not afraid of Smith *per se*, but that she felt threatened by the fact Smith worked for Petitioner, who was someone she was afraid of. (*Id.*, page 233, lines 18–23). Lockett again stated that McGowan never tried to coerce her into lying. (*Id.*, page 238, lines 23–24).

### **Lorianne Morrow**

Lorianne Morrow (Morrow) provided a statement to police (Pet. Ex. 5), testified at Petitioner’s jury trial (Resp. Ex. 33, Deposition Ex. 8, pages 43–53) testified at Petitioner’s bench trial (Resp. Ex. 4, pages 104–157), signed an affidavit (Pet. Ex. 2), testified at a deposition (Resp. Ex. 28), and also testified at the evidentiary hearing (Evid. Hearing, page 35).

Morrow told police that she knew Petitioner as “Tre” and knew that he sold drugs from an apartment on 2404 E. 29<sup>th</sup> Street 1W. On the night of murder, Morrow saw Victim selling crack cocaine to people in a car at an intersection near the apartment. She further stated that she saw Petitioner come out of the apartment building and yell at Victim carrying a long black gun. Petitioner began chasing Victim through the alley, and that Petitioner fired three times at Victim. She stated they ran north up the alley, then east toward Prospect street. Morrow saw Victim collapse at Fish Town. She saw an individual known to her as “Kiki” running after Victim with Petitioner. “Kiki” also had a gun, but did not fire any shots. She stated that after Victim



collapsed, Petitioner rolled Victim over and shot him again, perhaps five times. Morrow indicated that she heard the shots at Fish Town and saw a flash. She heard a total of eight shots. She identified a picture provided by the detective as “Kiki,” a man named Gary D. Kitchen. When shown a photo line-up of six black males of similar depiction, she identified Petitioner as Tre, the individual she saw shoot the victim. She told police that Wendy Lockett, Lisa, Red (a black male), and Star were also present. (Pet. Ex. 5)

At the jury trial that ended in mistrial, Morrow testified that she knew Petitioner as a drug dealer called Tre that she had known for about a year, and he always wore an eyepatch. She testified that she bought drugs from him for other people, and that she used marijuana. In the evening of the murder, Morrow testified that she was walking up 29<sup>th</sup> Street and saw Victim selling drugs to people in a car. She then saw Petitioner yell at Victim that he can’t sell drugs there as it was Petitioner’s turf. Petitioner was standing on the porch of the middle building, left side. Petitioner jumped off the porch holding a gun and Victim began running. Morrow identified the gun he was holding as the one police had recovered, an assault rifle. Morrow testified that “Kiki,” Gary Kitchen, was out on the porch with a small gun, too, but stayed on the porch. As Petitioner chased Victim, he fired the gun he was carrying three times. Morrow testified that she both heard the shots and saw fire from the

bullet discharging. The Petitioner chased the victim down 29<sup>th</sup>, turning into the alleyway. Morrow continued on her way, seeking cover here and there, hearing gunshots in the alley, and eventually getting to the church, and behind some steps. She then saw Victim collapse at Fish Town and saw Petitioner turn Victim over and shoot him some more, including a shot in the head. Later, Morrow spoke with Victim's family who let the police know she wanted to talk to them. She testified that she went to the police station on October 12 to give a statement and identify the shooter in a lineup. (Resp. Ex. 33, Deposition Ex. 8, pages 43–53).

Morrow testified at the bench trial that she had known Petitioner as “Tre” and that she knew him to wear an eyepatch. At the time of the murder, Morrow said she made money by serving as a go-between in drug sales, including PCP, marijuana, and crack cocaine. She had purchased drugs from Petitioner on multiple occasions; each time, Petitioner was wearing an eye patch. No other person she bought drugs from or otherwise interacted with wore an eye patch. She used marijuana at the time, but had not used on the day of the murder. On that night, she was walking to a friend's and saw Victim standing on the corner talking to a car. Also in the area were Wendy, Star and Red. She saw Petitioner on the porch of the middle building, on the left, wearing a black hooded sweatshirt and his eyepatch. She witnessed Petitioner

stand on the ledge of the balcony porch and yell at Victim that he couldn't sell drugs on Petitioner's territory. She saw Petitioner go inside the building and come back out with an AK-47. She said no shots were fired from the porch. Petitioner and Kiki began chasing Victim down the street, shooting at Victim about three times. Kiki also had a gun, but it was smaller than Petitioner's. Kiki did not fire his gun. She testified that Victim began running through an alley behind the buildings, possibly heading to his grandma's house. Morrow continued down 29<sup>th</sup> Street. She saw Petitioner get on the front porch of 2846 Wabash Avenue and fire at the victim who continued to run down 29<sup>th</sup> Street. Kiki had stopped following Victim by the time Victim reached the field by the church parking lot. Morrow testified that she cut through the church parking lot looking for a place to hide. By this time, Victim had reached Fish Town. From her vantage point, she testified seeing Petitioner chase Victim all the way to Fish Town and saw him shoot Victim more, then rolled Victim over and shot Victim five times more. She knew this was Petitioner because she saw his eye patch. She was picked up by police after she spoke with Victim's family, and the family contacted police. During a thorough cross-examination, Morrow denied meeting with the prosecutor prior to trial, denied that anyone had shown her police reports related to the case, and denied that anyone told her shell casings were on the porch. She said that she knew shell casings were on

the porch because she saw Petitioner shoot from the porch. (Resp. Ex. 4, pages 104-157).

