

**IN THE CIRCUIT COURT OF THE CITY OF ST. LOUIS, MISSOURI
22ND JUDICIAL CIRCUIT**

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TAMARA JOHNSON

RODNEY LINCOLN)
Petitioner)
)
)
vs.)
)
STATE OF MISSOURI)
Respondent.)
)

**Case No. 22821-2021
Division 15**

BRIEF IN SUPPORT OF MOTION FOR RELEASE

COMES NOW, Rodney Lincoln, Petitioner, who by and through undersigned counsel submits the following Motion and Brief for Release based upon exonerating DNA results. This Motion is filed pursuant to R.S. Mo. § 547.037. The attached Brief in Support of Motion for Release provides the grounds supporting Mr. Lincoln's actual innocence of his conviction for manslaughter and two counts of first-degree assault.

STATEMENT OF JURISDICTION

Pursuant to the joint Stipulation to Post-Conviction Testing,¹ the following items were tested for DNA pursuant to R.S.Mo. § 547.035: pubic hair found on the blue blanket, fingernail scrapings from Joanne Tate, rape kits collected from the three victims, and the hair found near [REDACTED] perineum. With respect to the fingernail scrapings and rape kits, the testing found no genetic material that did not come from the victims. The perineum hairs and the blue blanket hair did contain testable genetic material and the results of these tests are at issue in this motion.

¹As of the date of this filing, the Joint Stipulation has yet to be entered. Counsel for Defendant delivered the signed stipulation to the State in January 2010. Despite repeated requests to the State by both the Court and undersigned counsel, the stipulation has yet to be filed.

The parties have agreed to litigate these findings under R.S.Mo. § 547.037. *See Ex. 2* pg. 000120.

R.S.Mo. § 547.035(1) states that this is a post-conviction action governed by the rules of civil procedure. If the evidence demonstrates a person's innocence of the crime for which the person is in custody, a motion for release may be filed in the sentencing court. *See* R.S.Mo. § 547.037(1). Actual innocence must be demonstrated by a preponderance of the evidence. *See* R.S.Mo. § 547.037(4); *see also* *Bey v. State* 272 S.W.3d 378, 383 (Mo.App.E.D. 2008).

“Preponderance of the evidence’ is defined as that degree of evidence that is of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows the fact to be proved to be more probable than not.” *Id.* at 383, *quoting* *George v. McLuckie* 277 S.W.3d 503, 507 (Mo.App.W.D.2007).

STATEMENT OF FACTS

Rodney Lincoln is incarcerated in the Jefferson City Correctional Center in Jefferson City, Missouri, pursuant to a conviction of manslaughter and two counts of first-degree assault in the April 27, 1982 death of Joanne Tate and the assaults of [REDACTED] and [REDACTED]. He is currently serving fifteen years and two life sentences for those convictions.

On the morning of April 27, 1982, Nathaniel Clenney and Gerald Woodward discovered the body of Joanne Tate lying on the bedroom floor of her residence, and her two daughters, four-year old [REDACTED] and seven-year old [REDACTED] both severely injured.

Mrs. Tate suffered multiple stab wounds, bruises, and had a broom protruding from her rectum. [REDACTED] had multiple stab wounds, including a six-inch laceration from her vagina to her rectum. [REDACTED] had been stabbed in the neck several times, severing her carotid artery, and was comatose at the time the paramedics arrived.

Upon discovery, [REDACTED] was repeatedly asked who attacked them. She told everyone a man named "Bill" attacked her.

In an attempt to locate the attacker, police interviewed [REDACTED] multiple times over the course of a month, also showing her at least six sets of photospreads typically consisting of 10-13 photos each, with the exception of the final photospread, which consisted of two photos. Given the nature and extent of her injuries, she was often on heavy doses of pain medication in the aftermath of her various surgeries.

Police made a composite sketch based on a photograph of a family acquaintance who sort of resembled "Bill." with alterations suggested by [REDACTED]

Joanne Tate's brother and sister, Daniel Clenney and Abigail Adams, informed police

that the composite reminded them of a man named "Rod." A man named "Rod" was listed in Mrs. Tate's diary along with a phone number.

Rodney Lincoln was identified by [REDACTED] through a photospread and several hours later through a physical line-up.

