**IN THE CIRCUIT COURT OF BOONE COUNTY, MISSOURI**
**FOR THE SUPREME COURT OF MISSOURI**

| | | |
|---|---|---|
| STATE EX REL. MARK WOODWORTH, | ) | |
| Petitioner, | ) | |
| vs. | ) | No. 10BA-CV05277 |
| | ) | (SC91021) |
| LARRY DENNEY, | ) | |
| Respondent. | ) | |

## RESPONDENT'S EXCEPTIONS TO MASTER'S REPORT

The Master's Report and recommendation would overturn Petitioner's guilty verdict, reach by two different juries and affirmed by two appellate courts, on the basis of alleged *Brady* material the court of appeals has held was not "new evidence." The State has no doubt that the Report is the product of many hours of review and deliberation, or that the Court has earnestly striven to reach a just and fair result in this case. Nonetheless, the State of Missouri believes the Report to be in error and respectfully submits these exceptions on behalf of the Respondent.

## Introduction

Courts must exercise special restraint in habeas proceedings alleging "actual innocence" not to become a thirteenth "super juror." *State v. Grim*, 854 S.W.2d 403, 407 (Mo. banc 1993). It is not the role of the habeas court to independently evaluate the strength of evidence appellate courts have held to be sufficient as a matter of law, especially when the innocence or guilt of Petitioner is not actually litigated before the habeas court. Although the Court has heard the evidence Petitioner believes to support

his claims, the State has not had the opportunity to reintroduce the testimony and evidence two juries found to support Petitioner's guilt. For example, this Court heard none of the ballistics evidence on the basis of which to two separate juries placed the murder weapon in the Woodworth home. This Court heard none of the fingerprint evidence on which those two juries placed the murder weapon in Petitioner's hand. Because the habeas court hears only part of the story—Petitioner's part—it should not substitute its judgment for that of the jurors who heard the entire case. Rather the Court's sole responsibility in this proceeding is to determine whether the Petitioner met his burden of proof—by clear and convincing evidence of actual innocence, or by the preponderance of the evidence that exculpatory evidence was withheld by the prosecution. The State respectfully takes exception to the Court's finding that Petitioner met either burden.

**I. Petitioner did not prove the prosecutor withheld evidence.**

The Report finds: "The Lewis letters make it clear … that the prosecutor was possessed of evidence that the surviving victim had previously requested that some other person be charged." (Report, p. 17) (emphasis added). However, no evidence adduced during five days of testimony supports that finding. Although the burden is upon the State to prove the elements of the offense at a criminal trial, the burden is on the Petitioner in a habeas case to prove a violation of his constitutional rights. *State ex rel. Taylor v. Steele*, 341 S.W.3d 634, 639 (Mo. banc 2011); *State ex rel. Nixon v. Jaynes*, 73 S.W.3d 623, 624 (Mo. banc 2002). The Court's Report improperly assumes that the State had the burden to prove it had disclosed these three letters. But, the proper legal analysis

requires the Petitioner to prove he did not receive the three letters, and to prove that the letters were so exculpatory that their disclosure would have altered the outcome of the trial. *Kyles v. Whitley*, 514 U.S. 419 (1995). He failed to do either.

Petitioner alleged that the letters proved that Lyndel Robertson told Doug Roberts that he wanted Brandon Hagan charged and prosecuted because he was the murderer. (Third Amended Petition, ¶17). However, Petitioner proved that he did not have evidence Mr. Robertson made any statements implicating Brandon Hagan:

> *Q. Did you have direct knowledge of this occurring, that Mr. Robertson had been adamant that we charge another young man?*
>
> *A. If by "direct" you mean from Mr. Robertson, I'm not sure, but I was certainly aware of it, most likely from Deputy Calvert.*

(Tr. 271).

No further questions were asked by Petitioner. That testimony is neither substantive evidence of any fact, nor "clear." At best, the testimony tends to prove (1) the actual source of Mr. Robert's belief—Deputy Calvert, and (2) that defense counsel knew of this source. Petitioner's original defense counsel, Mr. Wyrsch, introduced the pretrial conference in the first trial a newspaper article which he described as indicating Mr. Robertson wanted Brandon Hagan arrested. (Trial I Tr. 22-23). Nothing about the letters was new or unknown to Petitioner's counsel even during his first trial. As the Court of Appeals for the Western District has stated unequivocally, the letters were not

"new evidence." *Woodworth v. State*, *supra*., p. 11, fn. 10. Indeed, the issue of the letters "was exhaustively addressed by no less than seven witnesses at trial." *Id*.

Nonetheless, the Report concludes that the "State's evidence of guilt is thin … very thin," and noted that the "Court is skeptical that a jury of reasonable men and women, with a fair look, would find Woodworth guilty beyond a reasonable doubt." (Report, p. 35). There is no "future proceeding" in which the Petitioner can specify and identify the new witnesses and the new evidence – this hearing was that final opportunity. He had Mr. Calvert, Mr. Roberts, Mr. Robertson, and numerous other witnesses on the witness stand. He had the ability to subpoena any other witness he wished. He did not prove his allegations.

The sum total of Petitioner's evidence to support this claim was the deposition testimony of attorneys Cook and Wyrsch that they did not see these letters. (Wyrsch depo, p. 10; Cook depo, p. 10). But memories fade over time, and the inability to remember seeing something is not compelling evidence of its absence, particularly when other evidence shows those memories to be faulty. For example, the Third Amended Petitioner alleges that "according to the uncontradicted testimony of Honorable Judge Jacqueline Cook, attorneys James Wyrsch and William Kutmus and investigator Philip Thompson" the Diester letter was never produced to the defense." (¶42) (emphasis added). Kutmus corroborated that allegation at his deposition. (Kutmus depo, p. 7). Yet the trial transcripts show—unequivocally—that defense counsel not only saw the letter, but they actually had used that letter at trial (Trial I Tr. 885-886, 889-898). A conviction

should not be overturned based on the inability to remember seeing something when there is demonstrative proof that the same individual forgot seeing something similar.