In an affidavit signed by Morrow on October 3, 2014, Morrow avers that two white police officers picked her up and took her to McGowan's office. The affidavit continued that the prosecutor had two books on her desk, and the prosecutor asked her to look through the books and see if she saw a picture of the murderer. The affidavit said she saw photos of different light skinned and dark skinned black men in the first book. The affidavit said that Morrow pointed to Reggie's picture, but the prosecutor opened up the other book and pointed to Petitioner's picture, indicating that was the shooter, saying everyone else picked out Petitioner, and Morrow should say the same. The affidavit said the prosecutor told her what to say and showed her pictures of shell casings and the victim's body. The affidavit said Morrow felt sick, having just gotten out of the hospital, so she went along with it so that she could leave. The affidavit said that Reggie was big on the streets, so she was worried that someone would know she pointed out his picture, and that was why she told the detectives at first that she only heard the shots. The affidavit stated that she saw Reggie, dressed in black clothing, by the lady's porch with a big gun. The affidavit added that Petitioner did not chase or shoot Victim, but instead stood on the porch of the middle building. According to the affidavit, right after

the shooting, Morrow moved to Olathe. The affidavit stated that right before the trial, McGowan sent police to pick Morrow up and they met again. At this meeting, the affidavit said McGowan told her she was leaving to go to Kansas and that another female prosecutor would be taking over and that Morrow was not to mention to the new prosecutor seeing the pictures or that McGowan told her where the shell casings were. The affidavit said that during the trial, Reggie was in the courtroom looking at her and stroked his hand against his throat. (Pet. Ex. 2).

The signatures on the police statement (Pet. Ex. 5) and the affidavit (Pet. Ex. 2) appear to be by the same hand, but the latter signature shows less precision, confirming Morrow's testimony regarding her health conditions.

In a telephonic deposition on April 21, 2021, Morrow testified that she suffers from a number of medical conditions that can cause cognitive impairment and that she was diagnosed with those issues before she signed her affidavit. Morrow stated that Petitioner was known to wear an eyepatch and that no other drug dealers in the area wore an eyepatch. Morrow stated that Latahra Smith contacted her during a period of time when Morrow was repeatedly hospitalized due to medical issues. Morrow said that she spoke to the police before she spoke with McGowan (Resp. Ex. 4, page 30, lines 1–12). Morrow also stated in the deposition that she testified truthfully at trial. (*Id.*,

page 31, lines 21–23). Morrow stated that Smith told her she had proof of Petitioner’s innocence, but that Smith did not share that proof with Morrow. (*Id.*, page 33, lines 2–10). Morrow testified that Smith told her she had talked to other people who told Smith that Reggie was the killer, and that information caused Morrow to reexamine her memory (*Id.*, page 34, line 1 – page 36, line 7). Morrow also said that she takes “too much medication to say I have a clear picture of what happened back then.” (*Id.*, page 36, lines 8–17).

Later in the deposition, Morrow testified that McGowan had two books on her desk with photographs and had Morrow look through them. When Morrow pointed at Reggie’s picture, McGowan pointed at Petitioner’s picture. (*Id.*, page 41, line 2 – page 42, line 17). Morrow testified that she “wasn’t the type to have a record, to be out there doing something stupid or crazy because that wasn’t me so.” (*Id.*, page 43, line 23–25). Morrow stated that she didn’t tell the new prosecutor, Parsons, about McGowan’s bad conduct because Morrow was pregnant. (*Id.*, page 46, line 16–21) She also stated that Reggie was present in the courtroom when she testified at trial and made a gesture with his finger across his neck. (*Id.*, page 47, line 22 – page 48, line 11). Morrow testified that she lied at trial. (*Id.*, page 48, line 20 – page 49, line 1). Morrow also stated that she had waited for Petitioner’s counsel to ask her how she knew where the shell casing was. (*Id.*, page 49, lines 10–17).

At the evidentiary hearing Morrow testified that she was taken to McGowan's office and shown a display of six photos, commonly referred to as a "line-up." Contained in this group of six were the photos of three individuals known to her: Petitioner Keith Carnes, Gary Kitchen, and Reginald Thomas. Morrow testified that she indicated Thomas was the shooter and that Prosecutor McGowan redirected her to the photo of Petitioner. Morrow also indicated that she was harassed by McGowan when she did not appear for trial. In her previous affidavit and deposition, Morrow has testified that the photos were contained within "books," but that at the evidentiary hearing, Morrow testified that there were only six photos in a line-up and that the lineup contained photos of Petitioner, Reggie, and Kiki. (Evid. hearing, pages 35–102).

