

IN THE SUPREME COURT OF MISSOURI
EN BANC

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REGINALD CLEMONS, :

Petitioner, :

- against - :

STEVE LARKINS, Superintendent, :

Eastern Reception Diagnostic and :

Correctional Center, :

Respondent. :

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Capital Case

Execution Scheduled June 17, 2009
(STAYED)

No. SC90197

PETITIONER’S REPLY BRIEF

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PRELIMINARY STATEMENT

The Master found that Clemons’s confession was the product of police coercion—“I think he was coerced into making it.” App. at A108.¹ The State feigns ignorance of that finding, Br. at 38-39, but does not contest it. The Master also found that the State withheld Warren Weeks’s evidence that Clemons had a welt on his face the size of a golf ball or a baseball just hours after his confession; that the State defaced an official record to hide a notation by Weeks’s recording what he saw; that the State attempted to talk Weeks into changing his testimony; and that Weeks’s evidence was “[o]bviously” favorable to the defense. App. at 100-02. The State does not dispute any of these findings either.

Instead, the State argues that the use of a coerced confession as the central piece of evidence in Clemons’s capital murder trial was not prejudicial to him. The State can advance that remarkable proposition only by (a) ignoring the ample evidence in the record supporting the Master’s findings and/or asking this Court to reweigh the evidence; and (b) ignoring the numerous Missouri cases holding that the use of a coerced confession violates due process. The Master found that the State suppressed significant evidence showing that Clemons’s confession was coerced and that there was a reasonable

¹ The State claims that Clemons provided no pin cite for the Master’s finding that Clemons’s confession was coerced. Br. at 38. To the contrary, Clemons provided this cite within the very first paragraph in his Argument section on the State’s violation of *Brady v. Maryland*. Pet. Br. at 16.

probability that the result at trial would have been different had Weeks's evidence not been suppressed. *Brady v. Maryland*, 373 U.S. 83 (1963). Accordingly, under settled law, Clemons's conviction and sentence violate due process and must be vacated.

With respect to Clemons's claim that his death sentence is disproportionate, the State ignores this Court's recognition that it has a continuing duty to review the proportionality of any death sentence. Clemons was convicted and sentenced as an accomplice, not as a principal. Since this Court affirmed Clemons's death sentence, the principal's sentence has been reduced from death to life without the possibility of parole, and a death sentence for the accomplice is disproportionate when the principal receives life. In addition, the Court should reject the State's suggestion that it should entirely disregard statistical analyses of prior Missouri criminal sentences—analyses which demonstrate that the execution of someone with Clemons's characteristics would be unprecedented. The Court should consider that evidence in its proportionality review and Clemons's sentence of death should be vacated.

STANDARD OF REVIEW

Clemons's opening brief explained that the Master's finding of a *Brady* violation, and that Clemons's confession was coerced, are reviewable under the deferential standards of *Murphy v. Carron*, 536 S.W.2d 30 (Mo. banc 1976). The State concedes that this Court reviews a master's findings under the same standard that governs review of trial courts in court-tried cases under *State ex rel. Woodworth v. Denney*, 396 S.W.3d 330, 333 (Mo. banc 2013). Br. at 22. Quoting *State ex rel. Lyons v. Lombardi*, 303 S.W.3d 523, 525-26 (Mo. banc 2010), the State also acknowledges the substantial deference

due to a master's findings and that this Court will reverse only if "there is no substantial evidence to support them, they are against the weight of the evidence, or they erroneously declare or apply the law." *Id.* at 22.

