Case no. SC91021

IN THE MISSOURI SUPREME COURT

MARK WOODWORTH,

Petitioner,

v.

LARRY DENNEY, WARDEN
CROSSROADS CORRECTIONAL
CENTER,

Respondent.

PETITIONER'S BRIEF

Respectfully Submitted,

By: _____

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JURISDICTIONAL STATEMENT

Mark Woodworth, a prisoner at Crossroads Correctional Center, Cameron, MO., petitioned for a writ of habeas corpus on July 6, 2010. Subsequently, on November 2, 2010, this Court ordered the appointed Special Master, Honorable Gary M. Oxenhandler, to hear evidence and report findings of fact to this Court along with findings of fact. On May 1, 2012 the Special Master filed with this Court his report, recommendations and findings of fact and conclusions of law. On June 18, 2012, the Master overruled Respondent's exceptions to his report.

This Court has jurisdiction of this matter pursuant to Article V, Section 4, subsection 1, which provides that "The Supreme Court... may issue and determine original remedial writs." Habeas Corpus relief may issue when a prisoner's conviction or sentence violates the constitution or laws of Missouri or the United States. *State ex rel. Nixon v Jaynes*, 63 S.W.3d 210, 214 (Mo.Banc.2001).

This matter is presently before this Court pursuant to Supreme Court Rules 91.01 et seq., 68.03 (h) and 84.24 (i).

REQUEST FOR ORAL ARGUMENT

Because of the severity of the sentences imposed against Petitioner and the complexity of the issues involved, Petitioner respectfully requests that the Court grant twenty minutes of oral argument to each party.

STATEMENT OF THE FACTS

In this habeas corpus action, Mark Woodworth challenges his convictions for murder 2nd degree, assault 1st degree, armed criminal action (2 counts) and burglary 1st degree. The crux of his allegations is that his rights to due process under *Brady v. Maryland*, 373 U.S. 83, (1963), were violated by the suppression of exculpatory evidence, and that the entire process against him was marred by investigative, prosecutorial and judicial misconduct, bias and conflicts of interest.

The Special Master's report contains finding that, not only were there numerous *Brady* violations, but also that Petitioner's entire judicial process was marred by an unfair judge, *ab initio*, who assumed the role of prosecutor, and by myriad and complex judicial conflicts of interest involving investigators, prosecutors, one defense lawyer and judges. The Master found that the investigation of Petitioner was controlled by a conflicted private investigator. The investigators were not concerned with ascertaining the truth. (Master's Report p. 31)

The Master's report found and concluded that the circumstances of this case were sufficiently "rare and exceptional" so as to justify a review of the totality of the circumstances, including all evidence developed since the Petitioner's two trials. After an exhaustive review of the entire record, the evidence, exhibits and testimony, the Special Master concluded that a manifest injustice has occurred and that Petitioner is entitled to habeas corpus relief. (Master's Report p. 30, 35)

The following facts and circumstances support the Master's findings, conclusions and recommendations.

Factual and Procedural Background

On January 19, 2000, after a jury verdict, Petitioner was sentenced by the Circuit Court of Clinton County, Missouri, Hon. Stephen K. Griffin (retired) presiding, to four consecutive life sentences for Murder 2nd degree, Assault 1st degree, and two counts of Armed Criminal Action, and an additional consecutive sentence of 15 years for Burglary 1st degree, arising out of the shootings of Lyndel and Catherine Robertson at their farm near Chillicothe, Missouri on November 13, 1990. This second trial was prosecuted by Assistant Attorney General Rachel Smith. These are the convictions about which Petitioner brings this habeas action. Petitioner further alleges a comprehensive denial of his rights to due process and fundamental fairness from the investigative stage through both trials and beyond.

This was Petitioner's second trial on the same charges. The Missouri Court of Appeals Western District had reversed and remanded the first convictions for the reasons that he was improperly prevented from presenting evidence to support his theory of defense that another person had the motive and opportunity to commit the crime and that the State was allowed to introduce improper evidence of Woodworth's motive. *State v. Woodworth*, 941 S.W.2d 679 (Mo.App.W.D. 1997). The first trial was prosecuted by Assistant Attorney General Kenny Hulshof. In March 1995, the first jury found Petitioner guilty and recommended the drastically lower (and) minimum sentences of 10 years each on the Class A

felonies of Murder 2nd degree and Assault 1st degree and five, three and three years on Armed Criminal action and burglary. The trial court ordered the sentences to be served consecutively for a total sentence of 31 years.

The constitutional issue of retaliation by drastic increase in sentences is pending, along with several other overlapping issues, before this Court, Case No. SC 91221, by direct appeal from denial by the trial and appellate court of Petitioner's 29.15 motion.

The First Trial

After the first trial the Court in *State v Woodworth,* (supra), summarized the factual and procedural background, as follows:

> "At about midnight on November 13, 1990, Lyndel and Catherine Robertson were shot while in bed at their home outside of Chillicothe, Missouri. Mrs. Robertson was shot once in the neck and once in the chest. Mr. Robertson was shot three times in the face and once in the right shoulder... One of the bullets had entered Mr. Robertson's left ear, passed through his shoulder, punctured his lung, and lodged near his liver. That bullet was later removed and turned over to ballistics experts.
>
> A sheriff's deputy, who arrived at the scene soon after the paramedics, found no signs of forced entry. The house had

not been ransacked, and money was lying out in the open in the living room.

Two or three hours after the shooting, the county coroner and prosecuting attorney went to the house of Claude Woodworth, who lived about one-eighth mile from the Robertsons and who was in a farming partnership with them. Claude Woodworth's son, Mark Woodworth, was sixteen years old at the time of the shooting and lived at home with his parents and siblings. He was described at trial as being "slow in school." He was able to work for the partnership farming operation, but was generally not paid for his services. To avoid confusion, at times we will refer to the father as "Claude" and to the defendant, his son, as "Mark."

The Woodworths told investigators that Mr. Robertson kept a .22 caliber Ruger pistol in his pickup truck, and that the Robertson gun was identical to one they owned. Claude Woodworth went to his bedroom and retrieved his pistol to show to the coroner and prosecutor. They examined the weapon and returned it to Claude. Mark Woodworth knew where his father's pistol was kept and sometimes used it for

target practice. He and many others involved in the farming operation also were aware of the presence of Mr. Robertson's .22 in the Robertson truck. They had used Mr. Robertson's .22 for target practice on a number of occasions, including one occasion a few weeks before the shooting. They were aware that Mr. Robertson kept .22 shells in a box in his truck. Mr. Robertson also kept boxes of .22 shells under a cigar box on a workbench in the machine shed where he parked his truck. The shed was located about 100 yards from the Robertson house.

About twelve hours after the shooting, investigators examined the Robertsons' machine shed. The shed door, which Mr. Robertson had closed the previous night, was open. Three boxes of .22 caliber ammunition were found in the open on top of the workbench. Several bullets were missing from a box of high velocity .22 caliber long rifle bullets. Investigators dusted the box for fingerprints and found a clear thumbprint on it.

There is evidence that while in the hospital Mr. Robertson told a number of people, including his friends John Quinn,

Tom Woodworth, Claude Woodworth, Marvin Meusick, Joe Neal Williams and John Williams, as well as his physician Dr. Fraser, police officer Jim Lightner and others, that a former boyfriend of his daughter named Brandon Thomure was his assailant or that he had seen Brandon assault him. It is alleged that Mr. Thomure had physically abused the Robertsons' daughter Rochelle, that Rochelle had been impregnated by Mr. Thomure, that Rochelle had terminated that pregnancy, and that not long before the shooting Mr. and Mrs. Robertson had offered to buy Rochelle a new car if she would break up with Mr. Thomure. A witness said that he had seen a strange car in the Robertson's driveway on the night of the shooting. The day after the shooting, the police examined Mr. Thomure and found evidence of gunpowder residue on his hands.

Three days after the shooting, two police officers arrived at the Woodworth house and asked if they could conduct ballistics tests on Claude's .22 caliber Ruger pistol. Claude Woodworth gave the officers the gun. Ballistics tests were conducted on both the Woodworth and Robertson pistols. The tests revealed that the lands and grooves of both pistols were

consistent with the recovered bullet fragments. The police returned Claude's pistol on March 25, 1991.

Despite the initial leads and investigative activity, no arrests were made for some 20 months after the shooting. During that period Mr. Robertson became frustrated with the lack of progress and hired a private investigator named Terry Deister. Mr. Deister, joined by Gary Calvert, chief deputy and investigator for the Livingston County Sheriff's Department, went to the Woodworth home on July 4, 1992, while Mr. and Mrs. Woodworth were out of town. They asked Mark Woodworth to accompany them to the Sheriff's office. They advised of his Miranda rights and questioned from 8:10 p.m. until 12:32 a.m. The police took Mark's fingerprints during this interview. They later found his fingerprint matched the print found on the box of .22 caliber shells in the machine shed.

Mark was not arrested. Instead, on July 14, 1992, Deputy Calvert returned to the Woodworth home with a search warrant for Claude Woodworth's pistol, which he seized. In August of 1992, the bullet lodged near Mr. Robertson's liver

was removed. Ballistics experts tested this bullet against bullets test fired from Claude's pistol. These experts discovered that Claude's pistol had a manufacturing defect that left a distinct mark on fired bullets. The experts later testified that 150 to 1000 barrels could have been manufactured with that particular defect. Moreover, a forensics examiner found that the bullets recovered from the victims had the same brass wash coating and "swage mark" as the bullets in the Robertson's machine shed. So far as it appears from the record, however, none of the experts tested Mr. Robertson's .22 to see if it also had the distinctive manufacturing defect displayed by Claude Woodworth's gun.

Neither Mark nor anyone else was arrested for the next 9 months. Finally, however, on April 11, 1993, some two and one-half years after the murder, Deputy Calvert and Mr. Deister returned to the Woodworth home. They once again asked Mark to accompany them to the Sheriff's office. He was again advised of his *Miranda* rights and was questioned for another four hours. He was then allowed to leave.

During this and his prior interview, Mark denied knowing

anything about the shooting. He told Deputy Calvert and Deister that he had been in the Robertsons' machine shed a few times but that he had never noticed any .22 shells in the shed, that he had never touched the shells in the shed, and that they would not find his fingerprints or handprints on the shells. He later softened his statements, however, by stating that it was possible that he had picked up shells when in the shed to help Mr. Robertson and simply not noticed what he was touching. He also testified that he and a number of other persons who worked on the farm had gone target shooting using Mr. Robertson's gun and .22 ammunition taken from Mr. Robertson's truck on a number of occasions on which they were using the truck on the farm.

Some 6 months later--some three years after the murder--Mark Woodworth was finally charged by indictment on October 29, 1993 with murder in the second degree, § 565.021; [FN1] burglary in the first degree, § 569.160; assault in the first degree, § 565.050; and two counts of armed criminal action, § 571.015. Mark went to trial on March 13, 1995. The State presented the evidence noted above. Mark presented alternative explanations for the presence of his print on the

ammunition box. Another witness, Mr. Neal Williams, also testified that he, Mark, and others had target shot from Mr. Robertson's truck with his gun and .22 ammunition. Mr. Williams also testified that this ammunition was sometimes moved from the truck to the shed, or from the shed to the truck.

FN1. All statutory references are to RSMo 1994, unless otherwise noted.

Mark offered evidence concerning Brandon Thomure's relationship with Rochelle Robertson and his possible motive for injuring the Robertsons. That evidence was almost entirely excluded, however, based on the rule that evidence showing that another had a motive and opportunity to commit the crime can be admitted only if the defendant also shows some direct evidence connecting the other with the crime. The court ruled that the gunpowder found on Mr. Thomure did not constitute such evidence. It also ruled that Mr. Robertson's statements identifying Mr. Thomure as the assailant did not constitute direct evidence since at trial Mr. Robertson denied that he had made such statements. The court questioned whether Mr. Robertson would really have

had an opportunity to see the shooter. The court believed that due to Mr. Robertson's denial at trial that he had seen the shooter, his prior statements identifying Mr. Thomure were not admissible as substantive evidence, and if made were probably just based on speculation. The jury thus never heard the evidence about Mr. Thomure, and only heard a single reference to Mr. Robertson's prior statement identifying him. It had no opportunity to judge the credibility of the witnesses on this issue..." *State v. Woodworth*, 941 S.W.2d at 683-686.

The Second Trial

Based on the Court's opinion in *State v Woodworth,* (supra), the prosecution did not present the improper evidence of Petitioner's motive in the second trial. Similarly, Petitioner was allowed to present more evidence regarding Lyndel Robertson's "identification" of Brandon. The State presented the following evidence purportedly establishing an alibi for Brandon.

Renee Thomure

Mrs. Thomure, mother of Brandon and Misty Thomure, testified to the following (Second Trial p. 989):

On November 13, 1990, Brandon got home (Independence, MO) at about 6:30 p.m. from wrestling practice. She and Brandon talked for a while, Brandon took a shower, went to his room and went to bed around 8:30 p.m. (Second Trial pp. 990-991). She next saw Brandon at around 4:30 – 4:45 a.m., when they found

out that Catherine Robertson had been killed. Brandon wanted her to take him to Chillicothe (Second Trial p. 992). During the night she did not hear anyone leave the house.

Misty Thomure

Ms. Thomure was Brandon's sister, who was 11 years old and in the sixth grade on November 13, 1990. (Second Trial pp. 1003 - 1006) On that night, she testified that she went into Brandon's room at 10:40 p.m. to get her favorite blanket from his closet. She saw Brandon in his room. (Second Trial p. 1004)

Brandon Thomure (Hagan)

Brandon testified that he came home from wrestling practice and went to bed around 8:30 – 9:00 p.m. He didn't wake up until the next morning at 5:00 – 5:30 a.m. when Rochelle called and told him what had happened the night before. (Second Trial pp. 1008 – 1009) He denied shooting Lyndel and Catherine Robertson. (Second Trial p. 1012)

Brandon denied hitting Rochelle Robertson, but admitted shattering her rear car window with a rock. (Second Trial pp. 1015 – 1016) He testified that he never yelled "un-nice" things to Catherine Robertson on the telephone – "I would not do that… I know that I would never yell at Mrs. Robertson…" (Second Trial pp. 1022, 1027, and 1034)

Other than the above evidence, the State's evidence against Petitioner was virtually the same as that presented in the first trial.

Terry Deister, the private investigator hired by Lyndel Robertson, did not testify at either trial.

THE HABEAS CORPUS PETITION

On July 6, 2010, Petitioner filed a habeas petition in this Court, following the denial of similar petitions in the circuit court of DeKalb County and the Missouri Court of Appeals. The petition focused on a series of letters exchanged by the trial judge, the prosecutor and one of the victims which were discovered in 2009 by Associated Press Reporter Alan Zagier during a review of files maintained by the Missouri Attorney General. These letters had never before been disclosed to the defense and are particularly described below. Presiding Circuit Judge, Thirteenth Judicial Circuit, Special Master Gary M. Oxenhandler was appointed by this Court on November 2, 2010, and an evidentiary hearing was held by him on May 31, 2011 through June 3, 2011. After an extensive review of 32 depositions, documents, prior transcripts and previous court rulings, the Special Master filed his report on May 1, 2012 recommending that this Court grant habeas relief. Respondent filed exceptions pursuant to Rule 68.03 on May 31, 2012. These exceptions were denied by Judge Oxenhandler on June 18, 2012.

The Lewis Letters - A *Brady* Violation

The habeas petition centered at the outset on the *Brady* implications contained in the letters (referred to in the report thereinafter as "the Lewis letters", Master's Exhibits 1, 2 and 3) and the resulting claims of judicial bias and investigative and prosecutorial conflict of interest. These letters set the

background and motif for the prosecution of Petitioner. The habeas discovery process ultimately revealed numerous other *Brady* violations, to be discussed below.

With regard to these letters the Master found the following:

- "**Master's Exhibit 1** is a letter to Judge Lewis from victim Lyndel Robertson, dated September 24, 1993";
- "**Master's Exhibit 2** is a letter to Judge Lewis from Douglas Roberts, the Prosecuting Attorney for Livingston County, dated October 5, 1993"; and
- "**Master's Exhibit 3** is a letter to Assistant Attorney General Kenny Hulshof from Judge Lewis, dated October 7, 1993." (Master's Report, pp. 13-14)

Exhibit 1 was a letter of complaint from one of the victims, Lyndel Robertson to Judge Lewis, complaining about the "lack of enthusiasm" for prosecuting Petitioner exhibited by the "jurisdictionally empowered" prosecutor.

