IN THE
SUPREME COURT OF MISSOURI
EN BANC

STATE ex rel. REGINALD CLEMONS,	:	
Petitioner,	:	Capital Case
- against –	:	Execution Scheduled June 17, 2009 (STAYED)
STEVE LARKINS, Superintendent, Eastern Reception Diagnostic and Correctional Center,	:	No. SC90197
Respondent.	:	

PETITIONER'S BRIEF

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Constitution

Statutes

Rules

JURISDICTIONAL STATEMENT

Reginald Clemons, a prisoner at Potosi Correctional Center, petitioned this Court for a writ of habeas corpus on June 12, 2009 pursuant to Article V, Section 4, subsection 1 of the Missouri Constitution which provides that the Court may issue remedial writs. "[A] writ of habeas corpus may be issued when a person is restrained of his or her liberty in violation of the constitution or laws of the state or federal government." *State ex rel. Woodworth v. Denney*, 396 S.W.3d 330, 337 (Mo. banc 2013) (quoting *State ex rel. Engel v. Dormire*, 304 S.W.3d 120, 125 (Mo. banc 2010). This Court has original jurisdiction in this matter pursuant to Missouri Rule of Civil Procedure 91.02(b). App. at A116.

On June 30, 2009, the Court appointed the Honorable Judge Michael W. Manners under Rule 68.03 to serve as Master of this Court "to hold pretrial conferences, to take the evidence on the issues joined, . . . to hear and to determine all objections to testimony in the same manner and to the same extent as this Court might in a trial before it; . . . and to report the evidence taken, together with his findings of fact and conclusions of law of said issues." App. at A110 (6/30/2009 Commission).

On August 6, 2013, Judge Manners issued his report concluding that the State had violated Petitioner's constitutional rights under *Brady v. Maryland*, 373 U.S. 83 (1963), by suppressing material exculpatory evidence corroborating Petitioner's claim that his confession was coerced by police brutality. On September 25, 2013, Judge Manners overruled Respondent's exceptions to his report, App. at A117, and filed an Amended Report with this Court, confirming his factual findings that the State suppressed evidence

in violation of *Brady v. Maryland* and that police had coerced Petitioner's confession. App. at A99-A104 (Special Master's Amended Report ("Amended Report")).

STATEMENT OF FACTS

In 1993, Petitioner Reginald Clemons was sentenced to death in connection with the April 1991 murders of Julie and Robin Kerry on the Chain of Rocks Bridge. In June 2009, in response to a *habeas* petition, this Court appointed the Honorable Judge Michael W. Manners to serve as Master to take evidence. In 2012, as a result of this proceeding and nearly twenty years after Clemons was sentenced to death, a former bail investigator in St. Louis, Warren Weeks, came forward with evidence that he observed injuries to Clemons only three hours after police booked Clemons following a multi-hour interrogation. This new evidence, previously unknown to Clemons' counsel at the time of trial or thereafter, corroborated what Clemons has steadfastly maintained since the time of his arrest: that the police beat him into making a coerced confession regarding his involvement in the events on the Chain of Rocks Bridge. Judge Manners specifically found, as a matter of fact, that the confession was coerced. App. at A107-A108 (Amended Report).

The State, including prosecutor Nels Moss, was fully aware of Weeks' evidence at the time of Clemons' trial, but suppressed it. The trial court admitted the confession over Clemons' objection that it was coerced, and it was the key piece of evidence that resulted in Clemons' conviction of first-degree murder. At a pre-trial suppression hearing, the trial court held that the testimony at the hearing did not sufficiently support an inference

of police brutality. The key corroboration of Weeks' testimony would have provided just that evidence of police misconduct.

* * *

On April 7, 1991, Petitioner Reginald Clemons was picked up by the police at his home for questioning about the murders of Julie and Robin Kerry, who died after being pushed from the Chain of Rocks Bridge. App. at A138-A142 (Suppression Hr'g Tr. (Pappas) at 1304:24-1308:4). Clemons was 19 years old at the time and had no prior criminal record. The police told Clemons' mother that he did not need a lawyer and that she could not accompany him to the police station. App. at A155 (Suppression Hr'g Tr. (V. Thomas Testimony) at 1377:21-25). Alone with the police for several hours, Clemons was beaten by his interrogators. App. at A107-A108 (Amended Report); App. at A162-A172 (Suppression Hr'g Tr. (Clemons) at 1409:20-1419:19). Eventually, Clemons admitted to rape and being present when the Kerry sisters were pushed from the bridge. App. at A185-A214 (Resp't Hr'g Ex. O).

At Clemons' trial in 1993, the State of Missouri alleged that Clemons, along with Marlin Gray, Antonio Richardson, and Daniel Winfrey, visited the Chain of Rocks Bridge on April 4, 1991 after a night of drinking beer and smoking marijuana. *State v. Clemons*, 946 S.W.2d 206, 214 (Mo. banc 1997). On the bridge, the four encountered the Kerry sisters and their cousin, Thomas Cummins. *Id.* The State charged that the Kerrys were raped and then led, with Cummins, to a concrete platform below the bridge deck; the sisters were pushed to their deaths and Cummins was ordered to jump. *Id*. at

214-15. Notably, Clemons' confession was the only piece of testimonial evidence heard at trial that specifically placed him on the concrete platform beneath the bridge deck when the murders occurred. *See* App. at A217-A223 (Clemons Trial Tr. (Cummins) at 1694-1700).

Prior to trial, Clemons moved to suppress his statement on the ground that it was not voluntary. App. at A162-A172 (Suppression Hr'g Tr. (Clemons) at 1409:15-1419:19). At the suppression hearing, Clemons testified that St. Louis Metropolitan Police ("SLMPD") Detective Chris Pappas and another detective hit him in the head and chest while they were interrogating him. App. at A165-A169 (Suppression Hr'g Tr. (Clemons) at 1412:3-1416:8). Police detectives Pappas and Joseph Brauer testified for the State that they were present for three interrogations of Clemons and that neither of them hit Clemons or observed any injuries. App. at A131-A133, A136-A138 (Suppression Hr'g Tr. (Pappas) at 1297:18-1299:13; 1302:9-15; 1303:7-1304:1); A152 (Suppression Hr'g Tr. (Brauer) at 1347:10-19). Warren Williams, an SLMPD officer, testified that he visited Clemons in his holding cell and did not observe any injuries on him. App. at A124, A127 (Suppression Hr'g Tr. (Williams) at 1278:11-12; 1281:5-11). Williams' visit, however, was more than eight hours after bail investigator Warren Weeks observed injuries to Clemons during his interview. App. at A284-A285 (Weeks Dep. at 18:23-19:1; 22:7-14). Several other witnesses, including members of Clemons' family, testified that they visited Petitioner and *did* observe injuries on him, but these visits took place after Officer Williams' visit. App. at A120-A121 (Suppression Hr'g Tr.

(Chancellor) at 1265:19-1266:24); App. at A158-A159 (Suppression Hr'g Tr. (Kent) at 1391:7-1392:2). Clemons' counsel also introduced medical records indicating injuries on Clemons' face and cheek. App. at A175-A179 (Suppression Hr'g Tr. at 1430:25-1434:9).[1]

After weighing the competing evidence – but without the benefit of Weeks' testimony – the trial court ruled against Clemons at the suppression hearing. App. at A182-A183 (Suppression Hr'g Tr. at 1440:14-1441:3). The court made no finding as to whether Clemons sustained injuries while in police custody, and subsequently explained that "[t]he basis for my ruling is there was not any credible evidence to show how he got those injuries if, in fact, he got them. And that was other than the defendant's testimony." App. at A227 (Clemons Trial Tr. at 1765:19-22).

The principal evidence introduced against Clemons at trial was: Clemons' own confession; the testimony of Cummins, the Kerrys' cousin; and the testimony of co-defendant Daniel Winfrey.[2] The trial court granted the State's motion *in limine* to prevent Clemons from arguing in his closing statement that he was beaten by the police.

[1] These medical records were from treatment Clemons received pursuant to an order from the judge who handled his arraignment. App. at A260 (Clemons Trial Tr. (Kelly) at 3045:5-17).

[2] Winfrey, the only white defendant, eventually pled guilty and agreed to testify for the State in exchange for a reduced sentence. Winfrey was released from prison in 2007.

App. at A264 (Trial Tr. at 3222). During guilt phase deliberations, the jury requested and received a copy of the transcript of Clemons' confession, and the audiotape recording of the confession was also played at the jury's request. App. at A270-A271 (Trial Tr. at 3321-22). Shortly after hearing the audiotape confession, the jury found Clemons guilty of two counts of first-degree murder. App. at A272-A273 (Trial Tr. at 3323-3324). The jury subsequently sentenced Clemons to death.

