

IN THE SUPREME COURT OF MISSOURI

CASE NO. 91112

STATE EX REL. REGINALD GRIFFIN,

Petitioner,

v.

**LARRY DENNEY, Superintendent,
Crossroads Correctional Center,**

Respondent.

PETITIONER'S STATEMENT, BRIEF AND ARGUMENT

Respectfully submitted,

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JURISDICTIONAL STATEMENT

This Court has jurisdiction to issue original writs of habeas corpus pursuant to Article I, Section 12 and Article V, Section 4 of the Constitution of the State of Missouri, Missouri Rule 91.01(b), and § 532.020 *et seq.* R.S.Mo. (2000). This petition is also properly before this Court pursuant to Rule 91.02(a) and 84.22(a) because petitioner previously filed the same habeas petition in the Circuit Court of DeKalb County and later in the Missouri Court of Appeals, Western District.

STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

Petitioner Reginald Griffin was charged in 1989 the Circuit Court of Randolph County, Missouri, by way of information in CR-3-87-7-FX with the capital murder of James Bausley. (*See* Exh. 13). Mr. Griffin, along with co-defendants Doyle Franks and Arbary Jackson, were accused of stabbing Mr. Bausley, an inmate at the Missouri Training Center for Men, located in Moberly, Missouri, on July 12, 1983. These charges were filed after two other inmates, Paul Curtis and Wyvonne Mozee, implicated these three men.

Petitioner was represented at trial by retained counsel Jeanne Moenckmeier. The case proceeded to trial in the Circuit Court of Randolph County, Missouri, in January of 1988. On January 28, 1988, petitioner was found guilty as charged and was subsequently sentenced to death upon the jury's recommendation on March 29, 1988. (*Id.*). In her motion for new trial, Ms. Moenckmeier admitted that petitioner's trial was her first felony jury trial. (29.15 Tr. 29-34).

On consolidated appeal, after petitioner received a hearing on his 29.15 motion, this Court affirmed petitioner's conviction, but overturned his death sentence. *See State v. Griffin*, 818 S.W.2d 278 (Mo. banc 1991), *as modified* after recall of the mandate, *State v. Griffin*, 848 S.W.2d 464 (Mo. banc 2003). Petitioner

was then resentenced to life without parole for fifty (50) years on July 27, 1993. Petitioner, after resentencing, again unsuccessfully sought post-conviction relief under Rule 29.15. *Griffin v. State*, No. WD49507 (Mo. App. W.D. Nov. 8, 1994) (unpublished). Thereafter, petitioner unsuccessfully sought federal habeas corpus relief pursuant to 28 U.S.C. § 2254 from his capital murder conviction.

Petitioner initiated the present state habeas corpus litigation by filing a Rule 91 petition in the Circuit Court of DeKalb County on April 7, 2005 before Judge Warren L. McElwain. *Griffin v. Kemna*, No. 43V050500040 (Mo. Cir. Ct. Apr. 7, 2005). Judge McElwain subsequently ordered an evidentiary hearing be held on July 27, 2007.

On June 17, 2007, the deposition of Paul Curtis was taken on petitioner's behalf at the Missouri Eastern Correctional Center, located in Pacific, Missouri. (*See* Exh. 3). In his deposition, Curtis recanted his trial testimony as he had done in an earlier sworn affidavit. (*Id.*).

On July 27, 2007, the Circuit Court of DeKalb County held an evidentiary hearing. At the hearing, former Moberly inmate Michael Garrett, codefendant Arbery Jackson, petitioner Reginald Griffin, and Assistant Public Defender Nancy McKerrow testified on behalf of petitioner. (*See* Exh. 2). The Curtis deposition and the prior 29.15 testimony of codefendant Doyle Franks was also introduced

into evidence. (*See* Exh's. 3, 6). Several other exhibits, pertaining to undisclosed exculpatory evidence regarding the fact that inmate Jeffrey Smith was caught with a knife minutes after the stabbing, were also introduced into evidence. (*See* Exh. 1).

On September 5, 2007, Judge McElwain faxed a letter to the parties indicating, without elaboration, that he intended to dismiss the habeas petition. Judge McElwain's letter requested that Assistant Attorney General Stephen Hawke prepare and submit an order for him to sign and file as his judgment in the case. (*See* Exh. 7).

On April 22, 2008, the Mr. Hawke faxed a short document, just over three pages in length, entitled "Memorandum, Order & Judgment" to Judge McElwain. (Exh. 8). Judge McElwain signed and filed Mr. Hawke's prepared judgment on April 25, 2008, making no additions, substitutions, or deletions whatsoever. (*See* Exh. 9).

On August 13, 2009, petitioner filed a petition for a writ of habeas corpus pursuant to Rule 91 in the Missouri Court of Appeals, Western District. *In re Griffin v. Denney*, No. WD71349 (Mo. App. W.D. Aug. 13, 2009). The Court of Appeals denied this petition in a one line order on August 27, 2009. (*See* Exh. 14).

B. THE TRIAL

At approximately 2:30 on the afternoon of July 12, 1983, James “Tack” Bausley was fatally stabbed on the yard of the Missouri Training Center for Men, located in Moberly, Missouri. Two prisoners, Paul Curtis and Wyvonne Mozee, implicated three fellow inmates in the murder: petitioner, Doyle Franks, and Arbary Jackson. Curtis and Mozee became the key witnesses for the prosecution at petitioner’s trial, as well as the trials of co-defendants Arbary Jackson and Doyle Franks. At his capital murder trial, Jackson was subsequently acquitted. (Exh. 2, p. 35). Franks was convicted of the lesser offense of second degree murder.¹ *State v. Franks*, 793 S.W.2d 543 (Mo. App. E.D. 1990).

Curtis testified at petitioner’s trial that on the afternoon of July 12, 1983, while he was on his way to a vocational training class, he witnessed the altercation in the prison yard that led to Mr. Bausley’s death. (Tr. 478). After hearing someone yell, Curtis testified that he saw Doyle Franks, Arbary Jackson, and petitioner.

¹ The only logical explanation for the disparate results at these three trials, where the prosecution presented the same evidence, is the experience and performance of defense counsel. Ms. Moenckmeier, to her credit, admitted in her motion for new trial, that petitioner’s case was her first felony jury trial. (29.15 Tr. 29-34).

Curtis testified that James Bausley was standing in front of Curtis with his back to him. As Bausley turned and tried to run, Curtis testified that he saw petitioner hit Bausley in the lower part of the back. Curtis stated that as Franks and Jackson tried to grab Bausley, petitioner brandished a foot-long knife that had a yellow rag for a handle and stabbed Bausley in the chest. (Tr. 485-6, 493-4). Curtis testified that as Bausley fell down, he was visibly bloodied. (Tr. 487). According to Curtis, petitioner, Franks, and Jackson then ran away after petitioner disposed of the knife by throwing it up on the roof of the gym, near the corner of the building. (*Id.*). Curtis testified that he returned to his cell and did not say a word about witnessing the incident to anyone until he faced a transfer to the Jefferson City, Missouri prison, which had a reputation of being the “toughest” penitentiary in the state. On September 2, 1983, presumably to avoid the impending transfer, Curtis gave a statement to prison investigator Raymond Newberry implicating petitioner, Franks, and Jackson in the Bausley killing. (Tr. 496, 498-9).

