

No.91112

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In the  
Supreme Court of Missouri

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STATE EX REL. REGINALD GRIFFIN,

Petitioner,

v.

LARRY DENNEY, Superintendent,  
Crossroads Correctional Center,

Respondent.

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On Petition for Writ of Habeas Corpus

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RESPONDENT'S BRIEF

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## STATEMENT OF FACTS

Petitioner, Reginald Griffin, was charged as a persistent offender, with capital murder, §565.001, RSMo. 1978 (repealed effective October 1, 1984), for the prison murder of inmate James Bausley (Direct Appeal Legal File, pages 258-59, 314). The cause proceeded to a jury trial on January 25, 1988, in the Circuit Court of Randolph County, the Honorable Channing B. Blaeuer, presiding.

Viewed in the light most favorable to the verdict, the evidence adduced by the state was as follows: Petitioner, his co-defendants, Doyle Franks and Arbary Jackson, and the victim, James Bausley, were all inmates at the Moberly Training Center for Men (Tr. 443, 446-48). On July 11, 1983, Bausley told another inmate, Wyvonne Mozee, that he had lent his television set to an inmate nicknamed “Bo” who had sold it to petitioner for \$50 and a gold chain (Tr. 657). Bausley asked Mozee to look for the television (Tr. 658).

On the morning of July 12, Bausley told Mozee he had made a deal for the return of the television with petitioner, for \$10 in “green money” and the rest in prison “commissary” (Tr. 659). That afternoon, Bausley met with Mozee in the prison gym and the two went to the inmates’ cells, including petitioner’s, to look for the television (Tr. 659). After looking in petitioner’s cell, they ran into petitioner and Franks (Tr. 662). Petitioner stated that the deal had changed with petitioner wanting an additional \$50 because he had also given a gold chain for the television (Tr. 663-64). Franks asked Mozee what he had to do with this and warned him to stay out of it (Tr. 664). Mozee advised Bausley to report this to the prison Captain’s Shack, and Bausley headed in that direction (Tr. 665).

When Mozee returned to the prison gym, he saw petitioner, Franks, Jackson and another inmate looking around (Tr. 666). After being told by another inmate that somebody was going to get “stuck” outside, he saw the four standing around Bausley and arguing (Tr. 669). When Bausley turned to leave, Jackson grabbed him, petitioner produced a knife, and petitioner stabbed Bausley in the chest (Tr. 672-73). Another inmate, Paul Curtis, saw petitioner strike Bausley in the lower back when Bausley tried to leave (Tr. 484). When Bausley spun around, he saw Franks and Jackson grab Bausley and then petitioner stab him in the chest (Tr. 485-86).<sup>1</sup> The knife was thrown into the air and the group ran around the corner of the gym (Tr. 487).

At the scene, Bausley was not conscious and exhibited no signs of life (Tr. 561-62, 575-77, 587). The chest wound was 5 1/2 to 6 inches long penetrating the depth of the chest cavity and piercing the heart and right lung (Tr. 542-45). He died as a result of this chest wound, perforating the heart and lung (Tr. 548). There was also a cut to his left thigh, in the form of a “Y” (TR. 543; State’s Exhibits 5 and 6).

Prison investigators found the homemade knife twenty feet from the gym (Tr. 588-89). It was approximately thirteen inches long, 3/4 inch wide, and had a yellow cloth around the handle (Tr. 589). The knife could have caused the victim’s wounds and tested positive for human blood (Tr. 546). Investigators recovered the television in inmate Michael

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<sup>1</sup> The jury was presented with Mozee’s preliminary hearing testimony because he was deceased at the time of trial. While Mozee clearly testified to appellant’s participation in the murder (Tr. 655-56, 670-72), he was equivocal as to the identity of the co-defendants.

Washington's cell which was approximately thirty feet from petitioner's cell (Tr. 623-24, 627-29). Mozee identified petitioner, Franks and Jackson in a photo array, stating that petitioner had killed Bausley with the knife (Tr. 714). Paul Curtis, the other eyewitness, also identified the three (Tr. 498-99).

Petitioner did not testify, but called a number of inmates in an attempt to impeach the credibility of the inmate witnesses who testified for the state (Tr. 723-26, 791, 870), to demonstrate that Mozee and Curtis could not have witnessed the murder (Tr. 736-44, 765-69), and to present a purported alibi for petitioner (Tr. 797-811). At the close of the evidence, instructions and argument of counsel, the jury found petitioner guilty as charged (Tr. 927).

