IN THE TWENTY NINTH JUDICIAL DISTRICT
DISTRICT COURT OF WYANDOTTE COUNTY, KANSAS

Lamonte McIntyre,	)	
Movant,	)	
v.	)	**Case No.: 2016 CV 508**
	)	
State of Kansas,	)	
Respondent.	)	

AMENDED MEMORANDUM OF FACT AND LAW IN SUPPORT OF MOTION TO VACATE, SET ASIDE, OR CORRECT SENTENCE UNDER K.S.A. 60-1507

Lamonte McIntyre stands before this Court seeking justice and release from his wrongful conviction and confinement[1]. Arrested when he was just 17 years old, McIntyre has now served 22 years in prison for a double homicide he did not commit and knew nothing about. McIntyre did not even know the two victims and was nowhere near the scene when they were shot. After an eyewitness told police the shooter looked like a man she knew named "Lamonte," they arrested a *different* "Lamonte" – Lamonte McIntyre.

The arrest of Lamonte McIntyre was the beginning of a nightmare in which virtually nothing happened as it should have. Police and the prosecutor manipulated and threatened witnesses and forced them to testify falsely while concealing exculpatory evidence. Police failed to gather or analyze physical evidence, never looked for a motive, and ignored obvious leads suggesting the homicides were connected with the victims' drug activities. Five months later, McIntyre was convicted of two counts of first degree murder in a trial studded with prosecutorial abuses and devoid of due process.

[1] This Amended Memorandum corrects formatting errors, including the inadvertent inclusion of duplicate text and the omission of other text. Other editing changes were also made, including the addition of some additional legal authorities. Mr. McIntyre's legal claims, Claim I through IX, remain the same.

New and overwhelming evidence supports McIntyre's claim of innocence, allowing him to clear the procedural hurdles of K.S.A. 60-1507 based on "manifest injustice" and "exceptional circumstances." *Vontress v. State*, 299 Kan. 607, 616, 325 P.3d 1114 (2014); *State v. Kelly*, 291 Kan. 868, 872-73, 248 P.3d 1282 (2011). McIntyre's continued incarceration, in light of the new evidence, would be "obviously unfair" and "shocking to the conscience." *Vontress*, 219 Kan. at 614. To avoid "manifest injustice," this Court must consider McIntyre's claims on the merits, despite their filing outside of the one-year statute of limitations. K.S.A. 60-1507(f). Moreover, any claimed delay in the filing of these claims may be attributed directly to the misconduct of the police and prosecutor, who deliberately manufactured false evidence and concealed facts showing McIntyre's innocence.

Building on the doctrine of *Vontress,* recent amendments to K.S.A. 60-1507 (effective July 1, 2016) make clear that innocence cases are in a category of their own. A defendant may obtain consideration of otherwise time-barred claims if he can show that, in light of new evidence, "it is more likely than not that no reasonable juror would have convicted him." K.S.A. 60-1507(f)(2)(A). This statutory standard essentially adopts the approach of *Schlup v. Delo*, 513 U.S. 298, 327 (1995), a United States Supreme Court decision which declared that a petitioner may obtain consideration of his defaulted claims if he can show actual innocence with the "requisite probability," – i.e., that it was "more likely than not that no reasonable juror would have convicted him in light of the new evidence." *Id.* at 327. If the petitioner satisfies this test, he is permitted to pass through the innocence "gateway" and obtain consideration of his defaulted claims on the merits. Further, if the present filing is considered "successive" under K.S.A. 60-1507(c), McIntyre may still obtain relief based on a showing of actual innocence, as innocence coupled with the concealment and misconduct in this case clearly constitute "exceptional circumstances."

See Wimbley v. State, 292 Kan. 796, 805, 275 P.3d 35 (2011) ("exceptional circumstances" include unusual events that prevented the defendant from raising the issue earlier); *see also State v. Kelly,* 291 Kan. at 872.

McIntyre's new evidence – persuasive, powerful and abundant – readily satisfies the standards of *Vontress*, *Schlup* and the newly amended K.S.A. 60-1507. The new evidence not only conclusively establishes McIntyre's innocence, it also shows that his conviction resulted from the pervasive misconduct of State actors who repeatedly violated McIntyre's constitutional rights, including McIntyre's rights to due process, a fair trial and to confront the witnesses against him.

Throughout the investigation and trial, the police and prosecutor failed to seek the truth. Indeed, they consistently subverted and concealed the truth – manufacturing evidence and presenting testimony that they knew to be false. Two witnesses independently told the prosecutor that Lamonte McIntyre was *not* the shooter. (Exhs. 34 at ¶ 21; 35 at ¶ 7-8; 37 at ¶ 5). The prosecutor *never disclosed this critical exculpatory evidence to the defense.* (Exh. 31 at ¶ 13). Instead, the prosecutor forced one of those two eyewitnesses to testify falsely by threatening to have her children taken away, then sent the other from the courthouse without testifying after that witness told the prosecutor that police had arrested the wrong man. (Exh. 37, 37A at ¶ 5). The prosecutor and police *knew* that Lamonte McIntyre was the wrong "Lamonte," yet they manipulated and coerced two frightened eyewitnesses into identifying him at trial while concealing evidence of his innocence. (*Id.*).

The slayings, on April 15, 1994, were shocking, even in a drug-infested neighborhood where violence was not uncommon. In broad daylight, a shotgun-toting assailant ran down a hill up to a car where two men sat in the afternoon sunshine. (Exh. 1 at 27-39). Standing right next to the car, the shooter fired four times into the passenger side before turning and fleeing. (Exh. 5 at

132; Exh. 6 at 254). The car rolled backwards down a hill, leaving shattered glass and a blood trail in its wake. (Exh. 1 at 26, 49, 63). Several people on the street witnessed the crime, including three who were related to both victims. (Exh. 1 at 27, 36, 65-66). One victim, Doniel Quinn died instantly; the other, Donald Ewing, was taken to a hospital but died there. (Exh. 1 at 54, 62-63).

The police investigation was startling in its brevity, lasting just a few hours. (Exh. 1 at 13-15, 27-39). Police interviewed witnesses in the area, but never searched for the weapon, the shooter's clothing, or a single item of physical evidence that would have linked the assailant with the crime. (Exhs. 27 at ¶ 12, 14, 52-60, 79-81; 78). Police never asked for consent to search any location, nor did they obtain a single search warrant. (*Id.*). Police never looked into the victims' backgrounds or followed leads suggesting the homicides were connected to the victims' drug activities. (Exh. 1 at 63, 72-77; Exh. 27 at ¶ 51). Although police collected physical evidence from the crime scene, they never subjected it to any further examination or analysis. (Exh. 6 at 264-74; Exhs. 27 at ¶ 14, 52-60, 79-81). Inexplicably police failed to interview the one witness who was directly across the street and had the best view of the shooter. (Exh. 1 at 66; Exh. 27 at ¶ 17-19).

The State's case at trial, gossamer thin and full of gaping holes, rested on the confused, contradictory and coerced testimony of two eyewitnesses. (Exh. 5 at 122-211; Exh. 27 at ¶ 20-49). The prosecutor, Terra Morehead, won a conviction by: procuring and presenting testimony at trial that she knew to be false; concealing evidence that two witnesses told her that Lamonte McIntyre was not the shooter; by making improper references to unnamed, undocumented "reliable sources" who supposedly implicated Lamonte McIntyre; and by arguing in closing that McIntyre had a "vendetta" against the victims when there was not a shred of evidence to show he had any connection with either victim. (Exhs. 34 at ¶ 21; 35 at ¶ 5-9; 37 at ¶ 5-6; Exh. 4 at 6; Exh. 6 at 310, 353; Exh. 7 at 479).

The evidence of McIntyre's innocence is overwhelming and is supported by more than 40 affidavits that establish he had nothing to do with the crime, which was a drug-related, retaliatory slaying. Compelling new evidence points to the real killer – a young enforcer with a powerful drug ring who was avenging the theft of crack cocaine from a nearby drug house. Two witnesses with direct, personal knowledge of the murders have signed affidavits stating McIntyre had nothing to do with the slayings and that the two men were killed because a large amount of crack cocaine had come up "missing" at a nearby drug house run by the now-deceased Aaron Robinson. (Exh. 77 at ¶ 11-20; Exh. 41 at ¶ 9-19).

In light of the overwhelming new evidence of McIntyre's innocence, it is clear that no reasonable juror would have convicted him if this new evidence had been presented at trial. The new evidence includes the following;

- Niko Quinn, one of the two eyewitnesses who testified against McIntyre, has signed a detailed affidavit recanting her testimony and stating she was forced to lie because prosecutor Morehead threatened to have her arrested and to have her children taken away if she did not testify against McIntyre. (Exh. 34 at ¶ 21-22; 35 at ¶ 6-9). Niko Quinn's recantation is reliable and corroborated by other evidence, including her consistent and repeated statements to others over the years that she lied on the witness stand because she was coerced by the prosecutor. (Exhs. 34 at ¶ 24; 35 at ¶ 7-9; 37 at ¶ 5-12; 38 at ¶ 12, 17, 24; 43 at ¶ 9-16; 44 at ¶ 5-6; 45 at ¶ 5-7; 50 at ¶ 19-20). Niko Quinn told prosecutor Morehead twice before she testified that McIntyre was not the shooter and that police had arrested the wrong man. (Exh. 34 at ¶ 21-22; 35 at ¶ 6-9). McIntyre was much taller than the shooter and his ears stuck out too much. (Exh. 34 at ¶ 12-13; 35 at ¶ 8). The prosecutor dismissed Ms. Quinn's statements, telling her that she could be held in contempt and have her children taken away from her if she didn't testify against McIntyre. (Exh. 34 at ¶ 21-

22). Frightened and upset, Niko Quinn complied and testified, falsely identifying McIntyre as the shooter. (Exh. 34 at ¶ 21-22) The prosecutor concealed from defense counsel Ms. Quinn's powerful exculpatory statements while presenting her false and coerced testimony to the jury. (Exh. 31 at ¶ 12-13; 34 at ¶ 21-22, Exh. 5 at 122-56).

- Niko Quinn's mother, Josephine Quinn, was also an eyewitness to the shooting, and she, too, signed an affidavit, stating she spoke to prosecutor Morehead during the trial and told her McIntyre was not the shooter. (Exh. 37 at ¶ 5-6, 31 at ¶ 12). Like her daughter, Josephine Quinn stated that McIntyre was too tall and his facial features did not match the shooter's. (Exh. 37 at ¶ 5-6). Prosecutor Morehead dismissed Josephine Quinn's statements, sending her from the courthouse without testifying. (*Id*). And just as she had with Niko Quinn's statements, Morehead concealed Josephine Quinn's exculpatory account and did not disclose it to defense counsel. (Exh. 31 at ¶ 13).

- The other eyewitness who testified at the trial, Ruby Mitchell, signed an affidavit attesting to her confusion during the identification and her fear of the lead detective, Roger Golubski. (Exh. 40 at ¶ 14-15). Detective Golubski was infamous in the black community for his sexual pursuit and manipulation of drug-addicted black women and prostitutes. (Exh. 25 at ¶ 5-22; 29 at ¶ 9; 40 at ¶ 14-16; 44 at ¶ 20-26; 51 at ¶ 8-14; 53 at ¶ 17-29; 54 at ¶ 15-20; 65 at ¶ 25-30; 66 at ¶ 2-20; 68 at ¶ 4-10; 69 at ¶ 8-16; 71 at ¶ 14-22). Golubski drove Ms. Mitchell to the police station to make her identification, and, alone in the car with her, expressed a sexual interest in her, commenting on her figure, telling her liked black women, and asking her if she liked to "date" white men. (Exh. 40 at ¶ 14-15). Mitchell, already traumatized by seeing the shooting, felt "very nervous and vulnerable" in Golubski's presence. (*Id.*). She wondered whether he was going to arrest her for "solicitation" or "offer her money for sex." (*Id.*).

- In her affidavit, Ms. Mitchell states that she made clear to police that the shooter had "French braids," which is why she thought the shooter was a "Lamonte" who had dated her niece and who wore that hairstyle. (*Id.*). A mugshot of that "Lamonte" indeed shows that, at the time of the shooting, he wore his hair in thick French braids. (Exh. 89)[2]. But police never showed a photo of that "Lamonte" to Ms. Mitchell, and none of the photos shown to her depicted a man with "French braids." (Exh. 10 at 25-34). Mitchell's statements about the shooter having French braids were never documented, a critical omission because Lamonte McIntyre wore his hair in a short Afro and did *not* have French braids. (Exh. 10 at 29).

- During Ms. Mitchell's nearly three hours with police, her description of shooter's hair shifted. According to a detective's report, she described the shooter's hair as "short...on the sides and long...on top." (Exh. 1 at 51-52). Of the photos in the array, *only* the photo of Lamonte McIntyre (which was more than a year old) showed hair that was "short" on the sides and "long" on top. (Exh. 10 at 25-34; Exh. 84). By the time of trial, Ms. Mitchell had completely distanced herself from the issue of hair, stating she was hadn't been "paying attention to hair" and was instead "focused" on the assailant's "face" during the shooting. (Exh. 5 at 165, 183, 204, 209). *However, newly developed evidence, including photographs and measurements of the crime scene, establish that Ms. Mitchell, who was standing in a doorway two houses south of the scene – more than 100 feet away – would have been unable to discern the shooter's facial features at that distance.* (*See* Exh. 46 at ¶ 5-7, 13-16, 20-22 (affidavit and diagrams of Michael Bussell); Exh. 119 at 4-5 and attachments A-F (affidavit and photographs of Dan Clark)). Thus, Mitchell's trial testimony that

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[2] The "Lamonte" with whom Ruby was acquainted was Lamonte Drain, also known as Anthony Lewis. (Exh. 5 at 165; Exh. 89).

she could identify the shooter because she "focused on" his *face* during the shooting is utterly unbelievable.

- Ms. Mitchell's initial statement to police, given within less than hour of the shooting, was never specifically referenced at trial, suggesting it was not disclosed to defense counsel. That statement undermines nearly every aspect of Mitchell's testimony. When asked by a detective at the homicide scene: "Did you see his *face*?" Mitchell responds: "Well, he's brown skinned, *that's all I could tell*....." (Exh. 1 at 33) (emphasis added). Mitchell thus admitted that the *only* facial characteristic she could see from where she stood in her doorway, more than 100 feet away, was the color of the shooter's complexion.

- Prosecutor Morehead intentionally elicited testimony from Mitchell that falsely portrayed her initial statement to police. To convince the jury that Mitchell's identification was reliable and not the result of police influence, the prosecutor elicited false testimony that, when Mitchell identified McIntyre's photo four hours after the homicides, she no longer believed the shooter was the "Lamonte" who had dated her niece. (Exh. 5 at 172, 183). Referring to the photo she identified, Mitchell testified: "I never knew his last name....I never knew his first name....I just picked out the person I saw." (Exh. 5 at 204). Indeed, it was undisputed that Ms. Mitchell did not know and had never met Lamonte McIntyre. But, the prosecutor relied on misleading testimony to cover up the inconvenient fact that Ms. Mitchell, obviously manipulated by police, recited in her taped statement the name of "Lamonte *McIntyre*" when asked to name the man whose photo she identified. Also contrary to Mitchell's trial testimony, Mitchell said in her taped statement that she "knew" the person she had identified as Lamonte McIntyre because he "used to talk to" her niece. (Exh. 1 at 34-35). At trial, Ms. Mitchell's confusion was largely concealed. Instead of admitting that, when she made her identification, she actually thought the photo depicted

the other "Lamonte," Mitchell instead testified falsely that she "just picked out the person [she] saw" and that she knew by then he was not the "Lamonte" who had dated her niece. (Exh. 5 at 204). There was also no reference to the fact that Mitchell had recited the name "Lamonte McIntyre" in her taped statement, as that would have made revealed that police had fed to her the name. Indeed, there was testimony to the contrary, including testimony from Golubski stating that Mitchell had not mentioned the name "McIntyre." (Exh. 6 at 309).

- Remarkably, police failed to interview the one witness who was directly across the street and had the best view of the shooter. (Exh. 1 at 66; Exh. 27 at ¶ 14, 17-19; Exh. 15 at 3-48). That witness, Stacy Quinn (the daughter of Josephine and sister of Niko), told her mother she "knew who the suspect was," according to a police report. (Exh. 1 at 66). The failure of detectives to interview Stacy is inexplicable. Like Josephine Quinn and Niko Quinn, Stacy was related to both victims – Doniel Quinn was her first cousin and Donald Ewing was a more distant cousin. Stacy was standing directly across the street from the assailant when he fired, and Josephine Quinn told police her daughter could identify the shooter. (Exh. 1 at 66). Detective Golubski, who went to the neighborhood the day after the shooting, stated in his report that Stacy was "not available" that day, and the police file shows that he made no further effort to contact her or get a statement. (Exh. 1 at 66).

- As Stacy's entire family knew, Stacy had frequent contact with Golubski, with whom she'd had a sexual relationship for several years. (Exh. 34 at ¶ 27; 38 at ¶ 18-21). Stacy, known as "Buckwheat" in the street community, was a prostitute and Golubski was one of her regular customers. (Exh. 64 at ¶ 10). Indeed, Golubski was frequently seen in the neighborhood picking her up. (Exh. 38 at ¶ 19). Although Golubski regularly spoke with Stacy, he made no

effort to document her account of the shooting, which – as revealed post-trial – pointed to another suspect, not to Lamonte McIntyre.

- Golubski was widely known not only for his sexual pursuit of prostitutes, but also for using them as sources of information, as he readily obtained leverage over them through a variety of illicit means involving favors and coercion. (Exh. 25 at ¶5-19; Exh. 26 at ¶11-19; Exh. 55 at ¶20-25; Exh. 56 at ¶8-9; Exh. 71 at ¶13-21). Many in the police department were aware of his practices, which had gone on without challenge for many years, including his use of his power and authority to obtain sexual services. (Exh. 25 at ¶5-19; Ex. 26 at ¶11-19). In the community, Golubski was regarded as all-powerful, able to do anything he wanted without repercussions. (Exh. 71 at ¶13-21; Exh. 65 at ¶26-30; Exh. 51 at §8-13). When Golubski *wanted* information, he got it, and when he *didn't want* information, he didn't get it. He was widely viewed as "crooked" and "corrupt." (Exh. 51 at ¶8-13; Exh. 44 at ¶9; Exh. 71 at ¶13-21).

- In a post-trial hearing in April 1996, Stacy Quinn (who died in 2000) finally testified when the defense called her in support of a motion for new trial. (Exh. 15). She stated that Lamonte McIntyre was definitely not the shooter – he was too tall, his face was too long and his ears stuck out too much. (Exh. 14 at 7). But Judge Burdette rejected her testimony, stating that "she never came forward until now." (Exh. 14 at 46). No one at the hearing asked why Detective Golubski, or any other officer, had not interviewed her, despite knowing she had the best view of the shooter.

- Niko Quinn told police that some drug dealers had recently beaten Doniel and had a motive to harm him, as they believed he'd stolen some drugs from a nearby drug house run by Aaron Robinson, a major drug dealer in Kansas City, Kansas, in the 1990s. (Exh. 34 at ¶13-15). Doniel had confided in cousin Niko about the beating, which occurred just days before he was

murdered. (*Id.* at ¶ 14). Despite the obvious importance of this lead, detectives never documented it or pursued it, even after Doniel's father, John Quinn, told Golubski that his son had gotten involved with the "worst kind" of people – "cobra snakes" who could inflict "instant death." (Exh. 1 at 76).

- The autopsy report of Doniel Quinn documents a blunt trauma injury to his skull, an injury that might have been incurred in the recent beating. But McIntyre's counsel never learned of theft from the drug spot, the beating of Doniel, or the blunt trauma injury. (Exh. 22 at 12).

- Two men who were closely involved with Aaron Robinson in the drug business in the 1990s have signed affidavits stating that Lamonte McIntyre is innocent, that he did not shoot the victims and that the murders were a retaliatory hit carried out by a young enforcer for Robinson called "Monster," whose real name is Neil Edgar, Jr. Joe Robinson, a cousin of Aaron Robinson, states that Doniel Quinn used to work as a "doorman" at one of Aaron's drug spots and that one day, he stole some of the "honey pot," a large amount of crack cocaine. (Exh. 41 at ¶ 14). Robinson states: "Monster knew Aaron wanted Doniel to pay for breaking into the stash house and stealing drugs. Knowing this, Monster found Doniel and shot him and another Quinn [Donald Ewing] while they sat on the street." (Exh. 41 at ¶ 15). According to Robinson, "Monster was a crazy kid. He knew the victims were sitting around in the area. It didn't matter to him if there were people who saw him shoot in broad daylight." (Exh. 41 at ¶ 17).

- Another major figure in the Kansas City, Kansas, drug trade in the 1990s, Cecil Brooks, has also signed an affidavit confirming Joe Robinson's account. Brooks states: "Monster was the kind of person who would do anything, and he loved my cousin Aaron. He would do whatever Aaron wanted him to do." (Exh. 77 ¶10). Brooks stated that Doniel Quinn had worked as a "doorman" at Aaron Robinson's "spot," but that he was regarded as a "scandalous" because

he was "always stealing from someone." (Exh. 77 at ¶11). Brooks was present the night before the murders at Aaron's spot. (Exh. 77 at ¶12-13). Aaron, his cousin Marlon Williams, and "Monster" were all there discussing Doniel's theft of drugs. (*Id*). "Donnie stole something, and he did not return with what he stole. As a result, two junkies – Donnie and the other Quinn – got killed over it." (Exh. 77 at ¶14-15). Lamonte McIntyre "had nothing to do with it," stated Brooks. "none of us had ever heard of him." (Exh. 77 at ¶16).

- Numerous other witnesses confirm that "Monster" had a reputation for being exceptionally violent, volatile and always carrying a gun. (Exhs. 42 at ¶2-7; 50 at ¶12; 60 at ¶6; 65 at ¶14-16, 23; 66 at ¶22; 71 at ¶2-8). One young woman who was very close to "Monster" in 1994 recalls that he would "rant and rave" and one day bragged to her about how he had "taken care of" Aaron's "problem" by killing the men who had stolen drugs from Aaron's spot. (Exh. 65, 65A at ¶16-21).

- At the time of the shooting, "Monster" wore his hair in French braids. (Exh. 24). Seen at a distance, he might appear similar to the "Lamonte" whom Ruby Mitchell originally thought the shooter might be. (Exh. 42 at ¶ 8; Exh. 95; Exh. 85). "Monster" – Neil Edgar, Jr. – is presently incarcerated in Missouri after pleading guilty to second degree murder in 2001. (Exh. 96 at 28-29). In that case, the victim was shot in front of several witnesses, and the body was stuffed into a car trunk and torched. (Exhs. 91, 96).

- At the time of the murders, Lamonte McIntyre was with his family, including an aunt and cousins who testified at trial. They all said that when Lamonte was arrested, he was wearing the same clothes he'd been wearing for two or three days. Even though McIntyre was arrested within hours of the shooting, police never seized his clothing or shoes, an inexplicable deviation from standard police practice. (Exh. 27 at ¶ 54). Police did not even document in a report

what McIntyre was wearing at the time of his arrest – a significant error, given that McIntyre's clothing did not match the "all black" clothing worn by the shooter, as described by both Niko Quinn and Ruby Mitchell. The police investigation was inexplicably brief – police never looked for a motive or a weapon and did not conduct a single search at any location. Instead, they relied solely on the accounts of two manipulated, coerced and frightened eyewitnesses. The day after the homicides, on April 16, 1994, Golubski submitted to the District Attorney's office the police file along with a "clearance" report indicating the case was solved. (Exh. 1 at 67).

As the facts stated above show, the evidence of Lamonte McIntyre's innocence is overwhelming. The newly discovered evidence demolishes the State's flimsy, falsehood-laden case and exposes the murders to be just what they appeared to be – a retaliatory, drug-related hit.

McIntyre easily satisfies any required showing of innocence. When his case is viewed in light of the newly acquired evidence, it is "more likely than not that no reasonable juror would have convicted him." *Schlup*, 513 U.S. at 327; K.S.A. 60-1507 (eff. July 1, 2016); *see also Vontress*, 299 Kan. 607.

HISTORY OF PROCEEDINGS

At 2:10 p.m. on April 15, 1994, police officers were dispatched to the 3000 block of Hutchings to respond to report of a shooting. (Exh. 1 at 14). Detectives conducted brief taped interviews of Josephine Quinn, Niko Quinn and Ruby Mitchell within an hour of the shooting. (Exh. 1 at 27-39). Ms. Mitchell told the police she thought she could identify the shooter, and Detective Golubski took her to the department. (Exh. 1 at 34). Just before 6 p.m., Ms. Mitchell made an identification of Lamonte McIntyre, stating, incorrectly, that she knew him because he "used to talk to her niece." Police did not interview the niece, and, on the basis of a single identification, dispatched patrol units to arrest McIntyre. (Exh. 1 at 52, 63-64).

At 8 p.m., detectives attempted to interview him, and Lamonte declined to sign a waiver advising him of the right to remain silent. Lamonte, who was just 17 years old, did agree, however, to speak with police. He told them he that he knew nothing about the crime, that he had been at a relative's house at 1515 Wood with his aunt, his cousin and the cousin's girlfriend. Police did not tape these statements.

Lamonte was immediately booked into the Juvenile Detention Center. On April 18, 1994, the Juvenile Prosecutor Victoria Meyer filed a complaint against him alleging two counts of first degree murder. (Exh. 129 at 54). The following day she moved the court for an order authorizing the prosecution of McIntyre as an adult. (Exh. 129 at 50). The juvenile court appointed Gary Long to represent McIntyre, and on June 28, 1994, held a hearing to address whether McIntyre should be waived to adult status. (Exh. 129 at 37).

At the hearing, the court heard testimony from Niko Quinn, Ruby Mitchell and Roger Golubski as well as McIntyre's mother and a juvenile court services officer.

Despite weak and contradictory testimony, the court ruled in favor of the prosecution. The court first ruled from the bench that it had considered the statutory factors under K.S.A. 38-1636(e) and determined that the best interests of McIntyre and the community would be served by prosecuting him in adult court. (Exh. 3 at 75-77). At the time of the hearing, McIntyre was still 17, a month shy of his 18th birthday. (Exh. 3 at 53). The court also made the requisite probable cause finding, binding McIntyre over for trial in district court with no need for a further preliminary examination. (Exh. 3 at 75-77). That same day, McIntyre was transferred to the adult detention facility. (Exh. 21 at 3).

McIntyre pled not guilty in district court and his attorney Long filed a Notice of Alibi, listing persons that he had been with at the time of the homicides. (Exh. 10 at 37-38). The

prosecutor, Terra Morehead, stated in a discovery form signed and submitted to the court that the "State has disclosed all evidence in its file favorable to the defendant on the issue of guilt." (Exh. 2 at 36-37). McIntyre's case proceeded to trial on September 26, 1994 before Judge J. Dexter Burdette. (Exhs. 5 at 1).

The only evidence linking McIntyre to the homicides was the testimony of Niko Quinn and Ruby Mitchell. The State presented no physical evidence, no evidence of motive, and no evidence showing any kind of link between McIntyre and the victims. As she did at the preliminary hearing, Ms. Quinn identified Lamonte McIntyre as the shooter. When asked by the prosecutor if she was able how she was "able to tell the jury positively that that's the same person that you saw kill your two cousins," Ms. Quinn replied: "The face." (Exh. 5 at 143). Similarly, Ms. Mitchell identified McIntyre as the shooter, stating no less than 10 times that she was able to identify him because she had "focused" on the shooter's "face" and had her "mind on the face." (Exh. 5 at 204). After three days of evidence, the jury returned a verdict of guilty on both counts of first degree murder. (Exh. 7 at 495-503).

Following trial, the judge denied a motion for judgment of acquittal and a motion for new trial based on newly discovered evidence. (Exh. 8 at 4-5). The court ordered a pre-sentence report and scheduled sentencing for January 6, 1995. (Exh. 8 at 5). Mr. McIntyre's family retained counsel at that point, and attorney Carl Cornwell entered his appearance. (Exh. 2 at 198). The observed that the convictions were off-grid felonies under K.S.A. 21-3401. (Exh. 9 at 6). Cornwell requested that court sentence McIntyre to concurrent terms in prison. Morehead argued that the crime reflected premeditation and asked for consecutive terms. (*Id.* at 5).

Significantly, the issue of McIntyre's possible innocence arose at the sentencing hearing, with Doniel Quinn's mother and Donald Ewing's grandmother both addressing the court. Saundra

Newsome, Doniel's mother stated: "I don't know if Mr. McIntyre is guilty. It's not for me to say that...I feel sorry for Mr. McIntyre because if he's innocent, he shouldn't be here. If he's guilty, then he should be." (*Id.* at 3). Bessie Hawthorne, Ewing's grandmother, stated: "Only God knows what happened. Only God will set the innocent free. If he didn't do it, he'll be set free..." (*Id.* at 4). Lamonte McIntyre's mother, Rose McIntyre, spoke as well, stating: "[T]his has been my nightmare as well. My son did not do this. We just want to clear his name..." (*Id.*). Morehead protested the characterization of McIntyre as possibly innocent, stating: "I know a lot of folks don't know whether Mr. McIntyre is guilty or not guilty. We had a jury trial in this courtroom and a jury of twelve people who knew nothing about this case came in and heard the evidence...[and] they found the defendant guilty beyond a reasonable doubt." (*Id.* at 4).

The district court made few findings before imposing sentence, citing only McIntyre's young age and making passing reference to "prior criminal activity" – two juvenile adjudications. As the prosecutor had requested, Judge Burdette sentenced McIntyre to consecutive life sentences. (*Id.* at 6).

Throughout the trial proceedings, neither Judge Burdette nor Terra Morehead disclosed to defense counsel a critical fact bearing on whether Judge Burdette should preside over Mr. McIntyre's case: In the recent past (1990 through January 1991), Judge Burdette and Ms. Morehead had been involved in a romantic relationship together. That relationship was first confirmed in 2006 in post-conviction proceedings in another case, *Hooker v. State*, Case No. 04CV-2824. In that case, Judge Burdette acknowledged, and the State admitted, the existence of the past romantic relationship involving Morehead and Judge Burdette. (Exh. 73; Exh. 74 at 3-5; Exh. 72). The romantic relationship, which ended just three years before the *McIntyre* trial, gives rise, at a minimum, to a "strong appearance of impropriety," McIntyre's counsel, Gary Long,

stated in his recent affidavit. (Exh. 31 at ¶20). Long stated that if he had possessed facts that, prior to the *McIntyre* trial, the prosecutor and the Judge had engaged in a romantic relationship, he would have requested that Judge Burdette recuse himself from the case. (Exh. 31 at ¶15-20).

Following sentencing, the *McIntyre* case returned to Judge Burdette's courtroom on two more occasions, in connection with a motion for new trial based on newly discovered evidence and a motion for relief under K.S.A. 60-1507. On both occasions, Judge Burdette possessed substantial discretion to hear or not hear evidence and to grant or not grant relief. In both instances, Judge Burdette denied all relief to Lamonte McIntyre, stating he found "no credibility" in the new evidence of McIntyre's innocence and that he was convinced McIntyre "got a fair trial." (Exh. 15 at 46; Exh. 19 at 14).

Before those later hearings, the case first proceeded to direct appeal, where Mr. McIntyre was represented by Carl Cornwell and his associate, Lindsey Erickson. They raised five issues, all denied by the Kansas Supreme Court. The Court held that the failure to give an eyewitness instruction was not clear error, that McIntyre was properly certified to stand trial as an adult, that the evidence was sufficient to support conviction, that the prosecutor had no duty to disclose information about an undocumented photographic line-up and that failure to disclose information about that lineup was not a denial of fundamental fairness. *State v. McIntyre*, 259 Kan. 488, 912 P.2d 156 (1996) (Exh. 16).

Shortly after the appeal was denied, Ms. Erickson filed a Motion for New Trial Based on Newly Discovered Evidence under K.S.A. 22-3501 and K.S.A. 60-259. The motion stated that Niko Quinn had recanted her trial testimony and admitted committing perjury and that Stacy Quinn had come forward as a newly discovered witness. (Exh. 14 at ¶9-12). The motion attached an affidavit by Stacy Quinn stating that she got a clear view of the shooter's face and that McIntyre

was not the shooter – his face is too long, he is too tall, and his lips are too dark." (Exh. 14, attached affidavit, Exh. 36 at ¶ 9-12). Niko Quinn also signed an affidavit stating that McIntyre was not the shooter, that he was too tall and that his ears stuck out too much and that she had perjured herself after police threatened to take away her children if she didn't talk. (Exh. 35 at ¶5-9).

Judge Burdette held a hearing on April 4, 1996, at which McIntyre was not present. The judge heard testimony from Stacy Quinn and reviewed the affidavit of Niko Quinn. (Exh. 15). Stating that newly discovered evidence must be viewed "with a great degree of caution," Judge Burdette ruled that Niko Quinn's recantation had "no credibility whatsoever." (Exh. 15 at 46-47). He next dismissed Stacy Quinn's testimony because she was a drug user and "she never came forward until now" and because trial counsel had not acted with due diligence. (*Id.*). Judge Burdette then denied McIntyre's request for a new trial. (*Id.*).

McIntyre's counsel appealed, and the Kansas Supreme Court affirmed the denial relief, holding that the district court had not abused its discretion in denying a new trial. *McIntyre v. State,* Case No. 76,519. The Supreme Court stated that a recantation is to be "looked upon with the utmost suspicion" and the weight to be accorded to such testimony "is for the trial judge…to determine." (Exh. 17 at 7; *State v. McIntyre,* No. 76,519 (Kan. 1997) (unpublished opinion) at 7, quoting *State v. Norman,* 232 Kan. 337, 347, 574 P. 2d 1368 (1978)). The Supreme Court deferred to the trial court's finding that Niko Quinn's recantation was not credible. *Id.* The Supreme Court also concluded that Stacy Quinn's testimony was not "newly discovered evidence" because her existence as a potential witness had been known to trial counsel "as she was listed on the information, but was never subpoenaed." *Id.* at 6.

Following the denial of his second appeal, Lamonte McIntyre made another effort to obtain relief from the court by filing a *pro se* motion for relief under K.S.A. 60-1507. (Exh. 20 at 1-7). McIntyre asserted his innocence, and alleged his attorney was ineffective in failing to obtain and eyewitness instruction and in failing to subpoena witnesses who would have rebutted the trial witness's identification of him as the shooter. (Exh. 20 at 2).

Judge Burdette appointed attorney Mark Sachse to represent McIntyre, but Sachse never met with or communicated with McIntyre. The court initially set a hearing on the 60-1507 motion for October 17, 1997, then rescheduled it for January 9, 1998. The hearing was not held on that date either, and was continued until January 16, 1998. (Exh. 19).

Mr. Sachse admits in his affidavit that he never met with or communicated with Lamonte McIntyre. (Exh. 33 at ¶4-5, 14). Sachse states that his failure to have any communication with his client was not "unusual in Wyandotte County" during that time period, as "judges would sometimes just pull a lawyer in from the hallway, impromptu, to represent a petitioner in a 60-1507 hearing." (Exh. 33 at ¶14). Sachse stated: "The hearings were typically very short, and the defendant was not present. That is simply the way it was in Wyandotte County at that time." (Exh. 33 at ¶3).

The hearing on McIntyre's 60-1507 motion was very brief, with about 10 to 15 minutes of argument by Sachse and about 10 minutes by Morehead. McIntyre was not present, as was typical with such hearings. Sachse argued that trial counsel was ineffective for failure to request an eyewitness instruction and for failure to subpoena witness Willie Bush. (Exh. 19 at 2-3). Sachse's arguments failed to address the issue of "prejudice" other than to say that McIntyre was prejudiced by counsels' failures. (Exh. 2-8). The court ruled from the bench, dismissing McIntyre's claims. (Exh. 13-15).

Inexplicably, Sachse failed to raise a critical item of new exculpatory evidence, the account of Josephine Quinn, the mother of Niko Quinn and Stacy Quinn, had come forward two months earlier, telling Sachse that McIntyre was not the shooter. (Exh. 33 at ¶5-6).

Following the denial of his petition, McIntyre filed a *pro se* Notice of Appeal. But his Notice was not timely, and his appeal was dismissed. (Exh. 20 at 13-14).

FACTUAL BACKGROUND

The factual background in this case is extensive, covering the homicides, the initial investigation, the evidence presented at trial and later hearings and the immense amount of new evidence developed by McIntyre's current attorneys and investigators. The evidence of McIntyre's innocence is overwhelming. More than 40 affidavits have been obtained in the recent investigation, including exculpatory eyewitness accounts, statements pointing toward the real killer and affidavits addressing the extensive misconduct by police and the prosecutor.

The Crime

Doniel Quinn had fought drug addiction, and, in April 1994, he appeared to be losing the battle. He had recently seen his former girlfriend, Tonette, who had brought over his infant son, but Doniel was struggling. (Exh. 58 at ¶1-5). He had been working at a drug house near 21st and Quindaro, and his family worried that he was associating with dangerous people. (Exh. 1 at 75-76; Exh. 34 at ¶ 15).

On the afternoon of April 15, 1994, he was sitting with his friend, Donald Ewing, in an old, powder blue Cadillac. They were parked on Hutchings Street, close to the drug trade centered around Quindaro Boulevard. Quinn was just 21 years old; Ewing was older, age 34 (Exhs. 22 at 1, 23 at 1). They had a crack pipe in the car and time on their hands.

That afternoon was a typical one on Hutchings. Several of Quinn's relatives were nearby – his father, John Quinn was also sitting in a car farther south on the street, along with one of his

brothers and another man. (Exh. 1 at 72-75). Doniel's Aunt Niko, who lived just a couple doors south on Hutchings, was walking up the street toward the house where her mother, Josephine, lived with her sister, Stacy. (Exh. 5 at 152, Exh. 1 at 27-20; Exh. 5 at 128-34). Josephine Quinn, was going back and forth between her truck and the house after she had an argument with her brother about a washing machine. (Exh. 1 at 36-37). Stacy heard her mother out in the street arguing, and went to the front door of her house, which was directly across the street from the men sitting in the blue Cadillac. (Exh. 15 at 13-14). While she was standing there looking out, she saw a man coming across the across a vacant field across the street, adjacent to the blue Cadillac. (Exh. 15 at 14-15). Ruby Mitchell who had also heard an argument outside, had come to her front door and looked outside. (Exh. 5 at 158).

All of the women – Niko, Stacy and Josephine Quinn and Ruby Mitchell – saw a young black male, clad in black and carrying a shotgun, run down a sloping vacant lot from the next street to the east, Hiawatha, down to Hutchings Street. (Exh. 1 at 27-30, 31-35; Exh. 5 at 159-60; Exh. 15 at 14). About halfway down the hill, the man stopped and bent over, like he was picking up something. (Exh. 5 at 160). When he reached Hutchings, he turned to the north and ran up to the blue Cadillac. (Exh. 3 at 24). Standing just inches away from the passenger side of the car, he uttered a couple of words, raised his shotgun and started firing. (Exh. 3 at 7, Exh. 5 at 163). The glass on the passenger side of the car instantly shattered, spraying in the street. (Exh. 15; Trial Exhibit 12; Exh. 6 at 255). The shooter, pumped, fired, pumped and fired again, getting off a total of four shots. (Exh. 1 at 29; Exh. 5 at 132, 155; Exh. 6 at 254). He then turned and fled in the direction he came from. A witness on Hiawatha saw a man come running up the hill, get into a car where another man waited behind the wheel and drive off. (Exh. 6 at 248-60).

As the man turned to run away, Ruby Mitchell left her front, went to her bedroom and called "911." (Exh. 5 at 166-67). Niko Quinn, who had been walking up the street toward her mother's house, saw the shooting while she was standing next to a tree next at the curb, to the north of Ruby's house. (Exh. 5 at 128, 150). Niko, upset, started to run after the man, but her legs "gave out" and Ruby, who had just come outside, caught her. (Exh. 5 at 135).

Niko saw the Cadillac roll backward several feet, stopping directly in front of Josephine's house. (Exh. 5 at 134). Stacy, who had been looking out the front door of the house, came running out, yelling "Oh my God, it's Little Don." (Exh. 15 at 13-15; Exh. 5 at 134).

John Quinn, who had been sitting in another car farther south on Hutchings, had pulled away just moments before the shooting. When he heard shots, he immediately turned around and pulled up near the blue Cadillac. (Exh. 5 at 135-26). Picking up an empty wine bottle from the street, John Quinn busted out the windows on the driver's side of the Cadillac, but when he saw blood inside of the vehicle, he went no further. (Exh. 1 at 74-75; Exh. 5 at 135-36).

Doniel Quinn died at the scene, and his body was transported to the University of Kansas Medical Center. (Exh. 1 at 12). The doctor who performed the autopsy stated that Quinn died of a massive gunshot wound to the head "which essentially took out the entire [right] eye plus all of the skull that lies beneath." (Exh. 6 at 350; Exh. 22). Donald Ewing, who had been sitting the driver's seat and thus farther away from the shooter, was rushed to Bethany Hospital where he underwent emergency medical care, then died of multiple gunshot wounds. (Exh. 1 at 53-55; Exh. 23).

The Investigation

Police and other emergency responders arrived within a few minutes of the shooting. Between 2:10 and 3:00 p.m., the street filled with uniformed officers and detectives. They taped off the scene, and, once the victims were removed, photographed and collected physical evidence.

(Exh. 1 at 3-5, 8-26, 40-41, 49). Officers searching the street and adjacent field discovered a pile of broken glass in the street next to a light pole and four nearby shotgun shell casings. The car, whose interior was splattered with blood and brain tissue, was parked next to a light pole when the shots were fired. It then rolled backward 35 feet before coming to a stop, leaving a blood trail behind in the street. (Exh. 1 at 17, 63, Exh. 12).

The police investigation was fast and short. The first dispatch was at 2:10 p.m., and police arrived within minutes. (Exh. 1 at 8-10, 13-16) Detectives almost immediately began interviewing, getting very brief, taped statements from eyewitnesses. (Exh. 1 at 27, 31, 36). Detective W.K Smith, whose role was limited to two eyewitness interviews, started his interview of Niko Quinn began at 2:46 p.m.; by 2:56 p.m., he had moved on to Josephine Quinn. (Exh. 1 at 31, 36).

In her statement, Niko Quinn stated that she'd seen a "man come running from between the houses and ran up to a blue car and shot the windows..." (Exh. 1 at 27). Niko described the shooter as wearing all black, a "black shirt, black hat, black pants and black tennis shoes." (Exh. 1 at 28). She said the man was carrying a shotgun, and that she did not recognize him and had never seen him before. (Exh. 1 at 28-29). Niko stated she didn't know of any "difficulties" the men in the car were having. (*Id.*). She stated the shooter shot three times, then turned and ran back in the direction he came from, toward Hiawatha. (*Id.*). When asked if she "saw this person again" if she would be able to recognize him, she answered. "Yes." (*Id.* at 29). At no point did Detective Smith ask Niko where she was standing when she witnessed the shooting or whether she was close enough to view the shooter's face. (Exh. 1 at 27-30). Although he asked how the shooter was dressed, he *never asked Niko to describe anything else* about the shooter, such as his height, build, skin color, hair style or facial features, etc. (Exh. 1 at 27-30). He also did not ask her where the shooter was when she first saw him, or if she knew why the men in the car were in the

neighborhood, or who else might have witnessed the shooting. (Exh. 1 at 27-30). Although Niko Quinn lived in a house just three doors south of the shooting, he did not ask who else was in her house at the time and might have heard or seen something. (Exh. 1 at 27-30).

