No. SC90197

In the Supreme Court of Missouri

STATE EX REL. REGINALD CLEMONS,

Petitioner,

vs.

STEVE LARKINS, Warden,

Eastern Reception Diagnostic and Correctional Center,

Respondent.

On Petition for Writ of Habeas Corpus

RESPONDENT'S BRIEF

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STATEMENT OF FACTS

Petitioner Reginald Clemons (Clemons) was charged by indictment on June 21, 1991, with two counts of first-degree murder, two counts of forcible rape, three counts of felonious restraint, one count of first-degree robbery, and one count of first-degree assault (Direct Appeal Legal File (L.F.), p. 562-564). On January 10, 1992, the State filed notice of its intent to seek the death penalty (L.F. p. 519). The non-homicide counts were severed for a separate trial, and a substitute information in lieu of indictment was filed (L.F., p. 286-89). On January 25, 1993, the trial of the two counts of first-degree murder began before a jury in the St. Louis City Circuit Court, the Honorable Edward M. Peek presiding (Tr. 1).

Viewed in the light most favorable to the verdicts, the following evidence was adduced: The murder victims were two sisters, twenty-year-old Julie Kerry and nineteen-year-old Robin Kerry, who both lived in St. Louis County and attended the University of Missouri at St. Louis (Tr. 1455-57, 1477-78, 1520-21). During the last part of March and the first part of April 1991, the Kerry family was visited by relatives from Maryland, including the sisters' cousin, nineteen-year-old Thomas Cummins (Tr. 1661-63). Julie Kerry discussed with a friend her plan to take Cummins to the Chain of Rocks Bridge (Tr. 1491). Several years earlier, Julie and Robin Kerry had painted a graffiti poem on the deck of the bridge, and they wanted to take

Cummins to the bridge to show him the poem (Tr. 1491-92). This trip was scheduled for several different nights, but was postponed, because of bad weather until the evening of Thursday, April 4, 1991 (Tr. 1493, 1666-70). At around 11:25 p.m., Julie and Robin Kerry, got into Julie's car, went and picked up Thomas Cummins, and then left for the bridge (Tr. 1493, 1522-1523, 1666-1669).

Around 4:00 p.m. that day, Marlin Gray went to Daniel Winfrey's home in Wentzville (Tr. 2002-2005). Gray told Winfrey that he had his girlfriend's car until 10:30 p.m., and he asked if Winfrey wanted to go riding (Tr. 2005). They got into the white four-door 1981 Chevrolet Citation that was owned by Gray's girlfriend, Eva Altadonna, and they drove to the home of a friend of Gray's (Tr. 2007, 2259-60). At that residence, they visited with Clemons and his cousin, Antonio Richardson (Tr. 2007, 2055). They stayed there for about fifteen minutes (Tr. 2007-2008). Clemons, Richardson, Gray, and Winfrey left that house and went to the home of Michael Schaffner at 7623 San Diego in Normandy, where they drank beer, smoked marijuana, threw darts, watched television, and where Clemons gave Gray a haircut (Tr. 2008-2009, 2231-2235).

Gray suggested to the others that they go to the Chain of Rocks Bridge, and at about 11:00 p.m. Clemons, Richardson, Gray and Winfrey left to go there in two cars (Tr. 2009-2011, 2236). Gray drove the white car, mentioned

above, with Winfrey as his passenger (Tr. 2009-2011). Clemons drove a blue car with Richardson as his passenger (Tr. 2009-2011). Near the bridge, they parked their cars, went through a hole in a fence, over a pile of rocks blocking the bridge entrance, and onto the bridge (Tr. 2012-2014). Clemons and his companions went to a location where a large peace sign was painted on the bridge deck and attempted to smoke a joint of marijuana, but the substance was too wet to light (Tr. 2016-2019). They then walked back toward the Missouri end of the bridge (Tr. 2020). In doing so, they inadvertently left behind a long metal flashlight that Richardson had brought to the bridge (Tr. 2015-2016).

Julie and Robin Kerry and Thomas Cummins arrived at the bridge sometime after Clemons and his associates. As they walked across the bridge toward the Illinois side, they encountered Clemons, Richardson, Gray and Winfrey (Tr. 1673-77, 1722-33). The two groups exchanged pleasantries, and Winfrey asked for and received a cigarette from one of the Kerry sisters (Tr. 1678, 2021). Gray demonstrated to the others how to climb over the bridge railing and come back up through a manhole in the deck of the bridge, and he commented to Cummins that the manhole was a "good place to be alone and take your woman" (Tr. 1677-78). The two groups parted (Tr. 1680). Cummins and the Kerry sisters viewed the graffiti poem the sisters had

painted (Tr. 1672), and they continued walking across the bridge all the way to the Illinois side (Tr. 1673, 1680).

After their meeting with Cummins and the Kerry sisters and as they climbed over the pile of rocks that blocked the bridge at the Missouri end, Clemons said to his companions, "Let's rob them" (Tr. 2024-25). Gray replied, "Yeah I feel like hurting somebody" (Tr. 2025). All four men turned around and walked eastward on the bridge, in the direction where they had last seen their intended victims (Tr. 2025-27). As they walked, Winfrey saw Gray in conversation with Clemons, after which Gray came to Winfrey, handed him a condom, and said: "Here, take this" (Tr. 2027-28). Winfrey put the condom in his pocket and stated that he "wasn't going to do it" (Tr. 2029). Clemons grabbed Winfrey, pushed him towards the side of the bridge, and threatened him until Winfrey agreed to "do it" (Tr. 2029).

As Cummins and the Kerry sisters were standing near the Illinois side of the bridge, they saw Clemons, Richardson, Gray, and Winfrey approaching them from the direction of Missouri (Tr. 1680-82, 2030). The two groups stood at the end of the bridge, and Richardson carried on a shouted conversation with some persons around a campfire on the shore of the river (Tr. 2031). As Cummins and the Kerry sisters walked back across the bridge toward Missouri, Clemons, Richardson, Gray, and Winfrey went with them (Tr. 1682-83, 2031-32). After awhile, Cummins noticed that two of the strangers,

Clemons and Richardson, were walking ahead of him and the Kerrys, and the other two, Gray and Winfrey, were walking behind them (Tr. 1682-83, 2032).

After the parties were on the Missouri side of the bridge and passed the bend in the bridge, Gray grabbed Cummins by the arm, walked him back a short distance, and told him that this was a robbery and to get down on the ground (Tr. 1602-10, 1684-85, 1964, 2033-34, 2621). Cummins immediately complied (Tr. 1685). At the same time, Julie and Robin Kerry screamed for help as Clemons and Richardson grabbed them (Tr. 1685-1686, 2034). Clemons pushed one of the sisters toward Winfrey and ordered him to hold her, and Winfrey forced her to the ground and got on top of her (Tr. 2035). Gray told Cummins that he would kill him if he looked (Tr. 1687). Cummins heard one of the assailants say to Julie Kerry, "You stupid bitch, do you want to die? I'll throw you off this bridge if you don't stop fighting" (Tr. 1687).

