

No. 22-

IN THE
Supreme Court of the United States

IN RE CHRISTOPHER DUNN.

ON PETITION FOR WRIT OF HABEAS CORPUS TO THE
SUPREME COURT OF THE UNITED STATES

**PETITION FOR WRIT OF HABEAS CORPUS
PURSUANT TO 28 U.S.C. § 2241**

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QUESTIONS PRESENTED

Mr. Christopher Dunn's petition presents exceptional circumstances that have sharply divided courts below and left both state and federal courts with an unanswered question by this Court: does innocence matter? Since Mr. Dunn's murder conviction in 1991, a Missouri Circuit Court justice found that no jury would convict Dunn had the jury heard the evidence that Mr. Dunn presented in his last post-conviction proceedings in 2018. Despite hearing the evidence Dunn presented and finding that *no jury* would convict Dunn had any jury heard this evidence, the Missouri state court denied Mr. Dunn's habeas petition because freestanding claims of innocence apply only to prisoners who are sentenced to death pursuant to Missouri precedent under Lincoln v. Cassady, 517 S.W.3d 11 (Mo. Ct. App. W.D. 2016).

The following questions are presented.

1. Is it cruel and unusual punishment and a substantive due process violation for an innocent man to remain in prison?
2. Is the claim of freestanding actual innocence a cognizable claim for petitioners sentenced to either incarceration or death under the United States Constitution when a state court has concluded, after taking testimony and hearing evidence at a post-conviction hearing, that no jury would convict the petitioner?
3. Is "clear and convincing evidence" the standard to meet a freestanding actual innocence claim?

PARTIES TO THE PROCEEDINGS BELOW

This petition stems from a habeas corpus proceeding in which petitioner, Christopher Dunn, was the movant before the United States Court of Appeals for the Eighth Circuit. Petitioner was sentenced to life plus ninety years and in the custody of Michele Buckner, Warden of South Central Correctional Facility.

RELATED CASES STATEMENT

State v. Dunn, Cause No. 901-1555, St. Louis County Circuit Court, judgment date September 6, 1991.

State v. Dunn, Court of Appeals of Missouri, Eastern District, Division Three, judgment date October 25, 1994.

State v. Dunn, Court of Appeals of Missouri, Eastern District, Division Five, judgment date September 12, 1995.

Dunn v. Bowersox, Dock. No. 4:97-cv-00331-MLM, United States District Court for the Western District of Missouri, judgment date March 27, 2000.

Dunn v. Bowersox, Dock. No. 00-2008, United States Court of Appeals for the 8th Circuit, judgment date August 24, 2000.

State ex rel. Dunn v. Buckner, Docket number 17TE-CC00059 and SC99157, Texas County Circuit Court, judgment date September 23, 2020.

State ex rel. Dunn v. Buckner, Dock. No. SD36893, Court of Appeals of Missouri Southern District, judgment date November 13, 2020.

State ex rel. Dunn v. Buckner, Dock. No. SC99157, Missouri Supreme Court, judgment dated June 9, 2021.

Dunn v. Buckner, Docket number 22-1892, United States Court of Appeals for the 8th Circuit, judgment date July 27, 2022.

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I. PETITION FOR WRIT OF HABEAS CORPUS

Petitioner Christopher Dunn petitions this Court for a writ of habeas corpus based upon his freestanding claim of actual innocence and his continued imprisonment in violation of the 8th and 14th Amendments of the United States Constitution in accordance with its authority under 28 U.S.C. § 2241(b).

II. OPINIONS BELOW

Mr. Dunn filed a pro se motion for post-conviction relief under Missouri Criminal Procedural Rule 29.15 and a direct appeal. His motion for post-conviction relief was denied and his conviction was affirmed in all respects, except that the appellate division remanded the matter back down to the trial court for a hearing on Mr. Dunn's Batson claim. See State v. Dunn, 889 S.W.2d 65 (Mo. App. E.D. 1994). Mr. Dunn's Batson claim was ultimately denied as well. See State v. Dunn, 906 S.W.2d 388 (Mo. App. E.D. 1995).

Mr. Dunn therein filed a writ of habeas corpus in the United States District Court, Eastern District of Missouri, pursuant to 28 U.S.C. 2254, which was denied on March 27, 2000. See Appendix C, pg 29a - Dunn v. Bowersox, Dock. No. 4:97-cv-00331-MLM (March 27, 2000). Dunn sought a certificate of appealability from the United States Court of Appeals for the Eighth Circuit, which was denied. Dunn v. Bowersox, Dock. No. 00-2008 (8th Cir. August 24, 2000). This Court denied Mr. Dunn's petition for writ of certiorari on February 5, 2001.

Mr. Dunn next filed a writ of habeas corpus on February 15, 2017, pursuant to Rule 91 because of newly discovered evidence. He was granted an evidentiary hearing by the 25th Circuit Court of Texas County, which took place on May 30, 2018. The 25th Circuit Court also granted the Petitioner leave to amend the habeas petition to include evidence of a Brady claim after a recanting witness admitted to a deal with the prosecutor that was not disclosed to the jury.

On September 23, 2020, after finding that no jury would convict Christopher Dunn with the evidence presented at Dunn's post-conviction hearing, the Circuit Court of Texas County, Missouri, denied Mr. Dunn's state petition for writ of habeas corpus. State ex rel. Dunn v. Buckner, 17TE-CC00059 and SC99157, (Sept. 23, 2020) (Judge William E. Hickie). See Appendix B, pg. 3a.

Dunn appealed his denial to the Missouri Appellate Division Southern District, which declined to hear the case. State ex rel. Dunn v. Buckner, Dock. No. SD36893 (Mo.App. S.D. November 13, 2020). Dunn appealed the Appellate Division's denial to the Missouri Supreme Court. His application to be heard before the Missouri Supreme Court was likewise denied. State ex rel. Dunn v. Buckner, Dock. No. SC99157 (Mo. June 9, 2021).

On April 29, 2022, Dunn sought leave to file a successive petition for writ of habeas corpus before the United States Court of Appeals for the Eighth Circuit pursuant to 28 U.S.C. § 2244. His petition for leave was denied on July 27, 2022. Dunn v. Buckner, 22-1892 (8th Cir. July 27, 2022). See Appendix A, pg 1a.

III. JURISDICTION

The order of the court of appeals denying authorization to file a successive petition was entered on July 27, 2022. This Court has jurisdiction over an original writ of habeas corpus petitions pursuant to United States Supreme Court Rule 20.4(a), 28 U.S.C. §§ 2241, 2254(a), 1651(a), and Article III of the United States Constitution. See also Felker v. Turpin, 518 U.S. 651, 663 (1996); Byrnes v. Walker, 371 U.S. 937 (1962); Chappel v. Cochran, 369 U.S. 869 (1962). Mr. Dunn's claims are ripe before this Court, as he has exhausted all his state court and federal court remedies. See 28 U.S.C. §§ 2241, 2242 & 2254(b).

IV. STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

This case involves an original habeas application pursuant to 28 U.S.C. § 2244 and 28 U.S.C. § 2241, which is an extraordinary form of review for both state and federal convictions that have exhausted post-conviction remedies. See generally In re Davis, 130 S. Ct. 1 (2009); Felker v. Turpin, 518 U.S. 651 (1996). The constitutional provision directly at issue here is the 8th Amendment right to remain free from cruel and unusual punishment based upon the incarceration of an innocent man and the 14th Amendment provision that “[n]or shall any State deprive any person of life, liberty, or property, without due process of law....”

V. STATEMENT OF THE CASE¹

Christopher Dunn was convicted by a jury on July 18, 1991, for the May 18, 1990, murder of Ricco Rogers. Dunn was also convicted of two counts of assault in the first degree and three counts of armed criminal action arising from the same occurrence. Mr. Dunn was subsequently sentenced to life without parole and consecutive sentences of ninety years by St. Louis City Circuit Judge Michael Calvin.

The State's case rested upon the eyewitness testimony of fourteen-year-old DeMorris Stepp and twelve-year-old Michael Davis. Both of these young men testified at trial that on May 18, 1990, these two juveniles and Mr. Rogers were sitting on a porch at a house at 5607 Labadie in the City of St. Louis. Just before midnight, Mr. Stepp testified that he saw Christopher Dunn standing in the gangway of the house next door. A few minutes later, shots rang out and all three boys tried to run away. Both Mr. Stepp and Mr. Davis testified at trial that Mr. Dunn was the person who fired the fatal shots that caused the death of Mr. Rogers.

At the time he testified, Mr. Stepp had pending charges for armed robbery, armed criminal action, unlawful use of a weapon, and tampering in the first degree. In exchange for his testimony against Dunn, the prosecution dropped the armed criminal action charges against Mr. Stepp, who then pleaded guilty to the remaining charges. The state recommended a fifteen-year sentence for the charges;

1. The factual recitation of this case is gathered directly from Appendix B, pg 5a-16a.

however, the sentencing judge granted Mr. Stepp three years of probation.

After Mr. Dunn was convicted and sentenced, he filed a timely notice of appeal and a timely Rule 29.15 motion pursuant to Missouri's then-existing consolidated post-conviction review system in criminal cases. After holding an evidentiary hearing, the trial court denied Petitioner's Rule 29.15 motion. On consolidated appeal, the Missouri Court of Appeals, Eastern District affirmed Mr. Dunn's convictions and the denial of his post-conviction motion in State v. Dunn, 889 S.W. 2d 65 (Mo. App. E.D. 1994). Mr. Dunn, thereafter, unsuccessfully sought federal habeas corpus relief pursuant to 28 U.S.C. § 2254 in the United States District Court for the Eastern District of Missouri.

In 2005, DeMorris Stepp signed a sworn affidavit claiming that he committed perjury when he identified Christopher Dunn as the man he saw shoot Ricco Rogers. Mr. Stepp indicated he was pressured by police and prosecutors to falsely identify Mr. Dunn as the shooter because they wanted him off the streets. Mr. Stepp also asserted that the prosecution utilized Mr. Stepp's pending felony charges as leverage to convince him to testify that Christopher Dunn was the shooter and promised him he would avoid jail time if he did so. Mr. Stepp's affidavit states that because it was so dark that night, he could not identify the person who fired the fatal shot.

At the recent evidentiary hearing, Mr. Stepp testified that he committed perjury when he identified Christopher Dunn as the shooter. In addition, he testified that he lied under oath regarding the plea bargain he reached with the prosecution about his pending charges. Mr. Stepp testified

that he had an understanding with the prosecution that, if he testified against Dunn, he would be guaranteed probation and there was no danger in his mind that he would receive a fifteen-year sentence.

At the Court's request, the record was recently reopened to allow the presentation of a transcript from Mr. Stepp's 1991 guilty plea and sentencing, which was marked and received as Petitioner's Exhibit 19. Though the transcript corroborated that Mr. Stepp received probation, it did not evidence an agreement or understanding with Mr. Stepp or anyone else that Mr. Stepp would receive probation.

On July 17, 1991, in Mr. Dunn's trial, Mr. Stepp testified against Dunn. Mr. Stepp acknowledged to the jury that he had unrelated charges pending against him. He testified that he had reached a plea agreement where the state dropped armed criminal action charges to give him a chance at probation, and that the state was recommending that he receive fifteen years in prison (Tr. 147, 155-156). Later that same day, on July 17, 1991, Mr. Stepp pleaded guilty before Judge Michael Calvin, who was also the judge presiding over Mr. Dunn's trial. In cause number 911-640, Mr. Stepp was charged with robbery in the first degree, armed criminal action, tampering in the first degree, and unlawful use of a weapon. At the commencement of the plea hearing, the prosecution announced that there was a plea agreement whereby the State would recommend concurrent sentences of fifteen years on the robbery charge, one year on the tampering charge, and one year on the weapons charge, all to run concurrently. The armed criminal action charge would be dismissed pursuant to this plea bargain. During the plea

colloquy, the trial court noted that this plea bargain was offered in consideration for Mr. Stepp's testimony in the case that he was presently trying. After the court accepted the plea, a presentence investigation was ordered, and sentencing was set for August 30, 1991.

At the sentencing hearing, Mr. Stepp's counsel requested on behalf of Mr. Stepp probation rather than fifteen years' imprisonment. Judge Calvin then conducted a lengthy hearing in which he inquired of other family members of Mr. Stepp who were present in the courtroom, and ultimately elected to suspend imposition of sentence on all three charges, granting Mr. Stepp only three years of probation. The prosecutor remained silent during the sentencing hearing.

The Circuit Court, during Dunn's state habeas hearing, found that no agreement for probation existed at the time of Mr. Stepp's testimony at Dunn's trial for Mr. Stepp to receive probation. The Circuit Court found that it appeared that Judge Calvin at Mr. Stepp's sentencing hearing made an independent determination as to whether young DeMorris Stepp should have been granted probation rather than being sent to prison for fifteen years. The Court believed that Judge Calvin ultimately decided on probation, not because the parties had agreed to it, but because Judge Calvin deemed it appropriate.

After he received probation, Mr. Stepp repeatedly violated his probation and ultimately served his fifteen-year sentence. After he was released, Mr. Stepp was subsequently convicted of first-degree murder involving the killing of his girlfriend and is currently serving a sentence of life without parole at the Jefferson City Correctional Center.

In 2017, in an interview with an investigator from the Missouri Attorney General's office, Mr. Stepp provided a third version of the events he purportedly observed the night of the shooting. In this 2017 statement, Mr. Stepp stated that another unknown individual shot and killed Ricco Rogers and Mr. Dunn was standing by him when the shooting occurred. At the evidentiary hearing in the instant case, in addition to claiming that his trial testimony was fabricated and false, Mr. Stepp testified that this story he told the prior year to the attorney general's investigator was also false. In his 2018 testimony, Mr. Stepp asserted that he hoped by giving this false statement to obtain a reduction of his current sentence of life without parole.

At 2:50 a.m. on May 19, 1990, less than three hours after the shooting, Mr. Stepp gave a recorded interview with law enforcement officers, the transcript of which was marked as Exhibit 14 of the post-conviction hearing. Mr. Stepp said that Ricco Rogers, Michael Davis, and DeMorris Stepp were on the porch at 5607 Labadie, when Mr. Stepp saw Christopher Dunn hiding around the corner next door. He then stated, "You know, I thought my mind, you know, was playing games and I looked dead in his face, and I guess he fired, he thought I seen him, so he shot at me first...It missed me by just an inch." Several shots were fired, and the boys started running, except that Ricco Rogers fell and died. When Mr. Stepp was asked whether he saw Christopher Dunn prior to the shots being fired, Mr. Stepp answered: "He was shooting the gun." (Exh. 14, pp. 2-6).

The hearing judge held that it was next to impossible to determine which version of events related by Mr. Stepp was the most credible. The hearing judge continued,

“[h]owever, regardless of which of Mr. Stepp’s multiple statements are true, it is beyond dispute that Mr. Dunn was convicted based upon the eyewitness testimony of a person who at this point has told multiple contradictory versions of what he claims to have observed on the night of the shooting.” See Appendix B, pg 10a. The hearing judge determined that DeMorris Stepp was a liar.

The other eyewitness, Michael Davis, moved to California shortly after he testified at Mr. Dunn’s trial. Mr. Davis was on the Labadie porch with Ricco Rogers and DeMorris Stepp at the time of the shooting. He was interviewed by law enforcement at 3:04 a.m. on May 19, 1990, within approximately three hours of the shooting. The statement was recorded, and the transcript was marked as Exhibit 20. He stated in the interview that moments after the shooting he fell to the ground and played dead and looked up and was able to see the shooter. He claimed to have recognized the shooter as “Trap”, the nickname for Christopher Dunn, by the unique sunglasses that Mr. Dunn regularly wore. (Exh. 20, pp. 2-9).

At trial, Mr. Davis testified that he did not see the shooter until after the first shot was fired. Ricco Rogers fell, and Mr. Davis fell beside him to avoid getting shot. Mr. Davis claimed that right before he fell, he looked and saw the shooter, who he identified as Christopher Dunn. (Tr. 174-182).

In 2015, Mr. Davis was located at the Solano County Jail in Fairfield, California where he was incarcerated on pending criminal charges. (Exh’s. 2, 17, 18). After being interviewed, Mr. Davis also recanted under oath in a sworn affidavit. (Id.). This affidavit indicates that Mr.

Davis committed perjury when he identified Mr. Dunn as the killer at the 1991 trial. (Id.). Mr. Davis stated that he could not see the shooter from his location. (Id.). Mr. Davis indicated that Mr. Stepp convinced him to implicate Mr. Dunn as the shooter because they believed he was a member of the Crips gang in their neighborhood. (Id.). Because Mr. Stepp and Mr. Davis were members of the rival Bloods gang, they wanted Mr. Dunn out of the neighborhood and believed implicating him in the murder was an easy way to get that done. (Id.). This account is corroborated by the testimony at the evidentiary hearing from Mr. Stepp, who stated that he convinced Mr. Davis to tell the police that Mr. Dunn was the shooter.

A couple of weeks after the shooting, Mr. Davis moved to California with his mother. (Id.). He was brought back to Missouri by the prosecutors in 1991 to testify at Dunn's trial. When interviewed by the police prior to testifying, he stated that he hesitated as to whether he could identify who shot Ricco Rogers. (Id.) At that time, he asserted that he was pressured by the police to identify Christopher Dunn as the killer. The police showed Mr. Davis photos of Ricco Rogers' corpse. The police also arranged to have Ricco Rogers' mother call him and urge him to testify. (Id.) Mr. Davis stated that as a result of this pressure, Mr. Davis appeared in court and committed perjury at trial by identifying Mr. Dunn as the shooter. (Id.).

On November 17, 2015, Mr. Davis gave a tape-recorded statement to Christopher Dunn's investigator, Craig Speck, at the Solano County Jail. (See Exh. 17). A copy of this tape-recorded statement was transcribed by a court reporter and was attached to Mr. Dunn's reply in support of his original petition as Exhibit 7. Mr. Davis provided

another tape-recorded statement to Investigator Speck on June 9, 2017, and affirmed his 2015 statement.

At the time of the evidentiary hearing, Mr. Davis was in California custody and had been released from jail to an inpatient drug treatment program. Counsel for Dunn intended to take Mr. Davis' deposition on or before August 1, 2018, and submit it to the hearing court. However, Mr. Davis absconded from the halfway house and a warrant was issued for his arrest. Because he was not arrested on this warrant, Mr. Dunn requested that the hearing court consider the testimony of Mr. Davis' through his sworn affidavit and through the transcribed taped statement that were previously submitted to the hearing court.

The hearing court held that the recantations of DeMorris Stepp and Michael Davis were bolstered by the testimony of an independent eyewitness, Eugene Wilson, who was present at the house and witnessed the shooting death of Ricco Rogers. Mr. Wilson is referred to as "Geno" in the police reports and during the trial testimony of Mr. Stepp and Mr. Davis. Mr. Wilson signed a sworn affidavit and testified at the evidentiary hearing that he was present with Ricco Rogers, DeMorris Stepp, and Michael Davis on Marvin Tolliver's porch at 5607 Labadie on the night of May 19, 1990. Several shots rang out that came from the front of the house to the west. Mr. Wilson stated that because it was dark outside, none of the young men on the porch could see who was shooting at them. Everybody started to run except for Ricco Rogers and, after the gunshots stopped, Mr. Wilson realized that Ricco had been shot.

Shortly after the shots were fired, one of the men on the porch mentioned Christopher Dunn's name and indicated he might have been the shooter. Mr. Wilson stated that many of the younger kids in that neighborhood did not like Christopher Dunn. Mr. Wilson also testified that because he and Marvin Tolliver were friends with Mr. Dunn, he did not believe that Dunn would have shot at them because of that friendship. He also testified that he was certain that because of where Mr. Stepp and Mr. Davis were positioned when Ricco Rogers was shot, neither of them could have possibly seen the shooter or positively identified Mr. Dunn. When he was told about some of the prior statements that Mr. Stepp and Mr. Wilson had given regarding the description of the shooter, Mr. Wilson stated that these statements were false because it was not possible that either of them could have seen the shooter.

