IN THE CIRCUIT COURT OF THE CITY OF ST. LOUIS
STATE OF MISSOURI

STATE OF MISSOURI, Plaintiff, v. LAMAR JOHNSON, Defendant.	)))))))))	 Cause No. _______________________

MOTION TO VACATE OR SET ASIDE JUDGMENT
AND SUGGESTIONS IN SUPPORT

COMES NOW the Circuit Attorney of the City of St. Louis, and, pursuant to newly enacted R.S. Mo. § 547.031, moves to vacate or set aside the judgment by which the defendant, Lamar Johnson, was convicted of first-degree murder, R.S. Mo. § 565.020 (1994), and armed criminal action, R.S. Mo. § 571.015 (1994), in the shooting death of Markus[1] Boyd. Johnson received a sentence of life without the possibility of parole. The judgment should be set aside because there is clear and convincing evidence that Johnson is innocent; and because material exculpatory evidence was not disclosed to Johnson's defense in violation of *Brady v. Maryland*, 373 U.S. 83 (1963).

OVERVIEW OF THE CASE

Two masked men shot and killed Markus Boyd on his front porch at approximately 9 p.m. on October 30, 1994. There were two eyewitnesses to the crime. The first eyewitness, Greg Elking, was held at gunpoint and narrowly escaped with his life. The second eyewitness was Boyd's girlfriend, who peered outside the front door before retreating upstairs to protect their baby and

[1] The trial record usually spells Boyd's first name as "Marcus." His mother's handwritten letters spell his first name as "Markus," and the Circuit Attorney follows her preferred spelling.

call 911. Following an investigation that lasted only a few days, this Office charged two men for Boyd's murder. One of those men was guilty; one was not.

The first man was Phillip Campbell. Campbell pleaded guilty to voluntary manslaughter and received a sentence of 7 years, which he served. Campbell is now deceased. The Circuit Attorney remains confident of Campbell's guilt.

The second man was Lamar Johnson. As set forth below, this Office has found overwhelming evidence of Johnson's innocence, and the Circuit Attorney no longer has confidence in Johnson's convictions. On the contrary, the Circuit Attorney is confident of Johnson's innocence.

Twenty-seven years ago, the prosecution's case against Johnson was not overwhelming. The case rested upon a "stranger" identification by Elking and two alleged confessions overheard by a jailhouse informant and a police detective. Boyd's girlfriend, the second eyewitness who had known Johnson for years, did not identify Johnson as one of the masked assailants. There was also no physical or forensic evidence that directly connected Johnson to the crime. Additionally, several alibi witnesses placed Johnson at a friend's house at the time of the shooting. Johnson lacked a clear motive and insisted that Boyd was a friend. Although Campbell was guilty, his motive was not initially clear, and there was never an explanation why Johnson and Campbell committed the crime together. The case largely rested on Elking's identification of Johnson.

In letters seized after Johnson's conviction, Campbell identified the second shooter as James ("B.A.") Howard, who lived down the street from Boyd. Over the next 27 years, both Campbell and Howard have executed multiple affidavits confirming that they, and not Johnson, killed Boyd. Those affidavits also explain, in detail, the circumstances that led to Boyd's otherwise-unexplained murder, which arose out of a drug dispute. Their sworn confessions are

corroborated by multiple people who have executed sworn affidavits describing conversations in which Campbell or Howard confessed that they, and not Johnson, killed Boyd. Howard re-confirmed his guilt in a lengthy interview earlier this year. The Circuit Attorney is confident that Howard is the second guilty party.

Reviewing the evidence in light of the whole record, Johnson's conviction cannot stand. Elking's identification was false. Both assailants wore masks, and Elking—unlike Boyd's girlfriend—did not know Johnson at all. Without additional indicia of reliability, the danger of an inaccurate identification is particularly high because Elking is white, while Johnson is Black. But Elking admitted he only glimpsed the assailants' eyes and never saw the rest of their faces. Elking failed to provide a reliable identification of Johnson during a photo lineup and an in-person lineup. Moreover, during the in-person lineup, he not only failed to identify Johnson but instead identified a participant from a holding cell. According to police, Elking finally identified Johnson in a private conversation with a detective before he left the station. Even ignoring any suspicion about this belated identification, Elking's identification was always prone for inaccuracy. Elking's identification of Johnson was: (1) a cross-racial identification; (2) of a stranger; (3) wearing a mask; (4) holding a gun; (5) at nighttime; (6) in dim lighting.

The jailhouse informant's testimony was erroneous and unreliable. The jailhouse informant was a career petty criminal in a desperate situation who sought out detectives and agreed to testify against Johnson in exchange for favors. The informant only recounted a generic-sounding confession by Johnson in a holding cell, supposedly made in the presence of numerous people, and without any unique details. No other witnesses corroborated its occurrence. Furthermore, upon review, the purported overheard "confession" is, in a word, confusing and inconsistent with the record.

The final piece of evidence, another hearsay confession, was also weak. After Johnson's arrest, he denied involvement in Boyd's murder and insisted on his innocence to the lead detective. While the lineup was assembled, a second police detective conducted an impromptu interrogation of Johnson in a different interview room about a different crime. Although Johnson had just denied involvement, Johnson allegedly implicated himself by telling the second detective, "I should have killed the white guy." The statement was not recorded, Johnson did not write out a confession, and the detective admits he destroyed his notes. After the statement, the lineup was held, and it was a failure, and Johnson continued to maintain his innocence.

Following a 2-day trial, a jury convicted Johnson of both counts, and he received a sentence of life without the possibility of parole. Johnson has been in prison since 1995.

Three years ago, this Office's Conviction Integrity Unit conducted an investigation that prompted the Circuit Attorney to file a motion for a new trial. The Supreme Court of Missouri ruled, however, that the motion was untimely under existing rules, meaning that the Circuit Attorney lacked standing to seek relief for Johnson without additional legislative intervention. *State v. Johnson*, 617 S.W.3d 439 (2021).

Within months, the General Assembly obliged by enacting § 547.031, which empowers the Circuit Attorney to file motions to vacate or set aside wrongful convictions. The Circuit Attorney appointed the undersigned special prosecutors to reinvestigate, on a clean slate, whether Johnson was guilty or innocent of Boyd's murder. That investigation confirmed, through clear and convincing evidence, that Johnson did not murder Boyd, and there were constitutional errors that infected his conviction.

Several facts have become clear. ***First***, the two individuals who killed Boyd were Campbell and Howard. Howard, whose mother lived just a few houses away from Boyd, has

credibly described the details of Boyd's murder at length. The confession explains their motive, including that he and Campbell sought to rob Boyd because of a drug dispute. As far back as 1995, Campbell mailed letters to Johnson that acknowledged Johnson was not involved in Boyd's death. Campbell apologized to Johnson for getting charged for a crime he did not commit, but threatened to turn on Johnson if he "snitched." As the years wore on, Campbell executed several affidavits before his death, which remained consistent with his 1995 letters: that he and Howard committed the crime, not Johnson.

Second, Elking's identification of Johnson was not only unreliable, but erroneous. For years, Elking has stated that he felt pressured to identify Johnson as the assailant. Elking, who suffered from substance abuse issues, testified against Johnson after receiving promises of financial support to move to new apartment, among other remuneration. Elking first recanted his testimony nearly two decades ago. During the special prosecutors' investigation, Elking again recanted his identification and expressed his regret and willingness to testify on Johnson's behalf.

Third, the prosecution did not disclose to the defense the fact that Elking received thousands of undisclosed dollars from the State before Johnson's trial. Johnson's defense counsel has sworn that he never received this key impeachment evidence. In their review, the special prosecutors found no evidence in the record that the prosecution ever provided this information to Johnson's defense.

Fourth, the prosecution did not disclose other impeachment evidence about the jailhouse informant. At Johnson's trial, the prosecution only disclosed that the trial prosecutor had agreed to send a letter requesting consideration for early parole. The jailhouse informant, however, had also made other requests, including a pardon from the governor, a reduction in sentence from his trial court, decreases to his level of security, transfer to a drug rehabilitation program, and

rectifying a contraband infraction. Impeachment evidence is not limited to the promises fulfilled by prosecutors by the time of trial, but also the other benefits that a jailhouse informant requests. Based on documentary evidence, the trial prosecutor continued to assist the jailhouse informant with some of these requests after trial. Furthermore, the prosecution did not disclose that the informant had previously sought, and received, consideration for jailhouse testimony concerning another alleged homicide confession. Moreover, the jailhouse informant had multiple guilty pleas that were not disclosed to defense. Finally, the jailhouse informant falsely testified in a deposition that he had never been committed to a mental institution, which the prosecution did not correct before trial.

Finally, in the 27 years since Johnson's conviction, no new, credible evidence has come to light that implicates Johnson. The original investigation was hasty, leading to an arrest within five days. It does not even appear that anyone investigated Johnson's alibi before bringing charges. There is no record of an investigation of any other suspects. With the passage of time, however, the exculpatory evidence has continued to mount. Today, the original basis for charging and convicting Johnson no longer exists. Based on the evidence that exists today, Johnson would not even be charged, much less convicted.

In sum, Johnson's conviction resulted from an abbreviated investigation, incomplete information, and inadequate disclosures concerning the key witnesses' credibility. The Circuit Attorney is convinced that Johnson is innocent of the murder of Markus Boyd. His conviction of first degree murder and armed criminal action must be vacated or set aside.

For any crime, the interest of this Office "is not that it shall win a case, but that justice shall be done." *State v. Long*, 684 S.W.2d 361, 365 (Mo. App. 1984) (quoting *Berger v. United States*, 295 U.S. 78, 88 (1935)). Prosecutors are "servant[s] of the law, the twofold aim of which is that

guilt shall not escape or innocence suffer." *Id.* (quoting *Berger*, 295 U.S. at 88). These prosecutorial responsibilities do not end after obtaining a conviction, and the Circuit Attorney cannot, and will not, turn a blind eye to the conviction of an innocent person.

Prosecutors are "bound by the ethics of [their] office to inform the appropriate authority of after-acquired or other information that casts doubt upon the correctness of the conviction." *Imbler v. Pachtman*, 424 U.S. 409, 427 n.25 (1976). In this respect, public confidence in the justice system is restored, not undermined, when the Circuit Attorney accounts for the wrongful conviction of an innocent person.

