No. _____

CAPITAL CASE
EXECUTION SCHEDULED FOR FEBRUARY 7, 2023, AT 6:00 P.M.

IN THE
SUPREME COURT OF THE UNITED STATES

LEONARD TAYLOR,

***Petitioner*,**

vs.

DAVID VANDERGRIFF, 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

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 scientific 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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Petitioner, Leonard Taylor, 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.

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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 Rule 91 is unpublished and is published in the Appendix at A-1.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 February 6, 2023. 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 AND STATUTORY 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."

This case involves Section 1 of the Fourteenth Amendment to the United States Constitution which provides in pertinent part: "No state shall make or enforce any law which shall 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 laws."

STATEMENT OF THE CASE

A. Procedural History

Petitioner Leonard Taylor was convicted, after a jury trial, in the Circuit Court of St. Louis County, Missouri, on February 28, 2008. *See State v. Taylor*, 2104R-05338-01. Mr. Taylor was convicted of four counts of first-degree murder and four counts of armed criminal action. He was sentenced to death on each murder count and to consecutive life sentences on the armed criminal action counts.

Mr. Taylor filed a timely appeal. The Missouri Supreme Court affirmed his convictions and sentences on October 27, 2009. *See State v. Taylor,* 298 S.W.3d 482 (Mo. banc 2009). After rehearing was denied, Mr. Taylor filed a petition for writ of certiorari before this Court that was denied on May 24, 2010. *Taylor v. Missouri*, 560 U.S. 928 (2010).

On March 1, 2010, Mr. Taylor filed a timely *pro se* motion for post-conviction relief under Missouri Supreme Court Rule 29.15. *See Taylor v. State*, No. 10SL-CC01158. After a limited evidentiary hearing, the post-conviction court denied Mr. Taylor's amended motion. The Missouri Supreme Court, on October 30, 2012, affirmed the post-conviction court's denial of relief. *See Taylor v. State,* 382 S.W.3d 78 (Mo. banc 2012). This Court subsequently denied certiorari in *Taylor v. Missouri,* 569 U.S. 1032 (2012).

Mr. Taylor, through undersigned CJA appointed counsel, filed a timely petition for a writ of habeas corpus under 28 U.S.C. § 2254 on December 3, 2013, in the United States District Court for the Eastern District of Missouri. The case was assigned to the Honorable Rodney W. Sippel, Chief United States District Judge. On March 31, 2019, Judge Sippel denied relief but issued Mr. Taylor a certificate of appealability on Mr. Taylor's claim that he was denied effective assistance of counsel when trial counsel failed to make a closing argument during the penalty phase of the trial. *Taylor v. Steele*, 372 F. Supp. 3d 800 (E.D. Mo. 2019). After his timely Rule 59(e) motion was denied, Mr. Taylor filed a timely notice of appeal.

After briefing and argument, the Eighth Circuit issued an opinion on July 26, 2021, affirming the district court's denial of his habeas corpus petition. *Taylor v. Steele*, 6 F.4th 796 (8th Cir. 2021). Thereafter, the Court of Appeals denied petitioner's petition for rehearing and suggestion for rehearing en banc on October 19, 2021.

This Court subsequently denied Mr. Taylor's petition for a writ of certiorari on May 31, 2022. *Taylor v. Blair*, 142 S. Ct. 2757 (2022). Upon application of the attorney general, the Missouri Supreme Court set petitioner's execution for February 7, 2023, at 6:00 p.m.

On August 28, 2021, a new law passed by the General Assembly went into effect that gives prosecuting attorneys the right to file a motion in the trial court to

allow a prisoner, who was wrongly convicted, to obtain a hearing to establish that there is clear and convincing evidence that he is actually innocent or that his conviction was imposed in violation of the Constitution. *See* § 547.031 RSMo Supp. (2021). Within a matter of days after this statute went into effect, petitioner filed an application to the conviction investigations review unit (C.I.R.U.) of the St. Louis County Prosecutors Office asking them to review his claim of innocence. In the weeks and months thereafter, counsel for petitioner remained in constant contact with the C.I.R.U. and provided them with evidence from the trial record, state post-conviction proceedings, and new evidence that established that he could not have possibly committed this crime.

