No. SC91021

In the Missouri Supreme Court

STATE, EX REL. MARK WOODWORTH,

Appellant,

v.

LARRY DENNEY,

Respondent.

On Writ of Habeas Corpus

RESPONDENT'S BRIEF

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ATTORNEYS FOR RESPONDENT

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Jurisdictional Statement

Petitioner filed a petition for writ of habeas corpus with this Court on July 6, 2010. On November 2, 2010, this Court issued an order appointing Judge Gary M. Oxenhandler, Circuit Court of Boone County, Missouri, to serve as Special Master. This Court has jurisdiction pursuant to Article V, Section 4, Missouri Constitution.

Statement of Facts

The Petitioner is convicted on murder in the second degree, assault in the first degree, two counts of armed criminal action, and burglary in the second degree based on the following evidence presented at his second trial:[1]

Lyndel and Cathy Robertson were a farm family living in rural Livingston County, near Chillicothe, in 1990. (Trial II 73). The Robertsons had five children, including Scott and Rhonda who were still living at home. (Trial II 73, 167). The Robertsons' oldest daughter, Rochelle, was 18 years old and attending college in St. Joseph, Missouri. (Trial II 167). Rochelle was dating a young man named Brandon Hagan, who was still in high school.[2] (Trial II 88, 95). The relationship between Mr. Hagan and Rochelle Robertson was shaky and the Robertsons did not approve of the relationship. (Trial II 95, 100, 1021). At the time of the crimes, Mr. Hagan had moved to Independence, Missouri, attending high school there. (Trial II 989-990, 1009).

Mr. Robertson was a business partner with Petitioner's father, Claude Woodworth, in a farming operation. (Trial II 180, 181). The Woodworths and

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[1] Transcript references to the evidence in the second trial are identified by "(Trial II)".

[2] Brandon Hagan was also known as Brandon Thomure. For purposes of consistency, the State will refer to him as Brandon Hagan throughout this Brief.

Robertsons were also neighbors. (Trial II 180). At the time of the crimes, Petitioner was 16 years old. (Trial II 154).

On November 13, 1990, Lyndel and Catherine Robertson were shot as they slept in their rural Livingston County, Missouri, home (Trial II 133, 173, 713). Catherine Robertson died of two gunshot wounds to her head and body (Trial II 133). Lyndel Robertson, Catherine's husband, survived multiple gunshot wounds (Trial II 173).

Scott Robertson, the Robertsons' 11-year-old son awoke to the sounds of his father's moans coming from his parents' bedroom (Trial II 222). Scott entered his parents' room to find the light already on (Trial II 222-223). First, he saw his mother, closest to the doorway, and then observed his father, on the other side of the bed on the floor (Trial II 223). His father was "coughing up blood and sound[ing] like his mouth was full of blood" (Trial II 223). Scott was unable to wake his mother and unable to understand his father (Trial II 223). He next observed his youngest sister, Roxanne, in the hallway outside his parents' room (Trial II 223-224). Scott sent Roxanne to wake Rhonda, the oldest child in the home that night (Trial II 224). Scott continued to help his father (Trial II 224). Once Rhonda arrived upstairs, Scott went outside to flag down the ambulance (Trial II 224). Scott heard and saw no one while he was outside (Trial II 225). Scott denied hearing any car or automobile start outside when he initially awoke (Trial II 227-228).

Rhonda Robertson went to bed on November 13, 1990, around 11:00 or 11:30 p.m. (Trial II 75). She awoke sometime later when Roxanne banged on her basement bedroom door (Trial II 75). Rhonda ran to her parents' bedroom upstairs. Her parents' bed was to the left of the door as she entered the room (Trial II 81-85). She discovered her mother, not moving, and her father, moaning with "blood everywhere" (Trial II 81). Rhonda dialed 911, called her boyfriend's parents and then helped her father (Trial II 81-82). While waiting for the ambulance to arrive, Rhonda tried speaking with her father but she could not understand him. "It was blah, blah -- Blood was streaming out of his mouth" (Trial II 83). The Alexanders, the parents of Rhonda's boyfriend, arrived shortly after the ambulance (Trial II 83).

Kevin Hoskins, a paramedic employed by Emergency Medical Services in Livingston County, arrived first at the Robertson residence (Trial II 105). The children directed him to the master bedroom (Trial II 105). Once in the bedroom, he found Catherine Robertson dead on her bed (Trial II 106). He next saw Lyndel Robertson lying on the floor on the opposite side of the bed (Trial II 109). Hoskins observed gunshot wounds in Lyndel's head and body (Trial II 109-110). While treating him for his injuries, Hoskins asked Lyndel what had happened and Robertson communicated that he did not know (Trial II 110-111).

Lyndel Robertson survived the multiple gunshot wounds, but underwent two separate surgeries (Trial II 177-178). At least three bullets entered Lyndel's

head (Trial II 177-178, 216, 217). Lyndel was shot on his left side--the side facing his bedroom door (Trial II 216-217). Some of his teeth were blown out, his tongue was lacerated, and lead was removed from his jawbone and sinuses (Trial II 178, 415, 713; L.F. 21-25). Fragments of those bullets, located in 1990, were admitted at trial (Trial II 415; L.F. 21-25). At least one other bullet entered the side of his body, damaged his shoulder, collapsed his lung, and rested in his liver (Trial II 178, 216-217). This bullet fragment was removed during surgery in 1992 and was admitted into evidence at trial (Trial II 178, 415; L.F. 21-25).

Scott Lindley, the Livingston County Coroner, concluded that Catherine Robertson died from gunshot wounds (Trial II 133). One bullet entered her brain two inches above her right ear (Trial II 130). The other bullet entered her right collarbone area and lodged in her chest (Trial II 130). The two bullet fragments recovered during her autopsy were admitted at trial (Trial II 131, 132; L.F. 21-22).

Deputy Keith Reith was the first law enforcement officer to arrive at the Robertsons' home on November 14, 1990 (Trial II 120). Reith, while securing the household, observed that the door between the office and the garage in the home was open (Trial II 12). Reith also spotted an open patio door (Trial II 120). The open patio door led to a deck off the back of the house--near a shed behind the Robertson home (Trial II 121). The machine shed was used to store personal

items of the Robertsons and some farm equipment owned by the Robertsons and their farming partners, the Woodworths (Trial II 167, 168, 180). The Woodworths lived across the road from the Robertsons (Trial II 86).

Claude Woodworth, the Petitioner's father and the Robertsons' farming partner, took investigators through the Robertsons' shed the morning after the shooting (Trial II 332). When Lyndel Robertson closed the shed the evening before the shootings, everything was put away and the shell casings were hidden in their usual location behind cigar boxes on the workbench (Trial II 169). But when Woodworth entered the shed, he noted that a box of .22-caliber shell casings was open and that some shells were lying out on the workbench in the shed (Trial II 332). Mr. Robertson later examined a photograph of the workbench in the shed taken the morning after the shootings, and noted that the shell boxes and shells were out in the open on the bench; whereas, the prior evening those items were not out (Trial II 169-171).

David Miller, an officer with the Chillicothe Police Department, dusted the exposed surfaces of the workbench, the open shell boxes, and the shells for fingerprints (Trial II 248-249). While dusting the casing box labeled "Remington .22 Long Rifle High Velocity" at the scene, two partial prints and one nearly complete print "came right up" (Trial II 250). They were "very distinct right off the bat" (Trial II 250). Miller lifted those latent prints using clear tape (Trial II 252).

In 1990 and 1991, Don Locke, a certified latent fingerprint expert, examined the prints lifted by Officer Miller and compared them to all known prints on file with the Missouri Highway State Patrol, and the known fingerprints of several individuals submitted by the Livingston County Sheriff's Department (including the fingerprints of one Brandon Hagan, also known as Brandon Thomure) (Trial II 297, 300-301). At that time, the fingerprints from the shed and shell box did not match known prints on file (Trial II 301).

In April of 1992, Sheriff Gary Calvert was called to investigate a vandalism complaint involving a combine owned by, and stored in, Lyndel Robertson's shed (Trial II 490). Calvert noticed "very distinct footprints" in the dirt and recalled seeing the Petitioner create a similar set of footprints (Trial II 491-492, 495-496). Following up on this observation, Calvert spoke with the Petitioner on July 4, 1992 (Trial II 497). During this four-hour interview, Calvert obtained the fingerprints of the Petitioner (Trial II 498). Calvert submitted them for comparison to the print obtained from a shell box on the workbench (Trial II 498, 500). On July 10, 1992, Calvert learned from Don Locke that the fingerprint lifted from the .22-caliber shell-casing box in the shed matched the Petitioner's thumbprint (Trial II 500).

Don Locke explained that scientifically one cannot date, precisely, when a print is placed on an object (Trial II 309, 311, 313, 320). He never aged or dated a particular print. However, he asserted that a latent print examiner can

estimate whether or not a print appeared fresh and how long it might last on an item (Trial II 310-313, 317). In determining whether a fingerprint appears fresh, one would look at how dark the print became, how much powder adhered to the print, how immediately apparent the print was when dusted, and the nature of the surface dusted (Trial II 317-318). Because a latent print is a reproduction of the ridges of the fingertips transferred by the moisture on the finger itself, the amount of the moisture left on the object surface will affect the quality of the print (Trial II 318). Once the moisture has completely disappeared, black fingerprint powder is useless for locating latent prints (Trial II 318). A print that is immediately apparent to the person dusting the print indicates that "the print was fresh and placed there a short time ago" (Trial II 319).

The "Remington Long Rifle" shell casing box, where the print was located, was made of cardboard (Trial II 318). Locke stated that cardboard acts as a "sponge, it starts absorbing the moisture element immediately" (Trial II 318). Thus, the surface of the particular box would begin immediately to absorb moisture from a latent print left upon it (Trial II 318). Locke opined that when a finger deposits moisture onto cardboard and that cardboard is subsequently left exposed to air for a week or less, then black powder would be virtually useless to process that surface for latent prints (Trial II 319). Locke observed that the print lifted from the shell casing box had a large amount of powder

adhering to it, which indicated that "the print was very fresh when it was developed" (Trial II 318). Locke concluded that the evidence suggested the print was very fresh and on the box at most a week or more likely under a week (Trial II 322). The Petitioner endorsed Dr. Andre Morrison as a fingerprint expert but did not call him at trial (Trial II 48, 49; Sec. Supp. L.F. 1).

The Petitioner did not testify at trial (Trial II 939-943). However, he gave statements to Sheriff Gary Calvert on two dates: July 4, 1992, and April 11, 1993. During those interviews, the Petitioner was questioned about the number of occasions he had been inside the Robertsons' shed. On July 4, 1992, he gave multiple and conflicting answers about his access to the shed (Trial II 517). He initially stated he had never been inside the shed (Trial II 517). When questioned further, he said he may have been in the shed a time or two (Trial II 517). He stated he had helped pour concrete for the shed the summer prior to the shooting and that was the last time he was in the shed (Trial II 517, 519). He later asserted that he could not have been in the shed very much because he was in school and if he was in there it was only on the weekend.

Calvert asked him when the last time prior to the shootings he had been in the shed and the Petitioner replied that it had been probably August of 1990 when he was last in there. Yet, in the April 11, 1993, interview, the Petitioner denied ever being in the shed. When pressed, he changed answers, stating that he might have been in there a little bit while pouring the concrete (Trial II 520).

The Petitioner said he had not been in the shed in the fall of 1990 (Trial II 520). Indeed, the Petitioner, during the second interview with Calvert, stated that it had been two or three months prior to the shootings that he had been in the shed (Trial II 520-521). The Petitioner told Calvert:

> I know, but I might not have been there for a long time, it might have been August. He built that shed. I never had been in there. I'm talking about a lot. I hadn't been in there a lot through the years. I'm not talking about one year.

(Trial II 555).

During both the 1992 and 1993 interviews, Sheriff Calvert refrained from mentioning the workbench and its connection to any fingerprints to anyone involved, including the Petitioner. Sheriff Calvert explained: "That was a piece of the information that we were withholding just in the hopes that at some point somebody would incriminate themselves on that issue" (Trial II 522). When questioned about the presence of any .22-caliber shells in the shed in July 1992, the Petitioner denied three times that he had ever seen any shells in the shed (Trial II 521).

The fourth time he answered, he qualified his denial by mentioning that there was a workbench in the shed (Trial II 522). Yet, in April of 1993, the Petitioner emphatically denied ever seeing any .22-caliber bullets in the

machine shed and seeing anywhere they might have been (Trial II 522). Furthermore, the Petitioner claimed he did not remember seeing any bench in the shed before the shootings (Trial II 559). He stated he had never picked any shells up, adding that he did not know why he would (Trial II 559). The Petitioner denied throughout both interviews that he had killed Catherine Robertson and shot Lyndel Robertson (Trial II 515, 523).

When questioned by Calvert about his personal feelings about Lyndel Robertson, the Petitioner provided Sheriff Calvert two different answers. Initially, during the July 4, 1992, interview, the Petitioner stated that he thought Lyndel Robertson was an "asshole" (Trial II 512). Yet, later in the same interview, the Petitioner told Calvert that "[he] really d[id]n't have anything against [Lyndel Robertson]" (Trial II 512). When asked about why the shootings happened, the Petitioner stated that it might have happened because someone was mad at Lyndel or did it for fun (Trial II 509).

Calvert also questioned the Petitioner about his knowledge of the Robertson-Woodworth farming partnership's difficulties (Trial II 513). During the July 4, 1992, interview, the Petitioner initially stated that he knew of no problems with the partnership (Trial II 514). Later in the 1992 interview, the Petitioner stated that it was his father's idea to terminate the partnership (Trial II 514). During the six-hour interview on April 11, 1993, the Petitioner stated that he learned of the partnership problems after the shootings (Trial II 514).

Calvert asked about the Petitioner's familiarity with the Robertson home (Trial II 524). The Petitioner maintained that he had been inside the Robertsons' house two or three times when Cathy Robertson was babysitting him (Trial II 524). He had been primarily in the office area, which is inside the house as one enters through the garage (Trial II 523).

The Petitioner was questioned about his ability to shoot and the number of times he had practiced with any weapon (Trial II 15). During the July 4, 1992, interview, the Petitioner explained that he had target practiced with both his father's pistol and rifle but felt that the pistol was easier to shoot (Trial II 515). In the same interview, the Petitioner stated he only practiced with targets maybe three or four times. During the April 11, 1993, interview, the Petitioner specified that he had practiced with a gun off of the Woodworths' back deck out into a bank (Trial II 516). In July of 1992, the Petitioner said he had not fired a weapon since the murder of Catherine Robertson (Trial II 516). At trial, Claude Woodworth asserted that his son might have practiced with the pistol but that they used his rifle "ninety-nine percent of the time because none of us could hit anything with a pistol" (Trial II 359).

Sheriff Calvert questioned the Petitioner as to his familiarity with the location of his father's revolver. In July 1992, the Petitioner explained that the revolver was always kept in the nightstand next to the bed (Trial II 560). His father was diabetic and kept his insulin in the nightstand (Trial II 560). When

the Petitioner helped prepare his father's shots he would see the gun (Trial II 560). In April 1993, the Petitioner stated the Woodworth revolver was kept in either the nightstand or on the dresser (Trial II 561). Yet at trial, Claude and Jackie Woodworth, when called by the State, both contended that the gun was always kept on the dresser out of reach (Trial II 345, 376).

Both Claude and Jackie Woodworth explained that they had been awakened by a telephone call from the Robertson residence (Trial II 341, 362). Both eventually went over to the Robertsons without checking on their children or home (Trial II 341, 362, 376, 377, 382). The Petitioner slept in the basement of his parents' home, within a few feet of an exit to the outside (Trial II 341, 362, 377). Neither Claude nor Jackie Woodworth saw their eldest son until the next morning (Trial II 333, 377).

They did, however, speak to the coroner, Scott Lindley, and the local prosecutor when the two men came to their home in the early morning hours after the shootings (Trial II 127, 334, 389). During that conversation, Claude Woodworth showed them his .22 caliber Ruger revolver and explained that Lyndel Robertson owned a firearm of the same make and model that was usually stored in Robertson's pickup truck (Trial II 127-128, 334, 335).

Deputy Donald Rohrbach recovered Lyndel Robertson's .22-caliber revolver from his pickup truck that was stored in the shed (Trial II 231). The Robertson weapon was located behind the jump seat of the pickup truck. In the

Robertson pickup Rohrbach also found two boxes of shell casings: a box of ".22 Thunderbolts" and a box of "magnums" (Trial II 240). Lyndel Robertson explained that the variety box of shells on the workbench was never in his pickup and that he had separate shells in his pickup (Trial II 179).

Todd Garrison, a firearms expert employed by the Missouri State Highway Patrol Crime Laboratory, examined Robertson's .22-caliber Ruger revolver (Trial II 417, 425, 435). Garrison compared test firings from Robertson's Ruger to the bullet fragments recovered from the bodies of Cathy and Lyndel Robertson (Trial II 436). Garrison eliminated the Robertson Ruger as having fired the bullets recovered from Cathy and Lyndel Robertson (Trial II 437).

Mr. George Wilson, President of Wilson Arms Company, explained that his company owned the exclusive contract to manufacture the barrels of Ruger Single Six revolvers (Trial II 596). He examined the revolvers and concluded that his company manufactured the barrel of the Woodworth's Ruger revolver (Trial II 578). The Wilson Company used the button "swag" process to manufacture the barrel of the Woodworth gun (Trial II 570, 578). The process uses a button rifling tool to compact the barrel's metal into grooves and corresponding lands, which run in parallel helixes down the length of the barrel (Trial II 574-576).