The hearing court found that Mr. Wilson's testimony was credible. The court reasoned that Wilson had no obvious motive to lie. Mr. Wilson credibly testified that he did not speak to the police that night because he could not identify who did it and did not believe at that time that he had any relevant information to aid the police in catching the actual shooter. Mr. Wilson's credibility was also enhanced by the fact that he had lived with Ricco Rogers' family since he was fourteen years old. As a result, he was very close to Mr. Rogers' mother and would have no apparent motive to hinder the effort to hold accountable the murderer of Ricco Rogers.

Mr. Wilson testified at the evidentiary hearing that Mr. Rogers' mother's boyfriend had a motive to commit these crimes because Mr. Rogers, Mr. Stepp, and Mr. Davis had beaten him up three days earlier because he

was physically abusive toward Ricco Rogers' mother. Mr. Wilson also testified that Ricco Rogers' younger brother was shot approximately three months later. Mr. Rogers' brother was also involved in the beating of his mother's boyfriend.

The hearing court found that Christopher Dunn's claim of innocence was also corroborated by other independent evidence. Mr. Dunn submitted a sworn affidavit from Catherine Jackson indicating that she was friends with Mr. Dunn at the time of the shooting in 1990 and that they often spoke on the phone.

Ms. Jackson indicated that at approximately 11:00 p.m. on the night of the shooting, she was engaged in a lengthy phone conversation with Mr. Dunn that lasted between thirty and sixty minutes that could have been ongoing at the time that Mr. Rogers was shot. During that conversation, she remembered that Mr. Dunn was happy and acting normal and did not seem upset or indicate that he had been involved in any altercation or dispute with anyone. When she was contacted about being a trial witness for Mr. Dunn, Ms. Jackson's mother did not want her to get involved and refused to answer the door when the public defender's office came. However, she did not testify at the evidentiary hearing in this cause.

Another friend of Dunn, Nicole Bailey, provided an affidavit and testified at Mr. Dunn's post-conviction hearing. Ms. Bailey testified that she spoke on the phone with Dunn on the night that Mr. Rogers was shot. Ms. Bailey remembers this phone conversation because it occurred while she was in the hospital, after having given birth to her first child the night before. Ms. Bailey also

was certain that this phone conversation occurred on the night that Mr. Rogers was killed because she attempted to call Mr. Dunn again that same night and was informed by Dunn's sister that the police had just come to Dunn's house looking for him as a suspect in the killing of Mr. Rogers that had occurred earlier that evening. (Id.).

Curtis Stewart testified at the post-conviction evidentiary hearing. Mr. Stewart testified that he was incarcerated in a ten-man pod at the St. Louis City workhouse with DeMorris Stepp in 1991. Mr. Stewart overheard Mr. Stepp making a telephone call, during which Mr. Stepp indicated that he did not know who shot Ricco Rogers. When Mr. Stewart and the other inmates in that pod learned that Mr. Stepp was going to falsely accuse Mr. Dunn of being the shooter, this caused friction and fights and, as a result, Mr. Stepp was removed to another area of the workhouse.

Finally, the hearing court found that Christopher Dunn's claim of innocence was corroborated by several alibi witnesses whose testimony was presented at Mr. Dunn's Missouri Criminal Procedure Rule 29.15 hearing. Mr. Dunn's claim of innocence was also bolstered by evidence adduced during the Rule 29.15 hearing that the victim's brother, Dwayne Rogers, had made statements that Petitioner was not the man who had killed his brother and that he knew the identity of the actual shooter.

The hearing court found that no jury would convict Mr. Dunn with the evidence that Dunn had presented in his post-conviction proceedings. Yet, the hearing court denied Dunn's freestanding actual innocence claim because freestanding actual innocence claims are not available to defendants who are not sentenced to death based upon

Missouri precedent set in In re Lincoln v. Cassady, 517 S.W.3d 11 (Mo. Ct. App. W.D. 2016). While the hearing court found that Mr. Dunn *had met* the gateway claim of actual innocence pursuant to Schlup, supra., it also ruled that his underlying constitutional claims were without merit. Dunn's applications to the Appellate Division and Supreme Court in Missouri were all denied, as was his application for successive writ of habeas corpus before the United States Court of Appeals Eighth Circuit.

VI. REASONS FOR GRANTING THE WRIT

Preliminary Statement

This Court's power to grant an extraordinary writ is very broad but reserved for exceptional cases in which "appeal is a clearly inadequate remedy." Ex parte Fahey, 332 U.S. 258, 260 (1947). 28 U.S.C. § 2244(b)(3)(e) prevents this Court from reviewing the court of appeals' order (Appendix C) denying Mr. Dunn leave to file a second habeas petition by appeal or writ of certiorari. The provision, however, has not repealed this Court's authority to entertain original habeas petitions, Felker, supra., nor has it disallowed this Court from "transferring the application for hearing and determination" to the district court pursuant to 28 U.S.C. § 2241(b).

Rule 20 of this Court requires a petitioner seeking writ of habeas corpus demonstrate that (1) "adequate relief cannot be obtained in any other form or in any other court;" (2) "exceptional circumstances warrant the exercise of this power;" and (3) "the writ will be in aid of the Court's appellate jurisdiction." Further, this Court's authority to grant relief is limited by 28 U.S.C. § 2254, and any considerations of a second petition must be "inform[ed]"

by 28 U.S.C. § 2244(b). See Felker, 518 U.S. at 662-63.

Mr. Dunn's last hope for relief lies with this Court, as he has exhausted all remedies before the state and federal courts. His case presents exceptional circumstances that warrant exercise of this Court's discretionary powers.

During his post-conviction proceedings, Christopher Dunn proved that no reasonable juror would have convicted him after the hearing court took testimony from witnesses and heard and considered all the evidence both from the State and from Dunn. This Court has yet to definitively hold that defendants have a right to pursue freestanding actual innocence claims in a post-conviction setting. The closest to such precedent came from In re Davis, 130 S. Ct. 1 (2009), when this Court held that a United States District Court should "receive testimony and make findings of fact as to whether evidence that could not have been obtained at the time of trial clearly establishes petitioner's innocence." With this decision, this Court was implying that if a petitioner "clearly establishes" his "innocence," he or she is entitled to relief.

In 2020, a judge in Missouri state court found that no jury would convict Christopher Dunn with the evidence presented in Christopher's post-conviction proceedings, stating:

As was noted earlier, in the instant case new evidence has emerged, in addition to the recantations, which make it likely that reasonable, properly instructed jurors would find [Christopher Dunn] not guilty. House, 547 U.S. at 538. Eugene Wilson, an independent eyewitness who has no reason to lie and

was the only eyewitness in the case who is not currently incarcerated for other crimes, provided credible testimony that none of the witnesses at the scene of the shooting could have identified the assailant. Mr. Wilson's testimony provides corroborating evidence to buttress the recantations of Mr. Stepp and Mr. Davis. Coupled with the evidence in the record that Petitioner had an alibi, this Court does not believe that any jury would now convict Christopher Dunn under these facts. Instead, this Court concludes that, based on all the evidence considered under the dictates of Schlup, it is more likely than not that any reasonable juror would have reasonable doubt.

State ex rel. Dunn v. Buckner, 17TE-CC00059 and SC99157, p. 19 (Sept. 23, 2020) (Judge William E. Hickle). See Appendix B, pg 22a.

Missouri Circuit Judge William E. Hickle came to this determination after taking testimony and reviewing all the evidence as was directed under In re Davis, supra. See 28 U.S.C. § 2244(b)(2)(B)(ii); see also House v. Bell, 547 U.S. 518 (2006). Notably, Judge Hickle also ruled that the evidence presented in the motion was newly discovered and could not have been discovered with due diligence. See 28 U.S.C. § 2244(b)(2)(B)(i); State ex rel. Dunn v. Buckner, 17TE-CC00059 and SC99157 (Citing State ex rel. Griffin v. Denney, 347 S.W.3d 73, 77 (Mo. banc 2011)). As the first recantation did not occur until 2005, the state court judge ruled there was cause and prejudice to allow a review of Dunn's due process claims. See Murray v. Carrier, 477 U.S. 478 (1986); State ex rel. Griffin v. Denney, 347 S.W.3d 73, 77 (Mo. banc 2011). The state court

concluded that Christopher Dunn proved, with both old and new evidence, which the jury never heard, that he is actually innocent. See Appendix B.

The question is, why is Christopher Dunn still in prison? The answer is that the State of Missouri case law bars freestanding actual innocence claims' application to prisoners who are not sentenced to death. See In re Lincoln v. Cassady, 517 S.W.3d 11 (Mo. Ct. App. W.D. 2016). The Missouri courts believe that an *innocent* man, who allegedly received a fair trial, allegedly does not have an underlying constitutional violation, and was convicted, does not have a due process right to be free from unlawful seizures and incarceration. In re Lincoln v. Cassady, 517 S.W.3d at 21-23. A freestanding claim of actual innocence is rooted in several concepts, including the constitutional rights to substantive and procedural due process, and the constitutional right not to be subjected to cruel and unusual punishment. See generally Jonathan M. Kirshbaum, Actual Innocence after Friedman v. Rehal: The Second Circuit Pursues a New Mechanism for Seeking Justice in Actual Innocence Cases, 31 Pace L Rev 627, 660-661 [Spring 2011]; People v. Cole, 1 Misc 3d 531, 541-542 (N.Y. Kings Cty. Sup. Ct. 2003).

The evidence now before this Court demands review, as the State of Missouri is unreasonably applying Supreme Court precedent and keeping innocent people in prison who are not sentenced to death. A judge has already heard this case and determined that no jury would have convicted Christopher Dunn had it heard such evidence.²

2. Specifically, Judge Hickle stated that he did not believe that *any* jury would convict Christopher Dunn after hearing the evidence before him.

Here, this Court should overrule the atrocious precedent set in In re Lincoln v. Cassady, *supra*. Mr. Dunn has proven his innocence and deserves, at the very least, a new trial.

Additionally, this Court should find that it is cruel and unusual punishment for an individual to remain in prison for a crime that he did not commit. See U.S. Const. 8th & 14th Amends. Dunn's current imprisonment would shock the conscience of a reasonable citizen. His continued incarceration is a substantive due process violation, violates his Eighth Amendment right to be free from such unlawful punishment, and may only be remedied by this Court's action under 28 U.S.C. 2241.

POINT I

STATEMENT OF REASONS FOR NOT FILING IN THE DISTRICT COURT.

As required by Rule 20.4 and 28 U.S.C. §§ 2241 and 2242, Mr. Dunn states that he has not applied to the district court because the circuit court prohibited such an application. See Appendix A. Mr. Dunn exhausted his state remedies for stand-alone innocence claims. Since Mr. Dunn exhausted his state remedies and was denied permission by the Court of Appeals for the 8th Circuit to file a second habeas petition, he cannot obtain relief in any other form or from any other court.

POINT II

THE EXCEPTIONAL CIRCUMSTANCES OF THIS CASE WARRANT THE EXERCISE OF THIS COURT'S JURISDICTION BECAUSE A STATE COURT JUDGE FOUND THAT NO JURY WOULD CONVICT DUNN AFTER HEARING AND CONSIDERING ALL OF THE EVIDENCE IN MR. DUNN'S POST-CONVICTION PROCEEDINGS. MR. DUNN REMAINS IN PRISON ONLY BECAUSE MISSOURI STATE COURTS DO NOT RECOGNIZE FREE-STANDING INNOCENCE CLAIMS FOR DEFENDANTS NOT SENTENCED TO DEATH.

The Circuit Court of Texas County, Missouri found that, after hearing testimony and considering all the evidence presented by both the State of Missouri and Christopher Dunn, no jury would convict Dunn. See Appendix B, pg 22a. Based upon this finding, Dunn was entitled to habeas relief, yet he was barred because of the unconscionable Missouri state court precedent set in In re Lincoln v. Cassady, 517 S.W.3d 11 (Mo. Ct. App. W.D. 2016), which held that inmates who were not sentenced to death were not entitled to habeas relief under freestanding claims of actual innocence. This is an unreasonable application of Supreme Court precedent both in the fact that (a) the State of Missouri's denial of habeas relief to an innocent man is a violation of the 8th and 14th Amendments of the United States Constitution and (b), pursuant to Article 1 Section 9, Clause 2 of the United States Constitution, the State of Missouri is suspending habeas corpus relief that is due to Dunn.

It is true that there is no constitutional right to an appeal or post-conviction hearing. Abney v. United States, 431 U.S. 651, 656, 97 S. Ct 2034, 2038 (1977). Having made the right to post-conviction proceedings available under Mo. R. 29.15 and Mo. R. 91, however, the State of Missouri is obligated by the United States Constitution to avoid impeding effective access to or relief under the post-conviction process. Rinaldi v. Yeager, 384 U.S. 305, 86 S.Ct 1497, (1966); Douglas v. California, 372 U.S. 353, 83 S.Ct 814 (1963); Griffin v. Illinois, 351 U.S. 12, 76 S.Ct 585, (1956) (quoting from Harris v. Kuhlman, 601 F.Supp. 987 (E.D.N.Y. 1985)).

Here, the habeas court in Missouri found that Dunn had presented evidence that was newly discovered *and* that established his innocence. See Appendix B, pg 22a.³ The habeas court specifically held it did “not believe that any jury would now convict Christopher Dunn under these facts.” See Appendix B, pg 22a. The state court came to this conclusion by finding the following:

- a. The affidavit and hearing testimony of eyewitness Eugene Wilson was both independent and credible.
- b. The recantations of Michael Davis and DeMorris Stepp were bolstered by independent evidence that the hearing court deemed credible. While the judge concluded that DeMorris Stepp was a

3. This Court should know that the judge in the state court proceeding specifically addressed the newly discovered aspect of the evidence and found that any procedural hurdle based upon the timing discovery of the evidence was defeated. See Appendix B, pg 22a.

proven liar, the hearing court specifically found that both Davis's and Stepp's recantations were corroborated by Eugene Wilson, an independent eyewitness who testified that neither Davis nor Stepp could have identified the shooter because of their positions at the time of the shooting.

- c. The hearing court found that Petitioner's claims of innocence were also corroborated by Catherine Jackson, Nicole Bailey, and Curtis Stewart, who were presented during Dunn's last post-conviction hearing, the alibi witnesses, and the statement of the deceased's brother, Dwayne Rogers,⁴ that Mr. Dunn presented in his Missouri Rule 29.15 hearing in the 1990's prior to his direct appeal.

Christopher Dunn has presented a freestanding claim of actual innocence, because no jury would convict him with the evidence presented to the Circuit Court in Missouri. His continued incarceration is a violation of the Eighth Amendment – it is cruel and unusual punishment. This is plainly a constitutional violation that this Court recognized in its seminal decision In re Davis, 130 S. Ct. 1 (2009). And as this Court required to obtain habeas relief in Davis, here, a hearing court took testimony and evidence and found that there was clear and convincing evidence, i.e., no jury would convict, that Christopher Dunn is an innocent man. As such, this Court should either grant immediate relief and free an *innocent man* or order a new trial.

4. Dwayne Rogers testified that Petitioner was not the man who had killed Ricco Rogers, his brother, and that Dwayne knew the identity of the actual killer.

Contrary to popular belief, this Court never foreclosed freestanding actual innocence claims. As more and more evidence of wrongful convictions has come to light, this Court, like all courts around the country, has recognized that there may be innocent people languishing in prison. In Herrera v. Collins, 506 U.S. 390 (1993), a case from 1993, this Court set the stage for freestanding claims of actual innocence. But the criminal justice system, and this Court, for that matter, have greatly progressed since 1993, recognizing that there are innocent people in prison. In House v. Bell, 547 U.S. 518, 554-555 (2006), this Court specifically addressed a petitioner’s freestanding claim *and did not foreclose* relief for a prisoner who makes a claim of actual innocence that is unaccompanied by an underlying constitutional violation outside of his or her incarceration. But that changed when the Supreme Court held that the execution of an innocent man is cruel and unusual punishment. In Re Davis, *supra*.

Specifically, In Re Davis made it clear that habeas relief is appropriate for an innocent man who does not have an underlying constitutional violation:

Second, JUSTICE SCALIA assumes as a matter of law that, “[e]ven if the District Court were to be persuaded by Davis’s affidavits, it would have no power to grant relief” in light of 28 U.S.C. § 2254(d)(1). *Post*, at 2. For several reasons, however, this transfer is by no means “a fool’s errand.” *Post*, at 5. The District Court may conclude that § 2254(d)(1) does not apply, or does not apply with the same rigidity, to an original habeas petition such as this. See Felker v. Turpin, 518 U.S. 651, 663, 116 S.

Ct. 2333, 135 L. Ed. 2d 827 (1996) (expressly leaving open the question whether and to what extent the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) applies to original petitions). The court may also find it relevant to the AEDPA analysis that Davis is bringing an “actual innocence” claim. See, e.g., Triestman v. United States, 124 F.3d 361, 377-380 (CA2 1997) (discussing “serious” constitutional concerns that would arise if AEDPA were interpreted to bar judicial review of certain actual innocence claims); Pet. for Writ of Habeas Corpus 20-22 (arguing that Congress intended actual innocence claims to have special status under AEDPA). Even if the court finds that § 2254(d)(1) applies in full, it is arguably unconstitutional to the extent it bars relief for [an incarcerated] inmate who has established his innocence. Alternatively, the court may find in such a case that the statute’s text is satisfied, because decisions of this Court clearly support the proposition that it “would be an atrocious violation of our Constitution and the principles upon which it is based” to [imprison] an innocent person. In Re Davis, 565 F.3d 820, 830 (11th Cir. 2009) (Barkett, J., dissenting); cf. Teague v. Lane, 489 U.S. 288, 311-313, 109 S. Ct. 1060, 103 L. Ed. 2d 334 (1989) (plurality opinion).

JUSTICE SCALIA would pretermitt all of these unresolved legal questions on the theory that we must treat even the most robust showing of actual innocence identically on habeas review

to an accusation of minor procedural error. Without briefing or argument, he concludes that Congress chose to foreclose relief and that the Constitution permits this. But imagine a petitioner in Davis's situation who possesses new evidence conclusively and definitively proving, beyond any scintilla of doubt, that he is an innocent man. The dissent's reasoning would allow such a petitioner to be [incarcerated] nonetheless. The Court correctly refuses to endorse such reasoning.

In re Davis, 130 S. Ct. at 1-2. (Justice Stevens, concur.)⁵

Even the Eighth Circuit, which heard Dunn's petition for a successive habeas petition, has (a). never foreclosed a petitioner from making a freestanding actual innocence claim and (b). actually recognizes freestanding actual innocence claims, albeit, at a higher standard than gateway innocence claims. Feather v. United States, 18 F.4th 982 (8th Cir. 2021) (recognizing a freestanding actual innocence claim); Dansby v. Hobbs, 766 F.3d 809, 816 (8th Cir. 2014) (stated that the freestanding claim is a higher

5. Any allusion by the State of Missouri that Dunn has other recourse is absolutely misplaced. Significantly, Justice Stevens' response to Judge Scalia's dissent addressed the same point that the State of Missouri often points to as an alternative avenue for Dunn to seek relief – via DNA testing, clemency, or Mo. Rev. Stat. § 547.031. Christopher Dunn should not have to present his case to a prosecutor, who has an obligation to the victim and to vigorously defend convictions. Likewise, he should not have to seek mercy from the governor. Lastly, to punish a defendant for not having a DNA case is wholly arbitrary. These avenues still deny Dunn's right to the criminal justice system; it denies him due process.

standard than a gateway innocence claim); Cornell v. Nix, 119 F.3d 1329, 1334 (8th Cir. 1997) (recognizing free standing actual innocence and defining the standard as “clear and convincing evidence” or “unquestionably established” innocence).

To be clear, this Court in In Re Davis did not differentiate between petitioners who are facing death or just imprisonment. Any restriction of a petitioner’s right to remain at liberty based upon a wrongful conviction is a constitutional violation that entitles a petitioner to relief under 28 U.S.C. 2254 and 28 U.S.C. 2241. Likewise, this Court has set precedent here for the law that applied to cases concerning inmates facing death also being applicable to inmates who are imprisoned for however long, let alone life without parole plus 90 years as Christopher Dunn is facing. See, e.g., Strickland v. Washington, 466 U.S. 668 (1984); Wiggins v. Smith, 539 U.S. 510 (2003); see also Feather v. United States, 18 F.4th 982; Cornell v. Nix, 119 F.3d at 1334 (While the standard for a freestanding claim of actual innocence is more demanding than a gateway claim of actual innocence, a freestanding claim is available to non-death sentenced defendants).