On January 31, 2023, Wesley Bell issued a press release that he did not believe he had sufficient grounds at this time to invoke the provisions of § 547.031. However, Mr. Bell, in a letter, indicated he would join in petitioner's motion to the Missouri Supreme Court to withdraw their warrant of execution and issue a new execution date under court rules between ninety and one hundred days hence, to give both counsel and the C.I.R.U. time to investigate petitioner.

On February 2, 2023, the Missouri Supreme Court denied petitioner's motion to delay his execution. On the same date, petitioner filed a petition for a writ of habeas corpus in the Missouri Supreme Court accompanied by a motion for a stay of execution which raised a freestanding claim of actual innocence, a due process

claim, and an ineffective assistance of counsel claim. After the state's response and petitioner's reply were filed, the Missouri Supreme Court summarily denied the petition and the motion for stay of execution in a one page order on February 6, 2023. (A-1).

B. Statement of Facts

In the late afternoon of December 3, 2004, Angela Rowe and her three children were found shot to death at their home in Jennings, Missouri. The police investigation of the crime immediately focused upon Angela's live-in boyfriend Leonard Taylor to the exclusion of any other possible suspects. At the time the victims were found, Leonard had a substantial prior criminal record primarily for drug and fraud related crimes. He had been recently paroled from a Missouri forgery conviction, had absconded, and a parole violation warrant had been issued for his arrest.

An investigator from the medical examiner's office, Joseph Lebb, arrived at the scene shortly after the bodies were found. Mr. Lebb's report and his pre-trial deposition indicated that rigor mortis was present when he examined the bodies of Angela Rowe and Tyrese Rowe. (*See* Exh. 5; Exh. 6, pg. 20). It is a well-settled principle of forensic science that rigor mortis sets in within approximately twenty four hours after death and disappears approximately thirty six hours after death. *See e.g.* Richard Saferstein, *Forensic Science, An Introduction*, (2nd ed. 2011), pp. 62-

63. Medical examiner, Dr. Phillip Burch, conducted an autopsy of the victims the following day and concluded and testified under oath in his pre-trial deposition, that the victims' time of death was approximately two to three days before the bodies were found. (*See* Exhs. 7, 8).

After the police conducted extensive interviews of Angela's family, friends, employer, and officials from the childrens' school, it was evident that Angela and the children were not killed until the week of November 29, which was the week after Thanksgiving. Thanksgiving in 2004 fell on November 25, 2004.

A neighbor, Elmer Massey, told the police and testified at trial that he saw Angela outside of her home on the weekend after Thanksgiving and also saw a light-skinned black man going in and out of Angela's home during the week of November 29. (Tr. 1600-1614). Angela's sister, Gerjuan Rowe, told the police and testified in her deposition that she had spoken to Angela on the phone and met her in person on November 27 and 28. (Exhs. 12, 13). When Gerjuan last saw her sister, Angela had an abrasion on her forehead and what appeared to be a black eye, injuries that were subsequently corroborated by the autopsy report. (*See* Exhs. 7, 12). The two aunts of the children, Beverly and Sherry Conley, told police that they had spoken to one of the children and Angela on the 27th and 28th of November. (Exhs. 14, 15, 16, 17). Other evidence, both direct and circumstantial, came to light during the police investigation that other persons (either the victims or the killer) were alive and inside

the home between November 26 and December 2, 2004. This evidence will be further chronicled below.

The ballistics evidence indicated that Angela and her children were shot and killed by the same weapon, either a .38 or .357 caliber pistol. The actual murder weapon was never recovered.

After examining Leonard's cell phone records, the police investigation focused upon Leonard Taylor's brother, Perry Taylor.[1] Perry Taylor was an over the road truck driver. In the days after the bodies were found, the police hounded Perry and tracked his movements. The police detained him in Atlanta and in New Jersey and interrogated him about the murder. (*See* Exh. 18). After he arrived back in St. Louis on December 8, 2004, Perry was arrested for hindering prosecution. After a lengthy interrogation, Perry told the police that Leonard had admitted to him that he killed Angela and the kids. After he gave this statement, he was released from custody.

In his pre-trial deposition and in his testimony at Leonard's trial, Perry recanted his statements to the police and told the jury that what he told the police was not true, and that the police threatened him and his mother and provided him with certain details of the crime. (*See* Exh. 19; Tr. 855-893). The police told him that unless he gave a statement he would not be released from jail. The veracity of Perry's

[1] Perry died of cancer in 2015.

statements to police are also called into question by the fact that several details he provided in his statement to the police could not possibly be true. These inconsistencies will be chronicled in greater detail below.

