

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

KEITH CARNES,)	
)	
Petitioner,)	
)	
v.)	No. _____
)	
RONDA PASH, Superintendent,)	
Crossroads Correctional Center,)	
)	
Respondent.)	

PETITION FOR A WRIT OF HABEAS CORPUS

COMES NOW petitioner, Keith Carnes, a Missouri prisoner in respondent's custody and petitions this Court, pursuant to Rule 91 for a writ of habeas corpus vacating his convictions for first degree murder and armed criminal action and his sentence of life without parole. In support of this petition, Mr. Carnes states as follows:

SUGGESTIONS IN SUPPORT

I.

INTRODUCTION

This habeas corpus case presents the court with an extraordinary set of facts that conclusively demonstrate that Keith Carnes is innocent of the 2003 murder of Larry White, for which he was convicted, after two trials, in 2006 and sentenced to life without parole for the offenses of first degree murder and armed criminal

action that occurred in Kansas City, Missouri. Petitioner is currently serving a sentence of life without parole for first degree murder and armed criminal action in the custody of respondent. No physical evidence has ever implicated petitioner in any of the crimes for which he was convicted.

Petitioner was convicted solely on the eyewitness testimony of two women, Wendy Lockett and Lorraine Morrow. Both of these witnesses testified at trial that they observed petitioner shoot the victim in the Fishtown parking lot in Kansas City, Missouri. Both of these witnesses were inherently unreliable because not only did they give conflicting testimony, their testimony also conflicted with the physical and medical evidence in the case. Ms. Lockett and Ms. Morrow have now recanted their testimony under oath and admitted they committed perjury at trial when they identified Keith Carnes as the man they saw shoot Larry White in the Fishtown parking lot near 29th and Prospect. (See Exh.'s 2, 3). These recantations are corroborated by the sworn affidavits of another independent eyewitnesses and other evidence. (See Exh.'s 8, 9, 10, 11, 12, & 14). As a result, there is no remaining direct evidence of petitioner's guilt and this fact alone requires habeas relief under *State ex rel. Amrine v. Roper*, 102 S.W.2d 541 (Mo. banc 2003).

In addition to exonerating Mr. Carnes, Ms. Morrow's affidavit identifies the real killer as Reggie Thomas. (Exh. 2). Ms. Morrow stated that she initially identified Thomas as the killer, but was coerced by the prosecutor to change her

story and falsely identify Keith Carnes as the perpetrator. (*Id.*). Ms. Morrow's identification of Thomas as the killer is bolstered by the fact that several other witnesses interviewed by the police after the shooting implicated Thomas as a suspect. (Exh. 17).

In their police interviews, both Felicia Jones and Margo Thomas told the police that they observed Mr. Thomas near the scene of the shooting. (*Id.*). Ms. Jones also told the police that Mr. Thomas was a drug dealer, which would have supplied the same motive for the shooting that the prosecution utilized to convict petitioner. (*Id.*). Most importantly, Ms. Jones also told the police that she overheard Thomas tell some other men to make the "victim disappear" shortly before he was killed. (*Id.*).

Despite the fact that there was evidence provided in pretrial discovery pointing to Mr. Thomas as an alternative perpetrator of the murder, trial counsel Willis Toney inexplicably did not attempt to present any evidence or argument to the court at trial implicating Mr. Thomas in the murder. This omission, as recent investigation has revealed, resulted from the fact that Mr. Toney labored under a conflict of interest because he had an ongoing attorney-client relationship with Mr. Thomas. (Exh. 16). This relationship is confirmed by the fact that Mr. Thomas told the police, when he was questioned about his knowledge of the homicide, that Mr. Toney had allowed him to review the discovery in petitioner's case. (Exh. 17).

Recently discovered court records also indicate that Mr. Toney represented Thomas in 1997 on a felony drug charge in Laclede County, Missouri. (Exh. 16). Mr. Toney's relationship with Mr. Thomas, which explains his failure to vigorously defend Mr. Carnes by incriminating at his other client, presents a textbook case of a conflict of interest that requires a new trial under settled Sixth Amendment principles. *See Cuyler v. Sullivan*, 446 U.S. 335, 349-350 (1980).