Mr. Wilson observed a scratch in the Woodworth gun that paralleled exactly the edge of one land (Trial II 579). Wilson explained that the scratch

inside the barrel was consistent with being created at the time of manufacturing when the barrel itself was rifled into a helix shape (Trial II 579). According to the manufacturer, each button imparts its own slight imperfections to the barrel it rifles (Trial II 576). During the manufacturing process, "cold welding" can occur when the button picks up a fragment or chip and carries it along the barrel leaving a unique scratch that follows the helix angle of the tool itself (Trial II 575-576). "Anything that follows the helix exactly would have to be created by the buttoning tool itself" (Trial II 576).

John Cayton, a firearms and tool mark examination expert, explained that the barrel of every firearm is unique and will impart its mark upon bullets that pass through it (Trial II 623, 645). Thus, bullets recovered can be compared to known test firings from weapons to determine whether a particular firearm fired a particular bullet (Trial II 623, 645). Cayton examined the Woodworth revolver and noted the presence of a unique or unusual scratch in a land in the barrel of the gun (Trial II 624). Using a videotape of the interior of the barrel, Cayton demonstrated that the scratch ran nearly the length of the land directly parallel to its edge and ended near the front of the barrel closest to the revolver's cylinder (Trial II 625, 628). Cayton likewise examined the Robertson Ruger and found no similar scratch (Trial II 635).

Cayton analyzed the bullet fragments recovered from the bodies of Cathy and Lyndel Robertson, finding many of them to be in distorted or damaged

conditions (Trial II 648-652, 656). He examined each and found individual characteristics that could indicate that they had been fired in the Woodworth revolver; however, they were not of sufficient quantity or quality to make a positive match (Trial II 660). Three of the bullets recovered from the Robertsons had individual characteristics that matched individual characteristics of bullets test fired from the Woodworth revolver (Trial II 661). One of the bullets recovered from Lyndel Robertson's body had a unique mark on it that corresponded to the unique scratch in the Woodworth firearm (Trial II 653, 661, 690). Cayton eliminated the Robertson revolver as having fired the bullets recovered from the victims (Trial II 659).

Cayton also compared the larger bullet fragment recovered from Lyndel Robertson's liver during his second surgery to the live cartridges recovered from the workbench in the shed (Trial II 657). One cartridge from the box on the workbench had a mark consistent with a manufacturing defect that matched a similar manufacturing mark on the bullet recovered from Lyndel Robertson (Trial II 658).

In addition to Cayton, Steven Nicklin, a firearms expert with the Forensic Science Service in the United Kingdom, conducted examinations on the Robertson revolver, the Woodworth revolver, and the bullet fragments recovered from the Robertsons (Trial II 696, 698). Nicklin, too, compared the bullets recovered from the Robertsons to each other and concluded that they were all

fired from the same weapon (Trial II 700). He further observed that the bullet recovered during Lyndel Robertson's second surgery had a unique gross feature, a ridge, that could have been caused by the scratch in the Woodworth revolver (Trial II 701). Two other bullet fragments recovered from the Robertsons had fine details that matched details found in test bullets from the Woodworth revolver (Trial II 701). "The overall microscopic comparison strongly suggested to [Nicklin] that this revolver (Woodworth's) had been used to fire those three bullets" (Trial II 708).

Bruce Clemons, with the Missouri State Highway Patrol, questioned the Petitioner on July 14, 1994. During that interview, Clemons stated to the Petitioner that they both knew the Petitioner had shot the Robertsons (Trial II 603). The Petitioner responded by nodding his head in an "affirmative motion" (Trial II 603). Later the Petitioner maintained he did not shoot the Robertsons (Trial II 603). Clemons replied to the Petitioner that if he was a cold-blooded murderer and found guilty of capital murder he could be executed; but if Cathy's death was an accident, then it was an entirely different matter (Trial II 604). The Petitioner replied "We all have to die someday" (Trial II 604).

Lyndel Robertson explained that the Petitioner was actively involved in the farming partnership between Robertson and Claude Woodworth: "He wasn't in school. He was out in the field or in the shop or wherever we were Claude brought him along with him" (Trial II 183, 187). Until 1990, the Petitioner

received no money directly from the partnership on his own. However, during the summer of 1990, the Petitioner was allowed for the first time to plant a crop of wheat beans using partnership seeds and chemicals (Trial II 185). The Petitioner's father had a partnership insurance policy on Lyndel Robertson for around $102,000 (Trial II 182). Lyndel said that the farming partnership had two sheds to store items; however, in the fall of 1990, Mr. Woodworth began building a third shop on his property and stocking it with items that duplicated property already owned by the partners (Trial II 215-216). Lyndel Robertson learned that fall, from his hired man, that the partnership was splitting up (Trial II 217).

When Lyndel Robertson went to sleep on the night of the shootings, the bedroom light was on, as he was unable to sleep in the dark (Trial II 174). He awoke abruptly and all he "could see was kind of red . . . . I was real disorientated and didn't know what was going on" (Trial II 173). Lyndel Robertson never saw who shot him and his wife (Trial II 177, 193, 209, 210, 211, 214). Lyndel Robertson spent $35,000 of his own money to hire a private detective to help find out who shot him and his wife (Trial II 177). He stated, "I would have been a star witness if I had seen who shot me" (Trial II 210).

Lyndel Robertson said that when questioned, the questioners always asked "do you know who could have shot you" (Trial II 213, emphasis added). In the hospital, when asked who he thought might have wanted to shoot him, he

answered "Brandon" (Trial II 214). Brandon Hagan (Thomure) was the 16-year-old boyfriend of the Robertson's oldest daughter, Rochelle (Trial II 88). Officers Miller and Smith questioned Lyndel at the hospital (Trial II 255-256). Miller maintained Robertson never indicated that he saw who shot him, expressing instead, who he thought might want to shoot him (Trial II 256). Miller commented that at the hospital Lyndel Robertson was having great difficulty speaking and had to repeat things several times to be understood (Trial II 276).

John Quinn, testifying for the Petitioner, explained that he, Marvin Musick (a partnership employee), and Tom Woodworth went to the hospital to visit Lyndel Robertson after he left surgery (Trial II 731). Quinn said that Musick asked Lyndel who shot him and Lyndel responded just once, with difficulty, "Brandon" (Trial II 733-734). Quinn acknowledged that Robertson was not asked if he saw who shot him and that Lyndel Robertson never said he saw Brandon shoot him (Trial II 737). Tom Woodworth, Claude Woodworth's nephew, likewise acknowledged during cross-examination, that Lyndel Robertson never said he saw Brandon Hagan (Thomure) shoot him or his wife (Trial II 744-745). Tom Woodworth admitted that the group assumed that Lyndel meant "saw" when they actually had not asked that question (Trial II 745). Marvin Musick did not testify.

Neil Williams, when called by the Petitioner, stated that he and his brother John also visited Lyndel Robertson in the hospital (Trial II 757-758).

Williams contended that his brother asked Lyndel if he saw who shot him and Lyndel replied, "Yes, Brandon" (Trial II 757-758). However, John Williams denied Neil's contention (1057-1058). Instead, he insisted that when he and his brother Neil questioned Lyndel Robertson, Lyndel never said he saw who shot him (Trial II 1058-1059). "Mr. Robertson's words were it could have been --" (Trial II 1058). Similarly, Officer Lightner stated that when he questioned Lyndel Robertson, Lightner asked who would want to shoot Lyndel and Mr. Robertson replied "Brandon" (Trial II 780-782). Lightner also expressed that Lyndel Robertson never indicated he saw who shot him (Trial II 782).

Brandon Hagan (Thomure), who was then 16 years old, was dating Rochelle Robertson, age 19 (Trial II 88, 95). Cathy and Lyndel Robertson did not approve of the relationship (Trial II 95, 1021). According to Rhonda Robertson, her parents offered her sister an automobile if she broke up with Brandon (Trial II 100). Unbeknownst to her parents, Rochelle Robertson was pregnant with Brandon's child (Trial II 211, 1029). At the time of the shootings, Brandon and Rochelle did not know what they were going to do about the pregnancy (Trial II 1029).

Brandon's mother told Brandon about a call from Mrs. Robertson and the possibility of the Robertsons obtaining a restraining order to keep Brandon and Rochelle apart (Trial II 1025-1026). And because Rochelle had continued to see Brandon, Brandon did not think that the possibility of a restraining order was

anything serious (Trial II 1026-1027, 1039). But at the time of shootings there was no restraining order (Trial II 1026). Lyndel Robertson explained he had heard his wife speak of the possibility that Brandon had struck Rochelle, but that he personally was unaware of any violence between the two (Trial II 200, 202-203).

Chris Ruoff farmed and lived near the Robertsons and the Woodworths (Trial II 839). Ruoff passed the Robertson home around 11:30 p.m. on November 13, 1990, as he took his girlfriend home to Chillicothe (Trial II 839). It was a 20-minute drive to town (Trial II 843). As he passed the home, he saw no cars in the driveway; however when he returned sometime around midnight, he observed a "small vehicle, like a Bronco or a Blazer or a small pickup with a camper shell" right up next to the front door (Trial II 844). Ruoff knew that Rhonda Robertson's boyfriend, Brian Alexander, drove a Bronco (Trial II 853). Mr. Ruoff acknowledged that on the evening of November 13, 1990, he thought that the car he saw in fact belonged to Brian (Trial II 852). Rhonda Robertson had called the Alexanders, Brian's parents, for assistance (Trial II 83).

Melissa Suchland testified for the Petitioner (Trial II 1047). Three weeks after the shooting of the Robertsons, Melissa Suchland, a junior at Chillicothe High School, reported to investigators that on the night of the shooting of the Robertsons that she had seen Brandon Hagan (Thomure) at the Amoco station in Chillicothe around 9:00 or 10:00 p.m, with another individual at the Amoco

station on Washington Street (Trial II 1047-1048). Ms. Suchland acknowledged that her entire high school speculated about Brandon Thomure's involvement in the shooting of the Robertsons (Trial II 1051). Furthermore, she denied knowing the Petitioner or the Woodworths, or even being familiar with their names (Trial II 1044). Yet, the Robertsons had sold their home to the Suchland family who were known to be friends of the Woodworths (Trial II 1057).

Brandon Hagan testified for the State in rebuttal (Trial II 1007). Brandon denied shooting the Robertsons (Trial II 1012). Renee, John, and Misty Thomure (Brandon Hagan's mother, stepfather and sister) lived with Brandon in Independence, Missouri (Trial II 989-990). Independence was approximately 90 miles and an hour-and-a-half drive from the Robertsons (Trial II 983). On November 13, 1990, Brandon got a ride home from wrestling practice and went to bed about 8:30 p.m. (Trial II 990, 1009). Brandon did not have access to any family vehicle because he had the car keys taken away from him (Trial II 991, 1010). Misty Thomure, Brandon's sister, said that around 10:40 p.m. she went into Brandon's bedroom to get a blanket and saw her brother in his bed asleep (Trial II 1004). Mrs. Thomure rested on her couch until her husband came home from work between 12:30 and 1:00 a.m. (Trial II 993). She heard no one leave the house while she waited for her husband (Trial II 994). She and her husband locked their doors when he got home and went to bed (Trial II 994). Mrs. Thomure did not see Brandon until around 4:30 to 4:45 a.m. when they received

a telephone call from Rochelle Robertson informing them of her mother's death and her father's injuries (Trial II 992). Brandon was crying as he told them of the telephone call (Trial II 992). Brandon took a shower and called friends to try to get a ride to Chillicothe (Trial II 993).

The next morning around 11:40 a.m., 12 hours after the shootings, Police Officer Samsel obtained a voluntary gunshot residue test from Brandon Hagan (Trial II 790, 793). The test kit taken from Brandon Hagan, along with the kits obtained from Rhonda Robertson, Scott Robertson, Rochelle Robertson, Renee Robertson, Lyndel Robertson and Catherine Robertson, were submitted to the Missouri State Highway Patrol Crime Laboratory (Trial II 813). According to the test methods used in 1990, the kits indicated the presence of residue on both palms of Brandon Hagan and were inconclusive for the presence of residue on Rhonda Robertson's hands (Trial II 814).

Criminalist Jenny Smith explained that she would have concerns about the validity of any test obtained more than six hours after a shooting (Trial II 806). She said that hand-washing or showering can affect the validity of test results (Trial II 826). Smith further explained that the Highway Patrol Crime Laboratory would refuse to run Brandon Hagan's test kit if it were to come into the laboratory today because it was obtained outside the acceptable time limits for test validity (Trial II 826). She noted that there was a high level of antimony present on many of the kits that suggested an environmental contaminant (Trial

II 829). She also said that the laboratory's accepted testing method in 1990, of checking bulk quantities of individual elements, changed to the current standard of the microscopically analyzing kits, looking for the combination of the chemicals that constitute actual gunshot residue (Trial II 830-831). The test performed on Brandon Hagan, if even valid, simply meant that he had various elements on his hands and did not mean those elements ever actually formed gunshot residue (Trial II 830, 835). The test, if valid, did not mean he fired a weapon or came in contact with gunshot residue (Trial II 830, 835). Furthermore, while Mr. Robertson indicated it was possible that Brandon Hagan knew where the Robertson gun was kept, there is no evidence that Hagan, in fact, knew where the gun was kept (Trial II 975). "[H]e [Lyndel] said it's a possibility that [Brandon] could have seen it in the truck. But he didn't say he knew for sure that [Brandon] knew where the pistol was, but it was a possibility" (Trial II 975). Robertson's Ruger itself was eliminated as having fired the bullets that killed and injured the victims (Trial II 437, 659).

Petitioner's convictions were affirmed on direct appeal. *State v. Woodworth*, 55 S.W.3d 865 (Mo.App.W.D. 2001). Petitioner then filed a motion to vacate pursuant to Rule 29.15. His amended motion was filed on March 14, 2003. *Woodworth v. State*, No. 70685, p. 2 (Mo.App.W.D. August 10, 2010). After an evidentiary hearing, Petitioner's motion to vacate was denied. The denial of relief was affirmed on appeal. *Woodworth v. State*, *supra*.

On July 6, 2010, while the decision in Petitioner's appeal from his post conviction proceedings was awaiting a decision, Petitioner filed a petition for writ of habeas corpus with the Supreme Court of Missouri. Petitioner filed additional motions to supplement.

On November 2, 2010, this Court issued an order appointing Judge Gary M. Oxenhandler, Circuit Judge of the Circuit Court of Boone County, to serve as Special Master to take evidence and issue a report to this Court.

The Master conducted several evidentiary hearings, including a lengthy evidentiary hearing May 31, 2011 through June 3, 2011. Subsequently, the Petitioner was granted leave to file a third amended petition, which was granted.

On May 1, 2012, the Master filed his Report with this Court. The Master denied Exceptions that were filed by the State, and this case was set for briefing and argument by this Court.

I.

Petitioner is not entitled to a writ of habeas corpus because the Petitioner failed to sustain his burden to prove his claims in that:

A. Petitioner did not prove that the three letters were not disclosed to his trial counsel in that he did not produce the defense file at the hearing, did not have anyone review the defense file before the hearing, and failed to offer any testimony from his defense attorney, Richard McFadin, who was Petitioner's attorney at the time the letters would have been produced.

B. Petitioner was unable to identify to the Master any "new evidence" contained in the three letters because, as the Western District concluded, allegations that Brandon Hagan was the shooter were not "new" and Petitioner neither identified nor offered any evidence that any admissible *Brady* material was discovered as a result of the three letters.

C. Petitioner's claim that the three letters would have resulted in a possible acquittal in his first trial is not only "farfetched," as acknowledged by the Master, but not cognizable because the habeas petition can be used to challenge Petitioner's present conviction only. The first conviction is a nullity and Petitioner had already received the relief he sought from that conviction – a new trial.

D. Petitioner's claim that there was a "biased investigation" does not state a cognizable claim because the Constitution protects against flawed police work by providing for a fair trial before a jury of 12 persons, with the assistance of counsel whom have already been deemed to be effective.

E. Petitioner's claims of bias by Judge Lewis, and a conflict involving Mr. McFadin, are not cognizable because neither played any role whatsoever in the second trial, which is the only litigation at dispute in this case. Because neither individual played any role in the second trial, they could not have had any impact on the fairness of the second trial.

F. Petitioner's claim that Brandon Thomure's subsequent bad acts of allegedly violating an order of protection by making telephone calls to Rochelle Robertson, after the crimes had occurred, are not *Brady* material and, more important, Petitioner failed to produce any evidence whatsoever that his trial attorneys were unaware of this material, and he did not overcome the presumption that trial counsel simply made a strategic, sound decision to not use "evidence" of little or no value.

G. Petitioner's alleged new evidence is neither sufficient to prove his actual innocence nor is it likely to result in a different verdict

because Petitioner's conviction was not based on the strength of evidence suggesting that Brandon Hagan did not commit the crime but, instead, was based on the scientific evidence proving that the gun used to shoot the Robertsons was not accessible to Brandon Hagan, but was in the bedroom of Petitioner's father and that Petitioner's fingerprint was on the box of bullets used to shoot the Robertsons, and placed there recently.

H. Petitioner has failed to prove that his remaining claims are "new," in that he never questioned defense counsel about whether they had any knowledge of this information and none of it rises to a level where it is sufficient to demonstrate a reasonable probability that the result would be different.

