No. 19-5769

ORIGINAL

Supreme Court, U.S.
FILED
AUG 23 2019
OFFICE OF THE CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

DAN J. WHITT — PETITIONER
(Your Name)

vs.

JEFF NORMAN ET.AL. — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

U.S. DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI, SOUTHERN DIVISION
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

DAN WHITT
(Your Name)
SOUTH CENTRAL CORRECTIONAL CENTER
255 W. HIGHWAY 32
(Address)

LICKING, MISSOURI 65542
(City, State, Zip Code)

N/A
(Phone Number)

QUESTIONS PRESENTED PG. 1

IS A TRIAL ATTORNEY PREJUDICIALLY INEFFECTIVE IF HE, THROUGH HIS OWN NEGLIGENCE BY WAITING TOO LONG, FAILED TO SECURE AN EXPERT WITNESS ON LINE-UP IDENTIFICATION, WHICH WAS THE KEY PIECE OF EVIDENCE THAT ULTIMATELY THE (UNEDUCATED TO THIS SCIENCE) JURY USED TO FIND HIM GUILTY? DOES THE COURT BELIEVE THAT HAD THE JURY BEEN EDUCATED ON HOW THIS SPECIFIC SCIENCE FACTORS INTO REGARDING THE POTENTIAL LACK OF CREDIBILITY OF THE EYEWITNESS, THAT THERE IS A REASONABLE PROBABILITY OF A DIFFERENT OUTCOME?

IS A TRIAL ATTORNEY PREJUDICIALLY INEFFECTIVE IF HE FAILED TO OBJECT TO THE IN-COURT IDENTIFICATION OF THE PETITIONER BY THE VICTIM WHEN:

— THE DETECTIVE WHO CONDUCTED THE SUBSEQUENT PHOTO LINE-UP PROCEDURE, DET. SHIPLEY, ADMITTED IN HIS PROBABLE CAUSE STATEMENT THAT HE WAS IN PHONE CONTACT WITH THE EYEWITNESS (MS. KOGER) WHILE SHE WAS AT GAS STATION/STORE MOMENTS BEFORE SHE REVIEWED THE SURVEILLANCE CAMERA SHOWING THE PETITIONER'S VIDEO IMAGE MAKING A PURCHASE.

(AND)

— THIS HAD HAPPENED PRIOR TO HER VIEWING AND PICKING OUT THE PETITIONER IN A PHOTO LINE-UP.

(AND)

— DET. SHIPLEY ADMITTED AT TRIAL THAT VIEWING THE VIDEO PRIOR TO THE PHOTO LINE-UP WOULD HAVE TAINTED HER IDENTIFICATION.

KNOWING THAT THE IDENTIFICATION PROCESS WAS FOREVER TAINTED?

SHOULD THE RELIABILITY OF A SINGLE EYEWITNESS IDENTIFICATION, FROM A PHOTO LINE-UP, ALONE BE ENOUGH TO GAIN A CONVICTION? EVEN IN THE INSTANCE OF A TAINTED LINE-UP PROCEDURE?

IS THERE A DIFFERENCE BETWEEN AN "ILLEGAL" PHOTO LINE-UP AND AN "IMPROPER" ONE, OR ARE THEY ONE AND THE SAME? IF THERE IS A DIFFERENCE WHAT CONSTITUTES AN ILLEGAL PHOTO LINEUP PROCEDURE AS OPPOSED TO JUST AN IMPROPER ONE? WHAT ARE THE LIABILITIES OF EACH AND WITH WHOM DO THEY LIE, RESPECTIVELY?

QUESTIONS PRESENTED pg.2

WHAT ARE THE PARAMETERS OF ALLOWABLE IDENTIFICATION EXPERT TESTIMONY IN A CASE LIKE THIS? IS IT FAIR/PROPER TO JUST ARBITRARILY RULE/OR CLAIM THAT SUCH WOULD NOT BE ALLOWED AT TRIAL WITHOUT EVEN HOLDING A HEARING ON IT, OR CONSIDERING A MOTION?

WOULDN'T AN ID EXPERT'S TESTIMONY HAVE BEARING NOT ONLY ON THE EYEWITNESS'ES TESTIMONY ALONE BUT ALSO ON A DETECTIVE'S (IN THIS CASE) RESPONSIBILITIES TO CONDUCT A "CLEAN" PHOTO LINE-UP PROCEDURE - DESCRIBING IN SCIENTIFIC TERMS THE PRATFALLS OF IMPRINTING AND SUCH OCCURING IF THE PROCEDURE IS CONDUCTED IMAPOPERLY? SHOULDN'T THAT BE ALLOWED AT TRIAL?

CAN A 'RESPONDENT' INVOKE "TRIAL STRATEGY" FOR AN ATTORNEY EVEN WHEN THAT ATTORNEY DOES NOT?

WHAT ARE THE DISCOVERY RESPONSIBILITIES OF A PROSECUTOR'S OFFICE IN THE INSTANCE OF A LINE-UP PROCEDURE POLICY CHANGE BY IT'S RELATIVE POLICE DEPARTMENT WHEN THAT POLICY CHANGE DIRECTLY RELATES TO A CASE ABOUT TO GO TO TRIAL? WHEN THAT CHANGE WAS INSTIGATED RELATIVELY SOON AFTER THAT CASES LINE-UP WAS CONDUCTED, BUT BEFORE THAT CASE WENT TO TRIAL?

IN REGARDS TO THE STATES OVERBURDENED PUBLIC DEFENDERS SYSTEM. IS THERE AN UN-REASONABLY HIGH THRESHOLD OF PROOF TO BE MET IN PROVING INEFFECTIVE ASSISTANCE OF COUNSEL? DOES THE OVERBURDENED ASPECT CAUSE 'INEFFECTIVE' TO BE SUCH A PANDORAS BOX AS TO RULING IN IT'S FAVOR ANATHEMATA TO THAT STATES APPEALS COURTS EVEN IN REASONABLY PROVEN CASES OF SUCH?

LIST OF PARTIES

[ ] All parties appear in the caption of the case on the cover page.

[✓] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

JEFF NORMAN (WARDEN)
STATE OF MISSOURI

(MICHELLE BUCKNER IS THE RECENTLY-APPOINTED WARDEN REPLACING J. NORMAN)

TABLE OF CONTENTS

INDEX TO APPENDICES

TABLE OF AUTHORITIES CITED

IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

[✓] For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix B to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[✓] is unpublished.

The opinion of the United States district court appears at Appendix A to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[✓] is unpublished.

[✓] For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix D to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the 31ST JUDICIAL CIRCUIT COURT OF GREENE CO., MO. court appears at Appendix C to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[✓] is unpublished.

JURISDICTION

[✓] For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was NOV. 26, 2018.

[ ] No petition for rehearing was timely filed in my case.

[✓] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: MAY 29, 2019, and a copy of the order denying rehearing appears at Appendix B.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

[✓] For cases from **state courts**:

The date on which the highest state court decided my case was 8-12-16. A copy of that decision appears at Appendix C.

[✓] A timely petition for rehearing was thereafter denied on the following date: 11-27-17, and a copy of the order denying rehearing appears at Appendix D.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

AS I AM A Pro se' PETITIONER I AM NOT ENTIRELY SURE WHAT IS REQUIRED HERE. FOR ONE THING, I DO NOT HAVE A COPY OF THE U.S. CONSTITUTION OR MO. SUPREME COURT RULES. I WILL DO THE BEST I CAN BY PROVIDING THOSE PROVISIONS, RULES WHICH I HAVE RELIED THROUGHOUT MY APPEAL PROCESS.

STATEMENT OF THE CASE:

ON MARCH 23RD, 2009, MS. SHARON KOGER (VICTIM) ARRIVED AT HER PLACE OF EMPLOY-MENT AT ABOUT 5:10 A.M. HER SHIFT DID NOT START UNTIL 5:30 A.M., AND SHE HAD TO WAIT IN THE PARKING LOT UNTIL THE BUILDING WAS UNLOCKED.

WHILE WAITING IN HER CAR, KOGER NOTICED A BRIGHT YELLOW SAFETY KLEEN VAN STOPPED IN FRONT OF ONE OF THE ADJACENT BUSINESSES. A FEW MINUTES LATER, THE VAN PULLED UP AND STOPPED NEXT TO KOGER'S CAR. A MAN GOT OUT OF THE VAN AND APPROACHED KOGER'S CAR. KOGER WATCHED THE MAN AS HE CAME CLOSER. HE WAS WEARING A DARK UNIFORM AND A BASEBALL CAP PULLED DOWN OVER HIS FACE. HE APPROACHED WITHIN A FEW FEET OF KOGER. SHE "THOUGHT HE WAS LOST OR LOOKING FOR A CERTAIN STORE." SHE ROLLED DOWN THE WINDOW OF HER CAR AND THE MAN RESTED HIS ARM ON THE SIDE MIRROR OF THE CAR. THE MAN THEN SHOWED KOGER A GUN AND TOLD HER TO TURN OFF THE CAR AND GIVE HIM THE KEYS. KOGER COMPLIED FEELING SHE HAD NO OTHER CHOICE. THE MAN THEN DEMANDED THAT KOGER GIVE HIM HER PURSE, SO SHE HANDED HIM HER WALLET. HE TOLD HER TO GIVE HIM THE PIN FOR HER DEBIT CARD. HE SAID THAT, IF SHE GAVE HIM THE WRONG ONE, HE WOULD COME TO HER HOUSE AND HARM HER. HE MADE HER REPEAT THE PIN SEVERAL TIMES. FINALLY, THE MAN GOT BACK IN THE VAN AND DROVE OFF IN A NORTHERLY DIRECTION. KOGER SAID THE MAN WAS NOT WEARING ANY GLOVES.

ONCE THE ROBBER LEFT, MS. KOGER USED HER CELL PHONE TO CALL THE POLICE. OFFICERS ARR-IVED AT THE SCENE AT APPROXIMATELY 5:27 A.M. IT WAS STILL DARK OUTSIDE. TRIAL EXHIBIT COLOR PHOTOS OF THE CRIME SCENE, TAKEN BY POLICE UPON THEIR ARRIVAL, SHOW A DIMLY-LIT DARK PARKING LOT WITH SPARSELY PLACED LAMPPOSTS. THE OFFICER ON THE SCENE LATER TESTIFIED THAT TO THE BEST OF HIS PROFESSIONAL ABILITY HE WAS ABLE TO ASCERTAIN FROM KOGER AN APPROX-IMATE SIZE OF 5'8" AND 150 LBS. FOR THE ROBBER. IN TRIAL TESTIMONY THAT SAME OFFICER FURTHER TESTIFIED THAT KOGER HAD TOLD HIM THAT THE ROBBER'S HAT WAS PULLED DOWN OVER HIS FACE AND THAT SHE ALSO SAID THAT SHE COULD POSSIBLY IDENTIFY HIM.

FOR PURPOSE OF THIS STATEMENT MOVANT/PETIONER (WHICH IS MYSELF, pro se) WILL HEREBY BE REFERRED TO AS WHITT — i.e., WHITT IS 5'11" IN BAREFEET, 6'0" TO 6'1" SHOD. WHITT PRESENTLY WEIGHS 210 LBS., BUT IN 2009 WAS LISTED AT 180 LBS., HIS WORKING WEIGHT AS A

ROOFER/CONSTRUCTION WORKER, AS HE WAS AT THAT TIME.

DURING A SEARCH OF THE AREA, THE POLICE FOUND AN ABANDONED SAFETY KLEEN VAN BEHIND A BUSINESS JUST NORTH OF WHERE THE ROBBERY HAD OCCURRED. A LITTLE FURTHER NORTH, OFFICERS FOUND A HAT, A UNIFORM JACKET, AND A SHIRT THAT HAD BEEN DISCARDED BEHIND A RESTAURANT.

LATER THAT MORNING AT 6:36 A.M., AT A JUMP STOP GAS STATION, WHITT IS SEEN ON SURVEILLENCE VIDEO USING MS. KOGERS STOLEN CREDIT CARD. WHITT PURCHASES A RUBY RED GRAPEFRUIT JUICE AND A CARTON OF CIGARETTES. HE APPEARS ON THE VIDEO OPEN-FACED IN HIS ROOFING CLOTHES WITH NO HAT OR ANY OTHER ATTEMPT TO CONCEAL OR DISGUISE HIS FACE. THE STORE CLERK, RACHE LOCKHART, SAYS SHE REMEMBERED WHITT BECAUSE HE CAME IN WITH HIS OWN NEWSPAPER AND STARTLED HER BY CALLING OUT "HEY" WHEN HE CAME IN BECAUSE SHE WAS IN THE BACK WHERE SHE COULD NOT BE SEEN. MS. LOCKHARTS IMPRESSION OF WHITTS SIZE WAS ABOUT 6'2" AND 200 LBS. WHITT CAN ALSO BE SEEN ON AN ATM VIDEO FROM A REGIONS BANK DIRECTLY NEXT DOOR TO THE JUMP STOP, WITHDRAWING CASH WITH KOGERS STOLEN CREDIT CARD, AGAIN MAKING NO ATTEMPT TO DISGUISE OR CONCEAL HIS FACE.