In this petition, Mr. Carnes is raising three claims for relief: (1) a freestanding claim of actual innocence under *Amrine* and the Due Process and Cruel and Unusual Punishment clauses of the Missouri and United States Constitutions; (2) a due process claim based upon the undeniable fact that his convictions were based entirely upon the perjured testimony of Ms. Lockett and Ms. Morrow; and (3) a Sixth Amendment claim arising from Mr. Toney's conflict of interest involving his prior and ongoing representation of Reggie Thomas. As a result, petitioner respectfully requests that this Court direct the State of Missouri to respond to this petition, and after conducting appropriate hearings, grant the petition for a writ of habeas corpus, order petitioner's immediate release from state custody, and order the state to declare within thirty days whether it intends to re-prosecute petitioner for these crimes.

II.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

Petitioner, Keith Carnes was convicted at a bench trial¹ on March 10, 2006 for the October 6, 2003 murder of Larry White. Petitioner was also convicted of one count of armed criminal action arising out of the same occurrence. Petitioner was subsequently sentenced to life without parole by Jackson County Circuit Judge Gene R. Martin. (Exh. 18).

On October 6, 2003, Larry White was shot to death in the Fishtown parking lot in Kansas City, Missouri. Because police knew that Mr. White was a drug dealer, the police investigation immediately focused upon Keith Carnes based upon their belief that Mr. Carnes was a rival drug dealer in that neighborhood.

A few days after the shooting, both Ms. Morrow and Ms. Lockett were picked up by the police and brought downtown to be interviewed by assistant prosecutor Amy McGowan. Both of these witnesses, in their recent recantations, now admit that they were coerced into identifying Keith Carnes as the killer by Ms. McGowan. (See Exh.'s 2, 3). Both of these witnesses later testified at Mr. Carnes' two trials.

The state's entire case rested upon the eyewitness testimony of Ms. Lockett and Ms. Morrow, both of whom have criminal records and gave accounts of the

¹ Petitioner's first trial ended with a mistrial because of a hung jury.

shooting of Larry White that were inconsistent with each other and the physical evidence in the case. Both of these women testified that on October 6, 2003, Mr. Carnes got into a dispute with Mr. White about drug dealing in the area and that Mr. Carnes chased Mr. White down 29th Street and cut through an alleyway while shooting at him. During this foot chase, Ms. Morrow testified that Mr. Carnes was accompanied by Gary Kitchen. In contrast, Ms. Lockett told the police that Mr. Carnes was accompanied by two other men named Mitchell Powell and Damon Rhodes.

Ms. Morrow testified that, after Mr. White collapsed in the Fishtown parking lot, she observed Mr. Carnes stand over him, turn him over, and shoot him five or six times in the head from point-blank range with an AK-47 rifle. (Tr. 132, 145-147). In her statement to police, Ms. Morrow stated that she only heard the shots. (Exh. 5). Ms. Lockett testified that, after Mr. White collapsed in the Fishtown parking lot, that Mr. Carnes stood over him and shot him once in the head with a pistol. Contrary to Ms. Morrow's testimony, Ms. Lockett testified that Mr. Carnes did not turn White's body over before shooting him. (Tr. 227-228, 231-233).

Both of these eyewitness accounts were also inconsistent with the physical and medical evidence in the case. The initial reporting officer testified that he found no shell casings near the victim's body, nor any holes in the asphalt from gunshots near the body. (*Id.* 52). Medical examiner Thomas Gill testified that,

among other things, the fatal bullet wound to the head that Mr. White sustained was not fired at close range because of the absence of gunpowder soot and stippling and that the fatal head wound was not consistent with the victim lying in prone position on the ground while the shooter stood over him shooting at point blank range. (*Id.* at 318-340; See also Exhibit 6). These two eyewitness accounts of the shooting were further discredited during the 29.15 proceedings by expert criminalist Gary Rini.