The State provides no argument as to why the Master's findings lack substantial evidence to support them or are against the weight of the evidence. Rather, the State's argument appears to be that the Master erroneously applied the law by failing to use the correct legal standard for the prejudice inquiry (without specifying what level of deference the Master's prejudice determination is owed). As support for this assertion, the State relies on *Kimmelman v. Morrison*, 477 U.S. 365 (1986), *Strickland v. Washington*, 466 U.S. 668 (1984), and *Miller v. Fenton*, 474 U.S. 104 (1985). These cases address the deference owed by a federal court to a state court's findings and conclusions under former 28 U.S.C. § 2254(d) governing federal habeas review, not the deference owed to a report of a Special Master under Missouri law. In reviewing a Special Master's finding under Missouri law, this Court will only "exercise the power to set aside the [Master's] findings and conclusions on the ground that they are against the weight of the evidence with caution and with a firm belief that the conclusions are wrong." *Woodworth*, 396 S.W.3d at 337.

This Court should reject the State's invitation to re-weigh the evidence and credibility determinations made by Judge Manners by applying a less deferential standard of review of a Master's findings and conclusions than that articulated by this Court in *Woodworth* and numerous other cases.

ARGUMENT

I. The State’s Brief Does Not Undermine the Master’s Conclusion that the State Violated *Brady v. Maryland*.

The Master found that Clemons’s confession was the product of police coercion: “*I think he was coerced into making it.*” App. at A108 (emphasis added). The use of Clemons’s coerced confession was the critical piece of the State’s evidence of deliberation and the only piece of testimonial evidence heard at trial placing Clemons on the platform beneath the bridge deck where the murders took place. As evidenced by the prosecutor’s repeated reference to the confession in his closing argument, and the fact that the jurors requested and were played Clemons’s confession during the guilt phase deliberations and just before reaching their verdict, the confession was the most powerful piece of evidence against Clemons at trial. App. at A266, A270 (Clemons Trial Tr. 3232:19-21, 3321:15-21); Supp. App. at SA3, SA9, SA12-13, SA19, SA23-24, SA29-30, SA37 (Clemons Trial Tr. 3242:7-9; 3248:9-12; 3251:22-3252:3; 3258:22-25; 3299:22-3300:2; 3305:18-3306:8; 3313:1-7).

The State does not contest that (1) the State failed to disclose that Warren Weeks observed an injury on Clemons’s face shortly after he was interrogated and then attempted to talk Weeks into withdrawing his observations or (2) the State failed to produce the pre-trial release form on which Weeks noted Clemons’s injury, both by destroying Weeks’s notation and failing to produce an un-doctored copy to Clemons’s defense counsel. The State also does not contest the Master’s finding that evidence of Weeks’s observation was “[o]bviously” favorable to the defense. App. at A102

(emphasis added). Thus, the State concedes the first two prongs of the Court’s inquiry under *Brady*: (1) the withheld evidence was favorable to Clemons, *i.e.*, it was exculpatory or impeachment evidence; and (2) the evidence was suppressed by the State. *Woodworth*, 396 S.W. 3d at 338.

Therefore, the only question before this Court on whether Clemons’s due process rights were violated under *Brady* is the third prong of the analysis, *i.e.*, whether Clemons was prejudiced by the suppression of evidence that his confession was coerced. The Master’s conclusion that Clemons was prejudiced was analyzed under the proper legal standard and is well supported by the facts.

A. The Master Applied the Correct Analysis to the Question of Whether Clemons Suffered Prejudice from the State’s Unlawful Suppression of Warren Weeks’s Key Evidence of Police Coercion.

Both the State and Clemons are in complete agreement on the correct standard for determining whether the State’s willful suppression of evidence favorable to Clemons resulted in prejudice to Clemons. As the State sets forth, citing to the Master’s Report, “the offender must demonstrate a reasonable probability that the outcome of the trial would have been different.” Br. at 27. Where the parties disagree is on the State’s claim that “[t]he Master does not make that finding.” App. at A103-04. The State is simply wrong.

The error and incoherence of the State’s position regarding the Master’s prejudice analysis is clear on the face of the State’s brief. The Court need only consider the

following two statements in the State’s brief. At page 25 of its brief, the State quotes page 103 of the Master’s report, which says:

As to the third issue [of prejudice], Clemons does not have to demonstrate that the disclosure of Weeks’s knowledge of injury and the obscured form ‘would have resulted ultimately in [Clemons’] acquittal.’ *Woodworth*, 396 S.W.3d at 338. ***It is enough if there is a reasonable probability of a different result.*** *Ibid.* This element is satisfied ‘when the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.’ *Engel v. Dormire*, 304 S.W.3d 120, 128 (Mo. banc 2010).