While Winfrey restrained one of the Kerry sisters, Richardson held the other sister down as Clemons ripped off her clothes and raped her (Tr. 2035-36). She was then raped a second time by Richardson, while Clemons held her down (Tr. 2036-37). Gray told Winfrey to watch Cummins, which Winfrey did, and Gray and Clemons then went to the girl whom Winfrey had been guarding (Tr. 2037-38). Gray pulled her clothes off and raped her while Clemons held her down (Tr. 2039-2041). Clemons then raped this woman a second time (Tr. 2041-42). When the girl's clothes were pulled off, they were

thrown off of the bridge by Clemons (Tr. 2044). During the time when Clemons and Gray were committing these rapes, Richardson took the other Kerry sister to a manhole that had a hopscotch pattern painted next to it a short distance away on the Missouri side of the bridge, and forced her to climb down to the metal platform below, and then he went down the manhole with her (Tr. 1602-1610, 1696, 1744-46, 1934, 1964, 2040, 2621).

When Gray had completed his act of rape, he asked Winfrey where Richardson had gone (Tr. 2041). Winfrey said, "He went down that way," pointed toward the Missouri side of the bridge, but did not specify that Richardson had gone into the manhole (Tr. 2041-2042). In search of Richardson, Gray walked down the bridge past the manhole in the direction of the Missouri side, and Winfrey did not point out to Gray his mistake (Tr. 2042). Clemons then took the other Kerry sister and put her down the manhole where Richardson and the first sister had gone (Tr. 2043).

After Julie and Robin Kerry had been put down the manhole, Clemons went to Cummins, who was still lying on the ground, and forced him to surrender his wallet, some money, a Swatch brand wristwatch, and some keys (Tr. 1689-1691, 1738-1739, 2044). Clemons became upset when he found Cummins's firefighter badge in the wallet, because he was concerned that Cummins might be a police officer (Tr. 1689-90, 2044-45). He threw something, inferably the badge, off the bridge and put the wallet back into

Cummins's pocket (Tr. 1690, 2044). Someone told Cummins that it was his lucky day, because they had never had the pleasure of "popping" someone and said, "You're going to die" (Tr. 1692-1694). Clemons then took Cummins to the manhole and put him into it (Tr. 1694, 2045). As Clemons himself was entering the manhole, he asked Winfrey where Gray had gone and, when he discovered that Gray had been misdirected, told Winfrey to "go get him" (Tr. 2045). Winfrey walked off to find Gray (Tr. 2047).

When Cummins entered the manhole and lay down on the metal platform, he saw Julie and Robin Kerry lying next to him (Tr. 1694-96). A voice ordered the victims to get up and go to their left, to the concrete pier that was below the platform, and they complied (Tr. 1697-98). As Robin stepped down, she grabbed Cummins's arm and a voice told them to stop touching each other (Tr. 1698). When all three victims were standing on the pier, Julie was pushed off, and she screamed and fell into the river below (Tr. 1699). Robin was then pushed off the bridge in the same manner (Tr. 1699). The same voice that had told them not to touch each other then ordered Cummins to jump, and he jumped off the bridge (Tr. 1700). That voice was also the same voice that had earlier said that he would like to "pop" Cummins (Tr. 1932-33).

Cummins fell about seventy feet to the water and came to the surface downstream from the bridge (Tr. 1611, 1700-03, 2656-59). He saw Julie

nearby in the water and called for her to swim (Tr. 1703-04). As they fought the current and the rough water, Julie grabbed Cummins (Tr. 1705-06). They both started sinking under the surface (Tr. 1706). Cummins broke free from Julie and did not see her again (Tr. 1706-07). Cummins eventually reached a steep mud riverbank and came ashore (Tr. 1707-08). He had floated some distance downriver to a wooded area near the Chain of Rocks waterworks (Tr. 708-10, 1752, 2366). Cummins walked to a nearby road and flagged down two vehicles, after which the police were called in the early morning hours of April 5 (Tr. 1585-89, 1710-15, 2366).

On the bridge, Winfrey had continued walking toward the Missouri side looking for Gray and he found him past the rockpile at the end of the bridge (Tr. 2848). Winfrey and Gray were returning to the bridge when they were met by Clemons and Richardson, and Clemons told them, "Let's go, we threw them off" (Tr. 2049). The group then went in their cars to a gas station and bought food, cigarettes, and gas (Tr. 2050). While they were there, Gray went over by Clemons's car and talked to Clemons and Richardson (Tr. 2051). When Gray returned to the car that he had been driving, he asked if Winfrey wanted a watch (Tr. 2051-52). Clemons had a Swatch brand watch in his hand (Tr. 2052). Winfrey told Gray that he did not want the watch (Tr. 2052).

The group then drove in their cars to a place referred to as "the rock", which was a "big rock" that was "like a cliff" (Tr. 2053-54). They climbed to

the top of the cliff and, as they were sitting there, Clemons and Gray said that the victims "would never make it to shore" (Tr. 2054-55). Gray said to Clemons that Clemons's cousin, Richardson, "was brave for doing that" (Tr. 2055). Also while sitting on the cliff, Gray said to Winfrey that he "should have got some of the pussy" (Tr. 2056). As they were returning to their cars, Clemons said, "Now if anybody said [sic] anything I'm going to kill him" (Tr. 2056). Gray said, "Yeah, no shit" (Tr. 2056).

When the police arrived at the Chain of Rocks Bridge in the early morning hours of April 5, Cummins reported to them what had happened (Tr. 1715-19, 2372, 2618-19). Cummins, who was wet and cold, was placed in a heated police car with a blanket and a fireman's jacket and then in an ambulance (Tr. 1715-16, 2368). His father and Robin and Julie Kerry's parents arrived at the scene, and he was given a change of clothes (Tr. 1717). Cummins then accompanied police officers onto the bridge to point out where the crimes had been committed (Tr. 1718, 2621).

Officers found a number of items of evidence on the bridge. Near the manhole where the victims had been taken, they discovered a set of keys that had been carried by Cummins, and an unopened condom that had been in Cummins's wallet (Tr. 1737-38, 2541-42). An opened condom, a pen, some change, and a cigarette butt were also found on the bridge deck near the manhole in question (Tr. 2541-44). Forensic analysis of the used condom

revealed the presence of two sperm heads, which was too small of a sample of DNA for RFLP method of DNA analysis to be performed (Tr. 2067-2616). A flashlight was discovered near a large peace sign several hundred yards east of the other items (Tr. 2537-40).

The flashlight was later identified as one that had been stolen a few days earlier (Tr. 1503-08). Richardson had been present at the home of the flashlight's owner at approximately the time it was stolen from that residence (Tr. 1503-08, 1511).

In the first week of April, a group of people, including Clemons and Gray, were at the home of Dennis Doyle (Tr. 2313-17). Clemons was watching television when a news report about two ladies and their cousin going off the Chain of Rocks Bridge was aired (Tr. 2316-17). In response to the news report, Clemons said, "I did it" (Tr. 2318).

A few minutes after 6:00 p.m., on April 7, Officers Walsh and Brauer, of the St. Louis Police Department, went to a location on Barken Avenue in Northwoods and spoke to Clemons (Tr. 2192-96; 2840-44). The officers identified themselves and asked if Clemons would accompany them to police headquarters, because his name had surfaced in "the bridge case" (Tr. 2194, 2846). Clemons agreed (Tr. 2194, 2846). He got into the officers' car and accompanied them to police headquarters (Tr. 2194-95, 2846). They arrived at the interview room at about 6:30 p.m. (Tr. 2197, 2846). Clemons was not

under arrest (Tr. 2848). He was not handcuffed, and he was free to leave (Tr. 2195, 2846).

