No. __________

In the Supreme Court of the United States

EDWARD S. PHILLIPS,
Petitioner,
v.
ANTHONY WILLS, WARDEN,
MENARD CORRECTIONAL CENTER,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

APPENDIX

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APPENDIX

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Appendix A

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

Submitted April 14, 2026
Decided April 29, 2026

Before

JOHN Z. LEE, *Circuit Judge*

REBECCA TAIBLESON, *Circuit Judge*

No. 25–1393

EDWARD S. PHILLIPS, *Petitioner-Appellant*, *v.*	Appeal from the United States District Court for the Southern District of Illinois.
ANTHONY WILLS, *Respondent-Appellee.*	No. 3:24–cv–467–DWD David W. Dugan, Judge.

O R D E R

Edward Phillips has filed a notice of appeal from the denial of his petition under 28 U. S. C. §2254 and an application for a certificate of appealability. This court has reviewed the final order of the district court and the record on appeal. We find no substantial showing of the denial of a constitutional right. *See* 28 U. S. C. §2253(c)(2).

Accordingly, the request for a certificate of appealability is DENIED.

Appendix B
[Filed: Feb. 7, 2025]

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ILLINOIS

EDWARD S. PHILLIPS	)	
	)	
Petitioner,	)	
	)	
vs.	)	**Case No. 3:24–cv–467–DWD**
	)	
ANTHONY WILLS, Warden, Menard Correctional Center,	)	
	)	
Respondent.	)	

MEMORANDUM & ORDER

DUGAN, District Judge:

Petitioner, an inmate at Menard Correctional Center, filed a Petition for a Writ of Habeas Corpus under 28 U.S.C. §2254. (Doc. 1). Respondent filed a Motion to Dismiss that Petition under 28 U.S.C. §2244(d), to which Petitioner has filed a Response in Opposition. (Docs. 10 & 13). As explained below, the Motion to Dismiss is **GRANTED**.

I. BACKGROUND

On April 13, 2007, Petitioner was convicted by a jury in the Circuit Court of St. Clair County, Illinois, of first-degree murder under 720 ILCS 5/9–1(a)(1). (Doc. 1, pg. 2). He was sentenced to a term of 55 years of imprisonment on May 29, 2007. (Doc. 1, pg. 2).

Petitioner directly appealed the judgment of conviction to the Illinois Appellate Court, Fifth District, alleging speedy trial violations, delays in his initial appearance, a failure to provide funds for expert witnesses and for investigative services, a failure to grant a motion for a bill of particulars and motion for additional discovery, an erroneous denial of a motion to suppress a videotaped statement, a violation of an order *in limine*, erroneous videotaped testimony, an erroneous grant of a motion *in limine*, inappropriate contact between jurors and court personnel during deliberations, a failure to redact a videotaped statement to the police, a failure to present transcripts to the jury, a prejudicial statement during *voir dire* that the case was "high profile," a violation of the statutory right to a DNA database search, and a failure to prove guilt beyond a reasonable doubt. (Doc. 1, pg. 3). On December 2, 2011, the judgment of conviction was affirmed by that court. *See People v. Phillips*, 2011 IL App (5th) 070416–U; (Doc. 1, pg. 3). Petitioner filed a petition for leave to appeal to the Supreme Court of Illinois, which was denied on May 30, 2012. *See People v. Phillips*, 968 N.E.2d 1070 (2012); (Doc. 1, pgs. 3–4).

On October 10, 2012, Petitioner filed a *pro se* petition for relief from judgment under 735 ILCS 5/2–1401(f), alleging speedy trial violations, a failure to provide funds for expert witnesses and for investigative services, a failure to redact a videotaped statement to the police, an erroneous denial of a motion for mistrial, a denial of the right to cross-examination, and inappropriate contact between jurors and court personnel during deliberations. (Doc. 1, pg. 4). This petition was dismissed on May 28, 2014. (Doc. 1, pg.

4). Petitioner filed a postconviction petition under 725 ILCS 5/122–1 *et seq*. on February 27, 2013. (Doc. 1, pgs. 4–5). He alleged the ineffective assistance of trial and appellate counsel due to, *inter alia*, a failure to assert a marital privilege, violations of an order *in limine*, a failure to test evidence, a failure to investigate and present impeachment evidence, and a denial of due process from a failure to disclose *Brady* evidence. (Doc. 1, pg. 5). That postconviction petition was dismissed on June 7, 2018. (Doc. 1, pg. 6).

On August 26, 2013, Petitioner filed a successive *pro se* petition for relief from judgment under §2–1401(f), alleging the unlawful use of eavesdropping equipment to obtain evidence. (Doc. 1, pg. 6). Following a grant of leave to supplement, the petition was dismissed on May 28, 2014. (Doc. 1, pg. 6).

Petitioner's initial *pro se* petition for relief from judgment under §2–1401(f) and postconviction petition under §122–1 *et seq*. were appealed to the Illinois Appellate Court, Fifth District, and the Supreme Court of Illinois. (Doc. 1, pgs. 6–7). The dismissal of the *pro se* petition for relief from judgment under §2–1401(f) was affirmed by the Appellate Court on February 19, 2015, and a petition for leave to appeal in the Supreme Court of Illinois was denied on May 27, 2015. *See People v. Phillips*, 2015 IL App (5th) 140281–U; *People v. Phillips*, 32 N.E. 3d 677 (2015); (Doc. 1, pgs. 6–7). The dismissal of the postconviction petition under §122–1 *et seq*. was affirmed by the Appellate Court, as modified upon the denial of rehearing, on October 7, 2022, and a petition for leave to appeal to the Supreme Court of Illinois was denied on January 25, 2023. *See People v. Phillips*, 2022 IL App (5th) 180348–U; *People v. Phillips*, 201 N.E. 3d 595

(2023); (Doc. 1, pg. 7). Petitioner did not appeal the Circuit Court of St. Clair County's dismissal of his successive *pro se* petition for relief from judgment under §2–1401(f). (Doc. 1, pg. 7).

In the Petition filed with this Court, Petitioner alleges three grounds for relief. First, Petitioner alleges the ineffective assistance of trial counsel related to the failure to assert a marital privilege at trial. (Doc. 1, pgs. 8–20). Second, Petitioner alleges a *Brady* violation due to the prosecution's failure to disclose certain evidence and the ineffective assistance of counsel related to a failure to request that evidence. (Doc. 1, pgs. 22–24). Third, Petitioner alleges the ineffective assistance of trial counsel in relation to the failure to request that Petitioner's videotaped interview be redacted. (Doc. 1, pgs. 25–27). Petitioner states the first two grounds for relief were presented to the Illinois Appellate Court, Fifth District, and the Supreme Court of Illinois in postconviction petitions. (Doc. 1, pgs. 21, 25). As to the third ground for relief, however, Petitioner suggests the issue was not presented on direct appeal or in a postconviction petition to both the Illinois Appellate Court, Fifth District, and the Supreme Court of Illinois. (Doc. 1, pgs. 27–28).

Respondent filed a Motion to Dismiss the Petition under §2244(d). Petitioner, who is represented by counsel in this action, filed a Response in Opposition to that Motion to Dismiss. (Docs. 10 & 13). As such, the matter is now ripe for a resolution by the Court.

II. ANALYSIS

In the Motion to Dismiss, Respondent notes Petitioner certified that the Petition was placed in the prison mailing system on January 12, 2024. (Docs. 1, pg. 30; 10, pg. 4). Petitioner's counsel signed the Petition below that certification. (Doc. 1, pg. 30). However, Respondent further notes the Petition was not actually filed by Petitioner's counsel, with a signed Civil Cover Sheet, until February 20, 2024. (Docs. 1; 1–1; 10, pg. 4).

According to Respondent, the Petition is untimely by virtue of its filing on February 20, 2024. (Doc. 10, pg. 4). He argues, unless the Petition turns on newly discovered facts, a newly recognized constitutional right, or a State-created impediment to filing, it was subject to a one-year limitations period that began to run when Petitioner's judgment of conviction became final on direct review and that was tolled only during the pendency of the State's collateral review. (Doc. 10, pg. 4). In this case, Respondent suggests the one-year limitations period began to run on August 28, 2012, which was "ninety days after the Illinois Supreme Court denied his PLA on direct review[] when the time to petition for certiorari lapsed." (Doc. 10, pg. 5). The one-year limitations period allegedly ran for 182 days, at which point Petitioner filed an initial postconviction petition on February 27, 2013. (Doc. 10, pg. 5). The one-year limitations period was allegedly tolled through January 25, 2023, when the Supreme Court of Illinois denied Petitioner's petition for leave to appeal on the postconviction petition. (Doc. 10, pg. 5). Respondent argues the one-year limitations period then ran, uninterrupted, for 183 days until its lapse on July 28, 2023. (Doc. 10, pgs. 5–6). Respondent argues Petitioner, rather than file the Petition on that date, waited until February 20, 2024, which was 207 days later. (Doc. 10, pg. 6).

Respondent stresses that the Petition does not turn on newly discovered facts, a newly recognized constitutional right, or a State-created impediment to filing. (Doc. 10, pg. 5). While Petitioner suggests he did not learn of the *Brady* material until January 2015, Respondent argues that is belied by the record. (Doc. 10, pg. 5). Respondent explains, "[t]he materials at issue are recordings petitioner himself made of voicemails…received on his personal phone, [citation], so he was necessarily aware of them from the time of their creation." (Doc. 10, pg. 5). Since police officers seized those recordings pursuant to a search of Petitioner's car before trial, and Petitioner informed his trial counsel that the police officers possessed the recordings, Respondent argues Petitioner knew of the facts underlying the alleged *Brady* violation before the judgment of conviction became final. (Doc. 10, pg. 5). As such, Respondent argues "no later start date applies." (Doc. 10, pg. 5).

Similarly, Respondent argues "Petitioner's initial 2–1401 petition did not toll the limitations period because the state appellate court held that the petition was untimely, [citations], and thus, it was not 'properly filed.'" (Doc. 10, pg. 6). Respondent emphasizes, though, "even if the untimely state filing did toll—and thus the limitations period was tolled for the entire period from when petitioner's conviction became final until his postconviction proceedings concluded on January 25, 2023—petitioner's federal habeas petition would have been due January 25, 2024, almost a month before his attorney filed it in February 2024." (Doc. 10, pg. 6 n. 4). Finally, the remaining state petitions, in Respondents view, are "irrelevant to the timeliness calculation because the entirety of their pendency are encompassed by the period in which the limitations period was already tolled by petitioner's initial postconviction petition." (Doc. 10, pg. 6).

In Response, Petitioner concedes that the Petition is untimely by arguing the one-year limitations period should be equitably tolled "to and including the actual filing date of February 20, 2024." (Docs. 13, pgs. 1, 4; 13–1, generally). As to the diligence in pursuing his rights, Petitioner argues the record and procedural history of the case show he "has been more than reasonable." (Doc. 13, pg. 2). Specifically, Petitioner notes he timely filed a direct appeal from the judgment of conviction followed by a petition for relief from judgment under section 2–1401 and the initial post-conviction petition. (Doc. 13, pg. 2).

Moreover, Petitioner argues he "began corresponding with counsel about preparing and filing a federal habeas petition almost immediately after the Illinois Supreme Court denied his petition for leave to appeal the denial of his initial post-conviction petition on January 25, 2023, raising concerns about the applicable statute of limitations." (Doc. 13, pg. 2) (Emphasis in original omitted.). While arguing an attorney's failure to satisfy professional standards of care may constitute extraordinary circumstances for purposes of an equitable tolling, Petitioner further explains:

> The "extraordinary circumstance" that stood in [Petitioner's] way was an egregious error, committed by the undersigned counsel, in both calculating the limitations deadline imposed by §2244(d), and in affirmatively misinforming him about the deadline. Counsel erroneously

> informed Mr. Phillips that the deadline for filing his petition was April 24, 2024.
>
> …
>
> Here, there was more than just a "garden variety claim of excusable neglect." As explained in the declaration, counsel's error in miscalculating the filing deadline was compounded by his affirmative act of misinforming Mr. Phillips and persuading him that his prior understanding of the deadline was incorrect—when, in fact, it was Mr. Phillips who correctly understood how to calculate the limitations period correctly, and counsel who was in error. [Citation.] But for counsel's error, [Petitioner] would have timely filed his petition, or at least a version of his petition (which, if incomplete, could have been amended). Counsel's error effectively deprived [Petitioner] of his opportunity to file his petition in a timely manner and gave respondent grounds to seek dismissal of the petition as untimely.

(Doc. 13, pgs. 3–4) (Emphasis in original omitted.).

Habeas counsel's Declaration supports these assertions. (Docs. 13, pgs. 2–4; 13–1).[1]

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[1] Petitioner's counsel also notes, "[s]ince [Petitioner] is raising an issue of ineffective assistance of his habeas counsel, this raises a related concern that his claim and argument for equitable tolling may be compromised by a conflict of interest and raises the issue of whether counsel can continue to represent him." (Doc. 13, pgs. 4–5) (Emphasis in original omitted.). However, since "expectations can be exceeded" and "there does not appear to be any absolute bar to an attorney arguing his own incompetence or ineffectiveness as to a particular issue," Petitioner's habeas counsel "has elected to do so here." (Doc. 13, pg.

Alternatively, Petitioner argues he can overcome procedural barriers to a review based on new evidence of actual innocence, as it is more likely than not that no reasonable juror would have convicted him in light of the new evidence. (Doc. 13, pgs. 5–6). He notes "the evidence at trial was very closely balanced," so the new evidence, *i. e.*, his February 21, 2013, affidavit from the Illinois postconviction proceedings and an "additional recording of a voice mail message by [Petitioner's ex-wife] to [Petitioner] that was made and recorded after the one played at trial," makes the difference in this case. (Doc. 13, pgs. 7–9; 13–3) (Emphasis in original omitted.). The additional recording, which forms the basis for Petitioner's *Brady* claim, allegedly "would have completely undermined [his ex-wife]'s testimony—including her denial that it was her voice on the first voice-mail recording, her claim that she had only threatened to tell the divorce court, and not the police, about [Petitioner] being at the scene of the murder, and her evasion of the question as to whether she had sought to blackmail [Petitioner]." (Doc. 13, pg. 10). In short, the additional recording allegedly "would have exposed [Petitioner's ex-wife] as someone willing to lie in order to convict" him. (Doc. 13, pg. 10) (Emphasis in original omitted.).

Now, §2241(d) provides:

> (d)(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a

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5). Accordingly, Petitioner waives any conflict of interest. (Docs. 13, pg. 5; 13–2).

State court. The limitation period shall run from the latest of—

(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

(B) the date on which the impediment to filing an application created by State action in violation

of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;

(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

(2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

28 U.S.C. §2244(d).

This one-year limitations period may be equitably tolled. *See Conner v. Reagle*, 82 F.4th 542, 550 (7th Cir. 2023) (citing *Holland v. Florida*, 560 U.S. 631, 648–49 (2010)). However, Petitioner faces a "very high" threshold for obtaining an equitable tolling of that period. *Lombardo v. U.S.*, 860 F.3d 547, 551 (7th Cir. 2017) (quoting *U.S. v. Marcello*, 212 F.3d 1005, 1010 (7th Cir. 2000)). Such relief is "reserved for the exceptional case"; therefore, it is only rarely or sparingly granted. *Conner*, 82 F.4th at 550 (citing *Carpenter v. Douma*, 840 F.3d 867, 870 (7th Cir. 2016)); *Lombardo*, 860 F.3d at 553 (quoting *Robinson v. U.S.*, 416 F.3d 645, 650 n. 1 (7th Cir. 2005)). Petitioner must show (1) he pursued his rights diligently, and (2) extraordinary circumstances barred the filing of a timely petition. *Conner*, 82 F.4th at 550 (citing *Holland*, 560 U.S. at 648–49); *Boulb v. U.S.*, 818 F.3d 334, 339–40 (7th Cir. 2016)). Extraordinary circumstances exist only if "an 'external obstacle' beyond the party's control 'stood in [its] way' and caused the delay." *Lombardo*, 860 F.3d at 552 (quoting *Menominee India Tribe of Wisconsin v. U.S.*, 577 U.S. 250, 256 (2016)); *see also Moreland v. Eplett*, 18 F.4th 261, 271 (7th Cir. 2021) ("'[G]arden variety' claims are insufficient."). The inquiry, which requires an application of "flexible standards on a case-by-base basis," is "highly fact dependent." *Socha v. Boughton*, 763 F.3d 674, 683–84, 688 (7th Cir. 2014); *accord Isom v. Neal*, 574 F. Supp. 3d 598, 607 (N.D. Ind. 2021).

However, neither a lack of familiarity with the law nor ignorance of legal procedures, even by habeas counsel, is an extraordinary circumstance that justifies an equitable tolling. *Pigram v. Williams*, 182 F. Supp. 3d 861, 864 (N.D. Ill. 2016) (quoting *Taylor v. Michael*, 724 F.3d 806, 811 (7th Cir. 2013)); *Arrieta v. Battaglia*, 461 F.3d 861, 867 (7th Cir. 2006) (citing *Williams v. Sims*, 390 F.3d 958, 963 (7th Cir. 2004)).

Recently, in the context of §§2244(d) and 2254, the Seventh Circuit explained as follows:

> To qualify as extraordinary, the circumstance that prevented the petitioner complying with a deadline must have been an external obstacle that impeded the presentation of his claim to the court, [citations], in other words, something that was beyond his control, [citations]. Negligence on the part of the petitioner's counsel, including counsel's ignorance or miscalculation of a deadline or the failure to do sufficient legal research to ascertain the deadline, is ordinarily an insufficient basis in and of itself for equitable tolling, as it is not an external obstacle.

Conner, 82 F.4th at 551 (citing *Menominee India Tribe of Wisc.*, 577 U.S. at 256–57; *Lombardo*, 860 F.3d at 552; *Carpenter*, 840 F.3d at 872; *Holland*, 560 U.S. at 651–52; *Moreland*, 18 F.4th at 271; *Ademiju v. U.S.*, 999 F.3d 474, 477 (7th Cir. 2021)) (Emphasis in original omitted).

Here, based on these legal authorities, Petitioner is clearly not entitled to an equitable tolling of the one-year limitations period stated in §2244(d). This is true even if habeas counsel can be blamed for misunderstanding or negligently miscalculating, and erroneously advising Petitioner on, that limitations period. *See Conner*, 82 F.4th at 551; *Pigram*, 182 F. Supp. 3d at 864; *Arrieta*, 461 F.3d at 867. Put another way, even if Petitioner diligently pursued his rights, the Court cannot conclude an extraordinary circumstance, *i. e.*, an external obstacle beyond his control, barred him from timely filing the Petition. *See Conner*, 82 F.4th at 550; *Lombardo*, 860 F.3d at 552; *Moreland*, 18 F.4th at 271. Under the circumstances of this case, Petitioner is bound by the acts of habeas counsel. *See Conner*, 82 F.4th at 551–52; *Lombardo*, 860 F.3d at 552 (citing *Maples v. Thomas*, 565 U.S. 266, 280–82 (2012); *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 92 (1990); *Johnson v. McBride*, 381 F.3d 587, 589–90 (7th Cir. 2004); *Coleman v. Thompson*, 501 U.S. 722, 753 (1991)).

Critically, the Supreme Court, the Seventh Circuit, and other courts within the Seventh Circuit have reached this conclusion in various similar cases. *See, e. g.*, *Lawrence v. Florida*, 549 U.S. 327, 336–37 (2007) ("Attorney miscalculation is simply not sufficient to warrant equitable tolling, particularly in the postconviction context where prisoners have no constitutional right to counsel."); *Conner*, 82 F.4th at 551–52 (Seventh Circuit noting, as a factual matter, it could "appreciate that [the petitioner] was the victim of bad advice from his postconviction counsel," but, as a legal matter, the petitioner "[wa]s charged with the acts and omissions of his counsel, including his counsel's mistakes"); *Lombardo*, 860 F.3d at 552 (noting the Supreme Court, the Seventh Circuit, and other courts "have consistently held[] mistakes or miscalculations of that sort by a party's attorney," *i. e.*, a mistaken belief as to the running of the statute of limitations, "do not satisfy the extraordinary circumstances element for equitable tolling."); *Socha*, 763 F.3d at 685 ("Poor representation by an attorney calls for a more nuanced appraisal. Defects in performance, whether through the attorney's own fault or attributable to extenuating circumstances, do not inevitably support equitable tolling, but they are relevant. The Supreme Court has identified some types of errors (such as miscalculation of a deadline) that do not warrant relief; it calls them 'garden variety' claims of excusable neglect, meaning that these errors are too common to be called 'extraordinary.' "); *Obriecht v. Foster*, 727 F.3d 744, 749 (7th Cir. 2013) ("As our precedents make clear, an attorney's misunderstanding or miscalculation of the AEDPA deadline alone does not constitute an extraordinary circumstance."); *Griffith v. Rednour*, 614 F.3d 328, 331 (7th Cir. 2010) ("[A] lawyer's 'egregious behavior' [citation] satisfies th[e] [extraordinary circumstances] standard, though neither 'a garden variety claim of excusable neglect' nor a 'miscalculation' about the time available for filing is an 'extraordinary' circumstance.... The most one could say is that [the petitioner's] lawyer misunderstood how to determine when a state petition is 'pending' for the purpose of § 2244(d)(2). That sort of error is not 'extraordinary'; it is all too common. *Holland* tells us that a simple legal mistake does not excuse an untimely filing. It may be negligent to wait until what is by a lawyer's own calculation the last possible day, because such a calculation could be wrong. But this kind of negligence is not 'extraordinary' by any means. Such a blunder does not extend the time for filing a collateral attack."); *Robinson*, 416 F.3d at 650 n. 1 ("Equitable tolling is granted sparingly, where extraordinary circumstances beyond the litigant's control prevented timely filing; a mistaken understanding about the deadline for filing is not grounds for equitable tolling."); *Powell v. Davis*, 415 F.3d 727 (7th Cir. 2005) (" '[A]ttorney misconduct, whether labeled negligent, grossly negligent, or willful, is attributable to the client' and thus is not a circumstance beyond a petitioner's control that might excuse an untimely petition."); *Modrowski v. Mote*, 322 F.3d 965, 968 (7th Cir. 2003) ("We will not revisit our long-standing determination that petitioners bear ultimate responsibility for their filings, even if that means preparing duplicative petitions: petitioners, 'whether in prison or not, must vigilantly oversee the actions of their attorneys and, if necessary, take matters into their own hands.' "); *Pigram*, 182 F. Supp. 3d at 864 ("Missing a filing deadline…does not constitute an impediment that is beyond the litigant's control, even if the mistake is attributable to attorney incompetence."); *Consumers Health Info. Corp. v. Amylin Pharms., Inc.*, 54 F. Supp. 3d 1001, 1011 (S.D. Ind. 2014) ("The Seventh Circuit has expressly rejected attempts by a party to invoke its own attorney's misconduct and/or negligence as a basis for equitable tolling, finding that attorney conduct is attributable to the client.").