On May 23, 1982, the police arrested Rodney Lincoln for the murder of Joanne Tate and the assaults on [REDACTED] and [REDACTED]

Rodney Lincoln was tried twice for these crimes. The first trial, on August 10, 1983, resulted in a hung jury.² The second trial, on October 3, 1983, resulted in a conviction and two life sentences for manslaughter and two counts of first-degree assault.

A pubic hair on a blue blanket from one of the children's beds where they were attacked was allegedly matched to Mr. Lincoln through hair comparison analysis. The hair evidence along with [REDACTED] eyewitness identification served as the State's only evidence supporting Mr. Lincoln's conviction.

In 2001, the St. Louis Circuit Attorney's Office reopened Mr. Lincoln's case, along with several others, on the grounds that DNA testing would determine the defendants were actually guilty of the crimes for which they have been convicted. The State tested rape kits from each of the three victims using serological testing to determine if DNA was present. No male DNA was found and no further testing was ordered.

In 2010, both parties stipulated to DNA testing of the pubic hair, rape kits, two hairs

² The transcripts from the first trial were never recorded. With the exception of [REDACTED] competency hearing and testimony at the first trial, the court reporter, Tina Marie Price, never transcribed the testimony. Despite payment in advance, and a subsequent lawsuit by Defendant, as well as repeated attempts by counsel for Defendant, the transcripts cannot be found. All knowledge of the first trial derives from the Court's file.

found on [REDACTED] and Joanne Tate's fingernail clippings.

DNA RESULTS ESTABLISHING ACTUAL INNOCENCE

Pursuant to DNA testing conducted by the Serological Research Institute, the pubic hair used by the State to convict Mr. Lincoln does not match his DNA profile. Additional testing of the perineum hair found on [REDACTED] establishes that Mr. Lincoln is actually innocent of the crime for which he was convicted, and quite likely could identify the actual perpetrator of these offenses.

A. DNA test results exclude Rodney Lincoln.

Thirteen individual pieces of evidence underwent DNA testing conducted by the Serological Research Institute. These items include vaginal and rectal swabs from [REDACTED] two slides from hairs found on the perineum of [REDACTED] a slide containing a hair found on a blue blanket; vaginal, rectal, and oral swabs from [REDACTED] fingernail scrapings from Joanne Tate's left and right hands; a right inner thigh and a pubic hair swab from Joanne Tate; and another swab from Joanne Tate. An oral reference sample was also collected from Mr. Lincoln on March 25, 2010, and sent to the lab for comparison. *See Ex.7 pg.000227.*

No evidence collected at the crime scene contains Mr. Lincoln's DNA, thus establishing clearly that he is innocent. *See Ex. 7 pg. 000232.* The State's only physical evidence allegedly putting Mr. Lincoln at the crime scene fails to match his DNA profile, it identifies an unknown third party. Further exculpatory evidence reveals an unknown DNA profile on the perineum hair of [REDACTED] Tate collected by the State at the time of the crime. *See Ex. 7 pg 000232.* These results unequivocally prove that evidence once believed to have been left at the scene of the crime by Mr. Lincoln fails to implicate him in any respect. Had a reasonable jury been made aware of

such critical evidence, there would be no conviction against Mr. Lincoln.

The faulty forensic evidence relied upon by the prosecution played a significant role in the case against Mr. Lincoln. The State's theory, during both trials, rested on one hair collected from a blue blanket found near the children's bed, a hair that supposedly implicated Mr. Lincoln in this heinous crime. This evidence was initially collected and examined by a criminalist whose only experience came from a two-week training session with the FBI. *See* Trial Tr. 637.

Criminalist Joseph Crow's collection of evidence from the blanket consisted of "hanging the blanket up and taking a stick and running across the blanket to take off any hairs that were just lying there. [He] then laid the blanket down and picked off the hairs that were still adhering to the fibers in the blanket." *Id.* at 634. Out of approximately fifty hairs, Mr. Crow found only one he believed did not belong to Mrs. Tate.³ *See id.* at 634-636. Acknowledging his inexperience, Mr. Crow delivered the hair to criminalist Harold Messler. *See id.* at 637.

