

No. _____

CAPITAL CASE

EXECUTION SCHEDULED FOR AUGUST 22, 2017 AT 6:00 P.M.

**IN THE
SUPREME COURT OF THE UNITED STATES**

MARCELLUS WILLIAMS,

Petitioner,

v.

**STEVE LARKIN, Superintendent,
Potosi Correctional Center**

Respondent.

**On Petition For A Writ Of Certiorari
To The Supreme Court Of Missouri**

PETITION FOR A WRIT OF CERTIORARI

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CAPITAL CASE

QUESTIONS PRESENTED

Petitioner Marcellus Williams, a Missouri death row inmate who has maintained his innocence since he was charged with murder and sentenced to death in the stabbing death of Felicia Gayle during a home invasion, obtained new DNA testing in 2015 based on advances in DNA technology. An unknown male DNA profile was found on the handle of the knife that did not match the known DNA of petitioner.

Based upon the uncontradicted opinions of two DNA experts that petitioner could be excluded as the source of the male DNA detected on the knife, petitioner filed an original petition for a writ of habeas corpus before the Missouri Supreme Court on August 14, 2017 that raised a freestanding claim of innocence based on these new DNA test results and other existing evidence that had previously emerged during prior post-conviction proceedings that undermined the credibility of the prosecution's case. In the petition, petitioner also requested an evidentiary hearing before a special master, as authorized by Missouri law, so that a trier of fact could hear and weigh all of the evidence that establishes his innocence of the murder for which he was condemned to die. The following day the Missouri Supreme Court summarily denied the habeas petition, without granting a hearing, in a one page order.

In light of the foregoing facts, this petition presents the following questions:

1. Whether a freestanding claim of actual innocence presents a cognizable constitutional claim under the Eighth and Fourteenth Amendments.
2. Whether the Eighth and Fourteenth Amendments prohibit an execution from being carried out where new DNA evidence and other reliable evidence establishes that the condemned man is probably innocent.
3. Whether the Missouri Supreme Court violated petitioner's Fourteenth Amendment rights in failing to grant him an evidentiary hearing on his claim of innocence and in failing to reexamine the proportionality of his death sentence based upon this newly discovered evidence as required by state law.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Marcellus Williams, respectfully requests that a writ of certiorari issue to review the judgment and decision of the Supreme Court of Missouri that denied his original petition for a writ of habeas corpus challenging his Missouri convictions and sentence of death.

OPINIONS BELOW

The order and judgment of the Missouri Supreme Court denying petitioner's petition for a writ of habeas corpus pursuant to Mo. S. Ct. Rule 91 is unpublished and is published in the Appendix at A-1.

JURISDICTIONAL STATEMENT

The judgment of the Missouri Supreme Court was issued on August 15, 2017. The present petition for a writ of certiorari was required to be filed by petitioner within ninety (90) days. *See* Rule 13.1. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves provisions of the Eighth and Fourteenth Amendments to the United States Constitution:

The Eighth Amendment provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

The Fourteenth Amendment to the United States Constitution provides in part: "No state shall make or enforce any law which will abridge the privileges or immunities of the citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process

of law; nor deny to any person within its jurisdiction the equal protection of the law.”

STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

A St. Louis County, Missouri jury convicted Marcellus Williams in 2001 of one count of first degree murder, first degree burglary, first degree robbery, and two counts of armed criminal action involving the 1998 stabbing death of Felicia Gayle. The trial court, upon the recommendation of the jury, sentenced petitioner to death on the murder conviction. On direct appeal, the Missouri Supreme Court affirmed petitioner’s convictions and sentences in *State v. Williams*, 97 S.W.3d 462 (Mo. banc 2003), *cert denied*, *Williams v. Missouri*, 539 U.S. 944 (2003).

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

Petitioner, thereafter, commenced a federal habeas corpus proceeding by filing a timely habeas petition in the United States District Court for the Eastern District of Missouri. *Williams v. Roper*, No. 4:05-CV-01474-RWS. The case was assigned to District Judge Rodney W. Sippel. After the district court denied

petitioner's requests for discovery, further DNA testing, and an evidentiary hearing, Judge Sippel granted petitioner habeas relief on his claim of ineffective assistance of counsel at the penalty phase of trial and denied habeas relief on all other claims. *Williams v. Roper*, 2010 U.S. Dist. LEXIS 144919 (E.D.Mo., 3-26-10).

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

After briefing and argument, the Eighth Circuit Court of Appeals, by a two to one vote, reversed the district court and remanded the case with directions that the petition be denied. *Williams v. Roper*, 695 F.3d 825 (8th Cir. 2012). The Court of Appeals, thereafter, denied rehearing and rehearing *en banc* on December

6, 2012. This Court denied Mr. Williams' petition for a writ of certiorari in *Williams v. Steele*, 134 S. Ct. 85 (2013).

On December 17, 2014, the Missouri Supreme Court set petitioner's execution for January 28, 2015. On January 9, 2015, petitioner filed an original petition for a writ of habeas corpus before the Missouri Supreme Court, accompanied by a motion for a stay of execution. *Williams v. Steele*, Mo. S. Ct. No. SC94720. This petition was also accompanied by seventeen exhibits.

