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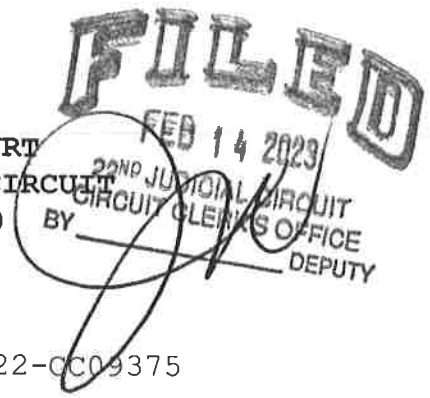

MISSOURI CIRCUIT COURT
TWENTY-SECOND JUDICIAL CIRCUIT
(City of St. Louis)

CIRCUIT ATTORNEY, 22ND JUDICIAL CIRCUIT OF MISSOURI, *ex. rel.* LAMAR JOHNSON,	)	No. 2222-CC09375
	)	Division 17
Relator/Movant.	)	

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Comes now the Court and hereby enters its Order and Judgment pursuant to Section 547.031 RSMo. This cause was filed by the Circuit Attorney of the 22nd Judicial Circuit, Kimberly M. Gardner (hereinafter "CAO" or "Circuit Attorney") for consideration of a motion to set aside and vacate the conviction of Relator Lamar Johnson in *State v. Lamar Johnson*, Cause No. 22941-3706A-01.

Lamar Johnson ("Johnson") was convicted of first-degree murder, under Section 565.020 RSMo (1994), and armed criminal action, under Section 571.015 RSMo (1994). In her Motion, the Circuit Attorney asserts that she has information and evidence that Johnson is actually innocent and was erroneously convicted based on constitutional error at his original trial and based on new evidence discovered since Johnson was convicted. This Court held an evidentiary hearing wherein the Office of the Missouri

Attorney General ("AGO") appeared for purposes of challenging the motion. Lamar Johnson was also directly represented by attorneys for the Midwest Innocence Project. This Court has reviewed the voluminous exhibits, trial and deposition transcripts and the transcript of the hearing in this cause held December 12-16, 2022. At the end of said hearing this Court instructed the parties to submit their post-hearing briefs and arguments. Section 547.031.1 RSMo confers jurisdiction and authority on this Court to consider, hear, and decide the Circuit Attorney's Motion. Having reviewed the relevant materials, this Court now renders the following order, judgment and memorandum.

Johnson was convicted of the murder of Markus Boyd ("Boyd") that occurred on October 30, 1994. No physical evidence connected Johnson to the murder, and Johnson had an alibi. The State's theory of the crime was that Johnson and Phillip Campbell committed the crime together. At trial, the State did not present evidence of a motive.

James "Greg" Elking ("Elking") was the only eyewitness to the shooting. Both assailants wore all black clothing and masks that covered everything but their eyes. After multiple failed line-up procedures, including the identification of the wrong

person, Elking eventually identified Johnson as one of the shooters and Johnson was charged and convicted.

Elking's identification was the State's only direct evidence. During the evidentiary hearing in this matter Dwight Warren, the trial prosecutor, described the case as "iffy" without Elking's identification. No other direct evidence linked Johnson to the crime.

The State offered indirect evidence, including a statement overheard by a jailhouse informant while in the holdover cells alleging that Johnson made a statement to a third jailhouse inmate about a "white boy," who should not have been allowed to live. Since Elking was the only white male at the scene of the shooting, the implication was that Elking was the "white boy" in question. Finally, there was a ski-mask seized from Johnson's car weeks before the day of Boyd's homicide that was similar to the masks used by the shooters in the crime, but that ski-mask was in police custody at the time of the shooting.

During this Court's five-day evidentiary hearing, Elking recanted his identification under oath and testified consistently with his previous writings and under-oath recantations that he was never able to identify the shooters. He further testified that the State provided him with payments,

relocation benefits, and other assistance after he made the identification and agreed to testify at trial. Previously undisclosed documents recording the payments corroborate Elking's testimony.

Furthermore, James ("B.A.") Howard and Phillip Campbell have since come forward through letters and signed affidavits confessing that they were the two assailants who shot and killed Boyd. Both Howard and Campbell have confirmed that Johnson was not involved in the crime. Howard testified before the Court under oath as to his involvement. Campbell, who is now deceased, affirmed in multiple affidavits and letters dating back to 1995 that he and Howard killed Boyd and that Johnson is innocent.

Over the course of five days, the Court had the opportunity to view and question the living witnesses called by the Circuit Attorney and the Attorney General.

The following is this Court's factual findings and legal conclusions as required by Section 547.031.2 RSMo.

On the evening of October 30, 1994, James Elking and Markus Boyd sat on the front porch of Boyd's apartment. The porch light was off. Through the front door was a flight of stairs. At the top of the stairs, a light was on and filtered through the

screen door.

Leslie Williams ("Williams"), Boyd's girlfriend, was upstairs when she heard what sounded like "fireworks." She ran halfway down the stairs before stopping. She saw a man in a dark mask standing over Boyd and firing shots at him. She saw another man, also in a dark mask. Williams ran back upstairs and called 9-1-1 at 9:07 p.m.

Boyd was transported to St. Louis University Hospital where he was pronounced dead at 9:55 p.m.

One neighbor reported seeing two men run through the gangway between houses. There was no report of a witness seeing a car arrive or leave the scene.

Two detectives, including Detective Nickerson ("Nickerson"), began their interview of Williams at 11:55 p.m. Williams told the detectives that both men had some type of mask or hood over their faces. She could not see either of their faces.

On November 3, Elking called Nickerson, after Nickerson had initiated contact through Elking's sister. When asked to describe the shooters, Elking stated that there were two shooters. Both men wore dark clothing and masks or hoods with only "the eyes and nose area cut out." The smaller suspect was

about 5'9" and had a small caliber semiautomatic. The taller man had some type of revolver.

Elking agreed to meet Nickerson to look at some photographs and try to identify the shooters. Nickerson prepared a spread of five photos, which included Johnson and Phillip Campbell. In other words, the five-photo array included two suspects. When Nickerson and Elking met that afternoon, Elking recounted what he witnessed.