In reaching its conclusion, the Court stresses that, contrary to Petitioner's assertions, the circumstances suggested by *Holland* are not present in this case. Habeas counsel's misunderstanding or negligent miscalculation of the one-year limitations period contained in §2244(d) may have resulted in a mistake and erroneous advice, when acting on Petitioner's behalf, but he in no way engaged in egregious behavior that, *e. g.*, reflects an abandonment of his legal representation of Petitioner. *See Holland*, 560 U.S. at 652–54; *Maples*, 565 U.S. at 282; *Conner*, 82 F.4th at 552; *Schmid v. McCauley*, 825 F.3d 348, 350 (2016); *Obriecht*, 727 F.3d at 749–50; *Griffith*, 614 F.3d at 331; (Doc. 13–1).

Apart from this conclusion under §2244(d), Petitioner is not necessarily barred from proceeding on the Petition. There is a narrow actual innocence gateway through which a petitioner may pass to obtain a review of a time-barred petition. *See Patterson v. Adkins*, 124 F.4th 1035, 1046 (7th Cir. 2025); *Gladney v. Pollard*, 799 F.3d 889, 896 (7th Cir. 2015).[2] To pass through that gateway, Petitioner must provide reliable new evidence—*i. e.*, exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence that was not presented at the trial—that shows it is more likely than not that no reasonable juror would have found him guilty beyond a reasonable doubt. *Id.* (quoting *House v. Bell*, 547 U.S. 518, 536–37 (2006); *Schlup v. Delo*, 513 U.S. 298, 324 (1995)); *Dixon*, 93 F.4th at 403; *see also Jones v. Calloway*, 642 F.3d 454, 461 (7th Cir. 2016) (" 'New evidence' in this context does not mean 'newly discovered evidence'; it just means evidence that was not presented at trial.") (Emphasis in original omitted). On the type of evidence necessary for such a showing, the Seventh Circuit has elaborated:

[2] Notably, though, an actual innocence gateway claim should not be confused with a substantive claim of actual innocence. *See Dixon v. Williams*, 93 F.4th 394, 402–03 (7th Cir. 2024); *see also Cal v. Garnett*, 991 F.3d 843, 850 (7th Cir. 2021) ("[T]he Supreme Court has never held that actual innocence claims, standing alone—separate and apart from any constitutional error—could support habeas relief."); *Lund v. U.S.*, 913 F.3d 665, 668 (7th Cir. 2019) ("Framing the exception as a gateway presupposes that a petitioner will have underlying claims separate from the claim that he is actually innocent."); *Gladney*, 799 F.3d at 895 ("[W]hen a petitioner accompanies his persuasive showing of actual innocence with a different claim for relief…actual innocence may be used as a 'gateway' to excuse procedural defaults that would otherwise bar a federal court from reaching the merits of the underlying claims."). In this case, Petitioner raises the former type of actual innocence claim. *See id.*; (Doc. 13, pgs. 5–7, 10).

> As this court described it, "[t]o demonstrate innocence so convincingly that no reasonable jury could convict, a prisoner must have documentary, biological (DNA), or other powerful evidence: perhaps some non-relative who placed him out of the city, with credit card slips, photographs, and phone logs to back up the claim."

Dixon, 93 F.4th at 403 (quoting *Hayes v. Battaglia*, 403 F.3d 935, 938 (7th Cir. 2005)).

Notably, an "[u]nexplained delay in presenting such evidence is not an absolute bar, though it may play a role in determining whether a petitioner has proven his actual innocence: a delayed petition 'should seriously undermine the credibility of the actual-innocence claim.'" *Gladney*, 799 F.3d at 898 (quoting *McQuiggin v. Perkins*, 569 U.S. 383, 399–400 (2013)). Further, during its review, the Court "consider[s] '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.'" *Patterson*, 124 F.4th at 1046 (quoting *House*, 547 U.S. at 538); *see also Wilson v. Cromwell*, 69 F.4th 410, 422 (7th Cir. 2023) ("[T]he presentation of new and credible evidence does not automatically satisfy the…standard for actual innocence. Instead, the new evidence must be considered along with the existing evidentiary record."). The Court then "'make[s] "a probabilistic determination about what reasonable, properly instructed jurors would do."'" *Patterson*, 124 F.4th at 1046 (quoting *House*, 547 U.S. at 538). It is not the Court's function to make independent factual determinations as to what likely occurred in the case; instead, the Court is only tasked with assessing the likely impact of the evidence on reasonable jurors. *Blackmon v. Williams*, 823 F.3d 1088, 1102 (7th Cir. 2016) (quoting *House*, 547 U.S. at 538). In light of these governing legal principles, it is clear that the actual innocence gateway standard is onerous and demanding, such that a review is allowed only in extraordinary cases. *Patterson*, 124 F.4th at 1046 (quoting *House*, 547 U.S. at 538); *accord Dixon*, 93 F.4th at 403. If Petitioner can prevail under that standard, though, the Court can consider the Petition despite its tardiness. *See Arnold v. Dittmann*, 901 F.3d 830, 842 (7th Cir. 2018).

Here, the Court has reviewed all the available evidence. *See Phillips*, 2011 IL App (5th) 070416–U, ¶¶ 7–96; *accord Phillips*, 2022 IL App (5th) 180348–U, ¶¶ 6–125; (Docs. 1, pgs. 8–20; 13, pgs. 7–11). The following summary of the evidence, which is consistent with that of Petitioner, is taken from the Illinois Appellate Court, Fifth District:[3]

> *Kenneth and Susan Blumberg*. Kenneth and Susan were the parents of the victim, Amy Jennifer Blumberg. Amy was working in the dance store owned by her aunt and uncle on December 31, 1999, while she was home on break from her college courses at Eastern Illinois University. She was 20 years old.
>
> At about 6 p.m. on December 31, 1999, Kenneth and Susan Blumberg began receiving phone calls

[3] When reviewing this evidence, the Court notes that, "[i]n a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct." 28 U.S.C. § 2254(e)(1).

from her friends wondering where Amy was. Amy had plans to spend the evening with some of these friends to celebrate the new year. Susan made multiple calls trying to locate Amy without success. They assumed that Amy must have stopped off somewhere on her way home. But, after some time had passed, they became concerned and decided to drive to the store. On the way to the store, they received a call from the manager of a pizza restaurant nearby in O'Fallon. That manager, Bob Uhrig, was a dear friend to Amy. Bob sent an employee down to the store to check on Amy. That person reported that the door was not locked, that the lights were on inside the store, that Amy's car was in the parking lot, but that Amy was not inside the store. The Blumbergs arrived at the store at about 9 p.m. After entering the store, Amy's parents saw blood on the doorjamb of the entryway to the hall in the back of the store. Kenneth Blumberg encountered a "tremendous amount of blood" in the hallway. Susan Blumberg called 9–1–1 to report the finding of blood and to request an ambulance. Kenneth came back to the front part of the store and told Susan that they were "too late." They waited outside the store at the direction of the 9–1–1 operator until police arrived at the scene.

Stipulation of Maureen Blumberg. The parties agreed to a stipulation regarding a couple of things that Maureen Blumberg, Amy's aunt, would testify to if she had testified at trial. Maureen Blumberg was a co-owner of the store. Maureen told Amy that she could close up the store at 2 p.m. The last recorded sale at the store was at 2:25 p.m. This was a cash purchase for a child's black leotard.

Andrew Whitehair. Andrew Whitehair testified that on December 31, 1999, he was a driver for Pizza World, an O'Fallon restaurant. Andrew's manager at Pizza World, Bob Uhrig, asked him to go to the store to check on Amy. The time of this request was approximately 8 p.m. Andrew drove past and saw a car on the parking lot. Upon return to the Pizza World location, he called Bob and told him about the car that he saw on the parking lot. Bob confirmed that this was Amy's car and asked Andrew to return to the store to see if she was there. He returned. He exited his car and knocked on the doors to all of the businesses in the building. The store still had the lights on. Andrew tried the door, which was unlocked. He walked in. He saw nothing amiss. He called out Amy's name a couple of times with no response. He did not go further than the front part of the store. He left the store and returned to Pizza World. He called Bob again to tell him that Amy did not seem to be there, although her car was there, the lights were on, and the front door was unlocked.

Officer John Stover. O'Fallon officer John Stover testified at trial that he arrived at the scene shortly after 9 p.m. on December 31, 1999. Sergeant Schaefer arrived at the same time. He and Sergeant Schaefer entered the store together. The store itself looked normal. However, the officers saw a trail of blood as well as blood splattering on the floor of the hallway that was on the left side of the store behind a door. Down the hall, the first unlocked door was the door to the men's bathroom. The officers noticed a pool of blood as well as blood splattering on the floor of the bathroom. The hallway continued with a right turn where they saw the blood trail continue with additional splattering. That hallway ended at another door which led into the women's bathroom. Inside the bathroom, the officers found the body of a white female on the ground with her head lying in a large pool of blood. Officer Schaefer confirmed that the woman was dead. The officers checked an adjacent store and then left the building.

Alva Busch. Alva Busch, a crime scene technician, testified that he arrived at the scene of the murder at 9:35 p.m. on December 31, 1999. He testified that he saw a purse and keys on top of the counter in the store and that the cash register in the store appeared to be undisturbed. He noticed what appeared to be blood on the door frame—about one foot off of the floor—leading to the hallway. He testified about the blood in the hallway, which he believed to have been caused by someone being dragged across the carpet towards the men's bathroom. In the men's bathroom, he located a pair of nylon pants, underwear, socks, and tennis shoes. To the left of the urinal on the floor, he found a tampon. The blood trail led from the men's restroom to the women's restroom. He indicated that the victim's body was lying on the ground with her legs widely separated. The victim was nude from the waist down, with part of her bra exposed on the left side. He was not then able to determine a cause of her death. In testimony upon his recall to the stand later in the State's case, Alva Busch testified about the various pieces of forensic evidence he collected in the forms of hair and fibers.

Officer Kevin McGinnis. Kevin McGinnis, a police officer from Mascoutah who is a member of the major case squad, was called upon to assist in the investigation of this case. He and Alva Busch went to the store to conduct their investigation on January 1, 2000. Kevin discovered what appeared to be a bullet fragment in the store next door. Looking then at the opposite wall in the store, they found a bullet hole in the wall in the front part of the store.

Lieutenant Kurt Eversman. Lieutenant Kurt Eversman was a St. Clair County sheriff's deputy at the time of this crime. On January 6, 2000, he was asked to examine a shell casing at the store where the crime occurred. While there, he searched for gunpowder residue on items in the store. He used an ion track vapor tracer. He found three indications of some gunpowder residue. The gunpowder residue was found on the cash register (which was the strongest alert of the three), in the hallway, and on a light switch in one of the bathrooms.

Officer Kerry Andrews. Officer Kerry Andrews was an O'Fallon police detective on call the evening of December 31, 1999. He videotaped the entire crime scene that night and returned to the scene the following day to do additional taping. He presented the video to the jury at trial, explaining what was on the tape.

On December 17, 2003, Detective Andrews was still a member of the O'Fallon police force. He participated in a search of the defendant's home in Mt. Sterling, Illinois, pursuant to the verbal and written consent of the defendant's ex-wife Dawn. Detective Andrews, Detective Cavins, and the defendant's ex-wife, Dawn Ritchey, were present during the search. Found at the residence was an empty gun box located in the attic above the garage. No guns were located in this search. Dawn Ritchey acknowledged that the gun box was for a .38–caliber gun that they owned.

Raj Nanduri, M.D. An autopsy was performed on the victim by Dr. Raj Nanduri on January 1, 2000. Dr. Nanduri testified that before conducting the examination, she was unable to tell what caused Amy's death just by visual examination. Dr. Nanduri described bruises and scrapes on various parts of her body—an impact bruise on her left knee, a pattern bruise on her left hip, a large bruise on the front of her left upper arm, and a small bruise on her right breast—all of which the doctor believed occurred before death. Amy was shot at close or intermediate range one time with the entry wound to the back of her left ear and an exit wound in front of her right ear. In Dr. Nanduri's opinion, the bullet wound would have caused a rapid death.

Forensic Evidence Stipulations. The parties stipulated to various items of forensic evidence.

The stipulations were read to the jury. The red substance on the carpet in front of the cash register was human blood matching Amy's DNA. Blood and debris was found on a dress on a rack in the front of the store. The substance on the hallway door frame was human blood. The defendant's finger and/or palm prints were not discovered anywhere in the store. No semen was found on the underwear found in the men's bathroom. Hairs on the nylon pants were consistent with the victim. One hair on the pants was not consistent with the defendant or with the victim. One hair on the victim's wrist was not that of the defendant or of the victim. Hair found on the victim's stomach did not belong to the victim or to the defendant. Semen was not found on any sample that was a part of the sexual assault kit collected from the victim's body. A hair collected from the victim's right ankle was consistent with the defendant's DNA profile.

James Hall. Forensic testimony was provided by James Hall who testified that the bullet recovered from the scene was a .38–caliber bullet with six lands and grooves with a right twist. The caliber term was explained as the diameter or size of the bullet. A .38–caliber bullet can be loaded into a different size of cartridge case—like a .38–caliber cartridge case. This particular bullet was from the .38–caliber class of bullets, and upon closer examination, James Hall testified that given the bullet's weight, design, and bearing surface, this bullet was consistent with a .38–auto–caliber bullet. He further testified that the bullet could have been fired by a Bryco Arms .38–caliber handgun, as well as by approximately 140 different weapons.

Without the actual gun used in the murder, which could be compared with the bullet fragment recovered from the crime scene, there is no forensic way to confirm that the defendant's .38–caliber Bryco Arms gun was the gun used in the crime.

Thomas Gamboe. Thomas Gamboe was a forensic scientist at the Illinois State Police Metro–East Forensic Science Laboratory in Fairview Heights. He provided testimony about the potential candidates for firing the projectile recovered in this case. He testified that there were 16 possible .38–caliber guns. In the .38 Special categories there were 23 possibilities. Between the .38–caliber revolvers and the .38 Special derringers, there were 49 different possibilities. When asked how many actual weapons would have been in circulation of these 49 different possibilities on December 31, 1999, Thomas stated that it was impossible for him to say, but he guessed that the number would be in the millions of guns.

Dennis Aubuchon. Dennis Aubuchon was a forensic biologist at the Illinois State Police Metro–East Forensic Science Laboratory in Fairview Heights. He tested the tampon that was recovered from the crime scene. No seminal fluid was found. He did not test to determine if the blood on the tampon was menstrual blood.

Donna Rees. Donna Rees was a forensic scientist at the Illinois State Police Metro–East Forensic Science Laboratory in Fairview Heights. She primarily does DNA testing. She tested the string of the tampon but only found the DNA of Amy. She was not asked to see if there was any DNA evidence on the shoes or on any clothing.

Leroy Yaeger. Leroy Yaeger of Lebanon testified at the trial on behalf of the State. He and his daughter arrived at the On Stage store at about 12:30 p.m. on December 31, 1999. The purpose of the visit was to exchange a leotard purchased for his daughter that was too small. At 12:30 p.m., the store was closed with a sign indicating that the clerk would return after lunch. Leroy and his daughter went to lunch. Upon return to the store, the store was open. When they walked in, Leroy noticed a man, who he estimated to be in his forties, looking through the clothing racks. Leroy's daughter proceeded to try various leotards on, until she found the proper size. While doing so, Leroy spoke with Amy and learned a bit about her educational background and career plans. Leroy's daughter overheard the man ask Amy if they sold dance shoes in the store. Before they completed their purchases, the man who had been looking through the racks left the store. Leroy and his daughter left. Later that evening when he learned that Amy had been found dead in the store, he contacted the O'Fallon police, ultimately working with a sketch artist to create a likeness of the man he saw in the store. Leroy testified that the man was wearing a pair of washed-out jeans with a dark-colored jacket. He recalled that the jacket reminded him of a ski coat. He also testified that there were two vehicles in the parking lot while they were there—a black car and a maroon car. There were no pickup trucks in the parking lot.

John Toumbs. A man by the name of John Toumbs who lives in Mt. Sterling, Illinois, testified at trial. He owns a repair store. Prior to January 8, 1992, John purchased a .38–caliber semiautomatic pistol that was manufactured by Jennings Bryco from a gun store called Merkels in Quincy, Illinois. Sometime before January 8, 1992, John Toumbs told a few people that he wanted to sell the gun. One of the people he told was Scott Bemis. He believes that Scott Bemis told the defendant that the gun was available. On January 8, 1992, the defendant came to his store. John testified that the defendant was an occasional customer of his store. He also knew the defendant from drag racing events, which was an interest that he and the defendant shared. The defendant said that he wanted to buy the gun. John Toumbs prepared a paper including the serial number, he confirmed that the defendant had a Firearm Owner's Identification card and included that number on the receipt, and he and the defendant both signed the sales receipt. John identified this original document, which was admitted into evidence. The gun he sold the defendant was in a blue box. On December 19, 2003, he turned the receipt over to the O'Fallon police department following a visit from an officer earlier that day. John testified that somehow he came to the police department's attention because they learned that he had owned a .38–caliber pistol at one time.

Lieutenant Eric VanHook. On December 17, 2003, an O'Fallon police department officer, Lieutenant Eric VanHook, along with Officer John Spanley, approached the defendant on the parking lot of his place of work, the Western Illinois Correctional Center, to ask if they could speak with him about a case. The defendant said that he would need to first speak with his attorney. The officers had a warrant to search the defendant's vehicle, although that fact was not immediately disclosed to the defendant. The officers did not read the defendant his constitutional rights pursuant to *Miranda v. Arizona* while on the parking lot. After speaking with his attorney, the defendant and the officers got into a vehicle and began traveling to the Mt. Sterling police department for the interview. Along the way, the defendant's attorney called and asked if the location of the interview could be changed from the police department to his law office. The officers agreed. During this ride, the defendant was not handcuffed and sat in the front seat. An officer drove the vehicle, and two other officers rode in the backseat. The defendant was not questioned during this commute. He was allowed two stops to use a restroom, and an officer purchased the defendant a soda to drink. Upon arrival at the defendant's attorney's office, the defendant and his attorney had a private conversation. Thereafter, the defendant requested immunity in exchange for agreeing to give the statement. Although the immunity request was denied, the defendant ultimately agreed to give a statement to the police, so long as the statement was recorded and done in the presence of his attorney. *Miranda* rights were read to the defendant before he gave his statement. The defendant acknowledged his understanding of those rights. The defendant's recorded statement lasted approximately 50 minutes. The officers offered the defendant a ride back home, but he declined that offer. During the defendant's interview, the police executed the search warrant for the defendant's vehicle.

Stipulation Regarding the Defendant's Truck Search. At trial, the parties stipulated that nothing of evidentiary value was found during the search of the defendant's truck on December 17, 2003.

The Defendant's Taped December 17, 2003, Interview. The defendant prefaced his interview with a statement to the effect that he had wanted to contact the police before this interview in order to tell them what he knew, but he had not done so due to advice he received from his wife and his father-in-law. During the videotaped statement, the defendant acknowledged that he was in the O'Fallon store on the date that the victim was murdered. On that date, the defendant traveled to the area to go to an auto parts swap show in Collinsville. However, he never found the show and ended up in the Fairview Heights/O'Fallon area. He traveled back onto eastbound Interstate

64 intending to go home but realized that he was going in the wrong direction. He exited the interstate in O'Fallon. He saw the dance store and thought that he could stop in there and purchase a black leotard for his daughter. He went into the store, made a purchase, and returned to the interstate. After several minutes, he began having second thoughts about his purchase—concern that the leotard would not fit. Because he did not live in that area, he would not likely be back to return or exchange the leotard. He then turned around and returned to O'Fallon with the intent of returning the item.

Upon parking his truck on the parking lot, he saw a young man in what he described as a track suit walk from the dance store towards his truck. He assumed that the man was going to talk to him, but instead, the man quickly passed by his truck. The defendant entered the store. He did not see the employee. He found some blood near a clothing rack, and out of concern for the employee, he began calling out to her and looking throughout the store. Upon entering a room in the store, he discovered her body. The defendant stated that when he found her body that there was nothing distinctive about the way in which the employee was dressed. He acknowledged touching her thigh and checking her body for a pulse. He determined that she was deceased. Fearing for his own safety, he fled the store and the O'Fallon area. He claimed that he did not know what to do. He did not have a mobile phone.

When he got home, he told his wife what happened, and the two of them tried to determine what he should do with this information. The defendant's father-in-law also was told about his experiences, and his father-in-law advised him to stay out the situation—essentially to say nothing.

The defendant testified about various threats that were made by Dawn relative to their pending divorce. The divorce had become combative, as the defendant stated that he had proof that Dawn committed child abuse. Dawn left him telephone messages advising him that if he did not act in a nicer manner towards her that she would have to go to the law enforcement authorities to tell them what the defendant knew about the murder and had not disclosed. Dawn allegedly told him that she would be contacting the O'Fallon police. The defendant stated that he had not spoken to any other members of law enforcement about the events of December 31, 1999, until this interview.

Emily Hea Buss's Videotaped Deposition Testimony. During her deposition, Emily explained her medical condition. Emily was due soon to give birth, and she did not feel safe traveling to St. Clair County to testify at the trial. She was previously married to Joe Hea, with whom she had two children. They were neighbors of the defendant and Dawn for some time. The Heas moved away to a different home in Mt. Sterling in 2002. In 2003, she was aware that Dawn and the defendant were going through a divorce. The defendant stored some of his personal belongs in their home at this time.