Petitioner was in possession of these three letters for at least two years prior to the hearing. Yet, Petitioner failed to present a single bit of additional evidence to be adduced as a result of the discovery of these three letters. **The only thing we now know is that Doug Roberts did not have any additional information about any statement made by Mr. Robertson.**

Furthermore, as this Court indicated, a review of the record shows that everyone in Chillicothe was aware that Mr. Robertson wanted Brandon Hagan charged at one point. In fact, prior to the first trial, defense counsel Wyrsch discussed his knowledge that there had been a local newspaper article to that effect:

> *there was a newspaper article that appeared I believe in the Chillicothe paper shortly after this occurred in which the Robertson's family is pictured and they make a statement critical of the officers in this case about why someone hasn't been arrested. And they thought shortly after this occurred the evidence that they provided that they would arrest the suspect.*
>
> *It doesn't say they weren't arresting Brandon Thomure, but that's the one they had in mind at the time. I'm quite sure they wouldn't make those statements to the press at the time unless they thought it was Thomure that did it, and we have direct*

*evidence that Thomure shot him and Lyndel Robertson had an opportunity to see it.*

(Trial I Tr. 22-23).

The evidence shows a plausible reason for Mr. Roberts to write, "recall that soon after this crime, Mr. Robertson was adamant that we charge another young man." (Exhibit 4). The evidence shows that the defense acknowledged in 1994 that it knew that Mr. Robertson wanted another man charged with the crime, Brandon Thomure. The evidence shows that Mr. Roberts' statement was not based on any direct evidence from Mr. Robertson. It was likely based on hearsay from the newspaper article discussed by defense counsel at the first trial.

Indeed, there is evidence that the defense actually made use of a letter Lyndel Robertson wrote to Judge Lewis. At a pre-trial hearing before the second trial,[1] Judge Cook acknowledged possession of the letters by referring to a motion she had filed in which she had attached Lyndel Robertson's letter to Judge Lewis! (Trial II Tr. 26). The State cannot say with certainty that the Lyndel Robertson letter referred to by Judge Cook in her pretrial motion in limine is the exact same letter which this Court concluded is a *Brady* violation, but State has seen only one letter from Lyndel Robertson to Judge Lewis. It was Petitioner's burden to show that this disclosed letter was not the same letter on which he based his *Brady* claim.

[1] It is the second trial the Petitioner is seeking to reverse and it is the second trial's fairness that Petitioner has made an issue.

Even if other correspondence did exist, and even if the reference made by Judge Cook during the pretrial conference is to a different Robertson/Lewis letter, the Court should reconsider its *Brady* finding for three reasons. *First*, Judge Cook's motion in limine supports Judge Lewis' testimony that he routinely forwarded correspondence he received to defense counsel. Any uncertainty about Judge Lewis' testimony that he forwarded all correspondence to Mr. McFadin (Lewis depo, p. 55-56) has been confirmed to be true.

*Second*, this record confirms what human experience and common sense tell us – memories over time are inexact at best, and the inability of Judge Cook and Mr. Wyrsch to remember receiving particular documents lacks sufficient reliability to constitute new evidence. The unreliability is compounded significantly by Petitioner's failure to have these witnesses review the file. The absence of memories is not the evidentiary equivalent of DNA evidence or other scientific evidence needed to justify habeas relief.

*Third*, the failure to present any evidence of Mr. McFadin's records or testimony concerning what he may have received prior to Mr. Wyrsch and Judge Cook is fatal to Petitioner's case. As defense investigator Thompson testified, "[McFadin] had already received a lot of documents from whatever sources he received them from … so it's hard to say where these reports came from, but I know McFadin had a fairly lengthy file when we got involved in the case." (Thompson depo, p. 20).

The Court expressed some skepticim of "Judge Lewis' seventeen-year-old recollection" of events (Report, p. 17), and the State completely agrees that one should be

hesitant to assume the accuracy of memories that are dated. But the Court should exercise the same level of caution with the memories of all the witnesses.

The legal responsibility for proving his assertions lies with Petitioner. It is not sufficient for the Petitioner to question the credibility of the State's prosecutors[2]; Petitioner must prove through substantial and competent evidence that the letters were not disclosed to Petitioner's counsel. He cannot do so because Petitioner failed to present two pieces of crucial and necessary evident to support this claim.

**A. Petitioner has not offered his defense file.**

Though Petitioner has the burden to of proof to establish the letters were never produced, he failed to present any evidence concerning the contents of his defense file. There is no evidence that these letters are not presently contained in those files at this very moment. The Court will remember that it strenuously questioned both Prosecutors Hulshof and Smith about how they knew what was contained in the prosecutor's files. (Tr. 622-624, 692-697). Each had reviewed the prosecutor's file prior to their depositions and prior to the hearing. Neither defense attorney could make a similar representation and, indeed, expressly admitted they had not reviewed the defense files. (Wyrsch depo, p. 38, 40-41; Cook depo, p. 26-27; Thompson depo, p. 15; Kutmus depo, p. 11). There is a very strong argument that an adverse inference can be drawn from the Petitioner's failure to present the current files into evidence.

[2] This Court found both Mr. Hulshof and Ms. Smith credible. (Report, p. 16).

**B. Mr. McFadin was never called.**

Even more fatal to Petitioner's burden of proof is his failure to call Mr. McFadin, his original trial attorney, as a witness at this hearing. Judge Lewis expressly testified that he personally sent the letters to Mr. McFadin. (Lewis depo, p. 55-56). Yet the one person who could testify that he never received those letters was absent from this trial. Indeed, this Court noted its puzzlement "over the lack of evidence adduced by Woodworth with regard to McFadin's knowledge, if any, of Mater's Exhibits 1, 2 and 3. McFadin did not testify about the issue. (Report, p. 17). The omission is much more than "puzzling." It prevents Petitioner from carrying his burden to prove the letters were never received.

## II. Production of the Prosecutor's File to Ms. Cook Satisfies *Brady.*

Prior to the second trial, which is the conviction at issue in this case, Prosecutor Smith made an appointment with Petitioner's defense counsel and provided the entire prosecutor's file for review. (Tr. 613). The State cannot make the defense look at the discovery it discloses. The only obligation is to disclose. Ms. Smith did so, beyond dispute.[3] It would be fundamentally unfair to reverse a conviction based on an alleged *Brady* violation where the State produced the evidence, but the defense chose to not examine the material. *Williams v. State*, 168 S.W.3d 433, 440 (Mo. banc 2005)("The state responded by allowing defense counsel to inspect and copy everything in the state's file on the case."); *State v. Brooks*, 960 S.W.2d 479 (Mo. banc 1997)("The prosecution has no obligation to disclose evidence of which the defense can acquire."); *State v.*

[3] This Court found Ms. Smith's testimony to be credible. (Report, p. 16).