The State tried Gray first, Clemons second, and Richardson last. Gray was also sentenced to death and was executed on October 26, 2005. Richardson was initially sentenced to death, but his death sentence was set aside on October 28, 2003 and he was resentenced to life imprisonment. App. at A290-A291 (Oct. 28, 2003 Order, *State v. Richardson*, No. SC76059).

On April 2, 1993, the same day that Clemons was sentenced to death, Cummins filed a civil lawsuit against the SLMPD. Cummins was questioned by police shortly after the events on the bridge and was initially arrested for the sisters' murders. Similar to Clemons' allegations of his mistreatment by the police, Cummins' lawsuit alleged that the police physically abused him in an attempt to elicit a confession. App. at A299-A300 (Pet'r Hr'g Ex. 17 ¶¶ 26-27). One of the detectives who interrogated Cummins and was named as an individual defendant in Cummins' complaint was Detective Pappas, who was also involved in Clemons' interrogation. App. at A144-A145, A148-A149 (Suppression Hr'g Tr. (Pappas) at 1310:8-1311:6; 1330:16-1331:19); App. at A299-A300 (Pet'r Hr'g Ex. 17 ¶¶ 26-27). Nels Moss, the prosecutor at Clemons' trial who elicited

key evidence from Cummins against Clemons, was aware of Cummins' abuse allegations and that Cummins intended to sue the SLMPD. App. at A331-A334 (Pet'r Hr'g Ex. 37 at 32:10-34:1; 34:20-35:2). Cummins' lawsuit against the SLMPD was later settled for $150,000. App. at A356 (Pet'r Hr'g Ex. 18).

Clemons' post-trial Rule 29.15 motion raised numerous claims of error, including that the trial court erred by allowing into evidence his confession because the statement had been obtained through physical coercion. The Rule 29.15 motion was denied on November 26, 1996 and this Court upheld the denial of the Rule 29.15 motion and affirmed the verdict and sentence on May 27, 1997. *Clemons*, 946 S.W.2d 206. In its Opinion, the Court "consider[ed] all evidence and reasonable inferences in the light most favorable to the trial court's ruling" and held that Clemons failed to meet his burden of proving his confession was involuntary. *Id.* at 218. The Court noted that Officer Williams testified that he did not observe any injury to Clemons when he visited him, while members of his family testified that they did observe injuries to Clemons. *Id.* Without the benefit of Weeks' unbiased testimony, the Court upheld the trial court's determination that Clemons' statement was voluntary.

Bail Investigator Warren Weeks Observed and Documented Injuries to Clemons Three Hours After Clemons Was Booked and More Than Eight Hours Before Officer Williams' Meeting With Clemons

On June 12, 2009, Clemons filed his Petition for a Writ of Habeas Corpus with this Court and on June 30, 2009, the Court entered an Order appointing Judge Manners as Master. App. at A109-A111 (6/30/2009 Commission). Judge Manners oversaw the parties' documentary and testimonial discovery, conducted numerous conferences with the parties, and on September 17-20, 2012, the parties presented witnesses to the Court (the "September 2012 Hearing"). The record was kept open after the September 2012 Hearing to depose additional witnesses.

In 2012, Warren Weeks contacted counsel for Clemons after learning about the Master proceeding. Weeks, who now lives more than 1,000 miles away from St. Louis, gave testimony in this proceeding by videotaped deposition and was questioned under oath by counsel for Clemons and the State. App. at A99, n.35 (Amended Report).

At the time of Clemons' arrest in 1991, Warren Weeks was a bail investigator working for the Missouri Board of Probation and Parole. App. at A100 (Amended Report). As Judge Manners found, Weeks interviewed Clemons around 5:25 a.m. on April 8 to process his pre-trial release form, approximately three hours after Clemons was booked and more than eight hours *before* Clemons was visited by Officer Williams. App. at A100, A102-A103 (Amended Report); App. at A283-A285 (Weeks Dep. at 17:24-18:2; 22:7-14); App. at A357-A359 (Pet'r Hr'g Ex. 3). During the interview with

Clemons, Weeks observed "a large bump, which he described as being between the size of a golf ball and a baseball, on [Clemons'] right cheek." App. at A100 (Amended Report); App. at A284-A285, A287 (Weeks Dep. at 18:25-19:1; 25:24; 32:16-18). Weeks recalled making a record of Clemons' injuries on a pre-trial release form and believes that he wrote "bump" or "bruise" on the form. App. at A100 (Amended Report); App. at A285 (Weeks Dep. at 23:1-10); App. at A357-A359 (Pet'r Hr'g Ex. 3). Weeks testified that it appeared his note of "bump" or "bruise" was later scratched out by someone other than himself. App. at A285 (Weeks Dep. at 23:1-10); App. at A359 (Pet'r Hr'g Ex. 3). The identity of the person who altered Weeks' notation describing Clemons' injury on the form is not known, but Judge Manners concluded that "it had to be someone who had [the form] on behalf of the State" who crossed out Weeks' description of the injury. App. at A103 (Amended Report).

After he interviewed Clemons, Weeks spoke with his now deceased boss, Pete Lukanoff, about the injuries he observed. App. at A285 (Weeks Dep. at 25:17-21). Weeks testified that Lukanoff, a former police officer, was not surprised by Clemons' injuries and that Lukanoff indicated that he had seen those types of post-interrogation injuries before. App. at A285-A286 (Weeks Dep. at 25:23-26:1, 26:10-12). Several months after Weeks interviewed Clemons, Weeks was called in to speak with Ben Coleman, a probation supervisor in the probation/parole office. App. at A101 (Amended Report). Coleman called Weeks into his office because the State's prosecutor, Nels Moss, wanted to speak with Weeks about Clemons. App. at A101 (Amended Report);

App. at A286 (Weeks Dep. at 27:12-17). Coleman challenged Weeks' ability to observe an injury. App. at A101 (Amended Report); App. at A286 (Weeks Dep. at 28:7-10). After meeting with Coleman, Weeks "felt pressure to not say anything about the injury that [he] had seen." App. at A286 (Weeks Dep. at 29:5-9). At Coleman's direction, Weeks subsequently met with Moss, who also questioned Weeks about the injuries he observed on Clemons. App. at A101 (Amended Report); App. at A405-A406 (Hr'g Tr. (Moss) 184:20-185:7). Moss discussed with Weeks what Weeks had written in the pre-trial release form and suggested that he did not think Weeks had accurately described Clemons' injuries. App. at A287 (Weeks Dep. at 31:12-14). Despite Moss' assertion that Clemons had not been injured, Weeks held fast to his observation that Clemons was injured. App. at A101 (Amended Report); App. at A287 (Weeks Dep. at 31:3-7). Moss seemed irritated by Weeks' refusal to change his mind. App. at A101 (Amended Report); App. at A287 (Weeks Dep. at 31:25-32:2).

Weeks had never been called in to see a prosecutor about one of his bail interviews before, nor had he ever heard of a colleague having such an experience. App. at A287 (Weeks Dep. at 30:3-8). Weeks' reaction after meeting with Moss was that "there's something weird going on. I think they don't want to – nobody wants to talk about the – what really happened to this gentleman when he was being interviewed by the police." App. at A287 (Weeks Dep. at 32:12-18).[3]

[3] Shortly after Clemons' arrest, the SLMPD Internal Affairs Department ("IAD") began investigating Clemons' claim of abuse. App. at A101-A102 (Amended Report); App. at

During his testimony at the September 2012 Hearing, Moss acknowledged that he may have met with Weeks or spoken to him on the phone about Clemons' injuries. App. at A101 (Amended Report); App. at A405-A406 (Hr'g Tr. (Moss) at 184:20-186:3). Moss also recalled that Weeks "may have made some reference to [Clemons'] left or right cheek being swollen." App. at A101 (Amended Report); App. at A406 (Hr'g Tr. (Moss) at 185:6-7). Judge Manners concluded, "[t]here is no indication that the State ever informed the defense about what Weeks observed on April 8, and I believed Weeks when he testified that he recorded his observations of Clemons on the Pre-Trial Release Form." App. at A103 (Amended Report); App. at A406 (Hr'g Tr. (Moss) at 185:8-11).

Based on Weeks' testimony and the other evidence presented to him, Judge Manners concluded in his August 6, 2013 initial report that Clemons' confession was coerced by the beating he endured at the hands of the police. Judge Manners' Amended Report, dated September 25, 2013, corrected certain errors in the original report but left

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A652-A952 (Resp't Hr'g Ex. D). IAD did not interview Weeks in connection with this investigation. App. at A102 (Amended Report); App. at A698-A699 (Resp't Hr'g Ex. D). IAD, however, interviewed or received a written memo from every other person in the St. Louis jail that Clemons came into contact with following his interrogation. App. at A652-A952 (Resp't Hr'g Ex. D); App. at A503 (Hr'g Tr. (Huelsmann) at 574:15-575:18).

unchanged the factual findings in support of his conclusion that the State violated *Brady v. Maryland* and that the confession was the product of coercion.