I believe Clemons has satisfied that standard.

Br. at 25 (quoting App. at A103 (emphasis added)).

Yet, despite quoting the Master’s statement of the correct prejudice analysis—whether there is “a reasonable probability of a different result”—and also quoting the Master’s conclusion that Clemons “has satisfied that standard,” a few pages later the State goes on to claim that “[t]he Master did not conclude that there was a reasonable probability that but for Weeks’s information, the outcome of Clemons’s trial would have been different.” Br. at 29. Having quoted that specific finding on page 25, the State has no good faith basis for its contrary argument on page 29. Regardless of why the State is

feigning ignorance of the Master's conclusion at page 103 of his Report, the result is the same: the State is simply incorrect that the Master applied the wrong standard.

Finally, the State's argument that the Master's report commits a "second error" by asking whether the trial court would have sustained the motion to suppress is nothing more than a red herring. Br. at 27. As the State itself points out, the ultimate question is whether there is a reasonable probability that the outcome of the trial would have been different, which the Master clearly answered in the affirmative: "*I believe Clemons has satisfied that standard.*" App. at A103 (emphasis added).

B. Viewing the Evidence in the Light Most Favorable to the Master's Report, The Master's Conclusion of Prejudice is Well Supported.

The record unquestionably supports the Master's conclusion that the suppression of Weeks's testimony was prejudicial to Clemons. As an initial matter, the evidence withheld by the State was not a minor or relatively unimportant fact. Not only did the State not disclose that Weeks would be able to provide testimony corroborating Clemons's claim that he was beaten by the police, Prosecutor Moss attempted to talk Weeks into backing away from his observation and the State produced a document in a falsified condition in an attempt to hide this evidence from Clemons's defense counsel. As the Master found, "I do not know who crossed out Weeks' description of the injury on that Form, but it had to be someone who had it on behalf of the State." App. at A103. If Weeks's evidence was of so little importance to Clemons's defense such that the suppression of it would not be prejudicial, why did the State go to such lengths to hide it from Clemons?

As described in Clemons's opening brief, the confession was the linchpin to the State's evidence of deliberation and the only piece of testimonial evidence heard at trial placing Clemons on the platform beneath the bridge deck where the murders took place. *See* Pet. Br. at 28-29. The State incorrectly claims that the Master found otherwise. Br. at 41. But the State cites the Master's discussion on proportionality, which was specifically based on testimony in Antonio Richardson's trial, and not any evidence introduced in Clemons's trial. App. at A103.²

Otherwise, the State attempts to represent testimony by Winfrey at Clemons's trial as evidence placing Clemons on the platform beneath the bridge deck during the murders. Br. at 41. Yet the State can only cite Winfrey's testimony as placing Clemons "at the manhole between the deck and the platform beneath." *Id.* Critically, the State omits Winfrey's specific testimony that Clemons did not go down through the manhole to the

² Whether purposeful or simply a poorly worded sentence, the State also appears to claim that there is evidence that Clemons himself pushed the victims from the bridge. Br. at 5-6 ("When the girls's clothes were pulled off, they were thrown off the bridge by Clemons."). The actual testimony was that Clemons threw the clothes off the bridge. Supp. App. at SA42 (Clemons Trial Tr. 2044:12-14). There is absolutely no evidence that Clemons threw the girls off the bridge. Indeed, during closing argument at the trial, the prosecutor acknowledged that Richardson, not Clemons, caused the girls's deaths. App. at A267 (Clemons Trial Tr. 3233:1-2).

deck below: “Q: Did he get in the manhole? A: No.” Supp. App. at SA41 (Clemons Trial Tr. 2043:2-13).³ The State simply cannot rebut Clemons’s contention that his confession was crucial to the State’s case on first-degree murder, let alone show that the Master’s conclusion was clearly erroneous.

