IN THE SUPREME COURT OF MISSOURI

No. _____

STATE ex rel. MICHAEL POLITTE,

Petitioner,

v.

DORIS FALKENRATH,

Respondent.

Original Habeas Corpus Proceedings
Writ Denied by Missouri Court of Appeals, No. WD84748
Writ Denied by Circuit Court of Cole County, No. 20AC-CC00109

SUGGESTIONS IN SUPPORT OF PETITION FOR WRIT OF HABEAS CORPUS

/s/ Megan G. Crane
Megan Crane, MO Bar 71624
Roderick & Solange
MacArthur Justice Center
3115 South Grand Blvd., Suite 300
St. Louis, MO 63118
Phone: (314) 254-8540
megan.crane@macarthurjustice.org

Attorneys for Petitioner Michael Polite

/s/ Rachel K. Wester
/s/ Tricia J. Bushnell
Rachel Wester, MO Bar 67826
Tricia Bushnell, MO Bar 66818
Midwest Innocence Project
3619 Broadway Boulevard, #2
Kansas City, MO 64111
(816) 221-2166 (phone)
rwester@themip.org
tbushnell@themip.org

/s/ Robert Langdon
/s/ Mark Emison
/s/ Alex Thrasher
Robert Langdon, MO Bar 23233
Mark Emison, MO Bar 63479
Alex Thrasher, MO Bar 71207
Langdon & Emison, LLC
911 Main Street
Lexington, MO 64067
(660) 259-9901 (phone)
mark@lelaw.com
alex@lelaw.co

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INTRODUCTION

Michael Politte has been wrongfully imprisoned for over twenty-two years, since he was 14 years old, for the murder of his own mother—a crime he did not commit. No valid evidence has ever connected him to this crime, and he has steadfastly maintained his innocence. We now know that the only physical evidence against him is indisputably false. Even the State agrees. Michael and his sisters have spent decades waiting to properly grieve their mother because they instead have been fighting for Michael's freedom. Rather than healing from this tragedy with his sisters, Michael is currently serving a life sentence for second-degree murder.

Just hours after finding his mother's burning body on the floor of her bedroom, 14-year-old Michael became the prime suspect; he was taken into custody that morning for days of interrogation, and arrested and charged with her murder within 48 hours. Michael was the only surviving family member present during the fire, and the police wrongly suspected him because they misinterpreted his reaction to the trauma of finding his mother's burning body as evidence of guilt, deception, and ultimately, what the State called a remorseless cold heart. Law enforcement ignored much more likely suspects – the victim's ex-husband, who had just lost a significant divorce settlement to the victim the week before her murder and threatened her life at that time, and his cousin, who was seen by multiple witnesses coming from the victim's home as the fire burned – because they did not fit the narrative decided on the morning of the murder.

Michael's family and friends have always believed in his innocence. And he has never wavered. He even turned down a sweetheart plea deal before trial because he refused

to plead guilty to something he did not do. The jury that convicted Michael, however, did not know any of this. Michael did not receive a defense; his attorney did not consult or present a single expert, despite the State's reliance on scientific evidence of which counsel had no knowledge or experience; counsel did not call any of Michael's family to testify in his defense, and counsel did not prepare or call Michael to testify despite his urgent desire to explain his innocence.

Science now proves what Michael and his family have always known. At trial, the State told the jury that gasoline found on Michael's shoes proved he started the fatal fire. We now know with scientific certainty, however, there was no gasoline on Michael's shoes. We also now know that the Fire Marshall's testimony that this fire was started with an accelerant was not true. But there's more: additional new evidence also proves Michael's actual innocence, including both an affidavit from the State's only witness who established any iota of motive negating the State's motive theory, as well as multiple new witnesses who have come forward with mutually corroborating information implicating Ed Politte's cousin.

Even the State admits the gasoline evidence is false. And, today, a member of the police investigation team has come forward to assert her belief in Michael's innocence. The compelling evidence of Michael's innocence enables this Court to review each of his constitutional claims, regardless of any procedural bars this Court may find.

Rita Politte deserves justice. But she is not the only victim here. Her family, including her then 14-year-old, now grown, son Michael, are also victims of the State's

failure to properly investigate and prosecute her murderer, not to mention their knowing misconduct. This Court can finally bring peace to this family.

STATEMENT OF FACTS

The Crime & Initial "Investigation"

Rita Politte was found murdered inside her mobile home in Hopewell, Missouri, in the early morning of December 5, 1998. Michael "Bernie" Politte, Rita's 14-year-old son, and his friend, Josh Sansoucie, were asleep on the other side of the family's trailer in Michael's room. Michael awoke to the smell of smoke, and groggily asked Josh if he was smoking a cigarette; he was not. (Ex. 58, Deposition of Joshua Sansoucie, at 52-53). When they opened the bedroom door, they found a smoke-filled trailer. As they crawled to escape, Michael stopped at his mother's room to check on her. (*Id.* at 55; Ex. 28, Washington County Sheriff's Office Investigative Reports, at 6). Horrifyingly, he found her body burning on the floor. (Ex. 28 at 6).