POINTS RELIED ON

I. Petitioner Is Entitled To A Writ Of Habeas Corpus Vacating His Conviction And Sentence Because The State Violated *Brady v. Maryland*, In That The State Failed To Disclose Weeks' Testimony Establishing That The Confession Was The Product Of Coercion.

Brady v. Maryland, 373 U.S. 83 (1963)

State ex rel. Woodworth v. Denney, 396 S.W.3d 330 (Mo. banc 2013)

State ex rel. Engel v. Dormire, 304 S.W.3d 120 (Mo. banc 2010)

State v. Owsley, 959 S.W.2d 789 (Mo. banc 1997)

II. Petitioner Is Entitled To A Writ Of Habeas Corpus Vacating His Sentence Because The Court Has A Continuing Duty To Review Proportionality And This Death Sentence Is Disproportionate, In That Petitioner Was Convicted As An Accomplice And The Actual Killer Under The State's Theory Was Sentenced To Life, And New Evidence Proves That Execution Of Clemons Would Be Unprecedented.

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

State v. Bowman, 337 S.W.3d 679 (Mo. banc 2011)

State v. Clemons, 946 S.W.2d 206 (Mo. banc 1997)

Mo. Rev. Stat. § 565.035

Argument

"Habeas corpus is the last judicial inquiry into the validity of a criminal conviction and serves as 'a bulwark against convictions that violate fundamental fairness.'" *State ex rel. Woodworth v. Denney*, 396 S.W.3d 330, 337 (Mo. banc 2013), (quoting *State ex rel. Engel v. Dormire*, 304 S.W.3d 120, 125 (Mo. banc 2010)). Judge Manners found, as a matter of fact, that Clemons' confession was coerced and that evidence of this coercion was suppressed. Under these circumstances, sustaining Clemons' conviction, let alone executing him, would violate fundamental fairness and would be unprecedented.

Under Missouri law, successive habeas review is permissible if the petitioner can demonstrate cause for failing to timely raise a constitutional defect and prejudice resulting from the defect ("cause and prejudice" standard). *Woodworth*, 396 S.W.3d at 337 (citing *Engel*, 304 S.W.3d at 125, and *State ex rel. Amrine v. Roper*, 102 S.W.3d 541, 546 (Mo. banc 2003)).

Here, Petitioner has uncovered key new exculpatory evidence that was improperly withheld by the prosecution in violation of Petitioner's constitutional right to a fair trial, satisfying the "cause and prejudice" standard. *See State ex rel. Koster v. McElwain*, 340 S.W.3d 221, 248, 251 (Mo. Ct. App. 2011) (citing *Engel*, 304 S.W.3d at 126). As discussed below, Petitioner has met his burden of showing that he is entitled to habeas relief under *Brady v. Maryland*, 373 U.S. 83 (1963), because the State withheld evidence that his confession was coerced and Judge Manners made a factual finding that it was coerced. Further, Judge Manners found that this withheld evidence created a "reasonable

probability of a different result" in Clemons' case. App. at A103 (Amended Report). Thus, Clemons' conviction should be vacated. *See Woodworth*, 396 S.W.3d at 337 (citing *State ex rel. Nixon v. Jaynes*, 73 S.W.3d 623, 624 (Mo. banc 2002)).

In addition, this Court has recognized that it has a continuing duty to review the proportionality of any death sentence. Clemons was convicted and sentenced as an accomplice, not as a principal. Since this Court affirmed Clemons' death sentence, the principal's sentence has been reduced from death to life without the possibility of parole. A death sentence for the accomplice is disproportionate when the principal receives life and thus, at a minimum, Clemons' death sentence should be commuted.

I. Petitioner Is Entitled To A Writ Of Habeas Corpus Vacating His Conviction And Sentence Because The State Violated *Brady v. Maryland*, In That The State Failed To Disclose Weeks' Testimony Establishing That The Confession Was The Product Of Coercion.

Standard of Review

This Court reviews a master's findings under the same standard that governs review of the "findings and conclusions entered by trial courts in court-tried cases." *Woodworth*, 396 S.W.3d at 333. This Court gives substantial deference to a master's factual findings, and will reverse only if "there is no substantial evidence to support [them]" or they are "against the weight of the evidence." *Murphy v. Carron*, 536 S.W.2d 30, 32 (Mo. banc 1976). This Court will only "exercise the power to set aside the findings and conclusions on the ground that they are against the weight of the evidence

with caution and with a firm belief that the conclusions are wrong." *Woodworth*, 396 S.W.3d at 337.

In determining the sufficiency of the evidence, this Court views "the evidence and permissible inferences drawn from the evidence in the light most favorable to the [master's] judgment." *Bateman v. Platte County*, 363 S.W.3d 39, 43 (Mo. banc 2012) (citing *Suffian v. Usher*, 19 S.W.3d 130, 136 (Mo. banc 2000)).

If credibility is at issue, this Court "will defer to the [master's] credibility assessments." *In re Adoption of C.M.B.R.*, 332 S.W.3d 793, 815 (Mo. banc 2011). The master is free to believe or "disbelieve any, all, or none of that evidence." *White v. Director of Revenue*, 321 S.W.3d 298, 308 (Mo. banc 2010). The rationale is that the master is "in a better position not only to judge the credibility of witnesses and the persons directly, but also their sincerity and character and other trial intangibles." *Id.*[4]

Here, Judge Manners' report makes two key findings: (1) that the State's suppression of Weeks' testimony was prejudicial; and (2) that Clemons' confession was coerced. Both are findings of fact. *Woodworth*, 396 S.W.3d at 338-39 ("master's *Brady* violation findings are supported by substantial evidence and are not against the weight of the evidence"); *State v. Clemons*, 946 S.W.2d 206, 218 (Mo. banc 1997) (upholding

[4] Indeed, some cases have held that a fact finder has "absolute discretion as to the credibility of witnesses." *Milligan v. Helmstetter*, 15 S.W.3d 15, 24 (Mo. Ct. App. W.D. 2000).

finding on whether Petitioner's confession was voluntary after "[v]iewing this evidence in the light most favorable to the trial court's ruling"). Taking the record evidence in the light most favorable to the Master's report here, there is ample evidence to support those two factual findings.

Argument

The State willfully violated *Brady* by (1) failing to disclose that Weeks had observed an injury on Clemons' face shortly after he was interrogated and attempting to intimidate Weeks into withdrawing his observations and (2) failing to produce the pre-trial release form on which Weeks noted Clemons' injury, both by destroying Weeks' notation and failing to produce an un-doctored copy to the defense. Judge Manners presided over discovery in this matter for over four years; heard several days of live and videotaped evidence from 23 witnesses; and conducted an exhaustive review of the evidence at issue and trial record. After a careful review of the record, and an assessment of the credibility of Warren Weeks, Thomas Cummins and Petitioner himself against contrary State witnesses including SLMPD Officer Williams, Detective Pappas and other current and former police officers, Judge Manners concluded that (1) Clemons' confession was the product of coercion, and (2) the State withheld evidence of this coercion from Clemons in violation of *Brady*. App. at A104, A107-A108 (Amended Report). Significantly, Judge Manners is the *only* finder of fact who has ever reviewed the testimony of Weeks – and is thus uniquely situated to assess his credibility.

Consideration of the new evidence of Weeks' observation of injuries to Clemons demonstrates that Clemons' trial suffered from two key constitutional infirmities: (1) the introduction of Clemons' involuntary confession as substantive evidence of guilt in violation of his Fifth Amendment right against self-incrimination; and (2) the State's suppression of material, exculpatory *Brady* evidence, which violated Clemons' due process rights by preventing Clemons from presenting a complete defense. *Brady v. Maryland*, 373 U.S. 83 (1963).

Because the evidence supports Judge Manners' findings and he correctly applied the law, his finding of a *Brady* violation should be sustained and Clemons' conviction should be vacated.

A. The State Violated *Brady v. Maryland*.

Embodying the constitutional principles of *Brady v. Maryland*, Missouri Rule of Criminal Procedure 25.03(A)(9) requires the State to produce, upon request, "[a]ny material or information, within the possession or control of the state, which tends to negate the guilt of the defendant as to the offense charged, mitigate the degree of the offense charged, or reduce the punishment." Rule 25.03 arises from the fundamental precept of our criminal justice system that "[the prosecution's] interest . . . in a criminal prosecution is not that it shall win a case, but that justice shall be done." *Berger v. United States*, 295 U.S. 78, 88 (1935).

The failure to disclose evidence favorable to the defense violates due process:

> [S]uppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or punishment, irrespective of the good faith or bad faith of the prosecution.