Sometime in August 2003, the defendant spoke to Emily in her garage about the events of December 31, 1999. He prefaced his story to Emily as one that would "freak [her] out." He told her that he had been in O'Fallon and had stopped to buy his daughter a leotard at a dance store. He returned to the dance store after deciding that the leotard may not fit his daughter, but upon his return, he could not find the store clerk. He waited a considerable length of time and ultimately decided to look for the clerk. He saw blood on the floor in an area by the cash register. The defendant searched through the store, ultimately finding the girl's body. He got scared and fled the scene. He had blood on his clothing and hands. He went to a convenience store where he washed his hands and threw away the leotard. He drove home and lied to Dawn about the source of blood on his clothing, telling her that he struck an animal with his car. He also told Emily that he believed Dawn planned to blackmail him about his failure to go to the police.

Emily testified that she asked him what he planned to do about what he had witnessed and told him that he should talk to someone and clear his name.

The next day, Emily searched the Internet without success for information about the murder.

Later in October 2003, just before Emily and her husband were to testify on his behalf at hearings about his divorce, the defendant told her that he had an appointment to meet with O'Fallon police and his attorney. On October 10, 2003, right after Emily and her husband Joe testified for the defendant, he told them that the night before he and his attorney met with O'Fallon police officers in his attorney's office and that he had been cleared. Having no reason to doubt this statement, Emily did not contact the police.

After this conversation, but before December 15, 2003, something happened that changed the nature of their friendship with the defendant. Emily testified that after the divorce hearing, some things the defendant told them did not match up with certain events. As a result, she and Joe determined that his items needed to be removed from their home. Emily stated that they quietly severed ties with the defendant. When pressed, Emily testified that she "disagreed with how he handled some things."

On December 15, 2003, the police contacted her. Ultimately, Emily gave four interviews to the O'Fallon police about these conversations. Upon cross-examination, Emily admitted that she had conversed with her then-husband Joe about the situation, but never about any substantive fact of the defendant's story. Instead, she characterized her conversations with her husband as being in the realm of shock that someone they knew had been involved in this type of situation.

Joseph Hea. Joseph Hea, the defendant's former neighbor and friend, and the ex-husband of Emily Buss, testified at trial. Sometime in 2000, he and the defendant had a conversation in which the defendant told Joseph that he had met a girl named Amy who looked a lot like Joseph's then wife, Emily. In August 2003, the defendant called Joseph and asked to meet him at a bar. The defendant told his story of purchasing the leotard on December 31, 1999, and then deciding to return the leotard and finding the store clerk dead. Joseph testified that the defendant traveled to O'Fallon for a swap meet but earlier had told police in an interview that he thought that the swap meet was a gun swap meet. The defendant explained to Joseph that upon determining that the dance store employee was dead, he panicked and fled the scene. The defendant told him that he went to a convenience store to wash his hands in order to get the blood off of his hands and arms. The defendant threw the bag containing the dance leotard in the convenience store trash can. The defendant told Joseph that at some point after fleeing the dance store crime scene, he threw a gun that he was carrying that day out the window of the truck. He got rid of the gun because he was in this state of panic.

At some point during this conversation in the bar, the topic of the weapon and the caliber of the weapon came up. The defendant stated that the weapon was a "throw-away" one. Joseph asked the defendant if it was a .45–caliber gun, and the defendant said that it was. The defendant told Joseph that the caliber of the gun he threw away on his way home matched the caliber of the gun used by Amy's murderer.

The defendant told Joseph that he drove home and told his wife that he had hit an animal resulting in the blood on his clothing.

The defendant told Joseph that Dawn was "blackmailing" him in the course of their divorce proceedings with the knowledge that the defendant had not gone to the authorities with the information he had.

Joseph testified that at this bar, after the defendant told his story, Joseph advised him to go to the authorities to tell them what he saw. Joseph testified that approximately one week later, the defendant told him that he and his attorney had gone down to St. Clair County to file a report. The defendant told Joseph that the authorities were not terribly interested in the information he had about the crime.

Thereafter, the defendant and Joseph had a falling out in which Joseph and his wife Emily distanced themselves from the defendant relative to allegations apparently made by the defendant to third parties that Emily was having an extramarital affair.

Sometime in December 2003, Joseph had a conversation with Dawn about what he knew of the defendant's involvement at the O'Fallon crime scene. Dawn told Joseph that she was going to let the authorities know that the defendant also told Joseph about what happened. Approximately three days later, Joseph was contacted by the police on December 15, 2003, to inquire about the conversations he had with the defendant about the O'Fallon crime. By the time of the interviews, Joseph was no longer friendly with the defendant.

Joseph testified that the defendant and Dawn were both into guns—that buying and shooting guns was their hobby.

John Hackman. John Hackman, Emily Buss's father, also testified at the trial. He resides in Jacksonville. He met the defendant in 1999 when Emily and her husband Joe became neighbors with him. As time passed, he became friendly with the defendant due to shared interests. When the defendant was diagnosed with cancer, John drove him numerous times down to the St. Peters, Missouri, location of Barnes Hospital for chemotherapy. He also accompanied the defendant on a trip to Wisconsin to obtain a drag racing engine.

In the fall of 2003, when the defendant and Dawn began the divorce process, the defendant began spending more time with John—frequently spending nights with John in his home. During one of these visits, the defendant told him about the O'Fallon crime scene he encountered. During this conversation, the defendant told John that he was fearful that Dawn was going to tell the authorities what she knew.

The defendant told John that he went down to the area on December 31, 1999, to go a swap meet gun show. Unable to find the swap meet, he ended up in a store at which he purchased an article of clothing for one of his daughters. He told John that he decided to return the item and upon arrival back at the store saw a man running out of the store wearing a coat and a stocking cap. He discovered the store clerk's body in the store. The defendant told John that he rolled the girl's body over in order to check for a pulse. He told John that the girl had been shot in the head. The defendant fled the scene. He told John that the reason he ran was because he had an unregistered handgun with him, and he was afraid to be caught with it. Somewhere on the way home from O'Fallon, he got rid of the gun. When he got home, he told Dawn that he hit a deer. When she began to try to get the stain out of the pants and noticed that there was more blood there than what she would have expected, Dawn was able to get the defendant to tell her the full story.

John testified that for two to four weeks, he tried to get the defendant to contact police. Finally in October 2003, when John and the defendant were at a race track, the defendant told John that he and his attorney had an appointment with O'Fallon detectives. The day after the alleged meeting, John contacted the defendant to find out how it went. The defendant told him that the meeting was fine and that the detectives advised him that he was uninvolved in the case.

Eventually that fall of 2003, the friendship between John and the defendant began to wane. After the divorce, John went to Dawn's home to apologize to Dawn for taking the defendant's side during the divorce proceedings. The topic turned to the events of December 31, 1999. While at Dawn's home, Dawn told John what the defendant had told her about his involvement in the case. Dawn told John that the defendant bought the gun that he threw away at a swap meet. The defendant allegedly told Dawn that he took the gun with him to the swap meet because he was carrying $300 in cash.

Ultimately, the police interviewed John in December 2003 and again in January 2004 due to technical difficulties with the recording in December 2003.

In John's testimony, he stated that while he spoke with Dawn about the defendant's story prior to the police interview, nothing that he would have told the police officers changed because the stories that the defendant told him and told Dawn matched. John acknowledged reading newspaper articles about the crime. John also acknowledged that he and his daughter Emily and son-in-law Joseph talked about the defendant from time to time, but not exclusively about this case because there were many things going on with the defendant at the time.

James Ritchey. James Ritchey is Dawn Ritchey's father. He testified that his daughter had been married to the defendant for approximately 10 years. He socialized with the defendant during his daughter's marriage. He confirmed that the defendant and his daughter both enjoyed owning and using guns. He testified that the defendant bought his daughter an inexpensive .38–caliber pistol and that the defendant possibly had another .38–caliber gun as well.

In early January 2000, the defendant and Dawn came to speak with him in his home in Macomb. The defendant proceeded to tell the story of what he witnessed on December 31, 1999. The defendant told James that the victim had been shot in the head. James Ritchey denied ever telling the defendant to stay out of the case or to not get involved. To the contrary, James told the defendant that he needed to get in contact with the O'Fallon police detectives to tell them what he saw. He also confirmed that his daughter Dawn did not ever, in his presence, tell the defendant to stay out of the matter and/or to tell no one of what he witnessed.

At some point in the fall of 2003, after the divorce process had begun, O'Fallon detectives were in contact with him. At their request, he did participate in a taped phone call to the defendant in an effort to get his acknowledgment that he did at one time buy Dawn a .38–caliber handgun. The defendant denied doing so and told James that he bought her a .22–caliber gun.

James denied ever reading newspaper articles about the crime.

Dawn Ritchey. Dawn Ritchey testified that she married the defendant in 1993, and two daughters were born during the marriage. The children were five and three in December 1999. Dawn has been employed with the Illinois Department of Corrections throughout her career. Currently, Dawn is a parole agent. Prior to that, she was a correctional counselor within the Western Illinois Correctional Center. The defendant was a maintenance equipment operator for the Department of Corrections and drove a truck delivering meat to all of the State's prisons. Dawn testified that both she and the defendant were firearms enthusiasts.

On the morning of December 31, 1999, the defendant left the home wearing a dark brown leather bomber jacket she gave to him that Christmas as a present. He was also carrying a small black triangular-shaped case in which they kept a small gun—a .38–caliber. Dawn explained that she knew that the defendant was carrying the .38 that date because it was the only gun that they owned that would fit into that case. Dawn testified that the defendant bought the gun for her. Her understanding was that the gun was purchased at a gun show in 1996 or 1997.

Later that night, the defendant came home at somewhere between 5 and 6:30 p.m. Dawn testified that the defendant came in and walked straight upstairs. He was not wearing his leather bomber jacket. She noticed that there was something on his jeans from the knees on down. She described the substance as being more than a mere splatter but less than being soaked. Dawn testified that she asked the defendant what that was on his pants. The defendant told her that it was blood from an animal that he had to drag off of the road. Later, Dawn saw the pants again—in the trash can in their bathroom.

That night, the defendant had to work because it was the New Year's Eve of the year 2000, and officials were concerned that there could be Y2K outages, necessitating the delivery of things to the prisons within the system. He got home at around 2 a.m.

The next day, the defendant slept in. Dawn described this as unusual as the defendant always got up early in the morning. At around 1 p.m., she carried lunch into the bedroom for the defendant. Dawn stated that she could tell that there was something wrong, and she asked the defendant. The defendant proceeded to tell his story. He told Dawn that he had witnessed something that really bothered him and that he could not get the images out of his mind when he tried to sleep. He told Dawn that he had intended to go to the gun show on December 31, 1999, but that he was unable to locate the show. He returned to a convenience store where he had seen the flyer with the plans of rereading the flyer, only to discover that the flyer was now gone. As he returned to his car, he saw a dance clothing store and decided to go over to purchase an outfit for their daughter. Dawn testified that this would have been unusual because Dawn bought not only all dance apparel for their daughter, but she purchased all clothing for both daughters. She could not recall any instance where the defendant bought clothing for their daughters. Shortly after the purchase, the defendant returned to the store with the intention of returning the outfit. He then encountered a man running from the store. This man had a duffel bag and was wearing a track suit. The defendant told Dawn that he thought that the man was coming straight towards him, and so the defendant reached for the gun that he had with him. However, when the defendant looked up, the man was gone. The defendant then entered the store with the outfit. He saw no one. He called out but got no response. The defendant told Dawn that he saw blood behind the counter and followed a trail that led to a back room in the store where he found the girl's body. The defendant knelt down to check the girl's pulse in her neck. He explained to Dawn that this is how he got blood on his pants. He told Dawn that the girl's pants were pulled down. Dawn was unable to remember if the defendant told her that the pants were pulled down to her knees or to her ankles. The defendant told Dawn that upon determining that the girl was dead, he got scared and left the store, stating that he feared that he had left prints on the door.

A couple of days later, she and the defendant went to Quincy to look in newspapers to see if there was a description of the man the defendant said he saw leaving the store. Dawn recalled that in a St. Louis Post–Dispatch article (that she believed was dated sometime between January 1 through January 4, 2000), the police investigators were looking for a six-foot-tall blond man.

Shortly after looking in the newspapers, Dawn and the defendant went to her dad's home. The defendant told her dad the same story, also explaining that the reason he did not call anyone was because he was afraid that they would think that he committed the crime. Dawn testified that her dad told the defendant that he should call the police anyway. Dawn also encouraged the defendant to do so, telling the defendant that at a minimum he should call the CrimeStoppers hotline with his tip. Her dad never told the defendant to stay out of the case. Dawn testified that she never told the defendant to stay out of the case. Dawn testified that she continued to encourage his reporting, but due to life circumstances in their own home, Dawn testified that, sadly, she somewhat forgot about the murder.

In 2002, the defendant was diagnosed with colon cancer. He had surgery and six to eight months of chemotherapy. Dawn testified that they all focused on the defendant's recovery.

Dawn testified that she never thought that the defendant was lying to her or that he was in any way involved in the murder of Amy.

At the end of July in 2003, the defendant accused Dawn of having an affair with a man in the area where they lived. She moved out of the home, taking the two girls with her, and filed for divorce. Dawn described the divorce process as not amicable. Dawn acknowledged that after the defendant began an attempt to obtain sole custody of their daughters, she called him and left a voicemail to the effect that if he continued to do these things, she would have no choice but to tell the court about the crime he failed to report. The morning after she left this voicemail, Dawn was visited at work by the defendant and his mother to discuss the divorce.

A prison employee who worked with Dawn and whom Dawn had told about her husband's story located the St. Clair County sheriff's department website and read the information about the unsolved crime. Dawn's friend felt that what she read was important and asked Dawn to look at the information. On the website, there were two composite drawings. Dawn agreed with her coworker that one of the drawings, coupled with the description of the man that the O'Fallon police were looking for, matched the defendant. Her friend advised that if Dawn would not call the police, then she would. Dawn then went to see her divorce attorney and told him the full story. Prior to that time, she had only told her attorney that she had information that the defendant failed to report a crime. Dawn had not previously told her attorney the specifics of the incident. Her attorney called the O'Fallon police department on September 19, 2003.

On September 20, 2003, Officer Spanley drove to the home of Dawn's divorce attorney to interview her. Dawn testified that she, the attorney, and the officer did not discuss the facts of the case before she gave her recorded statement.

The court entered a dissolution of the Phillips' marriage on December 15, 2003, reserving all decisions relative to child custody, visitation, and property distribution.

On December 17, 2003, the police returned to Mt. Sterling and stopped at her home to ask if they could search the premises. Dawn signed a consent for the search and then showed the officers around. One of the places that the officers searched was in the attic. Dawn testified that while the parties were by then divorced, not all of the defendant's things had been removed from the home. She testified that the attic space had essentially been divided with her things on one side and the defendant's things on the other side. The officers searched through the defendant's items and located a cardboard box for a .38–caliber handgun. Dawn testified that she did not remember ever seeing this box before. On cross-examination, she explained that the .38–caliber handgun was a gift from the defendant to her, and when he gave it to her, it was not in a cardboard box.

Dawn testified that the .38–caliber gun was never registered.

She claimed that when she left that phone message for the defendant that she was not attempting to get the upper hand in the divorce proceedings. At trial, the defendant's attorneys played Dawn a tape-recorded message that they contended was her threat to the defendant. Dawn testified that she really did not believe that this was her voice on the tape. The voice did not sound like her voice, and the speaker on the tape used words in the message that Dawn would never use.

Dawn testified that the defendant had visitation with his children until he was arrested on December 16, 2003. Ultimately, she was awarded custody of their two girls and was awarded the house in the property settlement.

Dawn testified that she and the defendant had been down in the metro-east area of St. Louis several times before December 31, 1999.

When asked why she never called the police herself after she learned what the defendant witnessed, she testified that she believed her husband. However, Dawn testified that after looking online at the composite drawing and accompanying description, coupled with the defendant's behavior after she filed for divorce, she felt compelled to provide the information that she had.

Dawn acknowledged that someone told her that there was a $20,000 reward for information about Amy's murder, but this person also reminded Dawn that as employees of the Department of Corrections, they were ineligible for an award.

Doris Lehne. The defendant's mother, Doris Lehne, testified at trial. She was a tax accountant and had lived in Mt. Sterling, Illinois, since 1964. She testified that the defendant had worn facial hair—a moustache and goatee—from approximately 1997 through 2003. After the divorce proceedings began, she suggested to the defendant that he shave his facial hair because he was going to be making court appearances. Doris testified that the defendant and Dawn had many mutual hobbies, including guns. She testified that the defendant was unaware that Dawn was going to leave him and got home on that particular day to find that most of her personal possessions had been removed. She described the marriage as a good one up until that point, and she testified that the defendant adored his two daughters.

Vehicle Sightings Testimony at Trial. All of the witnesses provided information about vehicles that they saw in the vicinity of the store and/or on the parking lot of the store on December 31, 1999.

David Delano testified that he saw a 1980s Dodge Chrysler vehicle driving at a high rate of speed at 4:25 p.m.

Paul Levins testified that at 4 p.m., and later at 4:50 p.m., he saw three vehicles on the parking lot—a dark maroon sedan, a 1970s muscle car, and a third vehicle that he could not remember.

Janet Channel testified that between 5:10 and 5:20 p.m., a 1950s or 1960s dark-colored vehicle with rust on it cut her off as she was driving on Highway 50 near the store.

Lisa Krius testified that between 3 and 5 p.m., she saw a black Chevrolet Cavalier, a white car, and a pickup truck on the parking lot.

Victoria Dickerson testified that between 3:30 and 4 p.m., she saw an older, boxy gray car drive away from the area. At about the same time she saw a man standing on the parking lot.

Marilyn Cox testified that at about 4:15 p.m. and at 5:15 p.m., she saw an old, rusted car on the parking lot. She believed that the car was an old 1960s powder blue Thunderbird.

A stipulation was read that James Miller would testify that between 6:30 and 6:45 p.m., he saw a black Chevy S–10 pickup truck parked on the parking lot.

Other Possible Suspects Presented in the Defendant's Case at Trial.

A man by the name of Thomas Boger testified that on December 31, 1999, at around 1:30 p.m., a car drove up behind him flashing its lights and driving erratically. Thomas stopped. The driver—a young white male with blond hair—wanted directions to the Sports Authority store in Fairview Heights. Later at about 3 p.m., he saw the same man in his car on the parking lot of the Sports Authority, and he had a revolver in his hands.

Officer Spanley was with the O'Fallon police department at the time of this crime and during its investigation. He testified to the various leads and suspects received by law enforcement agencies about this crime.

They obtained fingerprints from many different people, including Amy's boyfriend, Jody Woods. When the detectives from the major case squad arrived at the apartment where Jody lived, he was found hiding in a closet. Jody drives a Chevy S–10 pickup truck.

A man by the name of John Sprous was seriously considered as a suspect. The information leading to John Sprous was overheard by a fellow inmate of Sprous who wanted a transfer to another jail. This inmate is John Little. John Little and his cellmate were in fact transferred to the prison of choice. Officer Spanley's investigation revealed that John Sprous was out on parole on December 31, 1999. At the time that he became a suspect, he was in prison in Missouri for robbing and killing a store clerk. They cross-checked his fingerprints against what was recovered at the scene and there were no matches. Officer Spanley confirmed that all St. Louis media, which heavily covered this murder and the investigation, was carried into the Potosi, Missouri, correctional facility where John Little was then housed. Although there were five other inmates involved in the conversation overheard by John Little through an air vent, none of these five inmates were interviewed.

John Little testified at trial that he was serving a life sentence in Missouri. Little heard the conversation on January 19, 2002. Little testified that the men were looking at a magazine and that Sprous allegedly stated that the photo of a woman in the magazine looked like a girl he had killed in Illinois. Sprous allegedly claimed that he got off the interstate and went to a service station. He saw the victim through the window of a store. His alleged plan was to rape the woman, but then because he saw a taxi cab or a police car out the front door of the store, he determined that it was necessary to kill the woman. He allegedly claimed to have moved her body to another area of the store before returning to St. Louis.

Defense Expert, Brent Turvey. Brent Turvey is a forensic scientist and criminal profiler. He is an adjunct professor of criminality at Oklahoma City University. He was asked to review materials related to this case. He reviewed an FBI profile prepared in this case, the crime scene and autopsy photographs, the crime scene video, crime scene sketches, several crime scene reports, the coroner's report, the O'Fallon police department investigative reports and evidence logs, the St. Louis Major Case Squad investigative reports, and the Illinois State Police forensic reports and evidence logs that involved biology, firearms, and latent prints. He prepared a written report for the defense dated December 6, 2006, based upon his review of these documents along with his expertise.

In his review, he found several deficiencies in the processing of the crime scene. He testified to what he characterized as a very limited effort on the part of the investigators to document, collect, or search for evidence outside of the building. No attempt to determine the point of entry or exit from the building was done. He took issue with the fact that a police vehicle was parked by the front door of the store. By parking the official vehicle there, Brent Turvey testified that critical evidence could have been contaminated or destroyed. He testified that the police vehicle could have been parked on top of evidence that could have pointed to the criminal offender's point(s) of entry and exit. On the subject of entry to and exit from the store, Brent Turvey testified that the investigation did not seem to include a search for bloodstains or blood trails outside of the store. He felt that the police should have processed Amy's vehicle for any sort of evidence relative to the crime. Brent Turvey also testified that the police investigation was deficient because there was no attempt to locate the high-velocity bloodstain pattern typically associated with a gunshot wound, which could provide detail as to exactly where Amy was when she was shot.