Michael ran to get the hose in front of the trailer, but it would not reach far enough inside. (*Id.* at 3). Josh sprinted to Rita's neighbor, Leigh Ann Skiles, and begged her to call 911. (T. 197).[1] Neighbors Chuck Skiles and Mike Nixon then ran into the home and tried to put out the fire with a pan of water. (Ex. 28 at 4). The fire department and first responders arrived shortly after. (*Id.*).

[1] Citations to Exhibit 62, the trial transcript, will be denoted by a "T." followed by the appropriate page number.

Fire Investigator Jim Holdman began examining the scene at around 7:30 am. (Ex. 26, Fire Marshal's Investigative Reports, at 1). Holdman quickly decided on his theory of the case—based only on his visual observations—that gasoline had been poured onto Rita's body and the carpet below. (*Id.* at 4). He concluded in his initial report, *before* testing any samples from the scene, that a liquid accelerant had been poured onto the stomach, chest, shoulders, neck, and head of Rita and burned through the carpet underneath Rita's body, through the wood floor.[2] (*Id.* at 5).

Off. Tammy Belfield was dispatched to the scene to collect evidence at around 7:50 a.m. (Ex. 28 at 9). Before she began, Sheriff Ron Skiles informed her "that there had been a report of a female that had been intentionally set on fire." (*Id.*). Belfield and State Highway Patrol officers conducted a thorough search of the residence. A fire poker, mag light flashlight, and two baseball bats were collected and later tested by the Missouri State Highway Patrol Crime Lab, but all were excluded as the weapon that caused the blunt force trauma to Rita's head. (*See* Ex. 27, Missouri State Highway Patrol Evidence and Lab Reports, at 12, 20). No murder weapon was ever located.

The pathologist later determined that Rita had died of carbon monoxide poisoning, but also sustained blunt trauma to her head, (Ex. 25, Rita Politte Autopsy Report, at 1), and

[2] Three samples of carpet were taken from the scene for further testing—from the carpet northwest of Rita's body, from the carpet under Rita's back, and from the far northeast side of the room (as a control). (Ex. 26 at 4.)

a dislocated shoulder.[3] (*Id.* at 8). She was found in the doorway to her bedroom, laying face-up on the floor, her legs spread apart, (Ex. 28 at 2, 10), wearing only a pair of underwear. (*Id.* at 10). Her body was burned from her pubic area to her head. (*Id.*). There was blood on her left thigh, on the floor beside her right leg, on the light switch next to her bedroom door, on the carpet underneath the light switch, and a few drops on the bed sheet in her room, close to where her body was discovered. (T. 284). The pathologist concluded that "The scene and autopsy suggest blunt trauma to the right [rear skull] with fracture and a concussion" and that there would have likely been a "great deal of blood" at the time of this injury. (Ex. 28 at 7; T. 407-08). No blood was observed on Michael or Josh or their clothing on the morning of the fire. (Ex. 28 at 3-7).

Nonetheless, the two boys were immediately considered suspects. They were placed in separate police vehicles and questioned by Detective Curt Davis, (Ex. 28 at 3). He did not observe or document any blood, scratches, or defensive wounds on Michael or Josh—nor did he smell gasoline or any accelerant that would indicate Michael had come into direct contact with the fire. (*Id.* at 3-7). The boys then were taken to the police station for further interrogation.

[3] There was disagreement about whether Rita's right arm and shoulder were dislocated. While the radiologist concluded her shoulder had been dislocated, the pathologist opined the damage was due to the fire. (T. 399).

Michael & Josh's Statements are Consistent from The First Interview to the Final Interrogation

Both boys separately recounted the same set of facts. The evening before the fire, on Friday night, December 4, 1995, Rita was out with her friends.[4] Michael was supposed to be in St. Louis with his dad, Rita's ex-husband, Ed Politte, and Ed's girlfriend, Christal. But Ed and Christal called to say they could not pick him up until the next day. (Ex. 26 at 27). Instead, Michael spent time with Josh and some friends, playing pool at the Hopewell Store, stopping at the graveyard, and playing video games at Michael's house. (*Id.* at 23; Ex. 58 at 18; Ex. 28 at 4). Michael invited Josh to spend the night, (Ex. 28 at 3), and around 11 pm, Michael and Josh went to the railroad tracks near the trailer and tried to burn a railroad tie before returning home around midnight.

