IN THE
SUPREME COURT OF MISSOURI

In Re: MARCELLUS WILLIAMS,	)	
	)	**CAPITAL CASE**
Petitioner,	)	**Execution Set for**
	)	**August 22, 2017**
v.	)	**At 6:00 p.m.**
	)	
STEVE LARKIN, Superintendent,	)	**Case No. _____**
Potosi Correctional Center,	)	
	)	
Respondent.	)	

PETITION FOR WRIT OF HABEAS CORPUS

COMES NOW petitioner, Marcellus Williams, a Missouri prisoner under a sentence of death in respondent's custody, and petitions this Court, pursuant to Rule 91 and Article I, Section 12 of the Missouri Constitution, for a writ of habeas corpus vacating his convictions for first degree murder and other offenses and/or his sentence of death. Petitioner further moves this Court to stay his execution, currently scheduled for August 22, 2017 and appoint a Special Master pursuant to Rule 68.03 to hear his claim of innocence. In support of this petition, Mr. Williams states as follows:

SUGGESTIONS IN SUPPORT

I.

INTRODUCTION

This capital habeas corpus case presents this Court with an ideal opportunity to not only remedy an obvious miscarriage of justice and prevent the execution of a man who may very well be innocent, but also to clarify existing law regarding whether this Court's decision in *Amrine*, Missouri's proportionality review statute, and the state or federal constitutions would preclude the execution of a condemned prisoner where all existing evidence, including newly discovered evidence here involving exculpatory DNA tests, raises substantial doubts regarding the prisoner's guilt. *See State ex rel. Amrine v. Roper*, 102 S.W.3d 541 (Mo. banc 2003).

As the court is aware, this Court stayed petitioner's January 28, 2015 execution date and ordered further DNA testing in petitioner's previous habeas corpus action. *See State ex rel. Williams v. Steele*, SC94720. This new DNA testing, as the attached opinions of DNA experts Greg Hampikian and Norah Rudin demonstrate, provide additional compelling evidence that petitioner was not the perpetrator of this murder. (See Exh.'s 10, 15). Both experts concluded that the Y-STR profile finding an unknown male's DNA on the knife does not match petitioner and he can be excluded as a contributor. (*Id.*).

Petitioner's counsel believed that they would be given the opportunity to present all of the evidence of Mr. Williams' innocence and argue and brief the case before the Special Master and this Court before a final decision would be rendered in his 2015 petition. Because no hearing was conducted and the master did not write a report, counsel were caught off guard when this Court summarily denied the petition shortly after the Master submitted the new DNA test results to the court.

Counsel for petitioner also contend that all the evidence of his innocence has not fully come to light because Judge Oxenhandler believed, based on internal memorandums from this Court he had in his possession that were not available to counsel, that his only duty in the 2015 case was to oversee DNA testing and that he lacked the power or authority to order evidence regarding the unsolved Debra McClain homicide to be released to counsel for petitioner as requested in the previous habeas petition.[1] For this reason, petitioner believes that the proper course here would be to appoint a new Special Master who can conduct an evidentiary hearing where all of the evidence and expert testimony regarding the recent DNA test results can be heard, coupled with any existing exculpatory evidence that likely will come to light after the production of documents relating to

[1] This information was revealed by the master in a June 1, 2015 phone conference with counsel after he was sworn in.

the Debra McClain homicide. Thereafter, this Court can decide whether petitioner deserves a new trial or whether his death sentence should be commuted to life imprisonment because grave doubts exist as to whether he committed the murder for which he is condemned to die.

As set forth in greater detail in the body of the petition below, the evidence of petitioner's guilt presented at trial is tenuous at best, because it rested primarily on the testimony of two "snitches" whose testimony is unworthy of belief. As in the *Amrine* case, new evidence has come to light at various stages of the post-conviction process that casts further doubt upon the state's case and also uncovered additional evidence through the subsequent Y-STR DNA testing that also strongly indicates that petitioner is innocent. It is an open question as to whether the execution of a condemned prisoner who is actually innocent would violate the Eighth and Fourteenth Amendment. Likewise it is unclear, what the standard of review should be for assessing such claims under the Eighth and Fourteenth Amendments to the United States Constitution. In other words, how much doubt must exist as to whether a condemned man is guilty before a reviewing court will find it constitutionally intolerable that he must forfeit his life at the hands of the state.

In addition, there are ample state law authorities that give this Court the power to commute petitioner's sentence of life imprisonment under the state

constitution, the *Amrine* decision, and Missouri's Proportionality Review Statute. History tells us that there are a substantial number of wrongfully convicted persons in this state and in this country that also includes many unfortunate souls who received capital punishment. Credible scholarly research, coupled with the spate of modern DNA exonerations, have shattered the myth that the criminal justice system is nearly infallible and that the conviction of an innocent man is a rare occurrence. It would be difficult to imagine a more frightening scenario that would undermine the public's confidence in Missouri's already beleaguered criminal justice system than to let a condemned man die at the hands of the state where there is significant doubt that he committed the crime.

II.

PROCEDURAL HISTORY

A St. Louis County jury convicted Marcellus Williams in 2001 of one count of first degree murder, first degree burglary, first degree robbery, and two counts of armed criminal action involving the 1998 stabbing death of Felicia Gayle. The trial court, upon the recommendation of the jury, sentenced petitioner to death on the murder conviction. On direct appeal, this Court affirmed petitioner's

convictions and sentences in *State v. Williams*, 97 S.W.3d 462 (Mo. banc 2003), *cert denied*, *Williams v. Missouri*, 539 U.S. 944 (2003).[2]

Petitioner subsequently sought post-conviction relief pursuant to Rule 29.15. The trial court denied this motion on May 14, 2004, after denying petitioner's request for a hearing on all but one of his claims for relief. (29.15 L.F. 800). This Court affirmed the denial of post-conviction relief in *Williams v. State*, 168 S.W.3d 433 (Mo. banc 2005).

Petitioner, thereafter, commenced a federal habeas corpus proceeding by filing a timely habeas petition in the United States District Court for the Eastern District of Missouri. *Williams v. Roper*, No. 4:05-CV-01474-RWS. The case was assigned to District Judge Rodney W. Sippel. After the district court denied petitioner's requests for discovery, further DNA testing, and an evidentiary hearing, Judge Sippel granted petitioner habeas relief on his claim of ineffective assistance of counsel at the penalty phase of trial and denied habeas relief on all other claims. *Williams v. Roper*, 2010 U.S. Dist. LEXIS 144919 (E.D.Mo., 3-26-10).

Respondent filed a timely notice of appeal and petitioner thereafter filed a timely cross-appeal and moved for a certificate of appealability ("COA") in the

[2] Petitioner requests that this Court take judicial notice of its files in his direct appeal, 29.15 appeal, and his 2015 state habeas corpus action.

district court. This COA, among other things, sought leave to cross-appeal the district court's refusal to order further DNA testing to permit petitioner to prove his innocence. The district court denied petitioner's COA motion. The Warden's appeal and petitioner's cross-appeal were docketed in the Eighth Circuit as Case Nos. 10-2579 and 10-2682. Petitioner, thereafter, filed an application for a COA before the Eighth Circuit requesting to brief additional issues, including the DNA issue, on the cross-appeal. The Eighth Circuit denied the COA application and dismissed Williams' cross-appeal. The Supreme Court subsequently denied certiorari in *Williams v. Missouri*, 539 U.S. 944 (2003).

After briefing and argument, the Eighth Circuit Court of Appeals, by a two to one vote, reversed the district court and remanded the case with directions that the petition be denied. *Williams v. Roper*, 695 F.3d 825 (8th Cir. 2012). The Court of Appeals, thereafter, denied rehearing and rehearing *en banc* on December 6, 2012. The Supreme Court denied Mr. Williams' petition for a writ of certiorari in *Williams v. Steele*, 134 S. Ct. 85 (2013).