### **Felicia Jones**

Felicia Jones (Jones) provided a statement to police (Resp. Ex. 13, pages 28, 93–97), testified at Petitioner's jury trial (Resp. Ex. 33, Deposition Ex. 2, pages 20–29), testified at Petitioner's bench trial (Resp. Ex. 4, page 48–54), and testified at a deposition (Resp. Ex. 27).

Jones told police that on the night of Victim's murder, she was in the vicinity of 29<sup>th</sup> and Wabash. She saw a boy on the corner. She heard Reggie say "Make him disappear," and while she didn't know who he was talking about, thought maybe he was talking about the boy. Shortly afterward, they

told the girls to leave. After she left, in front of the apartment building, she saw “Puffy,” identified as Mitchell Powell, standing out front wearing a brown hooded sweatshirt jacket. She also saw Tre go to his car and pulled out two guns. She followed a truck up the street, and then heard gunshots. She looked back and saw Tre on the porch shooting the dope dealer that was selling on the corner. The dealer was running towards Fish Town. She saw Puffy standing in front of the apartment shooting at the same kid. She got in the car and left with the truck. She identified Petitioner as Tre from a photo line-up. She identified Gary Kitchen as someone inside the apartment building who did not come outside. She identified Reggie as Reginald Thomas. (Resp. Ex. 13, pages 28, 93–97).

At the jury trial that resulted in a mistrial, Jones testified that she was unable to recall what occurred the night of the murder. Her previous statement to police was admitted as a prior inconsistent statement. (Resp. Ex 33, Deposition Ex. 3, pages 30–32). Likewise, at the subsequent bench trial, Jones again could not recall what happened and her previous statement to the police was admitted as a prior inconsistent statement. (Resp. Ex. 4, pages 159–183).

Jones testified via a telephonic deposition on April 21, 2021. Jones testified that she has suffered a brain injury that resulted in a coma. She



testified that she cannot remember the night of Larry White's murder or any details. (Resp. Ex. 27).

### **Robert Blehm**

Robert Blehm was the lead investigator and authored police reports, (Resp. 12 and 13), testified at the jury trial, testified at the bench trial, (Resp. Ex. 4, page 252), was interviewed by the Attorney General's Office, (Resp. Ex. 1A and 1B), testified at a deposition, (Resp. Ex. 23), testified at the evidentiary hearing, (Evid. hearing, page 483), and submitted an affidavit, (Resp. Ex. 50).

At a deposition on April 20, 2021, Blehm testified that on October 6, 2003, he was assigned to the "murder squad," which was a group of detectives that were on call for any homicides that occurred in the city where the suspect was not at the scene. (Resp. Ex. 23, page 6, line 8 – page 7, line 12). Upon arriving at the scene at Fish Town, 2831 Prospect Street, Blehm was assigned as case detective. This position acted as the primary case agent, with all information about the case eventually filtering back to him. (*Id.*, page 7, line 16 – page 8, line 12). In order to develop suspects to the shooting, the police first canvassed the area. They obtained names and put out question advisories which are essentially alerts that if police have contact with an individual listed that detectives wanted to speak with them. (*Id.*, page 8, line 23 – page 9, line 5). They determined Petitioner was a suspect only after getting statements

from eyewitnesses, specifically Lorianne Morrow and Wendy Lockett. Blehm testified that witnesses don't often come to the station voluntarily, that police often need to go out and find them. (*Id.*, page 9, line 6 – page 12, line 15).

Blehm knew Amy McGowan as an Assistant Jackson County prosecutor who worked in the section of the office that frequently dealt with violent crimes and murder. The prosecutors in that section rotated a pager that was used by police that needed help with a search warrant or other things. Blehm did not know their schedule, but had a number police could call if they needed someone. (*Id.*, page 12, line 16 – page 13, line 22) Blehm never called McGowan for assistance with taking witness statements and never took any witnesses to her office to give a statement—that is not how the procedure worked and not the way the policy is handled. (*Id.*, page 13, line 23 – page 14, line 16). Blehm could not think of a single time in his entire career that he picked up a witness and took them directly to the prosecutor's office, "...that's just not the way we do things." (*Id.*, page 20, lines 4–12). When someone gave a statement, police would sit down and find out what information the person wanted to provide and took notes. They then got a typist who was there 24 hours a day, to type the information up in a question answer format. The person is then provided the document to review, initialing each page for

accuracy and veracity, and then the person signed the document. (*Id.*, page 21, line 4 – page 22 line 6).