*Benedict*, 319 S.W.3d 483, 487 (Mo. App. S.D. 2010)("open-file policy" of the State sufficient disclosure); *Strickler v. Greene*, 527 U.S. 263, 283, 119 S.Ct. 1936, 1949, fn. 23 (1999)("We certainly do not criticize the prosecution's use of the open file policy.")

**III. The "Lewis Letters" are not Exculpatory Evidence**

The Lewis Letters are the only evidence Petitioner has offered as "exculpatory." This Court's Report concludes that the "evidence uncovered via the Lewis letters was highly prejudicial." (Report, p. 17). Yet, neither Doug Roberts, Lyndel Robertson nor Gary Calvert testified to any exculpatory evidence based on these letters. Petitioner should be able to identify the additional witness and additional testimony "uncovered" as a result of these "new" letters and to articulate exactly what this additional witness would say. He has not done so.

This Court made reference to the first trial and suggested that these letters may have resulted in a not guilty verdict, though the Court candidly acknowledged that "at first blush this analysis may appear far-fetched." (Report, p. 18). The first trial is not at issue in this case. The conviction was set aside and is a nullity. The Western District remedied any error at the first trial with a remand for a second trial. It is the second trial, whose validity was affirmed by two appellate courts, that Petitioner is trying to set aside.

The speculation that these letters "<u>may</u> have tipped the scales in favor of Woodworth"[4] (Report, p. 18), is negated by the <u>fact</u> that at the second trial the defense was allowed to present evidence supporting Petitioner's claim that Brandon Hagan

[4] The use of the word "may" by the Court establishes the speculative nature of this opinion and does not comport with the standard for habeas relief.

committed the murder. The fact is that the jury rejected that claim. A jury verdict affirmed by two appellate courts should not be overturned because these letters "might" be helpful to the defense. *See Lawrence v. Armontrout*, 961 F.2d 113 (8th Cir. 1992). It was the Petitioner's responsibility to prove by a preponderance of the evidence that these letters would either be admissible themselves or lead to admissible evidence, and what that admissible evidence would be. *Cf.*, *Lawrence v. Armontrout*, 31 F.3d 662, 668 (8th Cir. 1994); *Kyles v. Whitley*, *supra*. The law is quite clear: "such a claim requires petitioner to support his allegations of constitutional error with new reliable evidence." *Schlup v. Delo*, 513 U.S. 298, 324 (1995) (emphasis added).

**IV. The Court's findings about the grand jury are not relevant to this case.**

The Report also discusses whether these letters could have been used to attack the grand jury proceedings. After two findings by two juries of guilt beyond a reasonable doubt, a conclusion that two separate appellate panels affirmed, the adequacy of the grand jury proceedings is irrelevant. A grand jury proceeding cannot be challenged in a post conviction proceeding. *Johnson v. State*, 574 S.W.2d 957 (Mo. App. 1978). Petitioner did attack the grand jury proceedings in his first appeal, unsuccessfully. *State v. Woodworth*, 941 S.W.2d 679, 695 (Mo. App. W.D. 1997). Once it has been established beyond a reasonable doubt that there is sufficient evidence of Petitioner's guilt, the grand jury's finding of mere probable cause becomes completely irrelevant. Once a petit jury has found the defendant guilty, the propriety of grand jury proceedings are of no consequence. *United States v. Mechanik*, 475 U.S. 66, 106 S.Ct. 938, 942, 89 L.Ed.2d 50 (1986).

The Report also assumes that there were some improprieties in the grand jury proceedings. As this Court knows, a judge does not sit and listen to the presentation of evidence once the grand jury is convened and there is no evidence that the grand jury proceedings conducted by Prosecutor Hulshof were irregular, unfair or improper. Finally, with all due respect to the judgment of this Court, the State cannot comprehend how it is improper for the circuit judge to appoint someone he knows, in this case Judge Cook, to serve as the foreperson of the grand jury. There is nothing uncommon or improper about that. In fact, it must be noted that throughout the extremely harsh criticisms directed at Judge Lewis, not once does the Report identify a single statute or Supreme Court rule violated by Judge Lewis.

**V. Violations of Ex Parte Orders**

The other *Brady* violations identified in the Report are some documents relating to ex parte orders of protection for Rochelle Robertson. While the Report is silent as to the specifics, the State believes it is very important to acknowledge that these alleged violations of the restraining order were not acts of actual violence, but were attempts by Mr. Hagan to speak to Rochelle Robertson on the telephone. Unless this important fact is made clear, one might be led to believe the violations were more significant. This fact is also important to acknowledge because, as will be shown below, defense counsel <u>did know</u> of these violations and, thus, no prejudice is possible.

Therefore, the State requests that the Court amend its Report to identify the records which this Court believes were not disclosed and were prejudicial. The State cannot adequately address this conclusion because the Report provides details of neither.

We do know that the Petitioner's attorneys did have information about Rochelle Robertson's attempts to get an order of protection because she was deposed repeatedly (three of those depositions were offered into evidence: one dated May 31, 1994; one dated April 26, 2006; and one dated May 11, 2011). More important, Brandon Hagan was also deposed and asked about his acts of alleged violence against Rochelle Robertson (Exhibit EE, Hagan depo, p. 17), and about the restraining order (Exhibit EE, Hagan depo, p. 49).

Trial counsel did know of the alleged violations and was told of these alleged violations repeatedly by Rochelle Robertson in her multiple depositions:

> A. That was, well, I don't remember exactly when the restraining order was issued. This is all that I'm speaking of right now is after my mom's death and I don't remember. I mean, he tried to get a hold of me continuously after she died and he tried after I put the restraining order on him, but not as many times, like he'd call once and if I wouldn't talk to him, then he wouldn't call back like he did before the restraining order.
>
> Q. But he still tried to contact you; didn't he?
>
> A. Yes.
>
> Q. That was in violation of the restraining order?
>
> A. Yes. It was.