DETECTIVE KEVIN SHIPLEY WAS LEAD INVESTIGATOR ON THIS CASE. IN HIS SWORN PROBABLE CAUSE STATEMENT (PCS) HE STATES THAT AT 9:00 A.M. ON THE DAY OF THE ROBBERY HE MADE PHONE CONTACT WITH MS. KOGER WHO INFORMED HIM THAT SHE WAS UNABLE TO PROVIDE ANY FURTHER INFORMATION ABOUT THE SUBJECT, OTHER THAN SHE DID NOT SEE ON HIM ANY VISIBLE TATTOOS, HE WASN'T WEARING GLOVES AT THE TIME OF THE ROBBERY AND BELIEVED SHE WOULD BE ABLE TO IDENTIFY THE SUSPECT. SHE ALSO TOLD HIM THAT HER BANK HAD INFORMED HER THAT HER DEBIT CARD HAD BEEN USED AT THE REGIONS BANK ATM. SHIPLEY THEN INVOLVES KOGER IN THE INVESTIGATION BY REQUESTING HER TO CONTACT HER BANK TO OBTAIN COPIES OF THE ATM WITHDRAWALS AND THE LOCATION OF THE REGIONS BANK WHERE THE CARD HAD BEEN USED, KOGER AGREES. KOGER ADVISED HIM THAT HER BANK TOLD HER THAT HER DEBIT CARD HAD BEEN USED AT A JUMP STOP GAS STATION, A COMPANY WHICH SHE HAD BEEN PREVIOUSLY EMPLOYED BY.

SHIPLEY THEN STATES IN HIS PCS "AT 1000 HOURS (10 A.M.) I WAS CONTACTED VIA PHONE BY VICTIM KOGER, WHO INFORMED ME THAT SHE WAS CURRENTLY AT THE JUMP STOP GAS STATION,

LOCATED AT 2101 S. GLENSTONE AND WAS INFORMED BY THE CLERK THAT SHE RECALLED A WHITE MALE SUBJECT MAKING A PURCHASE WITH HER STOLEN DEBIT CARD AND WAS GOING TO ATTEMPT TO LOCATE HIM ON THE STORE SURVEILLANCE CAMERA SYSTEM."

A BRIEF DIGRESSION HERE TO CORRECT A MISREPRESENTION OF FACTS. SOMEWHERE ALONG IN MY STAGES OF APPEAL - I BELIEVE IT WAS AT THE 29.15 STEP - A RESPONDENT TOOK IT UPON THEMSELVES TO ALTER THE LANGUAGE OF THE ABOVE PARAGRAPH (I HAVE TRANSCRIBED IT VERBATIM FROM SHIPLEY'S PCS) IN A SIGNIFICANT WAY, AND IT HAS BEEN ADOPTED AS "FACT" BY EVERY RULING PARTY SINCE. I WILL TAKE THE OPPURTUNITY HERE FOR CLARIFICATION.

THIS IS IN REFERENCE TO APPENDIX C PG. 17 OF THE 29.15 MOTION COURTS' RULING ON POINT VII - MOVANTS TRIAL COUNSEL WAS NOT INEFFECTIVE IN FAILING TO IMPEACH THE TESTIMONY OF DETECTIVE SHIPLEY (WITH HIS OWN PCS). THEY STATE THE FOLLOWING, "AT THE HEARING ON THE MOTION TO SUPPRESS AND AT TRIAL, DET. SHIPLEY TESTIFIED THAT HE WAS NOT AWARE THAT VICTIM HAD VIEWED A VIDEO OF MOVANT IN THE GAS STATION PRIOR TO VIEWING A PHOTOGRAPHIC LINEUP. THE DETECTIVE'S PCS IS NOT INCONSISTENT WITH THAT TESTIMONY, AND ONLY STATES THAT VICTIM ADVISED HIM THAT SHE WAS AT THE GAS STATION WITH THE CLERK AND THAT <u>THE CLERK</u> (MY UNDERLINE, INDICATING THE PART WHICH THE STATE ALTERED FROM WHAT THE PCS ACTUALLY STATES) WAS GOING TO LOOK ON THE VIDEO TO FIND THE PERSON WHO USED VICTIMS DEBIT CARD. AS SUCH, MOVANTS TRIAL COUNSEL WAS CORRECT THAT THERE WAS NO DIRECT IMPEACHMENT VALUE IN THE PCS WHEN COMPARED TO DET. SHIPLEY'S TESTIMONY, AS HIS STATEMENTS WERE NOT INCONSISTENT."

FIRST OF ALL, THERE IS MUCH DIRECT IMPEACHMENT VALUE IN THE PCS, ON MORE THAN JUST THIS PARTICULAR ISSUE (i.e. HIS LATER CLAIM OF IGNORANCE OF DNA SWABS BEING TAKEN FROM THE VAN, ALTHOUGH THE PCS CLEARLY SHOWS HIS AWARENESS OF SAME), BUT THAT IS A MATTER TO BE ADDRESSED IN 'REASONS FOR GRANTING WRIT.'

SECONDLY, AND TO THE POINT AT HAND, IF ONE READS THE PARAGRAPH IN QUESTION, ONE CAN SEE THAT, AT BEST, IT IS AMBIGOUS AS TO WHO WAS GOING TO ATTEMPT TO LOCATE HIM ON THE STORE SURVEILLENCE CAMERA SYSTEM." IN FACT, IF IT HAS ANY SLANT AT ALL IT WOULD BE IN THE DIRECTION OF MS. KOGER ATTEMPTING TO PULL UP THE VIDEO. SHE TOLD THE DETECTIVE SHE USED TO WORK FOR JUMP STOP, SO CLEARLY SHE WAS AWARE OF THEIR SECURITY SYSTEM AND

THE LIKELIHOOD OF CAMERA SURVEILLANCE AND HOW TO ACCESS IT. THAT WAS HER PURPOSE IN GOING TO THE JUMP STOP THAT MORNING — TO VIEW THE VIDEO. ALSO, KOGER WAS ON THE PHONE SPEAKING TO DET. SHIPLEY IN THE FIRST PERSON. AS IN "...I WAS CONTACTED VIA PHONE BY VICTIM KOGER, WHO INFORMED ME THAT SHE WAS CURRENTLY AT THE JUMP STOP GAS STATION ... AND WAS GOING TO ATTEMPT TO LOCATE HIM ON THE STORE SURVEILLANCE CAMERA SYSTEM."

HOWEVER, RECOGNIZING THE AMBIGUITY OF THAT PARAGRAPH, I HAVE NEVER TRIED TO MAIPULATE IT'S LANGUAGE TO MISREPRESENT IN A LIGHT MORE FAVORABLE TO MYSELF IN ANY OF MY PREVIOUS FILINGS — SUCH AS "MS. KOGER WAS GOING TO ATTEMPT, ETC." BUT IT IS CLEAR THAT, AT THE VERY LEAST, MS. KOGER AND THE STORE CLERK TOGETHER PULLED UP THE VIDEO OF MYSELF USING HER CREDIT CARD AND THEY VIEWED IT TOGETHER (TO WHICH MS. KOGER LATER TESTIFIED THAT SHE DID NOT RECOGNIZE ME AS THE MAN WHO ROBBED HER), AND THAT MS. KOGER CALLED DET. SHIPLEY ON HIS PHONE THAT MORNING TO TELL HIM THAT SHE WAS DOING EXACTLY THAT. THERE IS NO "SPIN" YOU CAN PUT ON THAT FACT TO CHANGE IT'S TRUTH.

THE FACT THAT PREVIOUS RESPONDENTS HAVE MANIPULATED THE LANGUAGE OF THE PCS TO MISLEAD FROM THIS TRUTH REVEALS THAT THEY RECOGNIZE THIS IS INDEED AN ISSUE WITH VALIDITY. IT IS AN ATTEMPT TO ABSOLVE DET. SHIPLEY OF HIS RESPONSIBILITY AND THEMSELVES OF ACKNOWLEDGING A SERIOUS MISCARRIAGE OF JUSTICE.

I WILL RETURN TO THE EVENTS OF 3-23-2009.

DURING THAT 10 A.M. PHONE CALL WITH DET. SHIPLEY IN WHICH SHE INFORMED HIM THAT SHE WAS THERE TO VIEW THE VIDEO SURVEILLENCE (AT THE JUMA STOP), MS. KOGER ALSO INFORMED HIM THAT THE REGIONS BANK WHERE HER CARD WAS USED WAS RIGHT NEXT DOOR.

DET. SHIPLEY NEXT STATES IN HIS PCS: "AT 10:30 A.M. I ARRIVED AT THE JUMP STOP GAS STATION AT 2101 S. GLENSTONE WHER I CONTACTED VICTIM SHARON KOGER AND CLERK/WITNESS RACHE LOCKHART." IT ALSO GOES ON TO STATE THAT SHIPLEY WENT NEXT DOOR TO THE REGIONS BANK WHERE THE DEBIT CARD WAS USED BY WHITT AT AN ATM. HE SEARCHED AROUND THAT AREA AND FOUND THE RUBY RED GRAPEFRUIT JUICE BOTTLE THAT WHITT HAD PURCHASED AT THE JUMP STOP. IT HAD BEEN CASUALLY TOSSED ASIDE, NOT HIDDEN OR WIPED OF FINGERPRINTS — OBTAINING THOSE FINGERPRINTS ENABLED DET. SHIPLEY TO PUT

A NAME TO THEM (DAN WHITT), AND CONDUCT A PHOTO-LINE UP (WITH WHITTS PHOTO IN IT) WITH MS. KOGER 2 DAYS AFTER KOGER HAD WATCHED WHITT USING HER CARD ON VIDEO SURVEILLANCE AND NOT RECOGNIZING HIM AS THE ROBBER. AT THE PHOTO LINE-UP KOGER PICKED WHITTS' PHOTO OUT OF THE LINE-UP AS THE MAN WHO ROBBED HER. THE PCS GOES ON WITH OTHER PROCEDURALS WHICH CAN BE READ BY ACCESSING THE APPENDIX WHERE I HAVE PUT THE PCS.

SOMETIME BEFORE DET. SHIPLEY ARRIVING AT 10:30 A.M. THAT MORNING, KOGER AND LOCKHART PULLED UP AND VIEWED VIDEO SURVEILLANCE OF WHITT USING THE DEBIT [redacted] CARD. IT IS A DOCUMENTED FACT THAT LOCKHART POINTED WHITT OUT IN THE VIDEO AND TOLD KOGER "THATS THE MAN WHO USED YOUR CARD." LOCKHART TESTIFIED THAT KOGER WAS ONY 2 OR 3 FEET FROM THE MONITOR SCREEN WHEN SHE VIEWED IT. THERE IS CONTRASTING TESTIMONY ABOUT HOW [redacted] MANY 'PANELS' APPEARED ON THE SCREEN, AMONGST THE THREE (KOGER, LOCKHART, SHIPLEY) WHO VIEW-ED IT THAT MORNING — ONE SAYS IT WAS IN FOURTHS, OR 4 PANEL 15 OR 20 INCHES SQUARE (LOCKHART), ONE SAYS SMALLER 9 PANEL SQUARES (KOGER), ANOTHER SAYS FULL FACE, FULL SCREEN (SHIPLEY). LOCKHART TESTIFIED THAT SHE COULD NOT RULE OUT HAVING VIEWED IT WITH KOGER IN FULL SCREEN.

THERE IS ALSO CONTRADICTORY TESTIMONY [redacted] GIVEN ABOUT WHO ALL WERE AT THE JUMP STOP WATCHING THE VIDEO AT ONCE — OR EVEN AT THE JUMP STOP AT ONCE. LOCKHART TESTI-FIED THAT SHE RECALLED THAT DET. SHIPLEY CAME IN WHILE KOGER WAS WATCHING THE VIDEO. BESIDES THE PCS, WHERE HE STATES KOGER WAS THERE WHEN HE ARRIVED, HE ALSO GAVE TESTIMONY OF THE SAME AND HAVING SPOKEN WITH HER THERE AT SOME LENGTH. HOWEVER, MS. KOGER GAVE TESTIMONY THAT SHIPLEY DID NOT ARRIVE WHILE SHE WAS AT THE JUMP STOP. SHIPLEY AND LOCKHART IN AG-REEMENT, KOGER AT ODDS.

IT IS THE SAME IN REGARDS TO THE CLARITY OF THE VIDEO. KOGER TESTIFIED THAT THE VIDEO WAS "GRAINY". IN APPENDIX H OF THIS PETITION YOU WILL FIND TESTIMONY FROM THE 2 OTHER PEOPLE (AND A 3RD, INCLUDING THE PROSECUTOR AT TRIAL, WHO REFERENCES HOW CLEAR THE VIDEO IS) WHO VIEWED THE VIDEO THE SAME TIME, AND THE SAME EXACT SPOT AS KOGER — THAT BEING SHIPLEY AND LOCKHART — OF HOW CLEAR THE VIDEO WAS. THEY (SHIPLEY, LOCKHART) BOTH TESTIFY HOW CLEAR IT IS TO DISCERN THE FACE OF WHITT, OF HOW EASY IT IS TO MAKE OUT THAT IT IS WHITT IN THE VIDEO. THAT IT WAS NOT "GRAINY". SHIPLEY TESTIFIES OF HOW EASY IT IS TO

MATCH WHITTS FACE IN THE VIDEO TO HIS FACE IN THE PHOTO USED IN THE LINE-UP HE CONDUCTED 2 DAYS LATER. SO, AGAIN, IT IS MS. KOGER WHO IS AT ODDS HERE ALSO. IN FACT, THROUGHOUT MUCH OF THE TESTIMONY GIVEN BY THE THREE IN RELATIVE MATTERS, SHIPLEY AND LOCKHART ARE MOSTLY CONSISTENT WITH ONE ANOTHER, WITH KOGER AT ODDS WITH THEM. BUT, TO BE FAIR, AMONGST THE THREE IT IS KOGER WHO LED IN RESPONDING "I DON'T RECALL" (OR SOME VERSION THEREOF) TO QUESTIONS BY A FAIR MARGIN, ALTHOUGH SHIPLEY WAS A RESPECTABLE SECOND. BETWEEN A SUPPRESSION HEARING, HER DEPOSITION, AND AT TRIAL MS. KOGER RESPONDED TO QUESTIONS WITH "I DON'T RECALL/REMEMBER" WELL OVER 60 TIMES - AND THAT IS NOT AN EXAGGERATION. SHE GAVE THIS RESPONSE MOST PREVANTLY IN REGARDS TO QUESTIONS CONCERNING SHIPLEY'S PRESENCE AT THE JUMP STOP AND HIS AWARENESS OF HER HAVING VIEWED THE VIDEO.