Exhibit 2, the Roberts letter to Judge Lewis dated October 5, 2012, notes that "it has come to my attention that the complaining witness... has requested that you disqualify me for lack of enthusiasm." The letter asks Judge Lewis to "recall" that shortly after the crime (nearly three years earlier) Lyndel Robertson was "adamant that we charge another young man." The evidence developed at the hearing identified that other person as Brandon Thomure (a/k/a Hagan), the former boyfriend of the Robertson's daughter, Rochelle Robertson. (Master's Hearing pp.

271-272, Roberts Testimony) At the end of this letter, Roberts disqualifies himself and requests Judge Lewis to appoint the Attorney General, despite his assertion that "lack of enthusiasm" is not an appropriate or recognized ground for recusal. Roberts refers, instead to the unusual circumstances of the case.

Exhibit 3 was a letter dated October 7, 1993 specifically to Kenny Hulshof with Exhibits 1 and 2 attached. The Master found the following regarding this letter:

> "In the third letter, dated October 7, two days after the second letter:
>
> First, Judge Lewis acknowledges that he has previously spoken to Hulshof about the case on more than one occasion:
>
> "In accordance with our various telephone conversations..."[12]
>
> Second, Judge Lewis acknowledges that he was "prompted to call the grand jury" based on receiving the first letter, the letter from victim Lyndel Robertson.
>
> It is clear that the first letter, the victim's letter to Judge Lewis, was not cursorily reviewed by Judge Lewis and thereafter filed as previously "typically" suggested, but was substantively considered as it "**prompted**" the initiation of one of the most serious legal procedures at a judge's fingertips: the calling of a grand jury.

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[12] Why would Judge Lewis be talking to Hulshof with regard to the case? (Master's Footnotes)

Third, Judge Lewis states that Prosecutor Roberts had "boycotted" the grand jury.[13]

Four, Judge Lewis appears to have substantively analyzed the statute of limitations issues as well as the possible charges to be filed or which may be filed in the case: felonious assault, burglary in the first degree and armed criminal action.

Five, Judge Lewis states that:

"I felt that ***we***[14] (emphasis added) could wait no longer for Mr. Roberts to act." (Master's Report pp 15-16)

The Master Found the Lewis Letters to be *Brady* Material

The genuineness of these letters was admitted by the State. The State's pre-hearing discovery responses were that the only members of the prosecution team who were aware of these letters were Kenny Hulshof and Rachel Smith, both being special prosecutors on the staff of the Missouri Attorney General, for the first and second trials respectively. (Appendix pp.1 - 4, Respondent's Response to

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[13] Why would Judge Lewis accuse Prosecutor Roberts of boycotting the grand jury if Judge Lewis was enclosing a letter from Roberts disqualifying himself and requesting the appointment of the Attorney General? (Master's Footnotes)

[14] Though it appears that Judge Lewis is referring to the Office of the Attorney General and himself, it may be that he is just generally and collectively referring to the judicial system as a whole. (Master's Footnotes)

Request for Admissions numbers 1, 4, 7, 11 and 12; Appendix pp.5 - 7, State's Response to First Supplemental Interrogatories) By the time of the second trial, Hulshof had been elected to the United States House of Representatives. The Master found that the Lewis letters were material and exculpatory or could have led to the discovery of exculpatory and impeaching evidence. His finding was based, in part, on the admissions of Kenny Hulshof that the letters contain:

> "... in black and white references the fact that some other person was originally in some fashion, rumor or otherwise, fingered as the perpetrator..." and that "... it would be significant information for the Defense..." (Master's Hearing p. 694, Hulshof Testimony)

Further, Hulshof specifically testified that:

> "... this letter (Lewis' letter to Hulshof) was not disclosed..." (Master's Hearing p. 695, Line 20-21, Hulshof Testimony)

He agreed with the Court that the letters should have been disclosed. (Master's Hearing p. 695, line 25, Hulshof Testimony)

Other Evidence Supporting the Master's Findings

That the Lewis Letters Were Not Disclosed

In addition to Hulshof's admission, the Master found other evidence supporting his factual finding (that the Lewis letters were not disclosed). This supporting evidence includes:

1.) Hulshof testified that it was his practice to place consecutive numbering on each page of every document provided to the defense in discovery. The Lewis letters contain no such numbering. (Master's Report p. 16; Master's Hearing pp. 648-649, Hulshof Testimony)

2.) Rachel Smith, prosecutor at the second trial, testified that she prepared an inventory letter to the defense of all discovery provided. These letters are not included in this inventory. (Master's Report p. 16; Master's Hearing pp. 618-621, R. Smith Testimony; Master's Hearing Exhibit 194, Rachel Smith Deposition pp. 16-18)

3.) All defense counsel from both trials, including investigator Phil Thompson, testified "credibly" that they never saw the Lewis letters. (Master's Report pp. 16-17; Master's Hearing Exhibit 200, James Wyrsch 2011 Deposition p. 11; Master's Hearing Exhibit 174, Jacqueline Cook 2011 Deposition pp. 10-11; Master's Hearing Exhibit 183, William Kutmus 2011 Deposition pp. 6-7; Master's Hearing Exhibit 196, Phil Thompson 2011 Deposition p. 10)

According to James Wyrsch, first trial counsel, the information would have been of great benefit in strengthening the argument to Judge Griffin to allow evidence about Brandon. It could have formed the basis for a challenge to the fairness of the grand jury proceedings and the propriety of Judge Lewis' involvement, as well as providing a trial defense that the investigation was not

credible. (Master's Hearing Exhibit 200, James Wyrsch 2011 Deposition pp. 14-15, 34, and 50-53)

The Master Found that the Non-Disclosure was Prejudicial

The Master found that the non-disclosure was "highly prejudicial to Woodworth in, at least, the following respects:

1.) Efforts to impeach key prosecution witnesses, such as Deputy Calvert, Lyndel Robertson and Brandon Thomure were deprived of substantial evidentiary force; correspondingly prosecutors "were able to claim much greater credibility than was warranted" from their testimony. (Master's Report pp. 17-18)

2.) Since evidence of another perpetrator was not permitted by the first trial court, resulting in reversal and remand by the appellate court, disclosure and the "evidentiary offspring" of the letters "would have substantially augmented the argument" to the first trial court to allow such evidence, especially where, as the Appellate Court found that the evidence against Petitioner was "thin". (Master's Report p. 18)

3.) Given that it was a "thin" case, "the slightest bit of defense evidence eroding the force of the State's witnesses or bolstering the weight of the defense witnesses may have tipped the scales in favor of Woodworth." (This analysis was found to apply to both trials.) (Master's Report p. 18)

4.) Disclosure impacted on Woodworth's ability to attack the grand jury proceeding and the indictment. (Master's Report p. 18)

5.) Prosecutor Hulshof may have been deterred from pursuing the case against Woodworth had he known the defense would discover this evidence. (Master's Report p. 18)

6.) This non-disclosure was part and parcel of the totality of the circumstances discussed below.

In summary, the Master found that:

"However, this Court is clearly convinced and finds:

that Woodworth requested discovery;

that discovery should have included the Lewis Letters;

that the State failed to disclose the Lewis Letters;

that the Lewis Letters constitute *Brady* materials; and

that the failure to disclose the Lewis Letters prejudiced the Petitioner as the letters were both exculpatory and impeaching evidence and, further, would reasonably lead to the discovery of other important defense related evidence." (Master's Report p. 19)

The Special Master found that the non-disclosure of the Lewis letters alone justified granting habeas relief. (Master's Report p. 19)

NEWLY DISCOVERED EVIDENCE - ADDITIONAL *BRADY* MATERIAL

Prior to the Master's evidentiary hearing and during the course of discovery, Petitioner unearthed and presented to the Master, additional substantial

and material exculpatory and/or impeaching evidence suppressed by the State, including the following:

Reports of Brandon's Violations of

Rochelle Robertson's Ex Parte Order of Protection

Prior to the first trial, Rochelle Robertson, Lyndel Robertson's daughter and Brandon's boyfriend, testified in a pre-trial defense deposition that she obtained an order of protection against Brandon shortly after the shootings. At that time she denied that she had ever made a complaint to law enforcement about Brandon violating the order. (Master's Hearing Exhibit 190, Rochelle Robertson 1994 Deposition p. 16) Petitioner was forced to obtain two separate court orders from the Special Master in 2011 in order to obtain the complete court file regarding this matter, after having been alerted of these violations for the first time by the testimony of Deputy Calvert on April 15, 2012. (Master's Hearing Exhibit 156, Calvert Deposition pp. 72-73) (Master's Report p. 19)

The Master found that these violations, which contained explicit threats by Brandon against Rochelle Robertson, were not disclosed to the defense, nor were investigative reports about these incidents. (Master's Hearing Exhibit 6, Reports of Violations) He credited Sheriff Steve Cox's testimony that the reports were not included in the Robertson shooting file but should have been. (Master's Hearing pp. 90-94, Cox Testimony) (Master's Report pp. 19-20) At the hearing, Rochelle admitted giving "inaccurate" testimony during the 1994 deposition. (Master's Hearing pp. 533 – 536, Rochelle (Robertson) Koehly Testimony)

The Master found and concluded that these violations and reports were *Brady* material, were not disclosed to the defense, and were prejudicial in the following respects:

1.) They would have augmented the defense theory that another person had the motive and opportunity to commit the crime and "erode" the State's case in that regard." (Master's Report p. 20)

2.) They "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." (Master's Report p. 20) Rachel Smith, second trial prosecutor, in her final argument, urged to the jury that the Robertsons' did not have any fear of Brandon because he was dating their daughter. (First Trial pp. 1124-1126)

3.) They "demonstrated, at the very least, Rochelle's intention to protect her boyfriend...from prosecution." (Master's Report p. 20)

4.) Rochelle's dishonesty or that of the reporting officers would have provided "substantial impeachment" of "Thomure, Lyndel Robertson, Gary Calvert and the integrity and credibility of the investigation and prosecution as a whole." (Master's Report p. 20)

Undisclosed Deals with State's Witness Jim Johnson

The Master found that Jim Johnson, a hired hand of Lyndel Robertson, was making "deals" with the State to implicate Petitioner and his father, in exchange for reduced sentences on numerous charges against him. (Master's Report p. 22) Letters from Jim Johnson regarding his seeking a deal were considered by the Master and found to be meaningful as either *Brady* material or facts within the totality of the circumstances which, in total, established that a manifest injustice has occurred. (Master's Report pp. 22-23) (See Appendix pp.8 - 13, Jim Johnson Timeline Attached to Petitioner's Reply to States Response to Third Amended Petition – Filed with the Special Master) The Master further found that these circumstances are "sufficiently rare and unusual so as to justify a review of the totality of the circumstances," and that "Woodworth's verdict is not worthy of confidence." (Master's Report pp. 23, 30) This deal-making was not disclosed to the defense before either trial.

Consummation of the "deals" was evidenced by the documents in Master's Hearing Exhibits 155, 157 and 169 and significantly, was "bartered" by Attorney Richard McFadin, who was contemporaneously representing Petitioner in the homicide case, notwithstanding the actual conflict of interest between Woodworth and Johnson. At least one of the guilty pleas consummating Jim Johnson's deal was accepted by Judge Lewis. It is evident that these documents and the fact of a "deal" were never disclosed to the defense, because there is no consecutive number on them nor are they included in Rachel Smith's inventory of discovery

provided. The record from the outset of the case through the second trial contains no reference to Jim Johnson or his deals.

OTHER *BRADY* VIOLATIONS

Chain of Custody of the Evidence

In June 1991, approximately six months after the shootings, victim Lyndel Robertson hired a private investigator, Terry Deister, who ultimately and "inexcusably took over control" of the homicide investigation. (Master's Report p. 31) Deister was "conflictually employed" in that his duties included helping Lyndel Robertson in a pending civil lawsuit between him and Petitioner's family. (Master's Hearing Exhibit 175, Deister's 1995 deposition pp. 114 – 115; Master's Hearing pp. 371, 372, and 393 – 395, Deister Testimony; Appendix pp.14 -16, *Woodworth v Robertson*, Davies County Circuit Court, Case No. CV391-87CC.) By this time, Lyndell Robertson had changed his tone from being "adamant" that Brandon be prosecuted to being adamant that Petitioner be prosecuted.

At the Master's evidentiary hearing, private investigator Terry Deister testified that he and Deputy Calvert arranged to surreptitiously remove the entire Livingston County Sheriff's investigative file regarding the Robertson shootings from the Sheriff's Department. Calvert entrusted possession of it for several weeks to the private investigator. (Master Hearing pp. 385, 421, 428 and 429, Deister Testimony; Master's Report p. 31) No inventory or transfer of custody forms reflecting this secret transfer was ever provided to the defense. Possession of the firearm and bullet purportedly linking the shootings to Petitioner were also

entrusted to the Deister's possession. (Master's Hearing pp. 380, 381 and 385, Deister Testimony; Exhibits Z and AA of Master's Hearing Exhibit 176, Deister's 2011 Deposition)

Although Mr. Hulshof assured the Court and the defense that there were no problems with the chain of custody of the fingerprint and ballistics evidence (First Trial pp. 1-3), the State has never disclosed the clandestine transfer of possession of the entire investigative file to the defense. It was first revealed in the evidentiary hearing during Deister's testimony.

The Master found other nefarious activities of Deister which will be discussed below.

Suppression of Exculpatory Impeaching Evidence

Against Brandon Hagan (Thomure)

Petitioner presented post-hearing deposition evidence from several individuals who provided information to Sheriff's deputies approximately three weeks after the shootings regarding Brandon and/or Rochelle. The evidence was suppressed by agents of the State, but came to light only after news coverage of the hearing before the Special Master held between May 31, 2011 and June 3, 2011. As to this newly discovered evidence, the Master made the following findings:

1.) **Connie Grell** – Approximately two weeks before the shootings in Grell's Chillicothe hair salon, Rochelle remarked that there "...was a lot of hate between her parents and Brandon" and that Brandon had

expressed his wish that her parents were dead or that he could kill them. Although Grell provided this information to Deputy David Miller, no report of this is in the Robertson shooting file. (Master's Report p. 29; Appendix pp.17 - 20, Grell Deposition pp. 4-8 and Grell's Deposition Exhibit 1)

2.) **June Cairns** observed Brandon in her Chillicothe home on the morning after the shootings between 6:30 a.m. and 7:30 a.m., "directly contradicting Brandon's alibi." Further, two weeks before the shootings she observed Brandon in her home having a telephone conversation with Cathy Robertson, at which time Brandon threatened to slit Cathy Robertson's throat. She provided this information to Deputy Miller but this information inexplicably was not included in his report. (Master's Report p. 29; Appendix pp.21 - 23, June Cairns Deposition pp. 4 - 7 and J. Cairns Deposition Exhibit 1)

3.) **Shelly (Cairns) Rucker and Matt Cairns**, children of June Cairns, also heard or were aware of the conversation when Brandon stated to Cathy Robertson "Fuck you bitch, I'll slit your throat" (Master's Report p. 29; Appendix pp.24 - 28, Matt Cairns Deposition pp. 7-8, M. Cairns' Deposition Exhibit 1 and 2; Appendix pp.29 - 34, Shelly Rucker Deposition pp. 6, 12 and 13 and Rucker's Deposition Exhibit 1)

4.) **Loronda Corbin** – This witness testified at the hearing that before the crimes, Rochelle Robertson indicated to her that "… she wished her mother was dead or someone would kill her…" (Master's Report p. 25, Master's Hearing p. 237, Corbin Testimony)

At no time during the proceedings before the Master did the State offer or present any evidence to rebut or contradict any of the above testimony.