(Exhibit 190, p. 16) (emphasis added).

Several years ago Ms. Robertson related this very same information to Petitioner's present counsel during one of her numerous depositions by Petitioner:

> Q. You ended up getting a restraining order against him, as I understand, didn't you?
>
> A. Yes.
>
> Q. When was that?
>
> A. I don't know when it was. It was after the murder. I don't know when. Within a month after the murder, but I don't know the date.
>
> Q. Why did you go get a restraining order against him?
>
> A. Because my dad and my uncle wanted me to. And I thought it would just be easier to go along.
>
> Q. Why did they want you to?
>
> A. Because he kept calling.
>
> Q. Did you talk to him when he would call?
>
> A. I think whenever I answered the phone and it was him, I'd tell him I couldn't talk to him and I'd hang up and he'd call back. I don't remember having any conversations with him.

(Exhibit G, April 26, 2006, depo) (emphasis added).

Defense counsel knew prior to trial that Brandon Hagan had violated the restraining order by calling Rochelle. Petitioner did not sustain his burden to establish why counsel did not use the information they had available.

In addition, the Report fail to identify in what way they would have impeached the testimony of any witness. As it was, the defense attorneys had gathered information about the existence of the restraining order (Exhibit EE, Hagan depo, pp. 43-49), which they never used at trial. If the defense did not use the information we know they had about the restraining order, how can it be concluded that the defense would have used this supposedly "additional" evidence?

This Court will remember that Petitioner's post conviction claims included an allegation that defense counsel failed to effectively cross examine Brandon Hagan with the evidence available. (Exhibit D, pp. 20-21). There is no factual basis to conclude that trial counsel would have used this additional information.

While the Report states it was "clearly convinced" these items were not disclosed (Report, p. 20), there is no evidence to support that conclusion. None of the attorneys, not just Mr. McFadin, were asked any questions about these items and whether they reviewed them, had them, or knew of them. None of the prosecutors were asked a single question about any of these items. There is a legal presumption that any actions taken by a trial attorney were matters of sound trial strategy. *State v. Tokar*, 918 S.W.2d 753, 768 (Mo. banc 1996). Petitioner not only failed to overcome that presumption, but failed to even address it.

The law is very clear that there is no *Brady* violation if the defense has the materials, regardless of the source. "If the defense knew about the evidence at the time of trial, no *Brady* violation occurred." *Gill v. State*, 300 S.W.3d 225, 231 (Mo. banc 2009). The "prosecutor has no obligation to disclose evidence of which the defense is already aware and which the defense can acquire." *Williams v. State*, 168 S.W.3d 433, 440 (Mo. banc 2005).

In the pretrial conference before the first trial, Mr. Wyrsch made specific reference to substantial knowledge of the records and reports concerning the very matters contained in Exhibit 6. Mr. Wyrsch says:

> Let me tell you what additional evidence we have in that regard. This is from basically the State's file. They did talk about motive, but there was a restraining order, at least according to Rochelle Robertson, against this Brandon Thomure. She was pregnant and was concealing that fact from her parents at the time of the shooting. In addition, this was a threat -- I don't know if this is a suggestion, but we've learned there was a threat by Brandon Thomure that if she broke off the relationship that he would then go to her parents, that is Lyndel Robertson and Cathy Robertson, and tell them she is pregnant.
>
> There had been violence perpetrated by Brandon Thomure against Rochelle, and we have various police reports including the one on December 1, which goes back to an earlier

> time, Brandon choking Rochelle. Another police report, Brent Reed saw an act of violence. Another police report, which are detailed, Brandon -- one of them says Brandon Thomure threatened to kill himself if he and Rochelle ever broke up. We also had a vehicle cited by a witness in which Mr. Brandon Thomure may have had access which matched at least to some degree a description of the vehicle at the scene at the time of the shooting, which the State discounts, but we have some evidence of that.

(Trial I Tr. 20-21) (emphasis added).

Petitioner has yet to show exactly how this "evidence" would be used. The United States Supreme Court stated very clearly that a Petitioner must "support his allegations of constitutional error with new reliable evidence – whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence – that was not presented at trial." *Shlup v. Delo*, 513 U.S. 298, 324, 115 S.Ct. 851, 865 (1995). To prove prejudice, the Petitioner must prove that the evidence was "material and admissible to establish reasonable doubt as to defendant's guilt." *State v. Twenter*, 818 S.W.2d 628, 835 (Mo. banc 1991).

"The likelihood of a different result must be substantial, not just conceivable." *Harrington v. Richter*, 131 S.Ct. 770, 792 (2011).

In fact, prior bad acts are generally inadmissible in Missouri. *State v. Hitchcock*, 329 S.W.3d 741, 747-48 (Mo. App. S.D. 2011); *State v. Fassero*, 256 S.W.3d 109, 118 (Mo. banc 2008). The only evidence less likely to be admissible is subsequent bad acts.

Petitioner never makes any showing how this evidence would have been admissible and leaves it to this Court to speculate as to the form, and admissibility, and relevance it would have.

As to the final suggestion regarding the importance of this information in the Report, the Court suggests that the evidence "served to provide evidence that Rochelle was not being candid about her boyfriend's, Thomure's, threats against Rochelle and her mother, Catherine." (Report, p. 20). Rochelle did not testify at either trial, so her candor seems to be of no consequence when assessing how important this information is to the fairness of Petitioner's second trial.

**Jim Johnson**

Jim Johnson not only did not testify at either trial, but he also did not testify at the hearing in this case.[5] In reviewing the Report, the Missouri Supreme Court will be unable to discern this extremely important fact – Jim Johnson did not testify and we have absolutely no evidence whatsoever if Mr. Johnson had any information detrimental to Petitioner or helpful. The letters, some of which the Court acknowledges were never offered into evidence (Report, p. 22, fn. 22), are hearsay. *State v. Janes*, 949 S.W.2d 633, 634 (Mo. App. E.D. 1997). Yet the Court considered the content of these letters to make several serious "assumptions."[6]

[5] For that matter, Judge Lewis was not the Judge in either trial; Mr. McFaddin was not Petitioner's attorney in the second trial; Judge Elliott was not involved in the second trial; Kenny Hulshof was not the prosecutor in the second trial; Doug Roberts was not the prosecutor in the second trial. Thus, the "conflict triangle" this Court refers to was non-existent at the time of the second trial.

