

**IN THE CIRCUIT COURT OF TEXAS COUNTY, MISSOURI**

**CHRISTOPHER DUNN,** )  
**Petitioner,** )  
 )  
 vs. )  
 )  
**MICHAEL BOWERSOX,** )  
**Superintendent, South Central** )  
**Correctional Center,** )  
**Respondent.** )

**Case No. 17TE-CC00059**

**ORDER AND JUDGMENT**

Pending before the Court is Petitioner's petition for a writ of habeas corpus challenging his St. Louis City convictions for first degree murder, two counts of assault in the first degree, and three counts of armed criminal action, for which he received a sentence of life without parole plus ninety (90) years. The original petition raised two claims for relief: 1) a freestanding claim of actual innocence under *State ex rel. Amrine v. Roper*, 102 S.W.3d 541 (Mo. banc 2003) and, 2) a perjured testimony claim under *Napue v. Illinois*, 360 U.S. 264 (1959).

An evidentiary hearing was conducted on May 30, 2018. At the hearing, Petitioner presented the testimony of DeMorris Stepp, who recanted his trial testimony and stated he falsely identified Petitioner at trial as the person who committed these crimes. Petitioner also presented the testimony of Curtis Stewart, Nicole Bailey, and an independent eyewitness to the shooting, Eugene Wilson. At the conclusion of the hearing, the Court agreed to keep the record open to give Petitioner the opportunity to take the deposition of the other eyewitness who

testified at the 1991 trial, Michael Davis Jr., who was in custody in the State of California. Counsel for Petitioner then informed the Court that Mr. Davis absconded from a drug treatment center shortly after the hearing was conducted and was a fugitive from justice, last seen in California. Petitioner asked that the Court consider previous exhibits submitted, including an affidavit and transcript of a tape recorded statement, where Mr. Davis allegedly recanted his trial testimony. (See Exh's 2, 7).

On August 31, 2018, Petitioner filed a motion for leave to amend his habeas petition, pursuant to Rule 55.33(b), to conform to the evidence that was presented at the evidentiary hearing. Specifically, Petitioner contended that Mr. Stepp's testimony at the May 30, 2018 hearing provided a factual basis for Petitioner to raise a third claim for relief involving the State's suppression of exculpatory evidence under *Brady v. Maryland*, 373 U.S. 83 (1963) and, also provided additional facts to bolster his previously advanced perjured testimony claim.

Contemporaneously with this motion pursuant to Rule 55.33(b), Petitioner filed a first amended petition for a writ of habeas corpus that supplemented his perjured testimony claim and added a third claim for relief under *Brady* that alleged that the State suppressed exculpatory and material impeachment evidence regarding an agreement that the State had with DeMorris Stepp that he would receive probation on his pending charges in exchange for his testimony against Petitioner. The Court grants Petitioner's motion and permits the filing of the first amended petition.

## **RECITATION OF THE FACTS**

Petitioner, Christopher Dunn, was convicted by a jury on July 18, 1991, for the May 18, 1990 murder of Ricco Rogers. Petitioner was also convicted of two counts of assault in the first degree and three counts of armed criminal action arising out of the same occurrence. Petitioner was subsequently sentenced to life without parole and consecutive sentences of ninety years by St. Louis City Circuit Judge Michael Calvin.

The State's case rested upon the eyewitness testimony of fifteen year old DeMorris Stepp and twelve year old Michael Davis. Both of these young men testified at trial that on May 18, 1990, these two juveniles and Mr. Rogers were sitting on a porch at a house at 5607 Labadie in the City of St. Louis. Just before midnight, Mr. Stepp testified that he saw Petitioner standing in the gangway of the house next door. A few minutes later, shots rang out and all three men tried to run away. Both Mr. Stepp and Mr. Davis testified at trial that Petitioner was the person who fired the fatal shots that caused the death of Mr. Rogers.

At the time he testified, Mr. Stepp had pending charges for armed robbery, armed criminal action, unlawful use of a weapon, and tampering in the first degree. (Exh. 5). In exchange for his testimony against Petitioner, the prosecution dropped the armed criminal action charges against Mr. Stepp, who then pleaded guilty to the remaining charges. The state recommended a fifteen-year sentence for the charges; however, the sentencing judge granted Mr. Stepp probation. (Exh. 5).