FACTS SUPPORTING MASTER'S FINDINGS THAT PETITIONER'S RIGHT TO DUE PROCESS WAS VIOLATED AND THAT A MANIFEST INJUSTICE HAS OCCURRED – TOTALITY OF THE CIRCUMSTANCES

Right to an Impartial Judge

The Master's finding and conclusion that Judge Lewis "lost sight of his judicial sense of fairness" and "(I)n effect he became a prosecutor" were supported by substantial evidence, including the following:

1.) The very words of the Lewis letters established that:

a. Judge Lewis received an ex parte contact from one of the victims, in which the victim complained about the county prosecutor's "lack of enthusiasm" for prosecuting Woodworth; (Master's Report p. 17) (Master's Exhibit 1)

b. Judge Lewis and Kenny Hulshof were possessed of evidence that the surviving victim had, shortly after the crime, been "adamant" that another person (Brandon) be prosecuted; (Master's Report p. 17) (Master's Exhibits 1,

2 and 3) (This conflicts with Lyndel's pre-trial deposition testimony that "I never pointed my finger at anybody", a deposition attended by Kenny Hulshof.) (Master's Hearing Exhibit 187, Lyndel Robertson's 1995 Deposition p. 43, Appendix pp.35 - 36)

c. That Judge Lewis "was in a rift with Prosecutor Roberts."; (Master's Report p. 17) This was corroborated by the events depicted in the transcript of the opening of the grand jury proceedings on October 15, 1993, (Exhibit 6 of Master's Hearing Exhibit 185, Judge Lewis' 2011 Deposition)

d. Judge Lewis was knowledgeable about the underlying facts of the case, including the applicable statute of limitations date, the exact charges to be sought, and was "sharing that knowledge" with a person not yet appointed as a prosecutor (Kenny Hulshof).; (Master's Report pp. 17, 31 and 32; Master's Exhibit 3; Master's Hearing Exhibit 180, Hulshof Deposition pp. 11 – 17; Master's Hearing p. 643, Hulshof Testimony) Further, the record does not reflect that Judge Lewis made these letters a matter of record.

e. That Judge Lewis complained to Hulshof that Prosecutor Roberts had "boycotted" his grand jury, even though Roberts had disqualified himself prior to the convening of the grand jury; (Master's Report pp. 17, 32; Master's Exhibits 2 and 3; Master's Hearing Exhibit 185, Lewis Deposition p. 27 – 29; Master's Hearing pp. 272 – 274, Roberts Testimony)

f. Judge Lewis "called a grand jury based upon an ex parte letter that he got from one of the victims." (Master's Report p. 32; Master's Exhibit 3)

Other Irregularities in the Grand Jury Process

2.) Additional evidence and testimony supporting these findings and conclusions includes the following:

a. John Cook was selected by Judge Lewis to be the foreman of the grand jury. The personal note from Cook to Lewis, suggests a personal relationship. (Master's Exhibit 4) Cook also testified that a court reporter was present during the entire grand jury proceedings against Woodworth and was taking notes of ALL witnesses. This contradicts Hulshof's discovery response that the only two witnesses whose grand jury testimony was transcribed were Claude and Jackie Woodworth, Petitioner's parents. (Master's

Hearing, State's Exhibit V, Hulshof's letter dated November 29, 1993; Master's Hearing Testimony p. 442, Cook Testimony)

b. On September 29, 1993 Judge Lewis ordered that no officer of the Court could disclose even "the fact of the existence of the grand jury or the names of the members thereof. (See Appendix p.37, Order from Judge Lewis)

c. Judge Lewis kept records of the grand jury in his personal possession. According to the testimony of Livingston County Circuit Clerk Brenda Wright, she is unable to locate most of the grand jury records which are required by statute to be kept. *§ 476.010 RSMo* (Hearing Exhibit 199, Brenda Wright Deposition p. 13)

d. John Cook, at a minimum, had a business relationship with Judge Lewis; (Master's Report p. 33; Master's Hearing Exhibit 178, Brent Elliott Deposition pp. 5, 6, and 45-47; Master's Exhibit 4)

Involvement of Judge Lewis' Personal Attorney Throughout

e. During the time in which Attorney Brent Elliott was Judge Lewis' personal attorney, Elliott consulted with Deputy Calvert and private investigator Terry Deister regarding their criminal investigation of Woodworth. (Exhibit Y of

Master's Hearing Exhibit 176, Deister's 2011 Deposition and pp. 21, 22, and 151; Master's Hearing pp. 373, 374, 377, 378, 382, 399, Deister Testimony and Master's Hearing Testimony pp. 542 and 543, Williams Testimony)

f. Elliott, Judge Lewis' personal attorney, represented Rochelle Robertson during the proceedings related to her ex parte order of protection against Brandon. (Master's Hearing Exhibit 193, Rochelle Robertson 2011 Deposition p. 28) As such, he would have been specifically aware of the complaints by Rochelle Robertson that Brandon had threatened her and the untruthful deposition testimony she gave that she had never reported a violation of the order by Brandon.[15] (Master's Hearing Exhibit 190, Rochelle Robertson 1994 Deposition p. 16)

g. Judge Lewis appointed Elliott to represent the Juvenile Officer in certification proceedings against Woodworth

[15] Appendix pp.38 - 40, *Rochelle Lynn Robertson v Brandon Patrick Hagan Thomure,* Livingston County Circuit Court, Case No. CV890-197AC, which reflect Elliot's entry of appearance in that case and Appendix pp.41 - 43, *State of Missouri v Brandon P Hagan a/k/a Brandon P Thomure*, Livingston County Circuit Court, Case No. CR890-2113M.

held after he was already indicted by Lewis' grand jury; (Master's Hearing Exhibit 178, Elliott Deposition p. 34)

h. Review of the juvenile certification proceedings suggests that Elliott disclosed nothing of this even though serving in a prosecutorial capacity. (Appendix p.44 - 48, Petitioner's Juvenile file, In the Matter of Mark E. Woodworth, Livingston County **Juvenile Case No. JU793-27J**)

i. Elliott, Lewis' personal attorney, assisted Hulshof at the first trial by providing case law to support Hulshof's argument that Woodworth should be denied an appeal bond. (First Trial pp. 1331-1333)

j. During the pre-indictment period and subsequently, Elliott was representing Judge Lewis in attempting to secure the assistance of the Missouri Attorney General's office in obtaining indictments against Livingston County Commissioners, with whom he had a personal dispute over the public nature of a road running through some of Lewis' real property. (Master's Hearing Exhibit 197, Larry Weber Deposition pp. 13 – 17, 23 and 29) Further, immediately preceding the empanelling of the grand jury, Elliott represented Lewis in a personal lawsuit. (Master's

Hearing Exhibit 184, Lewis' Federal Deposition pp. 71 - 72)

3.) Judge Lewis was, or should have been, aware of the severe conflict of interest existing by virtue of the contemporaneous legal representation by Attorney Richard Eugene McFadin of both Woodworth and Jim Johnson, who was actively seeking and actually obtained a "deal" in exchange for providing information against Woodworth. This actual conflict and Judge Lewis' and Judge Griffin's role in it were established by the following:

a. Numerous letters were sent by Jim Johnson to Kenny Hulshof, Judge Lewis and the grand jury. They had a similar theme – I will give you information against Woodworth if you get me out of prison. (Appendix pp.49 - 62, Jim Johnson letters; Appendix pp.63 - 69, Master's Hearing Exhibits 157 and 169, court documents indicating Judge Lewis accepted a guilty plea from Jim Johnson in consummation of one of the deals.) In the letters, Johnson also implicated Lyndel Robertson in farm-related stealing activities over a long period of time.

b. Judge Griffin, during the pendency of the proceeding against Petitioner, sustained Jim Johnson's 29.15 motion and vacated his sentence of 15 years, all without making

specific findings of fact and conclusions of law. In that action, Lyndel Robertson was listed as a witness. Subsequently, Judge Lewis accepted a guilty plea from Johnson and sentenced him to the drastically reduced sentence of three years. (Appendix pp.70 - 71, *Johnson v. State,* Davies County Circuit Court, Case No. CV394-76CC)

c. No court records reflect that either Judge Lewis or Judge Griffin ever conducted an on the record inquiry as to the actual conflict of interest. Additionally, Petitioner gave undisputed testimony that the conflict of interest involving Johnson was never disclosed to him by McFadin or anyone else. (Master's Hearing p. 457, Mark Woodworth Testimony)

TOTALITY OF THE CIRCUMSTANCES - CONTINUED

Unfairness of the Investigation

The Master found that "...(O)ther than in the very early stages, there is no indication that the investigation of the Robertson crimes was conducted by a sheriff's office with a fair eye for ascertaining the facts, but was inexcusably led by an outside private investigator... who was conflictually employed by one of the victims..." (Master's Report p. 31) These findings are supported by the above facts and the following additional facts and circumstances:

Terry Deister, Private Investigator

Deister and the Livingston County deputy sheriff in charge of the investigation, Gary Calvert, agreed to premise their investigation on the assumption that evidence implicating any other suspects did not exist, thus focusing solely on Woodworth. This was memorialized in Deister's report. (See Exhibit H of Master's Hearing Exhibit 176, Deister's 2011 Deposition; Master's Hearing p. 390, Deister Testimony)

Deister acknowledged sending letters to the ballistics supervisor in England, Roger Summers. (Master's Hearing p. 368, 369 and 375, Deister Testimony; Master's Hearing Exhibits 1 and 2) Deputy Calvert characterized these letters as "improper", while Hulshof declared them to be "untoward". (Master's Hearing Exhibit 156, Gary Calvert Deposition pp. 48, 49 and 51-57; Master's Hearing Exhibit 180, Kenny Hulshof Deposition p.38) Sheriff Cox testified that these letters were an improper attempt to influence the ballistic expert to obtain a favorable opinion. (Master's Hearing p. 72, Cox Testimony)

Master's Hearing Exhibits 1 and 2 –

Deister's Letters to Ballistics Experts in England

Petitioner obtained Exhibits 1 and 2 in 2011 (Appendix pp.72 - 78) from the file maintained by the State's crucial ballistics expert, Steve Nicklin, from England. Petitioner possessed Exhibit 1 before both trials, but Exhibit 2 had never before been disclosed by the State. These exhibits support the finding that Deister endeavored to improperly influence the British ballistics expert.

Master's Hearing Exhibit 1

Master's Hearing Exhibit 1 is a letter from Deister addressed to Nicklin's supervisor, Roger Summers. It contains the following:

- Deister falsely asserted that two Missouri ballistics experts had already indicated that the Woodworth gun was, in fact, the murder weapon, although neither would be able to testify as such;
- Deister set forth his "theory" of the case against Woodworth, and that he was "convinced" of this theory;
- Deister disparaged Prosecutor Doug Roberts;
- Deister stated…"our case against this boy is very weak without the ballistic evidence… I don't think we will ever have a good case if this firearm cannot be identified as the shooter's weapon. Therefore, we are willing to take whatever steps necessary, within reason, to identify this weapon." Deister admitted that Roger Summers was a friend of his. (Master's Hearing pp. 369, Deister's Testimony)

Master's Hearing Exhibit 2

This is an unusual letter purportedly from Lyndel Robertson to Judge Lewis dated September 16, 1992. It was attached to Exhibit 1 and sent to the experts. It was prepared for Lyndel Robertson by Deister to improperly influence an expert. (Master's Hearing pp. 372 – 373) It contains the following:

- Deister describes the shooting and the effect on Lyndel Robertson's family, including the resulting financial cost;

- It again disparages Prosecutor Roberts and requests Judge Lewis' assistance in disqualifying him from the case.

That the prosecutors were unaware of and condoned these improper efforts is established by an internal memorandum from one assistant attorney general to another dated 6/4/1998, which states:

> "... Kenny and I tried it the first time. The ballistics testimony is critical – pretty much our only evidence. Both experts testified in the first trial and are trying to strengthen their test results/testimony. Thus, the expense is necessary, to say the least. This is a high profile long-shot-to-win case which is being followed by Court TV..." (Master's Hearing Exhibit 21, Appendix p.79)

Evan Todd Garrison

Mr. Garrison has been a firearms examiner with the Missouri Highway Patrol for 23 years, and is a "criminalist supervisor." (Master's Hearing pp. 548, 552) As a member of the Association of Firearms and Toolmark Examiners (AFTE), he identified the association's code of ethics which provides that:

> "Examiner is unbiased and refuses to be swayed by evidence or matters outside the specific materials in question. He is immune to suggestion, pressures and coercions inconsistent with the evidence at hand." (Master's Hearing pp. 552 – 554; Master's Hearing Exhibit 144)

It is important that a firearms examiner maintain the appearance that he is objective (Master's Hearing p. 553)

Prior to this Case, Steve Nicklin had only examined two .22 caliber firearms. (Master's Hearing p. 566) Nicklin indicated to him a willingness to go further in an "inconclusive" finding than he was. (Master's Hearing pp. 578, 579)

Sheriff Steve Cox

The present Livingston County Sheriff Steve Cox testified at the hearing both as a fact and expert witness. He was a young police officer with the city of Chillicothe Police Department when participated in the early stages of the Major Case Squad investigation into the Robertson shootings. (Master's Hearing pp. 31, 32, Cox Testimony) As a long time law enforcement officer, the Special Master treated him as an expert witness on the investigation of crime. (Master's Report p. 27, Master's Hearing p. 46, Cox Testimony)

Sheriff Cox testified that he has re-opened the Sheriff's Department investigation into the Robertson shootings. He investigated leads and evidence which had not been pursued in the original investigation, in addition to interviewing witnesses. (Master's Hearing pp. 33, 35 – 122, Cox Testimony) He reviewed the existing investigative file which had been under the charge of lead Deputy Gary Calvert after the Major Case Squad had been disbanded. Cox testified to several investigative leads and crucial witnesses that were not followed up on by Deister, Calvert or Deputy David Miller, including the following:

Mike Thistlethwaite

Mr. Thistlethwaite saw Thomure in Chillicothe at approximately 11:00 pm on the night of the shootings, contrary to Brandon's alibi that he was at home in bed in Independence, MO, some ninety miles away. His knowledge was included in a report prepared shortly after the shootings, however Thistlethwaite was never contacted by any investigator for the state. This fact was uncontradicted by Respondent. (Master's Hearing pp. 35, 36, 53, 54, 108, Cox Testimony and 596, Thistlethwaite Testimony; Master's Hearing Exhibit 20, Thistlethwaite Report)

Melissa Suschland

Ms. Suschland also saw Thomure in Chillicothe between 9:00 and 10:00 pm the night of the shootings. She was never followed up with by investigators or the prosecution after giving her information initially to members of the Major Case Squad shortly after the shootings. (Master's Hearing pp. 35, 53, 54 and 108, Cox Testimony; Master's Hearing Exhibit 139, Suschland Report)

Bob Fairchild

Bob Fairchild, Principal of Chillicothe High School, ran Brandon out of the school between 7:30 and 7:45 am the morning after the shootings, directly contradicting Brandon's alibi that he was at his mother's home in Independence, MO. until 6:50 am. It would normally take an hour and thirty minutes to an hour and forty-five minutes to drive. (Master's Report p. 27; Master's Hearing pp. 140, 142, 143 and 145, Fairchild Testimony) (See also above referenced testimony of June and Matt Cairns, Shelly Rucker and Mike Thistlethwaite)

Shannon Callahan

Ms. Callahan told Major Case Squad investigators shortly after the shootings that Brandon left a duffle bag in the back of her vehicle and that there were spent .22 bullet casings with it. (Master's Hearing pp. 41 – 44, Cox Testmony)

Other Impeaching Evidence as to

Brandon Thomure (Hagan) and Rochelle Robertson

Not only were June and Matt Cairns, Shelly Rucker and Connie Grell (see above) not followed up on, but the damning information given by them as to the motive and opportunity for Brandon to commit the crimes, as well as the possible ill motive of his girlfriend and victims' daughter, Rochelle Robertson, was among the facts evidently "deep-sixed" by Deputies Calvert and Miller three weeks after the shootings.