Despite these glaring weaknesses in the prosecution's case, Mr. Carnes was found guilty at trial by the judge at his second trial and was sentenced to life without parole. Mr. Carnes' convictions were affirmed on direct appeal in *State v. Carnes*, 241 S.W.3d 344 (Mo. App. W.D. 2007). During his 29.15 proceeding, Mr. Carnes secured the expert services of Mr. Rini who testified by way of deposition that, based on the absence of bullets or shell casings in the parking lot near the body and the angle of the bullet wounds on the victim's body, the physical evidence did not support either of the eyewitnesses' testimony that the victim was shot in a prone position in the Fishtown parking lot. (See Exh. 7). After hearing this evidence, the 29.15 motion court and the Missouri Court of Appeals rejected Mr. Carnes' claim that his trial counsel was ineffective in not securing an expert crime scene witness and affirmed his convictions. *See Carnes v. State*, WD72916 (unpub. op. 11/08/2011).

In 2014, Mr. Carnes' case was taken on by the KC Freedom Project ("KCFP"). KCFP director Latahra Smith has conducted an extensive investigation into the facts of the case and interviewed numerous witnesses, which has uncovered clear and compelling evidence that Mr. Carnes is innocent and that his conviction was secured through the perjured testimony of Ms. Lockett and Ms. Morrow.² Both of these women have now recanted their trial testimony under oath in sworn affidavits and admitted they committed perjury when they identified Keith Carnes at trial as the man who shot and killed Larry White in the parking lot of the Fishtown Restaurant near 29th & Prospect. (See Exh.'s 2, 3). The KCFP's investigation has also uncovered numerous instances of prosecutorial and police misconduct and also uncovered substantial evidence that the actual killer of Mr. White was Reggie Thomas. However, as noted earlier, due to trial counsel's conflict of interest, which was also uncovered by the KC Freedom project, no evidence was presented by the defense at trial that implicated Thomas.

As a result of the painstaking investigation recently completed by the KCFP, unassailable evidence has now been uncovered that both Ms. Lockett and Ms. Morrow lied when they identified Mr. Carnes as the person who shot and killed Larry White. Both of these witnesses have signed sworn affidavits admitting that

² Mr. Carnes' claim of innocence was chronicled in a recent published article authored by former Kansas City Star reporter Barbara Shelly, that is attached to this petition as Exhibit 1.

their trial testimony implicating Mr. Carnes in the shooting of Mr. White was false. (Exh.'s 2, 3). Ms. Morrow stated that she was coerced by Ms. McGowan to identify Keith Carnes as the shooter after Ms. Morrow initially told Ms. McGowan that the real killer was Reggie Thomas. (Exh. 2). Because she feared for her safety from Mr. Thomas if she had identified him, she was intimidated by Ms. McGowan to give a statement to the police implicating Keith Carnes as the murderer. (*Id.*). Ms. Morrow also admitted she gave perjured testimony at trial primarily because Reggie Thomas, the actual killer, was present in the courtroom during her testimony and that she feared retaliation from him if she changed her story and told the truth. (*Id.*).

Wendy Lockett has also signed a sworn affidavit admitting she lied at Mr. Carnes' trials. (Exh. 3). She admitted that she was high on crack cocaine at the time the shooting occurred and, like Ms. Morrow, she was coerced by Ms. McGowan to implicate Mr. Carnes as the murderer. (*Id.*). Within the last few years, Ms. Lockett has become clean and sober and has now admitted under oath that she could not identify who shot and killed Larry White and that her testimony implicating Mr. Carnes at trial was false. (*Id.*).

In addition to the recantations of the prosecution's two star witnesses and the exculpatory physical evidence, the KCFP also located and interviewed a number of other witnesses who lived in or near the apartment buildings where the initial

confrontation between White and his killer occurred. The KCFP also located a number of people who actually saw the shooting and other persons who could have testified at trial that Keith Carnes never left the apartment building at 2404 East 29th Street during the time Mr. White was gunned down.

Vernetta Bell, Eugenia Burch, and Kermit O'Neal were all at this apartment building on 29th & Olive with Mr. Carnes at the time Mr. White was shot. (See Exh.'s 8, 9, 10). All three of these witnesses have stated that Mr. Carnes never left the apartment building or chased Mr. White from that building. (*Id.*). Ms. Bell has given an affidavit stating she saw Mr. White arguing with two men earlier in the day but neither of those men was Keith Carnes. (Exh. 8). Ms. Burch was also in the apartment building with Mr. Carnes when the shooting occurred and never saw Mr. Carnes leave the area of the apartment building that night. (Exh. 9). Ms. Burch did not come forward with this information and provide it to the police at that time because there was a warrant out for her arrest. (*Id.*).