Curtis later reached an agreement with the prosecution to testify at the trials of petitioner, Jackson, and Franks under which the state promised to assist him in handling a stealing charge in Gasconade County. (Tr. 468, 506). In addition, the state agreed to report Curtis’s cooperation to the Board of Probation and Parole. (Tr. 468). After Curtis was released on parole, the state also paid Curtis’s rent on a

trailer home and a plot of land for one month and loaned him a television set. (Tr. 469). During cross-examination at trial, Curtis admitted that in his initial statement to the investigators, he stated that the incident took place at 9:30 a.m., instead of in the afternoon, when the stabbing actually occurred. (Tr. 519, 520).

At petitioner's trial, the state was allowed to introduce a transcript of the preliminary hearing testimony of inmate Wyvonne Mozee. Mr. Mozee died on July 30, 1987, before petitioner's trial commenced. (Tr. 631). At the preliminary hearing, Mozee indicated that he knew the victim and believed Bausley was murdered because of a dispute involving a television set. Mozee testified that on the morning of the homicide, he heard at the gym that there would be trouble over this dispute and went outside. (Tr. 668). When he went outside the gym, Mozee stated that he saw petitioner, Arbary Jackson, Doyle Franks, and a man he identified by the nickname "Static Steve" standing with Bausley by a tree. (Tr. 668-9). At one point during his testimony, Mozee said that petitioner's nickname was "Little Dirty." (Tr. 655). At a different stage of his testimony, Mozee (erroneously) identified co-defendant Arbary Jackson as "Little Dirty" and indicated that petitioner went by the nickname "Little Papa." (Tr. 656, 670-1, 691). Mozee said that "Little Papa" tried to grab Bausley and then he saw "Little Dirty" stab Bausley in the chest with a knife with a cloth wrapped around the end. (Tr.

672-3). Mozee testified that Bausley fell backwards on the ground with blood on his chest. (Tr. 673-4.)

At trial, petitioner's defense counsel challenged the credibility of Mozee's testimony with the testimony of David Steele, a fellow inmate. According to Steele, Mozee told him at a halfway house that he had a deal with the prison administration to testify against petitioner, Jackson, and Franks in order to get released quicker. (Tr. 724-5). Another inmate, Eddie Johnson, testified that Mozee had told him that on the day of the homicide that Bausley had been stabbed but that Mozee did not see the incident occur. (Tr. 741-3.) Finally, it should be noted that absolutely no physical evidence was presented which linked petitioner to Bausley's murder.

C. NEWLY DISCOVERED EVIDENCE

The trial record, in isolation, indicates that Mr. Griffin was convicted based upon scant and questionable evidence, as demonstrated by the outcomes of his two co-defendants' trials. New evidence incrementally has come to light in the years since Mr. Griffin exhausted his normal avenues of state appeals in the early 1990's that demonstrates that prison investigators concealed exculpatory evidence implicating Jeffrey Smith in the Bausley murder and that petitioner is actually innocent of any involvement in that crime. At a June 19, 2007 deposition given

during the present Rule 91 action before the circuit court, the star witness for the state, inmate Paul Curtis, recanted his trial testimony. (*See* Exh. 3). On July 27, 2007, at the circuit court hearing on petitioner's habeas corpus petition, fellow Moberly inmate Michael Garrett's testimony totally discredited inmate Wyvonne Mozee's preliminary hearing testimony, which was the only other evidence implicating petitioner. (*See* Exh. 2). At that same hearing, eyewitness and codefendant Arbary Jackson testified that petitioner had no involvement in the murder and was not present at the scene. (*See* Exh. 2).

All of the existing credible evidence now shows that Curtis's trial testimony was fabricated. (*See* Exh. 3). At his deposition on June 19, 2007, Paul Curtis testified that he did not actually see the stabbing of James Bausley because he was attending a vocational auto mechanics class, which met from approximately 8:00 am to 3:00 pm from Monday to Friday. (Exh. 3 pp. 10-11, 21-23). In his trial testimony, he claimed to be an eyewitness to both the altercation and the stabbing. (*See* Exh's. 3, 4). Curtis testified in his recent deposition that he learned details of the murder while in administrative segregation for an unrelated fighting incident from petitioner's co-defendant Doyle Franks, who was in an adjoining cell and openly bragged about committing the murder. (Exh. 3 pp. 10-11).

When asked about his motivation for fabricating his trial testimony, Curtis revealed that he was facing a transfer to Jefferson City, the highest security state prison at the time, and feared for his safety as a 22-year-old young man. (*Id.*). By contacting prison officials and agreeing to testify against petitioner, Franks, and Jackson, he avoided transfer to the Jefferson City penitentiary and was instead sent to the state prison located in Pacific, Missouri. (*Id.* 13-14). He was paroled in 1984, in large part due to his cooperation. (*Id.* 15). Other details of the murder were provided to him by prison investigators and other state agents. (*Id.* 21). When asked why he was admitting that he lied at the trials, Curtis stated that he wanted to clear his conscience. (*Id.* 23).

Many aspects of Mr. Curtis' 2007 deposition testimony are corroborated by prison records. These records were presented as exhibits to Mr. Curtis' deposition and were attached to Exhibit 3 to the habeas petition. For instance, prison records indicate that Mr. Curtis started attending an auto mechanics class on May 25, 1983, which corroborates his deposition testimony that he was in the class when the stabbing occurred and could not have observed the incident. (*See* Exh. 3; Dep. Exh. 1). In addition, Mr. Curtis' testimony that he learned details of the stabbing from Doyle Franks while they were in administrative segregation ("ad. seg.") together a few days after the stabbing is corroborated by the fact that prison

records indicate that Curtis was placed in ad. seg. for fighting on July 15, 2009.² (*Id.*). Prison records also indicate that Curtis was placed in ad. seg. due to a fight with an inmate named J.D. Skinner and two other inmates because they had been pressuring him for sex. (*See* Exh. 3 pp. 43-44; Dep. Exh. 3). These documents corroborate Curtis' contention that he fabricated his testimony against petitioner in order to be transferred out of Moberly and escape these inmate predators. (*Id.* p. 37, 43-44).

Finally, prison records corroborate Curtis' deposition testimony that he was diagnosed as schizophrenic before he testified at trial, a fact that was also not revealed to the defense. (*Id.* pp. 16-18; Dep. Exh. 2). In fact, Curtis, in 1987, slashed his wrist in an apparent suicide attempt in Farmington. (*Id.*).

Additional new evidence shows that deceased inmate Wyvonne Mozee's preliminary hearing testimony which was presented at trial, was also fabricated. (*See* Exh. 2 pp. 5-28). At petitioner's preliminary hearing, Mozee testified that he witnessed the murder of James Bausley. (*See* Exh. 5). Mozee died twenty-three years ago, so he cannot recant his false testimony. However, fellow inmate

² Evidence presented at the subsequent trial of Doyle Franks also corroborates Curtis' contention that he obtained details of the stabbing from Franks while they were in adjoining cells in ad. seg. *See Franks*, 793 S.W.2d at 545.