Brady, 373 U.S. at 87; *accord*, *Johnson v. State*, 406 S.W.3d 892, 901 (Mo. banc 2013) ("If the State suppresses evidence that is favorable to a defendant and material to either the guilt or penalty phase, due process is violated."). It is equally clear that a conviction that is the product of a coerced confession violates due process. *State v. Owsley*, 959 S.W.2d 789, 794 (Mo. banc 1997) ("[C]onfession that becomes part of the basis of a conviction must be voluntary or else the defendant is denied due process."). For a confession to be free and voluntary, it "must not be extracted by any sort of threats or violence, nor obtained by any direct or implied promises, however slight, nor by the exertion of improper influence." *State v. Vinson*, 854 S.W.2d 615, 620 (Mo. Ct. App. 1993) (quoting *Bram v. United States*, 168 U.S. 532, 542-43 (1897)).

To prevail on a *Brady* claim premised on the State's failure to adhere to Rule 25.03, a petitioner must show that (1) the withheld evidence was favorable to him, *i.e.*, exculpatory or impeachment evidence; (2) the evidence was suppressed by the State; and (3) he was prejudiced by the suppression. *Woodworth*, 396 S.W.3d at 338. Here, Judge Manners found that the State suppressed two pieces of related exculpatory evidence regarding the voluntariness of Clemons' confession, in violation of *Brady*: (1) the testimony of Weeks, the bail investigator who interviewed Clemons hours after he was interrogated by the police, and who saw evidence that Clemons had been physically

assaulted and reported what he saw to his superiors and Moss; and (2) the original, unaltered version of Weeks' report which documented injuries to Clemons. This evidence could have been used by Clemons' counsel at trial to (1) establish that his confession was coerced, (2) contradict and attack the credibility of evidence in the State's case and impeach State witnesses, and (3) demonstrate that the prosecution was intent on getting a conviction at any cost, all of which would have created a "reasonable probability of a different result." *Woodworth*, 396 S.W.3d at 338 (citing *Kyles v. Whitley*, 514 U.S. 419, 434 (1995)).

1. Weeks' Observation and Documentation of Post-Interrogation Injuries to Clemons Was "Obviously" Favorable Evidence That Corroborated Clemons' Claim of Police Abuse.

Judge Manners concluded that Weeks' observations of Clemons' injuries would have been favorable to Clemons' defense counsel at trial: "The first *Brady* issue is whether the Weeks' evidence was favorable to the defense. ***Obviously, it was***." App. at A102 (Amended Report) (emphasis added).

Evidence tending to show that the defendant's confession was coerced is exculpatory for purposes of *Brady*. *See, e.g.*, *Tillman v. Burge*, 813 F. Supp. 2d 946, 962 (N.D. Ill. 2011). At the time of the initial suppression hearing, the trial judge did not have the benefit of testimony from Weeks that he observed a "golf-ball-sized welt" on Clemons, documented those observations on a State form, and was admonished by prosecutor Nels Moss. App. at A100-A101 (Amended Report); App. at A285 (Weeks

Dep. at 25:23-25). Weeks, unlike other defense witnesses on this point, had "no ties to Clemons" and testified that the injury was inflicted by the police during Clemons' interrogation. App. at A103 (Amended Report); App. at A287 (Weeks Dep. at 32:16-18).

Instead, the trial judge heavily relied on the testimony of SLMPD Officer Warren Williams, who saw Clemons more than eight hours after Weeks did and testified that he did not observe any injuries to Clemons. App. at A103 (Amended Report) (citing *Clemons*, 946 S.W.2d at 218). The fact that Weeks saw Clemons injured just hours after his interrogation and booking – long before either Williams or any defense witnesses (who testified that they too saw injuries) observed Clemons – undermines any theory that Clemons inflicted injuries on himself in the short time period between Williams' visit and the defense witnesses' observations, and could serve to impeach the testimony of Williams. App. at A102-A103 (Amended Report). Clemons could have used both Weeks' testimony and the original, un-tampered with pre-trial release form to show that his confession was coerced and should not have been admitted at trial.

The State's efforts to suppress Weeks' testimony and the original pre-trial release form further demonstrate their materiality and importance to the defense. Weeks' testimony about his meetings with his supervisor and prosecutor Nels Moss shows that the State hoped to, and ultimately succeeded in, suppressing Weeks' testimony. Similarly, someone affiliated with the State doctored the pre-trial release form by crossing out Weeks' notation of Clemons' injury. App. at A103 (Amended Report). Moss conceded at the September 2012 hearing that testimony like Weeks' would have

been helpful to the defense. App. at A101 (Amended Report); App. at A405 (Hr'g Tr. at 184:11-15).

In addition, the new information surrounding the $150,000 settlement paid to Cummins, discussed below, both corroborates Clemons' account that he was beaten by the police and also demonstrates, as Moss was forced to acknowledge during his testimony in this proceeding, that either Detective Pappas (who testified that he did not strike Cummins) or his star witness, Cummins (who testified that Detective Pappas did strike him), perjured himself at Clemons' trial. App. at A404 (Hr'g Tr. (Moss) at 179:16-19). By finding that Cummins was beaten, Judge Manners effectively found that Detective Pappas perjured himself at Clemons' trial. *See* App. at A32, A94 (Amended Report). This evidence of Detective Pappas' perjury is particularly important given that the trial judge ruled Clemons' confession was voluntary after Pappas testified that he did not hit Clemons. App. at A131-A133, A136-A138 (Suppression Hr'g Tr. (Pappas) at 1297:18-1299:13; 1302:9-15; 1303:7-1304:1); App. at A182-A183 (Suppression Hr'g Tr. at 1440:14-1441:3).

2. The State Suppressed and Altered Evidence of Weeks' Observation and Documentation of Post-Interrogation Injuries.

Judge Manners concluded that the State never disclosed Weeks' observations to Clemons' defense counsel at trial: "The second *Brady* issue is whether the State suppressed the information, either willfully or inadvertently. There is no indication that the State ever informed the defense about what Weeks observed on April 8, and I

believed Weeks when he testified that he recorded his observations of Clemons on the Pre-Trial Release Form. . . . I believe Clemons satisfied the second element." App. at A103 (Amended Report).

Both the exculpatory note on the pre-trial release form and Weeks' testimony were suppressed. *Brady* requires that the State inform a defendant that it has knowledge of a witness that can offer him favorable evidence regardless of whether there is any related documentary or physical evidence. *See, e.g.*, *Koster*, 340 S.W.3d at 247-48 (holding that the State's failure to disclose oral complaints made to Sheriff by victim that she was being physically abused by someone other than defendant was violation of *Brady* even though no record of complaints was made). The State had a duty to disclose to Clemons that there was a bail investigator who could corroborate Clemons' claims of police abuse, and the State failed to do so.

The Master's finding is not only supported by substantial evidence, but the record on this point is completely undisputed. Respondent did not even argue, let alone offer evidence, that the crucial information concerning Weeks' potential testimony was provided to Clemons at trial, or at any time prior to this Master proceeding. To the contrary, the evidence shows that the State intentionally took affirmative steps to hide this evidence from Clemons. Weeks' supervisor and the prosecutor tried to intimidate Weeks into not reporting Clemons' injuries, and the State appears further to have suppressed Weeks' notation of those injuries. App. at A103 (Amended Report) ("I do not

know who crossed out Weeks' description of the injury [as "bump" or "bruise"] on that Form, but it had to be someone who had it on behalf of the State.")

3. The State's Suppression of Weeks' Observation and Documentation of Injuries to Clemons Was Prejudicial.

Judge Manners concluded that the State's suppression of Weeks' testimony and the original pre-trial release form was prejudicial to Clemons' defense at trial: "As to the third issue [whether Clemons was prejudiced] . . . [i]t is enough if there is a reasonable probability of a different result. . . . I believe Clemons has satisfied that standard." App. at A103 (Amended Report) (citing *Woodworth*, 396 S.W.3d at 338 and *Engel*, 304 S.W.3d at 128).

The record unquestionably supports that ruling. Weeks' testimony, establishing that Clemons had a welt on his head the size of a golf ball or a baseball just three hours after he was booked, was corroborated by contemporaneous documentation and is powerful circumstantial evidence of coercion. Judge Manners found Weeks' testimony regarding his documentation of Clemons' injuries credible, a finding that is entitled to substantial deference. App. at A103 (Amended Report). And, unlike the other witnesses who attested to Clemons' injuries, Weeks had no prior connection to Clemons and hence no motive to exaggerate the extent of his injuries.