LOCKHART TESTIFIED THAT AT NO TIME WHILE SHE WAS AT THE STORE DID KOGER SAY OR INDICATE TO HER THAT WHITT WAS THE MAN WHO HAD ROBBED HER JUST A FEW HOURS EARLIER - EVEN AFTER LOCKHART POINTED WHITT OUT ON THE VIDEO AND TOLD KOGER, "THATS THE MAN WHO USED YOUR CARD." SHIPLEY TESTIFIED THAT AT NO TIME WHILE THEY WERE AT THE STORE TOGETHER DID KOGER SAY OR INDICATE TO HIM THAT WHITT WAS THE MAN WHO ROBBED HER. AND, HERE AGAIN, KOGER LATER TESTIFIED THAT AT THAT TIME SHE DID NOT RECOGNIZE WHITT (THE MAN IN THE SURVEILLANCE VIDEO) AS THE MAN WHO ROBBED HER.

DETECTIVE SHIPLEY RAN THE FINGERPRINTS ON THE JUICE BOTTLE, CAME UP WITH A MATCH OF DAN WHITT. TWO DAYS AFTER THE EVENTS AT THE JUMP STOP GAS STATION, DET. SHIPLEY HIMSELF CONDUCTED A PHOTO LINE-UP (WITH WHITTS PHOTO IN IT) PROCEDURE. AT THAT TIME MS. KOGER PICKED WHITTS PHOTO OUT OF THE LINE UP AS THE MAN WHO HAD ROBBED. MS. KOGER STATED THAT SHE WAS 100% CERTAIN OF THIS.

DET. SHIPLEY TESTIFIED AT TRIAL THAT HAD HE KNOWN THAT MS. KOGER HAD VIEWED THE STORE SURVEILLENCE VIDEO OF WHITT USING HER CARD 2 DAYS BEFORE THE PHOTO LINE-UP, HE NEVER WOULD HAVE CONDUCTED IT. WHEN ASKED IF THIS WAS BECAUSE HE THOUGHT THAT KOGER WOULD HAVE PICKED WHITTS PHOTO OUT OF THE LINE-UP BECAUSE THATS WHO SHE SAW ON VIDEO TWO DAYS PRIOR, SHIPLEY REPLIED, "OBVIOUSLY, YES. SHOWING HER A LINE-UP WOULD HAVE BEEN MOOT."

THE TRIAL PROSECUTOR, HOLDING A PHOTO OF THE LINE-UP, ASKED KOGER WHILE SHE WAS ON THE STAND, "DID YOU PICK THE MAN OUT OF THE PHOTO LINE-UP BECAUSE YOU SAW SOMEONE IN A VIDEO, OR DID YOU PICK THE MAN OUT OF THE PHOTO LINE-UP WHO WAS THE MAN WHO ROBBED YOU AT GUNPOINT?" KOGER LET SLIP, "I PICKED THAT MAN OUT OF THAT VIDEO BECAUSE THAT'S WHO HELD A GUN ON ME AND ROBBED ME." AT WHICH POINT THE PROSECUTOR STEPS IN TO REDIRECT HER BY TELLING HER SHE MEANS THE PHOTO LINE UP RATHER THAN THE VIDEO. KOGER AGREES, THEN STARTS TO SAY "... THAT VIDEO HAD NOTHING TO DO WITH ..." BEFORE THE PROSECUTOR CUTS HER OFF WITH, "NOTHING FURTHER. THANK YOU.", BEFORE MS. KOGER CAN LET SLIP WITH ANYTHING ELSE DAMAGING TO HIS CASE. I KNOW, BECAUSE I WAS THERE.

IN SUMMATION: IN A DIMLY-LIT PARKING LOT WHILE IT WAS STILL DARK OUTSIDE, MS. KOGER WAS ROBBED AT GUNPOINT BY A MAN APPROXIMATELY 5'8" AND 150 LBS, WHO WAS WEARING A HAT PULLED DOWN OVER HIS FACE, BUT NO GLOVES AS HE DROVE OFF IN A STOLEN VAN. LATER THAT MORNING, JUST A FEW HOURS AFTER THE ROBBERY, KOGER GOES TO A STORE (WHICH SHE USED TO WORK FOR) WHERE HER STOLEN DEBIT CARD WAS USED. THE STORE CLERK TELLS KOGER THAT A MAN — WHOM THE STORE CLERK ASSESED TO BE ABOUT 6'2" 200 LBS — CAME IN TO THE STORE AND USED HER CARD AND THAT SHE HAS VIDEO SURVEILLANCE OF THAT MAN. KOGER CALLS DET. SHIPLEY ON THE PHONE TELLS HIM ALL THIS AND THAT SHE/HER/THEY ARE GOING TO WATCH ('LOCATE') THE MAN ON THE VIDEO.

THEY DO SO, STANDING 2 OR 3 FEET FROM THE SCREEN, WATCHING A CLEAR, IN COLOR EASILY DISCERNIBLE PICTURE OF WHITT USING KOGERS DEBIT CARD. THE STORE CLERK POINTS TO HIM ON THE VIDEO SCREEN AND TELLS KOGER "THATS THE MAN WHO USED YOUR CARD." KOGER DOES RECOGNIZE HIM AS HER ROBBER AND DOES NOT INDICATE IN ANY WAY TO THE STORE CLERK THAT HE IS.

THE DETECTIVE ARRIVES AS THEY (STORE CLERK, KOGER) ARE IN THE STORE OFFICE WATCHING THE VIDEO. WHEN THE DETECTIVE ARRIVES HE SPEAKS BRIEFLY WITH KOGER — SHE DOES NOT SAY TO HIM THAT WHITT, THE MAN IN THE VIDEO, IS THE ROBBER NOR MAKES ANY OTHER INDICATION OF SUCH — BEFORE SHE LEAVES WITH HER BOYFRIEND. SHIPLEY THEN SPEAKS WITH THE STORE CLERK AND THEY WATCH THE VIDEO TOGETHER. KOGER TESTIFIES THAT SHE DOES NOT RECOGNIZE WHITT AS THE ROBBER AT THAT TIME.

TWO DAYS LATER DET. SHIPLEY, KNOWING THAT KOGER HAD WATCHED THE VIDEO — OR, AT THE VERY LEAST HAD A HIGHLY REASONABLE EXPECTATION THAT SHE HAD DONE SO — CONDUCTS AN

IMPROPER (ILLEGAL?) PHOTO LINE-UP PROCEDURE. AS A THEN 20 YEAR VETERAN HE SHOULD HAVE KNOWN BETTER. KOGER THEN ID'S WHITT. SHIPLEY LATER TESTIFIES IT IS VERY LIKELY THAT KOGER WOULD HAVE DONE THAT BECAUSE SHE WAS PICKING THE FACE OUT OF THE LINE-UP WHICH SHE HAD SEEN 2 DAYS PRIOR ON THE VIDEO. IN FACT, HE AGREES THAT IT IS OBVIOUS THAT SHE WOULD HAVE DONE SO. WHETHER OR NOT SHIPLEY WAS AWARE THAT KOGER HAD WATCHED THE VIDEO DOES NOT CHANGE THAT.

IT IS NOTEWORTHY HERE TO POINT OUT WHAT IS CONTAINED IN APPENDIX J OF THIS PETITION — THE SPD'S POLICY CHANGE REGARDING PHOTO LINE-UP PROCEDURES AND HOW THEY ARE CONDUCTED. NOTE THE EFFECTIVE DATE, 9-30-2010, ON PAGE 1.

THE PHOTO LINE-UP IN MY CASE WAS CONDUCTED IN MARCH 2009. I DID NOT START MAKING AN ISSUE OF THE PROCEDURAL MISCONDUCT I SAW IN THE LINE-UP PROCEDURE WITH THE COURT AND PROSECUTORS (THROUGH MY TRIAL ATTORNEY, AFTER READING SHIPLEY'S PCS IN SEPT. OF 2009) OFFICE UNTIL WINTER OF 2009. BY THAT NEXT FALL THERE WAS A POLICY CHANGE PUT IN PLACE — AFTER MY LINE-UP PROCEDURE, BUT A FEW MONTHS BEFORE MY TRIAL. I DO NOT CLAIM THAT MY CASE WAS THE SOLE IMPETUS OF THIS POLICY (ALTHOUGH SUCH IS NOT OUT OF THE REALM OF POSSIBILITIES). HOWEVER, MY CASE WAS A MAJOR FELONY CASE THAT WAS GOING TO TRIAL WITH IMPROPER LINE-UP PROCEDURE AS ONE OF THE KEY ISSUES, SO IT IS VERY LIKELY THAT MY CASE HAD SOME ROLE IN THE CAUSE OF THE POLICY CHANGE. I DO NOT BELIEVE THE TIMING IS PURELY COINCIDENTAL. THE POINT HERE IS NOT THAT SOME NOT-YET-EXISTENT POLICY WAS VIOLATED (IMPOSSIBLE, OF COURSE), BUT RATHER THAT SOMETHING BROUGHT TO THE ATTENTION OF THE SPD THAT THERE LINE-UP PROCEDURES WERE FLAWWED AND NEEDED TO BE CHANGED (AGAIN, THE TIMING.) REGARDLESS, A FLAW IS A FLAW — POLICY OR NO. I CIRCLED AND NOTATED THE FLAWS WHICH OCCURED IN MY LINE-UP, THAT THEY LATER CHANGED.

BRIEFLY THEN (DUE TO PAGE LIMITATIONS), A WRAP-UP. WHITT WAS FOUND GUILTY AT TRIAL. GUILTY OF STEALING THE VAN BY PROXY, PRESUMABLY, BECAUSE ABSOLUTELY NO EVIDENCE WHATSOEVER WAS PRESENTED AT TRIAL OF VEHICLE THEFT, OTHER THAN WHITT LIVED IN THE GENERAL NEIGHBORHOOD OF WHERE THE VAN WAS STOLEN. HIS SENTENCE WAS ENHANCED AS A PERSISTENT OFFENDER (FROM 2 FELONY FORGERY CHARGES WHICH HE PLED GUILTY TO IN 2006) TO 25 AND 15 YEARS TO RUN CONCURRENTLY. THE TRIAL RESULT AND SUBSEQUENT APPEAL DENIALS CAN BE FOUND IN THE APPENIXES. I WILL ADDRESS PARTICULAR ISSUES WITH THOSE AND THE TRIAL ITSELF IN REASONS FOR GRANTING WRIT.

Dan Whitt

REASONS FOR GRANTING THE WRIT

I WILL PREFACE THIS SECTION WITH A REMINDER THAT I AM A Pro se' PETITIONER. I AM A REASONABLY INTELLIGENT MAN, BUT I'M NOT A SCHOOLED ATTORNEY — OR EVEN A SELF-TAUGHT QUASI-PARALEGAL. AS A PRISONER IN A HIGH MAX. PRISON WITH A LOT OF LOCKDOWN TIME, MY ACCESS TO THE MEAGER LEGAL TOOLS AVAILABLE IS VERY LIMITED. ASKING ME TO AMPLIFY MY LEGAL ARGUMENTS IN THE PURE FASHION OF A BARRISTER IS AKIN TO ASKING ME TO IDENTIFY A CANCEROUS MYOCHANDRIA CELL AS OPPOSED TO AN IMMUNO-LYMPHONIC PROTEIN — NO HOURLY VISIT ONCE A WEEK TO A COUNTRY LIBRARY IS GOING TO MAKE ME PROFICIENT AT EITHER.

HOWEVER, I HAVE CAREFULLY READ THE HELPFUL GUIDE FOR INDIGENT PETITIONERS (AND ACCOMPANYING RULES BOOKLET) THAT THE CLERKS' OFFICE WAS SO GRACIOUS IN SUPPLYING ME. SO I WILL DO THE BEST I CAN IN THE ONLY MANNER I KNOW HOW TO, KEEPING IN MIND THE INSTRUCTIONS ON BREVITY AND RELEVENCE. I DO NOT INTEND TO, NOR WILL I, MEANDER OFF INTO THE WILDERNESS OF CONSPIRACY THEORIES OR INDIGNANT TREATIES OF OUTRAGE. I WILL BE FOCUSED, MAINLY, ON RULE 10 a, b, c, EMPHASIS ON THE LATTER PART OF a.

FIRST I WILL POINT OUT AND EXPLAIN THE DOCUMENTS FOUND IN APPENDIXES E, H, I AND J.