At trial, the only direct evidence that the prosecution could muster was Perry Taylor's statements to the police, that petitioner had told him that he committed the murders. The only other evidence the prosecution presented was totally circumstantial. The prosecution utilized Angela Rowe's phone records, petitioner's phone records, Perry Taylor's phone records, and Gerjuan Rowe's phone records, to make an argument to the jury that, since phone activity on Angela's line ceased after Thanksgiving and petitioner never called her after he left town, the reason Leonard did not call home was because he knew that Angela and the kids were dead because he killed them. The prosecution also made an effective argument at trial that the fact that petitioner left town using an assumed name and when he was arrested in Kentucky, he was going by a different alias and possessed several forged documents and identifications, and that this indicated a consciousness of guilt.

During his trial testimony, Dr. Burch drastically changed his opinion regarding the time of death from two to three days before the bodies were found and told the jury that they could have been killed as much as two to three weeks earlier. (Tr. 1196). In light of the rigor mortis present in Angela's and Tyrese's bodies, this new opinion was not scientifically possible and is demonstrably false because there

was irrefutable evidence that the children were in school ten days before their bodies were found.

The defense team at trial was blind-sided by Dr. Burch's trial testimony because in his pre-trial deposition he estimated the time of death as two to three days before the bodies were found. (Exh. 6). Defense counsel, Karen Kraft, in her opening statement, told the jury that Dr. Burch would testify that the time of death was two to three days before their bodies were found, and as a result, Leonard could not have possibly been the murderer because of his alibi. (Tr. 818). Had this evidence been disclosed to defense counsel prior to trial, counsel would have had an opportunity to hire an expert to contradict and completely discredit Dr. Burch's trial testimony[2]. (*See* Exh. 25).

Assistant prosecutor Alan Key interviewed Beverly and Sherry Conley prior to trial and convinced both of them to change the statements they provided to police, that the victims were alive on Thanksgiving weekend, by convincing them that their statements to police could not possibly be true in light of Angela's phone records. (Tr. 1671-1694). However, Elmer Massey and Gerjuan Rowe stuck to their stories that they had seen Angela alive on the Friday and Saturday after Thanksgiving. Mr. Massey, who had absolutely no motive to lie, testified at trial. (Tr. 1600-1614).

[2] Dr. Burch's testimony is further called into question by the fact that he gave false testimony at the trial of Patricia Stallings that led to her wrongful conviction. (*See* Exh. 23).

However, Gerjuan Rowe did not appear to testify, despite being under subpoena, because she had pending warrants out for her arrest. As a result, the trial court only admitted very small portions of her pre-trial deposition into evidence [3].

Apart from Perry Taylor's recanted statement to the police and the false testimony from Dr. Burch regarding the time of death, there were two other pieces of circumstantial evidence presented by the prosecution that, in all likelihood, convinced the jury to convict Mr. Taylor. First, as noted earlier, phone records from Charter Communications, the carrier for Angela's home phone, were introduced into evidence. According to Charter's records custodian Cathy Herbert's testimony, the phone records reflected no calls were made to or from that phone number after November 24, 2004. (Tr. 1530-1531). Ms. Herbert testified that these records reflected all outgoing calls and some, but not all, incoming calls to Angela's phone number. (Tr. 1509-1513, 1516, 1550-1551).

However, evidence came to light during Leonard's 29.15 proceeding that the Charter phone records were inaccurate and that calls were made from Angela's line that did not show up in Charter's records when they were cross referenced to the

[3] The trial court excluded Gerjuan's deposition testimony regarding Angela's calendar that indicated in Angela's handwriting that Leonard would often leave town for extended periods of time and would not call her until he was on the way home. (Tr. 1641-1648). The trial court also refused to admit portions of Gerjuan's deposition regarding the fact Angela called her from a pay phone on November 28 and she met with Angela and loaned her fifty dollars. (Tr. 1651-1655).

Sprint cell phones of Leonard, Perry Taylor, and Gerjuan Rowe. (29.15 Tr. 41-53). Specifically, the Sprint records indicated that Perry and Leonard received calls from Angela that did not appear as outgoing calls in Angela's Charter records. (*Id.*).

