*** CAPITAL CASE ***

No. _____

IN THE

Supreme Court of the United States

JESSE DRISKILL, *Petitioner*,

v.

STATE OF MISSOURI, *Respondent.*

On Petition for a Writ of Certiorari
to the Supreme Court of Missouri

PETITION FOR A WRIT OF CERTIORARI

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*** CAPITAL CASE ***

QUESTIONS PRESENTED

I. Whether Missouri's verbatim adoption of the prosecution's factually deficient findings without independent review – contrary to *Jefferson v. Upton*, 560 U.S. 284 (2010) – fails to provide adequate due process review of constitutional claims, including alleged *Brady* violations.

II. Whether Missouri upends *Brady's* disclosure requirements and violates due process by permitting nondisclosure of the state's tacit agreement with its own witness to eliminate the remainder of his prison sentence following his testimony, while allowing the witness to deny this deal at trial.

III. Whether Missouri's added requirement to show "purpose to deprive" or "official animus" before sanctioning the state's destruction of hair and fiber evidence - found in a victim's hand but not matching the defendant and having an exculpatory value apparent to law enforcement - is contrary to *California v. Trombetta*, 467 U.S. 479 (1984), and violates due process.

PARTIES TO THE PROCEEDING

Petitioner, Jesse Driskill, was the appellant below. Respondent, the State of Missouri, was the respondent below.

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PETITION FOR A WRIT OF CERTIORARI

Jesse Driskill respectfully prays that a Writ of Certiorari issue to review the judgment of the Missouri Supreme Court.

OPINIONS BELOW

The circuit court opinion within the State of Missouri is unpublished. The opinion of the Missouri Supreme Court denying Mr. Driskill's direct appeal appears at 459 S.W.3d 412 (Mo. banc 2015). The opinion of the Missouri Supreme Court denying Mr. Driskill's appeal for post-conviction relief is published as *Driskill v. State*, 626 S.W.3d 212 (Mo. banc 2021). This opinion was modified on the Court's own motion upon its denial of Mr. Driskill's motion for rehearing; this modified opinion is attached at Appendix (A-1). The Missouri Supreme Court denied Mr. Driskill's motion for re-hearing on August 31, 2021. That order is attached at Appendix (B-1).

JURISDICTION

The Supreme Court of Missouri denied Mr. Driskill's appeal on June 1, 2021. A motion for rehearing was filed within 15 days as required by state law. That motion was denied on August 31, 2021. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

This case implicates the Fourteenth Amendment to the United States Constitution, which states in pertinent part: "No state shall… deprive any person of life, liberty, or property, without due process of law." U.S. Const., amend. XIV.

STATEMENT OF THE CASE

Nearly 60 years ago, this Court held that States violate the Fourteenth Amendment when they do not turn over evidence that might exonerate the defendant. *Brady v. Maryland*, 373 U.S. 83 (1963). This Court later recognized that the prosecution fails in its duty when it does not disclose a tacit deal with a testifying witness, *Giglio v. United States*, 405 U.S. 150, 154 (1972), and when it destroys potentially exculpatory evidence in bad faith, *California v. Trombetta*, 467 U.S. 479 (1984). In this capital case, the Missouri Supreme Court has undermined these longstanding principals by affirming a lower court opinion – adopted verbatim from the prosecution's factually incomplete and inaccurate findings – condoning both: 1) the State's failure to disclose a tacit deal to release a testifying witness from prison, denied on the stand by the witness, but carried out following his testimony; and 2) the State's bad faith destruction of hair and fiber evidence found clenched in the victim's hand, that did not match Mr. Driskill.

This case will allow the Court to both: 1) address Missouri's practice of allowing one-sided findings to be adopted verbatim by lower courts in capital cases, and 2) remedy the misapplication of standards regarding the disclosure and destruction of exculpatory evidence implicating fundamental rights under the Fourteenth Amendment.

