

**IN THE CIRCUIT COURT OF COLE COUNTY
STATE OF MISSOURI**

JOSHUA C. KEZER,)	
)	
Petitioner,)	
)	Cause No. 08AC-CC00293
v.)	Division 2
)	
DAVID DORMIRE, SUPERINTENDENT)	
JEFFERSON CITY CORRECTIONAL)	
CENTER)	
)	
Respondent.)	

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND JUDGMENT

Now on this 17th day of February, 2009, the Court again takes up this matter for the purpose of entering its final Judgment.

This case is a proceeding in habeas corpus under Missouri Supreme Court Rule 91. For the reasons stated below, this Court grants Petitioner habeas corpus relief.

I. OVERVIEW

Trial by jury is a fundamental tenet of our criminal justice system. A populist notion in its very essence, the right to be judged by one's fellow citizens serves as an important check on the State's power to deprive its citizens of their liberty. A jury trial is intended by purpose and design is to limit the power of prosecutors and judges to incarcerate. Just as important, however, is what the right to jury trial is not. A jury trial is not a shield for prosecutors to avoid difficult charging decisions, and deference to a jury verdict is not a substitute for meaningful judicial review. In the final analysis, our system of trial by jury is there to protect citizens from its own government, not to protect government from its own mistakes.

There is little about this case which recommends our criminal justice system. The system failed in the investigative and charging stage, it failed at trial, it failed at the post trial review,

and it failed during the appellate process. The only bright note is the Scott County Sheriff Rick Walter who after being elected sheriff, reopened the investigation. Largely through his efforts, along with those of Petitioner's counsel, is the system finally righting itself with respect to Josh Kezer.¹ Tragically for the family of Mischelle Lawless, the real killer or killers remain at large.

II. 1994 TRIAL

Petitioner Joshua C. Kezer ("Josh Kezer") was convicted in 1994 of second degree murder for the November 8, 1992 murder of Angela Mischelle Lawless ("Mischelle Lawless") in Scott County, Missouri. The victim had been found in her car on the I-55 exit ramp near Benton with its motor still running. She was sprawled across the center console with her head resting on the front passenger-side seat. She had been shot three times. Josh Kezer was 17 years old at the time of the murder. The evidence against him at trial was extremely weak. There was no physical evidence linking him to the crime. Although evidence at the scene showed that there had been a struggle and ample physical evidence was collected, none of the fingerprints, palm prints, hair, or blood from the car, or DNA from under the victim's fingernails matched Kezer. The only physical evidence the prosecution introduced against Josh Kezer involved a few invisible specks of a substance that reacted with Luminal on the inside of Josh Kezer's leather jacket and on the armrest of the white car that belonged to of friend of Kezer. This physical evidence was seized and tested months after the murder. The prosecution's expert testified that he could not conclude the substance was blood. He said the substance could have been any substance that contains oxidation, including vegetable stains; nevertheless, the prosecutors

¹ Counsel for Respondent is also to be complimented. While an advocate for his client, his timely disclosure of evidence favorable to Petitioner displayed honor and integrity.

repeatedly misstated the evidence to the jury, arguing that the specks were in fact blood. (TR. 1142, 1143, 1200, and 1202)².

Going into the trial, the prosecution's case consisted primarily of testimony by three jail inmates, given in expectation of more lenient sentences, that Josh Kezer confessed to the crime, together with an identification of Josh Kezer made by a witness four months after the murder as someone driving a small white car near the highway exit where the body was discovered.

The defense case consisted of several witnesses who testified that the defendant was 350 miles away in Kankakee, Illinois (where he was then living) at the time of the murder. One witness, Brenda Garduno, testified Josh Kezer came by her house not long before midnight on November 7 to check on his cousin, who had been injured in an automobile accident while driving with her daughter earlier the same night.

In the course of the trial preparation, David Rosener, one of Kezer's lawyers, had interviewed the inmate witnesses and obtained signed recantations. Two weeks before the trial was scheduled to begin, the State filed a motion to disqualify defendant's private counsel on the basis a lawyer cannot be both a witness and an advocate on the same case and that the jail inmates were now going to testify that the recantations were given only after they had been threatened by defense counsel David Rosener. In order to avoid a continuance, defense counsel agreed that Rosener would not testify. Kezer, who had already been incarcerated 15 months awaiting trial and whose family by this time had run out of money to hire new lawyers, agreed

² Citations herein: (a) "TR" are to the trial transcript; (b) to "P's Ex.'s" or "R's Exs." are to exhibits introduced at the hearing in this proceeding. ("Doc." on an exhibit refers to the Bates numbered page); and (c) to "Depositions" are to deposition testimony taken in the original case against Kezer or in this proceeding.

and waived any conflict. Thus the inmates were able to testify with impunity that their recantations had been obtained by duress.³

At the end of the prosecution's case-in-chief, Chantelle Crider (a friend of Michelle Lawless who had been attending the trial) informed the prosecutors that she recognized Josh Kezer as a person who had threatened and harassed Michelle Lawless at a Halloween party in 1992, 10 days before the murder. Before Crider came forward with this information, there was no evidence that Josh Kezer and Michelle Lawless knew one another. Scott County Sheriff Ferrell had admitted that their investigation had uncovered no evidence that they had ever met (Tr. 709). Crider testified as one of last witnesses in the case; she related how Kezer had met Michelle Lawless at the party and asked her out. When Michelle refused, Kezer became agitated and called her a stupid bitch (Tr. 1063). This new evidence was devastating to the defense case and finally gave the prosecutors a motive which they were able to use in closing argument (Tr. 1188).

Too late to help Josh Kezer, on the Monday morning following the weekend that the conviction and the defendant's picture were reported in the local newspaper, the host of the Halloween party contacted defense counsel. She related how she had read about Chantelle Crider's testimony and saw Josh Kezer's picture. She further told them that while she had no opinion of Kezer's guilt or innocence, that she did know all the guests at her party and that Ms Crider was mistaken; that she (host) had never met Josh Kezer; that he had never been a guest at her house; and that the person who had gotten into an argument with the victim was a man named Todd Mayberry, not Josh Kezer. This account was corroborated by another guest at the

³ This circumstance is particularly pernicious because an investigator for the Scott County Prosecutor's office, who presumably did not threaten the inmate, also obtained a hand-written recantation from Shawn Mangus in December of 1993; however, this hand-written recantation was never turned over to the defense.

party. Inexplicably, this new information did not gain Kezer a new trial, nor did the public defender who took over the case from private counsel even mention it on appeal.

III. CLAIMS FOR HABEAS RELIEF

Josh Kezer has advanced two legal grounds for his habeas corpus Petition:

- Violation of his right to due process by suppression of exculpatory evidence under *Brady v. Maryland*, 373 U.S. 83 (1963), and
- Actual innocence under *Schlup v. Delo*, 513 U.S. 298 (1995), and *State ex rel. Amrine v. Roper*, 102 S.W.3d 541 (Mo. banc 2003).

A. The Brady Claims

Josh Kezer contends the State violated his right to due process when it failed to disclose :

a. A written report by Scott City Police Lieutenant Bobby Wooten of a November 18, 1992 interview he conducted of Mark Abbott (the “Wooten Report”) in which Abbott stated unequivocally that the person he saw in the white car near the murder scene was Ray Ring, a local mixed-race teenager he said he had just met at a party in Sikeston.

b. Investigation notebooks of Deputy Brenda Schiwitz, the primary investigator for the Scott County Sheriff’s Department in the investigation. Brenda Schiwitz testified in her deposition that she had destroyed all her notes. Contrary to her statement, the notes were not destroyed, but were maintained as part of the Sheriff’s officer files and were discovered after the Mischelle Lawless case was reopened by a new Sheriff. These notebooks contain additional *Brady* material, including principally the following: (1) notes of a November 11, 1992 meeting of the investigative team listing Mark Abbott (or his identical twin Matt) as a suspect (Schwitz testified at trial Mark Abbott was never a suspect; (2) a note from a November 23, 1992 interview with Mark Abbott regarding the person in the white car who approached him near the

murder scene looking for gas while he was trying to call 911: “man @ phone – not white – Mexican or Negro” (Kezer is white); (3) a note from the same interview that the white car Abbott saw was: “4 door ... newer model car – ’90-91 ... w/high rear bumper w/chrome on it (the car Abbott later picked out as the car he saw was a 2-door and did not have a high chrome bumper); (4) notes of a May 2, 1994 interview with one of Kezer’s former cellmates, Joseph R. Flores, in which Flores said Kezer talked about the murder “a lot,” told him he was innocent and in another state when the murder occurred, and had been mistaken for someone else. This information contradicted trial and deposition testimony of prosecution witnesses and the formal written reports of law enforcement that were provided to the defense

c. A December 6, 1993 signed and hand-written statement of Shawn Mangus given to the Scott County prosecutor’s investigator that the statement he had made to the effect that Josh Kezer had confessed to the murder was a lie he told it to get a more lenient sentence.