Standard of Review

This Court is reviewing the Report and recommendations of the Master, submitted to this Court on May 1, 2011. These findings and conclusions are accorded the weight and deference given to trial courts in court-tried cases. *State ex rel. Winfield v. Roper*, 292 S.W.3d 909, 910 (Mo. banc 2009); *State ex rel. Lyons v. Lombardi*, 303 S.W.3d 523, 525 (Mo. banc 2010). Deference is given to this opportunity to view and judge the credibility of witnesses. *Id.*

This Court will sustain the Master's findings "unless there is no substantial evidence to support them, they are against the weight of the evidence, or they erroneously declare or apply the law." *Id.* "However, when the issue is primarily legal, no deference is warranted and appellate courts engage in *de novo* review." *State v. Taylor*, 298 S.W.3d 482, 492 (Mo. banc 2009). Whether there is sufficient evidence to support a claim is a legal question. *Feiteira v. Clark Equipment Co.*, 236 S.W.3d 54, 59 (Mo.App.E.D. 2007); *Klotz v. St. Anthony's Medical Center*, 311 S.W.3d 752, 769 (Mo. banc 2010); *Howard v. City of Kansas City*, 332 S.W.3d 772, 788 (Mo. banc 2011).

Petitioner's Burden of Proof

The State believes that the vast majority of the issues raised by Petitioner in his numerous petitions, and addressed by the Master in his Report, are matters that were either addressed in prior proceedings, or could have been reviewed earlier. This habeas petition is not to be a substitute for post-conviction review. *State ex rel. Green v. Moore*, 131 S.W.3d 803, 805 (Mo. banc 2004). Habeas proceedings were not designed to allow "for duplicative and unending challenges to the finality of a judgment." *State ex rel. Simmons v. White*, 866 S.W.2d 443, 446 (Mo. banc 1993).

A new claim is permissible in a habeas proceeding under limited circumstances:

> A person who has suffered criminal conviction is bound to raise all challenges thereto timely and in accordance with the procedures established for that purpose. To allow otherwise would result in a chaos of review unlimited in time, scope, and expense. In accordance with our previous decisions, habeas corpus is not a substitute for appeal or post-conviction proceedings. Habeas corpus may be used to challenge a final judgment after an individual's failure to pursue appellate and post-conviction remedies only to raise jurisdictional issues or in circumstances so rare and exceptional that a manifest injustice results.

Id.

Habeas review is not meant to be a substitute for post-conviction review under Rule 24.035 or Rule 29.15 or for direct appeal. *State ex rel. Green v. Moore*, 131 S.W.3d 803, 805 (Mo. banc 2004). As such, to be entitled to habeas review of a challenge to the validity of a conviction, a petitioner must: 1) demonstrate the existence of a jurisdictional defect, 2) show that he is probably actually innocent, 3) or demonstrate cause and prejudice for the failure to make the claim on direct appeal or post-conviction review. *Green*, 131 S.W.3d at 805, n.5.

In *State ex rel. Engel v. Dormire*, 304 S.W.3d 120 (Mo. banc 2010), this Court determined that cause was established "where there is a factor at issue external to the defense or beyond its responsibilities." *Id*. at 125-26 *citing Strickler v. Greene*, 527 U.S. 263, 283, n. 24 (1999). The Court suggested that to show cause, the offender can "establish that the grounds relied on were not 'known to him' during his direct appeal or post-conviction case." *Id*. at 126 *citing State ex rel. Simmons*, 866 S.W.2d at 446. Not only must the offender show cause, but he must show prejudice. *Id*. And under *Engel*, to show prejudice, the offender must show prejudice rising to the level of "*Brady* prejudice." *Id*. *citing Brady v. Maryland*, 373 U.S. 83 (1963).

To show *Brady* prejudice, the offender must demonstrate a reasonable probability that the outcome of the proceeding would have been different. *Id*. at

128, *quoting Strickler v. Greene*, 527 U.S. 263, 280 (1999) *quoting United States v. Bagley*, 473 U.S. 667, 682 (1995). In *Bagley*, the Supreme Court stated, "[w]e find the *Strickland* formulation of the *Agurs* test for materiality sufficiently flexible to cover the 'no request,' 'general request,' and 'specific request' cases of prosecutorial failure to disclose evidence to the accused: the evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Id*.

As has become common, Petitioner attempts to overcome his procedural default by asserting actual innocence. As a result, Petitioner believed he was entitled to raise every possible claim, even if raised and denied previously.

Petitioner bears the burden of proving actual innocence. *State ex rel. Amrine v. Roper*, 102 S.W.3d 541 (Mo. banc 2003). He must prove actual innocence by clear and convincing evidence sufficient to undermine the Court's confidence in the correctness of the conviction. *Id*. at 548.

The other method of overcoming the procedural default of his claims used by Petitioner is to allege that no reasonable juror would find Petitioner guilty in light of "new evidence of innocence." *Murray v. Carrier*, 477 U.S. 478, 496 (1986).

"[S]uch a claim requires petitioner to support his allegations of constitutional error with new reliable evidence – whether it be exculpatory scientific evidence, trustworthy eyewitness accounts or critical physical evidence – that was not presented at trial. Because such evidence is obviously unavailable

in the vast majority of cases, claims of actual innocence are rarely successful." *Schlup v. Delo*, 513 U.S. 298, 324 (1995).

Under *Schlup*, in order for evidence to be classified as new, it must be evidence "that was not available at trial." *Storey v. Roper*, 603 F.3d 507, 524 (8th Cir. 2010), *quoting Nance v. Norris*, 392 F.3d 284, 291 (8th Cir. 2004). That evidence must also be uncontradicted. If a habeas petitioner adduces conflicting evidence about the murder, the new conflicting evidence is insufficient to show probable innocence. "The existence of such a 'swearing match' would not establish that no reasonable juror would have credited the testimony of the prosecution witnesses and found [that petitioner] guilty beyond a reasonable doubt." *Moore-El v. Luebbers*, 446 F.3d 890, 902-903 (8th Cir. 2006); *Johnson v. Norris*, 170 F.3d 816, 818-819 (8th Cir. 1999)(reversing grant of habeas relief, finding that much of the evidence -- witnesses' memory loss and potentially conflicting testimony of witnesses -- is not new and reliable); *Gomez v. Jaimet*, 350 F.3d 673, 679-681 (7th Cir. 2003)(holding that petitioner's own statements and statements of petitioner's co-defendants were insufficient to warrant applying the extremely rare actual innocence exception); *Bosley v. Cain*, 409 F.3d 657, 665 (5th Cir. 2005)(rejecting claim where new evidence consisted only of testimony from four relatives of petitioner). Merely putting a different spin on evidence that was presented to the jury does not satisfy the *Schlup* requirement. *Bannister v. Delo*, 100 F.3d 610, 618 (8th Cir. 1996).

Not only must Petitioner establish cause to overcome the default, but he must also show the equivalent of "*Brady* prejudice." *State ex rel. Engel v. Dormire*, 304 S.W.3d 120, 126 (Mo. banc 2010). "The likelihood of a different result must be substantial, not just conceivable." *Harrington v. Richter*, 131 S.Ct. 770, 791-792 (2011).

A "reasonable probability" is a probability sufficient to undermine confidence in the outcome. *United States v. Bagley*, 473 U.S. at 682. The Supreme Court described this standard in more detail in *Harrington v. Richter*, 131 S.Ct. 770, 791-92 (2011).

> In assessing prejudice under *Strickland*, the question is not whether a court can be certain counsel's performance had no effect on the outcome or whether it is possible a reasonable doubt might have been established if counsel had acted differently. . . . Instead, *Strickland* asked whether it is "reasonably likely" the result would have been different. . . . This does not require a showing that counsel's actions "more likely than not altered the outcome," but the difference between *Strickland*'s prejudice standard and more-probable-than-not standard is slight and matter "only in the rarest case." . . . The likelihood of a different result must be substantial, not just conceivable.

Id.

Introduction

The Petitioner's primary allegations, and the allegations receiving the most attention in the Report, involve alleged *Brady* violations. Petitioner's evidence that he did not receive these materials and that they are, therefore, "new" were not proven by competent evidence. Petitioner failed, in almost every single situation, to ask his trial counsel if they had ever seen these materials. [3] Thus, he did not sustain his burden of proof.

The greater error, however, and the error upon which the denial of habeas relief is most clearly appropriate, is the Petitioner's complete failure to present any admissible, relevant evidence that he has obtained as a result of this "new" material. Petitioner forgot that he also had to prove actual prejudice from these alleged *Brady* violations. *State ex rel. Simmons v. White*, 866 S.W.2d 443, 446 (Mo. banc 1993).

A new trial is not appropriate unless the Petitioner can identify specifically the new evidence that he believes will overcome the State's evidence that has resulted in two juries finding Petitioner guilty. The Petitioner fails to identify that evidence in his Brief; it does not exist. Additionally, the Missouri

[3] Petitioner's Appendix is also problematic. It contains a number of "Exhibits" not admitted at trial and the State is unable to conceive of any legitimate reason the Petitioner did so.

Court of Appeals, Western District, has already determined that this evidence is not "new." *Woodworth v. State*, No. 70685, p. 7 (Mo.App.W.D., August 10, 2010).

Petitioner's second major theme appears to be an attack on the integrity of every single person associated with this case, including every judge, prosecutor, police officer, juror, and even the victims. The most succinct response to these challenges is to point out that the individuals vilified by Petitioner did not participate in his second trial that resulted in his present conviction. Two subsequent, appellate courts have concluded that Petitioner's second trial was fair.

Summary of the Argument

The Petitioner's claim is based on the false premise that his conviction was based on the strength of evidence inculpating or exculpating another, Brandon Hagan, the boyfriend of the victims' daughter. Petitioner's conviction was not based on that evidence, and he could not have been convicted based on the juries' analysis of that evidence.

Petitioner was convicted based on scientific evidence proving that the gun used to shoot the Robertsons was in the bedroom of Petitioner's father before and after the crime, proving that Petitioner's fingerprint was on the box of bullets used to shoot the Robertsons, proving that the fingerprint was recently placed there, and based on Petitioner's incriminating statements. He could not have been found guilty based on any other evidence, and the history of this case confirms this. In the first trial, there was no testimony regarding Brandon Hagan and Petitioner was convicted. In the second trial, the defense was permitted to present any evidence it desired implicating Brandon Hagan in the shootings,[4] and Petitioner was again convicted.

Petitioner has yet to offer a plausible explanation as to how Brandon Hagan entered the Woodworth home, took the pistol from the Woodworths'

[4] "That issue was exhaustively addressed by no less than seven witnesses at trial." *Woodworth v. State*, No. 70685, p. 7, n. 10 (Mo.App.W.D. 2010).

bedroom, had Petitioner procure a box of bullets from a nearby shed for Mr. Hagan to use, and then return the gun to the Woodworths' bedroom.

Because the weapon cannot be placed in Brandon Hagan's hand, additional "new" evidence strengthening Mr. Hagan's motive or opportunity is not likely to create a "reasonable probability" of a different result, *Harrington v. Richter*, 131 S.Ct. 770, 791-792 (2011), because Petitioner was not convicted based on the strength of any suspicions about Brandon Hagan.

A review of the record will also demonstrate to this Court that, as the Court of Appeals found, this alleged evidence is not "new." *Woodworth v. State*, *supra*. In fact, nearly every issue raised by Petitioner were matters resolved on appeal or in post-conviction proceedings – or which should have been addressed in those proceedings.

Finally, the record will make it clear that Petitioner failed to sustain his burden to prove that if he were to receive a third trial, he could produce any new, admissible, relevant evidence as a result of the *Brady* materials he claims to have discovered. In fact, his Brief fails to even identify a single piece of new, admissible evidence allegedly obtained as a result of the alleged *Brady* violations.

Argument

A. Petitioner did not prove that the three letters were not disclosed to his trial counsel in that he did not produce the defense file at the hearing, did not have anyone review the defense file before the hearing, and failed to offer any testimony from his defense attorney, Richard McFadin, who was Petitioner's attorney at the time the letters would have been produced.

The State readily acknowledges the deference given to the Master's factual findings and his credibility determinations. The significant error in the Master's Report, however, is in the legal analysis of the evidence presented by the Petitioner, not his credibility determinations.

"The habeas corpus petitioner has the burden of proof to show that he is entitled to habeas corpus relief." *State ex rel. Lyons v. Lombardi*, 303 S.W.3d 523, 525 (Mo. banc 2010). The Master's recommendations will not be sustained, however, if "there is no substantial evidence to support them." *Id*. Petitioner failed to sustain his burden to prove that his defense did not receive the three letters which he claims are *Brady* material – the only evidence that could constitute substantial evidence to support his *Brady* claim.

The three letters were created before a criminal charge was filed and, therefore, could not have been produced at the time they were created. Instead, Judge Lewis testified that once Petitioner was indicted, he sent the letters to

Mr. Hulshof, the prosecutor, and Mr. McFadin, defense counsel. (Lewis depo, 55-56; Appendix, pp. 1-2). The Master chose to not find that testimony credible. (Report, 17). This factual finding, which the State recognizes it cannot challenge, does not entitle Petitioner to relief.

In this proceeding, the burden is not actually on the State to prove it sent the letter,[5] but it was Petitioner's burden to prove he had not received it. Thus, disregarding Judge Lewis' testimony[6] does not sustain the Petitioner's burden.

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[5] The Master's analysis of this issue was legally flawed. In footnote 16, the Master asserts that "Even if Judge Lewis had provided the Lewis Letter to McFadin, it is unclear to this Court whether that would have excused a State's subsequent *Brady* violation …." (Report, 17, n. 16) (emphasis added). If the defense received the material – regardless from whom – there can be no *Brady* violation because there can be no prejudice. *Gill v. State*, 300 S.W.3d 225, 231 (Mo. banc 2009). The legal analysis of the Master was erroneous but it is unclear the extent this erroneous analysis affected the Master's conclusions.

[6] The Master's express reason for disregarding Judge Lewis' testimony is because it was a "seventeen-year-old recollection." (Report, 17). One should give similar pause to reversing a conviction, affirmed by two appellate courts, based on 20 year old recollections of witnesses whose biases are overt.

Petitioner could have sustained his burden by offering any of the three necessary pieces of evidence:

1. Petitioner failed to produce the defense file to demonstrate the letters are not part of that file;
2. Petitioner failed to have anyone review the defense file, including his trial attorneys, to determine what was in the file; and
3. Petitioner failed to produce the testimony of Richard McFadin, his defense counsel at the time, who would have been the individual who would have received the letters.

But Petitioner offered none of this evidence.

1. Petitioner did not produce the defense file.

While Petitioner's subsequent trial attorneys did testify that they never saw the letters,[7] these assertions are not sufficient to sustain the Petitioner's

[7] The State does not doubt the sincerity of the testimony of these attorneys, nor does it have any reason to suggest any of their testimony was fabricated. Nevertheless, it is beyond dispute that their memories were flawed, with the erroneous assertion that they had never seen the Diester letter, as the most obvious example. This simply demonstrates the hesitation courts should exercise in setting aside a conviction based on witnesses' dated recollection of events, no matter how sincere their testimony may be.

burden of proof. We know their recollection of events 17 years later was flawed. The Petitioner's third amended petition alleged that "according to the uncontroverted testimony of Honorable Judge Jacqueline Cook, attorneys James Wyrsch and William Kutmus, and investigator Phillip Thompson," the Diester letter was never produced. (Third Amended Petition, ¶42) (emphasis added). Mr. Kutmus testified accordingly. (Kutmus depo, 7). Yet, the fact is the defense used that very letter by Mr. Diester to cross-examine a State's expert in the first trial! (Trial I 885-886, 889-898).

Memories fail; justice requires caution in overturning a conviction based on 20 year old memories.

In contrast to the Petitioner's evidence, the State had both prosecutors review the prosecution file prior to their testimony. The Master extensively questioned both prosecutors about how they knew what was in the prosecution file (Tr. 622-624, 692-697), but never expressed any curiosity about the content of the defense file.

We know, of course, that in preparing his trial attorneys – who had not seen the defense files in over 10 years[8] – for their testimony before the Master,

[8] "10 years after the trial recollections of witnesses may differ and may be imprecise." *State ex rel. Winfield v. Roper*, 292 S.W.3d 909, 910 (Mo. banc 2009).

Petitioner did not have these attorneys review the files. (Wyrsch depo, 38, 40-41; Cook depo, 26-27; Thompson depo, 15; Kutmus depo, 11).

Without some evidence concerning the content of the defense file, Petitioner cannot possibly sustain his burden of proof. It would have been a simple, straightforward step to present at least some evidence as to what the defense file contains. Even if he did not literally produce the entire file, the testimony of one witness to say "those letters are not in the file" was necessary, and reasonably to be expected. "It is his burden to prove that the events did occur." *Winfield*, 292 S.W.3d at 911. The law "requires petitioner to support his allegations of constitutional error with new reliable evidence." *Schlup v. Delo*, 513 U.S. 298, 324 (1995).

The significance of the omission of this crucial piece of evidence is increased by two additional facts.

First, trial counsel acknowledged that Mr. Kutmus, one of the defense attorneys, continually lost records and documents. (Cook depo, 17;[9] Exhibit HH; Thompson depo, 29, 32; Exhibit 196). The Court can have no confidence in the defense files given this admitted problem with those files.

Second, while the trial attorneys express no memory of letters between Judge Lewis and Mr. Robertson, the trial transcript reveals that Judge Cook did

[9] "He lost it." (Cook depo, 17).

attach a letter from Lyndel Robertson to Judge Lewis as part of a motion she filed in the second trial. (Trial II 26).[10] The State cannot say with any certainty that this is one of "those" letters – because the Petitioner did not produce it! But it certainly further undermines the testimony of the trial attorneys even more, and significantly bolsters the "seventeen year old memory" of Judge Lewis that he provided all correspondence to the trial attorneys. (Lewis depo, 55-56).

Most important, the trial transcript references to correspondence between Mr. Robertson and Judge Lewis, which were disclosed to defense counsel (Trial II 26), underline the necessity for the Petitioner to have presented the defense file to prove that disclosure had not occurred. Again, the prosecutors testified that they believed they had disclosed everything.[11] Although not incumbent upon the State to prove or disprove anything, this testimony makes the defense file, itself, material. Regardless of whether an adverse inference can

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[10] The State brought this to the attention of the Master and Petitioner in its Exceptions. Rather than address this significant issue, the matter was ignored by the Petitioner and summarily dismissed by the Master.