Michael Garrett's July 27, 2007 hearing testimony entirely discredits Mozee. (*See* Exh. 2 pp. 5-28).

At the hearing, Garrett testified that he and Mozee walked the halls of the school building and arrived at the law library on the afternoon of Bausley's death. (*Id.* p. 7-8). Another inmate came up to Garrett and Mozee in the law library and told them that someone had stabbed James "Tack" Bausley. (*Id.* p. 8). After hearing the news, Garrett testified that Mozee ran out of the building toward the yard. (*Id.*). Garrett immediately entered a classroom in the building where he observed through a window Mr. Bausley's body being placed on a stretcher. (*Id.* p. 8-9). The next time Mozee and Garrett spoke, about two days after Bausley was stabbed, Mozee told Garrett that he was going to testify about Bausley's stabbing to make parole, despite the fact he did not see the stabbing. (*Id.* p. 11). By that time, it was common knowledge within the penitentiary that petitioner, Doyle Franks, and Arbary Jackson were suspects in "Tack's" murder. (*Id.* p. 10-11). Garrett's hearing testimony shows that Mozee could not have possibly witnessed Bausley's murder. (*Id.* 11).

Finally, codefendants Arbary Jackson and Doyle Franks have both given sworn testimony exonerating petitioner. Jackson has always maintained that petitioner had nothing to do with the murder. (Exh. 2 pp. 28-56). At the July 27,

2007 hearing, Jackson testified that the stabbing was the result of an argument between Bausley, codefendant Doyle Franks and fellow inmate Jeffrey Smith over a portable television set. (*Id.* 32-33). Jackson testified that he tried to defuse the situation, but then Bausley, Franks and Smith produced weapons. (*Id.*). At that point, Jackson turned and walked away, wanting nothing to do with the impending violence. (*Id.*). Moments later, after hearing someone say, “He’s dead,” Jackson stated that he turned around and saw Bausley lying on the ground. (*Id.* 33). Jackson said that he was advised by counsel not to testify at petitioner’s trial or come forward with any evidence exonerating petitioner because he too was facing capital murder charges in connection with Bausley’s death. At Jackson’s subsequent trial, where Curtis and Mozee also testified, he was acquitted. (*Id.* 34-35). At Jackson’s trial, Curtis mistakenly identified Jackson as being Reginald Griffin, and in turn identified Griffin as Arbary Jackson sixteen different times. (*Id.* 32). Jackson stated that petitioner was not at the scene when Bausley was stabbed. (*Id.* 34-35).

Co-defendant Doyle Franks previously testified at petitioner’s 1989 29.15 hearing that petitioner had nothing to do with Bausley’s murder. (*See* Exh. 6). Franks testified that he and Jeffrey Smith stabbed Bausley and that Smith was caught with a knife by a guard shortly thereafter. (Exh. 6; 29.15 Tr. 105-106).

At the 2007 evidentiary hearing before Judge McElwain in DeKalb County, petitioner Reginald Griffin and his former public defender Nancy McKerrow also provided sworn testimony regarding petitioner's *Brady* claim involving the knife seized from Jeffrey Smith a few minutes after the murder. (Exh. 2 pp. 56-80). Petitioner testified that he did not know that Jeffrey Smith had been caught with a knife shortly after the murder until he heard his codefendant Doyle Franks testify at his Rule 29.15 hearing in 1989. (*Id.* 57-58). By that time, it was too late to raise a *Brady* claim based upon this information in his 29.15 action because the time limits for filing a timely amended motion had expired. (Exh. 2 at 58, 67). *See also* Rule 29.15(b)(f)(k) (1988).

After this Court reversed petitioner's death sentence in 1993, Public Defender Nancy McKerrow was appointed to represent petitioner at his penalty phase retrial. Upon meeting Ms. McKerrow, petitioner brought the issue regarding Mr. Smith and the knife to her attention. (*Id.* 59). After Ms. McKerrow investigated the issue, (*See* Exh. 11), reports came to light that indicated Mr. Smith was caught with the knife matching the description of the murder weapon shortly after the stabbing and that he had been charged with and had pleaded guilty to a felony weapons charge arising from being caught with the knife. (*Id.* 59-60; *See also* Exh. 1).

Based upon this newly discovered evidence, Ms. McKerrow filed a motion before the trial court to reverse petitioner's conviction based upon a *Brady* violation, which was subsequently denied on procedural grounds.³ (*See* Exh. 12, 13). After petitioner was resentenced to life imprisonment in 1993, he again attempted to raise this *Brady* claim in a new 29.15 motion. (*See* Exh. 10). However, both the motion court and the Missouri Court of Appeals ruled that any claims affecting his conviction, as opposed to his new sentence, were successive and could not be heard on the merits in a subsequent 29.15 action. (*Id.*; Exh. 2 at 60-61). Finally, Mr. Griffin indicated that he knew Jeffrey Smith, who is known by the nickname of "Little Jeff," from Moberly prison. (*Id.* at 62). Mr. Smith was similar in height, weight and complexion to petitioner.⁴ (*Id.*)

³ Had such a motion been filed today, the trial court would have had the legal authority to grant petitioner a new trial to correct a miscarriage of justice based upon newly discovered evidence in light of this Court's recent decision in *State v. Terry*, 304 S.W.3d 105, 108-111 (Mo. banc 2010).

⁴ Prison records indicate that petitioner and Smith, both of whom are black males, are close in age and possessed similar physical characteristics. Smith was 5' 6½ inches tall and weighed 132 lbs. Petitioner was 5' 6 inches tall and weighed 115 lbs. (*See* Exh's. 1, 12; App. 4).

The final witness to testify at the 2007 hearing was Assistant Public Defender Nancy McKerrow. (*Id.* 66). Ms. McKerrow testified that she was appointed to represent petitioner on his penalty phase retrial after his death sentence was reversed in 1993. (*Id.* 66-67). Upon meeting Mr. Griffin, she was informed by him about the possible *Brady* issue involving Jeffrey Smith and the knife. (*Id.* at 67). Upon receiving this information, she prepared a memorandum for her investigator to look into this issue. (*Id.* 67-68; Exh. 11; App. 5). Ms. McKerrow's investigator went to Moberly and obtained Mr. Smith's DOC file. (*Id.* at 68). Ms. McKerrow also obtained the public defender's file pertaining to Mr. Smith's subsequent concealed weapons charge. (*Id.*). In both of these files, investigative reports were written indicating that Mr. Smith was caught at approximately 2:50 p.m. on July 12, 1983 with a homemade knife with a yellow handle on it. (*Id.* 69; Exh. 1; App. 1-3). Mr. Smith was also prosecuted in 1983 on a felony weapons charge in Randolph County for which he received a two year sentence. (*See* Exh. 1).