Ms. Herbert, at the 29.15 hearing, compared the Charter records of Angela's landline with the Sprint records on Gerjuan Rowe's cell number. This comparison revealed that Gerjuan made seventeen calls from her number (314-517-1270) that were listed on Angela's Charter records coming from a different phone number (314-878-1575). (29.15 Tr. 56-65).

It also came to light that it was Charter's policy, when responding to requests for call records from 2004 through 2008, to provide a disclaimer that their phone records do not contain all calls to and from the requested phone number. (*See* Exhs. 10, 11). Based upon this information, the records custodian from Charter Communications who testified at trial, admitted at the 29.15 hearing that her testimony at trial, that Angela's phone records reflected all outgoing calls, was false. (29.15 Tr. 53-54). The prejudice that resulted from this false testimony was exacerbated by the trial court's exclusion of Dejuan Rowe's deposition testimony that Angela called her from a pay phone on Thanksgiving weekend.

Dan Jensen, a records custodian from Sprint Nextel, testified at trial that the Sprint records of Perry and Leonard's cell phones captured all incoming and outgoing calls in the Sprint network. Mr. Jensen also testified at the trial that Sprint's

billing records for Gerjuan's cell phone did not indicate the telephone number for incoming calls but merely designated them as "incoming." (Tr. 1451-1452).

At the 29.15 hearing, Mr. Jensen compared Angela's Charter records with the Sprint records for Gerjuan, Leonard, and Perry, and testified that several outgoing calls made from Angela's landline to Gerjuan's cell phone were not reflected on the Sprint records as incoming calls. (29.15 Tr. 112-115). Mr. Jensen also agreed that when Gerjuan's cell phone called Angela's landline, the Charter records showed a different incoming phone number. (*Id.* at 111-112). Like Ms. Herbert, Mr. Jensen acknowledged that the Sprint records of both Perry and Leonard's cell phones showed incoming calls from Angela's landline that were not in the Charter records as outgoing calls. (*Id.* at 106-110).

Mr. Jensen also found that there were calls between Perry and Leonard's phones that showed incoming calls and outgoing calls between them that were not reflected in both sets of Sprint records. (*Id.* at 116). Based upon these discrepancies between the records, Mr. Jensen testified that Sprint does not guarantee one hundred percent accuracy of its phone records, which was not made clear to the jury during Mr. Jensen's trial testimony. (*Id.* at 117).

There were also alternative explanations for Leonard's use of an alias and his possession of other forged identification documents. If he had been given a hearing in state court, it can be established that Leonard was on the run because he feared

retaliation from the Gangster Disciples because of a drug deal gone bad. Leonard also knew that he had an active arrest warrant lodged against him for a parole violation. Leonard's criminal history also provides an alternative explanation because he had a history of using various forged identification papers to commit petty crimes such as credit card fraud and forgery.

Finally, new evidence has recently emerged that corroborates Leonard Taylor's alibi and provides additional compelling evidence that the victims were still alive after Leonard left St. Louis and flew to Southern California on November 26, 2004. On the weekend after Thanksgiving, Leonard located a daughter he had fathered with his girlfriend in California thirteen years earlier, just before he was sent to federal prison on drug charges. He located his daughter in Compton, California, and went to her residence on the weekend after Thanksgiving to meet her for the first time. His daughter, Deja Taylor, who was thirteen years old in 2004, has recently provided a sworn declaration. (*See* Exh. 1). During this visit with her father, Deja recounts that Leonard called his girlfriend Angela in St. Louis to tell her that he had found and met his long-lost daughter. During this conversation, Leonard put Deja on the phone, and she briefly spoke to Angela and one of the children. These events are corroborated by declarations from Deja's mother, Mia Perry, and her sister, Ashley Winfrey. (*See* Exhs. 2, 3).

As alluded to earlier, there are several aspects of Perry Taylor's statements to police that are demonstrably false when viewed in light of other irrefutable evidence in the case. First, Perry told the police that the first time Leonard admitted to him that he killed Angela and the kids was on November 22, 2004. (Exh. 18). This could not possibly be true because school records indicated that all three children went to school on that date and also attended school on November 23, 2004. Second, Perry told the police that Leonard told him that he shot Angela after she came at him and cut him with a knife. (*Id.*). This could not possibly be true because upon his arrest, the Madisonville, Kentucky police and the Major Case Squad, stripped him naked and photographed his body. There was not a mark on him. If Leonard had been stabbed or wounded in a knife attack that occurred no more than two weeks earlier, there would have been physical evidence to support Perry's account of the crimes.