[11] While the Master did not make credibility decisions about all witnesses, he did expressly find Mr. Hulshof and Ms. Smith, the two prosecutors, credible. (Report, 16).

be drawn from the Petitioner's failure to produce the defense file, the failure to do so is fatal to Petitioner's efforts to prove his claim.

2. Petitioner failed to have his trial attorneys review the file.

Rather than produce the file itself, Petitioner could have had his trial attorneys review the file before testifying. This simple, obvious step would have served two necessary purposes. First, it would have provided meaningful evidence as to the content of the file and, second, it would have provided some level of confidence in the reliability of the attorneys' memories of the issues before the Court.

Again, the prosecutors undertook such a review of the prosecutor files prior to the hearing and were subject to examination by the Master, himself, about the significance of that review. (Tr. 622-624, 692-697). Petitioner did not ask defense counsel to undertake a similar review. And, as a result, the trial attorneys' memories were faulty on a number of significant issues. They denied knowledge of the Diester letter, although it was actually used in cross-examination at the first trial. (Trial I 885-886, 889-898). Mr. Wyrsch believed that Rochelle Robertson had testified at trial (Wyrsch depo, 14), when she had not.

The State does not point these out to suggest the testimony of trial counsel was intentionally false, or to necessarily criticize them for being in error on a number of significant facts. The State is, however, critical of Petitioner for

failing to do the things necessary to prove his allegations. Having the trial attorneys review the defense file – or any documents for that matter – is a self-evident, necessary step in order to prove his claim.

3. Failure to present testimony from Richard McFadin.

In this case, however, the omission was made more material, and more fatal to the sufficiency of Petitioner's proof, because Petitioner also failed to call his initial defense attorney, Richard Mc Fadin.

It is not the State, alone, that believes the failure to offer any evidence from Mr. McFadin is significant. The Master stated that he "is puzzled over the lack of evidence adduced by Woodworth with regard to McFadin's knowledge, if any." (Report, 17). "McFadin did not testify about the issue." (Report, 17). The omission is more than "puzzling"; it is fatal to the Petitioner's ability to prove his claim that he did not have the letters, particularly when coupled with his failure to provided the defense file or to have trial counsel review and testify regarding that file. Defense investigator Thompson testified that by the time Mr. Wyrsch and Judge Cook became involved in the case, "Mr. McFadin had a fairly lengthy file." (Thompson depo, 20).

Even if the Master completely discounted the State's evidence that the letters were produced by Judge Lewis and through discovery, this does not entitle Petitioner to relief. Again, Petitioner must affirmatively prove his claim.

The testimony of Judge Cook and Mr. Wyrsch does not satisfy that burden because they were not involved in the case until much later.

4. Prosecutor Smith's production of the prosecutor's file to Judge Cook satisfies *Brady*.

Finally, the evidence – believed by the Master – is that prior to the second trial (which is the conviction at issue in this case), Prosecutor Smith made an appointment with defense counsel for Petitioner and provided the entire prosecutor's file for review. (Tr. 613).[12] The Report fails to address the sufficiency of this action to comply with *Brady*. Indeed, both the Petitioner and the Report are silent regarding this long-standing and well-recognized practice, and the fact that it complies with *Brady*. The Report does not dispute that Prosecutor Smith provided the file, but the State cannot make defense counsel look at what is provided; the obligation is to disclose. Ms. Smith did so, beyond dispute. It would be fundamentally unfair to reverse a conviction based on an alleged *Brady* violation where the State produced the evidence, but the defense chose to not examine the material. *Williams v. State*, 168 S.W.3d 433, 440 (Mo.

[12] The Master found this evidence by Ms. Smith to be credible and summarized his factual finding this way: "Prosecutor Smith testified, however, that the letters would have been available to the defense through her 'open file' offer, though she did not recall when she first saw the letters." (Report, 16).

banc 2005) ("The state responded by allowing defense counsel to inspect and copy everything in the state's file on the case."); *State v. Brooks*, 960 S.W.2d 479 (Mo. banc 1997) ("The prosecution has no obligation to disclose evidence of which the defense can acquire."); *State v. Benedict*, 319 S.W.3d 483, 487 (Mo.App.S.D. 2010) ("open-file policy" of the State sufficient disclosure); *Strickler v. Greene*, 527 U.S. 263, 283, 119 S.Ct. 1936, 1949, fn. 23 (1999) ("We certainly do not criticize the prosecution's use of the open file policy.")

Returning to the Petitioner's burden of proof, it may well be that Judge Cook does not remember seeing the three letters because they were not deemed material or significant. Indeed, the failure of defense counsel to even remember seeing these letters before speaks more to whether they were material or prejudicial than to whether they were disclosed.

As to disclosure, again, the Petitioner failed to sustain his burden of proof by failing to offer any evidence of the contents of the defense file, to have anyone review the defense file, or to offer the testimony of Mr. McFadin.

The Petitioner's burden in this case was very simple and straightforward. He asserted that none of his attorneys ever received the three letters. Because he did not have all of his attorneys testifying to that fact, he did not sustain his burden. No matter how many inferences the Petitioner will ask this Court to make, it will not substitute for the evidence he could have and should have provided.

B. Petitioner was unable to identify to the Master any "new evidence" contained in the three letters because, as the Western District concluded, allegations that Brandon Hagan was the shooter were not "new" and Petitioner neither identified nor offered any evidence that any admissible *Brady* material was discovered as a result of the three letters.

The Petitioner failed to sustain his burden of proof establishing the three letters were material or contained any evidence likely to have affected the outcome of the trial.

The Report states "the evidence uncovered via the Lewis letters[13] was highly prejudicial to Woodworth …." (Report, 17). The Report then goes on to suggest ways in which "the evidence" was prejudicial. The Report sets forth ways in which "the evidence" could have benefited Petitioner "in the first trial." (Report, 18).

Nowhere in the Report, or in the Petitioner's Brief, is the admissible, relevant "evidence" supposedly uncovered as a result of these three letters identified. This is a critical deficiency in Petitioner's proof at the hearing.

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[13] The Report identifies and refers to the three letters as the "Lewis Letters."

Indeed, the Petitioner's Brief does not even attempt to identify the actual evidence that he claims is revealed from these three letters. Instead, he simply cites the Report and its generalities about "possible" ways the letters might help.

This inability to identify the actual evidence which defense counsel would have obtained and used in the Petitioner's trial is the single most significant deficiency in his proof, and the single most significant error in the Report's analysis.

As the United States Supreme Court has stated, when undisclosed information is not admissible at trial, it is "not 'evidence' at all." *Wood v. Bartholomew*, 516 U.S. 1, 6 (1995) (because polygraph results were not admissible at trial, the undisclosed results were "not 'evidence' at all;" thus, "Disclosure of the polygraph results . . . could have had no direct effect on the outcome of trial, because [the defendant] could have made no mention of them either during argument or while questioning witnesses."). *See also Warren v. State*, 482 S.W.2d 497, 500 (Mo. 1972) (where the suppressed evidence had no probative force or was not competent evidence, there was no *Brady* violation).

It is simply not sufficient to speculate about what might have been uncovered if the State had not suppressed certain information. *See Wood v. Bartholomew*, 516 U.S. at 6.

In *Wood v. Bartholomew*, the Ninth Circuit reversed a defendant's conviction based on the government's failure to disclose the results of a

polygraph performed on one of the state's witnesses (a man named "Rodney"). 516 U.S. at 5. The Ninth Circuit acknowledged that the results would not have been admissible at trial, but the Ninth Circuit concluded that the results were nevertheless material under *Brady*. *Id*. In support of its holding, the Ninth Circuit reasoned that "[h]ad [respondent's] counsel known of the polygraph results, he would have had a stronger reason to pursue an investigation of Rodney's story"; that he "likely would have taken Rodney's deposition" and that in that deposition "might well have succeeded in obtaining an admission that he was lying about his participation in the crime" and "would likely have uncovered a variety of conflicting statements which could have been used quite effectively in cross-examination at trial." *Id*.

But the United States Supreme Court held that granting relief on the basis of such speculative possibilities was a "misapplication" of *Brady*. *Id*. at 2, 6. The Court observed that "Other than expressing a belief that in a deposition Rodney might have confessed to his involvement in the initial stages of the crime—a confession that itself would have been in no way inconsistent with respondent's guilt—the Court of Appeals did not specify what particular evidence it had in mind." *Id*. at 6. The Court, thus, concluded that the Ninth Circuit's "judgment is based on mere speculation, in violation of the standards we have established." *Id*.

It is abundantly clear that Petitioner's claim was predicated upon the assumption that Mr. Robertson told Prosecutor Roberts something that would be exculpatory. Had Prosecutor Roberts testified that Mr. Robertson stated, "Brandon did it," or even words to that effect, this might possibly be such "new" evidence. But that is not the evidence revealed by these letters. In fact, at the hearing it was determined that Prosecutor Roberts possesses no admissible, relevant evidence (new or otherwise), about this case or any statement by Mr. Robertson. When questioned by Petitioner, Prosecutor Roberts states:

> **Q. Did you have direct knowledge of this occurring, that Mr. Robertson had been adamant that we charge another young man?**
>
> **A. If by "direct" you mean from Mr. Robertson, I'm not sure, but I was certainly aware of it, most likely from Deputy Calvert.**

(Tr. 271).

This is the totality of the "new evidence" upon which Petitioner demands a new trial. He never asked another single question to Prosecutor Roberts about this issue.

Forgotten in the analysis by Petitioner is that he was required to prove, not at some future hearing, but at the hearing before the Master, what specific,

identified piece of admissible, material evidence was withheld from him because these three letters were not disclosed.

"[T]he evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *United States v. Bagley*, 473 U.S. 667, 682 (1985). "The likelihood of a different result must be substantial, not just conceivable." *Harrington v. Richter*, 131 S.Ct. 770, 792 (2011). Again, Petitioner has yet to identify that evidence.

Petitioner intentionally avoids answering that critical question because the evidence at the hearing did not support his claim. Petitioner now has had the three letters for at least three years. The question the Petitioner refuses to answer, and the question he was required to answer in order to receive relief is:

> **Now that Petitioner has the letters, what relevant, admissible piece of evidence was obtained from those letters that was unavailable at the previous trial?**[14]

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[14] And this enormous problem in the Petitioner's proof is separate and apart from the fact that the Western District has already concluded that this is not "new evidence." *Woodworth v. State*, No. 70685, p. 7, n. 10 (Mo.App.W.D. August 10, 2010).

What is the evidence Petitioner claims he can now offer at a retrial? The letters are not admissible; the letters themselves are hearsay, and clearly so. The State challenges the Petitioner to identify in his Reply Brief the specific testimony which he claims to now have acquired as a result of obtaining the three letters and the significance of that specific piece of evidence.

In filing the Petition with this Court, the Petitioner asserted that this evidence "contradicts and proves that Robertson not only identified Thomure but also had expended considerable time and energy in adamantly seeking Thomure's prosecution." (Writ Summary, ¶21, 7). But, again, after extensive discovery and multiple days of hearings,[15] Petitioner cannot identify the new witness who would testify that Mr. Robertson identified Brandon Hagan as the shooter, or even as a suspect.

There seems to have been a misperception by Petitioner that he needed to prove merely that the letters could "possibly"[16] be material. The hearing was the

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[15] The Master reported seven hearings, spanning 11 days. (Report, 1).

[16] Indeed, the Master's Report discusses "three obvious possibilities" about what a letter might mean. (Report, 14, n. 11). At the conclusion of the hearing, after the evidence is in, the Petitioner should not have left the Master to speculate; the time for speculation is over once the evidence is closed. The Petitioner had the obligation to prove the significance, if any, of the letters. The

opportunity for Petitioner to present the evidence which he believed was withheld or uncovered. While he had Mr. Robertson, Mr. Calvert, and Mr. Roberts testify,[17] Petitioner cannot point to any part of their testimony nor identify one piece of evidence that is new, admissible and, most important, a product of discovering the letters.

Petitioner's claim was abundantly clear; he asserted that the letters "prove that Robertson not only identified Thomure but also had expended considerable time and energy in adamantly seeking Thomure's prosecution." (Writ Summary, ¶21, 7).

Such bold assertions may have had much to do with this Court entertaining the writ. But when the time came to prove his claim, Petitioner failed completely. The entirety of the Petitioner's evidence on this issue was one single question to Prosecutor Doug Roberts:

> Q. Did you have direct knowledge of this occurring, that Mr. Robertson had been adamant that we charge another young man?

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very fact that the Master is left to speculate demonstrates that the Petitioner did not sustain his burden.

[17] In addition to multiple depositions.

A. If by "direct" you mean from Mr. Robertson, I'm not sure, but I was certainly aware of it, most likely from Deputy Calvert.

(Tr. 271).

That is the totality of the Petitioner's inquiry into Mr. Roberts' knowledge of any accusations Mr. Robertson may have made that Brandon Hagan was the shooter. This does not rise to the level of exculpatory evidence. This is not new evidence. This is not even admissible evidence. Yet, this one question and answer is all of the evidence Petitioner presented and upon which Petitioner demands a new trial.

Petitioner never asked Mr. Calvert what he did or did not say to Prosecutor Roberts. Petitioner never asked Roberts what Mr. Calvert might have told him.

The Master's Report, like Petitioner's Brief, fails to identify the evidence "uncovered" by these letters. The language of the Report itself reveals this flaw, referring not to the letters themselves as pertinent evidence but as the door to finding future, unspecified evidence:

> "The letters were both exculpatory and impeaching evidence and, further, would have reasonable lead to the discovery of other important defense related evidence."

(Report, 19) (emphasis added).

There is no future hearing in which Petitioner may identify and clarify what "*other important defense related evidence*" was revealed in those letters. The hearing before the Master was his opportunity to present any and all evidence he claims to be "exculpatory and impeaching." Any "other important defense related evidence" gathered as a result of the three letters needed to be identified and offered during the 11 days of hearings. Petitioner produced none.

The Report repeats this critical error in its legal analysis by referring to "the Lewis letters and the evidentiary offspring." (Report, 18). That "offspring" is never identified. More important, there was no testimony about what this "offspring" may someday look like.

"Evidentiary offspring" is a telling description. There is no "other" hearing in which the Court and State must await the "birth" of this "offspring." It was at this hearing, before the Special Master, in which Petitioner was obligated to sustain his burden of proof to establish what "new evidence," what admissible evidence, is now available once he received those three letters. This issue did not await some future hearing, but was a matter Petitioner was obligated to establish. Why would Petitioner even think a conviction that has been affirmed on direct appeal and through post-conviction proceedings should be set aside based on some future, uncertain and speculative possibility that "future offspring"– unidentified and uncertain if it even exists – "may" result?

The question to be answered is really very simple and straightforward: what testimony at the hearings did Petitioner offer and prove that he can identify as a result of any of these three letters?

It is obvious that Petitioner expected and intended that witness to be Doug Roberts. These hearings were Petitioner's opportunity to prove his claim.

The Western District's analysis that this is not "new evidence" is accurate.

As has been noted, above, and as will be discussed further, below, evidence that Mr. Robertson had stated Brandon Hagan could be the attacker is not "new." *Woodworth v. State*, No. 70685, p. 7, n. 10 (Mo.App.W.D., August 10, 2010). "The issue was exhaustively addressed by no less than seven witnesses at trial." *Id.*

Petitioner's trial attorneys vigorously litigated the claim that Mr. Robertson identified Brandon Hagan as the shooter shortly after the shootings. This included the testimony of John Quinn (Trial II 725-734), and Neal Williams (Trial II 745-759). Indeed, Petitioner advocates an independent claim that trial counsel failed to call additional known witnesses, such as Mark Mellor, at trial to testify to these very same facts. (Third Amended Petitioner, ¶78). How, then, can this be new? A review of the trial transcript, including the opening statement and closing argument of counsel, demonstrates that the defense was

fully aware of the claim that Mr. Robertson initially asserted that Mr. Hagan was the shooter. The jury was aware, and rejected that claim.

The Doug Roberts' letter (Exhibit 5), does not provide any admissible evidence or additional or cumulative evidence to support the Petitioner's claim that Mr. Robertson initially stated that Brandon Hagan was the probable shooter. Nor did the letter lead to any further evidence to support this theory.

In fact, Mr. Wyrsch testified that what he knew at the time was consistent with what was contained in the Doug Roberts' letter. (Wyrsch depo, 64, 65). That is because Mr. Wyrsch had deposed Mr. Roberts (Wyrsch depo, 61), and Mr. Thompson, the investigator, had spoken to Mr. Roberts (Wyrsch depo, 63).

In addition, prior to the first trial, Mr. Wyrsch explicitly discussed his knowledge that Mr. Robertson had publicly indicated that he wanted someone else prosecuted. Mr. Wyrsch discussed, during a pretrial conference in the first trial, that there had been a local newspaper article to that effect:

> *They went over to Research Hospital and shortly after this occurred -- And as I say, I don't read it as it's his opinion that [Brandon] shot him or this is a possibility of the suspect. Now, again, we would proffer this up to the Court or proffer it now to make it a part of the record, there was a newspaper article that appeared I believe in the Chillicothe paper shortly after this occurred in which the Robertson's family is pictured and they make a statement critical*

of the officers in this case about why someone hasn't been arrested. And they thought shortly after this occurred the evidence that they provided that they would arrest the suspect.