After Petitioner was convicted and sentenced, Petitioner filed a timely notice

of appeal and a timely Rule 29.15 motion pursuant to Missouri's then existing consolidated post-conviction review system in criminal cases. After holding an evidentiary hearing, the trial court denied Petitioner's Rule 29.15 motion. On consolidated appeal, the Missouri Court of Appeals, Eastern District affirmed Petitioner's convictions and the denial of his post-conviction motion in *State v. Dunn*, 889 S.W. 2d 65 (Mo. App. E.D. 1994). Petitioner, thereafter, unsuccessfully sought federal habeas corpus relief pursuant to 28 U.S.C. § 2254.

In 2005, DeMorris Stepp signed a sworn affidavit claiming that he committed perjury when he identified Christopher Dunn as the man he saw shoot Ricco Rogers. (See Exh. 1). Mr. Stepp indicated he was pressured by police and prosecutors to falsely identify Mr. Dunn as the shooter because they wanted him off the streets. (*Id.*). Mr. Stepp also asserted that the prosecution utilized Mr. Stepp's pending felony charges as leverage to convince him to testify that Christopher Dunn was the shooter and promised him he would avoid jail time if he did so. (*Id.*). Mr. Stepp's affidavit states that because it was so dark that night, he could not identify who the person was who fired the fatal shot. (*Id.*).

At the recent evidentiary hearing, Mr. Stepp testified that he committed perjury when he identified Petitioner as the shooter. In addition, he also testified that he lied under oath regarding the plea bargain he reached with the prosecution about his pending charges. Mr. Stepp testified that he had an understanding with the prosecution that, if he testified against Petitioner, he would be guaranteed probation and there was no danger in his mind that he would receive a fifteen year

sentence.

At the Court's request, the record was recently reopened to allow the presentation of a transcript from Mr. Stepp's 1991 guilty plea and sentencing, which was marked and received as Petitioner's Exhibit 19. Though the transcript corroborates that Mr. Stepp received probation, it does not evidence an agreement or understanding with Mr. Stepp or anyone else that Mr. Stepp would receive probation.

On July 17, 1991, in Petitioner's trial, Mr. Stepp testified against Petitioner. Mr. Stepp acknowledged to the jury that he had unrelated charges pending against him. He testified that he had reached a plea agreement where the state dropped armed criminal action charges to give Defendant a chance at probation, and that the state was recommending that he receive fifteen years in prison (Tr. 147, 155-156). Later that same day, on July 17, 1991, Mr. Stepp pleaded guilty before Judge Michael Calvin, who was also the judge presiding over Petitioner's trial. In cause number 911-640, Mr. Stepp was charged with robbery in the first degree, armed criminal action, tampering in the first degree, and unlawful use of a weapon. At the commencement of the plea hearing, the prosecution announced that there was a plea agreement whereby the State would recommend concurrent sentences of fifteen years on the robbery charge, one year on the tampering charge, and one year on the weapons charge, all to run concurrently (Ex. 19, p. 2). The armed criminal action charge would be dismissed pursuant to this plea bargain. During the plea colloquy, the trial court noted that this plea bargain was offered in consideration for

Mr. Stepp's testimony in the case that he was presently trying. After the court accepted the plea, a presentence investigation was ordered and sentencing was set for August 30, 1991.

At the sentencing hearing, Mr. Stepp's counsel requested on behalf of Mr. Stepp probation rather than fifteen years imprisonment. Judge Calvin then conducted a lengthy hearing in which he inquired of other family members of Mr. Stepp who were present in the courtroom, and ultimately elected to suspend imposition of sentence on all three charges, granting Mr. Stepp three years of probation. The prosecutor remained silent during the sentencing hearing.

It appears to this Court that no agreement for probation existed at the time of Mr. Stepp's testimony at Petitioner's trial for Mr. Stepp to receive probation. For any such agreement to be effective, the judge sentencing Mr. Stepp would have had a need to know it, which means that Judge Calvin would have been a participant in a scheme, along with the prosecutor, to hide from the jury an agreement that Mr. Stepp would receive probation rather than fifteen years in prison. Rather, it appears that Judge Calvin at Mr. Stepp's sentencing hearing made an independent determination as to whether young DeMorris Stepp should be granted probation rather than being sent to prison for fifteen years. Judge Calvin ultimately decided on probation, not because the parties had agreed to it, but because Judge Calvin deemed it appropriate.

After he received probation, Mr. Stepp repeatedly violated his probation and ultimately served his fifteen year sentence. (Exh. 5). After he was released, Mr.