In the punishment phase of trial, the state presented evidence of petitioner's sixteen prior convictions (Tr. 950-51, 969-73). Petitioner presented a number of family and friends in purported mitigation of his punishment (Tr. 973-1008). The jury recommended a sentence of death, finding statutory aggravating circumstances that petitioner had a substantial history of serious assaultive convictions, §565.012.2(1), RSMo. 1978 (repealed effective October 1, 1984) and that at the time of the murder, petitioner was in the lawful custody of a place of confinement, §565.012.2(1), RSMo. 1978 (repealed effective October 1, 1984), as well as a number of non-statutory aggravating circumstances involving petitioner's past convictions (Direct Appeal Legal File, pages 66-68). Petitioner was sentenced to death (Tr. 1102).

### **Procedural History**

Petitioner was convicted of capital murder in the Circuit Court of Randolph County and was sentenced to death (Respondent's Exhibit A). He appealed that conviction

and sentence to the Missouri Supreme Court. Petitioner then filed a postconviction motion under Missouri Supreme Court Rule 29.15. After an evidentiary hearing (Respondent's Exhibit B), the Randolph County Circuit Court denied postconviction relief (Respondent's Exhibit C). On petitioner's consolidated appeal to the Missouri Supreme Court, the Court affirmed the petitioner's conviction, but remanded for a new penalty phase proceeding (Respondent's Exhibit D).

Petitioner was resentenced on July 27, 1993 to life imprisonment without the possibility of parole for fifty years (Respondent's Exhibit E). Petitioner filed a second postconviction relief motion under Rule 29.15, but the circuit court denied the motion (Respondent's Exhibit E). The Missouri Court of Appeals affirmed the circuit court's judgment (Respondent's Exhibit F).

Petitioner then filed a petition for writ of state habeas corpus in the Circuit Court of Washington County (Respondent's Exhibit G). After responsive pleading (Respondent's Exhibit H), the Washington County Circuit Court denied the petition for writ of habeas corpus. The Court stated:

The court finds that petitioner's claims were raised on direct appeal of his postconviction 29.15 motion and the court further finds that petitioner has not alleged or shown any special circumstances which would allow him to proceed in habeas corpus than postconviction remedy relief, White v. State, 770 S.W.2d 571 (1989), State ex rel. Simmons v. White, S.W.2d 443 (1993), and the court thus finds that petitioner has waived his right to address

the complaints herein. It is thus ordered that petitioner's petition for writ of habeas is dismissed and denied.

(Respondent's Exhibit I). The Missouri Court of Appeals also denied the petition for writ of habeas corpus (Respondent's Exhibit J), as did the Missouri Supreme Court (Respondent's Exhibit K).

Petitioner then filed a petition for writ of habeas corpus in the United States District Court for the Eastern District of Missouri. The federal district court denied relief (Respondent's Exhibit M), and the Court of Appeals affirmed (Respondent's Exhibit N).

Petitioner then filed another petition for writ of state habeas corpus in the Circuit Court of DeKalb County. After pleadings and an evidentiary hearing (Petitioner's Exhibit 2), the circuit court denied relief (Petitioner's Exhibit 9). Petitioner refiled his petition with the Missouri Court of Appeals for the Western District, and that court denied relief (Petitioner's Exhibit 14).

## ARGUMENT

### I.

PETITIONER IS NOT ENTITLED TO A NEW TRIAL ON THE BASIS OF NON-DISCLOSURE BECAUSE THERE WAS NO PROOF THAT THE STATE FAILED TO DISCLOSE INFORMATION CONCERNING JEFFREY SMITH BEFORE TRIAL AND PETITIONER FAILED TO SHOW ANY PREJUDICE FROM THE ALLEGED FAILURE TO DISCLOSE.

Petitioner briefs two points in this case - - a Brady issue and an Amrine issue. Before the circuit court, petitioner did not present credible evidence supporting either claim; thus, the circuit court denied the petition for writ of habeas corpus (Petitioner's Exhibit 9). The court of appeals also denied the petition (Petitioner's Exhibit 14). This court should also deny relief.