> Brent Turvey rendered additional opinions at trial about the evidence in addition to those detailed opinions as to deficiencies in the processing of the crime scene. Although Amy's body sustained bruising consistent with a struggle, he felt that she was not in a lengthy struggle because her fingernails were not broken. He also testified to his opinion that the crime scene was staged to look like a sexual assault. He defined staging as something a criminal offender might do to mislead the investigation by altering the crime scene in order to make it appear to be something other than what occurred. He further explained this by testifying that Amy's body was dragged into the bathroom, and her legs were spread apart, but the evidence failed to support any effort on the part of the offender to attain sexual gratification. He testified that had any sexual activity transpired, blood would have been transferred to the genital area. As there was no blood in that area of her body, Brent Turvey testified that in his opinion, the crime scene was staged to look like a sexual assault. On cross-examination, he admitted that he could not rule out a sexual motivation for the crime in this case.

See Phillips, 2011 IL App (5th) 070416–U, ¶¶ 7–96 (cleaned up) (Emphasis in original.); *accord Phillips*, 2022 IL App (5th) 180348–U, ¶¶ 6–125; (Docs. 1, pgs. 8–20; 13, pgs. 7–11).

By way of a reminder, Petitioner briefly suggests his February 21, 2013, affidavit from the Illinois post-conviction proceedings qualifies as new evidence, stating as follows:

> Additional new evidence is presented in the fact section in Ground One, in the form of [Petitioner]'s own affidavit in support of his post-conviction petition…. In that affidavit, [Petitioner] directly asserts his actual innocence. In a new trial, [Petitioner] could elect to testify and directly refute the testimony of Dawn and other witnesses.

(Docs. 13, pg. 10; 13–3).

However, "obviously self-serving," " 'eleventh hour' affidavits, containing facts not alleged at trial and accompanied by no reasonable explanation for the delay[,] are inherently suspect" and do not meet the evidentiary bar for an actual innocence gateway claim. *See McDowell v. Lemke*, 737 F.3d 476, 483–84 (7th Cir. 2013); *see also Jeffries v. Adkins*, No. 21–cv–3637, 2024 WL 1363633, *15 (N.D. Ill. March 29, 2024) (finding the petitioner's "self-executed affidavit" fell short of that evidentiary bar where he "sw[ore] that he did not commit the crime and that he was merely driving his car near the scene, smoking marijuana, and then fled from police because he did not have the money to bail himself out of jail"). Therefore, to the extent Petitioner now seeks to rely on his affidavit, the Court finds that evidence is insufficient to support an actual innocence gateway claim under the above-discussed authorities. *See Patterson*, 124 F.4th at 1046; *Dixon*, 93 F.4th at 403.

Further, Petitioner identifies an "additional recording of a voice mail message by [Petitioner's ex-wife] to [Petitioner] that was made and recorded after the one played at trial." (Doc. 13, pgs. 7–9) (Emphasis in original omitted.). Notably, the recordings were made by

Petitioner, in mid-to-late-2003, with a cassette tape. *See Phillips*, 2022 IL App (5th) 180348–U, ¶¶ 186–88; (Docs. 1, pgs. 10, 23–24; 10, pg. 5; 13, pgs. 7–10). Petitioner stored the cassette tape in his truck until it was seized, pursuant to a search warrant, in December 2003. *See Phillips*, 2022 IL App (5th) 180348–U, ¶ 188; (Doc. 1, pgs. 23–24). Therefore, the additional recording is new in the sense that it was not presented at trial, but it was evidence about which Petitioner knew before the trial and the time that the judgment of conviction became final, as Respondent suggests. (Docs. 1, pgs. 5–6, 10, 22–23; 10, pg. 5; 13, pgs. 7–10). As stated above, an unexplained delay in presenting this evidence to a court, though not a bar to his actual innocence gateway claim, would tend to undermine the credibility of Petitioner's claim. *See Gladney*, 799 F.3d at 898.

To provide the necessary context, the Court describes each of the recordings related to Petitioner's argument in these proceedings. The first recording, which was played at Petitioner's trial, contained the following message from Dawn to Petitioner:

> Ed, I just wanted to ask you if you had any input on this before I make a call. I thought I was going to call Jim Stover of the O'Fallon Police Department about an unsolved murder. I just wondered if you had any thoughts on that before I made the Call. I'll talk to you later. Bye.

Phillips, 2022 IL App (5th) 180348–U, ¶ 187; (Docs. 1, pg. 22; 13, pg. 9).

Petitioner left Dawn the following voicemail in response to the above message:

> Hi, Dawn. I just wondered if you had any input on this and I just wanted to check with you first in case I decided to make a call. I made a little trip to talk to some people and I decided to make a statement, and these nice people assured me that there is absolutely nothing to be concerned about. In fact, someone mentioned a term called attempted blackmail. This would be a good time to stop playing games and treat each other like we at least used to love each other. So, I guess it is back to the bargaining table since I want the home and 50–50 visitation and you will have custody and I will help you get a place if you treat me like you know you should. I just wanted to get your input first in case I decided to make a call. I guess I'll talk to you later.

Phillips, 2022 IL App (5th) 180348–U, ¶ 187; (Doc. 1, pg. 22).

The additional recording, which was not played at trial and is now identified as new evidence, contained the following responsive message from Dawn to Petitioner:

> Hi, Ed. It's Dawn. I just got your last message. Okay. I guess it won't be blackmail because I'm gonna call Captain Jim Stover tomorrow at the O'Fallon Police Department and I guess we'll just do this. I can't understand why you won't be nice and I guess it is what I will have to do. Well, I will talk to you later. Bye.

Phillips, 2022 IL App (5th) 180348–U, ¶ 187; (Doc. 1, pgs. 22–23).

Petitioner argues, if the additional recording was played at trial, it "would have completely undermined

Dawn's testimony—including her denial that it was her voice on the first voice-mail recording, her claim that she had only threatened to tell the divorce court, and not the police, about [him] being at the scene of the murder, and her evasion of the question as to whether she had sought to blackmail [Petitioner]." (Doc. 13, pg. 10). Petitioner argues the additional recording "would have exposed her as someone willing to lie in order to convict" Petitioner. (Doc. 13, pg. 10) (Emphasis in original omitted.).

Like Petitioner's February 21, 2013, affidavit, the additional recording is not the type of evidence that typically allows a petitioner to prevail on an actual innocence gateway claim. In other words, the additional recording is unlike the type of reliable evidence described by the Seventh Circuit, *i. e.*, exculpatory scientific or biological (DNA) evidence, trustworthy eyewitness accounts, or other critical physical or documentary evidence. *See Patterson*, 124 F.4th at 1046–47; *Dixon*, 93 F.4th at 403.

In any event, though, even when viewing the additional recording in the light requested by Petitioner, the Court cannot conclude that evidence proves it is more likely than not that no reasonable juror would find him guilty beyond a reasonable doubt. *See Patterson*, 124 F.4th at 1046; *Dixon*, 93 F.4th at 403; (Doc. 13, pgs. 7–10). That is, even assuming the additional recording undermines Dawn's testimony or amplifies her alleged credibility issues, as discussed above, Petitioner cannot satisfy the demanding standard for an actual innocence gateway claim in light of all the other available evidence of record. In reaching this conclusion, the Court stresses that it cannot make independent factual determinations about what occurred in this case, as it is only tasked with assessing the likely impact of the evidence on reasonable jurors. *See Blackmon*, 823 F.3d at 1102.

When doing so, the Court recognizes Petitioner's theory is that Dawn sought an upper hand in their divorce proceedings when reporting her knowledge of the murder. However, it remains the case that Dawn, by choosing to make that report years after the murder, potentially subjected herself to criminal liability for not making an earlier report. *See Phillips*, 2011 IL App (5th) 070416–U, ¶ 246. Further, regardless of whether she intended to make a report to the divorce court or to the police, or whether the second recording was more threatening than the first recording, the record shows Dawn accused Petitioner of failing to report the murder but not of committing the murder. *See id.* ¶ 247; *Phillips*, 2022 IL App (5th) 180348–U, ¶ 192. Indeed, the record indicates Dawn initially believed Petitioner's version of events. And, importantly, Petitioner admits, "[o]n cross-examination, [Dawn] admitted telling police that her voice-mail message…was 'threatening' because he was seeking custody of their children." (Doc. 1, pgs. 14–16, 24).

Also, Petitioner told a largely consistent version of events to James Ritchey, Joseph Hea, Emily Hea Buss, and John Hackman, including, *inter alia*, that he: (1) was at the scene of the crime interacting with Amy immediately before her murder; (2) found, and then touched, Amy's dead body; (3) had blood on his clothing; (4) fled the store without reporting the crime to law enforcement; (5) destroyed the evidence, including the leotard, his clothing, and his firearm, that tied him to the scene of the murder; (6) found Amy with a gunshot wound to the head, despite the fact that the police investigators and the forensic pathologist could not determine a cause of death by looking at Amy; and (7) indicated he met with, and was subsequently cleared by, police detectives, when that was not true. *See Phillips*, 2011 IL App (5th) 070416–U, ¶¶ 247–250; *Phillips*, 2022 IL App (5th) 180348–U, ¶ 192. Therefore, even when setting Dawn's testimony aside, the Court agrees with the Illinois Appellate Court, Fifth District, that "[i]t defies logic that every one of these witnesses, all of whom relay[ed] essentially the same story, ha[d] motivations to falsify evidence and to harm" Petitioner. *See Phillips*, 2011 IL App (5th) 070416–U, ¶ 247. Petitioner's interview with the police was also played for the jury at trial, which indicated he could remember "precise details" about some things, such as seeing a man exiting the store before he found Amy's body and subsequently deciding to touch Amy's body to determine if she was still alive, but not other things, such as whether Amy's clothes were removed. *See id.* ¶ 252. Finally, the jury heard that, while Petitioner denied owning a .38 caliber firearm, John Toumbs sold such a firearm to Petitioner in 1992 and was able to identify the "blue Bryco Arms box" that was found in the attic of the Phillips' marital home. *See id.* ¶¶ 25, 253. Based on this evidentiary record, which would still allow a reasonable juror to find beyond a reasonable doubt that Petitioner's actions were inconsistent with innocence, Petitioner cannot prove a gateway claim of actual innocence.

III. CONCLUSION

As stated above, the Motion to Dismiss is **GRANTED.** The case is **DISMISSED with**

prejudice. The Clerk of the Court is **DIRECTED** to enter judgment accordingly.

Since Petitioner is a state prisoner, he does not enjoy an absolute right to appeal. *See Buck v. Davis*, 580 U.S. 100, 115 (2017). He must obtain a certificate of appealability, which may issue only if Petitioner made a substantial showing of the denial of a constitutional right. *See* 28 U.S.C. §2253(c)(1)(A), (2); *see also* Rule 11(a) of the Rules Governing Section 2254 Cases in the United States District Courts. Petitioner must show "jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed." *Buck*, 580 U.S. at 115. If a petition is dismissed on procedural grounds, without consideration of the merits, then the petitioner must show jurists of reason would find it debatable whether he or she stated a valid claim for the denial of a constitutional right *and* that the Court was correct in its procedural ruling. *See Slack v. McDaniel*, 529 U.S. 473, 484 (2000); *accord Peterson v. Douma*, 751 F.3d 524, 530–31 (2014).

Here, the Petition was filed after the time prescribed by the one-year limitations period and Petitioner has not shown he is entitled to either an equitable tolling or to proceed through the actual innocence gateway. The Court **FINDS** jurists of reason would not disagree with this conclusion. Therefore, a certificate of appealability is **DENIED**.

SO ORDERED.

Dated: February 7, 2025

/s/ David W. Dugan
DAVID W. DUGAN
United States District Judge

Appendix C
[Filed: Feb. 20, 2024]

Petition for Relief From a Conviction or Sentence By a Person in State Custody (Petition Under 28 U.S.C. §2254 for a Writ of Habeas Corpus)

Instructions.

1. To use this form, you must be a person who is currently serving a sentence under a judgment against you in a **state court**. You are asking for relief from the conviction or the sentence. This form is your petition for relief. Make sure the form is typed or neatly written.
2. You may also use this form to challenge a state judgment that imposed a sentence to be served in the future, but you must fill in the name of the state where the judgment was entered. If you want to challenge a **federal judgment** that imposed a sentence to be served in the future, you should file a motion under 28 U.S.C. §2255 in the federal court that entered the judgment.
3. You must tell the truth and sign the form. If you make a false statement of material fact, you may be prosecuted for perjury.
4. Answer all the questions. You do not need to cite law. You may submit additional pages if necessary. If you do not fill out the form properly, you will be asked to submit additional or correct information. If you want to submit arguments, you must file a separate memorandum.
5. **You must pay a filing fee of $5**. If the fee is paid, your petition will be filed. If you cannot pay the fee, you may ask to proceed *in forma pauperis* (as a poor

person). To do that, you must submit a written motion (a form is available from the Clerk's Office). Also you must submit a certificate signed by an officer at the institution where you are confined showing the amount of money the institution is holding for you.

6. In this petition, you may challenge the judgment entered by only one court. If you want to challenge a judgment entered by a different court (either in the same state or in different states), you must file a separate petition.
7. When you have completed the form, send the original and one copy (for your records), along with the $5 filing fee (or your motion to proceed *in forma pauperis*), to the Clerk of Court at this address:

United States District Court
Southern District of Illinois
750 Missouri Avenue
East St. Louis, IL 62201

8. <u>CAUTION</u>**: You must include in this petition <u>all</u> the grounds for relief from the conviction or sentence that you challenge. And you must state the facts that support each ground. If you fail to set forth all the grounds in this petition, you may be barred from presenting additional grounds at a later date.**
9. <u>CAPITAL CASES</u>**: If you are under a sentence of death, you are entitled to the assistance of a lawyer and should request the appointment of counsel. A form for this motion is available from the Clerk of Court at the address above.**

UNITED STATES DISTRICT COURT
for the
Southern District of Illinois

Edward S. Phillips,	)	Prisoner No: S01121
	)	
Petitioner,	)	Case Number: 3:24–cv–467
	)	
v.	)	(To be supplied by Clerk's Office)
	)	
Anthony Hills, Warden,	)	
	)	Place of Confinement:
Respondent	)	Menard Correctional Center
	)	

PETITION UNDER 28 U.S.C. § 2254
FOR WRIT OF HABEAS CORPUS
BY A PERSON IN STATE CUSTODY

1. (a) Name and Location of court that entered the judgment of conviction you are challenging:

Circuit Court of the Twentieth Judicial Circuit
St. Clair County, Illinois
#10 Public Square
Belleville,62220.

(b) Criminal docket or case number: 03–CF–1744.

2. (a) Date of the judgment of conviction: April 13, 2007.

(b) Date of sentencing: May 29, 2007.

(c) Date of trial or plea: March 26 – April 13, 2007.

3. Length of sentence: 55 years, at 100 percent time.

4. In this case, were you convicted on more than one count or of more than one crime? ☐Yes ☒No

5. Identify all crimes of which you were convicted. and sentenced in this case: First degree murder; 720 ILCS 5/9–1(a)(1) (2007).

6. (a) What was your plea? Not guilty.

(b) If you entered a guilty plea to one count or charge and a not guilty plea to another count or charge, to which counts did you plead guilty and to which did you plead not guilty? N/A.

(c) If you went to trial, what kind of trial did you have? Jury trial.

7. Did you testify at a pretrial hearing, trial, or a post-trial hearing? No.

8. Did you appeal from the judgment of conviction? Yes.

9. If you did appeal, answer the following

(a) Name of court: Illinois Appellate Court, 5th District.

(b) Docket or case number: 5–07–0416.

(c) Result: Judgment of trial court affirmed.

(d) Date of Result: December 2, 2011.

(e) Citation to the case: *People v. Phillips*, 2011 IL App (5th) 070416–U.

(f) Grounds raised:

- Violation of speedy trial rights;

- unconstitutional delay before petitioner's first appearance;
- the trial court's failure to provide funds for expert witnesses and investigative services after private counsel entered their appearance;
- the failure to grant defense motion for a bill of particulars;
- the failure to grant defense motion for additional discovery;
- the denial of a defense motion to suppress petitioner's videotaped statement to police;
- violation of an order *in limine* barring evidence of other crimes, bad acts and the order of protection filed against petitioner, and denial of his requests for a mistrial;
- the court's allowance of the testimony of a witness by videotaped deposition;
- the granting of a State motion *in limine* precluding petitioner from referencing or using two other taped conversations he had with police for purposes of impeachment;
- alleged inappropriate contact between the jury and court personnel during deliberations;
- the failure to redact petitioner's videotaped statement to police;
- the failure to send transcripts of defense witnesses to the jury;
- the court's reference to the case as "high profile" during *voir dire*;
- the cumulative effect of the above rulings denying him a fair trial;

- whether the State had proved his guilt beyond a reasonable doubt; and
- an alleged violation of petitioner's statutory right to a DNA database search.

(g) Did you seek further review by a higher state court? Yes.

If YES, answer the following:

(1) Name of court: Illinois Supreme Court.

(2) Docket or case number: 11369

(3) Result: Petition for leave to appeal denied.

(4) Date of result: May 30, 2012.

(5) Citation to the case: *People v. Phillips*, 968 N.E.2d 1070 (Ill. 2012).

(6) Grounds raised: Subset of grounds raised in appellate court.

(h) Did you file a petition for *certiorari* in the United States? No.

If YES, answer the following:

(1) Docket or case number:

(2) Result:

(3) Date of result:

(4) Citation to the case:

10. Other than the direct appeals listed above, have you previously filed any other post-conviction petitions, applications, or motions concerning this judgment of conviction in any state court? Yes.

11. If your answer to Question 10 was YES, give the following information:

(a) (1) Name of court: Circuit Court of the Twentieth Judicial Circuit, St. Clair County, Illinois.

(2) Docket or case number: 03–CF–1744.

(3) Date of filing: October 10, 2012.

(4) Nature of the proceeding: *Pro se* petition for relief from judgment pursuant to 735 ILCS 5/2–1401(f) (2012).

(5) Grounds raised: Violation of speedy trial rights, trial court's refusal to provide funds for expert witnesses and investigative services, failure to redact video to remove reference to other crimes or bad acts, court's denial of motion for mistrial after evidence of prior bad acts and an order of protection against petitioner was heard by jury, denial of right of cross-examination of witness, and court's failure to inquire into inappropriate contact between court personnel and the jury.

(6) Did you receive a hearing where evidence was given on your petition, application, or motion? No.

(7) Result: Petition dismissed.

(8) Date of result: May 28, 2014.

(b) If you filed any second petition, application, or motion, give the same information:

(1) Name of court: Circuit Court of the Twentieth Judicial Circuit, St. Clair County, Illinois.

(2) Docket or case number: 03–CF–1744.

(3) Date of filing: February 27, 2013

(4) Nature of the proceeding: Post-conviction petition, pursuant to 725 ILCS 5/122–1, *et seq*. (2013).

(5) Grounds raised:

a. Petitioner was denied the effective assistance of trial counsel by the failure of his trial attorney[s] to assert the marital privilege to prevent his ex-wife from testifying to statements he allegedly made to her, in confidence and while they were married, despite his repeated requests that they invoke the privilege.

b. Petitioner was denied the effective assistance of counsel where the jury was ostensibly allowed to consider improper evidence of other crimes, regarding an order of protection against him which had been excluded by the court's order *in limine*, because nobody bothered to inform the jury that it was not permitted to consider it and defense counsel never requested that the jury be so informed.

c. The State failed to test the hairs or fingerprints recovered from the crime scene, that did not match the petitioner, the victim or anyone else known to be there, to see if they matched the victim's boyfriend, or that of another suspect, John Sprous.

d. Petitioner was denied the effective assistance of counsel by the failure of his trial attorney to investigate and present evidence to impeach his ex-wife with evidence that he asked his attorney to present.

e. Petitioner alleged that a few days before the trial, lead counsel Andrew Sosnowski became upset with him over comments that Sosnowski construed to be inappropriate. Even after petitioner apologized for his comments, Sosnowski told him he was not going to vigorously defend him and the relationship between him and Sosnowski was strained throughout the trial. Petitioner alleged that Sosnowski did not properly defend him as a result of that encounter, denying him the effective assistance of counsel, and that this may explain why Sosnowski refused to object to the testimony of his ex-wife as a violation of marital privilege and why he did not pursue impeaching his ex-wife.

f. Petitioner was denied the effective assistance of appellate counsel, where appellate counsel failed to raise the first three claims described above.

g. Petitioner was denied due process of law by the failure of the State to disclose a voice-mail message left by his ex-wife on his cell phone message system that could have significantly impeached her testimony at trial. The tape recording of that voice mail message was in the possession of the police prior to the trial and was not disclosed to the defense before the trial. Petitioner learned of the police possession of the recording through a Freedom of Information Act request in January 2015. This message was evidence favorable to the accused and should have been disclosed to petitioner pursuant to *Brady v. Maryland*, 373 U.S. 83 (1963) and Illinois Supreme Court Rule 412(c).

h. The failure of the State to disclose the second voice-mail recording seriously impaired petitioner's ability to properly cross-examine his ex-wife, denying him his rights under the 6th Amendment and Article 1, section 8 of the Illinois Constitution.

i. Petitioner was denied the effective assistance of counsel by the failure of his trial attorneys to request his ex-wife's second voice-mail recording (the one later discovered to be in the State's possession) after he informed counsel that it was missing and asked him to request it.

(6) Did you receive a hearing where evidence was given on your petition, application, or motion? No.

(7) Result: The post-conviction petition was dismissed at the second stage.

(8) Date of result: June 7, 2018.

(c) If you filed any third petition, application, or motion, give the same information:

(1) Name of court: Circuit Court of the Twentieth Judicial Circuit, St. Clair County, Illinois.

(2) Docket or case number: 03–CF–1744.

(3) Date of filing: August 26, 2013

(4) Nature of the proceeding: Successive *pro se* petition for relief from judgment, pursuant to 735 ILCS 5/2–1401(f) (2012).

(5) Grounds raised: The orders of protection filed by petitioner's ex-wife were used to obtain the court's authorization for use of an eavesdropping device by James Ritchey to obtain evidence that

petitioner was in possession of a firearm suspected of being used as the murder weapon. Petitioner asserted that this was unlawful, because the State arranged a third-party contact that violated the order of protection, and that the evidence should have been barred under the fruit of the poisonous tree doctrine.

(6) Did you receive a hearing where evidence was given on your petition, application, or motion? No.