Based on Rochelle Robertson's admitted dishonesty to investigators about Brandon's prior behavior and whereabouts at the time of the crime, she was initially questioned as a suspect in the shootings. (Master's Hearing Exhibit 190, Rochelle Robertson 1994 deposition p. 16; Master's Hearing Exhibit 193, Rochelle Robertson's 2011 Deposition pp. 22 - 25; Master's Hearing Exhibit 47 and 48, Law Enforcement Interviews of Rochelle Robertson; Master's Hearing pp. 256 – 258, Price Testimony, and 533 – 536, Rochelle (Robertson) Koehly Testimony)

Angie (Smith) Gutshall

Ms. Smith was a next-door neighbor to the Robertson's. The morning after the shootings, Brandon called her out of class at Chillicothe High School and "... was anxious to know whether she had seen anything at the time of the shootings..." Although she gave this information to the Major Case Squad investigators shortly after the shootings, she was never interviewed by Calvert, Deister, Miller or any other State investigator. (Master's Hearing pp. 155, 156, Gutshall Testimony; Master's Hearing Exhibit 62, Angie (Smith) Gutshall report)

Roger Wolf

Mr. Wolf lived approximately ¼ mile from the Robertson's around the time of the shootings. He heard a vehicle accelerate away from near the Robertson's residence and the opposite of the Woodworth's residence, and pass his house at a high rate of speed. He was never interviewed by investigators. (Master's Hearing pp. 44 – 51, Cox Testimony; Exhibit L of Master's Hearing Exhibit 176, Deister's 2011 Deposition)

Tire Track Evidence

Tire tracks were observed, measured and photographed by the first investigators at the scene. The tracks were in a gravel driveway immediately across the road from the Robertson house and indicated acceleration from the scene (towards Mr. Wolf's residence). Inasmuch as Petitioner lived diagonally across the road from the Robertsons (in the opposite direction of the Wolf's residence), the evidence, coupled with other witnesses, suggested a suspect other

than Petitioner. Inexplicably, they were never compared to any vehicle or followed up on. (Master's Hearing pp. 47-49 and 51, Cox Testimony)

Brandon Thomure (Hagan)

Sheriff Cox also testified to Brandon Thomure's past criminal activities, which included instances of assaulting women and threatening to kill Aaron Duncan. The Master found that this was relevant to show Brandon Thomure's motive and pattern of actions (Master's Report p. 28)

The Special Master made further findings regarding Brandon Thomure. At the hearing on June 2, 2011, Brandon Thomure was called as a witness by Petitioner. Rather than answer questions about the Robertson shooting incident, Brandon Thomure invoked his Fifth Amendment privilege not to incriminate himself as to all questions that might be asked of him. In referencing Brandon Thomure's order of protection violations, certain self-incriminating statements made to investigators and his demeanor in court, the Special Master found that:

> "... If there ever was a set of facts that lent itself to an inference that if Thomure had answered the anticipated questions truthfully, the answers would have been unfavorable to him, this is it." (Master's Report p. 30, Master's Hearing pp. 507 – 511, Hagan (Thomure) Testimony)

Aaron Duncan

Mr. Duncan met Brandon Thomure in 2007 in the Lake of the Ozarks area. He was a mixed martial arts participant, while Brandon Thomure was a promoter of those fights. (Master's Hearing pp. 315 – 316, Duncan Testimony) After Duncan refused to loan Thomure $5,000.00 for his new fight club, Thomure threatened to kill Duncan, his wife and children and made a series of threatening phone calls to Duncan's residence. Thomure kept a series of news clippings about the Robertson shootings in a box with his wrestling trophies and had previously shown them to Duncan, Brandon told Duncan "You saw what I can do. I got away with one murder, what makes you think I can't do it again." Brandon further added that he knew Woodworth was innocent. (Master's Hearing pp. 321-323, Duncan Testimony) Duncan reported these threats immediately to law enforcement officers. [16]

Sheriff Cox's Expert Opinions

Regarding the Investigation of the Robertson Crimes

The Special Master found "Sheriff Cox to be both credible and knowledgeable, both as a fact witness and as an expert." (Master's Report p. 29) He credited Cox's opinions and testimony that:

[16] See police report of Aaron Duncan to Miller County Sheriff's Department. State's Exhibit K at Master's Hearing.

> "(f)rom the time that Deister was involved ... (the investigation) ... was pointed at Mark Woodworth. I don't believe it was well-rounded. I don't believe that the proper leads were followed that would - - could possibly take you in a different direction...
>
> ... there's parts (of the investigation) that are unethical and unprofessional and would hinder the integrity of the case ..." (Master's Report p. 28; Master's Hearing p. 58, Cox Testimony)

The master credited Cox's testimony that the acts of Deister and Deputy Calvert showed "... a lack of credibility of the investigation and any attempt to ascertain the truth..." (Master's Report p. 28)

In addition to the above referenced witnesses and evidence, the following evidence supports the Master's finding that the investigators showed no interest in "ascertaining the truth":

Chris Ruoff

Mr. Ruoff testified at both trials that he observed a vehicle in the Robertson driveway at the time of the crimes. At the hearing he testified that Deister and Calvert tried to convince him that he did not, or could not see a vehicle. Deister and Calvert, in 1992 wrongfully accused Ruoff of having an affair with Cathy Robertson, and having his own motive to commit the crimes. Ruoff testified that he heard Scott Robertson, the only son of Lyndel and Cathy Robertson, say that

immediately after the shootings he heard a vehicle start up in the driveway. (Master's Report p. 25, Master's Hearing pp. 173 – 174, Ruoff Testimony)

Max Smith

Mr. Smith, father of Angie (Smith) Gutshall and Robertson's next-door neighbor, testified that the Robertson driveway was visible from the road, contrary to the urgings of Calvert and Deister. He was never contacted by investigators. (Master's Report p. 25; Master's Hearing pp. 164, 165, Smith Testimony)

Maurice Eskew

Maurice Eskew was a sheriff's deputy with the Livingston County Sherriff's Department the night of the shootings. He was assigned to guard the scene until sunrise. Eskew testified that you could see the front of the driveway from the road that night. (Master's Report p. 24; Master's Hearing pp. 354, 355, Eskew Testimony)

In addition, Eskew testified that deputy Paul Frey told him that he, Frey, had in fact lifted the fingerprint from a box of .22 shells allegedly linked to Petitioner. This is contrary to the trial testimony of Deputy Miller, who testified at both of Petitioner's trials that it was he, Miller, who lifted the prints. (Master's Report p. 24; Miller First Trial pp. 593, 594, 924, and 925; Miller Second Trial pp. 249 - 252; Master's Hearing pp. 352, 353, Eskew Testimony) This evidence was uncontradicted by the State. This raises a serious chain of custody issue as to one of the State's ostensibly crucial pieces of evidence placing Petitioner at the scene of the crime.

OTHER SIGNIFICANT EVIDENCE

Doug Roberts

Doug Roberts was the duly elected Livingston County Prosecuting Attorney at the time of the shootings and the indictment of Woodworth. He testified that he did not boycott Judge Lewis' grand jury, that because of his disqualification, he was never notified of its convening. He testified that Kenny Hulshof never contacted him about his letter to Judge Lewis and the fact that the victim, shortly after the crimes, had been "adamant" that someone other than Woodworth be prosecuted. (Master's Hearing pp. 271 – 274)

Kevin Price

Mr. Price testified at the Master's hearing that the early morning hours after the crimes, he went to St. Joseph to pick up Rochelle Robertson from college and bring her back to Chillicothe. At that time, Rochelle indicated to him that she had talked on the telephone to Brandon at his residence in Independence, MO at 11:00 p.m. the night of the shootings and, therefore, Brandon could not have committed the crimes. (Master's Hearing pp. 255 – 258, Price Testimony; Master's Hearing Exhibit 108 and 110)

Significantly, Rochelle Robertson soon changed her story, told investigators she was too tired to call Brandon after getting off work at 10:30 p.m. and never called him that night. (Master's Hearing Exhibit 121, transcript of Rochelle Robertson Interview pp. 35; Master's Hearing Exhibit 190, Rochelle Robertson's 1994 Deposition p. 16; Master's Hearing Exhibit 193, Rochelle

Robertson's 2011 Deposition pp. 22-25; Master's Hearing pp. 533-536, Rochelle Robertson Testimony)

Ron Motley

Mr. Motley, Petitioner's uncle, testified that he had a conversation with prosecutor Hulshof during the first trial. Hulshof told him that he did not believe Woodworth was guilty, but that going forward with the case would result in the real killer coming forward. (Master's Hearing p. 194 – 195, Motley Testimony)

Phil Thompson

Mr. Thompson, investigator for Woodworth's first trial defense counsel James Wyrsch and later for second trial counsel William Kutmus, testified that he inquired of Kenny Hulshof about rumors he had heard that there were letters regarding the grand jury and wanted to obtain copies of them, Hulshof responded that the grand jury was still investigating, was secret, and that he was unable to produce them. (Master's Hearing Exhibit 196, Phil Thompson 2011 Deposition p. 10) Further, he inquired of Calvert whether there were any violations by Brandon with respect to Rochelle Robertson's ex parte order of protection, but Calvert told him at the time there were none. (See Affidavit signed by Phil Thompson, filed with the Special Master, Appendix pp. 80 - 81)

John Williams

Mr. Williams, a hired hand of Lyndel Robertson at the time of the crimes, testified that it was the intention and purpose of both him and Lyndel Robertson to oust Petitioner's father from the farming partnership. Williams and Robertson

would then become partners. (Master's Hearing Testimony pp. 540 – 542, Williams Testimony; Master's Hearing Exhibit 152, John Williams' statement, pp. 30 – 32) Williams was one of the persons who consulted, along with Calvert, Deister and Robertson, with Judge Lewis' attorney, Brent Elliott, during the course of Deister's and Calvert's investigation of Woodworth. (Exhibit Y of Master's Hearing Exhibit 176, Deister's 2011 Deposition pp. 21, 22 and 151; Master's Hearing pp. 373, 374, 377, 378, 382, 399, Deister Testimony and Master's Hearing pp. 542 and 543, Williams Testimony)

Jim Johnson and Judge Griffin

Court records indicate that Judge Griffin presided over at least one of Jim Johnson's stealing cases during the investigation and proceedings against Woodworth, in which Johnson was found guilty and sentenced to 15 years. On May 4, 1995, Judge Griffin sustained Johnson's 29.15 motion, however there is no record that he filed the required findings of fact and conclusions of law. Johnson listed Lyndel Robertson as one of his witnesses. Johnson, apparently as part and parcel of the "bartered" deals, subsequently pleaded guilty in front of Judge Lewis and received the reduced sentences of three years concurrent with multiple other sentences, including those from Holt and Davies Counties. (Appendix pp.82 - 86, *Johnson v. State* Davies County court file, Case No. CV394-76CC)

At the outset of the first trial, there was an on the record discussion with Judge Griffin about Jim Johnson. Defense attorney Wyrsch stated the following:

> "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 Claude Woodworth this morning, and we've also ourselves counseled with Mark this morning." (First Trial p. 30)

This circumstance supports the Master's findings as to the indescribable "judicial conflicts" in this case.

Mark Mellor

Mr. Mellor visited Lyndel Robertson in the hospital shortly after the shootings and heard Lyndel Robertson say that he saw who shot him and it was Brandon. (Master's Hearing pp. 178 and 179, Mellor Testimony) Deister and Calvert tried to discourage him from his statements by accusing him of having had an affair with Cathy Robertson. (Master's Hearing pp. 183, 184, Mellor Testimony)

Phyllis Penniston

Mrs. Penniston took food to the Robertson house shortly after Lyndel's release from the hospital. At that time, Lyndel expressed that he was sure the person who shot him and his wife was Brandon. (Hearing Testimony p. 130, Penniston Testimony)

Mindy (Woodworth) Stedem and Matt Penn

Ms. Woodworth and Mr. Penn observed the dusty condition of Claude Woodworth's gun when it was initially taken into custody by David Miller shortly after the shooting. Miller took no precautions to preserve the dusty condition and, in fact, stuck it in his coat pocket, thus disturbing the gun's condition when seized. This testimony was unconradicted by the State. (Master's Hearing pp. 124 – 126, Stedem Testimony and Master's Hearing p. 190, Penn Testimony)

State's Hearing Witnesses

At the Special Master's Hearing, the State offered the testimony of only two witnesses, Kenny Hulshof and Rachel Smith. (Their pre-hearing depositions were filed with the Master)

Kenny Hulshof

During direct examination Hulshof attempted to establish that the Lewis letters were turned over to the defense because it was policy to put numbers on the bottom right corner of each document produced, so that they would know which documents were produced. However, on cross examination he admitted that there are no such numbers on Master's Exhibit's 1, 2 and 3. (Master's Hearing pp. 648, 649, 652)

During questioning by the Master, Hulshof admitted that the documents were exculpatory (*Brady* material) and should have been produced, but were not. (Master's Hearing pp. 691-695)

In his deposition, he characterized the actions of Terry Deister in attempting to influence the British ballistics experts as "untoward". (Master's Hearing Exhibit 180 p. 38)

Rachel Smith

The Master disagreed with Rachel Smith's hearing testimony that the Lewis letters were not *Brady* material. Although she tried to establish that Master's Exhibits 1, 2, and 3 were part of the file she made available to defense counsel, this was contradicted by her deposition testimony that she was unable to remember the first time she saw the Lewis letters. (Master's Hearing pp. 613 – 624)

Smith identified the following:

1.) A discovery inventory letter provided to the defense, which contains no reference to Master's Exhibits 1, 2 and 3. (Master's Hearing pp. 618-620)

2.) A pre-trial to-do-list she prepared containing the entry "Meet with Brandon's mom, set up alibi." (Master's Hearing pp. 626 – 628; Master's Hearing Exhibit 28, Appendix pp.87 - 88)

3.) An internal Attorney General memorandum indicating the following:

> "I (think) I need approval to send John Cayton, ballistics expert, to England with high-tech equipment and a gun to work with our expert in England (airfare and app. 3 days lodging). This case is scheduled to be re-tried in August (me and the new person?). Kenny

> and I tried it the first time. The ballistics testimony is crucial - - pretty much our only evidence. Both experts testified in the first trial and are trying to strengthen their test results/testimony. Thus the expense is necessary, to say the least. This is a high profile long-shot-to-win case which is being followed by Court TV. Please advise re expense and case assignment as soon as possible. Thanks John...." (Master's Hearing Exhibit 21)

The Special Master's Conclusions

After reviewing the totality of the circumstances, including the voluminous court records of the case, hearing testimony, exhibits and depositions, the Special Master came to the following conclusions:

1.) "There was nothing fundamentally fair about the investigation, prosecutions and convictions of Petitioner; (Master's Report p. 30)

2.) The circumstances of the prosecutions and convictions are sufficiently rare and exceptional as to justify a review of the totality of the circumstances; (Master's Report p. 30)

3.) In and of itself, the *Brady* violation presented by the Lewis letters requires the granting of habeas relief; (Master's Report p. 30)

4.) Judge Lewis inappropriate actions, the "un-ending conflicts", "investigative misconduct" and the other "significant" *Brady*

violations by agents of the state, clearly manifested that an injustice has occurred; (Master's Report p. 30)

5.) Evidence of the "real underlying issues" was not disclosed and "...what previously amounted to a 'thin' case became a steamroller..." (Master's Report p. 31)

6.) The investigation, led by a "conflictually employed" private investigator, was not conducted with "...a fair eye for ascertaining the truth..." (Master's Report p. 31)

7.) The prosecution was "replete with *Brady* violations", and Woodworth was prejudiced thereby; (Master's Report p. 31)

8.) Woodworth's "guaranteed judicial process was ignored" by a judge who "lost sight of his judicial sense of fairness" who assumed the de facto role of prosecutor; (Master's Report p. 31)

9.) The Special Master was "...hard-pressed to come up with a word or phrase in the English language that fairly describes the conflicts that existed with regard to Woodworth's judicial process..." (Master's Report p. 33)

10.) Woodworth has met his burden of proof that he is entitled to habeas corpus relief "clearly and convincingly", "...not only on a finding of cause and prejudice but also on a finding of manifest injustice." (Master's Report p. 34)

11.) Woodworth's "...claims of not having a verdict worthy of confidence are well supported by clear and convincing evidence." (Master's Report p. 35)

12.) Because this case did not involve DNA testing or recantation of witnesses, the Master did not conclude that Woodworth was actually innocent. However, he did say that:

> "... at best, though, the State's evidence is thin...very thin. This Court is skeptical that a jury of reasonable men and women, with a fair look, would find Woodworth guilty beyond a reasonable doubt." (Master's Report p, 35)

Recommendation of the Special Master

The Master recommended to this Court that Woodworth's conviction should be set aside, the case should be reviewed by an independent prosecutor "exercising prosecutorial discretion," and if there is a decision to retry him, there should be an independent judge appointed. (Master's Report p. 35)

POINTS RELIED ON

I. PETITIONER MARK WOODWORTH IS ENTITLED TO THE ISSUANCE OF A WRIT OF HABEAS CORPUS DISCHARGING HIM FROM HIS UNCONSTITUTIONAL CONVICTIONS OF MURDER 2ND DEGREE, ASSAULT 1ST DEGREE, ARMED CRIMINAL ACTION (2 COUNTS) AND BURGLARY 1ST DEGREE AND CONSECUTIVE SENTENCES OF FOUR LIFE SENTENCES PLUS FIFTEEN YEARS IMPOSED BY THE CIRCUIT COURT OF CLINTON COUNTY AS RECOMMENDED BY THE SPECIAL MASTER APPOINTED BY THIS COURT FOR THE REASON THAT THE TOTALITY OF THE CIRCUMSTANCES ESTABLISH A COMPREHENSIVE DENIAL BY THE STATE OF PETITIONER'S CONSTITUTIONAL RIGHTS TO DUE PROCESS AND FUNDAMENTAL FAIRNESS, BY THE STATE'S FAILURE TO DISCLOSE MATERIAL, EXCULPATORY EVIDENCE, BY AN UFAIR JUDGE WHO ASSUMED THE ROLE OF PROSECUTOR AND IGNORED PETITIONER'S GUARANTEED RIGHTS TO DUE PROCESS, BY INVESTIGATORS WHO CONDUCTED THE INVESTIGATION OF PETITIONER WITH NO