Clemons was advised of his rights (Tr. 2397-98, 2848). Clemons indicated that he understood his rights, and he said, "I don't want a lawyer, I'll talk to you guys" (Tr. 2398, 2848). Clemons was interviewed for about forty-five minutes, took a twenty-minute break, and then was interviewed from about 7:50 to 9:05 p.m. (Tr. 2399, 2404, 2859).

Clemons said that he, Richardson, Gray and a person that he did not know, who the police later found out was Winfrey, went to the Chain of Rocks Bridge on the evening in question (Tr. 2400). Clemons said that after they got there, Richardson gave him a large flashlight (Tr. 2400). Clemons described how they approached the bridge and walked across it to the Illinois side (Tr. 2401). Clemons said that was when they walked towards the Missouri end of the bridge they stopped briefly and conversed with two white females and a white male (Tr. 2402). Clemons said that they left the presence of these three individuals and walked to the Missouri end of the bridge (Tr. 2402). Then they conversed among themselves and came up with the idea of returning to the bridge and raping and robbing the individuals that they had encountered (Tr. 2402-03). Clemons said that his role was to assist Gray in subduing the white male (Tr. 2402). Clemons was shown a photograph of the flashlight that had been recovered at the crime scene (Tr. 2403-04). He said

that it was a photograph of the flashlight that Richardson had given him when they reached the bridge (Tr. 2404).

After the interview, Clemons was told that he was not free to leave (Tr. 2862). Clemons agreed to do an audiotaped statement (Tr. 2404). That recorded statement began at about 9:35 p.m., after Clemons had about a thirty-minute break, and continued until about 10:15 p.m. (Tr. 2493, 2863). In that statement, Clemons was informed of his rights. He indicated that he understood them and that he wanted to talk to the officers (Respondent's Exhibits N,O). He then made a statement in which he admitted, in addition to that discussed above, that he raped one of the victims (Respondent's Exhibits N, O).

On April 8, Clemons's mother called a relative of hers, Officer Warren Williams, who knew Clemons and who worked for the St. Louis Police Department (Tr. 3131-32). She told Officer Williams that Clemons had been arrested, and she asked for Officer Williams to find his whereabouts (Tr. 3132). He found out that the officers investigating this case had completed their questioning of Clemons and that Clemons was in a holdover cell (Tr. 3135). Officer Williams visited Clemons in holdover at 2:10 p.m. that day (Tr. 3139). Clemons told Officer Williams that he got in with the wrong people and they raped two girls (Tr. 3141). He said that a boy made a statement that one of these girls was not going to identify him and that boy

pushed the girls into the water (Tr. 3141). He said that he left his flashlight when they left the area (Tr. 3141).

The watch stolen from Cummins was found on April 8th hidden in a residence where Gray had recently visited (Tr. 1691, 2294-2311). Cummins later returned to Missouri from Maryland and viewed a series of lineups in which he identified Clemons, Richardson, Gray and Winfrey as his assailants (Tr. 1722-33).

On April 26, 1991, a body of a female was found in the Mississippi River near Caruthersville in Pemiscot County (Tr. 1458-60, 1475). It was identified, through dental records, as being the body of Julie Kerry (Tr. 1476-78, 1562-66, 2697). An autopsy indicated that she had died by drowning (Tr. 1536). The body of Robin Kerry has never been found; she has not been seen by her family, her friends, or at the school she attended (Tr. 1455-57, 1478, 1524).

Clemons did not testify on his own behalf. Clemons and the State presented evidence that showed that Clemons's face was bruised sometime after his statement to the police was made (Tr. 2858, 2863, 2879-82, 2910, 2929-32, 3131-45, 3173-77). Defense witness Dr. Stephen Duntley testified that Clemons's injury could have been caused by Clemons's cheek being hit against a solid object, such as a wall or a bar (Tr. 2929-31). At the close of the

evidence, instructions and argument of counsel, the jury found Clemons guilty of two counts of murder in the first degree (L.F. 142-43).

In the punishment phase, the State presented the testimony of thirteen witnesses and Clemons presented the testimony of eighteen witnesses (Tr. 3349-3590). Clemons did not testify on his own behalf. At the close of the evidence, instructions and argument of counsel, the jury recommended two death sentences (L.F. 93-96a). The jury found twelve statutory aggravating circumstances (L.F. 93-96a). The trial court followed the recommendation of the jury and sentenced Clemons to death for each of the murders (L.F. 51-52).[1]

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[1]Codefendant Marlon Gray was convicted of two counts of murder in the first degree, while codefendant Antonio Richardson was convicted of one count of murder in the first degree and one count of murder in the second degree. The juries sentenced them to death, and their convictions and sentences were affirmed on appeal. *State v. Gray*, 887 S.W.2d 369 (Mo. banc 1994); *State v. Richardson*, 923 S.W.2d 301 (Mo. banc 1996). Daniel Winfrey, who was fifteen years old at the time of the murders, pled guilty to two counts of murder in the second degree, two counts of forcible rape, robbery, and felonious restraint, in exchange for a recommendation of a thirty-year sentence from the State (Tr. 2004, 2068-69).

On November 1, 1993, Clemons filed a motion to vacate, set aside, or correct the judgment or sentence of the trial court pursuant to Rule 29.15 (PCR L.F. 1371). An amended Rule 29.15 motion was filed for Clemons on February 4, 1994 (PCR L.F. 1027). An evidentiary hearing was held before Judge Peek in April and September of 1995 (PCR Tr. 2-1474). On March 18, 1996, the motion court entered its findings of fact and conclusions of law and denied Clemons's Rule 29.15 motion (PCR L.F. 6-54).

On consolidated appeal, this Court affirmed Clemons's conviction and sentence and affirmed the denial of post-conviction relief. *State v. Clemons,* 946 S.W.2d 206 (Mo. banc 1997).

Clemons then filed a petition for writ of habeas corpus in the United States District Court. The district court granted the petition and vacated the death penalty. The court denied relief in all other respects. *Clemons v. Luebbers,* 212 F.Supp.2d 1105 (E.D. Mo. 2002). The State appealed, and the court of appeals reversed the grant of habeas relief. *Clemons v. Luebbers,* 381 F.3d 744 (8th Cir. 2004).

The present litigation began when Clemons filed a petition for writ of state habeas corpus on June 12, 2009. The court referred the matter to a Master who held a hearing. The Master issued his amended final report on September 25, 2013, which began the briefing schedule.

As outlined above, there was substantial evidence from which the jury could find Clemons guilty of first degree murder: the testimony of Daniel Winfrey (Tr. 2002), and Thomas Cummins (Tr. 1659) corroborated by Clemons's own pretrial statement (Respondent's Exhibits N, O). At the September 17, 2012 habeas hearing, the habeas court heard additional inculpatory information.

The testimony at the September 17, 2012 hearing focused on whether Clemons's post-arrest statement was a product of police coercion. During the hearing Clemons did not testify that the post-arrest statements he made were erroneous or false. (H.Tr. 328-332). When directly asked whether his post-arrest statements were false, Clemons declined to answer. (H.Tr. 383).

