IN THE CIRCUIT COURT OF COLE COUNTY, MISSOURI

STATE OF MISSOURI, *ex rel.* RYAN FERGUSON,	)	
Petitioner,	)	
v.	)	**Case No. _____**
DAVE DORMIRE, Superintendent, Jefferson City Correctional Center,	)	
Respondent.	)	

PETITION FOR WRIT OF HABEAS CORPUS

COMES NOW Ryan Ferguson ("Ryan"), by and through undersigned counsel, and petitions this Court to issue a Writ of Habeas Corpus pursuant to Missouri Rule 91, based on violations of Ryan's constitutional rights which enabled the State of Missouri to obtain a conviction and sentence totaling 40 years in the Missouri Department of Corrections against an innocent person. In support of this Petition Ryan states as follows:

Introduction

On October 19, 1984, the day of Ryan's birth, his mother and father could never have imagined the Kafkaesque nightmare that lay ahead for their only son. Bill and Leslie Ferguson's only thoughts that day were that their son would have the brightest of futures and fulfill all of their dreams for him.

Indeed, Ryan fulfilled many of those dreams. He was an Eagle Scout, a good athlete, handsome and popular. His life seemed on track when a cruel twist of fate derailed him. Ryan was arrested for a crime he did not commit. After five short days of trial, all of Bill and Leslie Ferguson's hopes and dreams for Ryan died when they heard the judge utter the words "guilty of second degree murder" and "guilty of first degree robbery" as she read the jury verdicts on December 5, 2005.

On that date, the young man with so much promise was sentenced to 40 years in prison. His new home, a tiny cell in a maximum security prison, where he has languished for more than 2,000 days. Ryan has endured all of the punishment prison has to offer. He left behind the comfort and support of his family, his friends, his reputation and all of his hopes and dreams for a successful life.

Now, after so many years of despair and hopelessness, the rotten core of his conviction is laid bare before this court. It is a story of betrayal, fueled by fear, ambition and a rush to judgment. It is a story that is an affront to our Constitution and the laws of Missouri.

The sole witnesses against Ryan were a blacked-out, drug impaired teenager and a convicted sex offender. Now, both of these witnesses have admitted that their trial testimony was untrue. Their false testimony was

aided and abetted by a cunning prosecutor who cared more about obtaining a conviction than seeking justice.

Ryan's words before his sentencing ring as true today as they did on December 5, 2005:

> "I really just wanted to say that today is a sad day, because the justice system has failed not only my family and I, but the Heitholts and the community. It has failed because they're sending an innocent man to jail. Because they're letting a horrible person run free, without a care. They don't have to worry about the police looking for them. I can't understand that. I don't see how Crane can live with himself with that.
>
> But some day the truth will come out and everyone will see that I am innocent, and I will be free. And that will be a great day, because on that day the justice system will finally have done justice." (Tr. 2253).

That day has finally arrived for the justice system to do justice for Ryan and set him free.

Procedural History and Statement of Facts

A. Procedural History

1. Ryan is incarcerated in Jefferson City Correctional Center, located at 8200 No More Victims Road in Jefferson City, Cole County, Missouri. The Jefferson City Correctional Center is operated by David Dormire, Superintendent. Mr. Dormire is restraining Ryan's liberty.

2. Ryan was charged in Boone County of felony murder in the second degree in violation of §565.021RSMo, and robbery in the first degree in violation of §569.020RSMo.

3. Prior to trial the parties agreed that due to publicity concerns, a jury would be drawn from Lincoln County and that the case would thereafter be tried in Boone County.

4. Following a jury trial in the Boone County Circuit Court before the Honorable Ellen Roper, Ryan was convicted of one count of second degree murder and one count of first degree robbery. Ryan was sentenced to 30 years on the murder count and 10 years on the robbery count, to be served consecutively. (See Sentence and Judgment Order, attached and incorporated herein as Exhibit "1").

5. The Missouri Court of Appeals, Western District, affirmed the judgment and sentence on direct appeal. *State v. Ferguson*, 229 S.W.3d 612, 614 (Mo.App., W.D. 2007).

6. Ryan filed a timely *pro se* Rule 29.15 motion on November 14, 2007 and an amended motion on March 3, 2008. The amended motion made claims, *inter alia*, of *Brady* and ineffective assistance of counsel. An evidentiary hearing was held July 16-18, 2008.

7. Ryan filed a habeas petition that challenged the jury selection process in his trial. On September 2, 2008, the motion court transferred the habeas motion to the Circuit Court of Cole County, Missouri. The court denied the petition. *Ferguson v. State*, No. 08AC-CC00721. The petition was also denied by the Appellate and Supreme Courts. *In re Ferguson v. Dormire*, No.WD70818, *In re Ferguson v. Dormire*, No.SC90095.

8. Circuit Judge Jodie C. Asel entered findings of fact and conclusions of law overruling Ryan's Rule 29.15 motion on June 12, 2009, adopting almost verbatim the State's proposed findings of fact crediting the testimony of the prosecution's witnesses while rejecting all evidence in favor of Ryan. *Ferguson v. State*, No. 07BA-CV05888.

9. In December, 2009, while the appeal of the denial of Ryan's Rule 29.15 petition was pending, Kathleen T. Zellner and Douglas H. Johnson, admitted *pro hac vice*, entered their appearance on behalf of Ryan, along with Missouri attorney Sam Henderson.

10. The Missouri Appellate Court, Western District, denied Ryan relief pursuant to his appeal of the judgment denying his Rule 29.15 motion. The court also declined to review new evidence that Ryan's co-defendant,

Charles Erickson ("Erickson"), had recanted his trial testimony. In doing so, the court stated:

> That is not to say that the issues of this case do not give us pause. The sole evidence tying Ferguson to the crime was the testimony of Erickson and the identification of Trump. There is no physical evidence that ties Ferguson to this murder. However, we are mindful that Ferguson has other legal avenues to bring forth his claims of newly discovered evidence. *Ferguson v. State*, WD71264. (See Appellate Court Opinion, attached and incorporated herein as Exhibit "2", p. 30).

11. Ryan filed a Motion for Rehearing and Transfer which was denied on November 2, 2010. His application to the Supreme Court was denied. *Ferguson v. State*, SC91303.

12. Ryan petitions this Court for a writ of habeas corpus, bringing issues and evidence before the court that could not have been presented in his original Rule 29.15 motion for post-conviction relief as explained below.

13. Ryan supplements his claims with powerful new evidence that he is actually innocent of the murder of Kent Heitholt ("Heitholt"). Persuasive evidence of innocence requires consideration of constitutional claims otherwise deemed procedurally barred:

> [I]f a petitioner...presents evidence of innocence so strong that a court cannot have confidence in the outcome of the trial unless the court is also satisfied that the trial was free from non-harmless constitutional error, the petitioner should be allowed to pass through the gateway and argue the merits of his underlying claims. *Schlup v. Delo*, 513 U.S. 298, 316 (1995).

Missouri courts apply the *Schlup* standard to claims for habeas corpus relief pursuant to Rule 91. In *Clay v. Dormire*, 37 S.W.3d 214, 217 (Mo. banc. 2000), the Missouri Supreme Court also recognized that clear and convincing evidence of innocence justifies habeas corpus relief even if the petitioner had a fair trial. Habeas corpus relief may even be available in rare circumstances where a free standing claim of actual innocence is brought independent of any constitutional violation at trial. *State ex. rel. Amrine v. Roper*, 102 S.W.3d 541, 547-48 (Mo. banc. 2003).

14. Constitutional violations rendered Ryan's trial fundamentally unfair. Moreover, Ryan has clear and convincing evidence of his actual innocence. Based upon the newly discovered evidence, no rational trier of fact could convict Ryan. Ryan's conviction must be reversed, and he must be discharged from custody.

B. Statement of Facts

This case is about innocence. No direct evidence tied Ryan to Heitholt's murder. No physical evidence even placed him at the scene. The only circumstantial evidence was the testimony of Charles Erickson ("Erickson") and Jerry Trump ("Trump"). Both of those witnesses have now admitted that their trial testimony was false.

It should be noted at the outset that not only has the Appellate Court explained that it is "mindful that Ferguson has other legal avenues to bring forth his claims of newly discovered evidence," (Exhibit 2, p. 30) but the State has agreed that an evidentiary hearing is appropriate. In its "Suggestions in Opposition to Appellant's Motion to Remand" filed February 16, 2010, the State wrote, "The state is not averse to a full and fair hearing on the issues presented by Mr. Ferguson's motion, including whether Mr. Erickson's newly available testimony is material." (See "Suggestions in Opposition to Appellant's Motion to Remand," attached and incorporated herein as Exhibit "3", p. 7).

The Trial Evidence

In its opinion of August 31, 2010, the Appellate Court recited the trial testimony in a light most favorable to the verdict as follows:

"On October 31, 2001, Chuck Erickson, a seventeen-year-old high school junior, attended a party at night at his friend's house in Columbia, Missouri. The police broke up the party, and as Erickson was leaving the party, he ran into Ferguson who was just driving up to the house. Ferguson, who was also a seventeen-year-old high school junior, told Erickson to get in his car, and the two drove off. They made plans to meet with Ferguson's sister at By George's, a club in downtown Columbia, Missouri.

Although underage, Ferguson's sister had arranged for them to "borrow" other people's I.D.'s so they could enter the club. Once in the club, Ferguson bought a few mixed drinks for Erickson and himself. Around 1:00 a.m. Ferguson and Erickson ran out of money so they left the club.

Once outside, they went to Ferguson's vehicle. There, Ferguson told Erickson that he did not want to go home and that they should find something else to do. Ferguson suggested that they rob someone so they could get more beer money and stay out later. Erickson agreed. They exited Ferguson's vehicle, and Ferguson got a tire tool out of his trunk to use in the robbery. They then walked downtown to find someone to rob. They eventually walked to the Columbia Tribune Building where they saw the victim leaving the building.

Ferguson and Erickson went down an alley and hid behind a dumpster. They observed as the victim reached his vehicle in the Tribune parking lot and opened his front door. As he was shuffling some papers, Erickson and Ferguson ran up behind him as he was facing his vehicle, and Erickson hit him with the tire tool. Erickson repeatedly hit him with the tire tool. The victim eventually fell to the ground, where he laid motionless.

Erickson dropped the tire tool near the victim. Ferguson went over to the victim and took the victim's belt off and strangled him with it.

During the assault, a custodian at the Tribune Building, Shawna Ornt, had exited the building to smoke a cigarette. She observed what was happening and went back to the building to get a co-worker, Jerry Trump. While that was occurring, Ferguson reached down and searched the victim's pockets and took his watch and car keys. Erickson grabbed the tire tool and the belt. Trump exited the building and saw the victim on the ground. He called out, 'I see you there. Who's out there.' Erickson responded that the victim was hurt. Erickson and Ferguson then left the scene. Trump went over to the victim's body and told Ornt to call 911.

The police were unable to develop any leads immediately after the murder, based primarily on the fact that little forensic evidence was left at the scene of the crime.

Eventually, Ferguson and Erickson went to separate colleges. Erickson stayed near Columbia for college, and Ferguson moved to Kansas City to attend college ... Soon after, Erickson disclosed what he believed to be his involvement in the murder to his friends [who] contacted the Columbia Police Department. On March 10, 2004, the police contacted Erickson, and he went to the Columbia Police Department where he

confessed to his involvement in the murder and robbery. He was eventually arrested and charged.

On March 10, 2004, the police drove to Kansas City, Missouri, where they arrested Ferguson, who was later charged with the class A felony of murder in the first degree, in violation of § 565.020 and the class A felony of robbery in the first degree, in violation of § 569.020. Erickson pled guilty to first-degree robbery, in violation of § 569.020, second-degree murder in violation of § 565.021.1(2), and armed criminal action, in violation of § 571.015. In exchange for a lesser sentence, Erickson agreed to testify against [Ferguson]." (Exhibit 2, pp. 2-4).