1. Mr. Driskill was convicted of two counts of first-degree murder and eight other counts and sentenced to death. A key state witness, Calvin Perry, was in prison at the time of Mr. Driskill's trial. As a condition of testifying, Perry continually asked the state to give him a time-credit instead of serving the last six

months of his prison sentence. Perry received the time-credit shortly after he testified at Mr. Driskill's trial. When asked to reveal any agreements before trial, Assistant Attorney Zoellner denied entering into any deals, but suggested "the defense may want to inquire of Mr. Perry next week about that," noting that their office had received a call from Perry's family member stating that someone in the family had died and that "if [the prosecutor] didn't get Mr. Perry out for the funeral, that he would not cooperate." (Tr. 24).

2. The following week, a month before trial, Perry was deposed by the defense. In the hallway, Perry asked AAG Zoellner if he could get time removed from his sentence; AAG Zoellner said he would put in a good word for him with the parole board, and Perry insisted that he needed the prosecution's help. At the end of the deposition, Perry suggested that it was "a little bit ridiculous" for him to continue to testify while he was "not getting favors." AAG Zoellner told Perry, "I can promise you that if you need us to vouch for what you've done, we can do that in the future." Perry reiterated the specifics of the time credit he was requesting, and AAG Zoellner replied, "Yes."

3. Perry testified against Mr. Driskill, making damaging allegations about statements he claimed Mr. Driskill made about the murders. He denied having any deals with the state. Immediately following Perry's testimony, Prosecutor Morris "visited" with Perry and obtained the details regarding Perry's probation time-credit request. Morris testified that he knew the Perry family personally, and was helping Perry for the sake of Perry's mother. He noted that granting time credits

like this was highly unusual for his office, calling it "kind of extraordinary." Perry was released early from prison.

4. Autopsy photos from the crime scene showed that one of the victims had light-colored hairs and orange fibers in her right hand; multiple officers viewed this evidence at the scene and at the autopsy. This hair and fiber evidence was given to law enforcement by the medical examiner at the autopsy. However, there is no record of this evidence in any police report or property record. Other evidence was detailed in the report of seized items. The jury never saw nor heard about the hair and fibers, and the evidence could not be found when evidence was viewed during post-conviction proceedings. The hair and fibers were never tested.

5. Defense counsel stated they would have wanted to investigate the type of hair and fibers and determine if they could lead to exculpatory evidence if they had known about them. Specifically, the hairs were exculpatory in nature because Mr. Driskill had a shaved head and dark facial hair when he was arrested, and law enforcement was aware of Mr. Driskill's appearance.

6. In this same trial, other evidence was destroyed before the defense could view it, including surveillance footage of Mr. Driskill at a gas station on the night of the murders, and a fully consumed DNA swab that the defense could not retest despite multiple potential issues regarding DNA contamination.

7. Mr. Driskill's convictions and sentences were affirmed on direct appeal, with two judges dissenting, finding that he was incompetent during trial. Mr. Driskill could not attend portions of trial as he was actively suffering from mental health issues for which he was not properly medicated.

8. Mr. Driskill filed a post-conviction relief action in the Missouri state court, arguing that the state failed to disclose a deal with a critical state witness and failed to disclose or intentionally distorted hairs and fibers seized from the victim's hand at autopsy and given to law enforcement. Mr. Driskill's post-conviction counsel found that the state had arranged for Perry's time-credit before Mr. Driskill was sentenced, but his trial attorneys were not made aware of this fact. When post-conviction counsel attempted to depose Perry about this deal, Perry refused to testify, responding "no comment" to every question.

9. The motion court denied Mr. Driskill's motion, adopting the State's proposed findings, which were missing one claim and provided factually incorrect information about other claims.