1. The Wooten Report

The State failed to disclose a written report by Scott City Police Lieutenant Bobby Wooten of a November 18, 1992 interview he conducted of Mark Abbott (the “Wooten Report”) in which Abbott identified Ray Ring as the person he saw looking for gas in a small white car near the murder scene. (P’s Ex. 15). Scott County Sheriff’s Investigator Branden Caid found it paper clipped to Brenda Schiwitz’s investigation notebook in the Sheriff’s Department case file in 2006, after newly-elected Sheriff Rick Walter re-opened the investigation. Josh Kezer’s trial counsel testified they had not seen the document until it was provided to them by Josh Kezer’s current attorneys. The Wooten Report directly contradicts Abbott’s identification of Josh Kezer and the white car he supposedly was driving. According to the report, Abbott unequivocally told

Lt. Wooten ten days after the murder that the person he saw near the murder scene in a white car was Ray Ring, who was half African-American, whom he had just met at a party.

Wooten testified that, although he does not now specifically remember notifying then-Sheriff Bill Ferrell of the interview the same night (as the report indicated he did) or delivering the report to him soon after, he is certain he did so given that the interview was such a significant development in the case. (Wooten Dep. 27-29, 34-35). In addition, the documented sequence of events surrounding the time of the Wooten and Windham Reports confirms Wooten's testimony that the Scott County Sheriff received at least a verbal report of Wooten's interview with Abbott almost immediately. The Wooten Report states that the interview occurred at 10:16 p.m. on November 18, 1992. Trooper Windham and Sheriff Ferrell interviewed Ring the next morning, November 19, gave him a Miranda warning, and obtained a blood sample. (P's Ex. 6, Doc. 162-163). This was the first time in the case that Ferrell joined Windham for an interview, and Windham assumed the Sheriff had received information that prompted him to do so. (Windham Dep. 17-20). The Windham-Schiwitz interview of Abbott, in which Abbott told about Ring's attempts to contact him and said Ring might have been the person in the white car, occurred on November 23, 1992, four days after Windham and Sheriff Ferrell interviewed Ring and, therefore, could not have been the reason for conducting the Ring interview on the 19th.

2. Investigation Notes Maintained by the Sheriff's Department.

It is undisputed that the State also failed to disclose the investigation notebooks of then Scott County Deputy Brenda Schiwitz, the primary investigator for the Scott County Sheriff's Department in the investigation, to which the Wooten Report had been attached. Deputy Schiwitz expressly and specifically testified in her August 24, 1993 pre-trial deposition (p. 227) that she disposed of her notes after transcribing them into her formal reports and double-

checking them. She testified in her deposition in this proceeding (pp. 14-16), however, that she provided her notes to the prosecution team at the Attorney General's Office, Kenny Hulshof and Van Godsey; but she does not know what they did with them. Josh Kezer's trial counsel, Albert Lowes and David Rosener, testified at the habeas corpus hearing that these notebooks had not been produced to the defense.

The Schiwitz notebooks contain notes of a November 11, 1992 meeting of the investigative team listing "Mark Abbott – Matt Abbott?" as a suspect. (Petitioner's Ex. 44, Doc. 20). Chief Deputy Tom Beardslee testified at the habeas corpus hearing that he was the one who added both Mark and Matt Abbott to this list of suspects—because they are identical twins and it was not clear to him which Abbott had reported the crime and because Mark Abbott had been telling inconsistent and implausible stories to him and others in his various interviews. This is consistent with Abbott's statement in the Wooten Report that Abbott said he had asked to talk to Wooten because "Deputy Beardslee accused him of being guilty and Sheriff Ferrell wanted him to take a polygraph test and that all of the people down there [at the Scott County Sheriff's Office] were a bunch of assholes," which explains why Abbott was so anxious to offer up Ray Ring as another suspect. Other entries in Deputy Schiwitz' notes, in addition to the November 11 suspect list, indicate that she considered Abbott a suspect herself, at least during the first months of the investigation—because he returned to the scene of the crime and because he gave inconsistent accounts of events the night of the murder. (Schiwitz Nov. 17, 2008 Dep. pp. 37, 42-43 & Ex. 1, pp. 34 & 37). In contrast to this undisclosed information and in an effort to bolster Abbott's credibility, the prosecutor elicited from Deputy Schiwitz at trial that Mark Abbott was never a suspect in the murder, "not at any time." (Trial Tr. 505).

The Schiwitz notebooks contain a note from a November 23, 1992 interview with Mark Abbott regarding the person in the white car who approached him looking for gas while he was trying to call 911: “man @ phone – not white – Mexican or Negro.” (P’s Ex. 44 Doc. 38). In her formal report of that interview, however, she wrote that Abbott said: “This driver was *not a Negro...but* could have been Hispanic or Mexican as he had a dark complexion.” (P’s Ex. 8, Doc. 446)(emphasis added). In her recent deposition testimony in this case, Schiwitz admitted her notes taken at the time of the interview should be more accurate than her typed report and that the description in her notes (*i.e.*, that the person was possibly Negro) is significantly different from the description in her typed report. (Schiwitz Nov. 17, 2008 Dep. 54). MSHP Trooper Don Windham’s report of the same November 23, 1992 interview with Mark Abbott states that Abbott said the person in the white car looking for gas was a “dark skin toned male, possibly Hispanic.” (P’s Ex. 8, Doc. 157-158). When confronted with Deputy Schiwitz’ note that Abbott said the man was “not white - Mexican or Negro,” Windham testified: “You know, I assume in broaching that deal that he really believed him to be Hispanic, so rather than put down other options you put down which one he really believed.” (Windham Nov. 14, 2008 Dep. 27). He said further: “I don’t know why you would want two different races to say which one is which. That doesn’t make sense. That doesn’t help you in an identification purpose. You want to get it to a certain race as best you can.” *Id.* (pp. 27-28). The narrowing of Abbott’s description in the two disclosed reports to possibly Hispanic or Mexican made it easier for Deputy Schiwitz to argue at trial (Trial Tr. 497-500) that Josh Kezer could have appeared Hispanic in November 1992 because his dyed black hair made his skin look darker or because he possibly had the vestiges of a tan from the previous summer, although such arguments are implausible.

The Schiwitz notebooks contain a note from the November 23, 1992 Schiwitz/Windham interview with Mark Abbott that the white car he saw was: “shape of SAAB – maybe Escort – white - 4 door – no tinted windows newer model car – '90-91 all white car w/high rear bumper w/chrome on it.” (P’s Ex. 44, p. 38). Schiwitz’ notes of that interview also describe a car Abbott identified as looking like the car he supposedly saw as a “white Merkur XR4Ti (Ford product) w/ 1 piece spoiler.” *Id.* (p. 37). Neither Schiwitz’ nor Windham’s typewritten reports of the interview specified the number of doors or mentioned a high rear chrome bumper. (P’s Ex. 6 & 8, Docs. 446, 157-158). Windham’s typewritten report indicated that Abbott said the car “had a spoiler or something on back” and that Abbott identified a Merkur XL4Ti as a car that looked like the one he supposedly saw. (P’s Ex. 6, Doc. 157-158). In his recent deposition testimony taken in this proceeding, Abbott identified a photo of a 1985 Merkur XR4Ti with a spoiler as looking like the car; and he emphasized the “fin” on the back of the car he saw as the distinguishing feature. (Abbott Dep. pp. 51-54, 195-197 & Ex. 14). In contrast to Schiwitz’ suppressed notes, Christy Naile’s car that Abbott identified from a photo lineup and at trial looked nothing like the car Abbott described. It was a 1985 *two-door* Plymouth Duster hatchback with *louvers* on the back window (**not a one-piece spoiler**) and ***without a chrome high rear bumper***. (pp. 42-43). A spoiler is markedly different from louvers, as Sgt. Windham admitted in his testimony in this case (Windham Nov. 14, 2008 Dep. 31 & 66); but none of the eight cars in the photo lineup had a spoiler. Five of the cars had nothing on the back; and three, including Naile’s, had louvers, a feature Abbott had never mentioned until he saw the photo lineup. (P’s Ex. 19).

The Schiwitz notebooks contain notes of a May 2, 1994 interview with one of Josh Kezer’s former cellmates, Joseph R. Flores, in which Flores said Kezer talked about the murder

“a lot,” told him he was innocent and in another state when the murder occurred, and had been mistaken for someone else. (P’s Ex. 44 p. 111). This information contradicts the trial testimony of another cellmate, Wade Howard, that Kezer confessed to the murder but is consistent with the details of Howard’s recantation statement given to David Rosener. (P’s Ex. 41). Messrs. Lowes and Rosener testified in this proceeding that defense counsel did not have this information regarding Flores.

3. Mangus’ Handwritten Statement To Scott County Prosecutor’s Office

In December 1993, Shawn Mangus gave a handwritten statement to an investigator for the Scott County Prosecutor’s Office. The statement explained that his story that Josh Kezer had confessed was a lie he had made up in order to get a reduced sentence on his pending charges. Mangus was the first of the four Kezer acquaintances (the others were Weissinger, Grah, and Kelly Church) in jail together in Cape Girardeau County Jail to approach the Scott County Sheriff with the story that Kezer told him he killed Mischelle Lawless. He gave that story to the sheriff in March 1993 and then gave the same testimony at Kezer’s 1994 trial. In August 1993, however, Mangus had provided a written statement to David Rosener that the story he had told in March was a lie and that he told it to get a reduced sentence. (P’s Ex. 26). At trial, he explained his recantation to Rosener by claiming that Rosener had threatened him with harm from Kezer’s supposed gang if he did not recant. Because December handwritten statement was not provided to the defense, it was not available to show the jury or to use in cross-examining Mangus at trial.