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

On May 26, 2015, the Missouri Supreme Court appointed Boone County, Missouri Circuit Judge Gary Oxenhandler as a special master to oversee further DNA testing in conjunction with the underlying habeas petition. However, the court did not authorize the master to conduct an evidentiary hearing after DNA tests were completed or consider the McClain murder evidence. After DNA testing was completed by Bode Laboratory, the parties filed post-testing briefs

accompanied by the deposition of a Bode Lab technician and the affidavit of the DNA expert Norah Rudin. On January 31, 2017, the Missouri Supreme Court summarily denied the habeas corpus petition, without explanation, in a one page order. The Missouri Supreme Court, thereafter, set an August 22, 2017 execution date for petitioner.

Petitioner, thereafter, filed a timely petition for a writ of certiorari to this Court. *Williams v. Steele*, No. 16-8963. This Court denied this petition on June 26, 2017.

On August 14, 2017, at approximately 12:54 p.m., petitioner filed an original petition for a writ of habeas corpus accompanied by eighteen exhibits pursuant to Missouri Supreme Court Rule 91 before the Missouri Supreme Court. *Williams v. Larkin*, Mo. S. Ct. No. SC96625. On August 15, 2017, at approximately 12:56 p.m., respondent filed suggestions in opposition. (A-3). Approximately two hours later, the Missouri Supreme Court summarily denied the petition and the motion for stay of execution. (A-1).

B. STATEMENT OF FACTS

Marcellus Williams was convicted in 2001 for the 1998 murder of Felicia Gayle, who was stabbed to death in her University City home, on the word of two paid informants whose testimony was inherently unreliable. Despite the violent and bloody nature of the crime scene, police failed to uncover any forensic

evidence connecting petitioner to the murder. In fact, physical evidence collected from the crime scene, including hair and footprints, could not be linked to petitioner, the victim or her husband, suggesting that the actual killer may still be at large. Because the murder went unsolved for nearly a year, the authorities resorted to the “snitch” testimony of Henry Cole and Laura Asaro to make an arrest.

Because the victim was a former reporter with the *St. Louis Post-Dispatch* and the wife of a prominent St. Louis area physician, the case generated enormous publicity. (Tr. 1730, 2820-28). After the murder went unsolved for several months, Henry Cole and Laura Asaro came forward in June of 1999 and claimed that petitioner had confessed to committing the murder in order to lay claim to a \$10,000 reward that was offered for information about the homicide by the victim’s husband.

Henry Cole is a career criminal with convictions dating back thirty years. Mr. Cole also has a long history of mental illness, evidence that the jury did not hear. The state’s other star witness, Laura Asaro, also has a checkered background. She is an admitted crack addict and prostitute, who was supposedly petitioner’s girlfriend for a two-month period around the time of the Gayle murder. Both of these witnesses testified at trial that petitioner admitted to them that he had murdered Ms. Gayle. Mr. Williams’ alleged jailhouse confession to Mr. Cole gave

a much different account of the crime than his alleged confession to his prostitute girlfriend. As a result, it is abundantly clear that at least one of these witnesses, if not both of them, committed perjury at trial in exchange for the reward money. (Tr. 1818, 1882). Although trial counsel tried to expose Cole's and Asaro's credibility problems before the jury, they were denied access to impeaching information and failed to uncover Cole's and Asaro's histories of mental illness before trial.

Trial counsel, Joseph Green and Christopher McGraugh, were hired by the Missouri Public Defender System to represent petitioner at his trial. Both Green and McGraugh were admittedly unprepared for trial. (Hab. Exh. 10). In fact, Green sought a continuance because he was involved in another highly publicized St. Louis County capital murder trial involving Kenneth Baumruk, which started just a month before Mr. Williams' trial commenced. *See State v. Baumruk*, 85 S.W.3d 644 (Mo. banc 2002).

In denying virtually all of defense counsel's discovery requests, requests for forensic testing and two requests for a continuance based upon the state's failure to produce impeaching information on Cole and Asaro, the trial court pushed the case to trial beginning June 4, 2001. (Tr. 136; L.F. 269, 295, 394, 457). In a racially charged case (Ms. Gayle was white and petitioner is black), the prosecutor struck

six of seven blacks from the venire panel, leaving just one black juror to serve on the petit jury. (Tr. 1569-70).

Due to trial counsel's lack of preparation, coupled with several trial court rulings, the jury did not receive a complete picture of the case during the guilt phase of trial. Because the prosecution failed to disclose impeaching information and because trial counsel did not conduct a reasonable investigation, trial counsel's cross-examination of Cole and Asaro barely scratched the surface of establishing their utter lack of credibility. As will be discussed in greater detail below, new information came to light during state post-conviction proceedings, including information regarding both of these witnesses' long histories of drug abuse and mental illness which would have further undermined their credibility in the eyes of the jury. Because the jury did not hear this evidence, it was no surprise when the jury found petitioner guilty as charged.

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

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

Between April and June of 1999, Cole testified he was in the city jail with petitioner. (Tr. 2382). After a few weeks, he and petitioner realized they were distantly related and, according to Cole, became friends. (Tr. 2385-87). Cole stated that in early or mid-May, he was watching television with petitioner, when a story came on about Felicia Gayle's death, reporting that there were still no suspects and that a reward for \$10,000 had been offered. (Tr. 2388-89). According to Cole, who had known petitioner only for a few weeks, petitioner admitted to him that he had committed the crime. (Tr. 2390).