[6] "The Court can only assume that Judge Lewis must have thought …." (Report, p. 22, fn.

If Petitioner had been candid with this Court, he would have acknowledged that Mr. Wyrsch most certainly did know about Mr. Johnson, his hints at having pertinent information, and that Mr. Wyrsch did investigate this issue with the help of Judge Griffen. At the first trial, Mr. Wyrsch said the following:

> So we have a second motion to endorse witnesses that would include this Ms. Broehard, James Johnson, Edward David and Phil Wilson, and I understand we have to file this over in Livingston, but I will proffer up a copy of this to the Court.
>
> * * *
>
> Johnson wrote a letter to Judge Lewis about this case that stated his knowledge of some time ago and Johnson says he's got some information helpful to Mark and harmful to Claude Woodworth. Nobody has paid much attention to that because of Mr. Johnson's various statements he's made about various matters over time, and he wasn't really investigated in this case.
>
> I'm bringing this to your attention because I'm not sure what to do with the evidence. I would like to have Johnson and Davis over here. We'll produce Broehard ourselves at some point in the State's case and find out what it is anybody knows that's admissible or inadmissible. I'm asking the Court's indulgence in that regard.

---

21). "Though it is somewhat foggy from the record, some or all of the letters …." If the record is "foggy," it is Petitioner's duty to clear up any confusion.

I have a little bit of a situation. I represent Claude Woodworth, not on this matter, but over in this chemical matter, and we have asked Mr. McFadin, who is not involved in the chemical matter, to counsel with Mr. Claude Woodworth this morning, and we've also ourselves counseled with Mark this morning. Mark feels that at least we ought to bring these folks over to see if they have got any information, so I'm asking the Court's indulgence in that regard. I have a petition for a writ of habeas corpus for both Davis and Johnson, and it could be there may be nothing here and it may be there is something here. Given the fact the State's asking for first degree murder, the penalty is life without parole, I think we ought to make a record in it.

THE COURT: How much room do you have in your jail, Sheriff? Do you got any spots open?

THE SHERIFF: Yes, sir.

THE COURT: Does the State have any objection of having those people brought over and placed in the Livingston County jail for your convenience and Mr. Wyrsch and Mr. McFadden's convenience?

MR. HULSHOF: I would be reserving my objections to the motion to endorse and reserving further objections. Would that be permissible with the Court?

THE COURT: Certainly. But I think we better bring them over and let you guys visit with them.

MR. HULSHOF: I would also point out, Your Honor, I'm not involved in the chemical theft case that Mr. Wyrsch alluded to, but James Johnson was deposed by Mr. Wyrsch recently and I don't have a copy of that and really has nothing to do with this as far as I'm concerned, but --

* * *

MR. WYRSCH: We just wanted you to know the situation. I did not want you not to be informed. Mark's willing to go forward. We've had Mr. McFadden counsel Claude Woodworth. But if the Court feels it's an irreconcilable conflict -- I'm at your disposal. I feel comfortable going forward at this point. I've counseled with Mark and Claude about it. This came out of the blue. They indicate the fax came in on Wednesday. That's true. We weren't able to locate the witness until Thursday.

THE COURT: I think for safety and precaution if I sign the writ and get them in Chillicothe, at least we got them where they are at our disposal, and I have no objection in doing that as long as we got room over there.

MR. WYRSCH: I need to swear this out under oath, Your Honor.

THE COURT: All right. We can deal with that as we go along. I don't know if you want to try to take their depositions some night or have the investigators go visit with them.

* * *

MR. MCFADDEN: I have counseled with him and actually he's anxious to go forward since his son has been incarcerated for over a year and this is all news to him. He feels that he certainly doesn't concur with it or believe it. I think I can speak for him. However, I understand where Mr. Wyrsch is coming from. He feels we do represent Mark Woodworth, and I think to let it ride as far as -- I think it should be important that these two people be available to us in the Chillicothe jail. If necessary, we can take some action then. But that's about -- I don't think Mr. Claude Woodworth can particularly add anything.

THE COURT: I'll go ahead and order the writs to have them brought over. I think -- I don't know how you have this. I think the best thing to do is to have them go get them today and have them there. I'll probably change the date on them.

(Trial I Tr. 27-34).

Thus, Petitioner's claim is incorrect. We know that Mr. Wyrsch was aware of Mr. Johnson and did, in fact, investigate. What we do not know, because Petitioner offered no

evidence on this issue, is what Mr. Wyrsch actually learned, what the actual facts are, and what were Mr. Wyrsch's reasons for not using Mr. Johnson at trial.

Furthermore, this record demonstrates that the issue of a conflict was discussed with Petitioner and his father. But much more important is the fact that his habeas action is directed at attacking the second trial, and Mr. McFadin was not involved in the second trial in any way. Thus, there can be no prejudice and it would be a "jump to light speed" to presume any.

The "possibility" of a conflict is legally insufficient to impugn a criminal conviction. *Hickey v. State*, 328 S.W.3d 225, 228 (Mo. App. E.D. 2010). Petitioner must prove – with evidence – that trial counsel actually represented conflicting interests. *Id*.

To prevail on a claim of ineffective assistance of counsel based on a conflict of interest, the movant must show that an actual conflict of interest adversely affected counsel's performance. *Price v. State*, 171 S.W.3d 154, 157 (Mo. App. E.D. 2005). "In order to prove a conflict of interest, something must have been done by counsel or something must have been forgone by counsel and lost to [the movant], which was detrimental to the interests of [the movant] and advantageous to another." *Id*. (*quoting Helmig v. State*, 42 S.W.3d 658, 680 (Mo. App. E.D. 2001); *State v. Johnson*, 549 S.W.2d 348, 350 (Mo. App. St.L.Dist. 1977). Petitioner does not tell us what that "something" is and the Report does not identify that "something."

If the alleged *Brady* violations are Mr. Johnson's letters, then how are they *Brady* material? Mr. Johnson was never a witness so his statements have no impeachment value.