ATTEMPT TO ASCERTAIN THE TRUTH, BY THE STATE'S ALLOWING THE INVESTIGATION TO BE LED BY PERSONS WHO WERE ACTING AS PRIVATE PROSECUTORS, AND THE REPRESENTATION OF A DISLOYAL ATTORNEY, RESULTING IN A MANIFEST INJUSTICE AND A VERDICT NOT WORTHY OF CONFIDENCE, IN VIOLATION OF THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, ARTICLE I, SECTION 10 OF THE CONSTITUTION OF MISSOURI, AND MISSOURI SUPREME COURT RULE 25.03, ALL AS CORRECTLY FOUND AND CONCLUDED BY THE SPECIAL MASTER TO HAVE BEEN ESTABLISHED CLEARLY AND CONVINCINGLY BY NEWLY DISCOVERED EVIDENCE AND HIS REVIEW OF THE TOTALITY OF THE CIRCUMSTANCES

State ex rel Engel v Dormire, 304 S.W.3d 120, 125, 126, 128 (Mo.Banc 2010)

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

Kyles v Whitley, 514 U.S. 419, 434, 435, 437, 442, 444, 445, 447 (1995)

State v Harrington, 534 S.W.2d 44 (Mo 1976)

II. THE LACK OF ANY CREDIBLE EVIDENCE REMAINING AGAINST PETITIONER AND THE CONDUCT OF PROSECUTORS, AGENTS FOR THE PROSECUTION AND CIRCUIT JUDGE KENNETH LEWIS, AS FOUND AND CONCLUDED BY THE SPECIAL MASTER TO HAVE BEEN ESTABLISHED CLEARY AND CONVINCINGLY WAS SO COMPREHENSIVELY AND EGREGRIOUSLY VIOLATIVE OF PETITIONER'S DUE PROCESS RIGHTS AS GUARANTEED BY THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION ARTICLE I, SECTION 10 OF THE CONSTITUTION OF MISSOURI, AS TO REQUIRE AN ORDER BY THIS COURT VACATING PETITIONER'S CONVICTIONS AND SENTENCES OUTRIGHT AND PREVENTING THE STATE FROM BEING ALLOWED TO ATTEMPT TO TRY PETITIONER FOR A THIRD TIME

State ex rel Jackson Co. Prosecuting attorney v Prokes,363 S.W.3d 71, 77, 78

Taylor v State, 262 S.W.3d 231 (Mo.Banc 2008)

State v Bowman, 337 S.W.3d 679, 689 (Mo 2011)

Rochin v California, 342 U.S. 165 (1952)

ARGUMENT

I. PETITIONER MARK WOODWORTH IS ENTITLED TO THE ISSUANCE OF A WRIT OF HABEAS CORPUS DISCHARGING HIM FROM HIS UNCONSTITUTIONAL CONVICTIONS OF MURDER 2ND DEGREE, ASSAULT 1ST DEGREE, ARMED CRIMINAL ACTION (2 COUNTS) AND BURGLARY 1ST DEGREE AND CONSECUTIVE SENTENCES OF FOUR LIFE SENTENCES PLUS FIFTEEN YEARS IMPOSED BY THE CIRCUIT COURT OF CLINTON COUNTY AS RECOMMENDED BY THE SPECIAL MASTER APPOINTED BY THIS COURT FOR THE REASON THAT THE TOTALITY OF THE CIRCUMSTANCES ESTABLISH A COMPREHENSIVE DENIAL BY THE STATE OF PETITIONER'S CONSTITUTIONAL RIGHTS TO DUE PROCESS AND FUNDAMENTAL FAIRNESS, BY THE STATE'S FAILURE TO DISCLOSE MATERIAL, EXCULPATORY EVIDENCE, BY AN UFAIR JUDGE WHO ASSUMED THE ROLE OF PROSECUTOR AND IGNORED PETITIONER'S GUARANTEED RIGHTS TO DUE PROCESS, BY INVESTIGATORS WHO CONDUCTED THE INVESTIGATION OF PETITIONER WITH NO

ATTEMPT TO ASCERTAIN THE TRUTH, BY THE STATE'S ALLOWING THE INVESTIGATION TO BE LED BY PERSONS WHO WERE ACTING AS PRIVATE PROSECUTORS, AND THE REPRESENTATION OF A DISLOYAL ATTORNEY, RESULTING IN A MANIFEST INJUSTICE AND A VERDICT NOT WORTHY OF CONFIDENCE, IN VIOLATION OF THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, ARTICLE I, SECTION 10 OF THE CONSTITUTION OF MISSOURI, AND MISSOURI SUPREME COURT RULE 25.03, ALL AS CORRECTLY FOUND AND CONCLUDED BY THE SPECIAL MASTER TO HAVE BEEN ESTABLISHED CLEARLY AND CONVINCINGLY BY NEWLY DISCOVERED EVIDENCE AND HIS REVIEW OF THE TOTALITY OF THE CIRCUMSTANCES

STANDARD OF REVIEW

Findings of Fact and Conclusions of Law by a Special Master

"Where the master has the opportunity to view and judge the credibility of witnesses, the findings and conclusions of the master are accorded the weight and deference given to trial courts in court-tried cases... In such cases, the master's findings and conclusions will be sustained... 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. This Court should exercise the power to set aside the findings and conclusions on the ground that they are against the weight of the evidence with caution and with a firm belief that the conclusions are wrong." *State ex rel. Lyons v Lombardi and Koster*, 303 S.W.3d 523-525 (Mo.Banc 2010); *State ex rel. Winfield v Roper*, 295 S.W.3d 909, 910 (Mo.Banc 2009); *Murphy v Carron*, 536 S.W.2d 30, 32 (Mo.Banc 1976). "...The trial court has the 'Superior opportunity to determine the credibility of the witness.'" *State v Johnson*, 207 S.W.3d 24, 44 (Mo. 2006), quoting *State v. Rousan*, 961 S.W.2d 831, 845 (Mo. 1998). Thus, it makes practical sense to defer to the master's factual findings where, as here, the master conducted an evidentiary hearing, reviewed depositions, balanced the testimony and made credibility determinations.

Habeas Corpus Standards

"The habeas corpus petitioner has the burden of proof to show that he is entitled to habeas corpus relief." *Lyons* (supra); *State ex rel. Nixon v Jaynes*, 73 S.W.3d 623, 624 (Mo.Banc 2002)

"Habeas Corpus is the last judicial inquiry into the validity of a criminal conviction and serves as a 'bulwark against convictions that violate fundamental fairness.'" *State ex rel. Amrine v Roper*, 102 S.W.3d 541, 545 (Mo.Banc 2003) (quoting *Engle v Isaac*, 456 U.S. 107, 126, 102 S.Ct. 1558, 71 L.Ed.2d 783 (1982).

"(A) writ of habeas corpus may be issued when a person is restrained of his or her liberty in violation if the constitution or laws of the state or federal government." Id. Habeas proceedings, authorized under Rule 91, are limited to determing the facial validity of a petitioner's confinement. *State ex rel. Simmons v White*, 866 S.W.2d 443, 445 (Mo.Banc 1993)

Habeas claims may be reviewed only if they present jurisdictional issues or "circumstances so rare and exceptional that a manifest injustice will result if review is not taken." *State ex rel. Engel v Dormire*, 304 S.W.3d 120, 125 (Mo.Banc 2010).

Where an application for habeas relief is time-barred, procedural default may be overcome by a showing of cause and prejudice, manifest injustice or a jurisdictional defect. To prove cause and prejudice, a petitioner must establish that the claim was not timely raised because of some objective factor external to the defense. *Engel*, 304 S.W.3d at 126 (Citing *Strickler v. Greene*, 527 U.S. 263, 283 n.24, 119 S.Ct. 1936, 144 L.Ed2d 286 (1999).

The claim may be proved by alleging and proving a *Brady* violation that material evidence favorable to the petitioner was requested but not disclosed, either willfully or inadvertently, and that petitioner thereby suffered prejudice. *Brady v Maryland*, 373 U.S. 83 (1963)

In order to establish prejudice, a petitioner "...must demonstrate that the newly discovered evidence resulted in a verdict not worthy of confidence." State ex rel. *Griffin v Denney*, 347 S.W.3d 73, 77 (Mo.Banc 2011) (citing *Engel*, 304

S.W.3d at 129, *Kyles v Whitley*, 514 U.S. 419, 434, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995))

"(S)o long as ...(a petitioner) ... establishes the prejudice necessary to support his *Brady* claims, he will have shown the required prejudice to overcome the procedural bar for habeas relief." *Engel*, 304 S.W.3d at 126, *Griffin*, 304 S.W.3d at 77.

"Justice requires that this Court consider all available evidence uncovered following...(the petitioner's) trial that may impact his entitlement to habeas relief." and "...(C)ourts must consider the cumulative effect of excluded evidence in determining if a *Brady* violation occurred." *Engel*, 304 S.W.3d at 126.

"When reviewing a habeas petition premised on an alleged *Brady* violation, this Court considers all available evidence uncovered following the trial." *Griffin*, 347 S.W.3d at 77.

Prosecutor's Duty of Disclosure

Rule 25.03 governs disclosure requirements in criminal proceedings, providing in pertinent part:

(A)... the state shall, upon written request of defendant's counsel, disclose to defendant's counsel such part or all of the following material and information within its possession or control designated in said request:

> (9) Any material or information, within the possession or control of the state, which tends to negate the guilt of the defendant as to the offense charged...

(C) If the defense in its request designates material or information which would be discoverable under this Rule, if in the possession or control of the state, but which is, in fact, in the possession or control of other governmental personnel, the state shall use diligence and make good faith efforts to cause such materials to be made available to the defense counsel... (emphasis added)

"Under Rule 25.03(c), the state has an affirmative duty to find even that evidence in the possession of other government personnel." *Merriweather v State*, 294 S.W.3d 52, 55 (Mo.Banc 2009).

A failure to comply with the Rule is not an error that can be made in good faith. *Taylor v State*, 262 S.W.3d 231 (Mo.Banc 2008)

"The due process implications of a failure to disclose potentially exculpatory material render ... (a)... claim of a Rule 25.03 violation an issue of 'fundamental fairness.'" *Merriweather*, 294 S.W.3d at 55.

ARGUMENT

In *Brady v Maryland*, 373 U.S. 83 (1963), the Supreme Court held that

> "...the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution."
>
> Id. at 87.

In *Strickler v Greene*, 527 U.S. 263 (1999), the Court established three essential elements of a *Brady* claim:

> "...the evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the state, either willfully or inadvertently; and prejudice must have ensued..." Id. at 281, 282.

It further held that the *Brady* rule applies to evidence:

> "...known only to police investigators and not the prosecutor...(I)n order to comply with *Brady*, therefore 'the individual prosecutor has a duty to learn of any favorable evidence known to others acting on the government's behalf..., including the police.'" Id. at 280-281; quoting from *Kyles v Whitley*, 514 U.S. 419, 437 (1995)

This Court has held that under Rule 25.03 the prosecutor's duty includes an

> "...affirmative requirement of diligence and good faith on the state to locate records not only in its own possession or control but in the control of other government personnel."

Although violations of Rule 25.03 are trial errors which normally must be raised on direct appeal, such claims may be considered in a post-conviction action where there are exceptional circumstances "in the interest of fundamental fairness." *Merriweather v State*, 294 S.W.3d 52, 54-55 (Mo.Banc 2009)

CAUSE AND PREJUDICE – PROCEDURAL DEFAULT

Throughout the habeas court proceedings, Respondent has asserted that Petitioner is procedurally barred from raising these *Brady* issues. A habeas petitioner can overcome a claim of procedural default by showing "cause and prejudice" or that there are "circumstances so rare and exceptional that a manifest injustice 'will result if review is not taken…'" *State ex rel Engel v Dormire*, 304 S.W.3d 120, 125 (Mo.Banc 2010), *State ex rel Amrine v Roper*, 102 S.W.2d 541, 545 (Mo.Banc 2003).

"Cause" is defined as a factor external to the defense or a cause for which the defense is not responsible, for example a *Brady* claim of the state's non-disclosure of exculpatory evidence. *Murray v Carrier*, 477 U.S. 478, 488 (1986); *Strickler v Greene*, (supra, at 283); *State ex rel Engel v Dormire* (supra, at 126)

"In the context of whether… *Brady* claims are barred procedurally from habeas review, prejudice is identical to this Court's assessment of the prejudice undertaken in assessing… *Brady* claims. Consequently, so long as (the habeas petition) establishes the prejudice necessary to support his *Brady* claims, he will have shown the required prejudice to overcome the 'procedural bar for habeas relief." *Engel* (supra, at 126)

"(B)efore determining whether the (non-disclosed) evidence meets the test for *Brady* prejudice, this Court must assess whether the evidence at issue is material to (the) case." Citing *Strickler*, 527 U.S. at 282. Evidence is material if there is a reasonable probability that its disclosure to the defense would have

caused a different result in the proceeding. Citing *Strickler*, 527 U.S. at 280. The materiality standard for *Brady* claims is established when 'the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.' *Kyles*, 514 U.S. at 435. 'The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence.' Id at 434." *Engel* (supra, at 128)

BRADY VIOLATIONS

The Lewis Letters

The Special Master was "clearly convinced" that Woodworth had requested discovery, that the State's disclosure should have included the Lewis letters, as they constituted *Brady* materials, but did not and that Woodworth was prejudiced "by suffering a verdict not worthy of confidence." (Master's Report p. 19)

The Special Master found the Lewis letters material and favorable to Woodworth because they "make it clear that the surviving victim had complained to the judge; that the prosecutor was possessed of evidence that the surviving victim had previously requested that some other person be charged...; that Judge Lewis was in a rift with Prosecutor Roberts; and that Judge Lewis was knowledgeable about the facts of the case and was sharing that knowledge." (Master's Report p. 17)

The master concluded that non-disclosure and "the inability of Woodworth's defense counsel to use the Lewis letters and the evidence uncovered via the Lewis letters was highly prejudicial to Woodworth." (emphasis added) (Master's Report p. 17)

He found the following prejudice:

1.) "In both trials, Woodworth's efforts to impeach key prosecution witnesses such as Lyndel Robertson, Thomure and Calvert were deprived of substantial evidentiary force..."

2.) "...Prosecutors were able to claim much greater evidentiary force than was warranted from the testimony of Robertson, Thomure and Calvert."

3.) Use of the letters at the first trial, wherein the Appellate Court characterized the State's evidence as "thin", would have "substantially augmented" Woodworth's argument that the trial court should allow evidence that Thomure was the shooter (which it did not and which ruling resulted in the reversal of the first conviction).

4.) Further, had the evidence of Thomure been allowed, "a 'thin' case may have turned into a 'not guilty' case: the slightest bit of defense evidence eroding the force of the State's witnesses or bolstering the weight of the defense witnesses may have tipped the scales in favor of Woodworth."

5.) Disclosure "would have significantly impacted" on the ability of the defense to mount a "meaningful" defense during the grand jury process and to the indictment.

6.) "Though doubtful, it may have even deterred Prosecutor Hulshof from pursuing the case against Woodworth in the first instance."

(Master's Report pp. 17 – 18)

The Master concluded that "...this Court is clearly convinced that if there had been a balanced investigation, had there been a fair judge *ab initio*, had the State not violated *Brady*, no jury would have convicted Woodworth of the crimes charged..." (emphasis added) (Master's Report p. 35)

The master concluded that his finding as to the Lewis letters was sufficient in and of itself to require the granting of habeas corpus relief.

Reports of Thomure's Violations of Rochelle Robertson's

Ex Parte Order of Protection

The Master found another significant *Brady* violation, the state's non-disclosure of several reported violations of Rochelle Robertson's ex parte order of protection by Brandon Thomure. There was no reference to these reports in the order of protection court file, nor were law enforcement reports placed within the Robertson shooting file or produced to the defense. Petitioner first learned of them from the deposition of Deputy Gary Calvert on April 15, 2011. (Master's Report pp. 19, 20)

The master credited the unrefuted testimony of present Livingston County Sheriff Steve Cox that the violation reports should have been included in the Robertson shooting file, but were not.