(7) Result: The petition was dismissed.

(8) Date of result: October 2, 2013. Petition sought to supplement the petition following the dismissal, and the court granted leave to supplement the petition but again dismissed the supplemented petition on May 28, 2014.

(d) Did you appeal to the highest state court having jurisdiction over the action on your petition, application, or motion?

(1) First petition: Yes.

Result: The judgment of the circuit court was affirmed by the Illinois Appellate Court, Fifth District, on Feb. 19, 2015, in case No. 5–14–0281. *People v. Phillips*, 2015 IL App (5th) 140281–U. A petition for leave to appeal to the Illinois Supreme Court was denied on May 27, 2015, in case No. 119042. *People v. Phillips*, 32 N.E.3d 677 (Ill. 2015).

(2) Second petition: Yes:

Result: The judgment of the circuit court was affirmed by the Illinois Appellate Court, Fifth District, on August 25, 2022, then modified upon denial of rehearing, on October 7, 2022, in case No. 5–18–0348. *People v. Phillips*, 2022 IL App (5th) 180348–U. A petition for leave to appeal to the Illinois Supreme Court was denied on January 25, 2023, in case No. 129092. *People v. Phillips*, 201 N.E.3d 595 (Ill. 2023).

Third petition: No.

Result: N/a.

(e) If you did not appeal to the highest state court having jurisdiction, explain why you did not:

Petitioner initially appealed the third petition to the Illinois Appellate Court, Fifth District, but was not assigned appellate counsel due to the nature of the §2–1401 petition as a civil proceeding, and he therefore abandoned that appeal.

For the sake of completeness, it should be noted that Petitioner also filed a fourth collateral attack on his conviction in the circuit court of St. Clair County, filing a successive *pro se* petition for post-conviction relief pursuant to 725 ILCS 5/122–1, *et seq.*, on June 19, 2014. The grounds for that petition were that the Illinois Supreme Court had recently ruled that Illinois' eavesdropping statute was facially invalid, rendering it void *ab initio*, and that eavesdropping recordings had been entered into evidence against him; therefore, the judgment was based on a void statute. The circuit court dismissed the successive petition on June 24, 2014, and petitioner appealed to the Illinois Appellate Court, Fifth District. That appeal, No. 5–14–0347, was voluntarily dismissed by petitioner at the recommendation of present counsel, the appellate court dismissing the appeal on July 21, 2017.

12. **TIMELINESS OF PETITION**: If your judgment of conviction became final over one year ago, you must explain why the one-year statute of limitations contained in 28 U.S.C. §2244(d) does not bar your petition.[1]

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[1] The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") contained in 28 U.S.C. §2244(d) provides in part that:

> (1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of –
>
> > (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
> >
> > (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;
> >
> > (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
> >
> > (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.
>
> (2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection. For this petition, state every ground on which you claim that you are being held in violation of the Constitution, laws, or treaties of the United States. Attach additional pages if you have more than four grounds. State the facts supporting each ground.

N/a.

For this petition, state every ground on which you claim that you are being held in violation of the Constitution, laws, or treaties of the United States. Attach additional pages if you have more than four grounds. State the facts supporting each ground. **State only the facts supporting each ground – do not argue or cite law.**

CAUTION: To proceed in the federal court, you must ordinarily first exhaust (use up) your available state-court remedies on each ground raised in the petition. If you fail to set forth all the grounds in this petition, you may be barred from presenting additional grounds at a later date.

GROUND ONE: Petitioner Edward S. Phillips was denied effective assistance of counsel by the failure of his trial counsel to assert the marital privilege against his ex-wife Dawn.

(a) **Supporting facts**: In order to fully understand the factual basis of this claim, and the other claims herein, it will be necessary to review the evidence at trial in considerable detail, so as to establish that the evidence in this case was very closely balanced, and that Mr. Phillips was therefore prejudiced by the failings of his trial counsel. That review follows. Citations to the record refer to the page numbers of the official record in the last appeal, Illinois Appellate Court case No. 5–18–0348.

On January 16, 2004, Mr. Phillips was charged by indictment with the offense of first-degree murder, the indictment alleging that on or about December 31, 1999, with the intent to kill or do great bodily harm to Amy J. Blumberg, he shot Blumberg in the head with a firearm, thereby causing her death. (C.60)

The principal evidence against Mr. Phillips was almost entirely circumstantial in nature, based largely on his admission to being at the scene of the crime, as told to police and several other witnesses, evidence that he had a .38-caliber pistol with him at the time, and parts of his explanations for being at the scene, as told by various witnesses, that were inconsistent and/or suspicious.

1. Mr. Phillips' recorded statement to police

The first account is the recorded interview that Mr. Phillips gave to police on December 17, 2003. (State exhibit 23; R.2733) Mr. Phillips was very cooperative with police about being interviewed. (R.2748; 3485) He gave the following account (there are no time stamps on the VCR tape, so times are approximate):

He wanted to tell his story a long time ago, but his wife and father-in-law advised against him going to police. (3:35–4:25; 32:50–33:00) However, at the time of the interview, his wife was threatening him with this information in his divorce proceedings. (4:30–4:55)

On December 31, 1999, he left his home in Mt. Sterling to go to a car parts swap meet he had read about on a flyer in Collinsville. He could not find the swap meet and went to a shopping mall in the Fairview Heights/O'Fallon area. (4:56–5:45)

After getting on Interstate 64 to head home, he realized that he had entered the highway headed the wrong way and exited the Interstate at O'Fallon. He then saw a dance store and decided to look for an outfit for his daughter, who was taking dance lessons and needed a new costume. He bought a black leotard for her. While in the store, he saw another man in the store with his young daughter. It was still daylight, in the afternoon. (4:56–7:15; 17:00–18:09) He did not recall any nearby businesses, but later clarified that he stopped at a gas station when he got off the Interstate to get something to drink, and that is when he noticed the dance store, across the street. (17:00; 22:20–23:20)

After he began to drive home, he became concerned that the item would not fit, and thought it best to return it right away rather than have to drive all the way back to O'Fallon from Mt. Sterling. This occurred after about 10 minutes, so he drove 10 minutes away and then 10 minutes to return to the store. (7:20–7:56)

Upon parking outside the store, he saw a slender man of about 20, about five feet six inches tall, with dark hair, wearing a track suit or jogging outfit, heading toward his truck. He thought the man was going to accost him or have a conversation with him but the man walked past him. He did not recall seeing any blood on him. (7:56–9:00; 20:40–20:55) The man he had seen in the dance store with his daughter was taller and older than the man in the jogging outfit. (21:00–21:20)

As Mr. Phillips entered the store, he saw the man jogging away. He laid the leotard on the counter, noticed a stain on the carpet and called out for the store clerk but did not hear a response. (9:02–9:51) He followed the stain to the back of the store, opened a door and saw a lot of blood. He called out again, several times, tried one door, which was locked, and followed the trail of blood to a door at the end of the hall. He was scared by this point, seeing that blood went into that room. (9:52–11:00)

Mr. Phillips entered that room, which appeared to be both a restroom and storage room, saw that no one was in there, but as he went to shut the door, he found it blocked by a shoe in the doorway. He moved the shoe and shut the door. He followed the blood trail to another door. He was scared. (11:00–13:00)

When he entered the next door, he saw a girl, lying on her back, by the door. He kept the door open, thinking he might be next. He shook her leg at the thigh to see if she was still alive, "shimmied up" next to her, then grabbed her right wrist but did not feel a pulse. (13:10–14:40; 20:15)

Mr. Phillips said that he could not recall what the victim was wearing. (15:05) (This was later deemed significant in that, when discovered later by her father and police, the victim, Amy Blumberg, was naked except for a top, partially lifted up, with part of her bra exposed on the left side. (R.2568, 2855; State exhibits 2, M1) However, when the police later told him that the victim's pants had been removed, he did not express surprise. (19:30–19:40)

He said that he did not feel a pulse on the victim's neck, leaned down to see if she was breathing and she was not. He grabbed her head, getting blood on his hands. (15:15–15:35) He repeated that he was really scared. He wiped the blood on his pants, grabbed the bag with the leotard on the way out, and left. (15:49–16:15)

One of the officers asked Mr. Philllips if he thought about calling 911. He replied that he felt that he had to get out or he might be next. (16:30–16:40) He denied touching the phone at the store. (34:00) He remembered seeing a little black car in the parking lot. (16:55) He was not wearing gloves that day, as it was a nice day. (19:20–19:30)

Mr. Phillips did not stop on his way home and got out as fast as he could, afraid for his life. (23:40–24:05) He did not have a cell phone. He was in shock and had blood on his pants. (24:20–24:45) He said that when he got home, he told his wife (Dawn Ritchey, hereinafter, "Dawn"), what had happened right away. (24:45–24:50)

Two or three days later, he and Dawn went to the library to check newspapers and the Internet to see if the perpetrator had been caught but did not see any reports about the murder. (25:20–25:45) They then went to see her father (James Ritchey), who advised him, "if you don't think that you have anything that can help, stay out." (25:45–25:55) He reiterated that both Dawn and her father told him that there was no reason to come forward with his information. (32:50–33:00)

Mr. Phillips said that it was either dark or almost dark by the time he returned to Mt. Sterling, which was two hours away. (27:20–27:30)

Mr. Phillips stated that he told his mother, and Joe and Emily Hea about this incident, adding that he "thought" that the Heas were his friends (suggesting that they may no longer be friends), and that he told Joe Hea after his wife threatened him, around September 1, 2003. (29:30–30:15)

Mr. Phillips said that this had all come up due to the divorce and that he had evidence of child abuse against his wife. She had told him that if he did not give her the divorce that she wanted, she would make his life miserable. (30:40–30:51) She had called him threatening to implicate him in the offense. He responded by telling her to "go for it." She then went after him, had "come up with the order of protection," kicked him out of the marital home and had made his life hell. (30:51–31:40) He said that she had followed information on the crime and told him that "anyone could be made to look like they had done this." (31:45–31:50)

Mr. Phillips said that he paid cash for the leotard. (33:50) (The parties stipulated that the last recorded purchase made at On Stage Dance Apparel on December 31, 1999, at 2:25 p.m., was a cash sale for a child's black leotard. (R.2721))

Dawn had left a message on his answering machine asking why she should not call a Jim Stover of the O'Fallon police department. (39:40–40:00) He left her a message saying that he wasn't going to "take it," apparently meaning that he wouldn't give in to her implicit threat. He mentioned a follow-up call from Dawn and said that he had kept the recordings. (40:25–40:48) While they were together, Dawn said she knew he had not done anything wrong, but after she left him, she said that she would make his life miserable. (41:00–41:27)

Mr. Phillips said he had not spoken with any other law enforcement people about what he witnessed. (41:35–41:55)

2. Emily Buss's recorded testimony

The second account was provided by Emily Buss ("Emily"), formerly Emily Hea, whose testimony was recorded by videotape, since she was pregnant and near giving birth as the trial date approached. (R.2933–34; State exhibit 31 at 2:00) She gave the following account on State exhibit 31 (times are approximate):

In August 1999, she was married to Joe Hea and moved to Mt. Sterling, where Mr. Phillips and Dawn were her neighbors. They became friends, with their children playing together. (3:00–4:15) Mr. Phillips also befriended her father, John Hackman. They went to drag races together, and after Mr. Phillips became ill with cancer, Hackman drove him to his chemotherapy sessions. (5:15–6:00; 41:00)

Emily testified for Mr. Phillips during his divorce proceedings. She and Joe moved from the neighborhood in 2002. (6:00–7:00) Afterwards, Mr. Phillips still visited occasionally. (6:00–7:00) In one of her conversations with Mr. Phillips that fall, he told her that he had a story that would "freak [her] out." (7:50) He then described going to a dance shop, buying a leotard, then deciding to return it. When he returned, he saw blood on the floor, followed the blood and found a deceased woman in the bathroom. (7:50–10:00)

Mr. Phillips told her that after leaving the store, he stopped in a gas station to wash the blood off his hands. When he arrived home, he told his wife Dawn that he had hit an animal on the way home. (10:00–11:00) Mr. Phillips told Emily that Dawn was going to blackmail him with this information. She advised him to come forward with what he knew. He said that he had told his mother about the incident. (11:00–11:30) Mr. Phillips later told her that he had spoken to the O'Fallon police about the incident. (13:30)

Emily looked for information about the case on the Internet but was unable to find anything. (12:40, 14:10) She did not go to the police with this information herself because she did not think that she had enough information to report. She was subsequently contacted and gave a total of four interviews to police. (15:15–20:15) She did not discuss the case with anyone but Joe prior to speaking with police, not even her father, Hackman. (22:00; 25:00)

Joe Hea and Dawn worked together in the same prison. Joe had spoken with Dawn about the incident prior to December 15, 2003. She assumed that Joe had the same information about the incident that she had and didn't discuss it in detail with Joe. (26:00–30:00)

When the divorce proceedings first began between Mr. Phillips and Dawn, Mr. Phillips had custody of the children. He was very upset by the divorce, which was brutal. Dawn had threatened to go to the police with information about the murder during the divorce proceedings. (37:45–39:30)

Emily confirmed that Mr. Phillips' daughter Jennifer was in a dance class in 1999. (41:00–42:00) Emily had a falling out with Mr. Phillips some time after he told her about the incident, but their falling out was not related to that conversation. (Second tape; 44:20)

3. John Hackman's testimony

The third account was provided by Hackman, who testified that Mr. Phillips visited him in the Fall of 2003 and told him of his visit to the Metro East on New Year's Eve 1999. (R.2941) According to Hackman, Mr. Phillips told him that he went to visit a swap meet gun show and couldn't find it, but found a shop where they sold tutus, stopped in and bought a uniform for his daughter. (R.2941) He left the store but decided he didn't like something about the item and would return it. (R.2941) As he started toward the store, he saw a man run out in a coat and stocking cap. (R.2941) He entered the store but couldn't find anyone to wait on him, then discovered a trail of blood, followed it to this girl, rolled her over and checked her pulse. (R.2941–42) He got blood on his hands and instinctively wiped it on his pants. (R.2942) He stated that the woman had been shot in the head. (R.2942)

Hackman asked him why he ran and Mr. Phillips told him it was because he had an unregistered handgun with him that he bought at a swap meet for his wife. (R.2942) He stated that he had brought the gun with him because he didn't trust the area where he was going and ditched it on his way home. (R.2942) Upon arriving home, he told his wife he'd hit a deer, and that's where the blood came from. (R.2942) However, when she started washing his pants, there was so much blood that he ended up telling her what he had told Hackman. (R.2942–43)

Hackman said he urged Mr. Phillips to contact the police. (R.2943) A few weeks later, Mr. Phillips told Hackman that he was planning on meeting with O'Fallon detectives at his attorney's office. (R.2943) In October 2003, he told Hackman that the police interview had occurred, that the case was over and there was no problem. (R.2943–44)

Mr. Phillips said he was afraid that Dawn would threaten him with this information, but not that she had threatened him. (R.2950) Hackman denied turning against Mr. Phillips but admitted telling Dawn, after the divorce, that he was sorry he had taken Mr. Phillips' side during the divorce proceedings. (R.2950–51)

According to Hackman, Dawn told him that Mr. Phillips had told her about hitting a deer and about purchasing the gun at a swap meet. (R.2951–53) She also told him that Mr. Phillips told her that he had carried a gun that day because he had $300 on him, and that he called her that day and told her he couldn't find the gun swap meet. (R.2953) Dawn told him that she knew the caliber of the gun. (R.2954) She and Mr. Phillips had many guns and they both shot guns for sport. (R.2954) Hackman admitted discussing the situation with Emily and Joe Hea prior to talking to the police and said that Emily had told him about where to find articles on the Internet about the murder. (R.2957–59)

In his testimony, Hackman mentioned an order of protection that Dawn had obtained against Mr. Phillips, contrary to an agreement between the parties and the court. (R.2428, 2959) Hackman knew that Dawn got custody of the children and the marital home in the divorce. (R.2960–61) He knew from news accounts that the victim had been killed by a gun. (R.2963)

4. Joe Hea's testimony

The fourth account was provided by Joe Hea ("Hea"). Hea testified that in late August or early September 2003, he had a conversation with Mr. Phillips at a tavern. (R.2989) Mr. Phillips told him that he had been in the O'Fallon area and had been at a swap meet. (R.2989) He passed a dance apparel store and decided to buy a leotard-type outfit for his daughter. (R.2989) After making the purchase, he drove about 10 minutes away from the store when he changed his mind and decided to go back to the store because the leotard might have been the wrong size, or his daughter might not like it. (R.2990)

While in the parking lot, he noticed a man coming out of the store in a hurried manner, approaching his truck. He believed that the man wanted to talk to him, but the man ran away. (R.2990)

Mr. Phillips told Hea that he took the merchandise inside the store and did not see anyone. (R.2990) He observed blood in the store, followed a trail of blood into a hallway, into one room where no one was there, then followed it into the next room, a restroom, where he found a female. (R.2990) He checked for vital signs and determined that she was dead. (R.2991) In the process, he touched her hair and got blood on his clothing. (R.2991) He then panicked and ran out, taking his merchandise with him. (R.2991)

According to Hea, Mr. Phillips said that he had a weapon in his possession. (R.2992) In his panicky state, he pitched it out of the window of his truck. (R.2992) Mr. Phillips indicated that the gun was a .45 caliber, which he said matched the newspaper account of the weapon used. (R.2992–93) This was in response to Hea's questions. (R.2994–95, 3014) On cross-examination, Hea stated that Mr. Phillips told him that he had purchased this firearm at a swap meet on December 31, 1999, and when Hea asked him if it was a .45 caliber, Mr. Phillips "shook his head yes." (R.3013–14)

Mr. Phillips said that after discovering the body, he stopped at a convenience store to wash the blood off his hands and arms and dispose of the leotard. (R.2996) He said that when he got home, he told Dawn that he had hit an animal and that explained the blood on his pants and clothing. (R.2996)

Hea claimed that in November 2003, he and Emily had advised Mr. Phillips to go to the police and tell them what he knew. (R.2997) About a week later, Mr. Phillips told Hea that he and his attorney had gone down to St. Clair County and filed a report but that the police didn't want anything to do with him. (R.2997) When Mr. Phillips spoke to him in the bar, he was sad, stated that Dawn was blackmailing him with this information and that the most important thing to him was his children. (R.3012–13)

Hea spoke to Dawn about the murder on December 12, 2003, three days before he spoke to police the first time. (R.3017) He stopped liking Mr. Phillips in part because Mr. Phillips told him that Emily had been having an affair. (R.3026) Hea testified that Mr. Phillips and Dawn both bought guns for one another.

(R.3027) He did not recall seeing Mr. Phillips ever carry a .380 caliber weapon. (R.3028)

5. James Ritchey's testimony

The fifth account was from James Ritchey, Dawn's father. (R.3046) He had a good relationship with Mr. Phillips prior to the divorce, socializing and going to drag races, gun shows and shooting ranges with him. (R.3047–48) On one occasion, prior to 1999, Mr. Phillips showed him a cheap .380 handgun that he had bought for Dawn. (R.3048–49) In early January 2000[1], Dawn and Mr. Phillips came to him and Mr. Phillips told him what he had witnessed. Ritchey gave this abbreviated description of the conversation:

> He said he'd went down to St Louis, and I don't remember if he said why. But he went to a – the dance studio down there and got Jennifer, his daughter something and bought her something and then he left. And before he left town he decided he didn't want it, so he turned around and went back. Said when he pulled up to the store a fellow walked out, and he didn't pay much attention to him. But he walked out and kind of looked

[1] According to the transcript, the prosecutor asked him about a conversation taking place in early January 2004, "just a couple days after New Years Eve, maybe a week after New Years Eve in January of 2004." (R.3050) From context, this appears to be referring to a few days after the murder on December 31, 1999; therefore, the prosecutor probably meant to say "2000." However, no one corrected the error. Mr. Phillips was arrested in Brown County in December 2003 (R.3908–09) and the warrant for his arrest for murder in the instant case was issued on December 23, 2003 (C.56); therefore, he and Dawn could not have visited James Ritchey in January 2004.