It doesn't say they weren't arresting Brandon Thomure, but that's the one they had in mind at the time. I'm quite sure they wouldn't make those statements to the press at the time unless they thought it was Thomure that did it, and we have direct evidence that Thomure shot him and Lyndel Robertson had an opportunity to see it.

(Trial I 22-23).

Mr. Wyrsch's own testimony shows that he was fully aware of these facts.

And, frankly, the State does not concede that evidenced that Mr. Robertson vigorously sought the prosecution of another earlier in the investigation "weakens" his credibility. No one is surprised that Mr. Robertson would want his wife's killer to be prosecuted. When the evidence lead to Mr. Hagan, the victim wanted Hagen prosecuted. But when the evidence shifted to Petitioner, it was his desire to see Petitioner prosecuted.

This information actually refutes the claim that Mr. Robertson knew, saw or identified the actual killer. Frankly, if he really saw the murderer, or had told anyone who the murderer was, the case would have been prosecuted far

earlier.[18] This "evidence" does not strengthen the defense, but weakens it because it is entirely consistent with the evidence that Mr. Robertson was not able to identify the shooter.

The Western District's decision that this is not new evidence is correct and it is that judgment that should be upheld by this Court.

The other letters (Exhibits 1 and 2)

The other two letters are even less significant than the Doug Roberts' letter and Petitioner is even more obtuse about the actual evidence supposedly adduced from them.

Exhibit 1 is a letter that Lyndel Robertson, the surviving victim, wrote to Judge Lewis. In the letter, Mr. Robertson expresses a lack of faith in Prosecutor Roberts. Petitioner cites no case to suggest that the opinion of a crime victim about the skill, or lack thereof, of a prosecutor is relevant or admissible. Nor does this hearsay, a letter, express any other admissible evidence. Indeed, Petitioner does not even assert any relevance. Instead, the focus of the

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[18] The Court of Appeals raised the same question in its affirmation of Petitioner's post-conviction appeal: "which raises the obvious question … if Lyndel Robertson saw Brandon Hagan shoot and kill his wife and shoot and attempt to kill him, why would he spend $35,000 of his own money to try to find 'the shooter'?"

Petitioner is that it was an "ex parte" communication between Judge Lewis and Mr. Robertson. The Master simply noted that such letters "are not unusual." (Report, 14). Aside from the fact that there was no litigation or charges at the time of the letter,[19] Judge Lewis did not try either case involving Petitioner. Any disqualifying factors evident in this letter are, therefore, moot.

The letter from Judge Lewis to Prosecutor Hulshof (Exhibit 3), is one the Master found more sinister because the Master thought it reflected certain traits of Judge Lewis. But neither the Report nor Petitioner identify any evidentiary value of the letter itself, other than a basis to disqualify Judge Lewis. Petitioner seems to suggest that, theoretically, he could have, and would have, used the letter to disqualify Judge Lewis. Once more, Judge Lewis did not try the second trial, and it is the fairness of that trial upon which habeas relief must be based. Where is the prejudice?

And, as the State will demonstrate, below, the speculation that Judge Lewis might have been disqualified from presiding over the grand jury, or appointing a special prosecutor is completely irrelevant at this stage.

By the time of the second trial, one jury had already concluded that Petitioner was guilty beyond a reasonable doubt. Thus, the "fairness" of the initial grand jury is no longer relevant. By the second trial, a completely

[19] And, thus, no parties to ex parte.

different prosecutor and defense counsel litigated the case. Thus, the aspersions on the first special prosecutor are irrelevant.

The Master concluded that the *Brady* violation, alone, should entitle Petitioner to relief. (Report, 19). But as the State has demonstrated, the Petitioner failed completely to identify any new, important, admissible evidence as a result of the three letters.

Claims must be supported "with new reliable evidence." *Schlup v. Delo*, 513 U.S. 298, 324 (1995) (emphasis added). And for evidence to be deemed material, it must be evidence that is admissible at trial. *Wood v. Bartholomew*, 516 U.S. 1 (1995).

Petitioner did not, and cannot, identify a single piece of new, admissible evidence obtained as a result of those three letters. Generalities are not sufficient. Petitioner cannot say "as a result of the letter, this witness will now come to court upon my retrial and testify that he heard Lyndel Robertson say …." Petitioner's failure to have any such evidence is the gigantic "hole" in his proof. He cannot overcome his failure to identify any actual evidence that is new or admissible. He is not entitled to relief.

C. Petitioner's claim that the three letters would have resulted in a possible acquittal in his first trial is not only "farfetched," as acknowledged by the Master, but not cognizable because the habeas petition can be used to challenge Petitioner's present conviction only. The first conviction is a nullity and Petitioner had already received the relief he sought from that conviction – a new trial.

In support of his claim that he is entitled to have his conviction set aside based on the three letters, the Petitioner's Brief relies entirely on the Report's conclusions about the "possible" benefits of these letters. The Report opines that because the Western District determined the evidence in the first trial was thin,[20] having these letters "may have … convinced" the trial court in that trial to allow evidence that Brandon Hagan shot the victims. (Report, 18). The Report readily acknowledges "that at first blush this analysis may appear far-fetched." (Report, 18). That analysis is not only speculative, it is inappropriate and inconsequential to the issues before this Court. The petition before this Court is not directed at Petitioner's first conviction. He sought, and received, relief from that conviction through a direct appeal. His first conviction is now a nullity, and has been for several years. When the first conviction is set aside, it becomes a nullity. *Lockhart v. Nelson*, 488 U.S. 33, 42, 109 S.Ct. 285, 291 (1988); *State v.*

[20] Yet nevertheless sufficient to prove guilty beyond a reasonable doubt.

Owens, 740 S.W.2d 269, 270 (Mo.App.W.D. 1987); *U.S. v. Mayfield*, 810 F.2d 943, 946 (10th Cir. 1987). Analysis of the first trial serves no useful purpose, nor does any reference to the strength of the State's evidence in the first trial.

In the second trial, evidence of the claim that Brandon Hagan was the shooter was admitted, along with the State's evidence of Hagan's alibi.[21] In the second trial, the State introduced the testimony of George Wilson, a firearm's expert whose company actually manufactured the gun used by Petitioner to shoot the victims.[22] (Trial II 574-596). The State's case had very little to do with

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[21] The Master concluded that the alibi evidence for Mr. Hagan was "shaky." (Report, 30). This is not a surprising conclusion given the fact that the Master heard no evidence of Hagan's alibi since it was not an issue and Petitioner asserted that the State could not "relitigate" its case in chief in the habeas proceedings.

[22] While the Report concludes that the "state's evidence of guilt is thin" (Report, 35), the Report makes no reference to, nor acknowledges, that the evidence at trial excluded Mr. Hagan because the gun used to shoot the victims belonged to Petitioner's father, that Petitioner's fingerprint was found on the box of bullets likely used in the shooting, that the fingerprint was recent, and that Petitioner made significant incriminating statements when questioned. The

Brandon Hagan, and everything to do with the science of ballistics and fingerprints.

Regardless of the propriety of the first trial, the issue is the fairness of the proceedings in the second trial. This Court has consistently ignored the claim that a reviewing court should assess the evidence from the first trial, after a reversal:

> "*When the trial court erroneously admits evidence resulting in reversal, as in the instant case, the State should not be precluded from retrial even though when such evidence is discounted there may be evidentiary insufficiency. The prosecution in proving its case is entitled to rely upon the rulings of the court and proceed accordingly. If the evidence offered by the State is received after challenge and is legally sufficient to establish the guilt of the accused, the State is not obligated to go further and adduce additional evidence that would be, for example, cumulative. Were it otherwise, the State, to be secure, would have to assume every ruling by the trial court on the evidence to be erroneous and marshall and offer every bit of relevant and competent evidence. The practical consequences of this would*

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elimination of Brandon Hagan had very little to do with the strength of the State's case.

adversely affect the administration of justice, if for no other reason, by the time which would be required for preparation and trial of every case." *State v. Wood*, 596 S.W.2d 394 (Mo. 1980); *State v. Kinkead*, 983 S.W.2d 518, 519 (Mo. banc 1988).

Petitioner then attempts to go back even before the first trial, citing the Report in support of an argument that he "may have been" able to attack the grand jury that indicted him. (Petitioner's Brief, p. 81). Two juries have found the evidence sufficient to prove Petitioner guilty beyond a reasonable doubt. Three appellate panels have affirmed that conclusion. At this stage, 18 years after the grand jury indictment, the grand jury proceedings are irrelevant. And Petitioner has, in fact, already attacked the grand jury proceedings in his first appeal, without success. *State v. Woodworth*, 941 S.W.2d 679, 695 (Mo.App.W.D. 1997). Grand jury proceedings cannot be challenged in a post conviction proceeding. *Johnson v. State*, 574 S.W.2d 957 (Mo.App. 1978).

The proposition that once a conviction is affirmed, grand jury proceedings are not relevant is well-established. In *State ex rel. Woods v. Connett*, 525 S.W.2d 326 (Mo. banc 1975), this Court held that §540.060 and §540.070, RSMo, limited review of grand jury proceedings. The *Woods* court allowed appellate review of objections to indictments where the grand jury was convened under the wrong statute, notwithstanding §§540.060 and .070, because a timely objection was made before trial. *Id.* at 331. The rationale underlying the

statute was to prevent verdicts from being set aside and new trials granted for frivolous and unsubstantial reasons in the manner of selecting a grand jury. *Id.* at 332. The court stated that if the case had proceeded to trial without objection, then whatever defects occurred with respect to the grand jury were waived. *See State v. Hadley*, 736 S.W.2d 580, 588 (Mo.App.S.D. 1987). "[I]rregularity or imperfections in the magistrate court proceedings in felony cases are waived if the defendant pleads in the circuit court without, in some manner, raising his objections to the preliminary proceedings." *Id. quoting McGlathery v. State*, 465 S.W.2d 496, 498 (Mo. 1971). The rationale is that a grand jury is of a preliminary nature or interlocutory in nature. Phrased another way, today the petitioner is not in custody due to a defective charging process; instead, he is in custody pursuant to a lawful judgment by a petit jury.

Again, Petitioner did unsuccessfully attempt to challenge the grand jury in his initial direct appeal. *State v. Woodworth*, 941 S.W.2d 679, 695 (Mo.App.W.D. 1997). He also raised these same claims in his amended motion to vacate. (Exhibit A, 4-5). These claims were denied by the motion court. (Exhibit D, 27).

The only question that is before this Court involves the fairness of Petitioner's second trial. No less authority than the United States Supreme Court has determined that once a petit jury has found a defendant guilty, the propriety of the grand jury proceedings are of no consequence. *United State v. Mechanik*, 475 U.S. 66, 106 S.Ct. 938, 942, 89 L.Ed.2d 50 (1986).

Again, the reason courts do not revisit grand jury proceedings following a conviction are obvious. And there are good, valid reasons for applying that rule here. Even if Petitioner's indictment were to be voided somehow, we continue to know there is more than enough evidence to establish probable cause – based on two jury verdicts that have been affirmed on appeal.

Thus, the litany of errors attributed to Judge Lewis in the Report do not permit habeas relief in this case because they have nothing to do with the fairness of the second trial.[23] Whether the criticisms of Judge Lewis is justified

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[23] The State by no means concedes that the behaviors condemned in the Report by Judge Lewis are inappropriate. In fact, the State believes that the actions for which Judge Lewis is criticized are known to this Court to be common and proper.

Convening a grand jury is within the "discretion" of a circuit judge. §540.021.5, RSMo. The circuit judge selects the grand jurors. §540.021.4, RSMo. It is not unusual for the judge to select as a foreperson someone he or she knows and respects to serve as foreperson, particularly in a rural county. §540.090, RSMo. A judge contacting the Attorney General's Office to see if one of our prosecutors will serve as a special prosecutor is not unusual. A judge being aware that the statute of limitations for a shooting is three years, and to be concerned about a statute of limitations running, is not unusual and not

or not, he is inconsequential to these proceedings because he played no role whatsoever in the second trial.

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improper. The Report criticized Judge Lewis for doing what the Master knew to be perfectly appropriate – designating Judge Griffin as the trial judge. Telling the jury to disregard a press report that the grand jury is going to indict a particular individual seems entirely appropriate as well.

D. Petitioner's claim that there was a "biased investigation" does not state a cognizable claim because the Constitution protects against flawed police work by providing for a fair trial before a jury of 12 persons, with the assistance of counsel whom have already been deemed to be effective.

The Report concludes that investigative leads implicating others were not followed up on by investigators. The State believes that the only legitimate question, and one that was never addressed, is whether the Petitioner's trial attorneys followed up on those leads, and just as important, if trial counsel had a sound, strategic reason for not calling any of these "investigative leads."

While there is no constitutional obligation for the police to follow "leads" or fail to interview any witness, Petitioner does have a constitutional right to the effective assistance of counsel. Petitioner unsuccessfully challenged his trial counsel in his post-conviction proceeding. (Exhibit A; Appendix pp. 29-45). The law presumes that the decision to not call certain witnesses was a matter of sound trial strategy, and that is a presumption that the Petitioner did not overcome on appeal. *State v. Tokar*, 918 S.W.2d 753, 768 (Mo. banc 1996).

Having failed to challenge the thoroughness of his trial counsel's investigation, Petitioner now frames this claim as a failure of the police to thoroughly investigate. Of course, "habeas corpus is not a substitute for appeal or post-conviction proceedings." *State ex rel. Simmons v. White*, 866 S.W.2d 443,

446 (Mo. banc 1993). "To allow otherwise would result in a chaos of review unlimited in time, scope, and expense." *Id*. Yet, that is exactly what has occurred in this case. The Master acknowledged "that Woodworth has endeavored to further inject into this hazy legal equation whether or not Woodworth had effective assistance of counsel." (Report, 26, n. 25).

The Petitioner made the analysis even more difficult by attempting to frame what is in reality a non-cognizable ineffective assistance claim into a "failure to investigate" claim. While neither is properly cognizable in a habeas proceeding, Petitioner's success in finding an "expert witness" on police investigations[24] emboldened him to assert that an inadequate investigation is a constitutional violation.

Unfortunately for Petitioner, while he found a purported expert, he failed to find any case law to support his claim for relief.

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[24] It is reasonable to suspect that the asserted use of a police expert was a means to circumvent the fact that the Petitioner did not actually have several witnesses available to testify and, instead, submitted this obvious hearsay into the case under the guise of information his expert relied on – over the objections of the State. (Tr. 39, 40). While the Master assured the State that it was being accepted only as it goes to the expert's opinions, the hearsay made it into the Report as fact. (Report, 27).

It is the fairness of the second trial that is at issue, not the investigation. The Sixth Amendment right to counsel is premised, at least in part, upon the assumption that law enforcement will not always "get it right" and that a defendant is entitled to an advocate in court to challenge the State's evidence.

The law has long recognized that while police have restrictions on their powers of arrest, search and seizure, there is no constitutional duty to conduct "good" investigations. "[P]olice officers are not required to take the initiative or even to assist in procuring any evidence on behalf of a defendant which is deemed necessary to his defense." *State v. Snipes*, 478 S.W.2d 299, 302 (Mo. 1972). "In general, Missouri rejects placing affirmative duties on law enforcement officials to take the initiative or assist in procuring evidence …." *State v. Evans*, 802 S.W.2d 507, 513 (Mo. banc 1991). Furthermore, the State "is not required to account for its failure to gather or present such evidence." *State v. Hopson*, 168 S.W.3d 557, 564 (Mo.App.E.D. 2005); *State v. Goforth*, 736 S.W.2d 552 (Mo.App.E.D. 1987). Furthermore, the United States Supreme Court has stated unequivocally that "the police do not have a constitutional duty to perform any particular tests." *Arizona v. Youngblood*, 488 U.S. 51, 59, 109 S.Ct. 333, 102 L.Ed.2d 281 (1988).

Petitioner had two of the finest criminal attorneys representing him in these cases. They investigated the case and the necessary witnesses. Judge Cook stated that she investigated witnesses for the defense but "we never could find

anyone who could say with any degree of certainty that it was Brandon Thomure." (Cook depo, 33). What Petitioner failed to do – and it was his responsibility to do so because he has the burden of proof – is to identify the people Ms. Cook interviewed. We know that some of the witnesses who Petitioner asserts were not "properly investigated" were used by Ms. Cook at the trial.[25]

Finally, even if a claim exists for an "inadequate investigation," and even if a court were to give merit to the conclusory allegations of Petitioner's expert, Petitioner again failed to establish any prejudice. *State ex rel. Engel v. Dormire*, 304 S.W.3d 120, 126 (Mo. banc 2010). "The likelihood of a different result must be substantial, not just conceivable." *Harrington v. Richter*, 131 S.Ct. 770, 791-792 (2011).

This shortcoming is demonstrated by the quotes contained in the Report, in which the expert testified these "leads" "could possibly take you in a different direction." (Report, 28) (emphasis added). At this stage, the Petitioner should be

[25] The State is at a complete loss as to why the Report cites several witnesses who were named as trial witnesses by the defense, or who actually testified in previous trials, such as Mindy Stedem, Matt Penn, Chris Ruoff, and Melissa Suschland. How can they be "new?"

identifying that other "direction" and submitting facts that prove he is actually innocent, not discussing "possibilities."

These proceedings were not held in order for the Petitioner to establish "possible" new evidence; his obligation was to demonstrate that new evidence did exist, and does exist, that made the likelihood of a different result substantial. *Harrington*, *supra*.

The most obvious example of this utter failure to prove his case are the tire tracks allegedly found "across the road from the Robertson residence indicating acceleration." (Report, 27). Petitioner's "expert" testified this "lead" was not followed by the police. (Tr. 48-49). The Report indicates this is relevant because Randy[26] Wolf heard a vehicle accelerating "at the time of the crimes." (Report, 28).