Additionally, the State asked Clemons direct questions concerning the events on the bridge that night. (H.Tr. 383-389). Clemons understood that the Court could take a permissive adverse inference from his failure to answer the questions asked by the State. (H.Tr. 390-391). The Court made that inference adverse to Clemons. (H.Tr. 390; Master's Report, pp. 104-5).

The State also introduced evidence that corroborated the trial evidence. During these habeas proceedings, the Missouri State Highway Patrol performed DNA testing on the condom the police discovered on the bridge. (Respondent's Exhibit E, M). The condom produced a full DNA profile of a female (H.Tr. 684). The profile is a rare one, one in 59.14 quadrillion in the

Caucasian population (H.Tr. 704). Kim Gorman from the Paternity Testing Corporation compared the profile from the condom with the profiles from Virginia and Richard Kerry, the parents of the murdered women (H.Tr. 752-3). It is 6 trillion times more likely that the donor of the DNA on the condom was the daughter of the Kerry's than a random person (H.Tr. 755). There is a 99.99% chance the donor was a daughter (H.Tr. 756).

The Missouri State Highway Patrol also performed DNA testing on Marlin Gray's clothing the police seized at the residence of Robert Troncale. The Highway Patrol developed profiles from the samples and compared the profiles to those contained in the CODIS database. (H.Tr. 694).

Ms. Bollinger concluded that Marlin Gray could not be eliminated from the mixture profile from Exhibit AA, a cutting taken from Marlin Gray's boxer shorts. (H.Tr. 698). Likewise, the person who left DNA on the condom could not be eliminated from the mixture profile of Exhibit AA (H.Tr. 698). The mixture was of at least three persons (H.Tr. 688). With the non-sperm fraction from this cutting, the profile was consistent with being a mixture of two individuals. (H.Tr. 699). This profile was consistent with the condom profile (H.Tr. 699). As to the sperm fraction, it was also a mixture of at least two people (H.Tr. 693). The major component was consistent with Marlin Gray, and Reginald Clemons could not be eliminated as a contributor to the profile. (H.Tr. 699).

As to cuttings of cloth from the fly of Marlin Gray's pants, Exhibit X, the profile was a mixture of at least three individuals (H.Tr. 690). The person who left DNA on the condom could not be eliminated. (H.Tr. 700). Likewise, Marlin Gray and Reginald Clemons could not be eliminated as a contributor to the mixture profile. (H.Tr. 700). When Ms. Bollinger examined the non-sperm fraction from this cutting, there was a mixture of at least two individuals (H.Tr. 694). The major component of the mixture was consistent with the DNA profile from the condom. (H.Tr. 700-701). As to the sperm fraction from this sample, the profile was consistent with a mixture of at least three individuals (H.Tr. 694, 701). Marlin Gray, Reginald Clemons and Antonio Richardson could not be eliminated as contributors to the mixture profile. (H.Tr. 701).

Ms. Bollinger also conducted statistical analysis of the DNA profile and provided a frequency for the profiles. The condom profile was rare, one in 59.14 quadrillion Caucasians (H.Tr. 704). Concerning the boxer shorts, the profile was consistent with Marlin Gray and occurred 1 in every 5.938 quadrillion in the black population (H.Tr. 706). Reginald Clemons could not be eliminated as a contributor to the mixture profile (H.Tr. 703). Only 1 in every 16,690 individuals in the black population would be included as a contributor to the mixture profile. (H.Tr. 707). As the individual who left DNA on the condom, Marlin Gray and Reginald Clemons could not be

eliminated from that mixture profile. (H.Tr. 708). The DNA results corroborate the trial testimony of Daniel Winfrey (Tr. 2028-9, 2034-42), Thomas Cummins (Tr. 1685-88) and the pretrial statement of Clemons (Respondent's Exhibit O, p. 11-15) that Clemons, Gray and Richardson each raped at least one of the Kerry sisters.

I. Clemons is not entitled to a new trial on the basis of non-disclosure because he does not demonstrate a reasonable probability that the outcome of the trial would have been different.

A. The elements of a *Brady* claim.

Clemons contends that his due process rights were violated because the State did not disclose exculpatory information possessed by Warren Weeks (Clemons's Brief, p. 14). *Brady v. Maryland,* 373 U.S. 83 (1963). For Clemons to show a *Brady* claim, he must show that the State failed to disclose exculpatory evidence that was material to the outcome of his trial. *Id.*; *Strickler v. Greene,* 527 U.S. 263 (1999); *Kyles v. Whitley,* 514 U.S. 419 (1995). To show that the claimed evidence is material, Clemons must show prejudice as that term is defined by the Supreme Court in *Strickland v. Washington,* 466 U.S. 668 (1984). Evidence is material only if there is a reasonable probability that the outcome of the trial would have been different. *State ex rel. Engel v. Dormire,* 304 S.W.3d 120, 128 (Mo. banc 2010), *quoting Strickler v. Greene,* 527 U.S. at 280, and *United States v. Bagley,* 473 U.S. 667, 682 (1995). In *Bagley*, the Supreme Court stated,

> We find the *Strickland* formulation of the A*gurs* test for materiality sufficiently flexible to cover the

> "no request" "general request" and "specific request" cases of prosecutorial failure to disclose evidence favorable to the accused: The evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A "reasonable probability" is a probability sufficient to undermine confidence in the outcome.

United States v. Bagley, 473 U.S. at 682.

Recently, the Supreme Court described the high standard of prejudice that is necessary under *Strickland*.

> In assessing prejudice under *Strickland*, the question is not whether a court can be certain counsel's performance had no effect on the outcome or whether it is possible a reasonable doubt might have been established if counsel acted differently. … Instead, *Strickland* asks whether it is "reasonably likely" the result would have been different. … This does not require a showing that counsel's actions "more likely than not altered the outcome," but the difference between *Strickland's* prejudice standard

> and a more-probable-than-not standard is slight and matters "only in the rarest cases." … The likelihood of a difference result must be substantial, not just conceivable.

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

B. Standard of Review of Master's report.

The habeas petitioner has the burden of proof to show that he is entitled to habeas corpus relief. *State ex rel. Winfield v. Roper,* 292 S.W.3d 909, 910 (Mo. banc 2009). Because this Court appointed a Master and the Master issued a report, the report should receive the "weight and deference which would be given to a court-tried case by a reviewing court" due to the Master's unique ability to view and judge the credibility of witnesses. *State ex rel. Woodworth v. Denney,* 396 S.W.3d 330, 336-37 (Mo. banc 2013). "In such cases, the Master's findings and conclusion will be sustained by this Court unless there is no substantial evidence to support them, they are against the weight of evidence, or they erroneously declare or apply the law." *State ex rel. Lyons v. Lombardi,* 303 S.W.3d 523, 525-26 (Mo. banc 2010).

C. Clemons's claim.

Clemons contends that the State failed to disclose exculpatory information from William Weeks about his observation of Clemons's physical condition after the arrest (Clemons's Brief, p. 16).[2]

The information Weeks possessed was his observation of Clemons about 5:25 a.m. on April 8, 1991. At that time, Weeks was a bond investigator in the Pretrial Release Unit of the holdover area at the St. Louis Police Department. He screened recent arrestees to see if they qualified for release on their own recognizance or low bond (Master's Report, p. 100, citing Weeks' Depo. at 14). Weeks' testified that he filled out a three-page document called a Pretrial Release Form and gave it to the Commissioner who made a preliminary decision about whether an arrestee would receive pretrial release immediately or would be held over until a judge could set bond (Master's Report, p. 100).