And no exculpatory information is identified. Thus, even if the letters were not disclosed – which we know is untrue – there is no prejudice.

This Court was not asked to review the certification proceedings or the first trial, but the fairness of the second trial. Any alleged conflict of interest involving Mr. McFadin and/or Mr. Johnson were completely irrelevant to the second trial because neither was in the courtroom, nor did either play any role in the trial. Mr. McFadin did not represent Petitioner in the second trial.

**"The Totality of the Circumstances Continued"**

This court recites to the Missouri Supreme Court the testimony of several witnesses who testified at the hearing, suggesting that some of it is "new." Yet several of these witnesses testified to the exact same matters in the previous trials.[7]

**1. Aaron Duncan** – the State first takes exception to the quotes attributed to Mr. Duncan in the Report because there is no such testimony and the use of quotation marks suggests otherwise. Mr. Duncan did not say the quotes contained in the Report. This is important because one of the problems with Mr. Duncan's testimony was that he was inconsistent in his testimony.[8] The State does not dispute that Mr. Duncan made statements similar to what the Court reports as an exact quote. But the State believes this

[7] The Court will remember that the State objected to recalling Chris Ruoff because he had testified at trial. (Hearing Tr. 169-170). Petitioner assured this Court he had new information. (Tr. 170). He did not. (Tr. 175-176). Thus, the State cannot imagine why Mr. Ruoff's testimony was worthy of mention by this Court in its Report.

[8] Indeed, at one point this Court acknowledged Mr. Duncan's inability to tell the truth while admonishing him to answer the questions: "Mr. Duncan, the questions that Mr. Bruce is asking you are fair questions, and they are fair because in one instance you said, I got thirty calls and in another you said I got fifty." (Hearing Tr. 342).

Court will, in turn, acknowledge that Mr. Duncan's testimony was inconsistent, contradictory and not very credible. Thus, what he actually reported is of significance.

**2.** **Mindy Stedem** – testified at the second trial. She is the sister of Petitioner. The State cannot discern why, then, the Court felt it appropriate to even mention her. The Report says her testimony was "significant." Why?

**3.** **Matt Penn** – also testified at the first trial. (Hearing Tr. 190-191). Why is his repetition of his previous trial testimony "significant?"

**4.** **Maurice Eskew** – testified that Paul Frey told him, in 2005, that he had lifted the fingerprint from the box of .22 shells. The court concludes this is "new evidence," but, of what? Petitioner presented no evidence whatsoever that this "fact," even if true, would alter the outcome or conclusion in this case. In fact, the Court makes no finding whether this evidence is credible or not.

**5.** **Mike Thistlewaite** – was listed in a police report as a possible witness. Petitioner never asked any of his attorneys why Mr. Thistlewaite was not used at trial. Nor did he establish that Mr. Thistlewaite was available to testify. Both of these are necessary prerequisites. *Hurst v. State*, 301 S.W.3d 112, 117 (Mo. App. E.D. 2010) (petitioner must establish that a witness could be located and would have been available to testify). Petitioner never addressed either issue, nor did he overcome the legal presumption that trial counsel made a sound, strategic decision to not call Mr. Thistlewaite. *State v. Tokar*, 918 S.W.2d 753, 718 (Mo. banc 1996). Trial counsel did investigate these witnesses:

There was some -- we had -- we tried to track down some people what claimed that they saw Brandon in Chillicothe that night, but we never could find anybody who could say with any degree of certainty that it was Brandon Thomure.

We tracked down his alibi regarding he said he was doing weightlifting that evening, I think, and then he said he went home and went to bed and got up the next morning because of the phone call and drove over to Chillicothe.

(Cook depo, p. 33).

**6.** **Bob Fairchild** – his testimony was found to be "new evidence" by this Court. How can this be new evidence when Brandon Hagan, himself, testified at trial, that he was at the high school at the very same time as Mr. Fairchild stated:

Q. Now, about what time did you get to Chillicothe?

A. Right before first hour.

Q. Do you know what time it was?

A. I forget, it's been so long. Right around before first hour because I ran into some of the kids in the hallway and talking to me about what was going on.

(Trial II Tr. 1011).

Furthermore, the State must point out that the Report's recitation of the testimony is inaccurate.[9] The Court's recitation is as follows:

> "He testified that he ran Thomure out of the high school between 7:30 and 7:45 the morning after the crimes, contradicting Thomure's alibi."

(Report, p. 25).

First, the time is incorrect. Mr. Fairchild testified "it was between 7:50 and 8:00 because I always made sure I was there about five minutes before eight." (Hearing Tr. 140). Thus, his testimony is completely consistent with Brandon Hagan's.

Second, nowhere in his testimony does Mr. Fairchild assert that he "ran Thomure out of the high school." That quote actually comes from Petitioner's pleadings.

Third, this is not "new evidence." Mr. Fairchild stated he told Mrs. Woodworth about this information before the second trial. (Hearing Tr. 150) ("Well, are you asking me if it was before the last trial. And it was.").

**7.** **Angie Gutshall** – she was cited by this Court as "new evidence." The Court was presented absolutely no evidence that she was a new witness. None whatsoever. She testified she did talk to the police, but was never contacted again, (Hearing Tr. 156). It was incumbent upon Petitioner to ask his attorneys "why" they did

[9] The quote is actually from Petitioner's Third Amended Petition (p. 24), not the evidence.

not call her. In the absence of such evidence, the law presumes it was a matter of trial strategy.[10] *Tokar v. State*, 918 S.W.2d 753, 768 (Mo. banc 1996).

**8.** **Max Smith** – there was no evidence he was undisclosed. Mr. Smith made this astounding claim about his ability to see the Robertson house from 200 yards away in the middle of the night:

> Q. Now, would you agree, though, that if it's dark outside, from two hundred yards, that unless there was some illumination, that you couldn't see very well from that distance?
>
> A. Could you restate that? I'm not sure what you're -- where you are --
>
> Q. I'm saying that if you are standing outside at night, a clear night in November, you can see the stars, that in the absence of some illumination, something illuminating what you want to look at, that it is kind of hard so see something from two hundred yards away at midnight?
>
> A. Well, if the stars of shining brightly, that's clear -- I mean, the stars are going reflect some light also. I mean, that's -- that's the time of year when it was clear. There is no haze and not a lot of moisture in the air and things like that. I've been out lots of

[10] The Court is reminded that Judge Cook testified that when the defense spoke to these witnesses "we never could find anyone who could say with any degree of certainty that it was Brandon Thomure." (Cook depo, p. 33).

times early in the morning -- I like to deer hunt -- and, I mean, you can see a long ways.