Again, the hearing was not an opportunity to discuss "possible" relevance, but to prove that scientific evidence did exist that made these tire marks significant. Petitioner did not do so. If an expert in tire tracks exists who could have established the significance of those tire tracks, that witness' testimony should have been offered at the hearing. Instead, 20 years after the shootings we still have no evidence that these tire tracks are exculpatory or inculpatory.

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[26] The witness' name is actually Roger Wolf, who testified at the hearing. (Tr. 157).

Future promises to this Court that he "might" find a witness eventually do not sustain Petitioner's burden.

More important, this is an additional example of Petitioner improperly attempting to transform an ineffective assistance of counsel claim into one asserting new evidence by the erroneous assertion that he has a constitutional right to a thorough investigation. The evidence at trial is that Roger Wolf spoke to trial counsel before the second trial. (Tr. 159, 161, 162). He was named as a witness by defense counsel in both trials (Exhibits AA and BB), and trial counsel made a conscious decision to not use this witness. (Tr. 162). "If the defense knew about the evidence at the time of trial, no *Brady* violation occurred." *Gill v. State*, 300 S.W.3d 225, 231 (Mo. banc 2009). The law is well-settled that the "prosecutor has no obligation to disclose evidence of which the defense is already aware and which the defense can acquire." *Williams v. State*, 168 S.W.3d 433, 440 (Mo. banc 2005).

The proper question, and the only appropriate question, should have been directed at trial counsel concerning their reasons for not calling Mr. Wolf. The same question applies to Mike Thistlewaite, Shannon Callahan and Angie Gutshall. As to Melissa Suschland (Report, 27), Mindy Stedem, Matt Penn and Chris Ruoff (Report, 24-25), each of these witnesses did testify at trial, and the State cannot discern any possible prejudice from any alleged inadequacy of the police investigation.

Bob Fairchild is cited as one example of a witness who has "new" evidence. His testimony is neither new, nor unknown. Mr. Fairchild's testimony is entirely consistent with the testimony of Brandon Hagan himself.[27] There was no question that Brandon Hagan was seen at the school the morning following the murder because Hagan so testified at trial:

> Q. Now, about what time did you get to Chillicothe?
>
> A. Right before first hour.
>
> Q. Do you know what time it was?
>
> A. I forget, it's been so long. Right around before first hour because I ran into some of the kids in the hallway and talking to me about what was going on.

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[27] The Report erroneously states that Mr. Fairchild "testified that he ran Thomure out of the high school between 7:30 and 7:45 the morning after the crimes, contradicting Thomure's alibi." (Report, 25). The quote is actually from the Petitioner's petition, not the trial testimony. Mr. Fairchild testified "it was between 7:50 and 8:00 because I always made sure I was there about five minutes before eight." (Tr. 140). He never said anything about "running" Mr. Thomure off the grounds. (Tr. 140).

(Trial II 1011).[28]

If, as the Report suggests, Mr. Fairchild's testimony contradicted Mr. Hagan's alibi, the appropriate question again should have been directed at trial counsel – why was Mr. Fairchild not called as a witness? Mr. Fairchild told Mr. Woodworth about this information before the second trial. (Tr. 150) ("Well, are you asking me if it was before the last trial. And it was.") Thus, the Report's conclusion that Mr. Fairchild's evidence is "new" (Report, 25) is simply not accurate.

The one case Petitioner cites, *Kyles v. Whitley*, 514 U.S. 419 (1995), for the proposition that he could have used evidence from the "incomplete investigation" to impeach the police officers who testified and their motives. The problem with this argument is that such a claim was raised for the first time in his Brief. In none of the three versions of his petition, most noticeably the third amended petition, does Petitioner assert this claim. Nor does the Master's Report cite *Kyles*, or offer any suggestion that this alleged evidence could, or would, be used to attack the police officers at trial. Had the claim been properly raised, the State would have proved that several suspects were investigated before

[28] This testimony also negates any claim that Angie Gutshall's testimony is "new" or significant. Mr. Hagan testified that he spoke to other students about what had happened.

Petitioner was even a suspect. (Calvert depo, 71). It was not until Petitioner's fingerprint was identified on the box of bullets used to shoot the Robertsons that Petitioner became a suspect, two years later. (Trial II 498, 500). There was no "rush to judgment" in this case.

Furthermore, the distinction in *Kyles* is significant. In *Kyles*, the investigating officers had evidence in their possession exonerating the defendant; they withheld that evidence. There was no dispute as to that evidence and its impact for the defense.

In this case, the fact is the evidence is not withheld or new and is extremely suspect. Twenty years after the crime, the Cairns family claims to have seen Brandon Hagan the morning of the murder in their home. The Petitioner states this is "uncontroverted," but only because Petitioner was permitted to take these witness' depositions after the evidence was closed, over the objection of the State. It is hard to understand how the State could challenge the testimony when the evidence had already been closed.

The evidence is also not, however, uncontroverted. The police did interview this family and did prepare a report (Exhibit 2, attached to deposition of Matt Cairns). The officer spoke to Matt Cairns and his mother, June Cairns. The evidence is that neither indicated Brandon Hagan was at their home that morning and that Matt Cairns, instead, explicitly stated:

> "The day after the shooting, Matt saw Brandon, Rochelle and an unknown blonde girl [in a] red truck, they were in Simpson Park."

(Exhbit 2; Appendix, p. 3).

The Cairns' statements are not compelling testimony and it is certainly subject to challenge. The Master did not make a determination as to these witnesses being credible. Another difficulty with the credibility of these statements, in addition to the uncanny ability to recall a specific day 20 years ago, is that the Cairns said it was not unusual for Brandon Hagan to be there in the mornings (June Cairns depo, 15; Rucker depo, 10), even though the uncontroverted evidence was that Mr. Hagan had moved out of town several months prior to the murder and would not have been around every morning. (Tr. 138-139; Exhibit EE, 14).

Two other serious problems exists that undermine the significance of this evidence.

Most significant is the fact that the testimony was that Ms. Cairns did contact "someone" at the time of the second trial. (Rucker depo, 13). Thus, the actual issue becomes one of ineffective assistance of counsel for failing to use the Cairns family. And since Petitioner did not overcome the presumption of a reasonable trial strategy, he cannot prevail.

Second of all, the police report does record that Matt Cairns told the police that Brandon Hagan threatened Catherine Robertson over the phone. (Exhibit 2). That is in the police report and Petitioner does not allege his trial counsel did not see that police report. Therefore, once more, the actual issue is – why did trial counsel not follow up by talking to this family?

Thus, what the police report (Exhibit 2) clearly contradicts is the theory Petitioner is now putting forth, for the first time on appeal, that the police were withholding any evidence implicating Mr. Hagan. This evidence did, and it was disclosed.

The "evidence" of a bad police investigation is not really as compelling as the Petitioner alleged.

Finally, Petitioner fails to explain how the quality of Terry Diester's investigation can be of such significance that it is likely to change the outcome of the trial when the State twice proved Petitioner guilty beyond a reasonable doubt without Mr. Diester ever being called as a witness at either trial.

Petitioner failed to present one iota of evidence which he claims brings the investigation into question that was not known and available to his trial attorneys.

Regardless, the claim that Petitioner is entitled to a new trial based on an inadequate investigation is without merit.

E. Petitioner's claims of bias by Judge Lewis, and a conflict involving Mr. McFadin, are not cognizable because neither played any role whatsoever in the second trial, which is the only litigation at dispute in this case. Because neither individual played any role in the second trial, they could not have had any impact on the fairness of the second trial.

The Report concludes that "the McFadin conflict of interest" was prejudicial to Petitioner. (Report, 31). And, as has been noted, the Report is also extremely critical of Judge Lewis, suggesting that he "become a prosecutor." (Report, 31).

The State is conscious of the deference to be given the factual findings of the Master, but the Report does not explain why the conflict matters. The alleged conflict does not matter under the law for the simple reason that Judge Lewis and Mr. McFadin were not a part of the second trial and any bias, prejudice or conflict that Petitioner now asserts did not affect the fairness of his trial or the validity of his conviction. For a conflict to matter, the Petitioner must show that the conflict adversely affected counsel's performance. *Price v. State*, 171 S.W.3d 154, 157 (Mo.App.E.D. 2005). Petitioner cannot identify any adverse impact on counsel's performance in the second trial, because Mr. McFadin did not participate in the second trial. Just as significant, Petitioner failed to present one iota of evidence as to what information Jim Johnson had, whether

he ever provided that to Mr. McFadin, or whether it was helpful or detrimental to Petitioner.

Once more, Petitioner's argument suffers from a significant lack of proof. We do not know what Jim Johnson knew or didn't know, what Mr. McFadin knew, or even what Mr. Wyrsch knew. Mr. Wyrsch was not asked about Mr. Johnson, and neither Mr. McFadin nor Jim Johnson testified. Thus, we do not have any evidence that this alleged conflict of interest was prejudicial.

The "possibility" of a conflict is legally insufficient to impugn a criminal conviction. *Hickey v. State*, 328 S.W.3d 225, 228 (Mo.App.E.D. 2010). Petitioner must prove – with evidence – that trial counsel actually represented conflicting interests. *Id.*

To prevail on a claim of ineffective assistance of counsel based on a conflict of interest, the movant must show that an actual conflict of interest adversely affected counsel's performance. *Price v. State*, 171 S.W.3d 154, 157 (Mo.App.E.D. 2005). "In order to prove a conflict of interest, something must have been done by counsel or something must have been forgone by counsel and lost to [the Petitioner], which was detrimental to the interests of [the Petitioner] and advantageous to another." *Id.* (*quoting Helmig v. State*, 42 S.W.3d 658, 680 (Mo.App.E.D. 2001); *State v. Johnson*, 549 S.W.2d 348, 350 (Mo.App.St.L.Dist. 1977). Petitioner does not tell us what that "something" is and the Report does not identify that "something."

The second trial is the trial at issue. The Western District has already determined that Petitioner was not denied the effective assistance of counsel at that trial. *Woodworth v. State*, *supra*. Thus, there is no basis to set aside his present conviction based on a conflict that did not exist at the time of his trial.

The Petitioner further relies on the Report's conclusion that letters that Jim Johnson wrote "were only first discovered by the defense during the course of his habeas action." (Report, 23). Besides being inconsequential to the issues in this case, there is no evidence of this belated discovery and Petitioner cannot cite any evidence to support that claim.[29] While the Report states, "This evidence is uncontradicted" (Report, 23), there is no evidence whatsoever of that fact.

In addition to not producing the defense file and not having anyone review the defense file, Petitioner never once asked any of his trial attorneys about their knowledge of this matter. Petitioner continues to have this enormous omission in the evidence he presented to support his claims.

The evidence from the first trial[30] proves the allegations that trial counsel was unaware of Jim Johnson's allegations are completely inaccurate. Whether

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[29] The State acknowledges that Petitioner's counsel repeatedly made that assertion, but offered no proof.

[30] Though only the present conviction after the second trial is at issue here, the fact that counsel at the first trial knew of this issue is significant.

the Master overlooked, or failed to review the evidence from the first trial, the record nevertheless demonstrates that the letters were disclosed, that trial counsel was aware of Jim Johnson's claims, and they were aware of a potential conflict.

At the first trial, Mr. Wyrsch stated:

> So we have a second motion to endorse witnesses that would include this Ms. Broehard, James Johnson, Edward David and Phil Wilson, and I understand we have to file this over in Livingston, but I will proffer up a copy of this to the Court.
>
> * * *
>
> Johnson wrote a letter to Judge Lewis about this case that stated his knowledge of some time ago and Johnson says he's got some information helpful to Mark and harmful to Claude Woodworth. Nobody has paid much attention to that because of Mr. Johnson's various statements he's made about various matters over time, and he wasn't really investigated in this case.
>
> I'm bringing this to your attention because I'm not sure what to do with the evidence. I would like to have Johnson and Davis over here. We'll produce Broehard ourselves at some point in the State's case and find out what it is anybody knows that's admissible or inadmissible. I'm asking the Court's indulgence in that regard.

I have a little bit of a situation. I represent Claude Woodworth, not on this matter, but over in this chemical matter, and we have asked Mr. McFadin, who is not involved in the chemical matter, to counsel with Mr. Claude Woodworth this morning, and we've also ourselves counseled with Mark this morning. Mark feels that at least we ought to bring these folks over to see if they have got any information, so I'm asking the Court's indulgence in that regard. I have a petition for a writ of habeas corpus for both Davis and Johnson, and it could be there may be nothing here and it may be there is something here. Given the fact the State's asking for first degree murder, the penalty is life without parole, I think we ought to make a record in it.

THE COURT: How much room do you have in your jail, Sheriff? Do you got any spots open?

THE SHERIFF: Yes, sir.

THE COURT: Does the State have any objection of having those people brought over and placed in the Livingston County jail for your convenience and Mr. Wyrsch and Mr. McFadden's convenience?

MR. HULSHOF: I would be reserving my objections to the motion to endorse and reserving further objections. Would that be permissible with the Court?

THE COURT: Certainly. But I think we better bring them over and let you guys visit with them.

MR. HULSHOF: I would also point out, Your Honor, I'm not involved in the chemical theft case that Mr. Wyrsch alluded to, but James Johnson was deposed by Mr. Wyrsch recently and I don't have a copy of that and really has nothing to do with this as far as I'm concerned, but --

* * *

MR. WYRSCH: We just wanted you to know the situation. I did not want you not to be informed. Mark's willing to go forward. We've had Mr. McFadden counsel Claude Woodworth. But if the Court feels it's an irreconcilable conflict -- I'm at your disposal. I feel comfortable going forward at this point. I've counseled with Mark and Claude about it. This came out of the blue. They indicate the fax came in on Wednesday. That's true. We weren't able to locate the witness until Thursday.

THE COURT: I think for safety and precaution if I sign the writ and get them in Chillicothe, at least we got them where they

are at our disposal, and I have no objection in doing that as long as we got room over there.

MR. WYRSCH: I need to swear this out under oath, Your Honor.

THE COURT: All right. We can deal with that as we go along. I don't know if you want to try to take their depositions some night or have the investigators go visit with them.

* * *

MR. MCFADDEN: I have counseled with him and actually he's anxious to go forward since his son has been incarcerated for over a year and this is all news to him. He feels that he certainly doesn't concur with it or believe it. I think I can speak for him. However, I understand where Mr. Wyrsch is coming from. He feels we do represent Mark Woodworth, and I think to let it ride as far as -- I think it should be important that these two people be available to us in the Chillicothe jail. If necessary, we can take some action then. But that's about -- I don't think Mr. Claude Woodworth can particularly add anything.

THE COURT: I'll go ahead and order the writs to have them brought over. I think -- I don't know how you have this. I think the

best thing to do is to have them go get them today and have them there. I'll probably change the date on them.

(Trial I Tr. 27-34).

Thus, Petitioner's claim is incorrect. We know that Mr. Wyrsch was aware of Mr. Johnson and did, in fact, investigate. What we do not know, because Petitioner offered no evidence on this issue, is what Mr. Wyrsch actually learned, what the actual facts are, and what were Mr. Wyrsch's reasons for not using Mr. Johnson at trial. Furthermore, this record demonstrates that the issue of a conflict was discussed with Petitioner and his father. But much more important is the fact that his habeas action is directed at attacking the second trial, and Mr. McFadin was not involved in the second trial in any way. Thus, there can be no prejudice and it would be a "jump to light speed"[31] to presume any.

Furthermore, Jim Johnson, himself, is of no consequence to the issues before this Court. Jim Johnson not only did not testify at either trial, but he also did not testify at the hearing in this case. In reviewing the Report, the Missouri Supreme Court will be unable to discern this extremely important fact – Jim Johnson did not testify and we have absolutely no evidence whatsoever if Mr. Johnson had any information detrimental or helpful to Petitioner. The

[31] Report, 35.

letters, some of which the Master acknowledges were never offered into evidence (Report, 22, fn. 22), are hearsay. *State v. Janes*, 949 S.W.2d 633, 634 (Mo.App.E.D. 1997). Yet the Court considered the content of these letters to make several serious "assumptions."[32]

Mr. Wyrsch's statements directly refute the claim that the defense never saw the letters;[33] it is not surprising, therefore, that Petitioner failed to ask any of his attorneys whether they were aware of the Jim Johnson material – it is obvious that they did.

While the Master did not express any belief about Petitioner's claim that Mr. Johnson had an undisclosed deal, the State must nevertheless point out to this Court that Jim Johnson never testified at either trial. We cannot know because Petitioner did not prove, if Johnson had information harmful or helpful

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[32] "The Court can only assume that Judge Lewis must have thought …." (Report, 22, fn. 21). "Though it is somewhat foggy from the record, some or all of the letters …." If the record is "foggy," it is Petitioner's duty to clear up any confusion.

[33] At some point, some level of skepticism must arise when Petitioner repeatedly denies ever seeing letters that are, in actuality, part of the trial record. Judge Lewis letters (Trial II 26); Johnson letters (Trial I 27-29); Diester letters (Trial I 885-886, 889-898).

to Petitioner, if he had any "deal" whatsoever, or what the terms of any deal were.

Finally, the allegations against Judge Lewis are also not relevant because Judge Lewis did not preside over either trial. Regardless of how "unfair" the grand jury proceedings are alleged to have been, we know there was sufficient evidence to charge Petitioner with the crimes. For this reason, returning any case to the charging stage would serve no purpose since the existence of probable cause is not in doubt.

And to the extent that Petitioner argues that Judge Lewis somehow influenced the decisions of Prosecutor Hulshof, Mr. Hulshof was not involved in the second trial and his disqualifying factor,[34] whatever it may be, is inconsequential.

In fact, the State notes that of the many individuals placed by the Master in his bubble diagram on page 34 of the Report, the only individual involved in the second trial is Judge Stephen Griffin.