The state court found that Christopher Dunn’s claims of innocence are credible and held that no jury would have convicted Dunn had it heard the evidence before the hearing court. Legal rulings and factual findings of state courts are entitled to deference. 28 U.S.C. 2254(d); see also Commissioner v. Duberstein, 363 U.S. 278 (1960). Therefore, this Court should grant habeas relief to Christopher Dunn.

POINT III**THE COURT OF APPEALS ERRED IN BARRING
CHRISTOPHER DUNN'S SECOND PETITION
BECAUSE MR. DUNN MET THE STANDARD
OF A FREESTANDING CLAIM OF ACTUAL
INNOCENCE WHEN THE HEARING COURT
DETERMINED THAT NO JURY WOULD CONVICT
DUNN HAD IT HEARD THE EVIDENCE DUNN
PRESENTED IN HIS POST-CONVICTION
PROCEEDINGS.**

The Court of Appeals for the 8th Circuit denied Mr. Dunn's application to file a second petition for habeas relief in summary denial. See Appendix A, 1a.

The purpose of 28 U.S.C. § 2244(b)(2) that “informs” this Court's consideration of Mr. Dunn's original habeas petition are twofold: § 2244(b)(2)(B)(ii) requires that the petitioner diligently discover and present his new evidence in his first habeas petition. Mr. Dunn has diligently done so. § 2244(b)(2)(B)(i) requires that the claim raised in a second petition “impugn” the reliability of the underlying conviction. Mr. Dunn's stand-alone innocence claim does exactly that, which should have caused the 8th Circuit to hear Mr. Dunn's petition.

Here, the state court found that no jury would have convicted Dunn had the jury heard the evidence that was presented to the hearing court. Mr. Dunn submits that he met the standard for a freestanding claim of innocence when the state court came to this finding. Likewise, the state court also found that Mr. Dunn's evidence was newly discovered, timely presented, and defeated any procedural

hurdle based upon the gateway standard defined in Schlup, supra. See Appendix B.

This Court has been clear that, while the standard of a freestanding actual innocence claim does not rise to the level of the standard of beyond a reasonable doubt, it is more demanding than the gateway claim of actual innocence, which is that a person is more probably innocent than not. See Schlup v. Delo, 513 U.S. 298, 327 (1995) (citing Sawyer v. Whitley, 505 U.S. 333(1992) (Holding that freestanding claims of actual innocence must be proven by clear and convincing evidence that no reasonable juror would convict); see also Cornell v. Nix, 119 F.3d at 1334.

Mr. Dunn submits that the standard for a freestanding claim of actual innocence is “clear and convincing evidence”. See Schlup v. Delo, 513 U.S. at 327. And this is the general understanding of courts around the country. After remand in In re Davis, the district court borrowed the “clear and convincing evidence” standard from Sawyer and Delo, which meant, “Mr. Davis must show by clear and convincing evidence that no reasonable juror would have convicted him in the light of the new evidence.” In re Davis, No. CV409-130, 2010 WL 3385081, at *47 (S.D.Ga. Aug. 24, 2010). This Court apparently concurred with the district court’s standard of review when it affirmed the district court’s denial of Davis’s habeas petition. In re Davis, 137 S. Ct. 2273 (2017).

Clear and convincing evidence of evidence means that no reasonable jury or juror would convict the defendant had the jury heard that evidence. People v. Hamilton, 115 A.D.3d 12, 15, 979 N.Y.S.2d 97, 109 (N.Y.App.Div. 2d

Dep't 2014) (New York has held that clear and convincing is the standard for a freestanding claim of innocence. Clear and convincing evidence means that no reasonable juror would convict); People v. Washington, 171 Ill. 2d 475, 665 N.E.2d 1330, 216 Ill. Dec. 773 (Ill. 1996) (In Illinois, freestanding actual innocence claims must be supported by evidence that is new, material, noncumulative and, most importantly, 'of such conclusive character' as would 'probably change the result on retrial.');

Miller v. Comm'r of Correction, 242 Conn. 745, 700 A.2d 1108 (Conn. 1997) (In Connecticut, in a habeas corpus claim of actual innocence, an inmate must establish by clear and convincing evidence that he was actually innocent and that no reasonable person would have found him guilty of his charged crime.); In re Hardy, 41 Cal. 4th 977, 1016 (Cal. Sup. Ct. 2007) (California's standard for actual innocence is that the evidence must undermine the entire prosecution's case and point unerringly to innocence or reduced culpability.); Ex parte Elizondo, 947 S.W.2d 202 (Tex. Crim. App. 1996) (Texas's standard is clear and convincing evidence that no rational jury would convict); State ex rel. Amrine v. Roper, 102 S.W.3d 541 (Mo. 2003) (Missouri's standard is a clear and convincing showing of actual innocence that undermines confidence in the correctness of the judgment. Unfortunately, Missouri does not believe that this standard applies to inmates who are not sentenced to death); Montoya v. Ulibarri, 163 P.3d 476, 484 (N.M. 2007) (In New Mexico, a petitioner "asserting a freestanding claim of innocence must convince the court by clear and convincing evidence that no reasonable juror would have convicted him in light of the new evidence").

The state court ruled that no jury would have convicted Dunn with the evidence that was presented

in Dunn's habeas motion. In other words, Dunn met the standard of clear and convincing evidence of innocence. The State Court's failure to release Dunn was a violation of his 8th and 14th Amendment rights under the United States Constitution and the Supreme Court precedent held in In Re Davis, supra. As such, this Court has the authority to release Dunn because he has proven that he is innocent.

POINT IV

CHRISTOPHER DUNN'S RIGHT TO BE FREE FROM CRUEL AND UNUSUAL PUNISHMENT IS BEING VIOLATED EVERY MOMENT THAT HE REMAINS IN PRISON. IT WOULD SHOCK THE CONSCIENCE OF EVERY REASONABLE CITIZEN TO LEARN THAT CHRISTOPHER DUNN, A DEFENDANT WHO WAS FOUND INNOCENT BY A COURT, REMAINS IN PRISON. SEE 8TH & 14TH AMEND. U.S. CONST.

Here, Judge Hickle, the Circuit Court judge of Texas County, Missouri, found that he did not believe *any* jury would convict Christopher Dunn had it heard the evidence that he heard during Christopher Dunn's post-conviction proceedings. Judge Hickle was constrained by Missouri precedent that an innocent man in the State of Missouri can receive relief only when he either has met the gateway standard of actual innocence and has an underlying constitutional claim or the innocent man has met the freestanding standard of actual innocence and is sentenced to death. Unfortunately for Christopher Dunn, he was not sentenced to death, but to life in prison, and, while Judge Hickle found that Dunn met the standard for both a freestanding and gateway claim of

actual innocence, Dunn had not presented a meritorious underlying constitutional claim. Essentially, Judge Hickle was left with the fact that he could not free Mr. Dunn based upon precedent, even though Judge Hickle *did not believe that Christopher Dunn murdered Ricco Rogers*. See Appendix B.

This is an affront to the purpose of our justice system, and it stands in direct conflict with the United States Constitution. As was agreed upon by our founding fathers in the preamble of the United States Constitution:

“We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defense, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.”

It is beyond obvious and commonsense that an innocent man’s imprisonment is in direct violation of the basic principles that the founding fathers agreed were to be the heartbeat of the Constitution.

An innocent man’s imprisonment is exactly the purpose behind the last round of protection that a criminal defendant has, which is the collateral attack and petition for habeas corpus. In fact, Judge Henry Friendly specifically stated that all habeas petitions should come with colorable claims of innocence. Friendly, Henry J. (1970) “Is Innocence Irrelevant? Collateral Attack on Criminal Judgments.” *University of Chicago Law Review*: Vol. 38: Iss. 1, Article 9, page 142. And Justice Harry

Black was clear that innocence was always a factor in his consideration of habeas petitions:

...the defendant's guilt or innocence is at least one of the vital considerations in determining whether collateral relief should be available to a convicted defendant... In collateral attacks . . . I would always require that the convicted defendant raise the kind of constitutional claim that casts some shadow of a doubt on his guilt.

Kaufman v. United States, 394 U.S. 217, 235-36, 242 (1969) (dissenting opinion).

This Court has granted habeas relief solely based upon an Eighth Amendment claim of cruel and unusual punishment when an underlying constitutional claim did not exist. See e.g., Roper v. Simmons, 543 U.S. 551 (2005) (Execution of juveniles is forbidden); Atkins v. Virginia, 536 U.S. 304 (2002) (Execution of the mentally retarded is forbidden).

Here, Christopher Dunn has clearly established his innocence as set out in In re Davis, *supra*. To deny him his right to liberty and to be free from cruel and unusual punishment is an affront to our society and leaves everyone vulnerable to punishment without guilt. County of Sacramento v. Lewis, 523 U.S. 833, 842, 118 S. Ct. 1708, 140 L. Ed. 2d 1043 (1998) ("Where a particular Amendment provides an explicit textual source of constitutional protection against a particular sort of government behavior, that Amendment, not the more generalized notion of substantive due process, must be the guide for analyzing these claims."). Moreover,

a reasonable citizen's conscience would be shocked to learn that Dunn, proven innocent, still remains in prison. Sacramento, 523 U.S. at 845-46 (citing Wolff v. McDonnell, 418 U.S. 539, 558 (1974) (When evaluating whether a governmental action violates a substantive due process right, the threshold determination is whether the conduct "shocks the conscience." "The touchstone of due process is protection of the individual against arbitrary action of government," including protection against "the exercise of power without any reasonable justification in service of a legitimate governmental objective...").

There is no legitimate governmental objective to keep Christopher Dunn, an innocent man, in prison. Therefore, this Court should exercise its habeas powers pursuant to 28 U.S.C. 2241.

VII. CONCLUSION AND PRAYER FOR RELIEF

Acquitting the guilty and condemning the innocent—the LORD detests them both.

Proverbs 17:15 (NIV Edition)

The country needs guidance as to whether a freestanding claim of actual innocence indeed exists, what the standard is, and when that standard is met to prove the freestanding claim. The state court in the case at bar found that Dunn presented evidence that was new, internally consistent, and credible and that this evidence proved that there is no jury that would have convicted Dunn had that evidence been presented at Dunn's trial. The court also ruled that it is more likely than not that any reasonable juror would have reasonable doubt. As such, Mr. Dunn has proven himself

innocent and this Court should grant him habeas relief. His continued punishment is a clear violation of his constitutional right to liberty and Eighth Amendment right to be free from cruel and unusual punishment.

Respectfully submitted,

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APPENDIX

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**APPENDIX A — ORDER OF THE
UNITED STATES COURT OF APPEALS FOR
THE EIGHTH CIRCUIT, FILED JULY 27, 2022**

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 22-1892

CHRISTOPHER DUNN,

Petitioner,

v.

MICHELE BUCKNER, WARDEN,

Respondent.

Appeal from U.S. District Court for the
Eastern District of Missouri - St. Louis
(4:97-cv-00331-MLM)

JUDGMENT

Before LOKEN, COLLOTON, and GRASZ, Circuit
Judges.

The motion for authorization to file a successive habeas
application in the district court is denied. Mandate shall
issue forthwith.

July 27, 2022

2a

Appendix A

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

/s/ Michael E. Gans

**APPENDIX B — ORDER AND JUDGMENT
OF THE CIRCUIT COURT OF TEXAS COUNTY,
MISSOURI, DATED SEPTEMBER 23, 2020**

IN THE CIRCUIT COURT
OF TEXAS COUNTY, MISSOURI

Case No. 17TE-CC00059

CHRISTOPHER DUNN,

Petitioner,

v.

MICHAEL BOWERSOX, SUPERINTENDENT,
SOUTH CENTRAL CORRECTIONAL CENTER,

Respondent.

ORDER AND JUDGMENT

Pending before the Court is Petitioner's petition for a writ of habeas corpus challenging his St. Louis City convictions for first degree murder, two counts of assault in the first degree, and three counts of armed criminal action, for which he received a sentence of life without parole plus ninety (90) years. The original petition raised two claims for relief: 1) a freestanding claim of actual innocence under *State ex rel. Amrine v. Roper*, 102 S.W.3d 541 (Mo. banc 2003) and, 2) a perjured testimony claim under *Napue v. Illinois*, 360 U.S. 264 (1959).

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An evidentiary hearing was conducted on May 30, 2018. At the hearing, Petitioner presented the testimony of DeMorris Stepp, who recanted his trial testimony and stated he falsely identified Petitioner at trial as the person who committed these crimes. Petitioner also presented the testimony of Curtis Stewart, Nicole Bailey, and an independent eyewitness to the shooting, Eugene Wilson. At the conclusion of the hearing, the Court agreed to keep the record open to give Petitioner the opportunity to take the deposition of the other eyewitness who testified at the 1991 trial, Michael Davis Jr., who was in custody in the State of California. Counsel for Petitioner then informed the Court that Mr. Davis absconded from a drug treatment center shortly after the hearing was conducted and was a fugitive from justice, last seen in California. Petitioner asked that the Court consider previous exhibits submitted, including an affidavit and transcript of a tape recorded statement, where Mr. Davis allegedly recanted his trial testimony. (See Exh's 2, 7).

On August 31, 2018, Petitioner filed a motion for leave to amend his habeas petition, pursuant to Rule 55.33(b), to conform to the evidence that was presented at the evidentiary hearing. Specifically, Petitioner contended that Mr. Stepp's testimony at the May 30, 2018 hearing provided a factual basis for Petitioner to raise a third claim for relief involving the State's suppression of exculpatory evidence under *Brady v. Maryland*, 373 U.S. 83 (1963) and, also provided additional facts to bolster his previously advanced perjured testimony claim.

Contemporaneously with this motion pursuant to Rule 55.33(b), Petitioner filed a first amended petition for

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a writ of habeas corpus that supplemented his perjured testimony claim and added a third claim for relief under *Brady* that alleged that the State suppressed exculpatory and material impeachment evidence regarding an agreement that the State had with DeMorris Stepp that he would receive probation on his pending charges in exchange for his testimony against Petitioner. The Court grants Petitioner's motion and permits the filing of the first amended petition.

RECITATION OF THE FACTS

Petitioner, Christopher Dunn, was convicted by a jury on July 18, 1991, for the May 18, 1990 murder of Ricco Rogers. Petitioner was also convicted of two counts of assault in the first degree and three counts of armed criminal action arising out of the same occurrence. Petitioner was subsequently sentenced to life without parole and consecutive sentences of ninety years by St. Louis City Circuit Judge Michael Calvin.

The State's case rested upon the eyewitness testimony of fifteen year old DeMorris Stepp and twelve year old Michael Davis. Both of these young men testified at trial that on May 18, 1990, these two juveniles and Mr. Rogers were sitting on a porch at a house at 5607 Labadie in the City of St. Louis. Just before midnight, Mr. Stepp testified that he saw Petitioner standing in the gangway of the house next door. A few minutes later, shots rang out and all three men tried to run away. Both Mr. Stepp and Mr. Davis testified at trial that Petitioner was the person who fired the fatal shots that caused the death of Mr. Rogers.

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At the time he testified, Mr. Stepp had pending charges for armed robbery, armed criminal action, unlawful use of a weapon, and tampering in the first degree. (Exh. 5). In exchange for his testimony against Petitioner, the prosecution dropped the armed criminal action charges against Mr. Stepp, who then pleaded guilty to the remaining charges. The state recommended a fifteen-year sentence for the charges; however, the sentencing judge granted Mr. Stepp probation. (Exh. 5).

After Petitioner was convicted and sentenced, Petitioner filed a timely notice of appeal and a timely Rule 29.15 motion pursuant to Missouri's then existing consolidated post-conviction review system in criminal cases. After holding an evidentiary hearing, the trial court denied Petitioner's Rule 29.15 motion. On consolidated appeal, the Missouri Court of Appeals, Eastern District affirmed Petitioner's convictions and the denial of his post-conviction motion in *State v. Dunn*, 889 S.W. 2d 65 (Mo. App. E.D. 1994). Petitioner, thereafter, unsuccessfully sought federal habeas corpus relief pursuant to 28 U.S.C. § 2254.

In 2005, DeMorris Stepp signed a sworn affidavit claiming that he committed perjury when he identified Christopher Dunn as the man he saw shoot Ricco Rogers. (See Exh. 1). Mr. Stepp indicated he was pressured by police and prosecutors to falsely identify Mr. Dunn as the shooter because they wanted him off the streets. (*Id.*). Mr. Stepp also asserted that the prosecution utilized Mr. Stepp's pending felony charges as leverage to convince him to testify that Christopher Dunn was the shooter and

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promised him he would avoid jail time if he did so. (*Id.*). Mr. Stepp's affidavit states that because it was so dark that night, he could not identify who the person was who fired the fatal shot. (*Id.*).

At the recent evidentiary hearing, Mr. Stepp testified that he committed perjury when he identified Petitioner as the shooter. In addition, he also testified that he lied under oath regarding the plea bargain he reached with the prosecution about his pending charges. Mr. Stepp testified that he had an understanding with the prosecution that, if he testified against Petitioner, he would be guaranteed probation and there was no danger in his mind that he would receive a fifteen year sentence.

At the Court's request, the record was recently reopened to allow the presentation of a transcript from Mr. Stepp's 1991 guilty plea and sentencing, which was marked and received as Petitioner's Exhibit 19. Though the transcript corroborates that Mr. Stepp received probation, it does not evidence an agreement or understanding with Mr. Stepp or anyone else that Mr. Stepp would receive probation.

On July 17, 1991, in Petitioner's trial, Mr. Stepp testified against Petitioner. Mr. Stepp acknowledged to the jury that he had unrelated charges pending against him. He testified that he had reached a plea agreement where the state dropped armed criminal action charges to give Defendant a chance at probation, and that the state was recommending that he receive fifteen years in prison (Tr. 147, 155-156). Later that same day, on July 17, 1991, Mr.

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Stepp pleaded guilty before Judge Michael Calvin, who was also the judge presiding over Petitioner's trial. In cause number 911-640, Mr. Stepp was charged with robbery in the first degree, armed criminal action, tampering in the first degree, and unlawful use of a weapon. At the commencement of the plea hearing, the prosecution announced that there was a plea agreement whereby the State would recommend concurrent sentences of fifteen years on the robbery charge, one year on the tampering charge, and one year on the weapons charge, all to run concurrently (Ex. 19, p. 2). The armed criminal action charge would be dismissed pursuant to this plea bargain. During the plea colloquy, the trial court noted that this plea bargain was offered in consideration for Mr. Stepp's testimony in the case that he was presently trying. After the court accepted the plea, a presentence investigation was ordered and sentencing was set for August 30, 1991.

At the sentencing hearing, Mr. Stepp's counsel requested on behalf of Mr. Stepp probation rather than fifteen years imprisonment. Judge Calvin then conducted a lengthy hearing in which he inquired of other family members of Mr. Stepp who were present in the courtroom, and ultimately elected to suspend imposition of sentence on all three charges, granting Mr. Stepp three years of probation. The prosecutor remained silent during the sentencing hearing.

It appears to this Court that no agreement for probation existed at the time of Mr. Stepp's testimony at Petitioner's trial for Mr. Stepp to receive probation. For any such agreement to be effective, the judge sentencing

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Mr. Stepp would have had a need to know it, which means that Judge Calvin would have been a participant in a scheme, along with the prosecutor, to hide from the jury an agreement that Mr. Stepp would receive probation rather than fifteen years in prison. Rather, it appears that Judge Calvin at Mr. Stepp's sentencing hearing made an independent determination as to whether young DeMorris Stepp should be granted probation rather than being sent to prison for fifteen years. Judge Calvin ultimately decided on probation, not because the parties had agreed to it, but because Judge Calvin deemed it appropriate.

After he received probation, Mr. Stepp repeatedly violated his probation and ultimately served his fifteen year sentence. (Exh. 5). After he was released, Mr. Stepp was subsequently convicted of first degree murder involving the killing of his girlfriend and is currently serving a sentence of life without parole at the Jefferson City Correctional Center.