Claim Number 1

Ground for Relief Pursuant to Rule 91: Actual Innocence

In its Opinion rendered August 31, 2010, the Appellate Court for the Western District of Missouri explained that the "sole evidence tying Ferguson to the crime was the testimony of Erickson and the identification of Trump." (Exhibit 2, p. 30). Now, as a result of the new evidence described herein, it is clear that all of that evidence has been refuted.

The Janitor Jerry Trump's False Trial Testimony

Jerry Trump ("Trump") was a janitor working at the Columbia Tribune on November 1, 2001. He was the only witness, other than

Erickson, who testified against Ryan. Trump testified, at trial, that while he was incarcerated he received, from his wife, a copy of an article from the front page of the Columbia Tribune. (See Trump's Trial Testimony, attached and incorporated herein as Exhibit "4", Tr. 1020). The article was about the Heitholt murder and indicated that one of the perpetrators had come forward. (Exhibit 4, Tr. 1021). The article included pictures of Erickson and Ryan. According to his trial testimony, as Trump sat in his prison cell looking at pictures in the article, he suddenly recognized the newspaper photos as the two individuals he saw by Heitholt's car the night Heitholt was killed. (Exhibit 4, Tr. 1022). Thus, Trump's testimony placed Ryan with Erickson at the murder scene immediately after the murder.

Trump testified as to how he was able to identify Ryan from the newspaper article his wife sent him while he was in prison. Suspiciously, immediately prior to his release the prosecutor's office contacted him about the Heitholt murder and requested a meeting. This is perplexing because Trump had denied being able to identify the two individuals by Heitholt's car on November 1, 2001 and the prosecutor supposedly knew nothing about Trump receiving the newspaper article. (See Police Report 10, p. 3, attached and incorporated herein as Exhibit "5") (Exhibit 4, Tr. 1017).

Trump said that he was released from prison December 13, 2004. (Exhibit 4, Tr. 1027). He met with prosecutor Kevin Crane ("Crane") at his office approximately one week later. (Exhibit 4, Tr. 1027). According to Trump, for the first time, during the meeting with Crane, he told someone from law enforcement about seeing the newspaper article which led him to recognize Ryan and Erickson as the two individuals he saw by Heitholt's car on the night of the murder. (Exhibit 4, Tr. 1027). Trump testified that he was not shown any photographs of Ryan until the day of his trial testimony. (Exhibit 4, Tr. 1028). Trump then made an in-court identification of Ryan as one of the individuals he saw at the scene of the murder. (Exhibit 4, Tr. 1029).

The defense sought to bar Trump's identification at the trial. Specifically, the defense argued that the identification was unduly suggestive because "governmental action" had led to the identification. But during *voir dire* examination outside the presence of the jury, Trump testified that after receiving the article with photographs of Ryan and Erickson, he "remembered them as the ones that I had seen behind Kent's car." (Exhibit 4, Tr. 1001).

Trump further testified that nobody from "law enforcement" (including the prosecutor's office) had ever shown him photos of Ryan and

Erickson prior to the day of his testimony. (Exhibit 4, Tr. 1002). Trump testified that he had not seen the photographs in the article from the time he was sent the newspaper by his wife while he was in prison. (Exhibit 4, Tr. 1005). At the conclusion of the hearing, the trial court overruled the defense motion to exclude Trump's identification, presumably, because of the lack of governmental involvement in the identification of Ryan and Erickson. (Exhibit 4, Tr. 1017). Trump was allowed to identify Ryan in the presence of the jury. (Exhibit 4, Tr. 1006-07).

Trump's New Evidence

On October 11, 2010, Trump provided an affidavit attesting to the fact that his trial testimony was false because he had never received a newspaper article, while in prison, from anyone with pictures of Ryan and Erickson. (See affidavit of Jerry Trump dated October 11, 2010, attached and incorporated herein as Exhibit "6"). Then, on December 28, 2010, Trump provided a supplemental affidavit again confirming that his testimony was false, but adding further detail about the involvement of Crane in fabricating his trial testimony about receiving the newspaper article in prison. (See supplemental affidavit of Jerry Trump dated December 28, 2010, attached and incorporated herein as Exhibit "7").

In his first affidavit Trump admits that when he was first interviewed by police he informed them he could not identify the two individuals he saw by Heitholt's car. (Exhibit 6, ¶7). Trump told other people that he could not identify the individuals, nor could he describe them. (Exhibit 6, ¶¶8-9). These statements are consistent with what Trump told his sister, Barbara Randolph. (See summary of Investigator Kirby's interview with Ms. Randolph, attached and incorporated herein as Exhibit "8"). Ms. Randolph was shocked to learn that Trump had identified Ryan at the trial because Trump had told both her and her husband he had not seen anyone and could not identify anyone. (Exhibit 8, ¶10). These witnesses were not previously presented to impeach Trump. Clearly, discrediting Trump's testimony would have changed the outcome of the trial.

Trump's Meeting with Prosecutor Crane Which Led to the Fabrication of His Testimony

Before Trump was released from prison, he was contacted by the prosecutor's office in November or December of 2004, requesting a meeting upon his release. A short time after his release, Trump met with Crane and probably Investigator William Haws ("Haws"). (Exhibit 6, ¶¶12-13).

Contrary to his trial testimony, Trump now states that he never received a newspaper article about the Heitholt case while he was in prison, nor did he look at any article with pictures of Ryan and Erickson while he

was incarcerated. (Exhibit 6, ¶16). Instead, the first time Trump saw pictures of Ryan and Erickson was at Crane's office when Crane showed him pictures of several people, including Ryan and Erickson. (Exhibit 6, ¶¶14, 17). Crane and/or Haws told Trump that "they felt they had the right people in custody and they told me the names of the men they had in custody, which were Chuck Erickson and Ryan Ferguson." (Exhibit 7, ¶15).

In his second affidavit, Trump explains that it was Crane who produced the newspaper article with pictures of Ryan and Erickson when they met at Crane's office. (Exhibit 7, ¶14). Crane advised Trump that "*it would be helpful* to [Crane]" if Trump would identify Ryan as being in the parking lot the night of the murder. (Exhibit 7, ¶16). Crane actually told Trump that Trump needed to testify he saw the pictures of Ryan and Erickson when he opened the envelope in prison containing the newspaper article, and recognized the two of them before he saw the headline. (Exhibit 7, ¶17).

Trump concludes his second affidavit by unequivocally stating that although he testified at Ryan's trial that no one from law enforcement showed him the newspaper article, that testimony was false. He states,

"The truth is that Crane had showed me the newspaper article prior to trial at the first meeting we had in his office." (Exhibit 7, ¶21).

Obviously, Trump's affidavits demonstrate that his trial testimony is materially false. Trump testified at trial he was able to identify Ryan after seeing Ryan's photo in an article in the newspaper; his affidavit establishes he did not see the article until Crane showed it to him. Accordingly, Trump's testimony that nobody from the prosecution's office ever showed him a photo of Ryan is false. Finally, Trump testified that the first and only time he saw a photo of Ryan was when he saw the article during his incarceration; the affidavit establishes that the first time he saw such a photo was at Crane's office.

Crane's Alleged Misrepresentations to the Court

Crane represented to the court that no photographs had ever been shown to Trump by any government agent. (Exhibit 4, Tr. 992-93). According to Trump, that is untrue. (Exhibit 7, ¶¶14-17). Crane further informed the court that he was unaware whether Trump would be able to identify Ryan because nobody from Crane's office had ever asked Trump to make an identification. (Exhibit 4, Tr. 992-93). According to Trump, that statement is untrue. (Exhibit 7, ¶¶16-17, 21).

In summary, Trump claims in his affidavits that the true facts are: (1) Trump cannot identify or describe the individuals he saw by Heitholt's car; (2) Trump never saw an article with Ryan and Erickson's photos while he was incarcerated; (3) the first time Trump saw any photos of Ryan or Erickson was when he met with Crane; (4) Crane and/or Haws showed Trump several photos, including photos of Ryan and Erickson; and (5) Crane and/or Haws told Trump they felt they had the right people in custody, and their names were Charles Erickson and Ryan Ferguson.

In his affidavit, Trump explains that he cannot "positively identify the two people [he] saw in the parking lot" (Exhibit 7, ¶5) and that he "cannot testify with certainty that [he] saw Ferguson in the parking lot." (Exhibit 7, ¶22). Trump also explains that he is sure the two young men were not carrying a tire tool or belt as they walked away, as Erickson had testified. (Exhibit 7, ¶10). Also, Trump never testified that he observed blood on the hands or clothing of the two individuals.

Clearly, Trump's affidavits destroy his credibility as one of only two witnesses who placed Ryan at the crime scene.

Additional New Evidence of Trump's False Testimony Provided by the Attorney General

On January 3, 2011, the Attorney General's Office alerted undersigned counsel about new evidence supplied by Mary Groves

("Groves"), PO II, District 6, Trump's Probation Supervisor at the time of the murder of Heitholt. (See Letter and Report, attached and incorporated herein as Exhibit "9"). In her report, Groves states that Trump "reported to [her] office right after the murder" and advised that he could not "identify anyone who remained in the area." (Exhibit 9, p. 2). Groves felt obligated to come forward. She explains in her report:

> I read in the newspaper that Jerry Trump positively identified Defendant Ryan Ferguson during his testimony in the trial. I felt an obligation to report the contradiction between the information he told me and his court testimony. (Exhibit 9, p. 2).

Groves further reports that Regional Sex Offender Specialist Janice Palmer reported Trump had said the same thing when Trump was in the sex offender treatment group. (Exhibit 9, p. 2). This new evidence alone destroys the credibility of Trump's identification of Ryan at trial. (See Exhibit 4).

Charles Erickson's False Testimony

At Ryan's trial, Erickson related a story filled with factual errors implicating Ryan. At trial, Erickson explained that he and Ryan, two young men with no violence in their history, ran out of money for drinks and decided to rob and murder, of all potential victims, the vastly physically superior Heitholt. Both boys were about 5 feet 6 inches to 5 feet 7 inches

tall and weighed 140-150 pounds. Heitholt was 6 feet 4 inches tall and weighed 315 pounds. No money was taken from Heitholt and his wallet was left at the crime scene. After the murder, at approximately 2:30 to 2:45 a.m., Erickson testified they returned to the bar to continue drinking. The unrefuted trial testimony was that the bar closed at 1:30 a.m. (Tr. 1730) and the murder occurred sometime between 2:10-2:26 a.m. Then, Erickson simply forgot about the murder, for over two years, until he read a lengthy and detailed newspaper article published on the second anniversary of the crime. Inexplicably, memories only came back when he got drunk and talked to his friends. Erickson's initial recollections were vague and inaccurate until he was given the police reports. The memories "repressed" by Erickson have all been shown to be false. (See Erickson's trial testimony, attached and incorporated herein as Exhibit "10"). Erickson testified that he supposedly asked Ryan if he had ever heard of repressed memories. (Exhibit 10, Tr. 588). Ironically, that is exactly Crane's theory at trial. Erickson had "repressed memories" that came back in little snippets as he read hundreds of pages of police reports. Crane presented no expert testimony to validate his memory theory because no experts exist that could do so without risking their own credibility.

But now, like Trump, Erickson explains that, in fact, he can provide no evidence of Ryan's guilt. In his affidavit, Erickson states, "In the trial of *State v. Ryan Ferguson*, Case No. 04 CR 165368-01, I testified that Ryan Ferguson robbed and strangled Kent Heitholt. This testimony is false. I have no knowledge that Ryan Ferguson robbed and strangled Kent Heitholt." (See Erickson's affidavit, attached and incorporated herein as Exhibit "11").