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[34] The State is unable to discern the basis for Petitioner's repeated attacks on Prosecutor Hulshof, other than he zealously prosecuted – successfully – Petitioner for the shooting and murder.

Judge Griffin is not accused of misconduct.

The State suspects, for that reason, that Petitioner felt it necessary to gratuitously accuse Judge Griffin and Judge Brent Elliott of misconduct in his Brief. (Appellant's Brief, 86, 92-93). He accuses Judge Elliott of assisting Mr. Diester into morphing into the role of private prosecutor. (Appellant's Brief, 87). He further accuses Judge Griffin of a "professionally unacceptable pattern of practice" (Appellant's Brief, 92), using Judge Griffin's rulings at trial as a basis for his claim.[35] This Court can readily discern that the attacks on Judges Elliott and Griffin are particularly inappropriate and without any factual foundation to justify their assertion.

The best evidence of this is the fact that the conviction was affirmed on direct appeal and after a post-conviction hearing.

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[35] Apparently, because Petitioner's motion to transfer his 29.15 proceeding is pending before this Court, Petitioner believes he is free to repeat allegations against Judge Griffin that were denied by the Western District, and to expand his assertions of error to now include overt misconduct.

F. Petitioner's claim that Brandon Thomure's subsequent bad acts of allegedly violating an order of protection by making telephone calls to Rochelle Robertson, after the crimes had occurred, are not *Brady* material and, more important, Petitioner failed to produce any evidence whatsoever that his trial attorneys were unaware of this material, and he did not overcome the presumption that trial counsel simply made a strategic, sound decision to not use "evidence" of little or no value.

Petitioner's inability to recognize his responsibility to prove his claims with evidence, as opposed to argument, is once more evident when this Court reviews the claims that evidence of Mr. Hagan violating a protective order – an order obtained after the murder of Mrs. Robertson – was never disclosed and was evidence that would likely change the outcome of the trial.

The State must initially note that the Petitioner has produced documents not in evidence to support this claim and failed to include other relevant documents that result in this Court not having the necessary information to make its review meaningful.[36] On page 38 of Petitioner's Appendix is Exhibit 7.

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[36] There are actually several items attached to Petitioner's Appendix that are not in evidence, including "a timeline" (p. A8), an affidavit (p. A80) and a "bubble diagram" (p. A89).

Exhibit 7 was never admitted as evidence. Exhibit 9, also included in Petitioner's Appendix, is the file regarding the violation of the order of protection which Petitioner claims is *Brady* material. Exhibit 9 is actually an extremely edited version of Exhibit 9 which excludes some significant material of great relevance to the claims raised by Petitioner. Uncertain how to respond to the proffer of redacted and un-admitted exhibits, the State has included as part of its Appendix, those items necessary for this Court to accurately review this claim so that this Court can determine it is completely lacking in any merit.

The State reminds this Court that Petitioner has consistently asserted that every piece of evidence is "new" and a *Brady* violation. At times these accusations have been overtly reckless. Petitioner "found" a letter that Terry Diester had written to the State's expert witness in England and immediately amended his petition to assert this new, egregious violation of *Brady*. (Third Amended Petition, p. 13, ¶42).

Had Petitioner been more circumspect, he would have realized the allegation was completely false. Not only had his trial attorneys been in possession of the Diester letter, but they had actually used it in the first trial to cross-examine the State's expert:

> Q. Well, but let me ask you something, weren't you being pressured by Mr. Deister to change your opinion?

A. Not that I recall and it isn't the sort of thing that I would under any circumstances allow to affect my decision anyway.

(Trial I 885-886).

* * *

Q. Prior to doing this test, do you recall reviewing a letter from Mr. Deister to Roger Summers on -- of October 9, '92? [Date of Exhibit 1]

A. Yes, I read that, yes.

Q. Do you recall that Mr. Deister told you -- By the way, did you rely on information Mr. Deister gave you in terms of doing your examination?

A. In respect to what aspect?

Q. Well, to the identification of prior firearms ballistics analysis that you received -- he sent you in terms of the --

A. What I will do in any case submitted to me, frankly, I'll read the information that comes with it and if it's going to be of any assistance to me in determining the circumstances perhaps in the firearm used, I'll take notice of it. But where I'm solely trying to match to

compare test bullets from the revolver that I have in front of me with exhibit bullets. That information isn't required. I can see that with my own eyes.

Q. Did you review it, though?

A. I would have read it.

Q. The letter from Mr. Deister to Mr. Summers?

A. I have read that, yes.

(Trial I 889-890).

This demonstrates why allegations are not sufficient and that Petitioner needed to come forward with evidence in order to prove his counsel was unaware of the orders of protection.

Returning to the protection order, Petitioner fails to disclose to this Court that the actual, initial protective order – which trial counsel did possess – was of significantly greater evidentiary value than the "non-disclosed" violation of the protection order could possibly ever be. Yet, trial counsel did not use the actual protection order in the second trial and, once more, the only legitimate question to be asked should have been directed to trial counsel.[37]

[37] There was no mention of the restraining order actually issued following the shooting during the trial, although defense counsel questioned Mr. Hagan

The crucial, undisclosed *Brady* evidence in Exhibit 9 from the violation of the restraining order shows that, in reality, the violation of the restraining order was not for acts of violence, but for trying to telephone Rochelle Robertson. (Appendix, 6, 7, 8). There were no acts of violence in that court record.

In fact, the report that Rochelle Robertson made to the police reads as follows:

> "I answered the phone. He said it was Dennis Lapiea. And I said yes. And he said he was worried about Brandon because he was really upset and asked if I signed the restraining order and I said yes, because he calls constantly at all hours and is driving me and my family crazy and I can't stand it anymore. He asked if I thought Brandon did it, and I can't remember what I said to that. He asked if I could call Brandon sometime, and I said I couldn't. This happened Saturday, 11-24, 9:00 to 9:30 p.m. And next Monday 11-26, 9:00 to 9:30 a.m. a girl said This is a friend of Brandon's and can you talk to him? I said, No, I can't and hung up."

(Tr. 535-536).

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extensively about whether Mr. Hagan was aware of Cathy Robertson's intent to seek a protective order. (Trial II 1024-1029).

Petitioner claims that proving this information – that Brandon Hagan violated a restraining order by trying to telephone his ex-girlfriend – would have likely changed the outcome of the trial. In reality, it is the original order of protection, which was produced to trial counsel beyond any dispute, that contains any possible evidence of use for impeachment because it suggests acts of violence by Brandon Hagan. The accusations in the actual restraining order were:[38]

> "He has struck me in the past, and has made frequent harassing telephone calls to me since November 1st."
>
> "He may have murdered my mother and attempted to kill my father on November 15th."

(Appendix, 5).

That evidence was never introduced by defense counsel at the second trial and the relevant inquiry should be directed at them as to why it was not. If there was any "highly relevant evidence," it was this information, which the

[38] To be clear, page 5 of the State's Appendix is a part of Exhibit 8 from the hearing and was admitted as evidence.

Petitioner had in his possession during both trials.[39] The improper telephone calls pale in comparison.

The words of the Court of Appeals again ring true; this is not "new" evidence. *Woodworth v. State*, *supra*. Petitioner possessed significantly stronger evidence to be used for impeachment than the fact that Brandon Hagan tried to telephone Rochelle Robertson in violation of the restraining order.

While the Master's Report indicates that he was clearly convinced that these reports were not disclosed, the Report fails to identify the portions that would have, in fact, been admissible new evidence likely to have altered the outcome at trial. *Harrington*, 131 S.Ct. at 792. Indeed, Petitioner fails to do so in his brief as well. The record demonstrates very clearly that the defense was well aware of this information, and that the information was of such little significance to trial counsel that trial counsel did not consider it worthy of use to cross-examine any witness. This "new" evidence pales in comparison to the known, available evidence trial counsel chose to not offer.

The law is very clear that there is no *Brady* violation if the defense has the materials, regardless of the source. "If the defense knew about the evidence at

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[39] See 1994 deposition testimony of Rochelle Robertson, below. Mr. Wyrsch also stated during a pretrial conference "there was a restraining order." (Trial I 20).

the time of trial, no *Brady* violation occurred." *Gill v. State*, 300 S.W.3d 225, 231 (Mo. banc 2009). The "prosecutor has no obligation to disclose evidence of which the defense is already aware and which the defense can acquire." *Williams v. State*, 168 S.W.3d 433, 440 (Mo. banc 2005).

In a pretrial conference before the first trial, Mr. Wyrsch made specific reference to substantial knowledge of the records and reports concerning these very matters. Mr. Wyrsch says:

> Let me tell you what additional evidence we have in that regard. This is from basically the State's file. They did talk about motive, but there was a restraining order, at least according to Rochelle Robertson, against this Brandon Thomure. She was pregnant and was concealing that fact from her parents at the time of the shooting. In addition, this was a threat -- I don't know if this is a suggestion, but we've learned there was a threat by Brandon Thomure that if she broke off the relationship that he would then go to her parents, that is Lyndel Robertson and Cathy Robertson, and tell them she is pregnant.
>
> There had been violence perpetrated by Brandon Thomure against Rochelle, and we have various police reports including the one on December 1, which goes back to an

> earlier time, Brandon choking Rochelle. Another police report, Brent Reed saw an act of violence. Another police report, which are detailed, Brandon -- one of them says Brandon Thomure threatened to kill himself if he and Rochelle ever broke up. We also had a vehicle cited by a witness in which Mr. Brandon Thomure may have had access which matched at least to some degree a description of the vehicle at the scene at the time of the shooting, which the State discounts, but we have some evidence of that.

(Trial I Tr. 20-21) (emphasis added).

Thus, trial counsel did have this evidence. Furthermore, Petitioner fails to disclose to this Court that the violations of the protective order he claims were not disclosed were for making telephone calls to Rochelle Robertson, not for acts of violence against her. Absent from the records in his Appendix are the very pages of the Exhibit he claims to be crucial to his defense. The State encourages the Court to review the actual exhibits, which will confirm the acts constituting the violations were mere telephone calls to Rochelle Robertson.

This fact is significant because – contrary to Petitioner's repeated accusations that Rochelle Robertson is a liar who is "protecting" the murderer of her own mother – the evidence demonstrates that trial counsel did know of these

violations because Rochelle Roberts told defense counsel during her numerous depositions, including one in 1994:

> A. That was, well, I don't remember exactly when the restraining order was issued. This is all that I'm speaking of right now is after my mom's death and I don't remember. I mean, he tried to get a hold of me continuously after she died and he tried after I put the restraining order on him, but not as many times, like he'd call once and if I wouldn't talk to him, then he wouldn't call back like he did before the restraining order.
>
> Q. But he still tried to contact you; didn't he?
>
> A. Yes.
>
> Q. That was in violation of the restraining order?
>
> A. Yes. It was.

(Exhibit 190, 16) (emphasis added).

The allegation that defense counsel did not know that Brandon Hagan had violated the restraining order is false. Trial Counsel knew of this behavior, but it was not worthy of use at trial.

Once more, the State reminds this Court that Petitioner has already attempted to attack his trial counsel for failing to offer other acts of actual violence by Mr. Hagan as impeachment. In Petitioner's motion to vacate, he

claimed his trial counsel was ineffective for failing to effectively cross-examine Brandon Hagan with certain evidence. (Exhibit D, 20-21). Brandon Hagan was also deposed and asked about his acts of alleged violence against Rochelle Robertson (Exhibit EE, Hagan depo, 17), and about the restraining order (Exhibit EE, Hagan depo, 49).

The record demonstrates that the Petitioner's attorneys did have information about Rochelle Robertson's attempts to get an order of protection because she was deposed repeatedly (three of those depositions were offered into evidence: one dated May 31, 1994; one dated April 26, 2006; and one dated May 11, 2011).

One more thing is known about this particular issue; Petitioner understood that he had the burden of proof to demonstrate that his trial attorneys did not know about this information and that the decision to not use the information was not a matter of sound trial strategy. This is known because Petitioner acknowledged this obligation on the record:

> MR. RAMSEY: With regard to the information that was contained in 155 which I addressed the Court, I think, rather extensively yesterday morning before we started talking testimony, and with regard to the violations of the protective order which have been referred to that was entered against Brandon Thomure, we had scheduled and completed

> the depositions of all of the defense attorneys, Judge Cook and Mr. Wyrsch and Mr. Kutmus.
>
> Now, I was able to talk to Kutmus about the order of protection stuff because we got it before we did his deposition. We did that last week. But I did not have the opportunity to get testimony from the others, and they were really very heavily involved in this -- as to whether or not this stuff had ever been disclosed to them by the State.
>
> And so I know at the pretrial conference we had had a discussion about if there were any loose ends that we would perhaps do a deposition in short order just to do that, and this is one of those that I think I may have.

(Hearing Tr. 225-226) (emphasis added).

No such depositions were ever taken or were ever offered. Petitioner expressly acknowledged his obligation to produce this evidence, but has failed to do so.

Rochelle Robertson was never a witness at either trial, although deposed repeatedly. Thus, her credibility is not an issue, and never was an issue.[40] The evidence showed that she was questioned and placed under some initial suspicion, as was Brandon Hagan (Petitioner's Exhibits 46, 47, 48, 51, 52, 121), which actually negates Petitioner's claim that the police did not properly investigate other suspects.

Finally, the Report erroneously states that the "evidence" "would have served to substantiate the rebuttal of the State's evidence that Thomure had never threatened to harm Catherine Robertson, the murder victim, or Rochelle."[41] (Report, 20).

This statement is not supported by any substantial evidence. *State ex rel. Lyons v. Lombardi*, 303 S.W.3d 523, 525 (Mo. banc 2010) (Master's findings will not be upheld if "there is no substantial evidence to support them."). As is

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[40] After losing her mother and having no sense of finality to this case, she is subjected to baseless allegations that she is a "liar," somehow implicit in her mother's murder. The unfairness to this victim must be overwhelming.

[41] Again, the State does not question the sincerity of the Master's conclusions, nor accuse him of intentionally misstating the record. But the record was voluminous and Petitioner's accusations were numerous; erroneous factual assertions are not surprising.

obvious from the testimony above, the restraining order was not obtained until after Catherine Robertson's murder. The restraining order cannot possibly be proof that Mr. Hagan was threatening Mrs. Robertson. Additionally, as the State has noted, the violations of the restraining order were for making repeated telephone calls, not for threatening Rochelle Robertson.

Once more, the State asks the Petitioner to identify that new, admissible evidence which Petitioner claims to now possess and to identify it, not in vague generalities, but in sufficient detail to establish whether this evidence is, in fact, new and admissible. He cannot do so because there is no such evidence.

G. Petitioner's alleged new evidence is neither sufficient to prove his actual innocence nor is it likely to result in a different verdict because Petitioner's conviction was not based on the strength of evidence suggesting that Brandon Hagan did not commit the crime but, instead, was based on the scientific evidence proving that the gun used to shoot the Robertsons was not accessible to Brandon Hagan, but was in the bedroom of Petitioner's father and that Petitioner's fingerprint was on the box of bullets used to shoot the Robertsons, and placed there recently.

No matter how strong or weak the evidence is, or becomes, about Brandon Hagan having the motive or opportunity to shoot the Robertsons, Petitioner was not convicted based on that issue. Petitioner was convicted once with no discussion of Mr. Hagan's culpability, and once when Petitioner made that issue his primary defense. Brandon Hagan was not, and is not, the issue.

Instead, Petitioner's conviction was dependent upon the scientific evidence that the gun used to shoot the Robertsons was located in the bedroom of the Petitioner's parents; Hagan had no access. The State also proved that a "fresh" fingerprint of the Petitioner was found on the box of bullets used to shoot the victims. When questioned about the shootings, it was Petitioner's disparaging comments and lack of any empathy that lead to his conviction.

These facts are suspiciously absent from the Petitioner's Brief and received no acknowledgement whatsoever in the Report. Yet, proper legal analysis of the "strength" of the State's case or whether the "new" evidence would likely result in a different outcome requires an analysis of these facts.

Nothing Petitioner hopes to offer, after 11 days of hearings, reduces the strength of the State's evidence putting the gun in his hand. The strength or weakness of Brandon Hagan's alibi has absolutely no effect on that evidence.

Yes, Judge Stith did note that the evidence in the first trial was "thin." *State v. Woodworth*, 941 S.W.2d 679 (Mo.App.W.D. 1997). In response, at the second trial the State presented additional evidence regarding the gun, including testimony from the president of the company who manufactured the gun used in the shooting. (Trial II 570-596).

Even if Petitioner had been successful in proving every shred of evidence he claims to have proven, he did not present evidence that this case was one of those "exceptionally rare" cases where his conviction should be set aside. Twenty-year-old recollections of dubious witnesses, impeachment evidence that is cumulative to other evidence trial counsel consciously chose to not introduce, and alleged irregularities in the grand jury proceedings do not, in any way, qualify for the type of scientific or eyewitness testimony contemplated to entitle a petitioner to habeas relief. *Schlup v. Delo*, *supra*.

Once more, the obvious limited value of these attacks were noted by the Missouri Court of Appeals in denying Petitioner's post-conviction appeal. Besides the conclusion that Brandon Hagan's culpability was "exhaustively addressed by no less than seven witnesses," the Court also recognized that "if Lyndel Robertson saw Brandon Hagan shoot and kill his wife, why would he spend $35,000 of his own money to find 'the shooter'?" *Woodworth v. State*, *supra*. At 7, n. 10.

This "new" evidence is really collateral to the evidence upon which Petitioner has been twice found guilty beyond a reasonable doubt and none of Petitioner's claims go to the convicting evidence.