APPENDIX E CONTRINS A MOTION TO RECALL MANDATE AND THE ORDER DENYING SAME. THE DOCUMENTS REFERRED TO IN THAT MOTION (DET. SHIPLEY'S PCS AND DR. STEBLAYS DEPOSITION - MOVANTS' EXHIBIT'S #7 AND #11, RESPECTIVELY) WERE INTEGRAL TO MY 29.15 ARGUMENTS. THEY WERE ADMITTED EXHIBITS AT MY 29.15 EVIDENTIARY HEARING. AFTER THAT APPEAL WAS DENIED, THESE 2 DOCUMENTS WEREN'T CONSIDERED IN MY APPEAL OF THAT DENIAL (FOR REASONS FOUND IN THE MOTION TO RECALL), SO THE MOTION TO RECALL WAS SUBMITTED — AND DENIED WITHOUT ANY REASON GIVEN. HOWEVER, THEY WERE ALLOWED AND CONSIDERED IN THE LOWER COURTS DECISION WHICH THE WESTEN DISTRICT UPHELD — ALL OF WHICH I AM ASKING THIS COURT TO REVIEW. SO I HAVE SUBMITTED EXHIBIT #7 AS APPENDIX I, JUST AS I HAVE EXHIBIT #18 AS APPENDIX H. APPENDIX H IS KEY TESTIMONY. NOT ONLY IS IT SUBMITED AS IT'S OWN COMPELLING DOCUMENT, BUT LSO AS PROOF THAT SOME OF THE THINGS I LAYED OUT IN STATEMENTS OF THE CASE ARE NOT CONTRUED, HYPERBOLIC... OR RE-ARRANGED. SO, YES, ALSO AS A DETERRANT FROM PERHAPS

BEING 'RE-ARRANGED' BY ANY RESPONDENT, AS HAS OCCURRED BEFORE. WHAT IS NOT INCLUDED IN THE APPENDIXES FROM THE MOTION TO RECALL IS EXHIBIT #11, DR. STEBLAY'S DEPOSITION. THE DEPOSITION IS 40 PAGES IN OF ITSELF. I DID NOT INCLUDE IT IN THIS PETITION SO AS NOT TO BE OVERLY CUMBERSOME AND BECAUSE OF CONCERNS OVER PAGE LIMITATIONS AS I UNDERSTAND THEM. BUT IT ALSO IS A SUBMITTED EXHIBIT FROM MY 29.15 HEARING, AND I HAVE MULTIPLE COPIES SHOULD A BODY REQUIRE ONE. ANY REFERENCES I MAKE TO IT IN THIS PETITION I SWEAR TO BE TRUE AND ACCURATE.

APPENDIX J, THE SPRINGFIELD POLICE DEPARTMENT'S (SPD) POLICY CHANGE DOCUMENT, IS SOMETHING I ONLY RECENTLY DISCOVERED. BACK IN JUNE OF THIS YEAR I RECEIVED MY ENTIRE LEGAL FILE (WHICH I HAD REQUESTED A FEW WEEKS PRIOR) FROM THE MISSOURI PUBLIC DEFENDERS OFFICE. THERE WERE ACTUALLY SEVERAL INTERESTING, REVEALING DOCUMENTS AND INFORMATION WITHIN IT, BUT FOR PURPOSES HERE I'LL ADDRESS THIS DOCUMENT ONLY. I CANNOT SAY WITH 100% CERTAINTY THAT THIS DOCUMENT WAS INITIALLY AND/OR EXCLUSIVELY A PART OF MY TRIAL ATTORNEY'S FILE. [FROM THE MISSOURI STATE PUBLIC DEFENDERS' OFFICE. CHARLTON CHASTAIN WAS MY TRIAL ATTORNEY — I'M NOT SURE THAT HE IS STILL WITH THEM, OR EVEN PRACTICING LAW WHATSOEVER — WITH VARIOUS ATTORNEY'S SUBSEQUENTLY REPRESENTING ME IN MY APPEAL PROCESS, ALL FROM THAT OFFICE.] HIS FILE WAS MIXED IN AMONGST THE OTHERS. WHAT IS CERTAIN IS THAT THIS DOCUMENT IS DATED SEPTEMBER 30TH, 2009 — AFTER MY LINE-UP PROCEDURE TOOK PLACE, BUT BEFORE MY TRIAL.

THE DOCUMENTS CONTENT AND SUBJECT MATTER REGARDING PHOTO LINE-UP PROCEDURE POLICY RELATED DIRECTLY TO MY CASE, ACCUTELY, SINCE MY TRIAL HINGED ON THE MAIN TOPIC OF A TAINTED PHOTO LINE-UP PROCEDURE. INDEED, THE SOLE EVIDENCE OFFERED BY THE PROSECUTION OF MY HAVING COMMITTED THE ROBBERY (NOT OF 'FRAUDULENT USE OF A CREDIT DEVICE', AN ENTIRELY DIFFERENT CRIME INITIALLY LEVIED AGAINST ME) IS AN EYEWITNESS IDENTIFICATION FROM A TAINTED PHOTO LINE-UP PROCEDURE. MY POINT HERE IS THAT THIS DOCUMENT EMPHASIZES THAT THE SPD RECOGNIZED AND UNDERSTOOD THAT THE LINE-UP PROCEDURE POLICY IN PLACE WHEN MY LINE-UP OCCURRED WAS FAULTY AND PRONE TO ERROR — KEY ELEMENTS OF THE CHANGES PUT IN PLACE I HAVE CIRCLED ON THE DOCUMENT. THIS ALL OCCURRED SOON AFTER

I BEGAN TO MAKE A BIG ISSUE OF MY LINE-UP PROCEDURE, THEN ADOPTED AND PUT IN PLACE BEFORE MY TRIAL. I REALIZE THERE WERE MANY OTHER CASES GOING ON IN THIS TIME FRAME BUT HOW MANY WITH A QUESTION ABOUT FAULTY LINE-UP PROCEDURES AS IT'S KEY ELEMENT? THAT WERE A MAJOR FELONY ABOUT TO GO TO TRIAL? I DOUBT THE TIMING OF IT ALL WAS PURELY COINCIDENTAL. WAS MY CASE THE IMPETUS OF THESE CHANGES? IF NOT, JUST HOW MUCH DID MY CASE HAVE TO DO WITH IT? THESE ARE FAIR AND VERY RELEVENT QUESTIONS TO MY CASE, WHICH SHOULD HAVE BEEN ADDRESSED AT MY TRIAL. ONLY, THEY WERE NOT — WHY? THAT'S WHAT I'D LIKE TO KNOW, SINCE THE DOCUMENT IS DATED ALMOST 5 MONTHS BEFORE MY TRIAL. THIS PAST JUNE WHEN I RECEIVED MY FILE FROM THE PUBLIC DEFENDERS AND WENT THROUGH IT IS THE FIRST I HAVE EVER BEEN AWARE OF IT, MY TRIAL ATTORNEY NEVER MADE A PEEP ABOUT IT TO ME; NOT THEN, NOT SINCE. IF HE, SOMEHOW, WAS NOT AWARE OF IT'S EXISTENCE BEFORE MY TRIAL, HE SHOULD HAVE BEEN AS IT WAS AVAILABLE TO HIM. EVEN MORESO, IT'S ALMOST CERTAIN THAT THE PROSECUTORS OFFICE WAS AWARE OF THIS DOCUMENT/POLICY CHANGE MONTHS BEFORE TRIAL, YET NO MENTION OR NOTICE OF IT WAS BROUGHT TO THE COURT OR DEFENSE, WHATSOEVER. I INCLUDED THE DOCUMENT BECAUSE, TO ME, IT IS NEW, UNREVEALED EVIDENCE THAT WOULD HAVE IMPACTED MY TRIAL SIGNIFICANTLY. AND THE LIKELY DISCOVERY VIOLATION BY THE PROSECUTORS OFFICE — AREN'T PROSECUTORS OFFICES AUTOMATICALLY NOTIFIED OF POLICY CHANGES IN PROCEDURES BY IT'S RELATIVE POLICE DEPARTMENT?

I AM ASKING THIS COURT TO REVIEW THE DECISIONS FOUND IN APPENDIX A, AND THE DECISIONS WHICH A UPHELD FROM APPENDIX C. MOST OF WHICH HAS TO DO WITH INEFFECTIVE ASSISTANCE OF COUNSEL, OF WHICH ARGUMENTS I RELY ON TO BE FOUND IN THE TYPED PAGES OF THIS SECTION.

IN REGARDS TO IAC (INEFFECTIVE ASSISTANCE OF COUNSEL) I WISH TO POINT OUT THE FOLLOWING: I HAD A SOLID ALIBI FOR THE TIME OF THE ROBBERY. I AM THE ONE WHO INSISTED THAT THE DNA SWABS FROM THE VAN BE SENT OFF FOR TESTING (AND, ULTIMATELY, WE WERE THE ONES WHO SENT THEM OFF) — THE VAN HAD EVIDENTLY BEEN STOLEN SEVERAL DAYS BEFORE THE ROBBERY, AND IF I HAD BEEN THE ROBBER DRIVING AROUND IN THAT VAN WITH NO GLOVES (PER KOGERS TESTIMONY), THERE IS NO POSSIBLE WAY I WOULD BE INSANE ENOUGH TO TAKE A CHANCE LIKE THAT. BUT I KNEW I WAS

NOT THE ROBBER AND HAD NEVER BEEN IN THAT VAN. THERE WAS ABSOLUTELY NO PHYSICAL EVIDENCE WHATSOEVER PRESENTED (OR AVAILABLE) OF MY HAVING DONE THE ROBBERY. AGAINST ME THERE WAS ONLY A SINGLE EYEWITNESS WHO FIRST DIDN'T RECOGNIZE ME AS THE ROBBER THEN 2 DAYS LATER CHANGE HER MIND AND PICK ME OUT OF A TAINTED LINE-UP PROCEDURE (PER THE LEAD INVESTIGATOR'S TRIAL TESTIMONY) IN WHICH SHE ONLY SELECTED THE PHOTO OF THE MAN SHE HAD SEEN ON VIDEO 2 DAYS PRIOR (PER HER OWN TESTIMONY - "I PICKED THE MAN OUT OF THAT VIDEO...") — OBVIOUSLY THAT IS WHAT HAPPENED (AGAIN, PER THE LEAD INVESTIGATORS TRIAL TESTIMONY). ON TOP OF ALL THAT YOU HAVE CONTRADICTORY TESTIMONY ALL OVER THE PLACE FROM THE THREE PRINCIPALS WHO WERE AT THE JUMPSTOP THAT MORNING AND A LEAD INVESTIGATOR WHO COMMITED PERJURY UNDER OATH. TAKE A LOOK AT APPENDIX H, PG. 1 BOTTOM — THAT IS DET. SHIPLEY SAYING IN HIS SWORN TO PCS THAT HE IS AWARE OF THE DNA SWABS, THEN UNDER OATH AT A HEARING SAYING HE HAS NO IDEA ABOUT ANY DNA SWABS, THEN ONLY A COUPLE OF DAYS LATER UNDER OATH IN HIS DEPOSITION SAYING SURE HE KNOWS ABOUT THE DNA SWABS, HE WAS THEM. I KNOW THAT PERJURY IS AN INFLAMMATORY WORD, BUT REALLY, WHAT ELSE CAN ONE CALL THAT? THIS IS THE SAME MAN WHO SAYS THAT SEVERAL MONTHS AFTER THEY WERE ALL AT THE JUMPSTOP AT ONCE (SHIPLEY, KOGER, LOCKHART) WAS THE FIRST INSTANCE OF HIM EVEN HEARING OF KOGER HAVING VIEWED THE VIDEO (AT A SUPPRESSION HEARING), DESPITE WHAT HIS PROBABLE CAUSE STATEMENT SAYS [WHICH, AGAIN, WAS NEVER UTILIZED TO IMPEACH DET. SHIPLEY'S TESTIMONY BY MY TRIAL ATTORNEY, NOT ONLY ON THE SUBJECT OF THE VIDEO, BUT ALSO AS THE IMPETUS OF HIS CHANGING DNA-SWAB TESTIMONY, A FACT THAT NEVER IS REFERRED TO BY VARIOUS RESPONDENTS WHEN THEY CLAIM THAT THE DET.'S PCS HAS NO IMPEACHABLE VALUE.]. THIS IS THE SAME MAN WHO CONDUCTED, ALONE, THE PHOTO LINE-UP PROCEDURE WITH MS. KOGER. A PROCEDURE WHICH, OH BY THE WAY, IS AGAINST POLICE DEPARTMENT POLICY NOW.

ALL OF THE ABOVE ARE ACTUAL PROVEN FACTS — NOT NONSENSICAL RANTINGS. YET, DESPITE WHAT YOU SEE ABOVE (AND, HONESTLY, OTHER FACTORS IN MY FAVOR - BUT NOT REFERENCED FOR THE SAKE OF BREVITY AND BECAUSE OF THEIR SECONDARY NATURE), I WAS FOUND GUILTY BY A JURY AT TRIAL. THIS WAS DUE LARGELY TO INEFFECTIVE COUNSEL.