According to Nickerson's report, Elking stated that two young, black males in dark clothing and masks appeared out of the north gangway. The suspect he previously described as about 5'9" mounted Boyd. The other suspect, who was at least 6', grabbed Elking's arm, and told him to "get the fuck up." He put a revolver to Elking's head. The shorter suspect fired into "the back of Markus' shoulders, near the head." The taller suspect let Elking go before firing into Boyd's "chest or stomach area." Both men continued to fire into Boyd before fleeing down the gangway. Elking ran across Louisiana Avenue and went home.

According to Nickerson's report, Elking stated that after telling his wife what happened, they were scared and decided to leave their residence and stay with Elking's sister.

According to Nickerson's report, when asked to view

photos, Elking "again stated that the subjects had their faces covered with some type of mask…. However, enough of their faces were visible to allow him a good look at their facial features."

Nickerson showed Elking the array. According to Nickerson's report, Elking identified Johnson as the person who told him to "get the fuck up." Elking did not identify Campbell in the array. Asked to sign the photo to indicate his identification, Elking declined. Elking agreed to view lineups.

Nickerson informed Assistant Circuit Attorney Dwight Warren ("ACA Warren") of Elking's statement and that Johnson had been identified as one of the shooters. An arrest warrant was issued for Johnson at 4:30 p.m. on Nov. 3, 1994.

At 5:45 p.m. on Nov. 3, two detectives pulled over Johnson's car with Johnson and Campbell inside, and brought them to the police station for questioning.

At 6:15 p.m. Nickerson informed Johnson of his rights and that he was a suspect in Boyd's murder. Johnson responded, "Man, that boy was my friend, I didn't shoot him. I was with my girlfriend on Lafayette when that happened." Johnson and Campbell both agreed to participate in lineups.

While Nickerson tried to contact Elking for the lineup, Detective Ralph Campbell ("Det. Campbell") asked to interview

Johnson about an unrelated case. Nickerson was not present during that interview.

Nickerson's report reads "…Det. Campbell asked Lamar J. what was going on between the two groups that were fighting in the Tiffany neighborhood. Lamar J.'s response was 'I shouldn't have let the white guy live.'" Det. Campbell asked what Johnson was talking about. Johnson - according to Nickerson's report - answered "Man there's a witness. I should have never let the white guy live." The report states that Johnson continued, saying: "Man Markus and I used to be friends, now I'm fucked why did I let the white guy live." Det. Campbell asked if Johnson wanted to make a statement to detectives on Boyd's homicide. According to Nickerson's report, Johnson replied, "No, we're fucked, I let the white guy live."

There is no video or audio recording of this interview, nor any written statement by Johnson.

After 9:00 p.m. on Nov. 3, Nickerson picked up Elking for him to view lineups. According to Nickerson's report, Elking was "visibly shaken and extremely nervous." Elking confirmed several times that the lineup participants could not see him through the two-way mirror. Nickerson was present during the lineups.

The first lineup began at 9:56 p.m., less than eight hours

after Nickerson had already showed Elking photos of both Johnson and Campbell. A lineup was shown to Elking. As was done with the photo lineup, only four people were shown to Elking. It must be also be noted that the only person in both the photo lineup and the live lineup was Johnson. This alone could have easily suggested to Elking who the police wanted him to pick.

Johnson was in position #3 in the first lineup. Three fillers from the holding cells stood with him. None of the participants wore masks. The three fillers wore dark bottoms and dark, long-sleeved tops. Johnson wore white pants and a dark short-sleeved shirt.

According to Nickerson's report, after Elking viewed the first lineup with Johnson in position #3, he requested to leave the area. Detectives escorted him to a back room. Elking returned and viewed the lineup a second time. He again asked to leave and was escorted out by detectives.

According to Nickerson's report, Elking then asked Nickerson if the lineup participants could state, "Get the fuck up." All four participants did. "After standing in front of the two-way mirror for about 20 seconds," Elking identified participant #4 as the man who grabbed his arm and shot Boyd with a revolver. Participant #4 was a filler from the City Holdover,

Donald Shaw.

Elking viewed a second lineup, which contained Campbell and three other fillers. Campbell stood in position #4. Campbell and another participant wore dark pants and dark, long-sleeved shirts. One filler wore lighter jeans and a plaid top. The other filler wore khaki pants and a black long-sleeved top with a "Saints" logo.

According to Nickerson's report, Elking viewed the line-up "for nearly a minute without making any identification." Elking asked for the participants to say, "Get the fuck up." They did. Elking "again stood in front of the viewing mirror, visibly shaking." Elking said no one looked familiar, and did not identify Campbell.

In these lineups Johnson was sought as the shooter who "grabbed hold of Gregory Elking," not the shooter who struggled with Boyd. Elking asked for both lineups—i.e., with and without Johnson—to say "Get the fuck up." Elking failed to identify Johnson visually or verbally.

Nickerson's report states that, while Nickerson escorted Elking back to the office, Elking stated, "I want to do the right thing, but I'm scared. I have to worry about my family. All of this is happening too fast. I need time to think about

what I should do...."

After exiting the elevator, the report states that Elking admitted that he lied, and that the shooters were in positions #3 and #4. In other words, according to Nickerson's report, Elking had known that Johnson was in the first lineup, yet still asked the second lineup to repeat the phrase "Get the fuck up." Nickerson's report never explains the basis for Elking's identification of Phillip Campbell, and identifies no particular feature that Elking singled out.

As discussed in more detail below, Nickerson's report also does not mention the State's monetary arrangement with Elking, which began with a $250 payment the following day and culminated in over $4,000 in payments.

The Court's analysis must begin with the testimony of Elking at trial. He was repeatedly referred to as the "key" witness in the case. In fact, Dwight Warren, the Assistant Circuit Attorney who prosecuted the case, testified at the hearing that he would not have proceeded with the case if he did not have the testimony of Elking. Therefore, a closer look at his trial testimony is warranted by this Court.

Elking's role in this case begins with his "identification" of Lamar Johnson as the one who pointed a gun

directly at Elking and told him to "get the fuck off the porch." The setting at this moment is important as Elking testified that he was led to the bottom step and walk while the two assailants shot the victim in the neck and torso several times. Given these facts, Elking could not have been looking at the face of his assailant the entire time.