Detective Smith next interviewed Josephine Quinn, who lived with Stacy right across from where the shooting occurred. In a taped statement, Josephine told him she had just walked out of her house when she heard the shots. (Exh. 1 at 37). She told Smith she heard three or four shots, then she "turned around and looked" and the shooter fired two more shots. (Exh. 1 at 37). She then tried to get a better look at him, but couldn't, and heard her daughter screaming: "That's little Don."(Exh. 1 at 37). Smith never asked Josephine Quinn if she could describe the shooter, or where he was when she first saw him, or where he ran to after the shooting, or anything else about what she witnessed. (Exh. 1 at 36-39). According to a report by Golubski, Josephine informed Detective Smith that her daughter Stacy "*knew who the suspect was*," but Smith apparently did not document or follow up on that information. (Exh. 1 at 66). Less than an hour after the shooting, W.K. Smith had already wrapped up his interviews.

While Smith was interviewing Niko and Josephine, Detective Krstolich did a brief taped interview with Ruby Mitchell, who lived two doors south of Josephine Quinn, at 3020 Hutchings. (Exh. 1 at 31). In her statement, Mitchell said the shooter came down the hill across the street from her house, walked up to the car, said something to the men and "then…just started shooting." (Exh. 1 at 32). Mitchell saw all of this while standing in her front door, looking out. (Exh. 1 at 32). Like Niko Quinn, she described the shooter as wearing "all black" including black pants and a black t-shirt." Mitchell described the shooter as "thin," about 5'6" and said his hair "wasn't real short, it was like slicked back…" (Exh. 1 at 32). Then Krstolich asked:

Q. Did you see his face?

A. *Well, he's brown skinned, that's all I could tell.* I didn't know no scars or nothing like that."

(Exh. 1 at 33) (emphasis added). Despite Mitchell stating that, with regard to the "face," she only saw skin color, police asked her if she could recognize him if she saw him, and she said: "Yes." (Exh. 1 at 34).

The police then took Mitchell to the Department to prepare a composite "sketch" – which was a "face" assembled with mix-and-match features from an "identi-kit." (Exh. 1 at 52). Mitchell told police she thought the sketch "looked like" the shooter, and told them she recognized this face as a man she knew named "Lamonte." (Exh. 1 at 52). Krstolich's report contains no information as to how Ms. Mitchell knew this "Lamonte," or where he lived or anything else about him. (Exh. 1 at 52). Although Krstolich claimed in his report that pictures of "different Lamontes" were shown to Mitchell during a "picture interview of five...separate black individuals," an examination of those five photographs establishes that the *only* "Lamonte" shown to Mitchell was Lamonte *McIntyre*. Krstolich's report contains no explanation for why Lamonte *McIntyre's* photograph was included, as opposed to any other "Lamonte." (Exh. 1 at 52). Golubski, who was also involved with Mitchell's identification, stated in his report that "Ms. Mitchell stated she knew the suspect because she used to date his cousin." (Exh. 1 at 63). This statement was inaccurate as apparently Ms. Mitchell claimed that she knew "Lamont" because he had dated her niece. According to Golubski's report, when Mitchell was shown the five photos, she "immediately identified the photo of Lamonte McIntyre as the perpetrator." (Exh. 1 at 63).

Neither Golubski's report, nor Krstolich's report nor any other report in the police explains why Lamonte *McIntyre's* photo, as opposed to the photo of any other "Lamonte," was included in the photo lineup. Golubski claimed in his report that "Detective Maskil...ascertained some information that the suspect's name was "Lamonte." But this information included no last name,

and, further there is no report from Maskil stating he obtained any information at all. Instead, the report by Maskil's partner, Detective Blood, states the two of them spent the afternoon together collecting physical evidence, going to the hospitals where the bodies were taken and notifying victims' relatives of their deaths. (Exh. 1 at 53-56). Golubski's report and every other report in the file is completely silent as to how Lamonte *McIntyre* became a suspect. Golubski's report merely states that he obtained Lamonte McIntyre's photo from Victoria Meyers, the juvenile prosecutor, but the report is silent on why McIntyre's photo was requested.

Krstolich and Golubski taped a follow up statement with Ruby Mitchell in which she identified McIntyre as the shooter and claimed that he was the "Lamonte" who had dated her niece. Significantly, she also provides the *first and last name* of "Lamonte McIntyre," *a man she had never met and did not know*. (Exh. 1 at 35).

At 5:58 p.m., less than four hours after officers were first dispatched to Hutchings Street, Ms. Mitchell gave the following statement:

> Q. The time is now 1758 hours. We are now at headquarters. I am with Ms. Ruby Mitchell....She has made a positive identification of the party. She thought she knew him and...she knows she is positive that she did see the shooter and she knew who he was. Ms. Mitchell did you tell me...that you almost called out a name when you saw the man run down the hill?
>
> A. Yes.
>
> Q. What name did you almost call out?
>
> A. Lamont.
>
> Q. Why did you almost yell Lamont?
>
> A. Because he used to try to talk to my niece and I knew him.
>
> Q. When you got to headquarters did we show you a series of five (5) pictures?
>
> A. Yes.
>
> Q. Were you able to pick out the shooter of [sic] the picture?

A. Yes.

Q. Is there a number on that picture?

A. Yes.

Q. What is the number?

A. Number three (3).

Q. Are you absolutely sure this is the party who did the shooting?

A. Yes.

Q. Who is this party?

A. ***Lamont.***

Q. Do you know his last name?

A. ***Yes.***

Q. What is it?

A. ***McIntyre.***

Q. How do you know this party?

A. ***Because he used to talk to my niece.***

Q. How long have you known him?

A. ***For a couple months.***

Q. Once again, you are absolutely sure this is the party?

A. ***Yes.***

(Exh. 1 at 34-35) (emphasis added).

Immediately after obtaining this identification from Ruby Mitchell, officers went out looking for Lamont McIntyre. Detectives made no effort to interview Ruby Mitchell's niece or to find out anything more about the "Lamont" mentioned by Ruby Mitchell. (Exh. 1 at 51-52, 62-64). Instead, officers immediately launched an "all out canvas of the area" to locate Lamonte McIntyre. (Exh. 1 at 52).

Several officers went to the home of Lamonte's grandmother, Maxine Crowder, and told her they were looking for Lamonte. (Exh. 1 at 44; Exh. 52 at ¶4-9). Mrs. Crowder contacted Lamonte's mother, Rose McIntyre, who then picked him up from an aunt's house and headed toward the station to see what the police wanted. (Exh. 52 at ¶4-9). On the way, Mrs. McIntyre saw police in the parking lot at Fifi's, where she worked. (Exh. 52 at ¶4-9). She stopped and spoke with the police, and within minutes, police had taken Lamonte into custody. (Exh. 1 at 63). In his report, Golubski stated Mrs. McIntyre told another officer that Lamonte had been at the restaurant with her that day from 11:00 a.m. to 2:45 p.m., a claim Mrs. McIntyre denies. (Exh. 3 at 46-47). In fact, Lamonte told police he had been with family members that day, including one of his aunts and a cousin. (Exh. 1 at 63-64).

Shortly after 8:00 p.m. – just six hours after the homicides – Lamonte McIntyre was booked into juvenile detention based on the account of a single eyewitness, Ruby Mitchell, who believed he was the "Lamont" who had dated her niece. Police had no other evidence, and their investigative file contained no other reports linking Lamonte McIntyre to the homicides of Ewing and Quinn.

Although Josephine Quinn had told Detective Smith that Stacy "knew who the suspect was" Smith failed to pursue that information and wrote no report. Golubski documented the lead, but made no effort to locate or interview Stacy, other than noting when he returned to the neighborhood the next day, on April 16, 1994, Stacy was "not available." (Exh. 1 at 66).

On April 16, 1994, Golubski and another detective re-contacted Niko Quinn and to show her the photos that Krstolich and Golubski had shown to Ruby Mitchell the previous evening. According to Golubski's report, Niko held onto No. 3 – Lamonte McIntyre – for a "prolonged period of time" and she "began shaking" and "became teary eyed." (Exh. 1 at 31). Golubski stated

in his report that Niko appeared to be traumatized and that she stated she could not identify the individual in the photo positively. (*Id.*). After the April 16 meeting, the police reports do not refer to any further contacts or interviews with Niko Quinn during the remainder of the investigation. (Exh. 1).

Golubski interviewed a woman living on Hiawatha who saw the getaway vehicle as well as the driver and the shooter speeding off, but she could not make an identification from the photos. She described the getaway car as a blue Chevy Caprice classic with dark windows. (Exh. 1 at 66). Golubski had some photos of vehicles, but made no progress in making a vehicle identification. (Exh. 1 at 66).

Later on April 16, 1994, Golubski submitted a "clearance" report, indicating that the investigation of the Ewing-Quinn homicides was cleared with the arrest of Lamonte McIntyre and that the file would be submitted to the District Attorney's office.

A few days later, Golubski interviewed John Quinn, who had been sitting with two other men in another car on Hutchings just before his son, Doniel, and Donald Ewing had been shot. (Exh. 1 at 72-75). John Quinn had just pulled past his son and Ewing, headed up the street, when he heard shots and turned around. (*Id.*). John grabbed a wine bottle off the street and knocked the driver's side window out; he saw his son and didn't get in. (Exh. 1 at 75). John told Golubski that he sensed "weeks and weeks ago" that something wasn't right with his son, "because the way he was acting and the individuals he associated with." (*Id.*). When Golubski asked what kind of people Doniel had been associating with, John replied: "*The worst kind*....A cobra snake with any kind of bite would be *instant death*." (Exh. 1 at 76) (emphasis added).

Despite this vivid description of Doniel's associates, Golubski did not pursue the drug connection further, other than asking John if he knew the names of his son's associates. (*Id.*).

When John said he did not, but he knew that they were young, about his son's age, 21, Golubski abruptly stopped asking questions and ended the interview. (*Id.*). Golubski never asked John if he'd ever heard Doniel mention the name "Lamonte" or any other name. Golubski did not show John any photos or take out the stack of photos he'd shown to Ruby and Niko. Golubski made no further investigation into Doniel's background or associates, and also took no steps to look into Donald Ewing's background. (Exh. 1).

A few days after he interviewed John Quinn, Golubski interviewed three of Lamonte's alibi witnesses – an aunt, a cousin, and the girlfriend of another cousin. (Exh. 1 at 78-102). All three said Lamonte had been with family on the afternoon of the homicides, going back and forth between the houses of two aunts who lived across the alley from each other. (Exh, 1 at 78-102). The alibi witnesses all said that around 2 p.m., Lamonte made two calls a few minutes apart to a neighborhood cab company, trying to summon a cab for someone at his aunt's house. (Exh, 1 at 78-102).

Golubski never pursued any additional investigation of Lamonte's alibi and never sought any information from the nearby cab company to determine if, indeed, someone had twice called for a cab to the aunt's address that afternoon. Golubski never asked any of the alibi witnesses if Lamonte knew a young woman related to a Ruby Mitchell or if he had visited Hutchings street in the past. There was no attempt to corroborate any information provided by Ruby Mitchell or to attempt to corroborate or disprove Lamonte's alibi. Indeed, the investigation was filled with lapses and omissions. Although detectives gathered physical evidence from the scene, including collecting shotgun shells and dusting the victims' car for fingerprints, the evidence was never examined or analyzed. At no point did any detective attempt to determine a motive for the slaying or even determine if Lamonte McIntyre knew the two victims. Detectives never investigated the

background of the victims or made any attempt to determine if the homicides were related to their drug activities. Inexplicably, detectives never seized Lamonte's clothing, and never conducted any search for the weapon or ammunition or any other physical evidence. Although Josephine Quinn had informed detectives that daughter Stacy "*knew* who the suspect was," detectives made no effort to locate or interview Stacy.

A retired Kansas City, Kansas detective who has recently reviewed the police file at the request of counsel, states that, in his opinion, the investigation was grossly deficient and characterized by numerous inexplicable errors and failures. (Exh. 27 at ¶ 16). Randy Eskina, who retired as a captain in 2012, states in his May 2016 affidavit that the investigation of the Ewing-Quinn homicides "deviated substantially from the usual homicide investigation, as numerous leads were ignored and certain critical evidence was never sought or gathered."

On April 15, 1994, Lamonte McIntyre was arrested and jailed based the account of a confused and coached account of a single eyewitness who, when she identified McIntyre, stated that she *knew* him because he was the *"Lamonte"* who had dated her niece. Neither of those things was true. Under police tutelage, Mitchell also provided the first name and last name of *Lamonte McIntyre*, a man she did not know and had never met. (Exh. 1 at 34-35).

The Preliminary/Waiver Hearing

On June 28, 1994, the juvenile court, the Honorable Matthew G. Podrebarac, conducted a hearing to determine if Lamonte McIntyre should be waived to adult status and whether the evidence was sufficient to establish probable cause and bind him over for trial on two counts of first degree murder. The court resolved both of those questions in the affirmative. (Exh. 3).

Prosecutor A.J. Stecklein, who was assisting Terra Morehead, presented the State's witnesses, first putting Ruby Mitchell on the stand. Ms. Mitchell testified that when she first saw the shooter, she was standing in her front doorway looking out through her screen door. (Exh. 3

at 5, 15-16). The shooter was wearing a black t-shirt and black pants, and came down hill carrying a "short rifle." (Exh. 3 at 6). He stood within "two, three inches" of the passenger window," then fired his shotgun four or five times before running back up the hill. (*Id.* at 8) Although Mitchell had previously described the shooter as 5'6" or 5'7" in height, at the hearing she described him as "tall." (Exh. 3 at 6). On direct examination, Mitchell did not testify about her pretrial identification; she simply identified McIntyre in the courtroom. (Exh. 3 at 9).

On cross examination, Mitchell admitted she was some distance from the shooter, two houses south. (Exh. 3 at 11, 14). She also admitted that she originally told police that the shooter was not McIntyre, but another man she knew named "Lamonte." She changed her mind at the police station after going "through pictures and stuff." (Exh. 3 at 14).

Mitchell testified that she did not know Lamonte McIntyre and had "never seen him before in her life." She also testified: *"I didn't know his name was Lamonte until I went to the police station"* – thus effectively admitting that police had provided Lamonte McIntyre's name to her. (Exh. 3 at 14) (emphasis added). Mitchell claimed that McIntyre looked like the "Lamonte" she knew, and that she had about to call the name "Lamonte" when she first saw the assailant. (Exh. 3 at 15-17, 19).

Mitchell repeatedly contradicted herself, claiming that when she identified the photo she knew it was not the "Lamonte" she knew, and that she just "picked out the person [she] saw." (Exh. 3 at 19). Mitchell then immediately reversed and claimed that when made her identification, she *still* thought the man was the "Lamonte" she knew:

> Q. Okay. And it wasn't until you looked at that book at the police station that you decided it wasn't the Lamonte you knew?
>
> A. No, because at the police station when I picked out number three, it <u>still</u> looked like the Lamonte that I knew...<u>so that's the picture I picked</u>.

(Exh. 3 at 20) (emphasis added). So, when Mitchell made her pretrial photo identification, she believed she was identifying someone else, a man that she knew, not Lamonte McIntyre.

Niko Quinn testified next. Although Niko had not previously made an identification – telling detectives the day after the homicides that she was "not sure" – she identified McIntyre at the hearing as the shooter. (Exh. 1 at 31; Exh. 3 at 26). Niko, who was standing next to a tree north of Ruby Mitchell's house, stated she had a clear view of the shooter. (Exh. 3 at 23). The man wore all black and had a medium build. (Exh. 3 at 23). Niko saw the shooter, carrying a "rifle," run down an open field up to the blue Cadillac where the victims were sitting. (Exh. 3 at 22-23). Niko testified that he fired three shots, then turned and fled in the direction he'd come from. (Exh. 3 at 24). Right after the shooting, she remembered Ruby Mitchell asking her: "Was that Lamonte?" (Exh. 3 at 25). Niko responded: "Lamonte who? I don't know nobody named Lamonte." (Exh. 3 at 25).

After the shooting, Niko had not gone down to the police station, but looked at photos that detectives showed her the following day. She told detectives then that she couldn't identify the shooter. (Exh. 3 at 30-34). Golubski testified that when Niko viewed the photos the day after the homicides, she "couldn't be sure who the suspect was." (Exh. 3 at 37).

Despite the weak and contradictory testimony, the court ruled in favor of the prosecution. The judge stated he had considered the statutory factors under K.S.A. 38-1636(e) and determined that the best interests of McIntyre and the community would be served by prosecuting him in adult court. (Exh. 3 at 75-77). At the time of the hearing, McIntyre was still 17, a month shy of his 18th birthday. (Exh. 3 at 53). The court also made the requisite probable cause finding, binding McIntyre over for trial in district court with no need for a further preliminary examination. (Exh. 3 at 75-77).

The Trial

Three months after the juvenile court hearing, Lamonte McIntyre was tried before a jury in Wyandotte County District Court. The three-day trial (with jury deliberations continuing into the fourth) was bereft of evidence tying McIntyre to the homicides of Doniel Quinn and Donald Ewing. There was no physical evidence, no evidence of motive and no evidence that McIntyre even knew either of the victims.

Lacking evidence other than the confused and shifting accounts of the two eyewitnesses, prosecutor Morehead larded her opening statement with improper and unsupportable claims. Because McIntyre was not the "Lamonte" known to Ruby Mitchell, the prosecutor had to explain how Lamonte McIntyre had entered the investigation to begin with. Although it is clear that Ruby Mitchell mentioned a "Lamonte" to police, the investigative file contains no explanation as to why the photo of Lamonte *McIntyre* – as opposed to any other "Lamonte" – was included in the photo array and shown to Ruby Mitchell. Prosecutor Morehead moved to plug that hole in her case at the outset, providing a fictitious explanation that – *even if* it were supported by actual facts – relied on "evidence" that was totally inadmissible. Ms. Morehead told the jury in her opening statement:

> Detective Jim Krstolich and Lieutenant Barber...began talking to folks on the street that they know – we call them *confidential informants* – to see if anybody knew anything. From *numerous reliable sources, people had indicated that the individual who was responsible for this was the defendant, Lamonte McIntyre.* Thus, the name Lamonte McIntyre was introduced for the first time in this investigation.

(Exh. 4 at 6) (emphasis added). The prosecutor thus informed the jury that unknown, unnamed witnesses who would never testify had ***implicated Lamonte McIntyre in the homicides and stated that he was "responsible."*** The prosecutor also claimed that, because of these phantom witnesses, "The name Lamonte McIntyre was introduced for the first time into the investigation." (*Id.*). Defense counsel failed to object to the prosecutor's statement.

The police investigative file contains no report or other document referring to any such confidential informant or reliable source; indeed, there is no indication whatsoever in the police file as to how the name Lamonte *McIntyre* first entered the investigation. Contrary to prosecutor Morehead's representation in opening, Detective Krstolich did not testify that "confidential informants" or "reliable sources" supplied McIntyre's name to investigators. When asked by Morehead how McIntyre's name first came to the attention of police, Krstolich stated: "To the best of my knowledge, I didn't write this down...but I believe that Miss Mitchell called around until she found out the name of...Lamonte. I believe that's what she did." (Exh. 6 at 281).

When Detective Krstolich failed to come through with the testimony Morehead sought, she then turned to Golubski (who was not mentioned in opening) for his testimony. Golubski testified that a "possible" first name of "Lamonte" had come from Ms. Mitchell. (Exh. 6 at 297-98). Prosecutor Morehead then asked: "Okay. But subsequent to that...how did the name Lamonte *McIntyre* become to known to the police department?" (Exh. 6 at 298) (emphasis added). Defense counsel Long then objected on the ground of hearsay. (*Id.*). After a bench conference, Judge Burdette permitted Golubski to testify that he had obtained the name "McIntyre" from "various sources." (Exh. 6 at 310). But, when pressed during the bench conference as to who these "sources" were, Golubski had admitted getting the "name and photo" from the juvenile prosecutor, Vicky Meyer. (Exh. 6 at 307, 305). There was no explanation during the bench conference – and none is found in the police file – as to why he requested Lamonte *McIntyre's* photo in the first place. Lieutenant Barber – who had been involved in McIntyre's arrest – then testified, claiming he was "directly responsible" for obtaining the name of Lamonte McIntyre during the investigation. (Exh. 6 at 353). When asked how he obtained the name, Barber stated: "*From numerous sources.*" (Exh. 6 at 353) (emphasis added). However, a review of the police file shows

that Barber wrote no report and documented no information about getting McIntyre's name from any source, named or unnamed. (Exh. 1).

Ruby Mitchell, of course, could not be the source of McIntyre's name as it was undisputed that she did not know and had never met Lamonte McIntyre. Mitchell's testimony was a confusing hodge podge in which she continually contradicted and reversed herself, including as to statements she'd made just a few minutes earlier. During trial, Mitchell also claimed greater ability to view the shooter than she had claimed before. When the police had asked her shortly after the shooting if she had seen the shooter's face, she stated: "Well, he's brown skinned, *that's all I could tell*... " (Exh. 1 at 33) (emphasis added). But, at trial, she emphasized her intense "focus" during the shooting on the shooter's "face," despite the fact she was at a distance of more than 100 feet from the shooting. (*See* Exh. 5 at 166, 183, 196, 204, 209; Exh. 46 (affidavit, diagram).

At the preliminary hearing, Mitchell had stated that she had viewed the shooting through her screen door (Exh. 3 at 15-16). At trial, however, she testified that her view was entirely "open" with no obstructions, and that her front porch was not screened in. (Exh. 5 at 163). Her testimony is completely debunked by the crime scene video, which shows her house had a screened-in porch. (Exh. 5 at 163-64, 206-07; *cf* Exh. 12, Exh. 48, attachments A-C). The jury's attention, however, was apparently not drawn to that fact.

To shore up her observational claims, Ms. Mitchell provided outlandish estimates of how long she had observed the shooter, stating at first that she had seen him for "30 minutes to an hour," then revising that to: "[n]o, 30 minutes, about 30 minutes." (Exh. 5 at 198). Almost immediately, she changed her account again, stating she had seen the shooter for "five to ten minutes" – "long enough to see his face." (Exh. 5 at 199-200). She also claimed that the four gunshots took about "three minutes." (Exh. 5 at 200). At one point, Mitchell also stated the shooter

was wearing a "cap," then immediately reversed herself and said he was not wearing any hat. (Exh. 5 at 166-67). Although she had given a description of the shooter's hair to police – "short" on the sides and "long" on top and "slicked back" – she testified at trial that she never noticed the hair and hadn't told police anything about the shooter's hair. (Exh. 5 at 179, 182; *cf.* Exh. 1 at 33, 51-52). Mitchell testified: "I wasn't paying attention to hair" and "I told [police] that I didn't know about the hair…I didn't know if it was slicked back or what [be]cause I wasn't paying attention to the hair, just the face." (Exh. 5 at 179, 182).

Prosecutor Morehead, faced with the problem of a witness who had originally named another suspect to police, repeatedly elicited false testimony from Mitchell in an effort to persuade the jury that Mitchell's identification of Lamonte McIntyre was nonetheless reliable and free of police influence. Mitchell repeatedly stated in her testimony – 10 times or more – that she could identify McIntyre because she had "focused" on his "face" and had his "face in [her] mind." (Exh. 5 at 166, 172, 182, 183, 196, 197, 199, 204, 209). Under leading questions by the prosecutor, Mitchell claimed that she had simply mistaken one "Lamonte" for the other because the two looked like "identical twins." (Exh. 5 at 172). Morehead cemented the "twins" narrative by presenting an old yearbook photo of the other "Lamonte," in which he had the same popular hairstyle that Lamonte McIntyre had sported in his photo. Despite the fact that Mitchell testified that the yearbook photo did not look "Lamonte" as she knew him, the court nonetheless admitted the misleading photo over defense counsel's objection. The prosecutor then used the photo to show how Mitchell could have made her initial "mistake," but then quickly correct her error – thereby paving the way for Mitchell to testify that she now had *no doubt* that Lamonte McIntyre's *face* was the "face [she] saw at the shooting." (*Id.*).

Mitchell claimed she first realized that the shooter was *not* the "Lamonte" she knew when she was making the composite "sketch" with the detectives. (Exh. 5 at 182). Her testimony is troubling, however, because it suggests that, rather than relying on her recollection to shape the composite sketch, that the sketch instead shaped her recollection. When Mitchell saw the sketch, she realized: "I knew they wasn't sketching Lamonte that I knew." (*Id.* at 182; *see also* 184-85).

Mitchell testified that when she looked at the photographs right after the "sketch," she also knew then that the man she was identifying was *not* the "Lamonte" that she knew. (Exh. 5 at 191, 195). Under leading questions by the prosecutor, Mitchell testified: "I just picked out the – the person that I saw. That I saw do the shooting, the face that I saw....I had my mind on the face." (Exh. 5 at 204; *see also* Exh. 5 at 172). The prosecutor asked Mitchell:

> Q. And when you saw that photograph that's not Lamonte that you knew.... *when you saw that photo what did you think, Miss Mitchell?*
>
> A. That this is the face I saw at the shooting.

(Exh. 5 at 172) (emphasis added).

Mitchell's testimony contradicted her preliminary hearing testimony on this point, as she admitted in the preliminary hearing that, at the time she made her photo identification, she still believed the shooter was the "Lamonte" she knew. (Exh. 5 at 204). The impeachment on this point at trial was limited, however, and neither the prosecutor nor defense counsel ever referred to Ms. Mitchell's initial taped statement where the confusion and manipulation of Mitchell was starkly apparent.

In that statement, Mitchell said that she *knew* the shooter, that she had been acquainted with him for a couple of months, that she knew him because he used to "talk to" her niece, and that she *knew his first and last name*, which she provided – ***Lamonte McIntyre***. (Exh. 1 at 34-35). When the detective wrapped up the interview by asking Mitchell whether she was "absolutely

sure" of her identification, she answered "yes." (*Id*). Because Mitchell supplied the name of a man she did not know and had never met – Lamonte McIntyre – it is clear she was subjected to police influence.

The taped statement is devastating to Mitchell's credibility -- but the jury never heard about it. At trial, Ms. Mitchell testified – falsely – that when she made her identification to police, she had not known McIntyre's name or stated it to police. (Exh. 5 at 182-83). Similarly, Detective Golubski also testified that Mitchell had not provided the name "McIntyre" to police, only the first name "Lamonte" when she originally believed it was the young man she knew. (Exh. 6 at 309).

Although Ms. Mitchell did not *know* McIntyre's name from her own knowledge, she had clearly been *fed* McIntyre's name, and the exposure of such direct police influence on her account would have undermined the entirety of her testimony at trial. Consequently, it appears that Ms. Mitchell's taped statement was withheld from the defense. Certainly, the prosecutor repeatedly elicited testimony from Ms. Mitchell that directly contradicted the statement and falsely portrayed Mitchell's original account to police. By presenting false testimony, prosecutor Morehead concealed inconvenient facts and evidence of police manipulation, and instead presented Mitchell as someone who was just briefly mistaken at the outset, but who quickly realized and corrected her error. (*See* Exh. 5 at 204-205, 180, 182).

Niko Quinn's trial testimony was shorter than Mitchell's, but, like Mitchell's, was misleading and denied the defense an important opportunity for cross examination. Unknown to the defense, Niko Quinn had apparently met with Detective Golubski for a second view of the photo array. (Exh. 6 at 327-329). This follow-up meeting was never documented in any report, and no evidence of it appears in the police file. (Exh. 6 at 331). It also was not disclosed at the preliminary hearing, and, in fact, the testimony at that hearing suggested that Ms. Quinn did not

again view the photographs after the April 16 interview where she became upset and told detectives she could not make an identification. (Exh. 3 at 31).

In her trial testimony, Niko Quinn stated that, at the time of the shooting, she had just come out of her house, three doors south of where her mother, Josephine, lived with her sister, Stacy. (Exh. 5 at 123-24). Like Ruby, she first looked up the street when she heard her mother arguing outside with someone, who turned out to be her uncle, Robert. (*Id.* at 124; Exh. 5 at 158-59). Niko started walking up the street. Along the way, she noticed a blue car parked across from her mother's house. (*Id.* at 124-25). Niko then saw a man run through the vacant field across the street, but she "really didn't pay attention to it." (*Id.* at 129). The man "kind of ducked" as he approached the street, perhaps because her uncle, John Quinn, and his brother, Robert, were driving by at that moment in another car. (Exh. 5 at 129). Just as Niko was walking past a tree, in the street and north of Ruby's house, she saw the man run up to the passenger side of the blue car, raise a shotgun and fire three or four times into the vehicle. (Exh. 5 at 132). The car rolled back several feet, and the shooter ran off in the direction he came from. (*Id.* at 133).

Niko testified that the shooter was wearing all black – a black cap, black shirt, black pants and black shoes. (Exh. 5 at 132). She looked at photographs the day after the shooting, but told police that she "didn't know." (Exh. 5 at 141). She added, though, that when she viewed McIntyre's photo, she thought to herself, "oh, God, it's him." (Exh. 5 at 141). Niko then volunteered that she "eventually" re-contacted police and had met alone in a car with Golubski to make an identification. (Exh. 5 at 139, 145).

Defense counsel attempted to probe this secret meeting, and Niko testified that she'd told Golubski: "I can identify the guy that shot my cousin." (Exh. 5 at 146). Defense counsel then tried to show that Quinn's newly revealed pretrial identification conflicted with her preliminary hearing

testimony, where she acknowledged having told police she "couldn't" or "wouldn't" make an identification from the photos. (Exh. 5 at 146). Morehead cut off counsel's cross with an objection, however, complaining that counsel lacked the preliminary hearing transcript. (Exh. 5 at 146). The judge sustained the objection. (Exh. 5 at 149). Rather than asking for a recess until he could obtain the transcript – which was available later that day – defense counsel simply moved on to another area, leaving unexplored the shifting nature of Quinn's accounts. (*Id.*).

The secret meeting between Ms. Quinn and Golubski was not swept aside, however. The next day, when Golubski was on the witness stand and Niko Quinn was gone from the courthouse, prosecutor Morehead introduced extensive evidence about the meeting through Detective Golubski. Morehead waited until Golubski was testifying on re-direct, then asked: "Now were you involved...as far as Niko Quinn goes[,] having her identify a possible suspect in this investigation?" (Exh. 6 at 324). Defense counsel objected, arguing that Morehead's question went beyond the scope of his cross-examination, but not objecting on the ground of hearsay or violation of the right to confrontation. (*Id.*). The court overruled defense counsel's objection. (*Id.* at 324-25). Prosecutor Morehead then examined Golubski at length about his meetings with Niko Quinn – not only about the meeting on the day after the homicides when she became "teary eyed" and failed to make an identification, but also about the secret meeting in Golubski's car. In contrast to Niko Quinn's truncated testimony – cut off by when the prosecutor objected – Golubski's testimony about the secret meeting was specific and detailed.

Golubski did nothing to document that meeting and did not mention it in a single report. But Golubski testified that the meeting occurred "within a week...to ten days" of the homicides after Niko contacted him and said wanted to "speak...about what had...occurred" and requested to see the photos again. (Exh. 6 at 328). According to Golubski, "she felt uncomfortable for safety

reasons," and they agreed to meet at Wyandotte High School. (Exh. 6 at 329). He showed her the "exact same five photos," and "[a]t this point she told me she could make a positive ID of the suspect." (Exh. 6 at 328-29). The testimony continued:

> Q. Which photo did she identify?
>
> A. No. 3
>
> Q. Now, Detective Golubski, did you inquire of her what caused her to want to do this[,] I guess about a week afterwards? Was there – did she indicate if there was any change that made her want to do this?
>
> A. She felt – she expressed to me that she was having a lot of emotional problems dealing with the situation. She felt that the victims' deaths would be justified [sic] and that someone should step forward.
>
> Q. And when she identified No. 3 did she indicate to you how positive she was about that identification?
>
> A. She was adamant about it.

(Exh. 6 at 329). Defense counsel then cross examined him. Although Golubski was able to provide detailed testimony about the meeting, he could not recall *when* it occurred and could only estimate it happened "seven to ten days after the homicide." (Exh. 6 at 331). Golubski admitted that he had not submitted any report about the meeting, had not revealed it when he testified at the preliminary hearing, and had told no one about it until he disclosed it to the prosecutor. (Exh. 6 at 331-34). Significantly, Golubski could not say *when* he had disclosed the secret meeting to Morehead, other than sometime "during the course of the investigation....after the preliminary and before the trial." (*Id.* at 334).

After Golubski finished testifying, defense counsel argued in a bench conference that he was entitled to know when Golubski told the prosecutor about the second photo lineup. (*Id.* at 335-36). Morehead claimed she had "no recollection of exactly when" she became aware of that lineup but that defense counsel was not, in any case, entitled to that information. (Exh. 6 at 337).

Morehead refused to say whether she had any document in her file concerning the lineup. Anything in her file was "work product" and she argued that did not have to reveal that. (Exh. 6 at 338). Defense counsel Long suggested that the second photo lineup with Niko Quinn had never occurred, and Morehead took "exception to Mr. Long calling Detective Golubski a liar" because there was no evidence "that he's being dishonest about that." (Exh. 6 at 329).

Judge Burdette refused to compel Morehead to disclose any information regarding when she learned about the undocumented, undisclosed second lineup with Niko Quinn. Defense counsel "had an opportunity to cross-examine Detective Golubski about the second lineup and he hit all of the points he had intended to hit in that cross examination," the judge stated. (Exh. 6 at 329).

Morehead had not mentioned the second lineup in her opening statement, and defense counsel clearly appeared ambushed by it at trial. After asking Ms. Quinn when the meeting with Golubski occurred – she said about a "week after" the homicides – defense counsel attempted to establish that the newly revealed pretrial identification conflicted with the account Niko Quinn gave at the preliminary hearing. (Exh. 5 at 146). Prosecutor Morehead immediately objected that counsel did not have the preliminary hearing transcript, and the judge largely sustained the objection. (Exh. 5 at 148-49). As a result, Ms. Quinn was never cross examined about the undisclosed meeting with Golubski, and the account of her second lineup was therefore entirely provided by Golubski in his testimony. (Exh. 5 at 146; Exh. 6 at 327-34).

Other than the identifications by Niko Quinn and Ruby Mitchell, there was no other evidence linking Lamonte McIntyre to the murders of Doniel Quinn and Donald Ewing. There was no physical evidence connecting him to the homicides, no evidence of motive, and no evidence to show he had any connection at all to the victims.

The prosecutor attempted to compensate for her thin case by suggesting that McIntyre had not been forthcoming with police and had lied about his whereabouts at the time of the homicide. This argument, again, stretched the prosecutor's evidence and relied on false testimony from police witnesses.

Although McIntyre – who was only 17 when arrested – declined to provide a taped statement, he did cooperate by answering Detective Golubski's and Detective Krstolich's questions about his activities that day. (Exh. 6 at 311-324; 285-91). McIntyre told the detectives that he had spent the day at his aunt's house at 1515 Wood, along with his aunt, Yolanda Johnson, and a cousin, Montre Johnson, and his cousin's girlfriend. (*Id.; see also* Exh. 1 at 52, 63-64). McIntyre also said that his brother had arrived at the aunt's house at approximately 4:00 p.m. (Exh. 6 at 311-23; 285-91). McIntyre's account was fully corroborated when his alibi witnesses testified, and was also corroborated by his own courtroom testimony. (Exh. 7 at 447-465).

Nonetheless, Morehead repeatedly suggested that McIntyre was lying. She complained that he had not mentioned to police *all* of the people who had been with him at his aunt's house, and he had not mentioned that he had actually gone back and forth between the homes of two aunts who lived across an alley from each other. (Exh. 7 at 447-465).

On the day of the homicides, McIntyre was 1 ½ miles away from Hutchings, according to defense testimony. A relative at the home of McIntyre's Aunt Peggy, at 1510 Walker, needed a cab, and McIntyre, who had been at Aunt Peggy's, twice walked across the alley to his Aunt Yolanda's house at 1515 Wood to use her phone to call for a cab. *(Id.)*. He then remained at his Aunt Yolanda's house for the rest of the afternoon. *(Id.)*. In addition to the alibi witnesses, McIntyre himself testified, explaining in detail how he had gone back and forth that afternoon between 1510 Walker and 1515 Wood, and stayed at 1515 Wood after making the two phone calls

to the cab company. *(Id.)*. He stated he had not attempted to withhold anything from police and told them he had been at his Aunt Yolanda's – rather than mentioning both aunts' homes – because "[t]hey didn't ask me where I was all through the day. They said where I was between a certain time." (Exh. 7 at 458).

Although all of the defense witnesses testified to essentially the same account – differing by only a few minutes in their recollection of the timing of the phone calls – Morehead argued that they "can't keep their stories straight." (Exh. 7 at 480). Morehead also argued that McIntyre's cousin, Montre Johnson, and his girlfriend, Natasha Haygood, were not among the several alibi witnesses McIntyre called at trial even though he had initially mentioned them to police. (*Id.*)

Although Ms. Morehead argued that McIntyre's witnesses could not "keep their stories straight," it was *her* witnesses who had difficulty testifying about what they were told by McIntyre, as reflected in their own police reports. Golubski's police report stated that McIntyre said that "he had been with an aunt, Yolanda Johnson, at 1515 Wood....At this address, he was with a cousin, Montray Johnson, and his girlfriend, Tasha." (Exh. 1 at 63-64). Similarly, Krstolich's report states: "Mr. McIntyre stated he was at his auntie's house in the vicinity of 16th and Wood all day long...and that he was there with his auntie, his cousin and his cousin's girlfriend." (Exh. 1 at 52). Despite the fact that both investigative reports clearly stated that McIntyre informed detectives that he had with his aunt, Yolanda Johnson, Morehead attempted to elicit testimony that suggested McIntyre may have left this important fact out of his account.

When Morehead asked Detective Golubski if McIntyre had provided names of individuals who could corroborate his account, he mentioned only "Montre Johnson...and Tasha." (Exh. 6 at 216). When asked if McIntyre provided any other names, Golubski responded: "*Possibly* his aunt, Yolanda Johnson." (*Id.*) Thus, Golubski equivocated even though his report was clear that

McIntyre provided the full name and address of his aunt, Yolanda Johnson. (Exh. 1 at 64). Krstolich's testimony was categorically false. When asked if McIntyre had provided a specific name of someone who could corroborate his alibi, Krstolich said: "Well, from his statement, you could talk to his cousin's – cousin's girlfriend." (Exh. 7 at 291). Morehead continued:

> Q. He said he was at his auntie's house but he didn't say if she was there?
>
> A. No, ma'am.

(Exh. 6 at 291). An examination of Krstolich's own report shows his testimony was false: "Mr. McIntyre stated *he was at his auntie's house...and he was there with his auntie*, his cousin and his cousin's girlfriend." (Exh. 1 at 52).

Prosecutor Morehead also endeavored to improperly sway the jury by eliciting testimony on McIntyre's post-arrest silence from Detective Golubski:

> Q. Did Lamonte McIntyre subsequent to this interview...did he ever personally re-contact you and say, hey, I've got some additional witnesses you need to talk to?
>
> A. No.

(Exh. 6 at 319). Further, Morehead presented testimony from Officer James Brown about a statement McIntyre supposedly made in Brown's patrol vehicle as he was being transported to the police department. According to Officer Brown, McIntyre made an unsolicited statement, telling Brown that "he was at Fifi's all day helping his mother out in the kitchen doing some work." (Exh. 7 at 368-69). This alleged statement, of which the defense had no notice, *was not documented anywhere in the police file*. Although Officer Brown wrote an arrest report, the statement is not included in that report. It also was not included in the reports of either Detective Krstolich or Detective Golubski, even though Officer Brown stated he wrote a "note" to the detectives telling them what McIntyre had supposedly told him. (Exh. 6 at 369-70). That "note" also was not part of the police file. Moreover, the claim that McIntyre said he was at Fifi's "all day" is, in any case,

nonsensical as his mother had left Fifi's to go pick him up when she heard police wanted to talk to him, and the police – who were already in the parking lot – saw her pull into Fifi's parking lot with Lamonte in her vehicle with her. (Exh. 6 at 367, 353-58; Exh. 52 at 8).

After three days of testimony, the case proceeded to instructions and closing. In her argument, Prosecutor Morehead returned to the unnamed informants who supposedly implicated McIntyre, stating: "Nikki Quinn the next day after the shooting was approached by Detective Golubski, shown these five photographs. And these five photographs were shown to her after *Lamonte McIntyre's name came up from numerous sources....* " (Exh. 7 at 476) (emphasis added).

Morehead also manufactured out of thin air a motive for McIntyre. She told the jury he had a "vendetta" and shot the victims to "settle a score" even though there was absolutely no evidence of motive presented in the case. Indeed, there was not even an iota of evidence to show a connection between McIntyre and the two victims.

The jury deliberated the remainder of the afternoon and asked for a read-back of Ruby Mitchell's and Niko Quinn's testimony. After the read-back the following morning, the jury returned a verdict of guilty on both counts.

On January 6, 1997, Judge Burdette sentenced McIntyre to two consecutive life terms at the conclusion of a 10 to 15 minute hearing. (Exh. 9 at 6). McIntyre did not speak, but his mother told the court that the case against her son had been a "nightmare" and that police had "just picked someone." (Exh. 9 at 4).

After the trial, attorney Michael Redmon, who practices in Wyandotte County, ran into Terra Morehead. She made a comment about the *McIntyre* case that stuck with him. In an affidavit, Redmon states:

> Shortly after the trial, I had a brief conversation with Terra Morehead about the case in the cafeteria at the Wyandotte County Courthouse. I have a specific independent recollection

> that Ms. Morehead said she was "surprised" by the jury verdict. It appeared that she did not expect the jury to find Mr. McIntyre guilty.

(Exh. 29 at ¶6).

The *McIntyre* case also continued to occupy the thoughts of at least one juror, Greg Lauber, who was troubled by the case and has continued to question whether he and the other jurors made the right decision. (Exh. 28 at ¶2). Mr. Lauber stated that the *McIntyre* case had a substantial impact on his life, and he has had persistent "nagging doubts" about his vote. (Exh. 28 at ¶2, ¶8). Lauber was so troubled about the case, that about a year after the trial, he called prosecutor Morehead and "asked her if the jury had convicted the right man." (Exh. 28 at ¶8). The prosecutor told him that the "right man was convicted and that there was a lot more evidence that the state could not present to a jury." (*Id.* at ¶8). A review of the police investigative file reveals no such additional evidence, however. (*See* Exh. 1).

Mr. Lauber described his recollections of the case:

> I have several concerns about the state's evidence. The state's case was based on the testimony of two eyewitnesses who identified Mr. McIntyre in the courtroom. One of these witnesses, a neighbor, testified that the shooter looked like a man named "Lamonte" who had dated her niece. But, she also said that the Lamonte she knew was a different Lamonte than the one on trial.
>
> There was no evidence of motive presented during trial, which troubled me.
>
> There was some testimony about the shooter's hairstyle and clothing, but there was no evidence that police had gotten a search warrant for Mr. McIntyre's house to look for the clothing described.
>
> I remember that a detective testified that the shotgun shells recovered at the scene would not hold a fingerprint; nonetheless, he was careful not to touch the shell and held it with a pencil.
>
> The defense attorney did not ask any questions of substance of the police witnesses.
>
> ....Recently, I learned that Mr. McIntyre's case is being reinvestigated...I am very interested to learn what [the] investigation uncovers about the state's evidence. I want to know if police really did their job and arrested the right man. *I have always questioned my vote* and would like to know if the criminal justice system worked in this case.

(Exh. 28 at ¶3-10) (emphasis added).

Post-Trial Proceedings

As discussed in the procedural history, Mr. McIntyre appealed his conviction and sentence to the Kansas Supreme Court, which denied his claims. *State v. McIntyre*, 259 Kan. 488, 912 P.2d 156 (1996) (Exh. 16). He raised five issues, all denied by the Kansas Supreme Court. The Court held that the failure to give an eyewitness instruction was not clear error, that McIntyre was properly certified to stand trial as an adult, that the evidence was sufficient to support conviction, that the prosecutor had no duty to disclose information about an undocumented photographic line-up and that failure to disclose information about that lineup was not a denial of fundamental fairness. *McIntyre*, 259 Kan. 488 (Exh. 16).