Mr. O'Neal told the police he was the doorman for the apartment building at 2404 East 29th Street. As a result, he kept tabs on each person that entered or exited the building. Mr. O'Neal has provided an affidavit that Mr. Carnes remained inside and on the porch of the apartment building throughout the entire incident that led to the shooting death of Mr. White. (Exh. 10). Mr. O'Neal also saw an argument between Mr. White and another man earlier in that day. (*Id.*). He

identified this man as Mitchell Powell. Mr. O'Neal also stated that he saw Powell with a gun. (*Id.*).

Alton Shaw lived at 2915 Wabash and was outside when the shooting began. In his statement, Mr. Shaw saw two men chasing and shooting at Mr. White. (Exh. 11). Because he knows Mr. Carnes and would recognize him, Mr. Shaw is certain that neither of these men who shot Mr. White was Keith Carnes. (*Id.*).

Michael Mathews, who lives at 2816 Prospect, has also provided an affidavit. (Exh. 12). From his apartment, he had a clear line of sight to the Fishtown parking lot at the time Mr. White was shot. After he heard gunshots and saw Mr. White cross Prospect and collapse in the Fishtown parking lot, he got out his binoculars and observed Mr. White's body in a prone position on the lot and did not observe anyone approach Mr. White or shoot him while he was lying in the lot before the police arrived. (*Id.*).

During a neighborhood canvass, KCFP located and interviewed Ray Winn. Mr. Winn gave a videotaped statement that contradicted the testimony of Ms. Morrow and Ms. Lockett regarding the location of the shooting. Mr. Winn lived at 2911 Wabash and, after he heard gunshots, Mr. Winn was on his front porch and saw "fire" from the gun as it was being fired. He believed the gun was being fired from up or near the front porch of the corner house at 2846 Wabash. He observed someone chasing Larry White down the driveway of 2846 Wabash and up 29th

Street toward the Fishtown Restaurant. Mr. Winn's statement further discredits the testimony of Ms. Morrow and Ms. Lockett that the shooting occurred in front of the apartment building at 2404 East 29th Street. Mr. Winn's account is further corroborated by the crime scene investigator's report that located numerous shell casings in front of the residence at 2846 Wabash. (Exh. 13).

In addition to the previously noted governmental misconduct involving the coercion of the two eyewitnesses, former detective Avery Williamson has told the KCFP in a recorded conversation that his superiors at the Kansas City, Missouri Police Department were "in on" setting up Keith Carnes for this murder because he was a known drug dealer. This scenario is corroborated by Margo Thomas, who was questioned and pressured by the police and prosecutors to falsely implicate petitioner because she was in the area of the shooting at the time it occurred.

Ms. Thomas has recently provided a sworn affidavit indicating that she was pressured to falsely identify Mr. Carnes as the shooter by prosecutor Amy McGowan. (Exh. 14). Although she initially told the police she could not identify the man she saw jumping the fence in an alleyway after the shooting, she described him as a dark complexioned black male, which does not match the actual description of Keith Carnes and matches the description of the actual killer Reggie Thomas. (See Exh. 15).

There is also no procedural impediment to merits review of petitioner's perjured testimony and conflict of interest claims for two reasons. First, there is cause and prejudice to overcome any procedural default because the facts supporting these claims did not come to light until after petitioner's direct appeal and 29.15 actions had been litigated to completion. There is also no procedural bar to merits review of these claims because petitioner can easily meet the gateway innocence test of *Schlup v. Delo*, 513 U.S. 298, 315 (1995).

Because there is no procedural impediment to review of the merits of the constitutional claims raised in this petition and petitioner is clearly innocent, petitioner is confident that this Court, after a full and fair review of the facts and applicable law, will find that habeas relief is warranted. Pursuant to Rule 91.04(a)(4), petitioner also states that no habeas petition raising these issues has been filed in a higher court.

III.