HOWEVER, I HAVE MY RESERVATIONS ABOUT RELYING ON I A C ALONE IN MAKING MY ARGUMENTS HERE — DUE MAINLY TO WHAT I BELIEVE IS AN EXTREMELY HIGH THRESHOLD

OF PROVING. BECAUSE OF THE PANDORAS BOX THAT STATE COURTS FEAR MAY BE OPENED IN ACKNOWLEDGING THE VERY REAL, VERY SERIOUS PROBLEMS THEY HAVE IN THEIR RESPECTIVE PUBLIC DEFENDER OFFICES. THEY ARE OVERWHELMED, OVERBURDENED. THE INEQUITY OF COMPETENT, EFFECTIVE REPRESENTATION BETWEEN AN OVERWORKED PUBLIC DEFENDER AND A PAID ATTORNEY (OR EVEN A PROSECUTORS OFFICE, WITH THEIR RESOURCES) IS A WIDE GAP ALREADY AND CONTINOUSLY GROWING. BUT NO STATE WANTS TO EVEN ADMIT THIS, LET ALONE DEAL WITH IT. VALIDATION OF IAC IN CASES OF PUBLIC DEFENDER REPRESENTATION (EXCEPT IN THE MOST EXTREME OF CASES) IS SOMETHING MOST COURTS ARE ADVERSE TO.

ALSO, I AM COMING TO DISCOVER THAT "TRIAL STRATEGY" IS SOME SORT OF IMPERVIOUS NIMBUS IN THE FACE OF IAC. A BYPRODUCT OF THE ABOVE, PERHAPS, IN THE CASE OF PUBLIC DEFENDERS. IN THE MATTERS OF MY 29.15 EVIDENTIARY HEARING, MY TRIAL ATTORNEY (A PUBLIC DEFENDER), IN HIS TESTIMONY, SOMETIMES INVOKES "TRIAL STRATEGY". SOMETIMES HE DOESN'T (AS IN THE MATTER OF FAILING TO OBJECT TO IN-COURT IDENTIFICATION), SAYING IT WAS NOT A MATTER OF TRIAL STRATEGY AND IT WAS SOMETHING HE SHOULD HAVE DONE. SOMETIMES THE STATE'S ATTORNEY INVOKES IT FOR HIM AND HE JUST AGREES TO IT. IF YOU READ THE HEARING TRANSCRIPT ITSELF YOU WILL SEE THAT THE PRESIDING JUDGE SAYS THAT ALL IN ALL MY TRIAL ATTORNEY'S ANSWERS ARE "VAGUE, AT BEST". NEVERTHELESS, REGARDLESS OF WHO INVOKED IT, ONCE THE UMBRELLA OF "TRIAL STRATEGY" WAS WHIPPED OUT, THE MATTER SEEMED AUTOMATICALLY RESOLVED. SO MY FAITH IN IAC IS SOMEWHAT FLIMSY.

THOUGH, TRULY, I AM BLESSED TO LIVE IN A COUNTRY THAT AFFORDS YOU AN ATTORNEY WHEN YOU CAN'T AFFORD ONE YOURSELF. STILL, OUR CONSTITUTION CALLS FOR FAIR REPRESENTATION BY A COMPETENT, EFFECTIVE ATTORNEY.

TO FURTHER AMPLIFY MY ARGUMENTS I MUST DEFEND MYSELF AGAINST AN ARGUMENT WHICH VARIOUS RESPONDENTS KEEP GOING TO OVER AND OVER AGAIN — WHICH IS THAT EVIDENCE OF FRAUDULENT USE OF A CREDIT DEVICE IS THE EQUIVALENCE OF EVIDENCE OF 1ST DEGREE ARMED ROBBERY. IT IS NOT.

BRIEFLY AS POSSIBLE: I WANTED TO TAKE THE STAND IN MY OWN DEFENSE. TO TELL THE JURY OF HOW IT CAME BE THAT I WAS IN POSSESSION OF THAT CREDIT CARD, WHO GAVE IT TO

ME TO USE THAT MORNING, WHY I BELIEVED THEIR STORY (THEY KNEW THE PIN#, FOR ONE THING!), OUR EFFORTS TO TRACK THAT PERSON DOWN (HOWEVER, MY TRIAL ATTORNEY'S EFFORTS IN OBTAINING EMPLOYEE RECORDS OF MY PAST PLACES OF EMPLOYMENT, 2 ROOFING COMPANIES, TO OBTAIN THAT PERSONS LAST NAME WERE SOMEWHAT FEEBLE - NO SUBPOENA), ETC.. BUT MY PD (PUBLIC DEFENDER) COUNSELED AGAINST IT, SAYING THAT MY PAST CRIMINAL RECORD WOULD BE USED AGAINST ME. I ARGUED THAT MY PAST RECORD DID NOT CONTAIN ANY VIOLENCE WHATSOEVER - NO DOMESTIC NO RESISTS, NO ASSAULTS OF ANY KIND, MINOR OR MAJOR. AND NO WEAPONS WHATSOEVER, POSSESSION, USE OF, NOTHING, GUNS OR OTHERWISE. AND THAT'S NOT BECAUSE I MANAGED TO "HIDE" A VIOLENT NATURE PRONE TO USE GUNS ON FOLKS - FOR SOME 30 ODD YEARS?! MY RECORD IS NOTHING TO BRAG ABOUT, I'M NOT PROUD OF IT, BUT IT DOES CONSIST MAINLY OF DWI'S, THEFT, FRAUD AND FORGERY. NO VIOLENCE. I ARGUED THAT THE BALANCE OF THAT BEING USED AGAINST ME DID NOT OUTWEIGH THE IMPORTANCE OF ME TELLING THE JURY HOW I GOT THE CREDIT CARD. BUT, IN THE END, I ACQUIESCED.

I CAME TO SEE THAT AS A MISTAKE. BUT, TO BE FAIR, THAT WAS ONE OF THE FEW DECISIONS THAT MY PD AND I GOT TO DISCUSS AND STRATEGIZE ABOUT AT LENGTH, SO I MADE THE DECISION MYSELF NOT TO TESTIFY, OF MY OWN ACCORD - AND I HAVE NEVER CLAIMED OTHERWISE. UNLIKE THE DECISION CONCERNING THE PROSECUTORS LAST MINUTE, SURPRISE DISCOVERY VIOLATION. THAT WE HAD NO TIME WHATSOEVER TO DISCUSS AT ANY LENGTH, LET ALONE STRATEGIZE ABOUT. HE TOLD ME OF THAT MATTER ON THE MORNING MONDAY OF THE TRIAL, AND HE HAD ONLY LEARNED OF IT THE DAY BEFORE (SUNDAY). THERE WAS NO TIME TO PROPERLY CONSIDER THE MATTER (THE PROSECUTORS OFFICE WAS AWARE OF THE MATTER FOR SOME 6 MONTHS BEFORE TELLING US OF IT - WELL, I ADDRESS THIS FULLY IN THE TYPED SECTION) BETWEEN THE PD, MYSELF, AND MY ALIBI WITNESS. I ONLY HAD TIME, IN THE COURTROOMS LITTLE HOLDING CELL, TO BRIEFLY SCAN THE TRANSCRIPT, SAY, "WHAT THE (BLEEP) IS THIS? I WANT YOU TO OBJECT IF THEY (PROSECUTORS) REFER TO THIS IN ANY WAY." BEFORE HE FLEW OUT THE DOOR AFTER AGREEING HE WOULD OBJECT. HE DID NOT. AND HE ALLOWED THE PROSECUTION TO QUESTION MY ALIBI WITNESS ABOUT HER MENTAL HEALTH HISTORY (BI-POLARISM) AND MEDICATIONS. IF I HAD KNOWN ALL OF THAT (AND SEVERAL OTHER DECISIONS HE MADE OF HIS OWN ACCORD, "TRIAL STRATEGY" OR OTHERWISE)

I WOULD HAVE CERTAINLY INSISTED ON TESTIFYING ON MY OWN BEHALF.

BE THAT AS IT IS, AS TRIAL BEGAN I DID TELL MY PD TO INFORM THE PROSECUTOR THAT WE WOULD NOT BE DISPUTING IN ANY WAY THAT IT WAS ME ON THAT VIDEO, IN THAT STORE, USING THAT STOLEN CREDIT CARD THAT MORNING. THAT MY PD WOULD BE DECLARING THAT AS FACT, OPENLY AND FREELY, IN HIS OPENING STATEMENT. SO THEY COULD MAKE THE TRIAL MUCH SHORTER (SAVING EVERYONE INVOLVED MUCH OF THEIR VALUABLE TIME) BY FOREGOING ANY TESTIMONY CONCERNING THAT FACT AND GETTING RIGHT TO THEIR EVIDENCE OF 1ST DEGREE ARMED ROBBERY AND 1ST DEGREE TAMPERING WITH A VEHICLE. HE DID SO, AND THE PROSECUTOR DECLINED.

THE REASON FOR THAT SOON BECAME APPARENT.

A VERY LARGE PART OF MY TRIAL CONSISTED OF THE PROSECUTION PUTTING ON WITNESSES TESTIFYING ABOUT EVIDENCE OF ME BEING THE PERSON WHO USED THE CARD AT THE JUMP STOP THAT MORNING. FINGERPRINT WITNESSES ABOUT MY FINGERPRINTS ON THE JUICE BOTTLE, STORE CLERK TESTIMONY ABOUT ME BEING IN THE STORE USING THE CARD, MORE WITNESS TESTIMONY ABOUT THE JUICE BOTTLE - THIS TIME ABOUT MY DNA BEING ON THE LIP OF THE BOTTLE, TESTIMONY FROM A BANK MANAGER ABOUT ME USING THE CARD AT THEIR ATM (ALSO UNDISPUTED BY ME) — ON AND ON IT WENT. WHAT THE PROSECUTION DID WAS INUNDATE THE JURY WITH TESTIMONY AND EVIDENCE OF FRAUDULENT USE OF A CREDIT DEVICE IN THE ATMOSPHERE OF A 1ST DEGREE ARMED ROBBERY, WITH THE ASPIRATION THAT SAID EVIDENCE WOULD APPEAR TO THE JURY AS EVIDENCE OF THE ARMED ROBBERY. IF THEY HAD STUCK TO THEIR EVIDENCE OF THE ROBBERY ITSELF (A SINGLE EYEWITNESS WHO HAD BEEN SUBJECTED TO A TAINTED LINE-UP PROCEDURE) AND THE VEHICLE TAMPERING (SOME OFFICER USING A POINTER ON A SCREEN SHOWING A MAP OF SPRINGFIELD, MO. TO POINT OUT THAT I LIVED WITHIN A MILE OF WHERE THE VAN WAS STOLEN) THE TRIAL WOULD HAVE BEEN MUCH SHORTER — AND VERY LIKELY I WOULD NOT BE SITTING WHERE I'M AT NOW.

THIS PLOY BY THOSE PROSECUTORS WAS MET WITH SOME LEVEL OF SUCCESS (IN LARGE PART DUE TO MY PD'S INEFFECTIVENESS IN COUNTERACTING IT), SO ALMOST ALL OF THE RESPONDENTS AND MANY OF THE COURTS IN MY APPEAL PROCESS, UP TO AND INCLUDING THE U.S. WESTERN DISTRICT COURT, HAVE ADOPTED THIS FAULTY ARGUMENT AS THEIR OWN. YOU SEE IT IN MANY

OF THEIR ARGUMENTS" ... EVEN IF MOVANT DOES PROVE PREJUDICE [OF THIS], THERE IS STILL THE OVERWHELMING EVIDENCE OF THE JUICE BOTTLE FINGERPRINTS [AND/OR] THE VIDEO SURVEILLANCE, THE ATM PHOTO, TO OVERCOME." "EVEN IF MOVANT DOES ESTABLISH IAC [OF THAT], THERE IS STILL THE EVIDENCE OF ETC., ETC." WHAT THEY ARE ESSENTIALLY SAYING HERE IS, "OKAY, DISREGARD THE UNRELIABLE EVIDENCE PROVIDED BY THE VICTIM — THE MAN IS STILL PROVEN GUILTY OF THE ROBBERY BECAUSE HE HAD HER STOLEN CREDIT CARD." BY THAT STANDARD, PRISONS ACROSS THIS NATION WOULD BE FULL OF PAWN SHOP OWNERS CONVICTED OF MURDER BECAUSE THEY HAD POSSESSION OF A FIREARM PREVIOUSLY USED IN THAT MURDER. BUT THERE ISN'T, BECAUSE THAT ARGUMENT IS ILLEGITIMATE AND FAULTY.

I DO NOT MEAN TO BELITTLE THAT EVIDENCE. IT IS OVERWHELMING AND IRREFUTABLE EVIDENCE — OF MY BEING GUILTY OF FRAUDULENT USE OF A CREDIT DEVICE, OR IMPROPER USE OF A CREDIT DEVICE, WHICHEVER. I HAVE NEVER DISPUTED THAT FROM THE VERY BEGINNING. IT WAS A STUPID, IMPULSIVE MISTAKE TO HAVE USED IT, OR EVEN ACCEPTED IT FROM SOMEONE ELSE. I REGRET IT MORE THAN ANYONE CAN EVEN BEGIN TO FATHOM. I UNDERSTAND THAT MY BEING IN POSSESSION OF THE CARD DOES NOT LOOK GOOD. IT WOULD BE INACCURATE AND DISINGENUOUS OF ME TO CLAIM, "I'M JUST AN INNOCENT MAN THAT HAS NEVER DONE ANYTHING WRONG, I HAVE NO IDEA OF HOW I GOT DRAGGED INTO THIS MESS." I USED A CARD THAT HAD BEEN STOLEN FROM A WOMAN AT GUNPOINT — I GET IT. BUT IT IS JUST AS INACCURATE AND DISINGENUOUS TO PROCLAIM THAT EVIDENCE OF BEING IN THAT STORE USING THAT CARD IS INDICTABLE EVIDENCE OF COMMITTING THE ROBBERY. IT IS NOT. I STRESS THAT IN THESE LAST COUPLE OF PAGES BECAUSE RESPONDENTS KEEP ESPOUSING THAT IT IS AND COURTS KEEP ADOPTING IT.