On December 17, 2014, this Court set petitioner's execution for January 28, 2015. On January 9, 2015, petitioner filed an original petition for a writ of habeas corpus before this Court, accompanied by a motion for a stay of execution. *Williams v. Steele*, SC94720. This petition and the subsequent reply were also accompanied by seventeen exhibits.

Petitioner's previous state habeas petition raised a procedural due process claim alleging that he had been denied his due process right to seek DNA testing to prove his innocence. The petition also raised a freestanding claim of actual innocence. Petitioner also sought a stay of execution and requested that a Special Master be appointed to hear his claims after further DNA testing was completed. On January 22, 2015, this Court stayed petitioner's execution pending the disposition of his habeas petition.

On May 26, 2015, this Court appointed Boone County, Missouri Circuit Judge Gary Oxenhandler as a special master to oversee further DNA testing in conjunction with the underlying habeas petition. After DNA testing was completed by Bode Laboratory, the parties filed post-testing briefs before the master accompanied by the deposition of a Bode Lab technician and the affidavit of a DNA expert retained by petitioner. (See Exh.'s 15-18). On January 31, 2017, this Court summarily denied the habeas corpus petition, without explanation, in a one page order. This Court, on April 26, 2017, set an August 22, 2017 execution date for petitioner.

Petitioner, thereafter, filed a timely petition for a writ of certiorari to the United States Supreme Court. *Williams v. Steele*, No. 16-8963. The Supreme Court denied this petition on June 26, 2017. Jurisdiction and venue of this petition lies with this Court pursuant to Rule 91.02(a). Pursuant to Rule 91.04(a)(4),

petitioner also states that no petition for relief raising the issues brought herein has been sought in any higher court.

III.

STATEMENT OF THE CASE AND SUMMARY OF ARGUMENT

Marcellus Williams was convicted in 2001 for the 1998 murder of Felicia Gayle, who was stabbed to death in her University City home, on the word of two paid informants whose testimony was inherently unreliable. Despite the violent and bloody nature of the crime scene, police failed to uncover any forensic evidence connecting petitioner to the murder. In fact, physical evidence collected from the crime scene, including hair and footprints, did not match and could not be linked to petitioner, the victim or her husband, suggesting that the actual killer may still be at large. Because the murder went unsolved for nearly a year, the authorities resorted to the "snitch" testimony of Henry Cole and Laura Asaro to make an arrest.

Because the victim was a former reporter with the *St. Louis Post-Dispatch* and the wife of a prominent St. Louis area physician and the murder occurred in an upscale gated community, the case generated a great deal of publicity. (Tr. 1730, 2820-28). After the murder went unsolved for several months, Henry Cole and Laura Asaro came forward in June of 1999 and claimed they overheard petitioner

confess to committing the murder in order to lay claim to a $10,000 reward that was offered for information about the homicide by the victim's husband.

Henry Cole is a career criminal with convictions dating back thirty years. Mr. Cole also has a long history of mental illness, evidence that the jury did not hear. The state's other star witness, Laura Asaro, also has a checkered background. She is an admitted crack addict and prostitute, who was supposedly petitioner's girlfriend for a two-month period around the time of the Gayle murder. Both of these witnesses testified at trial that petitioner admitted to them that he had murdered Ms. Gayle. Mr. Williams' alleged jailhouse confession to Mr. Cole gave a much different account of the crime than his alleged confession to his prostitute girlfriend. As a result, it is self-evident that at least one of these witnesses, if not both of them, committed perjury at trial in exchange for the reward money. (Tr. 1818, 1882). Although trial counsel tried their best to expose Cole's and Asaro's credibility problems before the jury, they were denied access to impeaching information and failed to uncover Cole's and Asaro's histories of mental illness before trial.

Trial counsel, Joseph Green and Christopher McGraugh, were hired by the Missouri Public Defender System to represent petitioner at his trial. Both Green and McGraugh were admittedly unprepared for trial. (See Exh. 10). In fact, Green unsuccessfully sought a continuance because he was involved in another highly

publicized St. Louis County capital murder trial involving Kenneth Baumruk, which started just a month before Mr. Williams' trial commenced. *See State v. Baumruk*, 85 S.W.3d 644 (Mo. banc 2002).

In denying virtually all of defense counsel's discovery requests, requests for forensic testing and two requests for a continuance based upon the state's failure to produce impeaching information on Cole and Asaro, the trial court pushed the case to trial beginning June 4, 2001. (Tr. 136; L.F. 269, 295, 394, 457). In a racially charged case (Ms. Gayle was white and petitioner is black), the prosecutor struck six of seven blacks from the venire panel, leaving just one black juror to serve on the petit jury. (Tr. 1569-70).

Due to trial counsel's lack of preparation, coupled with several trial court rulings, the jury did not receive a complete picture of the case during the guilt phase of trial. Because the prosecution failed to disclose impeaching information and because trial counsel did not conduct a reasonable investigation, trial counsel's cross-examination of Cole and Asaro barely scratched the surface in attempting to establish their utter lack of credibility. As will be discussed in greater detail below, new information came to light during state post-conviction proceedings, including information regarding both of these witnesses' long histories of drug abuse and mental illness, which would have further undermined their credibility in

the eyes of the jury. Because the jury did not hear this impeaching evidence, it was no surprise when the jury found petitioner guilty as charged.

On August 11, 1998, Felicia Gayle was stabbed to death in her home in University City, Missouri. (Tr. 1712, 2163). Months went by without any charges being filed. On November 29, 1999, the state charged petitioner with first degree murder and armed criminal action after Cole and Asaro came forward. (L.F. 14). Subsequently, on January 6, 2000, petitioner was indicted on these offenses and the additional charges of burglary in the first degree, robbery in the first degree and an additional count of armed criminal action. (L.F. 18).

The autopsy revealed that Ms. Gayle died from a total of sixteen stab wounds to her head, neck, chest and abdomen, seven of which could have been fatal. (Tr. 2163). There were forty-three stab wounds on her entire body. (*Id*.) A kitchen knife was left in her body. The police collected blood and skin samples from under Gayle's fingernails. (Tr. 2268, 2962-63). Frustrated by the lack of progress in solving the crime, Ms. Gayle's husband Dr. Daniel Picus offered a $10,000 reward for information. (Tr. 1783, 1814). The police still had no leads in the case until June 4, 1999, when twelve-time convicted criminal Henry Cole came forward. (Tr. 2379-82).

Between April and June of 1999, Cole testified he was in the city jail with petitioner. (Tr. 2382). After a few weeks, he and petitioner realized they were

distantly related and, according to Cole, became friends. (Tr. 2385-87). Cole stated that in early or mid-May, he was watching television with petitioner, when a story came on about Felicia Gayle's death, reporting that there were still no suspects and that a reward for $10,000 had been offered. (Tr. 2388-89). According to Cole, who had known petitioner only for a few weeks, petitioner admitted to him that he had committed the crime. (Tr. 2390).

Cole also claimed petitioner had indicated to him that the only other witness he had told about the crime was Laura Asaro. (Tr. 2414). In November 1999, officers went to Ms. Asaro's mother's house to speak with her. (Tr. 1910). Ms. Asaro believed that the officers were there to arrest her on outstanding warrants. (Tr. 1923). The police offered to help Asaro with her warrants if she would provide information about the murder. (Tr. 1980). Asaro agreed to cooperate, becoming the second material witness against petitioner. (Tr. 1910).