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[2]Clemons attempts to make the failure to disclose look bigger by contending that the State failed to disclose Weeks and the State failed to disclose Week's pretrial release form (Petitioner's Brief, p. 16). Ultimately, the information is the same – the observation by Weeks of Clemons after the arrest (Petitioner's Brief, p. 16).

Weeks testified that he recalled seeing Clemons at 5:25 a.m. on April 8th, and recalled that Clemons had a large bump between the size of a golf ball and a baseball on his right cheek (Master's Report, p. 100, citing Weeks's Depo. at 18-19, 37). Weeks reported that Clemons stated that he had no physical problems (Master's Report, p. 100, citing Weeks's Depo. at 23). Clemons reported no physical problems to Weeks and did not say what caused the bump (Master's Report, p. 19). Weeks's stated that he wrote on a "Pretrial Release Form" the notation of either "bump" or "bruise" (Master's Report, p. 100 citing Weeks's Depo at 23).

Weeks gave the form to Commissioner Edwards in the pretrial release office (Master's Report, p. 100). Commissioner Edwards then interviewed Clemons (Master's Report, p. 102 quoting App. 7 at IAD00047). Commissioner Edwards reported that she did not see injuries on Clemons and he did not complain to her about any abuse (Master's Report, p. 102, quoting App. 7 at IAD00047). The Master found that the State did not disclose to the defense information by Weeks about the bump on Clemons's cheek (Master's Report, p. 103).

D. The Master's prejudice analysis is erroneous, and the Court should not adopt that analysis.

The Master suggested there was prejudice vis-à-vis the trial court's ruling on the motion to suppress statements (Master's Report, p. 103).

Notwithstanding the overall length of the Master's Report, the Master used the wrong prejudice standard and failed to conduct proper prejudice analysis (Master's Report, p. 103).

1. The Master used the wrong prejudice standard.

In conducting his prejudice analysis, the Master stated:

> As to the third issue, Clemons does not have to demonstrate that the disclosure of Weeks' knowledge of injury in the obscured form "would have resulted ultimately in [Clemons'] acquittal." *Woodworth,* 396 S.W.3d at 338. It is enough if there is a reasonable probability of a different result. *Ibid.* This element is satisfied "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." *Engel v. Dormire, supra,* 304 S.W.3d at 128.
>
> I believe Clemons has satisfied this standard. The importance of Warren Williams' testimony was emphasized by this Court in its original Opinion, affirming the trial court's denial of the motion to suppress Clemons' confession. 946 S.W.2d at 218. The contradiction of his testimony by Weeks is a method

> of impeachment. *Maugh v. Chrysler Corp.,* 818 S.W. 2d 658, 661 (Mo. App. 1991). In the criminal case, Weeks' testimony may have resulted in the trial court sustaining the motion to suppress, in which case, Clemons' confession would never have been heard by the jury.

(Master's Report, p. 103). The Master's conclusion is that the testimony "may have resulted in the trial court sustaining the motion to suppress." This conclusion is an insufficient basis for habeas relief for two independent reasons. First, the *Bagley/Strickland* prejudice standard is not "may have resulted" in a different outcome. Indeed, such language is clearly repudiated by the Supreme Court in *Strickland*. In no uncertain terms, the Supreme Court stated,

> It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding. Virtually every act or omission of counsel would meet that test, … and not every error that conceivably could have influenced the outcome undermines the reliability of the result of the proceeding.

Strickland v. Washington, 466 U.S. at 693. This Court has previously rejected *Brady* claims when the offender claimed the suppressed evidence "may be relevant" to a witness's credibility because the mere possibility that it would be helpful was insufficient. *State v. Nathan,* 404 S.W.3d 253, 263-4 (Mo. banc 2013), *citing State v. Taylor,* 134 S.W.3d 21, 26 (Mo. banc 2004). Instead, as *Strickland* and *Bagley* demand, the offender must demonstrate a reasonable probability that the outcome of the trial would have been different. The Master does not make that finding (Master's Report, p. 103-04).

The second error in the Master's report arises in applying the *Strickland* standard in the motion to suppress context. The legal question is not the one asked by the Master – whether the trial court would have sustained the motion to suppress (Master's Report, p. 103). Instead, the legal question is the question asked by the Court in *Strickland* – whether there is a reasonable probability that the outcome of the trial would have been different. *Id.*

The Supreme Court gave guidance in applying the *Strickland* prejudice standard in the motion-to-suppress context in *Kimmelman v. Morrison,* 477 U.S. 365 (1986). In *Kimmelman*, the offender complained that he received ineffective assistance of counsel because counsel did not present a motion to suppress based on a Fourth Amendment (illegal search and seizure) theory. In *Kimmelman*, the Court stated that a meritorious Fourth Amendment issue

was a necessary but not a sufficient condition for the grant of new trial. Phrased another way, the issue is not whether the motion to suppress should have been granted; instead, the question is whether there is a reasonable probability that the outcome of the trial would have been different.

> As is obvious, *Strickland's* standard, although by no mean insurmountable, is highly demanding. More importantly, it differs significantly from the elements of proof applicable to a straightforward Fourth Amendment claim. Although a meritorious Fourth Amendment issue is necessary to the success of a Sixth Amendment like respondent's, a good Fourth Amendment claim alone will not earn a prisoner federal habeas relief. Only those habeas petitioners who can prove under *Strickland* that they have been denied a fair trial by the gross incompetence of their attorneys will be granted the writ and will be entitled to retrial without the challenged evidence.

Kimmelman v. Morrison, 477 U.S. at 382; *see Gray v. State,* 378 S.W.3d 376 (Mo. App. E.D. 2012) (offender must show a meritorious suppression and a reasonable probability of a different outcome); *State v. Neal,* 849 S.W.2d 250,

258 (Mo. App. W.D. 1993) (same). There was no finding by the Master about the issue identified in *Kimmelman*. The Master did not conclude that there was a reasonable probability that but for Weeks's information, the outcome of Clemons's trial would have been different.

Indeed, the Master's finding is to the contrary:

> This is a troubling outcome for me, because we do not know if Weeks' recollection of the evidence is consistent with other people in the Pretrial Release Unit, for example, Commissioner Edwards, who, according to the IAD Report, observed no injuries to Clemons at 5:49 a.m. I am dubious that the suppression of Clemons statement would have made much difference in this case, due to the strength of the evidence, but the holding of *Kyles*, *supra*, would seem to suggest that the question of harmless error is not pertinent where there is a *Brady* violation.

(Master's Report, p. 104).

Clemons does not fulfill the *Strickland* standard when the Master concludes that he is dubious that the outcome of the proceeding would have been different had the jury not heard Clemons's statement (Master's Report, p. 104).

2. There is no reasonable probability that the outcome of the suppression hearing would have been different.

The trial record shows that at a little after 6:00 p.m. on April 7, 1991, Officers Walsh and Brauer went to a location on Barken Avenue in Northwoods and spoke to Clemons (Tr. 2192-96; 2840-44). The officers identified themselves and asked if Clemons would accompany them to police headquarters, because his name had surfaced in "the bridge case" (Tr. 2194, 2846). Clemons agreed (Tr. 2194, 2846). Clemons got into the officers' car and accompanied them to police headquarters (Tr. 2194-95; 2846). They arrived at the interview room at about 6:30 p.m. (Tr. 2197, 2846). Clemons was not under arrest (Tr. 2848). He was not handcuffed, and he was free to leave (Tr. 2195, 2846).