After being appointed to represent petitioner, Ms. McKerrow also obtained prior trial counsel's file. There was nothing in the discovery from these trial files regarding Jeffrey Smith being caught with a knife or the criminal charges arising therefrom. (*Id.* at 72).

After uncovering the information regarding Mr. Smith being caught with a knife, Ms. McKerrow recognized that this was powerful exculpatory evidence, in light of the fact that Jeffrey Smith's physical characteristics were almost identical to those of petitioner. (*Id.* 71). As Ms. McKerrow stated: "Even if there was an eyewitness, they could have easily mistaken them but it clearly would have been a huge help at trial." (*Id.*). Based upon the information uncovered regarding Smith and the knife, Ms. McKerrow filed, before the trial court, a motion to reverse petitioner's capital murder conviction based upon this *Brady* violation, which was denied because the trial judge believed he lacked jurisdiction to address any guilt phase issues. (*Id.* 73; Exh's. 12-13). After petitioner was resentenced to life imprisonment in 1993, Ms. McKerrow had no further involvement in the case. (*Id.*).

POINTS RELIED ON

I.

PETITIONER IS ENTITLED TO THE ISSUANCE OF A WRIT OF HABEAS CORPUS DISCHARGING HIM FROM HIS UNCONSTITUTIONAL CONVICTION AND SENTENCE OF LIFE WITHOUT PAROLE FOR FIFTY YEARS FOR THE OFFENSE OF CAPITAL MURDER IMPOSED BY THE CIRCUIT COURT OF RANDOLPH COUNTY BECAUSE AGENTS OF THE PROSECUTION FAILED TO DISCLOSE MATERIAL EXCULPATORY EVIDENCE THAT UNDERMINED CONFIDENCE IN THE OUTCOME OF PETITIONER'S TRIAL IN VIOLATION OF THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION, ARTICLE I, SECTION 10 OF THE CONSTITUTION OF MISSOURI, AND MISSOURI SUPREME COURT RULE 25.03.

Banks v. Dretke, 540 U.S. 668 (2004)

Strickler v. Greene, 527 U.S. 263 (1999)

Harrington v. State, 659 N.W.2d 509 (Iowa 2003)

State v. Stewart, 313 S.W.3d 661 (Mo. banc 2010)

II.

PETITIONER IS ENTITLED TO THE ISSUANCE OF A WRIT OF HABEAS CORPUS DISCHARGING HIM FROM HIS UNCONSTITUTIONAL CONVICTION AND SENTENCE OF LIFE WITHOUT PAROLE FOR FIFTY YEARS FOR THE CRIME OF CAPITAL MURDER IMPOSED BY THE CIRCUIT COURT OF RANDOLPH COUNTY BECAUSE HE CAN PERSUASIVELY ESTABLISH THAT HE IS ACTUALLY INNOCENT OF THAT OFFENSE, WHICH OVERCOMES ANY PROCEDURAL IMPEDIMENT TO THE REVIEW OF PETITIONER'S *BRADY* CLAIM AND ALSO PROVIDES AN INDEPENDENT BASIS FOR HABEAS RELIEF BECAUSE PETITIONER'S CONTINUED INCARCERATION FOR A CRIME HE DID NOT COMMIT VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 10 OF THE CONSTITUTION OF MISSOURI.

State ex rel. Amrine v. Roper, 102 S.W.3d 541 (Mo. banc 2003)

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

State ex rel. Verweire v. Moore, 211 S.W.3d 89 (Mo. banc 2006)

House v. Bell, 547 U.S. 518 (2006)

ARGUMENT I

PETITIONER IS ENTITLED TO THE ISSUANCE OF A WRIT OF HABEAS CORPUS DISCHARGING HIM FROM HIS UNCONSTITUTIONAL CONVICTION AND SENTENCE OF LIFE WITHOUT PAROLE FOR FIFTY YEARS FOR THE OFFENSE OF CAPITAL MURDER IMPOSED BY THE CIRCUIT COURT OF RANDOLPH COUNTY BECAUSE AGENTS OF THE PROSECUTION FAILED TO DISCLOSE MATERIAL EXCULPATORY EVIDENCE THAT UNDERMINED CONFIDENCE IN THE OUTCOME OF PETITIONER'S TRIAL IN VIOLATION OF THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION, ARTICLE I, SECTION 10 OF THE CONSTITUTION OF MISSOURI, AND MISSOURI SUPREME COURT RULE 25.03.

In *Brady v. Maryland*, 373 U.S. 83 (1963), the Supreme Court held that “the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.” *Id.* at 87. Later, in *Strickler v. Greene*, 527 U.S. 263 (1999), the court more precisely articulated the three essential elements for establishing a *Brady* claim: “The evidence at issue

must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the state, either willfully or inadvertently; and prejudice must have ensued.” *Id.* at 281-282. It is also well settled that the *Brady* rule encompasses evidence “known only to police investigators and not the prosecutor.’ In order to comply with *Brady*, therefore, ‘the individual prosecutor has a duty to learn of any favorable evidence known to others acting on the government’s behalf in this case, including the police.’” *Id.* at 280-281 (quoting *Kyles v. Whitley*, 514 U.S. 419, 437, 438 (1995)).

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

As a threshold matter, in the courts below, respondent has asserted a procedural bar defense arising from the undisputed fact that this *Brady* claim was not presented in petitioner's first 29.15 motion or direct appeal. A habeas petitioner can overcome a procedural bar defense if he can show "cause" for not presenting his claims in state court and "prejudice" resulting from a Constitutional error, or a fundamental miscarriage of justice. *See, e.g., Coleman v. Thompson*, 501 U.S. 722, 750 (1991). "Cause" as defined in *Murray v. Carrier*, 477 U.S. 478, 488 (1986), is a factor external to the defense or a cause for which the defense is not responsible.

In this action, the state, in its opposition and return, has wisely not directly challenged petitioner's arguments that he can establish cause for the default arising from the fact that the *Brady* claim was not raised on direct appeal or during the 29.15 proceedings. As the chronology of events set forth in the petition and in this brief demonstrates, cause exists because the factual basis for the claim was not available to petitioner during prior proceedings because the government "hid the ball" until this evidence was discovered by Nancy McKerrow in 1993 after this Court reversed petitioner's death sentence on consolidated appeal. *See, e.g., Williams v. Taylor*, 529 U.S. 420, 443-444 (2000); *State ex rel. Engel v. Dormire*, 304 S.W.3d 120, 125-126 (Mo. banc 2010). Thus, cause is established because

interference by law enforcement officials made it impossible for the petitioner to advance his claims in state court in a timely and procedurally correct manner. *See Amadeo v. Zant*, 486 U.S. 214, 222 (1987); *Strickler*, 527 U.S. at 281-284.

The prejudice requirement to overcome a procedural bar is identical to the *Brady* materiality test. *Id.* at 282; *Banks v. Dretke*, 540 U.S. 668, 691 (2004). To establish *Brady* materiality, petitioner must show “a reasonable probability of a different result.” *Kyles*, 514 U.S. at 434. In assessing prejudice or materiality, reviewing courts must consider the totality of the exculpatory evidence suppressed by the government and consider its cumulative impact in light of the whole case. *Id.* at 436-437. *See also State ex rel. Amrine v. Roper*, 102 S.W.3d 541, 545 (Mo. banc 2003).