Following the appeal, his then-counsel Lindsey Erickson filed a Motion for New Trial Based on Newly Discovered Evidence. (Exh. 14). The motion stated that Niko Quinn has recanted her trial testimony and admitted perjury and that Stacy Quinn, who did not testify at trial, was a newly discovered witness who was never interviewed by police. Stacy Quinn, the motion stated, would testify at a hearing that Lamonte McIntyre was not the shooter – he was too tall and his face was too long. (Exh. 14). The motion attached an affidavit signed by Stacy Quinn that summarized her anticipated testimony. (*Id.*).

Judge Burdette held a hearing on April 4, 1996, and prosecutor Morehead argued vigorously at the outset that the court should not even hear the evidence. (Exh. 15 at 6-11). Morehead asserted that Stacy Quinn's account was not newly discovered evidence because she had been mentioned in Golubski's report as a potential witness. (Exh. 15 at 7-8). Morehead also argued that Niko Quinn had testified at trial that she was "positive" about her identification of McIntyre and that "[w]hether she has now changed her story or not is irrelevant." (Exh. 15 at 10). Morehead urged Judge Burdette to make a determination based simply on reviewing the affidavits

by Stacy Quinn and Niko Quinn, which were signed on March 27, 1996, and April 2, 1996, respectively. (Exh. 14 [attached affidavit]; Exhs. 35, 36).

Although Judge Burdette decided to hear testimony from Stacy Quinn, he quickly rejected that testimony, stating she was not credible because "she is a felon, she's a habitual drug user." (Exh. 15 at 46). The judge also criticized her for failing to come forward earlier, though he raised no question about why police never interviewed her despite being informed that she could identify the shooter. (Exh. 15 at 46-47; Exh. at 66).

Stacy Quinn testified that, on the day of the shooting, she had been at home when she heard her mother outside arguing. (Exh. 15 at 13). She went to the front door and looked out, and noticed a blue car parked across the street. (*Id.* at 13-14). Almost immediately, she saw a man walking across a field across the street. (*Id.* at 14). She described him as "black, short, [with] big lips." (*Id.*). She also stated he was wearing black pants, a white t-shirt and had his hair in French braids. (*Id.* at 15). Carrying what looked like a "sawed off" rifle, the man walked up to the passenger side of the blue car. (*Id.* at 15-16). The man "cocked" the gun, fired it, and then "kept shooting, kept hitting [Doniel] in the head, and then he shot my other cousin, and then he took off and went back up through the field." (*Id.*).

Stacy admitted having a theft conviction and said she was presently detained in the Jefferson County jail on a probation violation. (Exh. 15 at 23). She admitted being a drug user, but testified that on the day of the shooting she had not used any drugs for two days. (Exh. 15 at 32). She stated her mind was clear that day and that she had viewed the shooter from directly across the street. (Exh. 15 at 36, 15).

Lamonte McIntyre was not present at the hearing, but Stacy viewed photos of him and stated he was definitely not the shooter. (Exh. 15 at 21-22). She testified that McIntyre was too

tall, his face was too long, and his ears were too large and stuck out too much. (*Id.* at 12-22). She described the shooter as being about her height, which she stated was 5'6" or 5'7" tall. (*Id.* at 21-22). Police records show that Lamonte McIntyre is 5'11" tall. (Exh. 1 at 23). Stacy also testified that she had seen the shooter out on the streets, at 7th and Allis and also up on Quindaro. (Exh. 15 at 19). She testified: "He walked up to me and kept looking at me like that, you know...[I]t scared me." (Exh. 15 at 19). Stacy testified about the impact her cousin's death had on her and that she wanted the real killer to go to prison. "I want the right one for my cousin...I seen him [the shooter] and I know him." (Exh. 15 at 22).

McIntyre's counsel did not present testimony from Niko Quinn, but did present an affidavit from her. (Exh. 15 at 4-5, 44; Exh. 35). The affidavit stated that Niko was positive that McIntyre was not the shooter, that his "ears are too large and they stick away from his face too much. Lamont McIntyre is too tall." (Exh. 35 at ¶8). Niko also admitted committing perjury and stated she had been pressured by Golubski and that police had threatened to take away her children. (Exh. 35 at ¶6, 11). Judge Burdette stated that he found "no credibility whatsoever to her recantation." (Exh. 15 at 46).

Following the denial of his motion for new trial, McIntyre appealed. The Kansas Supreme Court denied his appeal (Exh. 17), and McIntyre subsequently filed a *pro se* motion for relief under K.S.A. 60-1507. (Exh. 20 at 1-7).

In his petition under K.S.A. 60-1507, McIntyre raised issues concerning the failure to give an eyewitness instruction and the failure to present exculpatory testimony from another witness who lived on Hutchings, Willie Bush. (Exh. 20 at 1-7). Judge Burdette appointed Mark Sachse to represent McIntyre and, on January 16, 1998, held a hearing. (Exh. 19). Sachse made only a few minutes of argument and presented no evidence. (*Id.*). His presentation did not reflect any

familiarity with the trial record, and McIntyre was not present at the hearing. (*Id.*). Prosecutor Morehead complained about the witnesses coming forward after trial to say McIntyre was not the shooter: [A]ll of a sudden...they now have witnesses coming forward..." (*Id.* at 11). But, in fact, Sachse presented no witnesses – not Willie Bush, who was concededly unreliable, but also not presenting Josephine Quinn, whom Sachse had met with and who had a credible account that the shooter was not McIntyre. (Exhs. 37, 37A).

Judge Burdette denied McIntyre's petition, stating: "[F]rankly, I have gone over this particular trial and the efforts of both sides many times and I'm convinced the defendant got a fair trial." (*Id.* at 14).

Sachse never mentioned Josephine Quinn at the hearing, and the failure to present either her testimony or affidavit is unexplained. (*Id.*). Josephine's affidavit, which was handwritten and notarized at the courthouse in October 1997 when Sachse was first appointed, states that McIntyre was not the shooter and that Josephine had told Morehead at the courthouse that "he was not the one who killed my nephew." (Exh. 37 and 37A at ¶5).

Josephine had been subpoenaed, and first appeared at the courthouse the previous day, but was told by Ms. Morehead that she would not be needed to testify. (Exh. 37 and 37A at ¶3).

She returned the next day around 2 p.m. and spoke with Morehead, telling her that the man on trial was not the one who had killed her nephew. Like Niko Quinn and Stacy Quinn, she informed Morehead that McIntyre was too tall to be the shooter. (*Id.* at 4). Josephine also stated in her affidavit that McIntyre's "lips protruded too much and his complexion was too dark. He was not the one who killed my nephew. Reason being his body built, complexion, his height and facial feature." (Exh. 37 and 37A at ¶5).

Sachse, who has signed an affidavit, cannot recall why he did not present the testimony of Josephine Quinn at the hearing. (Exh. 33 at ¶11). The hearing on McIntyre's petition was originally scheduled for October 17, 1997, the day that Josephine Quinn signed her affidavit. (*Id.* at ¶10-11). Sachse states:

Ms. Quinn did not have a chance to testify on October 17, 1997 because the hearing was continued. I do not believe Ms. Quinn was present when the hearing was later held on January 16, 1998. At the January 16, 1998 hearing, I made an argument on Mr. McIntyre's behalf but I did not present any witnesses. I do not recall speaking again with Ms. Quinn after October 17, 1997 and do not know if anyone asked her to be present at the hearing on January 16, 1998. (Exh. 33 at ¶11).

Sachse also stated he did not recall why the hearing was continued from October 17, 1997, the date when Josephine Quinn clearly was in the courthouse, as an administrative assistant to Judge Boeding notarized Josephine's affidavit on that date. (Exh. 33 at ¶9-10).

Sachse stated in his affidavit that he continued to have some independent recollection of his interaction with Josephine Quinn. He stated that Ms. Quinn told him that she had talked to the prosecutor, and "that Ms. Morehead had told her not to testify." (Exh. 33 at ¶7) Sachse added: "Given the nature of her statement, I wanted to get it documented right away." (Exh. 33 at ¶8). Although some of the handwriting in the affidavit is Josephine Quinn's, most of it was Sachse's. (Exh. 37). The affidavit was written out longhand, with Sachse writing down facts as Ms. Quinn was giving her account. (Exh. 33 at ¶6). Ms. Quinn then added additional details in her own hand. (*Id.*)

As reflected in her affidavit, Josephine Quinn told Sachse that she informed Morehead at the courthouse that Lamonte McIntyre was not the shooter. (Exh. 37, 37A at ¶5). Prosecutor

Morehead told her it was "too late" and that the case was in the jury's hands. (Exh. 33 at ¶12; Exh. 37, 37A at ¶5-6).

Josephine Quinn's affidavit has never been presented to a court, and she has never testified. Although she told police that she was unable to make a positive identification from a photo lineup (Exh. 1 at 66), that issue is far different than the question of whether she could look at an individual and state whether he did or did not fit the gross characteristics of the shooter, with regard to such things as height and skin color.

Josephine Quinn, like Niko Quinn and Stacy Quinn, said that Lamonte McIntyre was "too tall" to be the shooter. (Exh. 37, 37A at ¶5; *see also* at ¶13; Exh. 15 at 21-22). Indeed, Lamonte McIntyre is 5'11" tall. (Exh. 1 at 23). In her initial taped statement, Ruby Mitchell described the shooter as 5'6" tall. (Exh. 1 at 33).

As noted above, Judge Burdette denied McIntyre's motion for relief under K.S.A. 60-1507. (Exh. 19 at 14-17). Lamonte McIntyre was not present in the courtroom, and never had any communication at any point with his attorney, Mark Sachse. (Exh. 115 at ¶ 10). The hearing lasted only 20 or 25 minutes and ended with Judge Burdette stating: "This particular case because of the activity after the conviction is very – well, is as clear as any case can be at this juncture for the trial court. I remember the evidence in this case. I remember the demeanor and credibility of the witnesses.....And frankly, I have gone over this particular trial and the efforts of both sides many times and I'm convinced the defendant got a fair trial." (Exh. 19 at 13-14).

NEW EVIDENCE OF MCINTYRE'S INNOCENCE

In amending K.S.A. 60-1507(f) and creating an exception for innocence cases to the one-year statute of limitations, the Kansas legislature looked to the United States Supreme Court's landmark case in *Schlup v. Delo*, 513 U.S. 851 (1995), which created the innocence "gateway" that allowed petitioners who satisfied the innocence standard to obtain a review of their defaulted

claims on the merits. (*Id.* at 861). The standard under the newly amended K.S.A. 60-1507 mirrors the standard of *Schlup*: A petitioner may obtain review of his claims that are otherwise time-barred if he can "show it is more likely than not that no reasonable juror would have convicted the prisoner in light of new evidence." K.S.A. 60-1507(f) (effective July 1, 2016). This language is identical to that governing the *Schlup* "gateway" standard. *Schlup*, 513 U.S. at 867. In making its "probabilistic inquiry," a court evaluates the case in light of *all* of the evidence. "Courts must assess the probative force of the newly presented evidence in connection with the evidence of guilt adduced at trial. *Id.* at 869. In considering all of the "relevant evidence," courts evaluate evidence that was "either excluded or unavailable at trial." *Schlup*, 513 U.S. at 867, 869. In that light, the following sections address: (1) the infirmity and falsity of facts presented at trial; and (2) new facts that conclusive show Mr. McIntyre's innocence.

The Ewing-Quinn Homicide Case: The Investigation That Wasn't

The investigation of the Ewing-Quinn homicides was over almost before it started. The investigation was so grossly deficient that serious questions have been raised about the integrity and reliability of the evidence gathered. Two experienced professionals in law enforcement have reviewed the file and provided opinions regarding the conduct of the investigation – a former detective and police captain who reviewed the detectives' investigation, and a forensic scientist who gathering and processing of physical evidence seized in the case. Both of these longtime professionals reached conclusions sharply critical about the handling of the Ewing-Quinn homicide investigation.

Randy Eskina: retired captain, Kansas City Kansas Police Department

Randy Eskina, who retired in 2012 from the Kansas City, Kansas, Police Department (KCKPD) as a Captain, worked for many years in the Detective Bureau, including during the mid-1990s. (Exh. 27 at ¶2-6). During his service in the KCKPD Detective Bureau, Eskina worked on

major felony cases, including homicide investigations. (*Id.*). He also served in the "Metro Squad," a multi-agency task force formed to address unusually difficult homicide investigations. (Exh. 27 at ¶3).

Eskina has reviewed the police file in this case, as well as the trial transcripts, photographs and exhibits. In his opinion, the investigation of the Ewing-Quinn homicides was "grossly deficient" and full of "multiple errors, failures and deviations from accepted police practices." (Exh. 27 at ¶14, 77). The shortcomings in the investigation "span several categories, resulting in the *reaching of premature and unsupported investigative conclusions.*" (Exh. 27 at ¶14) (emphasis added). Because these failures permeated the entire investigation, "potentially valuable evidence was never gathered and the entirety of the State's case rested on two dubious eyewitnesses whose accounts were filled with discrepancies." (Exh. 27 at ¶14).

Eskina examined each area of the investigation, reaching conclusions that are described in detail in his affidavit. (Exh. 27). The investigative failures fall into the following categories:

> (a) multiple failures, errors and lapses in interviewing witnesses, giving rise to a very substantial risk of misidentification;
>
> (b) the failure to include in the photographic line up a photo of the first individual identified as a suspect by one of the eyewitnesses;
>
> (c) the failure to properly document the eyewitness statements, including the failure to submit any report of the identification by a second eyewitness;
>
> (d) the failure to heed signs that the eyewitnesses' accounts may be unreliable or to take any steps to see if the witnesses' accounts could be corroborated with any other evidence;
>
> (e) the failure to obtain any evidence showing a link between Lamonte McIntyre and the victims, and, if no such link could be identified, the failure to heed the significance of that fact;
>
> (f) the failure to develop any evidence of a motive for the crime or to investigate the backgrounds of the victims;
>
> (g) the failure to obtain a search warrant or search any location for physical evidence, such as the shooter's clothing or weapon or any ammunition;

(h) the failure to seize Mr. McIntyre's clothing when he was arrested shortly after the shooting, as the clothing of the suspected shooter would have obvious evidentiary value and may have had physical evidence on it;

(i) the failure to analyze the physical evidence that was obtained from the crime scene;

(j) the failure to document any statements of informants who supposedly caused police to focus on Lamonte McIntyre; and

(k) the failure to do any follow up investigation based on the statements of the alibi witnesses or to gather available evidence that would have helped determine if McIntyre in fact had a valid alibi.

(Exh. 27 at ¶14).

Eskina states: "In examining the file, I could see no reason for the various failures, omissions and lapses that occurred during the investigation. In my opinion, the investigation deviated substantially from the usual homicide investigation, as numerous leads were ignored and certain critical evidence was never sought or gathered." (Exh. 27 at ¶16).

Eskina levels strong criticism at the interviewing and handling of eyewitnesses, including: the inexplicable failure to interview Stacy Quinn, who had the best view of the shooter and could reportedly identify the suspect; failing to determine the identity of the "Lamonte" whom Ruby Mitchell stated she knew and include his photo in the lineup; failing to properly conduct the photographic lineup (including using only five photos and filling photo array with three photos of young men in the McIntyre family), providing the name of "Lamonte McIntyre" to eyewitness Ruby Mitchell, and failing to document an identification by eyewitness Niko Quinn. (Exh. 27 at ¶17-49).

Eskina noted that, according to her trial testimony, Ruby Mitchell did not know and had never met Lamonte McIntyre. Yet, in her taped statement less than four hours after the shooting, Mitchell identifies him by the first and last name of "Lamonte McIntyre." Eskina states:

Because Ms. Mitchell did not know Lamonte McIntyre and had never heard of him, the only place she could have obtained that information was from a detective or viewing the

> back side of McIntyre's photo. *If she saw the back side of McIntyre's photo or was otherwise informed of his name (as would appear to be the case) that would constitute a very serious violation of accepted police identification practices."*

(Exh. 27 at ¶26) (emphasis added). Eskina noted that Ms. Mitchell originally identified "Lamonte McIntyre" as the "Lamonte" who had dated her niece, an assertion that was utterly incorrect. (Exh. 27 at ¶31-36). Ms. Mitchell then turned around and testified at trial directly contrary to her statement, claiming that she knew *at the time* she made her identification that the man she identified was not the "Lamonte" she knew, and that she had simply "picked out the person I saw." (Exh. 27 at ¶32).

Eskina also noted the extremely divergent estimates that Ms. Mitchell gave of how long she viewed the shooter, stating at first "30 minutes to an hour," then immediately changing that to "no, 30 minutes," then changing her account again to "[f]ive to ten minutes," with the shots taking about "three minutes." (Exh. 27 at ¶37). Eskina stated that the "contradictions in Ms. Mitchell's account raise serious questions about the reliability of her statements to police and her courtroom testimony." (Exh. 27 at ¶36). Eskina adds:

> In reviewing this file, I could not reconcile the highly divergent information provided by the witness, Ruby Mitchell. The many discrepancies in Ms. Mitchell's account – including her shifting descriptions of the shooter's appearance, her original identification of the shooter as the "Lamonte" who had dated her niece, her identification of Lamonte McIntyre by name even though she did not know him, her shifting accounts of when she decided the shooter was not the "Lamonte" who had dated her niece, and her shifting and incredible descriptions of the shooting timeline – **all raise serious concerns about whether she was a witness who should have been relied upon by the State,** in my opinion. The fact that she originally told police that the shooter was a "Lamonte" who had dated her niece but then identified another "Lamonte" was known (at the latest) by the time of the preliminary hearing. **But it appears nothing was done at that point to address what any reasonable detective would perceive as a possible case of mistaken identification.**

(Exh. 27 at ¶39) (emphasis added). Eskina also addressed the failure to document Niko Quinn's pretrial identification of McIntyre, opining that the failure to write a report about this identification was "*highly irregular, markedly questionable and raises grave concerns about the integrity of the*

investigation." (Exh. 27 at ¶46) (emphasis added). Eskina stated that the failure to document Ms. Quinn's identification is "flatly contrary to accepted police practices and gives rise to questions as to its legitimacy in a case of this gravity." (Exh. 27 at ¶46).

Eskina also noted other irregularities regarding Ms. Quinn's identification – she met with Golubski in a police vehicle away from the police department, no second detective was present, the interview was not taped, Golubski wrote no investigative report, and Ms. Quinn, as the eyewitness, did not write her initials next to the photograph she selected, as was customary. (Exh. 27 at ¶48). Eskina states: "The Niko Quinn interview was conducted in a very irregular manner....The failure to follow established procedures is especially troubling in this case, given Ms. Quinn's failure to make an identification when she was first interviewed." (Exh. 27 at ¶48-49).

Eskina also concluded that other aspects of the case were riddled with inexplicable omissions and failures. Detectives did almost nothing to look into the victims' backgrounds or to investigate a potential connection between the homicides and the victims' drug activities. (Exh. 27 at ¶50-151). "At no point did detectives develop any evidence of motive for the crime or even any connection between Lamonte McIntyre and the victims. The failure to locate such evidence is a ***red flag, suggesting that investigators may have focused on the wrong suspect.***" (Exh. 27 at ¶50) (emphasis added).

Eskina also criticized the failure to search for, gather, and analyze physical evidence. He noted that detectives made no "effort to search for the shooter's weapon or any clothing or any other item of evidence, such as ammunition, that could tie the shooter to the scene." (Exh. 27 at ¶52). They also did not apply for any search warrants and did not seek consent to search any

location. (*Id.*). "This was a striking failure," states Eskina. (*Id.*). Further, as Eskina noted, nothing was done to analyze the physical evidence collected at the crime scene:

> Although Frank Clair dusted the victims' car and lifted some latent prints, those prints apparently were never examined or compared with any suspect's prints. This should have been done, as the shooting was a close range shooting, and there was at least a chance that the shooter could have touched some part of the vehicle, particularly the outside of the passenger door. I also noted that although four shotgun shells were recovered from the scene, none of them was examined for fingerprints. *This is a significant omission,* as one of the casings had a significant brass base with the rest of the exterior being smooth plastic. The other casings had a shorter brass base. *There is at least a chance that a print could have been recovered, either through dusting or use of the "super glue" technique. At a minimum, an effort should have been made to recover a print, and the trial testimony of Frank Clair reflected that no effort was made whatsoever.* In a homicide case, a fingerprint examiner should at least *try* to obtain a print from an item of physical evidence seized from the crime scene if there is any chance the shooter may have touched it and if the surface could hold a print.

(Exh. 27 at ¶53) (emphasis added). Eskina observed that detectives did not seize Lamonte McIntyre's clothes or shoes, stating: "This is an *inexplicable and unusual departure from typical practice,* particularly given that the suspect was arrested close in time to the shooting." (Exh. 27 at ¶54-60) (emphasis added). Because a close-range shooting could generate significant "blowback" of blood or glass fragments, there was a possibility that physical evidence could have landed on the shooter's clothing. (Exh. 27 at ¶54).

McIntyre had been arrested within hours of the shooting, and alibi witnesses stated he'd been wearing the same clothes for days. (Exh. 27 at ¶54-56). Both Niko Quinn and Ruby Mitchell had stated the shooter was wearing "all black," but McIntyre reportedly had on bronze or rust-colored pants. (Exh. 27 at 57-58). Although McIntyre's clothing obviously had potential evidentiary value, police failed to seize or examine it, "creating substantial doubt about the integrity and thoroughness of the investigation." (Exh. 27 at ¶57-60).

Eskina also noted that at trial, there were multiple references to "confidential informants" or "reliable sources" who supposedly pointed to Lamonte McIntyre as the suspect. (Exh. 27 at

61). Yet, when Eskina examined the file, he could find no documentation of these supposed sources and the information they provided. (Exh. 27 at ¶ 61). He states: "I see nothing in the file that suggests the probative value of this 'information.' There was certainly no reference to a confidential informant whose identity is documented and who is known to the police to be reliable. There is also nothing in the file to indicate that these sources did in fact actually exist. (Exh. 27 at 61).

Eskina also noted that there was no explanation anywhere in the police file as to how the name of Lamonte *McIntyre* came into the investigation, following Ruby Mitchell's statement that she thought the shooter was a "Lamonte" who had dated her niece. (Exh. 27 at 62-65). A careful examination of the police file reveals "no basis for focusing on Lamonte *McIntyre,* and it appears that the first time Lamonte *McIntyre* entered the case is when Detective Golubski obtained McIntyre's photo from [Victoria] Meyers." (Exh. 27 at ¶65). There is no explanation as to why Lamonte *McIntyre's* photo was requested, as opposed to the photograph of any other male with the first name of "Lamonte." (*Id.* at ¶64). Although prosecutor Morehead referred to numerous "reliable sources" or "confidential informants," there is no reference to them in the police file. (Exh. 27 at ¶66). Eskina opines: "The lack of proper documentation causes me to have grave doubts about the existence or reliability of any informant or tipster who supposedly provided the name Lamonte McIntyre to the police." (Exh. 27 at ¶71).

Eskina also examined the statements and testimony of the alibi witnesses, noting key missed opportunities to either disprove or corroborate the alibi witnesses' accounts. (Exh. 27 at ¶75). The alibi witnesses all said Lamonte was going back and forth between the homes of two aunts and had come over to his Aunt Yolanda's twice around 2 p.m. to call for a cab for someone

at the other relative's home. (Exh. 27 at ¶74). Eskina noted that alibi witness Yolanda Johnson even provided to police the name of the cab company, United Cab. (*Id.*).

It was well known in the 1990s that cab dispatch information was readily available and could be obtained from cab companies; in fact, Eskina had once used such information to help solve a murder investigation in the late 1990s. (Exh. 27 at ¶75). Eskina stated that, given the specificity of the alibi witnesses' statements, "it appears that Detective Golubski missed a key opportunity to obtain vital evidence in this investigation that, had it been gathered, might have shed light on the validity of McIntyre's alibi." (Exh. 27 at ¶76).

Overall, Eskina found the investigation in this case to be "unusually brief and superficial" and "characterized by multiple errors, failures and deviations from accepted police practices." Overall, he found it "grossly deficient." (Exh. 27 at ¶77). Eskina concluded:

> If I had been involved as the lead detective or supervisor in this case, I would have conducted the investigation very differently. I would have ensured that the witnesses were properly interviewed, that their interviews were properly documented, that potential motives were investigated, that appropriate searches were conducted and that physical evidence was subjected to proper analysis. In my opinion, the investigation in this case was grossly deficient and did not conform with established police standards and practices. Had I been in charge of this case, I would not have submitted it to the District Attorney's Office *unless and until substantial additional evidence corroborated the accounts of the two eyewitnesses.*

(Exh. 27 at ¶82) (emphasis added).

Ronald Singer

Ronald Singer is the Technical and Administrative Director for the Tarrant County Medical Examiner's Office in Fort Worth, Texas. (Exh. 78 at 1). He is a past president of the International Association of Forensic Sciences and a Distinguished Fellow and Past President of the American Academy of Forensic Sciences. (Exh. 78 at 1). He has been qualified as a forensic science expert and given expert testimony in federal, state and local courts in numerous states. (*Id.*).

Mr. Singer reviewed the police reports in the Ewing-Quinn homicide investigation, the police photographs and videos, relevant portions of the trial transcript and the autopsy reports on Donald Ewing and Doniel Quinn. (Exh. 78 at ¶3). Singer concluded that although physical evidence was collected at the crime scene, "there was apparently *no* scientific examination of the materials collected, nor was there *any* attempt to recover evidence from Mr. McIntyre that might be compared to crime scene evidence in an attempt to prove or disprove that he was there. (Exh. 78 at ¶4). The total failure to collect and analyze physical evidence was significant:

> In my opinion, because Mr. McIntyre was initially linked to the scene only through eyewitness testimony, it was essential that a thorough evaluation of the physical evidence available be conducted in order to support or refute the eyewitness testimony. The failure to do so potentially hampered Mr. McIntyre's ability to prepare an adequate defense.

(Exh. 78 at ¶5). Singer identified four key areas in which investigators failed to conduct forensic examination:

- Although McIntyre was arrested shortly after the homicides, *no effort was made to collect and evaluate his clothing and shoes.* The autopsy results and other evidence confirmed that the men were shot at close range. "Since these were close range shots, it is reasonable to assume that *glass, blood and other debris from the shooting could have been present on the clothing and shoes that the shooter was wearing.*" If automotive glass and/or blood matching that from the scene were found on McIntyre's clothing, that would tend to connect him with the homicides, while the *absence* of such evidence also would have been significant and could have supported McIntyre's defense.

- No search was ever conducted of McIntyre's residence for any physical evidence, such as firearms, ammunition, or clothing. The presence of such evidence might have linked McIntyre to the scene; conversely, the *absence* of such evidence could have supported his lack of involvement in the crime.

- Although fired shotgun shells were collected at the scene, "there was no attempt to fingerprint them." Although rare, sometimes partial prints may sometimes be lifted from such surfaces. Singer observes that "[a]t least one of the shotgun shells collected has a brass base which would have been suitable for dusting, while the others could have been subjected to cyanoacrylate (super glue) fuming."

- Similarly, although the victims' vehicle was processed for prints, there does not appear to have been any examination or comparison of the prints.

(Exh. 78 at ¶4) (emphasis added). The failure to collect certain physical evidence and to conduct forensic examination or testing "potentially hampered Mr. McIntyre's ability" to defend against the homicide charges. (Exh. 78 at ¶5).

There remains, however, the possibility of *future* testing. If the shotgun shells were handled properly at collection and during storage, "DNA may still be present on the shotgun shells from their initial handling and loading" by the shooter. This could be highly significant for Mr. McIntyre: "If processing of those shotgun shells using current (2016) technology revealed a DNA profile that was different from Mr. McIntyre's, it could lead to an alternate suspect." (Exh. 78 at ¶4(d)).

McIntyre jail book-in record: Clothing did not match the shooter's clothes

Although detectives inexplicably failed to seize McIntyre's clothing, the jail records reflect that, when he was booked hours after the homicides, he was not wearing black pants. (Exh. 21 at 2). This is significant because both Ruby Mitchell and Niko Quinn were consistent throughout their statements and testimony that the shooter wore "all black," including black pants. (Exh. 1 at 28, 33; Exh. 27 at ¶57). The computerized print out from the jail lists McIntyre's pants as "tan," a color in the "brown" range, thus also confirming the alibi witnesses' descriptions of McIntyre's pants – which one witness described as "brown, rusted color jeans" and two others described as "bronze" colored pants or jeans. (Exh. 1 at 79, 90, 99). Although Golubski testified at the preliminary hearing that police had documented in a report what McIntyre was wearing when he arrested, that is not true – an examination of the arrest report shows no description of his clothing, and none of the investigative reports describe what McIntyre was wearing. (Exh. 3 at 38-39; Exh. 1 at 23-24).

The failure to collect McIntyre's clothing was a serious omission, states Eskina. "This is an inexplicable and unusual departure from typical practice, particularly given that the suspect was

arrested close in time to the shooting....No effort was made to conduct any search for physical evidence on McIntyre's clothing or shoes, *creating substantial doubt about the thoroughness and integrity of the investigation.* (Exh. 27 at ¶54, 60) (emphasis added).

The detectives' failure to seize and examine McIntyre's clothing deprived him of a key opportunity to present exculpatory evidence in his defense, as his clothes and shoes did not match the shooter's and would have been free of physical evidence from the crime scene. As Singer states, the failure to adequately investigate the physical evidence "potentially hampered McIntyre's ability to prepare an adequate defense." (Exh. 78 at ¶5).

The Eyewitnesses: Frightened, Manipulated and Forced to Lie

Niko Quinn occupies a unique and nightmarish role in this case: She is a first cousin of one victim (Doniel) and is also related, more distantly, to the other victim (Donald Ewing). (Exh. 34 at ¶5). The double homicide has dominated her life ever since. She witnessed a horrific homicide, was pressured and manipulated to make an identification, and, when she saw Lamonte McIntyre in the courthouse, she realized "he absolutely could not be the shooter." (Exh. 34 at ¶18-21). The police had arrested the wrong man and Niko Quinn did not want to convict the wrong person for her cousins' murders. (*Id.*).

The shooter had been fairly short, 5'6" or 5'7" tall. (*Id.*) At the courthouse, Niko saw McIntyre stand up, and she saw that he "was much taller than the shooter." (*Id.* at ¶21). Also, "his ears are too large and stick out too far away from his face, and the shooter's ears did not." (*Id.*). In her affidavit, she states: "I realized absolutely he could not be the shooter." (*Id.*).

Before she testified, Niko told prosecutor Morehead that McIntyre was not the man who shot her cousins. (*Id.* at ¶21). In fact, she told Morehead twice that police had the *wrong man.* (*Id.*). Morehead dismissed Niko's statement, and threatened her with being held in contempt, going to jail and having her children taken away if she did not testify as planned. (*Id.*). Frightened,

Niko complied and allowed the prosecutor to lead her through her testimony. (*Id.*). When she left the courthouse, she was very upset. (*Id.*).

Niko's encounter with Morehead was the starkest instance of coercion, but it was not the first. When Niko was first shown the photos the day after the shooting by Golubski and another detective, the other detective "placed his thumb on Lamonte's photo, as if he were pointing at it. (Exh. 34 at ¶18). At the same time, Golubski was telling Niko "that police had arrested the shooter and had the gun." (*Id.*) The claim about the gun was, of course, false, but detectives also attempted to influence Niko by showing her the name "Lamonte" on the photo, as they knew that Ruby had mentioned the name "Lamonte" on the day of the shooting. (*Id.* at ¶18). Niko did not make an identification that day, but she met with Golubski a "week or two or maybe a month later" in his car behind the Wyandotte High School track. (Exh. 34 at ¶19). She was scared – she had seen two men on the vacant lot near her home and wondered if they were connected with the murders. (Exh. 34 ¶19). Golubski told her that he would help her move to a new place, which he later did. (*Id.*).

But, in that same conversation, Golubski "continued to put a lot of pressure" on her to make an identification. (*Id.* at ¶20). She thought the photo of McIntyre bore a resemblance, though just in "some ways," to the shooter. (*Id.*). She allowed "Detective Golubski to push [her] to identify Lamonte McIntyre from the photograph." (*Id.*).

After Niko made the identification, the message from the police and prosecutor was clear: she had better stick with it. Before Niko testified, she heard from a now-deceased cousin, Sandy Quinn, that a woman (Ms. Morehead) and two men had come to her house and said that if she did not testify in court to what she said in her statement, that she would be held in contempt of court,

that she could go to jail, and that her children would be taken from her. (*Id.* at ¶22). Niko, who was only 22 or 23 then, was upset and knew she had to comply. (*Id.*).

Over the years, Niko has told many people that Lamonte McIntyre was not the shooter, including her aunt, several of McIntyre's family members, the mother of Doniel Quinn and the aunt of Donald Ewing. (Exhs. 38 at ¶ 13, 25; 44 at ¶ 7; 45 at ¶ 9; 50 at ¶ 21; 52 at ¶ 22, 41; 53 at ¶16). *All of the family members of both victims believe McIntyre is innocent of these homicides. (Id.).*

Niko had provided an important lead to police on nearby drug dealers who had a motive to harm Doniel, but they never followed up on it. (Exh. 34 at ¶13-14). She told them that Doniel, who had been staying at a nearby drug house, had been beaten up just a few days earlier by men from the house. (*Id.*). Doniel had confided in her that he was wrongly suspected of stealing drugs and that Aaron Robinson (a major drug dealer) and some of his "boys" had beaten him up. (*Id.*).

Niko knew the murders of Doniel and Don were likely connected to that nearby drug ring. She states:

> Doniel denied that he stole the drugs. But we knew that he sometimes stayed at a house on North 21st Street that was known as "Aaron's spot." It was a drug house that I later found out was operated by Cecil Brooks and Aaron Robinson, and Doniel sometimes worked there as a doorman, letting people in and out. Doniel's family knew that Doniel was spending time with dangerous people, and his family worried about him.
>
> Sometime after the shooting – I don't recall exactly when – my sister, Stacy, told me that Monster was the shooter. She said Cecil Brooks had paid Monster (Neil Edgar, Jr.) to kill Doniel. Of all of us on Hutchings Street that day, Stacy had the best opportunity to see the shooter. She was right across the street when Doniel was shot.

(Exh. 34 at ¶15-16). Niko knew her sister had the best opportunity to see the assailant, and that Monster was the one who had murdered her cousins. Niko nonetheless succumbed to pressure and manipulation by police. (*See Id.* at ¶18-20). But when she saw McIntyre at the courthouse, her knowledge that police had arrested the wrong man became certainty. She knew "absolutely" that

McIntyre was not the shooter – he was "much taller" than the assailant and his ears were "too large and stuck out too much." (*Id.* at ¶21). Sometime later, an acquaintance of hers, who was also a friend of Monster, told her that Monster was the one who had killed Doniel. (*Id.* ¶25) He said Monster had been paid to do the murder. (*Id.*) Niko also recalled another occasion when that same acquaintance, Bernard May, had come to her house with Monster, and Monster had confronted her in a menacing manner, and said: "Do you know who I am?" (*Id.* at ¶26).

Niko and Stacy shared a fear of Monster. Niko was out with Stacy on two occasions when Stacy saw Monster. (*Id.* at ¶27). "Seeing him upset her, as she was afraid of him." (*Id.*).

But Monster was not the only one who Stacy was afraid of – she was also afraid of the police. (*Id.* at ¶27). Stacy told Niko one time that a police officer had intentionally burned her with a cigar. (*Id.* at ¶27). Also, as Niko knew, Stacy had been having sexual relations with Golubski for a number of years. (*Id.*).

Niko, who also knew Golubski, told him several times throughout the years "that police had gotten the wrong man for Doniel's murder…that my sister said the real killer was Monster." When Niko told him this, "Detective Golubski said nothing…and he took no action." (*Id.* at ¶28).

Golubski took no action, just as Morehead took no action when both Niko Quinn and Josephine Quinn told her that Lamonte McIntyre was not the shooter. Indeed, the only "action" that Morehead took was to force Niko Quinn to testify falsely and send Josephine Quinn away when Josephine made clear that McIntyre was not the shooter. (Exh. 34 at ¶21-22; Exh 37 and 37A at ¶5-6). The police and prosecutor's treatment of the Quinn family – who were both victims and witnesses in the homicides – caused pain and trauma to the Quinn family. Freda Quinn, an aunt of Niko and Stacy Quinn and the sister of Stacy, stated in her affidavit:

> In the days after the murder, my family was very upset that police got the wrong guy. In fact, I remember sitting around the day of Doniel's funeral, and Stacy repeatedly said: "I know who did it. That's not the guy; they got the wrong guy."
>
> After the funeral, I became very depressed and pulled away from the family. The murder was hard to bear, and the injustice made it worse. I got upset being around the family because Josephine, in particular, would get angry and yell about how police had not arrested the real killer.
>
> Both Niko and Josephine told me that they had told the police that they had arrested the wrong man but no one seemed to care about that. The fact that the police ignored their information made them even angrier and more upset.
>
> All I ever wanted – and still want – is for the right man to be brought to justice. [The police] did not care about information that members of our family provided. We were treated very poorly.

(Exh. 38 at ¶10-13).

Not only did the Quinns suffer, the other eyewitness, Ruby Mitchell, suffered as well. During her ride to the police station to make an identification, she became alarmed: Detective Golubski was making sexually oriented comments to her, telling her she was pretty and had a nice figure. (Exh. 40 at ¶14). He also told her he "liked to go out with black women" and asked her if she had a boyfriend and whether she "date[d]" white men." (Exh. 40 at ¶14). Mitchell states: "Already traumatized by the murders I had just witnessed, I felt very nervous and vulnerable when Detective Golubski made these remarks." (Exh. 40 at ¶15). As she was transported to the station, Mitchell was afraid of what Golubski had in mind. She wondered: "Was he going to arrest me for solicitation or was he going to offer me money for sex?" (*Id.* at ¶16).

Mitchell had reason to fear Golubski. She was known to work as a prostitute and, according to a former neighbor, she had prior experiences with Golubski. (Exh. 39 at ¶7; Exh. 67 at ¶9). Women who were drug addicted or worked as prostitutes were very familiar with Golubski – they knew if he wanted something – usually sexual favors – that they had to comply or risk being taken to jail. (Exh. 64 at ¶7; Exh. 69 at ¶9). One witness who formerly worked as a prostitute stated that

one of her acquaintances had "warned" her to "watch out for Golubski" when she was out in the Bottoms. The witness stated:

> It was understood that if Golubski caught you "dirty," which meant with an outstanding warrant or something else he could arrest you for, you had to engage in a sexual act with him if you wanted to stay out of jail. If you did not provide what he wanted (oral sex), then he took you to jail. That was simply understood.

(Exh. 69 at ¶9) Golubski's constant, obsessive pursuit of prostitutes was widely known through the black community, and Mitchell's fear that he would "arrest [her] for solicitation" or "offer [her] money for sex" was well-founded. (Exhs. 24 at ¶ 5-9; 25 at ¶ 5-22; 26 at ¶ 4-19; 29 at ¶ 9; 39 at ¶ 4-7; 41 at ¶ 20-26; 50 at ¶ 13-18; 51 at ¶ 8-14; 53 at ¶ 17-29; 55 at ¶ 19-25; 58 at ¶ 7; 60 at ¶ 7-12; 61 at ¶; 62 at ¶ 7-16; 63 at ¶ 11-12; 64 at ¶ 7-14; 65 at ¶ 25-30; 66 at ¶ 2-20; 68 at ¶ 4-10; 69 at ¶ 8-16; 71 at ¶ 14-22).

As is apparent from her shifting stories, she was confused and frightened in the aftermath of the shooting. She thought the shooter looked "exactly like' her niece's former boyfriend, and also that the shooter had "French braids." Police never documented her statement about "French braids," and Mitchell realized at some point after the "sketch," that she had actually identified someone other than her niece's former boyfriend. (*See* Exh. 5 at 182-85).

Mitchell's most accurate statement was probably the one she gave at the very beginning when asked "Did you see his *face?*" Ms. Mitchell responded: "Well, *he's brown skinned, that's all I could tell.* I didn't know no scars or nothing like that." (Exh. 1 at 33) (emphasis added).

New physical evidence – analysis of the shooting scene – shows that Mitchell's original statement was correct – all that she could see of the shooter's face from her distance, more than 100 feet away, was the skin color. (*See* Exh. 46 at ¶13-15 and attachment A (affidavit and diagrams of Michael Bussell); *see also* Exh. 119 at ¶17 and attachment E (affidavit and photographs of Dan Clark)). In addition to the problem of distance, the crime scene video, from which still photos

were pulled, shows that Ms. Mitchell's house had a screened-in front porch. (*See* Exhibit 48 and attached photos of 3020 Hutchings). In addition, as Mitchell testified at the preliminary hearing, she viewed the shooting from her front doorway, through a storm door with a screen. (Exh. 3 at 15-16) Thus, Ms. Mitchell may have viewed the shooting through two screens, in addition to whatever obstruction resulted from the wood framing on her porch screens. Although Ms. Mitchell's house has since been demolished, the screened-in porch can be viewed in the crime scene video as well as the still photos captured from it. (*See* Exh. 12, Exh. 48 and attached photos).

To replicate the scene, investigators for Mr. McIntyre rented a 1987 blue Cadillac Deville, enlisted four black males to simulate different roles as the shooter and victims, and photographed and filmed the simulation. (*See* Exh. 46, with attachment A; Exh. 119, with attachment E; Exh. 47 (videos of simulation). Investigator Dan Clark took several photographs from the site of Mitchell's former home, replicating the location and elevation of her front door threshold. (Exh. 119 at ¶14-17). He took some of the photographs through a screen, to replicate Mitchell's view, and some of the photos without a screen. (Exh. 119 at ¶17). The photographs were taken using a particular lens and following a particular formula (all explained in Mr. Clark's affidavit) that allow the camera to capture what the human eye would see at a particular distance. By holding the photographs approximately 17 inches from the eyes, the viewer can see what the witness, Mitchell, would have seen from her doorway on the day of the shooting. (Exh. 119 at ¶17). As is clearly established by the photos, Ms. Mitchell could not see facial features from her location. Although she could make observations about height, build, skin color, clothing and perhaps the hair, facial features are too small and detailed to observe from her distance. (Exh. 119 at ¶17, attachment E). Moreover, once the shooter travelled to the bottom of the hill across the street, he would have been running or walking north on Hutchings, so she would have only been able to see his back. (*Id.*).

Once the shooter stood at the passenger side of the car, she would have seen only his profile. (*Id.*). Therefore, her opportunity to see "the face," as she repeatedly claimed at trial – was extremely limited and insufficient to allow her to discern facial features. (*See id.*) Despite her relatively distant and limited perspective, Mitchell repeatedly stated in her testimony – 10 times or more – that she could identify McIntyre because she had "focused" on his "*face*" and had his "*face* in [her] mind." (See Exh. 5 at Tr. 5 at 166, 172, 182, 183, 196, 197, 199, 204, 209) (emphasis added).

Based on the new analysis of the crime scene, this testimony is simply not believable.

New Evidence Points to the Real Killer: An Enforcer for a Nearby Drug Ring

Niko Quinn told police that her cousin, Doniel, had confided in her that he was beaten by members of a nearby drug house – Aaron Robinson and some of his associates – who suspected Doniel of stealing drugs. (Exh. 34 at ¶13-15). The beating happened just a few days before he was murdered. (*Id.*). Niko states in her affidavit that she knew that Doniel sometimes stayed at a house on North 21st Street that was known as "Aaron's spot." (*Id.* at ¶15). Niko states it was a drug house operated by Cecil Brooks and Aaron Robinson, and that Doniel sometimes worked there as a "doorman, letting people in and out." (*Id.*). Doniel's family knew he was spending time with dangerous people, and they worried about him. (*Id.*).

Aaron Robinson was killed in 1996, but Cecil Brooks is still alive and in federal custody; he is currently serving a prison term at the federal medical center in Springfield, Missouri. (Exh. 77 at ¶8 and attached photo). In an affidavit signed on June 22, 2016, Brooks stated that Doniel Quinn and Donald Ewing were murdered by a young man with the street name "Monster." Monster's real name is Neil Edgar, Jr., and he is currently serving a prison sentence in Missouri after pleading guilty to second degree murder. (Exhs. 91, 96; *see also* Exh. 77 at ¶8 and attached photo). Mr. Brooks provided a full account of the background and circumstances of the double homicide:

Throughout the 1990s and beyond, I was a major figure in the Kansas City, Kansas drug business.