Mr. Messler compared the sole hair to thirty-seven other hairs collected from alternate suspects. *See* Trial Tr. 650. Mr. Messler testified that out of the thirty-seven hairs, Joanne Tate's hair, and Mr. Lincoln's hair, only Mr. Lincoln's hair "matched." *Id.* at 717-18. He further bolstered the flawed hair comparison testimony by stating, "Q: And in the other two hundred cases that you have dealt with, concerning yourself with the Caucasian hairs that you've dealt with in the past, have you ever run across a circumstance where you had a hair from a scene that was matched to more than one person? A: No, Sir." Trial Tr. 718.

During the State's opening statement and closing argument, the State rested most of its

³He determined these similarities by looking with the naked eye, as well as a microscope. *See* Trial Tr. 636.

case on the significance of this flawed testimony arguing:

He separated out the pubic hairs that were not Joanne Tate's. There was one of them that matches that man's pubic hair. That was compared to thirty-seven others in addition to Joanne Tate. That's thirty-nine people. One out of thirty-nine people. None, no hair that that other hair was compared with other than Rodney Lincoln's matched.

Mr. Messler told you that in two hundred cases, he's never had more than two – more than one match. He's never had two people match one hair found at a scene.

Trial Tr. 957 (emphasis added).

The State enhanced the hair comparison testimony between the first and second trials by adding three "expert" witnesses. *See Ex. 10* and Trial Tr. 731-37. These three witnesses clearly signified the importance of the hair comparison evidence to the State's case. Each witness testified to the collection of pubic hair samples from various suspects. *See id.* That the State would go to such extremes to provide "credible" evidence supporting the shaky case against Mr. Lincoln clearly establishes the significance of the hair comparison evidence in bolstering the questionable identification of [REDACTED]. The State failed to gain a conviction against Mr. Lincoln by conservatively presenting the hair testimony during the first trial.

Now, DNA evidence proves this hair does not belong to Mr. Lincoln. Not only were the State's criminalists wrong in their examination of the hair from the blue blanket, but also misidentified one of the hairs from [REDACTED] pubic area as being her own. *See Ex. 7* pg 000232. The DNA testing shows that one of the perineum hairs belongs to a third person, and is unique from the blanket hair. *See id.* Mr. Messler and Mr. Crow were not mistaken just once, but twice in their analysis. The admission of such flawed forensic

science will clearly sway the jury, just as the State intended.

B. Scientific studies assessing the credibility of hair comparison testimony.

The numerous problems associated with using microscopic hair analysis or hair comparison evidence in criminal trials are well documented. The advent of mitochondrial DNA analysis gives credence to the unreliability of this faulty forensic science. In 1996, the Department of Justice issued a report on the exoneration of the first twenty-eight inmates using DNA technology. This report emphasized the significant role that hair analysis played in these wrongful convictions and stressed the need to use caution when resting cases on faulty science in the wake of much more valid DNA evidence.⁴ *See* Edward Connors et al., *Convicted by Juries, Exonerated by Science: Case Studies in the Use of DNA Evidence to Establish Innocence After Trial* (1996), available at <http://www.ncjrs.gov/pdffiles/dnaevid.pdf>.

Further analysis of questionable forensic science occurred over the last few years, resulting in an assessment ordered by Congress. A report released by the National Academy of Sciences concerning forensic analysis in the United States raises serious issues about all aspects of forensic science other than DNA, including hair analysis. Specifically, the NAS examination seeks to eliminate the application of junk science in the wrongful conviction of innocent people.

Those advances, however, also have revealed that, in some cases, **substantive information and testimony based on faulty forensic science analyses may have contributed to wrongful convictions of innocent people. This fact has demonstrated the potential danger of giving undue weight to evidence and testimony derived from imperfect testing and analysis.** Moreover, imprecise or exaggerated expert testimony has sometimes contributed to the admission of erroneous or misleading evidence.

⁴ Additionally, the NIJ report warns prosecutors about the fallibility of eyewitness identification evidence. (explaining, "As the 28 cases collected in this report demonstrate, when we subject new scientific techniques such as DNA typing to special admissibility rules, we force the courts to rely on inferior types of evidence, such as eyewitness testimony. In all 28 cases, without the benefit of DNA evidence, the triers of fact had to rely on eyewitness testimony, which turned out to be inaccurate.")Ex. 8 pg. 000247.