Then there is the issue of the mask. Elking testified at the hearing that the mask covered all but the eyes of the person who pointed a gun at him. He testified at both the trial and the hearing that the single identifying factor was the "lazy eye" that he saw that was exposed by the mask. That was his primary if not his sole basis for identifying Lamar Johnson as one of the killers. It is not logical to conclude that Elking recognized the face of Johnson during the line-up if in fact he did not have a full view of the assailant's face at the time of the murder.

The lazy eye view has to be considered in light of the fact that it was completely dark, no porchlight and the only light was that which came down the full one-story stairway leading to the apartment of decedent Boyd and his girlfriend. No evidence suggests that this light was any more powerful than common household lighting. The man who pointed a weapon at

Elking wore a mask and was completely in dark clothing. He would have had to turn away from Elking to shoot Boyd. When the shooting was over, the lighting from the doorway would have been behind the assailants or at their side as they stood on the walk at the bottom of the stairs. These facts make the reliability of Elking's identification suspect at best.

Moreover, Elking testified at the trial that he went through three line-ups of four people before he could identify Johnson. Even then he did not identify Johnson's face but only his supposedly "lazy eye." Detective Nickerson testified at the hearing that neither he nor any other officer checked to see if Johnson actually had a lazy eye. Instead, they had Elking draw lines on Johnson's photo array picture specifically indicating that he only saw the eyes of the person who aimed a gun at him. However, at the hearing Nickerson testified that after three line-up attempts Elking actually said "no" when asked if he could identify anyone. This fact was not revealed to the defense counsel, thus depriving the defense of an obvious and powerful cross-examination question. At the hearing, Elking testified that the officers during the line-ups repeatedly encouraged him to make an identification, information that was not revealed to the jury at the trial.

During the trial, Elking made an unequivocal in court identification before the jury. However, Elking made a very inconsistent statement during his direct examination. Elking testified that he was "intimidated" by the people in the lineup yet he identified someone in the line-up. The only other people in the line-up room were the detectives handling the investigation.

The Missouri Supreme Court has established standards for jurors judging the credibility of witnesses who testify at trial:

> Missouri Approved Instructions - Criminal (MAI-CR) > 410.00 SERIES INSTRUCTIONS REQUIRED IF REQUESTED BY STATE OR DEFENDANT
>
> 410.02 EYEWITNESS IDENTIFICATION TESTIMONY
>
> Eyewitness identification must be evaluated with particular care.
>
> In order to determine whether an identification made by a witness is reliable or mistaken, you should consider all of the factors mentioned in Instruction No. 1 concerning your assessment of the credibility of any witness. You should also consider the following factors.
>
> One, the witness's eyesight;
>
> **Two, the lighting conditions at the time the witness viewed the person in question;**
>
> **Three, the visibility at the time the witness viewed the person in question;**

Four, the distance between the witness and the person in question;

Five, the angle from which the witness viewed the person in question;

Six, the weather conditions at the time the witness viewed the person in question;

Seven, whether the witness was familiar with the person identified;

Eight, any intoxication, fatigue, illness, injury or other impairment of the witness at the time the witness viewed the person in question;

Nine, whether the witness and the person in question are of different races or ethnicities;

Ten, whether the witness was affected by any stress or other distraction or event, such as the presence of a weapon, at the time the witness viewed the person in question;

Eleven, the length of time the witness had to observe the person in question;

Twelve, the passage of time between the witness's exposure to the person in question and the identification of the defendant;

Thirteen, the witness's level of certainty of [his] [her] identification, bearing in mind that a person may be certain but mistaken;

Fourteen, the method by which the witness identified the defendant, including whether it was

[i. at the scene of the offense;]

[ii. (In a live or photographic lineup.)

In determining the reliability of the identification made at the lineup, you may consider such factors as the time elapsed between the witness's opportunity to view the person in question and the lineup, who was in the lineup, the instructions given to the witness during the lineup, and any other circumstances which may affect the reliability of the identification;]
[iii. (In a live or photographic show-up.) A "show-up" is a procedure in which law enforcement presents an eyewitness with a single suspect for identification. In determining the reliability of the identification made at the show-up, you may consider such factors as the time elapsed between the witness's opportunity to view the person in question and the show-up, the instructions given to the witness during the show-up, and any other circumstances which may affect the reliability of the identification;]

Fifteen, any description provided by the witness after the event and before identifying the defendant;

Sixteen, whether the witness's identification of the defendant was consistent or inconsistent with any earlier identification(s) made by the witness; and

Seventeen, [other factors.] [any other factor which may bear on the reliability of the witness's identification of the defendant.]

It is not essential the witness be free from doubt as to the correctness of the identification. However the state has the burden of proving the accuracy of the identification of the defendant to you, the jury, beyond a reasonable doubt before you may find [him] [her] guilty.

(emphasis supplied).

This instruction gives nine reasons to question the reliability of Elking's testimony:

First, the lighting conditions at the time Elking saw the shooting. It was completely dark and the assailants were black males wearing dark clothing. Both of them wore masks and, according to Elking, only their eyes and foreheads were visible. The only light came from the top of an indoor stairway that led to Boyd's second floor apartment. There can be no reasonable argument that it was easy for Elking to see such detail about his assailant's eyes. Moreover, Elking testified at trial that the assailant that told him to get up left Elking on the ground level then turned towards Boyd to shoot him. Elking then testified that as he left the assailant pointed the gun at him again then left turning back down the gangway to the back of the building.

The testimony of Leslie Williams was offered at trial to corroborate Elking's testimony. Williams was the girlfriend of the victim and the mother of the victim's child. Regarding Johnson, Williams testified that "his eye is lazy, it is like the whole side of his face is kind of slanted. His whole face is slanted."

This court has viewed the photos of Lamar Johnson used for a photo-line up and a photo of the live line-up that was the basis for Elking's identification. This Court saw no indication of a "slanted face" or lazy eye. This Court, knowing it to be the exclusive key factor in Elking's identification, never saw a "slanted face" or lazy eye on Lamar Johnson while observing Johnson regularly during the hearing. Moreover, no officer documented actually seeing this characteristic until the hearing, when Nickerson insisted he could see the lazy eye in court.

At trial, no medical personnel for the St. Louis Department of Corrections or other medical expert testified that Johnson had a lazy eye. There was no evidence, save the comments of Leslie Williams and the testimony of Elking, that Johnson had a lazy eye. There were no objections to the lack of foundation for either Elking or Williams to diagnose the lazy eye of the assailant beyond a description that the jury could judge against their own view of Johnson.