Blehm explained that at the beginning of an investigation, everyone is a suspect. Depending on what information is collected, who is or is not a suspect can change. (*Id.*, page 24, lines 5–9). At the time charges were filed against Petitioner, alternate suspects had been ruled out. Gary Kitchen had an alibi through his girlfriend. (Resp. Ex. 4, page 265, line 22 – page 266, line 11; Resp. Ex. 23, page 15, lines 5–8). Damon Rhodes also had an alibi on video at another location. (Resp. Ex. 4, page 265, lines 3–15; Resp. Ex. 23, page 15 lines 10–18). Reggie Thomas was ruled out because of eyewitness statements. (Resp. Ex. 23, page 25, lines 18–22). There was no doubt about the identity of the shooter, Petitioner. Blehm did not have any prior knowledge of Petitioner, and did not believe him to be a “kingpin” of drug enterprise. (*Id.*, page 17, lines 8–23)

Blehm explained that the eyewitnesses were afraid because they had information that could get someone locked up, and those accused often have friends, and there is a fear of retribution. (Resp. Ex. 23, page 22, lines 11–22).

At the evidentiary hearing, Blehm testified that at the time of the murder, he was working as a homicide detective on a squad that was on a twenty-eight day rotation to assist in solving cases where a suspect was not at the scene of a homicide. For Petitioner’s case, he was assigned as the case

agent. Those duties included maintaining the file, directing the investigation, attending court proceedings, and other duties. He was aware of all developments in the investigation. (Evid. hearing, page 483, line 17 – page 485, line 11). Blehm testified that witnesses in drug-related homicides tended to be less cooperative and less available than other crimes for a variety of reasons. (*Id.*, page 488, lines 6–17). Blehm denied that prosecutors were routinely involved in the early stages of investigation, stated that prosecutors were not in the early stages of this investigation, and outlined the procedure for taking witness statements as well as how line ups were created, conducted, and preserved as evidence. (*Id.*, page 488, line 21 – page 491, line 23). As lead detective, Blehm testified that he would have reviewed the lineup before it was used, even if another detective actually put it together. Blehm said he was 100% certain the lineup did not contain photos of all three individuals as alleged by Morrow. (*Id.*, page 500, lines 8-25).

Blehm testified as to physical evidence found and stated that he did not find the absence of shell casings in the parking lot to be unusual, based on his experience. He noted differences in springs, the ability to bounce, the tendency to roll, and humans or vehicles interfering with where the casings eventually land. (*Id.*, page 515, line 11 – page 516, line 14). Blehm also noted that when medical personnel arrive at the scene of a shooting, they are not concerned

about evidence preservation; their focus is on saving a victim's life. This focus and their activities can impact whether things like shell casings can be found later. (*Id.*, page 526, lines 2–23).

Blehm testified that the 911 call came in at 8:46 p.m. and his squad responded at 10:30 p.m. (*Id.*, page 516, line 17 – page 517, line 1). Blehm testified that the shell casings were found in a line down the sidewalk on or adjoining 2846 Wabash. (*Id.*, page 519, line 16 – page 520, line 11). Blehm testified that it was the ordinary practice to retain only signed copies of probable cause statements, and it was possible that Pet. Ex. 74 was a draft that was never pursued. (*Id.*, page 523, line 12 – page 524, line 20).

### **Kermit O'Neal**

Kermit O'Neal (O'Neal) gave a statement to police (Resp. Ex. 12, pages 84–85; Resp. Ex. 13, page 34), completed an affidavit (Pet. Ex. 10), testified at a deposition (Resp. Ex. 31), and testified at the evidentiary hearing. (Evid. Hearing, page 145).

Kermit O'Neal spoke with police on October 7, 2003. While police were executing the search warrant of the apartment at 2404 E. 29<sup>th</sup> Street, they found O'Neal inside. O'Neal indicated that he was homeless, but sometimes stayed in the apartment and took care of a dog for “O.G.” In exchange for

watching the apartment and dog, O.G. would give O'Neal food, liquor, crack, or the cash to buy those things. O'Neal also acted as a "door man" warning O.G. if police were in the area and monitoring people coming in and out of the apartment building buying drugs. He described customers approaching the door to the apartment, and the door opening with the chain still in place. The customer would reach through the open door with money in hand. Their money would be taken, then the door would close. The door would then re-open and the customer would again insert their hand to receive drugs. He listed friends of O.G. as Trey (who might have been named Keith), Fuzzy, G-Bone and Face. When asked about the murder the night before, O'Neal said he was sitting on the inside steps of the apartment and heard three shots, then a short time later about five more shots. O'Neal said the shots were in the distance and did not sound close. O'Neal said that there is a back door that people could go in and out of and he would not know. (Resp. Ex. 12, pages 84–85). When shown a picture of Victim, O'Neal said he had seen him the day before the murder, that Victim had come to the apartment wanting to speak to O.G. O'Neal also saw Fuzzy, AKA Mitchell Powell, yell at Victim over stealing customers and warning him to leave. He saw Trey, Fuzzy, and G-Bone all armed with pistols shortly before the shooting and that they were always armed. (Resp. Ex. 13, page 34).