Erickson also admits that every assertion in his testimony that implicates Ryan is false. Erickson's testimony that Ryan proposed they rob someone to get money for more drinks is false. (Exhibit 11, ¶19). Erickson's testimony that the two decided to go downtown to commit a robbery is false. (Exhibit 11, ¶20). Erickson's testimony that Ryan said they may need a weapon for protection and that weapon was a tire tool Ryan grabbed from the trunk of his car is false. (Exhibit 11, ¶21). Erickson's testimony that Ryan hid behind a dumpster in the parking lot is false. (Exhibit 11, ¶22). Erickson's testimony that Ryan urged him to attack Heitholt is false. (Exhibit 11, ¶23).

Erickson further admits that completely untrue were his allegations at trial i) that he saw Ryan stand over Heitholt (Exhibit 11, ¶24); ii) that he saw Ryan with Heitholt's belt (Exhibit 11, ¶24); iii) that he saw Ryan

strangling Heitholt (Exhibit 11, ¶24); iv) that he saw Ryan going through Heitholt's pockets (Exhibit 11, ¶25); v) that Ryan told him not to touch anything (Exhibit 11, ¶26); vi) that he asked Ryan about a tire tool and saw Ryan in possession of a tire tool that night (Exhibit 11, ¶27); vii) that he saw Ryan put a tire tool in a plastic bag (Exhibit 11, ¶28); viii) that he put a belt in a plastic bag provided by Ryan (Exhibit 11, ¶29); ix) that Ryan said he wanted to kill someone before he was sixty (Exhibit 11, ¶30); x) that Ryan said he would dispose of the items in his trunk (Exhibit 11, ¶30); xi) that Ryan's father found Heitholt's wallet (Exhibit 11, ¶31); and xii) that he witnessed Ryan commit the robbery and murder (Exhibit 11, ¶32). Finally, Erickson admitted that he has no memory of ever telling anyone on November 1, 2001, to "get help" and no memory of ever telling anyone after November 1, 2001 that he had done so. (Exhibit 11, ¶33).

A Summation of Erickson's Inaccurate and Contradicting Statements

The Appellate Court Opinion (Exhibit 2) states "Erickson was subjected to a lengthy and extensive cross-examination, wherein Ferguson's trial counsel was successful in illustrating that Erickson had made various prior statements that seriously undermined Erickson's credibility." (Exhibit 2, p. 26). It is important to review the many falsehoods in Erickson's trial testimony to illustrate that the jury must have been persuaded by other

evidence in convicting Ryan. The other evidence will be reviewed in the section following this summation of Erickson's contradictory statements before and during Ryan's trial. His testimony was repeatedly refuted by evidence from other witnesses, the evidence from the crime scene, and the autopsy. The following is a list of some of Erickson's many false statements during his testimony at Ryan's trial.

- Erickson testified that he observed Heitholt exit the building, then another person came out later, spoke to Heitholt, got into his car and left the parking lot. (Exhibit 10, Tr. 522). This contradicts Police Report #18 wherein Michael Boyd ("Boyd") states that he came out of the building first, followed by Heitholt. (Police Report #18 attached and incorporated herein as Exhibit "12"). It also contradicts Shawna Ornt's and Russ Baer's statements to Investigator Steve Kirby that Boyd left before Heitholt. (Affidavit of Investigator Steve Kirby attached and incorporated herein as Exhibit "13" and Affidavit of Shawna Ornt attached and incorporated herein as Exhibit "14"). Erickson also testified that the individual who came out of the building after Heitholt was a white man with a regular build.

(Tr. 827). Michael Boyd, the individual described, is African American with a large build.

- Erickson testified that he and Ryan were hiding behind the dumpster enclosure. (Exhibit 10, Tr. 523). This contradicts the report of Investigator Haws, about his interview with Boyd. (Report of Haws attached and incorporated herein as Exhibit "15"). Boyd told Haws he saw "two white guys" standing near the dumpster. (Exhibit 15, p. 1). Boyd would not have seen Erickson and Ryan if they were "hiding behind [the] dumpster enclosure." (Exhibit 10, Tr. 522).
- Erickson testified that he observed Heitholt from the moment Heitholt exited the building, but Erickson never mentioned observing Heitholt feed a stray cat after he exited the building. Crime scene photos verify that Heitholt fed the cat before he was attacked. (Tr. 1158).
- Erickson's version of the attack is totally inconsistent with the crime scene photos (Tr. 1153-61), the autopsy findings and the blood spatter at the crime scene. Erickson claims he "crept up behind [Heitholt]." (Exhibit 10, Tr. 525). However, the dumpster was to Heitholt's right, southwest of where he was

standing. Erickson would have clearly been in Heitholt's line of vision and would have had to walk past him first in order to circle back and creep up behind him. (Tr. 1093-95).

- Erickson claimed a tire tool was the murder weapon, but when presented with the tire tool from Ryan's car (Trial Exhibit #90), Erickson denied that it was the tire tool used in the attack. (Exhibit 10, Tr. 538). A tire tool has been ruled out as the murder weapon by forensic pathologist Larry Blum, M.D. (Affidavit of Larry Blum attached and incorporated herein as Exhibit "16", ¶6).
- Erickson claimed he hit Heitholt several times, by the open driver's door and once when Heitholt was on his knees. (Exhibit 10, Tr. 540-41). This contradicts the testimony of Edward Adelstein, M.D., who performed the autopsy and testified that Heitholt was struck in the head 11 times. (Tr. 1414). In his first police interview, Erickson told police he had only hit Heitholt once. (Tr. 644).
- Although Erickson testified to the entire attack upon Heitholt, he never mentioned hitting Heitholt's hands or arms. This contradicts the known fact that Heitholt had multiple defensive

wounds on his hands. (Tr. 1422). Erickson never mentioned that most of the attack occurred by the driver's side rear wheel. (Exhibit 10, Tr. 526). He testified most of the attack occurred by the driver's door. (Exhibit 10, Tr. 526).

- Erickson admitted that he had told the police in his first interview that Heitholt kicked him in the testicles but at trial he said Heitholt had not kicked him in the testicles. (Tr. 644).
- Erickson told the police he thought he vomited at the scene. (Tr. 642). This contradicts the known fact that there was no vomit at the crime scene.
- Erickson testified that Ryan entered and searched Heitholt's car. (Exhibit 10, Tr. 551). This contradicts the known fact that none of Ryan's fingerprints were found in the car and Erickson did not testify that they were wearing gloves. (Exhibit 10, Tr. 518).
- Erickson admitted, at trial, that he first told police that he and Ryan had taken Heitholt's wallet, but they had not. (Tr. 646). Heitholt's wallet was found in the car after the murder. (Tr. 1178).

- Erickson testified that he yelled at the cleaning lady, "This man's hurt. Go get help" (Exhibit 10, Tr. 553) and "Go get help. This man needs help." (Exhibit 10, Tr. 554). This contradicts Erickson's testimony during cross-examination, wherein Erickson testified that his information about what the cleaning lady heard came from the newspaper. Specifically, Erickson told Detective Nichols, "Look I'm just here trying to come up with something that I can – think I remember based on what I read." (Tr. 714). Erickson also testified that when Detective Short asked him if he said anything to the cleaning lady, Erickson said he was not sure. (Tr. 813-14). Short told Erickson that the cleaning lady told the police that someone asked for help and then Erickson said that was him. (Tr. 815).
- Erickson testified that he did not take the tire tool from the scene and that he did not observe Ryan with it. (Exhibit 10, Tr. 558). A tire tool was not found at the scene. This supports Dr. Blum's opinion that a tire tool was not the weapon used. (Exhibit 16, ¶6).
- Erickson testified that he only took the broken belt. He did not testify that he or Ryan took Heitholt's keys or watch, nor could

he explain what happened to these items. (Exhibit 10, Tr. 573). This contradicts the known fact that Heitholt's keys and watch were taken from the scene and have never been found. (Tr. 419-20).

- Erickson admitted at trial that in his first police interview he told Detective Short that a shirt or a bungee cord was used to strangle Heitholt – then he admitted he was "just guessing." (Tr. 668). Erickson never thought it was a belt and when Detective Short told him it was a belt, Erickson was incredulous. (Tr. 669). Erickson said "Oh really? A belt?" After Short told him it was a belt, Short asked Erickson, "Does that ring a bell?" to which Erickson responded, "Not at all." (Tr. 669).
- Erickson testified that when he and Ryan returned to By George at 2:30-2:45 a.m. the bouncer was still at the door of the bar. Erickson added that people were still drinking and dancing at the club. (Exhibit 10, Tr. 567). This contradicts the undisputed testimony from other witnesses that By George closed at 1:30 a.m. (Tr. 1730), including the new evidence from Kimberly

Bennett ("Bennett"). (Affidavit of Kimberly Bennett attached and incorporated herein as Exhibit "17").

- In Erickson's police interview, he claimed that after the murder, he and Ryan headed west to the northeast corner of Providence and Ash where they saw Dallas Mallory at a stoplight next to the Break Time, which is on the northeast corner of Providence and Ash. (Tr. 648, 674). In his videotaped interview with Detective Nichols driving him on the different route the tracking dog took from the crime scene, Erickson advised that the route did not look familiar. (Tr. 685-86). Erickson changed this testimony at trial so it would match the route taken by the tracking dog from the murder scene. (Tr. 558-60). Erickson said he and Ryan walked east down the alley to Fourth Street and headed south to the Flat Branch Park where they tried to wash blood off of their hands and clothes and then at the intersection of Providence and Locust, they encountered Dallas Mallory by the Phillips "66" station. (Tr. 556-61).
- Erickson admitted that he had first told the police that Heitholt was lying face up when Ryan strangled him, but the undisputed

testimony is that Heitholt was face down when his body was discovered. (Tr. 672).

- During Erickson's demonstration at trial with Crane, he never demonstrated Heitholt "being thrown to the ground" during the attack. (Tr. 670). Erickson admitted that in his first interview with police he stated either he or Ryan threw Heitholt to the ground. (Tr. 671).
- Erickson testified that he didn't know whether the impressions he was having concerning the death of Heitholt were memories or a dream. (Tr. 627-28). He told his friends, Figueroa and Gilpin, of his confusion. (Tr. 627-28). Neither Crane nor the defense called either of them as witnesses at trial.

The Only Explanation For Ryan's Conviction is the Jury's Confusion about Erickson's Plea Agreement

As a result of this false testimony, replete with inaccuracies and errors, it is hard to comprehend how the jury could have believed Erickson's testimony was based upon the truth. There is only one explanation - the jury believed Erickson because of the plea deal to which he agreed. Crane misled the jury into thinking that Erickson had already been found credible by another court, in a prior proceeding.

Crane described the courtroom procedure that placed the plea agreement "upon the record" as if the veracity of Erickson's accusation that Ryan was involved in the Heitholt murder had already been established before Ryan's trial. He led Erickson as follows:

[Q] And you pled guilty to those three counts in this courtroom?

[A] Yes.

[Q] Is that right?

[A] Sitting right here.

[Q] You were sitting right there in that chair.

[A] Yes.

[Q] And it wasn't Judge Roper; it was another judge.

[A] Yes.

[Q] And your attorney was here.

[A] Yes.

[Q] And I was here.

[A] Yes.

[Q] And it was on the record; is that correct?

[A] That's correct.

[Q] Sir, what – if you live up to the terms of the agreement, what is your sentence?

[A] 25 years.

[Q] 25 years –

[A] Yes.

[Q] -- in the department of corrections.

[A] Yes.

(Tr. 620-21).