I have many family members in the Kansas City, Kansas, area, including Joe Robinson, who is my brother. I was also related to Aaron Robinson, now deceased, who as his first cousin.

Even though I was ten years older than Aaron, he and I were not simply relatives. We were close friends and associates in the drug business. In fact, I personally taught Aaron the drug business. He listened carefully and learned very quickly. Aaron started out on Delavan with me, and then he broke out on his own.

I told Aaron how to get his own spot. I mentored him and taught him what I knew. Aaron learned quickly....

Although Aaron and I were tight, he ran his own operation. He was good to his subordinates and associates. He never cheated and gave everyone their fair share.

When Aaron was accidentally killed in March 1996, his whole crew was lost. His group disintegrated and everyone went their separate ways. Aaron had been their leader and boss, and he personally ran his spot. His right hand man was his first cousin, Marlon Williams. It was Marlon's actions that resulted in Aaron's accidental death.

Aaron had a number of little "cats" working for him. A man whose street name was "Monster" was one of those cats. (I have identified the man named "Monster," whose photograph is attached to this affidavit).

When the double killing of the Quins (Doniel Quinn and Donald Ewing) occurred in 2994, Monster was about 15 or 16 years old.

Monster was the kind of person who would do anything, and he loved my cousin Aaron. He would do whatever Aaron wanted him to do.

Doniel Quinn (I called him Donnie) worked for Aaron as a doorman at Aaron's "spot." He'd come to Aaron's spot with customers. Donnie was a crack addict who was always stealing from someone. He was "scandalous."

Trouble came when dope was missing. I went to Aaron's spot the night before it happened (the double killing) for a brief visit.

There was some conversation about Donnie stealing dope. Some dope came up missing. I remember that Aaron, Marlon and Monster were there. Two other guys were there too, but I forget their names.

Donnie stole something, and he did not return with what he stole.

As a result, two junkies – Donnie and the other Quinn – got killed over it.

The guy who got convicted for these murders had nothing to do with it. None of us had ever heard of him.

Monster got paid to do the murder. He didn't get the whole ticket. He got $500, and the rest was due him but was never paid.

Monster did the murders. I know Monster did it because Aaron told me Monster was the shooter.

When the wrong guy got arrested, we all knew that Monster did what the other guy was arrested for. Maybe we should have stepped up and done something, but that wasn't how it worked.

People close to me told me about the wild things Monster used to do and how crazy Monster was in doing so many murders. I know of two murders that he did – the two Quinns and the white guy. Monster killed a white man over missing dope. To my knowledge, that murder is still unsolved. The victim's body disappeared, and to my knowledge, was never found. This happened sometime in the mid 1990s.

Once Monster started acting out he would then live up to his reputation and image and would do what others expected him to do. He was a 15-year-old kid who somehow got molded into what his name meant – a monster.

(Exh. 77 at ¶2 – 22). Brooks also signed a handwritten addition to his affidavit stating:

Doniel Quinn was the doorman at Aaron's dope house. Everyone fell asleep and then when they awoke, $3,500 worth of crack cocaine was missing and Monster was responsible for the missing crack. Doniel Quinn was also gone, so Aaron, Marlon Williams and Monster assumed Doniel Quinn took the crack cocaine.

On the day that Doniel Quinn and Donald Ewing were killed, Marlon drove Aaron's car. Aaron had a dark blue Oldsmobile delta 88 with a peanut butter colored Landeau top. Marlon drove Monster to the area of the shooting. Marlon parked one street over from where Doniel Quinn and Donald Ewing were parked and smoking crack cocaine. Monster got out of the car and walked past and through a vacant lot to where Quinn and Ewing were sitting. Monster shot Quinn and Ewing with a pump shot gun and returned to Marlon and the car.

After the shooting, Aaron Robinson told me that the shotgun Monster used had been taken apart and destroyed.

I am deciding to sign this affidavit today because I know this is the right thing to do. I know I have thing[s] to deserve to be in prison, but Lamonte McIntyre did not commit the homicides of Doniel Quinn and Donald Ewing. I cannot imagine how it must feel to be convicted of a crime and not be responsible.

(Exh. 77 at ¶29-32).

Joe Robinson, who is Cecil's older brother and a cousin of Aaron Robinson, also signed an affidavit stating that Monster killed Doniel Quinn and Donald Ewing. (*See* Exh. 41). Joe Robinson stated that "Monster" was one of the young "thundercats" in the area who "would do anything to gain status, favor, recognition and money. They all wanted to make a name for themselves." (Exh. 41 at ¶7). If somebody did Aaron wrong, "he would find a 'thundercat' to take care of business. In those days, and even now, thundercats who were 15 or 16 years old would be paid to do shootings.' (Exh. 41 at ¶8).

Robinson continued:

> I remember that Monster frequently hung out at Aaron's drug "spot' on N. 21st Street, just off Quindaro. Everyone, and especially the young thundercats, looked up to Aaron. Monster would do anything to gain Aaron's favor.
>
> Within the organization, Monster was Aaron's enforcer. Monster was a shooter. He was a killer. If the price was right, Monster would kill someone. Monster would not kill for free.
>
> At that time. Doniel Quinn was a drug abuser and as addicted to crack. He was a regular customer at Aaron's spot on N. 21st Street. He was an occasional "doorman" in that he would bring customers in and would keep traffic flowing.
>
> Being the crack addict that he was, Doniel Quinn would frequently steal. In fact, he would take anything from anyone. He was regularly robbing and stealing, which was very dangerous. One day, he broke into Aaron's stash house and stole some of the "honey pot," a large amount of crack cocaine.
>
> Monster knew Aaron wanted Doniel to pay for breaking into the stash house and stealing drugs. Knowing this, Monster found Doniel and shot him and another Quinn while they sat in a car on the street.
>
> Monster was the one who shot and killed Doniel and the other Quinn. Doniel was the intended victim and the other Quinin was just a "freebie." I asked Aaron what happened to his doorman, and Aaron stated: "He got himself killed." We all knew what that meant. In those days, it was just "putting in work" – killing those who steal from you.

(Exh. 41 at ¶11-16; *see also* Exh. ¶65, 65A at 10-23).

CLAIMS FOR RELIEF UNDER K.S.A. 60-1507

Lamonte McIntyre is innocent, and because of that fact and the exceptional circumstances that surround his case, he is entitled to have all of his claims considered on the merits. His case is one of those for which courts have created a "'safety valve' for the extraordinary case." *Schlup,* 513 U.S. at 870 (O'Connor, J., concurring). *See also Vontress*, 299 Kan. at 616; *Kelly*, 291 Kan. at 872-73. In the sections below, McIntyre will first address the "gateway" issues of "manifest injustice" and "exceptional circumstances" will permit this court to grant his claims full consideration on the merits under K.S.A. 60-1507. McIntyre will then address his constitutional claims, including violations of the right to due process, a fair trial and to confront the witnesses and his claims of ineffective assistance of counsel, all in violation of the Fifth, Sixth, and Fourteenth Amendments of the United States Constitution and §5 and §10 of the Kansas Bill of Rights.

I. LAMONTE MCINTYRE IS INNOCENT AND THE FAILURE TO CONSIDER HIS CLAIMS ON THE MERITS WOULD CONSTITUTE A MANIFEST INJUSTICE UNDER K.S.A. 60-1507(f)

New and overwhelming evidence of innocence allows McIntyre to clear the procedural hurdles of K.S.A. 60-1507(f) despite the filing of this motion outside of the one-year statute of limitations. Subsection (f)(2) states that the "time limitation" "may be extended by the court only to prevent a *manifest injustice*." K.S.A. 60-1507(f)(2). In *Vontress,* the Kansas Supreme Court addressed the meaning of "manifest injustice," holding that a court considering such an inquiry "should consider a number of factors as part of the totality of circumstances analysis." *Vontress*, 299 Kan. at 616. The Court provided a "nonexhaustive list" of such factors, including whether: (1) the movant provides persuasive reasons or circumstances that prevented him or her from filing the 60-1507 motion with the one-year time limitation; (2) the merits of the movant's claims raise substantial issues of law and fact deserving of the district court's consideration; and (3) the movant

sets forth a colorable claim of actual, factual innocence. *Id.* The Court stated that all of the "factors considered under the totality of the circumstances need not be given equal weight, and no single factor is dispositive." *Id.*

The Court first addressed federal law allowing for "equitable tolling" of time limitations when a prisoner is actually innocence or "when an adversary's conduct – or other uncontrollable circumstances – prevents a prisoner from timely filing. *Vontress*, 299 Kan. at 616. The Court then singled out *innocence* as a particularly deserving basis that may satisfy the "manifest injustice" standard stating:

> The federal approach is more similar to the one advocated by Judge Leben in his concurring opinion than the limited approach the State urges us to adopt. In concluding that the majority's holding too narrowly defined manifest injustice, he wrote: *"If a person can show actual innocence, for example, I would not leave him or her in prison* even if that person failed for unexplained reasons to meet the 1-year time limit. *Vontress,* 45 Kan. App.2d at 433, 249 P.3d 452. *We agree that a person under these circumstances would suffer a manifest injustice* to extend the time limit regardless of the reasons, if any, for the delay in filing the 60-1507 motion.

Vontress, 299 Kan. at 616 (emphasis added). Recognizing that "innocence" is the most compelling basis for finding a "manifest injustice," the Kansas legislature recently amended K.S.A. 60-1507(f), limiting the grounds for excusing compliance with the one-year statute of limitations for the majority of cases, but *singling out* a "colorable claim of actual innocence" as a particular basis for allowing a prisoner to file his 60-1507 motion outside of the one-year limitations period. *See* K.S.A. 60-1507(f)(2)(A) (effective July 1, 2016). The newly amended version of subsection (f)(2) states:

> (2) The time limitation herein may be extended by the court only to prevent a manifest injustice.
>
> (A) For purposes of finding a manifest injustice under this section, the court's inquiry shall be limited to determining why the prisoner failed to file the motion within the one-year time limitation or *whether the prisoner makes a colorable claim of actual innocence. As used herein, the term actual innocence requires the prisoner to show it is more likely than not that no reasonable juror would have convicted the prisoner in light of the new evidence.*

K.S.A. 60-1507(f)(2) (effective July 1, 2016) (emphasis added).

Mr. McIntyre's petition is being filed on June 30, 2016, so his claim should be analyzed under the *Vontress* factors. *Alternatively*, he submits that his case may be analyzed under the new statutory language, which, as noted above, essentially adopts the approach of *Schlup v. Delo*, 513 U.S. 298, 327 (1995), a United States Supreme Court decision which allows a petitioner who satisfies the standard to pass through the innocence "gateway" and obtain consideration of his otherwise defaulted claims on the merits.

McIntyre's evidence of innocence and other circumstances surrounding his case made it *impossible* for him to bring the claims asserted here within the one-year statute of limitations, which, based on the 2003 amendment to 60-1507, would have given him a one-year grace period to June 30, 2004. *Hayes v. State*, 34 Kan. App.2d 157, 159-62, 115 P.3d 162 (2005)(discussing the retroactive application of the 2003 enactment of the one-year limit for the filing of a 60-1507 motion). It should be noted, briefly, a point that will be discussed further below, that McIntyre's present motion is not his first motion under K.S.A. 60-1507. That issue is addressed separately in Section II below, in a discussion of "exceptional circumstances" permitting consideration of a successive motion. *See, e.g.,* K.S.A. 60-1507(c); *Wimbley v. State,* 292 Kan. 796, 805, 275 P.3d 35 (2011) ("exceptional circumstances" include unusual events that prevented the defendant from raising the issue earlier); *see also State v. Kelly,* 291 Kan. at 872.

A. McIntyre Addresses the Three *Vontress* Factors

1. Persuasive Reasons or Circumstances Prevented the Filing Within the One-Year Limit

The investigation of McIntyre's case, which required years of street investigation, work with experts, document requests and the expenditure of enormous resources, did not begin until 2009, after an innocence project, Centurion Ministries began its investigation. Given limitations on the organization's resources, this was the earliest date that Centurion was able to commit to the

case. (Exh. 118 at ¶3-11). The investigation required years of focused, intense effort, including interviews with dozens of witnesses, the gathering of numerous old documents including jail records and mugshots, and uncovering facts that had long remained hidden. A factor hindering the investigation throughout, and making it far more difficult to obtain witness statements, was the fear that witnesses had of Detective Roger Golubski. (Exh. 121 at ¶25-26). Witnesses feared retaliation or targeting by law enforcement if they came forward and provided information. (Exh. 121 at ¶25-26). James McCloskey, lead investigator for Centurion Ministries (a Princeton, New Jersey based innocence project) states in his affidavit:

> Without question, many of the witnesses we interviewed have a very real fear of Roger Golubski specifically and law enforcement in general based on their own experiences in the community.
>
> As is evidenced in the numerous witness affidavits filed in this case, Roger Golubski was and remains a prominent figure in the African American community in Kansas City, Kansas. *Mr. Golubski's victimization of the community, especially of African American women, had pervasive effects on the willingness of some witnesses to provide information. These witnesses feared arrest, and targeting by law enforcement.* Even though Mr. Golubski has retired from the Kansas City, Kansas police department, he is still a presence within the community, as he now works as a detective in nearby Edwardsville and can still be seen frequently in Kansas City, Kansas. According to witnesses, he continues to frequent Kansas City, Kansas housing projects and can be found cruising the streets in the vicinity of Quindaro Boulevard. It is well known within the community that Mr. Golubski has remaining ties to the Kansas City, Kansas police force. These factors directly impacted witnesses' willingness to talk to investigators about Mr. McIntyre's case. Because of these difficulties, attorneys and investigators had to spend an unprecedented amount of time with witnesses to obtain their trust. Despite making significant inroads, these witnesses still fear the consequences of telling the truth about Roger Golubski and the injustices their community has suffered.

(Exh. 121 at ¶25-26) (emphasis added).

The conduct of Detective Golubski is an integral part of the events underlying McIntyre's case, and also illustrates why many fear him. Detective Golubski's improper sexual approach to Ruby Mitchell during the police investigation left her feeling "nervous and vulnerable." (Exh. 40 at ¶14-15). Niko Quinn recalls how, the day after the shooting, Detective Golubski "pressured

[her] to make an identification" and told her, falsely, that police had seized the shooter's gun. (Exh. 34 at ¶18). At a subsequent meeting behind Wyandotte High School, Golubski continued to pressure Niko to make an identification. (Exh. 34 at ¶19-20).

Through persistent investigation, McIntyre's current investigators discovered Detective Golubski's sexual relationship with the now-deceased Stacy Quinn. At the time of the Ewing-Quinn homicide investigation, Golubski had been having regular sexual contact with Stacy for many years. (*See, e.g.,* Exh. 38 at ¶19). Although Golubski plied Stacy with gifts (*see id.*), she was also afraid of the police – one time an officer had intentionally burned her with a cigar. (Exh. 34 at ¶27). Stacy's sexual relationship with Golubski was well known. One woman who worked as a prostitute in the mid-1990s, saw Golubski pick up and drop off Stacy – known on the street as "Buckwheat" – numerous times. (Exh. 64, 64A at ¶11). Like the other prostitutes, Stacy knew the repercussions for failing to provide what Golubski wanted: a prostitute could either "provid[e] sexual services or get[] arrested." (*Id.* at ¶7).

Joe Robinson, who, along with Cecil Brooks, identified "Monster" as the killer, knew Stacy Quinn well, and also knew that Stacy, as a drug user, knew "everyone who came to Aaron's spot" and would have recognized Monster if she had seen him do the shooting. (Exh. 41 at ¶22). Like many others, Robinson knew that Stacy worked as a prostitute, and over a long period of time, had been having sexual relations with Golubski. (*Id.*). Based on all of this, it is extremely unlikely that Golubski would have been unable to find and interview Stacy during the investigation; instead, he simply indicated in his report that she was "not available." (Exh. 1 at 66).

Golubski's activities were well known throughout the community and even the Police Department. Ruby Ellington, a retired officer who worked at the KCKPD for 25 years, states that Golubski's "exploitation of black women was well known throughout the Department." (Exh. 24

at ¶6). Ellington stated that "[a]lthough some officers were disturbed by Golubski's misconduct, they were afraid to speak up. They knew that Golubski's activities with prostitutes were well known throughout the Department, but his misconduct was never acknowledged or punished." (*Id.* at ¶18). Ellington stated that Golubski was seen "at all hours of the day or night...in the company of prostitutes." (Exh. 24 at ¶7). Golubski also had a reputation for "taking street drugs from users and dealers and giving those drugs to prostitutes in return for sexual acts." (*Id.* at ¶9). Ellington states Golubski used these same women as his "informants." (*Id.* at 11). "Once he had leverage or control over them, he could use that to obtain information for his cases from them, whether that information was true or not." (Exh. 24 at ¶11).

Detective Maskil, who played a very small role in the Ewing-Quinn homicide investigation (collecting physical evidence and notifying relatives of the victims), was also disturbed by Golubski's activities, stating that Golubski "used his color of authority over these prostitutes/informants to obtain sexual relations" and that others in the department "turned a blind eye." (Exh. 26 at ¶14-15; Exh. 1 at 53-56, S*ee also* Exhs. 49, 117).

Golubski's activities were also known in the legal community. Defense lawyer Mike Redmon states that Golubski has a reputation among criminal defense lawyers and in the community for "having a fixation or preoccupation with having sexual relationships with black women." (Exh. 29 at ¶9).

Golubski's activities also attracted the attention of the FBI in the late 1980s and early 1990s. Retired agent Al Jennerich states in an affidavit that when he conducted interviews in the Wyandotte county jail, one of the topics that repeatedly came up was Roger Golubski. (Exh. 24 at ¶6-9). Jennerich recalls that:

> He was a well-known detective, and, as my investigation uncovered, he used the authority of his position to extort sexual favors from black females. The women complied with his

> demands because they knew they would be arrested if they said no. Some of these women were prostitutes, and most were drug addicted. The women knew that unless they provided what Golubski wanted that he could arrest them and have them held in jail. The women were powerless, and Golubski exploited them.

(Exh. 24 at ¶6-9).

Golubski's influence can be seen throughout this investigation – in Ruby Mitchell feeling "nervous and vulnerable"; in Stacy Quin being "not available" although she regularly saw Golubski; and in Niko Quinn feeling pressured to make an identification. Golubski also made an advance on Doniel Quinn's mother, Saundra Newsome. (Exh. 44 at ¶ 9). Although Golubski made no investigation into her son's background as part of the homicide case, he nonetheless showed up at Newsome's door and told her she was a "very attractive black woman" and asked her: "Do you ever go out with white men?" (Exh. 44 at ¶9). Ms. Newsome was shocked at Golubski's inappropriate advances on a grieving mother. (*Id.*). Newsome, and many others, knew that Golubski is "infamous" in the black community for being a corrupt officer who pursues prostitutes. (*Id.*).

Over time, through persistent investigation, numerous other witnesses have revealed that Golubski's activities have had a pervasive effect on the community, on law enforcement, and on the justice system. (*See, e.g.,* Exhs. 24 at ¶ 5-9; 25 at ¶ 5-22; 26 at ¶ 4-19; 29 at ¶ 9; 39 at ¶ 4-7; 41 at ¶ 20-26; 50 at ¶ 13-18; 51 at ¶ 8-14; 53 at ¶ 17-29; 55 at ¶ 19-25; 58 at ¶ 7; 60 at ¶ 7-12; 61 at ¶; 62 at ¶ 7-16; 63 at ¶ 11-12; 64 at ¶ 7-14; 65 at ¶ 25-30; 66 at ¶ 2-20; 68 at ¶ 4-10; 69 at ¶ 8-16; 71 at ¶ 14-22). One witness explained that "Golubski…had the power of his badge…We all knew he could do anything to anyone, and people frequently said he would 'put a case' on those he wanted to target." (Exh. 51, 51A at ¶11-12).

The fear of not only Golubski, but law enforcement authorities generally, is pervasive in Kansas City, Kansas, and clearly had a significant impact on the initial investigation as well as the

length of time it took to obtain the necessary evidence of Lamonte McIntyre's innocence. Black residents of Kansas City, Kansas, are often very reluctant to cooperate with anything that has to do with criminal justice or the court system. (*See* Exh. 39 at ¶9-10) Freda Quinn, who is an aunt of Niko Quinn, states in her affidavit:

> Over the years, I have spoken with Niko a number of times about her testimony at Lamonte McIntyre's trial. The family knew that she had testified falsely. When I asked Niko why she had not told the truth, she told me she had been scared. It was clear to me that she had lied in court because of her fear of the police or prosecutor or both.
>
> In Kansas City, Kansas, I knew it was not unusual for people to be scared of the police or prosecutors. Many were fearful of cooperating with any kind of investigation or legal proceeding. It is well known in the community that police and prosecutors have used threats and improper and coercive tactics to gain compliance from witnesses. The police had a reputation for intimidating and manipulating witnesses to get information, not caring whether that information was true or false, or actually intending to get information that was false. For this reason, people in that community typically do not trust the criminal justice system and often avoid having anything to do with it, if possible. It's difficult to persist in telling the truth if that is not what the police or prosecutor want to hear. People are simply afraid. I knew from Niko's words to me that she had been frightened, and that she had lied about the identity of the shooter because of her fear.

(Exh. 39 at ¶9-10).

For all of these reasons, the investigation to establish McIntyre's innocence was especially challenging. (Exh. 121 at ¶25-26). In addition, investigators faced many obstacles simply locating people in the first place. (*Id.* at ¶26-28). Because of poverty, some witnesses did not have a stable place to live and were transient; many also lacked regular access to cellular phones. (*Id.*). McCloskey stated: "Often we would find a witness after an exhaustive search, but be unable to find them again for some time. The effort and complexity that these issues added to the investigation, and the time it took to adequately investigate Mr. McIntyre's case cannot be overstated." (*Id*). McCloskey added:

> We attempted to locate some witnesses in excess of several times without success. Other witnesses we spoke to but could never locate again. We spoke with several witnesses that gave credible, valuable information who became afraid to talk with us further. Still others agreed to talk with us, but refused to sign affidavits and witness statements for fear of the

> consequences to them and their families from law enforcement. There is no doubt that the investigation in this case was hindered, and significantly delayed, for all of the reasons stated above.

(Exh. 121 at ¶27). By way of just one example, McCloskey first spoke with witness Cecil Brooks in 2010, and Mr. Brooks just signed an affidavit in June 2016. (*Id.* at ¶28). Dan Clark, a veteran investigator who also worked on the case and spent many days attempting to locate witnesses stated: "I have investigated many cases during my twenty years as an investigator, and this case was among the most challenging." (Exh. 118 at ¶13).

2. Merits of Claims Raise Substantial Issues of Law or Fact Deserving of the Court's Attention

As discussed throughout this Motion, the issues go to the very heart of the constitutional protections afforded criminal defendant: the right to due process, the right to be tried in a fair proceeding before an impartial tribunal, the right to confront and cross examine witnesses and the right to the effective assistance of counsel. At every stage, the proceedings against McIntyre were permeated with unfairness and laden with structural and other grave errors, as follows:

- Prosecutor Morehead coerced Niko Quinn to testify falsely that Lamonte McIntyre was the shooter knowing that Ms. Quinn had told her in the courthouse that McIntyre was *not* the shooter.

- Prosecutor Morehead knowingly elicited false testimony from Ruby Mitchell claiming that, at the time Mitchell identified McIntyre's photo, she knew then that he was not the "Lamonte" who had dated her niece, when, in fact, Mitchell's taped statement to police shows that she identified "Lamonte *McIntyre*" – a name obviously fed to her by police – as the young man who had dated her niece.

- Prosecutor Morehead knowingly elicited misleading testimony from Golubski regarding Mitchell's identification of McIntyre, in which he stated Mitchell had not given the name

"McIntyre" in her statement when, in fact, Golubski knew that Mitchell had recited the name "McIntyre" after it was fed to her by police.

- The prosecutor failed to disclose that eyewitnesses Niko Quinn and Josephine Quinn had both told her that Lamonte McIntyre was not the shooter, thereby failing to disclose powerful exculpatory evidence in violation of *Brady v. Maryland*, 373 U.S. 83 (1963).

- The prosecutor failed to disclose that Niko Quinn's testimony was obtained through the use of coercion, threats to arrest her, charge her with contempt and have her children taken away, thereby failing to disclose powerful impeaching evidence in violation of *Giglio v. United States*, 405 U.S. 150 (1972)

- The prosecutor failed to disclose that Niko Quinn's pretrial identification of Lamonte McIntyre was obtained through coercive and suggestive means, in violation of the doctrine of *Brady* and *Giglio*.

- The prosecutor failed to disclose that Niko Quinn told the detectives about alternative suspects who had recently beaten up Doniel, who was suspected of stealing drugs from a nearby drug house, thereby failing to disclose powerful exculpatory evidence in violation of *Brady v. Maryland.*

- The prosecutor failed to disclose to the defense the initial statement of Ruby Mitchell, or alternatively, deliberately presented evidence about that statement which was false and designed to mislead defense counsel and the jury as to what Ms. Mitchell actually told police.

- The prosecutor failed to disclose that Ruby Mitchell told the police that the shooter had "French braids," a hair style worn by the "Lamonte" whom she originally identified, but *not* worn by Lamonte McIntyre.

- The prosecutor failed to disclose that Detective Golubski made improper advances on Ruby Mitchell prior to her identification of Lamonte McIntyre, which caused her to feel anxious and afraid.

- A recent romantic relationship between the prosecutor and the judge deprived McIntyre of his right to due and a fair trial before an impartial tribunal

- Prosecutor Morehead engaged in repeated instances of prosecutorial misconduct throughout trial, including: the use of a misleading photograph of Lamont Drain; presenting evidence of Niko Quinn's pretrial identification of Lamonte McIntyre solely through the testimony of Detective Golubski in violation of the right to confrontation; relying on unnamed informants who supposedly implicated Lamonte McIntyre to bolster her weak case, in violation of McIntyre's right to confrontation; improperly commenting on McIntyre's post-arrest silence; and improperly arguing in closing that McIntyre had shot the victims because of a "vendetta" or to "settle a score" when no evidence of motive was presented.

- The State actors in this case engaged in outrageous government conduct, which permeated the entirety of the investigation and trial. According to retired captain and former detective Randy Eskina, the investigation was "grossly deficient" and full of "errors, failures and deviations from accepted police practices." (Exh. 27 at ¶77). Further, some of the techniques used were "highly irregular" and "markedly questionable," raising "grave concerns about the integrity of the investigation." (Exh. 27 at ¶46).

- Trial counsel failed to provide effective assistance of counsel under the Sixth Amendment by failing to conduct even basic pretrial investigation and by failing to adequately review the police file and prepare for cross examination of witnesses.

- Appellate counsel failed to provide effective assistance of counsel under the Sixth Amendment by failing to raise on appeal preserved, meritorious claims, including use of a misleading photograph of Lamont Drain and reference to unnamed "sources" who supposedly implicated Lamonte McIntyre, and, further by failing to raise as prosecutorial misconduct the prosecutor's improper closing argument suggesting McIntyre had a "vendetta" or was out to "settle a score" when no evidence of motive was presented.

- Counsel who was appointed to represent McIntyre in proceedings under K.S.A. 60-1507 failed to provide competent counsel because he never met with his client, never conducted any investigation and failed to present any evidence at the 60-1507 hearing even though he had spoken with an available witness, Josephine Quinn, who told him she had seen the shooting and that Lamonte McIntyre was not the shooter.

All of the above-listed claims raise "substantial issues of law and fact deserving of the district court's consideration." *Vontress*, 299 Kan. at 616. All of McIntyre's claims concern violations of bedrock constitutional guarantees.

Throughout this case, the prosecutor repeatedly and egregiously violated her obligations, as stated in *Berger v. United States,* 295 U.S. 78 (1935), to ensure that "justice shall be done." The prosecutor instead engaged in deceitful and illicit practices throughout the proceedings that were "calculated to bring about a wrongful conviction." *Id.* at 88. As recognized in *Berger*, a representative of the sovereign "may prosecute with earnestness and vigor – indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones." *Id.* Throughout Mr. McIntyre's case, prosecutor Morehead deliberately and repeatedly struck "foul blows." *See id.* By her actions, the prosecutor subverted and denigrated the purpose of her role, which is to aid "the search for truth in criminal trials." *See Strickler v. Greene*, 527 U.S. 263, 281 (1999).

For all of the reasons stated above, Mr. McIntyre is entitled to have his claims considered on the merits by this court. *See Vontress*, 299 Kan. at 616.

3. McIntyre Has Raised a Colorable, Indeed Overwhelming, Claim of Innocence

Under *Vontress*, a movant asserting a claim of innocence must show *actual, factual innocence*, not mere "legal innocence." *Vontress*, 299 Kan. at 616. Mr. McIntyre has amply satisfied this standard, as well as the standard stated in the newly amended K.S.A. 60-1507(f). Although McIntyre is proceeding under *Vontress*, he believes that the new amendment, with its exception for those with a "colorable claim of actual innocence," may inform the court's analysis. K.S.A. 60-1507(f)(2)(A). The language of the new subsection (f)(2) follows the standard of *Schlup v. Delo,* 513 U.S. at 329, in requiring the petitioner to show that "it is more likely than not that no reasonable juror would have convicted the prisoner in light of the new evidence." K.S.A. 60-1507(f)(2)(A)(effective July 1, 2016); *see also Schlup*, 513 U.S. at 327-28. In making this determination under *Schlup*, the court considers what "reasonable, properly instructed jurors would do" upon considering *all* of the evidence, including evidence admitted at trial along with evidence that was wrongly excluded or which only became available after trial. *Schlup*, 513 U.S. at 327-29. Under Kansas Supreme Court Rule 183, the movant has the burden of establishing the grounds for relief, including "manifest injustice," by a preponderance of the evidence. S. Ct. Rule 183(g).

McIntyre believes that the standards under *Vontress*, the newly amended 60-1507(f)(2) and *Schlup* are highly similar. Regardless of the particular formulation, McIntyre has amply satisfied the standard. The new evidence of innocence here is enormous – an avalanche of exculpatory facts burying the false and flimsy trial evidence.

As discussed at length previously, the new evidence of innocence includes the following;

- Niko Quinn's detailed affidavit stating that McIntyre was not the shooter, and that she told the prosecutor at the courthouse that he was not the shooter, that police "had the wrong man." (Exh. 34 at ¶21).

- Josephine Quinn's affidavit, handwritten with Mark Sachse, in which she stated that she also told the prosecutor at the courthouse that McIntyre was not the shooter, "not the one who killed my nephew." (Exh. 37, 37A at ¶5).

- Niko stated that McIntyre was "too tall" and his "ears are too large and stick out too far away from his face, and the shooter's ears did not." (Exh. 34 at ¶21).

- Niko Quinn's observations about McIntyre being "too tall" to be the shooter are similar to the observations of Stacy Quinn, who testified at the April 1996 hearing that McIntyre was "too tall," and to the observations of Josephine Quinn, who also stated in her affidavit that McIntyre was "too tall." (Exh. 15 at 21-22; Exh. 37, 37A at ¶5). Stacy described the shooter as being close to her height, about 5'6" or 5'7" tall. (Exh. 15 at 21-22). Significantly, at the outset, Ruby Mitchell also stated that the shooter was about 5'6 or 5'7" tall, before switching her account at the preliminary hearing and claiming he was "tall." (Exh. 1 at 51; Exh. 3 at 6).

- As McIntyre's arrest report reflects, in 1994, he was 5'11" tall. (Exh. 1 at 23) Neil Edgar, Jr. aka "Monster," by contrast, was only 5'7" tall. (Exh. 91).

- Like Niko, Stacy also stated that McIntyre's ears are "too big." (Exh. 15 at 22). Stacy testified that McIntyre's ears were so large they "stand out, can't miss them, I mean." A photo of Lamonte McIntyre from that time period shows that his ears were very prominent and stuck out. (*See* Exh. 107).

- Josephine Quinn and Stacy Quinn, who were right across the street from the shooting, also noticed other facial features that did not match the shooter's. Stacy said that

McIntyre's face was "too long" and Josephine stated that his lips protruded too much and his complexion was too dark. (Exh. 15 at 21; Exh. 37, 37A at ¶ 5).

- Josephine stated in her affidavit: "I told [Morehead] that he [McIntyre] *was not the one who killed my nephew*. He was too tall, his lips protruded too much and his complexion was too dark. He was not the one who killed my nephew. Reason being his body built, complexion, his height and facial feature!" (Exh. 37, 37A at ¶5).

- Both Josephine and Niko tried avoid false testimony: Morehead told Josephine she would not be needed to testify, but she coerced Niko to testify falsely, identifying McIntyre as the shooter. (Exh. 37, 37A at ¶3; Exh. 34 at ¶21). Morehead told her that, if she failed to testify and implicate McIntyre, that she could be held in contempt and go to jail and have her children taken away. (Exh. 34 at ¶21). Morehead's threat to Niko at the courthouse matched an earlier message left by a woman (who Niko believed to be Morehead) and two men with a relative who was staying at Niko's house. "They told my cousin, Sandy Quinn, that if I did not testify to what I had said in my statement, that I would be held in contempt of court and that my children would be taken away or I could go to jail." (Exh. 34 at ¶22).

- Niko's and Josephine's accounts mesh with the account of aunt Freda Quinn, who recalls how the pain and trauma of Doniel's murder was increased by the failure of authorities to listen to the Quinn family witnesses. Freda Quinn recalls: "the murder was hard to bear, and the injustice made it even worse. I got upset being around the family because Josephine, in particular, would get angry and yell about how police had not arrested the real killer." (Exh. 38 at ¶11).

- Niko, threatened with jail and losing her children, admits she testified falsely. (Exh. 34 at ¶21). She states: I am signing this affidavit because I know that Lamonte McIntyre was not the man who shot my cousin Doniel. I saw the shooter myself, and I know that Lamonte is not the

shooter. He is significantly taller than the shooter and looks very different from the shooter because of the way his ears stick out from his head." (Exh. 34 at ¶29).

- Niko has also admitted she had been pressured into making a false identification by detectives, including Detective Golubski. While another detective was showing Niko a photo array and pointing with his thumb to McIntyre's photo, Golubski told her they had arrested the assailant and falsely claimed they had gotten his gun. (Exh. 18 at ¶18). When Niko told detectives she wasn't sure, Golubski pressured her to make an identification. (*Id.*). When Niko met with Golubski later behind Wyandotte High School, he pressured her again to make an identification. (*Id.*) After seeing some men on a vacant lot near her home, Niko was scared; Golubski told her he would help her move to a new place, which he later did. (Exh. 34 at ¶19). Niko succumbed to pressure and the promise of moving to a new place and allowed Golubski to push her into identifying Lamonte McIntyre from his photograph. (*Id.* at ¶19-20).

- Over the years, Niko has told many people that McIntyre was not the shooter, including her aunt, several members of McIntyre's family, the mother of Doniel Quinin and the aunt of Donald Ewing. (Exhs. 38 at ¶ 12; 44 at ¶ 5-6; ¶¶ 5-7; 50 at ¶ 19-21; 52 at ¶ 27-29; 53 at ¶ 14-15).

- Niko also told police that men from a nearby drug house where Doniel had been staying had beaten him up a few days earlier. (Exh. 34 at ¶13-15).

- That drug house was operated by Aaron Robinson and Cecil Brooks, and it was Aaron and some of his associates who had beaten Doniel because he was suspected of stealing drugs. (Exh. 34 at ¶13-15).

- Both Stacy and one of Monster's associates, Bernard May, confirmed to Niko that Monster had killed her cousin Doniel and Donald Ewing. (Exh. 34 ¶26). Niko remembers Monster

coming to her house one day and confronting her in a menacing manner: "Do you know who I am?" (Exh. 34 at ¶26). "Monster was clearly trying to intimidate me and send me a message." (Exh. 34 at ¶26).

- The Quinn family wants the right man to be brought to justice. (Exh. 38 at ¶10-11). All of the members of both victim families believe that McIntyre is innocent. (Exhs. 38 at ¶ 13, 25; 44 at ¶ 7; 45 at ¶ 9; 50 at ¶ 21; 52 at ¶ 22; 53 at ¶ 16). Niko has told Golubski several times through the years that police got the "wrong man for Doniel's murder" and that the real killer was "Monster." (Exh. 34 at ¶28). But Golubski never took any action on this information. (*Id.*)

- Ruby Mitchell has admitted her confusion during the identification, stating how she told the police the shooter had French braids (as did Lamont Drain, aka Anthony Lewis during that time, and as did "Monster), but they did not document that information. (Exh. 40 at ¶9; Exh. 1 at 51-52; *see also* Exh. 42 at ¶8; Exh. 77 at ¶24). Neither the photo array nor the composite show any man with French braids. (Exh. 40 at ¶11; Exh. 10 at ¶ 25-34). The absence of French braids in the photos and sketch is "very puzzling and of grave concern" to Mitchell because, as she states, "I am positive that the person who shot those men in the car had French braids that went down the back of his neck. That's why I thought the shooter looked like the Lamont who dated my niece. He had that same hairstyle." (Exh. 40 at ¶12).

- Mitchell states that if she made a mistake in identifying Lamonte McIntyre, "I am truly sorry for this occurrence." (Exh. 40 at ¶13).

- Mitchell states she was traumatized by seeing the murders, and then had to travel alone with Golubski in his car to the police station. Golubski "made some very unsettling comments," telling her he thought she was "pretty" and had a "nice figure." (Exh. 40 at ¶14). He

also stated he "liked to go out with black women" and asked her if "she had a boyfriend" and whether she "date[d] white men." (Exh. 40 at ¶14).

- Mitchell states that she was "[a]lready traumatized by the murders" she had just witnessed, and now she "felt very nervous and vulnerable when Detective Golubski made these remarks." (Exh. 40 at ¶15). She wondered why he was asking such personal questions, and feared he was going to arrest her for "solicitation" and or offer her "money for sex." (Exh. 40 at ¶15-16). She also started worrying about him driving her home later: "My fear was running away with me." (*Id.*).

- In that fearful, vulnerable frame of mind, when she though Golubski might be setting her up for arrest or might offer her money for sex, Mitchell approached the identification process. She saw a man with French braids, but no one documented that fact.

- As discussed elsewhere, Mitchell continually changed her account, and her testimony at trial appears to reflect both coaching and confusion. Although Mitchell told the first detective who interviewed her that she could only see skin color with respect to the shooter's face, by the time of trial, she was claiming that her entire identification rested on seeing and remembering the shooter's facial features. (*See* Exh. 1 at 33; *cf* Exh. 5 at165, 183, 204, 209).

- As discussed in the Introduction and the Factual Background, Ms. Mitchell was too far away – more than 100 feet – to be able to discern facial features. (*See supra* and Exh. 46 at ¶13-15 and attachment A). Photographs and diagrams prepared of the crime scene show that from Mitchell's distance, all that she could reasonably see of the face was the shooter's skin color – which is exactly what she told the detectives at the outset. (Exh. 1 at 33).

- In addition to all of the evidence of the eyewitnesses, undermining the entirety of the trial testimony, new evidence has also surfaced regarding the real killer – "Monster."

- As Niko Quinn stated, the real killer was associated with Aaron Robinson's drug ring. Cecil Brooks, a cousin of Aaron Robinson, was Aaron's mentor in the drug business and was present when Aaron and his associates discussed the theft of drugs from Aaron's drug spot. (Exh. 77 at ¶13).

- Brooks recalls: "Trouble came when dope was missing." (Exh. 77 at ¶12). The night before the double homicide, Brooks recalls being present at a meeting with Aaron, his cousin Marlon Williams, "Monster" and two other men. (Exh. 77 at ¶13). They were talking about Donnie (Doniel) stealing dope. (*Id.*). "Donnie stole something, and he did not return with what he stole. As a result, two junkies – Donnie and the other Quinn – got killed over it," Brooks attests. (Exh. ¶14-15). Brooks states that "Monster," whom he identified as Neil Edgar, Jr., committed the murders" and that Aaron confirmed that fact to him. (Exh.77 at ¶18). Monster was paid $500, but "didn't get the whole ticket." (Exh. 77 at ¶17).

- Brooks identified a mugshot of Neil Edgar, Jr., as "Monster," and stated that killing was consistent with the "wild things that Monster used to do" as he tried to "live up to his reputation and image." (Exh. 77 at ¶8, 21).

- Monster did the murders with the now-deceased Marlon Williams, who drove the getaway car, Aaron's dark blue Oldsmobile Delta 88, with a peanut-butter colored Landeau top. (Exh. 77 at 30). After the shooting, Aaron told Brooks that the shotgun that Monster used had been taken apart and destroyed. (Exh. 77 at ¶31).

- Joe Robinson, Cecil Brooks' older brother, also signed an affidavit stating Monster had done the murders. (Exh. 41). Monster frequently hung out at Aaron's drug spot on N. 21st Street, just off Quindaro. (Exh. 41 at ¶11-15). Monster was Aaron's enforcer – he was a killer and would do anything to gain Aaron's favor. (*Id.*). After Doniel stole from the "honey pot," Monster

"knew that Aaron wanted Doniel to pay for breaking into the stash house and stealing drugs." (*Id.*).

- "Monster was the one who shot and killed Doniel and the other Quinn....Monster was a crazy kid. He knew the victims were sitting around in the area. It didn't matter to him if there were people who saw him shoot in broad daylight. (Exh. 41 at ¶16-17).

- Another witness, a woman who spent a great deal of time with "Monster" in the months after the murders, recalls Monster being a controlling, manipulative and violent man with extreme mood swings. (Exh. 65, 65A at ¶ 8, 13-16, 24). Monster always carried a gun, usually tucked in his waistband, and "everyone knew he was prepared to use it." One day, "Monster" essentially confessed to this young woman that it was he who stole the money and drugs from Aaron's drug spot and then pinned the crime on the "Quinn boys." (Exh. 65, 65A at ¶17). "Monster" also made clear to her that he had "taken care of" Aaron's problem by killing the Quinns. (*Id.* at ¶19).

- These witnesses all know that Lamonte McIntyre is innocent. As Cecil Brooks stated: "The guy who got convicted for these murders had nothing to do with it. None of us had ever heard of him." (Exh. 77 at ¶16).

When the new evidence of innocence is considered alongside the paltry and insubstantial evidence of guilt, it is clear that not an iota of reliable evidence remains from the trial. The State's case has been reduced to dust, now swept away.

Lamonte McIntyre satisfies the innocence standard of both *Vontress* and the newly amended statute, K.S.A. 60-1507. This Court should therefore consider all of his claims on the merits, despite their filing outside of the statute of limitations. *Vontress*, 299 Kan. at 616.

II. LAMONTE MCINTYRE'S CASE PRESENTS "EXCEPTIONAL CIRCUMSTANCES" ALLOWING HIS PETITION BE CONSIDERED DESPITE ANY CLAIM THAT IT IS "SUCCESSIVE"

Under K.S.A. 60-1507, the district court "shall not be required to entertain a second or successive motion for similar relief...absent a showing of exceptional circumstances." *Wimbley v. State*, 292 Kan. 796, 805, 275 P.3d 35 (2011); K.S.A. 60-1507(c). "Exceptional circumstances" are "unusual events or intervening changes in the law that prevented the defendant from raising the issue in a preceding 60-1507 motion." *Wimbley*, 292 Kan. at 805; *see also State v. Kelly*, 291 Kan. 868, 872, 248 P.3d 1282 (2011).

As discussed below, "unusual events" abound in this case, along with a couple of changes in the law. Although Mr. McIntyre previously filed a motion under K.S.A. 60-1507, he asserts that the present motion is, functionally, his first proceeding under section 1507, as the initial proceeding, nearly 20 years ago, was little more than a sham – intended to lend the appearance of regularity and due process while providing no real process at all.