In the affidavit O'Neal swore to on November 8, 2014, he said that at the time of Victim's murder, he was working the door and heard the sound of gunshots. The affidavit said that he and others ran out to the porch "to speculate what was going on." The affidavit indicated that Petitioner was one of the others who ran out on the porch from inside. The affidavit said that Petitioner told O'Neal to go back inside, and he did, but he continued to watch Petitioner on the porch through a window. The affidavit indicated that after the shooting, Petitioner returned to the apartment, and then shortly thereafter left the property. O'Neal claims in the affidavit that police attempted to intimidate him and put words in his mouth, and police did not ask him any questions about Petitioner. The affidavit states that O'Neal entered a drug rehabilitation program then moved to Cass County. The affidavit states that the victim had exchanged words with another guy about selling drugs in front of that property and warned by the same guy not to come back. That guy was not Petitioner. (Pet. Ex. 10).

At a deposition conducted on May 5, 2021, O'Neal testified that at the time of Victim's murder, he had been in Kansas City for a about a month. He had met Petitioner in Springfield because he was a user of drugs and Petitioner sold drugs. Petitioner talked O'Neal into giving him a ride and moving up to Kansas City. He confirmed that he worked as a doorman, and that he didn't

see everyone who used the apartment because they used a back door. O'Neal said he was in the front of the building. When asked if he warned about police in the area, O'Neal said it didn't seem like anyone was worried about police. O'Neal said that Petitioner lost his glass eye while in Springfield, so Petitioner was wearing an eye patch until he got a new one. O'Neal confirmed things he had told police, such as the people he saw at the apartment, that he had been at the front door and heard three shots, and then heard five more. He heard the shots from Prospect, two blocks away. O'Neal indicated that he saw Victim the day of the murder, and that this memory was prompted by a woman from the "Innocence Project" showing him a picture. O'Neal confirmed this was Latahra Smith. O'Neal testified that he had probably used cocaine the night of the murder. O'Neal testified that he was being interviewed by a female police officer and a male police officer and that the female police officer turned over tables and threw things. O'Neal stated that the male police officer was nice. O'Neal confirmed that a dark skinned guy was on the porch, but he didn't know his name. O'Neal did not have contact with any of the people from the apartment in the years since. O'Neal said that Latahra Smith found him on Facebook and asked him questions about what happened. Smith produced a photo and told O'Neal that the person in the photo was the actual shooter. O'Neal didn't remember the name Smith told him, but initially he remembered the face as one of the people who ran out on the porch when the shooting



started, but later clarified that the person in the photo was not on the porch. Smith prepared the affidavit for him to sign, and O'Neal read the affidavit before signing it. (Resp. Ex. 31, pages 1–38). O'Neal did not remember windows on the sides of the door, but did remember a window in the door. (Resp. Ex. 31, page 39, lines 14–16). O'Neal also said that he thought Fuzzy had exchanged words with the victim, but didn't know for sure because the argument happened through a closed door, and he didn't know who for sure was standing inside. (*Id.*, page 42, lines 15–20). Petitioner was the only person frequenting the apartment that he knew. (*Id.*, page 42, lines 21–25).

O'Neal testified at the evidentiary hearing. He did not recognize the building located at 2404 East 29<sup>th</sup> Street, where he had said he worked as a “doorman.” (Evid. Hearing, page 146, line 20 – page 147, line 5). He did not remember a window in the door or windows along the side of the door, but agreed that he had a clear view from inside the door to outside. (*Id.*, page 148, lines 5–17). He denied hearing gunshots (*Id.*, page 148, line 24 – page 149, line 2; *Id.*, page 152, lines 19–24). He stated that he saw Petitioner inside the building and that someone ran up and said there was a shooting up the street. (*Id.*, page 149, lines 3–19). O'Neal said that it was possible he had passed out from drug use. (*Id.*, page 156, lines 13–15). O'Neal said that Smith helped him remember who was present at the time of the shooting, including showing him

a picture of who “they thought” the shooter was. (*Id.*, page 159, line 17 – page 160, line 11). O’Neal was certain that Petitioner was on the porch looking down the street, not doing the shooting. (*Id.*, page 160, lines 16–19).

### **Michael Matthews**

Michael Matthews signed an affidavit (Pet. Ex. 12), testified at a deposition (Resp. Ex. 38), and testified at the evidentiary hearing (Evid. Hearing, page 130).

In his affidavit, with Matthews’ name spelled with one “T,” signed on November 9, 2014, Matthews states that he recalled being on his back porch when he heard gun fire. The affidavit states that the sound came from behind his apartment building. The affidavit states he ran from the back porch, through the kitchen, to the front porch. The affidavit states that after looking out he saw a man running up 29<sup>th</sup> toward Prospect, cross Prospect, then fall down in the Fish Town parking lot. The affidavit states Matthews then dialed 911, and was put on hold. The affidavit states that while on hold, Matthews heard sirens approaching, so he hung up. The affidavit states he continued to watch the man’s body and no one shot him or touched him until the emergency personnel arrived. The affidavit indicated that Matthews used binoculars to observe the whole time. The affidavit states that no one ever took a statement from Matthews in the past. (Pet. Ex. 12).