Stepp was subsequently convicted of first degree murder involving the killing of his girlfriend and is currently serving a sentence of life without parole at the Jefferson City Correctional Center.

In 2017, in an interview with an investigator from the Missouri Attorney General's office, Mr. Stepp provided a third version of the events he purportedly observed the night of the shooting. In this 2017 statement, Mr. Stepp stated that another unknown individual shot and killed Ricco Rogers and Mr. Dunn was standing by him when the shooting occurred. (See Resp. Exh. H). In addition to claiming that his trial testimony was fabricated and false, Mr. Stepp testified at the evidentiary hearing in the instant case that this story he told last year to the attorney general's investigator was also false. In his testimony, Mr. Stepp asserted that he hoped by giving this false statement to obtain a reduction of his current sentence of life without parole.

At 2:50 a.m. on May 19, 1990, less than three hours after the shooting, Mr. Stepp gave a recorded interview with law enforcement officers, the transcript of which was marked as exhibit 14. Mr. Stepp said that Ricco Rogers, Michael Davis, and DeMorris Stepp were on the porch at 5607 Labadie. Mr. Stepp saw Christopher Dunn hiding around the corner next door. He then stated, "You know, I thought my mind, you know, was playing games and I looked dead in his face, and I guess he fired, he thought I seen him, so he shot at me first . . . It missed me by just an inch." Several shots were fired and the boys started running, except that Ricco Rogers fell and died. When Mr. Stepp was asked whether he saw Christopher Dunn prior to

the shots being fired, Mr. Stepp answered: “He was shooting the gun.” (Exh. 14, pp. 2-6).

It is next to impossible to determine which version of events related by Mr. Stepp is the most credible. However, regardless of which of Mr. Stepp’s multiple statements are true, it is beyond dispute that Petitioner was convicted based upon the eyewitness testimony of a person who at this point has told multiple contradictory versions of what he claims to have observed on the night of the shooting. As Judge Wolff observed in the *Amrine* case, the only witnesses who implicated Petitioner in the crime are proven liars. *Amrine*, 102 S.W.3d at 550 (Wolff, J., concurring).

The other eyewitness, Michael Davis, was more difficult to locate because he moved to California shortly after he testified at Petitioner’s trial. (Exh. 2). Mr. Davis was on the Labadie porch with Ricco Rogers and DeMorris Stepp at the time of the shooting. He was interviewed by law enforcement at 3:04 a.m. May 19, 1990, within approximately three hours of the shooting. The statement was recorded, and the transcript was marked as exhibit 20. He stated in the interview that moments after the shooting he fell to the ground and played dead, and looked up and was able to see the shooter. He recognized the shooter as “Trap”, the nickname for Christopher Dunn, by the unique sunglasses that Mr. Dunn regularly wore. (Exh. 20, pp. 2-9).

At trial he testified that he did not see the shooter until after the first shot was fired. Ricco Rogers fell and Mr. Davis fell beside him to avoid getting shot.

Right before he fell he looked and saw the shooter, who he identified as Christopher Dunn. (Tr. 174-182).

In 2015, Mr. Davis was located at the Solano County Jail in Fairfield, California where he was incarcerated on pending criminal charges. (Exh's. 2, 17, 18). After being interviewed, Mr. Davis also recanted under oath in a sworn affidavit. (*Id.*). This affidavit, if believed, indicates that Mr. Davis committed perjury when he identified Mr. Dunn as the killer at the 1991 trial. (*Id.*). Mr. Davis indicated that he could not see the shooter from his location. (*Id.*). Mr. Davis indicated that Mr. Stepp convinced him to implicate Mr. Dunn as the shooter because they believed he was a member of the Crips gang in their neighborhood. (*Id.*). Because Mr. Stepp and Mr. Davis were members of the rival Bloods gang, they wanted Mr. Dunn out of the neighborhood and believed implicating him in the murder was an easy way to get that done. (*Id.*). This account is somewhat corroborated by the testimony at the evidentiary hearing from Mr. Stepp, who stated that he convinced Mr. Davis to tell the police that Mr. Dunn was the shooter.

A couple of weeks after the shooting, Mr. Davis moved to California with his mother. (*Id.*). He was brought back to Missouri by the prosecutors in 1991 to testify at Petitioner's trial. When interviewed by the police prior to testifying, he states that he hesitated as to whether he could identify who shot Ricco Rogers. (*Id.*) At that time, he asserts he was pressured by the police to identify Christopher Dunn as the killer. The police showed Mr. Davis photos of Ricco Rogers' corpse. The police also arranged to have Ricco Rogers' mother call him and urge him to testify. (*Id.*)

Mr. Davis states that as a result of this pressure, Mr. Davis appeared in court and committed perjury at trial by identifying Mr. Dunn as the shooter. (*Id.*).