This aspect of Perry's statement regarding the knife attack is also inconsistent with what the police found at the crime scene. No blood matching petitioner was found at the scene. There was no evidence of any sort of struggle and no knife was recovered. Instead, it appears that all of the four victims were shot execution style. Perry also told the police that Leonard told him that he initially shot Angela in the stomach before shooting her in the head. However, the autopsy revealed that the only bullet wounds on her body were to the head, her arms, and a graze wound on her upper left chest. She was not shot in the stomach. (*See* Exh. 7).

Finally, there are several red flags that indicate that Perry's statement to the police was coerced and given under duress. It is abundantly clear that without Perry's statement the police had no case against Leonard and no charges would have ever been filed. The police were under enormous pressure to secure some direct evidence to support an indictment against Leonard. This would explain the extraordinary lengths that the police took in hounding Perry, following him, and detaining him, all across the country when he was on the road driving his truck. Another red flag involves the circumstances of his arrest for hindering prosecution and interrogation on December 8, 2004. On this date, Perry was interrogated for over three hours. The tape of this recording corroborates Perry's recantation that he was threatened with a long term of imprisonment and that the police promised to release him if he implicated his brother.

This was the third time that he was arrested, detained, and interrogated in five days in three different states. Perry previously denied knowing anything about the murders when he was interrogated in Atlanta and New Jersey. (Exh. 18).

During his videotaped interview, Perry told the police that "you have threatened me with my job, my future, my freedom." (Tr. 1061). Perry obviously felt threatened because he was charged with hindering prosecution and faced a prison term of up to seven years. (*Id.*). The interrogating officer repeatedly told Perry to consider this charge a threat. (*Id.* at 1061-1062). The interrogating officer also told

Perry: "the answers that you [give] probably in the next fifteen or twenty minutes are probably going to dictate the next good portion of what happens to the rest of your life." (*Id.* at 1060). The interrogating officers also implicitly threatened to harm Perry's mother.

Almost immediately after he gave a statement to the police and was released from custody, Perry began recanting his statement to anyone who would listen. Prior to trial, Perry was deposed by petitioner's defense counsel. (*See* Exh. 19). During this sworn deposition, Perry steadfastly maintained that his statement to the police on December 8, 2004, was not true and was the result of police coercion.

Perry described the circumstances regarding his arrest and being jailed before he was interrogated at the Jennings Police Station. Before his videotaped statement was given, Perry told him that the police took him out of his cell and put him in a car in the parking lot and told him what he needed to say to obtain his release from jail. (*Id.*). Perry also testified in his deposition that the police made threats against his mother, Jessie Bland. Ms. Bland lived in a high rise apartment and the police told him she might have an accident where she would fall out a window if Perry wouldn't play ball. (Exh. 19, p. 29). Based upon these facts, false confession experts James Trainum and Dave Thompson completed preliminary reports that set forth several factors that call into question the veracity of Perry's statements to police. (*See* Exhs. 21, 26, 27).

When the prosecution called Perry to testify at trial, he apparently balked at testifying until he was assured by the prosecutor that they would not arrest his mother to bring her to court to testify. (Tr. 851-853). On the witness stand, Perry once again recanted his statements to police and reiterated the numerous threats and coercive tactics that were used to induce him to implicate his brother in the murders. (*Id.* 855-893). Despite his recantation, the state was permitted to introduce his prior inconsistent statements to the police as substantive evidence of guilt under § 491.070 RSMo (2000).

The checkered backgrounds of the interrogating officers raise further questions regarding the veracity of Perry's statements. John Zlatic is currently incarcerated on felony charges, and Brian Rossomanno has been embroiled in civil rights litigation as a result of his participation in the physical abuse of protesters during the aftermath of the Jason Stokley verdict.