The master found that the files and violation reports were not disclosed to the defense, in that they were not numbered (per Hulshof) nor were they contained in Rachel Smith's discovery inventory letter.

The reports of violations were material and their non-disclosure prejudiced Petitioner, in the following respects:

1.) They would have "served to substantiate the rebuttal of the State's evidence that Thomure had never threatened Cathy or Rochelle Robertson.

2.) They would have shown that Rochelle was untruthful about Thomure's threats and "demonstrated at the very least, Rochelle's intention to protect her boyfriend, Thomure, from prosecution."

3.) They "would have provided impeachment evidence for use with Thomure, Lyndel Robertson, Gary Calvert…"

4.) They would have been useful to show the lack of credibility of the investigation and prosecution as a whole and in particular in corroborating the "apparent pattern of not following up on witnesses and investigative leads which tended to contradict Thomure's alibi."

5.) They "would have substantially augmented the defense theory that another person had the motive and opportunity to commit the crime, and, in turn, served to erode the State's case... in that regard."

(Master's Report pp. 19 – 20)

This non-disclosure entitled Petitioner to habeas relief.

Petitioner has clearly and convincingly satisfied the three part test for establishing a *Brady* violation and for overcoming procedural default. The Lewis letters and the evidence of reported protection order violations were favorable to the defense, they were suppressed by the State either willfully or inadvertently and they prejudiced him. He is entitled to habeas relief.

NEWLY DISCOVERED EVIDENCE

Brandon's Motive, Opportunity and Alibi Evidence

News Accounts of the Master's hearing in 2011 prompted several witnesses to contact Sheriff Cox regarding information they had conveyed to investigators only a few weeks after the shootings.

Connie Grell

Rochelle Robertson was in Connie Grell's hair salon two weeks before the shooting. Rell heard Rochelle say that "there was a lot of hate between her parents and Brandon (Thomure)..." and that "...(he) wished they were dead or could kill them." Three weeks after the shootings, she gave this information to Deputy David Miller (who was a family friend) however, Miller never followed up with her or prepared any report of this. (Grell's 2011 Deposition pp. 5 – 8)

The Cairns Family

June Cairns observed Thomure in her Chillicothe home at approximately 6:30 a.m. the morning after the shooting, contradicting Thomure's alibi.

Approximately two weeks before the shootings Cairns, her son Matt and daughter Shelly (Cairns Rucker), observed Thomure in their Chillicothe residence having a telephone conversation with Cathy Robertson. Thomure was very angry and threatened Mrs. Robertson, stating "Fuck you bitch, I'll slit your throat.". Three weeks after the shootings June and Matt Cairns gave this information to Deputy Miller, however Miller's report does not contain this information, nor did Miller ever contact them again. (Master's Report p. 29; J. Cairns' Deposition pp. 4 - 7 and J. Cairns Deposition Exhibit 1; Matt Cairns Deposition pp. 7-8, M. Cairns' Deposition Exhibit 1 and 2; Shelly Rucker Deposition pp. 6, 12 and 13 and Rucker's Deposition Exhibit 1)

The State presented no contradicting evidence or testimony to the Cairns and Grell testimony.

Deputy Miller, as a member of the investigative team, committed a *Brady* violation by concealing evidence which was material and favorable to the defense. This evidence would have augmented the strength of the cross-examination and the defense theory that another person had the motive and opportunity to commit the crime. The defense would have been able to present compelling evidence that the police investigation was shoddy and lacked integrity and credibility.

In *Kyles v Whitley* 514 U.S. 419 (1995), the Court granted habeas corpus relief to an accused who had been convicted of murder, but later discovered that the prosecution had suppressed *Brady* evidence vitiating the state's identification testimony against Kyles. The prosecution's case relied heavily on eyewitness identification. The *Kyles* Court emphasized that the suppression of contradictory witness statements known to the police had deprived *Kyles* of the ability to attack not only the eyewitness, but also the police investigation. (Id at 442) The Court held that:

> "(D)amage to the prosecution's case would not have been confined to the evidence of the eyewitnesses, for... (the *Brady* material)... would have raised opportunities to attack not only the probative value of crucial physical evidence and the circumstances in which it was found, but the thoroughness and even the good faith of the investigation, as well ... (and) ... would have revealed a remarkably uncritical attitude on the part of police." (Id at 444)

The ***Kyles*** Court further noted that:

> "A common trail tactic of defense lawyers is to discredit the caliber of the investigation or the decision to charge the defendant, and we may consider such use in assessing a possible *Brady* violation." (Id at 445) Citing *Lindsey v King*, 769 F.2d 1034, 1042 (CA 5 1985)

Here, the identification issue turned on the denial by the eyewitness, Lyndel Robertson, that he had originally identified Thomure as the perpetrator.

Had the defense possessed the Cairns evidence, the protective order violations, and the Lewis letters this testimony would have been substantially weakened. The defense could have mounted a vigorous attack on the motives, integrity and credibility of the investigation and the prosecution as a whole. This would have been well supported by, and consistent with, the conduct of Deister and Calvert in other parts of the investigation, such as their clandestine activities, their agreement to "assume" evidence implicating another suspect did not exist and the ensuing failure to pursue other leads implicating Thomure. The Master's conclusion that Woodworth was prejudiced by the *Brady* violations is well supported in fact and law.

TOTALITY OF THE CIRCUMSTANCES – MANIFEST INJUSTICE

Acts and Omissions of Judge Lewis

The Missouri Code of Judicial Conduct contains the following relevant provisions:

- **2.01.Preamble**

Our legal system is based on the principle that an independent, fair and competent judiciary will interpret and apply the laws that govern us… This Rule 2 is not intended as an exhaustive guide for the conduct of judges. They should also be governed in their judicial and personal conduct by general ethical standards. This Rule 2 is intended, however, to state basic standards that should govern the

conduct of all judges and to provide guidance to assist judges in establishing and maintaining high standards of judicial and personal conduct.

- **2.03. Canon 1. A Judge Shall Uphold the Integrity and Independence of the Judiciary**

A. An independent and honorable judiciary is indispensable to justice in our society. A judge should participate in establishing, maintaining and enforcing high standards of conduct and shall personally observe those standards of conduct so that the integrity and independence of the judiciary will be preserved. The provisions of this Rule 2 are to be construed and applied to further that objective.

COMMENTARY

Deference to the judgments and rulings of courts depends upon public confidence in the integrity and independence of judges. The integrity and independence of judges depends in turn upon their acting promptly, courteously and without fear or favor. Although judges should be independent, they must comply with the law, including the provisions of this Rule 2. Public confidence in the impartiality of the judiciary is maintained by the adherence of each judge to this responsibility. Conversely, violation of this Rule 2 diminishes public confidence in the judiciary and thereby does injury to the system of government under law.

- **2.03. Canon 2. A Judge Shall Avoid Impropriety and the Appearance of Impropriety in All of the Judge's Activities**

A. A judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.

COMMENTARY

Public confidence in the judiciary is eroded by irresponsible or improper conduct by judges. A judge must avoid all impropriety and appearance of impropriety…

… The test for appearance of impropriety is whether the conduct would create in reasonable minds a perception that the judge's ability to carry out judicial responsibilities with integrity, impartiality and competence is impaired.

B. A judge shall not allow family, social, political or other relationships to influence the judge's judicial conduct or judgment. A judge shall not lend the prestige of judicial office to advance the private interests of the judge or others; nor shall a judge convey or permit others to convey the impression that they are in a special position to influence the judge. A judge shall not testify voluntarily as a character witness.

- **2.03. Canon 3. A Judge Shall Perform the Duties of Judicial Office Impartially and Diligently**

B. Adjudicative Responsibilities.

(1) A judge shall hear and decide matters assigned to the judge except those in which disqualification is required.

(2) A judge shall be faithful to the law and maintain professional competence in it. A judge shall not be swayed by partisan interests, public clamor or fear of criticism....

(5) A judge shall perform judicial duties without bias or prejudice. A judge, in the performance of judicial duties, shall not by words or conduct manifest bias or prejudice....

COMMENTARY

A judge must perform judicial duties impartially and fairly. A judge who manifests bias or prejudice on any basis in a proceeding impairs the fairness of the proceeding and brings the judiciary into disrepute... A judge must be alert to avoid behavior that may be perceived as prejudicial.

(7) A judge shall accord to every person who has a legal interest in a proceeding, or that person's lawyer, the right to be heard according to law. A judge shall not initiate, permit, or consider ex parte communications, or consider other communications made to the judge outside the presence of the parties concerning a pending or impending proceeding except that:

(a) (ii) the judge makes provision promptly to notify all other parties of the substance of the ex parte communication and allows an opportunity to respond.

COMMENTARY

...A judge must disclose to all parties all ex parte communications described in Canon 3B(7)(a) and Canon 3B(7)(b) regarding a proceeding pending or impending before the judge.

E. Recusal.

(1) A judge shall recuse in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances where:

COMMENTARY

...A judge should disclose on the record information that the judge believes the parties or their lawyers might consider relevant to the question of disqualification, even if the judge believes there is no real basis for disqualification...

> **(a)** the judge has a personal bias or prejudice concerning a party or a party's lawyer, or personal knowledge of disputed evidentiary facts concerning the proceeding;

A judge "cannot become an advocate or otherwise use his judicial powers to advantage a party unfairly." *United States v Melendez-Rivas*, 566 F.3d41, 50 (1st Cir 2009)

> "A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias

> in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness. To this end no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome. That interest cannot be defined with precision. Circumstances and relations must be considered...every procedure which would offer a possible temptation to the average man as a judge...not to hold the balance nice, clear and true between the State and the accused, denies the latter due process of law...to perform its high function..."
>
> Where the judge has been a part of the accusatory process "...a judge cannot be wholly disinterested in the conviction or acquittal of those accused...Fair trials are too important a part of free society to let prosecuting judges be trial judges of the charges they prefer." *In re Murchison*, 349 U.S. 133, 136, 137 (1955)
>
> "Trial before an unbiased judge is essential to due process." *Johnson v Mississippi*, 403 U.S. 212, 215 (1971)

The Special Master, with regard to Judge Lewis, made the following findings:

- He "received, was prompted by, acted on the purported *Brady* materials..." The Lewis letters included a written ex parte

communication from the victim demanding that he remove the elected prosecutor for showing a lack of interest in prosecuting Petitioner. (Master's Report pp. 7, 32; Master's Exhibits 1, 2 and 3)

- He "was dissatisfied with the work" of Prosecutor Doug Roberts regarding his expressed refusal to prosecute Petitioner. (Master's Report p. 7; Master's Exhibit 3)
- He "gratuitously criticized" Prosecutor Doug Roberts before the grand jury, "setting an improper tone for a fair grand jury process." (Master's Report pp. 7, 32 – 33; Exhibit 6 of Master's Hearing Exhibit 185, Judge Lewis' 2011 Deposition)
- After Doug Roberts disqualified himself in a letter, he "sought and obtained the appointment of Special Prosecutor Kenny Hulshof" to conduct a grand jury and prosecute Petitioner...(in lieu of the same being prosecuted by Doug Roberts)." (Master's Report p. 7)
- He "called the grand jury that indicted Mark Woodworth." (Master's Report p. 6)
- He "analyzed the crimes with which to charge Woodworth and the Statutes of Limitations for those crimes." (Master's Report p. 31)
- He "selected the foreperson of the grand jury, John Cook." (Cook was a CPA who did accounting work for Judge Lewis' old law firm,

"...with whom he had, at a minimum, a prior business relationship.") (Master's Report pp. 7, 33)

- He presided over Mark Woodworth's certification hearing and certified him as an adult. (Master's Report p. 6)
- He appointed his personal attorney, Brent Elliott, to represent the juvenile officer in the certification proceedings. (Master's Report p. 11)
- In addition to being Judge Lewis' personal attorney, Elliott had extensive involvement in the case, including:
    - He represented the victim's daughter, Rochelle Robertson, when she obtained an order of protection against the original suspect, Thomure, in November 1990. (Master's Report p. 11)
    - Subsequently he consulted with private investigator Deister, Deputy Calvert and Lyndel Robertson during their "investigation" of Woodworth. (Master's Report p. 12)
    - He assisted Kenny Hulshof at Woodworth's sentencing after the first jury verdict. (First Trial pp. 1331 – 1333)
- He presided over the adult criminal proceedings until a change of judge and venue was filed by the defense, and then transferred the case to his fellow 43rd Judicial Circuit Judge, Stephen Griffin. (Mater's Report p. 7)

Judge Lewis contemporaneously presided over at least two guilty plea proceedings involving Jim Johnson. Johnson had been a hired hand of victim Lyndel Robertson, who faced multiple criminal charges in several counties involving theft of farm products and writing bad checks. By virtue of various letters Johnson sent to Judge Lewis, Kenny Hulshof and the grand jury, Judge Lewis was aware that Johnson was seeking to barter a "deal" with the State in exchange for providing evidence and testimony against Woodworth and his father. In one of Johnson's guilty pleas before Judge Lewis, Judge Griffin had vacated Johnson's jury recommended sentence of 15 years pursuant to Johnson's Rule 29.15 motion. Strangely (or maybe not) Judge Griffin failed to file findings of fact and conclusions of law. Judge Lewis accepted a subsequent guilty plea from Johnson and, by that time the sentence had been reduced from 15 years to three years.

In one of the guilty pleas, Woodworth's first trial attorney, Richard Eugene McFadin, contemporaneously represented Johnson at the guilty plea proceedings before Judge Lewis. Judge Lewis was, or should have been, aware that this presented a possible, actual conflict of interest. No record was made on this conflict, nor was Woodworth ever informed by anyone, much less Judge Lewis or Judge Griffin, that this conflict existed. (Woodworth's unrefuted hearing testimony was that McFadin never disclosed this conflict of interest to him. (Master's Hearing p. 457)

The Master made specific findings and conclusions regarding this and the myriad other conflicts present in this case. He cited the holdings in *Wheat v United States*, 486 U.S. 153; 108 S.Ct. 1962; 100 L.Ed.2d 140 (1988); and *State v Darrell Chandler*, 698 S.W.2d 844 (Mo. 1985)

In *Wheat*, the Court imposed an affirmative duty that trial judges must make an on the record inquiry into the possible conflicts of interest which may be present in a criminal case where an attorney represents multiple parties. It held that the Court has the authority and duty to make orders, to prevent multiple representation, where the public interest in maintaining the integrity of the judicial system outweighs an accused's right to the attorney of his choice. Joint representation is "suspect" because of what it tends to prevent the attorney from doing. The Court has "substantial latitude" in rejecting even waivers of an accused's objection to the multiple representations. (Id at 160, 161) In the case at hand, neither trial judge fulfilled his duty under *Wheat*, but instead allowed an egregious actual conflict of interest to persist without making a record or informing Woodworth of McFadin's conflicting position.

In *Chandler*, this Court reversed a conviction of 1st Degree Murder because the defendant had received ineffective assist of counsel by being represented by an attorney who was also a co-defendant arising out of the same murder. The *Chandler* Court found that "...(t)he unique facts presented here are so bizarre (emphasis added)we cannot place our imprimatur on the conviction." *Id at 846.* The Master concluded that, "If the conflicts of interest in *Chandler* were bizarre,

this Court is hard-pressed to come up with a word or phrase in the English language that fairly describes the conflicts that existed with regard to Woodworth's judicial process..." (Master's Report p. 33) The Master prepared several diagrams depicting the breadth and complexity of the overlapping conflicts. (Master's Report pp. 6, 7, 8, 9, 10, 11, 12 and 34) Petitioner directs this Court to the diagram and timeline submitted to the Master. (Appendix pp. 89 - 99)

There is ample evidence in the record to support the Master's conclusions about the "judicial conflicts."