10. On appeal of the post-conviction case, the Missouri Supreme Court denied Mr. Driskill's claim that an unwritten agreement existed between Perry and the prosecution. The court acknowledged that AAG Zoellner said "[y]es" in response to Perry's explicit description of what he wanted in exchange for testifying. However, despite no findings by the lower court as to what AAG Zoellner meant by "yes," the Missouri Supreme Court opined that the positive response "seemed to signify an understanding of what Perry hoped to receive, rather than acknowledgement that a deal existed." (Appendix A10). The court acknowledged that the motion court found that Perry had a subjective hope of receiving favorable treatment and ultimately received the favorable treatment he requested. (Appendix A12). However, the Missouri Supreme Court found that this did not demonstrate enough evidence to establish a mutual understanding and tacit agreement

(Appendix A12). The court also held that it was unnecessary to draw an adverse inference from the fact that Perry stated "no comment" to every question in the postconviction deposition, even though a trial judge may draw such an inference in civil proceedings (Appendix A11).

11. The Missouri Supreme Court also upheld the motion court's denial of Mr. Driskill's argument that the state destroyed hairs and fibers found between the victim's fingers in bad faith. The court noted that to meet the test of bad faith for destruction of potentially exculpatory evidence, the state must have some knowledge that the evidence is important to a pending criminal prosecution (Appendix A18). The Court acknowledged both that the evidence was lost or misplaced by the state (Appendix A19), and that the officers were aware that the evidence was important to a pending criminal prosecution because they were aware that the light-colored hairs did not match Mr. Driskill's dark hair (Appendix A19). However, noting that an absence of " 'official animus towards [a defendant] or of a conscious effort to suppress exculpatory evidence' can impact the bad faith analysis" (quoting *California v. Trombetta*, 467 U.S. 479, 488 (1984), the Court found there was no evidence showing the evidence was destroyed with a purpose to deprive the defense of obtaining exculpatory evidence. (Appendix A19).

12. Mr. Driskill filed a motion for rehearing, which the Missouri Supreme Court denied on August 31, 2021.

REASONS FOR GRANTING THE WRIT

I. This Court should grant certiorari to review Missouri's procedure of allowing the state's proposed findings to be adopted verbatim as the court opinion, as it deprives defendants of due process of law. This is especially true when the claims under review include *Brady* violations of the state's duty to disclose favorable evidence to the defense. The remedy for this due process violation should be tailored to the injury suffered, and a remand is necessary to allow independent review of the factual record.

This Court has repeatedly questioned a state court's factfinding procedures which are based on its verbatim adoption of one party's proposed order. *Jefferson v. Upton*, 560 U.S. 284, 292 (2010). Indeed, it has "also criticized that practice." *Id.* at 293-94 (quoting *Anderson v. City of Bessemer City, North Carolina*, 470 U.S. 564, 572 (1985)). The Missouri Supreme Court also purports to discourage this procedure, see *Hosier v. State*, 593 S.W.3d 75, 83 (Mo. banc 2019), noting that, "adopting a proposed finding that is not supported (and, in fact, is contradicted by) the evidence wastes judicial resources and strongly demonstrates why the practice of wholesale adoption of a party's proposed findings is discouraged." *Id.* Yet, these admonishments ring hollow and the practice continues in lower Missouri courts.

The Missouri Supreme Court does not deny that the lower court adopted the state's findings, or that they are factually inaccurate and fail to address all of the issues raised. Instead, it employed circular reasoning to allow "[a]trial court judgment [to be] affirmed if cognizable under any theory, regardless of whether the reasons advanced by the trial court are wrong or not sufficient." (Appendix A15). Such reasoning fails to acknowledge what this Court long ago recognized about findings drafted by the parties:

> These lawyers, and properly so, in their zeal and advocacy and their enthusiasm are going to state the case for their side in these findings as strongly as they possibly can. When these findings get to the courts of appeals they won't be worth the paper they are written on as far as assisting the court of appeals in determining why the judge decided the case.