On June 6, 1997, McIntyre filed a *pro se* Petition under K.S.A. 60-1507 that raised two issues – the district court's failure to give an eyewitness instruction and counsel's failure to present testimony from witnesses Keva Garcia and Willie Bush. (Exh. 20). Neither of those issues is raised in the present motion. (*Id.*).

The district court appointed attorney Mark Sachse to represent Mr. McIntyre. However, Sachse *never contacted or met with his client*. (Exh. 115 at ¶10; Exh. 33 at ¶4). The court initially set a hearing on the 60-1507 motion for October 17, 1997, then rescheduled it for January 9, 1998. The hearing was not held on that date either, and it was continued until January 16, 1998. On that date, the district court held a brief hearing, no more than 30 minutes, hearing arguments from Sachse and Morehead. (Exh. 19 at 1-15).

Mr. Sachse admits in his affidavit that he never met with or communicated with Lamonte McIntyre. (Exh. 33 at ¶ 4-5, 14). Sachse states that his failure to have any communication with his client was "not unusual in Wyandotte County" during that time period, as "judges would sometimes just pull a lawyer in from the hallway, impromptu, to represent a petitioner in a 60-1507 hearing." (Exh. 33 at ¶ 14). Sachse stated: "The hearings were typically very short, and the defendant was not present. That is simply the way it was in Wyandotte County at that time." (Exh. 33 at ¶ 3).

The hearing on McIntyre's 60-1507 motion was indeed very brief, and McIntyre was not present. Sachse argued that trial counsel was ineffective for failure to request an eyewitness instruction and for failure to subpoena witness Willie Bush. (Exh. 19 at 2-10). Sachse's arguments failed to address the issue of "prejudice" other than to say that McIntyre was prejudiced by counsels' failures. (Exh. 19 at 2-10).

Inexplicably, Sachse failed to raise a critical item of new exculpatory evidence, the account of Josephine Quinn, the mother of Niko Quinn and Stacy Quinn, had come forward two months earlier, telling Sachse that McIntyre was not the shooter. (Exh. 33 at ¶5-6). Sachse, who has signed an affidavit, cannot recall why he did not present the testimony of Josephine Quinn at the hearing. (Exh. 33 at ¶11). The hearing on McIntyre's petition was originally scheduled for October 17, 1997, the day that Josephine Quinn signed her affidavit. (*Id.* at ¶10-11). Sachse states:

> Ms. Quinn did not have a chance to testify on October 17, 1997 because the hearing was continued. I do not believe Ms. Quinn was present when the hearing was later held on January 16, 1998. At the January 16, 1998 hearing, I made an argument on Mr. McIntyre's behalf but I did not present any witnesses. *I do not recall speaking again with Ms. Quinn after October 17, 1997 and do not know if anyone asked her to be present at the hearing on January 16, 1998.*

(Exh. 33 at ¶11) (emphasis added). Sachse also stated he did not recall why the hearing was continued from October 17, 1997, the date when Josephine Quinn clearly was in the courthouse,

as an administrative assistant to Judge Boeding notarized Josephine's affidavit on that date. (Exh. 33 at ¶9-10).

Judge Burdette ruled from the bench, denying McIntyre's motion stating: "This particular case because of the activity after the conviction is very – well, is as clear as any case can be at this juncture for the trial court. I remember the evidence in this case. I remember the demeanor and credibility of the witnesses.....And frankly, I have gone over this particular trial and the efforts of both sides many times and I'm convinced the defendant got a fair trial." (Exh. 19 at 13-14).

As is apparent, McIntyre's 60-1507 hearing did not conform with any of the norms of due process. McIntyre had no notice, except through the attorney who did not communicate with him. And after his initial filing, McIntyre had no opportunity to be heard, again because his attorney did not communicate with him. Mr. Sachse did nothing whatsoever to review, investigate or prepare his client's case, not even carrying out that most basic of counsel's duties – meeting with the client. This is all the more remarkable given that Sachse met with Josephine Quinn and was clearly apprised that Josephine had told Terra Morehead that Lamonte McIntyre was not the shooter because he was "too tall" and, in other respects, did not resemble the shooter. (Exh. 37 at ¶ 5; 37A). Had Sachse reviewed the file, he would have noted that counsel Lindsey Erickson had previously filed and litigated a motion for new trial based on the sworn statements by Stacy Quinn and Niko Quinn that Lamonte McIntyre was innocent. (*See* Exhs. 8; 14 at ¶ 3-11).

Sachse has no explanation for his failures, other than "that is simply the way it was in Wyandotte County at that time." (Exh. 33 at ¶3). How the system worked in Wyandotte County is not relevant to Mr. Sachse's ethical and statutory obligations, however.

Under the Kansas Rules of Professional Conduct, Mr. Sachse had an obligation to represent his client competently and diligently and to keep his client "reasonably informed" about the status

of his case. Mr. Sachse did not fulfill any of those obligations. *See* Kansas Rules of Professional Conduct, rr. 1.1, 1.2, 1.3 and 1.4. Moreover, as counsel appointed on behalf of an indigent defendant, Sachse was required to adhere to a *statutory* standard of effective assistance of counsel in a post-conviction proceeding. *Brown v. State*, 278 Kan. 481, 101 P.3d 1201 (2004); *Robertson v. State*, 288 Kan. 217, 228 (2009). Although a petitioner has no constitutional right to effective assistance of legal counsel in proceedings under 60-1507, he does have a statutory right, based on K.S.A. 22-4506(b), which requires a district court to appoint counsel for an indigent movant "[i]f the court finds that the...motion presents substantial questions of law or triable issues of fact." Once the right to 60-1507 counsel attaches, a movant is entitled to the effective assistance of counsel. *Robertson*, 288 Kan. at 228; *Brown*, 278 Kan. at 484-85.

By failing to communicate with his client or review the case file or take any steps to prepare his case, Sachse failed to function as an effective attorney for Mr. McIntyre. *See Brown*, 278 Kan. at 483. Just as the defendant in *Brown* – who was not advised by counsel of his right to appeal – was entitled to relief, so too is Mr. McIntyre. *Id.* The circumstances in *Brown* are strikingly similar to the circumstances presented here. In *Brown,* counsel failed to "notify his client of his appointment and of the hearing. Most important, he failed to notify his client of the denial of his 1507 motion and of [his] right to appeal by certain deadlines." *Id.* at 484. The Kansas Supreme Court thus reversed with directions to the district court to allow the appeal to be filed. *Id.* at 485.

Just as in *Brown*, the representation of McIntyre in his 60-1507 proceeding was so deficient as to be utterly worthless. In fact, the representation was worse than appointing *no* counsel, because if McIntyre had been left on his own, he almost certainly would have done a better job than Sachse. Indeed, he could have hardly done worse.

Sachse's egregious failure to fulfill any of his obligations to McIntyre, including the duty to communicate with his client,[3] constitutes "exceptional circumstances," and McIntyre should be permitted to proceed with the present 60-1507 motion as if this one were his first. All of the claims in sections III, IV, VI, VII, VIII, could have been presented in some form by Mr. Sachse. Although the factual basis of many of the *Brady* and perjured testimony claims would not be as developed as it is in this petition, the claims could have been raised to the degree known. Certainly, with respect to the recantation of Niko Quinn, which was available in the court file (Exh. 14), and the sworn statement of Josephine Quinn, counsel was well aware – or should have been – that there was a colorable claim of innocence as well as claims concerning the knowing use of perjured testimony. Yet, counsel did nothing to develop these claims despite being told by Josephine Quinn that "Morehead...told her not to testify." (Exh. 33 at ¶7). Sachse states in his affidavit that he recalls speaking on the phone with Josephine and also meeting with her in person. (Exh. 33 at ¶5). She was present at the courthouse when the 60-1507 hearing was initially scheduled, yet Sachse doesn't recall speaking with her again and does not know if she was asked to be present at the hearing on January 16, 1998. (Exh. 33 at ¶10-11). Sachse never even mentioned Josephine Quinn during the hearing. (Exh. 19).

Compounding the egregious prejudice to Mr. McIntyre is another circumstance – one that was undisclosed to him or his counsel – 3 ½ years before McIntyre's trial, the prosecutor and judge were engaged in a romantic relationship. That issue is discussed in detail in Section V, *infra*, and need not be addressed at length here. The critical point is that Judge Burdette, the former romantic partner of the prosecutor, was the sole decision-maker in critical post-trial proceedings, including

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[3] Mark Sachse has previously been found to have rendered ineffective assistance of counsel. *See United States v. Montgomery*, 676 F. Supp.2d 1218 (D. Kan. 2009).

a hearing on a motion for new trial based on newly discovered evidence. (Exh. 15). Virtually every time Judge Burdette had the opportunity to exercise his discretion, he did so in favor of the prosecutor's position. At the hearing on motion for new trial and in the 60-1507 proceeding, Judge Burdette summarily denied all relief to Lamonte McIntyre, stating he found "no credibility" in the new evidence of McIntyre's innocence and that he was also convinced McIntyre "got a fair trial." (Exh. 15 at 46; Exh. 19 at 14).

Given the involvement of Ms. Morehead and Judge Burdette in a recent romantic relationship, the circumstances here give rise, at a minimum, to "a strong appearance of impropriety." (Exh. 120 at ¶20). Moreover, the *appearance* of bias in such a situation is likely to be accompanied by *actual* bias, appearing "even in ways Judge Burdette could not recognize." (*See* Exh. 120 at ¶20; expert report of Lawrence Fox).

Under these circumstances, as well as all of those enumerated in section I above pertaining to manifest injustice (which are hereby incorporated by reference), Mr. McIntyre is entitled to have his claims considered on the merits in the present petition as if it were his first petition under K.S.A. 60-1507. As discussed above and below, the majority of those claims may be raised as direct claims and as instances of ineffective representation by trial and/or appointed counsel.

Further, "exceptional circumstances" exist based on the deliberate deception of defense counsel and the jury by the presentation of false, perjurious evidence during a trial stripped of due process. The egregious and repeated violation of Mr. McIntyre's right to a fair trial was so extreme that it is difficult to find *any aspect* of this trial that was not tainted by gross misconduct.

Finally, Mr. McIntyre asserts, as another "exceptional circumstance," the existence of intervening changes in the law pertaining to the claims in sections VI and IX. The new authorities

concerning the right to confrontation and the sentencing of juveniles are discussed in those sections.

III. THE PROSECUTOR SOLICITED AND KNOWINGLY PRESENTED FALSE AND PERJURIOUS TESTIMONY, IN VIOLATION OF MCINTYRE'S RIGHTS TO DUE PROCESS AND A FAIR TRIAL UNDER THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION AND §10 OF THE KANSAS BILL OF RIGHTS

The United States Supreme Court has repeatedly recognized that a prosecutor may not knowingly use false evidence, including false testimony, or allow it to go uncorrected when it appears. *Napue v. Illinois*, 360 U.S. 264, 269 (1959). The "deliberate deception of a court and jurors by the presentation of known false evidence is incompatible with 'rudimentary demands of justice.'" *Giglio v. United States*, 405 U.S. 150, 153-154 (1972) (quoting *Mooney v. Holohan*, 294 U. S. 103, 112 (1935)); *see also Pyle v. Kansas*, 317 U.S. 213, 216 (1942) (imprisonment resulting from perjured testimony, knowingly used by State authorities to obtain a conviction, and from the deliberate suppression by those same authorities of evidence favorable to the defendant are a deprivation of rights guaranteed by the United States Constitution entitling petitioner to release from custody) (citing *Mooney v. Holohan*, 294 U.S. 103).

Federal precedents and state authorities make clear that convictions and punishments obtained through the use of materially false evidence violate the due process clause and the Eighth Amendment. *See Johnson v. Mississippi*, 486 U.S. 578 (1988); *United States v. Tucker*, 404 U.S. 443 (1972); *Napue v. Illinois*, 360 U.S. 264 (1959); *Townsend v. Burke*, 334 U.S. 736 (1948). *See also State v. Saenz*, 271 Kan. 339, 344-45, 22 P.3d 151 (2001); Kansas Bill of Rights, §10.

The Supreme Court declared decades ago that convictions based on misconduct such as concealing exculpatory evidence and offering perjured testimony offend the Constitution. The prosecutor is:

> [T]he representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done.

Berger v. United States, 295 U.S. 78, 88 (1935). The concern with justice is echoed throughout Supreme Court cases discussing the due process obligations of prosecutors to disclose exculpatory evidence and refrain from the use of perjured testimony and fabricated evidence. *See Brady v. Maryland*, 373 U.S. 83 (1963); *Napue v. Illinois*, 360 U.S. 264 (1959). Indeed, the constitutional imperative to abide by the demands of due process, as set forth in *Brady*, *Napue*, and similar cases, is so strong that federal courts have recognized the availability of damages relief under 42 U.S.C. § 1983 for wrongly convicted prisoners who later establish their innocence. In *Wilson v. Lawrence County*, 260 F.3d 946 (8th Cir. 2001), the Eighth Circuit observed that law enforcement officers "must be faithful to the overriding interest that '***justice shall be done.***'" *Wilson,* 260 F.3d at 957 *(citing United States v. Agurs,* 42 U.S. 97(1976)) (emphasis added).

The knowing use of false evidence violates the Fourteenth Amendment. *Saenz,* 271 Kan. at 344-345. The "same result obtains when the State, although not soliciting false evidence, allows it to go uncorrected when it appears." *Saenz,* 271 Kan. at 344-345 (quoting *Napue,* 360 U.S. at 269-70). Throughout this trial, Morehead's use of false testimony was knowing, egregious and devastating to McIntyre's right to a fair trial. Absent the false testimony, Morehead almost certainly could not have won a conviction. Relying on the false testimony and amplifying it in closing argument, Morehead obtained a guilty verdict on both counts.

Because "manifest injustice" and "exceptional circumstances" abound in this case, and because any claimed "delay" in presenting the claims in section III below is due to the abusive and egregious misconduct of the State, this Court should consider McIntyre's claims on the merits. *See* Sections I and II, *supra* (hereby incorporated by reference).

A. The Prosecutor Coerced Niko Quinn to Testify Falsely After Ms. Quinn Told the Prosecutor that the Shooter was not Lamonte McIntyre

Niko Quinn's identification was manipulated from the beginning, when she was pressured by the police the day after the shooting, shown a photo array with a detective's thumb pointing at McIntyre's photo, and told that the shooter's gun had been recovered. (Exh. 34 at ¶18-20). A week or two later, Ms. Quinn met Golubski in his vehicle behind Wyandotte High School. (*Id*). Golubski continued to pressure her, and she succumbed and made an identification. *(Id.)*. She was scared about some men she had seen on a vacant lot near her home, and Golubski told her he would help her get a new place, which he later did. *(Id.)*.

Remarkably, Golubski never wrote a report documenting Niko Quinn's identification. The failure to follow standard police practices with an identification – typically conducted at the police department, with two detectives and a taped statement taken – coupled with the failure to submit a report caused retired Captain Eskina to conclude that the pretrial identification by Niko Quinn was "highly irregular and markedly questionable." (Exh. 27 at ¶46). Eskina concludes: "The failure to document Ms. Quinn's identification is flatly contrary to accepted police practices and gives rise to questions as to its legitimacy in a case of this gravity. *(Id.)*.

Perhaps sensing that Niko Quinn was an ambivalent or unsure witness, a woman and two men later came to Niko's house, and left a message with a relative that if Niko did not testify to what she said in her statement, that her children could be taken away or she could go to jail. (*Id.* At ¶22).

As Niko was getting ready to testify during the trial, she saw Lamonte McIntyre in the courtroom. As soon as he stood up, she absolutely realized he could not be the shooter – he was "much taller" than the shooter and his ears "are too large and stick out too far away from his face, and the shooter's ears did not." (Exh. 27 at ¶21). Niko told Morehead before her testimony that

Lamonte McIntyre was *not* the man who shot Doniel and Don – police had gotten the wrong man. (Id.) But Morehead dismissed her statement and told her she could be held in contempt and have her children taken away or go to jail if she did not proceed with her testimony as planned. (*Id.*). Niko, who was afraid of losing her children, complied and testified. (*Id.*). Afterward, she left the courthouse very upset.

Prosecutor Morehead knew when she presented Niko Quinn's testimony that it was false. Not only did she know it was false, she procured the testimony herself with threats and coercion. Morehead then amplified the impact of Niko's testimony in closing, arguing that Niko "looked at those pictures and she said I'm *positively sure* No. 3 is the one who I saw shoot into that car. Twice in court she's testified under oath, pointed to this man right here and said he is the one I saw shoot into the car on April 15th." (Exh. 7 at 476) (emphasis added).

Morehead procured Niko Quinn's false testimony; she then presented it to the jury knowing that Niko's identification of McIntyre was false and obtained through coercion. Absent Niko Quinn's testimony, the State's ability to obtain a conviction was vastly weakened. That would have left Mitchell – with her dubious and shifting account -- as the sole eyewitness in a trial with no other evidence to link the defendant to the crime. Under Kansas law, "perjury is intentionally, knowingly, and falsely swearing, testifying, affirming, declaring ....any material fact upon any oath" in any kind of proceeding. *Saenz*, 271 Kan. at 345. When Niko Quinn took the stand, she gave testimony that was false in every material respect. Under Kansas law, this is perjury. Prosecutor Morehead procured and presented that perjurious testimony, there violating McIntyre's right to due process and a fair trial. *Saenz*, 271 Kan. at 344-45. McIntyre's conviction is tainted and should be vacated.

B. The Prosecutor Presented Knowingly Presented False and/or Misleading Testimony from Ruby Mitchell and Detective Golubski Regarding Mitchell's Statements to Police

Prosecutor Morehead -- faced with the problem of a witness who had originally named another suspect to police and who had incorrectly identified a photo of McIntyre as that other man -- repeatedly elicited false testimony from Mitchell in an effort to persuade the jury that Mitchell's identification of Lamonte McIntyre was nonetheless reliable and free of police influence. A significant problem for Morehead was Mitchell's initial taped statement to police, in which she identifies, by name, Lamonte *McIntyre* – a man she did not know and had never met – and states that she had known him for a "couple months" and that he is the "Lamonte" who had dated her niece. (Exh. 1 at 34-35). Mitchell's statement reflects confusion, possible coercion, and, undeniably, the influence of police, who fed her the name of "Lamonte McIntyre."

Prosecutor Morehead used leading questions to try to conceal inconvenient facts from Mitchell's initial statement and instead presented Mitchell as someone who was just briefly mistaken at the outset, but who quickly realized and corrected her error.

Using carefully framed questions on re-direct and drawing from a portion of Mitchell's preliminary hearing testimony, the prosecutor elicited testimony from Mitchell suggesting that she knew when she selected the photo that the suspect was not the "Lamonte" she knew. Mitchell testified: "I just picked out the – the person that I saw. That I saw do the shooting, the face that I saw…I had my mind on the face." (Exh. 5 at 204; *see also* Exh. 5 at 172. The prosecutor asked Mitchell:

> Q. And when you saw that photograph that's not Lamonte that you knew.... *when you saw that photo what did you think, Miss Mitchell?*
>
> A. *That this is the face I saw at the shooting.*

(Exh. 5 at 172) (emphasis added).

Neither the prosecutor nor defense counsel ever referred to Ms. Mitchell's initial taped statement where she told the police:

Q. Are you absolutely sure this is the party who did the shooting?

A. Yes.

Q. *Who is this party?*

A. ***Lamont.***

Q. *Do you know his last name?*

A. ***Yes.***

Q. *What is it?*

A. ***McIntyre.***

Q. *How do you know this party?*

A. ***Because he used to talk to my niece.***

Q. *How long have you known him?*

A. ***For a couple months.***

Q. Once again, you are absolutely sure this is the party?

A. ***Yes.***

(Exh. 1 at 34-35) (emphasis added).

At trial, Ms. Mitchell testified falsely on cross examination that, when she made her identification to police, she "knew" *then* it wasn't the Lamonte she knew. (Exh. 5 at 183-85). She also testified she had not known McIntyre's name or stated it to police. (Exh. 5 at 183-84). Similarly, Detective Golubski also testified that Ruby Mitchell had not provided the name "McIntyre" to police, only the first name of "Lamonte" when she originally believed the shooter was the young man she knew. (Exh. 6 at 309). Although Ms. Mitchell did not *know* McIntyre's name from her own knowledge, she had clearly been *fed* McIntyre's name, and the exposure of

such direct police influence on her account would have undermined the entirety of her testimony at trial had it been revealed. Golubski testified as follows:

> Q. ...[Did] she ever personally give you the last name of McIntyre or did she ever just provide the first name of Lamonte to your knowledge?
>
> A. The best I recall is she only provided the first name.

(Exh. 6 at 309). Golubski's answer conveniently conceals the fact that Ms. Mitchell had, indeed, recited the name of Lamonte *McIntyre* in her taped statement – the name that had been fed to her by police.

Mitchell's testimony and Golubski's testimony were aimed at covering up the enormity of Mitchell's confusion, and portraying her as only momentarily mistaken. The fact that Mitchell provided Lamonte *McIntyre's* name in her taped statement was concealed, while misleading testimony was used to suggest just the opposite. Similarly, the fact that Mitchell identified Lamonte McIntyre's photo as the man who dated her niece was concealed behind a blizzard of testimony about focusing on the shooter's "face" and that when Mitchell made her photo identification she no longer harbored any thought that the shooter was the "Lamonte" that she knew. (*See, e.g.,* Exh. 5 at 204). All of that testimony was false and misleading, as shown by her original taped statement.

Morehead procured and elicited the false and misleading testimony, and did nothing to correct similar false and misleading statements made by Mitchell on cross-examination. By so doing, Morehead repeatedly violated McIntyre's right to due process and a fair trial. The knowing use of false evidence violates the Fourteenth Amendment. *Saenz,* 271 Kan. at 344-345; *see also,* Kansas Bill of Rights, §10. The "same result obtains when the State, although not soliciting false evidence, allows it to go uncorrected when it appears." *Seanz,* 271 Kan. at 344-345 (quoting

Napue, 360 U.S. at 269-70). Morehead did nothing to "correct" the false evidence – indeed, she constructed, coerced and compelled its presentation. Mr. McIntyre is entitled to a new trial.

IV. THE PROSECUTOR REPEATEDLY FAILED TO DISCLOSE MATERIAL EXCULPATORY AND IMPEACHING EVIDENCE, CAUSING PREJUDICE TO LAMONTE MCINTYRE, IN VIOLATION OF THE RULE OF *BRADY V. MARYLAND* AND MCINTYRE'S RIGHT TO DUE PROCESS AND A FAIR TRIAL UNDER THE UNITED STATES AND KANSAS CONSTITUTIONS

Prosecutor Terra Morehead and Kansas City, Kansas, police repeatedly concealed material evidence of Lamonte McIntyre's innocence from defense counsel and kept secret eyewitnesses' repudiations or contradictions of their identifications of McIntyre as the perpetrator, violating McIntyre's right to due process and a fair trial under the Sixth and Fourteenth Amendments of the United States Constitution and under §10 of the Kansas Bill of Rights. This misconduct contributed to the totality of circumstances creating manifest injustice to McIntyre, and the concealment constitutes an exceptional circumstance that has impeded McIntyre's attempts to remedy his fundamentally unjust conviction and continuing incarceration and show his actual innocence. *See* sections I and II, *supra.*

The *Brady* doctrine protects an accused's due process right to a fair trial. *Brady v. Maryland*, 373 US 83, 87 (1963). Under *Brady*, the State is required to disclose to the defense evidence favorable to the accused – whether that evidence is directly exculpatory or constitutes impeachment of a prosecution witness. *United States v. Bagley*, 473 U.S. 667, 676 (1985); *Giglio v. United States*, 405 U.S. 150, 154 (1972). The individual prosecutor also has an "inescapable" responsibility to learn of and disclose to the defense any evidence favorable to the defendant that is known by others acting on the government's behalf in the case, including the police. *Kyles v. Whitley*, 514 U.S. 419, 437-438 (1995). The State's duty does not decay with time, and Wyandotte County remains obliged to disclose *Brady* evidence to McIntyre <u>*to this day*</u>. "When police or prosecutors conceal significant exculpatory or impeaching material in the State's possession, it is

ordinarily incumbent on the State to set the record straight." *Banks v. Dretke* 540 U.S. 668, 675-676 (2004).

Misconduct under *Brady* and its progeny violates due process as defined in the Fifth and Fourteenth amendments to the United States Constitution and §10 of the Kansas Bill of Rights.

Here, a successful *Brady* claim would comprise three elements: (1) The evidence at issue must be favorable to McIntyre, either because it is exculpatory or because it is impeaching of an adverse witness; (2) that evidence must have been suppressed by the State, whether willfully or inadvertently; and (3) the withheld evidence must be "material" so as to establish prejudice. *See Wilkins v. State*, 286 Kan. 971 (2008)(citing *Banks v. Dretke*, 540 U.S. 668, 691 (2004)); s*ee also Strickler v. Greene,* 527 U.S. 263, 281–82 (1999).

The Kansas cases following *Brady* reiterate the same principles. Prosecutors "have a positive duty" to disclose "evidence favorable to the accused when the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *State v. Warrior*, 294 Kan. 484, 505-06, 277 P.3d 1111 (2012). Because law enforcement's knowledge is imputed to the State, a *Brady* violation can occur when the prosecutor withholds material evidence that is not known to the prosecutor but is known to law enforcement. *Warrior*, 294 Kan. at 506.

In *Warrior*, the Kansas Supreme Court addressed the *Brady* "materiality" requirement, holding, consistent with *Bagley*, that "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." *Warrior*, 294 Kan. at 507 (citing *Bagley*, 473 U.S. at 682). A "reasonable probability" is a "probability sufficient to undermine confidence in the outcome." *Warrior*, 294 Kan. at 507 (citing *Bagley*, 473 U.S. at 682). Significantly, the assessment of "materiality" requires that the withheld evidence be considered "collectively, not item by item." *Kyles*, 514 U.S. at 436-37.

Further, the requirement of "materiality" does not mean that the defendant must show he would have been acquitted; it is sufficient for him to show that confidence in the verdict has been undermined. *Kyles*, 5114 U.S. at 434.

All of the following *Brady* claims may be considered by this court pursuant to McIntyre's showing of "manifest injustice" arising from his actual innocence of the crimes. *See* sections I and II, *supra* (incorporated here by reference). Alternatively, McIntyre has established that his access to the evidence was blocked by the "exceptional circumstance" of the State's failure to disclose critical exculpatory evidence. Therefore, these claims should be considered by the court on the merits. *See* Sections I and II, *supra*. Finally, based on McIntyre's showing that the "exceptional circumstance" of ineffective assistance of appointed counsel has previously impaired his opportunities to pursue at least a portion of his 60-1507 claims, these claims may be fully considered here by this Court.

A. The Prosecutor Failed to Disclose to Defense Counsel that Eyewitness Niko Quinn Told Her that Lamonte McIntyre was not the Shooter

Niko Quinn recalls that when she first saw McIntyre standing in the courtroom, she knew absolutely that he was *not* the shooter. (Exh. 34. ¶21). She noticed startling and specific differences in McIntyre's appearance: McIntyre was taller than the shooter, and he had more prominent ears that stuck out from his face. (Exh. 34. ¶21).

> I knew then, and I know now, that Lamonte McIntyre was not the man who shot Doniel and Don. At the courthouse, I talked to the prosecutor, Terra Morehead, and told her twice that Lamonte McIntyre was not the shooter, that the police had the wrong man.

(*Id.*). These incredibly powerful and material statements were not disclosed to defense counsel. In a case hinging solely on eyewitness evidence, it is difficult to imagine more material statements than those of an eyewitness informing the prosecutor that the defendant was not the assailant. This evidence was unquestionably material, and it was both directly exculpatory of McIntyre as well as

capable of impeaching a key state witness. Therefore, the State was absolutely required to disclose the evidence to McIntyre, but it did not do so.

McIntyre was grossly prejudiced by the prosecutor's suppression of this critical evidence. This circumstance is similar to that of *Smith v. Cain*, where the Supreme Court reversed a first-degree murder conviction because the state withheld evidence of contradictory statements by the sole witness to link the defendant to the crime. *Smith v. Cain*, 132 S. Ct. 627, 630 (2012). Here, although two eyewitnesses testified at trial that they had seen McIntyre commit the crime, Ruby Mitchell's identification of McIntyre was so weak and dubious that, alone, it could not carry his conviction. Had the jurors known of Niko Quinn's earlier repudiation of her identification of McIntyre, they would surely have cast a far more skeptical eye on both her testimony and on the murky chain of police activities that led from Ruby Mitchell's confused identification of the killer to her later identification of McIntyre. A more than reasonable probability exists that, had this evidence been disclosed, the outcome of the proceeding would have been different. *Warrior*, 294 Kan. 484. Certainly, the State's misconduct undermines all confidence in the outcome of the proceeding. *Id.*

B. The Prosecutor Failed to Disclose that Niko Quinn's Pretrial Identification of Lamonte McIntyre's Photograph was Obtained Through Coercive and Suggestive Means

On the day after the shooting, a detective showed Niko Quinn a lineup of five photographs, and Golubski told her, "I'd better testify and that it would be better for me if I did." (Exh. 34 at ¶17). The detective holding the lineup placed his thumb on Lamont McIntyre's photo, "as if he were pointing at it." (Exh. 34 at ¶18). However, Quinn was unable to identify a photo matching the killer's appearance from the lineup. A week to a month afterward, Quinn notified Golubski that she feared two men whom she had seen near her house. (Exh. 34 at ¶19). Golubski met with her behind Wyandotte High School, told Niko Quinn he would help her move to a new place, and

asked her to look at the five photographs again. "I was scared, and I allowed Detective Golubski to push me to identify Lamonte McIntyre from his photograph." (Exh. 34 at ¶20).

Clearly, the coercive and irregular nature of both police interviews of Niko Quinn should have been disclosed to defense counsel before trial. Such evidence would have grossly undermined the credibility of Niko Quinn and would have allowed defense counsel to thoroughly undermine her credibility. Remarkably, the occurrence of the second lineup was concealed even as Quinn testified. Morehead did not question Niko Quinn about this meeting on direct or redirect examination at trial. On cross examination, defense counsel only elicited that Niko Quinn had in some way belatedly identified McIntyre to Golubski, but as counsel tried to impeach that identification by confronting Niko with her prior inconsistent preliminary hearing testimony, Morehead derailed the questions by objecting to counsel's lack of a transcript of the testimony. (Exh. 5 at 145-49).

As noted above, McIntyre was enormously prejudiced by this secrecy. Had McIntyre's defense counsel known of the coercive and suggestive circumstances of Niko Quinn's identification of McIntyre, he could have investigated police activities and interviewed Quinn before trial, who may have led him to more evidence of McIntyre's innocence. Had McIntyre's jury known of the coercive and suggestive circumstances of Niko Quinn's identification of McIntyre, Quinn's testimony would have lacked all credibility, and Ruby Mitchell's weak and dubious identification of McIntyre could not have carried his conviction alone.

A more than reasonable probability exists that, had this critical evidence been disclosed, the outcome of the proceeding would have been different. *Warrior*, 294 Kan. 484. Certainly, the State's misconduct undermines all confidence in the outcome of the proceeding. *Id.*

C. The Prosecutor Failed to Disclose that Niko Quinn Told Detectives About Alternative Suspects Who Had Recently Beaten Up Doniel Quinn, Who Was Suspected Of Stealing Drugs from a Nearby Drug House

Niko Quinn told police that Doniel Quinn had been beaten up a few days before the shooting by people who lived in the drug house where Doniel had been staying. Doniel told Niko that Aaron Robinson and some of his "boys" had beaten up Doniel because they suspected he had stolen drugs from them. (Exh. 34 at ¶13-14). Niko Quinn knew that Doniel sometimes stayed at a drug house known as "Aaron's spot" and worked as a doorman, letting customers in and out. (Exh. 34 at ¶15). Had McIntyre's defense counsel known of these facts, he could have investigated the victims' activities more thoroughly and interviewed Quinn about them before trial, which could have led him to more evidence of McIntyre's innocence and the actual killer's identity. Counsel also could have pursued an affirmative alternative perpetrator defense. In addition, Niko Quinn's identification of McIntyre would have lost all credibility, and Ruby Mitchell's identification of McIntyre could not have carried his conviction alone.

A more than reasonable probability exists that, had this critical evidence been disclosed, the outcome of the proceeding would have been different. *Warrior*, 294 Kan. 484. Certainly, the State's misconduct undermines all confidence in the outcome of the proceeding. *Id.*

D. The Prosecutor Failed to Disclose that Niko Quinn's Testimony was Obtained Through the Use of Coercion and Threats to Arrest Her, Charge Her with Contempt and have her Children taken Away

Before trial, two men and a woman visited Niko Quinn's home and left a message with her cousin, Sandy Quinn, that Niko Quinn must testify to statements she had made to police or face jail for contempt of court or loss of custody of her children. (Exh. 34 at ¶22). Niko Quinn believes that the woman was prosecutor Morehead. The prosecutor made the same warning to Niko Quinn at the courthouse. (Exh. 34 at ¶21).

The state's concealment of these threats caused gross prejudice to McIntyre. Although two eyewitnesses testified at trial that they had seen McIntyre commit the crime, Ruby Mitchell's weak and dubious identification of McIntyre could not carry his conviction alone. Had McIntyre's jury members known of the coercion and threats that elicited Niko Quinn's identification of McIntyre, they would surely have regarded her testimony in a negative light, and also would have cast a far more skeptical eye on the dubious and still-murky chain of police activities that led from Ruby Mitchell's mistaken identification of the killer to her later identification of McIntyre.

A more than reasonable probability exists that, had this critical evidence been disclosed, the outcome of the proceeding would have been different. *Warrior*, 294 Kan. 484. Certainly, the State's misconduct undermines all confidence in the outcome of the proceeding. *Id.*

E. Numerous Additional Failures to Disclose Evidence Caused Prejudice to McIntyre

The record before this Court shows that the prosecutor and police committed numerous other *Brady* violations, repeatedly withholding exculpatory and impeaching evidence that was unquestionably material, most notably:

- The prosecutor failed to disclose that eyewitness Josephine Quinn, who did not testify, told her in the courthouse – as had Niko Quinn -- that Lamonte McIntyre was *not* the shooter. (Exh. 31, 37). This was obviously powerful exculpatory evidence that Morehead had an absolute duty to disclose to the defense, and her failure to do so caused immense prejudice by depriving McIntyre of credible eyewitness testimony that would have greatly undermined less credible eyewitnesses. It's reasonable to conclude that the outcome of McIntyre's trial likely would have been different with disclosure of this evidence to the defense.

- The prosecutor failed to disclose that detectives fed the name "Lamonte McIntyre" to eyewitness Ruby Mitchell, who then recited his name in her taped statement. Had defense

counsel known of this improper influence on the eyewitness, his cross-examination of Golubski and Mitchell would have far more successfully impeached the credibility of these witnesses. It's reasonable to conclude that the outcome of McIntyre's trial likely would have been different with disclosure of this key evidence to the defense.

- The prosecutor failed to disclose that Ruby Mitchell told police that the shooter had "French braids," a hairstyle *not* worn by Lamonte McIntyre. (Ex. 40). Disclosure of the evidence to defense counsel could have allowed defense investigation of other suspects and impeachment of Mitchell's trial testimony identifying McIntyre. It's reasonable to conclude that the outcome of McIntyre's trial likely would have been different with disclosure of this evidence to the defense.

- The prosecutor failed to disclose that Detective Golubski made improper sexual advances on Ruby Mitchell prior to her identification of Lamonte McIntyre, causing her to feel nervous and vulnerable. (Ex. 40 at ¶15). Disclosure of this critical impeaching evidence to defense counsel would have afforded him an opportunity to further investigate Golubski's investigative methods and discover other improprieties. The evidence also could have also impeached a key eyewitness against McIntyre. It's reasonable to conclude that the outcome of McIntyre's trial likely would have been different with disclosure of the evidence to this defense.

In sum, the repeated and egregious failure by the prosecutor to disclose powerful, unquestionably material *Brady* evidence trampled McIntyre's right to due process and destroyed his right to a fair trial, in violation of the Fifth, Sixth and Fourteenth Amendments and §10 of the Kansas Bill of Rights. It should also be noted that, in the opinion of ethics expert Lawrence Fox, prosecutor Morehead repeatedly violated her obligations under the Kansas Rules of Professional Conduct, Rules 3.3, 3.4, 3.8 and 8.4. (*See* Exh. 120 at ¶42 – 62). *See also Warrior*, 294 Kan. at 506. McIntyre is therefore entitled to a new trial.

V. A RELATIONSHIP BETWEEN JUDGE BURDETTE AND PROSECUTOR MOREHEAD DEPRIVED LAMONTE MCINTYRE OF HIS RIGHT TO A TRIAL BEFORE A FAIR TRIBUNAL, IN VIOLATION OF HIS RIGHTS TO DUE PROCESS AND A FAIR TRIAL

The trial judge's undisclosed prior romance with the assistant district attorney prosecuting Lamonte McIntyre contributed to the totality of circumstances creating "manifest injustice" and constitutes an "exceptional circumstance" that has impeded McIntyre's attempts to remedy his fundamentally unjust conviction and continuing incarceration. *See* Sections I and II, *supra* (hereby incorporated by reference). "[T]he concealed relationship obliterated any semblance of judicial impartiality in Mr. McIntyre's trial and infected every aspect of these proceedings with implicit bias." (Exh. 120, *Expert Report of Lawrence Fox,* at 5, ¶8).

Judge Burdette could have ethically presided over McIntyre's case by only one means: disclosing the conflict to the parties and giving them notice of his intention to recuse unless he received a fully informed, independently negotiated, written agreement from the state and McIntyre that the conflict was immaterial. 1994 Kan. Ct. R. Annot. 3D. (Exh. 127). Otherwise, under the United States Constitution, Kansas judicial code, and case law, Burdette had a duty to recuse from Morehead's prosecution of McIntyre and repeatedly thereafter at other proceedings as McIntyre challenged his conviction. The prosecutor as well had a duty to disclose the relationship or to resign from the case and ask her employer to assign another assistant district attorney both in the criminal phase and the civil post-conviction stages.

Their secrecy undermined fairness and prejudiced McIntyre. Given the utter lack of credible or truthful evidence supporting McIntyre's guilt, his conviction and continued confinement are a manifest injustice caused by an unfair trial tainted by bias and prejudice resulting from Judge Burdette's "undue friendship or favoritism toward" Morehead, and McIntyre's conviction should be reversed. *See State v. Foy*, 227 Kan. 405, 411, 607 P.2d 481, 487 (1980).

A. Background

1. In 2006, Judge Burdette and the Prosecutor's Office Admitted What Had Long Been Rumored at the Wyandotte County Courthouse

Judge Burdette and prosecutor Morehead had a romantic relationship in the early 1990s. In *Hooker v. State*, Case No. 04CV2824, counsel representing the petitioner in a post-conviction action filed a stipulation in support of a claim originally raised by his client *pro se*. The stipulation, signed by Mr. Hooker's counsel, Patrick Lewis, states that, while Judge Burdette was a district court judge in Wyandotte County and Ms. Morehead was an assistant district attorney in Wyandotte County, they became involved in a romantic relationship in "approximately the year 1990." (Exh. 73 at ¶3). Both were unmarried at the time of the romantic relationship, which "ended permanently on January 18, 1991." (Exh. 73 at ¶4-5; *see also* Exh. 72).

According to the stipulation, Judge Burdette "would testify that this past romantic relationship did not have any effect on any decisions made" in the trials in *State v. Hooker*. (Exh. 73 at ¶8). Although prosecutor Constance Alvey did not sign the Stipulation, she admitted in a hearing that the relationship had existed, although "both parties had moved on" and were both married to other persons at the time of the *Hooker* trials in 1998. (Exh. 74 at 4-5).

Records show that within four months of the putative end of the Burdette-Morehead romance – and no later than May 1991 – Burdette presided over a sex offender case on which Morehead appeared as prosecutor. (Exh. 123). Their signatures appear together on many orders from Burdette's court, including a May 29, 1991, order for a competency evaluation in *Kansas v. Massey*, 91-CR-926. (Exh. 122). By the end of the year in which their romantic relationship ended, Burdette presided over at least two other cases in which Morehead had appeared: *State v. Lovingood*, No. 91-CR-02193 (Exh. 124) and *State v. Hartman*, No. 91-CR-02204A (Exh. 125).

Morehead had joined the DA's office Sept. 12, 1988, the same year that Burdette rose from the DA's office to the bench in Wyandotte County District Court. (Exh. 73, ¶1). Morehead left the

DA's office on Sept. 12, 2002 and became an Assistant U.S. Attorney for the District of Kansas. (*Id.*, ¶2). No records have surfaced showing that Judge Burdette ever disclosed the relationship or recused from a Morehead case during their 14 years of simultaneous service in the same Wyandotte County courthouse in 1988-2002.

2. Since July 1994, every day in court for Lamonte McIntyre has been tainted by the Burdette-Morehead romantic relationship

The undisclosed emotional residue of the Burdette-Morehead romantic pairing has polluted nearly every proceeding in McIntyre's case, before, during, and after his conviction. Morehead's prosecution of McIntyre's case began in adult court in July 1994, although she had also entered her appearance at McIntyre's June 28, 1994, waiver hearing at which juvenile court Judge Matthew Podrebarac ruled that McIntyre could be tried as an adult. (Exh. 3, p. 2). Morehead was not the signatory assistant district attorney on the information charging McIntyre in adult court. (Exh. 2, p. 18). Thereafter, Morehead's subscript appeared on all of the district attorney's pretrial notices and motions. (Exh. 2, p. 155, 156, 169, 197).

a) Before and during trial, Judge Burdette presided over Morehead's conduct

With Burdette, Morehead achieved an aggressive trial schedule for McIntyre. Burdette moderated Morehead's juror selections. Burdette oversaw Morehead's presentation of the state's evidence. Burdette ruled on Morehead's objections to defense questions of witnesses and presentation of evidence. Burdette oversaw Morehead's cross-examination of McIntyre's defense witnesses. Burdette approved Morehead's proposed jury instructions, and at her request made a lengthy on-the-record finding that an eyewitness instruction was unnecessary. (Exh. 6, pp. 469-71). Burdette did not intervene in Morehead's improper and factually false arguments to the jury about McIntyre. Morehead persuaded Burdette to give McIntyre consecutive life sentences.

b) After trial, Judge Burdette preserved Morehead's victory

Twice after conviction, Judge Burdette heeded Morehead's urging and refused McIntyre's motions for new trial. (Exh. 8 at 3-5; Exh. 15 at 44-47). In the second motion, McIntyre presented evidence that Morehead had elicited false testimony by eyewitness Niko Quinn, who identified McIntyre as the shooter at the 1994 trial. Exh. 35). Niko Quinn's affidavit recanted her trial testimony that had identified McIntyre as the shooter. (*Id.* ¶ 6).

On January 16, 1998, with McIntyre absent from Judge Burdette's courtroom, Morehead and Burdette continued to preserve the ill-gotten conviction of McIntyre, when Morehead persuaded Judge Burdette not to grant McIntyre's motion for relief. (Exh. 19 at 13-15). Upset with court-appointed counsel Mark Sachse for his disastrous performance and for failing to get him to the courtroom for the hearing, McIntyre helplessly barraged the court from prison with mailed-in *pro se* motions to try to salvage his rights under K.S.A. 60-1507. (Exh. 20, p. 11, 12, 13-14). Morehead persuaded both Burdette and David Boal – appointed by Burdette to represent McIntyre at an April 9, 1998, hearing – that McIntyre's motion for change of counsel was moot. (Exh. 20 at 17-18).

B. The Unpublished Decision in *Hooker* Should not Determine the Fate of McIntyre's Claim, Which Fully Develops Judge Burdette's Duty to Recuse

The Kansas Court of Appeals declined to overturn Terry Hooker's conviction despite the stipulation that Judge Burdette and Morehead had shared a romantic relationship before he presided over her two prosecutions of Hooker. *Hooker v. State*, 172 P.3d 1222, 2007, WL 4571102 (Kan. Ct. App.)(unpub.). But McIntyre's case is sharply distinguishable from *Hooker*, as it reflects a level of obvious and extreme prejudice that was not asserted in *Hooker*. Further, *Hooker* was an unpublished decision, and unpublished decisions are not to be relied upon as precedent.