The first ground for relief is a contention that the state did not disclose exculpatory information concerning Jeffrey Smith's alleged possession of a homemade knife on July 12, 1983, the date of the murder. The information about which petitioner complains appears to be Missouri Department of Corrections' documents contained in Petitioner's Exhibit 1 (Petitioner's Brief, pages 20-35). Petitioner acknowledges the claim is subject to a procedural default because he did not raise the claim on direct appeal or in the post-conviction motion (Petitioner's Brief, page 22). But petitioner contends he can show good cause and actual prejudice or that he is actually innocent (as a gateway to review). The circuit court rejected these contentions, and the circuit court also found the claim was

meritless (Petitioner's Exhibit 9, page 3). Petitioner does not present reasons to disturb these findings by the circuit court; accordingly, the court should deny relief.

For petitioner to present a Brady claim, he must show the state failed to disclose exculpatory evidence that is material to the outcome of petitioner's trial. Brady v. Maryland, 373 U.S. 83 (1963); Strickler v. Greene, 527 U.S. 263 (1999); Kyles v. Whitley, 514 U.S. 419 (1995). Petitioner does not make the high showing contemplated by the Supreme Court in order to receive a new trial on the basis of Brady.

Petitioner assumes but did not demonstrate to the circuit court that the state did not engage in pretrial disclosure (Petitioner's Exhibit 9, page 3). Petitioner's trial began on January 25, 1988 (Petitioner's Exhibit 13, page 19). After trial, conviction and the post-conviction proceeding, this court remanded the cause for a new penalty phase proceeding (Respondent's Exhibit D). In his brief on appeal, petitioner contends that remand counsel could not find documents in the defense file in 1993, five years after the trial, concerning Jeffrey Smith (Petitioner's Exhibit 2, pages 71-72). Remand counsel also testified that the original trial counsel had reviewed the files of all the inmates held in administrative segregation after the July 12, 1983 murder (Petitioner's Exhibit 2, page 77). That review was at trial counsel's request (Petitioner's Exhibit 13, page 12). Remand counsel did not recall seeing any information in the defense trial file resulting from trial counsel's review of those records (Petitioner's Exhibit 2, page 77).<sup>2</sup>

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<sup>2</sup> The record reflects trial counsel requested review of the files of the inmates held in administrative segregation (Petitioner's Exhibit 13, page 12). Petitioner's records reflect that

At the hearing in the circuit court, petitioner did not present his 1988 trial counsel to testify that she did not receive the information from the Missouri Department of Corrections (Petitioner's Exhibit 2, page 2). Nor did petitioner present the prosecutor to testify that the state failed to disclose the information (Petitioner's Exhibit 2, page 2). The Randolph County Circuit Court docket sheet reveals no complaint by trial counsel of non-compliance with the court's September 8, 1987 order (Petitioner's Exhibit 13, page 12). Petitioner only produced testimony that five years after the trial, the information was not in the defense file (Petitioner's Exhibit 2, page 72). Respondent also notes that discovery took place on July 10, 1987 (Tr. 1067). All the records and physical evidence were made available to all defense counsels (Tr. 1067). Petitioner's counsel made "copies of certain documents on that date with the help of [DOC] staff" (Tr. 1068). If the complained of information was actually not in the defense files five years after trial, it could have been because defense counsel did not copy it (Tr. 1068) or could have been due to the handling of the defense file over the years after trial by multiple people. If the various defense counsels did not copy the information or misplaced the information, those events are not attributable to the state and do not warrant a new trial under Brady.

Respondent also notes that the information concerning Jeffrey Smith was disclosed to counsel for petitioner long before trial. The paperwork submitted by petitioner indicates that Jeffrey Smith was represented by Public Defendant Tom Marshall (Petitioner's Exhibit 1,

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Jeffrey Smith was placed in administrative segregation after July 12, 1983 (Petitioner's Exhibit 1, pages 13, 15, 22, 23).

pages 4, 5, 8). Mr. Marshall also represented petitioner (29.15 Tr. I, page 4). The circuit court's finding that petitioner failed to show non-disclosure by the state (Petitioner's Exhibit 9, page 3) is well supported by the record.