National Research Council, National Academy of Sciences, Strengthening Forensic Science in the United States: A Path Forward 159 (2009), at 4 (emphasis added). (NAS Report) The review of microscopic hair analysis determined that “[t]he success of hair analyses to make a positive identification is limited in important ways.” The NAS Report emphasized that

testimony linking microscopic hair analysis with particular defendants is highly unreliable. In cases where there seems to be a morphological match (based on microscopic examination), **it must be confirmed using mtDNA analysis; microscopic studies are of limited probative value.** The committee found no scientific support for the use of hair comparisons for individualization in the absence of nuclear DNA.

Id. at 161 (emphasis added). Mitochondrial DNA (mtDNA) testing, the same testing used on the instant hairs, is the only way to verify the accuracy of hair comparison testimony and to ensure a wrongful conviction did not occur. The controversial aspect of expert testimony with microscopic hair analysis occurs when experts attempt to individuate the hair sample. *See* Paul C. Giannelli, Microscopic Hair Comparisons: A Cautionary Tale, *Criminal Law Bulletin*, Summer 2010, Volume 46 Issue 3. Even when an examiner offers a limited form of testimony stating hair samples are “microscopically indistinguishable” or “consistent with” each other, such testimony raises serious issues. *Id.*

A study performed by the FBI found that of eighty hair comparisons “associated” through microscopic examinations, nine came from different sources when re-examined using mitochondrial DNA. This would equate to an error rate of 12.5 percent. *See* NAS Report at 161. This highlights problems both with the imprecision of microscopic hair analysis and with using terms such as “associated with” or “match” that can easily be confused to imply individualization

of samples. *Id.*

The State's case against Mr. Lincoln contained numerous statements from both the prosecutor and hair examiner which have no scientific basis and were extremely misleading. In the prosecutor's opening statement,

The evidence will also be that after his arrest, pubic hair samples were taken from the defendant, and that Harold Messler, the chief criminalist at the police department lab, compared his pubic hair to the one found on the blanket at the scene of this crime, and **they were found to be identical or comparable, and his testimony will be that as an expert in the field, he will be able to say that that pubic hair could have come from the defendant. He will tell you that in his opinion, there are perhaps one in a hundred people that would share this type of pubic hair.**⁵

Trial Tr. 303-04 (emphasis added). Along with calling Mr. Lincoln's hair "identical" to the hair found at the scene, the prosecutor and hair expert both stated the hairs were a "match" to Mr. Lincoln. *See* Trial Tr. at 717-18, 957. The references to these statistics and hairs matching were completely improper and not based upon scientific principles. As noted in the NAS report "[n]o scientifically accepted statistics exist about the frequency with which particular characteristics of hair are distributed in the population. There appear to be no uniform standards on the number of features on which hairs must agree before an examiner may declare a "match." NAS Report at 160. Using such terminology improperly inflates the significance of the results to a jury making them much more likely to rely on this specious testimony without being aware of its high error rate and improper statistical emphasis. *See id.* (explaining that courts which use hair comparison evidence to connect a specific defendant is "highly unreliable").

Mr. Lincoln's case is yet another example of the danger of allowing microscopic hair comparison evidence that is not verified by mitochondrial DNA testing. Mr. Messler may have

conformed to the standards and procedures accepted in the scientific community at the time of the examination, however the results of his examination are scientifically unreliable and extremely misleading. The results of the mitochondrial DNA testing show Mr. Messler's analysis and testimony were simply wrong as Mr. Lincoln could not have been the source of the hair attributed to him.

C. Another Missouri case where hair comparison testimony resulted in a wrongful conviction.

Unfortunately, Mr. Lincoln's wrongful conviction is not the first instance of a Missouri criminal case where a hair expert testified that a hair found at a crime scene matched a defendant and verifying DNA testing later proved that claim to be false. In *State v. Briscoe*, Barbara Beard, a forensic chemist with the St. Louis County Police laboratory, testified that hairs from the crime scene matched the head and pubic hairs of Johnny Briscoe. *See State v. Johnny Briscoe*, 21CCR-482307 (unpublished), Trial Transcript at 194; *see also, Ex. 22*. This case occurred within a year of Mr. Lincoln's with a similar argument presented by the State. The victim in Mr. Briscoe's case misidentified him as the perpetrator on three separate occasions: during a photo spread session, a physical line-up, and at trial with eyewitness testimony. *See Ex. 21*. Years later, Mr. Briscoe obtained DNA testing on a cigarette butt smoked by the perpetrator which matched the DNA of an inmate in the Missouri correctional system. *See Ex. 21*. Just as in Mr. Briscoe's case, Mr. Lincoln was misidentified on three separate occasions by the victim and the only physical evidence attributed to Mr. Lincoln has been conclusively proven with DNA testing to have come from a source other than Mr. Lincoln. The single difference between the two cases is that Mr. Lincoln's post-conviction DNA testing did not match another person, but does reveal profiles of