Before being interviewed by Officers Pappas and Brauer, Clemons received his rights under *Miranda v. Arizona*, 384 U.S. 436 (1966) (Tr. 1313, 1320, 2397-98, 2847-48). Clemons indicated that he understood his rights, and he said, "I don't want a lawyer, I'll talk to you guys." (Tr. 2398, 2848). Clemons was interviewed for about forty-five minutes. After a twenty-minute break, Clemons was interviewed again from about 7:50 to 9:05 p.m. (Tr. 2399, 2404, 2859).

Clemons said he, Richardson, Gray and a person that he did not know, who the police later found out was Winfrey, went to the Chain of Rocks Bridge on the evening in question (Tr. 2400). Clemons said that after they got there, Richardson gave him a large flashlight (Tr. 2400). Clemons described how they approached the bridge and walked across it to the Illinois side (Tr. 2401). Clemons said that they walked towards the Missouri end of the bridge, stopped briefly and conversed with two white females and a white male (Tr. 2402). Clemons said they left these three individuals and walked to the Missouri end of the bridge (Tr. 2402). Then they conversed among themselves and came up with the idea of returning to the bridge and raping and robbing the individuals that they had encountered (Tr. 2402-03). Clemons said that his role was to assist Gray in subduing the white male (Tr. 2402). Clemons was shown a photograph of the flashlight that had been recovered at the crime scene (Tr. 2403-04). He said that it was a photograph of the flashlight that Richardson had given him when they reached the bridge (Tr. 2404). Before and during the making of this statement, Clemons was not beaten, threatened, coerced, and he did not ask for an attorney (Tr. 1303, 1316, 1327-28, 1370, 2848, 2858, 2862-63, 2879-82, 2932).

At the pretrial suppression hearing, Detectives Pappas and Brauer testified that Clemons was not beaten or coerced. And Clemons did not ask for an attorney (Tr. 1303, 1316, 1327-28, 1370). Clemons testified at this

hearing (Tr. 1409). His theory at that time was that police officers "mainly" hit him in the back of the head and the chest (Tr. 1412-13) and that he was hit once on the face, specifically, the jaw (Tr. 1413). The hit to the jaw, Clemons testified, caused his right cheek to swell and caused his eye to swell (Tr. 1414-15).[3] To corroborate this suppression hearing testimony Clemons called witnesses to describe swelling later on April 8th at 2:15 p.m. (Tr. 1336-38), and at 8:00 p.m. (Tr. 1270-71), and on April 9th (Tr. 1265-66, Tr. 1290, 1340, 1380, 1427). Some of the corroborating evidence was not effective. One witness noted that Clemons did not say what caused the putative injuries (Tr. 1272). Mr. Kent, associated with Melvin Leroy Tyler (Tr. 1406), testified that Clemons's lip, and only his lip, was swollen (Tr. 1392). Medical records reported that it was the left side of Clemons face that was slightly swollen (Tr. 1430). Vera Thomas testified that the right jaw was swollen, but no one else observed that (Tr. 1385). Clemons reported that his eye swelled halfway

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[3]Clemons's testimony changes. During the Internal Affairs investigation, he contended he had been hit sixteen or seventeen times, a number that expanded to twenty at the suppression hearing to between fifty and one hundred times at a prehabeas hearing deposition (H.Tr. 360). The severity of the alleged strikes has also increased over time (H.Tr.361, 362).

shut (Tr. 1415), but Mr. Robinson reported that it was completely shut (Tr. 1290).

In contrast, Warren Williams went to see Clemons at the holdover unit at 2:10 p.m. on April 8th, just hours after Clemons's arrest (Tr. 1276). Williams was related to Clemons mother and went there as a friend of the family due to Clemons' mother's request (Tr. 1285). Williams observed no bruises, lumps or swelling at 2:10 p.m. on April 8th (Tr. 1281, 1282-83). Clemons presented no complaint to Williams about the police (Tr. 1281).

Clemons testified that he was arrested between 1:00 and 2:00 a.m. on April 8, 1991 (Tr. 1417). The booking photograph shows no trauma to the face (Master's Report, p. 8). Clemons now concedes that the putative injury "does not show up for good on that photo" (H.Tr. 356). In addition to the testimony, Clemons presented medical records indicating that he received treatment for trauma to the face after his initial court appearance (Tr. 1431, 1432-33). At trial, the emergency room physician testified about seeing Clemons on April 9, 1991, at 7:50 p.m. (Tr. 2922-3). He described Clemons as having "mild facial trauma" (Tr. 2925) without swelling around the eye or a lip laceration (Tr. 2926). The swelling "wasn't impressive" (Tr. 2928). When the trial court ruled on the motion to suppress statement, the trial court found the police officers' testimony was credible. Clemons received Miranda warning, and there was no coercion.

> Based upon the testimony, I find that the Miranda warnings given to the defendant, were given to the defendant; at the time of his custody was not reasonable; and was not an amount of time that would, in of itself, amount to coercion. Further, I find that by a preponderance of the evidence, the State had shown that there was no official misconduct.
>
> Therefore, I'll deny the defendant's motion to suppress the statement.

(Tr. 1440-41).

Clemons contends that the evidentiary mix changes with the testimony of Weeks. Clemons contends that Weeks could testify that he saw a bump the size of a golf ball or baseball on Clemons at 5:25 a.m. on April 8, 1991, about eight-and-a-half hours before Williams observed Clemons without injury. That theory is meritless for multiple reasons. First, there is no corroboration of Weeks's putative observation at 5:25 a.m. on April 8, 1991 (Master's Report, p. 104). Indeed, to the contrary, Weeks observations are refuted by Commissioner Edwards's observation seventeen minutes later at 5:42 a.m. when she did not see any injuries on Clemons (Master's Report, p 102, quoting App. 7 at IAD00047).

Second, Weeks observations are not corroborated by any of the witnesses Clemons called at the motion to suppress hearing. None of those witnesses testified that they observed a golf ball or baseball sized injury on Clemons. While they testified that there was "swelling," nobody described it as the size of a baseball or a golf ball. Also significant is the fact Clemons did not testify that he had a bump the size of a baseball or golf ball (Tr. 1414-1415).

Third, Weeks observations are refuted by objective data: the photograph taken about 2:00 a.m. on the morning of April 8, 1991, about two-and-a-half hours before Weeks's observation (Master's Report, p. 9, H.Tr. 356). Contemporaneous with the photograph is the testimony by the intake personnel at intake. They saw no injury on him and heard no complaints from him (H.Tr. 505-7, 518-20, 527-9, 537-41, 553; Respondent's Exhibits WW, XX, YY and ZZ). Weeks's description is not supported by any of the medical data presented by Clemons at the motion to suppress hearing (Tr. 1431, 1432-33) or at trial (Tr. 2922-28). To the extent Weeks's testimony has value as impeachment (Master's Report, p. 103), it also impeaches the other witnesses at the motion to suppress hearing.