The prosecutor’s repeated reference to the confession in his closing argument, and the fact that the jurors requested and were played Clemons’s confession during the guilt phase deliberations and just before reaching their verdict, demonstrate that the confession was the most powerful piece of evidence against Clemons at trial. Indeed, at every stage after the trial, the State has specifically relied on the confession as a key piece of evidence supporting the conviction. For example, during Clemons’s direct appeal, the State used the confession as the centerpiece of its opposition brief, including a multi-page, detailed account of what Clemons said to the police. State’s Opp. Br. (Docketed on Jan. 22, 1997). And, during the proceedings below, the State submitted Proposed Findings of Fact and Conclusions of Law to the Master that referenced Clemons’s confession as one of only three pieces of “substantial evidence” of Clemons’s guilt. State’s Proposed Findings of Fact and Conclusions of Law, No. SC90197, at 17 (Docketed on Aug. 14, 2013). The State even highlights the confession as a key piece of evidence in its brief to this Court. Br. at 16. The State’s repeated assertion of the

³ The State also ignores the fact that, according to his own testimony, Winfrey was not present at the time the murders occurred. Supp. App. at SA45 (Clemons Trial Tr. 2111:14-21).

confession as key evidence against Clemons at his trial and in subsequent briefs speaks volumes about the importance of that confession to the State's case first-degree murder case against Clemons. After relying on the confession for nineteen years of judicial proceedings, it is far too late for the State to shift gears now and claim that the confession was completely superfluous and cumulative. In any event, under *Woodworth*, the State's own judicial admissions show that the Master's conclusion is not against the weight of evidence, and is therefore entitled to deference.

The majority of the State's argument on the Master's prejudice analysis otherwise amounts to an invitation to the Court to re-weigh the evidence and ignore the standard of deference owed to the Master's findings.⁴ As detailed in Clemons's opening brief, there is more than sufficient evidence to show that the suppression of Weeks's evidence was prejudicial to Clemons because there is a reasonable probability of a different result had the evidence been produced. App. at A103 (citing *Woodworth*, 396 S.W.3d at 338). The

⁴ The State also invites this Court to afford weight to evidence that the State chose not to present. Specifically, the State claims that Weeks would be impeached by Pre-Trial Release Commissioner Yvonne Edwards who reportedly told the SLMPD Internal Affairs Division that she did not observe injuries to Clemons. Notably, while Internal Affairs did interview Edwards, they chose not to interview Weeks, and the State chose not to present Edwards at the Master's proceeding even though the State listed Edwards on its witness list for the Master's proceeding.

trial judge did not have the benefit of Weeks’s testimony that he observed an injury to Clemons, documented those observations on a State form, and was admonished by prosecutor Nels Moss. App. at A100-A101; App. at A285 (Weeks Dep. at 23:1-25:21). Weeks was a neutral witness with “no ties to Clemons” and testified that he believed the injury was inflicted by the police during Clemons’s interrogation. App. at A103 (Amended Report); App. at A287 (Weeks Dep. at 32:14-18). This testimony would have served as a powerful counter to the testimony of Warren Williams, an SLMPD officer and hardly an “objective” observer as claimed by the State (Br. at 35), who saw Clemons more than eight hours after Weeks did and testified that he did not observe any injuries to Clemons. App. at A103 (citing *Clemons*, 946 S.W.2d at 218). As such, Clemons could have used both Weeks’s testimony and the original, un-tampered with pre-trial release form to show that his confession was coerced and should not be admitted at trial.

Finally, the State attempts to point to the Master’s skepticism as to whether the suppression of the confession definitely would have changed the result of the trial to support the State’s argument that Clemons did not demonstrate prejudice. Br. at 37-38 (citing Master’s Report at 104). But the relevant case law does not require a judicial determination that the suppressed evidence would be outcome determinative. Instead, it requires only a finding of a reasonable probability of a different result—precisely the determination reached by the Master. App. at A103. Again, the State ignores that the Master reached the conclusion that the suppression of Weeks’s testimony resulted in prejudice under the correct standard.