Asaro testified that at the time of the crime she had been dating petitioner for two or three months, living at times in his car. (Tr. 1840-41). Asaro claimed that, on the day of the murder, petitioner drove her to her mother's house around 9:00 a.m. and returned in the car later that afternoon at about 3:00 p.m. (Tr. 1841-43). Asaro claimed petitioner was wearing a jacket zipped to the top, despite the August heat and the car having no operable air-conditioner. (Tr. 1841-42).

After removing the jacket, Asaro claimed she saw blood on his shirt and fingernail scratches on his neck. (Tr. 1843, 1855). Petitioner allegedly explained he had been in a fight. (Tr. 1843). Later that day, Asaro claimed that petitioner took off his clothing, placed it in his backpack, and threw it down a sewer. (Tr. 1845).

Asaro also testified that when petitioner picked her up, he had a computer in the car. (Tr. 1859-60). She stated that he took it to a house down the street and, upon returning, the computer was gone. (Tr. 1844, 1860-61). The next morning when she wanted to retrieve her clothes from the trunk of petitioner's car, Asaro says she gained access to the trunk and saw a woman's purse. (Tr. 1846). Snatching the purse away from petitioner, Asaro claimed she opened it and saw the victim's identification and coin bag. (Tr. 1846). She became angry, believing that petitioner had another girlfriend. (Tr. 1847).

Asaro claimed that petitioner's response was to tell her that the purse belonged to a woman he just killed. (Tr. 1848). In contrast to Cole's account (and in direct conflict with the crime scene evidence), Asaro claimed petitioner told her that he broke into the woman's house through the *back* door. (Tr. 1848, 1851). Asaro then gave a general account of a surprise encounter with the victim, a struggle and an account of the stabbing. (*Id*.) Unlike Cole, Asaro testified that

petitioner drove to the scene (and did not take a bus). (Tr. 1841-42). Like Cole, Asaro admitted that she was also interested in the reward money. (Tr. 1953).

Because the state's case hinged on two highly unbelievable witnesses, defense counsel focused on the lack of forensic evidence linking petitioner to this extremely bloody murder scene, and suggested that police could easily have fed information to Cole and Asaro to resolve this long-unsolved, high-profile crime. For example, numerous hairs were discovered on the victim's shirt and on the rug where her body was found. (Tr. 2871-72, 2920). The rug had been vacuumed eleven days before the crime. (Tr. 2754-55). While some of the hairs matched Gayle or Picus, others did not match either of them or petitioner. (Tr. 2871-72, 2920). Similarly, two pubic hairs found on the rug did not match Gayle, Picus, or petitioner. (Tr. 2876-77). Head hairs also found on the rug also did not match any of these three individuals. (Tr. 2877). None of these unmatched hairs, nor the knife were ever tested for DNA by either the prosecution or the defense. (Tr. 2867).

In addition, fingernail clippings taken from Gayle that contained blood and skin could not be matched to petitioner. (Tr. 2961, 2964). Bloody footprints at the scene appeared to belong to a single assailant. None of the bloody shoeprints matched any paramedics' shoes, nor did they match the shoes seized from petitioner upon his arrest. (Tr. 2882, 3140).

Throughout the state and federal post-conviction process, petitioner was never afforded a hearing on any of his constitutional claims involving the credibility of Mr. Cole or Asaro. Petitioner was also denied a hearing on the DNA testing issue during his 29.15 litigation. Furthermore, the federal district court denied all of petitioner's discovery requests regarding the similar murder of Debra McClain and all other attempts to obtain further DNA testing of the untested and unmatched materials in this case. (Dist. Ct. Doc.'s 34, 42).

In his federal habeas petition, petitioner advanced a freestanding claim of actual innocence, coupled with a claim that he was convicted on the basis of the perjured testimony of Cole and Asaro. In the litigation of his federal habeas petition before the district court, petitioner filed numerous motions and requests for discovery seeking access to impeaching information regarding Cole and Asaro, the police investigation of the McClain murder, and for further DNA testing of the untested items and genetic materials. (See Dist. Ct. Doc.'s 9, 10, 11, 35, 37).

As noted earlier, there was trace evidence collected at the scene that did not microscopically match petitioner, the victim, or her husband. In particular, there were both head and pubic hairs found at the crime scene that did not match the victim, her husband, or petitioner. (Tr. 2871-2872, 2876-2877, 2920). Fingernail clippings taken from the victim revealed testable blood and skin samples. Although these samples contained some of the victim's DNA, there was no DNA

match to petitioner. In light of Ms. Asaro's account of the crime, indicating that petitioner had scratches on his body, if her account was true, Mr. Williams' DNA should have been found in the victim's fingernail scrapings.

Petitioner also sought access, through discovery motions filed in his 2254 action, to police reports, lab reports, and any DNA profiles developed in the unsolved murder of Debra McClain, which occurred in Pagedale, Missouri, on July 18, 1998. (Exh. 1); (See also Dist. Ct. Doc.'s 11, 35, 37). Apart from the temporal and geographical proximity of the murders, there were other remarkable similarities between the two cases. St. Louis County Medical Examiner Dr. Mary Case thought that these murders were connected. (H. Tr. 33).

At a meeting with the chief detectives investigating the Gayle homicide, Dr. Case articulated the following similarities between the murders of Ms. Gayle and Ms. McClain:

1. The age of the victims (McClain was 40, Gayle was 42);

2. Both women were of similar build and had long brown hair;

3. The injuries were similar in that both were stabbed on the right side of the neck and had numerous stab wounds on the front and back upper trunk area;

4. Crime scenes were similar in that very little was disturbed, each victim was stabbed with a knife from her own kitchen drawer and the victims' purses were missing in both cases; and

5. Both victims had defensive wounds.

(Exh. 1). Most importantly, Dr. Case noted the unusual factor that the victim in each case still had the knife in her body, which, according to Dr. Case "is extremely rare." (*Id.*). In fact, one investigator thought the killings were the work of a serial killer. (H. Tr. 29-30).

The murder of Debra McClain remained unsolved at the time of petitioner's 2001 trial and apparently remains unsolved to this day. As a result, any and all police records, crime laboratory testing and any other reports generated in the case are closed records under Missouri's Sunshine Law. See § 610.100 R.S.Mo. (2010). In light of advances in DNA technology, petitioner also unsuccessfully sought access to any available items of evidence in the McClain case, such as the knife and any trace evidence for DNA testing and, if any profiles have been or are developed, to have such profiles run through appropriate databases. (See Dist. Ct. Doc.'s 34, 42).

As noted earlier, this Court stayed petitioner's 2015 execution and appointed Judge Gary Oxenhandler as a special master to oversee DNA testing of trace evidence from the crime scene of the Gayle murder. However, this Court apparently did not authorize the master to conduct any hearings on petitioner's broader claim of actual innocence, nor did this Court order that Judge Oxenhandler address petitioner's request for evidence regarding the McClain murder, or issue a

report. As a result, the proceedings before the master merely involved the parties' making arrangements to have the trace evidence from the scene of the Gayle murder tested by Bode Laboratories. (*Id*.).

After Bode Laboratories completed testing, they issued reports finding, that, despite the fact that several alleles at eleven different loci from the Y-STR DNA testing of the knife did not match the known DNA of petitioner, that the threshold levels were too low to make a conclusive exclusion. (Exh.'s 16, 17). After the DNA testing was completed, the parties took the deposition of Bode Laboratory technician Jennifer Fienup and submitted post-DNA testing briefs. (Exh. 18). Before petitioner's post-DNA testing brief was filed, he secured the assistance of DNA expert Norah Rudin, Ph.D. After reviewing all of the DNA reports from Bode Lab and the lab notes and electronic raw data, Dr. Rudin concluded that Marcellus Williams was not the contributor of the detected DNA profile found on the knife that murdered Felicia Gayle. (Exh. 15).