LASTLY, I WOULD LIKE TO ADDRESS THE ARGUMENT MADE AGAINST ME THAT I DECLINED HAVING AN EYEWITNESS EXPERT TESTIFY AT MY TRIAL BECAUSE I WAS SO DEAD-SET AGAINST A CONTINUANCE.

THAT DECISION WAS NOT MADE LIGHTLY NOR EASILY. IN FACT, IT IS ACCURATE TO SAY THAT I WAS AT A CONSIDERABLE POINT OF DURESS BY THE TIME I HAD TO MAKE THAT DECISION. I HAD BEEN LOCKED UP IN A GROSSLY OVERCROWDED COUNTY JAIL (GREENE CO. JAIL, CIRCA 2009-10) FOR NEARLY 2 YEARS

AWAITING TRIAL BY THEN — IRONICALLY, MOSTLY DUE TO CONTINUANCES. CONTINUANCES THAT FOR THE MOST PART WERE CAUSED BY THE PROSECUTORS OFFICE AND/OR THE SPFLD. POLICE DEPARTMENT.

..THERE WAS THE MATTER OF THE DNA SWABS I WANTED SENT OFF FOR TESTING. FIRST THERE WAS DET. SHIPLEY AND HIS SHENANNIGANS — I WAS INFORMED THAT THERE WERE DNA SWABS / WHAT DNA SWABS? / I'VE GOT THE DNA SWABS = DELAY. THEN, DNA ON FILE NOT FRESH ENOUGH (2 YRS OLD!) / MUST GET SUBPOENA FOR DNA SAMPLE / (ME) NO, JUST COME TO THE JAIL AND I WILL FREELY GIVE YOU ONE = MORE DELAY. THEN THERE WAS THE PROSECUTORS' OFFICE; MY ATTORNEY AND I - YOU HAVE YOUR SAMPLE, WILL YOU PLEASE NOW SEND BOTH SAMPLES OFF FOR TESTING? THE PROSECUTORS OFFICE - WE WILL / WE WON'T (FUNDING) / WE WILL, BUT NOT YET US - LOOK, JUST GIVE THEM TO US, WE'LL (PD'S OFFICE) SEND THEM OFF = DELAY, DELAY, DELAY. ULTIMATELY, WE DID SEND THEM OFF.

..THEN IT WAS TIME FOR TRIAL. HOWEVER, THE DNA RESULTS WEREN'T BACK FROM THE LAB YET. I WAS GIVEN AN ULTIMATUM BY THE PROSECUTION, THROUGH MY TRIAL ATTORNEY, IN THE FORM OF A DOCUMENT CALLED AGREEMENT OF THE PARTIES (IT IS PART OF MY FILE, AND I HAVE SEVERAL COPIES HERE WITH ME) — THE ULTIMATUM WAS THIS; SIGN THE AGREEMENT OR GO TO TRIAL WITHOUT THE DNA TEST RESULTS. THE AGREEMENT SAID, AMONGST OTHER THINGS, THAT THE TRIAL WOULD BE PUT OFF TO AWAIT THE DNA RESULTS — BUT ONLY AT THE EXPENSE OF TOLLING MY UMDDL (180 DAY SPEEDY TRIAL WRIT), MY 2ND UMDDL, THAT IS, BECAUSE MY TRIAL ATTORNEY COULDN'T "FIND" MY ORIGINAL UMDDL (HOWEVER, SEVERAL YEARS LATER, MY 29.15 APPEAL ATTORNEY - ARTHUR ALLEN - DID FIND IT, IN THE FILES OF THE GREENE COUNTY CLERKS OFFICE)... A STORY TOO LONG TO GET INTO HERE, BUT THAT ALSO WAS A 5 MONTH DELAY. NOT ONLY DID THE AGREEMENT SAY THAT MY CURRENT UMDDL WOULD BE TOLLED WHILE WE WAITED FOR THE DNA RESULTS, BUT DOWN ON THE BOTTOM OF IT THE PROSECUTORS' HAD INSERTED A LITTLE RIDER CALLED CLAUSE d. CLAUSE d SAID THAT NOT ONLY WOULD MY TRIAL BE DELAYED UNTIL THE DNA CAME BACK (AGAIN, THE DNA WAS IN DELAY BECAUSE OF THE TACTICS EMPLOYED BY THE PROSECUTORS OFFICE AND DET. SHIPLEY) BUT ALSO UNTIL A PRIORITY 1 SETTING IN JUDGE MOUNTJOY'S COURTROOM COULD BE SECURED. I POINTED CLAUSE d OUT TO MY PD AND TOLD HIM THAT NOT ONLY WAS IT UNCALLED FOR, BUT A #1 SETTING COULD TAKE SEVERAL MONTHS TO BE OBTAINED (IT DID. ABOUT 6, TO BE EXACT - DELAY) EVEN IF MY DNA RESULTS CAME BACK THE FOLLOWING WEEK. I TOLD MY PD TO TELL THE PROSECUTION TO TAKE OUT CLAUSE

d, AS IT WAS UNNECCESSARY, AND I WOULD SIGN IT. HE CAME BACK SHORTLY WITH THERE RESPONSE, "NOPE. SIGN IT AS IS OR GO TO TRIAL WITHOUT THE DNA RESULTS." I KNEW THE DNA SWAB TEST FROM THAT VAN WOULD NOT COME BACK WITH ANY OF MY DNA ON IT, AND I WANTED IT FOR TRIAL. SO I FELT I HAD NO CHOICE, I SIGNED IT. MORE DELAY, MUCH MORE DELAY. BECAUSE OF THE PROSECUTORS OFFICE — WHICH MAKES IT PARTICULARLY GALLING TO HAVE THE DEFENDER OF THAT OFFICE (RESPONDENT) SO NONCHALANTLY REFER TO MY BEING OBSTINATE ABOUT NOT SUFFERING ANOTHER CONTINUANCE, AS THOUGH IT WAS THE FIRST ONE I HAD TO FACE.

SO, YES, I WAS UNDER CONSIDERABLE DURESS AS I SAT IN THAT OVERCROWDED JAIL WAITING TO GO TO TRIAL FOR A CRIME I DID NOT COMMIT, AND SUFFERING THROUGH CONTINUANCE AFTER CONTINUANCE. THEN MY ATTORNEY COMES TO ME A COUPLE OF WEEK BEFORE TRIAL (THE TRIAL SET AFTER THE DELAY OF WAITING FOR THE DNA RESULTS) TO INFORM ME THAT HE HAD NOT YET SECURED AN EYEWITNESS EXPERT, HAVING ONLY RECENTLY SET THOSE WHEELS IN MOTION, DESPITE MY LETTER TO HIM REQUESTING THAT SUCH AN EXPERT BE LOOKED FOR MANY MONTHS PRIOR TO THAT. HE ALSO TOLD ME THAT SUCH AN EXPERT MAY NOT EVEN BE ALLOWED TO TESTIFY [I HAVE SEEN WHERE RESPONDENTS ASSERT THAT THIS IS BECAUSE IT WOULD CALL INTO QUESTION THE WEIGHT OF THE EYEWITNESSES CREDIBILITY OR SOME SUCH? BUT I SAY AN EYEWITNESS EXPERT'S TESTIMONY SUCH AS DR. STEBLAYS WOULD ALSO HAVE A LOT OF IMPACT AND VALUE IN POINTING OUT WHY DET. SNIPLEY SHOULD NOT HAVE CONDUCTED HIS PHOTO LINE-UP IN LIGHT OF THE HIGH LIKELIHOOD THAT HIS SUBJECT HAD VIEWED A VIDEO OF ME 2 DAY PRIOR, POINTING OUT THE DANGERS OF WHAT MIGHT (DID) HAPPEN.]. HE SAID IF I STILL WANTED TO SECURE ONE FOR TRIAL WE WOULD HAVE TO SEEK ANOTHER CONTINUANCE.

SO I WAS FORCED TO MAKE YET ANOTHER UNFAIR, UNCALLED FOR CHOICE IN RIGHTS (JUST AS IN THE AGREEMENT OF THE PARTIES). AND BY THEN I HAD BEEN INCARCERATED EVEN LONGER AFTER SUFFERING CONTINUANCES NOT OF MY MAKING. AND I MADE THE CHOICE THAT I DID, BUT UNDER A HIGH DEGREE OF DURESS. A CHOICE I'M NOT SURE I WOULD HAVE MADE THE SAME WAY HAD I NOT BEEN UNDER THAT

[redacted] DURESS. BUT I SHOULDN'T HAVE HAD TO.

IN CLOSING, BEFORE I PRESENT THE PURELY LEGAL REASONS FOR GRANTING THIS PETITION, ALLOW ME TO SAY THIS; I SPEAK SINCERELY WHEN I SAY THAT I HAVE DEEP RESPECT FOR THE AUGUST BODY WHICH IS THE UNITED STATES SUPREME COURT, I AM IN AWE OF IT'S DUTIES AND RESPONSIBILITIES. I AM NOT SO VAIN AS TO ASK OF IT AN UNDERTAKING CONCERNING THE INNOCENCE OF ONE LONE SINGLE MAN IN THE WHOLE NATION. I DO ASK TO COME BEFORE IT, TO SEEK ITS REVIEW, AS AN ACTUAL INNOCENCE CASE, INNOCENT OF THE CRIME WHICH I HAVE BEEN WRONGFULLY CONVICTED FOR. BUT JUST AS MUCH SO I SEEK IT'S REVIEW TO HIGHLIGHT, EMPHASIZE THE KEY ISSUE OF CONVICTIONS GAINED SOLELY ON THE TESTIMONY OF A SINGLE EYEWITNESS. ACROSS THIS NATION, THROUGH DNA TESTING AND OTHER MEANS, WRONGFULLY CONVICTED INDIVIDUALS ARE BEING EXONERATED OF CRIMES WHICH THEY WERE CONVICTED FOR BECAUSE OF THE SOLE HUMAN CONDITION OF MISIDENTIFICATION, THE FACTORS WHICH INFLUENCE IDENTIFICATION NOT BEING CONSIDERED, OR, AS IN MY CASE, TAINTED LINE-UPS BEING ACCEPTED AS IRREPROACHABLE FACT. IT IS IN THIS LIGHT, WITH THIS HOPE, THAT I ASK THE COURT TO REVIEW MY CASE, AND ALSO WITH THE LATTER PART OF RULE 10a IN MIND.

I HAVE TRIED MY BEST TO NOT LET PERSONAL FEELINGS BLEED TOO MUCH INTO THIS PETITION, BUT I'M AWARE THAT HERE AND THERE THIS HAS OCCURRED A LITTLE. FOR THAT, I APOLOGIZE. I HAVE A SENSE THAT THIS HAPPENS MORE OFTEN THAN NOT IN Pro se' PETITIONS. I HAVE BEEN FIGHTING THIS FIGHT FOR GOING ON 10 YEARS NOW. I WAS HANDED A DRACONIAN SENTENCE BY A HARSH STATE - 25 YEARS FOR A MAN WHO HAS NO VIOLENCE IN HIS HISTORY WHATSOEVER, MADE EVEN HARSHER BY THE JUDGES DECISION TO HAVE THE 25 YEARS NOT EVEN BEGIN UNTIL 2013, WHEN AN OLD SENTENCE I HAD GIVEN TO ME IN 2006 FOR FORGERY RAN ITS COURSE. I AM BEING WORN DOWN, AND THIS PETITION IS ONE MY LAST HOPES (IF NOT THE LAST) FOR RELIEF.

TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO PRESENT EXPERT TESTIMONY ON THE ISSUE OF FALSE EYEWITNESS IDENTIFICATIONS AND TAINTED MEMORIES.

The Respondent argues that Petitioner's trial counsel was not ineffective in that (1)Petitioner is not entitled to relief because to the extent that an expert's testimony would have commented on the weight or credibility of the victim's testimony, it would have been inadmissible under Missouri law.

The Respondent also states (2) that under Missouri law, the admission of evidence is a matter of state law and it is not the province of a Federal Habeas Court to re-examine state court determinations of state law questions.

The Respondent further argues (3)that even if the evidence were admissible, the Petitioner decided not to seek a continuance fo further pursue an expert witness for strategic reasons.

(1) In Respondent's first point of contention, the Respondent wrongfully claims that an expert's testimony would have been inadmissible under Missouri law according to Missouri R.S.M.O 490.065 1(1) If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise; also in section 2(1)(a) The expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or determine a fact in issue. State v. Jones, 322 s.w.3d 141,144(MO.APP., W.D 2010) stated - The admissibility of expert testimony is measured in terms of whether the testimony will be helpful to the jury and should address a subject about which the jurors lack experience or knowledge.id. In this case, the expert witness that was retained by Petitioner's P.C.R counsel, Dr. Nancy Steblay, had testified via deposition for Petitioner's P.C.R hearing and stated that there were several factors present in the victim's identification of the Petitioner that, from a scientific aspect, would lead a reasonably minded juror to believe that the identification was unreiable.(exhibit A, pages 7-38). An expert witness that would have testified simiarily to Dr. Steblay was known and available to Petitioner's trial counsel, but he waited to long to secure an expert witness, prejudicing the Petitioner. Dr. Steblay was not testifying or commenting on the weight or credibility of the victim's testimony. In contrast, Dr. Steblay would have identified the scientific knowledge learned through study and research into eyewitness identifications, and then offered an opinion of how those scientific factors specifically speak to the circumstances surrounding the identification of the Petitioner. This testimony would have helped the trier of fact to understand the evidence. Petitioner was prejudiced because his trial counsel's

ineffectiveness caused him to go to trial without this important evidence. There is a reasonable probability that Dr. Steblay's testimony would have altered the outcome of the trial.