Moreover, in evaluating the prejudice prong of *Brady*, "justice requires that this court consider all available evidence uncovered following [petitioner's] trial that may impact his entitlement to habeas relief." *Engel*, 304 S.W.3d at 126 (vacating Engel's

conviction on the grounds that undisclosed evidence prejudiced his trial). The Court may consider all suppressed exculpatory evidence whether or not that evidence has been previously considered by a court or procedurally defaulted. *Woodworth*, 396 S.W.3d at 345 (in determining the prejudice element of a *Brady* violation, the Court will "consider the effect of all of the suppressed evidence along with the totality of the other evidence uncovered following the prior trial"); *State ex rel. Griffin v. Denney*, 347 S.W.3d 73, 77 (Mo. banc 2011) ("[C]ourts must consider the cumulative effect of excluded evidence in determining if a *Brady* violation occurred" (citing *Kyles*, 514 U.S. at 436-37)); *Koster*, 340 S.W.3d at 250 ("even though defendant unsuccessfully raised the State's failure to disclose certain exculpatory impeachment evidence in previous habeas proceedings, the Supreme Court could nonetheless hear the same *Brady* claim in a new habeas proceeding, and could review the same undisclosed evidence, in light of the discovery of additional undisclosed evidence, all of which accumulated to demonstrate cause and prejudice warranting habeas corpus relief" (citing *Engel*, 304 S.W.3d at 126-30)); *see Scott v. Mullin*, 303 F.3d 1222, 1229-30 & n.4 (10th Cir. 2002) (holding that appellate counsel not required to bring weak *Brady* claim, and if new exculpatory evidence is discovered with the same factual basis, court may consider all exculpatory evidence together).

Here, there is substantial new evidence that the police beat Cummins, using strikingly similar methods as those used against Clemons. On April 2, 1993, the same day that Clemons was sentenced to death, Cummins filed a civil suit against the SLMPD alleging that the police physically abused him to elicit a confession. App. at A299-A300

(Pet'r Hr'g Ex. 17 ¶¶ 26-27); App. at A276-A277 (Clemons Trial Tr. at 3653-54). Moss, the trial prosecutor, was well aware of Cummins' abuse allegations and that Cummins intended to sue the SLMPD. App. at A331-A334 (Pet'r Hr'g Ex. 37 at 32:10-34:1; 34:20-35:2). Cummins' suit against the SLMPD was later settled, and the settlement agreement was placed under seal. App. at A956 (Memorandum and Order dated July 23, 1999). However, it was not until years after trial in response to a subpoena served on the SLMPD that Clemons' counsel learned that the City of St. Louis paid $150,000 to Cummins to settle his claims of police abuse and coercion. App. at A986 (Subpoena Duces Tecum to St. Louis Metropolitan Police Department dated August 25, 1998 ¶ 12). Respondent acknowledges that Cummins did not file his lawsuit until after the trial, and did not receive the $150,000 settlement payment until after the post-trial proceedings. As such, this evidence relating to the settlement "didn't exist at the time of trial." App. at A372 (Hr'g Tr. (Resp't Opening Statement) at 52:19).

Cummins' allegations of police abuse during his interrogation on the night of the Kerrys' deaths as detailed in his civil lawsuit paralleled Clemons' claims of police abuse during his interrogation, and even involved one of the same detectives, Detective Pappas.

- ***Reggie Clemons:*** "Yes and I was told to sit on my hands, I sat on my hands and then detective number two slammed my head against the wall." App. at A998 (IAD Tr. (Clemons)).

- ***Thomas Cummins:*** "I remember at one point I was told to sit on my hands." App. at A326 (Pet'r Hr'g Ex. 37 at 27:23-24).[5]

- ***Reggie Clemons:*** "He told me I wasn't going to get a lawyer." App. at A167 (Supp. Hr'g Tr. (Clemons) at 1414:22).
    - ***Thomas Cummins:*** "The police [said] that I did not have a right to an attorney." App. at A316-A317 (Pet'r Hr'g Ex. 37 at 17:25-18:1).
- ***Reggie Clemons:*** "Q: Who told you what to say? A: Well it was written out. They had wrote it down on paper and everything . . . . Q: Well what I'm trying to get at is was it a legal pad like [your attorney] has there? A: Yes." App. at A1007-A1008 (IAD Tr. (Clemons)).
    - ***Thomas Cummins:*** "Q: Am I right that they, at some point, wrote down what they wanted you to say? A: I believe that's correct, yes. Q: Do you recall actually reading what they had written down? A. I do. I mean, I recall reading something more than once that they had written down. App. at A324 (Pet'r Hr'g Ex. 37 at 25:5-11).

[5] Like Clemons, Marlin Gray also alleged in his interview with IAD investigators that the detectives told him to sit on his hands during his interrogation. App. at A781 (Resp't Hr'g Ex. D). Detective Pappas, who was involved in both Clemons' and Cummins' interrogations, also interrogated Gray. App. at A137 (Suppression Hr'g (Pappas) at 1303:4-6).

- ***Reggie Clemons:*** "Q: Did Mr. Pappas assault you? A: Yes. Q: How did he do that? A: He struck me in the back of the head . . . . Q: Now when he struck you in the back of the head, what did he use to strike you with? A: His hand. Q: Open hand or closed? A: Open hand in the back of the head." App. at A165 (Supp. Hr'g Tr. (Clemons) at 1412:3-13).
    - ***Thomas Cummins:*** "I was hit and -- you know, on the back of my head with an open hand." App. at A326 (Pet'r Hr'g Ex. 37 at 27:7-8).

This Court has recognized that this kind of signature *modus operandi* evidence is both admissible to corroborate a victim's own testimony and highly persuasive. Evidence of other misconduct "that corroborates the testimony of the victim" is admissible when it is "so unusual and distinctive as to be a signature of the defendant's *modus operandi*." *State v. Bernard*, 849 S.W.2d 10, 17 (Mo. banc 1993).

Judge Manners "[was] troubled by the effect of the evidence that Cummins was beaten" and found that Cummins was "thumped" by SLMPD officers. App. at A32, A94 (Amended Report). Judge Manners acknowledged the similarities between Clemons' abuse allegations and Cummins' abuse allegations, noting, "having been a trial judge for nearly 13 years, if that kind of evidence were brought to my attention, I would scrutinize it carefully." App. at A94 (Amended Report). This new evidence of Cummins' allegations in his civil lawsuit and the City's settlement is powerful proof that Clemons' confession was coerced, which Judge Manners ultimately concluded, and that the police

were willing to perjure themselves (both about Clemons' interrogation and Cummins' interrogation) to secure a conviction.[6] At the September 2012 Hearing, Moss agreed that "[e]ither the detectives who had investigated the case or [his] star witness in the case [Cummins] was perjuring themselves" at Clemons' trial, and Moss acknowledged that although he knew of Cummins' allegations, and therefore that there was at least potential inconsistency, he made no attempt to resolve or cure this false testimony. App. at A404 (Hr'g Tr. (Moss) at 177:18-179:19).

The State's suppression of the Weeks evidence prejudiced Clemons because had it been considered, Clemons' confession should have been suppressed.[7] The confession was the linchpin to the State's evidence of deliberation and the only piece of testimonial

[6] At Clemons' trial, Cummins testified that he was beaten by the police during his interrogation. App. at A234-A235, A238-A239 (Clemons Trial Tr. (Cummins) at 1907:25-1908:25; 1916:23-1917:12). Two of the detectives who interrogated Cummins specifically testified that Cummins was not beaten. App. at A251, A254 (Clemons Trial Tr. (Jacobsmeyer) at 2810:7-11; 2820:7-17); App. at A257 (Clemons Trial Tr. (Pappas) at 2831:16-22).

[7] At a minimum, even if the trial judge somehow determined that the confession was voluntary, Clemons would undoubtedly have benefited from having the jury hear Weeks' unbiased account of the injuries he observed on Clemons and the prosecutor's effort to convince him that he was mistaken about what he saw.

evidence heard at trial placing Clemons on the platform beneath the bridge deck during the murders. As evidenced by the prosecutor's repeated reference to the confession in his closing argument, and the fact that the jurors requested and were played Clemons' confession during the guilt phase deliberations and just before reaching their verdict, the confession was the most powerful piece of evidence against Clemons at trial. As such, the Master correctly found that there is a "reasonable probability" that Clemons would have been acquitted at trial had the State not suppressed the Warren Weeks evidence. App. at A103 (Amended Report).

As Judge Manners found, Clemons has shown each of the elements of a *Brady* violation: (1) the State withheld evidence that was favorable to Clemons; (2) the evidence was suppressed by the State; and (3) Clemons was prejudiced by the suppression. And as Judge Manners rightly concluded, "once a violation of Brady and its progeny is shown, 'there is no need for further harmless-error review.'" App. at A103 (Amended Report) (citing *Kyles*, 514 U.S. at 434). The conviction and death sentence cannot be sustained.

B. The Court May Consider Clemons' Constitutional Claims Because the State's *Brady* Violation Satisfies Cause and Prejudice.