Q. From star light?

A. Yes.

(Hearing Tr. 168).

As previously noted, Petitioner also failed to prove this was new evidence, as opposed to evidence his trial attorney simply decided to not use. The burden was on the Petitioner to prove his claim.

**9.** **Chris Ruoff** – testified at both trials and offered no new evidence, by his own admission. (Hearing Tr. 175-176). How, then, is this significant?

The State's concern is that in engaging in what this Court described as considering "all available evidence," that this Court ignored the evidence of guilt. Not one mention is made of the ballistic evidence and the fingerprint evidence. Instead, the Court cites evidence that is not new as "new." There is absolutely nothing that Mr. Ruoff testified to that can be claimed as new evidence.

10. **Lorinda Corbin** –The Court placed Ms. Corbin's statement in quotation marks – "she wished her mother was dead or someone would kill her" (Report, p. 25) – but no such quote exists. A more basic problem is that she was also a witness the defense interviewed prior to the second trial and apparently chose to not call her. (Hearing Tr. 240-242).

Finally, what would Ms. Corbin have testified to? How would her testimony have been admissible? Petitioner avoided the State's hearsay objection by claiming the

testimony of Ms. Corbin were prior, inconsistent statements of Rochelle Robertson. (Hearing Tr. 235). Rochelle Robertson did not testify in either trial. What impeachment value does this evidence then have? What value does this evidence have, period?

**11.** **Doug Roberts** – his belief as to the strength of the evidence is never relevant, and was never relevant. Can a prosecutor argue for conviction based on his or her belief in the defendant's guilt? The Petitioner has yet to explain how Mr. Robert's opinions would be admissible, as impeachment or in any other form. Based on the fact that a jury and two appellate courts have affirmed Petitioner's guilt beyond a reasonable doubt, any opinion by any person concerning guilt is not material or relevant.

The Court states that Mr. Roberts testified regarding a meeting he had with Judge Lewis in which Master's Exhibit 1 … was discussed. (Report, p. 26). The State cannot find any such testimony and asks this Court to reconsider that finding or provide the citation in the record supporting that contention.[11] In fact, Mr. Roberts clarified for the Court that his letter was referring to Mr. Robert's recollections, not that of Judge Lewis. (Hearing Tr. 312).

12. **John Cook** – his testimony was information the Petitioner has had available since 2002. (Exhibit R). The exact claims were raised by Petitioner, by his same counsel, in his amended motion to vacate in 2003. (Exhibit A, p. 5). The motion court found that Petitioner "present no evidence to support these claims and they are, therefore,

[11] The State intends no disrespect in identifying what it believes are inaccuracies in the Report. The State recognizes that the record is voluminous, but the State also believes that the Report must be accurate for the Supreme Court's review to be meaningful.

denied." (Exhibit D, p. 26, ¶33). The State does not believe it is appropriate to revisit this issue again.

**Totality of the Circumstances of Steve Cox**

The Report concludes that, based on the "expert testimony" of Sheriff Cox, the criminal investigation did not follow up on certain leads and witnesses. It is very significant that there is no assertion that any of these witnesses or leads were not known to trial counsel for the Petitioner. This is the most blatant example, of many, of the Petitioner disguising an "ineffective assistance of counsel claim" as an actual innocence argument. The State asks this Court to objectively review this claim as a renewed ineffective assistance claim and reject it as the law requires. *State ex rel. Simmons v. White*, 866 S.W.2d 443, 446 (Mo. banc 1993); *State ex rel. Green v. Moore*, 131 S.W.3d 803, 805 (Mo. banc 2004).

The Petitioner cited no authority to the claim that there is a constitutional right to a "fair investigation." There is no such "right." The Petitioner has the right to a fair trial and to the effective assistance of counsel under the Sixth Amendment and that is the appropriate focus.

Petitioner had two of the finest attorneys in the State in Mr. Wyrsch and Judge Cook. They zealously represented Petitioner and provided a spirited defense. At no time during the hearing did Petitioner ever ask his trial attorneys what their reasons were for not calling these witnesses. That was the only relevant question, but it was never asked. The law presumes that counsel had a strategic reason for not calling these individuals. *Tokar v. State*, 918 S.W.2d 753, 768 (Mo. banc 1996).

As an example, this Court notes that "Melissa Suschland, a defense witness in the second trial, who was never interviewed further or contacted by State investigators …." (Report, p. 27) (emphasis added). Noticeably absent from the Report is any indication what additional information could have been obtained from "further" interviews, because the Petitioner presented no such evidence. Where, then, is the prejudice, error, or constitutional violation? Trial counsel did call Ms. Suschland at trial. If she had "further" evidence, Petitioner has failed to present it.

Likewise, this Court criticized the investigator for not comparing tire tracks. But, Petitioner presented no evidence that there were any vehicles to compare. Petitioner never presented any evidence that such a comparison would have resulted in any useful information whatsoever. Petitioner presented no evidence that comparisons were possible. Additionally, the State must return to the real issue –did the defense attorneys investigate this information and why did they decide to not use it? That is the only legitimate question, but it is one Petitioner should have answered in his previous post-conviction proceeding. It is the right to a competent attorney that assures a defendant a fair trial. For this reason, the Sixth Amendment guarantees a defendant the right to counsel, not the right to a "complete investigation" by the police. As long as the attorney does his or her job, the quality of a police investigation has little impact on the trial itself.

The Western District Court of Appeals has already decided that trial counsel exercised due diligence and that Petitioner was not denied the effective assistance of counsel. These are the relevant issues, not Sheriff Cox's post-mortem criticisms of an investigation.

