

In the Matter of:
MARCELLUS WILLIAMS)
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**REQUEST TO APPOINT AN INDEPENDENT BOARD OF INQUIRY
PURSUANT TO § 552.070**

**FILED BY THE MIDWEST INNOCENCE PROJECT
&
THE INNOCENCE PROJECT**

The Innocence Project and the Midwest Innocence Project respectfully move Governor Greitens, pursuant to § 552.070 RSMo. (1986) to appoint an independent board of inquiry to evaluate the conviction and death sentence of Marcellus Williams. DNA testing of the murder weapon, conducted at the direction of the Missouri Supreme Court, affirmatively excluded Mr. Williams as the perpetrator. Despite this evidence, Mr. Williams was inexplicably denied a hearing and is scheduled to be executed on August 22 at 6:00 p.m. The existence of exculpatory evidence, combined with serious infirmities in Mr. Williams’s conviction, including incentivized informants and the known racially discriminatory jury selection practices of the St. Louis County prosecutor’s office, discussed below, warrant the Governor’s consideration and involvement.

The Missouri Constitution bestows upon the Governor the power to grant reprieves, commutations and pardons:

The governor shall have power to grant reprieves, commutations and pardons, after conviction, for all offenses except treason and cases of impeachment, upon such conditions and with such restrictions and limitations as he may deem proper, subject to provisions of law as to the manner of applying for pardons. The power to pardon shall not include the power to parole.

Mo. Const. Art. IV sec. 7.

The General Assembly, in furtherance of the Governor’s constitutional powers, has given the Governor the discretion to appoint a Board of Inquiry to “gather information, whether or not

admissible in a court of law, bearing on whether or not a person condemned to death should be executed, reprieved or pardoned, or whether the person's sentence should be commuted.” § 552.070 RSMo. (1986). The statute imposes a duty on all persons to cooperate with the Board’s investigation, and imposes on the Board a duty to receive and hold information in strict confidence.

There is precedent for a Missouri Governor to appoint a board of inquiry to hear evidence on a condemned prisoner’s evidence of innocence and application for executive clemency. In the case of Lloyd E. Schlup, the prisoner made a plausible claim of innocence in a factually complex case. At the time of Mr. Schlup’s petition, the courts had declined to hold a hearing in order his innocence claim for procedural reasons. Then-Governor Mel Carnahan appointed a Board of Inquiry to conduct a hearing into Mr. Schlup’s claim of innocence. The Board’s role in the case became moot when the United States Supreme Court ordered a judicial hearing on Mr. Schlup’s claim. The manner in which Governor Carnahan appointed a five-member Board is further instructive. He personally made one selection, and he asked counsel for Mr. Schlup and counsel for the State of Missouri each to nominate two Missouri Circuit Judges to serve the Board. Both cases involve a court’s refusal to hear evidence of innocence, rather than a court’s rejection of such evidence. Much like in Mr. Schlup’s case, clear and compelling evidence of Mr. Williams’s innocence will go unreviewed unless the Governor exercises his inherent power to stay the execution and convene a board of inquiry.

Additional precedent exists for the Governor to intervene. In his tenure, Governor Nixon issued two grants of clemency—both cases involving serious questions as to the prisoner’s innocence. Richard Clay was convicted of murder-for hire. With no forensic or eye-witness evidence, prosecutors relied solely on the unreliable incentivized testimony of the alleged co-

defendants (who each received light sentences for their testimony and were subsequently released from prison). Based on evidence of grave prosecutorial misconduct, Mr. Clay was initially granted relief by a federal district court, which was vacated by the Eighth Circuit. Effectively shut out of the courts, he made his case for innocence in clemency. Chris King, *Nixon commutes death sentence of Richard Clay*, ST. LOUIS AMERICAN, Jan. 13, 2011, available at http://www.stlamerican.com/news/local_news/nixon-commutes-death-sentence-of-richard-clay/article_250fa3dc-1dd8-11e0-bccc-001cc4c03286.html. In the case of Kimber Edwards, Gov. Nixon commuted Edwards' death sentence just days before his scheduled execution. Edwards was convicted based upon the testimony of the triggerman, who received a life sentence without parole in exchange for testimony that Edwards had paid him to commit the murder, and a coerced-confession from Edwards, who was later diagnosed with autism. The witness later recanted his statement and said he lied when he said Edwards was involved. Based upon a review of the totality of the circumstances, Gov. Nixon stayed the execution and commuted Edwards sentence to life without parole. Jeremy Kohler, *Nixon commuted death sentence for convicted murderer Kimber Edwards*, ST. LOUIS POST-DISPATCH, Oct. 2, 2015, available at http://www.stltoday.com/news/local/crime-and-courts/nixon-commutes-death-sentence-for-convicted-murderer-kimber-edwards/article_ba43a356-35bc-597c-9c20-0ea5a30aea41.html. A former prosecutor of 16 years, who participated in 59 death sentences, then Governor Nixon has exercised his discretion to safeguard against the execution of potentially innocent men. Governor Greitens should do the same.