The Court finds that the descriptions given by Elking and Williams are not supported by the actual physical appearance of Lamar Johnson. There was and is no evidence that Johnson's face has been altered since his trial. Even the prosecutor at trial,

Dwight Warren, was not so daring as to say to the jury: "You can see the way Johnson's eye is lazy, how his face slants downward." If the jury, by either the State or defense counsel, had been called upon to see the evidence before them, they would have likely reached the same conclusion as this Court: there was nothing so distinctive about either eye of Lamar Johnson that Elking's testimony could be considered a reliable identification. Certainly not reliable enough to constitute proof beyond a reasonable doubt.

Most important, the jury was not given a universally accepted standard for what constitutes a lazy eye. **The descriptions given by Elking and Williams do not describe anything that was plainly visible about Johnson. This left the jury with accepting the lazy eye evidence as a fact just because an unqualified witness said it was true.** This is pivotal as even the prosecutor at trial has acknowledged that the entire case against Lamar Johnson was based on the testimony of Elking.

Second, the lighting conditions did not support the reliability of Elking's identification. It was dark with no illumination beyond ambient light coming from the top of the stairway leading to Boyd's apartment. This was not developed by defense counsel at trial. Such an argument could have been made

without any instruction from the Court.

Third, the testimony of Elking indicates that he was taken to the bottom of the steps. The physical location of Boyd's body and the testimony of Elking further indicates that the assailant who pointed a gun at Elking would have turned away from Elking in order to shoot Boyd at close range. This is not completely destructive of Elking's identification but undermines the reliability of the State's primary witness on the matter of Johnson's guilt.

Fourth, Elking testified that he did not know Johnson nor had any previous contact with him. This is important because, as the jury instruction noted above implies, stranger on stranger identification is undermined by the lack of familiarity. This is compounded by the fact the person identified by Elking was wearing a mask in the dark.

Fifth, simply put, Elking is white and the person who aimed the gun at him is black. Again, this is not absolutely determinative of a wrongful identification. However, this Court can take judicial notice of the research that supports the present-day instruction concerning cross-racial identification. The Missouri Supreme Court as well as the Missouri Bar Instructions Committee has attested to this. Moreover, the

research concerning the reliability of cross-racial identification is based on face to face identifications that have been proven wrong. In the present case there is not a face to face but rather a face to mask identification, in the dark of night. In fact, it appears from the record that all Elking witnessed was the assailant's eye. Giving a new meaning to the phrase "eye witness." Again, yet another serious weakness in the case against Johnson.

Sixth, it is clear that Elking was under significant stress. A gun was pointed right at him and he saw a man brutally murdered. He was so scared that he immediately ran and sought to protect his own family for fear that the gunmen would come after him or his wife and child.

Seventh, there is Elking's level of certainty. His trial testimony seems certain but this is only after he went through multiple line-ups. During the hearing, Assistant Circuit Attorney Dwight Warren testified that Elking was "fragile" and that he decided to refrain from testing the certainty of Elking's identification of the lazy eye. He did not ask him to look at the line-up again after he said he was able to make his identification based on the lazy eye. It is notable that even when he had Elking isolate the area of Johnson's face he could

see through the mask, he did not ask Elking to identify the specific characteristics of the lazy eye. Had the jury been fully advised of the problems in this identification, especially the fact that Elking specifically said "no" when asked if he could identify the person who pointed a gun at him and ordered him to "Get the fuck up!" it is likely they would have given less weight to his testimony.

Eighth, the same facts that undermine the certainty of Elking's testimony also go to the reliability of his identification. Specifically, the circumstances show that this fragile and clearly stressed witness may have misidentified Johnson. Of particular concern is the obvious inconsistency between, "I can't identify anyone" to "It might be number four" to "It's the one in the white pants because I recognize his lazy eye." Then there is his recollection of the hood or mask. Elking apparently described the masks first as allowing enough of their features to be visible to allow him a good look at their faces and later as only showing the eyes.

The above leads this Court to conclude that Elking's testimony at trial was not reliable beyond a reasonable doubt and therefore was insufficient, standing alone, to support a conviction of this degree and magnitude. In order to support a

conviction based on a single witness the jury must find a witness's testimony credible beyond a reasonable doubt. State v. Blackmon, 421 S.W.3d 473, 476 (Mo. App. S.D. 2013); State v. Barnes, 917 S.W.2d 606, 607 (Mo. App. E.D. 1996).

Then there is the trial testimony of William Mock ("Mock"). On November 5, 1994, Mock was confined in a holdover cell at the St. Louis City Jail. He was two cells away from Johnson. This witness was proffered as someone who could testify to a statement made by the defendant Lamar Johnson. Mock testified as follows, after establishing which jail Mock was in, the following exchange occurred:

> Dwight Warren: And while you (Mock) were in that jail cell, did you hear any conversation between anybody else in other jail cells on that same section of the holdover?
>
> Mock: Yes. I did.
>
> Warren: Now, were these people talking softly or talking loudly?
>
> Mock: They were talking loudly.
>
> Warren: Did you hear anybody referenced as Lamar?
>
> Mock: Yes, I did.
>
> Warren: Would tell the jury how you came to hear that?
>
> Mock: Well, it was kind of hard to miss.

> There was a lot of people there and people were shoutin' from one cell to another so naturally being in the area I heard----I could hear most of what was goin' on.
>
> Warren: Did you hear anybody direct any question to someone who subsequently identified themselves as Lamar?
>
> Mock: Yeah, some guy that I think under the name of Lamont said, do you think they got enough to hold ya'? He said no, they don't have the gun, they don't have the white boy, they're not askin' the right questions, they don't have shit.

Mock later explained that the only reason he could attribute the statement to Lamar was because he "was hollerin' back" to Lamont. Moreover, Mock attributes other incriminating statements to "Lamar" including having someone named Terrell tell his family to say he was with them at the time of the murder.

Mock recounted what he claimed to hear on Nov. 6 that Campbell asked Johnson if he thought they had a case. "They ain't got nothing, they aren't asking the right questions and they don't have the gun… unless the white boy is snitching, we're all right."