In *State v Harrington*, 534 S.W.2d 44 (Mo. 1976), this Court prohibited the use of private prosecutors in criminal trials and held that:

> "We believe, and hold, that the practice of allowing private prosecutors, employed by private persons, to participate in the prosecution of criminal defendants, is inherently and fundamentally unfair, and that it should not be permitted...in any case tried after publication of this opinion in the Southwestern Reporter... (T)he modern day prosecutor wields the power of the State's investigation force, decides whom to indict and prosecute, decides what evidence to submit to the court, negotiates the State's position in plea bargaining and recommends punishment to the court. The entry of a private prosecutor into a criminal prosecution

exposes all these areas to prejudicial influence. We consider such exposure intolerable..." (Id at 48, 50)

In the case at hand, the Prosecution and the Judges were aware that a private influence pervaded the investigation and accusatory phases of Woodworth's judicial process. The criminal investigation of Woodworth became led by the victim's private investigator Deister. He and Deputy Calvert, rather than consulting with the duly elected prosecutor, consulted during their investigation with a private attorney, Brent Elliott. During this time Elliott not only was Judge Lewis' personal attorney but also was the attorney for the Judges of the 43rd Judicial Circuit, including Judge Lewis and Judge Griffin. The Master's conclusion that Deister morphed into the role of private prosecutor was well-founded. The circumstances suggest that Elliott assisted him in this function. The suggestion and appearance is that Lewis was knowledgeable of and influenced the investigation, at least from the time Elliott became involved, an appearance that Judge Lewis is obligated to avoid. (Master's Hearing Exhibit 197, Larry Weber Deposition pp. 13 – 17, 23 and 29; Master's Hearing Exhibit 184, Lewis' Federal Deposition pp. 71 - 72)

Judge Lewis appointed Elliott to represent the juvenile officer at Woodworth's certification, over which Lewis presided. In November 1990 Elliott, had also represented Rochelle Robertson shortly after the crimes in her order of protection against Thomure.

Finally, Elliott appears on the scene again in 1995 when he is seen to be assisting Kenny Hulshof at Woodworth's sentencing. (First Trial pp. 1331 – 1333) The judicial appearance is that, through Judge Lewis' his eyes and ears (Elliott), Lewis was in control throughout the investigative, accusatory and trial processes.

In sum, private influence of victim Lyndel Robertson pervaded nearly every aspect of Woodworth's judicial process. When combined with the prosecutor/advocate role adopted by Judge Lewis, it is hard to imagine a set of circumstances which are more violative of the specific prohibitions of *Harrington*.

Prosecutor Hulshof knowingly and willingly entered into this case fully aware that grave improprieties were present. The Lewis letters notified him that there was evidence possessed by Doug Roberts that the victim had adamantly sought the prosecution of another. Nonetheless, Hulshof allowed the 1995 deposition testimony of Lyndel Robertson that "I never pointed my finger at anybody" to stand uncorrected. This strongly suggests Robertson was coached by a member of the prosecution team. Indeed, the Master found that Lewis' letter was a solicitation for Hulshof to do what the duly elected prosecutor would not – substantially alter the factual landscape to avoid devastating damage to the prosecution of Woodworth. Neither jury knew that Lyndel Robertson had not only identified Thomure as the shooter, but had adamantly sought to have him prosecuted. The state was able to present a false version of the facts, i.e. that Robertson did not identify anyone and had only been asked who might have been the perpetrator. A prosecutor has the duty to correct errors in testimony.

Similarly, Hulshof, as an officer of the Court and experienced prosecutor, had clear notice that he was walking into an ethical thicket, highlighted by the ex parte communication which "prompted" Judge Lewis to assume the role of advocate and prosecutor. He did it willingly and aggressively.

Hulshof was aware of the private influence during the investigative stage. He presented Deister's testimony at a pre-trial hearing on Woodworth's motion to suppress statements.

Hulshof had reason to know that Deister's and Calvert's investigation was unfair and not committed to "ascertaining the truth", as did Judge Lewis. The Attorney General's office possessed Deister reports, including one which indicated that Deister and Calvert, in order to be able to focus the investigation on Woodworth, had agreed to "assume" that evidence implicating another suspect did not exist. (Exhibit H of Master's Hearing Exhibit 176, Deister's 2011 Deposition) He should have been aware that leads implicating Thomure were not pursued. If he had conducted a good faith inquiry as required by Rule 25.03, he would have known about the suppression of the Cairns evidence and the order of protection violations. The circumstances suggest that Judge Lewis knew or should have known of the serious investigative improprieties, by virtue of his personal attorney's involvement. The appearance of grave improprieties at all levels was glaringly ignored, justifying the Master's conclusion that Judge Lewis had "lost his sense of fairness" and "ignored" Woodworth's judicial process rights.

Judge Lewis, Kenny Hulshof and Rachel Smith committed gross violations of their Oath of Admission to the Bar which provides in part:

> "That I will employ for the purpose of maintaining the causes confided to me such means only as are consistent with truth and honor, and will never seek to mislead the judge or jury by any artifice or false statement of fact or law..."

State ex rel McAllister v. State, 214 S.W. 85 (Mo.Banc 1919), this Court held that a writ of prohibition is the proper remedy to remove a circuit judge from presiding over a criminal case on the grounds of prejudice. In granting the Writ, this Court held that:

> "If a circuit judge is prejudiced in a cause, either for or against the State or the accused, he is incompetent to sit in said cause, and any exercise of jurisdiction therein by him except to certify his prejudice and take steps to call another judge is beyond his power."

In a dissenting opinion, Justice Marshall discussed the effect of bias on a grand jury proceeding as follows:

> "Given the potential power of the grand jury over the criminal defendant, there can be no question that due process requires state grand juries to be unbiased and impartial... Imprerative to the integrity of (the grand jury) system and its perceived legitimacy is the perception that any biases from whatever

source...be minimized." *Ford v Kentucky*, 469 U.S. 984 (1984) Judge Marshall, dissenting, 105 S.Ct. 392, 83 L.Ed.2d 325, 326-329

Had Woodworth been accorded the required fairness and notice by Judge Lewis, had he been informed of the prosecutive role being taken by Judge Lewis, had he been aware that Lewis was "prompted" to call a grand jury by the ex parte communication from one of the victims, he could have sought a writ of prohibiting Judge Lewis from presiding over any aspect of his case. In the alternative, he could have mounted a meritorious and timely challenge to the grand jury indictment, as found by the Master.

The Master presided over Judge Lewis' Deposition. He ultimately found that Judge Lewis was "not credible." (Master's Report p. 17) His finding is amply supported by Judge Lewis' untruthfulness to Hulshof when he declared that Prosecutor Doug Roberts had "boycotted" his grand jury, when, in fact, Roberts had disqualified himself several days before the grand jury was empanelled. Roberts letter to Judge Lewis, written before this, is a letter disqualifying himself to act in the Robertson shooting case. (Master's Hearing Exhibit 185, Judge Lewis' Deposition, pp. 27 – 30; Master's Exhibit 3) Judge Lewis' desire to demean Prosecutor Roberts found expression in his opening address to grand jurors where he vilified Roberts "gratuitously", giving rise to the Master's finding that:

> "The accusation and the vilification added to the momentum of the prosecution... no one with an inkling of due process was in control at that time. Judge Lewis' message to the office of the Attorney General was clear: this Court was 'oh so' offended by the actions of the duly elected prosecutor and that it was now time for a 'real' prosecutor to step up to the plate...join the team. At the same time it sent a message to the Grand Jury that things may have been out of control but I've taken charge 'now and we've got some professionals in here and so let's get out there and get 'em team...and that's what they did: they indicted Mr. Woodworth" (Master's Report Footnote 32, p. 32; Exhibit 6 of Master's Hearing Exhibit 185, Judge Lewis' 2011 Deposition)

The Master concluded that "It is inconceivable that each of these actions was simply an isolated, unrelated event; they hold the trappings of a case-specific, professionally unacceptable, pattern and practice." This conclusion is supported by all of the above. The evidence and the findings establish that Judge Lewis violated the provisions of Rules 2.01; 203Canon 1A, Canon 2 and Cannon 3, cited previously.

Judge Griffin

Judge Griffin's acts and omissions appear to be consistent with the Master's conclusion of a "professionally unaccepted pattern of practice", in the following respects:

- His ruling before the first trial excluding evidence to support the defense that another person had the motive and opportunity to commit the crimes, was glaringly erroneous. *State v. Woodworth*, 941 S.W.2d 679 (Mo.App.W.D.1997)
- Jacqueline Cook testified in a deposition that Judge Griffin indicated before the second trial that he intended to interpret the Appellate Court's instruction to allow such evidence as narrowly as possible, suggesting the possibility that his tendencies were hardly biased. (Master's Hearing Exhibit 174, Jacqueline Cook's 2011 Deposition p. 31)
- Judge Griffin was or should have been aware of the glaring conflict of interest presented by Attorney McFaddin's multiple representation of Woodworth and the man who was bartering a deal to provide evidence against him. (See case file from Jim Johnson's 29.15 motion)
- Judge Griffin, as a circuit judge from the 43rd Judicial Circuit, was also represented by Attorney Brent Elliott, thus contributing to the, at a minimum, glaringly severe appearance of impropriety.

- Judge Griffin was or should have been aware of Judge Lewis' evident violations of the Code of Judicial Conduct.
- Judge Griffin, without setting forth any objective facts on the record as justification, severely increased Woodworth's sentence after the second trial. This added further severity to the existing appearances of impropriety.
- Judge Griffin, while presiding over Woodworth's 29.15 motion, denied Woodworth the reasonable prayer to obtain grand jury records and take the deposition of Judge Lewis. (This issue, and the issue of Judge Griffin's possible vindictive sentencing of Woodworth are presently pending in this Court pursuant to Woodworth's motion to transfer from denial of his 29.15 appeal, Cause no. SC91221)

Thus, the Master's Conclusion that "...there was nothing fundamentally fair about the investigation of the Robertson crimes, or, in turn, Woodworth's prosecutions and convictions for these crimes", was well-supported by clear and convincing evidence of a "case-specific, professionally unacceptable, pattern and practice." Woodworth was denied fundamental fairness in a fair tribunal.

Jim Johnson – Undisclosed Deals with the State

The Master found that Jim Johnson was bartering deals with the State in exchange for providing evidence against Woodworth. This was not disclosed to the defense, although Johnson was listed as a State's witness.

The general rule is that non-disclosure of deals with the State for leniency or compensation is a *Brady* violation. *Engel v Dormire* (supra); *Banks v Dretke*, 540 U.S. 668 (2004).

Because Johnson was not a trial witness, the usual analysis of whether the defendant was prejudiced by the non-dosclosure of his "deals" may not be appropriate. However, these deals are important to a complete analysis of their relation to other *Brady* violations, as part of the "professionally unaccepted pattern of practice" involved here.

In *Roviaro v United States*, 353 U.S. 53, 77 S.Ct. 623, 1 L.Ed.2d 639 (1957) the Court reversed a heroin possession conviction on the grounds that the prosecution's withholding of the identity of an informant who was a participant in the activities for which the accused was charged and convicted. It held that:

> "(W)here the disclosure of an informers identity, or the contents of his communication, is relevant and helpful to the defense of an accused, or is essential to the fair determination of a cause, the privilege (against disclosure of an informant's identity) must give way... (W)e believe that no fixed rule with respect to disclosure is justifiable. The problem is one that calls for balancing the public interest in protecting the flow of information against the individual's right to prepare his defense. Whether a proper balance renders nondisclosure erroneous must depend on the particular circumstances of

each case, taking into consideration the crime charged, the possible defenses, the possible significance of the informer's testimony, and the other relevant factors." (Id at 61 – 63)

Had the State disclosed the Johnson deals, Woodworth would have had access to evidence with which could have greatly aided the defense, including:

- Attorney McFaddin's tawdry conflict of interest would have been manifest.
- The defense would have been able to attack the motive of Lyndel Robertson to lie about his apparent recantation of his identification of Thomure and to "frame" the Woodworths'. The Johnson letters and Robertson's own admissions to stealing indicate the likelihood that Robertson was a suspected participant in the stealing crimes. This attack would have been augmented when coupled with the facts that Woodworth's father had filed a post-shooting lawsuit alleging that Robertson was stealing from him and that Robertson had hired a private detective to assist in his defense these claims. This defense would have been supported by the facts that Robertson's daughter was being viewed by police as a suspect and had given false information in an apparent attempt to protect Thomure, her boyfriend. The defense would have a logical theory of the motives of Lyndel Robertson, Calvert and Deister to trump up a case against the Woodworth's, based on the following:

- It would have furthered his purpose to oust Woodworth's father from the partnership and partner up with John Williams.
- Lyndel Robertson needed to deal with the allegations of fraud brought by Woodworth's father, a few months after the shootings.
- By that time Lyndel Robertson had evidently changed his mind about identifying and prosecuting Thomure, joining his daughter Rochelle in protecting Thomure.
- Johnson's letter and his own later admission of stealing suggest Lyndel Robertson was a suspect or being investigated for widespread stealing of farm products
- Robertson and John Williams already had a pre-shooting purpose of ousting Woodworth from the farming partnership.
- Evidence of Deputy Calvert's participation in the deal-making process could have been used to attack the motives, credibility and integrity of Calvert and the investigation as a whole.
- This evidence could have formed the basis for a jury attack on the integrity and credibility of the prosecution and the motives of the State's prosecutors. Johnson's letters to Hulshof, Lewis and the grand jury notified Hulshof and

Rachel Smith of the existence of a serious ethical problem and their obliviousness to it.

- Woodworth could have used the evidence to mount a successful challenge to the fairness of the tribunal.

Cumulative Effect of the Suppressed Evidence

In determining if a *Brady* violation occurred, courts must consider the "cumulative effect" of undisclosed evidence. In *Kyles* (supra), for example, the Court held that:

> "(W)hen, for example, the probative force of evidence depends on the circumstances in which it was obtained and those circumstances raise a possibility of fraud, indications of conscientious police work will enhance probative force and slovenly work will diminish it." (*Kyles*, 541 U.S. at 447)

The accumulated evidence developed since Woodworth's trial suggests the possibility of fraud, in the following respects:

1.) Maurice Eskew's testimony raises serious issues as to the reliability of one of the most critical pieces of physical evidence, i.e. Woodworth's fingerprint purportedly lifted by Deputy Miller from a box of .22 ammunition in the victim's shed. Miller testified at trial that he lifted the print, but Eskew's hearing testimony raises a doubt as to the truthfulness of that testimony. (Master's Hearing, pp. 352 - 353, Eskew's Testimony)

2.) Eskew's testimony erodes the police version of events which suggested that an eyewitness could not possibly have seen a vehicle in front of the victims' house because it was too dark. He testified that he was assigned guard duty at the house the night of the shooting and the front of the house was visible from the road.

3.) The Cairns and Grell testimony strongly suggest bad faith and fraud by investigators. Critical information regarding Thomure's alibi and his motive and opportunity to commit the crime were either omitted from Deputy Miller's reports (Cairns) or not reported at all (Grell).

4.) Calvert and Deister's clandestine activities, unknown to the defense, add to the possibility of fraud in the investigation, in the following respects:

a. They felt it necessary and agreed to keep Deister's involvement a secret from the Sheriff and the Highway Patrol;

b. They surreptitiously removed the Sheriff's investigative file from the sheriff's office and gave possession of it to private investigator Deister without any accounting or inventory. They concealed a serious chain of custody problem. [17]

[17] During his deposition or at the hearing Hulshof admitted that he knew all along that there was a chain of custody problem, however he represented to the trial court and the defense that there was a proper chain of custody regarding the

c. They entrusted possession of the only other items of physical evidence to Deister and gave different versions of this. According to Deister's logs, the removed bullet was given directly to him, but Calvert's trial testimony was that he received the bullet.

d. Deister and Calvert pointed the focus of their investigation solely on Woodworth, based on their agreed assumption that evidence implicating Thomure or another suspect did not even exist. (See Exhibit H of Master's Hearing Exhibit 176, Deister's 2011 Deposition; Master's Hearing p. 390, Deister Testimony)

5.) The circumstances of Johnson's deals suggest that he was likely coached by members of the prosecution team. His early letters offering cooperation suggest that he was involved in stealing farm products with both Claude Woodworth and Lyndel Robertson. By the time, though, he is brought to Chillicothe to testify at the grand jury, which indicted Claude and Mark Woodworth for stealing, his letters had eliminated references to Lyndel Robertson as a partner in crime and referred only to Claude Woodworth as the perpetrator.