In *Banks*, the Supreme Court noted that the cause and prejudice test in the context of a defaulted *Brady* claim “parallel two of the three components of the alleged *Brady* violation itself.” 540 U.S. at 691. Thus, if petitioner can demonstrate cause and prejudice and establish the third component of a *Brady* violation that the excluded evidence was favorable to him, he can establish his entitlement to habeas relief under *Brady*. *Id.*

Based on the foregoing facts, there can be little dispute that petitioner can meet the first part of the *Brady* test because the suppressed evidence implicating

Jeffrey Smith was clearly favorable to the accused. *See Duley v. State*, 304 S.W.3d 158, 162 (Mo. banc 2010). As the Ninth Circuit recently stated: “new evidence suggesting an alternate perpetrator is ‘classic *Brady* material.’” *Williams v. Ryan*, 623 F.3d 1258, 1265 (9th Cir. 2010).

Because Jeffrey Smith physically resembled petitioner, it is obvious that C.O. O’Brien’s reports that Smith was caught with a homemade knife minutes after Bausley was stabbed that matched Curtis’ description of the murder weapon was exculpatory. *See, e.g., State v. Knapper*, 579 So. 2d 956 (La. 1991) (reversing conviction where state suppressed exculpatory evidence that assailants’ descriptions matched suspects in other robberies); *Jefferson v. State*, 645 So.2d 313, 316 (Ala. Crim. App. 1994) (“There is no question that evidence that points to the commission of the act by someone other than the accused is favorable to the defense.”); *State v. Spurlock*, 874 S.W.2d 602 (Tenn. Crim. App. 1993) (prosecutor had duty to disclose statement which implied in part that accused did not commit the murder); *State v. Goodson*, 277 S.E.2d 602 (S.C. 1981) (reversing conviction where state suppressed photograph of defendant’s brother arguably showing him to be present at scene where items were stolen that were later found in defendant’s possession).

As Nancy McKerrow pointed out in her 2007 hearing testimony, the Jeffrey Smith evidence “would have been a huge help at trial.” (Exh. 2, p. 71). An effective trial counsel could have used the suppressed Smith evidence, coupled with other evidence that has now come to light, to mount an effective defense that Curtis⁵ and Mozee were either mistaken or lying and the three assailants who actually confronted and stabbed Mr. Bausley were Doyle Franks, Jeffery Smith, and Michael Washington. *See Harrington v. State*, 659 N.W.2d 509, 523-524 (Iowa 2003).

As to the second element of the *Brady* test, there can also be no serious dispute that agents of the government suppressed the exculpatory report of C.O. O’Brien and the evidence of Smith’s 1983 criminal prosecution on a weapons charge until these documents were uncovered by Nancy McKerrow in 1993 after petitioner’s death sentence was reversed on consolidated appeal. (Exh. 2, p. 69;

⁵ Although it pales in comparison to the Jeffrey Smith evidence, another *Brady* violation occurred because the state also concealed prison records that Paul Curtis was schizophrenic and attempted suicide at the Farmington prison in 1987. (See p. 11, *infra.*). *See also Wilson v. Beard*, 589 F.3d 651, 665-666 (3rd Cir. 2009) (finding *Brady* violation from failure to disclose the mental illness of an eyewitness to the crime.)

App. 1-3, 5). Prior to trial, petitioner's counsel filed a detailed request for discovery, asking for any exculpatory information or any other evidence at the prosecutor's disposal that would have impeached or contradicted the prosecution's case. (*See* Exh's. 12, 13). In 1993, after petitioner had exhausted his state court appeals and was awaiting a new penalty phase trial, this exculpatory evidence was discovered in DOC and public defender files, regarding a 1983 concealed weapons charge against Moberly inmate Jeffrey Smith because he was caught with a homemade knife a few minutes after James Bausley was stabbed. (*See* Exh. 1 at pp. 1-2; App. 1-3).

According to a report authored by Corrections Officer W. R. O'Brien,⁶ inmate Smith was searched when he came into Housing Unit 2 after Bausley was stabbed at 2:50 p.m. on July 12, 1983. (App. 1-2). The weapon was described as a screwdriver with a yellow handle which had gray and white paint on it, and the end

⁶ Officer O'Brien was also directly involved in the investigation of the Bausley murder. Raymond Newberry testified that O'Brien retrieved Bausley's TV after the homicide from the cell of an inmate named Washington. (Tr. 462). Newberry's trial testimony corroborates the testimony of Doyle Franks that Michael Washington was involved in the argument with Bausley over the TV and was present at the stabbing. (Exh. 6, 29.15 Tr. 103-104).

had been sharpened down to a point. The homemade knife was seized and inmate Smith was placed in administrative segregation. (*Id.*).

Based on the evidence presented at the 2007 hearing and other documented evidence, it is clear that either the prosecutor, prison investigators, or both withheld exculpatory evidence regarding Jeffrey Smith being caught with a weapon shortly after the murder which should have been turned over to petitioner's trial counsel under *Brady*. The fact that Mr. Smith was prosecuted in 1983 by Randolph County prosecutors, who also later filed the charges against petitioner and his co-defendants, (*See* Exh's. 1, 13), provides strong circumstantial evidence that the prosecutor's office knew of this exculpatory evidence and failed to disclose it. In any event, it makes no difference whether the prosecutor intentionally withheld this evidence or not. *Engel*, 304 S.W.3d at 127. In other words, the prosecutor's knowledge and intent is irrelevant if *Brady* material is suppressed by investigating officers. *See State v. White*, 81 S.W.3d 561, 570-571 (Mo. App. W.D. 2002).

Even if the prosecutors in petitioner's trial did not personally know of the Jeffrey Smith incident and his subsequent prosecution, which is doubtful, they are still de facto responsible for the irrefutable fact that prison investigators concealed this evidence. It is well settled that the *Brady* rule encompasses evidence "known only to police investigators and not the prosecutor.' In order to comply with

Brady, therefore, ‘the individual prosecutor has a duty to learn of any favorable evidence known to others acting in the government’s behalf in this case, including the police.’” *Strickler*, 527 U.S. at 280-281 (quoting *Kyles*, 514 U.S. at 437, 438).

The evidence presented in the circuit court below indicates that prison investigators concealed evidence of the seizure of a knife from Jeffrey Smith shortly after the stabbing. Officer O’Brien’s investigative report clearly indicates that the knife was found shortly after the “stabbing incident on the yard.” (Exh. 1 at p. 2). Based upon the seizure of the knife from Smith by Officer O’Brien, Smith faced prison disciplinary proceedings and a subsequent criminal prosecution for a felony offense. (*Id.* pp. 8-21).