In 2017, in an interview with an investigator from the Missouri Attorney General's office, Mr. Stepp provided a third version of the events he purportedly observed the night of the shooting. In this 2017 statement, Mr. Stepp stated that another unknown individual shot and killed Ricco Rogers and Mr. Dunn was standing by him when the shooting occurred. (See Resp. Exh. H). In addition to claiming that his trial testimony was fabricated and false, Mr. Stepp testified at the evidentiary hearing in the instant case that this story he told last year to the attorney general's investigator was also false. In his testimony, Mr. Stepp asserted that he hoped by giving

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this false statement to obtain a reduction of his current sentence of life without parole.

At 2:50 a.m. on May 19, 1990, less than three hours after the shooting, Mr. Stepp gave a recorded interview with law enforcement officers, the transcript of which was marked as exhibit 14. Mr. Stepp said that Ricco Rogers, Michael Davis, and DeMorris Stepp were on the porch at 5607 Labadie. Mr. Stepp saw Christopher Dunn hiding around the corner next door. He then stated, “You know, I thought my mind, you know, was playing games and I looked dead in his face, and I guess he fired, he thought I seen him, so he shot at me first ... It missed me by just an inch.” Several shots were fired and the boys started running, except that Ricco Rogers fell and died. When Mr. Stepp was asked whether he saw Christopher Dunn prior to the shots being fired, Mr. Stepp answered: “He was shooting the gun.” (Exh. 14, pp. 2-6).

It is next to impossible to determine which version of events related by Mr. Stepp is the most credible. However, regardless of which of Mr. Stepp’s multiple statements are true, it is beyond dispute that Petitioner was convicted based upon the eyewitness testimony of a person who at this point has told multiple contradictory versions of what he claims to have observed on the night of the shooting. As Judge Wolff observed in the *Amrine* case, the only witnesses who implicated Petitioner in the crime are proven liars. *Amrine*, 102 S.W.3d at 550 (Wolff, J., concurring).

The other eyewitness, Michael Davis, was more difficult to locate because he moved to California shortly

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after he testified at Petitioner's trial. (Exh. 2). Mr. Davis was on the Labadie porch with Ricco Rogers and DeMorris Stepp at the time of the shooting. He was interviewed by law enforcement at 3:04 a.m. May 19, 1990, within approximately three hours of the shooting. The statement was recorded, and the transcript was marked as exhibit 20. He stated in the interview that moments after the shooting he fell to the ground and played dead, and looked up and was able to see the shooter. He recognized the shooter as "Trap", the nickname for Christopher Dunn, by the unique sunglasses that Mr. Dunn regularly wore. (Exh. 20, pp. 2-9).

At trial he testified that he did not see the shooter until after the first shot was fired. Ricco Rogers fell and Mr. Davis fell beside him to avoid getting shot. Right before he fell he looked and saw the shooter, who he identified as Christopher Dunn. (Tr. 174-182).

In 2015, Mr. Davis was located at the Solano County Jail in Fairfield, California where he was incarcerated on pending criminal charges. (Exh's. 2, 17, 18). After being interviewed, Mr. Davis also recanted under oath in a sworn affidavit. (*Id.*). This affidavit, if believed, indicates that Mr. Davis committed perjury when he identified Mr. Dunn as the killer at the 1991 trial. (*Id.*). Mr. Davis indicated that he could not see the shooter from his location. (*Id.*). Mr. Davis indicated that Mr. Stepp convinced him to implicate Mr. Dunn as the shooter because they believed he was a member of the Crips gang in their neighborhood. (*Id.*). Because Mr. Stepp and Mr. Davis were members of the rival Bloods gang, they wanted Mr. Dunn out of

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the neighborhood and believed implicating him in the murder was an easy way to get that done. (*Id.*). This account is somewhat corroborated by the testimony at the evidentiary hearing from Mr. Stepp, who stated that he convinced Mr. Davis to tell the police that Mr. Dunn was the shooter.

A couple of weeks after the shooting, Mr. Davis moved to California with his mother. (*Id.*). He was brought back to Missouri by the prosecutors in 1991 to testify at Petitioner's trial. When interviewed by the police prior to testifying, he states that he hesitated as to whether he could identify who shot Ricco Rogers. (*Id.*) At that time, he asserts he was pressured by the police to identify Christopher Dunn as the killer. The police showed Mr. Davis photos of Ricco Rogers' corpse. The police also arranged to have Ricco Rogers' mother call him and urge him to testify. (*Id.*) Mr. Davis states that as a result of this pressure, Mr. Davis appeared in court and committed perjury at trial by identifying Mr. Dunn as the shooter. (*Id.*).

On November 17, 2015, Mr. Davis gave a tape recorded statement to Petitioner's investigator, Craig Speck, at the Solano County Jail. (See Exh. 17). A copy of this tape recorded statement was transcribed by a court reporter and was attached to Petitioner's reply in support of his original petition as Exhibit 7.

At the time the evidentiary hearing was conducted earlier this year, Mr. Davis was in California custody and had been released from jail to an in-patient drug

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treatment program. Counsel for Petitioner intended to take Mr. Davis' deposition on or before August 1, 2018, and submit it to the Court. However, Mr. Davis absconded from the halfway house and a warrant was issued for his arrest. Because he has not yet been arrested on this warrant, Petitioner requested that the Court consider the testimony of Mr. Davis' through his sworn affidavit and through the transcribed statement that were previously submitted to the Court.

The recantations of DeMorris Stepp and Michael Davis are bolstered by the testimony of an independent eyewitness, Eugene Wilson, who was present at the house and witnessed the shooting death of Ricco Rogers. Mr. Wilson is referred to as "Geno" in the police reports and during the trial testimony of Mr. Stepp and Mr. Davis. Mr. Wilson recently signed a sworn affidavit and testified at the evidentiary hearing that he was present with Ricco Rogers, DeMorris Stepp, and Michael Davis on Marvin Tolliver's porch at 5607 Labadie on the night of May 19, 1990. (Exh. 3). Several shots rang out that came from the front of the house to the west. (*Id.*). Mr. Wilson states that because it was dark outside, none of the young men on the porch could see who was shooting at them. (*Id.*). Everybody started to run except for Ricco Rogers and, after the gunshots stopped, Mr. Wilson realized that Ricco had been shot. (*Id.*).

Shortly after the shots were fired, one of the men on the porch mentioned Christopher Dunn's name and indicated he might have been the shooter. (*Id.*). Mr. Wilson stated that many of the younger kids in that neighborhood

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did not like Christopher Dunn. Mr. Wilson also testified that because he and Marvin Tolliver were friends with Mr. Dunn, he does not believe that Petitioner would have shot at them because of that friendship. (*Id.*). He is also certain that because of where Mr. Stepp and Mr. Davis were positioned when Ricco Rogers was shot, neither of them could have possibly seen the shooter or positively identified Mr. Dunn. (*Id.*). When he was told about some of the prior statements that Mr. Stepp and Mr. Wilson had given regarding the description of the shooter, Mr. Wilson stated that these statements were false because it was not possible that either of them could have seen the shooter. (*Id.*).

The Court finds that Mr. Wilson's testimony is credible. He had no obvious motive to lie. Mr. Wilson did not speak to the police that night because he could not identify who did it and did not believe at that time that he had any relevant information to aid the police in catching the actual shooter. Mr. Wilson's credibility is also enhanced by the fact that he had lived with Ricco Rogers' family since he was fourteen years old. As a result, he was very close to Mr. Rogers' mother and would have no apparent motive to hinder the effort to hold accountable the murderer of Ricco Rogers.

Mr. Wilson testified at the evidentiary hearing that Mr. Rogers' mother's boyfriend had a motive to commit these crimes because Mr. Rogers, Mr. Stepp, and Mr. Davis had beaten him up three days earlier because he was physically abusive toward Ricco Rogers' mother. Mr. Wilson also testified that Ricco Rogers' younger brother

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was shot approximately three months later. Mr. Rogers' brother was also involved in the beating of his mother's boyfriend.

Petitioner's claim of innocence is also corroborated by other independent evidence. Petitioner submitted a sworn affidavit from Catherine Jackson indicating that she was friends with Mr. Dunn at the time of the shooting in 1990 and that they often spoke on the phone. (Exh. 4). She indicated that at approximately 11:00 p.m. on the night of the shooting, she was engaged in a lengthy phone conversation with Mr. Dunn that lasted between thirty and sixty minutes that could have been ongoing at the time that Mr. Rogers was shot. (*Id.*). During that conversation, she remembered that Mr. Dunn was happy and acting normal and did not seem upset or indicate that he had been involved in any altercation or dispute with anyone. When she was contacted about being a trial witness for Mr. Dunn, Ms. Jackson's mother did not want her to get involved and refused to answer the door when the public defender's office came. (*Id.*). However, she did not testify at the evidentiary hearing in this cause.

Another friend of Petitioner, Nicole Bailey, provided an affidavit and testified at the recent hearing. She testified that she spoke on the phone with Petitioner on the night that Mr. Rogers was shot. (Exh. 6). Ms. Bailey remembers this phone conversation because it occurred while she was in the hospital, after having given birth to her first child the night before. (*Id.*). Ms. Bailey also is certain that this phone conversation occurred on the night that Mr. Rogers was killed because she attempted to call Petitioner again

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that same night and was informed by Petitioner's sister that the police had just come to Petitioner's house looking for him as a suspect in the killing of Mr. Rogers that had occurred earlier that evening. (*Id.*).

Curtis Stewart testified at the recent evidentiary hearing. Mr. Stewart testified that he was incarcerated in a ten man pod at the St. Louis City workhouse with DeMorris Stepp in 1991. Mr. Stewart overheard Mr. Stepp making a telephone call, during which Mr. Stepp indicated that he did not know who shot Ricco Rogers. When Mr. Stewart and the other inmates in that pod learned that Mr. Stepp was going to falsely accuse Petitioner of being the shooter, this caused friction and fights and, as a result, Mr. Stepp was removed to another area of the workhouse.

Finally, Petitioner's claim of innocence was corroborated by several alibi witnesses whose testimony was presented at Petitioner's Rule 29.15 hearing. Petitioner's claim of innocence was also bolstered by evidence adduced during the 29.15 hearing that the victim's brother, Dwayne Rogers, had made statements that Petitioner was not the man who had killed his brother and that he knew the identity of the actual shooter.

CONCLUSIONS OF LAW

Legal Standard for Habeas Corpus Relief

Habeas corpus is the last judicial inquiry into the validity of a criminal conviction, and serves as "a bulwark against convictions that violate fundamental fairness."

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Engel v. Dormire, 304 S.W.3d 120, 125 (Mo. banc 2010). A writ of habeas corpus is a proper remedy “when a person is restrained of his or her liberty in violation of the constitution or laws of the state or federal government.” *State ex rel. Woodworth v. Denney*, 396 S.W.3d 330, 337 (Mo. banc 2013). A habeas corpus Petitioner bears the burden to show that he or she is entitled to relief. *State ex rel. Nixon v. Jaynes*, 73 S.W.3d 623, 624 (Mo. banc 2002). In order to avoid “duplicative and unending challenges to the finality of judgments”, habeas corpus review is limited to jurisdictional issues or “circumstances so rare and exceptional that a manifest injustice results if relief is not granted.” *Clay v. Dormire*, 37 S.W.3d 214, 217 (Mo. banc 2000). A writ of habeas corpus can provide relief for otherwise procedurally barred claims if the Petitioner can show (1) a claim of actual innocence, (2) jurisdictional defect, or (3) that a procedural defect was caused by something external to the defense, and prejudice resulted from the underlying error that worked to the Petitioner’s actual and substantial disadvantage. *State ex rel. Clemons v. Larkin*, 475 S.W.3d 60, 76 (Mo. banc 2015).

“Freestanding” and “Gateway” Claims of Actual Innocence

A claim of “actual innocence” can either be a “gateway” claim of innocence, or a “freestanding” claim of innocence. A “gateway” claim of actual innocence is a component of the “manifest injustice” analysis set forth by the United States Supreme Court in *Schlup v. Delo*, 513 U.S. 298 (1995), and followed by the Missouri Supreme Court in *Clay v. Dormire*, 37 S.W.3d 214 (Mo. banc 2000).

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Under this analysis, a “manifest injustice” occurs which would justify habeas corpus relief when a Petitioner has demonstrated that “a constitutional violation has probably resulted in the conviction of one who is actually innocent” by showing that “it is more likely than not that no reasonable juror could have convicted him in light of new evidence of innocence.” *Id.* at 217. Under this analysis, the proof of actual innocence is “a gateway through which a habeas Petitioner must pass to have his otherwise barred constitutional claim considered on the merits.” *Id.*

In addition, the Missouri Supreme Court has provided for a “freestanding” claim of actual innocence in order “to account for those rare situations ... in which a Petitioner sets forth a compelling case of actual innocence independent of any constitutional violation at trial.” *State ex rel. Amrine v. Roper*, 102 S.W.3d 541, 547 (Mo. banc 2003). To make a “freestanding” claim of actual innocence, a Petitioner must “make a clear and convincing showing of actual innocence that undermines confidence in the correctness of the judgment.” *Id.* at 548. As such, a habeas corpus Petitioner who proves innocence by a preponderance of the evidence has established a “gateway” claim of actual innocence and must also demonstrate that a constitutional violation occurred at trial, while a Petitioner who proves innocence by clear and convincing evidence has met the burden to establish a “freestanding” claim of actual innocence and does not need to demonstrate that a constitutional violation has occurred in order to obtain relief.

A freestanding claim of actual innocence is only cognizable for a petitioner who has been sentenced to

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death, and is unavailable for cases in which the death penalty has not been imposed. *State ex rel. Lincoln v. Cassady*, 511 S.W.3d 11 (Mo. App. W.D. 2016). Thus, Petitioner's freestanding claim of actual innocence is denied on that basis.

The Missouri Supreme Court in the case of *State ex rel. Robinson v Cassady*, SC95892 (2018) granted habeas relief in a non-capital habeas corpus case involving a claim of freestanding innocence. The special master appointed by the Missouri Supreme Court to take evidence issued a critique of the *Lincoln* holding, opining that limiting freestanding claims of actual innocence to capital punishment cases is inconsistent with other prior decisions from the Missouri Supreme Court, including *Amrine*. The special master recommended granting habeas relief both on petitioner's freestanding claim of actual innocence and his gateway claim of actual innocence, the latter of which opened the door to evaluating a due process claim involving perjured testimony. However, the Missouri Supreme Court declined to rule on the freestanding claim of innocence, electing to grant habeas relief through the gateway claim of actual innocence. Thus, *Robinson* provides no guidance as to the validity of the *Lincoln* holding.

More recently, this year the Missouri Supreme Court in the case of *State ex rel. Nash v. Payne*, SC97903 (7-10-2020) granted habeas relief in another non-capital habeas case involving a claim of freestanding innocence. The special master appointed by the Missouri Supreme Court to take evidence likewise disagreed

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with the *Lincoln* holding limiting such claims to capital punishment cases. The special master recommended granting habeas relief on petitioner's freestanding claim of actual innocence as well as his gateway claim of actual innocence. Again the Supreme Court avoided addressing whether a freestanding claim of innocence is available for a non-capital case, holding instead that the petitioner established his gateway claim of actual innocence, which in turn opened the gateway for considering and sustaining petitioner's multiple constitutional due process claims.

This Court is constrained to follow controlling precedent as pronounced in the only case directly deciding the issue of whether a freestanding claim of innocence is available in non-capital cases. Unless *Lincoln* is overruled or another division of our appellate court decides differently, controlling precedent would appear to limit freestanding claims of actual innocence to capital punishment cases. As such, Petitioner's freestanding claim of innocence in the instant case is denied without further analysis.

Next, this Court considers Petitioner's gateway claim of actual innocence. To establish a gateway claim of actual innocence, petitioner must show that "a constitutional violation has probably resulted in the conviction of one who is actually innocent." *Clay v. Dormire*, 37 S.W.3d 214, 217 (Mo. banc 2000) (quoting *Schlup v. Delo*, 513 U.S. 298, 327 (1995)). "A petitioner's burden at the gateway stage is to demonstrate that more likely than not, in light of the new evidence, no reasonable juror would find him guilty beyond a reasonable doubt—or, to remove the double

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negative, that more likely than not any reasonable juror would have reasonable doubt.” *House v. Bell*, 547 U.S. 518, 538 (2006); see also *State ex rel. Nixon v. Jaynes*, 63 S.W.3d 210, 214 (Mo. banc 2001) (“[A]ctual innocence’ means that the petitioner must show that it is more likely than not that ‘no reasonable juror would have found the defendant guilty’ beyond a reasonable doubt.”) (quoting *Schlup*, 513 U.S. at 328-29).

A credible gateway claim “requires ‘new reliable evidence—whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence—that was not presented at trial,’” but “the habeas court’s analysis is not limited to such evidence.” *House*, 547 U.S. at 538 (quoting *Schlup*, 513 U.S. at 324). “*Schlup* makes plain that the habeas court must consider all the evidence, old and new, incriminating and exculpatory, without regard to whether it would necessarily be admitted under rules of admissibility that would govern at trial.” *Id.* at 538 (quoting *Schlup*, 513 U.S. at 327-328) (internal quotation marks omitted). “Justice requires that this Court consider all available evidence uncovered following [the petitioner’s] trial that may impact his entitlement to habeas relief.” *Engel*, 304 S.W.3d at 126.

“The *Schlup* standard does not require absolute certainty about the petitioner’s guilt or innocence.” *House*, 547 U.S. at 538. “Reasonable doubt ... marks the legal boundary between guilt and innocence.” *Jaynes*, 63 S.W.3d at 214 (quoting *Schlup*, 513 U.S. at 315) (internal quotation marks omitted). The standard is “probabilistic” and considers “what reasonable, properly instructed jurors

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would do.” *House*, 547 U.S. at 538. “The word ‘reasonable’ in that formulation is not without meaning.” *Schlup*, 513 U.S. at 329. “It must be presumed that a reasonable juror would consider fairly all of the evidence presented.” *Id.*

As was noted earlier, in the instant case new evidence has emerged, in addition to the recantations, which make it likely that reasonable, properly instructed jurors would find Petitioner not guilty. *House*, 547 U.S. at 538. Eugene Wilson, an independent eyewitness who has no reason to lie and was the only eyewitness in the case who is not currently incarcerated for other crimes, provided credible testimony that none of the witnesses at the scene of the shooting could have identified the assailant. Mr. Wilson’s testimony provides corroborating evidence to buttress the recantations of Mr. Stepp and Mr. Davis. Coupled with the evidence in the record that Petitioner had an alibi, this Court does not believe that any jury would now convict Christopher Dunn under these facts. Instead, this Court concludes that, based on *all* the evidence considered under the dictates of *Schlup*, it is more likely than not that any reasonable juror would have reasonable doubt. As the first recantation did not occur until 2005, there is also cause and prejudice to allow review of Petitioner’s due process claims. See *State ex rel. Griffin v Denney*, 347 S.W.3d 73, 77 (Mo. banc 2011)

Due Process Claims

Because Petitioner has met the gateway innocence test, the Court may examine Petitioner’s otherwise barred due process claims. Under Claim 2, Petitioner claims that

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the presentation of the perjured testimony of Mr. Stepp and Mr. Davis violated his right to due process under *Napue and Giglio v United States*, 405 U.S. 150 (1971). Under Claim 3, Petitioner claims that his due process rights were violated due to the State's suppression of material exculpatory evidence involving DeMorris Stepp's plea agreement where he was guaranteed probation in exchange for his testimony.

As to Claim 2 alleging presentation of perjured testimony, no evidence was presented that either the police or the prosecution had actual knowledge that Mr. Stepp or Mr. Davis lied (if they indeed lied) during their trial testimony. Thus, Claim 2 is denied.

In Claim 3, Petitioner asserts that his due process rights were violated by the state's failure to disclose exculpatory evidence involving DeMorris Stepp's alleged plea agreement where he was guaranteed probation in exchange for his favorable testimony identifying Petitioner as the murderer of Ricco Rogers. In *Brady v. Maryland*, 373 U.S. 83 (1963), the Supreme Court held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Id.* at 87. Later, in *Strickler v. Greene*, 527 U.S. 263 (1999), the court more precisely articulated the three essential elements for establishing a *Brady* claim: "[T]he evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by

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the state, either willfully or inadvertently; and prejudice must have ensued.” *Id.* at 281-282. It is also well settled that the *Brady* rule encompasses evidence “known only to police investigators and not the prosecutor ... In order to comply with *Brady*, therefore, ‘the individual prosecutor has a duty to learn of any favorable evidence known to others acting on the government’s behalf in this case, including the police.’” *Id.* at 280-281 (quoting *Kyles v. Whitley*, 514 U.S. 419, 437 (1995)).