On November 17, 2015, Mr. Davis gave a tape recorded statement to Petitioner's investigator, Craig Speck, at the Solano County Jail. (See Exh. 17). A copy of this tape recorded statement was transcribed by a court reporter and was attached to Petitioner's reply in support of his original petition as Exhibit 7.

At the time the evidentiary hearing was conducted earlier this year, Mr. Davis was in California custody and had been released from jail to an in-patient drug treatment program. Counsel for Petitioner intended to take Mr. Davis' deposition on or before August 1, 2018, and submit it to the Court. However, Mr. Davis absconded from the halfway house and a warrant was issued for his arrest. Because he has not yet been arrested on this warrant, Petitioner requested that the Court consider the testimony of Mr. Davis' through his sworn affidavit and through the transcribed taped statement that were previously submitted to the Court.

The recantations of DeMorris Stepp and Michael Davis are bolstered by the testimony of an independent eyewitness, Eugene Wilson, who was present at the house and witnessed the shooting death of Ricco Rogers. Mr. Wilson is referred to as "Geno" in the police reports and during the trial testimony of Mr. Stepp and Mr. Davis. Mr. Wilson recently signed a sworn affidavit and testified at the evidentiary hearing that he was present with Ricco Rogers, DeMorris Stepp, and Michael Davis on Marvin Tolliver's porch at 5607 Labadie on the night of May 19, 1990. (Exh. 3). Several shots rang out that came from the front of the house to the west. (*Id.*). Mr.

Wilson states that because it was dark outside, none of the young men on the porch could see who was shooting at them. (*Id.*). Everybody started to run except for Ricco Rogers and, after the gunshots stopped, Mr. Wilson realized that Ricco had been shot. (*Id.*).

Shortly after the shots were fired, one of the men on the porch mentioned Christopher Dunn's name and indicated he might have been the shooter. (*Id.*). Mr. Wilson stated that many of the younger kids in that neighborhood did not like Christopher Dunn. Mr. Wilson also testified that because he and Marvin Tolliver were friends with Mr. Dunn, he does not believe that Petitioner would have shot at them because of that friendship. (*Id.*). He is also certain that because of where Mr. Stepp and Mr. Davis were positioned when Ricco Rogers was shot, neither of them could have possibly seen the shooter or positively identified Mr. Dunn. (*Id.*). When he was told about some of the prior statements that Mr. Stepp and Mr. Wilson had given regarding the description of the shooter, Mr. Wilson stated that these statements were false because it was not possible that either of them could have seen the shooter. (*Id.*).

The Court finds that Mr. Wilson's testimony is credible. He had no obvious motive to lie. Mr. Wilson did not speak to the police that night because he could not identify who did it and did not believe at that time that he had any relevant information to aid the police in catching the actual shooter. Mr. Wilson's credibility is also enhanced by the fact that he had lived with Ricco Rogers' family since he was fourteen years old. As a result, he was very close to Mr. Rogers' mother and would

have no apparent motive to hinder the effort to hold accountable the murderer of Ricco Rogers.

Mr. Wilson testified at the evidentiary hearing that Mr. Rogers' mother's boyfriend had a motive to commit these crimes because Mr. Rogers, Mr. Stepp, and Mr. Davis had beaten him up three days earlier because he was physically abusive toward Ricco Rogers' mother. Mr. Wilson also testified that Ricco Rogers' younger brother was shot approximately three months later. Mr. Rogers' brother was also involved in the beating of his mother's boyfriend.

Petitioner's claim of innocence is also corroborated by other independent evidence. Petitioner submitted a sworn affidavit from Catherine Jackson indicating that she was friends with Mr. Dunn at the time of the shooting in 1990 and that they often spoke on the phone. (Exh. 4). She indicated that at approximately 11:00 p.m. on the night of the shooting, she was engaged in a lengthy phone conversation with Mr. Dunn that lasted between thirty and sixty minutes that could have been ongoing at the time that Mr. Rogers was shot. (*Id.*). During that conversation, she remembered that Mr. Dunn was happy and acting normal and did not seem upset or indicate that he had been involved in any altercation or dispute with anyone. When she was contacted about being a trial witness for Mr. Dunn, Ms. Jackson's mother did not want her to get involved and refused to answer the door when the public defender's office came. (*Id.*). However, she did not testify at the evidentiary hearing in this cause.