H. Petitioner has failed to prove that his remaining claims are "new," in that he never questioned defense counsel about whether they had any knowledge of this information and none of it rises to a level where it is sufficient to demonstrate a reasonable probability that the result would be different.

The State must concede that some difficulty was experienced in attempting to address Petitioner's many claims. The State has attempted to organize its argument in a manner condusive to meaningful review, but there remain a number of issues raised by Petitioner that cannot be addressed easily because of the way they are presented.

In this final subpoint addressing Petitioner's point on appeal, the State believes there is no other effective way to address these remaining issues other than in a piecemeal manner.

1. Lyndel Robertson lied

The Petitioner accuses Lyndel Robertson of "lying" in a 1995 deposition. He then accuses the first prosecutor of failing to correct this lie. Mr. Robertson has consistently testified that he never identified anyone as the shooter, but while hospitalized he indicated that Brandon Hagan might be a suspect. (Trial II 177, 193, 209, 210-211, 214). Mr. Robertson testified that he wished he had, in fact, seen who shot them, stating, "I would have been a star witness if I had seen

who shot me." (Trial II 210). The Court of Appeals has concurred in that analysis. *Woodworth v. State*, *supra*. At 7, n. 10.

At trial, the Petitioner presented testimony from a witness who stated that Robertson did, in fact, identify Brandon Hagan. (Trial II 733-734, 744-745). Petitioner's accusation that Mr. Robertson "lied" in his deposition is just one more unfortunate wrong that Mr. Robertson has had to endure as a crime victim. The deposition testimony of Mr. Robertson which the Petitioner finds so egregious is consistent with his testimony and statements since being shot:

> Q. Okay. You don't remember him asking you who you thought might have done it or anything of that nature?
>
> A. It's been so long. I just can't -- I don't have that good of memory anyhow, and I don't remember him asking. He could have.
>
> Q. Okay. Now, you remember if you were -- when you were taken subsequently -- you were at Hedrick Hospital here, were you not?
>
> A. Yes.
>
> Q. And then you were taken by helicopter down to Research for further treatment; is that correct?
>
> A. Yes.

> Q. Do you recall being questioned at some point in time at the hospital, at Research Hospital, by Officers Lightner and Smith about who you thought shot you and your wife; do you remember being asked questions about that situation by Officers Lightner and Smith?
>
> A. Well, the question always was who possible could have done it, and I never did point my finger at anybody.

(Lyndel Robertson depo, 43).

As the State discussed in some detail above, Lyndel Robertson did at one point ask to have Brandon Hagan prosecuted because initially the evidence seemed to suggest he was a suspect. But Lyndel Robertson did not identify Mr. Hagan then, or at any other time, as the shooter.

The accusations that Mr. Robertson would intentionally seek the prosecution of a man whom he knew to be innocent, and intentionally allow the man who murdered his wife and almost killed him to go unpunished, is beyond any logic and common sense. *Woodworth v. State*, *supra*.

Petitioner's convoluted theory that Mr. Robertson has no genuine interest in finding the person who murdered his wife and shot him three times and, instead, fabricated his testimony to falsely implicate the Woodworths because of a falling out over business deals suffers from several serious shortcomings. The

first is credulity. Mr. Robertson spent $35,000 of his own funds to hire a private investigator to find the shooter.

More important, the "evidence" to support this theory was available prior to the first trial. Once more, Petitioner should have asked his trial counsel why they did not proceed with this far-fetched theory at trial. After all, Mr. Wyrsch had the newspaper article in which Mr. Robertson was insisting that another be prosecuted. (Trial I 22-23). Thus, the answer is evident and the fact remains that the vast majority of Petitioner's claims are ones that should have been raised in earlier proceedings.

Finally, this theory cannot overcome the fact that it was not Mr. Robertson who focused attention on the Petitioner. For two years, the police followed a number of leads, including Brandon Hagan and Jim Johnson as suspects. (Tr. 104; Trial II 297). It was not until Petitioner's fingerprint was matched to the fingerprint found on the box of bullets used to commit the shootings (Trial II 309) two years later, that Petitioner became the focus of suspicion. (Trial II 301, 498, 500).

Once more, the Western District properly concluded that Petitioner's proof is not "new." *Woodworth v. State*, *supra*. The jury heard Petitioner's evidence that Mr. Robertson allegedly identified Brandon Hagan from multiple witnesses; Mr. Robertson explained that he did not see who shot him and was merely identifying a suspect. (Trial II 213, 214).

Mr. Robertson is not deserving of the vilification directed at him.

2. There was no private prosecutor

Throughout the litigation, the Petitioner has accused Judge Lewis, Judge Elliott, and then Terry Diester of serving as a private prosecutor. Petitioner's Brief then asserts that Prosecutor Hulshof "had reason to know that Diester's and Calvert's investigation was unfair" based on the police reports. (Appellant's Brief, 88). Defense counsel also had those reports and, therefore, the questions is why defense counsel did not see this same "unfairness."

In *State v. Harrington*, 534 S.W.2d 44 (Mo. banc 1976), the Missouri Supreme Court expressly prohibited the practice of hiring a private attorney, paid for his services by private persons, to participate in the prosecution of criminal defendants. 534 S.W.2d at 50. Petitioner has presented no evidence that Judge Elliott was involved in the prosecution of Petitioner, much less that he was paid for such a role. Mr. Hulshof presented the case to the grand jury, and prosecuted the first trial. Ms. Smith prosecuted the second trial. Both were properly appointed special prosecutors from the Attorney General's Office.

3. Aaron Duncan

Mr. Duncan was intended to be the Petitioner's star witness, a man to whom Mr. Hagan had confessed to the murder. The Report attributes a quote to Mr. Duncan; the quote is inaccurate. This is important because one significant shortcoming in Mr. Duncan's testimony was his inconsistency. Indeed, at one

point the Master acknowledged Mr. Duncan's inability to tell the truth and admonished him to answer the questions:

> "Mr. Duncan, the questions that Mr. Bruce is asking you are fair questions, and they are fair because in one instance you said, I got thirty calls and in another you said I got fifty."

(Tr. 342).

The Master made no finding that Mr. Duncan was credible. Indeed, no one would find him credible after his repeated inconsistencies.

Petitioner asserts that Mr. Duncan's testimony constitutes "newly discovered evidence" that exonerates Petitioner and proves the guilty of Brandon Hagan. Mr. Duncan is not a credible witness, for a number of reasons that will be explained in detail. First, Mr. Duncan testified that he had never been convicted of a crime ("Q. Have you ever been convicted of a felony or misdemeanor? A. Never been convicted." (Tr. 314)) when, in fact, he has three criminal convictions for impersonating a police officer, endangering the welfare of a child, and conspiracy to commit arson. (Tr. 344-345). Convictions, alone, do not automatically make a witness incredible, but when the first few words of the witness are false denials of that criminal history, Mr. Duncan's credibility becomes immediately suspect.

At the hearing, Mr. Duncan first said that Mr. Hagan showed him a box of trophies and newspaper clippings about Mr. Hagan's exploits as a high school

wrestler. (Tr. 317). Mr. Duncan testified that Mr. Hagan then showed Mr. Duncan newspaper clippings and other information about the Robertson shootings. On cross-examination, we learned that it was Mr. Duncan who noted the other newspaper clippings and it was Mr. Duncan who brought up the subject. (Tr. 334). Mr. Duncan also revealed at the hearing, apparently for the first time, that Mr. Hagan said the Petitioner was innocent. (Exhibit I, Tr. 333).

Sheriff Cox interviewed Mr. Duncan about these matters on October 6, 2009. Sheriff Cox was obviously seeking exculpatory evidence on behalf of Petitioner and was very thorough in his interview. (Tr. 112, 323; Exhibit I). Yet not once did Mr. Duncan tell Sheriff Cox that Mr. Hagan asserted Petitioner's innocence. (Exhibit I). Instead, Mr. Duncan related that Mr. Hagan referred to Petitioner as "stupid." (Exhibit I).

Mr. Duncan also claimed that at a later time, Mr. Hagan telephoned him and left threats to kill Mr. Duncan and his family on a voice message system. (Tr. 323). Once again, the details of this vary considerably, depending upon when Mr. Duncan describes it. Mr. Duncan told the Master the incident occurred five to six months after seeing the newspaper clippings. (Tr. 319). Mr. Duncan told Petitioner's investigator, Kelly Berkel, it was a mere two weeks later. (Tr. 331). According to the statement Mr. Duncan gave to Sheriff Cox, it was over a year later. (Exhibit I; August of 2007 to September of 2008).

The statement Mr. Duncan related to the Master by Mr. Hagan was that Mr. Hagan had gotten away with murder before and would kill again. (Tr. 322-323). Mr. Duncan acknowledged that Mr. Hagan never said he shot the Robertsons, never admitted to killing Kathy Robertson, and did not identify whom he claims to have been his victim. (Tr. 333).

Mr. Duncan testified that Mr. Hagan left numerous death threats in his voice messages. He testified that Mr. Hagan called at least 30-40 times, and left at least 12 messages threatening to kill Mr. Duncan and/or his family. (Tr. 322, 337). This testimony is inconsistent with what he reported to the police and Sheriff Cox, and significantly inconsistent. (Exhibit I).

Mr. Duncan told Sheriff Cox of only two telephone calls, neither of which he said were recorded. (Exhibit I). On the night of the incident, the investigating officers reported that Mr. Hagan left three voicemail messages – "All three were threatening, but Brandon Hagan only hinted around to the fact that Aaron Duncan could be hurt." (Exhibit K)(emphasis added). Nowhere in the report does it suggest 30-40 messages were left, that Mr. Hagan ever made a threat to kill anyone, or that Mr. Duncan even said to the police that Mr. Hagan threatened to kill him or anyone else. (Exhibit J).

Nor does it appear that Mr. Duncan ever mentioned this alleged box of materials to the police that Mr. Duncan now asserts is so suspicious and incriminating. Mr. Duncan admits that when the police contacted him later,

they did not indicate that they looked for or found a box of newspaper clippings. (Tr. 343).

In fact, Mr. Duncan admitted that he told the police that he did not want to press charges and that he later went back to work for Mr. Hagan. (Tr. 344). This is very inconsistent behavior for a man who subsequently claims Mr. Hagan repeatedly threatened to kill his family and Mr. Duncan.

Even if Mr. Duncan had some arguable credibility, which he does not, this evidence would not constitute evidence of actual innocence. This testimony is, at most, evidence that conflicts with the State's proof that Petitioner, and not Brandon Hagan, committed the murder. *Storey v. Roper*, 603 F.3d 507, 524 (8th Cir. 2010) *quoting Nance v. Norris*, 392 F.3d 284, 291 (8th Cir. 2004). In habeas litigation, if a habeas petitioner adduces evidence that creates conflicting evidence about the murder, the new conflicting evidence is insufficient to show probable innocence under *Schlup*. "The existence of such a 'swearing match' would not establish that no reasonable juror could have credited the testimony of the prosecution witnesses and found [that petitioner] guilty beyond a reasonable doubt." *Moore-El v. Luebbers*, 446 F.3d 890, 903 (8th Cir. 2006); *Johnson v. Norris*, 170 F.3d 816, 818-19 (8th Cir. 1999).

4. Mike Thistlewaite

Though noted as a witness in a police report the Petitioner received (Exhibit 20), Petitioner continually argues the police were in error in not

contacting him. The appropriate inquiry should actually be addressed to defense counsel, not the police, as to why they did not call him as a witness.

Mike Thistlewaite was named as a witness in the report (Exhibit 20). While Petitioner wishes to indict the police for not "following up" with this potential witness, the relevant question is why Petitioner's trial counsel did not contact Mr. Thistlewaite (assuming they did not) or use him at trial. It may have been that his testimony was cumulative to that of Melissa Suchsland, or it may have been the fact that he had moved away before trial. We do not know because Petitioner failed to address those questions when he deposed his trial counsel.

While the Petitioner asserts that he proved the criminal investigation into this case was "defective," in actuality, the only real claim related to Mr. Thistlewaite is an ineffective assistance of counsel claim. Mr. Thistlewaite was named as a possible witness who says he saw Brandon Thomure the night of the murder in Chillicothe. (Exhibit 20). No claim is made that this report was not disclosed to the defense.

Sheriff Cox, who was clearly seeking information to exonerate Petitioner, testified that he searched for Mr. Thistlewaite and could not find him. (Tr. 108). The reason is because Mr. Thistlewaite moved away from Chillicothe when he was 18 years old. (Tr. 595). Petitioner failed to present any evidence that Mr. Thistlewaite could be located and would have cooperated in any investigation. Again, this was his burden to show actual prejudice to him – that a search would

have successfully located Mr. Thistlewaite. For that reason alone, Petitioner has failed to sustain his claim. *Hurst v. State*, 301 S.W.3d 112, 117 (Mo.App.E.D. 2010)(Movant must establish that a witness could be located and would have been available to testify).

As noted earlier, under the law, it is presumed that the decision to not contact or call Mr. Thistlewaite was a matter of trial strategy. *State v. Tokar*, 918 S.W.2d 753, 768 (Mo. banc 1996). Petitioner made no attempt to overcome that presumption. He asked none of his attorneys whether they knew of Mr. Thistlewaite, whether they had tried to contact him, or if they had any reason for not calling him as a witness. The attorneys did, in fact, call Melissa Suchsland to testify to the very thing that Mr. Thistlewaite claimed – she claimed to have seen Brandon Hagan in Chillicothe that night. (Trial II 1042-1048). The State did not rebut the claim of the defense that Brandon Hagan was the shooter by presenting Hagan's alibi alone. The evidence was that the gun used to shoot the Robertsons came from the Woodworth home, further eliminating Brandon Hagan as the shooter. Thus, the identification testimony of Ms. Suchsland was clearly and properly discounted by the jury – who heard the claim and rejected the assertion. Likewise, Mr. Thistlewaite's cumulative testimony fails to explain how Brandon Hagan could have shot the Robertsons with Claude Woodworth's gun.

II

The Petitioner is not entitled to discharge based on the allegations raised in his petition because the Petitioner produced no evidence that any prosecutor intentionally engaged in any misconduct intended to deny Petitioner his Double Jeopardy protection and the State continues to have scientific evidence and testimony to prove Petitioner is guilty beyond a reasonable doubt.

The State believes, of course, that Petitioner is not entitled to habeas relief. In fact, the allegations contained in Petitioner's second point on appeal fully illustrate why relief is not appropriate. Petitioner asserts the "lack of any credible evidence remaining," justifies his discharge. The State must again point out that Petitioner could not have been convicted based on the strength of the evidence inculpating or exculpating Brandon Hagan. Instead, Petitioner was convicted based on evidence never cited or addressed in Petitioner's Brief or the Report. Petitioner was convicted based on the evidence showing the gun used to shoot the Robertsons was in the bedroom of Petitioner's father, beyond the control of Brandon Hagan, and Petitioner's fresh fingerprint was found on the box of bullets used to shoot the Robertsons. This evidence, compounded by the incriminating statements Petitioner made to the police, are what led to his conviction.

That evidence had to have been believed by the jury in order for Petitioner to have been convicted and Petitioner has not presented one shred of evidence challenging that evidence. In fact, after significant discovery, the trial attorneys stipulated to the authenticity of this evidence and the chain of custody (Trial II 413,414).[42]

As to the Double Jeopardy claim, Petitioner fails to acknowledge that even in cases of "prosecutor misconduct," Double Jeopardy does not bar a retrial. *State v. Barringer*, 210 S.W. 3d 285, 307 (Mo.App.W.D. 2006). The only situation in which Double Jeopardy permits a discharge after a mistrial is if the Petitioner proves "an intent or the part of the prosecutor to subject the protections afforded to subvert the protections afforded by the Double Jeopardy Clause," *Id.*; *State v. Clover*, 924 S.W. 2d 853, 857 (Mo. banc 1996).

Additionally, the Master believed that Prosecutor Smith produced the entire state file to defense counsel prior to the second trial (Report, 16). In spite of Petitioner's claims otherwise, there is no evidence of any misconduct on the

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[42]Once more, if Petitioner takes issue with his trial counsel having done so, that is more appropriately a matter to have been addressed in his motion to vacate, previously filed. Even when "assuming" that the three letters were not disclosed, the Master refused to conclude that "the Lewis letters were intentionally concealed by the State." (Report, 18-19).

part of Judge Griffin or Prosecutor Smith at any point in these proceedings. They were the prosecutor and judge who participated in the second trial, the trial that resulted in Petitioner's conviction, and there has been no evidence that either was engaged in any unethical or unprofessional behavior. Petitioner can state no valid reason why a retrial would be unjust.

Petitioner's request to be discharged should be denied.

CONCLUSION

Review of the record demonstrates that there was very little "new" evidence presented by Petitioner during the 11 days of hearings in this case. After two jury trials, a post-conviction hearing, and three appellate reviews, there can be no question that sufficient evidence exists to confirm that Petitioner is guilty of the crimes for which he is convicted.

The suspicions concerning Mr. Hagan provided a defense for Petitioner, but have very little to do with his conviction and the evidence to support that conviction. The conviction could not have been based on the strength of any evidence inculpating or exculpating Mr. Hagan.

As this Court reviews the actual evidence produced by Petitioner, the Court will conclude that the Petitioner did not sustain his burden to prove he is actually innocent, nor did he prove any new, reliable evidence that could likely alter the outcome of his trial.

Petitioner's Petition should be denied.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify:

1. That the attached brief complies with the limitations contained in Supreme Court Rule 84.06, and contains 25,319 words as calculated pursuant to the requirements of Supreme Court Rule 84.06, as determined by Microsoft Word 2007 software; and

2. That a copy of this notification was sent through the eFiling system on this 31 day of August, 2012, to:

Robert Ramsey

/s/ Theodore A. Bruce
THEODORE A. BRUCE