Based on a thorough review of the evidence, the Circuit Attorney has concluded that: (1) there is clear and convincing evidence that Johnson is innocent; and (2) material exculpatory evidence was not disclosed to Johnson in violation of *Brady v. Maryland*, 373 U.S. 83 (1963). As a result, it is incumbent upon the Circuit Attorney to ask this Court to correct this manifest injustice by vacating or setting aside Johnson's convictions for first-degree murder and armed criminal action. Johnson was wrongfully convicted, and for 27 years he has suffered the deprivation and hardship reserved for only the most violent and depraved acts that we commit against each other. It is time for Mr. Johnson to go home.

EXHIBITS

The following described Exhibits are attached to and are incorporated by reference in this motion.

1. Transcript of Lamar Johnson trial
2. Phillip Campbell's letters written to Lamar Johnson in 1995
3. Phillip Campbell Affidavit dated August 9, 1996
4. Phillip Campbell Affidavit dated April 5, 2009

5. James Howard Affidavit dated October 29, 2002

6. James Howard Affidavit dated October 27, 2005

7. James Howard Affidavit dated August 21, 2009

8. Lamont McClain Affidavit dated August 21, 2009

9. Anthony Cooper Affidavit dated August 21, 2009

10. Letter from Elking to Rev. Larry Rice dated July 12, 2003

11. Letter from Elking to Lamar Johnson dated November 24, 2003

12. James Gregory Elking Affidavit dated December 17, 2003

13. James Gregory Elking Affidavit dated February 4, 2010

14. 2019 Deposition of Gregory Elking

15. Prosecution and William Mock correspondence

16. Record of payments to Elking

17. David Bruns Affidavit dated July 2, 2021

18. Transcript of Rule 29.15 proceedings

19. Notes reflecting dismissal of Elking traffic tickets

PROCEDURAL HISTORY

On July 12, 1995, a jury found Johnson guilty of first-degree murder and armed criminal action. The Court sentenced Johnson as a prior offender to life in prison without the possibility of parole based on a prior conviction for cocaine possession.

Johnson filed a motion for post-conviction relief under Rule 29.15, which the Court denied after an evidentiary hearing. The Missouri Court of Appeals affirmed Johnson's conviction on direct appeal and the denial of post-conviction relief in a single memorandum opinion. *Johnson v. State*, 989 S.W.2d 238 (Mo. App. 1999) (per curiam).

Johnson next sought habeas corpus relief in federal court, which was denied without an evidentiary hearing. Johnson then filed two petitions for a writ of habeas corpus in the Circuit Court of Mississippi County. The court denied the petitions without an evidentiary hearing. Johnson subsequently filed petitions for a writ of habeas corpus in the Missouri Court of Appeals, Southern District and Supreme Court of Missouri. Those courts also denied the petitions without an evidentiary hearing.

The Circuit Attorney established a Conviction Integrity Unit ("CIU") in 2017. Between 2018 and 2019, the CIU reviewed Johnson's case and issued a report concluding that, based on evidence uncovered after Johnson's trial, Johnson is actually innocent. The CIU also identified various constitutional errors associated with Johnson's conviction.

In 2019, the Circuit Attorney filed a motion for a new trial based upon the CIU's findings. The Court denied the motion because it fell outside the standard 30-day deadline, which led to an appeal that raised a variety of technical issues about timeliness and appellate rights. The Supreme Court of Missouri affirmed on procedural grounds, finding that there is no "authority to appeal the dismissal of a motion for a new trial filed decades after a criminal conviction became final." *State v. Johnson*, 617 S.W.3d 439, 445 (Mo. banc 2021). The Court was clear that its opinion was "not about whether Johnson is innocent or whether there exists a remedy for someone who is innocent and did not receive a constitutionally fair trial." *Id.*

LEGAL STANDARD

Newly enacted § 547.031.1 expressly permits the Circuit Attorney to file a motion to vacate or set aside a criminal judgment "at any time" based on information that a convicted person may be innocent or erroneously convicted. In its entirety, the statute states:

> **547.031. Information of innocence of convicted person – prosecuting or circuit attorney may file to vacate or set aside judgment – procedure.** – 1. A

> prosecuting or circuit attorney, in the jurisdiction in which a person was convicted of an offense, may file a motion to vacate or set aside the judgment at any time if he or she has information that the convicted person may be innocent or may have been erroneously convicted. The circuit court in which the person was convicted shall have jurisdiction and authority to consider, hear, and decide the motion.
>
> 2. Upon the filing of a motion to vacate or set aside the judgment, the court shall order a hearing and shall issue findings of fact and conclusions of law on all issues presented. The attorney general shall be given notice of hearing of such a motion by the circuit clerk and shall be permitted to appear, question witnesses, and make argument sin a hearing of such a motion.
>
> 3. The court shall grant the motion of the prosecuting or circuit attorney to vacate or set aside the judgment where the court finds that there is clear and convincing evidence of actual innocence or constitutional error at the original trial or plea that undermines the confidence in the judgment. In considering the motion, the court shall take into consideration the evidence presented at the original trial or plea; the evidence presented at any direct appeal or post-conviction proceedings, including state or federal habeas actions; and the information and evidence presented at the hearing on the motion.
>
> 4. The prosecuting attorney or circuit attorney shall have the authority and right to file and maintain an appeal of the denial or disposal of such a motion. The attorney general may file a motion to intervene and, in addition to such motion, file a motion to dismiss the motion to vacate or to set aside the judgment in any appeal filed by the prosecuting or circuit attorney.

The new statute grants standing to the Circuit Attorney to seek relief outside the standard timeline for motions for a new trial, in accordance with the Supreme Court of Missouri's pronouncement that "[i]t is incumbent upon the courts of this state to provide judicial recourse to an individual who, after the time for appeals has passed, is able to produce sufficient evidence of innocence to undermine the [] court's confidence in the underlying judgment that resulted in defendants' conviction." *State ex rel. Amrine v. Roper*, 102 S.W.3d 541, 547 (Mo. banc 2003).

Actual innocence claims require a reviewing court to "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, 327-28 (1995)). The statute expressly instructs the Court to consider "information and evidence" on these issues. R.S. Mo. § 547.031.3.

VENUE

Section 547.031.1 provides that venue is appropriate "in the jurisdiction in which a person was convicted of an offense." Because Johnson was convicted in the Circuit Court of the City of St. Louis, this Court is the appropriate venue for this motion.

FACTS

I. The Murder of Markus Boyd

The investigation of this case that culminated in Lamar Johnson's arrest transpired over the course of five days, between October 30, 1994, and November 4, 1994.[2]

A. The Homicide

On the night of October 30, 1994, Greg Elking visited Markus Boyd's home, a duplex apartment located at 3910 Louisiana Avenue. Elking, who had substance abuse issues, occasionally purchased drugs from Boyd, a friend and former coworker. Elking has testified that he went to Boyd's home because he intended to repay a small debt of approximately $40 and potentially purchase crack cocaine. When Elking arrived, Boyd was not home, so Elking waited alone on the front porch.

Not long afterward, Boyd returned home with his girlfriend, Leslie Williams, and their child. The couple first went upstairs to their apartment to put away groceries. Boyd then returned downstairs to talk with Elking alone while Williams remained upstairs with the baby. Boyd and Elking stayed on the front porch and talked by themselves for approximately 20 minutes. While they talked, Boyd possibly engaged in a drug transaction with another person, a white male.

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[2] The facts in Section I are primarily drawn from the trial record, pretrial depositions, and, where appropriate, investigation reports. Certain facts related to *Brady* violations are based on this Office's records or other subsequent investigation.

Around 9 p.m., the two men were sitting on Boyd's porch, which was poorly lit. Two Black men approached Boyd's porch from behind, coming by a small side alley. The two men were armed with handguns and wore black, "ninja"-style masks. Instead of two eyeholes, the masks had a single, oval-shaped hole that exposed the assailants' eyes. Otherwise, the assailants' features were hidden, except that Elking, who is white, could identify their race.

One assailant directed Elking to "get the fuck up" and held a gun on him while the other assailant focused on Boyd, who only said, "No, no, no." The second assailant knelt on Boyd, who only had enough time to scoot backward in his seated position. In a brief struggle, Boyd's assailant shot him. Then, the assailant holding Elking at gunpoint also shot Boyd. Both assailants then alternately shot Boyd several more times. Because it was dark, Elking could see Boyd's body and clothing light up from the muzzle flashes.

The two assailants descended the porch, kept their guns trained on Elking, who had remained frozen with his hands up, and laughed. Then they sprinted back down the same alley and disappeared.

Elking, understandably fearing for his life, fled by foot and returned to his apartment, where he lived with his wife and infant son. Elking was traumatized and feared the shooters might come looking for him. After spending one night at his apartment, Elking and his wife left their apartment in the City and moved in with his sister in St. Louis County.

Boyd's girlfriend, Leslie Williams, was upstairs in the apartment when she heard a series of pops that sounded like fireworks. She ran about halfway down the apartment steps and saw one of the men shoot Boyd while another stood behind him. She ran upstairs to hide and protect her baby, and she called 911 at approximately 9:05 p.m. Williams has testified that she did not

recognize either assailant and could not see their faces because of the masks. She only remembered one assailant as "kind of heavyset," and one as "kind of slim."

After the shooters left, Williams returned downstairs. Elking could hear her screaming for help as he fled. The police responded shortly afterward. Boyd had been mortally wounded. He was pronounced dead at a hospital at 9:55 p.m. that night.

B. Williams' Calls With Her Cousin and Johnson

Lamar Johnson and Boyd previously lived together, until a few months earlier. They had also sold drugs together. After Williams gave birth, however, Boyd moved out. He and Williams then moved in together at the house at 3910 Louisiana Avenue. After moving, Boyd stopped selling drugs as partners with Johnson. They had been "really good friends," Williams recalled, but Johnson had stopped talking to Boyd, which had made Boyd "kind of depressed." Williams had never seen Johnson threaten Boyd and they "never really had any words among each other."

Shortly after the shooting, Williams called her cousin, who was also the mother of Johnson's child. At that time, Williams was unaware of any enemies that Boyd had, and "the only person that seemed like they had any animosity towards him" was Johnson. As a result, "the first thing that came to my mind was Lamar had done it." She did not "know any reason that [Johnson] would want to kill him, but then again you never know."

During their phone call, Williams told her cousin not to tell Johnson that she felt this way. Her cousin called back, however, with Johnson on a three-way call, and Johnson was "going all off," on Williams, "asking me why did I think that." Williams asked Johnson where he was, and he said he was on Lafayette Avenue. She then hung up.