REASONS FOR GRANTING THE WRIT

CLAIM 1

PETITIONER'S CONTINUED INCARCERATION ON A SENTENCE OF LIFE IMPRISONMENT WITHOUT THE POSSIBILITY OF PAROLE IMPOSED FOR THE OFFENSES OF FIRST DEGREE MURDER AND ARMED CRIMINAL ACTION VIOLATE THE EIGHTH AND FOURTEENTH AMENDMENTS AND ARTICLE I, SECTIONS 10 AND 21 OF THE MISSOURI CONSTITUTION BECAUSE HE IS UNQUESTIONABLY INNOCENT OF THESE CRIMES.

The aforementioned evidence in this case conclusively establishes that petitioner did not commit the murder of Larry White in the City of St. Louis on October 6, 2003. There is simply no remaining credible evidence to establish that petitioner was the murderer. In light of the sworn recantations of Wendy Lockett and Lorraine Morrow, coupled with the lack of any physical evidence implicating him in the crime, there is no remaining evidence to support his guilt as presented in his original criminal trial.

In addition, the recantations of the state's two star witnesses is corroborated by other credible evidence, including the affidavits of other witnesses collected by the KCFP. (See Exh.'s 8, 9, 10, 11, 12, & 14). Coupled with the other exculpatory evidence presented in prior proceedings, all of the evidence, both old and new, clearly and convincingly undermines any confidence in the correctness of the jury's original verdicts which were rendered without the benefit of this previously unavailable evidence.

It is well settled under Missouri law that claims of innocence are cognizable in a Rule 91 petition for a writ of habeas corpus. *Wilson v. State*, 813 S.W.2d 833 (Mo. banc 1991). More recently, the Missouri Supreme Court held that a habeas petitioner may assert a free-standing claim of actual innocence, independent of any constitutional violation, as a means to obtain release from prison. *State ex rel. Amrine v. Roper*, 102 S.W.3d 541 (Mo. banc 2003). Although *Amrine* involved a

prisoner currently under a sentence of death, it is also a “manifest injustice” for the same reason to allow a prisoner to remain incarcerated for life if he is unquestionably innocent. *Id.* at 547-548. In fact, the court in *Amrine* framed the issue as follows: whether Amrine’s “continued incarceration and eventual execution for a murder he did not commit constitutes a manifest injustice entitling him to habeas relief.” *Id.* at 546.

In addition to being entitled to relief under the *Amrine* decision, petitioner’s continued incarceration where there is now that evidence unquestionably establishes his innocence, without affording him a new trial, is an arbitrary deprivation of life and liberty in violation of the due process clauses of the Fourteenth Amendment to the United States Constitution and Article I, Section 10 of the Missouri Constitution. Petitioner’s continued incarceration without a new trial in the face of this evidence also constitutes an arbitrary and disproportionate punishment in violation of the cruel and unusual punishment clauses of the Eighth Amendment to the United States Constitution and Article I, Section 21 of the Missouri Constitution.

In similar circumstances, courts of other states have granted new trials to state prisoners who have presented compelling and convincing evidence that they are innocent of the crime for which they are incarcerated. *See, e.g., Ex parte Elizondo*, 947 S.W.2d 202 (Tex. App. 1996); *People v. Washington*, 665 N.E.2d

1330 (Ill. 1996). In *Washington*, the Illinois Supreme Court declined to grant a prisoner a new trial based on an innocence claim on federal due process grounds in light of the decision in *Herrera v. Collins*, 506 U.S. 390 (1993). Instead, the court granted the defendant a new trial based upon the Illinois Constitution. 665 N.E.2d at 1335. Since that time, the United States Supreme Court has clarified that the fragmented *Herrera* decision, in which the petitioner had only made an extremely weak showing of innocence, did not actually resolve whether the Fourteenth Amendment would preclude habeas relief for a prisoner who presents a compelling claim of innocence. See *McQuiggin v. Perkins*, 133 S. Ct. 1924, 1931 (2013); *House v. Bell*, 547 U.S. 518, 554-555 (2006).

As in *Amrine*, all of the evidence the prosecution presented to convict petitioner at trial has been utterly discredited. When viewed in conjunction with the independent eyewitness testimony and the exculpatory physical evidence, as in *Amrine*, there is clear and convincing evidence, in light of all the evidence, that petitioner is completely innocent. Therefore, this Court should issue a writ of habeas corpus vacating petitioner's murder and armed criminal action convictions and his sentence of life imprisonment without parole.