Cole also claimed petitioner had indicated to him that the only other witness he had told about the crime was Laura Asaro. (Tr. 2414). In November 1999, officers went to Ms. Asaro's mother's house to speak with her. (Tr. 1910). Ms.

Asaro believed that the officers were there to arrest her on outstanding warrants. (Tr. 1923). The police offered to help Asaro with her warrants if she would provide information about the murder. (Tr. 1980). Asaro agreed to cooperate, becoming the second material witness against petitioner. (Tr. 1910).

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

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

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

Snatching the purse away from petitioner, Asaro claimed she opened it and saw the victim's identification and coin bag. (Tr. 1846). She became angry, believing that petitioner had another girlfriend. (Tr. 1847).

Asaro claimed that petitioner's response was to tell her that the purse belonged to a woman he just killed. (Tr. 1848). In contrast to Cole's account (and in direct conflict with the crime scene evidence), Asaro claimed petitioner told her that he broke into the woman's house through the *back* door. (Tr. 1848, 1851). Asaro then gave a general account of a surprise encounter with the victim, a struggle and an account of the stabbing. (*Id.*) Unlike Cole, Asaro testified that petitioner drove to the scene (and did not take a bus). (Tr. 1841-42). Like Cole, Asaro admitted that she was also interested in the reward money. (Tr. 1953).

Because the state's case hinged on two highly unbelievable witnesses, defense counsel focused on the lack of forensic evidence linking petitioner to this extremely bloody murder scene, and suggested that police could easily have fed information to Cole and Asaro to resolve this long-unsolved, high-profile crime. For example, numerous hairs were discovered on the victim's shirt and on the rug where her body was found. (Tr. 2871-72, 2920). The rug had been vacuumed eleven days before the crime. (Tr. 2754-55). While some of the hairs matched Gayle or Picus, others did not match either of them or petitioner. (Tr. 2871-72, 2920). Similarly, two pubic hairs found on the rug did not match Gayle, Picus, or

petitioner. (Tr. 2876-77). Head hairs also found on the rug also did not match any of these three individuals. (Tr. 2877). None of these unmatched hairs, nor the knife were ever tested for DNA by either the prosecution or the defense. (Tr. 2867).

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

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

In his federal habeas petition, petitioner advanced a freestanding claim of actual innocence, coupled with a claim that he was convicted on the basis of the perjured testimony of Cole and Asaro. In the litigation of his federal habeas petition before the district court, petitioner filed numerous motions and requests for

discovery seeking access to impeaching information regarding Cole and Asaro, the police investigation of the McClain murder, and for further DNA testing of the untested items and genetic materials. (See Dist. Ct. Doc.'s 9, 10, 11, 35, 37).

As noted earlier, there was trace evidence collected at the scene that did not microscopically match petitioner, the victim, or her husband. In particular, there were both head and pubic hairs found at the crime scene that did not match the victim, her husband, or petitioner. (Tr. 2871-2872, 2876-2877, 2920). Fingernail clippings taken from the victim revealed testable blood and skin samples. Although these samples contained some of the victim's DNA, there was no DNA match to petitioner. In light of Ms. Asaro's account of the crime, indicating that petitioner had scratches on his body, if her account was true, Mr. Williams' DNA should have been found in the victim's fingernail scrapings.

Petitioner also sought access, through discovery motions filed in his 2254 action, to police reports, lab reports, and any DNA profiles developed in the unsolved murder of Debra McClain, which occurred in Pagedale, Missouri, on July 18, 1998. (A-63-65); (See also Dist. Ct. Doc.'s 11, 35, 37). Apart from the temporal and geographical proximity of the murders, there were other remarkable similarities between the two cases. St. Louis County Medical Examiner Dr. Mary Case thought that these murders were connected. (H. Tr. 33).

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

1. The age of the victims (McClain was 40, Gayle was 42);
2. Both women were of similar build and had long brown hair;
3. The injuries were similar in that both were stabbed on the right side of the neck and had numerous stab wounds on the front and back upper trunk area;
4. Crime scenes were similar in that very little was disturbed, each victim was stabbed with a knife from her own kitchen drawer and the victims' purses were missing in both cases; and
5. Both victims had defensive wounds.

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

The murder of Debra McClain remained unsolved at the time of petitioner's 2001 trial and apparently remains unsolved to this day. As a result, any and all police records, crime laboratory testing and any other reports generated in the case are closed records under Missouri's Sunshine Law. See § 610.100 R.S.Mo. (2010). In light of advances in DNA technology and the creation of both the state

and CODIS databases, petitioner also unsuccessfully sought access to any available items of evidence in the McClain case, such as the knife and any trace evidence for DNA testing and, if any profiles have been or are developed, to have such profiles run through these databases. (See Dist. Ct. Doc.'s 34, 42).

As noted earlier, the Missouri Supreme Court in 2015 stayed petitioner's execution and appointed Judge Oxenhandler as a special master to oversee DNA testing of trace evidence from the crime scene of the Gayle murder. However, the Missouri Supreme Court did not authorize the master to conduct any hearings on petitioner's broader claim of actual innocence, nor did the Supreme Court order that Judge Oxenhandler address petitioner's request for evidence regarding the McClain murder. As a result, the proceedings before the master merely involved the parties' making arrangements to have the trace evidence from the scene of the Gayle murder tested by Bode Laboratory. (*Id.*).