The Innocence Project and Midwest Innocence Projects have a unique and critical role in protecting the rights of innocent prisoners around the country. As members of the Innocence Network, a collection of 70-organizations around the world, the Innocence Project and the

Midwest Innocence Project are dedicated to providing pro bono legal and investigative services to prisoners, whose actual innocence can be proven through post-conviction evidence. To date, 2,081 innocent men and women have been exonerated for crimes they did not commit. National Registry of Exonerations, <https://www.law.umich.edu/special/exoneration/Pages/about.aspx>. 351 of them were cleared by DNA evidence. 20 of those 351 were exonerated from death row. Innocence Project, DNA Exonerations in the United States, <https://www.innocenceproject.org/dna-exonerations-in-the-united-states/>. Because of their expertise, the Innocence Project and the Midwest Innocence Project have dedicated themselves to improving the reliability of the criminal justice system and preventing wrongful convictions by researching their causes and pursuing reforms to enhance the truth-seeking functions of the criminal justice system.

Despite DNA Testing Excluding Him From The Weapon, Mr. Williams Was Inexplicably Denied His Right To A Hearing.

In 2015, the Missouri Supreme Court issued a stay of execution to Marcellus Williams in order to permit him to obtain DNA testing of a piece of critical evidence in the case—the murder weapon. The victim in the case had been stabbed 43 times and the knife left in her body. Despite repeated requests from trial counsel for a continuance for DNA testing, no DNA testing was conducted on the knife at the time of trial. All other forensic evidence collected at the time of the crime excluded Mr. Williams; forensic analysis confirmed that hairs and footprints collected from the scene did not come from Mr. Williams. Trial counsel also sought analysis of bloody fingerprints, which could have provided the identity of the perpetrator, only to learn that law enforcement had *lost* them. In this context, DNA testing of the murder weapon became even more critical. Given the violent nature of the crime and the amount of contact the killer would

have had with the knife, it was likely that the killer's DNA would have been present on the murder weapon. Indeed, prosecutors have themselves relied on DNA testing of weapons used in murders to prosecute other defendants. In short, DNA testing could reveal the identity of the perpetrator.

After review of Mr. William's Petition for Writ of Habeas Corpus, the Missouri Supreme Court stayed Mr. Williams' execution, *Order*, SC94720, Jan. 22, 2015, and subsequently appointed a special master to "ensure DNA testing of appropriate items at issue in this cause and to report to this Court the results of such testing." *Order Appointing Special Master*, SC94720, May 26, 2015. The court's actions were extremely rare. Mr. Williams's was the lone stay of execution granted by that court in the 18 executions it oversaw during 22 months in 2014-2016. The stay and appointment of the special master were in clear recognition of the strength of the potential DNA evidence as well as the weakness of the evidence against Mr. Williams at trial. Unfortunately, although DNA testing was conducted, the results of those tests and testimony explaining the results were never presented at a hearing. As a result, exculpatory DNA test results excluding Mr. Williams from DNA found on the knife were never heard by the court that ordered the testing.

DNA testing now conclusively excludes Mr. William's as the source of the male DNA found on the murder weapon. At the court's order, Bode Cellmark Forensics, a private laboratory in Virginia, conducted Y-STR testing for male DNA on fingernail scrapings taken from the victim and swabs of the knife. Reports were issued on April 8, 2016 and August 12, 2016, listing the testing performed and their results. Although testing of the victim's fingernail scrapings revealed no Y-STR or male DNA profile, DNA testing of the knife handle revealed a partial male DNA profile at 14 loci or locations on the DNA strand. The testing laboratory, Bode, listed

the data found at each location in its report. However, in analyzing the data, Bode stated that it was unable to make a conclusion as to how the data from the profile on the knife compared to Mr. Williams's profile because of their own internal protocols. Subsequent experts retained by the defense have all stated, however, that the reported data from Bode is both *reliable* and *conclusive* in excluding Mr. Williams as the contributor.¹ Nonetheless, Missouri courts never evaluated this evidence, or heard testimony from the defense expert. On January 5, 2017, the magistrate judge sent his file to the Missouri Supreme Court without permitting Mr. Williams to present the results of the DNA testing at a hearing. Less than a month later, on January 31, 2017, the Missouri Supreme Court inexplicably dismissed Mr. Williams' claim summarily without ever evaluating the results of the testing it ordered, or issuing any sort of opinion regarding the same.

This refusal to hear the results of critical scientific testing undermines the confidence in a system that found the testing important enough to order, but not important enough to hear. Indeed, in order to receive the testing and the appointment of the special master, Mr. Williams satisfied an onerous standard reflecting that he had presented substantial questions as to his actual innocence and the existence of associated constitutional violations that compromise the integrity of his conviction and sentence. *See State ex rel. Woodworth v. Denney*, 396 S.W.3d 330, 333 (Mo. banc 2013).