The most compelling factor that presents clear and convincing evidence that petitioner is completely innocent was Dr. Burch's trial testimony in which he changed his opinion regarding the victims' time of death from two to three days to as much as two to three weeks before the bodies were found. Dr. Burch's "flip-flop" on this issue was undoubtedly the result of a pre-trial meeting with the prosecution in which he was persuaded to drastically change his opinion regarding the time of death to discredit petitioner's airtight alibi and prevent an acquittal.

During cross examination at trial, defense counsel asked Dr. Burch if he met with the prosecutors before trial to discuss his testimony and Dr. Burch admitted that he did. (Tr. 1201). In a follow-up question, defense counsel asked Dr. Burch if he was informed by the prosecutors of petitioner's alibi. (*Id.*). He gave a classic evasive answer that was utilized by several witnesses in the recent January 6 Congressional hearings, "I don't recall." (*Id.*).

If granted a Master's hearing, petitioner intends to call an independent forensic pathologist, Dr. Jane Turner, to totally discredit Dr. Burch's trial testimony regarding the time of the victims' death. Dr. Turner has conducted a preliminary review of Dr. Burch's testimony and findings regarding the time of death of the victims. In her attached affidavit, Dr. Turner found that the presence of rigor mortis in two of the bodies, coupled with Dr. Burch's failure to find the other post-mortem characteristics that appear in dead bodies within a few days of their death, that Dr. Burch's opinion that the victims could have been killed more than a week and up to three weeks before the bodies were found, was in all probability, wrong. (*See* Exh. 21).

Even without a forensic pathology expert to counter Dr. Burch's false testimony, his trial testimony regarding the time of death was so far beyond the pale that his conclusions regarding the time of death are demonstrably false based upon settled scientific principles of forensic science. Dr. Burch's autopsy report and his

trial testimony indicated there was no skin slippage on any of the corpses, no liquid oozing from the skin, putrefaction [4], or bloating in any of the victims' bodies. (Tr. 1202-1206). These changes to a dead body during the early stages of decomposition usually appear within two days of death. *See* e.g. Abdulaziz M. Almulhim & Ritesh G. Menezes, *Evaluation of Postmortem Changes*, pg. 4, National Library of Medicine (May 8, 2022), ncbi.nlm.nih.gov/books/NBK554464/# (Exh. 22).

Dr. Burch also testified that he did not find autolysis in any of the victims' autopsies. (Tr. 1206). Autolysis is a process wherein the organs in the body digest themselves, which occurs a few days after death. (*Id.*; Exh. 22).

Dr. Burch also found that there was no marbling on any of the corpses. (Tr. 1213). Marbling, like skin slippage and bloating, appears within twenty four to forty eight hours after death which can be easily observed by a forensic pathologist because this phenomenon results in the blood vessels becoming visible under the skin as greenish/black streaks. (Exh. 22, p. 4).

During his trial testimony, Dr. Burch attempted to justify the drastic discrepancy between the time of death he gave in his deposition with his trial testimony by stating that the air conditioning was set on 50 degrees and running at the time the victims' bodies were found. (Tr. 1207). However, this information was

[4] Putrefaction is a greenish discoloration of the abdominal wall that, as it progresses, creates a strong odor. This discoloration usually appears no more than two to three days after death. (Exh. 22).

previously provided to him by his investigator, Joseph Lebb's report. (Exh. 5). While this lower room temperature might have decelerated the development of rigor mortis and the other signs of early decomposition that manifest themselves within a couple of days of death, there is no possible scenario in which a temperature of approximately fifteen degrees below room temperature would decelerate decomposition or the onset of rigor mortis by a week or more. (See Exh. 21). The effects of this cooler room temperature would have also been mitigated by the fact that all of the victims were fully clothed and under blankets when their bodies were found. (*Id.*; Tr. 1218).

It is clear from the evidence, that if Leonard committed these heinous crimes, the only day he had the opportunity to do so would have been Thanksgiving Day, which was eight days before the bodies were found[5]. Had these bodies been decomposing for at least eight days, the corpses would have undoubtedly exhibited the post-mortem characteristics noted above that indicate a more advanced state of decomposition and there would have been an obvious smell. The initial reporting officer testified at trial that there was no odor that he could detect when he entered the house. Only after he removed the blankets off the bodies did he notice there was a faint smell. (Tr. 832-837). Based upon settled principles of forensic pathology, an

[5] The prosecution, however, argued at trial that the victims were killed on the evening of November 23, 2004, and the indictment alleged that the murders could have occurred as early as November 22, 2004 (Tr. 811-812, 1732; D.A.L.F. 54-57).

accurate and true assessment of the victims' time of death would be just as compelling in establishing clear and convincing evidence of innocence as a DNA exoneration. Coupled with the other compelling evidence that the victims were alive after November 26, 2004, when petitioner left town, petitioner can clearly meet the *Amrine* test.