On January 1, 2017, Judge Oxenhandler submitted all of the DNA data and briefs of the parties to this Court. Thirty days later, this Court summarily denied the habeas petition, without the benefit of any further briefing or argument, in a one page order. After certiorari was denied, petitioner filed a Rule 60(b)(6) motion on July 31, 2017 in his 2254 action in District Court seeking to reopen the case

based upon the DNA test results. This motion, accompanied by a stay of execution motion, is pending.

CJA appointed co-counsel for Mr. Williams, Laurence Komp, was recently hired to become the Director of the newly created Missouri Capital Habeas Unit (CHU). This new capital habeas unit began operations on Monday, July 24, 2017. Before that time, counsel for petitioner were relying upon *pro bono* expert assistance and limited financial assistance from the Missouri public defender's office to fund the DNA testing and other expert assistance necessary for executive clemency and the prior Rule 91 litigation. As a result, no additional funding was available for any other expert assistance on the DNA issues in this case until the Missouri CHU began its operations approximately three weeks ago.

As a result of the creation of the capital habeas unit, federal funding was recently secured for the expert assistance of DNA expert Dr. Greg Hampikian, a DNA expert and professor at Boise State University. In 2015, Dr. Hampikian had generously agreed to provide *pro bono* assistance in petitioner's clemency and previous Rule 91 proceedings.

Dr. Hampikian was provided with all of the reports and data from the Bode Laboratory and has thoroughly analyzed all of these materials. Dr. Hampikian, in his attached report that he completed on Sunday August 13, 2017, now removes any doubt that the Y-STR testing of the knife and the male profile developed

therefrom conclusively excludes petitioner as the perpetrator of this murder. (See Exh. 10).

Dr. Hampikian's report comprehensively describes the common laboratory techniques that scientists employ in conducting Y-STR DNA testing to attempt to develop a male DNA profile and explains, in layman's terms, why it is clear that Marcellus Williams did not contribute the male DNA that was found on the knife recovered from the victim's body. (*Id*.). Although it is difficult for Y-STR DNA testing to inclusively identify an individual, Dr. Hampikian explained that even incomplete Y-STR profiles can be utilize to definitively exclude a contributor. (*Id*. at p.1). In explaining this method of exclusion, Dr. Hampikian used an analogy involving a partial social security card number. Dr. Hampikian explained that if only four numbers are visible on the hypothetical card, anyone whose social security number does not include those digits can be eliminated as a match. (*Id*.). Because several of the "called alleles" in both knife handle swabs conducted by laboratory do not match the alleles of Marcellus Williams, there is a clear exclusion of Marcellus Williams from both knife handle samples. (*Id*. at p.2).

Based on the foregoing facts, this petition raises a claim of actual innocence under *Amrine*, the Missouri Proportionality Review Statutes and the state and federal constitutions. Accompanying this petition is a separate motion for a stay of execution. Petitioner also believes that a special master should be appointed to

allow petitioner, through subpoena power or court order, to obtain necessary evidence from the unsolved murder of Debra McClain that could very likely produce even more compelling evidence that he is innocent.[3] Thereafter, the master should be empowered to hold an evidentiary hearing where all of the evidence of petitioner's innocence can be thoroughly aired and assessed by a finder of fact before this Court reaches its ultimate determination as to whether petitioner's upcoming execution would be a constitutionally intolerable event.

IV.

REASONS FOR GRANTING THE WRIT

PETITIONER'S UPCOMING EXECUTION FOR THE OFFENSE OF FIRST DEGREE MURDER VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS AND ARTICLE I, SECTIONS 10 AND 21 OF THE MISSOURI CONSTITUTION BECAUSE ALL OF THE EXISTING EVIDENCE, COUPLED WITH THE EXCULPATORY RESULTS OF THE RECENT DNA TESTING, ESTABLISHES THAT HE IS LIKELY INNOCENT OF THE MURDER OF FELICIA GAYLE.

[3] At the very least, agents of the state should disclose whether DNA testing was conducted in the McClain case and whether any DNA profiles were developed so that they can be compared to the Y-STR profile developed from the knife.

Prior to the DNA testing that was recently completed in this case, the evidence in the case as presented at trial and that was developed during prior post-conviction proceedings raised substantial doubts whether Marcellus Williams murdered Felicia Gayle. There was not a shred of physical evidence from the bloody crime scene to link petitioner to the murder. Instead, petitioner was convicted almost entirely upon the inherently unreliable and incredible "snitch" testimony of Henry Cole and Laura Asaro. As noted in further detail below, evidence that emerged in prior post-conviction appeals calls the veracity of Cole's and Asaro's testimony into serious question.

Most importantly, however, the recent DNA testing ordered in this case in 2015 exonerates petitioner of this murder. The Bode Laboratory conducted Y-STR DNA testing of the murder weapon and developed a male DNA profile that does not match petitioner's known DNA profile. (See Exh.'s 10, 15). All of the evidence in this case establishes that there is a significant likelihood that petitioner is innocent and, as a result, both the federal and state constitutions, as well as Missouri's proportionality review statute, requires, at a minimum, that petitioner's death sentence be commuted to life imprisonment.

Innocence is a viable substantive claim for habeas relief under Missouri law. If there is clear and convincing evidence that petitioner is innocent, then Missouri

courts must issue a writ of habeas corpus even if petitioner's trial is otherwise free of constitutional error.

> "Because the continued imprisonment and eventual execution of an innocent person is a manifest injustice, a habeas petitioner under a sentence of death may obtain relief from a judgment of conviction and sentence of death upon a showing of actual innocence that undermines confidence in the correctness of the judgment."

State ex rel. *Amrine v*. *Roper*, 102 S.W.3d 541, 543 (Mo. banc 2003).

In analyzing claims of actual innocence based on newly discovered evidence, evidence is "new" if the jury did not hear it. In *Schlup v*. *Delo*, 513 U.S. 298 (1995), the court held that a limited concept of "new" evidence defeats the purpose of the actual innocence inquiry:

> "To be credible, such a claim requires petitioner to support his allegations of constitutional error with new reliable evidence - whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence - that was not presented at trial."

Id. at 324.

This formulation serves the fundamental purpose of habeas corpus to correct unjust incarcerations by focusing on the reliability of the verdict of the jury.

Therefore, "[t]he habeas court must make its determination concerning the prisoner's innocence 'in light of all the evidence, including that alleged to have been illegally admitted (but with due regard to any reliability of it) and evidence tenably claimed to have been wrongly excluded or to have become available only after the trial.'"

Id. at 328 (emphasis added).

This Court in *Amrine* requires reviewing courts to conduct a thorough analysis of the evidence, including in cases, such as petitioner's, in which evidence has grown with the passage of time, while evidence at trial utilized to convict him has proven false:

> "Amrine petitions this Court for a writ of habeas corpus, arguing that he is actually innocent of the Barber murder. Because the recantations were made over the course of years and between rounds of federal court proceedings, no court has addressed, at once, all of the evidence of Amrine's innocence. This Court is the first forum in which all of the existing evidence will be considered."

102 S.W.3d at 545.

Just as in *Amrine*, the present Rule 91 litigation is the first forum in which all of petitioner's evidence of innocence can be fully and fairly considered.[4] This Court in *Amrine* also made it clear that the doors of Missouri courthouses are always open to claims of innocence: "Habeas corpus is the last judicial inquiry into the validity of a criminal conviction and serves as a 'bulwark against convictions that violate fundamental fairness."' (*Id*.) (quoting *Engle v*. *Isaac*, 456 U.S. 107, 126 (1982)). Therefore, this Court's analysis of petitioner's innocence must be based upon a thorough review of all the evidence presented to this Court by petitioner in support of his petition for writ of habeas corpus.