U. S. v. El Paso Nat. Gas Co., 376 U.S. 651, 657 (1964) (quoting J. Skelly Wright of the D.C. Circuit). In other words, if the factual findings (especially on Brady claims raised herein) are drafted by the state, without independent review by the lower court, appellate courts cannot – consistent with due process - affirm under any theory, when those theories are based upon heavily skewed factual recitations by the state itself.

The danger of allowing a lower court opinion to be drafted by the state is evident in this death penalty case. Here, the state was allowed to craft findings that absolve itself of any *Brady* violations, based upon an incomplete and inaccurate review of the evidence, including evidence never before provided to any court, thereby forever tainting the factual record going forward. As outlined in the additional reasons below, due process requires independent review of these constitutional claims. This Court should grant certiorari to review Missouri's procedure of allowing the state's proposed findings to be adopted verbatim as the court opinion, as it deprives defendants of due process of law.

II. This Court should grant certiorari to review the Missouri Supreme Court's misapplication of *Brady v. Maryland*, and to correct its contrary view of what is required to prove a tacit agreement.

Due process requires that the prosecution disclose evidence favorable to the accused that, if suppressed, would deprive the defendant of a trial. *Brady v.*

Maryland, 373 U.S. 83, 87 (1963); U.S. Const., amend. XIV. To establish a *Brady* violation, the movant must show that the prosecution suppressed evidence that was favorable to him and material to either guilt or punishment. *Keys v. United States*, 943 F.3d 1152, 1154 (8th Cir. 2019). Evidence is material "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding could have been different." *United States v. Ladoucer*, 573 F.3d 628, 636 (8th Cir. 2009).

The duty to disclose includes evidence that may be used to impeach the government's witnesses by showing bias, self-interest, or other factors that might undermine the reliability of the witness's testimony. *Giglio v. United States*, 405 U.S. 150, 154 (1972); *United States v. Bagley*, 473 U.S. 667, 676 (1985). In *Giglio*, this Court held that evidence of any understanding or agreement between the state and the witness that conveyed a benefit would be relevant to witness credibility; thus, the jury was entitled to know of it. 405 U.S. at 154. These required disclosures are not limited to formal, written agreements: the prosecution has a duty to disclose a quid pro quo when there is an agreement or understanding that the witness may receive leniency or reduction in charges in exchange for his testimony. *Id.* at 152-55.

While acknowledging that tacit agreements between the state and a witness trigger *Brady* obligations to disclose, the Missouri Supreme Court held that it was not error to rule that there was no tacit agreement between Perry and the prosecution, as outlined by the state's findings. The facts are: there was a prior relationship between witness Perry and Prosecutor Morris; Perry made his request for a prison time cut clear to the prosecution multiple times and indicated he was

wavering in testifying without receiving something in return; AAG Zoellner acknowledged the future possibility of a bargain with Perry a week before they met; AAG Zoellner said "[y]es" when Perry reiterated his specific request; Perry was granted the exact time-credit he requested shortly after his testimony, even though it was extraordinary to do so, especially given that he had not behaved well on probation; and one could infer that Perry had a "subjective hope that his testimony might result in some benefit to his legal issues." Yet all of this evidence was, in the eyes of the court, insufficient to find an agreement between Perry and the state (again upon findings drafted by the State).

The Missouri Supreme Court noted that the fact a witness actually received favorable treatment may be relevant in establishing the existence of undisclosed promises of leniency when considered with other facts, although preferential treatment by a prosecutor alone cannot establish an agreement to provide leniency (Appendix A12) (citing *Shabazz v. Artuz*, 336 F.3d 154, 165 (2d Cir. 2003)). The court required that there be more than simply a subjective understanding, but did not articulate what elements would make such an understanding rise to the level of an agreement. However, *Brady* does not require such a high burden of proof.