C. All Available Evidence May be Considered in Evaluating the Prejudice Prong of *Brady*.

The State takes issue with Clemons’s discussion of the powerful corroborating evidence of Thomas Cummins’s testimony and post-trial settlement of his lawsuit claiming abuse by the police using methods strikingly similar to those alleged by Clemons. The State claims that Cummins’s allegations of abuse and the settlement of his case against the St. Louis Police Department are not “new facts.” Br. at 39.⁵ But the State never addresses the clear precedent cited by Clemons that, in evaluating the prejudice prong of *Brady*, “justice requires that this court consider all available evidence uncovered following [petitioner’s] trial that may impact his entitlement to habeas relief.” *Engel*, 304 S.W.3d at 126 (vacating Engel’s conviction on the grounds that undisclosed evidence prejudiced his trial); *Woodworth*, 396 S.W.3d at 345 (in determining the prejudice element of a *Brady* violation, the Court will “consider the effect of all of the suppressed evidence along with the totality of the other evidence uncovered following the prior trial”); *State ex rel. Griffin v. Denney*, 347 S.W.3d 73, 77 (Mo. banc 2011); *State ex rel. Koster v. McElwain*, 340 S.W.3d 221, 250 (Mo. App. 2011); *Scott v. Mullin*, 303 F.3d 1222, 1229-30, 1229 n.4 (10th Cir. 2002).

⁵ The State also claims that Detective Pappas “credibly testified” that he did not physically abuse Thomas Cummins, Br. at 40, thus accusing Cummins—the State’s star witness against Clemons—of committing perjury, a claim flatly rejected by the Master. App. at A32, A94.

The State's only other challenge to this argument is that evidence of "prior bad acts" may not be admissible at a suppression hearing. The State's challenge here misses the point and does not address the Court's recognition that this kind of signature *modus operandi* evidence is both admissible to corroborate a victim's own testimony and highly persuasive. *See State v. Bernard*, 849 S.W.2d 10, 17 (Mo. banc 1993) (Evidence of other "misconduct that corroborates the testimony of the victim" is admissible when it is "so unusual and distinctive as to be a signature of the defendant's *modus operandi*.").

Contrary to the State's misplaced arguments, the evidence of Cummins's allegations in his civil lawsuit and the City's settlement was properly considered by the Master as powerful circumstantial evidence that Clemons's confession was coerced.

D. The Use of a Coerced Confession to Secure a Conviction Violates Due Process.

Numerous Missouri cases hold that the use of a coerced confession violates due process. "It is firmly established as a matter of federal and state constitutional law that a conviction of crime based upon a coerced or involuntary confession cannot stand." *State v. Kiplinger*, 414 S.W.2d 547, 548 (Mo. 1967). As this Court held in *State v. Faruki*, 344 S.W.3d 193, 203 (Mo. banc 2011), the "Due Process Clause bars involuntarily obtained convictions from being admissible at trial." *Accord State v. Lyle*, 715 S.W.2d 910, 915 (Mo. banc 1986) ("[D]efendant is denied due process if his conviction is founded, in whole or in part, upon an involuntary confession."); *State v. Owsley*, 959 S.W.2d 789, 794 (Mo. banc 1997) ("[C]onfession that becomes part of the basis of a conviction must be voluntary or else the defendant is denied due process."); *see also People v. Wrice*, 940

N.E.2d 102, 110 (Ill. App. 2010), *aff'd*, 962 N.E.2d 934 (Ill. 2012) (“[C]oerced confession as substantive evidence of guilt is *never* harmless error.”) (emphasis in original).