The circuit court also found that petitioner failed to show prejudice (Petitioner's Exhibit 9, page 3). With a Brady claim, the offender has the obligation to demonstrate prejudice that is defined by the standard set forth by the United States Supreme Court in Strickland v. Washington, 466 U.S. 668 (1984). Evidence is material if there is a reasonable probability that the outcome of the trial would have been different. State ex rel. Engle v. Dormire, 304 S.W.3d 120, 128 (Mo. banc 2010) quoting Strickler v. Greene, 527 U.S. 263, 280 (1999) quoting United States v. Bagley, 473 U.S. 667, 682 (1995). In Bagley, the Supreme Court stated, “[w]e find the Strickland formulation of the Agurs test for materiality sufficiently flexible to cover the ‘no request,’ ‘general request,’ and ‘specific request’ cases of prosecutorial failure to disclose evidence to the accused: the evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A ‘reasonable probability’ is a probability sufficient to undermine confidence in the outcome.” United States v. Bagley, 473 U.S. at 682. Recently, the Supreme Court described the high standard of prejudice that is necessary under Strickland.

In assessing prejudice under Strickland, the question is not whether a court can be certain counsel's performance had no effect on the outcome or whether it is possible a reasonable doubt might have been established if counsel acted differently. . . . Instead, Strickland asks whether it is

“reasonably likely” the result would have been different. . . . This does not require a showing that counsel’s actions “more likely than not altered the outcome,” but the difference between Strickland’s prejudice standard and a more-probable-than-not standard is slight and matters “only in the rarest cases.”. . . The likelihood of a different result must be substantial, not just conceivable.

Harrington v. Richter, 131 S.Ct. 770, 791-92 (2011) (citations omitted).

Petitioner contends that he can show prejudice if he can show “there is a reasonable likelihood that the undisclosed exculpatory evidence affected the jury’s verdict” (Petitioner’s Brief, page 29). For this proposition, petitioner cites Strickler v. Greene, 527 U.S. at 280. But that page in Strickler v. Greene discusses materiality as whether there is a “reasonable probability” that the outcome of the trial would have been different. Id. at 280 quoting United States v. Bagley, 473 U.S. at 682. Petitioner also cites Kyles v. Whitley to support the “reasonable likelihood” standard. Again, the actual language in Kyles is “reasonable probability.” Kyles v. Whitley, 514 U.S. 419, 434 (1995) quoting United States v. Bagley, 473 U.S. at 682.

After incorrectly describing the materiality standard, petitioner then goes on to state that he can easily show materiality (Petitioner’s Brief, page 29). This too is mistaken. The circuit court found that petitioner failed to show prejudice (Petitioner’s Exhibit 9, page 3). Petitioner suggests that Jeffrey Smith had an 8 ¾ inch screwdriver taken from him on the date of the murder (Petitioner’s Exhibit 1). The federal district court considered the claim previously and found that the claims did not warrant relief under Brady v. Maryland, 373

U.S. 83 (1963). The federal district court concluded that the complained of information was not material because there was not a reasonable probability that, but for the purported error, the outcome of the trial would have been different (Respondent's Exhibit M, pages 7-10). The federal court of appeals affirmed that determination (Respondent's Exhibit N). In his brief to this court, petitioner provides no basis for this court's reconsideration of that conclusion.

Mr. Smith's weapon was a sharpened screwdriver with a 3 ½ inch yellow handle and a 5 ¼ inch long metal portion that was sharpened to a point (Petitioner's Exhibit 1, page 1). It was described as a "sticker" (Petitioner's Exhibit 1, page 13). But it was apparent from Dr. Dix's testimony that this screwdriver was not involved with the murder. The size of the wound was ¾ of an inch. The type of instrument to cause the wound was "a knife-life instrument with sharp edges" (Tr. 545). State's Exhibit 2, a knife, could have produced the wound (Tr. 546). State's Exhibit 2 produced a preliminary test for blood that was positive, and human proteins were found on the knife (Tr. 555). In contrast, Petitioner's Exhibit 1 indicates that Mr. Smith's screwdriver was clean. Prison investigators found the homemade knife twenty feet from the gymnasium (Tr. 588-89). It was about 13 inches long, ¾ inch wide and had a yellow cloth around the handle (Tr. 589). Lastly, respondent notes that the trial testimony indicated that petitioner threw the knife into the air as the group he was with rounded the corner of the gymnasium (Tr. 487).

Lastly, it is doubtful that testimony concerning Smith's possession of a screwdriver would have been admissible at petitioner's trial. Petitioner concedes that Smith allegedly had the clean screwdriver after the murder occurred (Petitioner's Brief, page 30). But for

petitioner to suggest that Smith committed the murder, he must introduce evidence that the other person committed some act directly connecting him with the crime. See State v. Wise, 879 S.W.2d 494, 510 (Mo. banc 1994). Evidence that has no other effect than to cast bare suspicion on another is not admissible. State v. Butler, 951 S.W.2d 600, 606 (Mo. banc 1997).