B. The Actual Innocence Claim

Josh Kezer also contends that his new evidence establishes his actual innocence by thoroughly discrediting the already suspect key evidence in the State’s case. This new evidence

includes both the information in the suppressed documents and a substantial amount of additional evidence that came to light after the trial.

The additional evidence impeaching Abbott's identification of Josh Kezer includes: (1) a statement by Abbott to Kevin and Terri Williams just hours after the murder that he could not see the face (only images or outlines) of anyone in the white car but that the driver was speaking with a "Spanish" accent; (2) a statement to another friend within a week of the murder that in the white car was a carload of Mexicans, who looked like Mexicans and talked like Mexicans; (3) Abbott's testimony that he may have been mistaken in his identification of Josh Kezer and that the person in the white car may have been the Mexican who asked Officer Moore at the murder scene where he could find an open gas station; (4) testimony of Ron Burton, Ryan Jones, and Chantelle Crider that Abbott stated or implied to them that he killed Mischelle Lawless; (5) testimony of Detective Bill Bohnert that Abbott told him that Abbott was with Kevin Williams when Kevin Williams killed Mischelle Lawless; and (6) testimony of Cathy Fowler, Helen Natvig, and Robin Natvig that Kevin Williams stated or implied to them that Mark Abbott killed Mischelle Lawless.

The additional new evidence impeaching the testimony of the jail inmates includes: (1) testimony of David Rosener that Mangus and Howard lied about what Rosener supposedly did to obtain their recantations; (2) testimony of Kelly Church, one of the original snitches who did not testify at the trial, that Mangus had concocted the story of the confession with him and Weissinger; (3) testimony of Jeff Rogers, another cellmate in Scott County Jail who did not testify at trial, that the then Scott County Sheriff had intimidated him into signing a false statement that Josh Kezer confessed to him.

The additional new evidence negating Chantelle Crider's identification of Josh Kezer at the Halloween party includes: (1) Crider's testimony at the hearing that she was mistaken; (2) testimony at the hearing of Dawn Worley Pierce and Lacy Warren Hall that they knew every male at the party, which they hosted, that Josh Kezer was not there, and that the boy who harassed Mischelle Lawless was Todd Mayberry.

Finally, there is new physical evidence that (1) tests of the substance on Josh Kezer's jacket and the white car's armrest which had reacted to Luminol were negative for the presence of human blood and (2) the DNA on blood found under Mischelle Lawless' fingernails was consistent with the profile of one of her boyfriends, Leon Lamb.

Coupled with the non-disclosed evidence described above, the following new evidence organized according to the categories of that evidence negates the evidence presented against Josh Kezer at trial.

1. Mark Abbott Testimony Identifying Kezer and the Plymouth Duster

At the hearing in this proceeding, Josh Kezer presented the following new evidence impeaching Abbott's identification of him as the person in the white car he saw near the murder scene.

Five items of new evidence are statements that Abbott made about the person in the white car shortly after the murder which flatly contradict his identification of Kezer. Early the morning of the murder, Abbott told his friend, Kevin Williams and Williams' wife, that there were several people in the white car, that he could only make out shapes and could not see faces, and that the person who spoke to him had a Spanish accent. (Williams Dep. 16-19, 22, 29, 60-61). Williams testified that Abbott told him "He said he seen an image, kind of an image of some people in the car. He didn't know exactly. Knew there was more than one. And said the person when they

spoke, it wasn't an English accent, it was a different accent like Spanish or something" (p. 18). William explained that Abbott said "he couldn't really see who was in [the car], all he could see were images or outlines" and that "wasn't able to describe the people in the car" (p. 29).

A few days after the murder, Abbott told Richard Clay the white car was a "carload of Mexicans," who "looked like Mexicans" and "sounded like Mexicans." (Clay Dep. pp. 8-10). Ten days after the murder, Abbott told Wooten the person in the white car was Ray Ring—a person he met at a party in Sikeston who was half African-American. Previously undisclosed notes of Deputy Schiwitz of the November 23, 1992 interview with Mark Abbott indicate he stated: "man @ phone—not white—Mexican or Negro." Schiwitz' notes of the November 23 interview also indicate Abbott stated that the white car he saw had four doors, a spoiler, and a high rear bumper with chrome on it. The car he identified at trial had two doors and louvers, not a spoiler, and did not have a high rear chrome bumper.

Several other pieces of new evidence are admissions by Abbott that he killed Mischelle Lawless or saw Kevin Williams do it. Ron Burton testified at the hearing that Abbott told Burton he knew the wrong person was in prison for the Mischelle Lawless murder because "I took care of that bitch." Chantelle Crider testified at the hearing that Abbott threatened he would do the same to her that he had done to Mischelle Lawless. Ryan Jones testified by deposition that Abbott once threatened to kill him like he killed Mischelle Lawless. (Jones Dep., pp. 10-17). Cape Girardeau Detective Bill Bohnert testified at the hearing that, in 1997, Abbott told Bohnert that he and Williams stopped Mischelle Lawless at the Benton exit and it was Kevin Williams who killed Mischelle Lawless while Abbott waited in his truck and that he had told authorities a different story in order to protect Williams

Several witnesses testified that Kevin Williams told them that Abbott killed Mischelle Lawless. Cathy Fowler testified Kevin Williams told her it was Abbott who killed Mischelle Lawless. Helen and Robin Natvig testified by deposition that Kevin Williams said that Mark Abbott was involved in the murder. (Helen Natvig Dep., 8-9, 20-21; Robin Natvig Dep. 7-9).

After the investigation into the Lawless murder was reopened and suspicion once again turned to him, Abbott backed off from his identification of Josh Kezer at trial. In a December 5, 2006 recorded telephone conversation from federal prison with Kevin Williams, Abbott stated that he does not know if Kezer was the person in the white car, only that the person looked like him. He also stated that the white car he identified as the one he saw that night only looked like the car he saw, but he was not sure. (Abbott Dep, p. 195). Abbott testified he believed his identification of Kezer was correct because of rumors and other information he had heard about the case and because the authorities seemed so sure they had the right person. He has found out recently that this information was not true and believes he could have been mistaken. (Abbott Dep. pp. 26-27, 61-64, 204-206). He also now thinks the Mexican in the white car who asked Benton Officer Roy Moore at the murder scene where he could find an open gas station may have been the person he identified as Kezer. *Id.* pp. 164-167. He now says he could not be positive he saw Naile's car clearly, and he was not positive at the time he picked it out. *Id.* at 21-23, 38-39.

2. Luminal Evidence in the Plymouth Duster and on Kezer's Jacket

The prosecution presented two microscopic specks in Christie Naile's Plymouth Duster and the few specks in Kezer's leather jacket that reacted with Luminal as if they were the victim's blood. The prosecution knew that the Luminal results did not even show that the substance or substances in the Duster and on the jacket were human blood; it could have been

any one of a number of substances (including vegetable stains). The prosecutor also knew there was no evidence linking any of it, whatever it was, to Mischelle Lawless or Josh Kezer. Nevertheless, he told the jury in closing it was no coincidence that the Luminal test revealed “the presence of blood” on the jacket and that, sprayed with Luminal, the car Abbott identified without knowing it had a connection to Josh Kezer, “glows like a Christmas tree.” (Tr. 1200). Reliagene Technologies, Inc. conducted new tests of the substances on Josh Kezer’s leather jacket and the armrest of Naile’s car. In a report dated October 31, 2007, Reliagene stated that these samples all tested negative for the presence of blood using the Kastle-Meyer test. (P’s Ex. 2, pp. 2-3).

3. Chantelle Crider’s Identification of Josh Kezer at the Halloween Party

Before she fell in with Mark Abbott and his friends, Chantelle Crider was one of Mischelle Lawless’ best friends. She attended a Halloween party at the home of John and Dawn Worley Pierce ten days before the murder with Mischelle Lawless and another friend, Lelicia O’Dell. At that party, Crider witnessed a boy she did not know harassing Mischelle Lawless. She attended the trial and, near the end of the prosecution’s case, told authorities she recognized Josh Kezer as the boy at the Halloween party. Until Crider surprisingly came forward after several days observing the trial, no evidence of a motive and no prosecution witness had seen Josh Kezer in Missouri during October or November 1992 or had provided any link between Josh Kezer and Mischelle Lawless. Chantelle Crider (now Carlisle) testified at the hearing in this case that she was mistaken in her identification of Josh Kezer and that the person she thought was Josh Kezer was Todd Mayberry. She acknowledged that the person who harassed Mischelle Lawless was clean cut and had light brown hair and did not look anything like the picture of Josh Kezer taken at Christmas 1992. (P’s Ex. 51).