A writ of habeas corpus is available as a post-conviction remedy for a petitioner who can meet the "cause and prejudice" standard for excusing any procedural default. *Brown v. State*, 66 S.W.3d 721, 731 (Mo. banc 2002) (habeas relief is available to a petitioner with procedurally defaulted constitutional claims who can establish both "cause

and prejudice" for the default).[8] "Cause" occurs when "some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule." *State ex rel. Nixon v. Jaynes*, 63 S.W.3d 210, 215 (Mo. banc 2001) (quoting *Murray v. Carrier*, 477 U.S. 478, 488 (1986)). Petitioner establishes cause when "interference by officials made compliance impracticable." *Woodworth*, 396 S.W.3d at 337 (quoting *Murray*, 477 U.S. at 488). Petitioner establishes prejudice when there is a "reasonable probability of a different result," *i.e.*, "when the government's evidentiary suppression undermines confidence in the outcome of a trial." *Id.* at 338.

A meritorious *Brady* claim automatically satisfies the cause and prejudice threshold. *Banks v. Dretke*, 540 U.S. 668, 691 (2004). Indeed, both the United States Supreme Court and this Court have held that the "cause and prejudice" analysis overlaps with "two of the three components of the alleged Brady violation itself," namely suppression and prejudice. *Strickler v. Greene*, 527 U.S. 263, 282 (1999); *see also State ex rel. Engel v. Dormire*, 304 S.W.3d 120, 129 (Mo. banc 2010) (holding that because petitioner showed that evidence met the elements of the *Brady* test, "he also has established the 'cause and prejudice' necessary to overcome the procedural bar to granting him habeas relief"). "The determination whether a constitutional violation is prejudicial under the cause and prejudice standard is identical to this Court's assessment

[8] Missouri courts reference the standards of cause and prejudice applied by the federal courts. *See, e.g.*, *State ex rel. Nixon v. Jaynes*, 63 S.W.3d 210, 215-16 (Mo. banc 2001).

of prejudice undertaken in assessing [Petitioner's] *Brady* claims." *Woodworth*, 396 S.W.3d at 338. Accordingly, no separate analysis of "cause and prejudice" is necessary once a *Brady* violation has been found.

That the cause and prejudice established by a meritorious *Brady* claim satisfies cause and prejudice in the habeas context is especially clear in the instant case, where the *Brady* violation prevented Clemons from establishing that his confession was coerced. The recent case of *People v. Wrice*, 940 N.E.2d 102 (Ill. App. Ct. 2010), is particularly instructive. In *Wrice*, the Illinois Court of Appeals examined whether Stanley Wrice was permitted to file a second successive post-conviction petition based on new evidence corroborating his pre-trial claim that his confession was the involuntary product of police torture. Before trial, the court held a suppression hearing at which both Wrice and the police detectives who questioned him testified, and the court subsequently denied Wrice's motion to suppress. *Id*. at 104-05.

Twenty-four years after Wrice's arrest, the State's Attorney released a Special Report concluding that the detectives working Wrice's case had a history of making false statements regarding their torture of suspects. *Id.* at 108. Following the report's release, Wrice argued that the report corroborated his torture claims. *Id.* at 110. The Illinois Court of Appeals held that Wrice satisfied the cause requirement because he identified an objective factor – the release date of the report – that impeded him from raising the report in the earlier post-conviction proceedings. *Id.* The *Wrice* Court also found prejudice, specifically articulating that "[a] coerced confession as substantive evidence of guilt is

never harmless error." *Id.* The Illinois Supreme Court affirmed. *People v. Wrice*, 962 N.E.2d 934, 952 (Ill. 2012).

Judge Manners' finding that the State violated *Brady*, and that the suppressed evidence provides strong corroboration that the confession was coerced, satisfies the cause and prejudice standard, entitling Clemons to a new trial.

II. Petitioner Is Entitled To A Writ Of Habeas Corpus Vacating His Sentence Because The Court Has A Continuing Duty To Review Proportionality And This Death Sentence Is Disproportionate, In That Petitioner Was Convicted As An Accomplice And The Actual Killer Under The State's Theory Was Sentenced To Life, And New Evidence Proves That Execution Of Clemons Would Be Unprecedented.

Standard of Review

Judge Manners did not issue a recommendation on the question of whether Clemons' sentence of death is disproportionate. Judge Manners acknowledged in his Amended Report, however, that "[t]he question of proportionality is largely one of law," App. at A104 (Amended Report), and expressly declined to consider whether certain new evidence, discussed below, would support Petitioner's proportionality claim, concluding that such consideration was best left to this Court. *Id.*

This Court reviews issues of law *de novo*. *Pearson v. Koster*, 367 S.W.3d 36, 43 (Mo. banc 2012). Accordingly, this Court reviews the issue of Clemons' proportionality claim *de novo*.

Argument

While Clemons is entitled to a new trial, Clemons' death sentence is in the alternative disproportionate and should be vacated because of evidence sufficient to "undermine the habeas court's confidence in the underlying judgment."[9] *State ex rel. Amrine v. Roper*, 102 S.W.3d 541, 547 (Mo. banc 2003); *see also id*. at 552 (Price, J., dissenting on other grounds). Here, two events trigger the Court's ongoing duty to review the proportionality of Clemons' death sentence under Section 565.035.3: (1) the reduction of the sentence of Richardson – the defendant alleged by the State to have actually pushed the Kerry sisters off the concrete platform – from death to life in prison; and (2) new evidence from an expert witness concluding that under the circumstances of the case, executing Clemons would be unique in Missouri.

A. The Court Has A Continuing Duty to Review The Proportionality of A Sentence of Death.

Under Missouri law, this Court must reexamine a death sentence in a given case whenever there is sufficient evidence to "undermine the habeas court's confidence in the underlying judgment." *Amrine*, 102 S.W.3d at 547; *see also id.* at 551 (Price, J., dissenting on other grounds). In conducting its independent review, the Court must determine, among other things, "[w]hether the sentence of death is excessive or

[9] The *Brady* violations that entitle Petitioner to a new trial also warrant a proportionality review of his death sentence.

disproportionate to the penalty imposed in similar cases, considering both the crime, the strength of the evidence and the defendant." Mo. Rev. Stat. § 565.035.3(3). Proportionality review is imperative to "provide[] a backstop against the freakish and wanton application of the death penalty," and to "promote the evenhanded, rational and consistent imposition of death sentences." *State v. Ramsey*, 864 S.W.2d 320, 328 (Mo. banc 1993) (citation omitted); *see also State v. Barton*, 240 S.W.3d 693, 709 (Mo. banc 2007).[10]

This Court has recognized that its duty to conduct a proportionality review under Section 565.035.3 is "***a continuing one***" to "avoid wrongful . . . executions." *Amrine*, 102 S.W.3d at 547 (emphasis added); *see also State v. Bowman*, 337 S.W.3d 679, 694 (Mo. banc 2011) (Wolff, J., concurring joined by Stith, J.) ("This Court's 'duty to assess the strength of the evidence is an ongoing duty" and "section 565.035.3 requires [the Missouri Supreme] Court *independently* to assess the strength of the evidence against the defendant in assessing whether a sentence of death is warranted."); *Amrine*, 102 S.W.3d at 549-50 (Wolff, J., concurring) ("[T]he death penalty statute requires this Court to assess the 'strength of the evidence' in determining whether to uphold a death sentence. . . . [I]t is particularly true in death penalty cases that the duty to assess the strength of the

[10] As the United States Supreme Court has held, independent proportionality review allows courts to serve the vital role of a "check against the random or arbitrary imposition of the death penalty." *Gregg v. Georgia*, 428 U.S. 153, 206 (1976).

evidence ***is an ongoing duty***." (emphasis added)); *id*. at 552 (Price, J., dissenting on other grounds) (holding that the Court "is charged under Section 565.035.3 with determining whether the death penalty is excessive or is disproportionate considering, among other things, 'the strength of the evidence.' I believe ***this is a continuing duty*** that must be addressed in light of new evidence such as the recantations in this instance") (emphasis added) (citations omitted)).[11]

B. Richardson's Life Sentence Renders Clemons' Death Sentence Excessive and Disproportionate.

Antonio Richardson's reduced sentence provides an independent basis to reassess the proportionality of Clemons' death sentence, because the change in Richardson's sentence "undermine[s] the habeas court's confidence" in its initial conclusion. *Amrine*, 102 S.W.3d at 547. The Court's initial decision affirming Clemons' death sentence shows that Richardson's sentence was a persuasive factor in the Court's analysis: the

[11] Notably, in 2009, the State appears to have conceded during oral argument before the Court that the duty to assess the proportionality of death sentences is a continuing one that is triggered by new evidence, even where that new evidence does not relate to the defendant's actual guilt or innocence. *See* App. at A1036-A1037 (Oral Argument Tr., *Winfield v. Roper*, SC88942) (State agreed that the Court had the obligation to assess appropriateness of death penalty where defendant alleged that there was misconduct during jury's deliberation during penalty phase).