As told by Mock, "Lamont" was again involved, but Mock couldn't recall what was said. They discussed another robbery, Mock claimed Campbell was worried that police would get the gun,

lean on Terrell, and learn about **"the robbery they did on the south side, the white boy."**

Johnson's trial was held on July 11-12, 1995, before the Honorable Booker T. Shaw. Assistant Circuit Attorney Dwight Warren (ACA Warren) appeared for the State. David Bruns of the Public Defender's Office represented Johnson. The State called ten witnesses, one in rebuttal. The defense called a single witness, Johnson's 18-year-old girlfriend Erika Barrow.

Before trial, Mock estimated that the conversations he heard were 20-30 feet away. He was not sure what cells Johnson or Lamont were in but knew that Lamont was "within the same area that we were."

During the State's opening statement, ACA Warren told the jury that Mock did not "want any special consideration" for his testimony against Johnson and just wanted to "tell the police what he heard."

The problem here is patently obvious. In order for a prior statement of a defendant to be admissible there must be a foundation that the statement was in fact made by the defendant. See State v. Floyd, 347 S.W.3d 115, 123 (Mo. App. E.D. 2011). In the present case, two constitutional problems were created by the testimony of Mock.

First, there was no foundation that Mock knew the voice of Lamar Johnson or actually saw Johnson make this highly incriminating statement. Nor was there evidence that the voice heard by Mock had distinctive characteristics unique to Johnson.

Second the statement itself did not refer to any specific "white boy" or indicate any specific circumstances that directly link the statement to Elking. The jury was left to speculate that the statement was being made by Johnson and that Johnson was referring to Elking. The speculative conclusion that Johnson made the statement was easy to make when the jury did not hear any challenge to the reliability that these words were Johnson's words.

Trial counsel for Johnson did not object. Accordingly, the jury was left to speculate that the statement was an actual statement of the Defendant. This is no small matter as the alleged admission by Johnson was clearly offered to bolster the testimony of Elking. This statement could, and likely did, become the brick of certainty that caused the jury to believe Elking beyond a reasonable doubt. Thus, Mock's testimony was inadmissible due to being speculative and unduly prejudicial. United States v. Levine, 477 F.3d 596, 601 (8th Cir. 2007); State v. Williams, 411 S.W.3d 275, 281 (Mo. App. S.D. 2013).

This was a manifest injustice.

In addition to all of this, Mock's testimony left an impression that Johnson was involved in another, unrelated, murder. In addition, the State called upon the jury to rely on Mock by calling Mock "God fearing" and "honest." The law of evidence is intended to make sure that juries do not hand down verdicts that are based on unreliable evidence. When it comes to the out-of-court statements of criminal defendants, there must, in every instance, be proof that the statement is indeed the statement of the defendant. State v. Carter, 285 S.W. 971, 971 (Mo. 1926). By allowing a highly incriminating statement to be used with no evidence that the statement was in fact Johnson's the trial court violated an essential due process right of Johnson's, creating a potentially manifest injustice.

There is also significant evidence that Mock had a criminal history that was not timely disclosed to Johnson's defense attorney so that the information could be used to impeach Mock. At the time of Johnson's trial, Mock had an extensive criminal history, the majority of which was undisclosed to Johnson.

Mock's criminal history included undisclosed felony convictions and two pending charges in Oregon at the time he

testified: One felony count of second-degree Burglary and one misdemeanor count of second-degree attempted theft. A felony case in Nevada was also pending at the time he testified. These were not disclosed to Johnson's attorney prior to trial and they should have been. State v. Hackney, 420 S.W.2d 257, 258 (Mo. banc 1967). The problems with Mock's testimony are compounded by the fact that there were statements by Mock that could have been used in cross-examination to effectively impeach Mock's testimony.

In Villasana v. Wilhoit, 368 F.3d 976 (8th Cir. 2004), the Court made clear the long-established duty of a prosecutor to fully disclose even impeaching evidence to the defense:

> In Brady, the Supreme Court held that 'suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.' 373 U.S. at 87. Materially favorable evidence includes both exculpatory and impeachment evidence. See United States v. Bagley, 473 U.S. 667, 676, 87 L. Ed. 2d 481, 105 S. Ct. 3375 (1985). To comply with Brady, a prosecutor must 'learn of any favorable evidence known to the others acting on the government's behalf in this case, including the police.' Kyles v. Whitley, 514 U.S. 419, 437, 131 L. Ed. 2d 490, 115 S. Ct. 1555 (1995).

Villasana v. Wilhoit, 368 F.3d 976, 978 (8th Cir. 2004)(citing Brady v. Maryland, 373 U.S. 83 (1963)).

A motion under §547.031 shall be granted where the court finds "clear and convincing evidence of actual innocence or constitutional error that undermines the confidence in the judgment." § 547.031(3) RSMo.

"Evidence is clear and convincing when it 'instantly tilts the scales in the affirmative when weighed against the evidence in opposition, and the fact finder's mind is left with an abiding conviction that the evidence is true.'" State ex rel. Amrine v. Roper, 102 S.W.3d 541, 548 (Mo. banc 2003)(citing In re T.S., 925 S.W.2d 486, 488 (Mo. App. E.D. 1996)).

In the present case, the Due Process deficiencies set forth above cause this Court to find constitutional error that undermines the confidence in the judgment of conviction against Lamar Johnson.

This Court now turns to the evidence presented at the hearing in this cause. As this Court did when analyzing the underlying criminal trial, this Court will start by looking at the hearing testimony of Greg Elking, whose trial testimony was the basis of the conviction against Johnson.

Several serious problems with Elking's trial testimony were exposed during the hearing. First, there was evidence that on November 4, 1995, Nickerson picked Elking up and took him to

meet ACA Warren. Immediately afterward, Elking was escorted to the woman in charge of the Circuit Attorney's witness compensation services program. Upon leaving, Elking had received his first payment of $250. Records subsequently discovered reflect additional payments to Elking or on his behalf in excess of $4,000 prior to testifying at trial. These payments were not disclosed to Johnson's defense attorney prior to trial.

Elking was not financially secure at the time and the fact that going into "witness protection" would provide him and his family a degree of stability could definitely impact a juror's decision whether to believe Elking beyond a reasonable doubt.