Much more credible than Chantelle Crider, however are two other witnesses who establish that Josh Kezer was not at the Halloween party. At the hearing in this proceeding, Lacey Warren Hall and Dawn Worley Pierce testified that the party was organized and sponsored by Dawn Worley Pierce and that they knew who was at the party and Josh Kezer was not there. Lacey Warren Hall testified at the hearing that she had read an article in the local paper on the weekend after Josh Kezer was convicted describing how Chantelle Crider had come forward at trial and identified Josh Kezer as the person who argued with Mischelle Lawless at the Halloween party. She stated that she was stunned because she knew all the people at the party and Josh Kezer was not at the party. She took the newspaper article and went to visit Dawn Worley Pierce who had sponsored and organized the party and showed Dawn Worley Pierce the news article. Dawn Worley Pierce's reaction was the same as Lacey Warren Hall. They decided they should convey this information to Josh Kezer's attorney. Thus, within days of Josh Kezer's conviction they visited with Josh Kezer's attorneys and signed affidavits that they knew all of the people at the party and Josh Kezer was not there. Dawn Elizabeth Worley testified and corroborated Lacey Warren Hall's testimony. Dawn Worley Pierce stated that she provided a list of all the people she knew at the party and was positive that Josh Kezer was not there. She remembered Mischelle Lawless being there with her two friends, but she was sure there were no strangers at the party except for Mischelle Lawless' two girlfriends and a few girls that had come with their boyfriends whom Dawn Worley Pierce and Lacey Warren Hall knew. Dawn Worley Pierce also remembered that Todd Mayberry was there and had been kissing and making out with Mischelle Lawless and had gotten into an argument with Mischelle Lawless. These two witnesses' testimony were credible and based upon that testimony the court is convinced beyond a reasonable doubt that Josh Kezer was not at the Halloween party.

4. Testimony of the Three Jail Inmates

Shawn Mangus is deceased, but Josh Kezer presented the following new evidence regarding his trial testimony.

- Another Kezer acquaintance, Kelly Church testified by deposition in this proceeding that Mangus told him they could get reduced sentences by telling a story about Josh Kezer confessing to them at Stacy Reid's apartment and that Weissinger was involved too. (Church Dep. 6-7). Church, who did not testify at Josh Kezer's trial, gave a statement to investigators on March 12, 1993 that Josh Kezer told him at Reid's apartment that he was *going to kill* a girl from Benton. (Petitioner's Ex. 6 Docs. 271-272; Church Dep. 10-13). This story was not true. Church Dep. 13-14, 22-24). Church also testified in his deposition that he deliberately changed this detail from the story Mangus had given him because he felt bad about making a statement against Josh Kezer. (*Id.* 19-20, 23-24).
- David Rosener was not able to challenge Mangus' claim at trial that Mangus had recanted his claims about Josh Kezer's confession in June 1993 because of Rosener's threats of violence as a consequence of the agreement to avoid disqualification of his firm. He testified at the hearing in this case, however, that Mangus was lying about the threats and that he did not threaten or coerce Mangus to make a recantation.
- Mangus gave the Scott County Prosecutor a written statement in December 1993 (which was not provided to defense counsel) that his statement that Josh Kezer had admitted he killed Michelle Lawless was false. (P's Ex. 21).

One of Josh Kezer's cellmates while he was incarcerated in Scott County jail awaiting trial, Wade Howard, testified that Josh Kezer confessed to him there. Prior to the trial, Howard gave Rosener a statement recanting that story; but then, after further conversation with the

prosecution, he reverted to his original story and claimed the statement he signed was not what he told Rosener (in particular a statement about being coerced by Sheriff Ferrell to make his original statement). Josh Kezer presented the following new evidence regarding Howard's testimony.

- Rosener credibly testified that Howard's explanation of the recantation was a lie.
- Another cellmate with Kezer and Howard, Jeff Rogers, testified by deposition that Josh Kezer did not confess, but always insisted he was innocent. He also testified that Sheriff Ferrell called him into his office and presented him with a statement, which already was prepared, claiming that Josh Kezer confessed. He did not want to sign it because it was not true but did sign after the Sheriff threatened to make life difficult for him if he refused and to help him out if he cooperated. (Rogerts Dep. pp. 8-13). On advice of counsel, he refused to discuss the matter in his deposition before Josh Kezer's trial, rather than lie; and the prosecution did not call him as a witness (*Id.* pp. 13-14).
- The prosecution suppressed Deputy Schiwitz' notes of the interview with another cellmate, Joseph Flores, in which Flores stated Josh Kezer always protested his innocence.

5. Evidence Of Leon Lamb's Blood Under Mischelle Lawless' Fingernails

On the first day of the hearing, Scott County Detective Branden Caid testified that the MSHP Crime Laboratory had told him in a telephone conversation about two months previously that there was new evidence Leon Lamb's DNA was under Mischelle Lawless' fingernails. Leon Lamb was one of Mischelle Lawless' boyfriends, who had testified that she came by her house and that they had sex shortly before she was murdered. The next morning, the Attorney General's Office produced a Crime Lab report dated September 22, 2008, which had not

previously been provided to the Attorney General's Office or to Josh Kezer's counsel. This report states that, on the basis of Y-chromosome DNA testing of two samples, an "Extract from RH fingernail clippings" (Marshall U. MOCR06-001 Q5; Reliagene 07-05258) and an "Extract from LH fingernail blood" (Marshall U. MOCR06-001 Q6; Reliagene 07-05259), Leon Lamb could *not* be eliminated as the source. Respondent's Ex. H (Items 21.3 & 21.4). Both the Marshall University and the Reliagene Reports describe these two samples as "Swabs of R & L fingernail clippings." P. Ex. 1, p. 1 & P. Ex. 2, p. 1.

As to Item 21.3, the report stated:

Additional Y-chromosome specific DNA testing was performed on the extract from the RH fingernail clippings. The Y-chromosome haplotype is consistent with a mixture of two individuals. The major component of the mixture Y-chromosome haplotype is consistent with the Y-chromosome haplotype from Leon Lamb (Reliagene #07-05306); therefore, neither Leon Lamb, nor males from a common paternal lineage, can be eliminated as the source of this haplotype.

The report further stated that this haplotype "would have an approximate frequency of 1 in every 1307 individuals in the Caucasian population." As to Item 21.4, the report stated:

Additional Y-chromosome specific DNA testing was performed on the extract from the *LH fingernail blood*. The partial Y-chromosome haplotype (data represented at 3 of the possible 12 loci) was developed. Neither Leon Lamb (Reliagen #07-05306), nor males from a common paternal lineage, can be eliminated as a contributor to the haplotype at the alleles represented. Additional allelic activity is present; however, the is insufficient information for comparison purposes. (Emphasis added.)

If, as Item 21.4 indicates, the samples are Leon Lamb's blood rather than semen, their presence cannot be explained as the result of a sexual encounter, but rather are suggestive of a violent struggle. Significantly, Leon Lamb was an early suspect because, by his own admission, he was the last person, other than the killer or killers, to see Mischelle Lawless alive. In addition,

Mischelle Lawless had told him recently that she was pregnant by him; and he had confronted her earlier the evening before her murder when he saw her driving around Cape Girardeau with someone else. *E.g.*, P. Ex. 5, Docs. 61, 77, 85, 93, 98.

IV. FINDINGS OF FACT

1. Angela Mischelle Lawless was murdered at the northbound I-55 Benton exit in Scott County, Missouri between approximately 1:00 a.m. and 1:20 a.m. on November 8, 1992.

2. Reserve Deputy Rick Walter, now Scott County Sheriff, and Benton Police Officer Roy Moore arrived at the scene at 1:29 a.m. They found Mischelle Lawless dead in her car, slumped across the center console with her head resting on the passenger side seat. There were obvious signs of a struggle. The headlights were on, and the engine was running. The driver's side door was unlocked, and the driver's side window was less than half or about five to seven inches down. The passenger side door was locked, and the window was rolled all the way up.

3. Shortly after the first officers arrived at the crime scene, a person driving a small white car approached the crime scene from the direction of Benton, made a U-turn, and approached Officer Moore to ask for assistance. Officer Moore described the man as in his early twenties and Hispanic. He spoke broken English in a heavy accent. He told Officer Moore he was almost out of gas and wanted to know where he could find an open station. Officer Moore directed him to drive north to Scott City, and he entered I-55 going in that direction.

4. At approximately 1:30 a.m., Mark Abbott came into the Scott County Sheriff's Office in Benton and reported finding a body, later identified as Mischelle Lawless, in a car parked at the I-55 exit with its lights on and motor running.

5. Between 1:35 a.m. and 1:39 a.m., Mark Abbott returned to the murder scene from the direction of Benton and spoke to Officer Moore about being the person who found the body. After checking Abbott's story with the dispatcher, Moore told Abbott to go home and that he would be contacted later for a more complete interview. Instead of going home, Abbott went to the home of a woman he had been with earlier in the evening at Country Nights, a nightclub in Sikeston, Missouri.

6. Abbott called his friend Kevin Williams early in the morning on November 8 and then went over to William's house. He told Williams and his wife about finding a body at the Benton exit and about being approached by a person or persons in a white car who were looking for gas while he was trying to make a call at an outdoor pay phone at the closed Cut-Mart convenience store. The phone was located right across I-55 from the murder scene in the direction of Benton. He told Williams that he could not make out faces in the dark, only shapes, but that he believed there were several people in the car. The person who spoke to him about getting gas had a "Spanish" accent. Abbott and Williams then went to the home of Glen Ferrell, the owner of a trailer sales business located adjacent to the murder scene at which Williams and his wife had worked. Abbott asked Ferrell if he could go onto the trailer sales property, and then Abbott and Williams went to the trailer sales property. Williams testified that Abbott seemed to be looking for something.