Conspicuously missing from petitioner's argument is evidence that Smith committed some act that directly connects him with the crime. See State v. Schaal, 806 S.W.2d 659, 669 (Mo. banc 1991). The evidence must be of a kind that directly connects the other person with the corpus delicti and tends clearly to point to someone other than the accused as the guilty person. State v. Castro, 276 S.W.3d 358, 361 (Mo. App. S.D. 2009).

In State v. Miller, 368 S.W.2d 353 (Mo. 1963), the offender was convicted of attempted second degree burglary for attempting to burglarize an ice cream store at 3:00 a.m. The defendant attempted to induce testimony that there were people other than the defendant acting suspiciously at the store between 12:30 a.m. and 1:30 a.m. There were also tools found that could have explained damage done to the phone booth that was very near the burglarized store. The trial court excluded that evidence, and this court affirmed. Id. at 360. The court reasoned that the evidence tending to prove that another person had the opportunity to commit the burglary constituted no defense. Id. Because it is doubtful that the complained of information was even admissible at petitioner's trial (Petitioner's Exhibit 1), petitioner

cannot show any materiality from the alleged Brady violation. See Wood v. Bartholomew, 516 U.S. 1 (1995) (inadmissible evidence (polygraph) not material under Brady).<sup>3</sup>

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<sup>3</sup> Petitioner complains that the state did not disclose “prison records” that Paul Curtis was schizophrenic and attempted suicide at the Farmington prison in 1987 (Petitioner’s Brief, page 25 n.5). This was not a ground for relief in the state habeas petition in the DeKalb County Circuit Court. Moreover, the contention that trial counsel did not have access to Department of Corrections’ information concerning Curtis was rejected during the Rule 29.15 litigation (Respondent’s Exhibit C, pages 8-9). Petitioner did not contend these findings and conclusions were erroneous on consolidated appeal.

## II.

PETITIONER IS NOT ENTITLED TO DISCHARGE OR A NEW TRIAL BECAUSE THE OFFENDER'S CLAIM OF INNOCENCE IS MERITLESS IN THAT THE NEW EVIDENCE IS NOT CREDIBLE, THE EVIDENCE IS CUMULATIVE TO THAT PRESENTED AT TRIAL AND THE INFORMATION DOES NOT DEMONSTRATE BY "CLEAR AND CONVINCING" EVIDENCE THAT PETITIONER IS ACTUALLY INNOCENT.

Petitioner's second point on appeal is that he should be discharged because he is "actually innocent" of the offense. The burden of proof petitioner must sustain in order to be entitled to writ of habeas corpus on the basis of this claim was established by the Supreme Court in State ex rel. Amrine v. Roper, 102 S.W.3d 541 (Mo. banc 2003).

The appropriate burden of proof for a habeas claim based upon a free standing claim of actual innocence should strike a balance between these competing standards and require the petitioner to make a clear and convincing showing of actual innocence that undermines confidence in the correctness of the judgment....

The burden of establishing a fact by clear and convincing evidence is heavier than the "preponderance of the evidence" test of ordinary civil cases and is less than the "beyond reasonable doubt" instruction that is given in criminal cases. Evidence is clear and convincing when it "instantly tilts the scales in the affirmative when weighed against the evidence in opposition,

and the fact finder's mind is left with an abiding conviction that the evidence is true.”

Id. at 548. How does a habeas petitioner meet this standard? In Amrine, the offender's conviction was based primarily on the testimony of three witnesses at the criminal trial. Amrine v. Bowersox, 128 F.3d 1222, 1223 (8<sup>th</sup> Cir. 1997). All three of those witnesses recanted leaving “no credible evidence. . . from the first trial to support the conviction.” State ex rel. Amrine v. Roper, 102 S.W.3d at 548.

In contrast to the freestanding innocence claim epitomized by Amrine is the “actual innocence” standard used in habeas corpus practice by offenders to overcome a procedural default from the offender's failure to raise a constitutional challenge to a conviction in a timely proper manner. Clay v. Dormire, 37 S.W.3d 214, 217 (Mo. banc 2000). As noted in Amrine, that showing of “actual innocence” is easier for the offender to make. Nonetheless, the showing requires new evidence in order for the procedural bar to be lifted.