Then, and most significant, Elking testified essentially that he lied about identifying Johnson as the one who held a gun on him and fired shots into the body of Boyd. Elking explained his false testimony starting with the line-up. Consistent with descriptions of him as a shaky witness, Elking gave some insight into why he made the identification. During the evidentiary hearing before this Court, Elking denied any ability to identify the shooters' faces.

During the shooting, Elking stated he was focused on the gun pointed at him, not the face of the man holding it. Elking described the skin color of one of the men who killed Boyd,

calling it "practically as black as the hood covering his face." When asked by this Court about the skin color of the man who held a gun to him, Elking responded that the man was "[d]ark in color," "just as dark "as Judge Mason." Johnson's complexion is clearly lighter than that of the undersigned judge.

Nickerson's impression of Elking was that he was "at best fragile."

Elking repeatedly told Nickerson that because the shooters had masks on, and because Elking did not know who the shooters were, he could not identify them.

At the hearing, Elking stated that he told Nickerson, "I just - I don't know what these photos would be good for."

Nickerson asked if Elking would look at the photos anyway, and Elking "appeased" him and said he would.

During the photo array, Nickerson slid pictures towards Elking. When viewing a photo of Johnson, Elking said that the person's "eyes look[ed] familiar."

In the ensuing in-person lineup, Elking believed that the perpetrators were present in the lineups because Nickerson indicated he had arrested two suspects prior to the line-up procedures.

Before the in-person lineup, Nickerson told Elking that he

believed the men he arrested killed Boyd "over a drug deal that went bad" and so he "needed to get [these guys] off the streets." Nickerson continued, "[W]e got have [sic] somebody like you, you know, pick these guys out and put these guys away."

Despite not recognizing anyone, Elking felt pressured by detectives to pick someone out. They "kept on [him]."

Elking wanted to help. He testified that he had just seen his friend murdered, he was traumatized, and he trusted law enforcement; he "trusted Joe Nickerson."

Elking felt that if he did not cooperate and help police by identifying someone, he could be charged as an accessory to the crime "because [Elking] brought Markus up on the porch" shortly before the shooting.

Elking also testified that law enforcement told him "[E]ither you're going to be on the winning side or the losing side. What side do you want to be on?"

Once Elking viewed both lineups several times and could not make a firm identification, he got on the elevator with Nickerson. Elking was scared; in that moment, Nickerson placed additional pressure on Elking, repeating that Elking needed to help get the alleged perpetrators off the street.

Because Elking had identified a non-suspect in the first lineup and no one in the second lineup, Elking could tell that Nickerson was "let down" by Elking's failure to make an identification.

Afterward, while they were on the elevator together, Elking, again wanting to help, stated that if Nickerson would tell Elking the numbers where each of the suspects were standing, Elking would "tell [Nickerson] if he was right."

Nickerson informed Elking that the suspects were in spots #3 (Johnson) and #4 (Campbell), respectively.

It was at this point in time that Elking suggested he could distinguish his perpetrator by his "lazy eye."

Elking testified that the term "lazy eye," used in his description meant: "Just maybe lazy would be like a one that would maybe not all the way open like most people's eyes are or even a little disfigurement maybe you know the one is just you know something happened to it or something … but it was just different from the other eye."

This Court spent five days observing Johnson for any signs of a lazy eye beyond the declaration of Elking. Notably, there was no attempt during the trial to explain to the jury exactly what a lazy eye is.

This Court finds that no reasonable juror could, without knowing what specific characteristic(s) distinguished Johnson's eye, look at Johnson's face and ascertain a "lazy eye" beyond mere speculation that Johnson had this characteristic merely because Elking said so.

The above facts lead to the question: Did Elking see something in the eyes of Johnson in the photograph that gave him a characteristic of someone in the line-up that he could use to make an identification or is the lazy eye a fiction? Given that the lazy eye testimony was clearly key to convincing a jury to believe Elking's identification, the Court finds that Elking's entire trial testimony failed to reach a level of reliability sufficient to support a finding of guilt beyond a reasonable doubt.

Immediately before testifying at trial, Elking was placed in a room with Boyd's girlfriend, Leslie Williams, and Boyd's mother. Williams and Boyd's mother were crying.

Elking testified: "I just wanted to help. I wanted to put a murderer away. And I believed [,] you know[,] you guys got to understand that when these detectives talked to me, they made it very clear that they [knew] exactly who it was [who had committed this crime] and that I was… doing the right thing and

no matter if I doubted it or not, it was the truth and I was doing the right thing."

When Elking identified Johnson in the courtroom at trial, it was because Johnson was "the only defendant at the table. [Elking] knew the others were lawyers. [S]o when [the lawyers] said 'Can you point out, you know, who the murderer was,' it wasn't hard to do that. It was the guy sitting at the defense table."

There can be no doubt that placing Elking in a room with the victim's family added to the pressure to testify as expected.

Elking testified he felt bullied into identifying Johnson.

He testified at the hearing that he has been living with the guilt of his false identification for almost 30 years.

He expressed to this Court: "I wanted to help. And this is how this whole thing happened. And I hate it. And I've been living with it for 30 - 25, 28 years and I'm telling you I - I just wish[,] I just wish I could change time."

Elking testified at the evidentiary hearing in order to try to right his wrong. Elking stated: "The thing is, I don't know who killed [Markus] at all. To this day, I still don't. And I think it was wrong what I did, and I take full blame for

it."

Elking could not positively identify Johnson as one of Boyd's shooters. In his own words, his testimony "should not have been a factor" in Johnson's conviction.

This Court now turns to the testimony of James "BA" Howard ("Howard"). Simply put, Howard testified at the hearing that he and Phillip Campbell shot Boyd.

> Q: How did Markus die?
> A: Me and Phillip Campbell killed him at -- on his front porch.
> Q: Do you remember -
> THE COURT: What -- did he just say Phillip Campbell killed him?
> MR. POTTS: He and Phillip Campbell killed him.