At Ryan's trial, Erickson's plea agreement was entered into evidence as an exhibit. (See State's Proffer with Charles Erickson, attached and incorporated herein as Exhibit "18"). (Tr. 617). There was no reason to present the above testimony in addition to the written plea agreement. The only inference the jury could draw from the above line of questioning was that Erickson's testimony implicating Ryan had been deemed truthful at a prior legal proceeding before another judge.

During his questioning of Erickson and through his argument to the jury, Crane repeatedly highlighted the condition of truthfulness upon which Erickson's testimony was supposedly based as if it had been satisfied. For example, in his opening statement, Crane said "[a]s a part of this agreement, Erickson agreed to testify truthfully." (Tr. 427). Crane repeated: "[a]s part

of the agreement, the evidence will be that Chuck Erickson agreed to testify truthfully at this trial in which you're jurors on today." (Tr. 427-28).

The impact of Erickson's plea deal as well as the manner in which it was presented cannot be underestimated. With no other evidence except Trump tying Ryan to the crime, Erickson's deal was the most important piece of evidence presented to the jury. Indeed, at 11:05 p.m. on the night it rendered its verdict, the jury sent out a note that said, "Can you supply us a reminder of what Charles Erickson's agreement was?" (Tr. 2228). Then, without an objection from defense counsel, the court sent the written agreement to the jury. (Tr. 2229). The agreement stated that Erickson got his 25 years "in return for ... truthful and complete testimony." (Exhibit 18, p. 1). At 11:42 p.m., only 37 minutes after requesting the agreement, the jury convicted Ryan.

Perhaps most devastating to Ryan was that the prosecutor was allowed to ask Erickson if he had pled guilty to "acting in concert with Ryan Ferguson" to which Erickson responded "that's correct." (Tr. 618). Erickson's guilty plea was used to establish his truthfulness and Ryan's guilt. In fact, Erickson had not been sentenced to his 25 years at the time of Ryan's trial because the agreement required Erickson to testify truthfully at Ryan's trial. This was never clearly explained to the jury.

No reasonable juror could have believed Erickson's trial testimony because it was repeatedly contradicted. The jury must have convicted Ryan simply because of their belief that Erickson was deemed to be truthful by a prior court, that he gave the same testimony at Ryan's trial, and that he had already received the 25 year sentence. Crane usurped the role of the jury as the fact finder and the final decision-maker about Erickson's truthfulness.

The Reasons Erickson Testified Falsely

The new information provided by Erickson sets forth the reasons Erickson believed he had to testify falsely against Ryan. At the outset, Erickson explains that his testimony at trial was the result of "pressure and coercion placed upon [him] by the police and the Boone County prosecutor's office." (Exhibit 11, ¶5). He closes his affidavit as follows: "My testimony at trial implicating Ryan was false. My testimony was involuntary and was the result of the coercion and pressure put on me by police and the prosecution." (Exhibit 11, ¶34).

Now it is known that Erickson only agreed to the deal because of the false information provided to him by his attorney, Mark Kempton ("Kempton"), who received the information from Crane. Erickson was advised that Ryan had implicated himself in the murder when he spoke with both Meghan Arthur and Richard Walker. (Exhibit 11, ¶¶12-14). Then,

Erickson was advised that Ryan was going to reach a deal with the police and prosecutors and testify against him. (Exhibit 11, ¶15). For that reason, Erickson felt he had no choice but to reach a plea agreement before Ryan did. (Exhibit 11, ¶17). Erickson did not testify truthfully to consummate his deal. He testified falsely as a result of pressure and trickery by law enforcement and the prosecutor. Erickson was in an alcoholic blackout the night of the murder. His memory was a blank into which police and prosecutors inserted a false script implicating Ryan in the crime.

Erickson's Physical Condition at the Time of the Murder and His Arrest

Erickson elaborates on his physical condition in his affidavit, which illustrates vulnerabilities that led him to be coerced to falsely implicate Ryan at trial. Erickson now, for the first time, provides details regarding his extensive drug and alcohol use before and after the murder and before his so-called "confession." At the age of 14 until his arrest at age 17, he was a heavy drug and alcohol user. He used LSD, psychedelic mushrooms, peyote and cocaine and drank excessively. (Exhibit 11, ¶7).

In fact, Erickson experienced his first alcoholic blackout that evening and was to experience 10-20 more alcoholic blackouts up to the time of his arrest on March 10, 2004. (Exhibit 11, ¶7). None of this information was ever explored by the prosecutor or Erickson's attorney, Kempton, or

Delaney Dean, Ph.D. before Erickson pleaded. Now, one of the most renowned experts in the United States on alcoholic blackouts has reviewed the evidence presented by the prosecution at trial and disputes the scientific validity of the prosecutions' memory theories about Erickson. Dr. Kim Fromme states:

- Mr. Erickson's testimony is consistent with having experienced an alcohol-induced blackout, as evidenced by the many episodic autobiographical facts he could not remember. (Exhibit 19, ¶11).
- I can say with a reasonable degree of psychological certainty, that Charles Erickson was experiencing alcohol-induced blackouts during the night of October 31 to November 1, 2001. (Exhibit 19, ¶14).
- Based on prevalence rates, it is far more likely that he experienced both fragmentary blackouts (whereby he remembered events only after being provided with information) and en bloc blackouts (whereby he never recalled certain aspects of the night) than that he suffered from Dissociative Amnesia or that Obsessive Compulsive Disorder led him to believe that he murdered Mr. Heitholt. (Exhibit 19, ¶14).

- If Mr. Erickson was experiencing fragmentary and en bloc blackouts during October 31 to November 1, 2001, his self report of events that transpired is unreliable. (Exhibit 19, ¶¶15). (See Affidavit of Dr. Kim Fromme, attached and incorporated herein as Exhibit "19").

Erickson also suffered from memory deficiencies that were revealed through an extensive assessment performed upon him on November 26, 2001, 2.5 years before his arrest on March 10, 2004. That assessment, performed at the University of Missouri, Columbia, concluded that "it is possible that [Erickson] has experienced a minor brain insult or organic abnormality that has gone undetected and has gradually compromised his cognitive abilities, memory, motivation or judgment." (Page 14 of Exhibit A to Exhibit 11 (Erickson affidavit)). That assessment, prepared after extensive testing by psychologists, also concludes that "it is possible that [Erickson's] past, or possibly current, use of substances is impairing his memory abilities." (Page 15 of Exhibit A to Exhibit 11 (Erickson affidavit)). In concluding the assessment, it was recommended that neurological testing be performed to determine whether "underlying organic structures might be compromised or damaged." (Page 16 of Exhibit A to Exhibit 11 (Erickson affidavit)). The data referenced in the assessment

shows a significant impairment in Erickson's memory. Erickson clearly needed to be examined by a neurologist who would have performed certain tests to determine if his memory impairment was linked to organic brain damage.

Delaney Dean, Ph.D. examined Erickson for competency prior to Ryan's trial, first for defense attorney Kempton and later for Crane. (See Report of Delaney Dean, Ph.D.'s examination, attached and incorporated herein as Exhibit 20). Dean's report establishes that all parties knew that Erickson suffered from potential "undetected brain injury ... resulting in cognitive and memory impairments." (Exhibit 20, p. 2). Dean never recommended neurological testing for Erickson as recommended in the assessment. Dean never explored Erickson's alcohol use when she evaluated him for competency, which according to Dr. Fromme was a serious oversight. (Exhibit 19, ¶9; 14). Crane never called Dean to testify at Ryan's trial.

For the first time, Erickson explains, under oath, that he was "high on marijuana when [he] was first taken into custody and questioned by police" and that "the statements [he] made during [his] interrogation were the result of being high on marijuana." (Exhibit 11, ¶11). Erickson's new evidence regarding his state of mind at the time of his arrest, interrogation and

"confession" is consistent with testimony of John James ("James") at Ryan's post-conviction hearing. James had been in the Boone County Jail with Erickson prior to Ryan's trial. James stated that Erickson had told him he "was high when he gave the statement to the police." (See testimony of John James, attached and incorporated herein as Exhibit "21", pp. 94-95). The probable cause for the arrest of Ryan and Erickson was based entirely on Erickson's videotaped statements. Obviously, if he were known to be high on drugs at the time of making these statements, probable cause would never have been established for Ryan's arrest. Ryan's attorneys failed to present James to challenge the arrest of Ryan, despite being aware of his existence. [1]

In his new affidavit (Exhibit 11), Erickson describes his alcoholic blackouts and drug use, memory problems and inability to recall Ryan having anything to do with the murder of Heitholt as set forth in the preceding section of this petition. (Exhibit 11). Erickson also sets forth his extensive and frequent interaction with the prosecution in preparing his testimony.

[1] Inmates Eric Gathings, Keith Fletcher and John James testified at the 29.15 hearing that Erickson repeatedly told them he could not remember committing the murder. (See witnesses' testimony, attached and incorporated herein as Group Exhibit "22").

From the outset, an investigation of Erickson's alcoholic blackouts and drug use by the police, prosecutors or the defense would have demonstrated any memories he claimed to have of the events of November 1, 2001 were completely unreliable.

Steven Abern, M.D., a board certified pediatric neurologist, has reviewed the aforementioned assessment as well as the trial testimony of Delaney Dean, Ph.D and Elizabeth Loftus, Ph.D. (See Dr. Abern's affidavit, attached and incorporated herein as Exhibit "23", ¶¶1-2). Dr. Abern explains that Erickson should have had the recommended neurological testing prior to trial and that such an evaluation could have led to the identification of neurological conditions that would have called into question the accuracy of Erickson's recollections. (Exhibit 23, ¶¶3-4).

Erickson Was Manipulated by False Police Reports and False Information From the Prosecutor

In the first steps towards convincing Erickson to testify against Ryan and plead guilty in return for a reduced sentence, Erickson was led to believe that Ryan had confessed to participating in the murder. The coercion by Crane of Erickson was subtle. Crane conveyed certain messages to Erickson's attorney Kempton that Erickson interpreted as threatening. Specifically, Erickson was provided with a police report by his attorney Kempton that reflected a statement by Richard Walker that Ryan was

negotiating a deal with prosecutors. (Exhibit 11, ¶¶12, 15). Then, Kempton provided Erickson with the police report of an interview with Meghan Arthur ("Arthur"). (Exhibit 11, ¶13). That police report set forth a version of events wherein Arthur described how she had heard Ryan make statements implicating both him and Erickson in the murder. (Exhibit 11, ¶13).

Both reports were untrue, but Erickson was never advised by his attorney or Crane that Walker recanted his claims about Ryan's negotiations. (Exhibit 11, ¶12). Moreover, when Arthur spoke with Investigator Miller on February 18, 2005, she stated that the report did not reflect what she had told the police. (See Affidavit and Report of Investigator Miller, attached and incorporated herein as Group Exhibit "24" ¶¶6-24, Exhibit 11, ¶13).

Still, Erickson had been misled about Ryan negotiating a deal with prosecutors. Thus, even though Erickson was in an alcoholic blackout and did not remember any details about how the crime took place during his interrogation, the reports of Walker and Arthur's statements led Erickson to believe Ryan must be involved in the murder because he was negotiating a plea with the prosecutors. (Exhibit 11, ¶14). Then, Erickson was advised that Ryan was going to accept a plea agreement and testify against him. (Exhibit 11, ¶15). Erickson was told that he would have to implicate Ryan

in the crime or the prosecutors would charge him with first degree murder and possibly sentence him to death. As a result, Erickson believed he had no choice but to testify falsely against Ryan. (Exhibit 11, ¶17). Crane told Kempton that Erickson had to come up with "more detail to secure the deal" than he had provided in his videotaped interrogation. Towards that goal, Kempton provided Erickson with all of the police reports, which Erickson used to construct his false testimony.