(2) In Respondent's second point of contention, the Respondent claims that under Missouri law, the admission of evidence is a matter of state law and it is not the province of Federal Habeas court to re-examine state court determinations of state law questions. However, the Federal Eighth Circuit had previously ruled that "A state court's evidentiary rulings can form the basis of Federal Habeas relief under the Due Process clause only when they were so conspicuously prejudicial or of such magnitude as to fatally infect the trial and deprive the defendant of Due Process. Parker v. Bowersox, 94 F.3d 458. The Petitioner must show that there is a reasonable probability that the challenged trial court error affected the outcome of the proceeding, that absent the alleged impropriety the verdict probably would have been different. Anderson v. Goeke, 44 F.3d 675.

In this case the expert witness testimony through scientifically proven facts that are based upon years of study and research, woud have properly informed the trier of fact to the circumstances surrounding the reliability of Ms. Koger's identification. Dr. Steblay identified what are known as estimator variables in eyewitness identifications: lighting, the presence of a weapon, and the use of a disguise.(Exhibit A, page 7-8) These factors in the memory at the time it is formed.(Ex.A, pages 7-8). These are also known as encoding factors.(Ex.A, pages 8-9). These factors taint memory(Ex.A, page 9). She identified poice procedures used to draw out a memory as a third important factor in eyewitness identification(Ex.A, page 9). Also Dr. Steblay found encoding factors in the records that could render Ms. Koger's identification unreliable(Ex.A, page). Ms. Koger was in fear at the time, there was a weapon involved drawing her attention away from the person, there was poor lighting in the parking lot, the event lasted only a short period of time, and the man was wearing a hat(Ex.A, pages 9-10). Each of these factors is known to diminish the reliability of an identification(Ex.A, pages 10-15).

There are two major concerns between encoding a memory and retrieving a memory(Ex.A,pages 15-16). One concern is that the witness will start forgetting things. The other concern is for interference; factors external to the memory that interfere with it(Ex.A, pages 15-16). Dr. Steblay found severa factors in the records which would interfere with Ms. Koger's memory of the incident. The identification

was two days after the incident after Ms. Koger viewed the security video, and after Ms. Koger may have received information from the store clerk(Ex.A, pages 16-17). Researchers worry that when a witness recalls details after an event that the information may be received from another source(Ex.A, page 17). Dr. Steblay noticed that Ms. Koger's description of her assailant changed over time. Ms. Koger incorporated what the store clerk had told her. The things the store clerk told Ms. Koger bacame part of what Ms. Koger "recalled" from the robbery(Ex.A, page 18).

Dr. Steblay found the same type of interference with Ms. Koger's memory was caused by the security video. Ms. koger saw the Petitioner (Mr. Whitt's) face on the video but she could not identify him as the robber(Ex.A, pages 18-19). Two days later Ms. Koger said that she knew that the Petitioner was the man who robbed her based on the time stamp on the video. Ms. Koger picked out of the lineup the face that was familiar to her, but Dr. Steblay said the question was why that face was familiar to Ms. Koger: Did she recognize the face from the robbery or did she recognize the face from the video? Laboratory research demonstrates that witnesses see a familiar face but cannot correctly remember why the face is familiar. Dr. Steblay testified that once a memory is tainted there is no way to seperate the encoded memory from the interfered memory(Ex.A, page 19).

Dr. Steblay noted that Ms. Koger initially testified at trial that she picked out the man on the video as the robber, but was then corrected by the prosecutor to say that she picked out the robber from the photographic lineup, and video had nothing to do with her identification. Dr. Steblay noted that there is enormous research which shows that people do not recognize when their memory becomes tainted(Ex.A, page 20). She also suggested that Ms. Koger's claim that the video was "grainy" could be a way for Ms. Koger to explain why she did not identify the Petitioner as the perpetrator when she saw him on the video(Ex.A, page 28).

Dr. Steblay discussed a large study of 1000 lay persons by the Public Defender Service in Washington, D.C(Ex.A, pages 29-30). The purpose of that study was to determine how potential jurors understand memory issues related to crimes. The results of the study showed that about half of the subjects thought that memory is like a video tape that can be played back. If the witness is cnfident in his or her testimony, jurors think that the witness is accurately "playing back" the memory of the event(Ex.A, page 30). But a witness' confidence is unreliable if the memory has been tainted(Ex.A,

page 22). Dr. Steblay testified that lay jurors are not aware of interference with memory and incorrectly assume that stress and other variables improve memory(Ex.A, pages 32-34). She said that the Pubic Defender Service study showed that lay persons do not understand eyewitness testimony very wellEx.A, page 34).

Dr. Steblay also testified that the same suspect should not be shown to a witness more than one time(Ex.A, pages 34-35). Here, Ms. Koger saw the same person in the video and in the photographic lineup(Ex.A, pages 34-35). Dr. Steblay believed that the security video was very clear. She believed that if Ms. Koger had encoded a memory of the Petitioner's face during the robbery she would have identified him from the video, but she did not(Ex.A, page 38).

Detective Shipley admitted at trial that if Ms. Koger had viewed the store security video she would not have been shown a photographic lineup because the video would have suggested to her who to identify and would have tainted her indentification(P.C.R Tr. pages 106-107, Tr. Pages 562-563). Detective Shipley testified at trial that Ms. Koger would have "obviously" identified from the lineup the person she saw on the video(P.C.R Tr. page 107, Tr. Page 562-563). Dr. Steblay's testimony was specific to the reliability of Ms. Koger's identification, and it should have been admissible at trial. It would have certainly assisted the jurors in understanding the reliability of eyewitness identifications and determining the reliability of Ms. Koger's identification of the Petitioner. The Petitioner was conspicuously prejudiced because his trial counsel's ineffectiveness caused him to go to trial without this important evidence, fatally infecting the trial and depriving the Petitioner of Due Process. There is a reasonable likelihood that Dr. Steblay's testimony would have altered the outcome of the trial.

(3) In Respondent's third point of contention, the Respondent argues that even if the evidence were admissible, the Petitioner decided not to seek a continuance to further pursue an expert witness for strategic reasons. It is true that the Petitioner agreed to proceed to trial without an expert witness on eyewitness identification(P.C.R Tr.pages 72-73, pages 120-121), but that does not excuse trial counsel's failure to timely seek and secure an expert witness within the ample timeframe to proceed with the trial as scheduled. In fact trial counsel fied a motion to suppress Ms. Koger's identification of February 23,2010, arguing that the identification was tainted by the security video(P.C.R L.F 4, pages 15-19). He then filed an amended motion to

suppress the identification on Apri 14, 2010, making the same argument(P.C.R L.F 5). The Petitioner sent trial counsel a letter on September 13, 2010, requesting that trial counsel pursue an expert to testify regarding eyewitness identifications(P.C.R Tr, pages 62-63). The Petitioner went to trial on February 14, 2011. Trial counsel had seven months from July 14, 2010 to February 14,2011 to pursue and retain an "expert to testify". However trial counsel waited until January of 2011 to request funds for a "memory expert"(P.C.R Tr., page 10), in which trial counsel's supervisor requested that he find an expert closer to Missouri. He was unable to do so(P.C.R. Tr., page 15). Ultimately funds to hire Mr. Budesheim were approved and trial counsel sent information to him(P.C.R Tr., page 11). But this was much too late for Mr. Budesheim to review the information and form an opinion regarding Ms. Koger's identification of the Petitioner(P.C.R.Tr., pages 11-12). At this point the Petitioner was forced to decide between proceeding to trial without an expert on the only contested issue in the case, or delaying his trial yet again to secure an expert witness(P.C.R Tr., pages 62-63). Trial counsel's actions forced the Petitioner to choose between two constitutional rights: his right to present a defense and his right to a speedy trial. The Petitioner told trial counsel that he was opposed to a continuance to secure the extra time for the expert to complete his review because he was under duress due to multiple delays of his trial to secure DNA evidence and did not want to waive his writ to dispose his case within 180 days under Uniform Disposition of Detainers Law(P.C.R Tr., pages 11-12, Tr. pages 72-73,120-121). The Petitioner had already been in jail for two years, and had previously agreed to toll his 180 day writ to secure a DNA ~~best of the [illegible] the Scene~~ RESULTS FROM THE DNA SWABS OF THE VAN.(Tr.page 73, 120-121).

In Simmons v. United States, 390 U.S 377, the court had found it intolerable that one constitutional right should have to be surrendered in order to assert another. In the present case, trial counsel's ineffectiveness to timely secure an expert witness had forced the Petitioner to choose between constitutional rights, surrendering one to assert another. Furthermore, trial counsel wrongfully suggested that an expert might not be allowed to testify at trial.(P.C.R Tr., page 71). Trial counsel's neglect to timely secure an expert witness forced the Petitioner to intolerably surrender one constitutional right for another. This action fell below the standard of a reasonable, competent attorney. Had he timely secured an expert witness, there is a reasonable probablility of a different outcome.

I FURTHER RELY HEREON RULINGS IN:

MANSON V. BRATHWAITE NO. 75-871 432 U.S. 98,97 S.Ct. 2243

NEIL V. BIGGERS NO. 71-586 — 409 U.S. 188,93 S.Ct. 375

U.S. V. WADE NO. 334 —— 388 U.S. 218,87 S.Ct. 1926

Ground 3: Trial counsel was ineffective for failing to object to the in-court identification of the Petitioner by the victim.

The Respondent argues that the Petitioner failed to properly allege facts that could show Strickland prejudice regarding this issue. The Respondent also argues that even if the Petitioner had properly alleged prejudice, the record shows there was no reasonable probability that counsel's decision not to object affected the outcome of the proceeding. The Respondent is incorrect. There is no disagreement that trial counsel is guilty of violating Strickland performance. In fact trial counsel agreed that "in hindsight, objecting at that time would have been the right thing to do(P.C.R.Tr.17)." Contrary to what the state argues, it is clear that the record does indeed reflect facts that show Strickland prejudice, as well.

Failure to object does not constitute ineffective assistance "unless admission of the objectional evidence resulted in a substantial deprivation of the Petitioner's rights to a fair trial." Harrison v. state, 301 s.w.3d 534.

Ms. Koger testified that she told the clerk that she had been robbed earlier that morning, that her debit card had been used at the store, and asked the clerk to watch the security tape(Tr.305). Ms. Koger observed the security video from the Jump Stop store(Tr.306). The trial attorney was aware of this at the time he filed the pre-trial motion to suppress Ms. Koger's identification(L.F 15-19). Ms. Koger claimed that the security video was not of good quaility(Tr. 306-307). However, both the store clerk and Detective Shipley would testify that the images on the video were clear, they could make out the Petitioner's features, and recognize him as the man on the video(Tr. 457-458,463,526,550). The trial attorney would have known this before trial. Detective Shipley also testified that a photographic lineup should not have been shown to a witness who had seen the same suspect in a video that witness had already seen(Tr. 562-564). This procedure would suggest to the witness who to identify, and would taint the identification(Tr.562-564). The trial attorney was aware of this testimony prior to trial because he brought this out in cross-examination of Detective Shipley(Tr 562-564). Detective Shipley testified at the suppression hearing and at trial that he was unaware that Ms. Koger had watched the security video(Tr.523). However, Detective Shipley stated in his probable cause statement

that:

On 3-23-09 at 1000 hours I was contacted via phone by victim Koger, who informed me that she was currently at the Jump Stop gas station, located at 2101 S. Glenstone and was informed by the clerk that she recalled a white male subject making a purchase with her stolen debit card and was going to attempt to locate him on the store surveillance camera system(P.C.S, page 2).

Detective Shipley clearly knew that Ms. Koger was with the store clerk and attempting to locate and view a suspect on the store surveillance camera system. Yet he made no attempt to prevent her from reviewing this footage knowing that it could taint any further photo lineup attempts.

The Petitioner was prejudiced by trial counsel's failure to make this objection to Ms. Koger's identification, because Ms. Koger's viewing of the Petitioner on the store surveillance video, forever tainted her ability to objectively pick anybody else but the Petitioner out of a photo lineup. The failure to object to Ms. Koger's in-court identification of the Petitoner resulted in a substantial deprivation of the Petitioner's rights to a fair trial. Had trial counsel objected to Ms. Koger's tainted in-court identification of the Petitioner, there is a reasonable probability of a different outcome.

I FURTHER RELY ON THE RULINGS IN:

GILBERT V. STATE OF CALIFORNIA NO.223 388 U.S. 263, 87 S.Ct. 1951

Ground 5: Trial Counsel was ineffective for failing to object to the state's use of evidence regarding prior statements made by Petitioner's alibi witness on the basis that the state failed to timely disclose the testimony in violation of Discovery rules.

The Respondent incorrectly argues that the trial counsel was not ineffective because he had made a strategic decision by not objecting to the introduction of evidence, literally the day before trial, showing that Petitioner's alibi witness made prior inconsistent statements. The trial attorney filed a Notice of Alibi and Request for Discovery of Rebuttal of Alibi on July 14,2010(L.F 6, pages 25-26). He notified the state that Petitioner's niece, Luta Whitt, would testify to an alibi for the Petitoner(L.F, pages 25-26). He also requested the name of anyone the state intended to call as a witness to rebut the alibi(L.F., pages 25-26).