Shortly after, Rita arrived home to the trailer. (Ex. 26 at 17). She brought sandwiches for her and Michael; Michael and Josh split a sandwich while Rita listened to her phone messages and went to bed shortly after.[5] (*Id.*). Michael and Josh decided to go to sleep a short while later. (Ex. 28 at 5). Michael offered Josh a spot to sleep on the floor in his room

[4] Tina and Francis Carter had a few beers with Rita at the Elk's Lodge on Friday, December 4, 1998, before they headed to Steve and Colleen's Bar. Tina remembered that Michael called Rita at around 9:00 pm that night. At 11:30 pm, Rita told Tina she needed to go get Michael something to eat and she went home. (Ex. 30, Statement of Tina Carter, at 1). Francis reported to police that Rita seemed to be having a good time and "everything was going fine." (Ex. 29, Statement of Francis Carter).

[5] Rita's daughter, Melonie, who had been living at the trailer at the time of the murder but spent Friday, December 4, at a friend's house, reported to police that Rita never locked the doors of the home. (Ex. 26 at 28).

or on the couch in the living room; Josh chose the floor next to Michael's bed. (Ex. 58 at 39).

In their initial interviews with Detective Davis, Michael also recalled waking up at the same time as Josh as the trailer began to fill with smoke the next morning. (Ex. 28 at 3). After the two ran out of Michael's bedroom and saw the fire in Rita's room, the boys tried to extinguish the fire with a hose before running to the neighbor's house for help. (*Id.*). Josh confirmed Michael's version of events. (*Id.*) Josh and Michael's explanations of what happened – from Friday evening through the start of the fire and up till the arrival of the first responders – were consistent. (*Id.*).

Michael is Repeatedly Interrogated in Days after His Mother's Death

Instead of grieving with his sisters, Michael was immediately taken to the police station by Davis to be interrogated. Over the course of the next two days, he was interrogated at least three more times, by at least four different law enforcement officers, in multiple locations, all within the 48 hours after his mother's death, and when he had not slept. He was not provided an attorney. He did not have any adult present on his behalf for most of the interrogations. While his father was present at times, his father was also a suspect and thus had a clear conflict of interest.[6]

[6] A parent, or any other adult, with a conflict of interest to the youth suspect is not considered a supportive friendly adult, as required by best practices for interrogations of youth. Int'l Ass'n of Chiefs of Police, *Reducing Risks: An Executive's Guide to Effective Juvenile Interview and Interrogation* (2012) (hereinafter "IACP Guide"), *available at* http://www.theiacp.org/portals/0/pdfs/ReducingRisksAnExecutiveGuidetoEffectiveJuvenileInterviewandInterrogation.pdf.

Law Enforcement Focuses on Michael Because They Misperceive his Trauma and Stress as Indicators of Guilt and Deception, & Because of Unreliable Computer Voice Stress Analysis

In the aftermath of finding his mother's burning body, Michael was traumatized and extremely distressed during these interrogations. Davis, however, interpreted Michael's distressed statements and behaviors as signs of that he was lying, guilty, and lacked remorse. Based on Davis's misguided judgments about Michael's behavior, he made Michael take a Computer Voice Stress Analysis ("CVSA") test. (Ex. 54, Michael Politte CVSA Test Report), an unreliable tool used by law enforcement to detect deception. The CVSA test, which occurred around 12:30 pm—approximately 6 hours after Michael discovered his mother's burning body—unsurprisingly indicated that Michael exhibited significant levels of stress, which police interpreted as "deception shown on all relevant questions." (*Id.* at 2).

Fire Marshal Holdman and Juvenile Officer Jerry Chamberlain interrogated Michael yet again immediately after the CVSA test. (Ex. 28 at 5; Ex. 26 at 6). Ed Politte, Michael's father and Rita's ex-husband, and a viable alternative suspect for Rita's murder, joined for this interrogation.[7] At the outset, the police told Michael that he failed the CVSA test, and this meant he was lying. Michael, exhausted, confused, and angry he was being kept from his sisters on the heels of this family tragedy, not to mention falsely accused of

[7] Ed lived about 90 minutes away in Hazelwood, Missouri with his then-girlfriend and later-wife Christal Sellers, and heard about Rita's death from a phone call from his sister, Patsy Skiles. (Ex. 26 at 27). *See* Section III.C, *infra*.

his own mother's murder, once again told the story of the previous day. (Ex. 58 at 13-14, 18-19).