Another friend of Petitioner, Nicole Bailey, provided an affidavit and testified

at the recent hearing. She testified that she spoke on the phone with Petitioner on the night that Mr. Rogers was shot. (Exh. 6). Ms. Bailey remembers this phone conversation because it occurred while she was in the hospital, after having given birth to her first child the night before. (*Id.*). Ms. Bailey also is certain that this phone conversation occurred on the night that Mr. Rogers was killed because she attempted to call Petitioner again that same night and was informed by Petitioner's sister that the police had just come to Petitioner's house looking for him as a suspect in the killing of Mr. Rogers that had occurred earlier that evening. (*Id.*).

Curtis Stewart testified at the recent evidentiary hearing. Mr. Stewart testified that he was incarcerated in a ten man pod at the St. Louis City workhouse with DeMorris Stepp in 1991. Mr. Stewart overheard Mr. Stepp making a telephone call, during which Mr. Stepp indicated that he did not know who shot Ricco Rogers. When Mr. Stewart and the other inmates in that pod learned that Mr. Stepp was going to falsely accuse Petitioner of being the shooter, this caused friction and fights and, as a result, Mr. Stepp was removed to another area of the workhouse.

Finally, Petitioner's claim of innocence was corroborated by several alibi witnesses whose testimony was presented at Petitioner's Rule 29.15 hearing. Petitioner's claim of innocence was also bolstered by evidence adduced during the 29.15 hearing that the victim's brother, Dwayne Rogers, had made statements that Petitioner was not the man who had killed his brother and that he knew the identity of the actual shooter.

## CONCLUSIONS OF LAW

### **Legal Standard for Habeas Corpus Relief**

Habeas corpus is the last judicial inquiry into the validity of a criminal conviction, and serves as “a bulwark against convictions that violate fundamental fairness.” *Engel v. Dormire*, 304 S.W.3d 120, 125 (Mo. banc 2010). A writ of habeas corpus is a proper remedy “when a person is restrained of his or her liberty in violation of the constitution or laws of the state or federal government.” *State ex rel. Woodworth v. Denney*, 396 S.W.3d 330, 337 (Mo. banc 2013). A habeas corpus Petitioner bears the burden to show that he or she is entitled to relief. *State ex rel. Nixon v. Jaynes*, 73 S.W.3d 623, 624 (Mo. banc 2002). In order to avoid “duplicative and unending challenges to the finality of judgments”, habeas corpus review is limited to jurisdictional issues or “circumstances so rare and exceptional that a manifest injustice results if relief is not granted.” *Clay v. Dormire*, 37 S.W.3d 214, 217 (Mo. banc 2000). A writ of habeas corpus can provide relief for otherwise procedurally barred claims if the Petitioner can show (1) a claim of actual innocence, (2) jurisdictional defect, or (3) that a procedural defect was caused by something external to the defense, and prejudice resulted from the underlying error that worked to the Petitioner’s actual and substantial disadvantage. *State ex rel. Clemons v. Larkin*, 475 S.W.3d 60, 76 (Mo. banc 2015).

### **“Freestanding” and “Gateway” Claims of Actual Innocence**

A claim of “actual innocence” can either be a “gateway” claim of innocence, or a “freestanding” claim of innocence. A “gateway” claim of actual innocence is a

component of the “manifest injustice” analysis set forth by the United States Supreme Court in *Schlup v. Delo*, 513 U.S. 298 (1995), and followed by the Missouri Supreme Court in *Clay v. Dormire*, 37 S.W.3d 214 (Mo. banc 2000). Under this analysis, a “manifest injustice” occurs which would justify habeas corpus relief when a Petitioner has demonstrated that “a constitutional violation has probably resulted in the conviction of one who is actually innocent” by showing that “it is more likely than not that no reasonable juror could have convicted him in light of new evidence of innocence.” *Id.* at 217. Under this analysis, the proof of actual innocence is “a gateway through which a habeas Petitioner must pass to have his otherwise barred constitutional claim considered on the merits.” *Id.*

In addition, the Missouri Supreme Court has provided for a “freestanding” claim of actual innocence in order “to account for those rare situations...in which a Petitioner sets forth a compelling case of actual innocence independent of any constitutional violation at trial.” *State ex rel. Amrine v. Roper*, 102 S.W.3d 541, 547 (Mo. banc 2003). To make a “freestanding” claim of actual innocence, a Petitioner must “make a clear and convincing showing of actual innocence that undermines confidence in the correctness of the judgment.” *Id.* at 548. As such, a habeas corpus Petitioner who proves innocence by a preponderance of the evidence has established a “gateway” claim of actual innocence and must also demonstrate that a constitutional violation occurred at trial, while a Petitioner who proves innocence by clear and convincing evidence has met the burden to establish a “freestanding” claim of actual innocence and does not need to demonstrate that a constitutional

violation has occurred in order to obtain relief.