A. <u>Evidence Developed in Prior State Post-Conviction Proceedings Undermines the Prosecution's Case</u>.

During state post-conviction proceedings under Rule 29.15, petitioner presented substantial evidence undermining the conviction which the state obtained solely on the testimony of Cole and Asaro.[5] This evidence establishes that Cole and Asaro simply were unworthy of belief.

---

[4] Because no hearings were conducted before the master, the DNA issue here is in a similar posture to what the court confronted in examining the innocence claim in *Amrine*.

[5] For over a year prior to trial, the state failed to disclose the actual addresses of Cole and Asaro. The prosecutor regularly contacted both Cole and Asaro, but

Cole wrote to his son, Johnifer Cole Griffin, while he was in jail with Mr. Williams. (See Exh. 4). Henry Cole bragged that he had a "caper" going on and something "big" was coming. (*Id*.) Johnifer knew that his father had made false allegations against others in the past, beginning in the 1980s and continuing throughout his life. (*Id*.) Indeed, Henry Cole even served as an informant against Johnifer, his own son, in order to get a deal from the authorities. (*Id*.)

Similarly, Cole's daughter, Bridget Griffin, knew that Cole could not be trusted. (29.15 L.F. 129-30). She knew of his well-known reputation of providing false information to the police in exchange for leniency. (*Id*. 130). She also had personal knowledge of prior false allegations Cole had made. (*Id*. 130).

Ronnie and Durwin Cole, Henry's nephews, confirmed that Cole had made false allegations in the past and was extremely unreliable. (See Exh.'s 5 and 6). Cole concocted scams, lied about others, and then left town. (*Id*.) He would do or say anything for money. (*Id*.) Cole's niece, Twanna, could confirm these family

---

actively concealed their whereabouts. (29.15 L.F. 95-97, 99). Police were in regular contact with Cole and bought him a bus ticket to New York, making him unavailable to be contacted by the defense. (L.F. 99, 102; Exh. 13 at 44). The trial prosecutor had personally interviewed Asaro three times, but told the court he was unable to locate her. (29.15 L.F. 99-102). (See also Exh's 13, 14).

accounts. (29.15 L.F. 136-37). She had witnessed her uncle's crazy and bizarre behavior. (*Id*. 136). She knew Henry needed money for drugs and would provide false information to get it. (*Id*. 137). As with the rest of her family, she did not trust her uncle, based on his history of making false allegations. (*Id*.).

Durwin Cole reported that Henry Cole often hallucinated, recounting one incident where Henry saw non-existent bugs in his hair and drinking glass. (See Exh. 5). Other members of his family also recounted that Cole often had auditory hallucinations and sometimes failed to take his psychiatric medications. (29.15 L.F. 133). His family also confirmed that he had been diagnosed as mentally ill and received disability benefits because of his mental illnesses. Members of the family also recalled other incidents of bizarre behavior by Mr. Cole brought on by his mental illness. (*Id*. 136).

Asaro's testimony is equally undermined. Edward Hopson and Colleen Bailey could have testified that Asaro admitted to them that she had "set up" Mr. Williams to get the $10,000 reward, that Asaro desperately needed this money to feed her crack cocaine addiction, and she had made prior false allegations against others. (29.15 L.F. 78-79, 151-157); (See also Exh. 7). Both Mr. Hopson and Ms. Bailey indicated that Asaro was a known police informant and had engaged in a pattern of lying to police to get herself out of trouble. (*Id*.)

Asaro's mother, Cynthia Asaro (29.15 L.F. 165-166), Walter Hill, and Latonya Hill, (See Exh's 8 and 9), established that Asaro lied when she testified at trial that petitioner drove his car on the date of the murder. Each witness indicated that Mr. Williams' car was not running on that day. Additionally, these witnesses revealed that Asaro lied when she stated that she did not have access to the trunk of petitioner's car. (*Id*.) These witnesses could have testified that Asaro had a set of keys to the car and that she could have gotten into the trunk and planted incriminating evidence linking him to the murder of Ms. Gayle. (29.15 L.F. 165-166). Cynthia Asaro reported that her daughter gave her coupons similar to those found in the victim's purse. (*Id*.).

Cole's and Asaro's testimony, like the inmate testimony in *Amrine*, has been demonstrably discredited during prior post-conviction proceedings. Many persons who were close with Mr. Cole, including his own relatives, have provided affidavits demonstrating that his trial testimony, or anything he says for that matter, is unworthy of belief. In fact, Cole's son indicated that Mr. Cole told him that he had a "caper" going on to implicate petitioner in this murder for the reward money. (See Exh. 4). Ironically, this affidavit provides evidence of the same category as petitioner's alleged jailhouse confession to Cole, which the jury relied upon to convict petitioner and sentence him to death. In addition, two other jail inmates have provided sworn affidavits that the police and prosecutors fed them

information and tried to induce them to become jailhouse snitches against petitioner, but they refused to do so. (See Exh's 2, 3). Sadly, this is not an uncommon occurrence in St. Louis County prosecutions because history tells us that St. Louis County authorities have previously solicited and pressured other inmates to fabricate jailhouse confessions in order to obtain an arrest and conviction in other high profile murder cases. *See Reasonover v. Washington*, 60 F.Supp.2d 937, 964-965 (E.D. Mo. 1990).

With regard to Asaro's testimony, her testimony is not only inconsistent with Henry Cole's testimony, it is also inconsistent with the physical evidence in the case. Had petitioner actually told Asaro the details of the crime as she recounted at trial, there would have been biological evidence at the scene of the crime connecting petitioner to the murder. Specifically, Asaro's trial testimony that she observed scratches on petitioner's neck, if true, would have led to a finding of petitioner's blood and skin in the victim's fingernail clippings. This fact alone provides objective evidence that Ms. Asaro was lying in exchange for the reward money.

B. The Recent DNA Tests Exonerate Petitioner.

As noted earlier, Bode Laboratories conducted Y-STR DNA testing on the knife and developed a male DNA profile that did not match petitioner's known DNA. (Exh.'s 16, 17, 18). However, because the lab could not develop a DNA

profile sufficient to satisfy the Bode Laboratory's protocol, the lab could not conclusively state that the test results excluded petitioner as the contributor to the DNA on the knife. (*Id.*). However, Dr. Norah Rudin and Dr. Greg Hampikian both disagreed with this conclusion. This evidence provides compelling evidence that Marcellus Williams is innocent and that another unknown male possessing this DNA profile murdered Felicia Gayle.

Dr. Norah Rudin, in December of 2016, reviewed the case notes and the data files generated by Bode. In her report and opinion, she concluded "Marcellus Williams could not have contributed the detected profile" on the murder weapon. (Exh. 15, p.1). Dr. Rudin noted "it is clear that he could not have contributed the profile reported by Ms. Fienup" due to an allele difference at 11 of the 15 detected loci. (*Id.*). A. Dr. Rudin went further and also reviewed the data files generated by Bode.

In comparing the Allele table from a known sample with the Bode's below threshold findings from the knife, Dr. Rudin described how even the non-called peaks did not comport with Mr. Williams' reference profile. (*Id.* p. 2-3). According to Dr. Rudin, allelic drop is not valid in these circumstances because "the alleles present in his profile would have to be assumed present but not detected (dropped out) in at least 13 of the 21 detected loci. Additionally, alleles from a second contributor would have to replace his missing alleles at each of

those loci." Such a scenario is statistically improbable, if not impossible. "A better explanation is that Marcellus Williams is not a contributor to the profile(s) found on the knife." (*Id*. p. 3). Thus, Dr. Rudin concludes that the "most reasonable explanation for the profile detected on the knife is that Marcellus Williams is not a contributor." (*Id*. p. 3).