The State makes a half-hearted effort to argue that the Master should have credited the State’s evidence over that of Weeks. Br. at 34-36. In making the finding that “I think he was coerced into making it,” App. at A108, the Master obviously believed Weeks instead of the police. The State’s request that this Court reweigh the evidence is plainly improper. *State v. Light*, 407 S.W.3d 135, 136 (Mo. App. 2013); *Estes v. State*, 950 S.W.2d 539, 541-42 (Mo. App. 1997); *see also* *Woodworth*, 396 S.W.3d at 336-37 (recognizing “the master’s unique ability to view and judge the credibility of witnesses”).

Finally, the State takes the remarkable position that a violently coerced confession used by the State as key evidence at trial against a criminal defendant is nothing more than harmless error. Br. at 39. That is not the law and the only precedent cited by the State in support—*Arizona v. Fulminante*, 499 U.S. 279 (1991)—stands in direct contradiction to the State’s position.⁶ Moreover, the State’s contention that the use of a coerced confession against Clemons at trial constitutes harmless error ignores Supreme Court precedent holding that a meritorious *Brady* claim automatically satisfies the cause

⁶ Notably, *Fulminante* holds that the State has the burden of proving an error was harmless beyond a reasonable doubt, 499 U.S. at 297, but the State specifically disclaims any such obligation, Br. at 36, and, in any event, has made no attempt to satisfy a harmless error standard.

and prejudice standard for habeas review. Quoting *Kyles v Whitley*, 514 U.S. 419, 435 (1995), Judge Manners correctly concluded, ““there is no need for further harmless-error review.”” App. at A103. As such, this Court should adopt Judge Manners’s conclusion of a *Brady* violation and vacate Clemons’s conviction and death sentence.

II. At a Minimum, Clemons’s Sentence Should Be Vacated Because the Death Sentence is Disproportionate.

A. Missouri Law Provides for a Continuing Duty of Proportionality Review and the State’s Argument to the Contrary Relies on Inapposite Cases

The Master made no finding on proportionality, deferring to this Court. Clemons is entitled to proportionality review under Missouri law and this Court should conclude that Clemons’s death sentence is disproportionate.

Missouri law requires that this Court reexamine a death sentence where there is sufficient evidence to “undermine the habeas court’s confidence in the underlying judgment.” *Amrine v. Roper*, 102 S.W.3d 541, 547 (Mo. banc 2003). This is a continuing duty. *Id.* (holding that this Court’s duty to review a death sentence is a “*continuing one*” particularly because “the death penalty is fundamentally different from other cases in which innocence is asserted after a fair trial) (emphasis added).

Arguing that the Court should not conduct a proportionality review at this stage, the State relies on *State ex rel. Simmons v. White*, which is factually inapposite, and

ignores more recent case law directly on point. Br. at 42⁷ (citing *Simmons*, 866 S.W.2d 443 (unsuccessful challenge of drunk driving conviction where petitioner sentenced to two five-year terms)). *But see Amrine*, 102 S.W.3d at 547 (upholding the procedural use of writ of habeas corpus to challenge a death sentence and holding that the Court has a “continuing duty” to review a death sentence); *see also State v. Bowman*, 337 S.W.3d 679, 694 (Mo. banc 2011) (Wolff, J., concurring) (“[S]ection 565.035.3 requires [the Missouri Supreme] Court *independently* to assess the strength of the evidence against the defendant in assessing whether a sentence of death is warranted”; this duty to assess the strength of the evidence is “*ongoing*.”) (emphasis added). Under Missouri law, Clemons’s death sentence must be re-reviewed in light of new evidence, as well as Antonio Richardson’s changed, lesser sentence.

Contrary to the State’s claim, the fact that the proportionality of Clemons’s sentence was reviewed on his direct appeal is not determinative. *See Amrine*, 102 S.W.3d at 549-50; Br. at 34. Here, however, Clemons is not merely rearguing claims made

⁷ The State also relies on *State v. Nunley* and *State ex rel. Taylor v. Steele*, which are likewise distinguishable. Br. at 44 (citing *Nunley*, 341 S.W.3d 611 (Mo. banc 2011); *Taylor*, 341 S.W.3d 634 (Mo. banc 2011)). In both cases, this Court held that it would not retroactively apply its ruling in *State v. Deck* that the initial proportionality review must consider comparable cases in which the State sought death but the jury did not impose it. *Nunley*, 341 S.W.3d at 623; *Taylor*, 341 S.W.3d at 652.