A freestanding claim of actual innocence is only cognizable for a petitioner who has been sentenced to death, and is unavailable for cases in which the death penalty has not been imposed. *State ex rel. Lincoln v. Cassady*, 511 S.W.3d 11 (Mo. App. W.D. 2016). Thus, Petitioner's freestanding claim of actual innocence is denied on that basis.

The Missouri Supreme Court in the case of *State ex rel. Robinson v Cassady*, SC95892 (2018) granted habeas relief in a non-capital habeas corpus case involving a claim of freestanding innocence. The special master appointed by the Missouri Supreme Court to take evidence issued a critique of the *Lincoln* holding, opining that limiting freestanding claims of actual innocence to capital punishment cases is inconsistent with other prior decisions from the Missouri Supreme Court, including *Amrine*. The special master recommended granting habeas relief both on petitioner's freestanding claim of actual innocence and his gateway claim of actual innocence, the latter of which opened the door to evaluating a due process claim involving perjured testimony. However, the Missouri Supreme Court declined to rule on the freestanding claim of innocence, electing to grant habeas relief through the gateway claim of actual innocence. Thus, *Robinson* provides no guidance as to the validity of the *Lincoln* holding.

More recently, this year the Missouri Supreme Court in the case of *State ex rel. Nash v. Payne*, SC97903 (7-10-2020) granted habeas relief in another non-capital habeas case involving a claim of freestanding innocence. The special

master appointed by the Missouri Supreme Court to take evidence likewise disagreed with the *Lincoln* holding limiting such claims to capital punishment cases. The special master recommended granting habeas relief on petitioner's freestanding claim of actual innocence as well as his gateway claim of actual innocence. Again the Supreme Court avoided addressing whether a freestanding claim of innocence is available for a non-capital case, holding instead that the petitioner established his gateway claim of actual innocence, which in turn opened the gateway for considering and sustaining petitioner's multiple constitutional due process claims.

This Court is constrained to follow controlling precedent as pronounced in the only case directly deciding the issue of whether a freestanding claim of innocence is available in non-capital cases. Unless *Lincoln* is overruled or another division of our appellate court decides differently, controlling precedent would appear to limit freestanding claims of actual innocence to capital punishment cases. As such, Petitioner's freestanding claim of innocence in the instant case is denied without further analysis.

Next, this Court considers Petitioner's gateway claim of actual innocence. To establish a gateway claim of actual innocence, petitioner must show that "a constitutional violation has probably resulted in the conviction of one who is actually innocent." *Clay v. Dormire*, 37 S.W.3d 214, 217 (Mo. banc 2000) (quoting *Schlup v. Delo*, 513 U.S. 298, 327 (1995)). "A petitioner's burden at the gateway stage is to demonstrate that more likely than not, in light of the new evidence, no

reasonable juror would find him guilty beyond a reasonable doubt—or, to remove the double negative, that more likely than not any reasonable juror would have reasonable doubt.” *House v. Bell*, 547 U.S. 518, 538 (2006); see also *State ex rel. Nixon v. Jaynes*, 63 S.W.3d 210, 214 (Mo. banc 2001) (“‘[A]ctual innocence’ means that the petitioner must show that it is more likely than not that ‘no reasonable juror would have found the defendant guilty’ beyond a reasonable doubt.”) (quoting *Schlup*, 513 U.S. at 328- 29).

A credible gateway claim “requires ‘new reliable evidence—whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence—that was not presented at trial,’” but “the habeas court’s analysis is not limited to such evidence.” *House*, 547 U.S. at 538 (quoting *Schlup*, 513 U.S. at 324). “*Schlup* makes plain that the habeas court must consider all the evidence, old and new, incriminating and exculpatory, without regard to whether it would necessarily be admitted under rules of admissibility that would govern at trial.” *Id.* at 538 (quoting *Schlup*, 513 U.S. at 327-328) (internal quotation marks omitted). “Justice requires that this Court consider all available evidence uncovered following [the petitioner’s] trial that may impact his entitlement to habeas relief.” *Engel*, 304 S.W.3d at 126.