Here, the issue in understanding the DNA comes not from the reliability of the results, but the testing laboratories own protocols in providing conclusions. The DNA profile developed

¹When an incomplete Y-STR profile is obtained, analysts can use whatever identifying DNA is obtained for the purpose of exclusion. Experts have likened it to finding part of a social security card, with only a few of the numbers remaining. While such partial information cannot be used for a complete identification of an individual, it can still be used to narrow the pool of potential matches by excluding some people. For example, if only 4 numbers are visible on the hypothetical card, anyone whose social security number does not include those digits can be eliminated as a possible match.

by Bode from the knife was reliable, but the lab's internal protocols prevented it from making a conclusion as to what the results meant. As a result, although the laboratory reported the data at every location, it would not provide a conclusion as to what the data meant. Subsequent qualified and credentialed DNA experts who reviewed the data agree with Bode on the results and its reliability, but drew a firm conclusion—Mr. Williams is excluded as the source of the DNA profile.

Such a DNA profile is critical in a case like here, where the only evidence connecting Mr. Williams to the crime is the unreliable testimony from incentivized informants who came forward only after an award was offered. All of the physical evidence found at the crime scene excluded Mr. Williams at the time of trial. The only thing left untested that could have put him there was DNA—and now even that is no longer a possibility.

The presence on the knife of a male DNA profile is also significant and worthy of additional testing and evaluation. In briefing, the State argued that the presence of DNA on a kitchen knife is unremarkable because anyone in the home could have used the knife. However, the State has long recognized the power of DNA found on a murder weapon and has relied upon such evidence to secure convictions. Here, the only male who lived in the home was the victim's husband. Additional testing could be performed to develop a profile from the husband for comparison to the profile found on the knife. Assuming the victim's husband (who is not and never was a suspect) is excluded as a match, it is then clear that the DNA matches the killer. Yet, law enforcement has never conducted such testing.

The DNA Testing Undermines Mr. Williams's Already Unreliable Conviction.

The present case possesses the hallmarks of a wrongful conviction. There is no forensic evidence or eye-witness testimony tying Mr. Williams to the crime. Instead, the case is made up

of circumstantial evidence and informant testimony. Two informants testified against him. The first was his girlfriend, who called law enforcement after learning about a \$10,000 cash reward. Her testimony is particularly unreliable; she was a drug addict and a prostitute with strong motivation to lie. Though, Mr. Williams was arrested with several of the victim's possessions in his car, it was his girlfriend who had access to and control of the car, and, thus, the victim's possessions.² The second informant was a prisoner, who was housed with Mr. Williams while he was awaiting trial. After authorities approached him he offered them information, some of which contradicted the girlfriend's story. He was not the first prisoner propositioned by authorities in this case. Other prisoners (including Kimber Edwards, who was subsequently sentenced to death) refused to bargain with the authorities.

Other red flags are present as well. Law enforcement was under a tremendous amount of pressure to make an arrest in the stabbing. Nearly a week had passed without serious leads. The racial dynamics of the crime—a black man from St. Louis city breaking into the county home of a white woman and stabbing her to death—intensified the fervor. Shortly before trial, law enforcement *lost* bloody fingerprints on which the defense had requested testing. The trial court denied multiple defense requests for discovery as well as for DNA testing.

At trial, the St. Louis County prosecutor's office capitalized on the racial intensity of the crime, employing its underhanded and long-standing practices to strike 6 of the 7 black venire

² DNA has in fact exonerated other individuals found in possession of a victim's property after a crime. See National Registry of Exonerations, *Gene Bibbins*, <https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3027> (Defendant found in possession of radio stolen from victim); National Registry of Exonerations, *Robert Clark*, <https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3108> (Defendant seen driving the victim's car). John Thompson was also exonerated of murder despite at one time having been in possession of both the murder weapon and a ring taken from the victim's finger. National Registry of Exonerations, John Thompson, <https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3684>.

members from the jury. Prosecutors struck one black juror because he was a postal worker, a practice known as the “postman gambit,” a technique the office used to eliminate African-Americans from jury empanelment. In a sworn affidavit, a former county prosecutor explained that because postal workers in St. Louis County are disproportionately African-American, St. Louis County state and federal prosecutors struck all postal workers in order to eliminate as many African-American jurors as possible.

Conclusion

The Innocence Project and Midwest Innocence Projects respectfully have deep concerns that Missouri is going to execute an innocent man. Thus, we request that, pursuant to § 552.070 RSMo. (1986), in the interest of justice, Governor Greitens appoint an Independent Board of Inquiry to examine Marcellus Williams’s conviction and death sentence, including evaluating exculpatory DNA evidence. The Governor has the power to grant Mr. Williams a reprieve and the hearing he deserves. Failing his exercise of that power, Missouri will execute an innocence man on August 22.

Respectfully Submitted,



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