during his direct appeal in 1997. At the time of his direct appeal, Clemons had no way of knowing that this Court would vacate Richardson’s death sentence six years later, resentencing him to life in prison. Oct. 28, 2003 Order, *State v. Richardson*, No. SC76059. Nor did Clemons know, until January 2012, that the State had deliberately suppressed and covered up evidence that Clemons was coerced into making his confession. This habeas petition is the first time that this Court will have an opportunity to carry out its duty of reviewing the proportionality of Clemons’s sentence in light of Richardson’s commuted sentence and all of the new evidence that has come to light since 1997. Indeed, the State acknowledged in 2009 this continuing duty to review the proportionality of a death sentence in light of new evidence, regardless of whether or not the evidence relates to actual guilt or innocence. *See* Pet. Br. at 35, n.11. The State’s brief does not address that acknowledgment.

The disproportionality of Clemons’s death sentence is clear. At Clemons’s trial, the State argued that it was Richardson—not Clemons—who “pushed [the Kerrys] off the bridge.” App. at A267. As discussed above, neither of the State’s key witnesses, Thomas Cummins and Daniel Winfrey, could place Clemons on the concrete platform beneath the bridge, where the Kerry sisters were pushed. Clemons was convicted of first-degree murder as an accomplice, not because he was the primary actor. Yet Richardson, who was the primary actor, is sentenced to life in prison while Clemons faces the death penalty. Missouri courts have held that such disproportionality cannot stand. *State v. McIlvoy*, 629 S.W.2d 333, 342 (Mo. banc 1982) (disproportionality found where “follower” faces execution while the mastermind of the murder scheme receives life

imprisonment). The State does not dispute that it presented no testimony at Clemons's original trial that suggested Clemons played any role in planning the crime or actually pushing the Kerry sisters.

B. Dr. Keys's Report Contains Useful Statistical Analysis that this Court Should Consider as Part of its Proportionality Review.

The State takes issue with Clemons's discussion of Dr. Keys's statistical analysis of sentencing in prior Missouri cases. According to the State, Clemons has merely "repackage[d]" a list of mitigating circumstances in an expert report, and the "counting of aggravating and mitigating circumstances" should not replace judicial judgment. Br. at 46. To the contrary, Dr. Keys's report is not an attempt to substitute his judgment for the judgment of this Court. Nor is it merely laundry list of mitigating factors. Instead, Dr. Keys's report offers a statistical analysis of sentencing in prior Missouri criminal cases to demonstrate that it would be unprecedented in the modern death penalty era to execute anyone with the same characteristics as Clemons. *See* Pet. Br. at 46-47. The State provides no sound reason why this analysis should not be considered by the Court in conjunction with other factors—including that a more culpable defendant received a lesser penalty than Clemons—as part of a proportionality review in this case.

CONCLUSION

For the reasons discussed above, Clemons respectfully requests that this Court (1) issue an Order granting Reginald Clemons a new trial on all issues, or in the alternative, (2) issue an Order commuting his death sentence, and (3) grant additional relief as may be just and proper under the circumstances.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify pursuant to Rule 84.06(c) that this brief (1) contains the information required by Rule 55.03; (2) complies with the limitations contained in Rule 84.06(b); (3) contains 4,772 words exclusive of the sections exempted by Rule 84.06(b), based on the word count that is part of Microsoft Word 2010. The undersigned counsel further certifies that the electronic version of this brief has been scanned and is free of viruses.

By: /s/ Mark G. Arnold

CERTIFICATE OF SERVICE

I hereby certify that on January 30, 2014, I electronically filed the foregoing with the Clerk of the Court for the Supreme Court of Missouri by using the Missouri eFiling System. Participants in the case who are registered users will be served by the Missouri eFiling System.

By: /s/ Mark G. Arnold_____