In addition to the testimony and accounts provided to the police by Elmer Massey, Dejuan Rowe, Beverly and Sherry Conley, and the declarations of Deja Taylor and her family, there is other credible evidence that the victims were alive after Thanksgiving. First, at the crime scene, the police found an opened envelope inside the house from Angela's employer that was postmarked on November 24, 2004, that contained her most recent pay stub. (Tr. 1578-1592). Since this pay stub was mailed the day before Thanksgiving, the earliest it would have arrived in the mail at Angela's home would have been on Friday, November 26, 2004. (*Id.* at 1599). This piece of mail demonstrates that Angela was alive on Friday because it was removed from the mail slot and she opened this envelope. There was also a Charter Communications phone bill that was post-marked on November 29 that was found opened inside of the house. (*Id.* at 1626-1627).

Even if these two pieces of mail had been unopened, these items couldn't have possibly been found inside the house if Angela and the children had been dead before

November 26, 2004. These pieces of mail would still have been inside the mail slot, which as noted by police, was full of other unopened mail.

In addition, Angela's aunt, Gwen Shaw, provided testimony that she went by Angela's house twice in the days just before their bodies were found. (Tr. 1695-1699). On the first occasion, the lights were off and in between the front door and glass screen door, she observed various items of mail. (*Id.*). During her second visit the following day, the overflow of mail had been removed from between the doors. This testimony establishes that some living person, either the victims and/or the killers, was alive and brought this mail into the home in the days immediately preceding when the bodies were found.

Finally, Dan Walter, a supervisor with Ameren electric company testified that a few days before the bodies were found there was a drastic decline in the use of electricity in the home between November 30 and December 1, 2004. (Tr. 1615-1623). This evidence indicates that someone, who was obviously alive, disconnected or turned off a major appliance or some other device during this time frame that would have been using a substantial amount of electricity. (*Id.*).

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 the due process and the cruel and unusual punishment clauses of the Eighth and Fourteenth Amendments prohibit 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*, 865 F.3d 956 (7th Cir. 2017) (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. *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* 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).

Prior to 2021, Missouri had 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). The recently enacted statute, § 547.031 RSMo Supp. (2021) does not provide a constitutionally adequate judicial remedy because it can only be triggered by the elected county prosecutor. Like executive clemency, this statute requires a discretionary decision by a political actor which is not an adequate alternative to an adversarial judicial hearing that can be initiated by an innocent prisoner, which raises serious due process concerns.

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 three 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. *People v. 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 SCIENTIFIC

EVIDENCE AND OTHER CREDIBLE 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.

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 a violation of 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 expert testimony regarding the time of death 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 (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 RSMo (2010).

The Missouri Supreme Court's failure to 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's decision outright for the reason that the original habeas corpus proceeding before 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.

An additional distinct Fourteenth Amendment violation also arises 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 RSMo (2010) In the petition filed in the Missouri Supreme Court, petitioner argued that, in light of the new scientific testing regarding the victims' time of death and other credible evidence of innocence that came to light after his direct appeal, 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 Leonard Taylor'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* held 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 2009 proportionality review the court conducted in his direct appeal

contained two fundamental flaws. First, the Supreme Court's proportionality review failed to take into account the "strength of the evidence" as required by § 565.035.3 RSMo (2000); *State v. Taylor*, 298 S.W.3d 482, 512-513 (Mo. banc 2009).

Second, it is clear that the proportionality review that the Missouri Supreme Court conducted in 2009 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 2009. Coupled with the fundamental flaw in its 2009 proportionality review in failing to evaluate the strength of the evidence presented at petitioner's trial, petitioner argued in the court below 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 *Amrine*, 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 it proscribes in *Amrine* and 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). *See also Johnson v. Missouri*, 598 U.S. 143 (2022)(Jackson, J., dissenting).

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 forensic science is 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 on 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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