“The *Schlup* standard does not require absolute certainty about the petitioner’s guilt or innocence.” *House*, 547 U.S. at 538. “Reasonable doubt . . . marks the legal boundary between guilt and innocence.” *Jaynes*, 63 S.W.3d at 214 (quoting *Schlup*, 513 U.S. at 315) (internal quotation marks omitted). The standard

is “probabilistic” and considers “what reasonable, properly instructed jurors would do.” *House*, 547 U.S. at 538. “The word ‘*reasonable*’ in that formulation is not without meaning.” *Schlup*, 513 U.S. at 329. “It must be presumed that a reasonable juror would consider fairly all of the evidence presented.” *Id.*

As was noted earlier, in the instant case new evidence has emerged, in addition to the recantations, which make it likely that reasonable, properly instructed jurors would find Petitioner not guilty. *House*, 547 U.S. at 538. Eugene Wilson, an independent eyewitness who has no reason to lie and was the only eyewitness in the case who is not currently incarcerated for other crimes, provided credible testimony that none of the witnesses at the scene of the shooting could have identified the assailant. Mr. Wilson’s testimony provides corroborating evidence to buttress the recantations of Mr. Stepp and Mr. Davis. Coupled with the evidence in the record that Petitioner had an alibi, this Court does not believe that any jury would now convict Christopher Dunn under these facts. Instead, this Court concludes that, based on *all* the evidence considered under the dictates of *Schlup*, it is more likely than not that any reasonable juror would have reasonable doubt. As the first recantation did not occur until 2005, there is also cause and prejudice to allow review of Petitioner’s due process claims. See *State ex rel. Griffin v Denney*, 347 S.W.3d 73, 77 (Mo. banc 2011)

### **Due Process Claims**

Because Petitioner has met the gateway innocence test, the Court may examine Petitioner’s otherwise barred due process claims. Under Claim 2,

Petitioner claims that the presentation of the perjured testimony of Mr. Stepp and Mr. Davis violated his right to due process under *Napue and Giglio v United States*, 405 U.S. 150 (1971). Under Claim 3, Petitioner claims that his due process rights were violated due to the State's suppression of material exculpatory evidence involving DeMorris Stepp's plea agreement where he was guaranteed probation in exchange for his testimony.

As to Claim 2 alleging presentation of perjured testimony, no evidence was presented that either the police or the prosecution had actual knowledge that Mr. Stepp or Mr. Davis lied (if they indeed lied) during their trial testimony. Thus, Claim 2 is denied.

In Claim 3, Petitioner asserts that his due process rights were violated by the state's failure to disclose exculpatory evidence involving DeMorris Stepp's alleged plea agreement where he was guaranteed probation in exchange for his favorable testimony identifying Petitioner as the murderer of Ricco Rogers. In *Brady v. Maryland*, 373 U.S. 83 (1963), the Supreme Court held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Id.* at 87. Later, in *Strickler v. Greene*, 527 U.S. 263 (1999), the court more precisely articulated the three essential elements for establishing a *Brady* claim: "[T]he evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the state, either willfully or inadvertently;

and prejudice must have ensued.” *Id.* at 281-282. It is also well settled that the *Brady* rule encompasses evidence “known only to police investigators and not the prosecutor. . . . In order to comply with *Brady*, therefore, ‘the individual prosecutor has a duty to learn of any favorable evidence known to others acting on the government’s behalf in this case, including the police.’” *Id.* at 280-281 (quoting *Kyles v. Whitley*, 514 U.S. 419, 437 (1995)).

Like the due process requirements of the *Brady* line of cases, Missouri Rule 25.03 requires the prosecution, upon written request of defendant’s counsel, to disclose exculpatory evidence to the accused prior to trial. This rule “imposes an affirmative requirement of diligence and good faith on the State to locate records not only in its own possession or control but in the control of other government personnel.” *Merriweather v. State*, 294 S.W.3d 52, 56 (Mo. banc 2009). Although discovery violations under Rule 25.03 are trial errors that normally must be raised on direct appeal, the Supreme Court held in *Merriweather* that such claims may be raised in a subsequent post-conviction action in the interest of fundamental fairness. *Id.* at 55.