C. Williams' Police Interview

Later that night the police asked Williams to come to the police station for an interview. Investigators asked Williams whether anyone might have a problem with Boyd, and she explained Boyd's and Johnson's history. Williams did not identify Johnson as either of the shooters. A police report stated, however, that Williams "strongly believes that Lamar may have something to do with the murder."

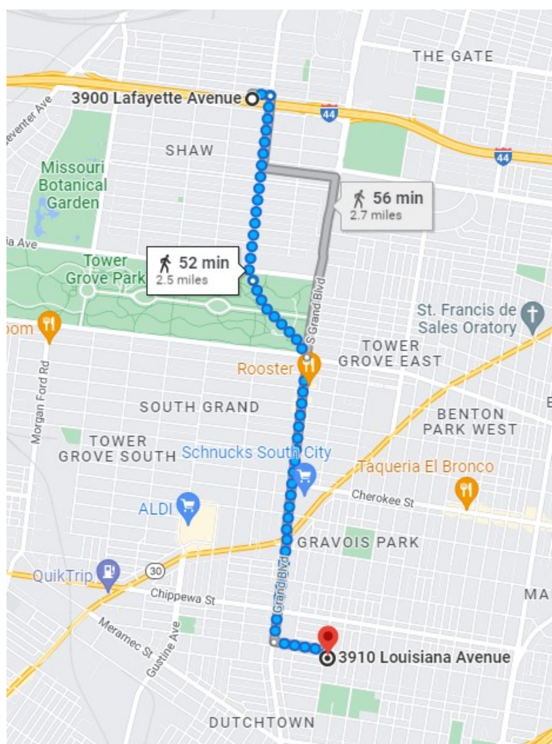
After that interview, the police immediately and exclusively focused on Johnson as a suspect. The police reports do not describe an investigation of any other potential suspects. The police reports state that several witnesses believed there was animosity between Boyd and Johnson. Several witnesses have denied the content of these statements as recorded in the police reports. Either way, the investigative reports depict an investigation in which the police did not seriously pursue other leads, including by investigating whether anyone *other* than Johnson might have had a motive for shooting Boyd.

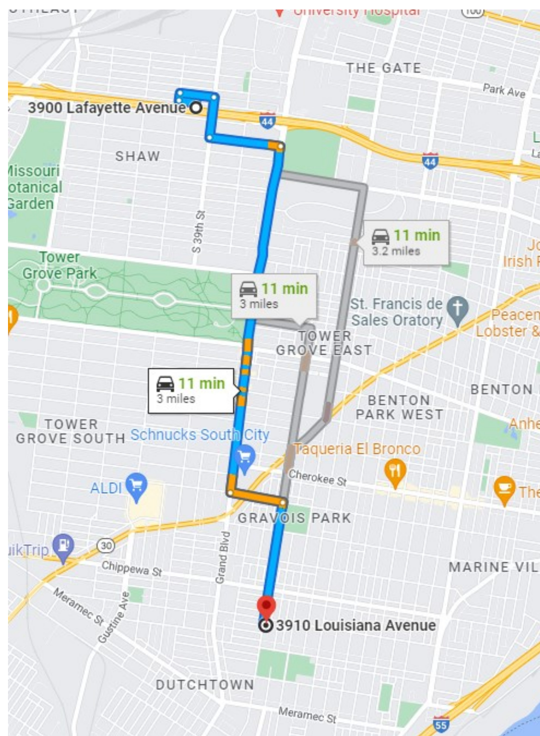
D. Johnson's Alibi

Multiple alibi witnesses have testified or provided statements that Johnson was at a friend's home on the 3900 block of Lafayette Avenue at the time of Boyd's murder on October 30. Johnson's then-girlfriend, Erika Barrow, testified at trial and executed an affidavit in 2009 that Johnson picked her up around 7 p.m. that evening and then drove to the friends' apartment. One of those friends, Robert Williams (no known relation to Leslie Williams), has also executed a declaration that Johnson was present at the apartment that night. Both Barrow and Robert Williams confirm that Johnson only left the apartment for a total of five minutes.

The 3900 blocks of Louisiana and Lafayette Avenues are not nearby. Johnson's location was 2.5 to 3 miles away from Boyd's home on Louisiana Avenue. The travel time by foot is

approximately 50 minutes, and the travel time by car is approximately 11 minutes. A round trip car ride would take at least 22 minutes—without accounting for the length of time associated with the crime itself or disposing of any evidence.





As explained below, Johnson provided this alibi to the police on November 3, telling them that he was with his girlfriend on Lafayette Avenue. There is nothing in the police reports to indicate that the police ever followed up to confirm its truth or falsity.

E. Elking's Initial Meeting With a Detective and Photo Array

Leslie Williams provided the police with Elking's first name and prior employer. The police initially struggled to make contact with Elking, who had gone into hiding. Finally, the police managed to contact Elking through the employer and his family.

On November 2, Elking's sister contacted a detective. Elking's sister told the detective that he was afraid of the shooters and that the police might believe Elking was involved in the

shooting. The detective informed Elking's sister that he needed to come forward and that his identity would be protected.

Elking's wife also contacted the detective to tell him that Elking was scared. The detective again told her that Elking needed to come forward.

On November 3, Elking himself made contact with the detective and confirmed that he had witnessed Boyd's murder. When asked to describe the shooters, Elking could only say that there were two Black shooters: one was about 5'9" and armed with a small caliber handgun; and the other was taller and armed with a similar handgun. Elking stated that both assailants wore masks and dark clothing.

The detective arranged to meet Elking later that day at a restaurant. Elking did not offer much more detail, describing the shooters as two young Black males, dressed in all dark clothing and masks. He repeated that one assailant was about 5'9" tall, with a slim build, and the other was at least 6' tall.

The detective showed Elking an array of five photos, which included both Johnson and Phillip Campbell. According to the police report, Elking identified Johnson in one of the photos because his eyes looked like the eyes of one of the shooters. Elking, however, refused to sign the back of the Johnson photo.

There is no record in the police report that Elkin identified Campbell in the photo array.

After that interview, the detective advised the Circuit Attorney's Office that Johnson had been identified as one of the shooters and arranged for his arrest.

F. Johnson's Police Interviews

Later that evening on November 3, the police arrested Johnson and Campbell. Johnson agreed to speak with a detective about Boyd's murder. Johnson denied any involvement in the

shooting and agreed to participate in a lineup. He told the detective that Boyd was his friend, and, as stated above, that he was with his girlfriend on Lafayette Avenue at the time of the shooting.

While they waited to assemble the lineup, Det. Ralph Campbell, who was not investigating Boyd's murder, took Lamar into a separate interview room to discuss an unrelated case involving an ongoing dispute in the Tiffany Neighborhood. There is no recording of this interview. According to Det. Campbell, Johnson stated, without prompting, that he "should not have allowed the white guy to live." According to Det. Campbell, he asked Johnson what crime he was referencing, and he indicated he was talking about Boyd's murder. There are no witnesses to the interview other than Det. Campbell and Johnson. Det. Campbell admitted under oath that he destroyed his notes.

Johnson denies making this hearsay statement. In his Rule 29.15 proceedings, Johnson testified that he had wanted to testify in his own defense, but his counsel discouraged it because of his criminal record. He then testified as follows:

> Q What would you have told the Court about your interview with Detective Campbell?
>
> A I would have told the Court that Detective Campbell is a liar. He came in and asked me about the Tiffany Neighborhood feud. He asked me did I have the weapons involved in the incident. I told Detective Campbell that I talked to officers in August about that and that I didn't want to talk about that at that time. I wanted to talk about Marcus and he kept pressin' me to talk about this incident and I told him I didn't cooperate with him and he got upset.

G. The In-Person Lineup

By the time of the lineup, Elking had already seen pictures of Johnson and Campbell in the detective's photo array at the restaurant. The first lineup included Johnson and three others from holding cells. None of the lineup participants wore masks.

Elking, however, did not identify Johnson. Elking also asked for the lineup participants to repeat the phrase "get the fuck up," which the first assailant had said to Elking. After three viewings of the initial lineup with Johnson in it, Elking identified one of the individuals from a holding cell as the assailant who grabbed him by the arm.

VI. Witnesses: CN:

1. SECRET WITNESS ____________

2. ____________ ____________

3. ____________ ____________

4. ____________ ____________

5. ____________ ____________

VII. Identifications Made:

1. Participant in Lineup SHAW, DONALD #4
Name Position No.

Identified by SECRET WITNESS

2. Participant in Lineup ____________
Name Position No.

Identified by ____________

3. Participant in Lineup ____________
Name Position No

Identified by ____________

Remarks: (Include any unusual occurrence, disturbance or difficulties encountered with regard to the conduct of the lineup)

Verbal words spoke by each participant at direction of Officer

"GET THE FUCK UP."

In the second lineup, which included Campbell, the participants also repeated the phrase "get the fuck up." Elking said that "no one in the lineup looked familiar."

VI. Witnesses: CN:

1. SECRET WITNESS ________ ________

2. ________ ________

3. ________ ________

4. ________ ________

5. ________ ________

VII. Identifications Made:

1. Participant in Lineup ________
Name Position No.

Identified by ________

2. Participant in Lineup ________
Name Position No.

Identified by ________

3. Participant in Lineup ________
Name Position No

Identified by ________

Remarks: (Include any unusual occurrence, disturbance or difficulties encountered with regard to the conduct of the lineup)

Verbal words spoke by each participant at direction of Officer

"GET THE FUCK UP."

According to the lead detective and Elking's initial testimony, Elking subsequently had a change of heart before leaving the police station. As related by the detective, Elking admitted that he was lying when he did not identify Johnson and Campbell during the lineup and that he could have identified both of them. Following Johnson's trial, however, Elking has alleged that police detectives told him Johnson's and Campbell's positions in the lineup and pressured him to identify them.

Either way, Elking took the position that Johnson was the assailant who held him at gunpoint, while Campbell was the assailant who struggled with Boyd and fired the first shot.

Elking claimed to recognize Johnson based on a "lazy eye," and Campbell based on a scar on his forehead.

H. Elking's Payments from the State

The following day, November 4, Elking received $250 for moving expenses. These payments continued for several months. Elking used the money to move from his apartment to a new place in St. Louis County and to pay an initial deposit on an apartment, bills, and other expenses, as well as unidentified "miscellaneous funds" to Elking directly. Over a course of several months, the State paid Elking more than $4,200 as the ledger below shows (*see* **Exhibit 16**).