Multiple meetings were held between Erickson and Crane to rehearse and review his testimony. Erickson rendered the false testimony as described above to avoid a first degree murder charge and possibly the death penalty. (Exhibit 11, ¶¶18-34).

Shawna Ornt's Misleading Testimony Contrived by Prosecutor Crane

Shawna Ornt was the first eyewitness to view the parking lot and the two individuals in the vicinity of Heitholt's body. However, she was never able to identify Erickson or Ryan as being present at that time. Still, the prosecution successfully elicited false testimony from her.

On November 1, 2001, Ornt advised the police as to what she saw and heard when she looked into the parking lot around the time Heitholt was killed. (See Police Report 1, attached and incorporated herein as Exhibit "25"). Ornt told police that she saw two individuals in the vicinity of

Heitholt's body and "the individuals stood up on the driver's side of the vehicle, and that one of them stated, 'Somebody's hurt, man.'" (Exhibit 25, p. 2). This initial statement by Ornt is identical to Trump's first statement to police. Trump told the police exactly the same thing as Ornt the night of the murder. He said that one of the individuals said only, "Someone is hurt man." (Exhibit 7, ¶7). Ornt was unable to describe the individuals with any specificity.

At the trial, Ornt was not asked to identify Ryan or Erickson as the individuals she saw that night in the parking lot. Accordingly, she offered no testimony tying Ryan or Erickson to the crime. However, because of pressure from Crane, Ornt did change her testimony from her initial statement of what she had reported the night of the murder. Instead of advising the jury that she had heard one of the individuals in the parking lot yell, "Somebody's hurt, man," as she did in her first police interview, in response to a leading question by Crane she testified the individual said, "Someone get help." (Exhibit 25, p. 2, See Affidavit of Shawna Ornt, attached and incorporated herein as Exhibit "26", ¶19). This seemingly inconsequential testimony actually played a significant role in Ryan's conviction.

The testimony is very important because the prosecutor argued that Erickson's testimony should be believed because Erickson had advised his friends *prior to his arrest* that he yelled "get help" to the cleaning woman on the night of the murder. (Tr. 425). This statement, Crane argued, was something that Erickson had volunteered to his friends prior to any contact with police. Because Ornt testified consistently with Erickson, the prosecutor had corroboration of its key accuser and was able to rebut defense accusations that all of the key evidence in the case was fed to Erickson by the police.

However, in his initial interview with police, Erickson did not tell them he told anyone to "get help" until Detective Short told Erickson that the cleaning lady had been told by one of the two individuals by Heitholt's car to "get help." (See Police Report Number 254, attached and incorporated herein as Exhibit "27", page 5). Erickson did testify at trial that he told the cleaning lady to "get help." However, in his new affidavit, Erickson explains that he has no memory of asking anyone to "get help" at the murder scene, or telling anyone at any point in time that he had done so. (Exhibit 11, ¶33). Clearly this testimony was fabricated by the police and

prosecution to refute the defense claim that Erickson was fed all of the crime scene information by the police.[2]

In her new affidavit, Ornt explains that her initial statement was truthful and accurate. (Exhibit 26, ¶11). That is, Ornt confirms that the individual in the lot said, "Somebody's hurt man," but not that the individual told her to go "get help." (Exhibit 26, ¶¶10; 18-19). Therefore, Erickson did not have details of the crime other than those provided to him by the police and prosecution.

Kimberly Bennett – More Evidence of Actual Innocence

Bennett did not testify at the trial, but new evidence, recently discovered, reveals that she possesses valuable information that demonstrates Ryan's actual innocence. The prosecutor used Erickson to testify that when Ryan ran out of money, they left By George and walked to Ryan's car, opened the trunk and removed the tire tool, which was used in the attack on Heitholt. They proceeded to walk to the Tribune parking lot and agreed to rob someone. They saw Heitholt, so they robbed and killed him. With the money they obtained, they walked back to By George. All of

[2] At the 29.15 hearing, Ornt testified that Crane scared and intimidated her when she met with him prior to trial. (See Ornt Testimony, attached and incorporated herein as Exhibit "28", p. 119). Dallas Mallory also testified at the 29.15 hearing that the police screamed at him, yelled at him, told him he was a liar and caused him to cry hysterically when he did not tell them what they wanted to hear. (See Mallory Testimony, attached and incorporated herein as Exhibit "29", p. 27).

this occurred, according to Erickson, after the murder which occurred at 2:20 a.m. (Tr. 418, 567).

Recently, Bennett, now a nursing student, saw coverage of Ryan's case on the news. On December 28, 2010, Bennett provided an affidavit wherein she stated that she knew both Ryan and Erickson for years prior to the night of October 31, 2001. (Exhibit "17")[3]. She spoke to Ryan and Erickson at By George that night at about 1:15 a.m. as they left the club. (Exhibit 172, ¶11). At that time, she observed Ryan and Erickson leave the bar, get into Ryan's car and drive in a northerly direction. (Exhibit 17, ¶¶12-14). She also told the police that everyone had left by 1:45 a.m. (Exhibit 17, ¶15).

This affidavit completely contradicts Erickson's trial testimony that he and Ryan left the bar at 1:00 a.m., proceeded to Ryan's car, took a tire tool

[3] Bennett provided this information to the police early in the investigation as set forth later in Petitioner's argument pursuant to *Brady v. Maryland.* No police report was ever disclosed to the defense of the Bennett interview conducted by the police and/or Crane's investigators despite the fact her eyewitness information was exculpatory to both Ryan and Erickson. There was a pattern of non-disclosure in the case as demonstrated by the prosecutor's failure to disclose witnesses Kris Canada and Melissa Griggs. Griggs and Canada provided exculpatory evidence to the investigators and police prior to trial, but that information was withheld from the defense. The court permitted Griggs and Canada to testify at the trial when they were located despite the non-disclosure. (See transcript, attached and incorporated herein as Exhibit "30").

from the trunk of Ryan's car and proceeded to the Tribune building on foot, where they murdered and robbed Heitholt, then returned to By George.[4]

Michael Boyd is the Only Viable Suspect in the Murder of Kent Heitholt Who has Never Been Eliminated

Michael Boyd was an employee of the Tribune who worked for Heitholt. He was 28 years old at the time of the murder, twenty years younger than Heitholt. At the time of the murder, he was 5 feet 9 inches and weighed about 230 pounds. Heitholt and Boyd were of comparable size. Heitholt had given Boyd some of his shirts to wear because Boyd did not have any money. (Tr. 2207). Boyd is African American.

From the inception of their investigation, the police created their own theory of the Heitholt murder. All of the evidence was molded and shaped to fit this theory by Crane. Evidence that did not fit this theory was ignored, manipulated or discarded. The theory created was that Heitholt was robbed and murdered by the two young white men. This theory evolved from the interviews with Ornt and Trump describing two young white men by Heitholt's car.

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[4] It is noteworthy that the prosecutor never provided an explanation of what Erickson and Ryan did in the one hour and fifteen minutes from the time they left By George until the murder. The Tribune was less than a three minute walk from By George. Allegedly, the two immediately targeted Heitholt, robbed and killed him, and eventually returned to By George after 2:20 a.m. The recent appellate opinion confirms that Erickson and Ryan left By George at 1:00 a.m. (Exhibit 2, p. 2).

Timeline of Murder

Heitholt logged off of his computer at 2:08 a.m. and exited the building about 2:10 a.m. to 2:12 a.m. He went to his car, retrieved a bag of cat food, walked over to the wall by the dumpsters, placed the cat food on top of the wall, and then returned to his car. All of these activities most likely would have placed him back at his car at about 2:12 to 2:15 a.m. The attack occurred from about 2:15 to 2:22 a.m., and took approximately 5 to 7 minutes. This precisely fits with forensic pathologist Larry Blum, M.D.'s timeline of events as well as that of Professor Ann Burgess. (See Exhibit 16 and the report of Anne Burgess, Ph.D., attached and incorporated herein as Exhibit "31").

Ornt claimed that on November 1, 2001, at approximately 2:21 to 2:22 a.m., she exited the Tribune building to smoke a cigarette. Trump corroborated this time. As she stood on the dock area, she saw a "shadow" duck down by the driver's side door of Heitholt's car. Ornt stated she became frightened, so she went back into the building and told Trump what she had observed. She and Trump proceeded immediately to the same dock area and Trump called out, "Who's there?" A young white male stood up and called back, "Somebody's hurt, man," and proceeded with another white male to walk towards Ornt and Trump (south) and then walked east down

the alley. (Exhibit 25). Neither individual chose to run north (in the opposite direction) out of the parking lot to avoid being seen by Ornt and Trump. Ornt and Trump did not observe that either individual had blood on their clothing or a weapon or belt in their hands.

Boyd also claimed he saw these two individuals by the dumpster as he exited the parking lot at 2:20 a.m. (Exhibit 15 and Police Report 25, attached and incorporated herein as Exhibit "32").

Timeline of Witness' Statements Eliminates Two White Males as Perpetrators

Ornt was at the scene at 2:21-2:22 a.m. and Ornt and Trump were at the scene together between 2:22-2:23 a.m., before getting help. Heitholt had already been attacked and was on the ground when Ornt first arrived on the scene at 2:21-2:22 a.m. Other Tribune employees were at the scene by 2:24 a.m. and attempted to give CPR to Heitholt. Ornt called 911 at 2:26 a.m. There was not time for these two unidentified males to have killed Heitholt. At most, these two men were only at the scene 1 to 2 minutes between Boyd's departure at 2:20 a.m. and Ornt's arrival at 2:21-2:22 a.m. Boyd described the two individuals as approaching the scene at 2:20 a.m. so they were not yet at Heitholt's car. The beating and strangulation of Heitholt took a minimum of 5 to 10 minutes, not 1 to 2 minutes.

Boyd was the last person with Heitholt before he was beaten and strangled. Boyd, in his first interview, described standing and talking to Heitholt in the exact location where the attack occurred. However, rather than investigating the only person with the opportunity to murder Heitholt, the Columbia Police Department focused all of its efforts on finding the two young white males described by Ornt and Trump.

If the Columbia Police Department had merely constructed a timeline from the reports of the witnesses at the scene, it would have been obvious that the white males arrived after the completion of the crime and were merely passers-by who saw an injured man and stopped to investigate. Their actions are inconsistent with guilt because the two young men walked south towards Ornt and Trump, under the building spotlights, risking identification. One of the two spoke to Ornt and Trump risking that his voice could later be identified. He reported to Ornt and Trump that Heitholt was injured, thereby expediting the 911 call at 2:26 a.m. Neither of the young men ran from the scene. (Tr. 978).

It is likely that the two young men observed by janitor Mike Henry earlier in the evening, entering the Tribune building at 10:30 p.m. to use the computer and bathroom, were the two young men observed by Ornt and Trump by Heitholt's car after he was attacked. One had blond hair. Henry

had talked to these two young men on previous occasions and knew they were college students working part-time at the Tribune Publishing Building immediately east of the Columbia Tribune building. (See Deposition of Detective Benjamin White, attached and incorporated herein as Exhibit "33" which described his interview with Mike Henry). No follow-up was ever done by the investigating officers or Crane to determine the identity of these two individuals. (Exhibit 33, pp. 29-30).

Since Boyd was the last known person to see Heitholt alive, a reasonable avenue of investigation would have been to attempt to eliminate him as a suspect. However, Boyd was never investigated in any way and was merely referenced in passing at the trial by the prosecutor. (Tr. 917). The police only interviewed him twice, and the first interview was by telephone. Boyd's conduct and statements, from his first interview the night of the murder through his most recent interview, have done nothing but increase suspicion that he was involved in the crime.