On April 23, 2021, Matthews testified at a deposition that he lived both at the time of the murder and presently at 2816 Prospect Ave. He marked this location on a map (Resp. Ex. 38, Deposition Ex. 2) and stated that he could see the whole Fish Town parking lot from his front porch. His back porch faces Wabash. He said that he was on his way to the kitchen when he heard the shots, went back to his back porch and looked up and down the alley, then went towards the front porch, stepped off the porch, and that's when he saw the guy run up and drop at Fish Town. Matthews did not know that there was a drug house in the neighborhood. He kept a pair of binoculars on his front porch, and he began using them after he saw the man drop to see if he knew who it was and to watch what was happening. He saw the man on the ground, saw people coming out of Fish Town with food and leaving, then went and got his cell phone to call 911. He then says that he never took his eyes off the scene until he heard sirens. They told him to hold on, and he did until he heard the sirens, then he hung up. He described the distance as not even a half a block away. (Resp. Ex. 38, page 12, line 9–12) Matthews testified that while he could see the front of the church and part of 29<sup>th</sup> street, the church did block his view of part of 29<sup>th</sup> street. He stayed watching as an ambulance and a police van arrive. After emergency personnel walked up, he started barbequing. Matthews testified that there were only ever four shots that he heard, with none afterward. He heard the shots come from the west, from Wabash towards

Brooklyn. He met Latahra Smith when she was in the neighborhood asking people if they knew anything about the shooting at Fish Town and he volunteered what he had seen. (Resp. Ex. 38).

Matthews testified at the evidentiary hearing. In reviewing photographs, Matthews noted that trees present in the photos were not present in 2003. Matthews said that he was standing in his kitchen when he heard the shots. He said the shots sounded as though they were directly behind his building. First, he went out on the back porch but didn't see anything, then walked back through the kitchen to the front porch and that's when he saw the guy fall in the parking lot. (Evid. Hearing, page 132, line 23 – page 133, line 12). Matthews said he grabbed his binoculars from a table on the front porch to look towards 27<sup>th</sup> street and as he was looking, he saw the guy cross the street and drop in the parking lot. Matthews testified that after Victim fell, he never took his eyes off him. (*Id.*, page 134, lines 13–24) He said he called 911 after Victim fell. Matthews did not see anyone walk up behind Victim, turn the body over, or shoot Victim while he lay in the parking lot. (*Id.*, page 135, lines 4–17) Matthews said there was still plenty of daylight, with street lights barely on at the time of the murder. (*Id.*, page 140, line 20 – 141, line 8

### **Reginald Thomas**

Reginald Thomas gave a statement to police (Pet. Ex. 17), testified at a deposition (Resp. Ex. 22), and testified at the evidentiary hearing (Evid. hearing, page 576).

On December 4, 2003, Reginald Thomas was picked up by police and brought in for questioning. After waiving his *Miranda* rights, Thomas told police that on October 6, 2003, he drove through the area of 2404 E. 29<sup>th</sup> Street earlier in the day, but did not stop. He had been to the apartment in the past and told police many different people were there selling drugs. Around 3pm, he went to 2700 Park and remained there all night watching his girlfriend's kids. He listed four other individuals that were with him. He told police that he had a chance to read the "discovery" in the case through an attorney hired by Petitioner. Thomas told police that he did not witness any of the events, but told police he had heard it was either Petitioner or Marcus Smith and that Marcus Smith and the victim were involved in an argument earlier in the night. He told police that two black females had witnessed the shooting, Nietta and "Little Mama." (Pet. Ex. 17).

On April 20, 2021, Thomas testified at a deposition that at the time of the murder, he was home with both of his daughters, his girlfriend's mother, and his girlfriend's aunt. (Resp. Ex. 22, page 6, lines 8–10). Thomas said that

before the first trial he was provided a document that indicated he had snitched on Petitioner by a man named Eddie who worked for Petitioner. Eddie was not a lawyer. (*Id.*, page 7, line 7 – page 8, line 19). Thomas denied being present at the scene. (*Id.*, page 9, line 22). Thomas agrees that Toney represented him in 1997 (*Id.*, page 11, line 10 – page 12, line 3). Thomas said that the only interaction he had with Toney after that happened when Toney told him that he needed to talk with Thomas about the Keith Carnes case, but they never did. Thomas assumed it was because he wanted money. (*Id.*, page 12, line 11 – page 14, line 20). This interaction occurred when Thomas was at the courthouse for another case. (*Id.*, page 16, line 10 – Page 17, line 5). Thomas denied retaining Forest for Petitioner, but said he gave money to Rhodes for Petitioner’s defense. (*Id.*, page 15, line 7 – page 16, line 4). Thomas said that there were rumors around town that he was a snitch and told on Petitioner. (*Id.*, page 18, line 21–24). When those rumors started, Thomas stopped providing money for Petitioner’s defense. (*Id.*, page 28, lines 1–10). At the time of the murder, Thomas was selling drugs, but did not have anyone that worked for him. (*Id.*, page 24, line 13–22).