From Ledger:

Transaction	Payee	Amnt	For
1	11/04/94 – Greg Elking	$250	Moving Expenses
2	11/09/94 – Laclede Gas	$227.99	Utilities
3	11/09/94 Southwestern Bell	$132.30	Utilities
4	11/09/94 - Union Electric	$848.61	Utilities
5	11/09/94 - Greg Elking	$242.43	Moving Expenses
6	11/22/94 - McBurie Moving	$392.50	Moving Expense
7	11/22/94 - Public Storage Mgmt	$105.00	Misc.
8	12/1/94 - Greg Elking	$222.43	Misc.
9	12/1/94 - Greg Elking	$194.99	Misc
10	1/24/95 - Greg Elking	$55.36	Misc. (Storage Facility)
11	2/2/95 - Public Storage Mgmt ??	$67.00	Misc. (Storage (Furniture)) (94-13606) AB
12	3/10/95 - Public Storage Mgmt	$77.00	Misc (Storage) Furniture (94-13606 AB)
13.	3/16/95 – Bill Baker	$1425.00	Moving Exp. (Rent, Initial Deposit) [illegible] home
		$4241.08	

Asset Forf. Victim/Witness Protection Fund

Elking, who suffered from financial hardship in addition to his issues with substance abuse, has confirmed in letters and sworn testimony that these payments helped induce him to testify against Johnson. These payments never came up at trial. Johnson's defense attorney has

confirmed under oath that he did not receive information about these payments before trial and would have used them to impeach Elking. During an interview with the trial prosecutor, he also had no recollection of turning over this information.

Elking has also stated that he had several outstanding traffic violations at the time, which the prosecution helped resolve. Because of the number of outstanding traffic violations and bench warrants, Elking's license had been suspended, and his car tags were not legal.[3] Documents in the Circuit Attorney's file show *nolle prosequis* for several tickets, including a drivers' license violation in March 1995 (*see* **Exhibit 19**).

TICKETS

Greg ELKING

94 0361582 - 7
94 0361581 - 9
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Insurance
License -
Speeding

3/3 NOLLE PROSSE George 3/13

This information was not disclosed to Johnson's defense either.

[3] On the evening of the shooting, for example, Elking's brother dropped him off at a grocery store, and he walked to Boyd's home and had to run back to his apartment after the shooting.

I. The Jailhouse Informant Comes Forward

1. William Mock's History

William Mock was a career petty criminal with alcohol and substance abuse issues and who transitioned in and out of homelessness. Most of the following criminal history was not revealed to Johnson's defense.[4]

Between 1976 and 1989, Mock had six guilty pleas or convictions on his record: (1) larceny (Platte County); (2) fraudulent checks (Platte County); (3) disturbing the peace (Platte County); (4) first-degree tampering (Platte County); (5) harassment (Platte County); and (6) receiving stolen property (Clay County).[5]

In 1989, Mock gave the police the false name of "James C. Robb" when he was charged for receiving stolen property in Clay County, to which he pleaded guilty.

By the early 1990s, Mock's crimes grew increasingly frequent, as well as references to his alcohol and substance abuse, which placed him in rehabilitation programs. In 1991, Mock pleaded guilty to harassment and resisting arrest in Platte County. After pleading guilty to driving while intoxicated in a separate case in 1991, No. CR191-641M (Platte County), a rehabilitation program may have offered him a position in Arizona to get him out of Missouri. In 1992, Mock pleaded guilty to auto burglary in Maricopa County Arizona, No. CR91-1729.

In February 1992, Mock failed to report to Probation Services, and the probation officer learned that Mock "was being held at the Missouri Western Mental Hospital on a Psychiatric Hold."

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[4] This discussion primarily focuses on a chronological history of Mock's guilty pleas and convictions for violations of Missouri state law, not violations of municipal ordinances. The guilty pleas and convictions that were not disclosed to Johnson's defense are underlined.

[5] The apparent ten-year gap in his Mock's Missouri criminal history is filled by out-of-state guilty pleas and convictions for: (1) burglary in California in 1978; (2) assault with intent to cause physical injury in 1980 in New York, *see* N.Y. P.L. 120.00; (3) criminal mischief in 1980 in New York, *see* N.Y. P.L. 145.00; (4) and theft in California in 1986.

Later in 1992, Mock was arrested for first-degree attempted burglary, a Class C felony, in Jackson County, Missouri. While in jail, Mock came forward claiming to have overheard a homicide confession from another inmate. He brokered a deal with the prosecutor and agreed to testify against the defendant in *State v. Joe Smith*, No. CR91-1927, in exchange for the prosecution's downgrading the charge to second-degree property damage, to which Mock pleaded guilty and received a 6-month suspended sentence.

In 1993, he pleaded guilty to driving while intoxicated and driving with a revoked license in this Court, No. 22919-07679. Later that year, Mock pleaded guilty to unlawful use of a weapon in Jackson County, No. CR93-1616. On July 23, 1993, the court sentenced Mock to five years in prison, suspending execution upon completion of five years of probation with a special condition of completing a substance abuse program.

In violation of his probation, Mock went to Florida. On December 29, 1993, Judge Mason,[6] who had taken over Mock's case in Jackson County, suspended Mock's probation and issued a warrant for his arrest. While Mock was in Florida, he was arrested for auto burglary in January 1994, to which he pleaded guilty. The Florida records describe Mock as homeless. The State of Florida extradited Mock back to Jackson County. On May 23, 1994, Judge Mason revoked Mock's probation by leaving the state without permission, by failing to report, and by failing to complete a substance abuse program. The court remanded Mock for execution of his sentence, but recommended placement at the Mineral Area Treatment Center.

A few months later, on September 7, 1994, Judge Mason re-stayed the execution of the balance of Mock's sentence, apparently based on receiving treatment, and released him from

[6] Judge Mason is identified by name in this discussion solely for purposes of clarity because Mock refers to Judge Mason by name in his subsequent correspondence with the prosecution, and Judge Mason's oversight of his case provides the relevant context for Mock's request for assistance.

custody. Judge Mason again placed Mock on probation for two years with conditions including the completion of an aftercare program, attending Alcoholics Anonymous/Narcotics Anonymous meetings, not consuming alcoholic beverages, and submission to random drug testing.

A little more than a month later, however, by October 24, 1994, Judge Mason had again suspended Mock's probation and issued a warrant for his arrest based on his failure to obtain permission before leaving the Kansas City area, imposing a $5,000 bond (10% or secured).

2. Mock's Statement to Police

On November 2, 1994, the St. Louis police arrested Mock on suspicion of breaking into a church van. Thus, on November 5, 1994, Mock found himself in a St. Louis City jail cell waiting to be sent back to Kansas City to account to Judge Mason for another probation violation shortly after Judge Mason had shown leniency.

Mock approached a jailer and asked to speak with a homicide detective. Mock reported that he had overheard a conversation in his cell block regarding a murder. According to Mock, he overheard Johnson confess to the murder to Phillip Campbell and another man named only "Lamont." The first interview was not recorded on audio, and Mock was returned to his cell.

Based on jail records, Mock was never in the same cell as Johnson, Campbell, or Lamont. Instead, as Mock explained it, the other men were having (loud) conversations between their own cells, in the presence of all of the other inmates. None of the other inmates corroborated the alleged confession.

On the next day, November 6, Mock again spoke with the detective and claimed to have overheard an additional conversation, allegedly regarding the Boyd homicide. As interpreted by the police, Mock stated he overheard Johnson and Campbell discussing their involvement in Boyd's shooting as well as an unrelated homicide occurring in South City. This purported South

City crime is unknown and, in fact, it appears that police attempted to identify the incident but could not.

Mock's second interview was recorded. As recounted in a police report, the alleged confession is not a model of clarity. It is difficult to disentangle the two crimes that Mock allegedly overheard:

> Mock stated that on 11-5-94 he over heard Lamarr [sic] Johnson in cell #7 talking to Phillip Campbell. Johnson was telling Campbell that the Police ain't got nothing, because they ain't asking the right questions. Johnson told Campbell, "They sure don't know nothing about that white boy we did.["]
>
> Mock then heard Johnson talking to someone named Lamont. Johnson told Lamont to go [to] 3910 Folsom and find Terrell and tell him to give you the chrome piece (gun). Lamont asked Johnson, "Where the other piece at." Johnson replied, "B.A. and Easy got the black piece. Lamont replied, "Easy who." Johnson replied, "Eddie."
>
> Johnson further stated to Lamont, "And be sure to tell my mother to tell the police that I was with them, when this went down."
>
> On 11-6-94, Mock again requested to speak to the Homicide Section, and was conveyed to the Homicide section by Detective Ronald Jackson.
>
> Mock stated that Johnson and Campbell were again talking about the Markus Boyd Homicide and another Homicide that they committed on the south side where the victim was a white male.
>
> Mock stated he over heard Campbell asked [sic] Johnson, "You don't think they (Police) got enough to convict us do you." Johnson replied, "They (Police) don't have the gun, they don't have Terrell and they don't have the white boy. And as long as the white boy ain't snitching we're cool, and we're going to take care of the white boy."
>
> Campbell stated to Johnson, "What if they (Police) get Terrell or the white boy. What if they get Terrell with the gun and they lean on him. He'll snitch on us about the robbery we did on the south side and the white boy you shot." Johnson replied, "Shut up and stop whining." Campbell replied, "You didn't have to kill him." Johnson replied, "Man he wouldn't give up the shit."
>
> Johnson then yelled down to a person named Lamont and told him, "Man you got to get a hold of Terrell and get that gun and take care of that white boy."

There are a variety of problems with Mock's statement in the police report. Reread against the full investigative record, Mock's statement has little probative value. These discrepancies reflect either Mock's misunderstanding of the conversation he claimed to have overheard or his difficulty ascertaining what information he believed the police wanted to hear.

First, the only statement on November 5 that arguably related to Boyd's homicide is Johnson's statement "that the Police ain't got nothing, because they ain't asking the right questions." This was an observation, which any innocent person could make.[7]

Second, Johnson's next alleged statement shifted to the ***other*** alleged crime: "They sure don't know nothing about that white boy we did." Elking, of course, was alive, so the "white boy" was not Elking.

Third, there is no allegation that anyone named "Terrell" was involved in Boyd's shooting. There were only two assailants. This statement, if even true, would appear to relate to the other alleged crime.

Fourth, the 3910 Folsom Avenue address has no meaning. Police detectives visited the property, and it was vacant.

Fifth, the reference to the "chrome piece (gun)" is erroneous because Elking has testified that both guns used in the Boyd homicide were black.

Sixth, Johnson's statement to Lamont to "tell my mother to tell the police that I was with them, when this went down" makes little sense. Johnson had already told the police during his interrogation on November 3 that he was with his girlfriend on Lafayette Avenue.