⁵ It is unclear how the prosecutor came to the one in a hundred statistical conclusion as Mr. Messler never testified to

two unknown people. *See Ex. 7.*

THE STATE'S ONLY REMAINING EVIDENCE – EYEWITNESS IDENTIFICATION – WAS HIGHLY SUGGESTIVE AND UNRELIABLE TO SUSTAIN A CONVICTION AGAINST MR. LINCOLN.

Without the hair evidence placing Mr. Lincoln at the crime scene, the case against him relies solely on the eyewitness identification of the traumatized seven-year-old [REDACTED]. Eyewitness misidentification is the highest contributing factor in wrongful convictions. In a study conducted by the Innocence Project, of the first 220 DNA exonerations in this country, seventy-five percent involved eyewitness misidentification. *See Ex. 23; see also Ex. 24.* The process by which Ms. Davis made her identification of Mr. Lincoln not only suffered from suggestive interview tactics, but also is flawed based on her consistent identification of an individual named “Bill.”

Ms. Davis’ account of the attack came riddled with inconsistencies from the beginning. She was subjected to numerous interviews, photospreads, and rides with police officers to find her attacker’s home following the assaults. It is evident throughout transcripts of her interviews that police investigators relied on suggestive methods. *See Ex. 6 & 13.* Interview techniques such as repeated questioning, leading questions, interviewer bias, and negatively characterizing the assailant led to a manufactured identification. “The manner in which a child witness is interviewed during a criminal investigation has significant implication not only regarding identification issues but also with regard to the totality of a child’s statement and, potentially, case outcomes.” *Ex. 6.*

[REDACTED] was questioned numerous times over the days and weeks after her attack.

She underwent multiple surgeries and was sometimes medicated during her questioning. *See* Trial Tr. 486-89; *see also Ex. 1* at 000033, 000526, 527; *Ex. 13*. During an interview with Detective Burgoon, [REDACTED] was sedated, complaining several times that she was tired, that her leg hurt, and police kept interviewing her while she attempted to use the bedpan - an experience which no doubt caused great pain due to her substantial injuries. *See Ex. 9* pg 000346-349. Further, the recording of this interview is so riddled with Ms. Davis' cries of pain that the trial court found it too prejudicial to play in court. *See* Trial Tr. 521-23; *see also Ex. 6* (explaining that conducting interviews during stressful circumstances will adversely affect the eyewitness' ability to recount details accurately about the event, especially over time).

Mr. Lincoln was not identified as the assailant until May 23, 1981, almost a month after the crime occurred. *See Ex. 9* at 000298-299. Throughout the investigation, [REDACTED] referred to her attacker as a man named "Bill." *See* Trial Tr. 402, 512-513, 522-523; *see also Ex. 9* at 000291-292. When found at the scene of the crime, [REDACTED] told her uncle, Nathaniel Clenney, that "Bill did it." Trial Tr. 402. Later that day, in the emergency room, [REDACTED] told Wayne Munkel:

Bill (no further description) broke into the house and when she woke up, she observed her mother (Jo Ann Tate) running around the house (room unknown) with a broom stick in her rectum (but). [REDACTED] stated that she saw **Bill** stab her mother twice in the back and she [REDACTED] saw **Bill** stomp on her mother numerous times.

[REDACTED] further stated that she observed **Bill** stab her sister, [REDACTED] twice and then stomp on her sister twice.

[REDACTED] stated that **Bill** has been known to the family for about one year.

See Ex. 1 at 000016 (emphasis added). Later that day, she told her half-sister, Melinda Parris, that

“Bill” attacked her, and she heard her mother call him “Bill.” *See id.* at 000023. Through every interview until she identified Rodney, she referred to her attacker as “Bill.” *See id.* During a pre-trial conference before Mr. Lincoln’s first trial, the State argued, “Up until the time that, . . .