Like the due process requirements of the *Brady* line of cases, Missouri Rule 25.03 requires the prosecution, upon written request of defendant’s counsel, to disclose exculpatory evidence to the accused prior to trial. This rule “imposes an affirmative requirement of diligence and good faith on the State to locate records not only in its own possession or control but in the control of other government personnel.” *Merriweather v. State*, 294 S.W.3d 52, 56 (Mo. banc 2009). Although discovery violations under Rule 25.03 are trial errors that normally must be raised on direct appeal, the Supreme Court held in *Merriweather* that such claims may be raised in a subsequent post-conviction action in the interest of fundamental fairness. *Id.* at 55.

Petitioner claims that the State and DeMorris Stepp had an agreement or understanding that DeMorris Stepp would receive probation on his pending charges if he testified at Petitioner’s trial, and that the State failed to disclose the fact of this alleged agreement or understanding to the defense. At the time of Petitioner’s trial, Mr. Stepp had a pending felony case arising from offenses that occurred before Petitioner’s trial. (Exh. 5).

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At Petitioner's trial, Mr. Stepp testified that he had entered into a plea agreement under which the State would recommend that he be sentenced to fifteen years in the Department of Corrections in exchange for his testimony in Petitioner's case. (Tr. 146). In contrast to his trial testimony, Mr. Stepp recently testified at the May 30, 2018 hearing that he had an understanding that he would definitely receive probation on his pending charges if he testified at Petitioner's trial. The Court finds the testimony of Mr. Stepp as to the existence of such an agreement or understanding to be not credible.

At the underlying criminal trial, Mr. Stepp testified to the jury that he had unrelated charges pending against him. He testified that he had reached a plea agreement where the state dropped armed criminal action charges to give Defendant a chance at probation, and that the state was recommending that he receive fifteen years in prison (Tr. 147, 155-156). Later that same day, out of the presence of the jury, Mr. Stepp pleaded guilty before Judge Michael Calvin, who was also the judge presiding over Petitioner's trial. The State was represented by Steve Ohmer, who was also the prosecutor in Petitioner's trial, and Mr. Stepp was represented by counsel Elizabeth Brown. The prosecutor announced that there was a plea agreement whereby the State would recommend concurrent sentences of fifteen years on the robbery charge, one year on the tampering charge, and one year on the weapons charge, all to run concurrently (Ex. 19, p. 2). The armed criminal action charge would be dismissed pursuant to this plea bargain. Judge Calvin accepted the plea, ordered a presentence investigation and set sentencing for six weeks later.

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At the sentencing hearing, the State was represented by Jane Darst and Mr. Stepp was again represented by Elizabeth Brown. Judge Calvin did not initially ask for recommendation or argument from either attorney, and instead immediately afforded allocution. Ms Brown requested probation for Mr. Stepp. Judge Calvin then conducted a lengthy hearing in which he inquired of other family members of Mr. Stepp who were present in the courtroom, spoke directly with Mr. Stepp, and eventually chose to suspend imposition of sentence on the charges, granting Mr. Stepp probation for a term of three years. The prosecutor remained silent during the sentencing hearing.

The Court concludes that no agreement for probation existed at the time of Mr. Stepp's testimony at Petitioner's trial for Mr. Stepp to receive probation. As noted earlier, for any such agreement to be effective, the judge sentencing Mr. Stepp would have had a need to know about it in order to grant probation as promised. This means that Judge Calvin would have been a participant in a scheme, along with the prosecuting attorney, to hide from the jury hearing the Christopher Dunn case an agreement that Mr. Stepp would receive probation rather than fifteen years in prison.

The transcript of the plea and sentencing hearing makes plain that this did not occur. Instead, Judge Calvin at Mr. Stepp's sentencing hearing made an independent determination that DeMorris Stepp should be granted probation rather than being sent to prison for fifteen years. Judge Calvin ultimately decided on probation, not

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because the parties had agreed to it, but because Judge Calvin deemed it appropriate.

To the extent that Mr. Stepp harbored a hope that he would be granted probation, this was disclosed to the jury in his testimony. He testified in Petitioner's jury trial as follows:

Q. And you're currently charged with Robbery in the First Degree?

A. Right.

Q. And Armed Criminal Action?

A. Right.

Q. Tampering in the First Degree and CCW; is that right?

A. Unlawful Use of a Weapon.

Q. Unlawful Use of a Weapon, Carrying a Concealed Weapon; isn't that right?

A. Right.

Q. And in exchange for your testimony Mr. Ohmer has agreed to drop the Armed Criminal Action; is that right?

A. Right.

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Q. What does that mean to you?

[objections argued and overruled]

Q. What does that mean to you?

A. That means that I would get a chance at probation.

Q. And that's important to you; is that right?

A. Yes, very important to me.

(Tr. at 155-156).

As no agreement or understanding existed that Mr. Stepp would receive probation as a result of his testimony, no *Brady* violation occurred. Accordingly habeas relief is denied under Claim 3.

CONCLUSION

For the above reasons, Petitioner's Amended Petition for Writ of Habeas Corpus is denied.

IT IS SO ORDERED.

September 23, 2020

/s/ William E. Hickle
William E. Hickle, Circuit Judge

**APPENDIX C — MEMORANDUM AND ORDER
OF THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MISSOURI,
EASTERN DIVISION, FILED MARCH 27, 2000**

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

CHRISTOPHER DUNN,

Petitioner,

vs.

DAVE DORMIRE,

Respondent.

Case No. 4:97CV0331 (MLM)

MEMORANDUM AND ORDER

This matter is before the Court on the petition for a writ of habeas corpus filed by Christopher Dunn (“Petitioner”) pursuant to 28 U.S.C. § 2254. Petitioner is presently incarcerated at the Jefferson City Correctional Center in Jefferson City, Missouri. Dave Dormire (“Respondent”) is the Superintendent of the Jefferson City Correctional Center. Thus, he is the proper party respondent. The parties have consented to the jurisdiction of the undersigned United States Magistrate Judge pursuant to 28 U.S.C. § 636(e). [11]

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**I.
PROCEDURAL HISTORY**

Petitioner is incarcerated at the Jefferson City Correctional Center pursuant to the judgment and sentence of the Circuit Court of the City of St. Louis. Petitioner was convicted on July 18, 1991, following a trial by jury, of murder in the first degree, two counts of assault in the first degree and three counts of armed criminal action. The trial court sentenced Petitioner to a term of life without possibility of parole plus ninety years.

Petitioner filed a motion for post-conviction relief pursuant to Missouri Supreme Court Rule 29.15. His motion was denied on July 8, 1993.

Petitioner appealed from the trial court's judgment and from the motion court's denial of his Rule 29.15 motion for post-conviction relief. Pursuant to *State v. Parker*, 836 S.W.2d 930, 939 (Mo. banc 1992), the Missouri Court of Appeals remanded Petitioner's case to the trial court for an evidentiary hearing on the *Batson*¹ motion to determine whether the prosecutor exercised his peremptory strikes in a racially discriminatory manner. *State v. Dunn*, 889 S.W.2d 65, 69 (Mo.App. 1994). The Missouri Court of Appeals denied all other points Petitioner raised on appeal from the trial court and affirmed the judgment of the post-conviction motion court. *Id.*

1. *Batson v. Kentucky*, 476 U.S. 79 (1986).

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On March 9, 1995, the trial court conducted an evidentiary hearing and subsequently denied the *Batson* motion. The parties filed supplemental briefs with the Missouri Court of Appeals addressing the trial court's rejection of the *Batson* claim. The Missouri Court of Appeals affirmed the judgment of the trial court on September 12, 1995.

Petitioner next filed the instant petition for habeas corpus relief, which is 141 pages in length. Although confusing in its structure, it appears Petitioner asserts the following numerous grounds for relief in his petition, several of which are duplicative:

1. Petitioner's conviction was obtained by a violation of the privilege against self-incrimination in that Petitioner was placed in a line-up against his will [*See* Petition, pp. 5, 28];
2. Petitioner's conviction was obtained by the use of evidence obtained pursuant to an unlawful unconstitutional search and seizure by the St. Louis police department [*See* Petition, pp. 5, 29];
3. Trial counsel provided ineffective assistance of counsel by failing to depose all of the state witnesses and Demorris Stepp and Michael Davis, for failing to withdraw from the case after Petitioner expressed his dissatisfaction with counsel's representation, for failing to object to the testimony of Michael Davis, for giving instruction number 11 over Petitioner's

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objection in that the evidence did not support the submission of an instruction on the first degree assault of Michael Davis, and counsel erred in giving instruction number 12 over Petitioner's objection in that the evidence did not support the submission of an instruction of armed criminal action [*See* Petition, pp. 6, 131];

4. The trial court erred in overruling Petitioner's motion to quash the jury panel, in allowing the state's peremptory strike of venireperson Ronald Lee Jackson, who is African American, and in failing to require the state to provide race-neutral reasons for striking Jackson, all of which were a violation of *Batson* [*See* Petition, pp. 6, 51];
5. The trial court erred in permitting the state to "misdefine" reasonable doubt during voir dire. [*See* Petition, pp. 6, 52];
6. The trial court erred in permitting the prosecutor to comment to the jury on ten occasions that the state's evidence was uncontradicted as this constituted an impermissible comment on Petitioner's failure to testify [*See* Petition, pp. 6, 53];
7. The trial court erred when it overruled Petitioner's objection to the submission of instruction No. 4, the reasonable doubt instruction, because the instruction is unconstitutional in that it requires a burden of proof for conviction less than is

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required by the due process clause [*See* Petition, pp. 6, 54];

8. The trial court erred in overruling Petitioner's motion to quash the indictment because the grand jury and petit jury selection were not drawn from a fair cross-section of the community [*See* Petition, pp. 6, 55];
9. The post-conviction motion court erred in failing to inquire of post-conviction counsel why no amended motion was filed by counsel and whether all grounds known to Petitioner were raised [*See* Petition, pp. 6, 56];
10. The post-conviction motion court erred in failing to issue findings of fact and conclusions of law on all issues as required by Missouri Supreme Court Rule 29.15(i) [*See* Petition, pp. 6, 57];
11. The post-conviction motion court erred when it adopted verbatim the state's proposed findings of fact and conclusions of law [*See* Petition, pp. 6, 58];
12. Trial counsel was ineffective for failing to investigate and call as alibi witnesses Arnetta Dunn and Martha Dunn; failed to investigate and call Nicole Williams as a witness, who would have testified that Petitioner telephoned her at the hospital at or near the time of the alleged offense; and failed to investigate and call Dwayne Rogers

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(the deceased victim's brother) as a witness, who would have testified that he was at the scene of the shooting and another person, not Petitioner, was the shooter [*See* Petition, pp. 6, 59];

13. Trial counsel was ineffective for her failure to properly cross-examine the state's witness who offered inconsistent statements to the ones he made prior to trial [*See* Petition, pp. 6, 59];
14. Trial counsel was ineffective for failing to object to or preserve in a motion for new trial, the state's failure to establish probable cause to arrest Petitioner; failure to show exigency in conjunction with the warrantless entry to Petitioner's mother's residence; and the state's failure to prove that consent was freely and voluntarily given to the officers conducting entry, arrest and search [*See* Petition, pp. 6, 8];
15. Trial counsel was ineffective for failing to file a motion for discovery pursuant to Missouri Rule 25.03, thereby denying Petitioner the right to prepare an adequate defense [*See* Petition, pp. 6, 9];
16. Trial counsel was ineffective for failing to object to, and preserve for appeal, the state's failure to prove deliberation as an essential element of first degree murder [*See* Petition, pp. 6, 10];

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17. Trial counsel was ineffective for failing to put on any defense; this precluded Petitioner from calling Dewayne Roger, the victim's brother, who was on the scene and would have testified that Petitioner was not the man that killed his brother [See Petition, pp. 6, 11];
18. "A doctrine establishing so fundamental a substantive constitutional standard, as proof beyond a reasonable doubt, of all essential elements must also require that the facts of evidence be present." [See Petition, pp. 6, 12];
19. Trial court erred in overruling defense counsel's motion to quash the indictment due to error in the jury process [See Petition, pp. 6, 13];
20. Trial court erred in overruling Petitioner's objection to the submission of Instruction No. 4, because the phrase "firmly convinced" required a lesser proof than that required by the constitution [See Petition, pp. 6, 14];
21. Trial court erred in overruling defense counsel's motion to suppress identification as the identification violated Petitioner's constitutional rights [See Petition, pp. 6, 15];
22. Trial court erred in overruling defense counsel's motion to suppress evidence, said evidence was obtained pursuant to an unlawful search and seizure in that it was conducted without a

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warrant, without probable cause and was not within the scope of any exception to the warrant requirements because it exceeded the scope of any exception to the warrant requirement [*See* Petition, pp. 6, 16];

23. Petitioner was denied due process and equal protection due to trial counsel's representation, which presented a conflict of interest, due to the fact that the public defender who represented Petitioner at trial was an agent of the State of Missouri, as was the prosecuting attorney and Petitioner was charged by the State of Missouri [*See* Petition, pp. 6, 17];
24. Trial counsel was ineffective for failing to file a motion for appointment of a psychiatrist under the offense charged of first degree murder [*See* Petition, pp. 6, 18];
25. Trial counsel was ineffective for not putting on Petitioner's alibi defense, which consisted of testimony from Karry Dunn, Angela Dunn, Arnetta Dunn, Martha Dunn, Wilford Rickman, Cathy Jackson and Crystal Johnson, all of whom would have testified that Petitioner was at home at the time of the shooting; trial counsel was ineffective for not calling Nicole Williams whose testimony would have been that she was on the phone talking to Petitioner at the time of the shooting *See* pp. 6, 19];

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26. Trial counsel was ineffective for failing to properly cross examine the state's witness who offered inconsistent statements [*See* Petition, pp. 6, 20];
27. Trial counsel was ineffective for her failure to bring to light, under cross-examination, the deal reached between the state and the state's witness, Demorris Stepp, who had been given fifteen years on probation in return for his testimony [*See* Petition, pp. 6, 21];
28. Trial counsel was ineffective for her failure to subpoena telephone records of the Deaconess Hospital for May 18, at 11:45 to 12:05, which would have been consistent with the testimony of Nicole Williams, who was in the hospital when Petitioner made this call after hours, and had to be transferred through switch boards and secretaries to complete this call [*See* Petition, pp. 6, 22];
29. Trial counsel was ineffective when she failed to advise the jury that, prior to being killed, the victim had shot a man on his own front porch, and that the state's witnesses were connected with the same gang as the victim and were present when the victim shot this man on his front porch [*See* Petition, pp. 6, 23];

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30. Trial counsel was ineffective for failing to object to the judge not issuing an instruction on premeditated murder to the jury [*See* Petition, pp. 6, 24];
31. Trial counsel was ineffective for not properly cross-examining Michael Davis; the witness made several inconsistent statements which would have caused the jury to question his credibility [*See* Petition, pp. 6, 25];
32. Trial counsel was ineffective for failing to utilize information known to her that was beneficial to Petitioner and would have altered the outcome of the trial and may have been instrumental in a not guilty verdict [*See* Petition, pp. 6, 26];
33. Trial counsel was ineffective in her role for failing to contact thirteen alibi witnesses in Petitioner's defense; she did not investigate potential alibi witnesses [*See* Petition pp. 6, 27].

Pursuant to Court order, Respondent filed a response to Petitioner's § 2254 petition. Due to the confusing structure of Petitioner's petition, Respondent only responded to Petitioner's first twelve grounds for relief. Respondent filed numerous exhibits with its response. Petitioner then filed a reply to Respondent's response, consisting of 96 pages.² He also submitted twenty-eight

2. In Petitioner's 96-page reply brief, he identifies twenty-three grounds for relief. The first twelve are the same as those identified

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exhibits to the Court with his reply. The Court has reviewed the petition, the response thereto, Petitioner's reply brief, and all the exhibits filed therewith, and concludes that Petitioner's request for habeas corpus relief should be denied.

II. STANDARD OF REVIEW

On April 24, 1996, the Antiterrorism and Effective Death Penalty Act of 1996 ("the AEDPA") was signed into law by the President of the United States. The AEDPA applies to all § 2254 petitions filed after its effective date. *Lindh v. Murphy*, --- U.S.---, 117 S.Ct. 2059, 2062-2067 (1997). Petitioner's § 2254 petition was received by the Court in November 1996 and filed in December 1996. Therefore, the Act applies to the instant petition for a writ of habeas corpus.

Title I of the AEDPA significantly amends habeas corpus law. The amended version sets forth a more stringent standard for issuance of a writ of habeas corpus. The text of section 2254(d) firmly establishes the state court decision as the starting point in habeas review. *Matteo v. Superintendent. SCI Albion*, 171 F.3d 877, 885

by Respondent. The remaining eleven are subsumed within this Court's identification of Grounds Twelve through Thirty-Three. Out of an abundance of caution, and in an effort to ensure that Petitioner obtains thorough review of his habeas petition, the Court elects to proceed with its analysis of Petitioner's request for habeas relief based upon the thirty-three grounds the Court believes to be identified by Petitioner in his § 2254 petition.

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(3rd Cir. 1999). Section 2254(d) sets forth two conditions (subsections (d)(1) and (d)(2)), at least one of which must be met before habeas relief may be granted. *Id.* at 887.

Section 2254(d)(1) provides that an application for a writ of habeas corpus shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless that adjudication “resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal Law, as determined by the Supreme Court of the United States.” 28 U.S.C. § 2254(d)(1). *See James v. Bowersox*, 187 F.3d 866, 869 (8th Cir. 1999). This first condition entails a two-step analysis. First, the federal habeas court must determine whether the state court decision was “contrary to” Supreme Court precedent that governs the petitioner’s claim. Relief is appropriate only if the petitioner shows that Supreme Court precedent requires an outcome contrary to that reached by the relevant state court. *Matteo*, 171 F.3d at 885. In the absence of such a showing, the federal habeas court must, second, ask whether the state court decision represents an “unreasonable application of” Supreme Court precedent. Under this standard, the federal habeas court should not grant the petition unless the state court decision, evaluated objectively and on the merits, resulted in an outcome that cannot reasonably be justified under existing Supreme Court precedent. *See James*, 187 F.3d at 869 (quoting *Long v. Humphrey*, 1999 WL 494096, at *2-3 (8th Cir. July 14, 1999)); *Matteo*, 171 F.3d at 890; *Ford v. Ahitow*, 104 F.3d 926, 936 (7th Cir. 1997).

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Section § 2254(d)(2) provides that an application for a writ of habeas corpus shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim “resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.” Prior to the passage of the AEDPA, there was a presumption in habeas corpus proceedings that factual determinations by a state court were correct. *Blair v. Armentrout*, 916 F.2d 1310, 1317-18 (8th Cir. 1990), *cert. denied* 502 U.S. 825 (1991). With the enactment of the AEDPA, the presumption of correctness still applies but the quantum of proof necessary to rebut the presumption has been increased (to the “clear and convincing” standard), making it more difficult for the petitioner to do so. *Warren v. Smith*, 161 F.3d 358, 360-61 (6th Cir. 1998), *cert. denied*, --U.S.--, 119 S.Ct. 2403 (1999).

III. STATEMENT OF FACTS

For purposes of placing Petitioner’s claims in their proper context, the Court offers the following statement of the facts, adopted entirely from the opinion of the Missouri Court of Appeals:

The sufficiency of the evidence is not in dispute. The evidence, viewed in the light most favorable to the verdict, reveals that shortly after midnight on May 19, 1990, Dunn ran by a house in the 5600 block of Labadie in the City of St. Louis and shot a firearm at three fifteen

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year old boys who were on the front porch. The shots hit one of the boys who was taken to the hospital where he died from a gunshot wound at 2:21 a.m. the same day. The other two boys knew Dunn and identified him.

See Respondent's Exhibit 11, pg. 3.