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[7] Even though the police interrogated Johnson, this is the complete description of that interview: "Lamar J. at that time he stated to Detective Nickerson, 'Man, that boy was my friend, I didn't shoot him. I was with my girlfriend on Lafayette when that happened.' Lamar J. continued to deny any involvement in the incident and stated he knew of no one who would want to kill Markus. Lamar J. was informed that he was going to be placed in a lineup relative to the incident. He stated that he would voluntarily do so because no one could or would pick him out."

Seventh, Johnson's alleged statement that "They (Police) don't have the gun, they don't have Terrell and they don't have the white boy" and similar statements again do not appear to describe Boyd's shooting, including the fact that there were ***two*** guns (not one) involved in the Boyd homicide.

Finally, Campbell's statement that "you didn't have to kill him," to which Johnson replied, "Man he wouldn't give up the shit," is inconsistent with the fact that, according to Elking, ***Campbell*** was the person who struggled with Boyd at the top of the porch and fired the first shot. This appears to be either a description of the alleged South City crime, or a bad guess by Mock.

Rereading the police report against Mock's transcribed statement also reveals that the police report is inaccurate. For example, as stated above, the police report begins:

> Mock stated that on 11-5-94 he over heard Lamarr [sic] Johnson in cell #7 talking to Phillip Campbell. Johnson was telling Campbell that the Police ain't got nothing, because they ain't asking the right questions. Johnson told Campbell, "They sure don't know nothing about that white boy we did.["]

Mock's statement reveals, however, that Johnson allegedly made these alleged statements to ***Lamont***, not his alleged accomplice, Campbell:

> Q. Okay, Mr. Mock is currently being interviewed in reference to the homicide of Marquis [sic] Boyd and as far as his statement, what he has overheard while being confined to second floor hold over cell 10, in which he overheard two suspects conversing about a homicide, suspects being identified Lamar Johnson and Phillip Campbell. Okay Mr. Mock, in reference to what you heard on November 5, when you first heard Lamar discussing the events in reference to his homicide, what did you overheard.
>
> A. I overheard him saying that… he was talking to a guy I think named Lamont and telling him…
>
> Q. Excuse me, okay you said Lamar was talking to who?
>
> A. Lamar was talking to Lamont, and he was saying uh that uh the police didn't have shit that uh they weren't asking the right questions, uh, that uh, that they weren't asking the right questions they didn't have the gun, they didn't have no case and us [sic] the wanted Lamont ot get ahold of Terrel at 3910 Fulsom to get a

__________ gun, and Lamont said well what about the other gun and he say [sic] BA and E-Z got the other gun there down in the hood, find them and get the gun.[8]

As this exchange reveals, there is also no reference to "the white boy we did" that appears in the police report related to November 5.

In sum, it is impossible to discern how much of Mock's statement as a jailhouse informant was misunderstanding, confusion, or Mock's outright fabrication to curry favor with the police and prosecutors.

3. Mock's Ongoing Probation Problems

Although the charges appear to have been taken under advisement, no charge was ever filed against Mock for his November 2 arrest on suspicion of breaking into the church van. On November 8, Mock returned to Kansas City. Judge Mason ordered that Mock had forfeited his prior $5,000 bond and ordered a new bond amount of $50,000 (secured). Following a hearing, Judge Mason revoked Mock's probation based on failure to report and absconding from supervision. Thus, on January 26, 1995, the court remanded Mock to the Jackson County Department of Corrections for execution of his sentence.

On May 17, 1995, Mock received a tentative release date of September 26, 1996, although his sentence would end in January 1999.

From the existing files, it is not clear of the exact point at which Mock first approached the prosecution. In a letter to the trial prosecutor dated June 1, 1995, and sent from Western Missouri Correctional, Mock began a series of requests, including that he wanted to use his assistance as pretext why he should not have to return to prison: "I am willing to testify as long as I do not have

[8] The transcribed statement is in all capital letters, which has been modified for ease of reading.

to return to the Department of Corrections once I testestify [sic]. I cant I wont live in protective custody or any institution once I testify."

Mock also requested other types of relief beyond parole. He continued: "I feel my testimony is worth a pardon by Mr. Carnahan or a reduction in my sentence by Judge Mason Division 11 of the Jackson County Court, Kansas City, Missouri."

Mock explained why he needed *more* than a letter concerning early parole—because, if paroled, "the head of Probation and Parole … and his agents can also violate my parole and return me straightback [sic] here for next to nothing. I can't take that chance, these young blacks are too tight nit [sic] in this prison system. Of course I don't plan to violate my parole, but its [sic] way to [sic] easy to wind up right back here for next to nothing. If that were the case the blacks would know I testified before I was returned to prison. That will not happen."

Mock thus made a different proposal: "I propose this, that Judge Mason reduce my five year sentence to time served for my testimony, or that Govenor [sic] Carnahan pardon me with time served thus guaranteeing my safety [sic] away from the Department of Corrections." Mock's June 1 letter concluded: "I am positive that this can be worked out for the good of all. I will uphold my end of this situation as I am positive you will fulfill your obligations to me."

II. Johnson's and Campbell's Convictions

Johnson's trial occurred on July 10-12, 1995. (**Exhibit 1**). The prosecution called nine witnesses: (1) Elking; (2) an evidence technician who collected shell casings at the scene; (3) a detective who previously pulled over Johnson and seized a mask (which was still in State custody); (4) the medical examiner; (5) Leslie Williams; (6) Det. Campbell; (7) Mock; (8) a custodian for jail records concerning Mock's presence in jail; and (9) the detective who recorded Mock's statement.

The defense called one witness: Johnson's girlfriend, Erika Barrow.

In rebuttal, the prosecution called the lead investigator to testify regarding the distance between the 3900 blocks of Lafayette Avenue and Louisiana Avenue. The jury returned guilty verdicts on both counts, for first-degree murder and armed criminal action.

A. The Prosecution's Case

The prosecution presented no physical or forensic evidence from the scene that implicated Johnson. Except for Elking, no eyewitnesses implicated Johnson. Williams, who knew Johnson, did not identify him as one of the assailants. There were no recorded confessions—only the out-of-court statements as reported by Mock and Det. Campbell. Elking retold the events leading up to the shooting, as described above. According to Elking, the man who held him at gunpoint had a lazy eye, and Elking identified him in the courtroom as Johnson.

Elking testified he got a good look at the gunman who approached him and had subsequently picked Johnson out of the photo array at the restaurant. He testified he refused to sign the back of Johnson's photo, however, because he was scared. He further stated he initially identified the wrong person at the in-person lineup because he was intimidated by the men in the lineup and was considering backing out. There was no testimony about Elking's receipt of more than $4,200 from the State.

A detective testified that, several months before Boyd's murder, he had pulled over Johnson and seized a mask that appeared similar to the one used in the crime. That mask was still in police custody at the time of the Boyd homicide

Leslie Williams testified about her recollection of the crime, but did not identify Johnson. Williams merely stated that she called her cousin after the crime, and that her cousin and Johnson had called back on a three-way call.

Det. Campbell testified about Johnson's rhetorical question during the interview concerning the other case of why he let "the white guy live." Det. Campbell was unable to provide any additional context for this alleged spontaneous confession. He admitted destroying his notes.

Finally, Mock testified about Johnson's alleged jailhouse confession. Mock testified that the only thing he requested in exchange for his testimony was that the prosecutor write a letter to the parole board on his behalf.

With respect to the information that had not yet been disclosed to the defense, the prosecution did not develop other types of consideration that Mock had requested in exchange for his testimony; Mock's prior service as an informant in another homicide case; or his long history of criminal convictions. Finally, Mock had previously testified in a deposition that he had never spent time in a mental institution, which was false testimony that was not corrected before trial.

B. Johnson's Defense

Johnson, who was represented by the Public Defender's Office, presented his alibi defense, questioned the reliability and credibility of Elking's identification, and sought to impeach the credibility of the alleged hearsay statements reported by Mock and Det. Campbell.

The defense had endorsed three alibi witnesses: (1) Johnson's then-girlfriend, Erika Barrow; (2) Anita Farrow; and (3) Robert Williams. The defense only called Johnson's girlfriend, who testified that she and Johnson were at their friend's home near 3900 Lafayette, along with another friend. Barrow was insistent that Johnson only left the apartment for approximately five minutes.

Johnson's counsel later testified that he subpoenaed Farrow, but she failed to appear at trial. Robert Williams ***did*** show up, but Johnson's counsel did not call him as a witness.

C. Rebuttal

A detective testified as a rebuttal witness that it would take no more than five minutes to drive from Johnson's location to Boyd's location and then back.

This testimony was erroneous. This distance would require a 20-30 minute roundtrip. To drive the distance, as the detective claimed, in five minutes, one would have to ***average*** 75 mph on City streets. That 75 mph average does not even account for the length of time to sneak up on Boyd's house, commit the crime, escape, and dispose of any evidence. The Circuit Attorney is confident that a five-minute roundtrip is a practical impossibility.

D. Conviction and Sentence

The jury returned verdicts of guilty on both counts. On September 29, 1995, the Court sentenced Johnson as a prior offender, based on a conviction for cocaine possession, to life without parole.

During the Court's examination of Johnson under Rule 29.07(b)(4), Johnson raised three grievances with his trial counsel: (1) that the mask found in his car several months before the crime had belonged to Stanford Morris; (2) that defense counsel should have called Anita Farrow and Robert Williams to corroborate his alibi; and (3) that defense counsel should not have denied the entirety of the conversation between himself and Phillip Campbell in the city holdover cell, but instead should have called another inmate to explain that "I was merely just tellin' Phillip information I had learned from both the police officers and Leslie Williams."

E. Campbell Subsequently Pleads Guilty to Voluntary Manslaughter.

Subsequent to Johnson's conviction, Elking stopped cooperating with the police. As a result, and despite having obtained a first-degree murder conviction for Johnson, the prosecution entered into a plea bargain with Campbell in which Campbell pleaded guilty to voluntary

manslaughter, rather than first-degree murder. On May 7, 1996, the Court sentenced Campbell to seven years.[9]

III. Evidence of Johnson's Innocence

A. Campbell's 1995 Letters to Johnson

Before Johnson's sentencing, Campbell then wrote several letters to Johnson. (**Exhibit 2**). The letters were seized pursuant to a search warrant and became the subject of a motion for a new trial, described in the following section. The letters written by Campbell explained what happened on the night of Boyd's murder and, namely, that Campbell and James ("B.A.") Howard committed the murder and that Johnson was not involved.