## Brandon Thomure's Alibi

This Court offers the opinion that Brandon Hagan's "alibi was shaky, at best." (Report, p. 30). This Court did not hear from any of Mr. Hagan's alibi witnesses. This Court did not hear any of the testimony of Judge Cook, who "tracked down" Mr. Hagan's alibi witnesses. (Cook depo, p. 33). The jury heard those witnesses testify, heard the claims that Mr. Hagan was in Chillicothe the night before, and concluded that Mr. Hagan did not attack the Robertsons. The State is indeed concerned that this Court has succumbed to the understandable temptation to independently assess the evidence without recognizing the important role the jury played in this case and that "rare and exceptional" circumstances are needed to justify habeas relief. *Engle v. Isaac*, 456 U.S. 107, 125, 102 S.Ct. 1558, 71 L.Ed.2d 783 (1982). The Western District already decided that "[T]his is not, however, 'new evidence,'" and that the "issue was exhaustively addressed by no less than seven witnesses at trial." *Woodworth v. State*, *supra*.

## The Invectives Lodged by Petitioner Against the Victims Were Not Addressed in the Report

The Respondent requests that this Court address the allegations and insinuations that Petitioner directed towards the victims in this case. As this Court can readily understand, the victims have suffered greatly throughout the protracted appeals process. Not only did they lose their wife and mother in a horrific manner, but after 20 years they have endured four trials[12] and three appeals. Any assurance of finality and "closure" have

[12] Including the PCR hearing and the hearing in this case.

been denied to them repeatedly. The agony has clearly been multiplied by the scurrilous accusations made by Petitioner against them and the way this case has proceeded.[13]

The Petitioner included several very pointed and personal attacks on Lyndel Robertson and Rochelle Robertson. The Petitioner accused Mr. Robertson of being guilty of perjury. (Third Amended Petition, ¶s 24, 28). Petitioner accused Rochelle of being involved in her own mother's murder, repeatedly alleging that there was "evidence" "to suggest the likelihood that she was, at least, an accomplice after the fact with Brandon." (Third Amended Petition, p. 39). The Court may remember at one point the Petitioner's questioning of Mr. Robertson became so outrageous that the Court called counsel to the bench and stated, "you're letting it get a hold of you," "you need to get it under control this morning," and "you have to do it in a respectful manner to the counsel and the Court." (Hearing Tr. 502).

The State asks the Court to note in its Report that Petitioner failed to prove any of those allegations.

**Court's Conclusion**

The State does not ask this Court to reconsider its Report simply because the State disagrees with the decisions. And the State reiterates its belief that the Court's conclusions are genuinely held by this Court and that it will be difficult to convince this Court of any errors committed to ink and paper. Nevertheless, the State believes that an

[13] That agony was compounded by the victims becoming aware of the Court's Report only when contacted by the media for comment. This Court will remember that he assured the parties they would receive notice when the decision would be made public. That was not done. Though the State is confident this was an unintentional oversight, the trauma to the family was no less severe and significant.

objective and rational review of the evidence that was actually presented will persuade this Court to conclude that Petitioner had a burden of proof that he did not sustain.

The State respectfully asks this Court to remember that it is the second trial at issue and that it is the fairness of that proceeding that this Court was asked to review. Judge Lewis, Kenny Hulshof, Terry Diester, Jim Johnson, Doug Roberts, Brent Elliott, Richard McFadin, and John Cook were not involved in any way in that trial. Thus it was not proper for the Court to consider what might have happened in the first trial.[14]

If, for example, Mr. McFadin had a conflict of interest, it was non-existent at the time of the second trial. If Judge Lewis was biased,[15] it was non-existent at the time of the second trial. Because Mr. Johnson was not a witness in either trial, any "deal" was of no legal consequence. *Hutchison v. State*, 59 S.W.3d 494, 496 (Mo. banc 2001).

Of all of the "persons" appearing in the Court's bubble diagram on page 34 of the Report, the only one involved in the second trial is Judge Griffen and there is absolutely no evidence that Judge Griffen had any bias, prejudice or was otherwise disqualified. The

[14] Which this Court, itself, acknowledged could be deemed "far-fetched". (Report, p. 18).

[15] The State is not conceding at all that Judge Lewis acted improperly but recognizes that, for whatever reason, this Court has come to feel overt animosity towards him. Judges pick the foreperson for a grand jury, and there is nothing unusual or improper about a judge picking someone he or she knows and respects. Judges very often contact the attorneys in the Attorney General's Office to discuss appointments as special prosecutors. Judges often notice a special prosecutor about the statute of limitations running and, in doing so, are only assuring that justice is served. Judges, in small communities, by necessity, appoint attorneys they know for positions. Judge Lewis was entirely justified in being concerned that a newspaper article had appeared indicating a grand jury had been convened and that "an indictment is expected" (Exhibit 6, Lewis depo, p. 2); it is not at all unreasonable for the Court to be upset over such a public pronouncement. The State believes this Court would be equally outraged. Judge Lewis never attended any of the grand jury testimony or suggested whom they should indict (Lewis depo, p. 54).

law presumes a judge is fair and impartial, and that presumption is overcome only by evidence that the judge has a bias from an extrajudicial source. *State v. Jones*, 979 S.W.2d 171, 178 (Mo. banc 1998). There has been no such evidence and the bold statement, unsupported by any factual reference, is not appropriate.

The Report discusses issues that were corrected, or made moot, by subsequent events – most notably the second trial before Judge Griffen, prosecuted by Rachel Smith, with Petitioner represented by Judge Cook and Mr. Kutmus (and not Richard McFadin), with a full and fair opportunity to "point the finger" at Brandon Hagan. That trial was fair and the verdict was supported by the evidence.

WHEREFORE, Respondent prays that this Court address the issues raised in these exceptions and enter its Report that Petitioner failed to sustain his burden to prove he is entitled to a new trial based on the allegations raised.

Respectfully submitted,

CHRIS KOSTER
Attorney General

THEODORE A. BRUCE
Assistant Attorney General
Missouri Bar No. 29687
P.O. Box 899
Jefferson City, MO 65102
(Ph) 573-751-1508 / (F) 573-751-0924

ATTORNEYS FOR RESPONDENT

**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing was mailed, postage prepaid, this ____ day of _____, 2012, to:

Robert B. Ramsey
104 Magnolia Drive, Suite B
Glen Carbon, IL 62034

_____
THEODORE A. BRUCE