CLAIM 2

PETITIONER IS ENTITLED TO THE ISSUANCE OF A WRIT OF HABEAS CORPUS BECAUSE PETITIONER'S CONVICTIONS WERE SECURED IN VIOLATION OF HIS RIGHT TO DUE PROCESS OF LAW GUARANTEED BY THE FOURTEENTH AMENDMENT DUE TO THE

GOVERNMENT’S KNOWING USE OF THE PERJURED TESTIMONY OF WENDY LOCKETT AND LORRAINE MORROW TO SECURE HIS CONVICTIONS.

The aforementioned recantations of Ms. Lockett and Ms. Morrow unquestionably establish that petitioner’s conviction was secured through the knowing use of perjured testimony.³ (See Exh.’s 2, 3). Apart from admitting that they lied at petitioner’s trial, both of these witnesses indicated that, when they waived in their identifications, that they were coerced by Ms. McGowan to falsely implicate petitioner as the murderer of Larry White. (*Id.*).

One of the most cherished principles of our criminal justice system, “implicit in any concept of ordered liberty,” is that the state may not use false evidence to obtain a criminal conviction. *Napue v. Illinois*, 360 U.S. 264, 269 (1959). Deliberate deception of a judge and a jury is “inconsistent with the rudimentary demands of justice.” *Mooney v. Holohan*, 294 U.S. 103, 112 (1935). Therefore, “a conviction obtained through the use of false evidence, known to be such by representatives of the state, must fall under the Fourteenth Amendment.” *Napue*, 360 U.S. at 269. Where it can be shown that the government knowingly permitted the introduction of false testimony, reversal is “virtually automatic.” *United States v. Stofsky*, 527 F.2d 237, 243 (2nd Cir. 1975).

³ There is also evidence that Detective Robert Blehm lied when he testified that he found and recovered a bullet fragment from the Fishtown parking lot. (Tr. 255-256). This testimony is contradicted by the CSI reports and the fact that no bullet fragment was introduced into evidence.

The government also violates a criminal defendant's right to due process of law, guaranteed by the Fourteenth Amendment when it allows false evidence to go uncorrected when it is presented. *Giglio v. United States*, 405 U.S. 150, 155 (1972); *Pyle v. Kansas*, 317 U.S. 213 (1942). Based on the foregoing facts, there can be little doubt that petitioner's conviction was secured through the use of perjured testimony, known by agents of the government to be false when it was presented.

To prevail on the due process violation involving perjured testimony under *Napue* and *Giglio*, a petitioner must establish that the prosecution knew or should have known that false testimony was utilized and that prejudice ensued. *Jackson v. Brown*, 513 F.3d 1057, 1071-1072 (9th Cir. 2008). The test for prejudice resulting from the use of perjured testimony is more lenient than the *Brady* materiality test and a new trial is required where there is "any reasonable likelihood" that the perjured testimony could have "affected the judgment of the jury." *United States v. Bagley*, 473 U.S. 667, 678 (1985).

Under Missouri law, a trial prosecutor does not have to have personal, subjective knowledge of the falsity of testimony before a due process violation can be established. *See State v. McClain*, 498 S.W.2d 798, 800 (Mo. banc 1973). Based upon these two recanting witnesses' sworn statements, it is clear, that at the

bare minimum, agents of the state solicited false testimony and allowed that testimony to go uncorrected after it was given. *Giglio*, 405 U.S. at 153 (1972).

In *Giglio*, the court also found a *Napue* violation when the prosecutor lacked personal knowledge of the perjury. In that case, the court held that one prosecutor's unknowing failure to correct false testimony that disavowed promises made by another prosecutor violated due process. *Giglio*, 405 U.S. at 155. In reaching this conclusion, the court in *Giglio* stated: "The prosecutor's office is an entity and as such it is the spokesman for the government. A promise made by one attorney must be attributed for these purposes, to the government." *Id.* at 154. Thus, *Napue* and *Giglio* stand for the proposition that the element of the "knowing use" of perjured testimony is established when any of the state's representatives, including the police, would know that the testimony presented at trial was false. *See, e.g., Jackson v. Brown*, 513 F.3d 1057, 1075 (9th Cir. 2008).