Luta testified at trial that the Petitoner was with her from 4:15am until she dropped him off somewhere at 6:15 or 6:30am(Tr.610-614,625). This would have made it impossible for the Petitoner to have been the individual who robbed Ms. Koger between 5:10 and 5:20am(Tr.285-286), but could account for his presence at the Jump Shop convenience store at 6:30am(Tr.446).

The state cross-examined Luta about a conversation she had with an investigator from the prosecutor's office, Bruce Waterman, on August 3, 2010(Tr.619,634). She agreed that in the that conversation she may have told Mr. Waterman that she dropped the Petitoner off during "rush hour" maybe as late as 7:15 or 7:45am(Tr.622-623). THe state called Mr. Waterman to testify that Luta "seemed to settle" on 7:00 to 7:15am as the time she dropped off the Petitioner(Tr.635).

The trial attorney testified that the prosector's office disclosed to him on the day before trial a transcript of the conversation Mr. Waterman had with Luta that was going to challenge the time-line she was going to present(P.C.R Tr.26, 50-51). Trial counsel did not object to the state using the information received by Mr. Waterman to impeach Luta at trial(Tr.61-625,634-635).

A reasonably competent attorney would have objected to the state's use of impeachment evidence disclosed late, literally the day before trial, by the state. The trial

attorney had presented Luta's testimony and hoped to mitigate the damage of the late disclosed evidence. However, had he acted reasonably and objected to the state's seemingly purposeful last second disclosure of this evidence, he could have secured it's exclusion from the trial and disclosed in violation of the Discovery rules.

Rule 25.03(A)(2) states that upon written request, the state must disclose to the defendant such material and information within its possesion or control designated in said request, including any written or recorded statements. This includes material not actually in the prosecutor's files. state v. Varner, 837 s.w.2d 44,45(MO.APP.E.D. 1992) The rules of discovery, including Rule 25.03, are designed to prevent surprise and deception at trial. state v. wells, 639 s.w.2d 563, 566(MO.BANC 1982). A criminal defendant is entitled to know before trial, upon request, what evidence is to be introduced by the state. state v. Childers, 852 s.w.2d 390, 391-392).

The state of Missouri says that appellate courts will intervene[in such a case] only when a defendant shows that the failure to make a timely disclosure resulted in fundamental unfairness. Fundamental unfairness turns on whether there was a reasonable likelihood that an earlier disclosure.....would have affected the result of the trial. Fundamental unfairness occurs when the state's failure to disclose results in defendant's "genuine surprise" and the surprise prevents meaningful efforts to consider and prepare a strategy for addressing the evidence. Johnson v. Denney, 2012 U.S DIst. Lexis 55054)

The state's late disclosure of Mr. Waterman's conversation with Luta clearly violated these discovery rules. The trial attorney gave notice of his alibi and requested the names of rebuttal witnesses on July 14, 2010(L.F.6, 25-26). Mr. Waterman spoke with Luta on August 30,2010(Tr. 619, 634). But it was not until literally the day before trial, which started on February 14, 2011(L.F.7) more than 6 months later, that the state disclosed the evidence.

The trial court must tailor an appropriate remedy for a discovery violation that is fundamentally fair to both parties. state v. whitfield, 837 s.w.2d 503,508. Exclusions of evidence is an appropriate sanction. state v. Martin, 103 s.w.3d 255, 260. Exclusion of evidence is the only fundamentally fair sanction in the Petitioner's case because the request for disclosure was made long before its late disclosure, literally a day before trial and the Petitioner had filed a request for

speedy disposition of detainers that had been previously tolled once. There is a reasonable likelihood that had trial counsel objected to the use of the late disclosed evidence, the trial court would have excluded the evidence.

The Petitoner was prejudiced because the evidence regarding Mr. Waterman's interview with Luta completely undermined Luta's alibi for the Petitioner. In fact the conflicting timeline in Mr. Waterman's interview with Luta could have caused the jurors to reject Luta's testimony in it's entirety, demolishing his only defense to the charges, his only alibi witness. Furthermore, this seemingly purposeful last second disclosure of the damaging interview with the Petitioner's only alibi witness created a "genuine surprise" and this surprise prevented a meaningful effort to consider and prepare a strategy for addressing the evidence.

Ground 6: Trial counsel failed to renew his motion to suppress before Judge Cordonnier once the case was transferred.

The Respondent incorrectly argues that the Petitioner failed to show that counsel acted unreasonably or that counsel's actions prejudiced him.

The trial attorney filed pre-trial motions to suppress Ms. Koger's identification of the Petitioner as her assailant(L.F 15-19, 20-24). Those motions were heard prior to trial by Judge Mountjoy and denied(L.F 5). Judge Cordonnier presided over the Petioner's trial because Judge Mountjoy was unavailable(P.C.R Tr. 31). Trial counsel did not think he would overrule the more senior presiding Judge(P,C,R Tr.53). Trial counsel stated that "it was possible that could have been done" and he chose not to from a "strategy point"(P.C.R Tr.53). On post-conviction appeal, the P.C.R Respondent erroneously claimed that trial counsel made a "reasonable" trial strategy decision not to renew the suppresion motion with Judge Cordonnier. He basically claimed that the trial attorney's "specuation" that Judge Cordonnier would not overrule the more senior presiding Judge was a "reasonable" trial strategy. He then went on to state that the Petitioner's claim that Judge Cordonnier would have ruled in favor of his motion to suppress was "speculation" that is insufficient to establish Strickland prejudice(P.C.A Resp.Brief 52-53). Furthermore he stated that decisions "should not depend on the idiosyncracies of the particuar decision maker, such as unusual propensities toward harshness or leniency" when arguing on why it was reasonable to not renew the suppression motion. When in fact, he seems to be strengthening the Petitioner's argument on why it was, in fact, an unreasonable decision to not renew the suppression motion(P.C.A Resp. Brief, 53). A reasonably competent attorney would have renewed the motion to suppress Ms. Koger's identification of the Petitioner before Judge Cordonnier, attempting to eliminate this substantial piece of evidence.

For the same facts set forth in the Petitioner's prejudice argument in Ground 3, the Petioner was prejudiced by trial counse's failure to renew his motion to suppress before Judge Cordonnier once the case was transferred. Ms. Koger's viewing of the Petitioner on the store surveillance video, forever tainted her ability to objectively pick anybody else but the Petitioner out of a photo lineup. Had trial counsel renewed the suppression motion, there is a reasonable probability that Judge Cordonnnier would

have ruled in favor of the Petitoner's suppression motion creating a reasonable probability of a different outcome.

CLARIFICATION FROM THE PREVIOUS PAGE: P.C.R RESPONDENT QUOTED THE FOLLOWING CITATION - "AN ASSESMENT OF THE LIKELIHOOD OF A RESULT MORE FAVORABLE TO THE DEFENDANT MUST EXCLUDE THE POSSIBILITY OF ARBITRARINESS, WHIMSY, CAPRICE, NULLIFICATION, AND THE LIKE." P6. 53 OF P.C.R.'S BRIEF.

MY TRIAL ATTORNEYS' ASSERTATION THAT HE DID NOT RENEW MY MOTION TO SUPPRESS BECAUSE HE DID NOT THINK THAT JUDGE CORDONNIER WOULD WANT TO RULE ON SOMETHING THAT A SENIOR JUDGE HAD ALREADY RULED ON CERTAINLY SHOWS THAT MY TRIAL ATTORNEYS' REASONING WAS THAT JUDGE CORDONNIER WOULD NOT WANT TO RISK THE IRE (A "WHIMSY", "CAPRICE", OR WHATEVER YOU WISH TO CALL IT) OF THE "SENIOR" JUDGE - BECAUSE HE WAS SENIOR, HENCE THE QUOTATION EMPHASIS.

THE ABOVE CITATION SEEMS TO BE AN ARGUMENT IN SUPPORT OF MY CLAIM, BECAUSE CERTAINLY IT STANDS TO REASON THAT "LESS FAVORABLE" IS AS VALID AS "MORE FAVORABLE" IN THE ABOVE CITATION SO I FULLY AGREE - IT WAS UNREASONABLE STRATEGY FOR MY TRIAL ATTORNEY TO ASSUME "ARBITRARINESS, WHIMSY . . . AND THE LIKE" ON THE PART OF EITHER JUDGE CORDONNIER OR THE "SENIOR" JUDGE IN THIS MATTER.

Ground 7: Trial counsel was ineffective for failing to cross-examine the state's witnesses with Detective Shipley's probable cause statement.

The Respondent incorrectly argues that trial counsel's decision not to use the probable cause statement to impeach Detective Shipley or other witnesses was reasonable because the probable cause statement was not inconsistent with testimony offered by the state. In fact, there are 2 instances where Detective Shipley's probable cause statement was noticeably and prejudicially inconsistent with testimony offered by the state:

(1.) Cotton swabs used for DNA testing.

(2.) Ms. Koger's identification had been tainted by viewing the store security video before he showed her the photographic lineup for an identification.

(1.) In the first instance, Detective Shipley stated in the probable cause statement that at his request the steering wheel and gear shift of the van was swabbed for fingerprints(P.C.S,page 3). Petitioner believed the results of DNA testing would show that he was not in the van, and he wanted the swabs sent out for testing(P.C.R Tr.93-94). However, trial counsel asked Detective Shipley at a pre-trial suppression hearing about the swabs, and Detective Shipley said that he was unaware of DNA Swabs being taken from the van(P.C.R Tr.94). At a deposition three days later, Detective Shipley acknowledged that the steering wheel of the van had been swabbed for DNA(P.C.R Tr.94-95), Detective Shipley testified in the deposition that the swabs were still in his possession and had not been sent for testing because he did not have a DNA sample from the Petitioner(P.C.R Tr. 75).

(2.) In the second instance, Detective Shipley wrote in his probable cause statement:

On 3-23-09 at 1000 hours I was contacted via phone by victim Koger, who informed me that she was currently at the Jump Stop gas station, located at 2101 S. Glenstone and was informed by the clerk that she recalled a white male subject making a purchase with her stolen debit card and was going to attempt to locate him on the store surveillance camera system(P.C.S, page 2).

At 1030 hours I arrived at the Jump Stop gas station at 2101 S. Glenstone where

I contacted victim Sharon Kroger and clerk/witness Rache Lockhart(P.C.S, page 2).

However, Detective Shipley testified at the suppression hearing and at trial that he was unaware that Ms. Koger had viewed the security video prior to viewing the photographic lineup(P.C.R. L.F 71).

Trial counsel testified that if Detective Shipley had said something different at trial that he put in his probable cause statement, he would have wanted to pursue that at trial(P.C.R.Tr.34). Trial counsel acknowledged that he might have been able to use the probable cause statement to impeach Ms. Koger's testimony(P.C.R. Tr.35-36). He said that if he thought he could impeach Ms. Koger's testimony with the probable cause statement "he would have jumped on the chance"(P.C.R T. 36).

The Eighth Circuit of the United States has found constitutionally deficient performance of trial counsel based on ineffective cross-examination where counsel allowed inadmissible devastating evidence before the jury or when counsel failed to cross-examine a witness who made grossly inconsistent prior statements. Whitfied v. Bowersox, 324 F.3d 1009, specifically, "A failure to impeach constitutes ineffective assistance when there is a reasonable probability that, absent counsel's failure, the jury would have had reasonable doubt of the Petitioner's guilt."i.d at 1018.

A reasonably competent attorney would have sought to introduce, or at least utilize Detective Shipley's probable cause statement to impeach the state's witnesses.

When Ms. Koger testified at trial that she left the Jump Stop store before Detective Shipley arrived(Tr., 307-308), she had contradicted Detective Shipley's probable cause statement in which he indicates that he contacted Ms. Koger at the store(P.C.S, page 2).

During the suppression hearing, Detective Shipley claimed that he was unaware that Ms. Koger viewed the security video at the store before he showed her the photographic lineup(Tr.523). However, Detective Shipley stated in his probable cause statement that he was contacted via phone by victim Koger while she was at the Jump Stop gas station where she was working with the clerk to "Locate him on the store surveillance camera system(P.C.S, page 2). Clearly Detective Shipley should have been aware that Ms. Koger saw the Petitioner on the security video. As a matter of fact, Detective

Shipley should have told Ms. Koger at this point to not view the video. But he made no effort to stop her from viewing the video knowing that it would taint any future photographic lineup viewing.

The probable cause statement would have allowed for trial counsel to challenge Detective Shipley's truthfulness in general. He could have cross-examined Detective Shipley about his contradictory statements at the suppression hearing, in the deposition, and in his probable cause statement. These contradictions would have given the jurors reason to question Detective Shipley's testimony in general.

In this situation, trial counsel's failure to "jump on the chance" to use Detective Shipley's probable cause statement to impeach the state's witnesses, prejudiced the Petitioner. Had he performed at the level of a reasonably competant attorney, the jurors would have had ample information to reasonably doubt the veracity of Detective Shipley's testimony, which would have validated Petitioner's claim that Detective Snipley prejudicially influenced Ms. Koger's identification of Petitioner by showing her the photographic lineup after she watched the security video. This would have resulted in a reasonable probability that the jury would have had reasonable doubt of the Petitioner's guilt.

CONCLUSION

FOR ALL THE REASONS I HAVE LAID OUT IN THIS PETITION AND BECAUS I AM INNOCENT OF THE CRIME FOR WHICH I WAS WRONGFULLY CONVICTED —

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Dan J. Whitt

Date: AUGUST 23RD, 2019