> at Ed a little bit and then left. And then Ed went on into the store. And nobody was in there apparently. And he went to the counter and said he saw some blood behind the counter and the blood trail went into another room. He followed it in there and found this girl laying on the floor. Said she had been shot in the head. (R.3050)

Ritchey said he advised Mr. Phillips to report what he knew to the police; he denied telling him to stay out of it, and said he never heard Dawn advising him to stay out of it. (R.3051) Ritchey discussed Mr. Phillips' story with Dawn before speaking with police. (R.3065) Ritchey agreed that Mr. Phillips was a car nut and that it would not be unusual for him to go to a car swap meet. (R.3068–69)

6. Dawn Ritchey's testimony

The sixth account was from Dawn. She testified that on the morning of December 31, 1999, Mr. Phillips was dressed in jeans and a brown leather jacket and came downstairs with a small gun case in which they kept a cheap .380 handgun. (R.3080–84, 3105) He had bought the gun for her two or three years prior. (R.3082) They both used guns and sometimes went shooting together. (R.3082–83) The .380 belonged to her; she used to keep it under her bed or in the closet. (R.3159–60) However, she told police that the box in which the gun was packaged (found by police in her attic after Mr. Phillips had moved out) belonged to Mr. Phillips. (R.3160) She never registered it in her name. (R.3161)

When Mr. Phillips returned home late afternoon or early evening on December 31, 1999, she noticed blood on his pant legs, from the knees down, not soaked, but a lot of blood. (R.3085) He told her that an animal had died in the road, and he had to drag it off the road. (R.3085–86) He threw away the jeans and she never saw the leather jacket after that morning. (R.3086–87) She denied that the jeans had to be thrown away because the blood couldn't be washed out. (R.3178–79)

Dawn testified that Mr. Phillips slept in the next day, which was unusual, and he later explained that he had witnessed something that really bothered him, a picture of a girl in his mind that prevented him from sleeping. (R.3088) He told her that he couldn't find the gun show he was looking for, stopped at a convenience store to re-read the flyer where he had originally learned about it, noticed a dance store nearby and decided to purchase an outfit for their daughter. (R.3089) Dawn said this was unusual because she always bought all the clothing for their two daughters. (R.3089)

Mr. Phillips then told her that he decided to return the outfit, and as he pulled into the parking lot, he noticed a man who came out of the store, wearing a jogging suit with stripes down the side and carrying a duffel bag. (R.3090) The man approached, so Mr. Phillips reached for the gun, but the man quickly disappeared. (R.3090)

Mr. Phillips reentered the dance store and didn't see anyone but noticed a trail of blood behind the counter. (R.3090) He followed it to a back room where he saw a girl lying on the floor, in blood, and when he knelt down to take her pulse, that's how he got the blood on his pants. (R.3091) He said her pants were down by her knees or ankles. (R.3091) He told her that he freaked out and left. (R.3091)

He told her that this occurred in St. Louis. (R.3092) A couple of days later, they went to Quincy to look for a newspaper article about the killing. (R.3092) They found a newspaper account, with a composite drawing, stating that police were looking for a six-foot tall blond man. (R.3093) (Mr. Phillips is 5 feet, 8 inches tall, with black hair. (Sup C.7)) Dawn admitted telling police that the first composite drawing of a suspect that she saw was “definitely not Ed.” (R.3114)

Dawn and Mr. Phillips spoke to James Ritchey a couple of days later. (R.3093) Mr. Phillips said he didn’t call anyone because he was afraid the police would think it was him, but both Dawn and James advised him to call the police or at least Crimestoppers. (R.3094) She denied that either of them ever told him to stay out of it or not get involved. (R.3095) She continued to recommend that he call Crimestoppers for a couple of weeks but eventually forgot about it. (R.3095)

Dawn filed for divorce in July 2003, and the divorce was contested and ugly. (R.3097) She denied threatening Mr. Phillips with his information about the murder but admitted calling and leaving him an answering machine message saying sarcastically that if he continued doing what he was doing, she would tell the court everything she knew about him, including his failure to report the scene he witnessed. (R.3098) On cross-examination, she admitted telling police that her voice-mail message to Mr. Phillips was “threatening,” because he was seeking custody of their children. (R.3127–28)

In September 2003, she told a friend and co-worker about Mr. Phillips' story, and the friend did some Internet research on the murder. (R.3099) The friend found two composite drawings of the suspect sought by the sheriff's office, and they agreed that one of them looked like Mr. Phillips. (R.3099–3100) Her friend said that if Dawn did not call the police, she would. (R.3100) She went to her attorney's office and her attorney called the police and related the story. (R.3100–01)

She first met the police at a cabin owned by her attorney, a former State's Attorney. (R.3101–02, 3125) Detective Jay Spanley and prosecutor James Piper interviewed her. (R.3102–03) On December 17, 2003, she showed police the attic above the garage where she and Mr. Phillips had items in storage, and where the .380 handgun box was found. (R.3103–05) Mr. Phillips had been out of the marital home since August 2003. (R.3162)

Dawn admitted that, prior to the Fall of 2003, she never called police because she believed Mr. Phillips' account of what happened. (R.3108) She denied contacting the police to gain an upper hand in the divorce proceeding. (R.3109)

The defense sought to impeach Dawn with defense exhibit 9, asserting that it was a recording of a voicemail message she left for Mr. Phillips prior to September 20, 2003, but, after hearing the recording, she said that she did not recall making those statements and testified that the recording "doesn't sound like me." (R.3153) She added: "I don't remember saying those things, and that's really not how I talk," and "[t]hose aren't the words I would use and I don't remember saying those words." (R.3154) Dawn admitted going to gun shows and at least one auto swap meet with Mr. Phillips. (R.3173)

7. Defense exposure of weaknesses in State's evidence

Although Mr. Phillips did not testify at trial, his defense team exposed a number of what they characterized as failings in the police investigation and other weaknesses in the State's case, some of which were revealed during the State's presentation of evidence.

The State presented testimony from Leroy Yaeger, who was shopping with his daughter at the dance apparel store on the afternoon of December 31, 1999. (R.2811–13) He observed another man there who was just pushing clothes around on the racks, looking at them but not actually taking them off the racks. (R.2815–16) The man asked Blumberg if they sold ballet shoes; he mostly kept his back turned to Yaeger. (R.2816–17)

Yaeger testified that the man he observed left without making a purchase (R.2817), yet store records corroborated Mr. Phillips' account that he had purchased a child's black leotard. (R.2721)

Yaeger never identified Mr. Phillips as the person present in the store. He assisted in the creation of State exhibit 32, a composite drawing depicting the person he observed. (R.2819) However, he testified that the person he observed had more of a five o'clock shadow than shown on the exhibit (R.2819) and was wearing a dark ski jacket and black jeans (R.2821), contrary to Dawn's description of Mr. Phillips wearing blue-colored jeans and a brown leather jacket that day.

(R.3081, 3480–81) Dawn told detective Spanley that Mr. Phillips did not even own a ski jacket. (R.3481) Unlike the person depicted in State exhibit 32, Mr. Phillips wore a goatee and mustache at the time. (R.3638–39; defense exhibit 57)

Yaeger observed two cars in the parking lot: A small black car, which he believed was a Chevy, and a maroon or burgundy colored vehicle. (R.2823) The small black car could have been Blumberg's vehicle. (R.2567, 2580, 2605; State exhibit A, E.317) Mr. Phillips drove a black and silver 1997 Chevrolet Silverado 3500 two-door extended cab four-by-four pickup. (R.3365, 3367, 3641, 4012)

In sum, Yaeger's testimony supported the conclusion that there were at least two men present in the store that afternoon other than Mr. Phillips – himself and the person with the ski jacket.

Emily discussed aspects of Mr. Phillips' account with her then-husband, Joe before speaking to the police. (State exhibit 31, 22:00; 25:00) Dawn discussed aspects of Mr. Phillips' account with John Hackman (R.2951–53) and Hackman said he discussed aspects of his account with the Heas prior to talking to the police (R.2956–58), even though Emily denied this. (State exhibit 31, 22:00; 25:00) Emily also denied being able to find any information about the case on the Internet (State exhibit 31, 12:40, 14:10), yet Hackman testified that Emily showed him where to find articles about the case on the Internet. (R.2958) Dawn discussed the murder with Joe Hea before speaking to police in December 2003. (R.3161–62)

Hackman said that Dawn told her that Mr. Phillips had called her on the day of the murder to tell her that he couldn't find the gun swap meet. (R.2953) Dawn did not mention this in her account and said that Mr. Phillips informed her about not being able to find the gun show when he told her what happened the following day. (R.3089)

Dawn admitted that her divorce was ugly. (R.3097) When the couple separated, Dawn left Mr. Phillips with the home and primary custody of the children at first. (R.3122, 3630–31) She felt threatened by Mr. Phillips seeking to win sole custody in the divorce, and this precipitated her threat to go to the police, her decision to report his account to the police, and her active cooperation with the police investigation. (R.3026–28; 3100–01) Although she denied going to the police to gain an advantage in the divorce proceedings (R.3109), she ended up gaining possession of the marital home and custody of the children. (R.3122)

8. Defense evidence: Forensics

Although the .38 caliber bullet recovered from the crime scene could have been fired from the .380 caliber handgun that Mr. Phillips (according to Dawn) allegedly took with him on the day of the murder, expert witnesses established that there were literally millions of other guns that could have fired the same bullet. (R.3293, 3299, 3301–09, 3352–59)

The Illinois State Police obtained a DNA profile of Blumberg but no one else connected with the case other than Mr. Phillips. (R.3337–38) They did not test for DNA on Blumberg's shoes or clothing. (R.3339–40) A forensic examiner for the defense conducted mitochondrial DNA testing on a hair found on Blumberg's stomach and excluded both Blumberg and Mr. Phillips as the source; another hair found on her right ankle did not exclude Mr. Phillips as the source. (R.3346–47; E.282–84)

9. Defense evidence: Witnesses to the area near the dress apparel shop on December 31, 1999

Mr. Phillips stated that it was almost dark by the time he returned to Mt. Sterling, which was two hours away. (State exhibit 23 at 28:20) Dawn agreed that he arrived home late afternoon or early evening, probably between 5 and 6 p.m., possibly 6:30 p.m. although she was uncertain. (R.3085) Along with the aforementioned evidence that someone made a cash purchase of a black leotard at 2:25 p.m., this indicates that he left O'Fallon somewhere in the ballpark of 3 to 4:30 p.m.

The defense presented several witnesses who observed other persons acting suspiciously and/or other vehicles present in the vicinity of the apparel store before, during, and after the same general time period, but prior to Blumberg's father discovering the body at about 9 p.m. (R.2564–67):

1. David Delano was driving eastbound into O'Fallon at about 4:25 p.m. on December 31, 1999, when he observed a tan or brown 1980s Dodge or Chrysler departing Eagle Drive, the short cul-de-sac road where the dance apparel store was located, at a high rate of speed. (R.3380–81)

2. Paul Evans was an attorney from O'Fallon whose office was located about 4/10ths of a mile from the

intersection of Eagle Drive and Highway 50. (R.3385) He was in his office in the late afternoon of December 31, 1999. (R.3386) He left his office a short time after 4 p.m. and passed by the dance apparel shop. (R.3386–87) He observed three vehicles in the parking lot – a dark maroon small sedan, a red 70s-era muscle car with a black top, and a third vehicle that he could not recall. (R.3389–91) He passed by again at about 4:50 p.m. and the three vehicles were still there. (R.3391–92)

3. Janet Channel was driving her car west on Route 50 in O'Fallon between 5:10 and 5:20 p.m. on December 31, 1999. (R.3393) She passed by the dance apparel shop at that time and saw a car pulling out from the side street at a high rate of speed. (R.3397–98) It was a dark-colored 1950s or 60s model vehicle. (R.3399) She had to slam on the brakes to avoid hitting it and noticed that the driver had shoulder-length hair. (R.3400)

4. Lisa Karius was in O'Fallon on December 31, 1999, staying at the Sleep Inn, located near the dance apparel store. (R.3402) She noticed the store because of a small black Chevy Cavalier parked outside that reminded her of her neighbor's granddaughter's car. (R.3402) She arrived sometime between 3 and 5 in the afternoon, and noticed that car, a medium-sized white car, a pickup truck and possibly another car parked by the store. (R.3403)

5. Thomas Boger was in O'Fallon on December 31, 1999, and was driving at 1:30 in the afternoon when a car approached from behind, driving erratically and flashing its lights. (R.3412) The man rolled down his window and asked for directions to Circuit City,

located about a quarter of a mile away from the apparel shop. (R.3412) The man was a clean-cut looking person in his mid-20s, driving a white small to mid-size car. (R.3413) He was white with blond hair. (R.3414) Later, Boger was parked outside a store when the man pulled up, parked next to him, and began playing with a black revolver, staring at it with a serious look, until his hands starting shaking. (R.3415–16) Boger got out, went into the store and had the store manager call the police. (R.3415) Boger got a license number for the vehicle and turned it in. (R.3415–16) The plate had been stolen. (R.3416) This occurred around 3 p.m. (R.3416)

6. Victoria Dickerson was a secretary in the St. Clair County State's Attorney's office. (R.3419) On December 31, 1999, she was on Highway 50 in O'Fallon, and drove onto a frontage road that paralleled it, in close proximity to the apparel shop. (R.3421) As she drove by, between 3:30 and 4 p.m., she saw a white man standing in the parking lot. (R.3422) As she continued to the next intersection, a car pulled out of the street that the shop was on, fishtailing and traveling at a high rate of speed. (R.3423) It was an older, boxy gray car, large, probably four-door. (R.3424) The car suddenly slowed down to a crawl as it approached a light. (R.3424) The man seemed angry and stared at Dickerson and her niece, not moving his vehicle. (R.3425)

7. Marilyn Cox was a passenger in a vehicle traveling on Highway 50 at about 4:15 p.m. on December 31, 1999, when she noticed an old rusted car parked outside the apparel shop. It was still there when she went by a second time at 5:15 p.m. (R.3426–28) She

thought it was an old 1960s Thunderbird, powder blue but so rusted that it was hard to see. (R.3429)

8. By stipulation, the parties agreed that James Miller would testify that he was driving on Highway 50 in O'Fallon on December 31, 1999, and observed a black Chevy S–10 pickup truck parked in the parking lot of the dance apparel shop between 6:30 and 6:45 p.m. (R.3456) That description matched the vehicle driven by Jody Wood, who had a dating relationship with Blumberg. (R.3471–74) When police first came to speak to Wood, he was hiding in a closet in his apartment. (R.3472)

10. Defense evidence: Testimony re John Sprous's confession to a murder

The defense presented the testimony of John Little, an inmate serving a life sentence in Missouri, who implicated another inmate, John Sprous, as the murderer of Blumberg. (R.3515, 3533–3556) This was based on a conversation Little overheard between Sprous and three other inmates on January 19, 2002. (R.3540–41) He could hear the conversation through a common vent that his cell shared with three other cells. (R.3542–43) Little had known Sprous since the early 1990s. (R.3543)

He said that his own memory of the conversation was sketchy, although upon review, he recalled flashes of it. (R.3535) Defense exhibit 54 was Little's handwritten notes of the conversation, which he had not seen since turning them over to investigators in 2002. (R.3540) He testified that the notes were taken as he was hearing the conversation and that they were accurate. (R.3541)

Sprous said that there was a girl in an adult magazine that the inmates were looking at that reminded him of a girl he had killed in Illinois who looked a lot like actress Nicole Eggert. (R.3546–47) Defense exhibit 53 was admitted, to show the resemblance. (R.3509; compare to State exhibit M3 (E.344), showing Blumberg (R.2570))

Sprous said he went from St. Louis to Illinois for a drug deal, exited the interstate, pulled into a service station, saw a young, blond, college-age woman in a store window and went into the store with the intention of robbing it. (R.3548–49) He said it was a clothing store for aerobics or gymnastics or something like that. (R.3550) As he walked through the door, he heard an alarm or chime. (R.3549) Detective Spanley testified that there was a chime on the door to the dance apparel store, a detail that he did not know until he heard Little's account. (R.3496–97)

Sprous said that he engaged the girl in conversation, then physically attacked her and decided to rape her. (R.3551–52) He restrained her, and she started to plead with him to take her gold jewelry, saying that her father was wealthy and she would give him money. (R.3552–53) He said he grabbed her breast. (R.3553) The pathologist who performed the autopsy on Blumberg's body testified that she had a small bruise on her right breast that was recent in origin. (R.3277, 3284)

According to Little, Sprous had Blumberg in a headlock as she was begging him, and he then saw either a taxi or police car cross in front of the building, so he wrestled her down and killed her. (R.3553–55) He was high on cocaine. (R.3554) He said he "freaked out" at the sight of the vehicle, which made him kill her; he did not say how but said he had both a knife and a gun on him. (R.3555–56) He moved the body where it could not be plainly seen and returned to St. Louis, saying that he did not actually sexually assault her or commit a robbery. (R.3556) No evidence was presented in this case that Blumberg was sexually assaulted, despite the positioning of the nearly nude body when discovered. (State Ex. M1)

Little was eligible for parole, with a hearing in two days. (R.3559–60) He had several prior convictions and had been in continuous custody since 1992. (R.3561) He admitted that it was possible that Sprous was bragging, and he could not vouch for Sprous's veracity. (R.3562) He agreed that bogus stories in prison are common (R.3563) but added that a rape was not something that inmates would typically brag about, as it would not help them gain status. (R.3578) He admitted that he had no independent recollection of the conversation and that it was possible he might have been set up to hear a deliberately false conversation. (R.3564–65)

Spanley investigated Little's report and considered Sprous a suspect but was skeptical because jailhouse bragging occurs frequently. (R.3490–91) However, he spoke to Little and Little did not ask him for any help to get a deal. (R.3492–93) Spanley verified that Sprous was out on parole when the murder occurred, and that he landed back in prison after shooting a clerk or a pharmacist while on escape status from a halfway house. (R.3494) He obtained a copy of Sprous's fingerprints, but they did not match any taken from the store. (R.3495) The police had Sprous's DNA profile, but Spanley did not know whether the crime lab tried to match the samples they had with Sprous. (R.3496)

Spanley verified that Sprous was driving the type of vehicle described in Little's account, a light blue old Camaro, and that he was arrested in that vehicle. (R.3498) He did not search the Camaro for evidence. (R.3499)

Little did not know whether the victim had been stabbed or shot. (R.3502) According to Little, Sprous said that he had contact with the counter and cash register area, where gunshot residue was found. (R.3502–03) The police never spoke with Sprous. (R.3503) Little gave Spanley the names of five other people who witnessed the conversation, but the police never interviewed them. (R.3503–04, 3512) The police stopped investigating Sprous when Mr. Phillips became the lead suspect. (R.3504)

11. Defense evidence: Expert critique of the investigation

Brent Turvey, a forensic scientist specializing in behavioral profiling, also testified for the defense. (R.3580–81) He had done trainings for the Major Case Task Force in the St. Louis area and had given expert testimony in numerous areas of criminal investigation and analysis. (R.3582–83) Defense exhibit 55 is his CV. (R.3584)

Turvey critiqued the early investigation of Blumberg's murder, noting that the police had parked a vehicle right on top of the entranceway to the shop, where evidence might be found, had failed to investigate for blood trails or other evidence outside the shop, failed to search the victim's vehicle and failed to examine other doorways to the building. (R.3588–90) The crime scene sketch was poorly done and was incomplete. (R.3590–91) The police failed to use various tests for fingerprints, blood or blood spray. (R.3593–95) They failed to test the bullet to see if the victim's blood or cells were on it. (R.3596–97) There were doors missing from the diagram used at trial and it was very deceptive. (R.3600–01)

Based on the trajectory of the recovered bullet, the autopsy report and area of the shop where Blumberg was shot, Turvey determined that Blumberg was not standing up but was struggling, lower to the ground, when shot. (R.3603–07) Her position was consistent with being in a headlock. (R.3608) He testified that finding a hair on a person's leg would not be inconsistent with shaking that person's leg. (R.3609) He concluded that the scene was staged to make it look like a sexual assault even though no sexual assault had occurred. (R.3610–14) The perpetrator was careful not to leave any bloodied footprints. (R.3614)

12. Length of jury deliberations.

The jury retired at 1 p.m. on April 11, 2007. (R.3793) It requested, and received for review, the videotapes of Mr. Phillips and Emily Emily, and transcripts of the testimony of Dawn Ritchey, Joe Hea, James Ritchey and John Hackman. (R.3795–99, 3811–3822, 3841, 3845–46) It deliberated for a full day on April 12 and did not reach its guilty verdict until 5 p.m. on April 13, 2007, a Friday. (R.3848–3850)

13. Mr. Phillips's affidavit

In an affidavit attached to his initial post-conviction petition, Mr. Phillips testified that, contrary to Dawn's trial testimony:

1. He never told Dawn that he got blood on his pants on December 31, 1999, by dragging an animal off the road. (C.1050)

2. He told Dawn immediately after he arrived home about finding the victim in this case after she had already been killed by an unknown person. (C.1050)

3. He told her that day that he was going to an auto parts swap meet, not a gun show, and that when he was unable to find the swap meet, he went back to find the sign in the yard for the meet; he never told her that he had seen it on a flyer. (C.1050)

4. He never told her that he noticed that the pants of the victim were pulled down around her knees or ankles. (C.1050)

5. Both Dawn and her father told him that he should not go to the police, which is why he did not make a police report. (C.1050)

6. He did not have the carrying case to Dawn's .380 pistol or any other pistol when he left home on the morning of December 31, 1999. (C.1050)

7. It was Dawn who threw away the pants that he had worn that day, a few days later, when she could not get the blood spots out of them. (C.1050–51)

8. He still had his brown leather jacket when he returned home, but it turned up missing a short time after that, along with other items that he and Dawn

believed had been stolen by their housekeeper. (C.1051)

Mr. Phillips further stated that all of his statements to Dawn about the murder scene were made while they were still married, but that his trial attorney, Andrew Sosnowski, refused to invoke the marital privilege. (C.1051)

(b) If you **did not** exhaust your state remedies on Ground One, explain why: N/a.

(c) **Direct Appeal of Ground One**:

(1) If you appealed from the judgment of conviction, did you raise this issue? No.

(2) If you did not raise this issue in your direct appeal, explain why: In part because, to make this claim, petitioner had to assert facts *de hors* the record available on direct appeal, and, in part, because petitioner was still being represented by some of his trial attorneys on direct appeal, and, as appellate counsel, they did not raise any issues implicating their own effectiveness at trial.

(d) **Post-Conviction Proceedings:**

(1) Did you raise this issue through a post-conviction motion or petition for habeas corpus in a state trial court? Yes.

(2) If your answer to Question (d)(1) is YES, state:

Type of motion or petition: Initial post-conviction petition.

Name and location of the court where the motion or petition was filed: Circuit Court of the Twentieth Judicial Circuit, St. Clair County, Illinois.

Docket or case number: 03–CF–1744.

Date of the court's decision: June 7, 2018.

Result (attach a copy of the court's opinion or order, if available): Petition dismissed at second stage. Copy is attached (please note that the pages in that pdf file are out of order, as they appeared that way in the record on appeal).

(3) Did you receive a hearing on your motion or petition? No.

(4) Did you appeal from the denial of your motion or petition? Yes.

(5) If your answer to Question (d)(4) is YES, did you raise this issue in the appeal? Yes.

(6) If your answer to Question (d)(4) is YES, state:

Name and location of the court where the appeal was filed: Illinois Appellate Court, Fifth District, Mt. Vernon, IL.

Docket or case number: 5–18–0348.

Date of the court's decision: August 25, 2022, then modified upon denial of rehearing, on October 7, 2022.

Result (attach a copy of the court's opinion or order, if available): The judgment of the circuit court was affirmed. A copy of the appellate court's order is attached. A petition for leave to appeal to the

Illinois Supreme Court was summarily denied on January 25, 2023, in case No. 129092. *People v. Phillips*, 201 N.E.3d 595 (Ill. 2023).

(7) If your answer to Question (d)(4) or Question (d)(5) is NO, explain why you did not raise this issue: N/a.