Although the *Hooker* panel relied upon the stipulation's lack of an explicit declaration of "undue friendship or favoritism" between Burdette and Morehead, the appearance of impropriety,

shown by the existence of the intimate relationship between Burdette and Morehead, is sufficient to show a violation of the petitioner's rights. "By prohibiting even the semblance of impropriety – regardless of the existence of an actual transgression – the Code recognizes that judicial impartiality is crucial not only to protecting litigants' Due Process rights, but also to maintaining public confidence in the justice system." ((Exh. 120, *Expert Report of Lawrence Fox,* at 7, ¶13).

Further, the *Hooker* Court relied upon dissimilar facts in *State v. Strayer*, 242 Kan. 618, 625–26, 750 P.2d 390 (1988), which held that a social acquaintance between judge and prosecutor was "no evidence whatsoever" of bias. Unlike *Strayer*, this case does not concern a judge who inevitably became "well acquainted with the members of the bar, including the prosecutors." *Id.* The facts in *Strayer* did not include a romantic relationship between a district judge and prosecutor, nor did *Strayer* include a finding that such a relationship between a judge and prosecutor would be harmless to the rights of a defendant.

C. Judge Burdette: Duty and Prejudice

In Kansas, when a trial judge has failed to recuse himself, a two-prong test determines whether the defendant received a fair trial: "(1) Did the trial judge have a duty to recuse himself from this case [under the Code of Judicial Conduct] (2) If the judge did have a duty to recuse and failed to do so, was there a showing of actual bias or prejudice to warrant setting aside the judgment of the trial court?" *State v. Logan*, 236 Kan. 79, 86, 689 P.2d 778, 784 (1984); *see also State v. Alderson*, 260 Kan. 445, 454, 922 P.2d 435, 443 (1996)(stating first prong as "Did the trial judge have a duty to recuse himself from this case because he was biased, prejudicial, or partial?").

1. Judge Burdette had a Duty to Recuse from McIntyre's Case

By virtually any standard of fair adversarial jurisprudence, Judge Burdette's failure to recuse from presiding over Morehead's prosecution of McIntyre trampled justice. Clear, interlocking guidance in the Kansas Code of Judicial Conduct, Kansas statute, and case law placed

Burdette on notice of his duty not to preside over a case prosecuted by his former romantic partner. As shown in an expert report prepared by Lawrence Fox, a leading legal ethics authority, Judge Burdette's conduct was a gross violation of an adversarial legal tradition and discipline constructed to protect the rights of the accused. (Exh. 120). "Preserving fair and impartial courts is so fundamental to our system of justice that it is considered a basic requirement of Due Process under the Fourteenth Amendment, is codified in 28 U.S.C. § 455 (governing federal judges), and is enshrined in the ABA Model Code of Judicial Conduct ("Model Code")." (Exh. 120, pp. 5-6, ¶11).

a) Kansas Judicial Rules Required Burdette to Recuse

The Kansas Code of Judicial Conduct states a judge has a duty to recuse himself or herself from a case "in which the judge's impartiality might reasonably be questioned ..." before enumerating a non-inclusive list of circumstances requiring a judge's disqualification. 1994 Kan. Ct. R. Annot. 3(C)(1). The Kansas Supreme Court has explained that a judge should disqualify himself or herself if the circumstances and facts of the case "***create reasonable doubt concerning the judge's impartiality***, not in the mind of the judge himself, or even, necessarily, in the mind of the litigant filing the motion, but rather ***in the mind of a reasonable person with knowledge of all the circumstances***." *State v. Strayer*, 242 Kan. 618, 625-26 (1988)(emphasis added).

An Arizona court cited Kansas's objective standard and granted a new trial to a civil plaintiff who belatedly learned that opposing defense counsel had briefly engaged in an intimate relationship with the female judge 20 years before the trial occurred. *In re Bogutz & Gordon PC v. Carondolet Health Network*, No. C2001-0922, 2002 WL 33966260, *4 (Ariz. Super. Dec. 16, 2002) (Trial Order)(quoting *Strayer* and finding "[t]he Court does find that a reasonable person applying an objective standard would have wanted to know this information ...).

(1) It Is Reasonable To Doubt The Impartiality Of A Judge Hearing A Case Prosecuted By His Intimate Partner

A reasonable person would readily entertain reasonable doubt about the impartiality of a judge who presides over a case argued by his romantic partner. "It is hard to imagine a circumstance in which a judge's impartiality would be more open to question than where the judge has been intimately involved with counsel for a party – in this case, the government prosecutor." (Exh. 120, p. 10 ¶18).

Zealous opposing counsel would likely be even more prone to reasonable doubt. An Air Force investigation in 1988-1989 found that two lawyers defending courts martial at Nellis Air Force Base, Nevada, "felt precluded from requesting a bench trial" when facing a judge and prosecutor known to be involved in a "close intimate relationship." *United State v. Berman*, 28 M.J. 615, 617 (1989). Finding "an indelible appearance of partiality that legal arguments will not wash away," the United States Air Force Court of Military Review set aside six convictions from that judge, ***including three convictions that occurred before the judge first shared a bed with the attorney***. *Id.* at 618.

(2) The Rules Prevent Husband-Wife Involvement

Of course, a husband and wife are not permitted to act as judge and attorney in the same case. *See* 1994 Kan. Ct. R. Annot. 3C(1)(d) ("A judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned, including … instances where … his spouse … is acting as a lawyer in the proceeding."). *See also* 28 U.S.C. § 455 ("Any justice, judge, or magistrate judge of the United States … shall disqualify himself in the following circumstances: … his spouse … [i]s acting as a lawyer in the proceeding.").[4] The 2007 ABA Model Code of

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[4] Local custom shows support for this rule in the 29th Judicial District and the overlapping United States District Court of Kansas. A search of Westlaw reveals that none of the appeals taken

Judicial Conduct also would require recusal where a judge's domestic partner acts as a lawyer in the proceeding. R 2.11 (2007).

Burdette's duty to recuse because of a probability of unfairness, judged by "a reasonable person with knowledge of all the circumstances," certainly would be obvious if Morehead and Burdette had gone so far as to formalize their romance in marriage, even if they then divorced. The intimate relationship of Burdette and Morehead, though not licensed in any recorder's office, nonetheless is analogous to marriage and reasonably raises similar doubts about Burdette's impartiality toward defendants prosecuted by Morehead, particularly Lamonte McIntyre.

In his expert report, Fox states:

> Because a judge's sexual relationship with the prosecutor appearing before him – even if that relationship is no longer ongoing – is highly likely to predispose the judge to experience feelings of "undue friendship or favoritism" (or – if the relationship ended on a negative note—"hostile feeling or spirit of ill will") – toward his former paramour, it falls squarely within the category of bias prohibited by the Code [of Judicial Conduct]. *It is impossible to believe that Judge Burdette's favoritism toward Ms. Morehead did not influence the numerous rulings Judge Burdette made that were adverse to Mr. McIntyre, both during his trial and during the post-conviction proceedings, even in ways Judge Burdette could not recognize.*

(Exh. 120 at ¶20) (emphasis added). Fox further opined that McIntyre's conviction should be vacated because Judge Burdette's judicial misconduct violated McIntyre's constitutional right to a fair trial. Fox stated:

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by Jody Boeding, who has served as city attorney for Kansas City as well as chief counsel for the Unified Government of Wyandotte County/Kansas City, had been tried before former Wyandotte County District Judge Thomas Boeding, her husband. In 2013, United States District Judge Carlos Murguia informed opposing litigants that unless both sides executed waiver letters he would recuse himself from their case because attorneys for one side had contributed to his wife's political campaign for local government. Paul Koepp, *Judge Offers to Take Himself off Sprint case*. Kansas City Business Journal, Jun 14, 2013, 2:01pm, Updated Jun 14, 2013, 5:33pm, http://www.bizjournals.com/kansascity/blog/2013/06/judge-offered-to-take-himself-off.html. Judge Murguia served on the Wyandotte County District Court bench 1990-1999.

> The United States Supreme Court has made clear what I have regularly taught, that there are "circumstances 'in which experiences teaches that the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable.'"

(Exh. 120 at ¶27) (citing *Caperton v. A.T. Massey Coal Co. Inc.*, 556 U.S. 868 (2009). Fox observed that, in such instances, "a judge's failure to recuse himself from the case so offends the requirements of due process that it invalidates the outcome of the proceedings." (*Id.*). A criminal defendant is entitled to a trial in an impartial tribunal, before a neutral and detached judge. (*Id.*).

Judicial misconduct affecting the fairness of the proceedings is a "structural error" and must be remedied by vacating the conviction and setting the case for retrial. (Exh. 120 at ¶27-29).

Fox concluded that Judge Burdette's conduct violated Canons 1, 2, and 3 of the current Code of Judicial Conduct, which all pertain to the independence, integrity and impartiality of the judiciary. "An intimate sexual relationship between a judge and the prosecutor trying a case before him presents a flagrant conflict of interest necessitating recusal," states Fox. Judge Burdette's "failure to disqualify himself in the criminal prosecution of Mr. McIntyre or to disclose to the defendant the nature of his previous romantic involvement with Terra Morehead constitutes judicial misconduct so egregious as to necessitate the vacating of Mr. McIntyre's conviction and setting his case for retrial before a neutral judge." (Exh. 120 at ¶12).

(3) Rules Allow Litigants to Agree a Conflict is Immaterial if Judge Discloses Reason for Disqualification

The Code of Judicial Conduct sets out a process for Judge Burdette to dissipate his duty to recuse. "A judge ... may, instead of withdrawing from the proceeding, disclose on the record the basis for his disqualification." 1994 Kan. Ct. R. Annot. 3D. A written agreement that "the judge's relationship is immaterial," signed by all parties and negotiated without the judge's participation, will allow the judge to overcome disqualification. *Id.* Here, no such disclosure or written agreement occurred.

(4) Judge Burdette's Duty Also Arose from General Rules of Judicial Conduct in Force in Kansas in 1994

Read *in toto*, the 1994 Code of Judicial Conduct left no room for Burdette to misunderstand the impropriety of presiding over a case brought by a prosecutor whom he had previously romanced:

- Canon 1 stated: "A judge should ... observe[] high standards of conduct so that the integrity and independence of the judiciary may be preserved." 1994 Kan. Ct. R. Annot. 1. Clearly, a secret romance with a party's attorney does nothing to "preserve" the "integrity and independence of the judiciary."

- Canon 2 stated: "A judge should not allow his ... social ... relationships to influence his judicial conduct or judgment." 1994 Kan. Ct. R. Annot. 2B.

- Canon 2's comments addressed a Kansas judge's personal conduct: "[A judge] must expect to be the subject of constant public scrutiny. He must therefore accept restrictions on his conduct that might be viewed as burdensome by the ordinary citizen and should do so freely and willingly."

- Indeed, the Code even put a duty on Burdette to address Morehead's unprofessional conduct in participating in their romance and then practicing before him: "A judge should take or initiate appropriate disciplinary measures against a judge or lawyer for unprofessional conduct of which the judge may become aware." 1994 Kan. Ct. R. Annot. 3B(3). Prosecuting cases before a judge whom the prosecutor has previously romanced is unprofessional conduct as shown below, creating a duty for Judge Burdette to ensure that Morehead's misconduct did not go undisciplined.

b) Judge Burdette had a Duty to Recuse Himself from McIntyre's Case Arising From Constitutional Guarantees of a Fair Trial

The Supreme Courts for both Kansas and the United States have recognized that the Due Process Clause requires a judge's recusal in certain instances in which "'experience teaches that

the probability of actual bias . . . is too high to be constitutionally tolerable.'" *State v. Sawyer*, 297 Kan. 902, 909, 305 P.3d 608, 613 (Kan.,2013) quoting *Caperton v. A.T. Massey Coal Co. Inc.*, 556 U.S. 868, 877 (2009). *See also Withrow v. Larkin*, 421 U.S. 35, 47 (1975) ("not only is a biased decision maker constitutionally unacceptable but our system of law has always endeavored to prevent even the probability of unfairness.")(internal quotations omitted.) The constitutional bases of Judge Burdette's duty are rooted in the Fifth and Fourteenth Amendments' guarantees of due process. ((Exh. 120, pp. 17-19, ¶¶27-29.)

c) Statute Sets Forth 'Personal Bias, Prejudice or Interest of the Judge' as Creating Duty for Judge to Disqualify Self

Judge Burdette also had a tacit duty to disclose the relationship to McIntyre or recuse under any fair reading of the Kansas statute. Under K.S.A. 20-311d(b), if McIntyre's trial counsel knew "facts and … reasons" for believing that Burdette and Morehead had engaged in a secret affair, counsel would have been obliged to move for Burdette's recusal from the case, then set forth the facts of the judge's romantic relationship with the prosecutor in an affidavit if the motion were denied. No motion for recusal occurred in McIntyre's trial. The default, however, was caused by Burdette's failure to inform McIntyre about the judge's romantic relationship with the prosecutor.

> K.S.A. 20-311d: Change of judge; procedure; grounds
>
> (a) If a party or a party's attorney believes that ***the judge to whom an action is assigned cannot afford that party a fair trial*** in the action, the party or attorney may file a motion for change of judge. The motion shall not state the grounds for the party's or attorney's belief. The judge shall promptly hear the motion informally upon reasonable notice to all parties who have appeared in the case. If the judge disqualifies the judge's self, the action shall be assigned to another judge by the chief judge. ***If the judge refuses to disqualify the judge's self, the party seeking a change of judge may file the affidavit provided for in subsection (b).*** If an affidavit is to be filed it shall be filed immediately.
>
> (b) If a party or a party's attorney files an affidavit alleging any of the grounds specified in subsection (c), the chief judge shall at once determine, or refer the affidavit to another district judge for prompt determination of, the legal sufficiency of the affidavit. If the affidavit is filed in a district court in which there is no other judge who is qualified to hear the matter, the chief judge shall at once notify the departmental justice for the district and

request the appointment of another district judge to determine the legal sufficiency of the affidavit. If the affidavit is found to be legally sufficient, the case shall be assigned to another judge.

(c) Grounds which may be alleged as provided in subsection (b) for change of judge are that:

(5) The party or the party's attorney filing the affidavit has cause to believe and does believe that on account of the ***personal bias, prejudice or interest of the judge*** such party cannot obtain a fair and impartial trial or fair and impartial enforcement of post-judgment remedies. ***Such affidavit shall state the facts and the reasons*** for the belief that bias, prejudice or an interest exists.

(Emphasis added). Clearly, the recusal process requires an attorney seeking disqualification of a judge to 1) file a motion to recuse and 2) if the motion is denied, to declare facts showing the "***personal bias, prejudice or interest of the judge***" under oath to the court.

(1) McIntyre Lacked Sufficient Facts about the Morehead/Burdette Romance to Seek Recusal

Here, however, the facts of Burdette's romance with Morehead were unknown to McIntyre's trial counsel in 1994. The official admissions by Burdette and the State occurred more than a decade later, and in 1994, McIntyre's trial counsel Gary Long knew only the "rumors" that were circulating through the halls of justice.

During the early 1990s, I repeatedly heard rumors in the Wyandotte County Courthouse that Judge Burdette and Terra Morehead were engaged in a romantic relationship. Their relationship was widely discussed by attorneys and other courthouse regulars, but there was never any official confirmation of the relationship.

(Exh. 31, ¶16). Long determined that he lacked a sufficient factual basis at the time to disqualify Burdette under K.S.A. 20-311d, and he also believed that he could rely upon the integrity of Burdette and Morehead to disclose the relationship to him if it had existed.

I had no personal knowledge of their relationship and had never seen them together in any context outside of the courthouse. Because of this, I felt that I lacked sufficient facts to bring up the issue. I also believed that if a relationship was ongoing or existed in the past, that either Judge Burdette or Terra Morehead or both of them should have disclosed it to me before Lamonte's trial.

(Exh. 31, ¶17). Further, Long reasoned that the professional prosecutors in the Wyandotte County District Attorney's Office would have known of such a conflict if it existed and would have prevented assignment of Morehead's cases to Burdette.

> If Ms. Morehead had been engaged in a romantic relationship with Judge Burdette, I would have expected that she, as well as her supervisor at the District Attorney's office, would have taken steps to ensure that her cases would not be assigned to Judge Burdette's Division.

(Exh. 31, ¶18.) Long strongly believed that Judge Burdette would have provided disclosure as well. (*Id.*, ¶19).

> The existence of a past or present romantic relationship between a judge and the prosecutor would create, at a minimum, a strong appearance of impropriety. Had I possessed factual knowledge of a relationship, between Judge Burdette and Terra Morehead, I would have sought for Judge Burdette to recuse himself and set the case for trial in another Division of the Court.

(Exh. 31, ¶20). The Kansas Supreme Court has suggested that a judge should not only inform attorneys of a potential conflict of interest, but that timely notice also is preferred. *See State v. Alderson*, 260 Kan. 445, 922 P.2d 435, 453 (Kan. 1996) (chiding the judge for the "lateness of the hour" when he disclosed one day before trial that he had a possible conflict of interest: the defendant's alleged crime spree occurred in the judge's brother's automobile, which had been stolen from the judge's father's house, but court found no conflict existed).

(2) Burdette's and Morehead's Secrecy About the Romance Excuses McIntyre's Failure to Move for Recusal, Relief

By allowing McIntyre's trial counsel to believe the judge-prosecutor romance was merely a false courthouse rumor, Burdette and Morehead interfered with McIntyre's compliance with the state's recusal statute at trial and during his post-conviction civil case. This establishes one factor of "manifest injustice" under Kansas Supreme Court's interpretation of K.S.A. 60-1507.

> Accordingly, courts conducting a manifest injustice inquiry under K.S.A. 60–1507(f)(2) should consider a number of factors as a part of the totality of the circumstances analysis. This nonexhaustive list includes whether (1) ***the movant provides persuasive reasons or***

> ***circumstances that prevented him or her from filing the 60-1507 motion within the 1-year time limitation***; (2) the merits of the movant's claim raise substantial issues of law or fact deserving of the district court's consideration; and (3) the movant sets forth a colorable claim of actual innocence, i.e., factual, not legal, innocence.

Vontress v. State, 299 Kan. at 616, 325 P.3d at 1121. Here, the judge's and prosecutor's failures to disclose their conflict of interest to McIntyre not only prevented McIntyre from seeking Burdette's recusal on the basis of that conflict of interest, it has continuously impeded McIntyre's access to evidence to prove the inevitable prejudice arising from the relationship between the judge and prosecutor. It should not be necessary for McIntyre to discover the relationship only by investigating the county's case files when in fact the court has had means to communicate the facts and provide relief to Mr. McIntyre at any time that the state has had him in custody.

d) Judge Burdette's Duty to Recuse or Disclose is Evident in Other Jurisdictions' Disciplinary Actions

Outside Kansas, judges' romantic affairs with criminal court litigators – primarily prosecutors – have figured in other jurisdictions' judicial disciplinary decisions. Ethics expert Fox cites numerous additional cases:

> *See, e.g., People v. Biddle*, 180 P.3d 461 (Colo. 2007) (three-year suspension for judge who engaged in, and later attempted to dispel unconfirmed rumors of, ***an affair with a deputy district attorney who appeared before him in court***); *In re Adams*, 932 So.2d 1025 (Fla. 2006) (public reprimand for a judge for entering into a ***romantic relationship with lawyer who practiced before him***); *In re Gerard*, 631 N.W.2d 271 (Iowa 2001) (sixty-day suspension without judicial pay for judge who had an ***undisclosed intimate relationship with a county attorney who appeared before him on a daily basis***); *In re Chrzanowski*, 636 N.W.2d 758 (Mich. 2001) (one-year suspension without pay for judge who had ***appointed an attorney with whom she was intimately involved to fifty-six cases without disclosing the relationship***); [...];

(Exh. 120, p. 16, fn6, emphasis added).

Clearly, the foregoing shows that the romantic relationship between Judge Burdette and Assistant District Attorney Morehead created a duty for the judge to disqualify himself from presiding in Morehead's prosecution of McIntyre or to disclose the conflict and afford McIntyre

an opportunity to either move for disqualification of Burdette under Kansas statute or reach an improbable agreement with Morehead that the conflict was immaterial. McIntyre therefore establishes the first prong of the test determining that his trial was unfair: Burdette had a duty to disqualify himself from McIntyre's trial and from hearing his post-conviction motions for relief.

2. Prejudice by Judge Burdette

Prejudice arising from Judge Burdette's secret romance with prosecutor Morehead overwhelmed McIntyre's right to a fair trial. The second prong of Kansas courts' analysis of whether a judge's failure to recuse is grounds for relief states, "If the judge did have a duty to recuse and failed to do so, was there a showing of ***actual bias or prejudice*** to warrant setting aside the judgment of the trial court?" *State v. Logan*, 236 Kan. at 86, *State v. Alderson*, 922 P.2d at 454.

a) In Romancing the Prosecutor, Judge Possessed a Disposition of "Undue Favoritism Toward" Her that Prejudiced McIntyre

Certainly, as shown below, Judge Burdette's conduct at trial showed bias and prejudice, and there is a reasonable probability of a different outcome if Burdette had not presided over McIntyre's trial. Further, strong arguments support invalidation of McIntyre's conviction and sentence based purely on Judge Burdette's misconduct in failing to recuse or disclose the prior romance to McIntyre's counsel.

> The reviewing court need not delve into the details of the record to determine whether the relationship between Judge Burdette and Ms. Morehead actually affected the outcome of the case (although doing so very well might reveal that this was so). Rather, under Supreme Court precedent, the court need only find either a "potential" for actual bias, *Caperton*, 556 U.S. at 881, or the "appearance of bias." *Commonwealth Coatings Corp. v. Continental Co.*, 393 U.S. 145, 150 (1968).

(Exh. 120, ¶29). This view by expert Lawrence Fox has support in Kansas case law.

> "[B]ias" and "prejudice," as used in connection with the disqualification of a judge, refer to the mental attitude or ***disposition of the judge toward a party to the litigation*** ... Bias and prejudice mean a hostile feeling or spirit of ill will against one of the litigants, or ***undue friendship or favoritism toward one***. *State ex rel. Mitchell v. Sage Stores Co.*, 157 Kan. 622, 625, 143 P.2d 652 (1943).

State v. Foy, 227 Kan. 405, 411, 607 P.2d 481, 487 (1980); *see also State v. Alderson*, 260 Kan. 445, 454, 922 P.2d 435, 444 (1996). Here, there is simply no need to consult the record at trial or in post-conviction proceedings for evidence of prejudice. Here, we have the stipulation showing the existence of Judge Burdette's romance with Morehead, an obvious statement of "undue friendship or favoritism" from him toward Morehead.

By keeping their romance a secret, Burdette and Morehead thwarted the purpose of K.S.A. 20-311d. "The purpose of the law is that no judge shall hear and determine a case in which he is not wholly free, disinterested, impartial, and independent." *State v. Pruett*, 213 Kan. 41, 515 P.2d 1051 (1973). It is flatly irrelevant for Judge Burdette to protest in the *Hooker* stipulation that his relationship with Morehead had no "effect on any decisions made in either trial of" Terry Hooker. (Exh. 73, *Hooker v. State, Case No. 04CV2824, stipulation*, ¶8.) Such a self-serving statement does nothing to repair the "appearance of impropriety" in Hooker's case or in McIntyre's case.

Clearly, Burdette and Morehead remained mutually silent concerning their past romance. They had preserved their bargain through several cases previously litigated by Morehead before Burdette in 1991-1994. It is reasonable to understand that to avoid discipline or for other reasons of personal privacy, each had a secret commitment to the other to continue the silence about their relationship in McIntyre's case. Thus encumbered by his bargain with the prosecutor, Burdette could not be "wholly free, disinterested, impartial, and independent," and McIntyre was prejudiced such that his trial was not fair.

b) Burdette's Trial Conduct Showed Prejudice Against McIntyre Such That it's Reasonable There Would be a Different Outcome

Reviewing courts have looked to the trial record for evidence supporting a petitioner's claim of prejudice from a judge who has failed to recuse, although the judicial misconduct shown here is rarely encountered. Here, the excess prosecutorial misconduct by Morehead, occasionally

abetted by Burdette, provides strong evidence that McIntyre was prejudiced by the judge's undisclosed prior relationship with Morehead.

Absent misconduct by Morehead, for example, she could not have persuaded the jury that police had any reason to suspect McIntyre. Morehead opened her case by telling the jury that unknown, unnamed witnesses who would never testify had implicated McIntyre in the homicides and had stated he was "responsible." (Exh. 4 at 6). Burdette disregarded hearsay problems and urged Morehead to elicit testimony from police that "they developed [Lamonte McIntyre's name] from investigating and they consulted numerous sources." (Exh. 4 at 307).

Further prejudice is evident in McIntyre's thwarted post-trial proceedings. As noted above, twice after conviction, Judge Burdette heeded Morehead's arguments and refused McIntyre's motions for new trial. (Exh. 8; Exh. 15). In the second motion, McIntyre presented evidence that Morehead had elicited false testimony by eyewitness Niko Quinn, who had identified McIntyre as the shooter at trial. (Exh. 35). Ms. Quinn's affidavit, presented at the post-trial hearing, recanted her trial testimony and acknowledged perjury. (*Id.* at ¶7-8). At the hearing, McIntyre presented another eyewitness who had not testified at trial who stated that McIntyre had not committed the crime. Yet Judge Burdette upheld the conviction, when he should have recused himself from even hearing the evidence.

Born of his apparent favoritism toward his former romantic partner, Burdette's indulgence of Morehead's prosecutorial misconduct, as shown elsewhere in this motion, clearly caused prejudice to McIntyre such that it's reasonable to conclude he would have had a different outcome with a different judge at trial or in post-conviction proceedings.

D. Prosecutor Morehead's Failure to Disclose Her Recent Romantic Involvement with Judge Burdette Deprived Mr. McIntyre of the opportunity to request that the Judge Recuse Himself

It is well-settled that a prosecutor has an obligation to ensure a fair trial. "It is the county attorney, not the defendant, who holds a position of quasi-judicial authority and who is held to a higher standard and required to protect the fair trial rights of the defendant." *State v. Gray*, 25 Kan. App. 2d 83, 86, 958 P.2d 37, 40 (1998). *See also Berger v. United States*, 295 U.S. 78, 88 (1935) ("The [prosecuting attorney] is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all.").

"ADA Morehead breached this duty when she allowed herself to prosecute Mr. McIntyre without disclosing her conflict of interest. Her prior romantic relationship with Judge Burdette unquestionably eviscerated the public appearance of fairness that she had an obligation to uphold." (Exh. 120, p. 24, ¶ 39).

Morehead also had a duty to withdraw from the case altogether. (Exh. 120, p. 23, ¶ 38).

As shown in Section VI, this was one of many acts of prosecutorial misconduct by Morehead that caused prejudice to McIntyre.

E. The judge-prosecutor romance establishes a manifest injustice, and the belated disclosure of the relationship created an extraordinary circumstance

Based on the crucial role that the biased judge played in McIntyre's trial and post-conviction proceedings, McIntyre also makes his required showing of a manifest injustice in the violation of his Fifth, Sixth and Fourteenth Amendment rights to a fair trial. Further, the delay of the judge in disclosing their affair, and the unsigned stipulation in another case, represents an extraordinary circumstance that foreclosed McIntyre's assertion of this bias in his previous K.S.A. 60-1507 motions and his motions for new trial. Mr. McIntyre therefore makes the necessary showing for relief.

F. Alternatively, Judge Burdette's Court was Manifestly Disqualified and Lacked Subject Matter Jurisdiction, and McIntyre's Trial was a Nullity

The shortest route to the justice that has been long delayed in this case is to recognize that a disqualified judge has no subject matter jurisdiction to hear a matter from which he is disqualified. *See Ellentuck v. Klein*, 570 F.2d 414 (2nd Cir.1978)(recognizing a statute that stripped jurisdiction from a disqualified judge); *In re Jose S.*, 78 Cal.App.3d 619, 144 Cal.Rptr. 309 (1978)("The legal effect of [a judge's] improper refusal to recuse himself [is] his loss of jurisdiction"); *State v. Slate*, 214 S.W. 85 (Mo.1919)(Disqualification of a judge showing bias and prejudice in a matter prohibits his exercise of jurisdiction in the case). A challenge to jurisdiction is not barred by any procedural or time limits so McIntyre need not argue manifest injustice, exceptional circumstances, or any other gateway claim for this court to reach his claim of lack of jurisdiction. Here, Judge Burdette's court lacked jurisdiction because he was *per se* disqualified by his prior romantic relationship with the prosecutor and his failure to take the proper procedural steps to preserve his jurisdiction. McIntyre's conviction and sentence are therefore null, and he must be freed from incarceration.

VI. PROSECUTOR MOREHEAD COMMITTED REPEATED ACTS OF MISCONDUCT THROUGHOUT TRIAL, VIOLATING LAMONTE MCINTYRE'S CONSTITUTIONAL RIGHT TO A FAIR TRIAL AND HIS SIXTH AMENDMENT RIGHT TO CONFRONTATION

The State repeatedly McIntyre's constitutional rights to due process and a fair trial when Prosecutor Terra Morehead knowingly presented false evidence, *see* Section III and IV, *supra*, and buttressed that false evidence with irrelevant and misleading evidence. She also overcame objections to present inadmissible hearsay evidence for improper purposes, which also violated McIntyre's Sixth Amendment right to confront witnesses. *See also* Kansas Bill of Rights, §10. Morehead also repeatedly committed misconduct with false, inflammatory, and legally unsupportable statements.

All of these claims could have been, and should have been, presented through McIntyre's appointed 60-1507 counsel, Mark Sachse. Mr. Sachse never reviewed the case file, never met with his client, never supplemented his client's *pro se* claims, never conducted any investigation, and never prepared for the 60-1507 hearing at which his client was not present.

As counsel appointed on behalf of an indigent defendant, Sachse was required to adhere to a *statutory* standard of effective assistance of counsel in a post-conviction proceeding. *Brown v. State*, 278 Kan. 481, 101 P.3d 1201 (2004); *Robertson v. State*, 288 Kan. 217, 228 (2009). Although a petitioner has no constitutional right to effective assistance of legal counsel in proceedings under 60-1507, he does have a statutory right, based on K.S.A. 22-4506(b), which requires a district court to appoint counsel for an indigent movant "[i]f the court finds that the...motion presents substantial questions of law or triable issues of fact." Once the right to 60-1507 counsel attaches, a movant is entitled to the effective assistance of counsel. *Robertson*, 288 Kan. at 228; *Brown*, 278 Kan. at 484-85.

Because "exceptional circumstances" exist here, *see* Section II, *supra*, and because the failure to consider McIntyre's claims on the merits would constitute a "manifest injustice," *see* Section I, *supra*, McIntyre is entitled to present his claims in this proceeding as if it were his first proceeding under K.S.A. 60-1507. *See* sections I and II, *supra* (incorporated here by reference).

A. Prosecutor Morehead Elicited False Testimony and Presented an Outdated, Misleading, and Ultimately Irrelevant Photograph to Bolster the Falsehood that McIntyre Resembled a Man (Mistakenly) Identified at the Shooting

No reasonable juror would find that Lamonte McIntyre looked like Lamonte Drain, as Drain appeared in April 1994. Up-to-date photographic evidence at trial would have impeached Ruby Mitchell's dubious identification of McIntyre, who she claimed looked like an "identical twin" of Drain. But by presenting an outdated and irrelevant high school yearbook photograph of Lamonte Drain, the person whom Ruby Mitchell initially thought was the shooter, Morehead

intentionally misled jurors to believe that Mitchell saw McIntyre, Drain's "twin," at the murder scene. (Exh. 5 at 173).

As shown, eyewitness Ruby Mitchell testified that she mistook the shooter for a man named Lamonte Drain.[5] Mitchell also testified that Lamonte Drain's wore his hair in braids when he visited her house the day after the shooting, April 16, 1994. (Exh. 5 at 186). Lamonte McIntyre did not wear his hair in braids in April 1994 or at trial in September 1994. To persuade the jury that Mitchell actually saw Lamonte McIntyre at the shooting, Morehead presented the 1992 Schlagle High School yearbook photograph of "Lamont Drain" without braids, sporting a then-popular hairstyle (short on the sides, longer on top) that was similar to the hairstyle that McIntyre had in his photo. Born on Dec. 13, 1974, Lamont Drain was 19 years old at the time of the shooting. (Exh. 86). His sophomore yearbook photo was likely taken in the fall of 1991, when Lamont Drain was 16. (Exh. 10 at p. 35 [State's Exhibit 36]).

1. Wyandotte County had Current Photos of Lamonte Drain that it did not Use at Trial or Produce to McIntyre's Defense Counsel

In fact, Wyandotte County had in its possession up-to-date photos of Lamonte Drain taken just two weeks before the shooting. The photos were filed about 100 yards from the courtroom, in jail records at the Wyandotte County Detention Center. (Exh. 85). At the time of the shooting, Lamonte Drain was known to Wyandotte County authorities as Anthony Lewis. (Exh. 85).[6]

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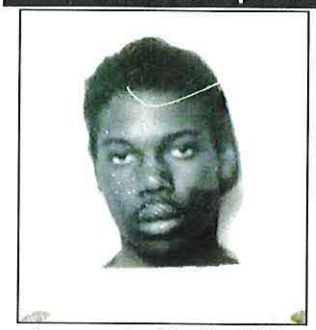
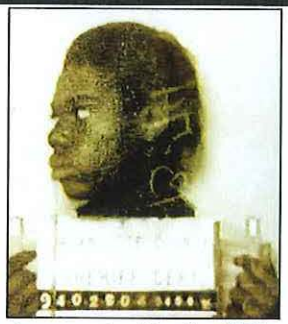
[5] McIntyre does not dispute that Mitchell was mistaken to believe Lamonte Drain was at the scene and does not allege that Lamonte Drain committed the murders for which McIntyre was convicted. The blame lies with neither man.

[6] McIntyre's present counsel obtained Drain's jail records and mugshots.

Undisclosed photos of Lamonte Drain		Photos admitted as evidence	
			
Lamonte Drain AKA Anthony Lewis April 1994 booking photo Exh. 85	**Lamonte Drain AKA Anthony Lewis April 1994 booking photo Exh. 85**	**Lamont Drain 1992 Schlagle H.S. yearbook photo (State Trial Exh. 36) Exh. 83**	**Lamonte McIntyre 1994 line-up photo (State Trial Exh. 30) Exh. 10, p. 29**

"Anthony Lewis" (Drain) was in Wyandotte County jail from April 4 through April 13, 1994, released just two days before the shooting. (Exh. 86). Kansas Department of Corrections records and Wyandotte County records show that Lamonte Drain was the same person as Anthony Lewis – also known as Uganda L. Drain in various spellings. (Exh. 87, 88).

Morehead relied upon the outdated and irrelevant yearbook picture of Lamont Drain to cement the false testimony she had elicited from Ruby Mitchell that Mitchell had simply mistaken one "Lamonte" for the other because the two looked like "identical twins." (Exh. 5 at 172). Defense counsel objected for lack of foundation because Mitchell testified that the yearbook photo did not look like Lamonte Drain as she'd last seen him, but Judge Burdette overruled the objection and admitted the misleading photo. (Ex. 5 at 173). As a result, jurors were sent into deliberations with two photos depicting two teenagers named Lamonte wearing similar hairstyles – the yearbook photo of Drain and the line-up photo of McIntyre – although neither looked like Mitchell's physical description of the shooter, and the photo of Drain did not look like the man as Mitchell knew him.

Under United States Supreme Court cases, justice disallows conviction by witnesses' lies or by false prosecution evidence. Convictions and punishments obtained through the use of

materially false evidence violate the due process clause and the Eighth Amendment. *Johnson v. Mississippi*, 486 U.S. 578 (1988); *United States v. Tucker*, 404 U.S. 443 (1972); *Napue v. Illinois*, 360 U.S. 264 (1959); *Townsend v. Burke*, 334 U.S. 736 (1948). Kansas recognizes that a violation of due process occurs when a prosecutor fails to correct material false evidence presented in the state's case. *Murray v. State*, 329 P.3d 1253 (Kan. Ct. App. 2014), review denied (July 21, 2015).

Here, Morehead elicited false testimony that Lamonte McIntyre and Lamonte Drain looked like "identical twins" on April 15, 1994, and promoted this falsity further by encouraging jurors to make an irrelevant comparison of photographs of McIntyre and Drain in which they were both younger and wore similar hairstyles that were unlike the hairstyle that either Drain or McIntyre wore at the time of the shooting. (*See* Exh. 1 at 23; Exh. 115 at ¶7). The admission of the misleading photograph and Mitchell's "identical twins" testimony violated McIntyre's right to a fair trial as the State presented false evidence while withholding material, exculpatory evidence – namely, the 1994 jail photographs of Lamonte Drain that would have disproved Mitchell's false "twins" testimony.

2. McIntyre's Constitutional Claims May Be Considered Under Exceptional Circumstances and Actual Innocence Standards

Exceptional circumstances allow this court to address McIntyre's due process claims on the merits and to terminate McIntyre's incarceration and reverse his conviction. *See* sections I and II, *supra.* McIntyre lacked assess to the jail photographs of Lamonte Drain in 1994 and for years thereafter because the photos were not filed under the name of Lamonte Drain and could not have been reasonably requested. Therefore, McIntyre could not raise the issue of the prosecutor's misconduct as presented here either on motions for new trial or on his previous K.S.A. 60-1507 motions. This impediment to McIntyre's raising of the claim also serves as a "persuasive reason"

under *Vontress* for the court to excuse McIntyre's failure to meet the one-year post-conviction deadline to raise the issue.

Of course, the issue could have perhaps been at least partially discerned and raised on appeal despite the lack of Drain's jailhouse photos because Mitchell explicitly testified that the yearbook photo did not look like Lamont Drain as she knew him, and defense counsel objected to admitting the photograph on that basis. Given the preservation of this issue, appellate counsel was ineffective for failing to raise it on appeal, and, similarly, 60-1507 counsel was ineffective for failing to raise it in the 60-1507 proceeding. See Sections I, II, VII, VIII, *supra* and *infra*; *see also Brown*, 278 Kan. at 484-85. McIntyre may be excused for not previously asserting this claim.

Finally, this prosecutorial misconduct demonstrates how the State used misleading and manipulated evidence to obtain McIntyre's conviction. Under both *Vontress* and the newly revised K.S.A. 2016 Supp. 60-1507, McIntyre may receive consideration of his claims outside the statute of limitations based on his showing of actual innocence. Here, the 1994 jail photographs of Lamonte Drain show stark differences between his appearance as compared with the image of Lamonte McIntyre that Ruby Mitchell purportedly chose from a photo array. (Exh. 10 at 29). The photos that depict Drain as he appeared in April 1994 show that Mitchell's identification is wholly lacking in credibility. The presentation of the "twins" testimony by Mitchell, supported by the misleading photograph, caused gross, unfair and irreparable prejudice to Lamonte McIntyre and violated his rights to due process and a fair trial under the Sixth and Fourteenth Amendments.

The obvious manipulation of Mitchell by the police and prosecutor, her admitted confusion as stated in her affidavit, and the emphatic recantation by Niko Quinn all make clear that not a shred of credible evidence remains of McIntyre's guilt. He is therefore actually and factually innocent and entitled to relief under K.S.A. 60-1507.

B. Prosecutor Morehead Presented Evidence of Niko Quinn's Undocumented and Undisclosed Pretrial Identification of Lamonte McIntyre as Hearsay Through the Testimony of Detective Golubski, Depriving McIntyre of His Opportunity to Challenge that Identification Before Trial or to Properly Cross Examine Niko Quinn During Trial

On the second – and last – day of the State's case, during Morehead's ***redirect examination of Detective Golubski***, she dropped a bomb on the defense: Golubski testified about an undocumented and previously undisclosed meeting with Niko Quinn in which she purportedly identified McIntyre from a photo lineup. (Exh. 6 at 327-29). According to Golubski, who wrote no report about this meeting, Ms. Quinn contacted him about a week after the murders and they met at Wyandotte High School. (*Id.* at 327-28). Golubski testified that, at the meeting, Niko Quinn selected Lamonte McInyre's photograph from a photo array. The detective did not tape record or document this meeting in any way; he also did not disclose it in his testimony at McIntyre's preliminary hearing. (Exh. 6 at 327-335).

On redirect examination, Golubski testified for the first time about this previously secret meeting, stating that Niko Quinn was having "a lot of emotional problems dealing with the situation" and that she "felt the victims' deaths would be justified [sic] and that someone should step forward." (Exh. 6 at 329). When asked if Niko Quinn had been "positive" about her identification, Golubski stated "[s]he was adamant about it." (Exh. 6 at 329).

On cross-examination, Golubski admitted he wrote no report about Ms. Quinn's identification and stated there was no documentation whatsoever in his police file about it. (Exh. 6 at 331, 333). When asked whether he had testified about the identification at the preliminary hearing, he stated: "I don't recall." (*Id*). An examination of the preliminary hearing testimony shows that Golubski never disclosed Quinn's photo identification; he only discussed the interview with her the day after the shooting when she did *not* make an identification. (Exh. 3 at 35-38).

The failure to disclose Quinn's photo identification – effectively robbing defense counsel of an opportunity to mount a pretrial challenge – and presenting evidence of it only through Detective Golubski rather than Niko Quinn herself, constituted prosecutorial misconduct. When defense counsel asked Morehead during a bench conference when she learned of the identification, she stated she had "no recollection" and refused to disclose anything about it from her file as that was "work product." (Exh. 6 at 337-38).

The court rebuffed defense counsel's request for information from Morehead's file, stating that he had "an opportunity to cross-examine Detective Golubski...and hit all the points he had intended to hit..." (Exh. 6 at 329).

Morehead's failure to disclose Ms. Quinn's identification at any point before Golubski's re-direct examination was clearly a violation of McIntyre's constitutional right to due process under *Giglio v. United States*, 405 U. S. 150, 153–154 (1972) (clarifying that the rule of *Brady v. Maryland*, 373 U.S. 83 (1963) applies to evidence undermining witness credibility). If Morehead had disclosed the photo identification, as she should have, defense counsel could have not only asserted a pretrial challenge to the identification, he could have also more effectively cross examined both Ms. Quinn and Detective Golubski. The circumstances of the identification are extremely unusual, in that no second detective was present, the interview was not taped, no report was written, and the meeting occurred at an unusual location, behind a high school. (*See, e.g.*, Exh. 27 at ¶43-49) Because Morehead never disclosed the circumstances surrounding this identification or that it even occurred, defense counsel was deprived of a critical opportunity to prepare and conduct critical cross examination.

The presentation of Quinn's purported identification solely through the testimony of Golubski also constituted a gross violation of McIntyre's Sixth Amendment right to confrontation.

Quinn's statements, as admitted through Golubski, were all inadmissible hearsay, and defense counsel had no meaningful opportunity cross examine Quinn as to her photo identification. As recognized in *Crawford v. Washington*, 541 U.S. 36 (2004), "Where testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation." *Crawford v. Washington*, 541 U.S. at 68-69. Quinn's statements were clearly testimonial – they were statements formally made to a "government officer[]." *Crawford,* 541 U.S. at 51. "Whatever else the term covers, it applies at a minimum to...police interrogations." *Id.* at 68. Testimonial statements are admissible only if the witness is unavailable and the defendant had a prior opportunity for cross-examination. *Id.* By deliberately presenting the evidence of the second identification *only* through Golubski, Morehead prevented McIntyre from confronting and cross-examining Niko Quinn, a clear violation of his right to confrontation. *See Crawford*, 541 U.S. at 68-69. *See also Pointer v. Texas*, 380 U.S. 400, 406 1965).