To be credible, such a claim requires petitioner to support his allegations of constitutional error with new reliable evidence - - whether it be exculpatory scientific evidence, trustworthy eyewitness accounts or critical physical evidence - - that was not presented at trial. Because such evidence is obviously unavailable in the vast majority of cases, claims of actual innocence are rarely successful.

Schlup v. Delo, 513 U.S. 298, 324 (1995).

Of course, even easier for the offender to meet is the prejudice standard for a valid discovery (Bagley) or ineffective assistance of counsel (Strickland) claim. That standard was

articulated by the Supreme Court in Strickland v. Washington, 466 U.S. 688 (1984). To meet the Strickland standard, the offender must show a reasonable probability that the outcome of the proceeding would have been different.

There is a dearth of decisions applying Amrine. But references to these lesser standards yields more plentiful appellate guidance. Accordingly, if a type of evidence is insufficient for an offender to make a showing of Strickland prejudice, that evidence should also be insufficient to meet the higher showing that is required under Amrine.

Initially, petitioner discusses Paul Curtis (Petitioner's Brief, pages 38, 40). At petitioner's trial, Mr. Curtis identified petitioner as one of three people who killed James Bausley. On the prison yard, Paul Curtis saw petitioner strike Bausley in the lower back when Bausley tried to leave (Tr. 484). When Bausley spun around, he saw Doyle Franks and Arbary Jackson grab Bausley, and then petitioner stabbed Bausley in the chest (Tr. 485-86). In considering the claim, the habeas circuit court found Mr. Curtis's trial testimony was credible and did not find the deposition testimony of Mr. Curtis was credible (Petitioner's Exhibit 9, page 2).

Petitioner does not address the credibility determinations made by the circuit court in his brief (App. Brf., pages 38, 40). Instead, petitioner reargues credibility. Mr. Curtis was thoroughly questioned on cross-examination by petitioner (Tr. 505-37). The jury was fully aware of the agreement between the state and Mr. Curtis to tell the truth in his trial testimony (Tr. 467-68). Petitioner suggests that Mr. Curtis received other benefits from the state (Petitioner's Brief, page 40). The jury heard that testimony at petitioner's trial (Tr. 469-70).

There is no “newly discovered evidence” as that term is described by this court in State v. Terry, 304 S.W.3d 105 (Mo. banc 2010).

Petitioner also contends that Paul Curtis recanted during the pre-hearing deposition. A recantation does not nullify the existence of the previous testimony by Mr. Curtis. See In re Davis, 2010 WL 3385081 at \*45 n.39 (S.G. Ga. Aug. 24, 2010), petition for cert. filed, 79 U.S. Law Week 3442 (Jan. 21, 2011). And as noted, the circuit court did not find the recantation testimony was credible (Petitioner’s Exhibit 9, page 2). That factual determination is amply supported by a reading of the deposition. The circuit court had the discretion to judge Mr. Curtis’s credibility and determine that the earlier testimony was proper and to disbelieve the recantation. See State v. Burse, 231 S.W.3d 247, 254 (Mo. App. E.D. 2007). Generally, courts look on recanted evidence with suspicion. In re Davis, at \*47.

It is easy to understand why this should be so. The trial is the main event in the criminal process. The witnesses are there, they are sworn, they are subject to cross-examination, and the jury determines whether to believe them. The stability and finality of verdicts would be greatly disturbed if courts were too ready to entertain testimony from witnesses who have changed their minds, or have claimed to have lied at the trial. United States v. Grey Bare, 116 F.3d 349, 350 (8<sup>th</sup> Cir. 1997). Understandably then, the circuit court properly did not find the deposition testimony of Mr. Curtis was credible (Petitioner’s Exhibit 9, page 2).

Petitioner next asserts that the testimony of Mr. Mozee who also implicated petitioner at petitioner's trial, was not credible (Tr. 653). Petitioner first suggests that Mozee obtained an early release from prison as a result of his testimony (Petitioner's Brief, page 41). Petitioner's citation for that proposition is Mozee's preliminary hearing testimony (Petitioner's Brief, page 41 citing Petitioner's Exhibit 5). The jury heard that testimony at petitioner's trial (Tr. V listing State's Exhibit 15; Tr. 653).