During the deposition, when questioned by Petitioner’s counsel, Thomas said “This is the same guy who made the video online that had people knocking on my door and scaring my kids, man...they put me in danger. This man right

here put me in danger.” (*Id.*, page 34, lines 4-15). When Petitioner’s counsel questioned Thomas about being put in danger for this case, Thomas responded “No, not for this case. For those videos you made.” (*Id.*, page 35, lines 20-24). Thomas disputed saying “make him disappear,” noting that the victim had been selling there as long as Thomas and that the only new person was Petitioner. (*Id.*, page 39, lines 2–7).

At the evidentiary hearing, Thomas testified that on the night of the murder, he was with his family. Thomas denied killing Victim. Thomas also denied receiving discovery from any attorney involved in the case. Thomas described receiving a piece of discovery from an individual known as Eddie who worked for Petitioner. Eddie sold drugs and also killed people as a “hitter.” Thomas stated that Eddie wanted Thomas to locate the witnesses against Petitioner, in order to prevent them from testifying. If the witnesses could not be bribed into silence, Thomas was to tell Eddie so that he could kill the witnesses. Thomas did not cooperate with this plan, and Thomas believes that is why Petitioner has accused Thomas of being the shooter. (Evid. hearing, page 368, line 7 – page 370, line 6).

The Court *sua sponte* asked that Thomas be read his *Miranda* rights. The Court made counsel available to Thomas to consult with, and he continued to provide testimony. Thomas outlined his criminal history, and confirmed

that Toney was his attorney for a case out of Laclede County. Thomas testified that he returned to prison in August 2004. Thomas testified that Kitchen is Thomas's child's uncle. He recalled a time where he saw Toney in passing at the courthouse but they did not have a chance to talk. (*Id.*, page 583, lines 8-17). When Thomas was asked about telling the police he received discovery from Petitioner's attorney, Thomas exercised his Fifth Amendment rights. Thomas stated that he provided money to Rhodes to contribute to Petitioner's defense. He denied being a drug "kingpin" in the area. Thomas said that he has never said Petitioner committed the murder, but he did tell police what rumors were that he had heard. (*Id.*, page 588, line 15 – page 589, line 17). Thomas denied ever speaking to Toney about Petitioner's case. Thomas also denied any "bad blood" between him and Kitchen. Thomas said that he didn't see Kitchen often, but that they never had a problem with each other. (*Id.*, page 599, line 21 – page 601, line 15).

### **Arthur Mitchell**

Arthur Mitchell (Mitchell) testified at the evidentiary hearing in rebuttal, (Evid. hearing, page 683), and created a demonstrative exhibit. (Pet. Ex. 83). Mitchell testified that he is a self-taught firearms consultant. He has acquired a number of certifications through the years. Mitchell testified that he was provided with some crime scene reports, some trial transcripts, some



crime scene photos and photos from the morgue. (Evid. hearing, page 685, lines 2–10). Mitchell testified that the murder weapon had a number of variants, and the photo he was provided was “wrapped up in the green material and there was no way of knowing which variant it was” and so he chose to use the base model. (Evid. hearing, page 685, line 15 – page 686, line 7). Mitchell testified that all models eject shells right and forward approximately 6 to 10 feet from the firearm. Mitchell testified about various aspects of the firearm, as found in the manual. Mitchell then testified explaining the series of tests he conducted. One such test was to fire through ballistic gel into asphalt. In conducting this test, he placed the muzzle 9 inches from the ballistic “head”, even though the medical examiner testified the shot to the victim’s head was fired from at least 2.5 to 3 feet from the victim. (*Id.*, page 698, lines 8–18). The result was asphalt that was blown apart, powder burn, stippling and pocketing. (*Id.*, page 699, line 16 – page 700, line 20). Mitchell gave his opinion about where shots may have been fired based on where shell casings were recovered. (*Id.*, page 704, line 11 – page 709, line 8). Mitchell agreed that casings can move and be moved and that he could only tell where the casings were found by police. (*Id.* page 718, line 10-page 719, line 19). Mitchell agreed that his opinion is only as good as the information he was provided. (*Id.*, page 727, line 11-14). Mitchell agreed that there was no new development in

firearms and that he could have done the same experiment in 2003. (*Id.*, page 736, line 12-page 737, line 22).