The letters demonstrate that Campbell was experiencing a variety of emotions about Johnson's conviction for their crime. In the first letter Campbell wrote:

> I don't know why you keep telling people we tried to kill Markus. Went up there to pistol whip Markus about talking shit to puffy. When we ran out the [illegible] B.A. tried to grab Markus. They started wrestling for the gun and that's why we had to shoot him. I don't know that honkey lied about us having on mask. The only reason why B.A. put one is because Markus knew he stayed down the street. And he might tell what we would did to him. Nobody didn't point no gun at that honkey after we shot Markus. When I turn back around he was gone so we ran back to B.A. house I know dud [sic] was your homie but you know how the game go. What Markus had took B.A. gun and shot us. Do you dig what I'm saying. Just be cool and stop telling people bullshit alright. Much love and stay up.

In the second letter Campbell writes as follows:

> Lamar,
> What's up dude. That's fucked up you got convicted when you didn't do a thing. I toll [sic] my lawyer to let me tell the true [sic] but he won't. Because he said I can't help [illegible]. I'm sorry I got you in to this but me and didn't try and kill Markus it just happen [sic]. That white boy ran when I pulled him from the steps. I didn't see him anymore after we shot Markus. These people told him to lie on you, keep your faith in god cause he will make everything alright. I told you to get a lawyer because the p.d. be working for them. I hope you are a [sic] appeal. Stay up!

[9] This is stark evidence of the importance of Elking's testimony at trial.

In the third letter he wrote:

> Lamar,
> I'm going to be real with you. I don't really know what I want to do. Because I want to help you if I didn't I would feel bad. I sit and think so I can see where you're coming from. You right B.A. didn't show us no love. I'm not his side snitching is something I can not do. 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. I know what your [sic] facing and if was in your shoes I'd be scared to [sic] but it would something I had to do. The reson [sic] I was tripping is because I thought you gave. Your p.d. the letter don't do that. That will fuck things up if I go through with it. I'm not turning my back on you it's just you. Talked some Big Shit and I was expecting you to stand on it. Tell me the truth if I didn't help and went to court. Would I be wrong? What would you do in my shoes? Tell me the truth.
> I don't want this to break us up.
> We was in the game we know how the game go. Stright [sic] up.
> You win or lose

At some point, Campbell became upset with Johnson during the letter writing and wrote a fourth letter:

> Lamar,
> So that how your going to play it. Your going to cross me and turn state on me. I don't give a fuck nigga. I don't care if you didn't have anything to do with killing Markus. You locked up for b.a. Fuck you I anit doing shit. I'll see you when you take the stand nigga. And if I lose I'll see you up there and only. One of us is coming back home alive. That on my life nigga.
> You anit no soldier you're a snich for the state nigga.
> Whe we get to the pen beware of the steel blade hoe.

B. Denial of Motion for New Trial Based on Campbell's Letters

Johnson moved for a new trial based on newly discovered evidence on August 4, 1995, referencing his hope to present testimony that "Campbell and another, not Lamar Johnson, committed the murder of Marcus Boyd." The Court noted, however, that based on Campbell's own pending case, Campbell had not expressed any willingness to testify and validate the content of his letters under oath. The prosecution further noted that Campbell's public defender had informed the prosecution that he would not permit his client to testify on Johnson's behalf. The Court denied Johnson's motion on September 29, 1995.

C. Campbell and Howard Have Confessed to Boyd's Homicide in Multiple Sworn Affidavits.

Since Campbell's letters in 1995 and the denial of Johnson's motion, both he and Howard have confessed to Boyd's murder under oath several times and confirmed that Johnson was not involved. Campbell executed the first affidavit on August 9, 1996, three months after his sentencing on May 7, 1996. (**Exhibit 3**). Campbell executed a second sworn affidavit in 2009 before his death. **(Exhibit 4).** Howard executed three sworn affidavits in 2002 (**Exhibit 5**), 2005 (**Exhibit 6**), and 2009 (**Exhibit 7**). Howard, who was not arrested for Boyd's murder, then committed another murder in the late 1990s and is now serving life in prison.

As these affidavits explain, Campbell and Howard planned the attack on Boyd while drinking and smoking marijuana in Howard's basement earlier in the day on October 30. Howard's mother lived at 3944 Louisiana Avenue, down the street from Boyd. While Campbell and Howard socialized, Howard informed Campbell about a disagreement between Boyd and Howard's friend, Sirone "Puffy" Spates, over a business transaction involving the "crumbs" from drug sales. "Crumbs" are the leftover residue from cutting crack cocaine, which can be recombined and sold. Boyd and Spates had agreed that Boyd could initially retain the crumbs. But once the crumbs had accumulated, Boyd could either give them to Spates or pay him for the value.

At the time of Boyd's murder, Spates was recovering from a gunshot wound to the neck and needed money. According to Spates, Boyd continued to "put him off." Because Spates was injured, including a neck brace, Howard decided to go to Boyd's house to teach him a lesson and rob him.

That night, Howard and Campbell put on dark clothing and "ninja"-style masks, which covered the entire head except for a large hole in the face for the two eyes. Howard stated they did not originally intend to kill Boyd, but only to rob him. When they confronted Boyd, however,

the situation spiraled into a struggle in which Campbell shot Boyd first and then both Howard and Campbell shot Boyd. Campbell and Howard fled back through the alleyway between the houses and returned through the backyards to Howard's mother's house.

Campbell's and Howard's sworn confessions are further confirmed by additional sworn affidavits from Lamont McClain (**Exhibit 8**) and Anthony Cooper (**Exhibit 9**), who were friends who lived in the same neighborhood.

In McClain's affidavit, he explains that Campbell told him that Campbell and Howard had gone to rob Boyd, but Boyd did not cooperate. As a result, they shot Boyd. Campbell told McClain there was a white guy sitting on the porch when they approached Boyd, but he ran away. Campbell confirmed to McClain that Johnson was not there when Boyd was killed and that Johnson had nothing to do with Boyd's death.

Cooper received letters from both Campbell and Howard in which they discussed their involvement in Boyd's murder. Those letters also told Cooper that Johnson had no involvement in Boyd's death.

Howard's and Campbell's affidavits credibly provide details explaining the homicide, including a clear motive. The affidavits are clear that Johnson was not involved.

The undersigned special prosecutors also interviewed Howard at length. He maintained his guilt and expressed his willingness to testify on Johnson's behalf. The Circuit Attorney finds the Campbell and Howard evidence highly reliable and credible evidence that Johnson did not murder Boyd.

D. Elking Has Recanted His Identification of Johnson in Multiple Sworn Affidavits and a Deposition.

Elking has also come forward to admit that he was mistaken in identifying Johnson as one of the two assailants. Following Johnson's conviction, Elking's substance abuse issues continued

to accumulate until he committed armed robbery. He served a 12-year prison sentence, but is now free.

Elking has retracted his identification of Johnson and now admits he did not see Johnson (or Campbell, for that matter) well enough to identify him as an assailant. This is not surprising. From the beginning, Elking supposedly made a cross-racial identification of a stranger wearing a ninja mask holding him at gunpoint on a dimly lit porch at 9 p.m. at night.

In 2003, Elking prepared a letter that was sent to Reverend Jerry Rice. (**Exhibit 10**). The letter states:

7-12-03

To whom it may Concern,

My name is JAmes Elkins #357849. I am Currently serving a sentence of 12 years in the Missouri Department of Corrections. I have information about Dwight warren Lead Prosecuting Attorney for ST. Louis, City. The information I have is about a Mulder of a Marcus Boyd, a friend of mine, on October 30 1994 or 1995. I was a star Witness against a defendant Lamour Johnson. He was convicted & sentenced to life in prison. When the murder happened I was with Marcus Boyd on his front porch, when two masked gunmen came out between the buildings along side of his Apartment, and rushed up on Marcus Boyd and shot and Killed him in front of me. At that time I never Knew who the gunmen were or did not see their faces, because they were wearing Masks. I was not shot and when they ran away, so did I. A few days later, after me, my pregnant wife & 1year old son, moved out to my sister's house, because I was afriad for my Family lives and mine. ST. Louis Detectives found out who I was & was present at the murdar & tracked me down. When they talked to me they showed me some photo's of suspects, but could not identify no one, because I did not know them or seen their faces.

Then when they showed me a line-up in the City Jail, I still could not pick out the suspects. Then the Detectives and me had a meeting with the Prosecutor Dwight Warren, and convinced me, that they could help me financally and move me & my family out of our apartment & and relocate use in the County out of harms way. They also convinced me who they said they knew who murdered Marcus Boyd. they had me say the suspects numbers in the line up, and told me to say ther reason I didnt pick them out while the line-up was going on, was because I was scared & terrified. The reason I'm telling you this now is my consience. I regret not coming to you or anyone Else sooner. I don't believe it was right thing to do then & more so now. If you would like to speak to me more in depth please feel free to contact me.

Thank you for your time,

James Elkins

P.S. I know the grounds fear purgery & I will take a lie detector test.

Elking also wrote to Lamar Johnson apologizing for identifying Johnson as an assailant and admitting he could not identify the actual assailants. (**Exhibit 11**).

Elking has also executed two sworn affidavits in 2003 (**Exhibit 12**) and 2010 (**Exhibit 13**) that he did not witness Johnson commit Boyd's murder and participated in a sworn deposition in 2019 further explaining that his identification of Johnson was erroneous. (**Exhibit 14**).

In an interview with the undersigned special prosecutors, Elking has explained that, although he did not recognize anyone, he wanted badly to make an identification. Elking was afraid that the perpetrators may come after him and his wife. He also felt pressured and intimidated by the police because, after he failed to identify anyone in the lineup, the mood changed and suddenly became foul. Elking believed he let everyone down, including Boyd's family. Elking also believed that the police "knew" who was responsible. While in an elevator, Elking and the detective had a discussion about the lineup, which resulted in Elking's identifying the suspects in positions 3 and 4: Johnson and Campbell.

The detective and Elking also discussed witness protection money. The next day a person came to Elking's apartment and gave him a check. Subsequently, the State helped Elking and his wife move into a new apartment by paying the deposit and the first month's rent. The State also paid other utility bills, and he was given cash for appearing for depositions and trial. This money was meaningful to Elking, who was suffering financial hardship and suffered from substance abuse issues.

E. The Prosecution Withheld Evidence Relating to Elking.

The prosecution did not inform Johnson's defense about these payments before trial. (**Exhibit 17**). As part of its CIU investigation in 2019, however, the CIU Unit located 63 pages of documents related to payments to Elking and services procured by the prosecution on his behalf.