On the issue of prejudice, there can be no doubt that the perjured testimony here could have affected the judgment of the jury. As noted above, this perjured testimony was the only evidence the prosecution could marshal to support petitioner's convictions. Without this testimony, the state simply had no case.

In light of the foregoing facts, it is beyond dispute the perjured testimony here affected the judgment of the jury. Habeas relief is warranted.

CLAIM 3

PETITIONER IS ENTITLED TO A WRIT OF HABEAS CORPUS BECAUSE THE RECORD ESTABLISHES THAT HIS CONVICTIONS WERE SECURED IN VIOLATION OF HIS SIXTH AMENDMENT RIGHTS BECAUSE TRIAL COUNSEL HAD AN ACTUAL CONFLICT OF INTEREST RESULTING FROM THE FACT THAT HE HAD AN ONGOING ATTORNEY-CLIENT RELATIONSHIP WITH REGGIE THOMAS, WHO WAS AN ALTERNATIVE SUSPECT IN THE MURDER FOR WHICH PETITIONER WAS CONVICTED AND, AS A RESULT, COUNSEL'S PERFORMANCE WAS ADVERSELY AFFECTED BECAUSE HE FAILED TO INVESTIGATE AND PRESENT AVAILABLE EVIDENCE AT TRIAL IMPLICATING THOMAS AS THE KILLER.

It is clear that the right to counsel guaranteed by the Sixth Amendment entails "a correlative right to representation that is free from conflicts of interest." *Wood v. Georgia*, 450 U.S. 261, 271 (1981). It is also clear that, in a case where a criminal defendant can establish that his trial counsel suffered from divided loyalties, prejudice is presumed if counsel's performance was adversely affected. In other words, in order to prevail on a conflict of interest claim, a defendant need only show that his representation at trial was adversely affected by the conflict and is not required to show that the conflict altered the outcome of the proceeding. *Cuyler v. Sullivan*, 446 U.S. 335, 349-350 (1980).

As noted earlier, the facts supporting the conflict of interest claim here are beyond dispute. It is clear that Mr. Toney suffered from divided loyalties between his duty to vigorously represent Mr. Carnes at his murder trial as opposed to the interests of his other client Reggie Thomas. It is beyond dispute that Mr. Thomas

and Mr. Toney had an attorney-client relationship in the past that was also clearly ongoing in light of Mr. Thomas's statement to the police that Toney had let him review the discovery in this case. (See Exh.'s 16, 17). As a result of this conflict, petitioner's defense at trial was adversely affected because Mr. Toney failed to present available evidence and argument to the court that Mr. Thomas, not Keith Carnes, had motive and opportunity to kill the victim because he was a rival drug dealer. (Exh. 17). Mr. Toney could have also presented direct evidence from Felicia Jones and Margo Thomas that placed Reggie Thomas near the scene of the shooting at the time it occurred. (*Id.*). Finally, and most importantly, counsel failed to present direct evidence of Thomas' guilt that Ms. Jones overheard Thomas telling some of his subordinates "to make the victim disappear." (*Id.*). In light of the facts, there was a clear conflict of interest between petitioner and Thomas that requires a new trial. *See LaFrance v. State*, 585 S.W.2d 317, 321-323 (Mo. App. W.D. 1979).

Because the facts here establish an actual conflict of interest existed that adversely affected counsel's performance, prejudice is presumed. *See State v. Risinger*, 546 S.W.2d 563, 565 (Mo. App. S.D. 1977). Because the facts noted above clearly establish a Sixth Amendment violation, habeas relief is warranted.

CONCLUSION

WHEREFORE, for all the foregoing reasons, petitioner respectfully requests that this Court require the State of Missouri to show cause as to why habeas relief should not be granted and thereafter, after a thorough review of the facts and law, enter an order granting a Writ of Habeas Corpus vacating petitioner's convictions, and grant such other and further relief that the Court deems fair and just under the circumstances.

Respectfully Submitted,

/s/ Kent E. Gipson
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CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of February, 2017, the foregoing was filed via case.net and a true and correct copy was sent to the office of the Missouri Attorney General via email: attorney.general@ago.mo.gov.

/s/ Kent E. Gipson
Counsel for Petitioner