An offender alleging gateway innocence must show that it is more likely than not that no reasonable juror would have convicted him in light of new reliable evidence of innocence. *Schlup*, 513 U.S. at 298. Petitioner has not done that here. A reasonable jury could certainly still vote to convict here. Lockett stands by her trial testimony that Petitioner was one of the shooters. The statements of Jones to the police identifying Petitioner as a shooter are still admissible evidence, as they were at trial. And Morrow's recantation must be taken in context of some the bizarre allegations made by Petitioner in this case including that a prosecutor provided a witness an eight ball of cocaine to frame Petitioner, that the prosecutor told witnesses a witness to identify Petitioner out of books of photographs, even though the witness alleges she identified someone else, and even though no such books existed, and lineups were conducted by the police, not the prosecutor, and the allegation that a detective said there was a police conspiracy to frame Petitioner even though the detective said no such thing. The sworn testimony that Petitioner attempted to arrange to have witnesses bribed or killed is also evidence of consciousness of guilt that could be considered by a jury. This is not a case where there is gateway innocence.

**III. Petitioner cannot show cause and actual prejudice to excuse the default of the alleged *Brady* violation, and the alleged *Brady* violation is without merit.**

Petitioner's fourth claim, raised after the evidentiary hearing, is that police allegedly failed to disclose a police report, Petitioner's Exhibit 70, in which a patrol officer indicated that a witness, later identified as Wendy Lockett, on the day after the murder told him that she witnessed two black men chasing the victim and shooting at him. The report does not contain details present in the witness's later statements to detectives and testimony, including that Petitioner was one of the shooters. Petitioner alleges this would have been useful impeachment evidence. Amended Petition at 64–65 (asserting the report could have been used to cross-examine Lockett about her later identification of Petitioner as one of the shooters). Petitioner alleges that he obtained the report during PCR litigation, but after he had filed his Amended Rule 29.15 Motion. (Petition at 68).

Petitioner alleges in an affidavit that the report was provided to him by a defense investigator after the filing of the Rule 29.15 motion but before the evidentiary hearing. (Pet. Ex. 84). Post-conviction counsel for Petitioner alleges the report was not made available to her until after she filed the amended motion, and that it came from her investigator who obtained the police master file in preparation for the evidentiary hearing. (Pet. Ex. 85). Petitioner's Exhibit 86 contains, as an attachment, an assignment from PCR

counsel to her investigator dated March 17, 2009, asking the investigator to “dig out” the report of Officer Huth, referred to as Hough in the assignment. The amended post-conviction motion is dated August 7, 2008. Resp. Ex. 14 at 159.

Respondent’s Exhibit 44 is an affidavit from prosecutor Parsons stating that it was the practice of the office to routinely disclose documents such as Petitioner’s Exhibit 70. Respondent’s Exhibit 46 is an affidavit from the other trial prosecutor, Twenter, indicating that “I am confident that it was disclosed” based on the practice of the office. Twenter also avers that he reviewed the Jackson County Prosecuting Attorney’s file and “found the same documents in the original case file.” (Rep. Ex. 46). Respondent’s Exhibit 40 is an affidavit from Detective Huth in which he states that he submitted the report to his supervisor, that he only spoke to the witness for five minutes, that he did not ask the witness for descriptions of the persons involved, or their names or if she knew them as he only documented the information given to him, as doing more was beyond his role as a patrol officer. (Resp. Ex. 40). Detective Blehm stated in an affidavit that he would have received the report, and it would have been common practice to put a report of this type in the file sent to the prosecutor but due to the passage of time he cannot specifically remember doing this. (Resp. Ex. 50).

Petitioner's theory of cause for the default of the claim seems to be that the report somehow did not make it to the prosecutor's file from the police file, and he only learned of the report after his post-conviction investigator discovered it in the master police file, which she obtained in preparing for the PCR hearing at the direction of counsel. But the assignment from counsel to the investigator to "dig out the report of an officer Hough" mentions what the officer talks about in the report. Petitioner's Exhibit 86, Attachment. So, counsel must have seen the report before the directing the investigator to "dig it out." That must logically defeat a claim of failure to disclose or of cause for the default of the claim. Assuming for the sake of argument, that counsel was unaware of the report before the master police file was obtained, despite showing awareness of its author and contents, there is no good reason counsel could not have directed the investigator to "dig out" the report before, as opposed to after filing the amended report, so the claim could have been raised in the ordinary course of review. And there is no good cause for not doing so.

There is also no actual prejudice to overcome the procedural bar or constitutional prejudice from the underlying claim. And there is no reasonable probability that the outcome of the proceeding was changed because Lockett was not cross-examined on the bare bones nature of the information she gave to a parole officer on the street, as opposed to more complete statement she gave to detectives and in her trial testimony. *See In re Lincoln v. Cassady*, 517

S.W. 3d 11, 18–20 (Mo. App. W.D 2016) (where alleged failure to disclose DFS reports did not create a reasonable probability the outcome of trial was changed it was not necessary to do cause and prejudice or gateway innocence analysis).

### Conclusion

This Court should deny Petitioner’s motion.

Respectfully submitted,

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**Certificate of Service**

I hereby certify that a true and correct copy of the following was electronically filed by using the Case.Net system on January 24, 2022.

/ s / Michael J. Spillane

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