Court referred to Richardson's sentence multiple times in its opinion affirming Clemons' conviction and sentence. *See Clemons*, 946 S.W.2d at 233-34.[12] However, the Court later determined that Richardson's death sentence was unconstitutional and vacated it. App. at A290-A291 (Oct. 28, 2003 Order, *State v. Richardson*, No. SC76059). Accordingly, the Court's reliance on Richardson's death sentence in upholding Clemons' death sentence, while arguably appropriate at the time, was ultimately rendered erroneous by the reduction of Richardson's sentence to life in prison.

Richardson's changed, lesser sentence warrants reassessment of the Court's initial decision in Clemons' case. As the Court expressly held in *State v. Bolder*, the "[r]elevant cases for a review of the appropriateness of the sentence" include not only those where the death penalty was imposed, but also those cases, such as Richardson's, "in which the judge or jury first found the defendant guilty of capital murder and thereafter chose

[12] Judge Manners' Report compares Clemons' case with that of co-defendant Marlin Gray. However, the State alleged that Gray was the ringleader in committing the crime, *see* App. at A267 (Clemons Trial Tr. (State's Closing Statement) at 3233:2-3 (stating that it was "Mr. Gray who organized [the crime]")) and this Court affirmed Gray's sentence on the basis that he was the ringleader. *State v. Gray*, 887 S.W.2d 369, 389 (Mo. banc 1994). Gray never argued that his sentence was disproportionate based on the reduction in Richardson's sentence. Accordingly, Gray's sentence does not render Clemons' sentence proportionate.

between death or life imprisonment without the possibility of parole for at least fifty years." 635 S.W.2d 673, 685 (Mo. banc 1982). Similarly, in *State v. Boliek*, the Court held that, in considering "whether the sentence imposed is excessive or disproportionate to the penalty assessed in similar cases," the Court must "examine all capital murder convictions except those where the State waived the death penalty." 706 S.W.2d 847, 851 (Mo. banc 1986). Moreover, the Missouri legislature has indicated that capital convictions resulting in life sentences should be considered in proportionality review. In Section 565.035.6, the legislature directed that, for purposes of reviewing death sentences, the Court shall not only "accumulate the records of all cases in which the sentence of death" was imposed, but also those where the defendant was sentenced to "life imprisonment without probation or parole." Mo. Rev. Stat. § 565.035.6 *see also Gregg*, 428 U.S. at 198 (comparing "each death sentence with the sentences imposed on similarly situated defendants to ensure that the sentence of death in a particular case is not disproportionate").

While the Court has indicated in some cases that it limits proportionality review to a comparison between the case at hand and "other cases where death has been imposed," *Lyons v. State*, 39 S.W.3d 32, 44 (Mo. banc 2001), that limitation clearly is inapplicable to this case because the Court has already determined that Richardson is a similarly situated defendant whose sentence should be compared to Clemons' for purposes of proportionality review. *See Clemons*, 946 S.W.2d at 233-34. Indeed, there can be no question that Richardson continues to be "similarly situated" for proportionality

purposes. He was a co-defendant convicted as the primary actor in the same crime. And Respondent itself suggested that Richardson's case was similar in its brief to this Court. *See* App. at A1112 (Respondent's Statement, Brief and Argument, *State v. Clemons*, No. 75833 (Mo. Jan. 23, 1997)). The only change is that while Richardson's sentence was initially cited as support for Clemons' sentence, it now weighs against it.

Furthermore, the State's theory of the case and its express concessions establish that Richardson was more culpable than Clemons in the deaths of the Kerry sisters. During Clemons' trial, the prosecutor told the jury that it was "Antonio Richardson who pushed [the Kerrys] off" the bridge. App. at A267 (Clemons Trial Tr. (State's Closing Statement) at 3233:1-2). The State's key witness, Cummins, could not place Clemons on the concrete platform beneath the bridge at the time of the murders. App. at A217-A223; A230-A231, A242-A244 (Clemons Trial Tr. (Cummins) at 1694-1700; 1886:22-1887:11; 1938:21-1940:14). And, during Richardson's trial, Cummins testified that it was Richardson – not Clemons – who directed him and his cousins onto the concrete platform. Cummins also testified specifically that it was Richardson – not Clemons – who pushed the Kerry sisters and then told him to jump from the bridge. App. at A1131-A1132, A1136-A1137, A1140 (Richardson Trial Tr. (Cummins) 1532:16–1533:12, 1607:14–1608:3, 1638:4-21).

The Court has determined that a death sentence was disproportionate where a more culpable co-defendant was also convicted of capital murder and received only a life sentence. In *State v. McIlvoy*, defendant Terry McIlvoy was convicted of capital murder

for killing co-defendant Vicky Williams' husband. Williams was found guilty of capital murder and was sentenced only to life imprisonment. 629 S.W.2d 333, 334 (Mo. banc 1982). McIlvoy, on the other hand, was sentenced to death for the same crime. *Id.* at 334. In conducting its independent review of McIlvoy's death sentence, the Court considered both that "[t]he 'crime' is the same crime charged in *Williams*, wherein Vicky Williams was sentenced to life imprisonment," and that McIlvoy "appears to be but a weakling and follower in executing the murder scheme perpetrated by Vicky Williams." *Id*. at 341. In light of this, the Court held that McIlvoy's "sentence of death [was] excessive and disproportionate to the penalty imposed in the similar cases," and set it aside. *Id*. at 342; *see State v. Shaw*, 636 S.W.2d 667, 676 (Mo. banc 1982) ("*McIlvoy* was peculiar because McIlvoy received the death penalty although [Williams], who was the driving force behind the plot, did not."); *see also State v. Kilgore*, 771 S.W.2d 57, 70 (Mo. banc 1989) (Blackmar, J., concurring) ("[T]his Court, in its proportionality review . . . should give attention to the fate of other participants in the same offense.").

This Court's decision in *McIlvoy* is consistent with decisions from around the country. The highest courts of numerous other states have held that a death sentence was disproportionate when an equally or more culpable co-defendant was convicted of capital murder and received a life sentence. For example:

Arkansas: The Arkansas Supreme Court vacated a death sentence as disproportionate where, *inter alia*, the defendant was convicted as an accessory

and the co-defendant who committed the murder received a life sentence. *Sumlin v. State*, 617 S.W.2d 372, 375 (Ark. 1981).

Florida: The Florida Supreme Court has recognized that disparate treatment of a co-defendant renders punishment disproportionate if the co-defendant is equally culpable. *Evans v. State*, 808 So. 2d 92, 109 (Fla. 2001). Correspondingly, the Court found a defendant's death sentence disproportionate because the co-defendant "was more culpable" and received a life sentence. *Hazen v. State*, 700 So. 2d 1207, 1214 (Fla. 1997). And the Florida Supreme Court held in a subsequent case that "[w]here a more culpable codefendant receives a life sentence, a sentence of death should not be imposed on the less culpable defendant." *Ray v. State*, 755 So. 2d 604, 611 (Fla. 2000); *see also Slater v. State*, 316 So. 2d 539, 542 (Fla. 1975) (holding that it would be unconstitutional to sentence defendant to death where, among other things, triggerman was sentenced to life in prison and defendant was accomplice who did not have the weapon in his hand).

Georgia: The Georgia Supreme Court found that a "death sentence, imposed upon [defendant] for the same crime in which the co-defendant triggerman received a life sentence, is disproportionate" where "[t]here is no evidence . . . that [the defendant] ordered the killing or was the 'prime mover' in the crime." *Hall v. State*, 244 S.E.2d 833, 839 (Ga. 1978).

Idaho: The Supreme Court of Idaho found that a defendant's death sentence was excessive and disproportionate because defendant was much less culpable than co-defendant who also received the death penalty. *State v. Windsor*, 716 P.2d 1182, 1193 (Idaho 1985). The court concluded that "[t]aking into account the differences in their level of participation in the crime, in their background and in the jury verdicts, we conclude that it was disproportionate for Windsor and Fetterly to receive the identical sentence." *Id.* (citing *State v. Sivak*, 674 P.2d 396 (Idaho 1983); *State v. Bainbridge*, 698 P.2d 335 (Idaho 1985); *State v. McKinney*, 687 P.2d 570 (Idaho 1984); *State v. Small*, 690 P.2d 1336 (Idaho 1984).

Illinois: The Illinois Supreme Court vacated a death sentence where the defendant was not the "ringleader" and the more culpable defendant was sentenced to prison. *People v. Gleckler*, 411 N.E.2d 849, 859-61 (Ill. 1980). The Illinois Supreme Court has also held that "[i]n reviewing a death sentence disparity claim," the court has "compared a defendant's death sentence to the sentence imposed upon a codefendant," "focused on such factors as . . . each defendant's relative involvement or culpability," and "held that similarly situated codefendants should not be given arbitrarily or unreasonably disparate sentences." *People v. Kliner*, 705 N.E.2d 850, 897 (Ill. 1998).