The following chart from the Bode Laboratory reports indicate that the above threshold alleles found at several of the loci do not match Marcellus Williams that were submitted for comparison purposes.

Locus	Unknown Sample (First Round)	Petitioner's Sample (Second Round)
DYS576	20, ---	16
DYS389 I	13, ---	13
DYS 448	No results	20
DYS389 II	No results	29
DYS19	No results	14
DYS391	10	10
DYS481	23, ---	26
DYS549	No results	11
DYS533	13, ---	12
DYS438	No results	11

DYS437	15, ---	14
DYS570	16, ---	19
DYS635	23	23
DYS390	24, ---	21
DYS439	12, ---	12
DYS392	13, ---	11
DYS643	No results	13
DYS393	13, ---	14
DYS458	17, ---	18
DYS385 a/b	11, 14	15, 16
DYS456	No results	15
Y-GATA-H4	No results	11

Jennifer Fienup of Bode Laboratory also indicated in her deposition that each of the non-matching alleles found in the unknown sample were over the threshold of RFU 75 but were not above the RFU of 300[6] that is necessary for the laboratory, under its existing protocols, to conclude with absolute certainty that petitioner could be excluded as the killer. (Exh. 18, pp 18-20). However, Ms. Fienup did indicate that these results do have exculpatory value. (*Id*. 53). Had

[6] RFU is an acronym for relative florescent units.

only one of the eleven alleles from the knife reached the 300 RFU threshold, petitioner would have been excluded under Bode's protocols as the unknown DNA contributor on the murder weapon. (*Id*. 58-59). In this regard, it is important to note that Ms. Fienup indicated that it was a "close call" under the laboratory's protocol regarding whether there was sufficient data to definitely exclude petitioner as the contributor of the DNA on the knife. (*Id*. 59).

Dr. Greg Hampikian, who was recently retained by the Missouri CHU to review the DNA test results in this matter, fully concurs with Dr. Rudin's conclusions. Dr. Hampikian, after reviewing all of the Bode Laboratory's reports and raw data, concludes that the male DNA detected on the knife handle clearly does not match petitioner's known DNA and, therefore he can be excluded as the contributor. (Exh. 10).

As noted earlier, Dr. Hampikian emphatically concluded that "the data supplied in this specific case gives clear results that exclude Marcellus Williams." (*Id*. at p.1). Using a partial social security card analogy, Dr. Hampikian explained that a definitive exclusion of Marcellus Williams as the contributor to the male DNA found on the knife could be made because the unknown profile developed on the two knife handle swabs yielded alleles sufficient for the purpose of exclusion. (*Id*. at p.2). In one of the knife handle swabs, that Dr. Hampikian set forth in Table 1 of his report, indicated that the unknown DNA profile does not match at three

different locuses. (*Id*.). At locus DYS390, the unknown male chromosome is a 24. Marcellus Williams' Y chromosome is a 21 at this locus. (*Id*.). At locus DYS393, the unknown male chromosome is a 13 at this locus. Marcellus Williams' Y chromosome profile is a 14. (*Id*.). Finally, at locus DYS458, the unknown Y chromosome is a 17. Marcellus Williams' Y chromosome profile is an 18. (*Id*.).

Dr. Hampikian also noted that a careful examination of the electropherograms "makes this conclusion even clearer" because there "is no indication of Marcellus Williams' alleles at several loci." *Id*. at p. 3. These electropherograms that Dr. Hampikian included in his report as Figures 1 and 2 also clearly indicate that the unknown DNA alleles do not match petitioner's known alleles at 3 different loci, DYS393, DYS458, and DYS390. (*Id*. at p.4). Dr. Hampikian also indicated that the Bode Cellmark lab's internal protocols restrict their ability to examine the results of "other potential alleles" below the laboratory's cutoff. (*Id*.). Dr. Hampikian, however, examined all of the peaks, even those below the threshold, and concluded that there is a clear exclusion of Marcellus Williams from the knife handle samples. (*Id*. at 4-5).

C. Petitioner's Upcoming Execution Violates The Eighth And Fourteenth Amendments.

In *Herrera v*. *Collins*, 506 U.S. 390 (1993), the Supreme Court addressed whether the due process and the cruel and unusual punishment clauses of the

Eighth and Fourteenth Amendment would prohibit the execution of a prisoner who raises a substantial claim of actual innocence. However, the fragmented opinions in *Herrera* created more confusion than certainty in this area of the law, which has resulted in conflicting opinions from both federal and state courts regarding whether the Constitution prohibits the execution of an innocent person. In the last decade, the Supreme Court has made it clear that *Herrera*, a case in which the petitioner had only advanced a very weak showing of innocence, did not actually resolve the issue of whether the Constitution precludes the execution of an innocent prisoner. *See McQuiggin v. Perkins*, 133 S. Ct. 1924, 1931 (2013); *House v. Bell*, 547 U.S. 518, 554-555 (2006).

Herrera, however, recognized that the central purpose of any system of criminal justice is to convict the guilty and free the innocent. *Herrera*, 506 U.S. at 398. In addition, the concept of "liberty from bodily restraint has been recognized as the core of the liberty protected by the Due Process Clause from arbitrary governmental action." *Youngberg v. Romeo*, 457 U.S. 307, 316 (1982). Because an innocent person "has a liberty interest in remaining free from punishment," the execution or continued incarceration of an innocent person violates elementary fairness and violates the due process clause of the Fourteenth Amendment.

Both the *Herrera* decision itself and subsequent decisions clearly indicate that strong procedural and substantive due process arguments can be made that the

continued incarceration and execution of an innocent prisoner would violate both procedural and substantive due process under the Fourteenth Amendment. *Hererra*, 506 U.S. at 436, 437 (Blackmun, J., dissenting). Although the majority of the court in *Herrera* declined to find that substantive due process would be violated by the execution of an innocent prisoner, at least six members of the court did agree that a truly persuasive case of actual innocence would render a conviction unconstitutional. *Id*. at 417.

A strong argument can also be made that execution of an innocent prisoner violates the Eighth Amendment. Due to the heightened reliability requirement in capital sentencing proceedings, the cruel and unusual punishment clause of the Eighth Amendment applies to death penalty cases with special force. *See Monge v*. *California*, 524 U.S. 721, 732 (1998); *See also Roper v*. *Simmons*, 543 U.S. 551 (2005). The Eighth Amendment's heightened reliability requirement applies with equal force regarding eligibility for the death penalty and to the attendant procedural safeguards that states must provide to prevent the imposition of unjust or unconstitutional death sentences. *See, e.g*., *Gardner v*. *Florida*, 430 U.S. 349, 357 (1977) ("This Court has acknowledged its obligation to re-examine capital sentencing procedures against evolving standards of procedural fairness in a civilized society.")

A capital sentencing and post-conviction review process that does not comport with "evolving standards of decency that mark the progress of a maturing society" also violates the Eighth Amendment. *Simmons*, 542 U.S. at 561; *Gregg v. Georgia*, 428 U.S. 153, 173 (1976). In determining whether an Eighth Amendment violation occurs under the evolving standards of decency test, the best indicator of contemporary values is legislation enacted by the states. *See Atkins v. Virginia*, 536 U.S. 304, 313 (2002).