**IV.
ANALYSIS**

A. GROUND ONE, GROUND TWENTY-ONE

For his first ground for relief, Petitioner asserts that his conviction was obtained by a violation of the privilege against self-incrimination in that Petitioner was placed in a line-up against his will. He elaborates:

Petitioner was placed within a court line up which he did not wish to become a participant. As petitioner asked the officer if it is not one of his rights if he wished not to, while the said officer stated this is only for the department's file, petitioner was also placed in a line up with two others who had requested a line up participation that came from the same neighborhood of petitioner and who knew the witnesses and the witnesses knew them. The Supreme Court found that the police used the line up procedure which were compelling example of unfairness, even after petitioner stated he wished to have an attorney, for counsel is needed because a line

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up offers an opportunity for the prosecution to take advantage of the accused.

See Petition, pg. 28.

In Ground Twenty-One, Petitioner asserts a variation of this argument. He argues that the trial court erred in overruling defense counsel's motion to suppress identification as the identification violated Petitioner's constitutional rights [*See* Petition, pp. 6, 15];

Petitioner did not raise these grounds in his motion for new trial. Although he challenged the line-up in his motion for new trial, it was based on the allegedly suggestive circumstances of the lineup and not on the grounds that he was placed in a lineup against his will. Furthermore, Petitioner failed to raise any claim concerning the lineup in the direct appeal of his conviction.

A prerequisite for filing a federal habeas petition requires that the petitioner must have first fairly presented the federal constitutional dimensions of his federal habeas corpus claim to the state courts. *Smittie v. Lockhart*, 843 F.2d 295, 296 (8th Cir. 1988) (quoting *Laws v. Armontrout*, 834 F.2d 1401, 1412 (8th Cir. 1987)). In the event that a petitioner has failed to present the federal issues to the state courts first, he has procedurally defaulted his claims and cannot subsequently bring them in a federal habeas petition. *Id.*

In the present action, the Petitioner did not present the claims he raises in the instant federal petition to the

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state courts. Thus, it would appear that he is procedurally barred from bringing his claims in the instant federal habeas petition.

Petitioner can overcome this procedural default in either of two ways: (1) by showing “cause” sufficient to excuse his default and “prejudice” resulting from that default, *Wainwright v. Sykes*, 433 U.S. 72, 87 (1977); or (2) irrespective of cause and prejudice, by showing that the error complained of resulted in petitioner’s conviction despite his probable innocence. *Murray v. Carrier*, 477 U.S. 478, 485-86 (1986). A review of Petitioner’s 96-page reply brief reveals that Petitioner has failed to articulate a reason sufficient to justify his failure to raise Grounds One and Twenty-One on direct appeal. Thus, he has failed to establish the requisite cause and prejudice necessary to overcome his procedural default.

Despite Petitioner’s failure to show cause for his default, the Court can reach the merits of his claims if he can show that he is probably actually innocent. *Wylde v. Hundley*, 69 F.3d 247, 254 (8th Cir. 1995), *cert. denied*, --- U.S.---, 116 S.Ct. 1578 (1996). Petitioner asks the Court to consider his defaulted claims under this exception.

Under *Schlup v. Delo*, ---U.S.---, 115 S.Ct. 851 (1995), a petitioner who raises a gateway claim of actual innocence must satisfy a two-part test. First, the petitioner’s allegations of constitutional error must be supported “with new reliable evidence ... that was not presented at trial.” *Id.* at 865. Second, the petitioner must establish “that it is more likely than not that no reasonable juror

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would have convicted him in the light of the new evidence.” *Id.*, at 867. *See also Wylde*, 69 F.3d at 254. The actual innocence exception requires “review of procedurally barred, abusive, or successive claims only in the narrowest type of case – when a fundamental miscarriage of justice would otherwise result.” *Ruiz v. Norris*, 71 F.3d 1404, 1409 (8th Cir. 1995) (citing *Schlup*, --- U.S. at ---, 115 S.Ct. at 864)). Petitioner cannot prevail on the actual innocence exception. Although Petitioner implores this Court to consider his defaulted claims under the actual innocence exception, he fails to provide this Court “with new reliable evidence ... that was not presented at trial.” Moreover, he has failed to establish “that it is more likely than not that no reasonable juror would have convicted him in the light of the new evidence.” *Schlup*, *supra*.

As Petitioner has failed to overcome his procedural default, the Court finds that it is procedurally barred from reviewing Petitioner’s first and twenty-first grounds for habeas relief.

B. GROUND TWO, GROUND TWENTY-TWO

For his second ground for relief, Petitioner claims that his conviction was obtained by the use of evidence obtained pursuant to an unlawful unconstitutional search and seizure by the St. Louis police department:

The said article was obtained by the St. Louis police department the night of the crime of May 18, 1990 into the 19th day of May 2:00 a.m. when the police officer came to petitioner’s mother’s

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home stating they had a search and arrest warrant for petitioner while petitioner's mother asked them to produce the search warrant none was given to her. While inside the home the officer retrieved a picture of petitioner and showed it to the state witnesses while still in front of petitioner's mother's home. When petitioner asked the homicide commanding officer Brown in the presence about it he simply said he was only sorry for the action of his officers. Nor did petitioner's mother consent that night for the unwanted and unwarranted entry.

See Petition, pg. 29.

In Ground Twenty-Two, Petitioner raises a variation of this argument. He claims the "trial court erred in overruling defense counsel's motion to suppress evidence, as the evidence was obtained pursuant to an unlawful search and seizure in that it was conducted without a warrant, without probable cause and was not within the scope of any exception to the warrant requirements because it exceeded the scope of any exception to the warrant requirement." *See* Petition, pg.16.

Petitioner did not raise this claim on direct appeal. Therefore, he has procedurally defaulted this claim for purpose of federal habeas corpus review. Petitioner has failed to establish cause for failing to present this issue to the State courts first. Moreover, for the reasons discussed in the previous subsection, he cannot avail

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himself of the actual innocence exception. Therefore, the Court is procedurally barred from reviewing this claim and concludes that Petitioner's second and twenty-second grounds for relief will be denied. *See Smittie v. Lockhart*, 843 F.2d 295, 296 (8th Cir. 1988).

C. GROUNDS THREE, THIRTEEN, FOURTEEN, FIFTEEN, SIXTEEN, TWENTY-FOUR, TWENTY-SIX, TWENTY-SEVEN, TWENTY-EIGHT, TWENTY-NINE, THIRTY, THIRTY-ONE, THIRTY-TWO

For his third ground for relief, Petitioner asserts that he received ineffective assistance of trial counsel because: (1) counsel failed to depose several witnesses; (2) counsel failed to withdraw from the case after Petitioner expressed his dissatisfaction with counsel's representation; (3) counsel failed to object to the testimony of Michael Davis; (4) counsel offered Instruction No. 11, over Petitioner's objection, when the evidence did not support the submission of an instruction on the first degree assault of Michael Davis; and (4) counsel offered Instruction No. 12, over Petitioner's objection, when the evidence did not support the submission of an instruction for armed criminal action. Petitioner did not present any of these claims of ineffective assistance of trial counsel to the post-conviction motion court. Nor did Petitioner attempt to raise these issues on the appeal from the denial of his Rule 29.15 motion.

In Grounds Thirteen and Twenty-Six, Petitioner alleges the same claim for relief. He asserts that trial

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counsel was ineffective for failing to properly cross-examine the state's witness, Demorris Stepp, who offered inconsistent statements to the ones he made prior to trial. Petitioner raised this issue in his motion for post-conviction relief *See* Petitioner's Exhibit 22.B., pp. 21. However, Petitioner did not raise this ground on the appeal from the denial of his Rule 29.15 motion. Although he did assert ineffective assistance of trial counsel as one of his appellate grounds, that claim charged counsel with ineffectiveness for failing to investigate and call as alibi witnesses Arnetta Dunn and Martha Dunn, failing to investigate and call as a witness Nicole Williams, and failing to investigate and call as a witness Dwayne Rogers. There was no discussion by Petitioner about counsel's failure to properly cross examine a state's witness in that claim.

In Ground Fourteen, Petitioner asserts that trial counsel was ineffective for failing to object to or preserve in a motion for new trial, the state's failure to establish probable cause to arrest Petitioner; failure to show exigency in conjunction with the warrantless entry to Petitioner's mother's residence; and the state's failure to prove that consent was freely and voluntarily given to the officers conducting entry, arrest and search. Petitioner presented this issue to the post-conviction motion court in his 29.15 motion. *See* Petitioner's Exhibit 22.B., pg. 8. However, as with the previous grounds, Petitioner did not raise this ground on the appeal from the denial of his Rule 29.15 motion as one of the ways in which his trial counsel was ineffective.

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In Ground Fifteen, Petitioner asserts that trial counsel was ineffective for failing to file a motion for discovery pursuant to Missouri Rule 25.03, thereby denying Petitioner the right to prepare an adequate defense. Petitioner raised this claim in his Rule 29.15 motion. *See* Petitioner's Exhibit 22.B, pg. 9. However, although he raised a claim of ineffective assistance of trial counsel on appeal, he did not assert this ground as one of the ways in which his trial counsel was ineffective.

In Ground Sixteen, Petitioner claims that trial counsel was ineffective for failing to object to, and preserve for appeal, the state's failure to prove deliberation as an essential element of first degree murder. Again, Petitioner raised this issue in his Rule 29.15 motion. *See* Petitioner's Exhibit 22.B., pg. 9. However, he failed to assert this claim on the appeal from the denial of his Rule 29.15 motion.

In Ground Twenty-Four, Petitioner claims that trial counsel was ineffective for failing to file a motion for appointment of a psychiatrist, particularly in view of his two prior suicide attempts. Petitioner presented this issue in his Rule 29.15 motion. *See* Petitioner's Exhibit 22.B., pg. 17. However, he failed to assert this claim on the appeal from the denial of his Rule 29.15 motion.

In Ground Twenty-Seven, Petitioner claims that trial counsel was ineffective for failing to bring to light, under cross-examination, the deal reached between the state and the state's witness, Demorris Stepp, who had been given fifteen years on probation in return for his testimony. Petitioner presented this issue to the post-

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conviction motion court. *See* Petitioner's Exhibit 22.B., pg. 21. However, Petitioner did not raise this issue on the appeal from the denial of his Rule 29.15 motion.

In Ground Twenty-Eight, Petitioner asserts that trial counsel was ineffective for failing to subpoena the telephone records of Deaconess Hospital for May 18, at 11:45 to 12:05, which would have been consistent with the testimony of Nicole Williams, who was in the hospital when Petitioner made this call after hours, and had to be transferred through switch boards and secretaries to complete this call. Petitioner presented this issue to the post-conviction motion court. *See* Petitioner's Exhibit 22.B., pg. 21. However, Petitioner did not raise this issue on the appeal from the denial of his 29.15 motion.

In Ground Twenty-Nine, Petitioner claims that trial counsel was ineffective when she failed to advise the jury that, prior to being killed, the victim had shot a man on his own front porch, and that the state's witnesses were connected with the same gang as the victim and were present when the victim shot this man on his front porch. Although Petitioner raised this issue in his Rule 29.15 motion, *See* Petitioner's Exhibit 22.B., pg. 22, he failed to include this as a ground in his post-conviction appeal.

In Ground Thirty, Petitioner contends that trial counsel was ineffective for failing to object to the judge not issuing an instruction on premeditated murder to the jury. Petitioner raised this issue in his Rule 29.15 motion. *See* Petitioner's Exhibit 22.B., pg. 22. However, he did not raise this issue on his appeal from the denial of his Rule 29.15 motion.

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In Ground Thirty-One, Petitioner asserts that trial counsel was ineffective for not properly cross-examining Michael Davis; the witness made several inconsistent statements which would have caused the jury to question his credibility. Petitioner presented this issue to the post-conviction motion court. *See* Petitioner's Exhibit 22.B., pg. 22. However, he did not include this ground as one of the bases for his claim of ineffective assistance of trial counsel when he appealed the denial of his Rule 29.15 motion to the state appellate court.

In Ground Thirty-Two, Petitioner contends that trial counsel was ineffective for failing to utilize information known to her that was beneficial to Petitioner and would have altered the outcome of the trial and may have been instrumental in a not guilty verdict. Again, although Petitioner's raised this ground in his Rule 29.15 motion, *See* Petitioner's Exhibit 22.B., pg. 23, Petitioner did not raise this issue when he appealed the denial of his Rule 29.15 motion to the state appellate court.

A post-conviction motion is the exclusive remedy for a claim of ineffective assistance of trial counsel upon conviction after trial. *State v. Hill*, 865 S.W.2d 702, 705 (Mo.App. 1993). *See also State v. Wheat*, 775 S.W.2d 155 (Mo. banc 1989), *cert. denied* 493 U.S. 1030 (1990) (Missouri procedure provides for review of allegations of ineffective assistance of trial counsel in a post conviction motion). The timely filing of a post-conviction pleading is essential to review of those allegations. *Day v. State*, 770 S.W.2d 692, 695 (Mo.), *cert. denied* 493 U.S. 866 (1989). Failure to file a timely motion constitutes a complete

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waiver. *State v. Hill*, 865 S.W.2d at 705; *State v. Wheat*, 775 S.W.2d at 157; *Day v. State*, 770 S.W.2d at 696.

Furthermore, even if a petitioner raises allegations of ineffective assistance of trial counsel in his motion for post-conviction relief, the failure to appeal those issues to the court of appeals creates a procedural bar. *Jones v. Delo*, 56 F.3d 878, 882 (8th Cir. 1995)(procedural bar arises for failure to appeal post-conviction motion denial); *Lowe-Bey v. Goose*, 28 F.3d 816, 818 (8th Cir. 1994)(the failure to raise claim in an appeal from the denial of Rule 29.15 relief raises a procedural bar to pursuing those claims in federal court).

Here, Petitioner has procedurally defaulted his allegations of ineffective assistance of trial counsel as set forth in Grounds Three, Thirteen, Fourteen, Fifteen, Sixteen, Twenty-Four, Twenty Six, Twenty-Seven, Twenty-Eight, Twenty-Nine, Thirty, Thirty-One and Thirty-Two. He did not present any of his allegations set forth in Ground Three to the post-conviction motion court. Moreover, he did not present any of his allegations set forth in Grounds Thirteen, Fourteen, Fifteen, Sixteen, Twenty-Four, Twenty-Six, Twenty-Seven, Twenty-Eight, Twenty-Nine, Thirty, Thirty-One and Thirty-Two to the Missouri Court of Appeals on the appeal from the denial of his Rule 29.15 motion. Thus, this Court is barred from reviewing those claims.

Petitioner can overcome this procedural default by establishing cause and prejudice for failing to present these allegations fairly to the state courts first. In

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Petitioner's 96-page reply brief, he appears to articulate two reasons which he believes constitute "cause" for failure to raise these grounds in his post-conviction appeal. First, he asserts fault of the part of his post-conviction counsel. Second, he claims ignorance and a lack of education. Both grounds fail.

In proceedings in which the Sixth Amendment requires legal representation, ineffective assistance of counsel is cause for a procedural default. *Murray v. Carrier*, 477 U.S. 478, 488 (1986). However, because a defendant is not constitutionally entitled to effective assistance of counsel in state post-conviction proceedings, see *Coleman v. Thompson*, 501 U.S. 722, 752 (1991); *Nolan v. Armontrout*, 973 F.2d 615, 616-617 (8th Cir. 1992), a state post-conviction attorney's rendering of ineffective assistance will not constitute cause for a procedural default. *Lamp v. Iowa*, --- F.3d ---, No. 96-2946 (8th Cir. August 13, 1997). Moreover, a petitioner's lack of knowledge does not constitute sufficient cause to overcome the default. *Stanley v. Lockhart*, 941 F.2d 707, 710 (8th Cir. 1991). Therefore, the Court finds that Petitioner has failed to allege cause and prejudice sufficient to overcome his procedural default.

Although Petitioner also asks this Court to consider his claims under the "actual innocence exception," he fails to meet the necessary burden permitting the Court to do so. Petitioner fails to support his allegations of constitutional error with "new reliable evidence ... that was not presented at trial." *Schlup v. Delo*, ---U.S.---, 115 S.Ct. 851, 865 (1995). Moreover, he has failed to establish

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“that it is more likely than not that no reasonable juror would have convicted him in the light of the new evidence.” *Id.*, at 867.

Petitioner cannot overcome his procedural default. This Court is therefore barred from reviewing Grounds Three, Thirteen, Fourteen, Fifteen, Sixteen, Twenty-Four, Twenty-Six, Twenty Seven, Twenty-Eight, Twenty-Nine, Thirty, Thirty-One and Thirty-Two. *Smittie Lockhart*, 843 F.2d 295, 296 (8th Cir. 1988). Petitioner’s federal petition for habeas relief will be denied with respect to these grounds.

D. GROUND FOUR

Petitioner asserts, as his fourth ground for relief, that the trial court erred in permitting the State to use a peremptory strike to remove venireperson Ronald Lee Jackson, an African-American, from the venire panel. *See* Petition, pg. 51. Petitioner presented this issue to the Missouri Court of Appeals and that Court ruled as follows:

For his first point on direct appeal, Dunn contends that the trial court erred in overruling his *Batson* motion without considering or requiring the state to provide reasons for its use of a peremptory strike against an African-American venireperson. We agree.

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After the parties had made their peremptory strikes, defense counsel asked the court to strike the jury panel and informed the court that she was making a motion under *State v. Antwine* [footnote omitted] and *Batson* because the state had struck an African-American male from the jury panel. Dunn's counsel advised the court that *Antwine* required the state to give reasons for the strikes before the court could rule. After hearing further argument, the trial court ruled that the state did not have to give reasons for its strike because one strike out of six did not disturb the numerical composition of the jury. The court also noted that the defendant, the three victims, and one of the investigating officers was [sic] African-American. The court denied the *Batson* motion.

In ruling on Dunn's *Batson* claim, the trial court denied the motion without requiring the state to give race-neutral explanations for its challenges. In *Antwine* the Missouri Supreme Court required Missouri trial courts, when considering *Batson* challenges, to consider the state's explanations in determining whether a *prima facie* case had been made....

[I]n *Parker*, the Missouri Supreme Court readopted the *Antwine* procedure and specifically directed the trial court to take the

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following actions when confronted with a timely *Batson* motion:

1. The defendant must raise a *Batson* challenge with regard to one or more specific venirepersons struck by the state and identify the cognizable racial group to which the venireperson or persons belong,
2. The trial court will then require the state to come forward with reasonably specific and clear race-neutral explanations for the strike.
3. If acceptable reasons are articulated, the defendant has the burden to show that the proffered [sic] reasons were pretextual and the strikes were racially motivated.

See Parker, 836 S.W.2d at 939....

We conclude that under *Parker* this case must be remanded for an evidentiary hearing on the *Batson* motion to determine whether the prosecutor used his strike in a discriminatory manner. The hearing should follow the three steps outlined in *Parker*. In considering whether purposeful discrimination has occurred, the trial court should take into account the relevant factors set out in *Parker*. *Id.* at 939-40. The trial court shall certify to this court a record of its proceeding and its finding. The direct appeal

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is remanded for a hearing consistent with the holding of this opinion.

See Respondent's Exhibit 11, pp. 3-6.

Petitioner's case was remanded to the trial court. A hearing was held before the trial court on March 9, 1995, concerning the *Batson* issue. *See* Respondent's Exhibit 2. The trial court issued its "Findings of Fact and Order" on April 13, 1995, in which it stated the following:

1. The sole issue before this Court involves the State's striking of Venireperson Ronald Jackson, an African-American male, from the panel of prospective jurors in Defendant's first degree murder trial.
2. The only witness to testify at the hearing on behalf of the State was The Honorable Steven R. Ohmer, the then Assistant Circuit Attorney who prosecuted Defendant's case.
3. At the hearing, the State presented three (3) explanations for striking Mr. Jackson: 1) that he knew Cathy Kelly, Regional Public Defender, and that Mr. Jackson indicated he may have attended a seminar with Ms. Kelly; 2) that Mr. Jackson's brother-in-law was on probation for stealing at the time of Defendant's trial; and 3) that he knew Cynthia Compton, another member of the prospective jury panel.

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4. While Defendant now asserts that knowing Ms. Kelly had “no bearing” on whether the juror could be fair and impartial, it was an appropriate factor for the State to consider in exercising its peremptory challenges. The Court finds that Mr. Jackson’s acquaintance with Ms Kelly was a reasonably specific and race-neutral reason for the strike. The Court further finds that Defendant failed to meet his burden that the State’s reason was pretextual and that the strike was, in fact, racially motivated.