██████████ was told that the defendant’s name was Rodney Lincoln after she identified him in a lineup. She referred to him consistently as ‘Bill.’” Pre-Trial Tr. 63.

During the course of the investigation, police showed ██████████ photographs of thirty-eight individual suspects. *See Ex. 1*, 000025, 000029, 000034, 000037. Seventeen of these thirty-eight suspects were named Bill, Billy, Will, or William. *See Ex. 1* 000025, 000029, 000034, 000037. Police also collected pubic hair samples from thirty-eight individuals. *See Ex 4*. At least nine of these individuals were named Bill, Will, Billy or William. *See Ex. 4*. Pages from Joanne Tate’s personal diary suggest a man named Bill was involved with another man who shot her ex-boyfriend in front of her and her children four months before she was murdered. *See Ex. 14* 000480-503.

The police arranged multiple photospreads for Ms. Davis to view, often including 10-13 photographs. Each photograph showed a possible suspect, creating a biased line-up. *See Ex. 1* and 13.

Federal guidelines state that only one suspect be included in each lineup. Guidelines recommend lineups with one suspect and at least 5 members that are known to be innocent (aka foils); this is done to increase the effectiveness of the lineup as a test of memory by introducing an aspect of falsifiability. Additionally, the addition of the foils protects the suspect from witnesses who are simply guessing or are otherwise not relying on an accurate or complete memory.

In this case, all photos were of potential suspects. Given what little information the police had to identify the attacker, ██████████ could have pointed to any photo and a case could have be[en] made based on her ID.

Ex. 8 at 000248. Picking a suspect would have been akin to shooting fish in a barrel; all Ms. Davis needed to do was point to a photo and the police would have their suspect. Such action conflicts with eyewitness identification procedures recommended by the FBI because of its inability to provide a solid foundation for the support of such identification. The fact that each photograph is of a possible suspect minimizes the effectiveness of the line-up, making it more likely that an incorrect identification would result.

The State continued to contaminate the memory of its only eyewitness with the creation of a composite sketch based on a Polaroid of Dennis Smith. Sketch artist William Swyers copied the photograph and asked [REDACTED] to show him where to make changes. According to Swyers, on May 18, 1982, he met with Detective Burgoon and [REDACTED] "I made a rough sketch of the subject in the Polaroid shot onto a pad, and then from there the little girl made the changes in the sketch." Trial Tr. 609. He states that she suggested altering his hair to dark and possibly altering his ears. Trial Tr. at 610. The methods used by Mr. Swyers in creating this composite sketch were unusual.

The Federal guidelines state the investigation using eyewitnesses should be properly documented to ensure a thorough investigation.

In this case the composite interview was not documented in sufficient detail to ensure a thorough investigation.

The Federal guidelines state that the composite technique must be employed in a manner that the witness description is reasonably depicted. What we do know is that the witness description was incredibly vague. It was not sufficient to use verbal information to create a complete composite. While other techniques employ a facial feature catalogue (such as that used by the FBI) this was not done in this case.

The Federal guidelines state that unless part of the procedure (e.g., facial feature catalogue) the witnesses shouldn't see photos prior to the development of the composite. This is to avoid potential memory contamination.

In this case, the police sketch was created by a sketch artist copying a photo of Dennis Smith and making changes to it based on [REDACTED] comments. This is essentially showing the witness a photo (likeness) of a suspect and can only bias the composite to look like the photo. Composite sketches are created from a feature-up basis with each feature added one at a time, not holistically from a complete sketch making small changes to the features.

While the sketch resembles Rodney Lincoln, the sketch looks almost identical to the photo of Dennis Smith including facial asymmetries (nose), thin lips, and hair. Using specialized computer software for faces that enables the user to define key facial points, I was able to demonstrate that the key points of the composite are considerable closer to those of the Smith photo rather than the Lincoln photo.

Ex. 13 at pg. 000366. Daniel Clenney and Abigail Wallace noticed the photograph resembled someone they knew, but they could not remember the name. Trial Tr. 612-14. Daniel Clenney recalled a conversation with his sister Abigail, "Well, I don't know who it is, Abbey, but, you know, I know the face." Trial Tr. 613. They went to the police station, where Detective Burgoon read them a list of names until they settled on "Rod." Trial Tr.614.