7. Chief Deputy Tom Beardslee went to Abbott's residence at 9:24 a.m. and again at 10:15 a.m. on the morning of November 8 but found no one at home. He finally contacted Abbott at home at 12:45 p.m. that afternoon and interviewed him regarding the murder. Abbott claimed that he reached with his whole upper body through the driver's side window and lifted Mischelle Lawless upright. Deputy Beardslee did not believe this was possible because the

window was rolled only part way down and felt that Abbott was lying and making up the story as he went along. When asked if he saw any person or car near the murder scene, Abbott mentioned for the first time to law enforcement seeing a man in a grey hooded sweatshirt and jeans on the shoulder of the road near the exit ramp who jumped out of the way as he passed. Abbott did not say anything about stopping at the pay phone near the Cut-Mart across the highway from the crime scene or seeing the man in the small white car looking for gas, even though he later stated that he assumed the person in the white car may have had something to do with the murder and was afraid.

8. Abbott came into the Sheriff's Office later in the afternoon of November 8 and gave another interview to Deputy Brenda Schiwitz. In that interview, he mentioned for the first time to law enforcement that he had seen the person in the small white car looking for gas while he was trying to call 911 at the Cut-Mart. He did not provide a description of that person other than to say he was male and had a dark complexion or the car other than to say it was small and white, even though Deputy Schiwitz asked him for all kinds of details as to what he observed.

9. At a meeting of the investigative team on November 11, 1992, Deputy Beardslee listed Mark Abbott as a suspect in the Mischelle Lawless murder. He did so because he believed Abbott had lied to him in the November 8 interview and was telling conflicting stories about what he saw at the murder scene.

10. Within a week of the murder, Abbott told his friend Richard Clay about finding Mischelle Lawless' body and the car that approached him looking for gas. He told Clay that it was "a carload of Mexicans" that "looked like Mexicans" and "sounded like Mexicans." Clay and Abbott were involved in dealing drugs together, and Clay is awaiting execution in the Potosi Correctional Center for a contract murder.

11. Late on November 18, 1992, Lt. Bobby Wooten of the Scott City Police Department interviewed Mark Abbott. Abbott unequivocally told Lt. Wooten that the person in the white car looking for gas was Ray Ring, who is half African-American. He also told him that he did not go to the Sheriff's Office with this information because Deputy Beardslee thought he was responsible for the murder.

12. In violation of the Missouri Supreme Court Rule 25.03, the State failed to disclose the Wooten Report of the November 18, 1992 interview of Mark Abbott. The Court further finds that if this report had been disclosed to the defense, there is a reasonable probability that the outcome of the 1994 trial would have been different.

13. In a November 23, 1992 interview, Mark Abbott told Deputy Schiwitz and Trooper Windham that the person in the white car looking for gas was "not white - Mexican or Negro." In their formal reports, both of them narrowed that description to exclude Negro and allow for the possibility the person might have been Hispanic with a dark complexion. Even that narrowed description does not fit Josh Kezer, who is white.

14. Mark Abbott's identification of Josh Kezer in the 1994 trial as the person in the white car at the abandoned Cut-Mart looking for gas is not credible and is untrue.

15. Abbott's identification of Christy Naile's white Plymouth Duster hatchback as the white car is also not credible. Prior to picking that photograph, Abbott could not identify the make or model of the car and described it as looking like a Saab, an Escort, and a Mercury Merkur. Moreover, in the undisclosed investigative notes that were not provided to the defense, he said the car had four doors, a high rear chrome bumper, and a spoiler on the back. Even in his recent deposition, he said the distinguishing feature that allowed him to identify the car in the picture was a "fin" on the back. Except for being small and white, none of the cars in the photo

lineup fit any of the descriptions he had been giving. Christy Nailes's Duster had two doors, no high chrome bumper, and louvers on the back window rather than a spoiler. Three of the cars in the lineup had back window louvers, but none had a spoiler. The selection of Christy Naile's car was either a lucky guess or the result of some extraneous hint not apparent in the pictures themselves.

16. In violation of the Missouri Supreme Court Rule 25.03, the State failed to disclose the investigative notebooks of Scott County Deputy Brenda Schiwitz, the primary investigator for the Scott County Sheriff's Department. The Court further finds that if these notebooks had been disclosed to the defense, there is a reasonable probability that the outcome of the 1994 trial would have been different.

17. The 1994 trial testimony of Chantelle Crider Carlisle that Josh Kezer was at a Halloween Party 10 days before the murder where he met and argued with the victim is not true. Josh Kezer was not at that Halloween party. There is no evidence of any motive for Josh Kezer to have killed Michelle Lawless and no evidence he had even met or known her.

18. There was no physical evidence presented at Josh Kezer's 1994 trial connecting him to the murder scene or to Michelle Lawless. Sheriff Rick Walter and his investigator, Branden Caid, have found no such physical evidence in additional testing performed since Sheriff Walter re-opened the investigation of Michelle Lawless' murder. Additional testing by Reliagene indicates no basis for the proposition that the purported specks on Josh Kezer's leather jacket and the armrest of Christy Naile's car are human blood.

19. In August 1993, Shawn Mangus gave a written statement to defense attorney David Rosener that his earlier story to the sheriff that Josh Kezer had confessed to the killing of Michelle Lawless was a lie. Mangus's claim and testimony at the 1994 trial that he only gave

this statement to Rosener because Rosener threatened him is untrue. The Court finds the testimony of David Rosener to be credible and trustworthy in all respects.

20. On December 6, 1993, Shawn Mangus gave a handwritten statement to the investigator for the Scott County Prosecutor's Office. The statement explained that he had made up the story about Josh Kezer's confession in order to get a more lenient sentence. In violation of the Missouri Supreme Court Rule 25.03, the State failed to disclose in advance of trial this handwritten statement. The Court further finds that if this handwritten statement had been disclosed to the defense, there is a reasonable probability that the outcome of the 1994 trial would have been different.

21. Shawn Mangus also wrote letters to Weissinger and Josh Kezer apologizing for lying about the confession. Weissinger and Church confirm that the two of them conspired with Mangus to get lenient treatment by falsely claiming that Josh Kezer confessed. When Weissinger made his statement, he got confused about what Mangus had told him and said the murder was in Benton, Illinois (which Deputy Schiwitz labeled a "Lie!" in her notebook). Schiwitz Dep. Ex. 2, p. 134. Church deliberately changed Mangus' suggested account. He told investigators about a purported statement of future intent instead of a confession to a murder already committed so his statement could not be used.

22. In February 1994, Samuel Wade Howard gave a written statement to defense lawyer David Rosener that his earlier story to the sheriff in November 1993 that while cell mates together Josh Kezer had confessed to the lawless murder was a lie. Howard's claim and testimony at the 1994 trial that Rosener tricked or forced him into giving this statement is untrue. The Court again finds the testimony of David Rosener to be credible and trustworthy in all respects.

23. Grah also lied about Josh Kezer's confession. In the first three interviews, he did not even claim Josh Kezer confessed. Initially, he only said he saw Josh Kezer in January 1993 with what looked like a .380 automatic; but, even if true, that could have been the realistic BB gun Cape Girardeau police confiscated from Josh Kezer on January 18, 1993. Pet. Ex. 22. Only much later did Grah copy the others and tell the story about a separate confession at Stacy Reid's apartment, which Grah claimed occurred on a date three weeks after her eviction from the apartment. Grah claimed he was able to pinpoint the date as January 29, because it was only a few days before the birth of his child on February 4, 1993. The investigator's reports establish that Reid had been evicted from her department by January 8, 1993. The local Cape Girardeau newspaper reported the birth of Grah's child occurring on February 4, 1993. This Court finds that Grah's account of the confession was a lie.

24. Wade Howard's account of Josh Kezer's confession while they were cellmates is not credible. In February 1994, Howard admitted that the confession story was false and had he had been encouraged by Sheriff Ferrell to corroborate the other jail inmates about Kezer admitting to the murder. Howard's explanation of the recantation, that Rosener tricked him into signing a false statement and then refused to correct it, is totally implausible. In contrast, the Court finds that Rosener's account, which he could not give at trial, that he drafted Howard's statement as it was told to him, is true. Moreover, the testimony of Jeff Rogers—that Josh Kezer never told Rogers that he killed Mischelle Lawless and that Sheriff Ferrell coerced a false statement that Josh Kezer confessed from him too—corroborates Howard's recantation. Deputy Schiwitz' undisclosed notes of the interview with Joseph Flores further corroborate Josh Kezer's position that he did not confess to his cellmates but always maintained his innocence.

25. This Court finds that Josh Kezer's testimony that he was in Kankakee, Illinois at the time of the murder, is innocent of Mischelle Lawless's murder, and did not confess is credible. He testified at the hearing and he answered all questions in a straightforward and forthright manner.

26. Josh Kezer's testimony at the hearing is buttressed by the testimony of witnesses at trial that Josh Kezer was in Kankakee, Illinois on November 7 and 8, 1992. Brenda Garduno in particular, whom this Court assesses as credible, testified that Josh Kezer came to her house to check on his cousin Michael at about 11:30 p.m. on November 7, 1992. She was able to recall the date and time because the automobile accident Josh Kezer's cousin was in with her pregnant daughter occurred at 6:45 p.m. on that date, as was documented by a police report of the incident authenticated by a police officer from Kankakee.

27. Just six days before the commencement of trial, the prosecution argued its motion before the court to disqualify Josh Kezer's defense counsel on the grounds that the prosecution was going to contend that Mangus's and Howard's recantations were coerced or falsified by Rosener, one of the defense lawyers, and therefore Rosener would have to be a witness. Defense counsel opposed the motion and argued that it would be fundamentally unfair to disqualify defense counsel who had been working on the case for over a year, in that Josh Kezer's family had no more money to hire new attorneys and the case should not be continued as Josh Kezer had been in jail for more than a year. To avoid the risk of disqualification, Josh Kezer's defense counsel agreed that the defense would not call Rosener to testify. As a consequence, Rosener could not refute the accusations of Mangus and Howard and the arguments of the prosecution that Rosener obtained the recantations by using threats, coercion, and trickery.