In this regard, it is interesting to note that chief prison investigator Raymond Newberry, who was also the chief investigator of the Bausley homicide who testified at the trials of petitioner and his co-defendants, (Tr. 430-464), reviewed all of the reports and referred Smith’s case to the Randolph County prosecutor’s office for prosecution on felony weapons charges. (Exh. 1 at pp. 8-11; App. 3). Conspicuously absent from any of Newberry’s testimony at petitioner’s trial, his reports and other prison files is any reference to a probable connection between the seizure of the knife from Smith and the Bausley stabbing that occurred a few minutes earlier. (*Id.*). Newberry’s conduct is inexplicable and reprehensible,

raising serious questions as to whether prison investigators were truly interested in finding the true culprits in the Bausley homicide. Newberry's misconduct is arguably as egregious as the failure of the chief detective in *White* to reveal that he was sleeping with White's wife. 81 S.W.3d at 567-568.

Based upon the foregoing facts, it is clear that the state withheld exculpatory evidence from the defense prior to petitioner's trial.⁷ Petitioner is, therefore, entitled to a new trial if he can establish the materiality of the excluded evidence. *See, e.g., Strickler v. Greene*, 527 U.S. 263 (1999). A habeas petitioner raising such a claim may prevail if he can show that there is a reasonable likelihood that the undisclosed exculpatory evidence affected the jury's verdict. *Id.* at 280; *see also Kyles v. Whitley*, 514 U.S. 419, 433-434 (1995).

Petitioner easily meets the prejudice component of this test. As noted earlier, the prosecution's evidence offered in support of a guilty verdict was far from

⁷ Respondent's argument in his return that the evidence was not concealed because Newberry testified he made his investigative files available to trial counsel is ridiculous. A similar "open file" argument by the state was rejected in *Strickler*. 527 U.S. at 283-287. In addition, Newberry's post-trial testimony, cited by respondent, involved a distinct issue involving the disclosure of prior statements of Paul Curtis. (Tr. 1067-1073).

overwhelming. In fact, no physical evidence whatsoever implicated petitioner. Both of the alleged eyewitnesses, setting aside the fact that they were thoroughly discredited at the 2007 hearing, had credibility problems, which trial counsel brought out at trial. If the jury had heard that Jeffrey Smith had been found with a knife resembling the murder weapon just a few minutes after Bausley was fatally stabbed, there is more than a reasonable probability that the jury would have entertained reasonable doubt about petitioner's guilt. *See United States v. Bagley*, 473 U.S. 667, 682 (1985); *Mendez v. Artuz*, 303 F.3d 411, 414-417 (2nd Cir. 2002) (finding *Brady* violation involving suppression of alternative perpetrator evidence in light of credibility problems with the eyewitness testimony at trial).

In light of the weakness of the state's case, had the jury heard evidence of Mr. Smith being caught with a knife shortly after the homicide, coupled with his resemblance to petitioner, this would have significantly bolstered petitioner's defense at trial that he was not involved in the stabbing. The suppression of this evidence clearly undermines confidence in the verdict. *Engel*, 304 S.W.3d at 128-129; *Strickler*, 527 U.S. at 290; *Kyles*, 514 U.S. at 434. *Brady* violations have been found to be material in other Missouri cases where the prosecution's evidence was arguably stronger and where the evidence only had impeachment value,

diminishing the credibility of some of the prosecution witnesses. *White*, 81 S.W.3d at 568-571; *Engel*, 304 S.W.3d at 128-129.

In a recent case, the Court of Appeals, Western District found a *Brady* violation where the state, as here, suppressed evidence that would have bolstered the defense that the defendant did not commit the murder. *State v. Buchli*, 242 S.W.3d 449, 454-456 (Mo. App. W.D. 2007). In finding the excluded evidence material in *Buchli*, the Court stated: “It appears to us, however, that the United States Supreme Court would have us ask whether or not the undisclosed evidence would have been significant to the defendant in the way that he tried the case: Would it have provided him with plausible and persuasive evidence to support his theory of innocence or would it have enabled him to present a plausible, different theory of innocence? If either question can be answered affirmatively, the evidence is material under a *Brady* analysis.” *Id.* at 545 (quoting *State v. Parker*, 198 S.W.3d 178, 180 (Mo. App. W.D. 2006)).

Petitioner’s case is also similar to this Court’s recent decision in *State v. Stewart*, 313 S.W.3d 661 (Mo. banc 2010). Although *Stewart* was decided in the context of a motion for a new trial under Rule 29.11 based on newly discovered evidence, the case is factually analogous and the reasoning this Court employed in *Stewart* is relevant here.

Zachary Stewart was also convicted of first-degree (capital) murder. *Id.* at 662. Since no physical evidence tied Stewart to the murder, his conviction rested upon the questionable testimony of two jailhouse snitches. *Id.* at 663-664, 667. Following Stewart's conviction, evidence emerged that Stewart's brother-in-law, Tim, had made statements to two members of his family that implicated Tim in the murder. *Id.* at 664-665. Additionally, following Stewart's conviction, Tim's DNA was matched to DNA found on a bloody hat at the crime scene; at trial, DNA information from the bloody hat had only reflected a DNA "hit" with respect to Tim, which is a lower standard of identification than a DNA "match." *Id.* This Court held that Stewart was entitled to a new trial under the more onerous standard of review required under Rule 29.11 because the newly discovered evidence would allow Stewart "to present an alternative theory in his defense beyond" that which he presented at trial and the new evidence "raise[s] a substantial doubt in the mind of a reasonable person as to the result if he is retried." *Id.* at 667.

There are also numerous cases from other jurisdictions, some of which have been previously cited, where reviewing courts have granted new trials on *Brady* violations involving similar factual situations where either the police or the prosecution suppressed reports pointing to an alternate perpetrator of the crime. *People v. Murdock*, 237 N.E.2d 442 (Ill. 1968); *Valdovinos v. McGrath*, 598 F.3d

568, 578-580 (9th Cir. 2010); *Banks v. Reynolds*, 54 F.3d 1508 (10th Cir. 1995); *Bowen v. Maynard*, 799 F.2d 593 (10th Cir. 1986). The facts confronted by the Tenth Circuit in the *Bowen* case bear remarkable similarities to petitioner's *Brady* claim. Like petitioner's trial, Bowen was convicted of murder based on the testimony of two eyewitnesses where no physical evidence tied him to the crime. *Bowen*, 799 F.2d at 598. Like this case, the police suppressed reports in *Bowen* that pointed to an alternative suspect who matched eyewitnesses' descriptions of the murderer. *Id.* at 599-603. Like this case, the Tenth Circuit found that the suppressed evidence was material because it could have undermined the believability of the eyewitness testimony and raised "serious questions about the manner, quality, and thoroughness of the investigation that led to Bowen's arrest and trial." *Id.* at 610-613.

The facts of petitioner's case also bear striking parallels to an Iowa Supreme Court decision granting a prisoner a new trial on a *Brady* issue. In *Harrington v. State*, 659 N.W.2d 509 (Iowa 2003), the Iowa Supreme Court granted a new trial to Terry Harrington on a *Brady* violation involving remarkably similar facts to the case presented here. Harrington was convicted of the shotgun murder of a security guard at a car dealership in 1997 in Council Bluffs, Iowa. *Id.* at 514. A shotgun

shell was found in the vicinity of the shooting and footprints and dog prints were also discovered near the victim's body. *Id.*

Like petitioner's case, Harrington's conviction rested upon the eyewitness/snitch testimony of an individual named Kevin Hughes who lacked credibility. *Id.* at 514-515. The eyewitness in *Harrington*, like Paul Curtis in this case, recanted his testimony during Harrington's second state post-conviction proceeding. *Id.* at 517.