North Carolina: The North Carolina Supreme Court has set aside a death sentence where a co-defendant who "committed the same crime in the same

manner" had been sentenced to life in prison. *State v. Stokes*, 352 S.E.2d 653, 667 (N.C. 1987).

These cases all demonstrate that Clemons' death sentence should be vacated as excessive and disproportionate in light of Richardson's life sentence. As discussed above, the State's own theory at Clemons' trial was that Richardson pushed the Kerrys off the bridge, App. at A267 (Clemons Trial Tr. (State's Closing Argument) at 3233:1-2), and Cummins testified during Richardson's trial that it was Richardson who directed him and his cousins onto the concrete platform and that it was Richardson who pushed the Kerry sisters, and then told him to jump from the bridge. App. at A1131-A1132, A1136-A1137, A1140 (Richardson Trial Tr. (Cummins) 1532:16–1533:12, 1607:14–1608:3, 1638:4-21).

Further, co-defendant Winfrey testified that he was not aware of any discussions or planning about pushing the Kerry sisters from the bridge. App. at A247 (Clemons Trial Tr. (Winfrey) at 2046:1-24). Not only was there no testimony at Clemons' trial of any such discussion, in his testimony taken in 2012 for this Court's hearing, Cummins acknowledged that "it's possible that it was Reginald Clemons" who told Cummins that he would live. App. at 352 (Pet'r Hr'g Ex. 37 at 68:2-17). Thus, there was no testimony presented at Clemons' original trial that Clemons played any role in planning the crime or pushing the Kerry sisters and subsequent evidence presented at the September 2012 hearing before Judge Manners only serves to further establish Clemons' lack of intent.

While in certain cases this Court has upheld a death sentence despite the fact that a co-defendant received only a life sentence, the death-sentenced defendant generally was at least as culpable as the co-defendant and played an active leadership role in the crime. For example, in *State v. Leisure*, the Court rejected the defendant's assertion that his death sentence should be overturned because "other participants in the murder did not receive the death penalty," 749 S.W.2d 366, 383 (Mo. banc 1988), since the defendant was "an integral part of the entire sordid episode." *Id.* at 382. Among other things, the Court found that the defendant "participated in the selection of the victim," "helped form and refine the plan by which the murder was carried out," and "made suggestions as to how to proceed as events unfolded." *Id.* at 382-83. Similarly, in *State v. Gilmore*, the Court upheld the defendant's death sentence despite the fact that his co-defendant had received a life sentence in large part because the "defendant's culpability exceeds that of his co-defendants." 681 S.W.2d 934, 946 (Mo. banc 1984). In that case, the defendant "contrived the pernicious scheme" and was the "guiding force in the killing," directing his co-defendant to stab the victim. *Id*. at 946-47.

These cases do not apply here. Under the State's own theory of the case, Clemons' role in the crimes was much more comparable to that of the less culpable defendant in *McIlvoy*, and not at all akin to the ringleader defendants in cases such as *Leisure* and *Gilmore*. As in *McIlvoy*, Clemons has been disproportionately sentenced to death despite the fact that his more culpable co-defendant, Antonio Richardson, received

only a life sentence. Therefore, while Clemons is independently entitled to a new trial, alternatively as in *McIlvoy* the Court should set aside Clemons' death sentence.[13]

C. New Evidence Relating to Clemons' Age, Lack of Prior Criminal History, and Other Characteristics Argues in Favor of a Reduction of His Sentence.

Research by Dr. David Keys, a professor of Criminal Justice who has conducted significant studies on sentencing in the State of Missouri, provides a simple fact that conclusively demonstrates the disproportionality of Clemons' death sentence: "should the State of Missouri carry out Mr. Clemons' execution, he would be ***the only person in Missouri*** and only ***the second person nationwide*** to be executed in the modern death

[13] Significantly, unlike in *Gilmore* and *Leisure* where the defendants spent countless hours "select[ing] the victim," 681 S.W.2d at 946, and "refin[ing]" and "practic[ing]" the murder plan, 749 S.W.2d at 382, here there is no evidence that Clemons, or his co-defendants for that matter, engaged in any long-term conspiracy or plan to commit murder. In fact, as described above, Daniel Winfrey, the co-defendant who testified for the State in exchange for a plea bargain, testified that he was not aware of any discussion at all among the group with regard to pushing the Kerry sisters from the bridge, much less that Clemons was involved in such planning. *See* App. at A247 (Clemons Trial Tr. (Winfrey) at 2046:1-24); App. at A1143 (Richardson Trial Tr. (Winfrey) at 1769:14-24).

penalty era (post 1976) who was not accused of directly killing his alleged victim and who did not have a prior criminal record."[14] App. at A1152 (Pet'r Hr'g Ex. 28 ¶ 18).

As discussed above, it has never been the State's theory that Clemons had direct involvement in the deaths of the Kerry sisters. To the contrary, Clemons was convicted of first-degree murder as an accomplice, and the State identified Richardson as the co-defendant who actually pushed the girls. App. at A267 (Clemons Trial Tr. (State's Closing Argument) at 3233:1-2); App. at A1131-A1132, A1136-A1137, A1140 (Richardson Trial Tr. (Cummins) at 1532:16-1533:12; 1607:14-1608:3; 1638:4-21). Indeed, as Dr. Keys points out, the only other instance of an execution of a defendant with no prior criminal record and convicted on an accomplice liability theory in the modern death penalty era was the case of Robert Lee Thompson, who was executed in Texas in 2009. App. at A1152-A1153 (Pet'r Hr'g Ex. 28 ¶ 18). While Mr. Thompson was technically convicted as an accomplice, his case is starkly different from Clemons'.[15]

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[14] The parties have stipulated that Prof. Keys is qualified to render expert opinions on comparative sentencing, that his opinions are based on sufficient facts and data, and are the product of reliable principles and methods of the type reasonably relied upon by experts in the relevant field. App. at A1161 (Pet'r Hr'g Ex. 35 ¶¶ 4-5).

[15] As described in Dr. Keys' expert affidavit, Thompson was accused of shooting a convenience store clerk four times and clubbing him with his pistol, but the clerk survived. App. at A1152-A1153 (Pet'r Hr'g Ex. 28 ¶ 18). Thompson's co-defendant

That Clemons' death sentence is disproportionate is also clear from the new statistical analyses done by Dr. Keys. At the time of the offense, Clemons was a teenager with no prior criminal record. *State v. Chaney*, 967 S.W.2d 47, 60 (Mo. banc 1998) (citing evidence that defendant "had no prior criminal convictions" as supporting finding that death sentence was disproportionate); *see also State v. McIlvoy*, 629 S.W.2d 333, 341-42 (Mo. banc 1982) (citing defendant's "only minimal juvenile criminal record" as supporting decision that death sentence was excessive and disproportionate). Dr. Keys' research demonstrates that a defendant with these and other characteristics present in this case would have a statistical likelihood of zero of receiving the death penalty. App. at A1150-A1152 (Pet'r Hr'g Ex. 28 ¶¶ 11-17). Specifically, a Missouri defendant who (1) is under the age of 21, (2) was not accused of using a weapon in committing murder, (3) had no prior felony convictions, and (4) did not know or have any relationship with the victim would have a statistical probability of zero of receiving the death penalty.[16] *Id.*

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fatally shot the clerk's cousin, however, and the jury heard evidence at the penalty stage that Thompson killed two other people during a 24-hour robbery spree. *Id.*

[16] Despite the Master's speculation as to whether Clemons knew the Kerry sisters, no evidence was presented at trial and no witness has ever testified in any proceeding that he did. Moreover, the State has never asserted that Clemons knew or had ever met the Kerry sisters before the night on the bridge in April 1991. *See* App. at A106-07 (Amended Report).

To execute a defendant such as Clemons who was convicted only as an accomplice and with no prior criminal record would be entirely unprecedented in Missouri and virtually unprecedented in the rest of the United States.[17] Accordingly, while Clemons is entitled to a new trial, under proportionality review Clemons' sentence should be commuted in the alternative.

CONCLUSION

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

[17] Even if the absence of a prior criminal record is disregarded, the instances of accomplices receiving the death penalty in the modern death penalty era are very rare. App. at A1153 (Pet'r Hr'g Ex. 28 ¶ 19).

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify pursuant to Rule 84.06(c) that this brief (1) contains the information required by Rule 55.03; (2) complies with the limitations contained in Rule 84.06(b); (3) contains 12,765 words exclusive of the sections exempted by Rule 84.06(b), based on the word count that is part of Microsoft Word 2010. The undersigned counsel further certifies that the electronic version of this brief has been scanned and is free of viruses.

By: /s/ Mark G. Arnold

CERTIFICATE OF SERVICE

I hereby certify that on November 4, 2013, I electronically filed the foregoing with the Clerk of the Court for the Supreme Court of Missouri by using the Missouri eFiling System. Participants in the case who are registered users will be served by the Missouri eFiling System.

By: /s/ Mark G. Arnold