These 63 pages of documents include copies of cancelled checks, correspondence with movers and successful efforts to locate and pay for Elking'ss housing costs. As stated above, the State paid Elking more than $4,200 in moving expenses, utility bills, storage facility, and miscellaneous expenses. The payments began on November 4, 1994, the day the probable cause statement against Johnson was issued by the Circuit Attorney's Office. Furthermore, the prosecution also arranged to eliminate driving tickets for Elking, including tickets for failure to have insurance, failure to have a license, and speeding. (**Exhibit 19**).

When the trial prosecutor had called to congratulate Elking and told him he would need to testify in the Campbell trial, Elking has explained that he felt guilty that he might have put an innocent man away for life, so he stopped cooperating and did not testify against Campbell.

F. The Prosecution Withheld Evidence Relating to Mock.

The prosecution also failed to disclose the full extent of the promises made to Mock, the jailhouse informant. At Johnson's trial, the state argued that Mock had no motive to lie to the jury and that Mock was not asking for anything, telling the jury, "What is he going to get out of this, a letter to his parole board?"

In fact, Mock had asked for several types of consideration. After making his original statement to detectives, Mock returned to prison before Johnson's trial and sought to use his testimony as a pretext for not returning to prison, one way or another. In addition to requesting a letter to the parole board, he began making additional requests, including a pardon from the governor, a reduction in sentence from Judge Mason in Jackson County, transfer to a rehabilitation program, and other items. The pressing issues in front of Judge Mason were particularly relevant because Mock had been extradited from Florida earlier in 1994 for violating his probation by fleeing to Florida. Judge Mason had revoked his probation and sent him to the Department of

Corrections, but had just shown leniency by again imposing probation. Just a few weeks later, Mock had fled Kansas City again and violated his probation, which ultimately led Judge Mason to revoke his original bond, raise it to $50,000 (which Mock, who was frequently homeless, could not afford), and then send him to prison. Mock knew he was in trouble.

Contrary to the prosecution's implication that Mock might only receive assistance with early parole, the prosecution in fact addressed other items on Mock's behalf, both to the Board of Probation and Parole and to the Department of Corrections regarding custody placements. Correspondence between Mock and the Circuit Attorney's Office continued for months after Johnson's trial in July of 1995 and none of this additional correspondence was disclosed to the defense. (**Exhibit 15**).

The prosecution also did not disclose Mock's full criminal history, including more than a dozen convictions or guilty pleas. One of those guilty pleas would have also disclosed his prior history of coming forward as a jailhouse informant in the *State v. Joe Smith* case in Jackson County. While Mock was an inmate in Kansas City, Mock claimed to have overheard another inmate admit to homicide—just as he did in Lamar Johnson's case. Smith had been charged with the death of two people after a hit-and-run incident. Just as he did with respect to Lamar Johnson, while in jail he made contact with a detective and told him that he had information about the case. Below is from the police report regarding Mock's statement about the purported statement of Joe Smith, Mock's fellow inmate:

> On 5/21/92, at approximately 0830 hours, reporting detective was contacted by "Phil" Mock at 1125 Locust, second floor, where he had voluntarily responded to relate information he had relative to the above investigation.
>
> Mock stated he was recently a cell mate of suspect Joseph Smith, W/M, 5/2/65, in the Jackson County Jail, and Smith told Mock that he was driving the car which had struck the above two victims but the police would not be able to prove it. Smith

> reportedly told Mock that after the incident the next thing he remembered was waking up upside down in his car.
>
> Mock, who was in jail on a burglary charge, stated he was willing to testify about what Smith told him.

Just as he did in Johnson's case, Mock sought a reduction in sentence in exchange for his cooperation. Mock pled guilty to a reduced charge of property damage, a Class B misdemeanor, under the condition that he receive a 6-month suspended sentence in exchange for his testimony in *Smith*.

Finally, Mock had a history of mental health issues which he denied during his deposition. In fact, Mock was placed on a 30-day psychiatric hold at Western Missouri Mental Health Center in February of 1992 and then transferred to West Central Recovery Services for in-patient treatment.

DISCUSSION

The Circuit Attorney has concluded that Lamar Johnson is innocent of first-degree murder and armed criminal action in the death of Markus Boyd. R.S. Mo. § 547.031.3. As set forth below, the Circuit Attorney is firmly convinced that Phillip Campbell and James ("B.A.") Howard murdered Markus Boyd, ***not*** Phillip Campbell and Lamar Johnson, meaning that Johnson is actually innocent (Count I). The prosecution also violated Johnson's right to due process by failing to disclose material impeachment evidence to Johnson's defense team regarding Elking and Mock (Count II).

COUNT I – ACTUAL INNOCENCE

Section § 547.031 adopts the Supreme Court of Missouri's habeas corpus standard of actual innocence by requiring a "clear and convincing showing of actual innocence … that undermines confidence in the correctness of the judgment." R.S. Mo. § 547.031.3; *cf. State ex rel. Amrine v. Roper*, 102 S.W.3d 541, 543 (Mo. banc 2003) (habeas corpus relief is warranted "upon a clear and

convincing showing of actual innocence that undermines confidence in the correctness of the judgment"). "[B]ecause an actual innocence claim necessarily implies a breakdown in the adversarial process, the conviction is not entitled to the nearly irrebuttable presumption of validity afforded to a conviction on direct appeal challenging the sufficiency of the evidence." *Amrine*, 102 S.W.3d at 547. This burden "is heavier than the 'preponderance of the evidence' test of ordinary civil cases and is less than the 'beyond reasonable doubt' instruction that is given in criminal cases." *Id.* at 548.

There is clear and convincing evidence of Lamar Johnson's actual innocence. First, two perpetrators have credibly confessed: Phillip Campbell and James ("B.A.") Howard. Second, Johnson has a credible alibi that was never investigated. Third, Greg Elking has recanted his unreliable identification of Johnson. Fourth, William Mock, who is dead, provided an unreliable and confusing jailhouse confession. When reviewed as a whole, the scales tip instantly in favor of Johnson's innocence

A. Campbell and Howard Killed Markus Boyd.

The two perpetrators are Phillip Campbell and James ("B.A.") Howard. Campbell pleaded guilty to voluntary manslaughter and, before his death, confirmed his guilt in letters to Johnson, conversations with acquaintances, and multiple sworn affidavits. Howard, who is alive, has confirmed his guilt in interviews with special prosecutors, conversations with acquaintances, and multiple sworn affidavits.

Campbell's letters from 1995 provide the baseline for Johnson's innocence. Across the four letters, Campbell relays a series of emotions about Johnson's innocence. In the first letter, Campbell rebukes Johnson for telling people that Campbell and Howard planned to kill Boyd instead of just "pistol whipping" him. Campbell tries to defend his and Howard's actions and tells

Johnson to stop spreading inaccurate information. In the second letter, presumably after the jury's verdict, Campbell strikes a more conciliatory tone by apologizing, but claims that, based on his lawyer's advice, he cannot help Johnson even though Johnson "didn't do a thing." In the third letter, Campbell again expresses regret that Johnson was convicted, but refuses to "snitch" on Howard. In the final letter, Campbell has grown upset and threatens Johnson, even suggesting that Johnson may be harmed in prison if he implicates them publicly.

After Campbell's sentencing, his approach softened, and he became willing to execute an affidavit. Campbell's and Howard's affidavits are credible. In contrast to Johnson, who had no clear means or motive, Campbell and Howard have detailed their motive and provided a step-by-step chronology of the events that led to Boyd's death. Their affidavits credibly explain a drug dispute in which they sought to teach Boyd a lesson by robbing him but ended up killing him. These explanations are far more credible than the original basis for investigating Johnson, which merely relied upon Leslie Williams' initial suspicion of Johnson without actual evidence.

B. Multiple Witnesses Corroborate Johnson's Alibi.

Johnson had an alibi: that he was with his girlfriend on the 3900 block of Lafayette Avenue, which is several miles away from 3910 Louisiana Avenue. Multiple witnesses, including the girlfriend, corroborate this affidavit. The police reports reflect that Johnson provided this alibi to detectives. The police reports do not, however, mention anyone looking into Johnson's alibi before charging him with murder.

These witnesses only describe a brief lapse of Johnson's presence that lasted approximately five minutes. Even under the best of circumstances, Johnson would have needed at least 25-30 minutes to commit the crime. The detective's testimony at trial, claiming that Johnson could have completed a roundtrip in five minutes, was erroneous.

C. Elking Has Recanted His Identification.

Greg Elking, the sole eyewitness who identified Johnson at trial, has recanted that identification under oath on multiple occasions. His identification was unreliable. At the lineup Elking failed to identify Johnson and instead picked an individual from a holding cell. He also could not identify Campbell (who was guilty) in the lineup. Elking's identification came later, on an elevator with a police detective.

"'[T]he annals of criminal law are rife with instances of mistaken identification.'" *Perry v. New Hampshire*, 565 U.S. 228, 245 (2012) (quoting *United States v. Wade*, 388 U.S. 218, 228 (1967)). The Supreme Court of Missouri has cited "'a near perfect consensus'" in the scientific community "concerning the potential unreliability of eyewitness identifications." *State v. Carpenter*, 605 S.W.3d 355, 361 (Mo. banc 2020) (quoting *State v. Guilbert*, 49 A.3d 705, 720-21 (Conn. 2012)). These scientific findings "are as nearly unanimous as it is possible to be." *Id.* In fact, "eyewitness misidentification is now the single greatest source of wrongful convictions in the United States, and responsible for more wrongful convictions than all other causes combined." *People v. Lerma*, 47 N.E.3d 985, 993 (Ill. 2016) (quoting *State v. Dubose*, 699 N.W.2d 582, 591-92 (Wis. 2005)) (cited with approval in *Carpenter*, 605 S.W.3d at 361).

Eyewitness testimony raises two distinct issues: accuracy and credibility. *Carpenter*, 605 S.W.3d at 362. In terms of accuracy, Elking has stated that he felt pressured to identify Johnson, but, even without pressure, his identification bore many hallmarks of unreliability. As the U.S. Supreme Court has explained,

> External suggestion is hardly the only factor that casts doubt on the trustworthiness of an eyewitness' testimony…. [M]any other factors bear on the likelihood of misidentification, … for example, … whether the witness was under stress when he first encountered the suspect, how much time the witness had to observe the suspect, … whether the suspect carried a weapon, and the race of the suspect and the witness.