Like the prison investigators in this case, police officers investigating the murder in *Harrington* suppressed police reports regarding an alternative suspect in the murder. The suppressed reports in *Harrington* indicated that another individual named Charles Gates was observed at the car lot with a dog and a shotgun attempting to break into a vehicle just days before the shooting. *Id.* at 517-519, 523. Based upon the substance of the suppressed evidence, the Iowa Supreme Court found that the excluded evidence was material and granted a new trial in light of the unreliability of the eyewitness testimony. *Id.* at 523-525. Although the Iowa Supreme Court did not directly base its reversal on Kevin Hughes' recantation, the court noted: "The unreliability of this witness is, however, important groundwork for our analysis because this circumstance makes it even more probable that the jury would have disregarded or at least doubted Hughes'

accounts of the murder had there been a true alternative suspect. Gates was that alternative.” *Id.* at 524.

There is clearly no procedural obstacle to this Court’s review of the merits of petitioner’s claim, notwithstanding the fact that his *Brady* claim was not advanced during direct appeal or state post-conviction proceedings. Apart from being reviewable under the gateway actual innocence exception outlined under Argument II below, cause and prejudice exists to overcome any procedural bar because the factual basis for raising this claim was not reasonably available to petitioner until 1993, well after his state post-conviction proceedings were completed. *See, e.g., Amadeo v. Zant*, 486 U.S. 214, 222 (1988); *Engel*, 304 S.W.3d at 125-126.

Because there is no procedural bar to this claim, and because the claim presents a textbook *Brady* violation, petitioner is entitled to a new trial. Habeas relief is warranted.

ARGUMENT II

PETITIONER IS ENTITLED TO THE ISSUANCE OF A WRIT OF HABEAS CORPUS DISCHARGING HIM FROM HIS UNCONSTITUTIONAL CONVICTION AND SENTENCE OF LIFE WITHOUT PAROLE FOR FIFTY YEARS FOR THE CRIME OF CAPITAL MURDER IMPOSED BY THE CIRCUIT COURT OF RANDOLPH COUNTY BECAUSE HE CAN PERSUASIVELY ESTABLISH THAT HE IS ACTUALLY INNOCENT OF THAT OFFENSE, WHICH OVERCOMES ANY PROCEDURAL IMPEDIMENT TO THE REVIEW OF PETITIONER'S *BRADY* CLAIM AND ALSO PROVIDES AN INDEPENDENT BASIS FOR HABEAS RELIEF BECAUSE PETITIONER'S CONTINUED INCARCERATION FOR A CRIME HE DID NOT COMMIT VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 10 OF THE CONSTITUTION OF MISSOURI.

The probability that Mr. Griffin is innocent has dual significance in this case. First, both state and federal law require a court to grant a new trial to a prisoner who presents a truly persuasive case of his innocence. *State ex rel. Amrine v. Roper*, 102 S.W.3d 541 (Mo. banc. 2003); *Herrera v. Collins*, 506 U.S.

390 (1993). Second, a prisoner who makes a colorable claim of innocence is entitled under both state and federal law to have a court review the constitutionality of his conviction, regardless of any issue relating to procedural default or timeliness of his claim. *Clay v. Dormire*, 37 S.W.3d 214, 217 (Mo. banc. 2000); *Schlup v. Delo*, 513 U.S. 298 (1995); *State ex rel. Verweire v. Moore*, 211 S.W.3d 89, 91 (Mo. banc 2006). Both aspects of judicial consideration of innocence claims rest upon the recognition that “[t]he quintessential miscarriage of justice is the [incarceration] of a person who is entirely innocent.” *Schlup*, 513 U.S. at 324-325.

Under this point, petitioner will first address his claim that he can meet the “gateway” innocence standard to overcome any procedural impediment to review of the merits of his *Brady* claim. Second, although it may not be necessary for this Court to address this issue if it finds that petitioner can meet the gateway innocence test, petitioner has presented clear and convincing evidence of his innocence sufficient to provide an independent ground for habeas relief under this Court’s decision in *Amrine*.

A. PETITIONER CAN MEET THE GATEWAY INNOCENCE TEST TO OVERCOME THE PROCEDURAL BAR ARISING FROM HIS

**FAILURE TO RAISE HIS *BRADY* CLAIM ON DIRECT APPEAL OR
IN HIS 29.15 MOTION.**

To meet the gateway innocence standard, a habeas petitioner must show that he is probably innocent. The evidence in this case unquestionably meets the *Schlup* test because no reasonable juror could find beyond a reasonable doubt that petitioner murdered James “Tack” Bausley. Thus, whether or not petitioner can establish an entitlement to relief on a “freestanding” innocence claim, petitioner is entitled to habeas relief on the merits of his *Brady* claim under the more lenient gateway innocence test.

To meet the gateway innocence test to allow review of the merits of a defaulted claim, a prisoner must establish that, in light of the new evidence, “it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt.” *Schlup v. Delo*, 513 U.S. 298, 327 (1995); *House v. Bell*, 547 U.S. 518, 537 (2006). In determining gateway innocence issues, reviewing courts must consider all of the evidence, both old and new “without regard to whether it would necessarily be admitted under the rules of admissibility that would govern at trial.” *Id.* at 538.

In light of the recantation of Paul Curtis and the fact that Wyvonne Mozee has been totally discredited, coupled with the Jeffrey Smith evidence, petitioner

can easily meet this test. This new evidence, viewed in conjunction with the credibility problems with the prosecution's case that were evident from the outcomes at the subsequent trials of Arbary Jackson and Doyle Franks, a new jury would not only probably not convict, but would certainly acquit petitioner if he received a new and fair trial.

Petitioner's gateway claim of innocence is undoubtedly stronger than Lloyd Schlup's case. In *Schlup*, after remand from the Supreme Court, Lloyd Schlup, obtained habeas relief under the gateway innocence standard despite the fact that two prison guards, who never wavered, identified him as the murderer. *Schlup*, 513 U.S. at 302; *Schlup v. Delo*, 912 F. Supp. 448 (E.D. Mo. 1995). In the unlikely event that this Court does not find cause and prejudice to remove any and all procedural obstacles to granting relief on petitioner's *Brady* claim, the merits of that claim are reviewable under the *Schlup* gateway innocence test.