Petitioner also refers to the Michael Garrett testimony at the 2007 habeas hearing (Petitioner's Brief, page 41). The circuit court did not find that testimony was credible (Petitioner's Exhibit 9, page 2). That information was also redundant with testimony presented by petitioner's witnesses at trial (Tr. 725-26, 742-43). Because the information is cumulative to that presented to and rejected by the jury, Mr. Garrett's testimony should not be the basis of relief under Amrine. See State v. Terry, 304 S.W.3d at 109. Phrased another way, the testimony was not of the character necessary to rise to the high level necessary for the grant of relief under Amrine.

Petitioner also suggests that he is probably innocent because co-defendants Arbary Jackson and Doyle Franks state that petitioner had no involvement with the victim's death (Petitioner's Brief, page 42). Being co-defendants, they cannot realistically be described as "newly discovered evidence," especially in light of the fact that they testified on petitioner's behalf twenty-one years ago at his Rule 29.15 evidentiary hearing (Respondent's Exhibit B, Vol. II, pages 36, 102).

Further, the Rule 29.15 trial court reviewed the co-defendants' testimony as one of the 78 claims presented in the Rule 29.15 litigation. See State v. Griffin, 848 S.W.2d 464, 470

(Mo. banc 1993). Arbary Jackson's testimony was evaluated during the Rule 29.15 litigation in connection with a claim that petitioner received ineffective assistance of counsel for not calling Arbary Jackson and Doyle Franks.

Trial counsel interviewed co-defendant Arbary Jackson concerning Jackson's knowledge of the murder and movant's role in it (29.15 Tr. III 94-95). That interview indicated that Jackson had no useful information for movant (29.15 Tr. III 95-97). Also, Jackson would not testify on movant's behalf (29.15 Tr. III 97). Trial counsel declined to interview co-defendant Doyle Franks because counsel believed that Franks would not discuss the case with her (Franks had not yet been tried) and because Franks did not possess helpful information (29.15 Tr. III 97-98, 108-09, 109-10). Indeed, trial counsel was fearful that Franks would testify for the state (29.15 Tr. III 97-98).

(Respondent's Exhibit C, pages 7-8). The motion court continued:

Trial counsel interviewed Arbary Jackson and found Jackson had nothing beneficial to say (29.15 Tr. III 94-95, 95-97). Also, Jackson would not testify on movant's behalf (29.15 Tr. III 97).

(Respondent's Exhibit C, page 13). Concerning the credibility of Jackson and Franks, the Rule 29.15 trial court held:

Additionally, this court viewed the in-court testimony of both Jackson and Franks. The court finds their testimony to be not credible. This finding is based on the court's hearing their testimony and watching the manner and

demeanor of the witnesses during the Rule 29.15 evidentiary hearing (29.15 Tr. II 36, 102). Each has an extensive criminal resume (29.15 Tr. II 37, 113). Neither currently has anything to lose by his hearing testimony. Since neither witness was credible, trial counsel breached no duty to movant by declining to interview a co-defendant who is not credible. Trial counsel breached no duty to movant. Movant also fails to show Strickland prejudice.

(Respondent's Exhibit C, page 14). The Rule 29.15 trial court later emphasizes that Jackson was not credible (Respondent's Exhibit C, page 18). At the habeas hearing, the DeKalb County Circuit Court again heard the testimony of co-defendant Jackson, and the circuit court again found the testimony was not credible (Petitioner's Exhibit 9, page 2). In light of these credibility determinations by the earlier courts, petitioner cannot fulfill the high standard set forth by this court in Amrine.

Lastly, petitioner repeats the suggestion that he is innocent because another of the 2000 inmates at the correctional center possessed a screwdriver on the date of the murder (Petitioner's Brief, page 38). As noted in Point I, the Jeffrey Smith information (Petitioner's Exhibit 1), does not rise to the high level of showing Strickland prejudice. Accordingly, it cannot rise to the even higher level of showing probable actual innocence under Amrine.

**CONCLUSION**

Respondent prays the court quash the writ of habeas corpus.

Respectfully submitted,

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**CERTIFICATE OF COMPLIANCE**

I hereby certify:

1. That the attached brief complies with the limitations contained in Missouri Supreme Court Rule 84.06 and contains \_\_\_\_\_ words, excluding the cover, certification and appendix, as determined by Microsoft Word 2003 software; and

2. That the floppy disk filed with this brief, containing a copy of this brief, has been scanned for viruses and is virus-free; and

3. That a true and correct copy of the attached brief, and a floppy disk containing a copy of this brief, were mailed this \_\_\_\_\_ day of March, 2011, to:

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\_\_\_\_\_  
STEPHEN D. HAWKE