In the more than two decades since the *Herrera* decision, the vast majority of the states either through legislation, court rule, or by the interpretation of its constitution, have created a post-conviction review system that allows wrongly convicted prisoners to obtain post-conviction relief if they can present a compelling case of actual innocence. *See* Brooks, Simpson, and Kaneb, *If Hindsight Is 20/20, Our Justice System Should Not Be Blind To New Evidence Of Innocence: A Survey Of Post-Conviction New Evidence Statutes And A Proposed Model*; 79 Alb. L. Rev. 1045 (2015/2016). This expansion of the rights of innocent prisoners to seek legal redress has also undoubtedly been accelerated as a result of the spate of DNA exonerations resulting from scientific advances in that technology. However, as noted earlier, for those innocent prisoners in the federal system and the handful of states that do not provide adequate legal remedies for innocent prisoners, the *Simmons* and *Atkins* decisions suggest that the United

States Constitution requires that innocent prisoners have a right to be heard in state court and obtain new trials on freestanding claims of actual innocence under the evolving standards of decency test.

Another central concern of the Eighth Amendment is its protection against disproportionate punishment. *See Montgomery v. Louisiana*, 136 S. Ct. 718, 732 (2016). The Supreme Court has identified four "penological justifications" for imposing a life without parole sentence in *Montgomery*: (1) retribution; (2) deterrence; (3) incapacitation; and (4) rehabilitation. *Id.* at 733. None of these purposes are served and are, in fact, undermined when the convicted individual is actually innocent. Therefore, because punishment of an actually innocent person is inherently disproportionate to the acts committed by that person, such punishment violates the constitutional prohibition on cruel and unusual punishment.

These state legislative and legal developments involving innocence jurisprudence in the aftermath of *Herrera* dictate that states must provide a fair process for judicial review of innocence claims. Evolving standards of decency clearly indicate that it is constitutionally impermissible to allow condemned prisoners to forfeit their lives if they have a substantial claim of innocence.

D. Petitioner Is Entitled To Relief Under The State Constitution And The Proportionality Review Statute.

In addition to being entitled to relief under the *Amrine* decision, petitioner's continued incarceration where there is evidence that establishes his innocence, without affording him a new trial, is an arbitrary deprivation of life and liberty in violation of the due process clause of, not only the Fourteenth Amendment to the United States Constitution, but also violates Article I, Section 10 of the Missouri Constitution. Petitioner's impending execution in the face of this evidence also constitutes an arbitrary and disproportionate punishment in violation of the cruel and unusual punishment clauses of both the Eighth Amendment to the United States Constitution and Article I, Section 21 of the Missouri Constitution.

In similar circumstances, courts of other states have granted new trials to state prisoners who have presented compelling and convincing evidence that they are innocent of the crime for which they are incarcerated. *See, e.g., Ex parte Elizondo*, 947 S.W.2d 202 (Tex. App. 1996); *People v. Washington*, 665 N.E.2d 1330 (Ill. 1996). In *Washington*, the Illinois Supreme Court declined to grant a prisoner a new trial based on an innocence claim on federal due process grounds in light of the decision in *Herrera v. Collins*, 506 U.S. 390 (1993). Instead, the court granted the defendant a new trial based upon the Illinois Constitution. Several other state courts have taken a similar path to grant innocent prisoners relief under state constitutions. *See, e.g., People v. Hamilton*, 115 A.D.3.d 12 (NY 2014); *Montoya v. Ulibarri*, 142 N.M. 89, 97 (2007).

Coupled with the other exculpatory evidence in this case as submitted in the present habeas corpus petition, the DNA evidence here, at the very least, casts sufficient doubt of guilt to justify the commutation of petitioner's death sentence to life imprisonment. Missouri's mandatory proportionality review statute requires the consideration of "whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime, the strength of the evidence, and the defendant." § 565.035.3 R.S.Mo. (2010). In light of the evidence presented at trial coupled with the further evidence of innocence developed in the state post-conviction proceedings and the present DNA test results, this Court should, at a minimum, reopen its previously conducted proportionality review and vacate petitioner's death sentence because the evidence of petitioner's guilt is clearly not established with sufficient certainty to justify the ultimate punishment.

As a result, the proportionality of petitioner's death sentence should be reexamined in light of the strength of all of the evidence that has come to light. Like the case of Timothy Chaney, there is no eyewitness, confession, or physical evidence establishing Marcellus Williams' guilt. *See State v. Chaney*, 967 S.W.2d 47, 60 (Mo. banc 1998). This Court noted, in commuting Mr. Chaney's death sentence to life imprisonment, that the evidence of his guilt was sufficient to

support the conviction, but is not of "the compelling nature usually found in cases where the sentence is death." (*Id*.).

In *Chaney*, this Court relied heavily on an Ohio case, where the Ohio Supreme Court commuted a death sentence under its proportionality review statute based upon residual doubt regarding the condemned man's guilt. *State v*. *Watson*, 61 Ohio St. 3d 1 (Oh. 1991). The key factors that motivated the court in *Watson* to commute the death sentence in that case was the fact that there were serious credibility problems with the prosecution's two primary witnesses and circumstantial evidence pointed to another possible perpetrator of the murder. *Id*. at 17. Similar circumstances exist here. In light of the foregoing facts, there are obviously serious questions regarding the credibility of Cole and Asaro. Moreover, the DNA test results point to another perpetrator of the murder. In light of these similarities, petitioner should receive the same remedy that the Ohio Supreme Court deemed appropriate in *Watson*.

Petitioner's claim of innocence is also more compelling than the facts this Court confronted in the Walter Barton case, which led three members of this Court to conclude that his death sentence should be commuted as disproportionate because there were substantial doubts as to whether he committed the murder for which he was condemned to die. *State v*. *Barton*, 240 S.W.3d 693, 712-717 (Mo. banc 2007)(Wolff, J., dissenting). In *Barton*, Judge Wolff's dissent noted at the

outset that the evidence that linked Barton to the murder was "not particularly compelling." *Id*. at 713. Like this case, the primary witness against Mr. Barton was a jailhouse snitch named Katherine Allen, whose credibility was inherently unreliable due to her prior record of committing crimes involving dishonesty and the fact that she received favorable considerations from the state in exchange for her testimony. *Id*. at 714, 716. Judge Wolff also noted that the physical evidence in *Barton* involving blood stains and expert blood spatter testimony was also suspect due to "contradictions and gaps in the state's evidence [that] call the validity of that evidence into question and at worst . . . render the only physical evidence in this case utterly inconclusive." *Id*. at 714. Like this case, Mr. Barton's guilt was also called into doubt because a hair found on the victim's stomach that was never conclusively identified was inconsistent with the hair sample taken from Mr. Barton. *Id*. at 716.

These remarkable similarities between the *Barton* case and this case clearly should give the Court pause regarding whether petitioner is guilty. In light of the new exculpatory DNA tests, petitioner's claim of innocence is clearly stronger than the evidence this Court confronted in Mr. Barton's case. It is safe to say that, hypothetically, had similar exculpatory DNA testing come to light in Mr. Barton's case, a majority of this Court would have decided to commute his sentence.

In *Amrine*, a substantial majority of the members of this Court indicated that Missouri's proportionality review scheme requires the court to conduct an ongoing review of the propriety of a condemned prisoner's death sentence when new evidence of innocence emerges. 102 S.W.3d at 547 (majority opinion); *Id*. at 549-550 (concurring opinion of Wolff, J.); *Id*. at 552 (dissenting opinion of Price, J.). As in *Amrine*, the DNA testing here provides sufficient evidence of innocence to justify a new trial.