B. PETITIONER CAN MEET THE “FREESTANDING” INNOCENCE TEST OF *AMRINE*.

It is well settled under Missouri law that claims of innocence are cognizable in a Rule 91 petition for a writ of habeas corpus. *Wilson v. State*, 813 S.W.2d 833 (Mo. banc 1991). More recently, this Court held that a habeas petitioner may assert a freestanding claim of actual innocence, independent of any constitutional

violation, as a means to obtain release from prison. *State ex rel. Amrine v. Roper*, 102 S.W.3d 541 (Mo. banc 2003). Although *Amrine* was a death penalty case, it is also a “manifest injustice” for the same reason to allow a prisoner to remain incarcerated on a non-capital prison sentence if he is unquestionably innocent. *Id.* at 547-48. As in the *Amrine* case, there is “clear and convincing evidence” that Reginald Griffin is innocent of the murder of James Bausley.

The facts encountered by this Court in *Amrine* are virtually indistinguishable from petitioner’s case. Like *Amrine*, the instant case involved a penitentiary murder case, and the only evidence adduced at trial to convict petitioner was the questionable, suspect testimony of other prisoners, who received promises and inducements in exchange for their testimony. *Id.* at 544-545. In exchange for his trial testimony, Paul Curtis received one month’s rent for both a trailer home and a plot of land from Investigator Raymond Newberry, in addition to a television set. (See Exh. 3). Given his host of conduct violations, many of which involved deceit, fraud, or lying, Curtis lacked credibility, notwithstanding his resulting pecuniary gain.

Wyvonne Mozee’s preliminary hearing testimony is similarly lacking in credibility and similarly motivated by personal gain. After implicating petitioner, Jackson, and Franks by falsely claiming to be an eyewitness to the incident that

resulted in Bausley's death, Wyvonne Mozee secured an early release from prison. (Exh. 5; Tr. pp. 88-89, 118-119). Even without Michael Garrett's testimony, which indicated Mozee committed perjury, Mr. Mozee had demonstrated his propensity for lying and duplicity while in prison. His prison file includes a record that he lied to his caseworker on at least one occasion and that he was suspiciously found with a key to another inmate's prison cell.

As in *Amrine*, all of the convicts who implicated petitioner at trial have either recanted or have been completely discredited. In his sworn deposition, Curtis stated that he lied when he testified at petitioner's trial and that he did not see what happened to Bausley. (*See* Exh. 3 p. 10-11, 21-23). When asked in his deposition why he held himself out as an eyewitness to the crime, Curtis stated that he feared that he would die if he were transferred to the penitentiary located in Jefferson City. (*Id.* at 13). Curtis testified at deposition that his motivation for recanting his false trial testimony was that he had "grown up" since petitioner's trial and that he wished to "clear" his conscience, no longer fearing retaliation from prison administrators. (*Id.* 21-23).

Regarding Mozee's preliminary hearing testimony, fellow Moberly inmate Michael Garrett's hearing testimony entirely discredits Mozee's trial testimony. At the hearing, Garrett testified that he and Mozee were wandering the halls of the

school building on the afternoon of Bausley's death, eventually arriving at the prison law library. (*See* Exh. 2). Garrett testified that while he and Mozee were inside the law library, another inmate notified them that Bausley had been stabbed on the yard. (*Id.*). Thus, it was physically impossible for Mozee to have observed the stabbing, and his testimony to the contrary was false. (*Id.*).

Garrett's account, unlike the stories of both Curtis and Mozee, was neither motivated by pecuniary interest nor an attempt to secure early release from custody by hoodwinking prison administrators. In fact, it is more likely that Garrett would face reprisal from prison administrators and state agents for testifying on petitioner's behalf, rather than receiving a financial benefit or an early release in exchange for his testimony.

Additionally, both codefendants Arbary Jackson and Doyle Franks have testified that petitioner had no involvement whatsoever in Bausley's death. Jackson has repeatedly avowed under oath, most recently at petitioner's July 2007 hearing, that inmates Doyle Franks and Jeffrey Smith were behind Bausley's stabbing. (*See* Exh. 2 pp. 32-33). Jackson testified that Franks, Smith, and Bausley were arguing over a portable television set, which escalated into violence after Franks and Smith both produced weapons. (*Id.*). Jackson testified that he tried to neutralize the situation, but once the weapons were displayed, Jackson walked away to avoid

being implicated himself. (*Id.*). Jackson testified that as he was walking away, he heard someone say “He’s dead.” When Jackson turned around in response, he stated that he saw Bausley lying on the ground. (*Id.*). When asked why he did not testify on petitioner’s behalf at trial, Jackson testified that was advised against both testifying for petitioner and volunteering evidence that would exculpate petitioner because of Jackson’s own pending case in connection with the stabbing for which he was subsequently acquitted. (*Id.* p. 34-35).

At the 2007 evidentiary hearing, Jackson testified that at his trial, Curtis mistakenly identified Jackson as being Reginald Griffin, and in turn identified Griffin as Arbary Jackson sixteen different times, further discrediting Curtis’s story. (*Id.* 32). Finally, Doyle Franks has consistently avowed that petitioner had nothing to do with the stabbing. Franks testified at petitioner’s 29.15 hearing that he and Jeffrey Smith had stabbed Bausley, not petitioner. (*See* Exh. 6; Tr. 103-106). Franks admitted that the dispute had indeed arisen over Bausley’s television set, and that when Bausley confronted him and Jeffrey Smith about it, they both produced homemade weapons and stabbed him. (*Id.*). Franks testified that he disposed of his weapon by throwing it down into the grass, and that Smith reconcealed his weapon on his person, which was later found and confiscated by prison officials. (*Id.* 105-106). Franks certainly had nothing to gain by

incriminating himself and another inmate in the murder,⁸ in stark contrast to both Curtis and Mozee.

As a result, as in *Amrine*, there is clear and convincing evidence, in light of all the evidence, that petitioner Reginald Griffin is innocent of the murder of James Bausley. 102 S.W.3d at 548-549. As in *Amrine*, this case, in Judge Teitleman's words: "presents the rare circumstance in which no credible evidence remains from the first trial to support the conviction." *Id.* at 548. Therefore, under the facts and prevailing law, this Court should issue a writ of habeas corpus, vacating petitioner's capital murder conviction and sentence.

CONCLUSION

WHEREFORE, for all of the foregoing reasons, petitioner Reginald Griffin prays that this Court, after examining the evidence and the applicable law, issue a writ of habeas corpus vacating his conviction for the offense of capital murder and remand the case to the Circuit Court of Randolph County for further proceedings and grant such other and further relief as the Court deems just and equitable.

⁸ Franks' initial consolidated appeal was still pending when he testified at petitioner's 29.15 hearing in 1989. *See State v. Franks*, 793 S.W.2d at 543.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE AND SERVICE

I hereby certify:

1. That the attached brief complies with the limitations contained in Supreme Court Rule 84.06(b) and contains 58,112 words, excluding the cover, table of contents, table of authorities, jurisdictional statement, this certification and the appendix, as determined by Microsoft Word software; and,
2. That the a computer disk submitted with this brief, containing a copy of this brief, has been scanned for viruses and that the disk is virus free; and
3. That a true and correct copy of the attached brief, a computer disk containing a copy of this brief, were mail, postage prepaid, this 22nd day of February, 2011, to:

Steven Hawke
Office of the Attorney General
P.O. Box 899
Jefferson City, MO 65102

KENT E. GIPSON