After the Bode Laboratories completed testing, they issued a report finding, that despite the fact that several alleles at eleven different loci from the Y-STR DNA testing of the knife did not match the known DNA of petitioner, that the threshold levels were too low to make a conclusive exclusion. After the testing was completed, the parties took the deposition of a Bode Laboratory technician and submitted post-DNA testing briefs. Before petitioner's post-DNA testing brief was filed, he secured the assistance of DNA expert Norah Rudin, Ph.D. After

reviewing all of the DNA reports from Bode Laboratory, Dr. Rudin concluded that Marcellus Williams could not have contributed to the detected DNA profile found on the knife that murdered Felicia Gayle. (A-10-13).

On January 1, 2017, Judge Oxenhandler submitted all of the DNA data and briefs of the parties to the Missouri Supreme Court. Less than a month later, the Missouri Supreme Court summarily denied the habeas petition without any further briefing or argument, in a one line order. (A-1).

CJA appointed co-counsel for Mr. Williams, Laurence Komp, was recently hired to become the Director of the newly created Missouri Capital Habeas Unit (CHU). This CHU began operations on Monday, July 24, 2017. Before that time, counsel for petitioner were relying upon *pro bono* expert assistance and limited financial assistance from the Missouri public defender's office to fund the DNA testing and other expert assistance necessary for executive clemency and the 2015 Rule 91 litigation. As a result, no additional funding was available for any other expert assistance on the DNA issues in this case until the Missouri CHU began its operations less than a month ago.

As a result of the creation of the CHU, federal funding was recently secured for the expert assistance of DNA expert Dr. Greg Hampikian, a DNA expert and professor at Boise State University. In 2015, Dr. Hampikian had generously

agreed to provide *pro bono* assistance in petitioner's clemency and previous Rule 91 proceedings.

Dr. Hampikian was provided with all of the reports and data from the Bode Laboratory and has thoroughly analyzed all of these materials. Dr. Hampikian, in a report that he completed on Sunday August 13, 2017, now removes any doubt that the Y-STR testing of the knife and the male DNA profile developed therefrom conclusively excludes petitioner as the perpetrator of this murder. (A-5-9).

Dr. Hampikian's report comprehensively describes the common laboratory techniques that scientists employ in conducting Y-STR DNA testing to attempt to develop a male DNA profile and explains, in layman's terms, why it is clear that Marcellus Williams did not contribute the male DNA that was found on the knife recovered from the victim's body. (*Id.*). Although it is difficult for Y-STR DNA testing to conclusively identify an individual, Dr. Hampikian explained that even incomplete Y-STR profiles can be utilize to definitively exclude a contributor. (A-5). In explaining this method of exclusion, Dr. Hampikian used an analogy involving a partial social security card number. Dr. Hampikian explained that if only four numbers are visible on the hypothetical card, anyone whose social security number does not include those digits can be eliminated as a match. (*Id.*). Because several of the "called alleles" in both knife handle swabs conducted by

laboratory do not match the alleles of Marcellus Williams, there is a clear exclusion of Marcellus Williams from both knife handle samples. (*Id.* at 6).

Petitioner also intended to submit to the Missouri Supreme Court in a reply, a declaration of Dr. Randell Libby that was submitted in a DNA case litigated in the state of Idaho involving former death row inmate George Junior Porter. Dr. Libby's affidavit demonstrated that Dr. Hampikian's findings were correct and, notwithstanding Bode Laboratory's protocol, that almost every crime lab in the country, including the FBI, can exclude an individual as a contributor from a biological sample if the RFU falls between fifty and two hundred. (A-14-16). Since Dr. Hampikian found that three alleles developed from the knife handle that did not match petitioner's known alleles at the same loci, with an RFU in this range, petitioner could definitely be excluded as contributor of the male DNA that was found on the knife handle.

Based upon Dr. Hampikian's affidavit and all the other previously discovered evidence of innocence, petitioner filed a petition for a writ of habeas corpus, accompanied by a stay of execution motion, before the Missouri Supreme Court on August 14, 2017. This petition raised a claim of innocence under federal and state law and requested an evidentiary hearing because no court had held a hearing on his claim of innocence. (A-17). The Missouri Supreme Court summarily denied the petition and the stay of execution motion on August 15,

2017. (A-1). The present petition for a writ of certiorari is now before this Court for its consideration.

REASONS FOR GRANTING THE WRIT

I.

CERTIORARI SHOULD BE GRANTED TO RESOLVE THE UNANSWERED QUESTION OF WHETHER THE EIGHTH AND FOURTEENTH AMENDMENTS PROHIBIT THE CONTINUED INCARCERATION AND EXECUTION OF A PRISONER WHO PRESENTS A PERSUASIVE POST-CONVICTION CLAIM OF ACTUAL INNOCENCE.

The facts of this case present this Court with an ideal opportunity to resolve the unanswered questions and confusion spawned by this Court's decision in *Herrera v. Collins*, 506 U.S. 390 (1993) regarding whether due process and the cruel and unusual punishment clauses of the Eighth and Fourteenth Amendments prohibits the incarceration and execution of an innocent prisoner. The *Herrera* decision has created a great deal of confusion and conflicts between the various state and federal courts that have addressed whether innocent prisoners have a due process right to post-conviction relief where credible and substantial freestanding claims of innocence are advanced.