Recent Investigation of Boyd

Private Investigator Steven Kirby has interviewed over 10,000 persons in his career and investigated all types of serious crimes. He interviewed Boyd on four separate occasions between August 2010 and January 2011. (Exhibit 13). Kirby has also reviewed other memorialized

interviews of Boyd by other investigators. Upon his review, Kirby has concluded that there are serious discrepancies in Boyd's statements about the events of November 1, 2001.

Boyd's Departure from Tribune Building on November 1, 2001

Boyd's statement as to *when* he left the Tribune building on November 1, 2001, significantly contradicts evidence from other witnesses. Boyd told the police he left the Tribune Building at approximately 2:00 a.m. the morning of the murder. However, Ornt stated that she was sure that Boyd left prior to 1:45 a.m. because she went to look for him to use his computer at that time and he was nowhere to be found. Russell Baer, another Tribune employee, told Kirby that Boyd left the building around 1 a.m. on November 1, 2001. (Exhibit 13, ¶9a). Therefore, according to these witnesses Boyd would have been in the lot anywhere from 30 to approximately 70 minutes waiting for Heitholt to exit the building.

Boyd's Contradictory Statements About Talking to Heitholt in Tribune Parking Lot and Exiting Parking Lot

According to Kirby, Boyd has repeatedly contradicted himself as to the circumstances surrounding his conversation with Heitholt immediately prior to Heitholt's murder. In Boyd's first interview with Detective Short on November 1, 2001, Boyd stated that he talked to Heitholt by Heitholt's car and then proceeded to his own car. Short reported that Boyd said he was

"standing there talking with Heitholt" and that after the conversation "Boyd stated that he went to his vehicle." (Exhibit 12, p. 2). However, in subsequent interviews, Boyd maintained that he remained in his vehicle and drove to Heitholt and spoke to Heitholt from his car. (Exhibit 32, p. 2; Exhibit 13, ¶9c).

Boyd's Exit From the Tribune Parking Lot

Police report 25 reflects that Boyd sat in his car for a couple of minutes adjusting the radio and observed Heitholt exit the back door of the Tribune. (Exhibit 32). He started his car, backed up, headed south towards the building, rolled down his driver's window and spoke to Heitholt, then turned west in the alley and exited going northbound onto Providence.

Boyd was interviewed by Investigator Jim Miller on February 14, 2005, and Boyd said he went to his vehicle, listened to a cassette tape of music, saw Heitholt exit the Tribune building, pulled his car out, headed south towards the building, made a U-turn in the parking lot, pulled up next to Heitholt and spoke to him through the passenger window. Boyd also stated that he "observed Heitholt's car tail lights come on." Boyd stated "Kent drove off the parking lot [as] I was driving off." (Exhibit 13, ¶9f). Clearly this is impossible. The timeline of the other witnesses' undisputed statements demonstrate Heitholt was lying on the ground dead or dying

when Boyd claims he left the parking lot. (See affidavit of Andrew Wilhelm, attached and incorporated herein as Exhibit "38").

Boyd's Contradictory Statements about Seeing Two Caucasian Males as He Exited the Parking Lot

Boyd has also contradicted himself as to whether he ever saw two individuals in the parking lot as he left that morning. Police report number 18 reflects that on November 1, 2001, Boyd specifically told the police that "he did not see anybody around the parking lot or anybody who was suspicious." (Exhibit 12, p. 2). Police report number 25 reflects that Boyd told police on November 2, 2001, that "he did not see anything suspicious" as he left the lot. (Exhibit 32 and Exhibit 13, ¶9g).

On June 25, 2005, after the arrest of Ryan and Erickson, Boyd suddenly remembered the two white males by the dumpster. (Exhibit 13, ¶9g). During the four interviews, when Kirby asked Boyd about what he saw, Boyd stated that he saw two people walking by the dumpster but could not identify their race or sex. Boyd told Kirby in each of the four different interviews that he almost hit the two individuals as he exited the parking lot. (Exhibit 13, ¶9h). It is reasonable to infer that Boyd feared his license plate number had been noted by the two males because his attack on Heitholt had been witnessed.

Boyd's Admission of Providing False Information to State Investigator Haws

Boyd has admitted to Kirby that he provided Haws with false information when he told Haws that he could hear music from "George's" when he left the evening of the murder. (Exhibit 13, ¶9i). Boyd told Kirby he learned this information about the music that night from the newspaper article written about the murder. It should be noted that if Boyd actually left the Tribune building at 1:00 a.m. rather than 2:00 a.m. as he told the police, he may have heard music from By George because it did not close until 1:30 a.m. Of course this would place him in the parking lot significantly earlier than the time of 2:00 a.m. he gave in his interviews to the police and investigators.

Boyd's Contradictory Statement About the Car he was Driving on November 1, 2001

Kirby notes in his affidavit that Boyd has changed his story about which of his two cars he drove the evening of the murder. On February 14, 2005, Boyd initially told Investigator Miller that he was driving his blue Oldsmobile Cutlass Ciera that night. (Group Exhibit 24; Exhibit 13, ¶9j). He told Miller that he still owned that car as of that date. (Group Exhibit 24; Exhibit 13, ¶9j). Then, on July 24, 2005, Boyd told Haws that he was driving his wife's red Plymouth Acclaim the night of the murder. (Exhibit

15, p. 1). Subsequently, Boyd advised Kirby that he traded in the Blue Oldsmobile in 2004. (Exhibit 13, ¶9j). Prior to relating that story, Mr. Boyd had claimed in an interview with Investigator Matthew Allen that he traded in the blue Oldsmobile as part of a lease deal with Enterprise Car Rental in St. Louis. (See Report of Investigator Matthew Allen, attached and incorporated herein as Exhibit "34"; Exhibit 13, ¶9j).

Kirby, by his own investigation, has established that the blue Oldsmobile is still registered to Boyd and his wife and was never sold or traded as Boyd claimed. (See Official Documentation reflecting car registration, attached and incorporated herein as Exhibit "35" and Exhibit 13, ¶9k). In November 2010, Kirby received official documentation from Missouri Department of Revenue that the blue Oldsmobile in question, VIN 1G3AL54R4M6310284, was still listed as registered to Michael and Dawn Boyd as of November 26, 2010. (Exhibit 35). Further, Investigator Allen reports that on May 1, 2006, Fred Price from Enterprise confirmed that there was no record of Enterprise taking title to the blue Oldsmobile. (Exhibit 35; Exhibit 13, ¶9k). The only conclusion to be drawn from this evidence is that Boyd has disposed of the blue Oldsmobile and has lied about that fact. Clearly, knowing the exact vehicle Boyd was driving would allow

investigators to locate the vehicle and conduct luminol testing for Heitholt's blood in the vehicle.

Boyd's False Statement about his Relationship With Heitholt

Boyd's claim that he and Heitholt had a good relationship is false. Boyd claimed to all of the prior investigators and Kirby, on several occasions, that he had a good relationship with Heitholt. (Exhibit 13, ¶9l). However, Ornt, in her most recent affidavit, states that Boyd repeatedly complained to her about how disrespectfully Heitholt treated him. (Exhibit 13, ¶9l; Exhibit 14, ¶¶11-12). A co-worker of both Heitholt and Boyd advised Kirby that Boyd was a poor reporter and writer and not held in high regard by other co-workers. (Exhibit 13, ¶9l).

Boyd's Concealment of his Return to the Crime Scene

In his initial interviews, Boyd never told the police that he had returned to the crime scene. (Exhibit 12; Exhibit 32). However, Boyd admitted to Kirby that he returned to the scene after the murder and he watched the crime scene being processed. (Exhibit 13, ¶9m). Boyd told Kirby Heitholt's body was face down when he returned to the crime scene at about 3:30-3:45 a.m. (Exhibit 13, ¶9m). This cannot be true, as it is undisputed that employees turned Heitholt face up prior to calling 911 at 2:26 a.m. Only the killer and the witnesses at the scene, before the 911 call,

knew the body was originally face down. Someone coming on the scene at 3:30-3:45 a.m. would not have known that several Tribune employees turned the body face up to render CPR before the call was made to 911 at 2:26 a.m.

Failure of Police, Prosecutors and Ryan's Defense Attorneys to Investigate Boyd

All of the above make it clear that considering Boyd as a suspect was a reasonable avenue of investigation. It is undisputed that Boyd was the last person who saw the victim alive. However, his car, clothing, and shoes were never checked for blood or hair. (Exhibit 13, ¶11). He was never fingerprinted, notwithstanding that there were unknown fingerprints at the crime scene. (Exhibit 13, ¶11). Samples of his hair were not taken despite the fact that Heitholt had hair in his hand that was tested by the FBI with mitochondrial DNA testing. Dozens of other suspects were eliminated by the FBI's mitochondrial profile of the hair in Heitholt's hand.

Boyd is the only person with the opportunity to kill Heitholt that night who was never eliminated by the police as a possible suspect.

New Expert Reviews Demonstrate Actual Innocence

Larry Blum, M.D.

Dr. Larry Blum, a board certified forensic pathologist, who has testified in numerous criminal prosecutions for the State, has reviewed the autopsy report, crime scene photographs, autopsy photographs and the

testimony of pathologist, Edward Adelstein, M.D. who performed the autopsy and testified about his findings at Ryan's trial. (Exhibit 16). In his affidavit, Dr. Blum explains that "fractures of the hyoid bone are likely to occur with direct, concentrated force to the upper neck area which might consist of a blow with a hand or fist, a kick, a stomp, or bilateral compression with the hands as in manual strangulation." (Exhibit 16, ¶3). He adds that "it is highly improbable that the victim, Kent Heitholt's hyoid bone was fractured by the strangulation with his belt" finding it "more likely the fracture was caused by a blow with a hand ... fist ... stomp, or bilateral compression with the hands." (Exhibit 16, ¶4).

Dr. Blum concludes that the entire attack took at least 5 to 10 minutes. (Exhibit 16, ¶7). He opines within a reasonable degree of medical certainty that Heitholt was "brought down to the ground by pressure on the neck resulting in a hyoid bone fracture with associated multiple blunt trauma. He was then struck repeatedly on the head, by the rear wheel on the driver's side of the car, and then strangled with his own belt." (Exhibit 16, ¶7).

Dr. Blum's new testimony contradicts Erickson's trial testimony as to how the murder took place. Dr. Blum's affidavit supports Ryan's actual innocence for many reasons.

At trial, Dr. Adelstein, who is not a forensic pathologist, testified that there were eleven separate blows struck to the head of Heitholt. (See trial testimony of Dr. Adelstein, attached and incorporated herein as Exhibit Group Exhibit "36", Tr. 1415). However, Heitholt's skull was not fractured, and there was no evidence of injury to the brain. (Exhibit 36, Tr. 1416). Additionally, the victim's hyoid bone was fractured. (Exhibit 36, Tr. 1425). Dr. Adelstein, as well as Dr. Blum, determined the cause of death to be asphyxia due to compression of the neck by strangulation. (Exhibit 36, Tr. 1431). Dr. Adelstein offered no opinion as to how the hyoid bone was fractured.

Erickson testified that he "crept up behind" Heitholt with the tire tool in his hand. (Exhibit 10, Tr. 525). According to Erickson, Heitholt started to turn towards him and Erickson hit him on top of the head. (Exhibit 10, Tr. 525). Thus, according to Erickson, the initial blow came from behind while Heitholt was standing at the open driver's side door. (Exhibit 10, Tr. 526). Erickson hit Heitholt one time causing him to fall to the ground, and then Erickson hit him twice more and dropped the tire tool. (Exhibit 10, Tr. 526). Following the blows, "there was blood everywhere." (Exhibit 10, Tr. 526).