1. Morehead's Misconduct Thwarted Defense Counsel's Knowledgeable Cross Examination of Niko Quinn About the Second Photo Lineup

Morehead not only failed to present testimony from Quinn about her photo identification, she objected when defense counsel – after picking up on a volunteered statement from Quinn – attempted to inquire into the previously unknown meeting with Golubski. During her testimony, Quinn apparently misunderstood a question and volunteered that "I had eventually called [police] and told them." (Exh. 5 at 139-42). Defense counsel then sought to impeach Quinn for changing her story, as testimony at the preliminary hearing had focused on Quinn's inability to make a photo identification. (Exh. 3 at 31, 33, 38) When defense counsel attempted to probe the meeting with Golubski and establish that Quinn's testimony differed from her account at the preliminary hearing, Morehead objected that McIntyre's counsel had not obtained a transcript of the

preliminary hearing. (Exh. 6 at 145-49). Long indeed did not have the hearing transcript at that point, and he backed off from that line of questioning. (Exh. 6 at 149).

The Kansas statute governing hearsay does not allow an out-of-court statement made by a person to be presented through the testimony of another *unless* the declarant "is *present* at the hearing and *available for cross-examination with respect to the statement and its subject matter*." K.S.A. 60-460(a) (emphasis added). In this case, Niko Quinn was not "present" on the second day of trial when Golubski testified, and she was not available for cross-examination. Further, the prosecutor had effectively thwarted defense counsel's effort to cross examine her the previous day, derailing his attempt to delve into the "subject matter" of the previously undisclosed meeting with Golubski. Ms. Quinn's statements, presented solely through Golubski, were therefore inadmissible hearsay under Kansas law. The prosecutor's deliberate elicitation of such inadmissible hearsay evidence constitutes misconduct. *State v. Dumars,* 33 Kan. App.2d 735, 746, 108 P.3d 448 (2005).

2. Morehead's Misconduct Unconstitutionally Deprived McIntyre of Information Necessary to his Defense and to Impeachment of Police

Morehead argued at the bench that she had no duty to disclose the purported identification because it was not exculpatory and because her records of conversations with Golubski were "work product." (Exh. 6 at 336-37). This is a perversion of her responsibilities as a prosecutor. A due process violation occurs when prosecutors or police deprive the defense of evidence that impeaches the quality of the investigation that implicated the defendant. *See Kyles v. Whitley*, 514 U.S. 419, 453-54 (1995). If delivered in a timely manner to the defense, the withheld evidence was clearly impeaching of Golubski's investigative techniques in light of his failure to take the routine investigative safeguard of documenting the purported second interview of Niko Quinn and the photo lineup. Disclosure of that information would have allowed the defense to more effectively

prepare for the cross-examination of Golubski. The information was also material to McIntyre's defense and should have been disclosed because it may have led McIntyre's counsel to interview Niko Quinn, a witness who subsequently repudiated her identification of McIntyre. *See Grant v. Alldredge*, 498 F.2d 376, 381 (2d Cir. 1974)(nondisclosure of a photo lineup violated *Brady* because defense could have used the information to broaden its pretrial investigation). Morehead also argued that defense counsel had not sought out information from the prosecution. (Exh. 6 at 336-37). But even in 1994, "the duty of disclosure exists even in the absence of a request on the part of the defendant." *United States v. Agurs*, 427 U.S. 97, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976).

3. This Showing of Morehead's Misconduct Supports McIntyre's Showing of Actual Innocence, Allowing this Court to Consider his Claims

Under both *Vontress* and the newly revised K.S.A. 2016 Supp. 60-1507, McIntyre may receive consideration of his claims on a showing of actual innocence even though they are raised outside of the one-year statute of limitations. *See* sections I and II, *supra*. "Exceptional circumstances" also allow this Court to consider this claim despite the restriction on "successive petitions" under K.S.A. 60-1507. Exceptional circumstances also include the ineffective performance of McIntyre's 60-1507 counsel, who did nothing to investigate or prepare his case.

Further, an important "intervening circumstance" has occurred. Although McIntyre clearly had a meritorious confrontation claim at the time of trial, the claim has been greatly strengthened by the United States Supreme Court's decision in *Crawford v. Washington*, 541 U.S. 36 (2004). Decided ten years after McIntyre's conviction, *Crawford* makes clear that the series of prosecutorial maneuvers that kept Niko Quinn's identification from being subject to cross examination violated the "bedrock" guarantees of the Sixth Amendment's confrontation clause. *See also* Kansas Bill of Rights, §10. McIntyre is therefore entitled to a new trial.

C. Prosecutor Morehead Manufactured Phantom Informants to Bolster Perjured Eyewitness Testimony, Referring to these Informants in Opening and Closing and Presenting Testimony that They Implicated Lamonte McIntyre

Police had no reason to suspect Lamonte McIntyre after Ruby Mitchell gave them only the name "Lamonte," and, at trial, Prosecutor Morehead had no evidence to present that would explain why investigators decided to place Lamonte *McIntyre's* photograph in the photo lineup as opposed to the photo of any other "Lamonte." So Morehead opened her case by telling the jury that ***unknown, unnamed witnesses*** who would never testify had implicated McIntyre in the homicides and had stated he was "responsible." (Exh. 4 at 6). Morehead stated:

> Detective Jim Krstolich and Lieutenant Barber...began talking to folks on the street that they know – we call them *confidential informants* – to see if anybody knew anything. From *numerous reliable sources, people had indicated that the individual who was responsible for this was the defendant, Lamonte McIntyre.* Thus, the name Lamonte McIntyre was introduced for the first time in this investigation.

(*Id*) (emphasis added). Morehead then sought to introduce through Detective Golubski the statements of these unnamed "sources" – who were not documented in the police file and who had supposedly provided Lamonte McIntyre's name to police. When Morehead asked Golubski: "[H]ow did the name Lamonte McIntyre become known to the police department," defense counsel objected. (Exh. 6 at 298). During a subsequent bench conference, Golubski stated he'd obtained McIntyre's name through "police personnel and other sources that may have pertinent information." (Exh. 6 at 306). When asked if he had gotten the name "Lamonte McIntyre" from the juvenile prosecutor, Golubski stated "Yeah...name and photo." (Exh. 6 at 307). Golubski offered no further explanation for how he focused on Lamonte McIntyre, as opposed to any other

"Lamonte." Of the five photographs in the array, three are young, male members of the McIntyre family,[7] but that fact never came out at trial.(Exh,. 10 at 29-34).

1. Police Provided Hearsay Testimony from 'Various Sources' and 'Numerous Sources' to Justify Placing McIntyre's Photo in Lineup

Judge Burdette permitted Golubski was to testify that he obtained McIntyre's name from "*various sources*" ruling that the testimony was an "exception to hearsay to explain how they zeroed in on this fellow." (Exh. 6 at 307-310) (emphasis added). When Lieutenant Barber was asked the same question, defense counsel did not renew his objection, and Barber testified that he was "directly responsible" for obtaining Lamonte McIntyre's name, and that he obtained it from "*numerous sources.*" (Exh. 6 at 353) (emphasis added). During closing argument, Morehead returned to the assertion she first made in opening about how police obtained Lamonte McIntyre's name from multiple, unnamed sources. Morehead argued: "All these photographs [in the photographic array] were shown to [Niko Quinn] after ***Lamonte McIntyre's name came up from numerous sources***." (Exh. 7 at 476) (emphasis added).

At the bench conference, Morehead prevailed against defense counsel's hearsay objection to Golubski's testimony by arguing that three Kansas cases allowed admission of hearsay regarding the identification of a suspect by an unnamed informant if the hearsay statement is presented for the purpose of explaining an investigative action taken by police. (Exh. 6 at 229). Morehead was wrong, as that was expressly not the finding of *State v. White*, 234 Kan. 340, 673 P.2d 1106 (1983), in which the Kansas Supreme Court declared "the substance of a communication by an informant to a police officer is inadmissible hearsay ***when it tends to identify the accused*** ...." (emphasis

[7] The photographs included were of Lamonte, his brother, James McIntyre, and cousin Terrance Brown (last name "Brown" missing on back of photo). (Exh. 10 at 29-34).

added). Here, Morehead presented the hearsay testimony from unnamed "sources" explicitly for the improper purpose of *identifying* McIntyre as the accused to explain the use of his picture in a photographic lineup.

2. Admission of the Informants' Hearsay Evidence Did Not Comport with the Rule Of Evidence Cited by Morehead, K.S.A. 60-460(d)(3)

Morehead also cited K.S.A. 60-460(d)(3) for the admissibility of the unnamed informants' purported identification of McIntyre and, indeed, the Court in *White* held that an informant's statement was admissible under that rule of evidence, although it was *not* admissible under another proffered doctrine, to explain the course of action of the investigating officer. *White,* 234 Kan. at 346. The statement in *White,* however, involved an unavailable child declarant and did not concern *identifying* a suspect. McIntyre's case is also dissimilar to another case cited by Morehead, *State v. Sanford*, 237 Kan. 312, 699 P.2d 506 (1985), which, like *White,* rested on the application of K.S.A. 60-460(d)(3). The evidence rule in K.S.A. 60-460(d)(3) allows admission of "contemporaneous statements" by an ***unavailable declarant*** about a "matter [that had] been recently perceived by the declarant and while the declarant's recollection was clear and was made in good faith prior to the commencement of the action and with no incentive to falsify or to distort." The courts in both *White* and *Sanford* considered statements by unavailable witnesses – who were named and identified by their association to the accused – and analyzed whether they met all the criteria of K.S.A. 60-460(d)(3). *White* allowed the statement of a child declarant to come in under 60-260(d)(3), but the judge in *Sanford* could not find that the declarant, a confidential informant, lacked an "incentive to falsify or distort," and the Kansas Supreme Court upheld his exclusion of the statement from trial. *Sanford*, 237 Kan. 312, 699 P.2d 506 (1985). The Court in *Sanford* specifically noted that testimony from a detective concerning prior information obtained from the informant caused him to question the informant's reliability. *Sanford*, 237 Kan. at 314-15.

Here, Judge Burdette made no on-the-record findings under K.S.A. 60-460(d)(3) that the "various sources" or "numerous sources" were in fact unavailable, that the sources had "perceived" anything relevant to the case, or that the sources' alleged mentions of McIntyre were "made in good faith ... with no incentive to falsify or to distort." Notably, there was *no information* provided about the alleged declarants that would have allowed Judge Burdette to assess their credibility. The fact that these declarants were never documented or even mentioned in the police file adds further question to the issue of their reliability. (*See* Exh. 27 at ¶61; affidavit of Randy Eskina).

This was also not a case like *State v. Laubach*, 220 Kan. 679, 220 Kan. 679 (1976) which entirely omits reference to K.S.A. 60-460(d)(3) and concerned a police witness testifying about an unnamed restaurant employee's *description* of a man, not an identification of him. "The statement did not place the ***defendant*** at the scene of the crime, but rather an unidentified man, ***whose description was then used in the investigation of the crime***." *Id.* at 682 (emphasis added). Here, the informants' hearsay declarations were used to directly implicate McIntyre as the suspect, an impermissible use of hearsay under the cases Morehead cited.

3. The Supreme Court's 2004 Decision in *Crawford* Makes Clear that McIntyre's Confrontation Claim Requires Relief

Exceptional circumstances and manifest injustice allow this court to address the violations of Kansas hearsay law and Morehead's improper opening statement and closing argument. *See* sections I and II, *supra* (incorporated here by reference). The admission of the statements by the phantom informants also violated McIntyre's right to confrontation under the Sixth Amendment. All of these arguments, apparent on the face of the trial record, also should have been addressed by McIntyre's 60-1507 counsel, as stated in Section II, *supra,* and Section VIII, *infra.*

The Sixth Amendment right to confrontation is a "bedrock procedural guarantee" that protects the right of the accused to confront and cross examine the witnesses against him. *Pointer*

v. Texas, 380 U.S. 400, 406 (1965); *see also* Kansas Bill of Rights, §10. Although McIntyre clearly had a meritorious confrontation claim at the time of trial, the claim has been greatly strengthened by the United States Supreme Court's decision in *Crawford v. Washington*, 124 S. Ct. 1354 (2004). Decided ten years after McIntyre's conviction, *Crawford* holds that "testimonial statements of witnesses absent from trial" may only be admitted "where the declarant is unavailable and the defendant has had a prior opportunity to cross-examine." *Crawford*, 541 U.S. at 59. In this case, there was no showing that these unknown, phantom informants were "unavailable," and obviously no opportunity was afforded for prior cross-examination. For these reasons, the admission of Golubski's and Barber's testimony about the "numerous" and "various" sources that named McIntyre as the suspect violated McIntyre's right to confront the witnesses against him. *Id.* at 59-68. *See also State v. Corbett*, 281 Kan. 294, 303 (2006) (*Crawford* holds that defendant must have prior opportunity to cross examine declarant if the State seeks to admit a testimonial statement from a declarant when the declarant is unavailable).

In this case, the statements of the phantom declarants, admitted through Golubski's and Barber's testimony, violated McIntyre's Sixth Amendment right to confrontation as well as his right to due process and a fair trial. Prosecutor Morehead's statements amplifying the inadmissible evidence constituted gross misconduct and also violated McIntyre's right to due process and a fair trial under the Sixth and Fourteenth Amendments. *See also* Kansas Bill of Rights, §10; *State v. Birth*, 37 Kan. App.2d 753 (Kan. Ct. App. 2007) (prosecutorial misconduct may involve a prosecutor's statements as well as eliciting inadmissible testimony). McIntyre is therefore entitled to a new trial.

D. False and Prejudicial Statements During Morehead's Closing Argument and Her Bad-Faith Factual Statements and Other Misconduct During Trial Violated McIntyre's Rights to Due Process and a Fair Trial Under the Sixth and Fourteenth Amendments

The State violated McIntyre's constitutional right to due process and a fair trial when prosecutor Morehead repeatedly committed misconduct with false, inflammatory, and legally unsupportable statements. Due process in Kansas requires that a criminal trial be fair. *State v. Tosh*, 278 Kan. 83, 97, 91 P.3d 1204 (2004) ("Denial of a fair trial violates the due process rights of the guilty defendant just as surely as those of the innocent one.") In *Tosh*, while observing that the Kansas Supreme Court had reviewed "case after case in which prosecutorial misconduct occurred," the Court held that false, prejudicial, and inadmissible statements by the prosecution at trial violate due process by rendering the trial unfair. *Tosh,* 278 Kan. at 98. Here, Morehead made statements to the jury that were false, prejudicial, and inadmissible in both her arguments and during bad faith examination of witnesses.

The Kansas Supreme Court has defined a two-prong test for determining when a prosecutor's statements deprive a defendant of a fair trial and thereby violate the Constitution. *State v. Pabst*, 268 Kan. 501, 505 (2000). First, a Court considers whether the statements were outside the "considerable latitude" that statements of a prosecutor are traditionally accorded when discussing evidence in front of a jury. *Akins*, 298 Kan. at 599-600. The Court considers the "wide latitude in language and manner or presentation" that a prosecutor is permitted in closing argument. *Id.* The analysis is simplified, however, when the prosecutor's statement to the jury lacks evidentiary support. *Akins*, 298 Kan. at 601 "[W]here a prosecutor refers to facts not in evidence, the first prong of the prosecutorial misconduct test is met." *Id.* (citing *State v. Simmons*, 292 Kan. 406, 414 (2011)). On the second prong, the Court considers whether the improper statements by

the prosecutor so prejudiced the jury against the defendant as to change the outcome of the trial. *Id.*

1. Analyzed under the First Prong of the Kansas Supreme Court's Two-Pronged Test, Prosecutor Morehead Committed Numerous Acts of Misconduct

The improper statements recited by Prosecutor Morehead during the closing arguments of McIntyre's trial strayed far outside the "considerable latitude" a prosecutor is allowed in discussing evidence presented at trial.

a) Misstated law: Morehead suggested to jury that she need not confine her statements to the truth and could offer speculation

Lamonte McIntyre had no motive to kill the two victims in this case. No trial evidence provided any hint of a motive for the defendant to commit the crime, and Morehead said as much during closing argument. Morehead then stated: "I could stand up here and give you a hundred possible reasons why this happened." (Exh. 7 at 479). This is a patently false description of Morehead's duty as a prosecutor and attorney. Prosecutors may not speculate or brainstorm in front of the jury about a defendant's motives without evidentiary support. "A lawyer shall not ... in trial, allude to any matter that ... will not be supported by admissible evidence." Rule 3.4(e) of Kansas Rules of Professional Conduct (KRPC) (2013 Kan. Ct. Annot. 601). See *State v. Akins*, 298 Kan. at 601; *State v. McCaslin*, 291 Kan. 697, 719, 245 P.3d 1030 (2011); *Tosh*, 278 Kan. at 88. Here, Morehead revealed fundamental incomprehension of a prosecutor's duty to present evidence only.

b) Prosecutor Morehead Speculated on a "Vendetta" Motive, Although No Evidence Showed that McIntyre Knew the Victims or Held a Grudge

After assuring the jury that she could offer 100 speculative and imaginary motives against McIntyre, Morehead then offered a purely fictional one. The State presented no evidence that showed that Lamonte McIntyre even *knew* the victims. (Exh. 6 at 453-454). He therefore bore no

animosity toward them, and absolutely no evidence at trial suggested otherwise. No "vendetta" existed to cause McIntyre to shoot the victims, and Morehead presented no evidence at trial for any such motive. Yet, during closing arguments, after conceding that she had no motive evidence, Morehead baldly told the jury a falsehood unsupported by evidence:

> But what I can tell you is whether he had something against one of those people or both of them. ***He had a vendetta against one of them, both of them, there to settle a score.*** And he did.

(Exh. 6 at 479) (emphasis added). No evidence whatsoever supported this argument. The "vendetta" theory was so transparently false that when McIntyre had taken the stand in his own defense, Morehead asked him no questions about it during cross examination. No family member or friend or police officer or detective offered any testimony or other evidence that supported the prosecutor's imaginative statement about a purported "vendetta" between McIntyre and the victims.

McIntyre's right to due process was demolished by the prosecutor's false description of the evidence, which constituted clear misconduct that falls outside the "wide latitude" accorded prosecutors' closing arguments. "[W]here a prosecutor refers to facts not in evidence, the first prong of the prosecutorial misconduct test is met." *Akins*, 298 Kan. at 601 (citing *State v. Simmons*, 292 Kan. 406, 414 (2011)). "This prohibition applies to all lawyers, but especially prosecutors." *Id.* As explained *infra*, this misconduct caused severe prejudice to McIntyre, which was only compounded by additional acts of misconduct, including additional misstatements of evidence.

c) Prosecutor Morehead Improperly Invoked Public Concern About Crimes During Closing Argument

In addition to injecting false evidence into the trial during closing argument, Prosecutor Morehead injected an issue – public safety and criminal trends – which was extraneous to the jury's duty to decide the case upon the evidence presented at trial.

"People kill each other every day," Morehouse told the jury as she urged them to accept the false "vendetta" motive she attributed McIntyre. (Exh. 7 at 479). The jury in a homicide case is tasked with deciding whether the defendant committed the crime, not with rendering judgment on generic murder sprees. That is a lesson Prosecutor Morehead should have been well aware of, particularly in light of a recent Kansas Supreme Court decision informing Kansas prosecutors that their statements would be judged against the ABA Standards for prosecutors:

> (d) The prosecutor should refrain from argument which would divert the jury from its duty to decide the case on the evidence, by injecting issues broader than the guilt or innocence of the accused under the controlling law, or by making predictions of the consequences of the jury's verdict.
>
> (e) It is the responsibility of the court to ensure that final argument to the jury is kept within proper, accepted bounds.

State v. Ruff, 252 Kan. 625, 634 (1993) (applying 1 ABA Standards for Criminal Justice, The Prosecution Function, Standard 35.8 (1980)). In *Ruff*, a Wyandotte County prosecutor had won guilty verdicts on three counts of aggravated assault after urging:

> Ladies and gentlemen of the jury, do not allow this conduct to be tolerated in our county … Send that message, ladies and gentlemen, come back with a verdict of guilty. Thank you.

Id. at 631.

Reversing, the Kansas Supreme Court declared:

> The prosecutor is under a duty to insure [sic] that only competent evidence is submitted to the jury. Above all, the prosecutor must guard against anything that could prejudice the minds of the jurors and hinder them from considering only the evidence adduced. The prosecutor's statement was improper and transcends the limits of fair discussion of the evidence.

Ruff, 252 Kan. at 636 (emphasis added).

Morehead's argument was improper under *Ruff* because it injected an issue that was irrelevant to the jury's determination of McIntyre's guilt or innocence and to the jury's determination of whether McIntyre had any motive to commit the crime. McIntyre was not

suspected in, arrested for, or charged in any other murder occurring in 1994. None of those cases were connected to Lamonte McIntyre. Both legally and factually, the prosecutor's reference to other murders was totally irrelevant and inflammatory and constituted misconduct.

2. Analyzed under the second prong of the Kansas Supreme Court's two-pronged test, Morehead's misconduct caused unfair prejudice

McIntyre's conviction must be reversed because Morehead's prosecutorial misconduct was so prejudicial that it denied him a fair trial. The second prong of the Kansas Supreme Court's test for prosecutorial misconduct considers whether the prosecutor so prejudiced the jury against the defendant as to change the outcome of the trial. *See State v. Akins*, 298 Kan. 592 (2014). This inquiry is considered in the context of the entire trial. The Kansas Supreme Court has described three factors it uses when analyzing the second prong: (1) whether the misconduct was gross and flagrant; (2) whether it was motivated by prosecutorial ill will; and (3) whether any evidence that remained untainted by the misconduct was of such a direct and overwhelming nature that the misconduct would likely have had little weight in the minds of jurors. *Id.* No single factor controls the outcome of this inquiry. *Id.*

Considered in the context of the entire trial, the prejudice caused by Morehead's misconduct changed the trial's outcome. But for the prosecutorial misconduct described here and elsewhere in this motion, Lamonte McIntyre would not have been convicted of two murders that he did not commit. The instances of misconduct, considered individually and cumulatively, permeated McIntyre's entire trial, causing immense prejudice. Beyond the examples enumerated in this section, Morehead also committed *Brady* violations by withholding evidence of exculpatory witnesses such as Josephine Quinn, who explicitly told Morehead that McIntyre was not the shooter when she saw him in the courthouse.

Both gross and flagrant, Morehead's misconduct changed the trial's outcome. She openly flouted evidentiary rules, blatantly disregarded the falsity of the evidence she presented, and grossly misstated the evidence in arguments. She sent exculpatory witnesses home or forced them to testify falsely, all while failing to disclose their critical, material statements. There was nothing subtle about Morehead's disregard of due process and McIntyre's other constitutional rights.

The pervasiveness and ferocity of Morehead's misconduct bespeaks intense ill will toward McIntyre. Her disregard of safeguards that protect against convictions of the innocent reveals deep enmity toward this defendant.

No credible evidence against McIntyre was untainted by the State's misconduct. The case rested entirely on the deeply flawed testimony of two putative eyewitnesses whose recollections were coerced, manipulated or misrepresented through the misconduct of Morehead and the police. One eyewitness has been thoroughly discredited, with her severe confusion readily apparent when her testimony is viewed in light of her original taped statement which was never referenced at trial, even as Mitchell falsely portrayed her initial interactions with police. The other eyewitness was coerced to testify in the State's false case against McIntyre and recanted once she was free of the prosecutor's and the lead detective's influence. She also told the prosecutor before her testimony that the shooter was not McIntyre, but was forced to identify him or face jail and the loss of her children. The gross prejudice caused to McIntyre by the State's repeated and egregious misconduct clearly changed the trial outcome and caused the guilty verdicts. Because of the "manifest injustice" and "exceptional circumstances" present here, along with the repeated violations of McIntyre's due process and fair trial rights, this Court may consider all of McIntyre's claims on the merits. *See* Sections I and II, *supra* (incorporated here by reference).

VII. BEFORE AND DURING TRIAL, DEFENSE COUNSEL FAILED TO PROVIDE EFFECTIVE ASSISTANCE OF COUNSEL, CAUSING IMMENSE PREJUDICE TO LAMONTE MCINTYRE AND VIOLATING HIS RIGHTS UNDER THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION

The Sixth Amendment to the United States Constitution guarantees in "all criminal proceedings" that "the accused shall enjoy the right...to have the Assistance of Counsel for his defense." The right to counsel guaranteed by this amendment is the right to effective assistance of counsel. *Chamberlain v. State*, 236 Kan. 650, 656-57 (1985) (adopting standards announced in *Strickland v. Washington*, 466 U.S. 688, 687 (1984)). *See also* Kansas Bill of Rights, §10.

In order to prevail on a claim of ineffective assistance of counsel, Mr. McIntrye must prove (1) that his counsel's performance was deficient, and (2) that counsel's deficient performance prejudiced his defense and rendered his trial unfair. *State v. Gleason*, 277 Kan. 624, 643 (2004).

Ineffectiveness claims are typically raised in a proceeding under K.S.A. 60-1507. Although Mr. McIntyre filed a *pro se* 60-1507 motion, his appointed counsel, Mark Sachse, never met with him and did virtually nothing to prepare or present the case. His "effort" was limited to 15 minutes of argument at a proceeding Mr. McIntyre did not attend. (Exh. 19).

Although the ineffective representation by trial counsel was plainly apparent from the face of the trial record and further investigation would have revealed additional instances of ineffectiveness, Sachse did nothing to identify, investigate or present these claims. As counsel appointed on behalf of an indigent defendant, Mr. Sachse was required to adhere to a *statutory* standard of effective assistance of counsel in a post-conviction proceeding. *Brown v. State*, 278 Kan. 481, 101 P.3d 1201 (2004); *Robertson v. State*, 288 Kan. 217, 228 (2009). Although a petitioner has no constitutional right to effective assistance of counsel in proceedings under 60-1507, he does have a *statutory* right, based on K.S.A. 22-4506(b), which requires a district court to appoint counsel for an indigent movant "[i]f the court finds that the...motion presents substantial

questions of law or triable issues of fact." Once the right to 60-1507 counsel attaches, a movant is entitled to the effective assistance of counsel. *Robertson*, 288 Kan. at 228; *Brown*, 278 Kan. at 484-85.

All of the claims addressed below regarding ineffective assistance of trial counsel should have been raised in McIntyre's 60-1507 proceeding as claims of ineffectiveness. By failing to raise these claims, Mr. Sachse also rendered ineffective assistance of counsel. *See Brown*, 288 Kan. at 228. Indeed, the entire 60-1507 proceeding – in which counsel never met with his client and presented only 15 minutes of argument – was a sham. The fact that it was litigated before a judge who had recently engaged in a romantic relationship with the prosecutor adds another layer of procedural irregularity and unfairness. All of these facts create both "manifest injustice" and "exceptional circumstances," and McIntyre is therefore entitled to have his claims of ineffective assistance of trial counsel and of 60-1507 counsel considered on the merits. *See* Sections I and II, *supra* (incorporated by reference). *See also* Sections VII and VIII.

A. Trial Attorney Gary Long Unreasonably Failed to Conduct an Investigation

The Supreme Court in *Wiggins v. Smith,* 539 U.S. 510 (2003), and *Rompilla v. Beard,* 545 U.S. 374, 377 (2005), clarified, but did not change, the standards for determining claims of ineffective assistance of counsel under *Strickland v. Washington,* 466 U.S. 668 (1984).

Where, as here, the prisoner claims that trial counsel was ineffective for failing to investigate and present exculpatory evidence, the court must "focus on whether the investigation supporting counsel's decision not to introduce [defense evidence] was *itself reasonable.*" *Wiggins, supra,* at 523. Further, "In assessing the reasonableness of an attorney's investigation, however, a court must consider not only the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further." *Id.,* at 526. In *Rompilla v. Beard,* 545 U.S. 374, 385-87 (2005), the Court emphasized counsel's duty to

investigate and respond to evidence that the prosecution will introduce at trial. In making this assessment in Wiggins' case, in which the Court was obliged by statute to give some deference to the state post-conviction court's findings, the Court found that even "partial reliance on an erroneous factual finding further highlights the unreasonableness of the state court's decision." *Id.*, 528.

Strickland also requires a prisoner to prove that he was prejudiced by counsel's deficient performance. In making this assessment, the court must examine the "totality of available [defense] evidence." *Wiggins, supra,* at 534. By "totality" of the evidence, the Court means "both that adduced at trial, and the evidence adduced in the habeas proceeding[s]." *Id.,* at 536. The final question is whether "at least one juror would have struck a different balance" in arriving at a verdict. *Id.,* at 537. Kansas courts follow the familiar *Strickland* two-pronged test in evaluating claims of ineffective assistance of counsel:

> 'First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Taylor v. State, 252 Kan. 98, 103, 843 P.2d 682 (1992).

Mr. McIntyre alleges that trial counsel's failure to investigate was unreasonable and prejudiced Mr. McIntyre in the following ways:

- Trial counsel **failed to interview** Stacy Quinn and Josephine Quinn who both knew, and attested post-trial, that Lamonte McIntyre was not the shooter.

- **Trial counsel failed to conduct even basic investigation** at the scene of the homicide—Hutchings Street—that would have allowed counsel to effectively challenge Ruby

Mitchell's eyewitness account by showing she was too far way – more than 100 feet – to discern the shooter's facial features.

- **Trial counsel failed to locate and examine the clothing** Lamonte McIntyre was wearing at the time of his arrest, which was readily available at the jail, which would have provided critical exculpatory evidence since Mr. McIntyre's clothing did not match the eyewitnesses' description of the shooter's clothing and did not have blood or glass fragments on it.

- **Trial counsel failed to even obtain the transcript of the preliminary hearing** before trial, even though it was readily available, leaving Lamonte McIntyre's counsel unable to effectively cross-examine Niko Quinn.

- **Trial counsel failed to conduct an adequate review of the police file**, leaving counsel wholly unprepared and unable to pursue key areas of cross examination, particularly with regard to Ruby Mitchell, who falsely portrayed her initial statements to police.

B. Counsel's Actions Portray a Gross Failure to Investigate, Not Reasonable Strategy

Choices made by counsel after a less than complete investigation can be reasonable, but only to the extent that the decision to limit or forego certain investigation is reasonable under the circumstances. *Strickland* 466 U.S. at 690-91. *See also State v. Sanford*, 24 Kan. App. 2d 518 (1997) (Counsel made only perfunctory attempts to contact alibi witnesses, and "decision not to investigate further, either personally or through a hired investigator, was not reasonable under the circumstances." *Id.* at 523.)) Where facts known to counsel suggest further investigation would be fruitful, the failure to investigate results from "inattention, not reasoned strategic judgment." *Wiggins*, 539 U.S. at 526. The assessment of counsel's performance "includes a context dependent consideration of the challenged conduct as seen 'from counsel's perspective at the time.'" *Id.* at 522, quoting *Strickland*, 466 U.S. at 689. The Court explained:

> In assessing the reasonableness of an attorney's investigation . . . a court must consider not only the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further.

Wiggins, 539 U.S. at 527.

The Tenth Circuit Court of Appeals also recognizes that the constitutional design of the adversarial process in criminal cases depends on the thorough, independent investigation by defense counsel to produce reliable results:

> In order to make the adversarial process meaningful, counsel has a duty to investigate all reasonable lines of defense. [*Nyugen v. Reynolds*, 131 F.3d 1340, 1345 (10th Cir. 1997)] see also *Strickland*, 466 U.S. at 691 ("Counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.").

Fisher v. Gibson, 82 F.3d 1283, 1291 (10th Cir. 2002).

In alleging that Mr. Long was ineffective, Mr. McIntyre is cognizant of *Strickland's* caution against the "distorting effects of hindsight," *Strickland*, 466 U.S. at 689, which is satisfied if Mr. Long was "on notice" that certain investigation might have been fruitful. *Rompilla*, 545 U.S. at 383. Mr. McIntyre's present counsel have located and interviewed many witnesses who had direct knowledge about the shooting deaths of Doniel Quinn and Donald Ewing, relying primarily on names and references to evidence and events within the police file. Mr. McIntyre will discuss the circumstances of each witness, or each piece of evidence, and what the witness or evidence could have provided to Mr. McIntyre's defense.

C. A Reasonable Investigation Uncovered Significant, Compelling Evidence of Innocence That Trial Counsel Gary Long Failed To Find

Josephine Quinn: An eyewitness to the homicides, Josephine Quinn stated that McIntyre was too tall and his facial features did not match the shooter's. (Exh. 37, 37A at ¶5). Had Mr. Long interviewed Josephine Quinn, he would have learned that Josephine knew that "he was not the one who killed my nephew." (Exh. 37 at §2-5, 37A [typed version of handwritten affidavit]) McIntyre was not the shooter – he was "too tall, his lips protruded too much and his complexion

was too dark." (Exh. 37, 37A at ¶ 5). "He was not the one who killed my nephew. Reason being his body built, complexion, his height and facial feature." *(Id.)*.

Stacy Quinn: Another eyewitness to the crime, who "knew who the suspect was" according to the police reports. (Exh. 1 at 66). Had Mr. Long investigated and interviewed Stacy Quinn, he would have learned that Stacy, like Josephine Quinn, said that Lamonte McIntyre was "too tall" to be the shooter. (Exh. 37, 37A at ¶5, 13; Exh. 15 at 21-22). Stacy Quinn had the best view of the shooter as she was standing directly across the street from the assailant when he fired. Just days after the homicides, Stacy stated to her Aunt Freda Quinn, that "I know who did it. That's not the guy; they got the wrong guy." (Exh. 38 at ¶ 10).

Basic Crime Scene Investigation: Had Mr. Long conducted even rudimentary investigation at the crime scene he would have discovered that Ruby Mitchell's location was too far from the location of the homicides for her have an opportunity to see the shooter's facial features. Photographs and measurements of the crime scene, establish that Ms. Mitchell, who was standing in a doorway two houses south of the scene – more than 100 feet away – would have been unable to discern the shooter's facial features at that distance. (Exh. 46 at ¶13-15 (affidavit and diagrams of Michael Bussell) and attachment A; *see also* Exh. 119 at ¶17 and attachment E (affidavit and photographs of Dan Clark)). Thus, Mitchell's trial testimony that she could identify the shooter because she "focused on" his face during the shooting is utterly unbelievable. Mr. Long would have been able to challenge Ruby Mitchell's testimony had he gone to the scene with a simple tape measure and a camera. Ruby Mitchell's initial statement to police, given within less than hour of the shooting, was never specifically referenced at trial, suggesting it was not disclosed to defense counsel. That statement undermines nearly every aspect of Mitchell's testimony. Mitchell admitted that the only facial characteristic she could see from where she stood in her

doorway, more than 100 feet away, was the color of the shooter's complexion. (Exh. 1 at 33). This initial statement corroborates what Mr. Long would have learned had he gone to the scene and conducted investigation into the State's theory. He did not, and his failure to do so falls below an objective standard of reasonableness.

In her initial statement, Mitchell replied to Detective Krstolich:

Q. Did you see his face?

A. Well, he's brown skinned, that's all I could tell. I didn't know no scars or nothing like that."

(Exh. 1 at 33) (emphasis added). This initial statement corroborates what Mr. Long would have learned had he gone to the scene and conducted investigation into the State's theory. He did not, and his failure to do so falls below an objective standard of reasonableness.

Failure to locate and examine the clothing Lamonte McIntyre was wearing at the time of arrest: Even though Lamonte McIntyre was arrested shortly after the homicides, no effort was made to by either the police or the defense to collect and examine his clothing and shoes. (Exhs. 27, 28). The eyewitnesses stated that the assailant was wearing "all black," but McIntyre was wearing rust-colored pants and white sneakers at the time of his arrest. Mr. McIntyre's clothing had obvious exculpatory value and Mr. Long's failure to obtain it—when it was readily available at the jail—is objectively unreasonable. If automotive glass and/or blood matching that from the scene were found on McIntyre's clothing, that would tend to connect him with the homicides, while the *absence* of such evidence would also have been significant and would have provided powerful evidence in McIntyre's defense. (Exh. 78). Jail records prove that when Mr. McIntyre was booked hours after the homicide, he was not wearing dark clothing or "all black" as the eyewitnesses stated. (Exh. 1 at 28, 33; Exh. 27 at ¶57). The computerized print out from the jail lists McIntyre's pants as "tan," a color in the "brown" range, thus also confirming the alibi

witnesses' descriptions of McIntyre's pants – which one witness described as "brown, rusted color jeans" and two others described as "bronze" colored pants or jeans. (Exh. 1 at 79, 90, 99). Mr. Long's failure to investigate Mr. McIntyre's clothing deprived him of a key opportunity to present exculpatory evidence in his defense, as his clothes did not match the shooter's and would have been free of physical evidence from the crime scene. The failure to adequately investigate the physical evidence "potentially hampered McIntyre's ability to prepare an adequate defense." (Exh. 78 at ¶5).

Failure to conduct an adequate review of the police file: Because Mr. Long put forth only negligible effort in reviewing the police file, he was wholly unprepared and unable to pursue key areas of cross examination which would have challenged witness accounts.

An adequate review of the police file would have allowed defense counsel to demonstrate the falsity of Mitchell's testimony that she realized when she made her identification that the shooter was not the Lamonte who dated her niece, when in fact, the taped statement shows she expressly identified Lamonte *McIntyre* and said he was the young man who "used to talk to" her niece. (Exh. 1 at 55).

If Stacy Quinn was interviewed by police, the report is not included in the police file. Even so, trial counsel was on notice of her highly relevant and exculpatory statements. Her mother, Josephine Quinn, told a detective that Stacy "knew who the suspect was." (Exh. 1 at 66). Trial counsel was "on notice" of Stacy Quinn.

An adequate review of the police file would have immediately revealed that the file contains no report or any other document referring to any alleged confidential informant or reliable source who named Lamonte McIntyre. Indeed, there is no indication whatsoever in the police file as to how the name Lamonte McIntyre first entered the investigation. Because counsel did not

adequately review the file, he was unable to expose this glaring gap in the investigation. Although prosecutor Morehead referred to numerous "reliable sources" or "confidential informants," there is no reference to them in the police file. (Exh. 27 at ¶66). Eskina opines: "The lack of proper documentation causes me to have grave doubts about the existence or reliability of any informant or tipster who supposedly provided the name Lamonte McIntyre to the police." (Exh. 27 at ¶71). Even a cursory review of the very limited police file would have given trial counsel this information, which he, in turn, could have used to cross examine the state's witnesses and point to the State's failure to adequately investigate this case.

Failure to obtain the transcript of the preliminary hearing: Mr. Long failed to obtain and review the transcript of the preliminary hearing, even though it was readily available, leaving Lamonte McIntyre vulnerable to prejudicial, factually incorrect statements by Prosecutor Terra Morehead. (*See* Section VI, *supra*).

On June 28, 1994, the juvenile court, the Honorable Matthew G. Podrebarac, conducted a hearing to determine if Lamonte McIntyre should be waived to adult status and whether the evidence was sufficient to establish probable cause and bind him over for trial on two counts of first degree murder. The court resolved both of those questions in the affirmative. (Exh. 3).

At the hearing, the court heard testimony from Niko Quinn, Ruby Mitchell and Roger Golubski as well as McIntyre's mother and a juvenile court services officer. Niko Quinn identified McIntyre in court as the shooter, even though, as she admitted, she told police the day after the shooting that she couldn't make an identification. (Exh. 3 at 31). Ruby Mitchell also identified McIntyre, but stated she no longer thought the shooter was the "Lamonte" who had dated her niece, as she had originally told police. (Exh. 3 at 13-17). She claimed the two "Lamontes" looked like each other, and when she identified the photo, she stated, "it still looked like the Lamonte I knew."

(Exh. 3 at 20). But she stated she was nonetheless "sure" of her identification because when she selected the photo in the photographic array, she "just picked out the person that [she] saw." (Exh. 3 at 19). Ms. Mitchell's statements and testimony are utterly inconsistent on when she supposedly realized that McIntyre was not the "Lamonte" she knew.

Mitchell's testimony contradicted her preliminary hearing testimony on this point, as she admitted in the preliminary hearing that, at the time she made her photo identification, she still believed the shooter was the "Lamonte" she knew. (Exh. 5 at 204). The impeachment on this point at trial was limited, however, and neither the prosecutor nor defense counsel ever referred to Ms. Mitchell's initial taped statement where she told the police:

Q. Are you absolutely sure this is the party who did the shooting?

A. Yes.

Q. Who is this party?

A. ***Lamont.***

Q. Do you know his last name?

A. **Yes.**

Q. What is it?

A. ***McIntyre.***

Q. How do you know this party?

A. ***Because he used to talk to my niece.***

Q. How long have you known him?

A. ***For a couple months.***

Q. Once again, you are absolutely sure this is the party?

A. ***Yes.***

(Exh. 1 at 34-35) (emphasis added). At trial, Ms. Mitchell testified – ***falsely*** – that when she made her identification to police, she had not known McIntyre's name or stated it to police. (Exh. 5 at 183-84).

At the preliminary hearing, Mitchell had stated that she had viewed the shooting through her screen door (Exh. 3 at 15-16). At trial, however, she testified that her view was entirely "open" with no obstructions, and that her front porch was not screened in. (Exh. 5 at 163). Her testimony is completely debunked by the crime scene video, which shows her house had a screened-in porch. (Exh. 5 at 163-64, 206-07; *cf* Exh. 12, Exh. 48 at A-C). The jury's attention, however, was apparently not drawn to that fact.

Niko Quinn testified that the shooter was wearing all black – a black cap, black shirt, black pants and black shoes. (Exh. 5 at 132). She looked at photographs the day after the shooting, but told police that she "didn't know." (Exh. 5 at 141). She added, though, that when she viewed McIntyre's photo, she thought to herself, "Oh, God, it's him." (Exh. 5 at 141). Niko then volunteered that she "eventually" re-contacted police and had met alone in a car with Golubski to make an identification. (Exh. 5 at 139, 145).

Defense counsel attempted to probe this secret meeting, and Niko testified that she'd told Golubski: "I can identify the guy that shot my cousin." (Exh. 5 at 146). Defense counsel then tried to show that Quinn's newly revealed pretrial identification conflicted with her preliminary hearing testimony, where she acknowledged having told police she "couldn't" or "wouldn't" make an identification from the photos. (Exh. 5 at 146). Morehead cut off counsel's cross with an objection, however, complaining that counsel lacked the preliminary hearing transcript. (Exh. 5 at 146). The judge sustained the objection. (Exh. 5 at 149). Rather than asking for a recess until

he could obtain the transcript – which was available later that day – defense counsel simply moved on to another area, leaving unexplored the shifting nature of Quinn's accounts. (*Id.*).

These failures are inexcusable especially since Mr. McIntyre's theory of defense is that he was innocent, and that he was not present at the scene. Trial counsel's negligible efforts in locating and interviewing eyewitness and investigating the state's evidence render trial counsel's performance below an objective standard of reasonableness. If the primary theory of defense is that the Mr. McIntyre was not the shooter then it is "objectively unreasonable" to fail to interview the eyewitnesses to the crime. *See State v. Overstreet*, 288 Kan. 1, 24, 200 P.3d 427 (2009).

In *Strickland*, the Supreme Court distinguished between "strategic choices made after thorough investigation of law and facts relevant to plausible options" and "strategic choices made after less than complete investigation." 466 U.S. at 690-91. Choices or actions by counsel in the second category are reasonable only to the "extent that reasonable professional judgment support the limitations on investigation." *Id.* The "decision not to investigate must be directly assessed for reasonableness" in all circumstances. *Id.* at 691. Even through a deferential lens, the Supreme Court has held that "*Strickland* does not establish that a cursory investigation automatically justifies a tactical decision with respect to...strategy. Rather, a reviewing court must consider the reasonableness of the investigation said to support that strategy." *Wiggins v. Smith*, 539 U.S. 510, 527 (2003). Under the circumstances of this case, there is no reason why a decision not to interview eyewitnesses, review the police reports, and request the available preliminary hearing transcript would be reasonable. Under the prevailing norms at the time of Mr. McIntyre's trial, counsel had an obligation to "conduct a prompt investigation of the circumstances of the case and to explore all avenues leading to the facts relevant to the merits of the case." *Bobby v. Van Hook*, 558 U.S. 4, 7 (2009), quoting the American Bar Association Standards for Criminal Justice in

effect in 1985. At the time of Lamonte McIntyre's trial the duty to investigate was well understood by competent defense counsel, and was a widely accepted professional norm of practice.[8]

In light of the total lack of physical evidence against Lamonte McIntyre, there is an overwhelming probability that, but for counsel's deficient performance in this case, the jury would have returned a different verdict. For the foregoing reasons, this Court should grant McIntyre a new trial.