(e) **Other Remedies**: Describe any other procedures (such as habeas corpus, administrative remedies, etc.) that you have used to exhaust your state remedies on Ground One: N/a.

GROUND TWO: The State committed a *Brady* violation[1] when it failed to disclose or provide a recording of Dawn's second threatening voicemail message, left on his answering machine. Petitioner was also denied effective assistance of counsel when trial counsel failed to request that recording from the State.

(a) **Supporting facts**: See supporting facts presented for Ground One. In addition:

In an addendum to his initial post-conviction petition, Mr. Phillips argued that he was denied due process of law and that a *Brady* violation had occurred when the State failed to disclose a voice-mail message

[1] Petitioner is mindful of the Court's instruction not to cite case law or argue the case herein. However, *Brady* is mentioned herein, not for purposes of making the legal argument, but for the limited purpose of identifying the nature of the constitutional claim. In *Brady v. Maryland*, 373 U.S. 83 (1963), the U.S. Supreme Court held that the prosecution violates an accused's constitutional right to due process of law by failing to disclose evidence favorable to the accused and material to guilt or punishment.

left by ex-wife Dawn Ritchey on his cell phone that would have significantly impeached her testimony at trial. (C.1475) A tape recording of that message was in the possession of the police prior to the trial yet was not disclosed to the defense before the trial. (C.1475) Mr. Phillips learned of it through a Freedom of Information Act request in January 2015. (C.1475 015076)

To place the potential significance of the undisclosed voice-mail recording in context:

1. A message was left on Mr. Phillips' phone on August 14, 2003, during the divorce proceedings. (C.1476) Dawn stated:

> Ed I just wanted to ask you if you had any input on this before I make a call. I thought I was going to call Jim Stover of the O'Fallon Police Department about an unsolved murder. I just wondered if you had any thoughts on that before I made the call. I'll talk to you later. Bye.
>
> (C.1468, 1476)

2. Mr. Phillips responded with a voice-mail message on August 17, 2003, stating:

> Hi, Dawn. I just wondered if you had any input on this and I just wanted to check with you first in case I decided to make a call. I made a little trip to talk to some people and I decided to make a statement, and these nice people assured me that there is absolutely nothing to be concerned about. In fact, someone mentioned a term called attempted blackmail. This would be a good time to stop playing games and treat each other like we at least used to love each other. So I guess it

> is back to the bargaining table since I want the home and 50–50 visitation and you will have custody and I will help you get a place if you treat me like you know you should. I just wanted to get your input first in case I decided to make a call. I guess I'll talk to you later.
>
> (C.1468–69, 1476)

3. On August 18, 2003, Dawn left another voice-mail message for Mr. Phillips. In that message she stated:

> Hi, Ed. It's Dawn. I just got your last message. Okay. I guess it won't be blackmail because I'm gonna call Captain Jim Stover tomorrow at the O'Fallon Police Department and I guess we'll just do this. I can't understand why you won't be nice and I guess it is what I will have to do. Well, I will talk to you later. Bye.
>
> (C.1469, 1476–77)

4. On August 19, 2003, Mr. Phillips recorded these three voice-mail messages onto a cassette tape and labeled it as "Dawn's blackmail phone calls." (C.1477)

5. On December 18, 2003, officers from the O'Fallon police department executed a search warrant on Mr. Phillips' truck. Among the items seized by the police was an envelope containing the cassette tape. The search of the truck and discovery of the blackmail recordings is documented in O'Fallon police report number 99–22191, dated December 24, 2003, and signed by Detective James Cavins. The blackmail tape is documented in the O'Fallon police department evidence inventory as Exhibit Number 87 (5952–5955). (C.1477)

6. Mr. Phillips' motion for discovery before trial included a request for any statements by any of the State's witnesses and any evidence favorable to the accused. (C.1477) The State provided the defense a copy of the August 14, 2003, voice-mail referred to in point 1, *supra*, but the defense never received a copy of the other two voice-mails. (C.1477)

7. During the trial, Mr. Phillips informed his attorneys that there was a second recorded voice-mail message that Dawn had left him and that the police possessed the only copy of the recording. However, lead counsel Sosnowski failed to follow up on this information. The transcript of the trial shows that counsel questioned Dawn regarding the first (August 19, 2003) voice-mail recording but no mention was ever made about Dawn's second message. (C.1477) If counsel had followed up on Mr. Phillips's request to obtain a copy of the second recorded message, he could have obtained it, since the O'Fallon police did, in fact, have it in their possession.

7. At trial, counsel attempted to impeach Dawn's testimony by showing that it was motivated by her animosity toward Mr. Phillips over issues in their divorce. Counsel asked Dawn whether she made a call threatening to go to Jim Stover "about an unsolved murder," and Dawn denied having any recollection of it. (R.3128–29) After the recording of the first voice mail was played for her, she denied that it was her voice on the recording, maintaining that she did not recall making the call, and asserting twice that it "doesn't sound like me" and that "that's really not how I talk." (C.1478; R.3153–54) The defense was unable to effectively dispute that denial, in part because

Dawn did not state her name in that first message. (C.1478) In other words, the attempt to impeach Dawn failed, or at least was rendered less effective, because the defense lacked evidence to prove that it was her voice on the recording.

8. In the second voice-mail message, Dawn clearly stated her name and provided an additional, slightly longer sample of her voice that included a reference to Mr. Phillips's call to her. Mr. Phillips contended that if the defense had been able to present the second message to the jury, it would have made it more difficult for her to credibly deny that it was she who had left these messages. (C.1478)

9. On September 24, 2014, Mr. Phillips submitted a request to the O'Fallon police department under the Freedom of Information Act, requesting that the police send a copy of the tape to his mother, Doris Lehne. Several months later, a CD was sent to Ms. Lehne from Captain Reginald Hunter of the O'Fallon Police Department containing a complete copy of the cassette tape recording. An affidavit by Captain Hunter was included with the disclosure, stating that the CD was "a true and correct copy of Exhibit #87 – (12) TDK D60 Audio cassette tape labeled Dawn's black male [sic] phone calls." (C.1478)

10. Lehne listened to the CD and the three messages are verbatim as indicated in points 1–3, *supra*. Mr. Phillips stated that they are a complete and accurate transcript of the three voicemail messages that were on the cassette tape that he had labeled as "Dawn's blackmail phone calls," and which was in his truck prior to it being searched. (C.1478)

11. These factual allegations were supported by the affidavits of Ms. Lehne and Mr. Phillips. (C.1468–1473)

12. At trial, when initially asked if she had ever threatened her husband with his failure to report what he knew about the murder in August or September of 2003, Dawn admitted calling him – once – and telling him, "if you continue to do the things you're doing, then I'm going to tell *the court* everything I've ever known about you, including the scene that you witnessed that you didn't report." (Emphasis added; R.3097–98) She later testified that she "might" have left more than one such message but couldn't remember. (R.3098) Thus, she only threatened to tell the divorce court that he had failed to *report* a crime, which is not a criminal offense. Yet, the person who had left the voice mail recordings on Mr. Phillips's cell phone threatened to call a *police officer* "about an unsolved murder." (C.1476) She named a specific officer with the O'Fallon police, signaling that she had made an initial inquiry about whom to contact. Accordingly, the call Dawn admitted making to Mr. Phillips at trial was far less threatening in nature than the contents of the first recorded message.

13. On cross-examination, Dawn first stated that she "didn't consider it [the message] a threat." (R.3127) It was only when confronted with the possibility of having the tape of her first police interview played back for her that she admitted telling the police and a prosecutor that she had made a threatening call to Mr. Phillips, because he had been seeking custody of their children. (R.3127–28)

14. When asked whether she had threatened Mr. Phillips with "blackmail," she hedged, and trial counsel rephrased the question, eliminating that word. (R.3127) If the jury had heard her second phone message, however, it would have heard her say, "I guess it won't be blackmail because I'm gonna' call Captain Jim Stover tomorrow at the O'Fallon Police Department and I guess we'll just do this" (Emphasis added, C.1476) – tacitly admitting that she *had* attempted to blackmail him in the prior call.

(b) If you **did not** exhaust your state remedies on Ground Two, explain why: N/a.

(c) **Direct Appeal of Ground Two:**

(1) If you appealed from the judgment of conviction, did you raise this issue? No.

(2) If you did not raise this issue in your direct appeal, explain why: It was based on facts *de hors* the record on direct appeal, and could not be raised until petitioner was able to obtain the above-referenced tape recordings from the O'Fallon police department, post-trial. Therefore, it had to be raised in a collateral proceeding. Additionally, with respect to the ineffective assistance claim, petitioner was still being represented by some of his trial attorneys on direct appeal, and, as appellate counsel, they did not raise any issues implicating their own effectiveness at trial.

(d) **Post-Conviction Proceedings:**

(1) Did you raise this issue through a post-conviction motion or petition for habeas corpus in a state trial court? Yes.

(2) If your answer to Question (d)(1) is YES, state:

Type of motion or petition: Initial post-conviction petition.

Name and location of the court where the motion or petition was filed: Circuit Court of the Twentieth Judicial Circuit, St. Clair County, Illinois.

Docket or case number: 03–CF–1744.

Date of the court's decision: June 7, 2018.

Result (attach a copy of the court's opinion or order, if available): Petition dismissed at second stage. Copy is attached (please note that the pages in that pdf file are out of order, as they appeared that way in the record on appeal).

(3) Did you receive a hearing on your motion or petition? No.

(4) Did you appeal from the denial of your motion or petition? Yes.

(5) If your answer to Question (d)(4) is YES, did you raise this issue in the appeal? Yes.

(6) If your answer to Question (d)(4) is YES, state:

Name and location of the court where the appeal was filed: Illinois Appellate Court, Fifth District, Mt. Vernon, IL.

Docket or case number: 5–18–0348.

Date of the court's decision: August 25, 2022, then modified upon denial of rehearing, on October 7, 2022.

Result (attach a copy of the court's opinion or order, if available): The judgment of the circuit court was affirmed. A copy of the appellate court's order is attached. A petition for leave to appeal to the Illinois Supreme Court was summarily denied on January 25, 2023, in case No. 129092. *People v. Phillips*, 201 N.E.3d 595 (Ill. 2023).

(7) If your answer to Question (d)(4) or Question (d)(5) is NO, explain why you did not raise this issue: N/a.

(e) **Other Remedies**: Describe any other procedures (such as habeas corpus, administrative remedies, etc.) that you have used to exhaust your state remedies on Ground One: N/a.

GROUND THREE: **Trial counsel were ineffective in failing to request that the recording of the petitioner's police interview be redacted to remove the reference to the order of protection against him.**

(a) **Supporting facts**: See supporting facts presented for Ground One. In addition:

In the recorded interview that Mr. Phillips had with police on December 17, 2003, at approximately 31 minutes and 20 seconds in, Mr. Phillips stated that Dawn "came up with the order of protection" against him, kicked him out of his home and had made his "life hell," shortly after she threatened to expose his knowledge of the Blumberg murder.

Long before the trial, the defense filed a motion *in limine* seeking to bar the State from introducing any evidence that Mr. Phillips had "previously been convicted or charged with a criminal offense, or has otherwise been involved in other crimes, wrongs or act." (C.102) Although the State asserted its right to impeach Mr. Phillips with some prior convictions, it agreed, on November 8, 2006, that it was "not seeking under any circumstances for impeachment purposes to get into his unlawful violation of an order of protection *conviction*." (Emphasis added; R.124) It specifically agreed not to introduce any reference to the order of protection through witness John Hackman. (R.212–213) The court denied the defense motion with respect to other convictions but granted the motion with respect to the order of protection violation convictions. (C.287)

On January 9, 2007, Mr. Phillips' defense counsel filed a motion for redactions that sought to redact certain statements made in Mr. Phillips' videotaped statements, including the statement recorded on December 17, 2003 and another statement that was never introduced at trial. (C.332) With respect to the December 17, 2003, recording, it sought to redact "[a]ll references regarding the location of the interview," and "[a]ll references regarding the presence of Edward Phillips' attorney" – but nothing else. (C.332) That motion was denied. (C.343)

At a hearing outside the presence of the jury just before the jury was sworn, the parties agreed that both sides "would not be using the term *with their witnesses* 'order of protection,'" and the State agreed that it would instruct its witnesses not to use that term. (Emphasis added; R.2428) The following day, after the videotaped recording of Mr. Phillips' December 17, 2003, police interview was played for the jury, defense attorney Andrew Sosnowski stated the following to the court, outside the presence of the jury:

> I did notice that there was a redaction that was not made regarding a reference to "order of protection." I believe that we had an agreement at the beginning of the trial and an understanding, and I believe I don't know if it was reduced to an order but that the word and the comments "order of protection" would not be used. It would be "divorce proceedings." And that goes for all witnesses or I would imagine all evidence that's in possession of the State.
>
> (R.2754)

Sosnowski moved for a mistrial based on this reference (R.2752), but the State observed that the parties' agreement only pertained to witness testimony, and that the defense "had this tape for seven months, the videotape, or longer now, and they never filed a motion to redact." (R.2753) The court denied the motion. (R.2754–55)

Subsequently, in his testimony, Hackman mentioned the order of protection that Dawn had obtained against Mr. Phillips, contrary to the agreement between the parties and the court. (R. 2959) Sosnowski again moved for a mistrial based on this violation of the court's order, noting that the jury had now heard a reference to the order of protection a second time. (R.2966–67) However, since counsel had failed to request the redaction of the reference to the order of protection on the taped police interview of Mr. Phillips, the court could not consider that as a violation of the order, and it denied the motion for mistrial based solely on Hackman's testimony mentioning the order of protection, which Hackman claimed was inadvertent. (R.2970, 2979)

(b) If you **did not** exhaust your state remedies on Ground Three, explain why: Petitioner asserts that his state remedies as to this issue *were* exhausted, but the issue is complicated, and some explanation is warranted here.

In his direct appeal, petitioner raised the issue that the trial court erred in denying his requests for a mistrial, based on both the reference to the order of protection on the videotaped police interview and on witness Hackman's reference to the order of protection. The appellate court denied relief on that ground, in part because of defense counsels' failure to request that the videotape be redacted in order to remove the reference to the order of protection. See *Phillips*, 2011 IL App (5th) 070416–U, ¶¶ 198–99 (not cited for purposes of legal argument but for the purpose of providing the factual explanation required here).

However, petitioner did not specifically raise the issue of counsel being ineffective in failing to request that the reference to the order of protection be redacted. Here again, petitioner was represented on appeal by some of the same attorneys who had represented him at trial, and they were neither inclined nor able to raise a claim based on their own ineffectiveness.

Petitioner wanted to include this issue in his post-conviction claims, but his post-conviction counsel failed to include it in either the initial post-conviction petition or the supplement to that petition. Petitioner raised this issue in the appeal from the dismissal of his post-conviction petition, but the issue had to be framed as a claim of unreasonable assistance of post-conviction counsel under Illinois law. Thus, it was not, in itself, a federal constitutional claim, but the *underlying* claim it encompassed (*i. e.*, the issue that post-conviction counsel failed to raise) was a federal constitutional claim.

Accordingly, petitioner contends that he did exhaust his state remedies with respect to this issue, but, if that contention is rejected, he offers the foregoing explanation as to why it was not exhausted.

(c) **Direct Appeal of Ground Three**:

(1) If you appealed from the judgment of conviction, did you raise this issue? No.

(2) If you did not raise this issue in your direct appeal, explain why: Petitioner was represented on appeal by some of the same attorneys who had represented him at trial, and they were neither inclined nor able to raise a claim based on their own ineffectiveness.

(d) **Post-Conviction Proceedings:**

(1) Did you raise this issue through a post-conviction motion or petition for habeas corpus in a state trial court? No, not directly. (See further explanation in sub-part (b).)

(2) If your answer to Question (d)(1) is YES, state:

Type of motion or petition:

Name and location of the court where the motion or petition was filed:

Docket or case number:

Date of the court's decision:

Result (attach a copy of the court's opinion or order, if available):

(3) Did you receive a hearing on your motion or petition? ☐Yes ☐No

(4) Did you appeal from the denial of your motion or petition? ☐Yes ☐No

(5) If your answer to Question (d)(4) is YES, did you raise the issue in the appeal? ☐Yes ☐No

(6) If your answer to Question (d)(4) is YES, state:

Name and location of the court where the appeal was filed:

Docket or case number:

Date of the court's decision:

Result (attach a copy of the court's opinion or order, if available):

(7) If your answer to Question (d)(4) or Question (d)(5) is NO, explain why you did not raise this issue: See answer to sub-part (b). The issue was not raised because petitioner was represented by post-conviction counsel, who refused to raise it. On appeal, petitioner did seek to raise the issue, but it had to be encompassed within a claim of unreasonable representation of post-conviction counsel under Illinois state law. That appeal was filed in the Illinois

Appellate Court, Fifth District, Mt. Vernon, IL, No. 5–18–0348. The date of the court's decision was August 25, 2022, then modified upon denial of rehearing, on October 7, 2022. The judgment of the circuit court was affirmed. A copy of the appellate court's order is attached.

(e) **Other Remedies**: Describe any other procedures (such as habeas corpus, administrative remedies, etc.) that you have used to exhaust your state remedies on Ground One: N/a.

14. Please answer these additional questions about the petition you are filing: Have all grounds for relief that you have raised in this petition been presented to the highest state court having jurisdiction? No.

If your answer is NO, state which grounds have not been so presented and give your reason(s) for not presenting them: This applies only to Ground Three; Grounds One and Two were presented to the Illinois Supreme Court. Ground Three was not presented, in part because it had to be incorporated into a claim of unreasonable representation of post-conviction counsel, as explained in Ground Three, sub-parts (b)–(d).

In addition, Ground Three could not even be presented to the Illinois Supreme Court indirectly (as it had been to the Illinois Appellate Court), since Illinois Supreme Court Rule 315(d) limits petitions for leave to appeal to 20 pages or 6,000 words, and it was not possible to present Ground Three to the court while also adequately explaining the factual and legal bases for Grounds One and Two. It took 5,905 words to present Grounds One and Two in the petition for leave to appeal, and even that required omitting a number of facts and points of law. In addition, the petition for leave to appeal to the Illinois Supreme Court had to be framed in terms of highlighting a conflict between the appellate court's order and opinions of other districts or the Illinois Supreme Court itself, in keeping with Illinois Supreme Court Rule 315(a), which further made it impossible to present all three grounds to that court in a comprehensible, let alone effective, manner.

Is there any ground in this petition that has not been presented in some state or federal court? If so, which ground or grounds have not been presented, and state your reasons for not presenting them: All grounds were presented, but, once again, Ground Three had to be incorporated within a broader claim of unreasonable representation of post-conviction counsel, for the reasons explained in Ground Three, sub-parts (b)–(d).

15. Have you previously filed any type of petition, application, or motion in a federal court regarding the conviction that you challenge in this petition? No.

If YES, state the name and location of the court, the docket or case number, the type of proceeding, the issues raised, the date of the court's decision, and the result for each petition, application, or motion filed. Attach a copy of any court opinion or order, if available.

16. Do you have any petition or appeal now pending (filed and not decided yet) in any court, either state or federal, for the judgment you are challenging? No.

If YES, state the name and location of the court, the docket or case number, the type of proceeding, and the issues raised.

17. .Give the name and address of each attorney who represented you in the following stages of the judgment you are challenging:

(a) At preliminary hearing: There was no preliminary hearing. Petitioner was charged by indictment.

(b) At arraignment and plea: Randall Kelley, Public Defender, St. Clair County, 10 Public Square, 4th Floor, Belleville, IL 62220.

(c) At trial: Andrew J Sosnowski, David R. Akemann and Kelli M. Childress Politte, Law Offices of Andrew J Sosnowski, current address at 164 Division Street Suite 508, Elgin, Illinois 60120–5531. Mr. Akemann's current address is not currently listed on the ARDC website, although he apparently served as a circuit court judge until retiring from that position in 2017. Ms. Politte, now Kelli Marie Childress, is currently at the office of the El Paso County Public Defender, 500 E San Antonio Street Fifth Floor, El Paso, Texas 79901.

(d) At sentencing: Same as trial counsel.

(e) On appeal: On direct appeal, petitioner was represented by attorneys Akemann and Politte (see above).

(f) In any post-conviction proceeding: Don Zuelke, 555 S. Randall Rd., Suite 204, St. Charles, IL 60174.

(g) On appeal from any ruling against you in a post-conviction proceeding: Richard J. Whitney, Office of the State Appellate Defender, Fifth District Office, 909 Water Tower Circle, Mt. Vernon, IL 62864.

18. Do you have any future sentence to serve after you serve the sentence for the judgment that you are challenging? No.

(a) If so, give name and location of court that imposed the other sentence you will serve in the future:

(b) Give the date the other sentence was imposed:

(c) Give the length of the other sentence:

(d) Have you filed, or do you plan to file, any petition that challenges the judgment or sentence to be served in the future? ☐Yes ☐No

In light of the foregoing, Petitioner asks the Court to grant the following relief: That a writ of *habeas corpus* issue from this Honorable Court, to be directed to Anthony Hill, Warden of Menard Correctional Center, Randolph County, State of Illinois, aforesaid, and whomsoever may hold your petitioner in custody, commanding him and them to have the body of your petitioner before this Honorable Court, at a date to be fixed by the Court, for the purpose of inquiring into the cause of the commitment and detention of your petitioner, and to do and abide by such order as this Court may make in the premises. Your petitioner further requests that this Court grant a writ of *habeas corpus* discharging petitioner from his unconstitutional conviction and sentence.

I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct and that this petition was placed in the prison mailing system on January 10th, 2024.

Signed on: January 10, 2024
(date)

PO Box 1030
Street Address

Menard IL 62259
City, State, Zip

/s/ Edward S. Phillips
Signature of Petitioner

Edward S. Phillips
Printed Name

/s/ Richard J. Whitney
Signature of Attorney (if any)

If the person signing is not Petitioner, state relationship to Petitioner and explain why Petitioner is not signing this motion.