In the aftermath of *Herrera*, federal circuit courts of appeals are divided on whether *Herrera* precludes federal habeas petitioners from obtaining habeas corpus relief under 28 U.S.C. § 2254 based on freestanding claims of actual innocence. *See, e.g., Burton v. Dormire*, 295 F.3d 839, 848 (8th Cir. 2002) (finding innocence

claims not cognizable); *Stephenson v. Neal*, 2017 WL 3319296 (7th Cir. 8-4-17) (considering and denying innocence claim on the merits). The question of whether the federal constitution precludes the incarceration and execution of an innocent prisoner has also divided many of the state courts who have addressed the issue. The Illinois Supreme Court determined that this Court’s “conflicted” decision in *Herrera* barred a federal due process claim grounded upon actual innocence and instead relied upon the Illinois Constitution to grant the prisoner a new trial. *People v. Washington*, 665 N.E.2d 1330, 1335 (Ill. 1996). Several other state courts have taken a similar path to grant innocent prisoners relief under state constitutions. *See, e.g., People v. Hamilton*, 115 A.D.3d 12 (N.Y. 2014); *Montoya v. Ulibarri*, 142 N.M. 89, 97 (2007).

However, in states where neither legislation nor the state constitution has been interpreted to permit innocent prisoners to obtain post-conviction relief, innocent prisoners have no legal recourse to obtain any meaningful judicial review despite compelling evidence that they are imprisoned or even condemned to die for a crime that they did not commit.¹ *See State v. El-Tabech*, 610 N.W.2d 737 (Neb. 2000). In that case, the Supreme Court of Nebraska held that, in light of *Herrera*

¹ Missouri has no law or rule permitting post-conviction review of claims of innocence in noncapital cases and, in capital cases, state habeas corpus petitions under Rule 91 must be filed in the Missouri Supreme Court where, as here, the vast majority of such petitions are summarily denied. *See State ex rel. Lincoln v. Cassady*, 511 S.W.3d 11 (Mo. App. W.D. 2016).

and the language of the state's post-conviction act, that an innocent prisoner had no legal recourse in Nebraska courts unless the legislature intervened to expand the scope of the state's post-conviction review act. *Id.* at 748. On the other hand, some states have found that post-conviction relief is available to innocent prisoners because the failure to provide post-conviction relief under these circumstances would violate the due process clause of the United States Constitution. *Ex parte Thompson*, 153 S.W.3d 416 (Tex. Crim. App. 2015).

It is also important to note that these restrictive interpretations of the *Herrera* decision to categorically preclude constitutional claims advanced by inmates with freestanding claims of innocence are demonstrably wrong. In the last decade, this Court has made it clear that *Herrera*, in which the petitioner had only made a weak showing of innocence, did not actually resolve the issue of whether the constitution precludes the execution of an innocent prisoner. *See McQuiggin v. Perkins*, 133 S. Ct. 1924, 1931 (2013); *House v. Bell*, 547 U.S. 518, 554-555 (2006).

This Court's decision in *In re Davis*, 557 U.S. 952 (2009) also strongly suggests that freestanding claims of innocence are constitutionally viable, at least in capital cases. In that case, this Court remanded a death row prisoner's original petition for a writ of habeas corpus under 28 U.S.C. § 2241 to the district court for an evidentiary hearing on his claim of innocence. *Id.* After a hearing was

conducted, the district court found that “executing an innocent person would violate the Eighth Amendment” but that Davis did not establish his innocence. *In re Davis*, 2010 WL 3385081 (S.D. Ga. 8/24/10) at *61.

Herrera recognized that the central purpose of any system of criminal justice is to convict the guilty and free the innocent. *Herrera*, 506 U.S. at 398. In addition, the concept of “liberty from bodily restraint has been recognized as the core of the liberty protected by the Due Process Clause from arbitrary governmental action.” *Youngberg v. Romeo*, 457 U.S. 307, 316 (1982). Because an innocent person “has a liberty interest in remaining free from punishment,” the execution or continued incarceration of an innocent person violates elementary fairness and “runs afoul” of that person’s due process rights. *Hamilton*, 115 A.D.3d at 26.

Both the *Herrera* decision itself and subsequent decisions clearly indicate that strong procedural and substantive due process arguments can be made that the continued incarceration and execution of an innocent prisoner would violate both procedural and substantive due process under the Fourteenth Amendment. *Herrera*, 506 U.S. at 436, 437 (Blackmun, J., dissenting). Although the majority of the court in *Herrera* declined to find that substantive due process would be violated by the execution of an innocent prisoner, at least six members of the court did agree that a truly persuasive case of actual innocence would render a

conviction unconstitutional. *Id.* at 417. The Illinois Supreme Court in *Washington* found that the continued imprisonment of an innocent person would violate both substantive and procedural due process. The court in *Washington* held that procedural due process required post-conviction relief because “to ignore such a claim would be fundamentally unfair.” *Washington*, 665 N.E.2d at 1336. The court in *Washington* also held that “imprisonment of the innocent would also be so conscience shocking as to trigger operation of substantive due process.” *Id.*

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

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

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

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

Another central concern of the Eighth Amendment is its protection against disproportionate punishment. *See Montgomery v. Louisiana*, 136 S. Ct. 718, 732 (2016). This Court has identified four “penological justifications” for imposing a life without parole sentence in *Montgomery*: (1) retribution; (2) deterrence; (3) incapacitation; and (4) rehabilitation. *Id.* at 733. None of these purposes are served and are, in fact, undermined when the convicted individual is actually innocent. Therefore, because punishment of an actually innocent person is inherently disproportionate to the acts committed by that person, such punishment violates the constitutional prohibition on cruel and unusual punishment. *Hamilton*, 115 A.D.3d at 26.