For example, in *Birano v. State*, 426 P.3d 387, 406 (Haw. 2018), the Hawaii Supreme Court found a *Brady* violation when there was a tacit agreement between the prosecution and a state's witness that he would testify in exchange for a favorable sentencing recommendation. In that case, involving robbery, kidnapping, and firearm-related offenses, the trial judge testified that there was an "understanding" that if the codefendant witness testified against Birano, the

prosecutor would "take it into consideration" with the witness's sentencing recommendation. *Id.* at 408. Even though the prosecutor testified that there was no formal agreement, there was evidence that the witness and the prosecutor discussed an agreement about testifying. *Id.* At the hearing, the witness's lawyer attempted to distinguish an agreement and an "understanding sometimes the prosecutor will make a recommendation." *Id.* at 409. The Supreme Court rejected that argument, emphasizing that "when determining whether the disclosure of impeachment evidence is required, the relevant question 'is not whether the prosecutor and the witness entered into an effective agreement, but whether the witness might have believed that the State was in a position to implement any promise of consideration.'" *Id.* at 409. The court stated that an indication sufficient to make the witness believe his testimony might be rewarded was sufficient to trigger the prosecutor's disclosure obligations. *Id* at 409. In fact, they emphasized that when a witness's testimony is contingent on the State's satisfaction with the end result, "It 'serves only to strengthen any incentive to testify falsely in order to secure a conviction.'" *Id.* at 410 (quoting *Bagley*, 473 U.S. at 683).

The Pennsylvania Supreme Court also found a tacit agreement in *Commonwealth v. Strong*, 761 A.2d 1167, 1170 (Pa. 2000), when there was an exchange of letters between the witness's lawyer and the D.A. prior to the defendant's trial. In *Strong*, even though there was no "ironclad" agreement, the witness offered to plead guilty for a 36-month sentence on murder and kidnapping charges, later receiving a 40-month sentence after testifying. *Id.* at 1174. At one point, the district attorney wrote to a state trooper that it was time to "sit down and

firmly discuss our deal" with the witness. *Id.* at 1172. The district attorney responded to the witness's attorney by saying he "had no control over" the prison placement of the witness, but that he would forward the attorney's letter to the warden. *Id.* Even though the witness later testified that there was no agreement, the court found sufficient circumstantial evidence of an understanding. *Id.* at 1174.

These cases are consistent with this Court's precedent. In *Giglio*, the case that extended *Brady*'s coverage to impeachment evidence, a key witness at trial was the bank teller who allegedly participated in Giglio's crime, passing of forged bank notes. 405 U.S. at 150. The bank teller testified during cross-examination that the prosecution had not indicted he could avoid indictment by testifying. *Id.* at 151-52. However, later affidavits showed that one Assistant United States Attorney was told that no promises had been made to the bank teller, but another U.S. Attorney said that he had emphasized to the bank teller that he would definitely be prosecuted if he did not testify and that he would be obliged to rely on the "good judgment and conscience of the Government" as to whether he would be prosecuted if he did testify. *Id.* at 152-53. This Court held that the failure to disclose the fact that the bank teller reasonably expected to benefit from his testimony violated due process and justified a new trial. *Id.* at 154-55. This Court noted that the second affidavit, "standing alone, contains at least an implication that the Government would reward the cooperation of the witness, and hence tends to confirm rather than refute the existence of some understanding for leniency." *Id.* at 153. Therefore, "when the 'reliability of a given witness may well be determinative of guilt or innocence,' nondisclosure of evidence affecting credibility falls within the general

rule that suppression of material evidence justifies a new trial." *Id.* at 154-55 (quoting *Napue v. Illinois*, 360 U.S. 264, 269 (1959)).

The reasoning at the heart of this Court's rules requiring disclosure is the potential impeachment value such evidence brings. It is the witness's reliance on government leniency and expectation that such leniency will be granted. Because of this, it is correct to rely on the cooperating witness's reasonable expectation of leniency, based on government implication, combined with the fact that the requested benefit was actually given, in finding an agreement. Indeed, in *Giglio*, where there was no explicit agreement, but an indication on which the witness subjectively relied.