Additionally, Weeks's observation is not supported by the objective observation of Warren Williams (Tr. 1275). As noted, Mr. Williams was related to Clemons (Tr. 1276). He visited Clemons on April 8th at 2:10 p.m. as

a friend of the family (Tr. 1285). He observed no bruises, bumps or evidence of physical coercion (Tr. 1281, 1282-83). Clemons did not complain about police brutality (Tr. 1281). The objective information before the suppression court was that the injuries occurred after 2:10 p.m. on April 8, 1991.

Even if the suppression court were to accept Weeks's testimony as credible, Weeks does not identify the cause of the bump because it is clear that Clemons was uninjured after the questioning and at the time of the arrest. If injuries existed at 5:25 a.m. on April 8, 1991, then those injuries must have occurred after the arrest and before the observation. But in that situation, the injuries did not occur as part of the questioning by Pappas and Brauer. Accordingly, even accepting Weeks's information as reliable, such acceptance does not show that Clemons's statement should have been suppressed.

Reviewing the information from Weeks in light of the information actually before the trial court at the motion to suppress hearing amply demonstrates that there is no reasonable probability that the outcome of the proceeding would have been different.

The Master's Report inserts the issue of "harmless error" (Master's Report, p. 103). With *Brady* analysis, the State does not have the burden of demonstrating that error is harmless. To the contrary, the offender bears the burden of demonstrating prejudice under *Kyles v. Whitley,* 514 U.S. at 434

and *Strickland v. Washington,* 466 U.S. at 668. If the offender shows a reasonable probability that the outcome of the proceeding would have been different, that concludes the prejudice inquiry. But that being said, the offender must demonstrate a reasonable probability that the outcome of the proceeding would have been different. Clemons does not fulfill that burden.

3. Clemons does not demonstrate that the ouctome at the trial would have been different.

As noted, under *Kimmelman*, the prejudice inquiry is not whether the outcome of the motion to suppress hearing would have been different; instead, the issue is whether the outcome of the trial would have been different. Accordingly, even if the Court were to assume that Clemons statement should have been suppressed, that assumption does not show a reasonable probability that the outcome of the trial would have been different. In addition to the physical evidence used at trial, the State introduced the testimony of Daniel Winfrey, a codefendant, who testified about Clemons's actions at the bridge. That testimony was supplemented by the other victim, the surviving victim, Thomas Cummins. The narrative Statement of Fact that began this brief was constructed with the testimony that did not include (with the exception of two easily identified paragraphs) Clemons's pretrial statement. The Master's conclusion that he was doubtful that the outcome of the trial would have been different had the motion to

suppress been granted (Master's Report, p. 104) amply shows that Clemons does not demonstrate prejudice.

4. Clemons's argument to this Court does not warrant a grant of relief.

Clemons asserts that two legal conclusions by the Master are actually fact-findings that should receive deference in the Court's review of the Master's Report (Clemons's Brief, p. 16). A court's determination that there is or is not a reasonable probability that the outcome of the trial would have been different is not a fact-finding but rather a mixed question of law and fact. *E.g.*, *Kimmelman v. Morrison,* 477 U.S. at 388-89; *Strickland v. Washington,* 466 U.S. at 698. Similarly, the question of whether a statement is voluntary is a legal question, not a factual question. *See Miller v. Fenton,* 474 U.S. 104 (1985). Clemons assertion that these are factual issues and should receive deference is erroneous.

Periodically, Clemons asserts that the Master found that his rights were violated because the police coerced his confession (Clemons's Brief, p. 2 citing Master's Report, pp. 99-104; Clemons's Brief, p. 11-12, 17). Clemons gives no pinpoint citation to the Master's Report to support his assertion. There is certainly no such finding in the Master's *Brady* analysis (Master's Report, pp. 99-104). Elsewhere in the report, the Master asked himself: "Would I have suppressed the statement?" (Master's Report, p. 94). To this

questions he replied: "That is hard to say." The Master echoed that sentiment later (Master's Report, p. 95). In any event, the Court should not resolve that question because Clemons fails to brief the coerced confession and does not include it in his point relied on (Clemons's Brief, p. 12).

Even if the claim were properly before the Court, the Court should find that Clemons's pretrial statement was adduced knowingly and voluntarily for the reasons stated earlier. Even if the Court were to conclude that the statement was not knowing and voluntary, the Court should then determine that its admission at Clemons's trial was harmless error, again for the reasons stated earlier. *See Arizona v. Fulminante,* 499 U.S. 279 (1991).

Clemons contends that the new information about a $150,000 settlement paid to Cummins by the City of St. Louis corroborates his account that Clemons was beaten by police (Clemons's Brief, p. 21, 24-28). But this settlement is not a "new fact" that Clemons uncovered since his criminal trial. The underlying alleged conduct, police brutality towards Thomas Cummins, is not a new fact because Cummins testified extensively at Clemons's trial about his interview with police (Tr. 1799, 1840-42, 1904-11). The theory that the St. Louis City police detectives coerced Cummins's statement is not a new theory and was fully aired by Clemons at trial.

Even if the Court were to accept Clemons's theory as true, it should not undermine the Court's confidence in the knowing and voluntary nature of

Clemons's pretrial statement. Initially, it is doubtful that such evidence of "prior bad acts" by an organization would even be admissible at a suppression hearing because the truth of an assertion that the police unlawfully took statements from Cummins does not make it more or less likely that the police unlawfully took statements from Clemons. A suppression hearing should not be a parade of "prior bad acts" or "prior good acts" by the police. Second, the police detectives Clemons accuses of coercion were Pappas and Brauer. Brauer was not involved with the Cummins interview (Habeas Hearing Transcript, p. 450), and Pappas's involvement with Cummins interview was minimal (H.Tr. 471-72). Detective Pappas credibly testified that he did not threaten or physically coerce a statement from Cummins (Habeas Transcript, p. 472-73).

Detective Pappas's testimony is credible in light of the settlement. Clemons did not show the City's motivation to settle. There is no proof that the City admitted liability through the settlement. There can be many variables that motivate a settlement: quality of claim, quality of counsel, quality of witnesses, costs to defend or prosecute the case and the like. The existence of a civil settlement with Mr. Cummins does not make it more or less likely that Clemons statement was involuntary.

Clemons contends that his statement was the lynchpin of the State's evidence of deliberation (Clemons's Brief, p. 28). The Master disagreed

(Master's Report, pp. 104-105). On direct appeal, the Court concluded that there was sufficient evidence of deliberation to sustain the finding of guilt to first-degree murder. *State v. Clemons,* 946 S.W.2d at 216. Again, the facts the Court cited to support the finding of deliberation was information testified to by Cummins and Winfrey and was not dependent on Clemons's statement.

Lastly, Clemons contends that the statement was the only testimonial piece of evidence placing Clemons on the platform beneath the bridge deck during the murders (Clemons's Brief, p. 29). The Master disagreed (Master's Report, p. 105). Winfrey's testimony placed Clemons at the manhole between the deck and the platform beneath (Tr. 2045-46). Indeed, he is sitting on the edge of the manhole (Tr. 2047). Clemons sent Winfrey after Gray away from the manhole (Tr. 2045, 2048). Because it was clear that Gray and Winfrey were not at the manhole, the two remaining culprits, Richardson and Clemons, were at the manhole entrance to the platform. Clemons contention is meritless.