28. In arguing to the jury, the prosecutor endorsed the obvious lies of Mangus and Howard. In effect, he attributed the Mangus and Howard recantations to unethical and arguably criminal conduct of Rosener, even though the only evidence of Rosener's alleged misconduct was the assertions of two convicted felons expecting reduced sentences in exchange for that very testimony. Prosecutors did this knowing that Rosener could not answer these charges because of the resolution to the motion to disqualify the defense firm which required Rosener to remain silent. This questionable conduct was compounded by arguing that Josh Kezer's alibi witnesses were also lying at the instruction of Rosener.

29. The MSHP Crime Lab's September 2008 report indicates that blood taken from under Michelle Lawless' fingernails is consistent with the DNA profile of Leon Lamb and is suggestive of Leon Lamb as a possible suspect in the murder. In contrast, neither this newly produced report nor any other scientific analysis has found any evidence connecting Josh Kezer to the murder.

V. ADDITIONAL FINDINGS AND CONCLUSIONS OF LAW

A. The *Brady* Claims

A prosecutor has a broad duty "to disclose evidence in [his or her] possession that is favorable to the accused and material to guilt or punishment." State v. Goodwin, 43 S.W.3d 805, 812 (Mo. Banc 2001.), cert. denied, 534 U.S. 903 (2001) *See also* State v. Parker, 198 S.W.3d 178, 179 (Mo. App. 2006). The failure to disclose such evidence deprives a defendant of due process.

"We now hold that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution."

Brady, 373 U.S. at 87. *See also* State v. Bebee, 577 S.W.2d 658 (Mo. App. 1979) (a Brady violation deprives defendant of due process rights under United States and Missouri constitutions).

The U.S. Supreme Court has identified three components of a Brady violation, which Missouri courts have adopted.

“The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued.”

Strickler v. Greene, 527 U.S. 263, 281-282 (1999). The Court has explained the component of prejudice as being the same as the determination that the withheld evidence is “material.” *Id.* at 282. Missouri courts use the same three factors, defining the third component either in terms of materiality or prejudice. State v. Goodwin, 43 S.W.3d at 812; State v. Parker, 198 S.W.3d at 179-180 (citing Strickler).

The Wooten Report, the Schiwitz notebooks, and the Mangus December 1993 statement to the prosecutor’s investigator were not disclosed. For purposes of a Brady violation, it does not matter which branch of law enforcement failed to make the disclosure Kyles v. Whitley, 514 U.S. 419, 437-38 (1995). Regarding the Wooten Report, Respondent has argued that it is not material because Windham’s account of the November 23, 1992 interview with Abbott (Petitioner’s Ex. 6, Doc. 157-158), which was disclosed to the defense, “indicates that Abbott thought the person he saw that night might be Ray Ring, **based on Ring’s desire to talk to him**” and therefore the Wooten Report is merely cumulative. Show Cause Response p. 9 (emphasis added).⁴

⁴ Windham’s report of the interview (paragraph 4) states, toward the end: “Abbott said Terry and Kevin Williams told him Ray Ring wanted to speak to him. Abbott then thought the subject he saw that night could have possibly been Ray Ring.” (Petitioner’s Ex. 6, Doc 157-158).

The two reports, however, are very different. As Respondent's characterization of the statement in Windham's report indicates, Abbott did not claim that he saw the person in the car clearly enough to identify him or that in fact it was Ray Ring he saw. He merely stated that he had deduced from the fact Ray Ring had been trying to contact him (perhaps to find out what he could tell authorities) that it, therefore, might have been Ray Ring in the car. That is the sort of speculation that would have little incremental value to the defense, especially in the context of the many explicit inconsistencies between Abbott's testimony and prior statements that the defense did use to cross examine him.

In contrast, Abbott made the unequivocal statement in the Wooten Report that it **was** Ray Ring he saw near the murder scene.

Upon arriving at the location I had a conversation with Mark T. Abbott he asked me if I knew a subject by the name of Ray Ring, I then told him that I didn't know him. The Abbott subject then told me that he had met the subject at a party in Sikeston apparently the night of the murder and then again when he was on the phone reporting what he had found at the Benton exit.

(P's Ex. 15). This suppressed statement unequivocally identifying a mixed-race (black-white) individual known to him as the person in the white car directly contradicts Abbott's trial testimony unequivocally identifying Josh Kezer as that person. Moreover, according to the Wooten Report: "Since the time of the incident the Ring subject has made several attempts to contact Mark Abbot [sic] through mutual friends *to meet with him and find out what exactly he saw that night.*" *Id.* (emphasis added). Abbott mentioned this to bolster the credibility of his positive identification of Ring, not as an explanation, as in Windham's report, of why he thought it *might* be Ring.

Deputy Schiwitz's undisclosed investigative notebooks also contradict Abbott's identification of Josh Kezer and Naile's car. They state that Abbott was a suspect (which was

denied at trial in response to questions by the prosecutor). Abbott said the person in the white car was not white, but was Mexican or Negro. Schiwitz' typed report states that the person was not Negro, but could have been Hispanic. This is a significant discrepancy, which she could not explain. She testified she wrote down what Abbott said and that her notes generally are more accurate than the reports she prepares from them. Schiwitz Dep. pp. 50-51, 53-54. Her notes indicate the white car had four doors and a high rear bumper with chrome on it. That description also is significantly different from any disclosed description and significantly different from Naile's car. Respondent argues unconvincingly that these undisclosed discrepancies are not material because there already were so many disclosed discrepancies in Abbott's testimony—in essence that the jury would not be influenced by this new evidence because they bought Abbott's already implausible story at trial.

The investigative notebooks also contain other relevant information. For example, they show that early in the investigation, Mark Abbott was listed as a suspect in the murder. Respondent argues that the fact that the person who found a murder victim is placed on an early list of suspects is not particularly remarkable or relevant. That would be true except for the fact that the prosecutor, in an effort to bolster Abbott's credibility, elicited the untrue fact that Abbott had never been considered a suspect. The notebooks also reveal that another jail inmate, Joseph Flores, contradicted Wade Howard's account that Kezer had been confessing to the murder rather than maintaining his innocence.

With respect to the Wooten Report, Mangus' undisclosed written statement given to the Scott County prosecution undermines Mangus' claims at trial that he only gave his recantation statement to Rosener because of Rosener's threats. Respondent argues that the existence of this statement was sufficiently disclosed (so that defense counsel could have requested it) because

Exhibit F to the prosecution’s last-minute motion to disqualify defense counsel (a Windham report of an interview with Mangus) makes a cryptic reference to the fact Mangus told Bill Stokes, from the Scott County Sheriff’s Department [sic], that he “told Stokes the story Rosener wanted him to tell.” There is nothing in the document indicating that Mangus had given Stokes a written statement. In any event, the State has an obligation to disclose all exculpatory documents and cannot satisfy that obligation by simply by referring to an interview without producing the written document. Alternatively, Respondent argues that the statement is not material—because Exhibit F provides the same information. That claim is not accurate. Mangus’ written statement to Stokes is much more exculpatory than the simple fact provided in Exhibit F that Mangus apparently made some sort of recantation statement to the prosecutor similar to what he had told Rosener. Moreover, Mangus’ statement to Stokes is much more detailed and contains much more exculpatory information to impeach Mangus than the brief statement Mangus gave to Rosener.

Any one of these non-disclosures satisfies the *Brady* requirements. All constituted significant and compelling exculpatory or impeaching evidence, all were suppressed by the State, either inadvertently or willfully, and the suppression of each was material to the defense and, therefore, prejudicial to the defendant.

The non-disclosure of this evidence, taken individually or together, was “so serious that there is a reasonable probability that the suppressed evidence would have produced a different verdict.” Strickler v. Greene, 527 U.S. 263, 281 (1999).

A “reasonable probability” is “a probability sufficient to undermine confidence in the outcome.” Bagley, at 682 (quoting Strickland v. Washington, 466 U.S. 668, 694 (1984)). In assessing materiality, “the question is whether ‘the favorable evidence could reasonably be taken

to put the whole case in such a different light as to undermine confidence in the verdict.”
Strickler, 527 U.S. at 290.

The undisclosed exculpatory evidence here undoubtedly meets this standard of materiality. There is “a reasonable probability” that evidence of Abbott’s previous unequivocal identification of Ring, or the identification of the car as a 4-door, with a spoiler and chrome bumper, Mangus’s signed recantation statement to the prosecutor’s office would have produced a different verdict; and this evidence certainly undermines confidence in the guilty verdict. Suppressed inconsistent statements of witnesses who, like Abbott and Mangus here, are “the essence of the State’s case” are material where disclosure of those statements “would have resulted in a markedly weaker case for the prosecution and a markedly stronger one for the defense.” Kyles v. Whitley, 514 U.S. at 441. The “evolution over time of a given eyewitness’s description can be fatal to its reliability.” *Id.* at 444, citing Manson v. Brathwaite, 432 U.S. 98, 114 (1977) (“reliability depends in part on the accuracy of prior description”); Neil v. Biggers, 409 U.S. 188, 199 (1972) (“reliability of identification following impermissibly suggestive lineup depends in part on accuracy of witness’s prior description”); Boyette v. LeFevre, 246 F.3d 76 at 92 (2d Cir. 2001) (suppressed prior statement indicating hesitancy in identification was material where credibility of identification was central issue in trial). When, as here, a suppressed prior statement directly contradicts a witness’s identification of the defendant at trial, “there is little doubt that the [prior statement] constitutes material impeachment evidence.” Slutzer v. Johnson, 393 F.3d, at 387 (3d Cir. 2004) (definite statement that man witness saw near scene of crime was **not** defendant versus trial testimony that he was defendant).