Here, AAG Zoellner told witness Perry "yes" in response to Perry's exact request about the specific time-cut he wanted, and Prosecutor Morris immediately followed through on getting Perry that time-cut following his testimony, even though such action was highly unusual for his office and was done as a favor to Perry's mother – none of which was disclosed to the defense. But this is not enough to trigger disclosure according to the Missouri Supreme Court.

The standard articulated by the Missouri Court places too high a burden of proof of a tacit agreement, subverting the intention behind *Giglio* and *Bagley*. The Court found that Perry's subjective belief that he would receive a time-credit, in combination with AAG Zoellner's acknowledgement of the request and the fact that he did in fact receive the credit immediately after his testimony, was insufficient to establish an agreement. Under Missouri's standard, the facts in *Giglio* would not be sufficient to establish an agreement, because it contains an "implication" that the

government would reward witness cooperation rather than an actual deal. Furthermore, these disclosures are particularly important where the "reliability of a given witness may well be determinative of guilt or innocence." *Giglio*, 405 U.S. at 154. Perry's testimony was key in Mr. Driskill's case, and evidence affecting guilt or innocence is of paramount importance in a capital case.

This case provides an especially good vehicle for considering the questions presented above. There are no jurisdictional obstacles to the Court's decision in this case, and the fact pattern in Mr. Driskill's case illustrates the practical, far-reaching importance of the issues at hand.

This Court may review final judgments rendered by the highest court of a State where any title, right, privilege, or immunity is claimed under the Constitution. 28 U.S.C. § 1257(a). The Missouri Supreme Court rendered an opinion and a motion denying rehearing in Mr. Driskill's post-conviction appeal, a case which implicates his fundamental Due Process rights under the Fourteenth Amendment to the Constitution, as well as the rights of citizens facing trial nationwide. (App. A1-55).

Mr. Driskill's argument focuses on the legal standards applied; using the correct rule, the court should have found a tacit agreement between the state and witness Perry. Furthermore, the court in Mr. Driskill's case based its ruling on Constitutional law under *Brady* rather than separate state grounds (Appendix A10-12). Perry's testimony was one of two key pieces of evidence that formed the state's case against Mr. Driskill (Ap. Br. 27). Given that his testimony was essential to the case, the issue of whether or not he entered into an agreement that the jury should have heard about in weighing credibility goes to the heart of the case's merits. This

case presents the issue cleanly, in a situation where a final judgment was rendered and the issue is central.

In addition to the lack of procedural obstacles to the Court's review, the facts in this case illustrate perfectly the importance of the issue at hand and the flaws in the standard Missouri uses. The rule requiring disclosure of tacit agreements contemplates instances where, despite the state's claim that they had no agreement with a witness, there was an unspoken understanding, which is equally deserving of a jury's consideration. Mr. Driskill's case is a paradigmatic example of exactly this situation. Perry made clear beforehand what he wanted in exchange for cooperation, the state acknowledged it, the state knew his testimony might be contingent on the deal, he received his exact request directly afterwards, and the exchange was colored by Perry's family friendship with one of the prosecutors (Ap. Br. 28-34). The evidence in such cases will not include writings or explicit agreement by definition, and given this Mr. Driskill has shown ample evidence that such an understanding existed.

The fact that this evidence failed to meet Missouri's standard perfectly illustrates the failings in Missouri's approach. These facts put into stark relief the extent to which the state can skirt its obligation to disclose under Missouri's standard. Simply by staying quiet about their agreement, they have circumvented *Brady*'s disclosure requirements. If such evidence is not sufficient to prove a tacit agreement absent more explicit proof of mutual understanding, then the Missouri standard renders the rule requiring disclosure of tacit agreements practically null. Mr. Driskill's case exemplifies the reason why such a standard exists – to make sure

that the state cannot avoid its disclosure obligations simply by failing to formalize unspoken agreements. Any hearing under the Missouri rule will be conducted unfairly, because it is inherently slanted towards the state in finding no agreement. With a standard that renders this showing practically impossible to make, Missouri flouts the holdings of *Brady*, *Giglio*, and *Bagley*.