5. The State’s second proffered reason for striking Mr. Jackson was his brother-in-law’s probation for stealing. Again, this is a reasonably specific and race-neutral reason for the strike. Defendant rebuts this claim by asserting the State did not strike Venirepersons Seim or Jaudes. The evidence at the hearing revealed that Ms. Seim’s ex-husband had been arrested for abuse of child. The State, however, indicated its belief that this experience would be favorable to the State.

Venireperson Jaudes, on the other hand, indicated that he had a brother who had been taken into police custody for questioning relative to a stealing. Mr. Jaudes’s brother was never charged, nor placed on probation for the incident; it is on this basis that the State distinguished the two venirepersons.

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The Court finds that Defendant failed to meet his burden of showing these reasons to be pretextual. There is no evidence that there were similarly situated venirepersons (i.e., those with relatives, by blood or by marriage, who were on probation at the time of Defendant's trial) who were not struck by the State, and that this strike was racially motivated.

6. The State's final explanation for striking Mr. Jackson is that he knew another member of the jury panel. In fact, the State struck both Mr. Jackson and Ms. Comptom, the prospective juror he knew. The Court finds that this was a reasonably specific and race-neutral reason for striking the juror. Defendant failed to prove that his reason was pretextual, and that the State's strike was racially motivated.

WHEREFORE, based on the foregoing, it is the Finding, Order and Judgment of this Court that Defendant's *Batson* challenge to the State's use of a peremptory challenge to remove Venireperson Jackson is hereby OVERRULED and DENIED. Pursuant to the Remand Order of the Court of Appeals, Eastern District in this cause, the Court hereby certifies the findings contained herein.

See Respondent's Exhibit 5, pp. 1-3.

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The issue was again appealed to the Missouri Court of Appeals. On September 12, 1995, that court affirmed the decision of the trial court:

[T]he issue for this court is whether the trial court's findings on the issue of discriminatory intent are clearly erroneous, a finding which turns primarily on an assessment of credibility. [citation omitted].

The explanations given were race-neutral. The decisive question is whether counsel's race-neutral explanation will be believed by the trial court. [citations omitted]. The trial court accepted the explanations. We have examined the explanations and the circumstances which appear in the record. It is clear from the findings that the trial court viewed the plausibility of the state's explanations in light of the totality of the facts and circumstances of the case, as *Parker* requires. [citations omitted].

The trial court took a permissible view of the evidence in crediting the prosecutor's explanation. We have no opportunity to review the demeanor of the prosecutor; however, there were many objective factors in the record which would support a finding of no intent to discriminate. The record discloses that, unlike Jackson's brother-in law, the two referenced white venirepersons' relatives were not convicted of crimes. The record further

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discloses that neither of these venirepersons knew someone in the public defender's office or another venireperson. On the other hand, the state struck Compton, a white venireperson who knew Jackson. The record also discloses that the state struck two white venirepersons who knew persons in public defenders' offices. Although there were two African Americans on the venire panel, the state only struck one, Jackson. All of the state's remaining peremptory strikes were exercised against white venirepersons. The three victims in this case were also African-Americans. The main homicide investigator, who prepared the photospread and conducted the line-up, was an African-American.

The trial court's findings are not clearly erroneous. The judgment of the trial court is affirmed.

See Respondent's Exhibit 12, pp. 9-11.

As stated in Section II, *supra*, the pertinent beginning point for this Court's analysis is the opinion of the Missouri Court of Appeals. The Court must consider that opinion and determine whether the state court's opinion on the *Batson* issue "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1). *See James v. Bowersox*, 187 F.3d 866, 869 (8th Cir. 1999).

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Federal law is established on the issue of racially discriminatory peremptory strikes. The Equal Protection Clause forbids a prosecutor from using peremptory challenges to exclude otherwise qualified persons from the jury based solely on their race. *Devose v. Norris*, 53 F.3d 201, 204 (8th Cir. 1995).

Under *Batson* in order to establish an equal protection violation, the defendant must first establish a prima facie case of purposeful discrimination in the selection of the jury panel. [*Batson*, 476 U.S. 79 (1986)] at 96. To establish a prima facie case, the defendant must show that he is a member of a cognizable racial group and that the prosecutor exercised peremptory challenges to remove members of his race from the venire. *Id.* He then “must show that these facts and any other relevant circumstances raise an inference that the prosecutor used [his peremptory] practice to exclude the veniremen from the petit jury on account of their race.” *United States v. Battle*, 836 F.2d 1084, 1085 (8th Cir. 1987)(quoting *Batson*, 476 U.S. at 96). Once the defendant has established a prima facie case of race discrimination, the government has “the burden of articulating a clear and reasonably specific neutral explanation for removing a venireperson of the same race as the defendant.” *United States v. Cloyd*, 819 F.2d 836, 837 (8th Cir. 1987).

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Whether an explanation is neutral is a question of comparability. “It is well-established that peremptory challenges cannot be lawfully exercised against potential jurors of one race unless potential jurors of another race with comparable characteristics are also challenged.” *Doss v. Frontenac*, 14 F.3d 1313, 1316-17 (8th Cir. 1994) [remaining citations omitted].

Devose, 53 F.3d at 204. *See also United States v. Brooks*, 2 F.3d 838 (8th Cir. 1993), *cert. denied* 510 U.S. 1137 (1994).

In this case, on remand to the trial court, the prosecutor articulated clear and reasonably specific neutral explanations for removing Venireman Ronald Lee Jackson, an African-American, from the panel. Moreover, he applied those reasons for striking Mr. Jackson consistently across the venire panel. The Missouri Court of Appeals found that the reasons offered by the State for striking Mr. Jackson were race neutral and not a violation of *Batson*.

Petitioner has not established that the decision of the Missouri Court of Appeals with respect to the *Batson* challenge resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States. *James v. Bowersox*, 187 F.3d 866, 869 (8th Cir. 1999). Moreover, the Court finds that the appellate court’s decision did not result in a decision that was based on an unreasonable determination of

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the facts in light of the evidence presented in the State court proceeding. *Warren v. Smith*, 161 F.3d at 360-361. Therefore, Petitioner's § 2254 petition for habeas corpus relief will be denied with respect to Ground Four.

E. GROUND FIVE

For his fifth ground for relief, Petitioner asserts that the trial court abused its discretion in overruling his objection to the state's comments during voir dire concerning reasonable doubt. Petitioner objected on the ground that the comments constituted an improper statement of law.

Petitioner presented this issue to the Missouri Court of Appeals on direct appeal. The appellate court thoroughly addressed the issue and rejected it as follows:

Dunn objected to the following statements made during voir dire:

[Prosecutor]: But in this criminal case as in every criminal case, the state represented by myself, has the burden of proof. I have the burden of presenting evidence to you. Everybody understand that? Any problem with that? And the burden I must meet is proof beyond a reasonable doubt. And that burden goes to the elements of the crime.

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At this point defense counsel objected and the court overruled the objection. The prosecutor continued:

[Prosecutor]: Again, in any crime there are specific elements or acts which must be proved before you can find the defendant guilty. There may be one act, two acts, three acts, four acts; just depends on the crime.

And the Judge will instruct you in connection with what those elements are at the conclusion of the case. But that is what my burden goes to, beyond a reasonable doubt. Not all doubt or any doubt, but a reasonable doubt. Does anybody have any problem with that?

The trial court is given broad control over the nature and extent of voir dire questioning; we do not interfere unless the record shows a manifest abuse of that discretion. *State v. Roe*, 845 S.W.2d 601, 605 (Mo.App. 1992). While counsel may not define reasonable doubt for the jury, the state may discuss the concept with the jury. *Roe*, 845 S.W.2d at 604. We use a three part test to distinguish definition from discussion. For the comments to constitute reversible error, 1) the state must state an incorrect definition of reasonable doubt before

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the jury, 2) defense counsel must object, and 3) if the objection was overruled, the state must continue to define reasonable doubt. *Id.*

Dunn argues that the remarks were erroneous because they invited the jury to ignore its duty to consider conflicts in the evidence in reaching a determination of credibility. We disagree that the remarks conveyed such a meaning. In *State v. Jacobs*, 866 S.W.2d 919, 920-21 (Mo. App. 1993), on which Dunn relies, the prosecutor stated:

Okay. Do you understand that this burden of beyond a reasonable doubt applies only to the elements that are charged in this case? In other words, there are three counts that are charged here in the petition. You're [sic] going to hear testimony from a variety of witnesses, and their stories may not exactly jibe. [sic] Its [sic] very infrequent that you find people that will come in and tell you exactly the same story, whether its witness A and B.

Defendant objected on the grounds that the prosecutor was discussing the sufficiency of the evidence and was argumentative. The

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trial court overruled the objection and the prosecutor continued:

Okay. Im [sic] going to repeat the last question again. Do you understand that the burden of reasonable doubt applies only to the elements that are given in the instructions? Youre [sic] going to have witnesses here that are going to give you different testimony, and you cant [sic] let that interfere. You need to consider the reasonable doubt instruction as it -- or the burden as it applies to the case, as it applies to the elements that are charged in this case and not as to the conflicts in evidence. Is that understood?

Id. at 921.

In *Jacobs* our Western District agreed with *Brown* that an explanation that proof beyond a reasonable doubt did not apply to matters other than the elements of the crime was not an erroneous definition of reasonable doubt. *Id.* at 921, 922. However, it found the prosecutor's whole question was ill-advised because the prosecutor also attempted to distinguish the jury's duty of finding each element beyond a reasonable doubt from its responsibility to determine the credibility of the witnesses. The court found this action tended to confuse and

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served no useful purpose. *Id.* at 922. The court held that the question was argumentative and the objection on that ground should have been sustained. *Id.* However, the court found the error was not prejudicial.

In this case the prosecutor limited his question to the application of reasonable doubt to the elements. The trial court did not abuse its discretion in overruling Dunn's objection that the prosecutor misstated the law. Point two is denied.

See Respondent's Exhibit 11, pp. 6-10.

As stated in Section II, *supra*, the pertinent beginning point for this Court's analysis is the opinion of the Missouri Court of Appeals. Considering that opinion, the Court finds that the state court's opinion on this issue did not result in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States. 28 U.S.C. § 2254(d)(1). *See James v. Bowersox*, 187 F.3d 866, 869 (8th Cir. 1999).

The scope of review by federal courts of habeas corpus petitions alleging violations of due process is narrow. *Moore v. Wyrick*, 760 F.2d 884, 886 (8th Cir. 1985). In this case, Petitioner must show that the prosecutor's remarks were so egregious that they fatally infected the proceedings and rendered Petitioner's entire trial fundamentally unfair. *Id.* *See also Culkin v. Purkett*, 45

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F.3d 1229, 1235 (8th Cir. 1995); *Pollard v. Delo*, 28 F.3d 887, 890 (8th Cir. 1994). Petitioner can meet this burden only by showing that absent the prosecutor's statement, there is a reasonable probability that the jury would have returned a different verdict. *Crespo v. Armontrout*, 818 F.2d 684, 687 (8th Cir. 1987).

The Court has reviewed the record in its entirety and has considered the overall fairness of the trial. Review of the comments Petitioner finds objectionable reveals that the prosecutor neither defined nor misdefined reasonable doubt. The prosecutor merely told the jury that he had the burden of proving all the elements of the offense charged beyond a reasonable doubt and that his burden of proof beyond a reasonable doubt extended only to the elements of the offenses. Applying the narrow standard of review to the instant case, the Court cannot say that the prosecutor's statements during voir dire were so "gross, conspicuously prejudicial or of such import that the trial was fatally infected." *Culkin*, 45 F.3d at 1235 (quoting *Logan v. Lockhart*, 994 F.2d 1324, 1330 (8th Cir. 1993)). This is especially so in light of the fact that the jury was properly instructed on reasonable doubt by the trial court. *Williams v. Goose*, 77 F.3d 259, 262 (8th Cir. 1996) (Even if the prosecutor's remarks about reasonable doubt during voir dire constituted trial error warranting reversal under state law, given the jury instructions correctly defining reasonable doubt, the prosecutor's remarks did not make Williams' trial fundamentally unfair").

Petitioner has not established that the decision of the Missouri Court of Appeals with respect to this issue

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resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States. *James v. Bowerson*, 187 F.3d 866, 869 (8th Cir. 1999). Moreover, the Court finds that the appellate court's decision did not result in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding. *Warren v. Smith*, 161 F.3d at 360-361. Therefore, Petitioner's § 2254 petition for habeas corpus relief will be denied with respect to Ground Five.

F. GROUND SIX

For his sixth ground for relief, Petitioner contends that the trial court erred in permitting the prosecutor to comment to the jury on ten occasions that the state's evidence was uncontradicted as this constituted an impermissible comment on Petitioner's failure to testify. Petitioner presented this issue to the Missouri Court of Appeals. The appellate court reviewed Petitioner's claim under plain error and rejected it:

During his closing argument the prosecutor reviewed specific evidence with the jury which the prosecutor contended was uncontradicted: that the victim died as a result of a gunshot wound in the back of the head; that St. Louis police officers chased Dunn, who ran, and apprehended him; that the surviving victims identified Dunn as the perpetrator; and that the surviving victims knew Dunn from the

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neighborhood. The prosecutor also referred to the evidence as uncontradicted on two other occasions in closing and twice on rebuttal....

A prosecutor's comment that the evidence is uncontroverted or uncontradicted, or that the defendant has failed to offer evidence, is not a direct or certain reference to a criminal defendant's failure to testify. *State v. Stanley*, 860 S.W.2d 836, 837 (Mo. App. 1993); *State v. Robinson*, 641 S.W.2d 423, 426 (Mo. banc 1982). Dunn argues that the assertion that certain evidence was uncontradicted constituted an indirect reference to his failure to testify.

A prosecutor may violate a defendant's right against self incrimination if, during closing arguments, the prosecutor makes an indirect reference which operates to focus the jury's attention on the fact that defendant failed to testify. *State v. Lawhorn*, 762 S.W.2d 820, 826 (Mo. banc 1988); *State v. Hemphill*, 608 S.W.2d 482, 484 (Mo.App. 1980). An indirect reference is improper only if the prosecutor demonstrates a calculated intent to magnify that decision so as to call the failure to testify to the jury's attention. *Lawhorn*, 762 S.W.2d at 826; *State v. Wood*, 719 S.W.2d 756, 761 (Mo. banc 1986).

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In this case the specific evidence which the prosecutor characterized as uncontradicted related to conclusions, observations, and knowledge of the other witnesses. The challenged comments do not show that the prosecutor had a calculated intent to call the jury's attention to Dunn's decision not to testify and they were not reasonably likely to call the jury's attention to Dunn's failure to testify. The trial court did not plainly err in failing to declare a mistrial *sua sponte*. Point three is denied.

See Respondent's Exhibit 11, pp. 10-12.

Beginning with the opinion of the Missouri Court of Appeals, the Court finds that the state court's opinion on this issue did not result in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States. 28 U.S.C. § 2254(d)(1). *See James v. Bowersox*, 187 F.3d 866, 869 (8th Cir. 1999).

Federal law is clearly settled on this issue. Indirect references to a defendant's failure to testify are violative of a defendant's constitutional rights only if they "(1) manifest the prosecutor's intention to call attention to the defendant's failure to testify, or (2) are such that the jury would naturally take them as a comment on the defendant's failure to testify." *United States v. Christians*, 200 F.3d 1124, 1128 (81 Cir. 1999); *Feltrop v. Delo*, 46 F.3d 766, 775 (8th Cir. 1995) (quoting *United States v. Montgomery*, 819

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F.2d 847, 853 (8th Cir. 1987)). A prosecutor's comment to the effect that "there is no contradictory evidence" is viewed as an "indirect, " as opposed to a "direct, " reference to a defendant's failure to testify. *Christians*, 100 F.3d at 1128.

Here, the statements made by the prosecutor, with which Petitioner objects, are all indirect references to Petitioner's failure to testify. The prosecutor spoke only of "uncontradicted evidence." The prosecutor's references to this "uncontradicted evidence" did not manifest the prosecutor's intention to call attention to Petitioner's failure to testify. Nor were they such that the jury would naturally taken them as a comment on Petitioner's failure to testify. Therefore, the fact that these statements were made by the prosecutor did not give rise to a violation of Petitioner's constitutional rights.

Petitioner has not established that the decision of the Missouri Court of Appeals with respect to this issue resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States. *James v. Bowersox*, 187 F.3d 866, 869 (8th Cir. 1999). Moreover, the Court finds that the appellate court's decision did not result in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding. *Warren v. Smith*, 161 F.3d at 360-361. Therefore, Petitioner's § 2254 petition for habeas corpus relief will be denied with respect to Ground Six.

*Appendix C***G. GROUND SEVEN, GROUND TWENTY**

For his seventh ground for habeas relief, Petitioner asserts that the trial court erred when it overruled Petitioner's objection to the submission of Instruction No. 4, the reasonable doubt instruction, because the instruction is unconstitutional in that it requires a burden of proof for conviction less than is required by the due process clause. For his twentieth ground for habeas relief, Petitioner asserts the same claim. That is, he claims the trial court erred in overruling Petitioner's objection to the submission of Instruction No. 4, because the phrase "firmly convinced" required a lesser proof than that required by the constitution.

The Missouri Court of Appeals addressed this issue thoroughly:

This issue has been thoroughly and repeatedly addressed by the Missouri Supreme Court. *State v. Griffin*, 848 S.W.2d 464, 469 (Mo. banc 1993); *State v. Twenter*, 818 S.W.2d 628, 634 (Mo. banc 1991). This court is constitutionally bound to follow the last controlling decision of the Supreme Court of Missouri. *State v. Weems*, 800 S.W.2d 54, 58 (Mo.App. 1990).

Dunn argues we should reverse or transfer to the Missouri Supreme Court in order for the instruction to be reanalyzed in light of *Victor v. Nebraska*, --U.S.--, 114 S.Ct. 1239, 127 L.Ed.2d 583 (1994). *Victor* does not change the *Griffin* analysis.

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In *Victor*, the United States Supreme Court reviewed reasonable doubt instructions given in a California case and a Nebraska case both of which instructed jurors that they must have “an abiding conviction to a moral certainty of the charge.” The court held the use of the phrase “moral certainty” in both instructions did not render the instructions unconstitutional because other language in the two instructions kept the jury from interpreting the words “moral certainty” as suggesting a standard of proof less than due process requires.

Dunn uses this case to support his contention that the use of “firmly convinced” in MAI-CR3d 302.04 is insufficient because it does not contain other language which would make this instruction constitutional. However Dunn does not cite any case holding that the words “firmly convinced” have the same ambiguity as “moral certainty” [footnote omitted] and thus need to be “saved” by other language in the instruction.

Dunn relies instead on the Federal Judicial Center’s Pattern Criminal Jury Instruction 21 on reasonable doubt to support his argument. Like MAI-CR3d 302.04 that instruction defines reasonable doubt as proof which leaves the jurors “firmly convinced” of the defendant’s guilt. The MAI instruction ends with, “If you are not so convinced, you must give him the benefit of the doubt and find him not

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guilty.” However, the Federal Judicial Center instruction ends with, “If on the other hand, you think there is a real possibility that he is not guilty, you must give him the benefit of the doubt and find him not guilty.” The fact that the Federal Judicial Center instruction uses the phrase “if -- you think there is a real possibility that he is not guilty” in lieu of “if you are not so convinced” is not authority for a conclusion that MAI-CR3d 302.04 does not comport with due process. [footnote omitted]

Dunn provides us with no basis to transfer this case to the Missouri Supreme Court for re-evaluation of *Griffin*. Point four is denied.

See Respondent’s Exhibit 11, pp. 12-14.

This exact issue concerning this same Missouri “reasonable doubt” instruction has been presented by other § 2254 habeas petitioners to the Eighth Circuit Court of Appeals. The Eighth Circuit has consistently ruled that the merits of this claim cannot be reached because the issue is barred by *Teague v. Lane*, 489 U.S. 288 (1989). *See Antwine v. Delo*, 54 F.3d 1357, 1370 (8th Cir. 1995); *Murray v. Delo*, 34 F.3d 1367, 1381-1382 (8th Cir. 1994). Therefore, Petitioner’s § 2254 petition for habeas relief will be denied with respect to Grounds Seven and Twenty.