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fingerprint evidence and the gun and bullet. This is one of many instances throughout Hulshof's involvement that raise serious questions as to his good faith. (First Trial pp. 1 – 3)

This should be compared to the strong inference that Lyndel Robertson was coached to eliminate from his testimony the previous identification of Thomure (Appendix pp. 49 - 62, Jim Johnson letters)

Substantial other accumulated evidence supports the Master's conclusion that there was a "case-specific, professionally unacceptable, pattern of practice." The prosecution failed to pursue or ignored leads which weakened Thomure's alibi and suggested his motive and opportunity to commit the crimes. These witnesses included Roger Wolf, Bob Fairchild, Angie Gutshall (Smith) and Mike Thistlethwaite. Instead of pursuing these leads the prosecution in the first trial endeavored to exclude all such evidence, suggesting that if the Court allowed the defense to present evidence supporting its theory that the State would be in the conflicting position of defense counsel. (Appendix pp. 100 - 102, Hulshof's Motion In Limine) The second prosecutor likewise ignored the investigative reports regarding these witnesses and proceeded to "set up" an alibi for Brandon. (Master's Hearing pp. 626 – 628; Master's Hearing Exhibit 28)

The Prosecutions Duty to Disclose Under Rule 25.03

Most illustrative of the prosecution's breach of its duty under Rule 25.03 is the simple fact that Kenny Hulshof never contacted Prosecutor Roberts about his letter to Judge Lewis indicating that Lyndel Robertson had been "adamant" that someone else be prosecuted. Although the investigative file contained reports

regarding witnesses who could have weakened Thomure's alibi, none of these witnesses were followed up on.

In *Merriweather v State*, 394 S.W. 3d 52 (Mo.Banc. 2009) this Court emphasized the affirmative duty of prosecutors under Rule 25.03 to "search diligently" and make "good faith efforts... burden is on the State to show that its search was diligent." (Id at 57)

Here, the State made no showing that it made any effort to determine the existence of exculpatory evidence which was explicitly provided them or was readily available.

Deference to Findings and Conclusions of the Special Master

The Special Master made explicit findings of fact and conclusions of law. He determined the credibility of crucial witnesses, including Judge Lewis, Sheriff Steve Cox, private investigator Terry Deister, and Prosecutors Kenny Hulshof and Rachel Smith.

This Court should, therefore, defer to the Master's findings and credibility determinations and follow his recommendations.

The State's Failure to Correct the Record

In *Napue v Illinois*, 360 U.S. 264 (1959), the Court reversed a conviction where the State had failed to correct a witness' false testimony that he had received no promise of consideration in return for his testimony. It held that:

> "First, it is established that a conviction obtained through the use of false evidence, known to be such by representatives of

> the State, must fall under the Fourteenth Amendment... The same result obtains when the State, although not soliciting false evidence, allows it to go uncorrected when it appears... (T) principle that a State may not knowingly use false evidence, including false testimony, to obtain a conviction, implicit in any concept of ordered liberty, does not cease to apply merely because the false testimony goes only to the credibility of the witness." (Id at 269) See also *Giglio v United States*, 405 U.S. 150, 152 (1972)

Allowing false testimony to go uncorrected is "incompatible with 'rudimentary demands of justice'"; *State v McClain*. 498 S.W.2d 798 (Mo.Banc 1978)

Here, the State has allowed several instances of false testimony to go uncorrected, including the following:

- Lyndel Robertson's 1995 pre-trial deposition was that "I never pointed my finger at anybody." (before Woodworth) This testimony was later revealed to be false by the discovery of the Lewis letters. (Master's Hearing Exhibit 187, Lyndel Robertson's 1995 Deposition p. 43)
- Lyndel Robertson testified in a 2006 deposition that no one had ever told him that Doug Roberts was not going to prosecute Mark

Woodworth. This testimony was also proved to be false by the Lewis letters.

- Lyndel Robertson testified in a 2011 deposition on p. 80 to the following:

" 6 You tried to get Claude Woodworth prosecuted
7 for stealing farm chemicals, didn't you?
8 A. Well, I knew that he'd brought -- he didn't
9 steal them. He didn't steal them, he just bought
10 them.
11 Q. Did you try to get him prosecuted for that?
12 A. I thought it would be a good idea to get him
13 on something.
14 Q. Why did you think it was a good idea to get
15 him on something?
16 A. Because he was responsible for my wife and
17 me getting shot."

- Rochelle Robertson testified in a 1994 pre-trial deposition that she had never reported any violations of her order of protection by Brandon Thomure (Master's Hearing Exhibit 190, Rochelle Robertson 1994 Deposition p. 16) This was proved false by the discovery of her reported violations shortly before the hearing in 2011.

None of these falsehoods have been corrected by the State. The Lyndel Robertson falsehoods would have been highly relevant to his credibility. The evidence against Mark relied heavily on the credibility of Lyndel's testimony that he had never previously identified Brandon Thomure as the perpetrator.

The 2006 deposition testimony was given prior to the discovery of the Lewis letters in 2009. It was clearly an attempt to cover up the fact of the improper 1993 ex parte communications with Judge Lewis.

Rochelle Robertson's false testimony was likely given, as found by the Master, to protect her boyfriend from prosecution. This testimony has never been corrected by the State, despite the discovery of the ex parte violation reports obtained in 2011.

The above facts are further proof of the lack of good faith in the prosecution of Petitioner.

CONCLUSION

The totality of the circumstances support the Master's findings and conclusions that Woodworth was prejudiced by numerous *Brady* violations, that his right to due process and fundamental fairness were "ignored" and that he suffered a manifest injustice.

The disregard of Woodworth's rights began when the victim, with the assistance and condonation of members of the prosecution team and the judges, injected unlawfully a private influence into the investigative process. This improper private influence prejudicially pervaded the entire process.

Investigators ignored or "deep-sixed" evidence and investigative leads that would have established that Brandon Thomure had the motive and opportunity to commit the crimes and that his alibi was false. The prosecutors ignored their constitutional and codified duties under *Brady* and Rule 25.03 to exercise affirmative, good faith diligence to seek out exculpatory evidence which was readily available to them in existing reports. The investigation was conducted with no attempt to ascertain the truth.

Prosecutors ignored the prohibition against private influence in the investigative, accusatory and trial process. They proceeded to prosecute Woodworth despite being on notice of serious ethical and judicial conduct violations by Judge Lewis. These problems were explicitly contained in Judge Lewis' letter to Kenny Hulshof and involved ex parte communications, the appearance of impropriety and the improper assumption of an accusatory, prosecutorial role by Judge Lewis. The State failed to disclose clandestine dealings with an informant when they would have clearly aided in Woodworth's overall defense to the charges.

Prosecutors deliberately altered the factual landscape as a way of disguising or minimizing the fact that the victim had not only identified another suspect, but had been "adamant" in seeking his prosecution. Despite Prosecutor Roberts letter setting forth these facts, neither Hulshof nor Smith ever contacted Roberts to inquire about these highly relevant facts. These facts would have substantially weakened the State's case and augmented the theory of defense.

Woodworth was prejudiced by the "inappropriateness" of Judge Lewis and Judge Griffin. Bothe judges had reason to be aware of a serious conflict of interest by one of Woodworth's attorneys, yet did nothing about it. They, like the prosecution, were aware of, and likely participated in the improper use of a private prosecutor. Judge Lewis assumed the role of prosecutor. Judge Griffin wrongfully limited the defense in the first trial and indicated his intention to interpret the instructions on remand as narrowly as possible. He vindictively quadrupled Woodworth's sentences after the second jury convicted him, without setting forth any objective justification.

For all the above stated reasons, Petitioner prays this Court to grant the habeas corpus relief requested.

II. THE LACK OF ANY CREDIBLE EVIDENCE REMAINING AGAINST PETITIONER AND THE CONDUCT OF PROSECUTORS, AGENTS FOR THE PROSECUTION AND CIRCUIT JUDGE KENNETH LEWIS, AS FOUND AND CONCLUDED BY THE SPECIAL MASTER TO HAVE BEEN ESTABLISHED CLEARY AND CONVINCINGLY WAS SO COMPREHENSIVELY AND EGREGRIOUSLY VIOLATIVE OF PETITIONER'S DUE PROCESS RIGHTS AS GUARANTEED BY THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION ARTICLE I, SECTION 10 OF THE CONSTITUTION OF MISSOURI, AS TO REQUIRE AN ORDER BY THIS COURT VACATING PETITIONER'S CONVICTIONS AND SENTENCES OUTRIGHT AND PREVENTING THE STATE FROM BEING ALLOWED TO ATTEMPT TO TRY PETITIONER FOR A THIRD TIME

THE STATE'S MISCONDUCT PROHIBITS A THIRD TRIAL

Petitioner asserts that this Court should bar a third re-trial of Woodworth as a sanction for repeated, gross discovery violations which establish, along with other newly discovered evidence that Petitioner is actually innocent, or, in the

alternative, that a retrial is barred by the Fifth Amendment prohibition against double jeopardy.

DISCOVERY SANCTIONS

In *State ex rel Jackson County Prosecuting Attorney v Prokes*, 363 S.W.3d 71, the Court refused to prohibit a circuit judge from dismissing murder charges against a defendant, Richard Buchli II, based on the State's egregious violations of its discovery obligations under the *Brady* rule and Rule 25.03. The Court held that "...a veritable catalogue of how the State's discovery violations created fundamental unfairness to Buchli in his ability to receive a fair trial...substantially prejudicing him." (Id at 77, 78)

The violations of *Brady* and Rule 25.03 in the instant case are, at minimum, are as egregious as those in *Prokes*. The Master's report contains a "veritable catalogue" of *Brady* and Rule 25.03 violations. The evidence accumulated since the trials establish a comprehensive, broad-gauged and grave assault on Petitioner's right to due process and fundamental fairness.

The Master concluded that:

> "...(T)here was nothing fundamentally fair about the investigation of the Robertson crimes, or, in turn, Woodworth's prosecutions and convictions for those crimes. Further, the circumstances of the prosecutions and convictions are sufficiently rare and exceptional so as to

> justify a review of the totality of the circumstances. Woodworth's verdict is not worthy of confidence."
>
> "In and of itself, the violation of *Brady* predicated on the Lewis letters would be sufficient to justify the granting of habeas relief. Aggregated with Judge Lewis' inappropriateness, the un-ending conflicts, the investigative misconduct and the significant State non-disclosures, it is even clearer that a manifest injustice has occurred." (Master's Report pp. 30 – 31) (emphasis added)

He concluded that the prosecution was "replete with *Brady* violations" and that Woodworth's "guaranteed judicial process was ignored." Woodworth "clearly and convincingly" proved that he was entitled to habeas corpus relief.

The State's discovery and *Brady* violations were both repeated and egregious. "A failure to comply with the (discovery) Rule is not an error that can be made in good faith." *Taylor v State*, 262 S.W.3d 231 (Mo.Banc 2008)

Considering the totality of the circumstances, in which the Master found that, at least during the ionvestigative and grand jury stage of the proceedings, "...no one with an inkling of due process was in control..." (Master's Report p. 32) The bad faith of the prosecution proceeded through both trials and continues on as the State had failed to this day to correct the false testimony given. Hulshof deliberately misled the Court and the defendant as to the serious flaw in the chain of custody of all the evidence, caused by the unaccounted for possession of the

investigative files to an incredible private investigator. The pattern was furthered by the tawdry and "untoward" influencing of ballistics experts, largely undisclosed to the defense.

In *State v Bowman*, 337 S.W.3d 679 (Mo 2011), this Court faced the issue of the sufficiency of the chain of custody of physical evidence, DNA evidence. It held that:

> "...(T)o admit exhibits and testimony regarding tests performed on those exhibits, the trial court must be satisfied as to the identity of the exhibits and that the exhibits were in the same condition when tested as when the exhibits were originally obtained...(T)his may be proven by evidence establishing a chain of custody, but proof of a chain of custody of the evidence nor proof that eliminates all possibility that the evidence has been disturbed...The trial court may assume, absent a showing of bad faith or tampering, that officials having custody of exhibits properly discharged their duty and that no tampering occurred." (Id at 689)

Here, all items of evidence were in the hands of a "conflictually employed" private investigator for significant periods of time. Deister was found not to be credible and to have engaged in tampering with expert witnesses to influence their opinions. This improper influence was condoned and participated in by the

prosecutors, who noted that they were attempting to have the ballostics experts "strengthen their testing/testimony." Thus, Petitioner has established the bad faith requirement. The State has offered no rebuttal for this evidence.

If this Court is unwilling to dismiss these charges or vacate the conviction outright, it should rule that the State be prohibited from using evidence, the reliability of which cannot now be sufficiently accounted for. Without this evidence, the Court would be justified in holding that Petitioner is actually innocent.

DOUBLE JEOPARDY

In *State v Barriner*, 210 S.W. 3d 285 (Mo.App.WD 2006) the Court was asked to decide whether the double jeopardy clause of the Fifth Amendment barred a subsequent trial of an accused based solely on the intentional misconduct of the prosecution. While noting that this was a case of first impression in Missouri, the Court did not rule on the above question and stated that even, assuming arguendo, that it was proper, the defendant in that case did not show that the misconduct of the prosecution was intentional. It did, however, discuss the rationale of the courts of two other states. (See *State v Minnitt*, 55 P.3d 774 (Ariz 2002) and *Commonwealth v Smith*, 625 A.2d 325 (Pa 1992)

In the case at hand Petitioner has proven by clear and convincing evidence that the prosecution and the circuit court engaged in a "case-specific, professionally unacceptable pattern of practice." This case is "replete with *Brady* violations" and characterized by a judge who "lost his sense of judicial fairness,"

"assumed the role of prosecutor" and "ignored Woodworth's guaranteed judicial process." The prosecutors, presumed to be familiar with the Court's ethical rules, willingly participated in and accepted this "pattern of practice." Gross misconduct is evident and Petitioner asserts that he has established that the misconduct of all was intentional.

If ever there were a case for this Court to decide, for the first time, that Fifth Amendment requirements of due process and against double jeopardy prohibit the State from retrying an accused based on intentional prosecutorial and judicial misconduct, this is it. The circumstances, considered in their totality, are characterized by conduct of investigators, prosecutors and judges which is truly "shocking to the conscience." See *Rochin v California*, 342 U.S. 165 (1952)

CONCLUSION

Based on the above, Petitioner respectfully requests this Court to accept the recommendation of the Master that habeas corpus relief be granted. However, in fashioning its remedy, this Court should consider vacating Petitioner's convictions outright.

If the Court accepts the Master's recommendation that an independent prosecutor be appointed, Petitioner asserts that the following orders are justified:

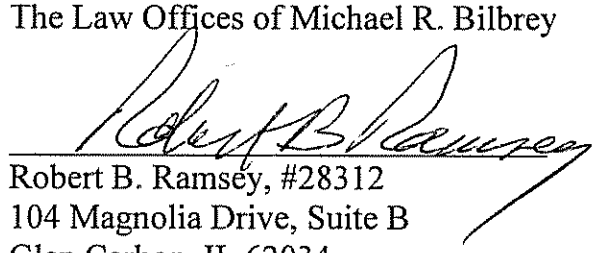
a.) That the Attorney General's office be prohibited from further involvement in this case;

b.) That any independent prosecutor appointed by this Court be not limited to a determination as to whether Petitioner should be re-tried,

but instead be given the authority to investigate and prosecute any and all criminal acts involved in the Robertson shootings and/or the wrongful obtaining of the convictions;

c.) That any independent judge appointed by this Court be empowered to empanel a grand jury to investigate and/or charge any and all wrongdoers with criminal acts committed in their involvement with this case.

Respectfully Submitted,
The Law Offices of Michael R. Bilbrey



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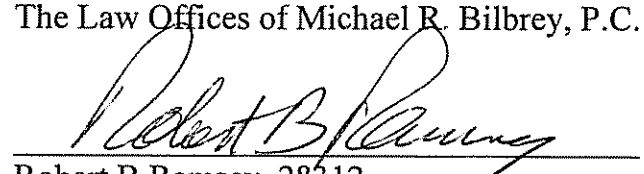
CERTIFICATE OF COMPLIANCE AND SERVICE

Petitioner hereby states that a true copy of the Petitioner's Brief complies with the limitations contained in Rule 84.06 (b), contains 22,906 words, excluding the cover page, table of authorities and this certificate of compliance and service; that a courtesy copy of Petitioner's Brief, signed by Robert B. Ramsey, Attorney for Petitioner, was served on the 17th day of July, 2012 via U.S. Mail, postage pre-paid to Mark Woodworth, Petitioner, 4 House, Crossroads Correctional Center 1115 E. Pence Road, Cameron, MO 64429 and Larry Denney, 1115 E. Pence Road, Cameron, MO 64429, Warden, Crossroads Correctional Center, Respondent; and that a copy of the foregoing has been served on this **17th** day of **July, 2012** via electronic filing to Mr. Theodore Bruce, Assistant State's Attorney and Mr. Stephen Hawke, Assistant State's Attorney at 207 W. High Street, Jefferson City, MO 65102, Attorney for Respondent and the Missouri Supreme Court, 1300 Oak Street, Kansas City, MO 64106-2970.

Respectfully Submitted,
The Law Offices of Michael R. Bilbrey, P.C.



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