Erickson testified that he later looked up and saw Ryan standing over the victim. (Exhibit 10, Tr. 548). Per Erickson, Ryan had a belt around the victim's neck and had his foot on the victim's back. (Exhibit 10, Tr. 548). According to Erickson, Ryan pulled up on the belt, strangling the victim while the victim was face down. (Exhibit 10, Tr. 548-50).

Based on Dr. Blum's affidavit, Erickson's story that he attacked the victim from behind, by hitting him on top of the head, is unsupported by the evidence. Specifically, Dr. Blum states that it is "highly improbable" that the victim's hyoid bone was later fractured by strangulation with his belt. (Exhibit 16, ¶4). It would be "unusual" and "relatively rare" for such an injury to be caused by strangulation because the force is not sufficiently concentrated to cause the fracture. (Exhibit 16, ¶4). Instead, the most likely scenario is that the perpetrator approached the victim from the front (because he knew him and could get close to him) and hit him in the neck, which fractured the hyoid bone and caused Heitholt to fall to his knees. (Exhibit 16, ¶¶7-8).

Not only does Erickson's trial testimony fail to account for the victim's fractured hyoid bone, but his description of the murder weapon fails to match the evidence. Specifically, Dr. Blum opines that because there were eleven blows, but no skull fractures, a tire iron should be ruled out as

the murder weapon. (Exhibit 16, ¶6). Based on the positioning of the body and the crime scene photos, these blows were struck when Heitholt was near the rear wheel of his vehicle, not where he was standing. (Exhibit 16, ¶7).

Finally, the duration of the attack established by Dr. Blum demonstrates that no person other than Boyd had the opportunity to kill Heitholt. Dr. Blum opines that given the victim's injuries, the entire attack upon Heitholt took at least five to ten minutes. (Exhibit 16, ¶7).

Establishing the Motive for the Heitholt Murder

Professor Ann Burgess, DNSc, APRN, BC

Professor Ann Burgess, a crime classification expert who has assisted the FBI in classifying crimes, has reviewed crime scene photographs, the police investigation interviews, depositions of key witnesses and various media reports. She has provided her classification of the crime in a detailed report. (Exhibit 31). She concludes that no evidence points to Ryan as the killer of Heitholt.

In summary, Professor Burgess has classified the murder of Heitholt as a crime based upon the deep personal animosity of the killer towards Heitholt. (Exhibit 31, p. 5). Specifically, she concludes that the crime was a revenge killing. (Exhibit 31, p. 5). In Professor Burgess' opinion, the intense beating and strangulation suggests the offender was well-known to

Heitholt and intensely angry at him. (Exhibit 31, p. 2). A stranger would not attack such a large man in a well lit, populated area. (Exhibit 31, p. 2). Strangulation is a personal type of attack. (Exhibit 31, p. 2). The location of the murder, at Heitholt's workplace, also suggests the offender was comfortable and knew Heitholt's work schedule. (Exhibit 31, p. 2). There was no evidence that suggested more than one offender. (Exhibit 31, p. 3). The person knew Heitholt so that once he had been injured, the perpetrator had to kill Heitholt to avoid being identified.

Professor Burgess sets forth numerous aspects of the crime that eliminate Ryan as the perpetrator. (Exhibit 31, pp. 6-7). Ryan had no motive to kill Heitholt in such a personal way. (Exhibit 31, p. 6). He did not know Heitholt or have any interaction with him before the crime. (Exhibit 31, p. 6). Ryan had been drinking at By George the night of the murder so if Ryan had been the offender, there would have been evidence left by him at the crime scene due to his impaired state. (Exhibit 31, p. 7). Ryan had no history of antisocial behavior. (Exhibit 31, page 7). Ryan was half the size and weight of Heitholt. (Exhibit 31, p. 7).

Professor Burgess agrees that the timeline, as established by the undisputed facts, does not provide enough time for Ryan to have committed this murder. Telephone records establish that Ryan made a series of calls

between 1:41-2:10 a.m. (Exhibit 31, p. 7). Relying on police reports, Professor Burgess concluded that Heitholt logged off his computer at 2:08 a.m. He fed the cat in the parking lot and spoke to Boyd for 5 to 10 minutes. Ornt observed two men in the parking lot at 2:22 a.m. A 911 call was placed at 2:26 a.m. Considering Dr. Blum's opinion that the attack would have lasted 5-10 minutes, there was simply no time for the two individuals (described by Ornt, Trump and Boyd) to approach Heitholt after Boyd's exit, then beat and strangle Heitholt. The two young white males would have had only 1-2 minutes to commit the entire crime.

New Evidence of Actual Innocence Requires the Writ be Granted

While habeas relief is limited in order to avoid unending challenges to final judgments, the concerns of finality give way when the petitioner can demonstrate that a "manifest injustice" would result unless habeas relief is granted. *Amrine,* 102 S.W.3d at 546. The continued incarceration of an innocent person constitutes such a "manifest injustice" so as to warrant habeas relief, even in the absence of an underlying constitutional claim. *Id.* at 546-47. Thus, the Missouri Supreme Court has held that a "freestanding claim of actual innocence" is cognizable in a state habeas proceeding. *Id.*

Because an actual innocence claim necessarily implies a breakdown in the adversarial process, the conviction is not entitled to the nearly irrefutable

presumption of validity afforded to a conviction on a direct appeal challenging the sufficiency of the evidence. *Id.* at 548. Indeed, if habeas relief were conditioned on a finding that no rational juror could convict after introduction of the new evidence, it would be impossible to obtain relief because exculpatory evidence cannot outweigh inculpatory evidence under that standard. *Id.*, (citing *State v. Dulany*, 781 S.W.2d 52, 55 (Mo. banc. 1989)). Rather, relief is afforded if a petitioner can make a clear and convincing showing of actual innocence that undermines confidence in the correctness of the judgment. *Id.*, (citing *Ex parte Elizondo*, 947 S.W.2d 202, 205 (Tex.Crim.App. 1996)). 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.*, (quoting *In re T.S.*, 925 S.W.2d 486, 488 (Mo.App., E.D. 1996)).

In *Amrine*, the defendant's petition for writ of habeas corpus based on newly discovered evidence of actual evidence was granted based on evidence much weaker than the new evidence in Ryan's case. In *Amrine*, the prosecution's case rested on the testimony of three inmate witnesses. The victim was stabbed to death in a recreation room at the Jefferson City Correctional Center. *Id.* at 544. One inmate, Terry Russell, testified that

the defendant admitted to him he had committed the murder. *Id.* Two other inmates testified that they witnessed the defendant stab the victim. *Id.* No physical evidence implicated the defendant. *Id.* The defendant introduced evidence of other witnesses claiming that Terry Russell was the perpetrator. *Id.* The jury found the defendant guilty and he was sentenced to death. *Amrine*, 102 S.W.3d at 544.

The defendant filed a state habeas petition alleging a "freestanding" claim of actual innocence. *Id.* at 546. The defendant included affidavits from each of the witnesses stating that they had falsely implicated the defendant. *Id.* at 544-45. The Missouri Supreme Court held that the defendant met his burden of providing clear and convincing evidence of actual innocence that undermined confidence in the correctness of the judgment. *Id.* at 548. The Court noted that although the evidence at trial was sufficient it was not overwhelming. *Id.* The Court emphasized that certain evidence pointed to another perpetrator, and no physical evidence linked the defendant to the murder. *Id.* Rather, the defendant "was convicted solely on the testimony of three fellow inmates, each of whom have now completely recanted their trial testimony." *Id.* The Court concluded that "no credible evidence remains from the first trial to support

the conviction" and ordered the defendant discharged from custody. *Id.* at 548-49.

In the case at bar, the affidavits of Trump and Erickson demonstrate that their testimony about Ryan's presence and involvement in the crime is false. The physical evidence excludes Ryan as the perpetrator. In short, there is no remaining evidence to support Ryan's conviction.

Claim Number 2

Allegations of Knowing Perjury Require a Hearing

As set forth above, Trump has made allegations that he was coached by Crane to give false testimony. Then, he testified falsely at Ryan's trial. Under Missouri law, these allegations are sufficient to allow this Court to order an evidentiary hearing on those issues. In the event the allegations are shown to be true, habeas relief will be warranted because a conviction resulting from the knowing use of perjured testimony cannot stand.

In order to show perjury entitling him to relief, a defendant must prove that the witness' trial testimony was false, the prosecution used the testimony knowing it to be false, and the conviction was obtained because of the perjured testimony. *Williams v. State,* 536 S.W.2d 190, 193 (Mo.App., 1976); *Duncan v. State*, 520 S.W.2d 123, 124 (Mo.App., 1975). The knowing use of perjured testimony on the part of the prosecution requires

reversal of the conviction. *See, for e.g., Miller v. Pate*, 386 U.S. 1 (1867); *Giglio v. U.S.*, 405 U.S. 150 (1972); *Alcora v. State*, 355 U.S. 28 (1957).

In *DeClue v. State*, 579 S.W.2d 158 (Mo.App., E.D. 1979) the defendant moved for an evidentiary hearing based on his claim that false testimony had resulted in his conviction. The defendant alleged that the victim had advised him that her trial testimony was false and explained why she had testified falsely. The victim provided a sworn statement that the prosecuting attorney had told her how to testify at the trial, coached her and rehearsed the proposed testimony with her. 579 S.W.2d at 159. The Appellate Court held that the allegation that the prosecutor knowingly used perjury to convict the defendant, entitled the defendant to an evidentiary hearing.

Indeed, in its recent opinion denying Ryan's motion for post conviction relief, the Appellate Court directed that Ryan assert his new claims of knowing perjury in this forum, explaining that "newly discovered evidence, if available, may better serve [Ferguson] in a Petition for a Writ of Habeas Corpus under Rule 91." (Exhibit 2, p. 6; citing *Wilson v. State*, 813 S.W.2d 833, 834-35 (Mo. banc 1991)).

The same result is required here. Trump alleges that Crane fabricated the story of Trump's identification of Ryan at the scene. Crane showed

Trump the newspaper article and photos – Trump had not seen them while he was in jail. (Exhibit 7, ¶¶14-16, 21). Crane coached Trump to testify he saw the photographs of Ryan and Erickson before he saw the headline. (Exhibit 7, ¶17). They had personal meetings and spoke on the phone, with Crane describing Trump's false testimony to him. (Exhibit 7, ¶¶18-19). Trump alleges that Crane knew the story was false because he had shown Trump the article himself and encouraged him to testify falsely about his identification of Ryan. (Exhibit 7, ¶¶16.21).

Thus, Ryan is entitled to an evidentiary hearing on this issue. In the event these allegations are shown to be true at a hearing and a constitutional deprivation exists, a new trial or other relief will be warranted.

Claim Number 3

Ryan Ferguson was denied Due Process of Law Where the Requirements of Brady v. Maryland were Violated.

Kim Bennett Interview Withheld from Defense

As previously discussed, Bennett has provided a sworn statement that completely refutes Erickson's trial testimony. Her statement sheds light on the tactics employed by law enforcement in this case.

Bennett's sworn statement exonerates Ryan in two ways. First, she saw Ryan and Erickson leave in Ryan's car at about 1:15 a.m. (Exhibit 17,

¶11), not on foot as Erickson testified. Second, when she left By George parking lot at 1:45 a.m. "the bar was closed and everyone had left." (Exhibit 17, ¶15).