Appendix D
[Filed: Mar. 11, 2025]

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 25–1393

EDWARD S. PHILLIPS, S01121	)	
	)	Appeal from the United States District Court for the Southern District of Illinois, No. 3:24–cv–467–DWD
Petitioner-Appellant,	)	
v.	)	
ANTHONY WILLS, Warden	)	The Honorable David W. Dugan. Judge Presiding
Respondent-Appellee.	)	

MOTION FOR
CERTIFICATE OF APPEALABILITY

Now comes Petitioner-Appellant, Edward S. Phillips, by counsel, and moves this Court, pursuant to Federal Rule of Appellate Procedure 22(b)(1), for a certificate of appealability of the District Court's order and judgment dismissing his petition for a writ of *habeas corpus* under 28 U. S. C. §2254, with prejudice. (Docs. 14 and 15) The grounds for this motion are as follows:

I. Standards for granting a certificate of appealability

A certificate of appealability ("COA") should issue when the petitioner "has made a substantial showing of the denial of a constitutional right." 28 U. S. C. § 2253(c)(2); *Miller-El v. Cockrell*, 537 U. S. 322, 338 (2003); *Barefoot v. Estelle*, 463 U. S. 880, 893 (1983). "Under the controlling standard, a petitioner must show that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." *Miller-El*, 537 U. S. at 336. (internal quotation marks omitted).

"Until the prisoner secures a COA, the court of appeals may not rule on the merits of his case." *Buck v. Davis*, 580 U. S. 100, 115 (2017). "The COA inquiry, we have emphasized, is not coextensive with a merits analysis. At the COA stage, the only question is whether the applicant has shown that 'jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further.'" *Id.*, *quoting Miller-El,* 537 U.S. at 327. "This threshold question should be decided without '"full consideration of the factual or legal bases adduced in support of the claims."' *Buck*, 580 U. S. at 115, *quoting Miller-El,* 537 U. S. at 336. "Indeed, a claim can be debatable even though every jurist of reason might agree, after the COA has been granted and the case has received full consideration, that petitioner will not prevail." *Miller-El*, 537 U. S. at 338.

II. Procedural History

On February 20, 2024, Mr. Phillips filed a petition under 28 U. S. C. §22545 for a writ of *habeas corpus* by a person in state custody, requesting discharge from his conviction and sentence for murder. (Doc. 1) The petition sought relief under three principal grounds:

1) He was denied effective assistance of counsel by the failure of his trial counsel to assert the marital privilege against his ex-wife Dawn Ritchey.

2) The State committed a *Brady* violation (per *Brady v. Maryland*, 373 U. S. 83 (1963)), when it failed to disclose or provide a recording of a threatening voice-mail message, left on his answering machine by Dawn, that the State had in its possession. Relatedly, Mr. Phillips was also denied effective assistance of counsel when trial counsel failed to request that recording from the State after being informed of its existence.

3) Trial counsel were ineffective in failing to request that a recording of Mr. Phillips's interview by police be redacted to remove a reference to the fact that Dawn had obtained an order of protection against him.

With respect to all three grounds, Mr. Phillips contended that the evidence in the case was closely balanced, *i. e.*, barely sufficient to sustain the conviction, and, therefore, even a slight shift of the evidence in his favor would have led to his acquittal. The petition (at pages 7–19) therefore contained a comprehensive review of all of the evidence in the case, both that favoring the State and that favoring the defense.

On July 22, 2024, the State filed a motion to dismiss the petition on the ground that it was time-barred.

(Doc. 10) Mr. Phillips filed a reply on September 20, 2024. (Doc. 13) In the reply, Mr. Phillips did not contest the fact that the petition was statutorily untimely, but asked the court to excuse the untimeliness on two grounds: 1) Equitable tolling, and 2) a claim of actual innocence, based on new evidence referenced in his petition.

With respect to the equitable tolling claim, Mr. Phillips contended that he had acted with reasonable diligence, but that his petition was untimely filed due to the extraordinary circumstance that his attorney had affirmatively and explicitly informed him, incorrectly, that the statutory deadline for filing his petition was on April 24, 2024.

Mr. Phillips acknowledged the body of case law holding that, ordinarily, a petitioner must bear the risk of attorney error, and that a simple miscalculation that leads a lawyer to miss a filing deadline does not warrant equitable tolling. In this case, however, Mr. Phillips himself had been informed, correctly, that the time for filing a *habeas* petition begins on the date when the judgment on a prisoner's *direct* appeal becomes final, and is only tolled during periods in which collateral proceedings are active. He then asked his attorney if this was correct, and his attorney affirmatively *mis*informed him that it was not correct. (See Declaration of Richard J. Whitney, Doc. 13–1, ¶¶ 6–13) This, he contended, went beyond the type of "garden variety" attorney negligence that does not qualify for equitable tolling, and constituted the type of "extraordinary circumstances" that do qualify for such tolling, as discussed by the U.S. Supreme Court in *Holland v. Florida*, 560 U. S. 631, 650–654 (2010).

With respect to the actual innocence claim, Mr. Phillips relied on the extreme closeness of the evidence, and the *Brady* violation described in Ground Two — *i. e.*, the voice mail recording that the police had in its possession at the time of his 2007 trial, which Mr. Phillips was unable to obtain until the O'Fallon Police Department responded to a Freedom of Information Act request on January 21, 2015. Essentially, his argument is that, if he and his attorneys had had possession of this recording at the time of trial, they would have been able to use it to effectively impeach the testimony of the State's most important witness against him — his ex-wife Dawn — thoroughly undermining her credibility.

The foregoing is, of course, a mere summary of Mr. Phillips's reply. Rather than repeat his arguments and supporting materials in their entirety here, he incorporates the reply and supporting exhibits (Docs 13 – 13–3, appended to this motion), and of course the petition itself, into the instant motion, and respectfully requests that this Court consider them in their entirety in reviewing this motion.

On February 7, 2025, the District Court entered a Memorandum and Order, and Judgment, dismissing Mr. Phillips's petition, with prejudice, and denied him a certificate of appealability *sua sponte.* (Docs 14–15) Mr. Phillips now respectfully requests that this Court issue him a certificate of appealability. The court's rationale will be discussed in the next sections of this motion.

III. A reasonable jurist could conclude that Mr. Phillips's petition should not have been dismissed, on grounds of equitable tolling.

As Mr. Phillips already acknowledged in his reply, and herein, it is indeed settled law that, ordinarily, a petitioner "must 'bear the risk of attorney error,'" and that "a garden variety claim of excusable neglect," such as a simple "miscalculation" that leads a lawyer to miss a filing deadline, does not warrant equitable tolling. *Holland v. Florida*, 560 U. S. 631, 650–52 (2010) (internal citations omitted). Indeed, the District Court here provided a veritable deluge of case authorities in support of that proposition. (Doc 14 at 9–13)

However, the *Holland* court also recognized that the "exercise of a court's equity powers . . . must be made on a case-by-case basis," emphasizing the need for "flexibility," and avoiding "mechanical" or overly rigid rules. *Id.* at 649–650 (internal citations omitted). Here, Mr. Phillips presented facts that differentiated his claim from the "garden variety" fact pattern in which a petitioner simply relies to his detriment on counsel, and counsel miscalculates or misapprehends the end point of the statutory limitations period. The distinction is that Mr. Phillips had already *correctly* understood how to calculate the limitations period, explicitly asked his attorney if his understanding was correct, and then his attorney affirmatively *misinformed him* that he had more time than he actually had. (Doc. 13 at 3; Doc. 13-1, ¶¶ 10-12)

This distinguishes the instant case from the body of case law cited by the District Court — even this

Court's recent reaffirmation of the broader rule in *Conner v. Reagle*, 82 F. 4th 542 (7th Cir. 2023), upon which the District Court placed special emphasis. Granted, *Conner* is similar insofar as petitioner Conner did ask his attorney whether he should go ahead and file a *habeas* petition, and his attorney incorrectly advised him that the filing of a petition for *certiorari* challenging the denial of his post-conviction petition would toll the statutory period for filing the *habeas* petition. *Conner*, 82 F. 4th at 548. However, there is nothing in *Conner* that suggests that Conner was already aware of the *correct* method of calculating the deadline but was then persuaded by counsel that his understanding was wrong. The affirmative act by counsel that occurred in the instant matter was qualitatively more egregious than that of the attorney who misadvised Conner. This act was an "extraordinary circumstance," at least in the sense that none of the voluminous case law cited by the District Court was based on the same type of affirmative act that actually *deterred* a petitioner from acting before the statutory deadline passed.

This Court may ultimately determine that this distinction is still not enough to qualify as the kind of "extraordinary circumstance" that prevented Mr. Phillips from timely filing his petition, but it is at least "debatable" that it qualifies. *Miller-El*, 537 U. S. at 336. Accordingly, this Court should grant Mr. Phillips's request for a certificate of appealability on this ground.

IV. A reasonable jurist could conclude that the new evidence obtained by Mr. Phillips, had it been available at trial, would have shifted the evidence substantially in his favor, such that no reasonable juror would have voted to convict him.

In response to Mr. Phillips's actual innocence gateway claim, the District Court concedes that the evidence at issue — Dawn Ritchey's second threatening voice-mail recording, wrongfully kept from the defense by the State — qualifies as "new evidence" that could support an actual innocence gateway claim, but suggests that Mr. Phillips's credibility has been undermined by the "unexplained delay" in presenting it. (Doc. 14 at 14, 36) Yet the court failed to explain why this rule should apply to Mr. Phillips and it appeared to fault him for circumstances beyond his control.

It is true, as the Court suggests, the Mr. Phillips was aware that he had made the recording, and he was probably aware that he had left it in his truck, and that the police had probably seized it. Yet one of his post-conviction claims of ineffective assistance of trial counsel was that he had *informed* his trial attorneys of the existence of the second recording but that they had failed to take action to obtain it from the State. (Doc. 1 at 22, ¶ 7) Being represented by counsel, Mr. Phillips was in no position to issue a *pro se* demand to the State that they produce the missing tape before or during the trial. He did not have means to acquire the missing tape, or a reasonable expectation that he could have acquired it, until after his conviction and sentence and direct appeal had concluded — at which time, he made a Freedom of Information Act request that finally revealed the *Brady* violation, which he then used in support of his post-conviction claims.[1] The delay was not "unexplained," nor was it his fault.

Next, the District Court reviewed all of the evidence in the case, essentially reproducing and adopting the recitation of the evidence as summarized by the Illinois Appellate Court in its orders denying Mr. Phillips's direct appeal and affirming the denial of his post-conviction petition. (Doc. 1 at 15-35) In the process, however, it *repeats factual errors, directly refuted by the record, that the Appellate Court refused to correct.*[2] These errors of fact include the following:

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[1] Section 7(1)(d)(i) of the Illinois Freedom of Information Act,5 ILCS 140/7(1)(d)(i) (2012) exempts law enforcement agencies from having to produce records that "interfere with pending or actually and reasonably contemplated law enforcement proceedings conducted by any law enforcement or correctional agency that is the recipient of the request." Thus, as long as the O'Fallon Police Department reasonably contemplated that Mr. Phillips might be retried, it was under no obligation to release any records from the case.

[2] The undersigned counsel filed a petition for rehearing with the Appellate Court calling attention to these errors of fact. In response to the PRH, the Appellate Court entered a modified order on August 25, 2022, but it failed to correct the errors of fact described herein. The undersigned counsel will attempt to attach a copy of the reports of proceedings, electronic exhibits and the common-law record from *People v. Phillips*, 2022 IL App (5th) 180348–U, so that this Court can verify the factual claims presented herein. Record cites provided herein, as well as those cited in the petition itself, are from those records. If the electronic filing system is unable to accommodate files of that size, counsel will contact the clerk to find another means of providing said records.

1) In describing the testimony of pathologist Raj Nanduri, M.D., the District Court repeats the Appellate Court's assertion that "Dr. Nanduri testified that she was *unable* to tell what caused Amy's death just by visual examination." (Emphasis added; Doc. 14 at 18) *Dr. Nanduri gave no such testimony*. (R.3269–3288) She was never *asked* whether she could determine the cause of death "by just looking at her," which would be contrary to the whole point of conducting an autopsy. What she did say was almost exactly the opposite. She testified that during the initial *external* examination of Blumberg's body she observed "a gunshot wound of entry as well as an exit on her body" (R.3275) — indicating that she *did* determine Blumberg had been *shot* "by just looking at her."

This is significant because one of the State's contentions at trial, as stated in its closing rebuttal argument, was that "the defendant tells his friend that the victim died from a gunshot wound to the head, even though the cause of death was not readily apparent to experienced investigators at the scene." (R.3778) Even that was misleading, as only *one* "investigator," Alva Bush, gave testimony to that effect, and he considered a gunshot wound to be one of the possibilities. (R.2856) Any lay person (including Mr. Phillips) could have surmised that Blumberg had almost certainly been shot in the head by simply looking at the severe defect to Blumberg's skull, surrounded by blood, as shown in the crime scene photo of the body. (Exhibit record at E.340) Yet the Appellate Court lent additional credence to the State's contention by stating a "fact" that even the State did not include in its argument — because it isn't true.

2) In describing the testimony of James Ritchey, the District Court repeats the Appellate Court's statement that he "testified that the defendant bought his daughter a .380-caliber inexpensive pistol, and that the defendant possibly had another .380-caliber gun as well." (Doc. 14 at 27) In his testimony (R.3046-3073), Ritchey never testified that Mr. Phillips may have had a second .380 caliber gun.

3) In its peroration, the District Court repeated and adopted the Appellate Court's assertion that Mr. Phillips, in his police interview, "acknowledges . . . destroying all clothing he was wearing at the time that could tie him to the murder scene." *Phillips*, 2022 IL App (5th) 180348–U, ¶ 175. (Doc. 14 at 39) Mr. Phillips made no such statement in his police interview, nor did he ever make such a statement to any of the State's witnesses.

There were also significant omissions in the Appellate Court's descriptions of the evidence that were adopted by the District Court. For example, Mr. Phillips was driving a truck on the day of the murder. (Doc. 14 at 22) Victoria Dickerson was one of several witnesses who encountered other vehicles (not trucks) driving near or away from the store where the murder occurred that afternoon (Doc. 14 at 32), some of them in a reckless or alarming manner, suggesting that they were in a hurry to leave. Yet the Court's description, again borrowing from that of the Appellate Court, drily reports that "between 3:30 and 4 p.m., she saw an older, boxy gray car drive away from the area. At about the same time, she saw a man standing on the parking lot." 2022 IL App (5th) 180348–U, ¶ 113. I n fact, she testified that the vehicle pulled out of the street on which the store was located, "so fast that he fishtailed," causing her to delay making a turn. (R.3423-24) As they were both stopped at a traffic light, she observed that the man looked angry and hostile and was staring at her and her niece, who was with her in her vehicle, causing her to be alarmed enough to ask her niece to write down his license number (which, unfortunately, she later discarded). (R.3424–25)

Although this omission, in isolation, may not appear to be of game-changing significance, it is part of a larger pattern of downplaying evidence that points away from a finding that Mr. Phillips was the perpetrator, which this Court can only fully appreciate by granting the application for a certificate of appealability and allowing Mr. Phillips the opportunity to more fully present his case for relief, on the basis of the evidence actually presented at trial, considered in conjunction with the new evidence.

Turning now to the central issue of the significance of the *Brady* violation, the District Court cites to *Dixon v. Williams*, 93 F. 4th 394 (7th Cir. 2024), reh'g denied, No. 21–1375, 2024 WL 1510579 (7th Cir. Apr. 8, 2024), where this Court held that, to support a claim of actual innocence, a petitioner "must have documentary, biological (DNA), or other powerful evidence." *Dixon v. Williams*, 93 F. 4th at 403, *quoting Hayes* v. *Battaglia*, 403 F. 3d 935, 938 (7th Cir. 2005). (Doc 14 at 37) A voice mail recording is surely a form of "documentary" evidence, at least in the broad sense that it is a factual and objective tangible piece of evidence that records a person's words. In the context of this case, it is also "powerful," as it would have shifted the balance of evidence in favor of the defense.

At the risk of restating some points already made in the petition and the reply to the motion to dismiss, Mr. Phillips here emphasizes the following:

● When Dawn testified that the voice on the first recording “doesn’t sound like me,” and “that’s not really how I talk,” (R.3153–54), this not only undermined the defense’s attempt to impeach her; it also barred the defense from using the tape as substantive evidence under 725 ILCS 5/115–10.1 (2007). It also made the defense look bad and/or desperate by Dawn's insinuation that it had tried to impeach her with a fraudulent recording. This damage would have been repaired, and Dawn’s credibility damaged instead, if the second recording had been available. The voice on the second recording begins by stating, "[i]t’s Dawn," and provided an additional, longer sample of her speaking voice. (C.1469, 1471) The jury would have more likely drawn the conclusion that Dawn was the speaker on both recordings.

● If the second recording had been available, thereby rebutting Dawn's denial of authenticity of the first recording, it would have provided evidence to the jury that Dawn was willing to lie under oath. This would support the further conclusion that she may have been lying about the statements she attributed to Mr. Phillips regarding the murder.

● If Dawn's credibility had been damaged by the second recording, the jury probably would have viewed the testimony of other witnesses, with whom Dawn had discussed the case, more skeptically. Dawn had discussed Mr. Phillips’s revelations about the murder, prior to the trial, with her co-worker and neighbor Joe Hea just prior to his own interview with police (R.3017; deposition of Emily Hea at 26:00–

30:00), John Hackman (R.2951–54), and, while en route to the trial, her father, James Ritchey. (R.3056)

- Although Mr. Phillips referred to Dawn blackmailing him in his recorded police interview, his claim was uncorroborated. In the second message, Dawn tacitly admits that she had tried to blackmail him, which would have provided vital corroboration. (C.1476-77) The recording also would have corroborated his statements that she had threatened to go to the police, specifically mentioning Jim Stover, and his claims that he had more than one voice-mail recording from Dawn. (State exhibit 23 at 30:51 - 31:50, 39:40 - 40:48) With only one recording played for the jury, which Dawn denied was a recording of her voice, the jury was more likely to conclude that Mr. Phillips had lied to police about having these blackmail recordings.

In sum, if the second voice-mail recording had been available and used at trial, it would have made the impeachment of Dawn far more effective, would have badly damaged her credibility, would have caused jurors to be more skeptical of the testimony of other State witnesses, and would have enhanced Mr. Phillips's credibility.

The District Court nonetheless downplays the significance of the recording, first, by contending that "it remains the case that Dawn, by choosing to make that report years after the murder, potentially subjected herself to criminal liability for not making an earlier report." (Doc. 14 at 38, citing *Phillips*, 2011 IL App (5th) 070416-U, ¶ 246." This is, to put it mildly, more than a stretch. To the best of the undersigned counsel's knowledge, Illinois does not impose an affirmative duty on its residents to promptly report their second-hand knowledge that another person claims to have witnessed the aftermath of a criminal offense — with criminal penalties attaching for those who fail to do so. If such an Orwellian statute or rule exists, neither the District Court nor the Appellate Court has cited it.

The District Court also attaches significance to the fact that, on cross-examination, Dawn admitted telling police that her voice-mail message was "threatening" in nature, because Mr. Phillips was seeking custody of her children. (Doc. 14 at 38) However, immediately thereafter, she explicitly denied conveying the message on the first voice-mail recording (R.3129, 3153-54), thereby harming the defense as described above.

In its conclusion, the District Court asserted that Mr. Phillips "told a largely consistent version of events to James Ritchey, Joseph Hea, Emily Hea Buss and John Hackman," which was followed by a list of seven incriminating points that he purportedly told each of these witnesses. (Doc. 14 at 39) In fact:

● James Ritchey did *not* give any testimony stating that Mr. Phillips said anything about touching the victim's body, getting blood on his clothing, or destroying the leotard, his clothing or a firearm.

● Joseph Hea did *not* give any testimony stating that Mr. Phillips said that he had destroyed his clothing.

● Emily Hea Buss did *not* give any testimony stating that Mr. Phillips said anything about destroying the leotard, his clothing or a firearm.

● John Hackman did *not* give any testimony stating that Mr. Phillips said anything about destroying the leotard or his clothing.

• The claim that Mr. Phillips "found Amy with a gunshot wound to the head, despite the fact that the police investigators and the forensic pathologist could not determine a cause of death by looking at Amy," has already been debunked herein. The forensic pathologist said nothing of the kind, only one police officer, not multiple "investigators," made this claim, and it was fairly obvious even from a lay perspective that a gunshot wound would have been the most probable explanation for the severe defect to the victim's head and the massive amounts of blood surrounding her.

The District Court prefaced its summary of the evidence by stating that it was taken from that provided by the Appellate Court, which it presumed to be correct, and stated that it was "consistent with that of Petitioner," (Doc. 14 at 16) While the District Court's use of that summary is understandable, a careful examination of the record demonstrates that the Appellate Court's summary is *not* entirely consistent with Mr. Phillips's more accurate summary, contains serious error and omissions, and that the presumption of correctness has been rebutted.

The Appellate Court based its own rulings, in part, on a misapprehension of some key evidence. By adopting the same erroneous summary, the District Court was led to adopt the same error-based conclusion.

In fact, the evidence at trial was much more closely balanced than either Court has acknowledged, thus supporting Mr. Phillips's claim that, but for the *Brady* violation (or but for the other errors claimed in the petition), the balance would have been decisively shifted towards acquittal, and no reasonable juror would have found him guilty beyond a reasonable doubt.

At the very least, Mr. Phillips has established that "jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed." *Buck*, 580 U. S. at 115. (quoted by the District Court at 40) Accordingly, Mr. Phillips beseeches this Court to issue a certificate of appealability and do what no reviewing court has thus far undertaken to do — review the evidentiary record in this case scrupulously, *accurately* and fairly, and then, in that context, give due consideration to the impact of the constitutional violations that occurred in this case.

To deny such a review is to tacitly find it acceptable, in the United States of America, for a person to be convicted of a criminal offense after constitutional violations denied him a fair trial, for his conviction to be affirmed by a court of appeals whose decision was based on substantial misapprehensions or errors of fact, and for him to then be left without further recourse to challenge that conviction. Mr. Phillips respectfully implores this Court to challenge this state of affairs, and at least afford him the opportunity to fully present his claim of actual innocence.

Respectfully submitted,

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