This Court has granted certiorari in other cases where states have misinterpreted federal precedent to encroach on Constitutional rights in criminal cases. See, e.g., *Lange v. California*, 141 S. Ct. 2011, 2024 (2021) (rejecting California's categorical rule that the flight of a suspected misdemeanant always justifies warrantless entry into a home under the Fourth Amendment and Court precedent). This Court's precedent has set the standard that a tacit agreement is one requiring disclosure to the fact-finder, but Missouri has refused to follow suit. This Petition respectfully asks the Court to correct Missouri's misinterpretation of *Brady* precedent.

III. The Missouri Supreme Court's finding no bad faith in the destruction of the hair and fiber evidence, by requiring a showing of "official animus" or "purpose to deprive," is contrary to *California v. Trombetta, Arizona v. Youngblood* and subsequent federal cases.

A state violates due process when it fails to preserve irreplaceable evidence possessing exculpatory value that is apparent before its destruction. *California v. Trombetta*, 467 U.S. 479, 488-89 (1984). Failure to preserve potentially useful evidence does not constitute a denial of due process unless a criminal defendant can show bad faith on the part of the state. *Arizona v. Youngblood*, 488 U.S. 51, 58 (1988). The exculpatory nature of the evidence must be apparent before it is

destroyed. *Id.* at 57. The presence or absence of bad faith by the police for purposes of the Due Process Clause must necessarily turn on the police's knowledge of the exculpatory value of the evidence at the time it was lost or destroyed. *Id.* at 56-57. The Missouri Supreme Court, however, went beyond this Court's requirement of "knowledge of the exculpatory value of the evidence at the time it was lost or destroyed" and further required "official animus" or "purpose to deprive." (Appendix A19). This is contrary to this Court's precedent

In *Jimerson v. Payne*, 957 F.3d 916 (8th Cir. 2020), the Eighth Circuit granted habeas relief after finding, inter alia, a *Youngblood* violation for the failure to preserve evidence. In that case, a jailhouse informant captured a co-defendant's testimony on a recording, but the prosecutor told law enforcement the recording was inadmissible and the sheriff later thought the tape "was gone." *Id.* at 922. The court noted that while the burden was on the appellant to establish bad faith in destruction, the State did not claim that the recording was preserved for trial or destroyed according to routine practice. *Id.* at 930. The State argued that there was no bad faith because the police and prosecutor thought the evidence was inculpatory; however, testimony indicated that instead they thought it could not be used or would not have evidentiary value. *Id.* at 930. The prosecution provided misleading answers to discovery requests, chose not to preserve the recording, and made a statement omitting reference to the recording and police report. *Id.* at 931. The court held that it could draw an adverse inference when the prosecutor and law enforcement acted together to conceal the contents and existence of the recording. *Id.*

In *United States v. Johnson*, 996 F.3d 200, 224 (4th Cir. 2021), the court held that there was insufficient evidence on the record to hold there was no bad faith when the state gave a victim's phone to his family after the defendant took a plea deal, but before the district court rejected the plea and the defendant went to trial. The family then lost the phone. *Id.* To show bad faith, Johnson argued that the way the state treated the phone was different than the way they handled another phone in his co-defendant's case. *Id.* at 209. There were no reports of investigations into the phone, no memos in the file about it, and no property disposition reports; the government seemed to hide the phone by excluding mention of it; and it was contextualized by a failure to preserve and analyze other potentially exculpatory evidence. *Id.* at 209-10. The district court found that there was no bad faith or negligence in losing the evidence without allowing any witnesses in the hearing. *Id.* at 211. However, the Court of Appeals remanded, finding that the evidentiary record was insufficient to rule there was no bad faith, and Johnson should get an instruction on adverse inference on remand. *Id.* at 216-217.