Petitioner claims that the State and DeMorris Stepp had an agreement or understanding that DeMorris Stepp would receive probation on his pending charges if he testified at Petitioner’s trial, and that the State failed to disclose the fact of this alleged agreement or understanding to the defense. At the time of Petitioner’s trial, Mr. Stepp had a pending felony case arising from offenses that occurred before Petitioner’s trial. (Exh. 5).

At Petitioner's trial, Mr. Stepp testified that he had entered into a plea agreement under which the State would recommend that he be sentenced to fifteen years in the Department of Corrections in exchange for his testimony in Petitioner's case. (Tr. 146). In contrast to his trial testimony, Mr. Stepp recently testified at the May 30, 2018 hearing that he had an understanding that he would definitely receive probation on his pending charges if he testified at Petitioner's trial. The Court finds the testimony of Mr. Stepp as to the existence of such an agreement or understanding to be not credible.

At the underlying criminal trial, Mr. Stepp testified to the jury that he had unrelated charges pending against him. He testified that he had reached a plea agreement where the state dropped armed criminal action charges to give Defendant a chance at probation, and that the state was recommending that he receive fifteen years in prison (Tr. 147, 155-156). Later that same day, out of the presence of the jury, Mr. Stepp pleaded guilty before Judge Michael Calvin, who was also the judge presiding over Petitioner's trial. The State was represented by Steve Ohmer, who was also the prosecutor in Petitioner's trial, and Mr. Stepp was represented by counsel Elizabeth Brown. The prosecutor announced that there was a plea agreement whereby the State would recommend concurrent sentences of fifteen years on the robbery charge, one year on the tampering charge, and one year on the weapons charge, all to run concurrently (Ex. 19, p. 2). The armed criminal action charge would be dismissed pursuant to this plea bargain. Judge Calvin accepted the plea, ordered a presentence investigation and set sentencing for six

weeks later.

At the sentencing hearing, the State was represented by Jane Darst and Mr. Stepp was again represented by Elizabeth Brown. Judge Calvin did not initially ask for recommendation or argument from either attorney, and instead immediately afforded allocution. Ms Brown requested probation for Mr. Stepp. Judge Calvin then conducted a lengthy hearing in which he inquired of other family members of Mr. Stepp who were present in the courtroom, spoke directly with Mr. Stepp, and eventually chose to suspend imposition of sentence on the charges, granting Mr. Stepp probation for a term of three years. The prosecutor remained silent during the sentencing hearing.

The Court concludes that no agreement for probation existed at the time of Mr. Stepp's testimony at Petitioner's trial for Mr. Stepp to receive probation. As noted earlier, for any such agreement to be effective, the judge sentencing Mr. Stepp would have had a need to know about it in order to grant probation as promised. This means that Judge Calvin would have been a participant in a scheme, along with the prosecuting attorney, to hide from the jury hearing the Christopher Dunn case an agreement that Mr. Stepp would receive probation rather than fifteen years in prison.

The transcript of the plea and sentencing hearing makes plain that this did not occur. Instead, Judge Calvin at Mr. Stepp's sentencing hearing made an independent determination that DeMorris Stepp should be granted probation rather than being sent to prison for fifteen years. Judge Calvin ultimately decided on

probation, not because the parties had agreed to it, but because Judge Calvin deemed it appropriate.

To the extent that Mr. Stepp harbored a hope that he would be granted probation, this was disclosed to the jury in his testimony. He testified in Petitioner's jury trial as follows:

Q. And you're currently charged with Robbery in the First Degree?

A. Right.

Q. And Armed Criminal Action?

A. Right.

Q. Tampering in the First Degree and CCW; is that right?

A. Unlawful Use of a Weapon.

Q. Unlawful Use of a Weapon, Carrying a Concealed Weapon; isn't that right?

A. Right.

Q. And in exchange for your testimony Mr. Ohmer has agreed to drop the Armed Criminal Action; is that right?

A. Right.

Q. What does that mean to you?

[objections argued and overruled]

Q. What does that mean to you?

A. That means that I would get a chance at probation.

Q. And that's important to you; is that right?

A. Yes, very important to me.

(Tr. at 155-156).

As no agreement or understanding existed that Mr. Stepp would receive probation as a result of his testimony, no *Brady* violation occurred. Accordingly habeas relief is denied under Claim 3.

### CONCLUSION

For the above reasons, Petitioner's Amended Petition for Writ of Habeas Corpus is denied.

IT IS SO ORDERED.

September 23, 2020

  
William E. Hickle, Circuit Judge