The details around this statement must be considered. Further testimony by Howard revealed the following:

> Q: Are you prepared to tell the Court what happened that day to the best of your memory?
> A: Yes.
> Q: Can you please tell the Court how that day started, Mr. Howard.
> A: It was, like, at nighttime. Me and Sirone was in the house making phone calls, smoking weed and drinking a little bit, and we was discussing -- he was discussing Markus about him owing out for some -- for drugs, you know, stuff they was going half on without and, whatever Tiny cut up, it was -- what would be left on the cut up, you know, was -- they made arrangements, or whatever, to sell it, split it, or whatever it was, so. But, anyway, Sirone was upset, and he was --

he wanted to go up there, you know, and handle business or -- but, he had just got out of the hospital. He had -- well, he just didn't get out of the hospital. He had just got a halo taken off his head, and so he still had a neck brace on him.

Howard went on to explain the motive behind the Markus Boyd shooting:

Q (By Mr. Potts): Okay. So, you said there was a drug situation. Can you describe to the Court what the drug dispute, as you understood it, was.
A: That, every time that they bought something, they cut it up, and then they go to separate it, sell it, or whatever. But, what was remaining is, when you cut up crack cocaine, it's crumbs that always -- from you cutting up drugs, and it accumulated to a nice little amount, or whatever, and so he was upset that Markus didn't pay him for it or, you know.

Howard testified as to how the murder unfolded as follows:

Q: Okay. How did you know where Markus Boyd was that day?
A: So, when Tiny, like I said, came in and they -- they was having a discussion, they was like, "Dude up the street right now."
Q: When you say, "Dude up the street right now," -
A: I was talking about Markus.
Q: Okay. You were talking about Markus.
Q: Okay. On the evening of -- on that evening, what did you decide to do about the dispute between Sirone Spates and Markus Boyd?
A: I decided to go up there in his place. Instead of him going up there with a neck brace on, I told him, "I'll go up there for you, man." So, me and Phil suited up and

left the back -
THE COURT: I'm sorry, did you say "suited up"?
THE WITNESS: Yes. Yes.
THE COURT: Okay. I -- I think I know what that means, but I don't want to guess. Tell me what "suited up" means.
THE WITNESS: Put on all black clothing and black ski masks -
THE COURT: All right.
THE WITNESS: -- and left the back of my -
THE COURT: Now, why would you suit up?
THE WITNESS: To go -- because we don't know. We know he up there, but we going to rob, so we don't want his people or his family or anybody to see, you know.
ITHE WITNESS: Yeah. When we left the back of the house, the back of my parents' house, we went up the alley, and we came around -- came around from the gangway to the front of the house, and they was -- and Markus was sitting on the porch. And -- and there was a white guy. He was out there, too. He was on the porch, too. But, when we approached and I grabbed Markus and Phil pointed a gun, I think, at the white guy, he went up to the -- like, if I'm standing in the front of our -- if I'm in the front of there, like, the right side of the porch, he went up -- the white guy went to, like, the right side of the porch.
THE COURT: Hold on. The white guy ran -- ran up the the -- the steps, or something?
THE WITNESS: Yeah. He stood up and, like, went to the corner of the -- of the right side of the porch.
THE COURT: And, at this point in time, you said you had grabbed -
THE WITNESS: Yes.
THE COURT: -- Markus?
THE WITNESS: Yes.
THE COURT: And how were you grabbing Markus?
THE WITNESS: I had my left hand on him. I had a revolver in my right hand.

THE COURT: And so, you had a revolver in your right hand?
THE WITNESS: Yes.
THE COURT: And so, the thing was to try to hold -
THE WITNESS: Yes.
THE COURT: -- Markus and -
THE WITNESS: Try to take him up -
THE COURT: -- make him stand there with the gun.
THE WITNESS: Right.

THE WITNESS: Yes. That's what I'm -- okay. So, the -- the -- the -- the front at the time, his apartment door was open, and so light was coming from out of there and you could hear people upstairs, whatever. But, I'm, like, telling him, like, "Let's go. You know what time it is." And I tried to get him to go up the steps with me, but he got to wrestling with me. So, Phillip, he -- he got to trying to handle them with me.
THE COURT: So, you and Markus Boyd are in a wrestling match.
THE WITNESS: Yes.
THE COURT: But, you got -
THE WITNESS: Not a -
THE COURT: -- the gun.
THE WITNESS: -- not a -- not a hard-core wrestling match.
THE COURT: But you got the gun.
THE WITNESS: Yes, I got the gun, and he's struggling.
THE COURT: And, evidently, Campbell has a gun.
THE WITNESS: Yes.
THE COURT: Keep going.
THE WITNESS: Okay. So, we started struggling and-
THE WITNESS: shots started being fired, and I remember -
THE COURT: Well, he -- evidently from what you told me before the shots were fired, you

never demanded that safe that you thought of, did you.
THE WITNESS: No, no, no. I told him: Let's go -- I told him: You know what time it was, and I tried to take him into the house and he started struggling. That's -- that's -
THE COURT: All right.
THE WITNESS: It never got to this. It never -
THE COURT: So, you never -
THE WITNESS: -- got to this.
THE COURT: -- got to the safe.
THE WITNESS: Yeah, we never got to that point.
THE COURT: Because of the struggle.
THE WITNESS: Yes. There we go.
THE COURT: And the struggle resulted in -
THE WITNESS: No, man.
THE COURT: -- both of you shooting -
THE WITNESS: Yes.
THE COURT: -- the guy?
THE WITNESS: Yes.
THE COURT: All right.
THE WITNESS: Yes.
THE COURT: Do you remember where you shot him?
THE WITNESS: Yes, I do. Phillip was firing, like, in his side, and -- and I had, like, his head bent forward. And I had shot, and then I remember cocking the gun the second time.
THE COURT: What I remember is I'm asking -- my question really was: Do you remember which part of -
THE WITNESS: The back of his head.
THE COURT: -- Mr. Boyd's body -
THE WITNESS: Like, the back of his -
THE COURT: -- was shot.
THE WITNESS: Like, the back of his head and neck area.
THE COURT: The back of his head -
THE WITNESS: Yeah.
THE COURT: -- and neck area.
THE WITNESS: Yes. Yes.