These state legislative and legal developments involving innocence jurisprudence in the aftermath of *Herrera* dictate that its holding should be abandoned, reexamined, and clarified. Evolving standards of decency clearly dictate that it is constitutionally impermissible to allow condemned prisoners to remain incarcerated or forfeit their lives if they have a substantial claim of innocence. This Court’s discretionary review is necessary to ensure that innocent prisoners, such as petitioner, have adequate judicial process to litigate their claims.

II.

CERTIORARI SHOULD BE GRANTED TO ALLOW THIS COURT TO ADDRESS WHETHER THE CONSTITUTION FORBIDS AN EXECUTION FROM TAKING PLACE WHERE NEWLY DISCOVERED EVIDENCE INVOLVING EXCULPATORY DNA RESULTS AND OTHER EVIDENCE RAISES REASONABLE DOUBTS REGARDING THE CONDEMNED MAN'S GUILT.

Despite the unanswered questions regarding the scope of *Herrera* and its progeny, an appropriate middle ground advocated by numerous legal commentators is that the constitution prohibits an execution from proceeding where compelling evidence emerges during post-conviction proceedings that raise reasonable doubts regarding the condemned man's guilt. In such situations, even if the evidence might not meet the high threshold suggested in *Herrera*, the Constitution requires that a death sentence must be commuted if there are reasonable and substantial doubts regarding the condemned man's guilt. The facts of this case provide the court an ideal opportunity to determine this important question that is likely to recur in several upcoming cases in light of advances in DNA technology in states that do not afford prisoners an adequate process to hear claims of innocence.

Various commentators have differed as to what standard of proof a condemned prisoner must meet to avoid execution on a freestanding claim of innocence. *See, e.g.,* R. Hardaway, *Beyond A Conceivable Doubt: The Quest For A Fair And Constitutional Standard Of Proof In Death Penalty Cases*, 34 New

Eng. J. on Crim. And Civ. Confinement, (Summer 2008). The Model Penal Code recommends that the death penalty not be an option if there is any remaining doubt about the defendant's guilt. Model Penal Code § 210.6(1)(f) (2000). Another possible middle ground between the *Herrera* standard and the Model Penal Code would be for the court to adopt the actual innocence standard of *Schlup v. Delo*, 513 U.S. 298 (1995), in reviewing claims of innocence in capital cases. Under this framework, a death row inmate in petitioner's situation should have his sentence reduced to life imprisonment if he is probably innocent, which means that, based upon all of the existing evidence, "it is more likely than not that no juror would have found petitioner guilty beyond a reasonable doubt." *Id.* at 327.

It would be contrary to the dignity of man and thus the Eighth Amendment to maintain a system that allows for the execution of innocent people. *Trop v. Dulles*, 356 U.S. 86, 100 (1958). This Court in *Robinson v. California*, 370 U.S. 660 (1962), hypothesized an extreme example of disproportionate punishment when it noted that "even one day in prison would be a cruel and unusual punishment for the crime of having a common cold." (*Id.* at 667). Allowing the execution of a person who is likely innocent or even possibly innocent is an even more extreme example.

For many of the same reasons, allowing the execution of a potentially innocent person presents an extreme violation of a criminal defendant's substantive

due process rights. As Justice Blackman’s dissenting opinion in *Herrera* makes it clear, maintaining a system that permits the execution of factually innocent people is a far more severe violation of substantive due process than acts that have been held unconstitutional in the past. *Herrera*, 506 U.S. at 430 (Blackmun, J., dissenting). Justice Blackmun advocated that a prisoner must show that he is “probably innocent” and briefly outlined how that standard might be applied. *Id.* at 442. This proposed test mirrors *Schlup*.

In addition, the more stringent beyond a reasonable doubt standard for criminal cases, as opposed to the lesser standard for civil cases, rests upon the value American society places on personal liberty, reflected in the maxim that it is better to allow ten guilty men to go free than to allow one innocent man to be convicted. *See In Re Winship*, 397 U.S. 358, 371 (1970) (Harlan, J., concurring). Since the societal interest in life is deserving of even more protection and respect than personal liberty, Justice Harlan’s position could be advanced a step further to require that an even higher standard than beyond a reasonable doubt must be met before the state may constitutionally take a convicted murderer’s life.

Certiorari should be granted to address whether and to what extent a condemned man must prove his innocence before his execution should be deemed a constitutionally intolerable event requiring, at a minimum, a reviewing court to set aside an impending death sentence as unconstitutional. This Court’s

discretionary intervention is necessary not only to save an innocent man's life, but to address this important issue that will undoubtedly recur in future cases.

III.