In addition, there was no physical evidence linking him to the scene, and the blood

evidence that was available excluded him.⁵ In State v. Parker, as here, “there was no forensic or other physical evidence of any kind linking” the defendant to the crime; and “the State’s case against [the defendant] was based solely on eyewitness identification testimony” that the car involved in a drive-by shooting matched a car the defendant was driving. 198 S.W.3d at 187-188. The evidence that was withheld contradicted the eyewitness testimony as to the make, model, and color of the car involved in the shooting. Judge Ellis, who dissented in the Parker case because he believed the appropriate remedy was to grant a new trial rather than remand for a hearing on whether to grant a new trial, concluded that, when there is only eye-witness evidence, “any undisclosed evidence tending to discredit or impeach the eyewitness identification testimony adduced by the State would have ‘the potential to alter the jury’s assessment of the credibility of a significant prosecution witness.’” *Id.* at 188 (quoting United States v. Avellino, 136 F.3d 249, 255 (2d Cir. 1998)).

As a general rule, evidence is material if it would have impeached a particularly critical prosecution witness. See State v. Perry, 879 S.W.2d 609, 612-13 (Mo. App. 1994) (finding *Brady* violation where State withheld prior inconsistent statement of material trial witness); Jacobs v. Singletary, 952 F.2d 1282 (11th Cir. 1992) (finding *Brady* violation where State withheld prior inconsistent statements of eyewitness that would have weakened State’s case); Savage v. State, 600 So.2d 405 (Ala. Crim. App. 1992) (finding *Brady* violation clearly established where State withheld prior inconsistent oral statements of two trial witnesses); Riddle v. Ozmint, 369 S.C.39 (S.C. 2006) (*Brady* violation occurred where solicitor failed to disclose inconsistent statement given by co-defendant to police five days prior to trial). Slutzer, 393 F.3d

⁵ Moreover, the other newly discovered evidence, particularly the multiple admissions of Abbott and Williams that the two of them were responsible for Mischelle Lawless’ death, overwhelmingly demonstrates that Josh Kezer would not have been found guilty beyond a reasonable doubt and that the prosecution mistakenly convicted the wrong man.

at 387-88 (effect of suppression on confidence in verdict greater where other prosecution witnesses not credible); United States v. Sperling, 506 F.2d 1323, 1334-1340 (2d Cir. 1974) (remanding for new trial with suppressed evidence of those defendants as to whom key witness's testimony was uncorroborated); Simmons v. Beard, 356 F.Supp.2d 548, 566 (W.D. Pa. 2005) (other evidence of guilt was "secondary" to testimony of witness impeached by suppressed evidence). Giglio v. United States, 405 U.S. 150, 154-155 (1972) (remanding for new trial where government's case depended "almost entirely" on witness as to whom impeaching evidence was not disclosed);

A finding of materiality does not require that the evidence negated by the suppressed evidence be the only evidence of guilt. Questions regarding the reliability of an eyewitness raised by suppressed prior statements can be sufficient in themselves to shake confidence in a guilty verdict if the other evidence of guilt is weak. Kyles v. Whitley, 514 U.S. at 451. The Supreme Court found a Brady violation in Kyles even though it acknowledged that the inconclusiveness of the physical evidence did not prove the defendant innocent and that the jury might have found the testimony of other eyewitnesses sufficient to convict. *Id.* at 453.

This Court concludes that the nondisclosure of the above-described exculpatory materials constituted a violation of Josh Kezer's constitutional due process rights within the holding of Brady v. Maryland, and, consequently, for this reason alone Josh Kezer's convictions for the murder of Mischelle Lawless and the related armed criminal action cannot stand and should be vacated, and Josh Kezer is entitled to habeas corpus relief.

B. The Actual Innocence Claim

In *State ex rel. Amrine v. Roper*, 102 S.W.3d 541 (Mo. Banc 2003), the Missouri Supreme Court acknowledged in a case a first impression that habeas corpus was an appropriate

remedy for a defendant to assert a claim of actual innocence, even in the absence of any constitutional error in his conviction. Such a so-called freestanding claim of actual innocence is to be evaluated on the assumption that the trial was constitutionally adequate. The evidence of actual innocence must be strong enough and by clear and convincing evidence to undermine the basis for the conviction so as to make the petitioner's continued incarceration manifestly unjust even though the conviction was otherwise the product of a fair trial.

The Missouri Supreme Court has adopted the actual innocence standard discussed by the U.S. Supreme Court in Schlup v. Delo, 513 U.S. 298 (1995). In Clay v. Dormire, 37 S.W.3d 214, the Court held that:

the manifest injustice or miscarriage of justice standard requires the habeas corpus Petitioner “to show that ‘a constitutional violation has probably resulted in the conviction of one who is actually innocent.’ . . . and further, “[t]o establish the requisite probability, the Petitioner must show that it is more likely than not that no reasonable juror would have convicted him in the light [of the new evidence of innocence].” *Id.* at 217.

In State v. Jaynes, the court further explained this actual innocence standard.

“Reasonable doubt,” the court said, “marks the legal boundary between guilt and innocence.” *Id.* at 328, 115 St. Ct. 851. Thus, “actual innocence” means that the Petitioner must show that it is more likely than not that “no reasonable juror would have found the defendant guilty” beyond a reasonable doubt. *Id.* at 328-29, 115 S. Ct. 851.

63 S.W.3d 210, 216. See also State ex rel. Verweire v. Moore, 211 S.W.3d 89, 91 (Mo. banc 2006); or, removing the double negative as the U.S. Supreme Court did in House v. Bell, *supra*, at 538, “is it more likely than not than any reasonable juror would have reasonable doubt.”

Under the Amrine standard, where the actual innocence claim is free standing, *i.e.*, without a constitutional violation, the burden of proof is not the lesser burden of showing “that it is more likely than not”; rather the burden is to show by “clear and convincing evidence”,

Amrine, supra Evidence is clear and convincing when it instantly tilts the scales in the affirmative when weighed against the evidence in opposition, and the fact finder's mind is left with an abiding conviction that the evidence is true. *Id.*

Even if the nondisclosure of the Wooten Report, Deputy Schiwitz's investigative notebooks, and the Mangus handwritten recantation were not *Brady* violations of substantive due process, which they most certainly are, they would still qualify as newly discovered evidence to be considered under a free standing actual innocence claim, along with all the evidence in the case, both old and new.

Neither the *Schlup* nor the *Amrine* burden of proof requires Josh Kezer to prove that Mark Abbott or someone else other than Josh Kezer killed Mischelle Lawless, even though the evidence suggesting that Abbott may have committed the crime is probative on the issue of Josh Kezer's guilt. *House v. Bell, supra*, at 552-553 (new evidence that killer may have been the victim's husband, including his confession to witnesses). Josh Kezer's burden is only to demonstrate to the applicable standard and in light of all the evidence, including the trial evidence, that he is innocent of that crime.

As a threshold matter, the evidence of guilt at trial was extremely weak. There was no physical evidence linking Josh Kezer to the crime, and he presented alibi witnesses who placed him 350 miles away in Kankakee, Illinois near the time of the murder. If the new evidence so requires, this Court may assess the credibility of witnesses presented at trial. *House v. Bell*, 547 U.S. at 538-539 (citing *Schlup*, 513 U.S. at 330). I find the testimony of Brenda Garduno that Josh Kezer came to her house around 11:30 p.m. on November 7, 1992 to check on his cousin particularly credible. Theresa Griffey's testimony that Josh Kezer left her house around noon the same day to check on his cousin likely was the result of faulty memory or confusing two

occasions on which he left the house. Tr. 871. I find no basis in fact for the prosecution's argument in closing that Rosener gave both witnesses a perjured story about the visit near midnight and Griffey could not keep it straight (Tr. 1191).

The prosecution's evidence of guilt consisted of: (1) Mark Abbott's identification of Josh Kezer as being at the Cut-Mart telephone in Christy Naile's white Plymouth Duster; (2) claims of the three jail inmates (Mangus, Grah, and Howard) that Josh Kezer confessed to them; and (3) Chantelle Crider's surprise identification of Josh Kezer as the person who harassed Mischelle Lawless at the Halloween party.

As already indicated, Abbott's trial testimony was not credible. His account of finding the body contained inconsistencies with the facts (the position of the driver's side window and the presence of rings on the victim's hand). He did not mention the man in the white car until the fourth time he spoke to authorities. Then, he gave only a vague description of the man, as having a dark complexion the first time he mentioned him and, in a subsequent interview, as possibly being Hispanic. Josh Kezer does not fit that description, and the attempts of prosecution witnesses to explain the discrepancy by saying that he might have had the vestiges of a tan or that his dyed-black hair might have made him look darker are not persuasive. Abbott's description of the car the man was driving was equally vague. He described it at various times as looking like a Mercury Sable, a Ford Escort, a Mercury Merkur, and a Saab, with four doors and "a spoiler or something" on the back. Then, four months later, after the investigation focused on Josh Kezer, Abbott identified Christy Naile's two-door, white Plymouth Duster hatchback, which had louvers rather than a spoiler, as the car Josh Kezer supposedly was driving. Given this background, the very fact that Abbott supposedly was able to pick Josh Kezer and the

Plymouth Duster out of the photo lineups without hesitation casts doubt on the validity of those lineups.