There is a duty under Missouri law to disclose "[a]ny material or information, within the possession or control of the state, which tends to negate the guilt of the defendant as to the offense charged, mitigate the degree of the offense charged, or reduce the punishment." Rule 25.03(A)(9). A *Brady* violation occurs and due process is violated if: (1) the prosecution did not disclose evidence that is favorable to the accused which is either exculpatory or impeaching; (2) the prosecuting attorney has suppressed the evidence, either intentionally or inadvertently; and (3) the undisclosed evidence is material. *Strickler v. Greene*, 527 U.S. 263, 282 (1999); *Buchli v. State*, 242 S.W.3d 449, 454 (Mo.App., W.D. 2007). The undisclosed evidence is material when "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 police interviewed Bennett shortly after Ryan and Erickson were arrested. (Exhibit 17, ¶16). She told them that she saw Ryan and Erickson exit the bar at 1:15 a.m., walk to Ryan's car and depart the area northbound. (Exhibit 17, ¶¶11, 14). The information supplied by Bennett negates Ryan's

guilt and is obviously very favorable to him. However, the information was not provided to Ryan's defense attorneys by Crane and no report of her interview with the police was ever disclosed. A *Brady* violation has been established because the Bennett interview was not disclosed.

Truth of Trump's Identification Withheld from Defense

Trump explains in his new sworn statement that he did not receive any newspaper articles about the case while he was in jail. Crane showed the article to Trump and told him how to testify about the identification. (Exhibit 7, ¶¶17,21). The details of how Crane directed Trump to make the identification were not disclosed to the defense.

The prosecution has a duty to disclose evidence affecting the credibility of a witness when the reliability of the witness may be determinative of guilt or innocence. *State v. Denmon*, 635 S.W.2d 345 (Mo. 1982), citing *Giglio*, 405 U.S. 150 (1972). Moreover, the knowing use of perjured testimony constitutes a *Brady* violation. *U.S. v. Agurs*, 427 U.S. 97 (1976).

Ryan has established a second *Brady* violation because Crane's manipulation of Trump was not disclosed.

Claim Number 4

Court's 2010 Decision in People v. Preston Requires that Ryan Be Granted Habeas Relief Because Statutory Jury Selection Requirements Were Violated

In his 29.15 motion, Ryan argued that he was denied his right to have his jury selected in conformity with statutory jury selection requirements. Ryan is raising this issue here because of *People v. Preston,* 325 S.W.3d 420 (Mo. App., E.D. 2010) (See copy of the opinion, attached and incorporated herein as Exhibit "37"). In *Preston*, the Court held that the jury selection process in that case, *which was identical to the process used in Ryan's case*, was a "fundamental and systemic" departure from statutory jury selection requirements. [5] *Id.* Like the defendant in *Preston*, Ryan is entitled to relief.

The jury selection process which was held to violate due process in *Preston* was Lincoln County's jury selection process. Due to pretrial publicity, Ryan's jury was drawn from Lincoln County. Upon information and belief, the State will not dispute that the jury selection process used to select the jury for Ryan's trial was identical to that utilized in *People v. Preston.* Therefore, the only issue before this Court is whether the constitutional violation Ryan suffered is cognizable in this habeas proceeding. The due process violation is cognizable here.

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[5] The Supreme Court denied the State's request to review the decision.

The Office of the State Public Defender did not discover Lincoln County's "opt-out" program until after Ryan's Rule 29.15 hearing. Ryan's public defender immediately filed a motion to re-open the hearing to present the jury selection claim to the motion court. The motion court declined to re-open the hearing and instead transferred the motion to Cole County to be heard in the form of a habeas corpus petition. The court then stayed ruling on the Rule 29.15 motion until after a ruling was made on the habeas petition.

The Honorable Richard Callahan considered Ryan's claim and denied relief for two reasons. The court determined that Ryan had procedurally defaulted on his claim because he had not raised it at trial or on direct appeal. Noting that Ryan had not presented a claim of actual innocence, the court held that Ryan could not show the necessary "cause" to overcome his default. In addressing the merits, the court further held that Lincoln County's opt-out program did not amount to a "substantial failure" to comply with the jury selection statutes. The court thus denied relief.

Ryan's claim is now cognizable for two reasons. First, an intervening clarification and change in the law prevents the application of *res judicata* and related doctrines to Ryan's claim. Second, Ryan has presented new evidence that was not presented in the previous habeas petition that

demonstrates his actual innocence. Ryan's showing of actual innocence permits this court to consider his jury selection claim.

An Intervening Clarification and/or Change in the Law Allows this Court to Consider Ryan's Claim

The doctrine of law of the case provides that a previous holding in a case constitutes the law of the case and precludes subsequent re-litigation of the issue. *State v. Graham*, 13 S.W.3d 290, 293 (Mo. banc. 2000). The doctrine applies to successive adjudications involving the same issues and facts. *Id.* However, the doctrine is not absolute; rather, it is a rule of policy and convenience and involves discretion. *Id.* The doctrine need not be applied where the first decision was based on a mistaken fact or resulted in manifest injustice, or where a change in the law intervened. *Id.*

Since the denial of Ryan's petition there has been a change and/or clarification of the law that avoids the preclusive effect of the previous judgment. Specifically, two of the precise issues considered in the previous habeas petition were addressed by the Eastern District Appellate Court in the *Preston* decision.

First, the State in *Preston* argued, as it did in opposition to Ryan's previous habeas petition, that the defendant's claim was untimely. 3225 S.W.3d at 423. Specifically, the State argued that Mo.Rev.Stat. § 494.465 requires motions asserting non-conformity with Missouri's jury selection

statutes must be made "before the petit jury is sworn to try the case or within fourteen days after the moving party discovers or by the exercise of reasonable diligence could have discovered the grounds therefore, whichever occurs later." *Id.* The *Preston* court rejected the State's timeliness argument. In doing so, the court noted the alleged violation occurred outside the defendant's presence, i.e., when the county board of jury commissioners assembled the qualified jury lists for the term in which the defendant's jury was constituted. *Id.* The record revealed no evidence that the defendant's trial or appellate attorneys had knowledge of, or through the exercise of reasonable diligence would have discovered, the practice employed by the circuit court. *Id.* The court therefore held that refusal to consider the defendant's claim would result in "fundamental unfairness." *Id.*

The previous judgment, entered without the benefit of the *Preston* decision, directly contradicts *Preston*. Specifically, Judge Callahan held that Ryan's claim was barred because Ryan "could have discovered the facts underlying his claim well before trial." *Ferguson v. Dormire, 08AC–CC 00721, p. 7* (1/9/09). However, as recognized by the appellate court in *Preston*, reasonable diligence would not have resulted in discovery of the claim because Ryan had no reason to believe that the jury list was improperly assembled. The *Preston* court noted that the error occurred

outside the defendant's presence, and thus refused to charge the defendant with the responsibility to ferret out a deviation from the jury selection statutes where the defendant had no reason to suspect a deviation in the first place. *Id.*

Second, the State argued in *Preston,* as it argued in opposition to Ryan's previous habeas petition, that Lincoln County's "opt-out" program did not constitute a "substantial failure" to comply with the statutory jury selection requirements. *Id. at* 423-26. The *Preston* court held otherwise:

> Though the community service opt-out practice...does not directly impinge on the concept of *random* juror selection...Lincoln County's practice implicates two other principles fundamental to the declared policy of the jury selection statutes. First, all qualified citizens have "an *obligation* to serve as jurors when summoned for that purposes, unless excused." §494.400. Second, excusal from jury service is generally predicated on a *discretionary judicial determination.* §494.430.1(2), (3). Permitting an otherwise qualified Missouri citizen to thwart these two principles by intentionally and unilaterally choosing to remove their name from a county's qualified jury list and forgo any potential jury obligations constitutes a statutory violation, one that is fundamental and systemic in nature. *Id.* at 426. (emphasis in original).

The *Preston* court concluded that because the deviation was "fundamental and systemic," the defendant need not demonstrate prejudice in order to obtain relief. *Id.*

The previous judgment again directly contradicts the *Preston* decision. Specifically, Judge Callahan held that despite the opt-out program, jury selection was still "random." Judge Callahan also determined that only 1.4% of the qualified jury pool was affected. Because the selection was "random" and only 1.4% of the pool was affected, Judge Callahan held the practice is not a "substantial failure" to comply with the statute.

However, the *Preston* Court noted there are requirements other than the "randomness" of the jury selection with which the jury selection statutes require compliance. First, Lincoln County jury selection procedures fail to promote each qualified citizen's obligation to serve as jurors unless excused. *Id.* Second, excusal is predicated on a discretionary *judicial* determination. *Id.* Permitting otherwise qualified jurors to unilaterally remove themselves from the jury list defeats these purposes and constitutes a "fundamental and systematic" departure from statutory requirements. *Id.* Further, consistent with *Preston*, the percentage of the jury pool has no bearing on compliance. *Id.*

The intervening change and/or clarification of the law allows this Court to consider Ryan's claim that the method of jury selection used at trial failed to substantially comply with statutory requirements. Ryan has a constitutional right to have a jury selected consistent with due process and in

compliance with the statutory scheme. To refuse to consider this claim, particularly in light of the *Preston* decision, would result in "fundamental unfairness." *Id.* at 426.

Ryan has Provided Clear and Convincing Evidence of His Actual Innocence, Which Allows this Court to Consider a Claim Otherwise Procedurally Barred

Should this Court decide that *Preston* alone does not allow consideration of the jury selection issue, the presentation of new evidence establishing actual innocence enables this court to consider a claim otherwise procedurally barred. *Clay v. Dormire*, 37 S.W.3d 214, 217 (Mo. banc 2000). "[A] person cannot usually utilize a writ of habeas corpus to raise procedurally-barred claims – those that could have been raised, but were not raised, on direct appeal or in a post-conviction proceeding." *Id.*, citing *Simmons v. White*, 866 S.W.2d 443, 445-46 (Mo. banc 1993). Limited exceptions to this rule apply "in circumstances so rare and exceptional that a manifest injustice results" if habeas corpus relief is not granted. *Id.*, citing *Simmons*, 866 S.W.3d at 445-46. A manifest injustice requires a petitioner to show that "a constitutional violation has probably resulted in the conviction of one who is actually innocent." *Id.*, citing *Schlup v. Delo*, 513 U.S. 298, 327 (1995). A showing of actual innocence acts as "a gateway

through which a habeas petitioner must pass to have his claim considered on the merits." *Id.* at 315-16.

As previously discussed, Ryan has presented clear and convincing evidence of his actual innocence. Given the weaknesses demonstrated in the prosecution's case against Ryan, no reasonable juror would again convict Ryan. Because Ryan has made the requisite showing of innocence, this Court may consider his constitutional claim that the method of jury selection in his case constituted a substantial failure to comply with statutory requirements and provide relief

CONCLUSION

WHEREFORE, because Ryan Ferguson has presented clear and convincing evidence of his actual innocence and for all of the foregoing reasons, Petitioner prays this Court to allow reasonable discovery, conduct an evidentiary hearing, issue the Writ of Habeas Corpus discharging him from his conviction and sentence, and grant such further relief as the Court deems just and equitable.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of February, 2011, a true and correct copy of the forgoing was served upon all parties of record in this case by U.S. Mail.

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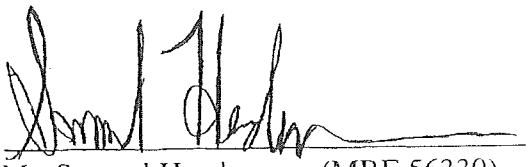

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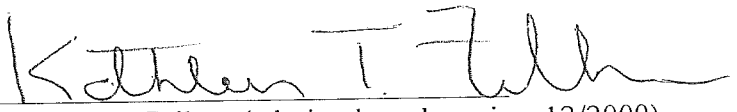

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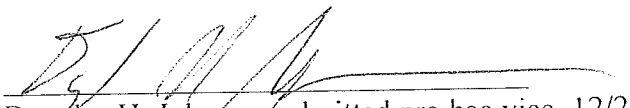

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