CERTIORARI SHOULD BE GRANTED TO ADDRESS WHETHER THE MISSOURI SUPREME COURT VIOLATED PETITIONER'S DUE PROCESS AND EQUAL PROTECTION RIGHTS BY FAILING TO AFFORD PETITIONER AN EVIDENTIARY HEARING ON HIS CLAIM OF INNOCENCE AND REEXAMINE PETITIONER'S DEATH SENTENCE UNDER ITS PROPORTIONALITY REVIEW STATUTE AS REQUIRED BY STATE LAW.

The manner in which the Missouri Supreme Court summarily disposed of petitioner's habeas corpus petition without affording him an evidentiary hearing and in failing to follow its own law that requires that court to reexamine the proportionality of death sentences where newly discovered evidence of innocence emerges implicates several constitutional concerns under the Fourteenth Amendment. First and foremost, because petitioner has never been afforded a hearing in any state or federal court to allow a trier of fact to evaluate the substance and credibility of his claim of innocence based upon the new DNA evidence and other evidence set forth above that undermines the state's case, this Court should intervene to address whether due process requires that an innocent prisoner under a sentence of death be afforded an evidentiary hearing where there is a colorable claim of innocence. *See In re Davis*, 557 U.S. 952, 952 (2009) (Stevens, J., concurring). As Justice Stevens' concurring opinion in *Davis* noted, because no

state or federal court has ever conducted a hearing to assess the reliability of the claim of innocence in that case, “[t]he substantial risk of putting an innocent man to death clearly provides an adequate justification for holding an evidentiary hearing.” *Id.*

Ironically, as Justice Scalia’s dissent in *Davis* points out, Troy Davis was afforded much more due process by the state of Georgia on his claim of innocence than the Missouri Supreme Court afforded to petitioner. Mr. Davis’s post-conviction claim of innocence was thoroughly analyzed by the Georgia Supreme Court in a published decision and that court concluded that the newly discovered evidence was not sufficient to probably produce a different result at a retrial. *Id.* at 953 (Scalia, J., dissenting) citing *Davis v. State*, 660 S.E.2d 354, 358-363 (Ga. 2008).

Mr. Davis also received a stay of execution after seeking clemency before the Georgia Board of Pardons and Paroles where he was given the opportunity to present every witness he desired to support his allegation that there was doubt regarding his guilt. *Id.* In contrast, Missouri’s unstructured, secret, and discretionary clemency process affords no such rights to petitioner in his ongoing application for commutation of his death sentence by the Governor of the state of Missouri. See § 217.800 R.S.Mo. (2010).

The Missouri Supreme Court's failure provide petitioner an evidentiary hearing on his claim of innocence in order to provide him an adequate opportunity to prove his innocence also violated due process under *Williams v. Kaiser*, 323 U.S. 471 (1945). In *Williams*, this Court reversed the Supreme Court of Missouri outright for the reason that the original habeas corpus proceeding conducted in the Supreme Court of Missouri failed to accord the prisoner a full and fair evidentiary hearing on his federal constitutional claim. *Id.* at 473; *See also Richardson v. Miller*, 716 F.Supp. 1246, 1254-1255 (W.D. Mo. 1989). The due process issue here is also similar to the question upon which this Court granted certiorari in *Case v. Nebraska*, 381 U.S. 336, 337 (1965), but ultimately did not decide after Nebraska enacted an adequate post-conviction procedure.

Additional distinct Fourteenth Amendment violations also arise from the failure of the Missouri Supreme Court to reevaluate petitioner's death sentence as required by state law. Missouri's mandatory proportionality review statute requires the consideration of "whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime, the strength of the evidence, and the defendant." § 565.035.3 R.S.Mo. (2010). In the petition filed in the court below, petitioner argued that in light of the new recent exculpatory DNA testing results and other evidence of innocence that came to light after his direct appeal, that the Missouri Supreme Court should

reassess the proportionality of petitioner's death sentence and reach the same result that was reached in the capital direct appeal involving former Missouri death row inmate Timothy Chaney. In this case, as in *Chaney*, there was no eyewitness, confession or physical evidence establishing Marcellus Williams's guilt. See *State v. Chaney*, 967 S.W.2d 47, 60 (Mo. banc 1997).

The state habeas petition also argued that a reassessment of the propriety of petitioner's death sentence was required under *State ex rel. Amrine v. Roper*, 102 S.W.3d 541 (Mo. banc 2003). In *Amrine*, six of the seven members of the Missouri Supreme Court indicated that Missouri's proportionality review scheme requires the court to conduct an ongoing review of the propriety of a condemned prisoner's death sentence when new evidence of innocence emerges. *Id.* at 547 (majority opinion); *Id.* at 549-550 (concurring opinion of Wolff, J.); *Id.* at 552 (dissenting opinion of Price, J.).

These opinions in *Amrine* found that middle ground is necessary in habeas corpus cases where a condemned man presents significant post-conviction evidence raising grave doubts about his guilt that might not meet the higher standard for reversal of the underlying conviction under *Amrine*, but would nevertheless be sufficient to require that a prisoner's death sentence be overturned and his sentence reduced to life without parole. Even where all of the evidence is legally sufficient to establish guilt and does not provide clear and convincing

evidence of innocence, the death penalty should be off the table where substantial doubts regarding guilt exist. As Judge Price's dissent in *Amrine* advocates, where evidence of possible innocence substantially undercuts confidence in the verdict, a death sentence should be set aside. 102 S.W.3d at 552 (Price, J. dissenting).