On May 23, 1982, Detective Burgoon then showed [REDACTED] and [REDACTED] two photographs, one a picture of Rodney Lincoln, the other a photograph of [REDACTED] cousin Gary Parris. *See Ex. 9* pg 000296-298. [REDACTED] identified Rodney Lincoln as the man who attacked her. *See Trial Tr. 752*. This photo line-up was flawed for two important reasons: 1) Detective Burgoon was the only person who gave it to the victims, and 2) it only included two photographs, Mr. Lincoln and Ms. Davis' cousin - Gary Parris. In every other session, [REDACTED] viewed at least four photo spreads composed of ten or more suspect photographs in each of them. *See Ex. 1*. Further, each of those previous photospreads occurred in the presence of her social worker Wayne Munkel. *See .id.* Reducing the number of potential suspects in any type of identification procedure, be that a photo spread or physical lineup, greatly increases the chance of bias. *See Ex.*

13; *see also Ex. 24*. When the identification choices drop to two photographs -- one being a known family member -- the suggestibility of that line-up procedure skyrockets, making it almost certain that a misidentification will occur. *See Ex. 23*.

When Ms. Davis picked Mr. Lincoln - the picture of the man not her cousin - police arrested Mr. Lincoln and placed him quickly in a physical line-up. Less than two hours later, Mr. Davis arrived at the police station where she viewed Mr. Lincoln and three others in a physical line-up. *See Trial Tr. 771*. The line-up consisted of four men, including Mr. Lincoln. Mr. Lincoln, who was thirty-seven at the time, was at least sixteen years older than all of the other men, two of whom were twenty-one and one of whom was eighteen. *See id. at 772; see also Ex. 18*. Further increasing the suggestibility of this line-up, Mr. Lincoln had the shortest hair. *Trial Tr. 771; see also Ex. 18*. "Federal guidelines state that the lineup should be constructed so the suspect does not unduly stand out." *See Ex. 13*. Mr. Lincoln is clearly different from the other individuals in a number of ways. *See Ex. 18*. "Federal guidelines state that lineups should consist of at least six members," reducing the chance that the witness is guessing. *See Ex. 13*. Further, subjecting the witness to a line-up two hours after she saw the photographs heightens the possibility that Mr. Lincoln would be identified, with his photograph still fresh in her memory. "Conducting a physical lineup after seeing a photo line up is biasing and a potential source of memory contamination." *See Ex. 13*. Such a line-up was built to make Mr. Lincoln stand out compared to the **three** other men with him.

Increasing the unduly suggestive nature of these identification procedures, Detective Burgoon told Ms. Davis that they were looking though a "magic door" to find the "bad man." *Trial Tr. at 432*. Detective Burgoon instructed Ms. Davis that "[I]f we get the wrong man, we let

the bad man go.” Trial Tr. 432. Detective Burgoon’s comments to Ms. Davis compelled her to make an identification even if she did not feel comfortable. This is one of the main reasons why officers who administer line-ups are told to give little to no commentary to the eyewitness. *See Ex. 24* at 11. In current eyewitness reforms, it is suggested that an officer unfamiliar with a case conduct the identification procedure to ensure no bias or suggestibility to the eyewitness. *See id.* at 19.

Even if one is inclined to accept the identification procedures as valid, there remain several inconsistencies in Ms. Davis’ story concerning Mr. Lincoln. According to Ms. Davis, Mr. Lincoln worked on Ms. Tate’s car a few days before the attack, lived in Illinois, drove a taxi or a white or yellow Oldsmobile, had an overweight mother who drank all the time and kept a number of puppies and kittens at his home. Not a single one of these statements is true. *See* Trial Tr. 337, 748, 769, 837-838, 000041-42. Mr. Lincoln had not seen Ms. Tate since August or September of 1981. *See Ex. 1*. He lived in South St. Louis, drove a light green station wagon, never owned a white or yellow car, and had a thin mother who owns one dog. Trial Tr. 836-39. The only identifiable characteristics that Mr. Lincoln might share with the actual perpetrator are being a white male with short hair who lived with his mother near a park. *See Ex. 1*. That description would identify a wide swath of people in St. Louis at that time. *See Ex. 6* (explaining why Ms. Davis was a poor historian given her understanding of the facts was questionable at best.)