Perry, 565 U.S. at 243-44 (internal quotation omitted). At the same time, "'jurors seldom enter a courtroom with the knowledge that eyewitness identifications are unreliable' and, even though 'science has firmly established the inherent unreliability of human perception and memory, this reality is outside the jury's common knowledge and often contradicts jurors' commonsense understandings.'" *Carpenter*, 605 S.W.3d at 362 (quoting *United States v. Brownlee*, 454 F.3d 131, 142 (3d Cir. 2006)). Furthermore, "'[c]ourts around the country have recognized that traditional methods of informing factfinders of the pitfalls of eyewitness identification—cross-examination, closing argument, and generalized jury instructions—frequently are not adequate to inform factfinders of the factors affecting the reliability of such identifications.'" *Id.* at 365 (quoting *State v. Lawson*, 291 P.3d 673, 705 (Or. 2012)).

At the time of Johnson's trial in 1995, the Missouri Supreme Court had not yet promulgated its MAI regarding eyewitness reliability. *But see Perry*, 565 U.S. at 246 ((internal footnote omitted).[10] Since 2016, the MAI now warn juries to consider issues that include Cross-Racial Identification, Environmental Viewing Conditions, Duration, and Presence of a Weapon, as well as "any other factors that may have affected the accuracy of the witness' identification." MAI-CR 310.02 [2016 New]. The new MAI do not even expressly contemplate the most obvious barrier to identification in Johnson's case: the fact that both assailants were strangers who wore masks that covered almost all of their faces.

The identification also lacked credibility. Even under the best of conditions, Elking's trustworthiness is undermined by the non-disclosure of the fact that Elking, who suffered from

[10] The Supreme Court of Missouri's Notes on Use reflect that this instruction was adopted in response to the U.S. Supreme Court's opinion in *Perry*, which noted that "[e]yewitness-specific jury instructions, which many federal and state courts have adopted, likewise warn the jury to take care in appraising identification evidence." *Perry*, 565 U.S. at 246. The Circuit Attorney does not suggest error in other convictions before the promulgation of this instruction—only that the instruction highlights the unreliability of Elking's identification in this case.

substance abuse issues, received $4,200 from the State. Those payments commenced on the day after the identification. Elking's subsequent letters and testimony confirm that this financial support motivated him to perpetuate his erroneous identification.

In sum, there is no confidence in Elking's identification based on his original failure to identify Johnson, the circumstances that prohibited a reliable identification, the circumstances that undermine his credibility, and his sworn recantation.

D. The Mock Evidence Is Not Credible

Mock was not a reliable or credible informant. Mock was a career petty criminal with substance abuse and mental health issues who, in November 1994, had just been arrested for the second time that year after fleeing Kansas City without permission. There is no unique information in his testimony that would furnish otherwise-unknown facts. At most, this confession recounted by Mock amounts to nothing more than a general description of the crime. It is not difficult to twist a description of the allegations against a suspect, which Mock could have overheard in jail, into a confession.

Mock's testimony, moreover, is confusing. He claims that he overheard Johnson confess to two different shootings, but the details blend together. Much of the material in his statement and testimony has no bearing on this case. Some of the information is flatly wrong, further undermining Mock's credibility. At trial, Johnson's counsel struggled to disentangle the two stories, and it remains unclear where one began and the other ended.

Viewed in light of the whole record, there is clear and convincing evidence that undermines confidence in the verdict. Therefore, pursuant to § 547.031, the Circuit Attorney requests that the Court vacate or set aside the judgment by which Lamar Johnson was convicted of first-degree murder and armed criminal action.

COUNT II – VIOLATION OF *BRADY*

A *Brady* claim has three components: (1) the evidence at issue must be favorable to the defendant; (2) that evidence must have been suppressed by the State; and (3) the evidence must be material. *State ex rel. Woodworth v. Denney*, 396 S.W.3d 330, 338 (Mo. banc 2013) (citing *Strickler v. Greene*, 527 U.S. 263, 281-82 (1999)). A due process violation occurs irrespective of the good faith or bad faith of the prosecution.

A. The Elking and Mock Impeachment Evidence Is Favorable to Johnson.

Brady applies to evidence that undermines the credibility of a State witness. *Wearry v. Cain*, 577 U.S. 385, 392 (2016) (citing *Giglio v. United States*, 405 U.S. 150, 153-54 (1972)). An undisclosed payment to a State witness is a classic example of *Brady* evidence. *See State ex rel. Engel v. Dormire*, 304 S.W.3d 120, 127 (Mo. banc 2010) ($500 payment); *see also Banks v. Drelke*, 540 U.S. 668, 691 (2004) (It is "beyond debate" that a witness's "paid informant status qualifies as evidence advantageous to the defendant."). Between November 1994 and March 1995, Elking received more than $4,200 from the State, including an initial deposit for an apartment and undescribed "miscellaneous" expenses. Elking has admitted his financial hardship and that this financial assistance motivated him to assist the prosecution. It should have been disclosed.

With respect to Mock, it was insufficient to disclose only the letter to the parole board. Even though when the State makes "no binding promises, a witness' attempt to obtain a deal before testifying [is] material" because the jury may conclude that the witness has "'fabricated testimony in order to curry the [prosecution's] favor.'" *Wearry*, 577 U.S. at 394 (quoting *Napue v. Illinois*, 360 U.S. 264, 270 (1959)).

The prosecution only disclosed a fragment of the terms sought by Mock and downplayed that request before the jury during closing statement. In reality, Mock sought more far-ranging

consideration. He sought the prosecution's influence in (1) obtaining a pardon from the governor; (2) reaching out to the Judge Mason to set aside his sentence; (3) transfer out of the Department of Corrections; and (4) transfer to a drug treatment program. Thus, Mock "might have believed that [the trial prosecutor] was in a position to implement (as he ultimately attempted to do) any promise of consideration." *Napue*, 360 U.S. at 270. In fact, the prosecution ***did*** follow up with these items. *See also Engel*, 304 S.W.3d at 127 (*Brady* material consisted of "letters evidencing that investigators sought leniency for Mammolito based on his cooperation").

Furthermore, the prosecution also failed to disclosed approximately a dozen convictions or guilty pleas for Mock, including multiple such convictions or guilty pleas in the State of Missouri.[11] Johnson's defense had the right to impeach Mock on all of these crimes under R.S. Mo. § 491.050 ("Any person who has been convicted of a crime is, notwithstanding, a competent witness; however, any prior criminal convictions may be proved to affect his credibility in a civil or criminal case and, further, any prior please of guilty, pleas of nolo contendere, and findings of guilty may be proved to affect his credibility in a criminal case.").

These omitted guilty pleas also include a guilty plea in another case for which Mock sought, and obtained, a reduced sentence for serving as a jailhouse informant in another homicide.

Finally, the prosecution failed to correct Mock's false testimony that he had never served time in a mental institution when, in fact, Mock had served time in a mental institution just two years beforehand.

B. The Impeachment Evidence Was Suppressed by the State.

Johnson's defense counsel has executed a sworn affidavit that he never received the above-described evidence. During an interview with the trial prosecutor, the trial prosecutor related that

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[11] This motion does not rest on ordinance violations, although there appear to be some violations that potentially implicate his honesty, such as forgery.

he had no memory of providing this evidence. He did not say that he deliberately withheld the material from Johnson's defense, "but under *Brady* it is irrelevant whether the failure to produce exculpatory evidence occurred willfully or inadvertently; if the evidence potentially is exculpatory, it must be produced." *State ex rel. Woodworth v. Denney*, 396 S.W.3d 330, 338 (Mo. banc 2013).

C. The Suppressed Evidence Is Material.

Evidence is material if there is "'any reasonable likelihood'" it could have "'affected the judgment of the jury.'" *Wearry*, 577 U.S. at 392 (quoting *Giglio*, 405 U.S. at 154 (quoting *Napue v. Illinois*, 360 U.S. 264, 271 (1959))). The standard is less than an actual innocence claim. In fact, a showing of prejudice "does not require demonstration by a preponderance that disclosure of the suppressed evidence would have resulted in the defendant's acquittal." *Woodworth*, 396 S.W.3d at 338 (quoting *Kyler v. Whitely*, 514 U.S. 419, 434 (1995)). Furthermore, "in deciding whether the prejudice shown by *Brady* violations is sufficient to determine that the prior verdict is not 'worthy of confidence,' the courts should consider the effect of ***all*** of the suppressed evidence ***along with the totality of the other evidence uncovered following the prior trial***." *Woodworth*, 396 S.W.3d at 345 (quoting *State ex rel. Griffin v. Denney*, 347 S.W.3d 73, 77 (Mo. banc 2011)) (emphasis added).

Relief is warranted for the same reasons as the actual innocence claim. There was no physical or forensic evidence, and Johnson had alibi witnesses at the time of the shooting. Leslie Williams, who knew Johnson, did not identify him. Instead, Johnson was convicted based on testimony from two unreliable prosecution witnesses about whom the prosecution did not provide material impeachment evidence to the defense that would call their credibility into serious question. In fact, Elking now admits that his testimony was erroneous.

After viewing several lineups, Elking failed to identify Johnson and Campbell and, in fact, misidentified a person from a holding cell. He now admits he could not identify the culprit, whoever it was. The fact that Elking, who was suffering from substance abuse and experiencing financial hardship, was being paid as encouragement to cooperate with the police was material evidence.

The importance of Elking's testimony in 1995 is readily apparent based on the plea deal reached with respect to Campbell. After Johnson was convicted of first-degree murder, Elking stopped cooperating. Under normal circumstances, prosecutors who secure a first-degree murder conviction against a co-defendant would be negotiating from a position of strength. Instead, the prosecution agreed to a plea of voluntary manslaughter and a sentence of only seven years.

Similarly, there was a material nondisclosure Mock's various requests for help getting him out of serious criminal trouble, his extensive criminal history that would be subject to impeachment under R.S. Mo. § 491.050, his history of informing on fellow inmates for a reduction in sentence, and his history of institutionalization. Such evidence was material to his credibility and reliability as a material witness against Johnson at trial.

Finally, under Missouri Supreme Court precedent, the Court must also consider this evidence along with the impact of Campbell's and Howard's confessions that they, not Johnson, committed the murder together. Taken together, there is a far more than "reasonable" likelihood that the outcome would be different.

For these reasons, Johnson's right to due process was violated. Therefore, the Circuit Attorney requests that the Court vacate or set aside the judgment by which Lamar Johnson was convicted of first-degree murder and armed criminal action.

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Respectfully submitted,

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