THE COURT: All right. And did you notice by any chance where Mr. Campbell's bullets hit?
THE WITNESS: I just remember him having his gun, like, to -- to the side of his body.
THE COURT: The side of his body.
THE WITNESS: Yes, like -
THE COURT: Got it.
THE WITNESS: -- to the -- pressed inside.
THE COURT: All right. Keep going.
THE WITNESS: And -- and, once those shots is fired, or whatever, we looked up, and the white guy was still standing in the corner, and, shit, we was like, "Let's go," so we went right back the way we came-
THE COURT: So, the white guy was standing in the corner.
THE WITNESS: Yes.
THE COURT: You knew the white guy had seen everything.
THE WITNESS: Yes.
THE COURT: You didn't fire a shot at the white guy.
THE WITNESS: Well, he didn't -- he wouldn't know who we were.
THE COURT: Say that again.
THE WITNESS: He wouldn't know who we were.
THE COURT: I'm sorry?
THE WITNESS: He wouldn't recognize or -- or know -
THE COURT: Oh, you felt -
THE WITNESS: -- who we were.
THE COURT: -- he wouldn't recognize you -
THE WITNESS: Uh-huh.
THE COURT: -- or know you.
THE WITNESS: I'm -- I'm positive he wouldn't.
THE COURT: Because of the masks you had.
THE WITNESS: Yes, sir.
THE COURT: All right.
THE WITNESS: Yes.
THE COURT: So, you thought of: Leave him alone.
THE WITNESS: Yes.

Incorporating this partial transcription of Howard's testimony is important to an appropriate opinion as it shows the basis of this Court's conclusion regarding this witness. The testimony of Howard is pivotal to the motion before the Court.

This Court, as demonstrated above, questioned Howard extensively in order to fully evaluate the credibility of Howard's testimony. Did he become confused when the Court broke up his narrative? Were there inconsistencies with either prior statements or independent objective facts? Did he appear candid or contrived?

This Court also has considered any evidence that corroborates Howard's testimony. In that regard this Court reviewed the letters written by Phillip "Bone" Campbell mere days after Johnson was convicted. These letters were first introduced at the sentencing of Johnson on September 29, 1995. The letters were discovered pursuant to a search warrant. These letters are from Phillip "Bone" Campbell to Lamar Johnson.

The letters contain several relevant statements. Specifically, the statement "That white boy ran when I pulled him from the steps" This is very similar to the testimony of Elking at the trial. The statement "B.A. tried to grab Markus. They started wrestling for the gun and that's why we had to

shoot him." This is very consistent in detail to the testimony of "B.A." Howard in the hearing before this Court.

Then there is the statement: "I don't care if you didn't have anything to do with killing Markus. You locked up for B.A." This is consistent with Howard testifying essentially that Johnson was locked up for Howard's criminal act. Similarly, the statement "I'm just saying we were in the game and you know how the game go. **B.A. just got lucky and didn't get caught.**" (emphasis added). This further corroborates Howard's testimony during the hearing. The proximity of the discovery of Campbell's letters to the trial (within days) and the degree of consistency with the testimony of Howard at the hearing bolsters the credibility of Howard's hearing testimony.

The Missouri General Assembly, in enacting Section 547.031 RSMo gave circuit courts the authority to set aside a conviction even after all appeals and post-conviction relief actions have been exhausted. This necessarily, as noted in the statute, requires this Court to consider a considerable body of evidence and in fact, there is a great deal of evidence that this Court has reviewed. Not only were there the transcripts of both the initial trial and the hearing, but there were numerous letters, pictures and reports. There were also the extensive briefs of

the parties. The issues in this case involved the constitutional integrity of the trial wherein Lamar Johnson was found guilty and the weight of the evidence in this cause offered to support the motion of the Circuit Attorney. That is why it has been necessary for this Court to set forth the facts this Court relied on and the conclusions this Court derived from those facts.

Based on the record before this Court the evidence is clear that Johnson was denied his Due Process right to a fair trial. First, the police so directly interfered with the identification of Lamar Johnson by Greg Elking that the in-court identification was tainted by undue suggestion. "An out-of-court identification can be unduly suggestive if the identification proceeds not from the witness's recollection of first-hand observations, but from the procedures or actions of the police conducting the identification." State v. Moorehead, 438 S.W.3d 515, 520 (Mo. App. E.D. 2014); See also Neil v. Biggers, 409 U.S. 188 (1972); State v. Littleton, 649 S.W.2d 225 (Mo. banc 1983); State v. Ivy, 455 S.W.3d 13, 19 (Mo. App. E.D. 2014). A show-up is impermissively suggestive if "the police… unduly pressure the witness to make a positive identification." State v. Moorehead, 438 S.W.3d at 520.

Second, there was significant information that was withheld by the State that would have impeached the testimony of Greg Elking. Since Elking's testimony was pivotal in identifying Johnson, this undermined Johnson's due process rights. Brady v. Maryland, 373 U.S. 83, 87 (1963); State ex rel. Engel v. Dormire, 304 S.W.3d 120, 128 (Mo. banc 2010).

Third, the testimony of William Mock was lacking in foundation in that there was no proof that he recognized Johnson's voice or observed Johnson talking. Any directly incriminating hearsay alleged to be a statement of the defendant must first be proven to actually be the defendant's statement. State v. Floyd, 347 S.W.3d at 123. This is a necessary plank in the foundation for admitting such statements. This evidence should not have been admitted.

Fourth, there was significant evidence that could have been used by Johnson's defense attorney to impeach Mock's testimony that was not disclosed to Johnson's attorney. This too undermined Johnson's right to Due Process. Brady v. Maryland, 373 U.S. at 87; State ex rel. Engel v. Dormire, 304 S.W.3d at 128.

All of these problems are not merely evidentiary, but cut to the heart of Johnson's right to a fair trial.

Regarding the evidence presented during the hearing, this Court finds the testimony of Greg Elking and of James "BA" Howard to be credible in light of all the circumstances. This combined testimony amounts to clear and convincing evidence that Lamar Johnson is innocent and did not commit the murder of Markus Boyd either individually or acting with another. Consequently, this Court finds that there is clear and convincing evidence of Lamar Johnson's actual innocence and that there was constitutional error at the original trial that undermines confidence in the judgment.

THEREFORE, for the reasons stated above, IT IS HEREBY ORDERED that the motion of the Circuit Attorney of the 22nd Judicial Circuit filed herein for the benefit of Lamar Johnson, is GRANTED.

The conviction of Lamar Johnson in *State v. Lamar Johnson*, Cause No. 22941-3706A-01 is hereby set aside and held for naught.

SO ORDERED:

_____

David C. Mason, Judge

Dated: _____