The testimony of the three inmates who claimed Josh Kezer confessed to them was not credible. All three testified in exchange for reduced sentences. Such testimony, when used at all by prosecutors has proven to be troublesome. Mangus demonstrated that before trial when he admitted—in a statement to Rosener, in a note of apology to Josh Kezer, in two notes to Weissinger, and in a statement to Stokes—that the story of the confession was fabricated. Mangus reverted to his original story after being re-interviewed by law enforcement, and his claim at trial that Rosener threatened him with gang violence to get the recantation was doubly suspect. Similarly, Howard admitted in a statement to Rosener that he made up the story of a confession under pressure from the Sheriff; and then testified that Rosener tricked him into signing a false statement. Grah did not recant, but he did not tell his story of the confession in any of the first three documented interviews. When he did claim Josh Kezer confessed, the story he told could not have happened because it supposedly took place in Stacy Reid's apartment three weeks after she had been evicted from that place. The fourth inmate, Weissinger, recanted and testified for Josh Kezer at trial that he had made up the story of the confession in conjunction with Mangus and Grah.

Finally, Chantelle Crider's last-minute recognition of Josh Kezer at the June 1994 trial as the boy who had harassed the victim at an October 1992 Halloween party was untrue.

Josh Kezer has further demonstrated actual innocence by offering new evidence to negating evidence of guilt presented at the trial. The new evidence so thoroughly impeaches the trial testimony against Josh Kezer that no reasonable juror could convict him on the basis of the remaining evidence under either the Schlup or the Amrine standard.

Abbott and Williams implicated each other in the murder in statements such as those to Ron Burton, Detective Bohnert, Ryan Jones, Cathy Fowler, Helen Natvig, Robin Natvig, and Chantelle Crider. The significance of this testimony is not that it proves that Abbott or Williams is the killer (although there now is more and better evidence against Abbott than there ever was against Josh Kezer). The significance is that Abbott was lying when he told the jury he recognized Josh Kezer as the person in the white car—in order to divert suspicion from himself—and that, therefore, Abbott’s testimony against Josh Kezer must be discounted. Abbott certainly had a reason to lie. As the Wooten Report demonstrates, Abbott believed the Sheriff’s Department viewed him as a suspect, which, in fact, was the case, as Deputy Beardslee testified at the habeas hearing. The admissions and accusations in statements of Abbott and Williams over the years at a minimum suggest that Abbott was involved in the murder. The U.S. Supreme Court, in *House v. Bell*, *supra*, considered new evidence of confession’s by the victim’s husband, similar to Abbott’s and Williams’ statements of involvement to Ron Burton, Detective Bohnert, and others, probative of the petitioner’s innocence even if not conclusive proof of another’s guilt. 547 U.S. at 552-553. In addition, even if these incriminating statements of Abbott and Williams do not prove who actually committed the murder, they certainly serve to discredit Abbott’s identification of Josh Kezer at trial.⁶

Moreover, the new DNA testing of blood from under Mischelle Lawless fingernails is consistent with Leon Lamb’s DNA and inconsistent with Kezer. Lamb thus far is the last person known to have been with Mischelle Lawless that evening, and he had fought with her in the past.

⁶ In the Response to Show Cause Order, Respondent dismisses the new evidence as “hearsay attempting to blame the murder on the man who found the body and reported the crime, and his friend Williams”. In fact, Abbott’s statements, which attempt to blame the murder on anyone but Abbott, are admissible as impeachment of his testimony against Josh Kezer, as prior inconsistent statements, and as admissions against interest and/or admissions against penal interest in a civil hearing. For that matter, some of these statements are not even hearsay, because they are offered, to show that he made the statements, not to prove the truth of any particular matter asserted in them.

In December 1993, six months after he recanted in a written statement provided to Rosener, Mangus gave a written statement to the Scott County Prosecutor that he had lied about Josh Kezer's confession in order to get a more lenient sentence. The fact that he recanted to the prosecutor would have undercut his claim at trial that the recantation to Rosener was false and was coerced. Kelly Church testified that Mangus had induced him and Weissinger to join a plot to trade a story of Josh's confession for more lenient sentences, further corroborating Mangus' withdrawn recantation and Weissinger's testimony at trial (which he repeated in a deposition for the habeas hearing). Church further explained his 1993 statement in furtherance of that plot—that Josh Kezer said he was planning to kill the girl from Benton--as an attempt to undermine his own statement. In light of all this evidence that the original plotters fabricated the story of Josh Kezer's confession at Stacy Reid's apartment, Grah's me-too testimony of a confession to him alone at that apartment (three week's after her eviction) is doubtful. This is especially true in light of the fact that Grah told the story months after repeatedly saying nothing about a confession in law enforcement interviews.⁷

New evidence further undermines the credibility of the testimony of Josh Kezer's cellmate, Wade Howard. Another cellmate, Jeff Rogers, testified for the hearing that he and Howard had made up the story of the confession, that the Sheriff had coerced him into signing a statement already prepared (which supports Howard's statement about coercion in his recantation), that he refused to testify in his pre-trial deposition to avoid telling a lie about Josh Kezer, and that Josh Kezer did not confess but always protested his innocence. See Reasonover, 60 F.Supp.2d at 955 (withheld tapes of defendant's conversations in which she did not admit

⁷ In an actual innocence claim, "the issue is not whether the newly discovered evidence has rebutted every jot and tittle of the original inculpatory evidence" but rather "whether, believing both the 'old' and the 'new' evidence, a rational trier of fact could reconcile that evidence and still reach a verdict of guilty." Ex parte Thompson, 153 S.W.3d at 429.

guilt, contrary to claims of snitch). One of Deputy Schiwitz withheld notebooks contains an account of a pre-trial interview with a third cellmate, Joseph Flores, in which Flores states that Josh Kezer never confessed but always protested his innocence. *Id.*

David Rosener testified credibly at the habeas hearing that the claims of his misconduct by Mangus and Howard as explanations for their recantations were a lie. This was “new” evidence because Rosener was not able to give that testimony at Josh Kezer’s trial. See Reasonover, 60 F.Supp.2d at 948-949. The prosecutor endorsed Mangus’ and Howard’s claims about Rosener’s misconduct in both his opening statement and his closing argument. Rosener, who was fresh out of law school at the time, did not have a witness to his conversations with the inmates or make a recording; and the defense was forced to let Mangus’ and Howard’s testimony and the prosecution’s accusations of misconduct go unchallenged. In point of fact, law, and fairness, Rosener should never have been prevented from testifying at the trial. The entire trial for the defense was conducted by defense attorney Albert Lowes. It would have been a simple compromise to have removed Rosener from the counsel table, treat him as a witness, and deny the State’s Motion to disqualify the entire defense firm. It is not unusual for investigators of the Attorney General’s Office or the local prosecutor’s office to testify in criminal cases and that happenstance does not result in disqualification. The same should have been true here.

The only other evidence offered at trial was Chantelle Crider’s identification of Josh Kezer as the person who harassed Mischelle Lawless at the Halloween party. Crider testified in the habeas hearing that her earlier testimony was a mistake, which was corroborated by two other extremely credible witnesses who knew every male at the party and are sure Josh Kezer was not there. This constitutes clear and convincing evidence that Josh Kezer was not at the Halloween

party. Thus, there is no remaining evidence that Josh Kezer had ever met or known of Mischelle Lawless or had any motive for Josh Kezer to have killed her.

At the very end of his closing, Mr. Hulshof summed up as follows:

You aren't just twelve individuals, you represent those people and you represent the small community down the interstate, in Benton, Missouri, and those people are looking to you for justice, ladies and gentlemen. You are our only hope. We put him at the scene, we put a gun in his hand, we put the victim with him, we have got blood on his clothes. Ladies and gentlemen, based on all of this evidence, I urge you to find this defendant Guilty of Murder and Armed Criminal Action. Tr. 1201-1202.

We now know that none of what Mr. Hulshof said in that final summary was true. Abbott's testimony putting him at the scene is totally discredited. No gun was ever found, and there is no credible evidence that he ever had a gun (other than a realistic-looking BB gun). There is now uncontroverted evidence that he was not at the Halloween party, which was the only evidence presented that he was ever in the presence of the victim. New testing indicates there was no blood on his jacket (or in Christy Naile's car).

In addition to his *Brady* claim, Petitioner has met the heavier burden under *Amrine* of demonstrating actual innocence by clear and convincing evidence that undermines this Court's confidence in the correctness of the judgment. As such, confidence in his conviction and sentence are so undermined that they cannot stand and must be set aside.

VI. JUDGMENT

Accordingly, Judgment is entered in favor of Petitioner against Respondent. Petitioner's convictions for Murder in the Second Degree and Armed Criminal Action are hereby set aside and held for naught. Accompanying this Judgment is the Court's Writ.

Richard G. Callahan
Circuit Court Judge, Division II