“Eyewitness misidentification is the single most important factor leading to wrongful convictions in the United States ” *Ferensic v. Birkett*, 501 F.3d 469, 482 (6th Cir. 2007). *Manson v. Brathwaite* states that one of the key factors in determining eyewitness credibility is

the “accuracy of the description.” *Manson v. Brathwaite*, 432 U.S. 98, 115 (1976). Ms. Davis gave absolutely no physical description of her attacker until almost a week later, where she initially said he had black hair to his ears, and then in the same interview said he had short black hair. *See Ex. 1*, 000033, 000311, and 000326. It is clear from the evidence that Ms. Davis could not accurately describe her attacker.

In order to corroborate her questionable testimony, the State relied on the physical evidence to create a connection to Mr. Lincoln.⁶ With the results from the DNA test proving the evidence used against him is false, there is no credible evidence upholding his conviction. *See Amrine v. Roeper*, 102 S.W.3d 541 (Mo. 2003). In *Kyles v. Whitney*, the Supreme Court reviewed the trial court’s decision in light of new evidence, determining “the question is not whether the State would have had a case to go to the jury if it had disclosed the favorable evidence, but whether we can be confident that the jury’s verdict would have been the same.” 514 U.S. 419, 453 (U.S. 1995); *see also House v. Bell*, 547 U.S. 518, 537 (2004).


In a recent decision regarding a wrongful conviction overturned during habeas corpus proceedings, the Court found, “[t]here was no physical evidence linking Petitioner to the murder. The thin circumstantial evidence has been substantially weakened by the newly discovered evidence previously discussed. This case presents the rare circumstance in which no credible evidence remains from the first trial to support the conviction.” *Helmig v. Denny* 09DK-CC00110 (unpublished). In *Helmig*, the false testimony and circumstantial evidence convicted an innocent man. Once the evidence was proven to be false, the conviction could no longer stand.

⁶ Other false testimony was deliberately introduced as inculpatory evidence of Mr. Lincoln’s guilt. Ms. Tate’s sister, Abigail Wallace, appeared as a rebuttal witness. Ms. Wallace claimed she found an ashtray full of cigarettes and an empty pack similar to the pack of cigarettes in Mr. Lincoln’s pocket in his line-up photograph. *See Trial Tr.* at 908-12. Photographs from the crime scene show an empty ash tray and do not show any packet of cigarettes. *See Ex. 19*.

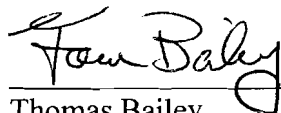
Unlike in Helmig, the burden of proof for Mr. Lincoln is the lower preponderance of the evidence standard requiring a showing that it is more likely than not that Mr. Lincoln is innocent of his conviction. *See R.S. Mo. § 547.037(4)*. Through DNA testing, Mr. Lincoln has clearly shown his innocence in light of the evidence. Having proven that the only physical evidence in the case does not belong to Mr. Lincoln, and further that no DNA evidence can be found related to Mr. Lincoln, combined with [REDACTED] inconsistent and unreliable identification, the State's case against Mr. Lincoln is significantly weakened to the point that no reasonable juror would have convicted him of this crime. Mr. Lincoln's motion to release should be granted based upon his exonerating DNA results.

CONCLUSION

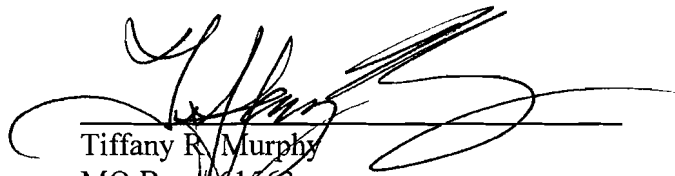
Whereas Petitioner requests that this Court grant his motion for release based upon his showing of actual innocence through DNA evidence in accordance with MO Rev. Stat. 547.037.



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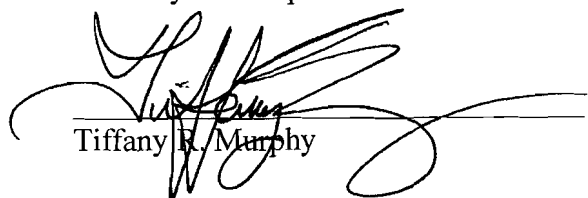
ATTORNEYS FOR PETITIONER

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was delivered by U.S. Mail this 9th day of

November, 2010, to:

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