VIII. DEFENSE COUNSEL FAILED TO PROVIDE EFFECTIVE ASSISTANCE OF COUNSEL IN K.S.A. 60-1507 PROCEEDINGS, CAUSING IMMENSE PREJUDICE TO MR. MCINTYRE AND VIOLATING HIS STATUTORY RIGHTS TO EFFECTIVE ASSISTANCE OF COUNSEL

In *Brown v. State*, Kansas Supreme Court held that, although there is no constitutional right to appointed counsel to pursue a K.S.A. 60-1507 motion, there is a statutory right under certain circumstances to counsel for collateral attacks, and such a right includes the right to have the effective assistance of counsel. *Brown,* 278 Kan. 481, 101 P.3d 1201 (2004), *see also* K.S.A. 22-4522(e)(4). The *Brown* court looked to other jurisdictions where courts held that some standard of competence is required by appointed counsel and quoted the following from *Cullins v. Crouse*, 348 F.2d 887, 889 (10th Cir. 1965):

> Although the right to counsel in a civil case is not a matter of constitutional right under the Sixth Amendment, counsel should be appointed in post conviction matters when disposition cannot be made summarily on the face of the petition and record. When counsel is so appointed he must be effective and competent. Otherwise, the appointment is a useless formality.

Brown, 278 Kan. at 484.

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[8]"Defense counsel should conduct a prompt investigation of the circumstances of the case and explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction. The investigation should include efforts to secure information in the possession of the prosecution and law enforcement authorities." ABA Standards for Criminal Justice 4-4.1 (a) (3d ed. 1993).

Although a petitioner has no constitutional right to effective assistance of legal counsel in civil proceedings under K.S.A. 60-1507, Kansas does provide a *statutory* right to counsel. *See* K.S.A. 22-4506(b) (requiring a district court to appoint counsel for an indigent K.S.A. 60-1507 movant "[i]f the court finds that the . . . motion presents substantial questions of law or triable issues of fact"); *Brown*, 278 Kan. at 483 (2004). Once the statutory right to 60-1507 counsel attaches, a movant is entitled to the effective assistance of counsel. *Robertson v. State*, 288 Kan. 217, 228, 201 P.3d 691 (2009); *Brown*, 278 Kan. at 484-85.

Mr. McIntyre's 60-1507 counsel, Mark Sachse, was grossly ineffective – he did nothing to review, investigate or prepare his client's case, and he did not even meet with his client. He was ineffective in failing to raise all of the claims discussed below, as well as the violations of constitutional rights alleged under the Fifth, Sixth and Fourteenth Amendments and presented in Sections VI and VII, *supra*, and, to the extent available, the constitutional claims presented in Sections III and IV, *supra*.

A. McIntyre's K.S.A. 60-1507 counsel was ineffective for failure to raise trial counsel's ineffectiveness, failure to investigate, failure to present evidence, and failure to communicate with his client

Lamonte McIntyre made another effort to obtain relief from the court by filing a *pro se* motion for relief under K.S.A. 60-1507. (Exh. 20 at 1-7). McIntyre asserted his innocence, and alleged his attorney was ineffective in failing to obtain an eyewitness instruction and in failing to subpoena two witnesses who would have rebutted the trial witness's identification of him as the shooter. (*Id*).[9]

Judge Burdette appointed attorney Mark Sachse to represent McIntyre, but Sachse never met with or communicated with McIntyre. The court initially set a hearing on the 60-1507 motion

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[9] Those claims are not presented in this Motion and Memorandum under K.S.A. 60-1507.

for October 17, 1997, then rescheduled it for January 9, 1998. The hearing was not held on that date either, and was continued until January 16, 1998. (Exh. 19). Mr. Sachse failed to inform Mr. McIntyre of the hearing and failed to request Mr. McIntyre's presence, even though Mr. McIntyre had previously filed *pro se* motions requesting transport to the district court so he could "meet with his attorney prior to a hearing to aid in the preparation of his case" and informing the district court that he wanted to be present at any hearing. (Exh. 20 at 11).

Mr. Sachse admits in his affidavit that he ***never met with nor communicated*** with Lamonte McIntyre. (Exh. 33 at ¶ 4-5, 14). Sachse states that his failure to have any communication with his client was not "unusual in Wyandotte County" during that time period, as "judges would sometimes just pull a lawyer in from the hallway, impromptu, to represent a petitioner in a 60-1507 hearing." (Exh. 33 at ¶14). Sachse stated: "The hearings were typically very short, and the defendant was not present. That is simply the way it was in Wyandotte County at that time." (Exh. 33 at ¶3).

The hearing on McIntyre's 60-1507 motion was very brief, with about 10 to 15 minutes of argument by Sachse and about 10 to 15 minutes by Morehead. McIntyre was not present, as was typical with such hearings. Sachse argued that trial counsel was ineffective for failure to request an eyewitness instruction and for failure to subpoena witness Willie Bush. (Exh. 19). Sachse's arguments failed to address the issue of "prejudice" other than to say that McIntyre was prejudiced by counsels' failures. (*Id.*). The court ruled from the bench, dismissing McIntyre's claims. (*Id.* at 15). The proceedings can hardly be called a hearing in any meaningful sense of the term. Mr. McIntyre was "represented" by an attorney who had never even spoken with him, Mr. McIntyre was not present, and the counsel (in name only) appointed to represent him presented no evidence on his behalf despite having knowledge that an eyewitness had come forward and said that

Lamonte McIntyre was not the shooter. (Exh. 37, 37A). Further, a simple review of the court file would have revealed that Stacy Quinn had previously testified that McIntyre was not the shooter and that Niko Quinn had signed an affidavit admitting her perjury. (Exh. 19, Exh. 35).

Inexplicably, Sachse failed to raise a critical item of new exculpatory evidence, even though at the sham hearing, he states that the case is "all about eyewitness identification." (Exh. 19, p. 6). Josephine Quinn, the mother of Niko Quinn and Stacy Quinn, had come forward two months earlier, telling Sachse that McIntyre was not the shooter. (Exh. 33 at ¶ 5-6). Josephine Quinn told Sachse that when she saw McIntyre in the courtroom, she knew that "he was not the one who killed my nephew." (Exh. 37 at ¶ 2-5, 37A). McIntyre was not the shooter – he was "too tall, his lips protruded too much and his complexion was too dark." (Exh. 37, 37A at ¶ 5). Josephine Quinn told Sachse that law enforcement "had threatened [her] daughter" for her testimony against McIntyre. (Exh. 37, 37A at ¶ 9). She also told Sachse that she had met with Morehead herself, but was sent from the courthouse without testifying. Josephine returned the next day and told Morehead that McIntyre was not the shooter – his height, build, and facial features differed from the shooter's. (Exh. 37, 37A at ¶ 5). Morehead told her it was "too late" for her to do anything and that the case was "in the hands of the jury." (Exh. 37, 37A at ¶ 6). Morehead never disclosed Josephine Quinn's exculpatory account to Gary Long. (Exh. 31 at ¶ 13-14).

When Josephine Quinn spoke with Sachse in October 1997, he determined her statement should be documented right away, and he wrote out an affidavit in longhand, to which Josephine added additional details. (Exh. 37, 37A at ¶ 6-9). He and Josephine went to an administrative assistant at the Wyandotte Courthouse and had her notarize it. (Exh. 37, 37A at ¶ 9).

Despite the obvious importance of this witness and the consistency of her account with Niko's account and Stacy's account – all three stated that Lamonte McIntyre was too tall to be the shooter – Sachse did not subpoena Josephine Quinn for the hearing or even present her affidavit to the court. He does not recall speaking with her after October 17, 1997, the day on which she signed the affidavit. (Exh. 37, 37A at ¶11). Sachse did not attempt to secure her testimony at the hearing, did not meet with her again, and did not communicate with her further. There can be no reasonable explanation for the failure to investigate and present these witnesses, whose existence was known, or should have been known, to Sachse.

Sachse made only a few minutes of superficial argument and presented no evidence. (Ex. 19). McIntyre was not present at the hearing. Prosecutor Morehead complained about the witnesses coming forward after trial to claim McIntyre was not the shooter: [A]ll of a sudden...they now have witnesses coming forward..." *(Id.* at 11)[10]. But Sachse presented no witnesses – not Willie Bush, who was concededly unreliable, but also not presenting Josephine Quinn, whom Sachse had met with and who had a credible account that the shooter was not McIntyre.

Judge Burdette denied McIntyre's petition, stating: "[F]rankly, I have gone over this particular trial and the efforts of both sides many times and I'm convinced the defendant got a fair trial." (*Id.* at 14).

Sachse never mentioned Josephine Quinn at the hearing, and the failure to present either her testimony or affidavit is unexplained. *(Id).* Josephine's affidavit, which was handwritten and

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[10] This is an extremely troubling argument by Morehead, as she suggests that witnesses were "all of a sudden" coming forward after trial when Morehead was well aware that she had been told by *two different witnesses* <u>*before*</u> trial that McIntyre was not the shooter. To call Morehead's argument disingenuous is an understatement.

notarized at the courthouse in October 1997 when Sachse was first appointed, states that McIntyre was not the shooter and that Josephine had told Morehead at the courthouse that "he was not the one who killed my nephew." (Exh. 37 and 37A at ¶5).

During trial, Josephine had been subpoenaed, and first appeared at the courthouse the previous day, but was told by Ms. Morehead that she would not be needed to testify. (Exh. 37 and 37A at ¶3). She returned the next day around 2 p.m. and spoke with Morehead, telling her that the man on trial was not the one who had killed her nephew. Like Niko Quinn and Stacy Quinn, she informed Morehead that McIntyre was "too tall" to be the shooter. (Id. at 4). Josephine also stated in her affidavit that McIntyre's "lips protruded too much and his complexion was too dark. He was not the one who killed my nephew. Reason being his body built, complexion, his height and facial feature." (Exh. 37 and 37A at ¶5).

Sachse, who has signed an affidavit, cannot recall why he did not present the testimony of Josephine Quinn at the hearing. (Exh. 33 at ¶11). The hearing on McIntyre's petition was originally scheduled for October 17, 1997, the day that Josephine Quinn signed her affidavit. (*Id.* at ¶10-11). Sachse states:

> Ms. Quinn did not have a chance to testify on October 17, 1997 because the hearing was continued. I do not believe Ms. Quinn was present when the hearing was later held on January 16, 1998. At the January 16, 1998 hearing, I made an argument on Mr. McIntyre's behalf but I did not present any witnesses. I do not recall speaking again with Ms. Quinn after October 17, 1997 and do not know if anyone asked her to be present at the hearing on January 16, 1998.

(Exh. 33 at ¶11).

Sachse also stated he did not recall why the hearing was continued from October 17, 1997, the date when Josephine Quinn clearly was in the courthouse, as an administrative assistant to Judge Boeding notarized Josephine's affidavit on that date. (Exh. 33 at ¶9-10).

Sachse stated in his affidavit that he continued to have some independent recollection of his interaction with Josephine Quinn. He stated that Ms. Quinn told him that she had talked to the prosecutor, and "that Ms. Morehead had told her not to testify." (Exh. 33 at ¶7). Sachse added: "Given the nature of her statement, I wanted to get it documented right away." (Exh. 33 at ¶8). Although some of the handwriting in the affidavit is Josephine Quinn's, most of it was Sachse's. (Exh. 37). The affidavit was written out longhand, with Sachse writing down facts as Ms. Quinn was giving her account. (Exh. 33 at ¶6).

As reflected in her affidavit, Josephine Quinn told Sachse that she informed Morehead at the courthouse during trial that Lamonte McIntyre was not the shooter. (Exh. 37, 37A at ¶5). Prosecutor Morehead told her it was "too late" and that the case was in the jury's hands. (Exh. 33 at ¶12; Exh. 37, 37A at ¶5-6).

Josephine Quinn's affidavit has never been presented to a court, and she has never testified. Although she told police that she was unable to make a positive identification from a photo lineup (Exh. 1 at 66), that issue is far different than the question of whether she could look at an individual and state whether or not he fit the gross characteristics of the shooter, with regard to such things as height and skin color.

Josephine Quinn, like Niko Quinn and Stacy Quinn, said that Lamonte McIntyre was "too tall" to be the shooter. (Exh. 37, 37A at ¶5, 13; Exh. 15 at 21-22). Indeed, Lamonte McIntyre is 5'11" tall. (Exh. 1 at 23). In her initial taped statement, Ruby Mitchell described the shooter as 5'6" tall. (Exh. 1 at 33). Sachse made no effort to interview Ruby Mitchell, or Niko or Stacy Quinn, despite being on notice of them and their exculpatory statements.

As noted above, Judge Burdette denied McIntyre's motion for relief under K.S.A. 60-1507. (Exh. 19 at 15). Lamonte McIntyre was not present in the courtroom, and never had any

communication at any point with his attorney, Mark Sachse. (Exh. 115 at ¶ 10). The subsequent appeal was dismissed. (Exh. 20 at 13).

B. McIntyre had a right to effective assistance from court-appointed counsel

Mr. Sachse never communicated with Mr. McIntyre, not even once. Mr. Sachse never informed Mr. McIntyre that his petition had been denied, nor did Mr. Sachse inform Lamonte McIntyre of his right to appeal. Mr. Sachse did not file a notice of appeal. His continued and pervasive lack of action forfeited Mr. McIntyre's right to a proceeding altogether:

> Assuming those allegations are true, counsel's deficient performance has deprived respondent of more than a fair judicial proceeding; that deficiency deprived respondent of the appellate proceeding altogether. . . . [T]he complete denial of counsel during a critical stage of a judicial proceeding mandates a presumption of prejudice because 'the adversary process itself' has been rendered 'presumptively unreliable.' [Citation omitted.] The even more serious denial of the entire judicial proceeding itself, which a defendant wanted at the time and to which he had a right, similarly demands a presumption of prejudice. Put simply, we cannot accord any '"presumption of reliability,'" [citation omitted], to judicial proceedings that never took place."

Roe v. Flores-Ortega, 528 U.S. 470, 483 (2000). Kansas adapted the *Flores-Ortega* standard "where appointed counsel failed to file a petition for review." *Albright v. State*, 229 Kan. 193, 211 (2011) citing *Kargus*, 284 Kan. 928. If the law grants a right to counsel, then effective assistance of counsel must be provided:

> As *Brown* concluded, no reason exists to carve out a weaker right to counsel in a 60-1507 action, which, as interpreted in Supreme Court Rule 183, may include the right to appellate counsel in certain circumstances. Rather, if a district court appoints counsel to represent a 60-1507 movant after finding the motion presents substantial questions of law or triable issues of fact and the movant is indigent, the movant has a right to receive effective assistance of counsel. *Brown*, 278 Kan. at 483-84.

Albright, 229 Kan. at 211. If it is alleged that appointed counsel's deficiencies resulted in the loss of the right to pursue a procedure the *Flores-Ortega* standard is to be applied. *Id.* Under that standard, as modified for a 60-1507 proceeding:

> (1) If the movant requested that an appeal be filed and it was either not filed at all or was not timely filed, appointed counsel was ineffective and the untimely appeal should be

> allowed; (2) a movant who explicitly told his or her appointed counsel not to file an appeal cannot later complain that, by following instructions, counsel performed deficiently; or (3) in other situations, such as where appointed counsel has not consulted with the movant or the movant's directions are unclear, the movant must demonstrate a reasonable probability that, but for appointed counsel's deficient failure to either consult with the movant or act on the movant's wishes, an appeal would have been filed. The movant need not show that a different result would have been achieved but for appointed counsel's performance.

Id. at 211-12.

Mr. McIntyre has alleged facts that, if true, demonstrate that trial counsel's performance was objectively unreasonable and constitutionally deficient. *See* Claim VII *supra*; *see also* Claim VI. Further, the performance of 60-1507 counsel was also deficient and failed to conform with any of the prevailing norms for appointed counsel. As stated in section II, *supra,* all of the claims in sections III, IV, VI, VII, VIII (particularly the trial misconduct claims stated in section VI) could have been presented in some form by Mr. Sachse as instances of trial counsel's ineffectiveness (albeit not presently as robustly as the claims discussed here). Although the factual basis of many of the *Brady* and perjured testimony claims (*see* Sections III, IV) would not be as developed as they have been in this 60-1507 motion, the claims could have been raised to the degree known, and the trial-related failures (*see* Section VI) could have all been raised as highly prejudicial instances of counsel's ineffectiveness). Because triable issues of fact exist with regard to whether trial counsel was ineffective under *Strickland,* Mr. McIntyre's K.S.A. 60-1507 counsel was therefore ineffective for failing to raise the obvious and meritorious issues concerning trial counsel's ineffectiveness, and Mr. McIntyre was grossly and irreparably prejudiced by these failures.

Mr. Sachse's total failure to investigate and present evidence at the 60-1507 hearing constitutes objectively unreasonable and grossly deficient performance. The only evidence against Mr. McIntyre at trial was that of the reluctant, confused, and coerced eyewitnesses. The failure to call any of those witnesses in 60-1507 proceedings, especially Josephine Quinn, who had told Mr.

Sachse that Mr. McIntyre was not the shooter, is inexplicable, and the prejudice McIntyre suffered is immense. For these reasons, Mr. McIntyre is entitled to a new trial.

IX. LAMONTE MCINTYRE'S CONVICTION AND SENTENCE OF TWO CONSECUTIVE LIFE SENTENCES WITH LIFETIME SUPERVISION CONSTITUTE CRUEL AND UNUSUAL PUNISHMENT OF A JUVENILE IN VIOLATION OF THE EIGHTH AMENDMENT TO THE CONSTITUTION AND VIOLATE THE RULES ANNOUNCED IN *MILLER V. ALABAMA*, *MONTGOMERY V. LOUISIANA*, AND *STATE V. DULL* AND THEREFORE SHOULD BE VACATED

The Eighth Amendment to the United States Constitution provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." Embodied in the Constitution's ban on cruel and unusual punishments is the "precept of justice that punishment for crime should be graduated and proportioned to [the] offense." *Graham v. Florida*, 560 U.S. 48, 59 (2010). The United States Supreme Court cases has established that "children are constitutionally different from adults for sentencing purposes." *Miller v. Alabama*, 132 S. Ct. 2455, 2464 (2012). In *Miller* the Court held that imposing mandatory life-without-parole sentences on juveniles constitutes cruel and unusual punishment. *Id.* at 2460. Sentencing courts must have the ability to consider "the mitigating qualities of youth." *Id.* at 2459.

The concept of cruel and unusual punishment is "not static" and "draws its meaning from the evolving standards of decency that mark the progress of a maturing society." *Trop v. Dulles*, 356 U.S. 86, 101 (1958). Our understanding of these standards, as well as the state of social and scientific knowledge are continually evolving. Society's knowledge and understanding informs our standards of decency and these standards change over time. The Court's decision in *Miller* was the next logical progression after *Graham v. Florida*, which held unconstitutional life-without-parole sentences for non-homicide juvenile offense. 560 U.S. 48 (2010). The Court's decisions reflect the prevailing view that children are "less deserving of the most severe punishments"

because they are still developing the cognitive and emotional maturity that the law expects of adults. *Id.* at 50.

Much like in *Miller,* the sentencing court did not take into account "the wealth of characteristics and circumstances attendant" (*Miller,* 132 S. Ct. at 2497) to Lamonte McIntyre's age at sentencing other than to note that Lamonte McIntyre was "a relatively young man." (Exh. 9 at 6). Lamonte McIntyre, just seventeen at the time of the homicides, "receive[d] the same sentence as the vast majority of adults committing similar homicide offenses" and "our individualized sentencing cases alike teach us that in imposing a State's harshest penalties, a sentencer misses too much if he treats every child like an adult." *Miller*, 132 S.Ct. at 2467. *See also Montgomery v. Louisiana,* 136 S. Ct. 718, 732 (2016) (*Miller* announced a substantive rule that is retroactive in cases on collateral review)).

Further, as *Graham* treats juvenile life sentences as analogous to capital punishment, the Court likewise extended another line of precedent requiring individualized sentencing. *Miller,* 132 S. Ct. at 2467. "[O]ur individualized sentencing decisions make clear that a judge or jury must have the opportunity to consider mitigating circumstances before imposing the harshest possible penalty for juveniles." *Id.* at 2475. There was no individualized consideration at Lamonte McIntyre's sentencing.

The sentencing court was "mandated by statute" to impose two life sentences for each count of first degree murder under "K.S.A. 21-3401, an off-grid felony." (Exh. 9 at 6). The court had no discretion to impose a sentence other than life imprisonment for each count. The only decision that the sentencing court had was whether to sentence Mr. McIntyre to concurrent or consecutive life sentences. No testimony or evidence was offered or presented on Mr. McIntyre's behalf related to his age, just seventeen at the time of the homicides. The sentencing hearing lasted

less than ten minutes, the transcript spanning only seven pages. *Id.* There is no reasonable argument that the sentencing court engaged in any meaningful consideration and deliberation of Lamonte McIntyre's individual characteristics, his youth, or the proportionality of the sentence.

Miller demonstrates, in part, that constitutional protection for the rights of juveniles at sentencing is rapidly evolving. *Miller,* 132 S. Ct. at 2470-73 (rejecting the argument by Alabama and Arkansas that widespread use of mandatory life-without-parole sentences precluded holding the practice unconstitutional).

Recently, in *State v. Dull*, 302 Kan. 32 (2015), the Kansas Supreme Court held that mandatory lifetime postrelease supervision for juveniles convicted of aggravated indecent liberties categorically constitutes cruel and unusual punishment in violation of the Eighth Amendment. Lamonte McIntyre's sentence includes supervision for the duration of his life. (Exh. 2 at 193). Mr. McIntyre contends that both the mandatory life sentences and the imposition of mandatory lifetime postrelease supervision "without the individualized sentencing mandated in *Miller v. Alabama*, 132 S. Ct. 2455, 2458, 83 L. Ed. 2d 407 (2012), is unconstitutional." *Dull*, 302 Kan. at 41. The state of the law is in flux, and currently evolving to comport with our evolving standards of decency. Mr. McIntyre argues that his sentence is disproportionate, excessive, and constitutes cruel and unusual punishment in violation of the Eighth Amendment. His sentence was not individualized. For these reasons, this court should vacate his sentence and set a resentencing hearing.

CONCLUSION

Lamonte McIntyre hereby requests that this court set his case for an evidentiary hearing and, further, vacate his conviction and sentence.

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I hereby certify that the above and foregoing document was served *via* hand delivery on the office of Jerome Gorman, District Attorney at 710 N. 7the Street; Suite 10, Kansas City, KS 66101 on July 12, 2016.

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CASE NUMBER: 2016-CV-000508

IN THE TWENTY NINTH JUDICIAL DISTRICT
DISTRICT COURT OF WYANDOTTE COUNTY, KANSAS

Lamonte McIntyre,	)	
***Movant*,**	)	
v.	)	**Case No.: 2016 CV 508**
	)	
State of Kansas,	)	
Respondent.	)	

SUPPLEMENT TO MOVANT'S AMENDED MEMORANDUM OF FACT AND LAW IN SUPPORT OF MOTION TO VACATE, SET ASIDE, OR CORRECT SENTENCE UNDER K.S.A. 60-1507

Movant Lamonte McIntyre, by and through his counsel, hereby files this supplement to his Amended Memorandum of Fact and Law in support of his motion under K.S.A. 60-1507, requesting that this Court vacate his conviction. This supplement is based on *newly acquired facts,* primarily obtained through discovery and acquired since Mr. McIntyre filed his Motion under K.S.A. 60-1507. In this pleading, Mr. McIntyre:

- Supplements his claims under *Brady v. Maryland,* 373 U.S. 83 (1963), including a claim that a witness told the prosecutor of alternate suspects and that at least one of the case detectives knew that McIntyre was likely innocent and that another man was responsible for the double homicide, yet concealed that information.
- Includes a claim under *Arizona v. Youngblood,* 488 U.S. 51 (1988), based on the failure to preserve the clothing Mr. McIntyre was wearing at the time of his arrest, despite the obvious potential significance of that clothing. The loss or destruction of that clothing has been confirmed by the Wyandotte County District Attorney's Office.
- Includes a claim regarding the close and undisclosed friendship between juror Robert Brady and Judge Dexter Burdette. This friendship was just recently discovered, in the

course of juror interviews conducted over the past several weeks. Because this relationship was not disclosed at trial as it should have been, counsel did not have an opportunity to inquire into whether the close personal friendship of the judge and Mr. Brady might affect Mr. Brady's ability to be fair and impartial.

In this pleading, Movant amends Claim IV (a *Brady* claim) and adds two claims as sections X (*Arizona v. Youngblood* claim) and XI (juror claim).

IV. THE PROSECUTOR REPEATEDLY FAILED TO DISCLOSE MATERIAL EXCULPATORY AND IMPEACHING EVIDENCE, CAUSING PREJUDICE TO LAMONTE MCINTYRE, IN VIOLATION OF THE RULE OF *BRADY v. MARYLAND* AND MCINTYRE'S RIGHT TO DUE PROCESS AND A FAIR TRIAL UNDER THE UNITED STATES AND KANSAS CONSTITUTIONS

The State has an affirmative duty to disclose material exculpatory evidence in its possession to defense counsel. *State v. Warrior*, 294 Kan. 484, 505-06, 277 P.3d 1111 (2012); *Brady v. Maryland*, 373 U.S. 83, 87 (1963); *Giglio v. United States*, 405 U.S. 150, 153 (1972). The failure to do so requires the reversal of the defendant's conviction when there is a reasonable probability that the outcome of the proceeding would have been different had the State disclosed the evidence. *Warrior*, 294 Kan. at 507. A "reasonable probability" is that which "is sufficient to undermine confidence in the outcome." *Id*.; *United States v. Bagley*, 473 U.S. 667, 682 (1985).

Information pointing toward an alternate suspect is, unquestionably, classic *Brady* material. The decisions of numerous courts of appeal emphatically establish this point. *See, e.g., Boyette v. Lefevre*, 246 F.3d 76, 91 (2d Cir. 2001) (holding that such evidence is "classic *Brady* material"); *D'Ambrosio v. Bagley*, 527 F.3d 489, 498-99 (6th Cir. 2008) (holding that the State must disclose existence of legitimate suspects); *Bies v. Sheldon*, 775 F.3d 386, 400 (6th Cir. 2014) (holding that concealing the identities of other suspects "was an egregious breach of the State's *Brady* obligations"); *Trammell v. McKune*, 485 F.3d 546, 551 (10th Cir. 2007); *Bowen v.*

Maryland, 799 F.2d 593, 599-600 (10th Cir. 1986); *Smith v. Sec'y of New Mexico Dept. of Corrections*, 50 F.3d 801, 834 (10th Cir. 1995). Indeed, withholding such evidence undermines defense counsel's ability to persuasively argue that someone other than the defendant committed the crime. *Trammell*, 485 F.3d at 551.

Newly obtained evidence shows that police and the prosecutor repeatedly violated or ignored their *Brady* obligations:

- Handwritten notes in the prosecutor's file show that Josephine Quinn provided critical exculpatory information to the prosecutor about alternate suspects who had a motive to harm her nephew, Doniel Quinn – indeed, the men already had done so by inflicting a beating. Josephine, an eyewitness to the double homicide, told prosecutor Terra Morehead that, just a week or two before Doniel was murdered, "*some guys up the street*" had "*jumped on*" him. They beat him, leaving him "*out of breath*" and with "*bruises on his face*" and a "*cut on his finger*." (Exh. 131) [1] (emphasis added). Josephine Quinn had been worried – her nephew was in "drug rehab" – and someone had "tried to warn him" about something. *See id*. Although Josephine's statement to Morehead, documented in Morehead's handwritten notes, pointed to men with a motive to harm Doniel and suggested a possible connection to drugs, this information was *never disclosed to the* defense – a remarkable failure, given that Josephine's account tracks closely with a similar account given by her daughter, Niko Quinn. Niko told the police that Doniel, days before the murder, had been beaten up by Aaron Robinson and some of his "boys" because the Robinson

[1] The exhibit numbering used in this pleading is consecutive to the exhibits previously filed in support of the Amended Memorandum of Fact and Law, filed July 12, 2016.

drug gang suspected Doniel of stealing their drugs. Niko's account is discussed throughout McIntyre's Amended Memorandum of Fact and Law and provides the basis for the *Brady* claim in section IV.C.[2] This vital information is not mentioned anywhere in the police reports and, like the information from Josephine Quinn, was never disclosed to defense counsel. Instead, prosecutor Morehead presented a case against Lamonte McIntyre that lacked even a hint of motive, while simultaneously concealing information that the "guys up the street" had beaten Doniel and had an apparent motive to harm him. The concealment of this exculpatory information prevented the defense from pointing to or investigating these alternate suspects -- men who operated drug houses in the neighborhood, had a motive to harm Doniel, and had demonstrated their intent to do so. The failure to disclose both Josephine's and Niko's accounts constitutes a gross violation of the *Brady* rule and Mr. McIntyre's Fourteenth Amendment right to due process.

- Other newly acquired information suggests that Detective Golubski was not only <u>*aware*</u> that a nearby drug gang had the intent and motive to harm Doniel Quinn, he <u>*knew*</u> that Aaron Robinson and his associates, including Neil Edgar, Jr. ("Monster"), were likely responsible for the murders of Doniel Quinn and Donald Ewing. Instead of investigating the violent drug dealers who operated in the neighborhood where the men were killed, Golubski deliberately steered the investigation --- which lasted just a few hours – in a direction that he knew or suspected to be false. With nothing other than a manipulated or coerced identification from Ruby Mitchell – who recited the

[2] Niko Quinn's account to police of the beating of Doniel Quinn is addressed in Claim IV.C of the Amended Memorandum of Fact and Law in support of Movant's Motion under K.S.A. 60-1507, filed July 12, 2017 (*see* Amended Memorandum at 10, 67, 72, 85, 91 and 114).

last name "McIntyre" in her taped statement even though she had never known or heard of Lamonte McIntyre -- police arrested McIntyre. How and why that happened within mere hours of the double homicide will be the subject of testimony at the evidentiary hearing. That testimony concerns the actions and motives of Roger Golubski, all of which were never disclosed to defense counsel.

- At trial, prosecutor Morehead relied on a misleading photograph of Lamonte McIntyre from 1992. That photo, which was shown to the eyewitnesses, showed Lamonte as a younger teenager, with a different hairstyle and less mature features. Had the prosecutor disclosed the more recent photograph, which depicted Lamonte as he appeared in 1994, defense counsel would have been able to persuasively argue that the line-up photograph was misleading and that no reliable identification could have been made from it. (*See* Exhibits 132 and 133). The failure to disclose the more recent photo, that depicted McIntyre far more accurately, violated the rule of *Brady* and McIntyre's Fourteenth Amendment right to due process.

X. BY TAKING NO STEPS TO PRESERVE MCINTYRE'S CLOTHING AND DISPOSING OF IT IN BAD FAITH, THE STATE DEPRIVED MCINTYRE OF VITAL EXCULPATORY EVIDENCE, IN VIOLATION OF DUE PROCESS AND THE DOCTRINE OF *YOUNGBLOOD v. ARIZONA*

Donald Ewing and Doniel Quinn were killed by a shooter dressed in all black. The two eyewitnesses, Niko Quinn and Ruby Mitchell, were in complete agreement on this point. On the day he was arrested, Lamonte McIntyre was not wearing all black. He was wearing a Michigan cap and rust-colored pants. (*See* Amended Memorandum at 60, 64, 163-64). He had worn the same outfit for three straight days—a subject of teasing among family members—and was still wearing it when he was arrested hours after the shooting occurred. (*Id*.). The jail records reflect he was, in fact, wearing "tan" pants, a color in the "brown" range, confirming the statements of

the alibi witnesses. (Exh. 21 at 14). Inexplicably, this clothing was never collected from the jail and preserved by the police. Recent information obtained from the District Attorney's Office confirms the clothing is gone, apparently destroyed or disposed of. There is no record of what was done with it.

The police failure to seize and have examined McIntyre's clothing is inexplicable. The clothing had obvious exculpatory value as it did not match the description of the shooter's clothing. Also, the two victims were shot at very close range, with blood, tissue and broken glass spraying everywhere. Had McIntyre's clothing been seized and examined, as it should have been, the absence of physical evidence on it would have had substantial exculpatory value. (Exh. 78 at 3; Ron Singer report). This failure to collect the clothing was an "inexplicable and unusual departure from typical practice, particularly given that [McIntyre] was arrested close in time to the shooting." (Exh. 27 at 12, ¶54). Because the detectives' failure to seize the clothing was contrary to established and typical practices, it strongly supports an inference of bad faith.

When the State in bad faith "fails to preserve potentially useful evidence," it denies the defendant his right to due process, as guaranteed by the Fourteenth Amendment. *State v. LaMae*, 268 Kan. 544, 550, 998 P.2d 106 (2000); *Arizona v. Youngblood*, 488 U.S. 51, 58 (1988). Where an officer's conduct demonstrates that he was so unmindful of "applicable policies and the common sense assessments of evidence," such that it constitutes "the reckless disregard of both, there is a showing of objective bad faith. *United States v. Elliott*, 83 F. Supp. 2d 637, 647 (E.D. Vir. 1999). The destruction and/or disposal of Mr. McIntyre's clothing despite its obvious significance violated his right to due process under the Fourteenth Amendment.

XI. JUDGE BURDETTE FAILED TO DISCLOSE AT TRIAL THAT HE HAD A CLOSE PERSONAL FRIENDSHIP WITH ONE OF THE JURORS, THEREBY PREVENTING DEFENSE COUNSEL FROM INQUIRING INTO THE RELATIONSHIP ON VOIR DIRE AND THEREBY VIOLATING MCINTYRE'S RIGHT TO A FAIR AND IMPARTIAL JURY

Judge Burdette never disclosed to defense counsel that he had a personal friendship with juror Robert Brady. This relationship, which included socializing and golf dates, may have affected Mr. Brady's ability to remain fair and impartial—a constitutional right guaranteed to McIntyre—but because it was never disclosed, the issue was not explored during *voir dire* or considered by the court.

The right to a fair and impartial jury is a fundamental facet of a defendant's right to a fair trial. Accordingly, a defendant is entitled to an adequate *voir dire* and to the exercise of peremptory challenges to ensure that the jury in whose hands his fate rests is able to fairly and impartially hear his case. *State v. Madkins*, 42 Kan. App. 2d 955, 963-64, 219 P.3d 831 (Kan. App. 2009). Judge Burdette's failure to disclose his close friendship with Robert Brady precluded McIntyre from availing himself of these constitutional safeguards.

Even in cases in which courts have held that a juror's relationship with the judge was not grounds for disqualification, ***the issue was examined and explored because it was disclosed***. *See State v. Timley*, 255 Kan. 286, 308-09, 875 P.2d 242 (Kan. 1994) (holding that there would have been no error in not excluding juror because she affirmatively stated that her personal acquaintance with the trial judge would not affect her ability to be fair and impartial); *State v. Mattire*, No. 2011 KA 2390, 2012 WL 4335432 at *10-11 (La. App. Sept. 21, 2012). In *Mattire*, the court emphasized the importance of a "full and complete voir dire" and the "exercise of peremptory challenges" when it evaluated the issue of the trial judge's relationship with two jurors. *Mattire,* 2012 WL 4335432 at *10-11.

Indeed, a juror's ability to remain impartial despite his relationship with the judge presiding over the case is a fact-specific inquiry that demands examination in each case in which the situation arises. Thus, Judge Burdette's failure to disclose his relationship with Mr. Brady violated Mr. McIntyre's rights to due process and a fair trial under the Sixth and Fourteenth Amendments, and this Court should therefore vacate his convictions.

Respectfully submitted,

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I, Cheryl A. Pilate, hereby certify that the above and foregoing pleading has been served on all via email and through the Kansas electronic filing system on October 5, 2017.

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CASE NUMBER: 2016-CV-000508

IN THE TWENTY NINTH JUDICIAL DISTRICT
DISTRICT COURT OF WYANDOTTE COUNTY, KANSAS

Lamonte McIntyre,	)	
***Movant*,**	)	
v.	)	**Case No.: 2016 CV 508**
	)	
State of Kansas,	)	
***Respondent*.**	)	

TRIAL BRIEF ADDRESSING EVIDENTIARY STANDARD FOR INNOCENCE CLAIMS

As this Court is aware, the newly amended version of K.S.A. 60-1507 created a standard for a "colorable claim of actual innocence" by employing language similar to that used to define the innocence "gateway" claim of *Schlup v. Delo,* 513 U.S. 298, 327 (1995). The Kansas statute states: "As used herein, the term actual innocence requires the prisoner to show it is more likely than not that no reasonable juror would have convicted the prisoner in light of new evidence." K.S.A. 60-1507(f)(B)(2)(A). The *Schlup* standard for the "gateway" innocence claim is stated in nearly identical terms: the petitioner "must show that it is more likely than not that no reasonable juror would have found the petitioner guilty beyond a reasonable doubt." *Schlup*, 513 U.S. at 328-29.

The Supreme Court's decision in *Schlup* provides firm guidance on what evidence may be considered to determine if a petitioner has satisfied the "gateway" standard. To determine whether a petitioner passes through the "gateway," the Supreme Court has instructed a "court must consider *'all the evidence,' old and new, incriminating and exculpatory,* ***without regard to whether it would necessarily be admitted*** *under 'rules of admissibility that would govern at trial.'" House v. Bell,* 547 U.S. 518, 538 (2006), quoting *Schlup v. Delo,* 513 U.S. 298, 327 (1995) (emphasis added).

Because the focus is on actual innocence, evidence that would otherwise be inadmissible, but which is relevant to the issue of actual innocence, must be considered by this Court. "In assessing the adequacy of petitioner's showing, therefore the district court is not bound by the rules of admissibility that would govern at trial. Instead, the emphasis on 'actual innocence' allows the reviewing tribunal to consider the probative force of relevant evidence that was either excluded or unavailable at trial." *Schlup*, 513 U.S. at 327-28.

Indeed, the *Schlup* Court itself considered otherwise inadmissible evidence in granting relief for Mr. Schlup, noting that a witness had passed a polygraph examiner in determining the witness's credibility. *Schlup v. Delo*, 912 F. Supp. 448, 455 (1995). Hearsay is also admissible. In *Qadar v. United States*, No. 13-CV-2967, 2014 U.S. Dist. LEXIS 100872 at *19 (E.D.N.Y. July 23, 2014), for example, the District Court entertained hearsay evidence, noting that "The fact that petitioner's 'new evidence' consists entirely of hearsay statements may not, alone, be determinative," though it was a factor in assessing the reliability of the evidence.

Similarly, in *Lopez v. Miller*, 915 F. Supp. 2d 373 (E.D.N.Y. 2013), a court granted relief, relying in part on otherwise inadmissible hearsay. In making its decision, the court concluded that although witness affidavits are hearsay, it had "no difficulty concluding that they are reliable and may be considered for [defendant's] actual innocence claim." *Lopez*, at 401. The court noted:

> As an initial matter, it is important to note that in considering the reliability of evidence for actual innocence purposes, the court 'is not bound by the rules of admissibility that would govern at trial.' *Schlup*, 513 U.S. at 328. Instead, the court must determine the reliability of all the new evidence Lopez has submitted, both *admissible and inadmissible*, by considering it 'both on its own merits and, where appropriate, in light of the pre-existing evidence in the record.' *Doe*, 391 F.3d at 161. As to the new witness

> testimony in particular, the court 'consider[s] the potential motives to be untruthful that the witness may possess, corroboration or the lack thereof, internal consistency, and the inferences or presumptions that crediting particular testimony would require.' *Id*. at 164-65.

Lopez, at 400-401 (emphasis added). The court continued that when considered individually, affidavits or recantations may be suspect—"the statements are hearsay, lack important indicia of formality, were made by questionable sources, and are at times ambiguous or inconsistent both internally and with [witness's] trial testimony…"—but when considered together and with other evidence, the documents reliably support the proposition that the witness contradicted her testimony. *Lopez*, at 403.

In *Hyman v. Brown*, 197 F.Supp.3d 413, 454-55 (E.D.N.Y. 2016), the Court discussed the *Schlup* admissibility standard in terms of the State's efforts to attack the defendant's credibility. It stated:

> … the state simply wishes to empty out its old file and introduce materials that unquestionably were available at the time of trial but that either the state elected not to [present] or were clearly inadmissible. The state's position here crystalizes the question: do all the adjectives in the House standard ("all the evidence, old and new, incriminating and exculpatory," admissible and inadmissible) apply to each other, so that evidence is "old," "incriminating" and "inadmissible" may now be showcased? Or, instead does the combination of "old" and "incriminating" merely refer to the state's case at trial? One detail in the relevant language in *Schlup* may offer a clue: as noted, *Schlup* authorizes consideration of evidence that was either "excluded or unavailable at trial," but only two sentences later appears a limiting restatement of the same idea: "The habeas court must make its determination concerning the petitioner's innocence in light of all the evidence, including that alleged to have been illegally admitted (but with due regard to any unreliability of it) and evidence *tenably claimed to have been wrongly* excluded or to have become available only after the trial." 513 U.S. at 328 (internal citation and quotation omitted).

Id.

In short, "in evaluating a claim of actual innocence, a habeas court is required to posit a hypothetical jury that is entitled to ***consider both admissible and inadmissible evidence, so long***

as the inadmissible evidence is reliable." *Cotinola v. Gipson,* No. EDCV 13-1004-JAK (RNB), 2014 U.S. LEXIS 17357 at *22 (C.D.Ca. Jan. 12, 2014), citing *Carriger v. Stewart,* 132 F.3d 463, 485-86 (9th Cir. 1997) (en banc), Kozinski, J. dissenting, *cert denied*, 523 U.S. 1133 (1998) (emphasis added); *see also Edwards v. United States*, No. 05 CV 0017 (NG), 2005 U.S. Dist. LEXIS 12700 at *11 (E.D.N.Y. June 27, 2005) ("The court will assume that hearsay testimony is admissible at a hearing to determine if granting a petition is justified."). "The Supreme Court emphasized in Schlup, [ ] that a habeas court is not bound by the rules of evidence, carefully explaining that it must 'focus the inquiry on actual innocence'…. Thus, under controlling precedent, the evidence supporting a showing of actual innocence need not be admissible at trial, but merely relevant and previously unavailable. *Wolfe v. Johnson*, 565 F.3d 140, 170 (4th Cir. 2009), citing *Royal v. Taylor*, 188 F.3d 239, 244 (4th Cir. 1999) (recognizing that court assessing actual innocence claim 'is not bound by the rules of admissibility').

Although a court must consider otherwise inadmissible evidence to make a determination under the *Schlup* standard, the evidence must still be reliable, *see Dixon v. Conway*, 613 F.Supp.2d 330, 378-79 (W.D.N.Y. 2009) ("Although a habeas petitioner is not bound by the rules of evidentiary admissibility in presenting alleged new evidence of actual innocence, he nevertheless must be able to establish that the evidence is 'reliable'" and relevant to the defendant's claims of innocence). *See also Schlup*, 513 U.S. at 368 n.47.

The *Schlup* standard for evaluating evidence in assessing claims of actual innocence is clear, well-established and provides reliable guidance. Based on the *Schlup* standard, it is clear that this Court may consider a range of evidence presented by Mr. McIntyre -- old and new, incriminating and exculpatory, without regard to whether it would necessarily be admitted under

the "'rules of admissibility that would govern at trial.'" *House v. Bell,* 547 U.S. 518, 538 (2006), quoting *Schlup v. Delo,* 513 U.S. 298, 327 (1995).

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CERTIFICATE OF SERVICE

I hereby certify that on October 10, 2017, I served the above and foregoing pleading on all counsel of record in this case, including Jennifer Tatum and Francis Gipson.

/s/ Cheryl A. Pilate