II. Clemons is not entitled to resentencing because 1) the Court has determined that his sentence is not disproportionate, and 2) Clemons's capital sentence is not disproportionate.

Clemons contends that he should receive a second proportionality review during this habeas litigation that will reduce his capital sentence to life imprisonment. Clemons had a proportionality review by this Court during his direct appeal; thus, he is not entitled to a second review years after the direct appeal. *State ex rel. Simmons v. White,* 866 S.W.2d 443 (Mo. banc 1993). In *Simmons* this Court stated that neither post-conviction proceedings nor habeas corpus was "designed for duplicative and unending challenges to the finality of a judgment." *Id*. at 446. Because the claim repeats one decided against Clemons, it should not be reconsidered.

On direct appeal, Mo. Rev. Stat. § 562.035.3 required this Court to consider "whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime, the strength of the evidence and the defendant." *State v. Clemons,* 946 S.W.2d at 232. This Court conducted a proportionality review on direct appeal.

> In considering whether the death sentence imposed in this case is proportionate, we consider the death sentence imposed in other cases. [Clemons] specifically argues that his punishment is

disproportionate compared to other cases in which the defendant was not the actual killer. There have been many cases in which defendant received the death sentence even where it appeared that an accomplice had done the actual killing. …

This case involves multiple murders. The death penalty has been found appropriate in other cases involving multiple murders. …

These murders were committed in conjunction with rapes. There are many cases in which the death penalty was imposed for murders committed in conjunction with rapes and other crimes involving force. …

This case involves murders committed in an attempt to avoid arrest for other crimes. The death penalty has been upheld in cases where the murder was committed in hopes of avoiding arrest or detection. …

The death penalty imposed in this case is proportionate to the sentence imposed in similar cases.

Id. at 233-34 (citations omitted). Because Clemons received "proportionality review in the manner provided by law at the time of that review" on direct appeal, he is not entitled to a second proportionality review in a state habeas proceeding. *See State v. Nunley,* 341 S.W.3d 611, 624 (Mo. banc 2011); *State ex rel. Taylor v. Steele,* 341 S.W.3d 634, 652 (Mo. banc 2011).

The Master did not recommend the Court issue the writ on the issue of proportionality (Master's Report, p. 104-108). The Master suggested that the question of proportionality is largely one of law. And it is. Section 562.035.3, RSMo 1994.

The Master compared the Clemons case to codefendant Gray (Master's Report, p. 104). If Gray's sentence was not disproportionate, then Clemons's sentence should not be as well (Master's Report, p. 104). The Master also examined the strength of evidence of guilt. The court found the trial evidence was bolstered by Clemons's failure to testify directly about the offense during the habeas hearing (Master's Report, p. 104-05). The Master also examined the codefendants' transcripts and concluded that there was substantial evidence supporting Clemons's culpability for first-degree murder (Master's Report, p. 104-07).

Clemons contends that two events have occurred since the direct appeal that warrant reconsideration of proportionality. First, Clemons argues that codefendant Richardson's sentence became a life sentence; thus, Clemons

sentence should become life as well. (Clemons's Brief, p. 33). As the Court recalls, codefendant Richardson capital sentence was summarily set aside because of a constitutional violation arising from the trial judge's sentencing following a jury deadlock. *See State v. Whitfield,* 107 S.W.3d 253 (Mo. banc 2003). The fact that the State could not retry Richardson because Mo. Rev. Stat. § 565.040.2 precluded retrial, does not mean that Clemons sentence became disproportionate. *See State v. Whitfield,* 107 S.W.3d at 271-72 (discussing effect of Mo. Rev. Stat. § 565.040.2). There was neither a jury determination nor a judicial determination that capital punishment was inappropriate for Richardson. The only judicial determination was that the State could not seek a retrial of punishment. Given the judicial imposition of the life without parole sentence on Richardson, it is like the situation where the State waived capital punishment because Richardson became ineligible for capital punishment due to a procedural defect in his original sentencing, Clemons's capital sentence should not be compared to Richardson's sentence. *Cf. State v. Schneider,* 736 S.W.2d 392, 397 (Mo. banc 1987) (declining to compare capital sentence to case where state waived capital punishment).

Lastly, Clemons suggests that there is new evidence that weighs in favor of reducing his sentence. Clemons focuses on his age, lack of prior criminal history, and other characteristic that argue in favor of a reduction of his sentence (Clemons's Brief, p. 44). But Clemons's age at the time of the

offense was known at the time of trial and direct appeal. Moreover, Clemons's lack of prior criminal history was also a fact that was known at the time of trial. Indeed, Clemons submitted a mitigating circumstance instruction based on those characteristics and more (L.F., pp. 107-114).

In his brief, Clemons repackages these characteristics through the lens of an expert, Dr. David Keys (Clemons's Brief, p. 44). Keys suggests that Clemons has two relevant characteristics: 1) he did not directly kill his victim, and 2) he did not have a prior criminal record (Clemons's Brief, p. 45). Dr. Keys continues by suggesting that people with those two characteristics should not receive capital punishment. Proportionality review, however, involves examination of the offender and the offense to determine if the capital sentence is disproportionate. Section 565.040.2, RSMo 1994. The analysis is not mechanical or mathematical as suggested by Dr. Keys; instead, the proportionality review contemplates judicial judgment. For example, an offender's capital sentence is not rendered disproportionate merely because there is one statutory aggravating circumstance instead of two. Likewise, a sentence is not disproportionate because an offender possess two mitigating circumstances instead of one. The counting of aggravating and mitigating circumstances does not take the place of judicial judgment about the offender and the offense.

Clemons's analysis does not focus on any of the statutory aggravating circumstances actually found by the jury (Clemons's Brief, p. 44-47). The jury found that the murder of Julie Kerry was committed while Clemons was engaged in the attempted commission of an unlawful homicide of Thomas Cummins. The jury also found that Clemons committed the murder of Julie Kerry while Clemons was knowingly aiding or encouraging the codefendants in the perpetration of or attempt to perpetrate rape. The jury also found that the murder of Julie Kerry involved depravity of mind and as a result thereof, the murder was outrageously vile, horrible, and inhumane. The jury also found that the murder of Julie Kerry was for the purpose of avoiding lawful arrest of the defendant or the codefendant (L.F., pp. 93-94). Similar statutory aggravating circumstances where found by the jury for the murder of Robin Kerry (Direct Appeal Legal File, p. 95-97). Clemons's mechanical analysis does not consider all the relevant factors. The counting of aggravating and mitigating circumstances does not substitute for judicial judgment about the offender and the offense that occurred during the proportionality review from Clemons's direct appeal. Only judicial judgment recognizes the appropriate weight to give aggravating and mitigating factors when conducting the proportionality review. Clemons's claim does not warrant habeas relief.

Conclusion

The Court should deny the petition for writ of habeas corpus.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify:

1. That the attached brief complies with the limitations contained in Missouri Supreme Court Rule 84.06 and contains 10,961 words, excluding the cover, certification and appendix, as determined by Microsoft Word 2007 software; and

2. That a true and correct copy of the foregoing was served through the efile system this 9 day of January, 2014, to:

Mark G. Arnold
Attorney at Law

3. That a true and correct copy of the attached brief, was mailed, postage prepaid, this 9 day of January, 2014, to:

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