In *U.S. v. Zaragoza-Moreira*, 780 F.3d 971, 978 (9th Cir. 2015), bad faith was found when the Department of Homeland Security destroyed potentially exculpatory video of Zaragoza crossing the border. Zaragoza argued the video would bolster her duress defense against drug charges. *Id.* The district court found no bad faith because its exculpatory value was not readily apparent to the border agent; however, the Court of Appeals disagreed, since Zaragoza repeatedly told the agent about her defense and why the video may be useful. *Id.* at 979. The agent's professional obligation, knowledge of the video's existence, and awareness of its

potential use in Zaragoza's defense were enough to make her actions more than merely negligent or reckless; additionally, the video was not destroyed in the course of usual procedures. *Id.* at 980. Furthermore, there was some corroborating evidence of Zaragoza's story, which should have given the agent a reason to view the evidence to determine its value. *Id.*

The exculpatory nature of the hair and fiber evidence in Mr. Driskill's case is far more obvious than the cases cited above. The evidence relates directly to the underlying crime of murder as it was found in a victim's hand at the crime scene. The police would have known of the exculpatory nature of the hair evidence because they knew Mr. Driskill did not have hair. There is no evidence in Mr. Driskill's case that there was any meaningful examination of the hairs before they were destroyed; however, additional testing was not necessary for the purpose of alerting law enforcement to the exculpatory nature of the hair evidence.

The Missouri Supreme Court case acknowledged that the minimum for establishing bad faith is that the state must have knowledge of the exculpatory nature of the evidence. However, the court went beyond this minimum to also require Mr. Driskill to show official animus or a conscious effort to suppress exculpatory evidence (Appendix A19). However, facts in the record show evidence of knowledge and other inconsistent action, is sufficient. As in *Jimerson*, both counsel and police were aware of the hairs and fibers in the victim's hand from the autopsy report. However, the defense counsel was not made aware of this in evidence sheets given to her. They were also not mentioned in the report of seized items or police records. None of the photos showing the hairs were entered into trial. Like

Jimerson, this shows the police and prosecution acting in concert to conceal the evidence. This evidence was given to law enforcement at the autopsy, they knew the photos existed, and they also do not claim it was destroyed in the course of usual procedures. The nature of hairs in a victim's hand at a crime scene is readily apparent as having exculpatory value.

The type of evidence the appellant put forth in *Johnson* is similar to the type of evidence demonstrating bad faith in Mr. Driskill's case: the lack of records about this evidence was different than the way other evidence was handled, and there were issues with preservation of other evidence in this case, such as the gas station video that was destroyed after being viewed by law enforcement. The Missouri Supreme Court's failure to acknowledge the bad faith in this case, where evidence having exculpatory value was misplaced amid inconsistent reporting, a lack of accounting or testing, and other destroyed evidence, does not align with the purpose of *Brady*. Unlike many cases where the prosecution would have no way of knowing whether evidence was potentially exculpatory without looking further or completing internal testing, the facts here are stark: there was light-colored hair in the victim's hand, and officers knew Mr. Driskill was bald and had a dark-haired beard when they arrested him. They knew the evidence was exculpatory in nature, and it was error to find there was no bad faith.

This Court should grant review to address Missouri's contrary application of *Trombetta* and *Youngblood*, to ensure the violation of Missouri defendants due process rights does not continue.

CONCLUSION

Mr. Driskill has suffered genuine prejudice by the Missouri Supreme Court's failure to require independent review by the lower courts of constitutional claims. The practice of adopting the state's proposed findings, which, in this case are both inaccurate and incomplete, prevent Mr. Driskill from receiving due process in review of this constitutional claims, including the state's Brady violations, which demand independent review, as outlined herein. This Court should grant Mr. Driskill's Petition for Writ of Certiorari to address these issues of general interest and importance.

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