In his habeas petition filed in the Missouri Supreme Court, petitioner argued that he had a due process and equal protection right to have a new proportionality review under *Amrine*, not only because of the newly discovered evidence, but because the 2003 proportionality review the court conducted in his direct appeal contained two fundamental flaws. In addressing the strength of the evidence in its original proportionality review of petitioner's sentence on direct appeal, the Supreme Court stated: "Williams confessed to the murder." *State v. Williams*, 97 S.W.3d 462, 475 (Mo. banc 2003). This passage is, at best, misleading because petitioner did not confess to the police. By any objective measure, the evidence that petitioner allegedly "confessed" to the murder to two paid informants, who were convicted felons, does not come anywhere close to having equal weight to a voluntary confession to the police. *See State v. Barton*, 240 S.W.3d 693, 714-716 (Mo. banc 2008) (Wolff, J., dissenting) (noting that a confession to the crime to a jailhouse snitch does not constitute a persuasive admission of guilt).

Second, it is clear that the proportionality review that the Missouri Supreme Court conducted in 2003 did not conform with the requirements of the statute. In

2010, the Missouri Supreme Court recognized that its earlier proportionality review procedure provided less than the full proportionality review required by statute. *See State v. Deck*, 303 S.W.3d 527, 557-559 (Mo. banc 2010); *State v. Davis*, 318 S.W.3d 618, 643-645 (Mo. banc 2010). § 565.035.3 has not changed since the Missouri Supreme Court considered the proportionality of petitioner's sentence in his direct appeal in 2003. Coupled with the mistake of fact in its 2003 proportionality review in describing the strength of the evidence presented at petitioner's trial, petitioner argued that he had a constitutional right to have his death sentence reexamined under *Amrine*, *Deck*, and *Davis*.

The *Deck* and *Davis* opinions are clearly retroactive. Under Missouri law, where a new decision involves the interpretation of a statute that was in place at the time of conviction, no issue of retroactivity arises. *See State v. Severe*, 307 S.W.3d 640, 642-643 (Mo. banc 2010). Because the proportionality statute remained unchanged between the time of petitioner's direct appeal and the 2010 opinions in *Deck* and *Davis*, the Missouri Supreme Court's failure to give him the benefit of those decisions and reexamine his death sentence violates due process under *Fiore v. White*, 531 U.S. 225 (2001) and *Bunkley v. Florida*, 538 U.S. 835 (2003).

The Missouri Supreme Court's failure to conduct a new proportionality review under the framework it established in 2010 in the *Deck* and *Davis* decisions also violated petitioner's right to equal protection of the law. The equal protection

clause of the Fourteenth Amendment imposes upon a state the requirement that all similarly situated persons should be treated alike. *Plyler v. Doe*, 457 U.S. 202, 216 (1982). Generally, legislation or a court decision will be presumed to be valid if the disparate treatment of a class of citizens is rationally related to a legitimate state interest. *See Vance v. Bradley*, 440 U.S. 93, 97 (1979). However, strict scrutiny of state laws is required if a suspect class is involved or “when state laws impinge on personal rights protected by the Constitution.” *Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 440 (1985). Under either of these standards of review, the Missouri Supreme Court was constitutionally required to review petitioner’s death sentence in the same manner as it did in considering the proportionality of Mr. Deck’s and Davis’ sentences. There is simply no rational basis for reviewing petitioner’s death sentence in a different manner than the death sentences imposed against Mr. Deck and Mr. Davis.

The Missouri Supreme Court’s failure to conduct a new and fair proportionality review in accordance with state law noted above also violated petitioner’s right to due process under *Hicks v. Oklahoma*, 447 U.S. 443, 446 (1980). In *Hicks*, the court found that a due process violation occurred when a state court did not afford a criminal defendant procedural protections guaranteed by state law. *Id.* A due process violation occurred here because the state court’s failure to conduct a new proportionality review, “arbitrarily deprive[d] the

defendant of a state law entitlement.” *See Laboa v. Calderon*, 224 F.3d 972, 979 (9th Cir. 2000).

As pointed out in the habeas petition below, a distinct due process violation also arises from the Missouri Supreme Court’s failure to conduct a proportionality review that considers all of the evidence of innocence under the principles announced by this Court in two civil punitive damages cases where the court held that due process required a heightened review in any civil case where punitive damages are assessed against a defendant. *See Honda Motor Company, Ltd. v. Oberg*, 512 U.S. 415, 432 (1994); *BMW v. North America v. Gore*, 517 U.S. 559, 575 (1996). In *Gore*, this Court held that punitive damages for a civil defendant’s conduct would not be appropriate unless the conduct was sufficiently reprehensible to render punitive damages proportionate to the degree of the defendant’s misconduct. *Id.* These same due process principles require a heightened review when a person’s life, rather than civil damages are at stake.

Although this Court has held that proportionality review is not constitutionally required in capital cases, procedural due process protections are clearly implicated and were violated by the Missouri Supreme Court’s treatment of petitioner’s claim of innocence. Due process requires that a condemned man’s claim of innocence receive much more thorough and careful scrutiny and a hearing than what occurred, where complex scientific issues surrounding the DNA results,

that are difficult for laymen and judges to grasp, are involved. The hasty and summary denial of this claim by the court below undermines the integrity of the criminal justice system and, if left undisturbed will result in a constitutionally intolerable event next Tuesday evening - - the execution of an innocent man.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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