*Appendix C***H. GROUND EIGHT, GROUND NINETEEN**

For his eighth ground for relief, Petitioner contends that the trial court erred in overruling Petitioner's motion to quash the indictment because the grand jury and petit jury selection were not drawn from a fair cross-section of the community. In Ground Nineteen, Petitioner asserts the same claim for relief. There he asserts that the trial court erred in overruling defense counsel's motion to quash the indictment due to error in the jury process.

Petitioner presented this issue to the Missouri Court of Appeals and that court rejected his argument as follows:

For his fifth point Dunn asserts that the trial court erred in overruling his motion to quash the indictment or, alternatively in overruling his motion to stay proceedings because the selection procedures for the grand and petit juries in the City of St. Louis denied him a jury which reflected a fair cross section of the citizens as required by § 494.400 through 494.505, RSMo Cum. Supp. 1989. He contends that the procedures resulted in an underrepresentation of African-Americans and persons between the ages of 21-29.

Dunn premises his argument relating to grand jury selection on a statistical study compiled in October 1990 by Kenneth Warren, Ph.D. The data involved practices prevalent in the grand jury selection process from 1985 to May 1990.

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We have held this statistical analysis to be irrelevant to grand jury selection procedures occurring after the 1989 changes to the statutory provisions of §§ 494.400-494.505. *State v. Wheeler*, 845 S.W.2d 678, 681 (Mo. App. 1993). These revisions were in effect when the grand jury returned Dunn's indictment in June 1990. "Because the statistical analysis did not cover the period of time relevant to the prosecution of defendant, the data cannot be used to support his constitutional challenge to the grand jury selection procedures." *Id.* See also *State v. Plummer*, 860 S.W.2d 340, 351 (Mo. App. 1993).

Likewise Dunn's challenge to the selection of the petit jurors in the City of St. Louis has been addressed and rejected many times by this court. The Honorable Ronald M. Belt considered this challenge on a motion to stay all jury trials in the City of St. Louis in another criminal case. After a hearing, he issued an order staying all jury trials on October 16, 1990. Although he found no under representation of racial, gender, or age groups, he found that the procedures used in granting juror continuances resulted in a non random selection of some juror panels. The Board of Jury Commissioners immediately corrected this impropriety and Judge Belt lifted the stay order.

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We have held that “[t]he evidence amply supports Judge Belt’s finding of no underrepresentation of racial, gender, or age groups.” *Plummer*, 860 S.W.2d at 352 (quoting *State v. Landers*, 841 S.W.2d 791, 793 (Mo.App. 1992)). An administrative order issued by the Board of Jury Commissioners before Dunn was indicted corrected the perceived deficiencies in the petit jury selection procedures. *Wheeler*, 845 S.W.2d at 681-82; *Plummer*, 860 S.W.2d 352. Dunn presented no evidence that the new procedures in place at the time of his trial were inadequate. Point five is denied.

See Respondent’s Exhibit 11, pp. 14-16.

Beginning with the opinion of the Missouri Court of Appeals, the Court finds that the state court’s opinion on this issue did not result in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States. 28 U.S.C. § 2254(d)(1). See *James v. Bowersox*, 187 F.3d 866, 869 (8th Cir. 1999).

Federal law on this issue is clearly established. A criminal defendant is guaranteed a jury chosen from a fair cross section of the community. *Phea v. Benson*, 95 F.3d 660, 662 (8th Cir. 1996). In order to establish a violation of this right, Petitioner must establish that: (1) African Americans and people aged 21-29 are a distinctive group in the community; (2) the representation of African-Americans and people aged 21-29 in jury pools is not

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fair and reasonable in relation to the number of African-Americans and people aged 21-29 in the community; and (3) this under-representation is due to systematic exclusion of African-Americans and people aged 21-29 in the jury-selection process. *Phea*, 95 F.3d at 662. *See also Duren v. Missouri*, 439 U.S. 357, 364 (1979).

The Court concurs with the Missouri Court of Appeals that Petitioner has not presented any evidence showing *either* that the representation of African-Americans and people aged 21-29 in jury pools is not fair and reasonable in relation to the number of African-Americans and people aged 21-29 in the community *or* that this under-representation is due to systemic exclusion of African-Americans and people aged 21-29 in the jury-selection process. As the state appellate court noted, the statistical evidence presented by Petitioner dealt with a time period before new grand jury procedures were in place to better ensure fairness and thus was not applicable to Petitioner's case. Moreover, the Missouri Court of Appeals noted that in another case the St. Louis courts had analyzed St. Louis City jury petit panels for under-representation and found none and that steps had been taken to further randomize the selection system since that analysis was conducted.

Petitioner has not established that the decision of the Missouri Court of Appeals with respect to this issue resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States. *James v. Bowersox*, 187 F.3d 866, 869 (8th Cir. 1999). Moreover, the Court finds that the appellate court's decision did not result in a decision that was based on an

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unreasonable determination of the facts in light of the evidence presented in the State court proceeding. *Warren v. Smith*, 161 F.3d at 360-361. Therefore, Petitioner's § 2254 petition for habeas corpus relief will be denied with respect to Grounds Eight and Nineteen.

I. GROUND NINE, TEN and ELEVEN

For his ninth ground for relief, Petitioner asserts that the post-conviction motion court erred in failing to inquire of post-conviction counsel why no amended motion was filed by counsel and whether all grounds known to Petitioner were raised. For his tenth ground, Petitioner asserts that the post-conviction motion court erred in failing to issue findings of fact and conclusions of law on all issues as required by Missouri Supreme Court Rule 29.15(i). For ground eleven, Petitioner asserts that the post-conviction motion court erred when it adopted verbatim the state's proposed findings of fact and conclusions of law.

Petitioner presented each of these three grounds to the Missouri Court of Appeals on the appeal from the denial of his motion for post-conviction relief. The Missouri Court of Appeals examined each of these arguments thoroughly and rejected each of them in a lengthy opinion. *See* Respondent's Exhibit 11, pp. 16-27. Regardless of the state appellate court's decision, however, Petitioner's ninth, tenth and eleventh grounds for relief are not cognizable in a federal proceeding for habeas corpus relief. Section 2254 only authorizes federal courts to review the constitutionality of a state criminal conviction. The Court cannot review infirmities in a state post-conviction relief proceeding. *Williams-Bey v. Trickey*, 894 F.2d 314 (8th

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Cir. 1990). Thus, the Court will deny Petitioner's § 2254 petition with respect to Grounds Nine, Ten and Eleven.

J. GROUNDS TWELVE, SEVENTEEN, TWENTY-FIVE and THIRTY-THREE

For his twelfth ground for relief, Petitioner contends that trial counsel was ineffective because counsel failed to investigate and call as alibi witnesses Arnetta Dunn and Martha Dunn; failed to investigate and call Nicole Williams as a witness, who would have testified that Petitioner telephoned her at the hospital at or near the time of the alleged offense; and failed to investigate and call Dwayne Rogers (the deceased victim's brother) as a witness, who would have testified that he was at the scene of the shooting and another person, not Petitioner, was the shooter.

Petitioner reiterates this claim in Ground Seventeen, where he asserts that trial counsel was ineffective for failing to put on any defense; this precluded Petitioner from calling Dewayne Roger, the victim's brother, who was on the scene and would have testified that Petitioner was not the man that killed his brother.

In Ground Twenty-Five, Petitioner again asserts that trial counsel was ineffective for not putting on Petitioner's alibi defense, which consisted of testimony from Arnetta Dunn, Martha Dunn, and Nicole Williams.³

3. In Ground Twenty-Five, Petitioner also asserts that trial counsel was ineffective for failing to call Angela Dunn, Karry Dunn,

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In Ground Thirty-Three, Petitioner asserts once more that trial counsel was ineffective for failing to contact thirteen alibi witnesses in Petitioner's defense and to investigate these potential alibi witnesses.⁴

Petitioner presented this issue of ineffective assistance of trial counsel to the Missouri Court of Appeals, which rejected Petitioner's argument as meritless:

Wilford Rickman, Cathy Jackson and Crystal Johnson as alibi witnesses, all of whom would have testified that Petitioner was at home at the time of the shooting. Petitioner identified these witnesses as part of his claim of ineffective assistance of trial counsel in his motion for post-conviction relief. *See* Petitioner's Exhibit 22.B., pg. 19. However, he did not identify these witnesses as part of his claim when he appealed the denial of his Rule 29.15 motion to the Missouri Court of Appeals. Thus, Petitioner has procedurally defaulted his claim with respect to these witnesses. He has not established cause and prejudice for failing to identify these witnesses as part of his claim on appeal and has failed to establish actual innocence. As a result, this Court is procedurally barred from reviewing this aspect of Petitioner's twenty-fifth ground for relief and Petitioner's federal petition for habeas relief with respect to this portion of his twenty-fifth claim will be denied on that basis.

4. Although Petitioner claims the trial attorney was ineffective for failing to investigate and contact thirteen alibi witnesses, he only identified four of those witnesses when he appealed this issue to the Missouri Court of Appeals. Thus, Petitioner has procedurally defaulted his claim with respect to the remaining nine witnesses, whoever they are. He has not established cause and prejudice for failing to identify these witnesses as part of his claim on appeal and has failed to establish actual innocence. As a result, this Court is procedurally barred from reviewing this aspect of Petitioner's thirty-third ground for relief and Petitioner's federal petition for habeas relief with respect to this portion of his thirty-third claim will be denied on that basis.

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For his ninth point, Dunn contends he was denied effective assistance of counsel because his trial counsel failed to investigate and call Arnetta Dunn, Martha Dunn, and Nicole Williams as alibi witnesses and Dewayne Rogers as an alibi witness. In his motion Dunn alleged that he gave Arnetta Dunn's and Martha Dunn's names and addresses to counsel and they would have testified that Dunn was at home when the shooting occurred. He also alleged that Nicole Williams would have testified that she was in the hospital and Dunn telephoned her there at the time of the shooting. He alleged that Dewayne Rogers was at the scene of the shooting and would have testified that Dunn was not the person who killed the victim.

We have already considered the claim relating to Dewayne Rogers and found that Dunn did not elicit substantial evidence that Dunn could have been located, would have testified if called, or that his testimony would have provided a viable defense. Accordingly, Dunn did not establish ineffective assistance of counsel with respect to the failure to call Dewayne Rogers.

At the motion hearing Dunn's trial counsel testified that she decided not to use the alibi defense that Dunn was at home at the time of the shooting because it was a "weak, if not bad" defense. She spoke with Martha Dunn,

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movant's mother, on several occasions but concluded she would not be a good witness because she admitted she lied to the police on two occasions. Martha Dunn had given police Dunn's clothing which matched the description of the perpetrator's clothing, and trial counsel did not want the prosecutor to use Martha Dunn to put that clothing into evidence. Martha Dunn's explanation for lying to the police included an explanation that Dunn had escaped from a halfway house which would indicate prior convictions. Counsel's investigator interviewed Arnetta Dunn who would have contradicted Martha Dunn and also would have explained that she was there when Martha Dunn lied to police, but did not volunteer the truth because Dunn had escaped from a halfway house.

Trial counsel was never able to contact Nicole Williams. Post conviction counsel asked Williams to testify at the PCR hearing but Williams said she had to work. After the hearing the motion court continued the case in order to give Williams an opportunity to testify. Williams was subpoenaed for the next setting, but arrived too late to testify. The hearing was reset. Post-conviction counsel's investigator re-subpoenaed Williams for the third setting, but when counsel talked to Williams by telephone the night before the hearing, Williams denied she had been subpoenaed and contended she could not miss summer school and come

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to court. She did not appear. The court accepted counsel's offer of proof which was that Christopher Dunn called her at the hospital the night her baby was born, but she was unsure of the time of the call except that it was "maybe" after a particular television program.

The motion court found that even if the witnesses were believed they would not have provided a defense because the time was "imprecise." It also found that the decision to call witnesses is a matter of professional judgment and counsel had expressed reasons why these witnesses should not be called.

Appellate review of a denial of post-conviction relief is limited to whether the findings, conclusions and judgment of the motion court are clearly erroneous. Rule 29.15(j); *Vinson*, 800 S.W.2d at 448.

To prevail on a claim of ineffective assistance of counsel, a movant must show both that counsel's performance was deficient and that the deficient performance prejudiced his defense. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 Led.2d 674, 693 (1984). To prove deficient performance a movant must show that counsel's acts or omissions were outside the range of professionally competent assistance. *Id.* Movant must overcome the presumption that counsel's challenged acts or

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omissions were sound trial strategy. *State v. Childers*, 801 S.W.2d 442, 447 (Mo. App. 1990). To show prejudice a movant must show there was a reasonable probability that, but for the errors by his attorney, the jury would have had a reasonable doubt respecting his guilt. *Id.* If a movant makes an insufficient showing on either the deficient performance component or the prejudice component, the court need not address the other component. *Strickland*, 466 U.S. at 697, 104 S.Ct. at 2069. Here, the trial court did not clearly err in finding that the decision not to call the alibi witnesses was trial strategy and that Nicole Williams' testimony would not have provided a defense.

The trial court's finding that Dunn was not denied effective of trial counsel is not clearly erroneous. Point nine is denied.

See Respondent's Exhibit 11, pp. 24-27.

Upon consideration of the opinion of the Missouri Court of Appeals as the pertinent beginning point for this Court's analysis, the Court finds that the state court's opinion on this issue did not result in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States. 28 U.S.C. § 2254(d) (1). *See James v. Bowersox*, 187 F.3d 866, 869 (8th Cir. 1999).

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Federal law is clearly established with respect to ineffective assistance of trial counsel. Because defense counsel is presumed to be effective, *Cox v. Wyrick*, 642 F.2d 222, 226 (8th Cir.), *cert. denied* 451 U.S. 1021 (1981), Petitioner bears a heavy burden in proving that counsel has rendered ineffective assistance. *Howard v. Wyrick*, 720 F.2d 993, 995 (8th Cir. 1983), *cert. denied* 466 U.S. 930 (1984). *See also Sidebottom v. Delo*, 54 F.3d 1357, 1365 (8th Cir. 1995).

In order to prevail on a claim of ineffective assistance of counsel, a petitioner must first demonstrate that his attorney failed to exercise the degree of skill and diligence that a reasonably competent attorney would exercise under similar circumstances. *Strickland v. Washington*, 466 U.S.

668, 687 (1984). This requires the petitioner to show that “counsel made errors so serious that counsel was not functioning as the ‘counsel’ guaranteed by the Sixth Amendment.” *Id. Sanders v. Trickey*, 875 F.2d 205, 207-08 (8th Cir.), *cert. denied* 493 U.S. 898 (1989)(the standard of conduct is that of a reasonably competent attorney; to comply with this requirement, petitioner must prove that his counsel’s assistance fell below an objective standard of reasonableness, considering all the circumstances faced by the attorney at the time in question.)

The petitioner must then demonstrate that he suffered prejudice by his attorney’s actions. To show prejudice required by *Strickland*, *supra*, the petitioner must demonstrate that counsel’s errors were so serious as to

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render the result of the trial unreliable or the proceeding fundamentally unfair. Since *Strickland*, the United States Supreme Court has clarified the “prejudice” analysis to be applied in ineffective assistance of counsel cases. The Court stated that the petitioner must show not only that the outcome of the proceeding would have been different, but something more. The Supreme Court explained:

[A]n analysis focusing solely on mere outcome determination, without attention to whether the result of the proceeding was fundamentally unfair or unreliable, is defective. To set aside a conviction or sentence solely because the outcome would have been different but for counsel’s error may grant the defendant a windfall to which the law does not entitle him.

Lockhart v. Fretwell, --- U.S. ---, 113 S.Ct. 838, 842-43 (1993)(footnote omitted). Thus, the Supreme Court specified that the proper prejudice analysis is whether “counsel’s errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.” *Id.*

The appellate court noted that Petitioner presented no substantial evidence that the alleged eyewitness could have been located, that he would have testified if called and that if he did testify that his testimony would have presented a viable defense. The court also noted that counsel decided not to present the alibi defense because it was “weak.” Trial counsel also indicated that he alibi witnesses contradicted each other when interviewed by a defense investigator and their testimony would probably

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have opened the door to other damaging evidence. Finally, a witness Petitioner claims would have corroborated the alibi testimony of the two alibi witnesses repeatedly failed to show up at the post-conviction hearing and the offer of proof as to the substance of her testimony indicated that testimony was so imprecise that even if believed it would not provide an alibi.

Petitioner has not established that the decision of the Missouri Court of Appeals with respect to this issue resulted in a decision that was contrary to, or involved an unreasonable application of, this clearly established federal law. *James v. Bowersox*, 187 F.3d 866, 869 (8th Cir. 1999). Moreover, the Court finds that the appellate court's decision did not result in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding. *Warren v. Smith*, 161 F.3d at 360-361.

The Missouri Court of Appeals reasonably applied the standards set forth in *Strickland v. Washington* and made reasonable findings of fact in applying those standards. Therefore, Petitioner's § 2254 petition for habeas corpus relief will be denied with respect to Grounds Twelve, Seventeen, Twenty-Five and Thirty-Three.

K. GROUND EIGHTEEN

It is not entirely clear what Petitioner is asserting in Ground Eighteen. There, he claims: "A doctrine establishing so fundamental a substantive constitutional standard, as proof beyond a reasonable doubt, of all

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essential elements must also require that the facts of evidence be present.” *See* Petition, pp. 6, 12. Petitioner did present this exact language as one of his claims in his Rule 29.15 motion. *See* Petitioner’s Exhibit 22.B., pg. 10. However, he did not raise this issue on the appeal from the denial of his Rule 29.15 motion.

A careful reading of Petitioner’s claim suggests that perhaps he is alleging insufficiency of the evidence to support his conviction. Be that the case, this issue should have been raised on his direct appeal to the Missouri appellate court. However, Petitioner did not challenge the sufficiency of the evidence in that forum.

In either case, Petitioner has failed to present this issue to the state courts first. As such, he has procedurally defaulted this claim. Petitioner has failed to establish the cause or prejudice necessary to overcome that procedural default. Additionally, Petitioner has failed to establish actual innocence. Therefore, this Court is procedurally barred from reviewing this claim in the instant habeas proceedings. *Smittie v. Lockhart*, 843 F.2d 295, 296 (8th Cir. 1988). Petitioner’s eighteenth ground for habeas relief will be denied.

L. GROUND TWENTY-THREE

For his twenty-third ground for relief, Petitioner asserts that he was denied due process and equal protection due to trial counsel’s representation, which presented a conflict of interest, due to the fact that the public defender who represented movant at trial was an

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agent of the State of Missouri, as was the prosecuting attorney, and Petitioner was charged by the State of Missouri.

Petitioner raised this issue in his motion for post-conviction relief which he filed pursuant to Missouri Supreme Court Rule 29.15. *See* Petitioner's Exhibit 22.B., pg. 17. However, Petitioner did not present this ground to the Missouri Court of Appeals either on the direct appeal from his conviction or on the appeal from the denial of his Rule 29.15 motion. Thus, he has procedurally defaulted this claim. He has failed to overcome this procedural default by establishing either cause or prejudice for his failure to raise this ground on appeal, or actual innocence. Thus, this Court is procedurally barred from reviewing Ground Twenty-Three. *Smittie v. Lockhart*, 843 F.2d 295, 296 (8th Cir. 1988). Petitioner's federal petition for habeas relief should be denied on this ground.

**V.
CONCLUSION**

For the reasons stated above, the Court finds that the thirty-three claims raised by Petitioner in the instant federal petition for habeas corpus relief are either without merit or procedurally barred. As such, Petitioner's § 2254 petition for habeas relief should be denied in its entirety.

Accordingly,

IT IS HEREBY ORDERED that the petition of Christopher Dunn for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 is **DENIED**. [4]

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IT IS FURTHER ORDERED that a separate judgment will be entered this same date.

IT IS FINALLY ORDERED that, for the reasons stated herein, any motion by Petitioner for a Certificate of Appealability will be denied for the failure of Petitioner to make a substantial showing that he has been denied a constitutional right. 28 U.S.C. § 2253(c)(2). *See also, Tiedeman v. Benson*, 122 F.3d 518, 522 (8th Cir. 1997).

/s/
MARYANN L. MEDLER
UNITED STATES MAGISTRATE
JUDGE

Dated this 27th day of March, 2000.