Alternatively, the aforementioned opinions in *Amrine* suggest that middle ground might be reached in habeas corpus cases where a condemned man presents significant post-conviction evidence raising grave doubts about his guilt that might not meet the higher standard for reversal of the underlying conviction under *Amrine*, but would nevertheless be sufficient to require that a prisoner's death sentence be overturned and his sentence reduced to life without parole. Even where all of the evidence is legally sufficient to establish guilt and does not provide clear and convincing evidence of innocence, the death penalty should be off the table where substantial doubts regarding guilt exist. As Judge Price's dissent in *Amrine* advocates, where evidence of possible innocence substantially undercuts confidence in the verdict, a death sentence should be set aside. 102 S.W.3d at 552 (Price, J. dissenting).

E. The Due Process And Equal Protection Clauses Of The Fourteenth Amendment And The Eighth Amendment Require That This Court Conduct A New Proportionality Review In Petitioner's Case.

This Court should reexamine all of the evidence and conduct a new proportionality review sentence in this case because the Court's prior review, conducted by the Court in 2003, is flawed in two respects. First, this Court's 2003 proportionality review rested upon a material mistake of fact.

In addressing the strength of the evidence in its original proportionality review of petitioner's sentence on direct appeal, this Court stated: "Williams confessed to the murder." *State v. Williams*, 97 S.W.3d 462, 475 (Mo. banc 2003). This passage from the court's previous opinion is, at best, misleading because petitioner did not confess to the police. By any objective measure, the evidence that petitioner allegedly "confessed" to the murder to two paid informants, who were convicted felons, does not come anywhere close to having equal weight to a voluntary confession to the police. *See State v. Barton*, 240 S.W.3d at 714-716 (Wolff, J., dissenting)(noting that a confession to the crime to a jailhouse snitch does not constitute a persuasive admission of guilt).

Second, it is clear that the proportionality review that this Court conducted in 2003 did not conform with the requirements of the statute. In 2010, this Court recognized that its earlier proportionality review procedure provided less than the

full proportionality review required by statute. *See State v. Deck*, 303 S.W.3d 527, 557-559 (Mo. banc 2010); *State v. Davis*, 318 S.W.3d 618, 643-645 (Mo. banc 2010). § 565.035.3 has not changed since this Court considered the proportionality of petitioner's sentence in his direct appeal in 2003. Coupled with the mistake of fact in this Court's 2003 proportionality review in describing the strength of the evidence presented at petitioner's trial, this Court should reexamine the proportionality of the death sentence.

There is nothing in the *Deck* or *Davis* opinions that would preclude this Court from conducting a new proportionality review in a capital case that preceded those decisions, particularly where there is additional evidence of innocence that has come to light that raises additional doubts regarding guilt. Should this Court decline to do so, this failure would violate petitioner's rights to equal protection, due process, and his right to be free from cruel and unusual punishment guaranteed by the Eighth and Fourteenth Amendments.

Should this Court fail to conduct a new proportionality review under the *Deck* and *Davis* and compare petitioner's case to those cases where a death sentence was not imposed, this failure would violate petitioner's right to equal protection of the law. The equal protection clause of the Fourteenth Amendment imposes upon a state the requirement that all similarly situated persons should be treated alike. *Plyler v. Doe*, 457 U.S. 202, 216 (1982). Generally, legislation or a

court decision will be presumed to be valid if the disparate treatment of a class of citizens is rationally related to a legitimate state interest. *See Vance v. Bradley*, 440 U.S. 93, 97 (1979). However, strict scrutiny of state laws is required if a suspect class is involved or "when state laws impinge on personal rights protected by the Constitution." *Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 440 (1985). Under either of these standards of review, this Court is constitutionally required to review petitioner's death sentence in the same manner as it did in considering the proportionality of Mr. Deck's and Davis' sentences. There is simply no rational basis for reviewing petitioner's death sentence in a different manner than the death sentences imposed against Mr. Deck and Mr. Davis.

The failure of this Court to compare petitioner's death sentence to cases where life sentences were imposed is significant because death sentences are rarely imposed when the primary evidence utilized to convict a man of a capital crime is jailhouse informant or "snitch" testimony. Counsel is aware of only two Missouri cases where death sentences were imposed where jailhouse snitch testimony was the only direct evidence of guilt: the Joseph Amrine and the Reginald Griffin cases. Apart from the fact that those two cases involved prison murders which presents perhaps the most compelling statutory aggravating circumstance other than a cop killing, both Mr. Amrine and Mr. Griffin were subsequently exonerated after the unreliable snitch testimony in both of their cases was discredited. *See*

Amrine, *supra; see also State ex rel Griffin v*. *Denney*, 347 S.W.3d 73 (Mo. banc 2011).

In addition, petitioner is confident that this Court's proportionality review data base will indicate that there are a number of cases where the jury rejected the death penalty where the primary evidence against a capital defendant was jailhouse informant or other similar snitch testimony. Two such cases involve Danny Wolfe and Michael Taylor. In *Wolfe*, after this Court reversed his conviction due to ineffective assistance of counsel, a new jury rejected the death penalty at the retrial after he obtained competent counsel. *Wolfe v*. *State*, 96 S.W.3d 90 (Mo. 2003); *State v*. *Wolfe*, 344 S.W.3d 822 (Mo. App. S.D. 2011). In *Taylor*, after this Court granted him a new penalty phase trial on a *Brady* claim, Mr. Taylor received a life sentence at retrial. *See Taylor v*. *State*, 262 S.W.3d 231 (Mo. banc 2008).

Should this Court decline to conduct a new and fair proportionality review under the *Deck* standard, this failure would also violate a due process under *Hicks v*. *Oklahoma*, 447 U.S. 443, 446 (1980). In *Hicks*, the court found that a due process violation occurred when a state court did not afford a criminal defendant procedural protections guaranteed by state law. *Id*. A due process violation would occur here, should the Court decline to conduct a new proportionality review, because this Court would "arbitrarily deprive the defendant of a state law entitlement." *See Laboa v*. *Calderon*, 224 F.3d 972, 979 (9th Cir. 2000).

As Judge Wolff pointed out in his dissent in *Wolfe*, a distinct due process violation would occur if the court conducted its proportionality review in a manner where it would not consider all of the evidence in the case, not just the evidence favorable to the verdict. 13 S.W.3d at 277. In this regard, Judge Wolff noted that the Supreme Court had held that due process required heightened review, as a matter of due process, in any civil case where punitive damages are assessed against a defendant. *Id*., citing *Honda Motor Company Ltd v*. *Oberg*, 512 U.S. 415, 432 (1994). Judge Wolff also noted that the Supreme Court held that punitive damages for a civil defendant's conduct would not be appropriate unless the defendant's conduct was sufficiently reprehensible to render punitive damages awarded proportionate. *Id*.,citing *BMW of North America v*. *Gore*, 517 U.S. 559, 557 (1996). It would be perverse, indeed, to afford corporate defendant's in civil cases broader constitutional protections than capital defendants.

CONCLUSION

For all the foregoing reasons, petitioner respectfully requests that this Court stay his scheduled execution and appoint a Special Master to hear petitioner's claim of innocence or, in the alternative, vacate petitioner's sentence of death and order that his sentence be commuted to life imprisonment or, grant such other and further relief that the Court deems fair and just under the circumstances.

Respectfully submitted,

/s/ *Kent E. Gipson*
KENT E. GIPSON, Mo. Bar #34524
121 East Gregory Boulevard
Kansas City, Missouri 64114
816-363-4400 / fax 816-363-4300
kent.gipson@kentgipsonlaw.com

COUNSEL FOR PETITIONER

CERTIFICATE OF SERVICE

I hereby certify that on the 14th day of August, 2017, this petition was filed via case.net. A copy was sent via email mike.spillane@ago.mo.gov, to Michael Spillane, Assistant Attorney General, 207 West High Street, P.O. Box 899, Jefferson City, Missouri 65102, attorney for respondent.

/s/ *Kent E. Gipson*
Counsel for Petitioner