Josh was interrogated at the Sheriff's Department at same time as Michael, and law enforcement did their best to pit Josh against Michael. But their efforts failed. Michael and Josh once again gave the same consistent account they had given from the moment they were first questioned at the scene. Their accounts remained consistent between the two of them and over time, despite repeated interrogation from multiple officers, while sleep-deprived and traumatized. Yet, at the end of this third interrogation of Michael, Holdman wrote in his report, "Michael never showed any visible remorse that I detected. He was calm accept [sic] when I would inform him he was not telling the truth." (Ex. 26 at 8).

Unreliable Canine Sniff Indicates Gasoline on Michael's Shoes

After concluding that Michael "was not telling the truth," Holdman asked Investigator Bob Jacobsen and his canine to join him in the interrogation room. (*Id.*). Holdman demanded Michael's shoes and, outside of Michael's presence, the dog allegedly made a positive alert for an accelerant. The shoes were seized as evidence. (*Id.*). Holdman wrote in his report that, after the dog alerted, Michael "became very irate, cussing and his dad calmed him down." (*Id*.).

Det. Davis then interrogated Michael for the fourth time that day, without an attorney. He repeated his account of December 4-5 once more, giving the very same details. (Ex. 28 at 5-7).

Michael is Arrested

On December 7, 1998, only two days after Rita's murder, Michael was arrested for his mother's murder.[8] Ed Politte surrendered Michael to the Sheriff's Department. (*Id.* at 8). Michael became visibly upset and asked for an attorney as he was being read his *Miranda* rights. (*Id.*). As he was handcuffed, Michael frantically asked the officers to take his fingerprints because someone was trying to frame him. (Ex. 26 at 19). He repeatedly told police he did not commit this crime.

At the time of Michael's arrest, law enforcement had not conducted any laboratory testing to confirm Holdman's speculative theory that the fire was ignited with gasoline. They had not investigated alternative suspects, despite evidence pointing to others, particularly Ed Politte. And they had no explanation for why 14-year-old Michael would kill his own mother.

After his arrest, Michael was transported to a juvenile detention facility. The next day, on December 8, 1998, Michael attended his mother's funeral with "leg irons" and an escort. (Ex. 60, Transcript of Detention Hearing, December 9, 1998, at 108).

At a detention hearing on December 9, 1998, Michael's then-public defender, Renee Murphy, accurately described the case against Michael during closing argument: "This is a case where they have . . . a troubled child during the parent's divorce and they have brought in everything that could possibly make him look evil but that doesn't mean he killed his mother." (*Id.* at 108-09). Despite the Court concluding the case was "thin" and

[8] Law enforcement obtained a 72-hour pick-up order for Michael.

"circumstantial at the best," Michael was ordered to remain detained. (*Id.* at 109). He has been in custody ever since.

Law Enforcement Fails to Investigate Evidence that Does Not Point to Michael

Law enforcement ignored and/or failed to preserve a significant amount of forensic evidence that did not implicate Michael:

- a fresh boot print outside the Politte trailer on the path leading away from the back door of the home which did not match Michael's tennis shoes, (T. 349);
- DNA from a sperm stain on a towel in Rita's bedroom matched Richard Jarvis,[9] a boyfriend of Rita's, and
- additional sperm and non-sperm stains found on Rita's bed sheet were consistent with a genetic mixture of at least three people. (Ex. 27 at 18).

Yet the investigation remained focused only on Michael.

There was also significant evidence implicating alternative suspects, in particular, Rita's ex-husband and Michael's father, Ed Politte, which police essentially ignored. *See* section III.E., *infra*, for details of this evidence, including but not limited to their recent nasty divorce and her significant financial settlement against Ed the week before her death, as well as his threat to her life when she won this money, and his history of domestic

[9] Jarvis was interviewed by Detective Davis on December 5, 1998. (Ex. 28 at 7). Jarvis stated that on December 4-5, he was on his way to Marion, Georgia as a commercial truck driver with a co-worker, Gary Gamble. Jarvis arrived home around 4:30-5:00 am and went to bed. (Ex. 33, Statement of Rick Jarvis). Jarvis had last been to Rita's house around Thanksgiving, about two to three weeks before Rita's murder. Rita had been to Jarvis's on December 2, only three days before her murder. (Ex. 26 at 12). After Jarvis showed "No Deception" during a CVSA test, law enforcement quickly disregarded him as a suspect.

violence. New witness evidence also strongly suggests that Ed's cousin Johnnie Politte may have committed this crime, perhaps hired by Ed. *Id.*

Other pertinent evidence which might have been examined or tested with new technology, such as Michael's clothing or Rita's rape kit, could never be tested because the items were inappropriately stored, comingled, covered with mold, and in some cases, eaten by rats. (Ex. 46, Washington County Evidence Photographs taken May 15, 2013). Attorney General's Office emails from the four year period during which the State tried to make a case against Michael leave no question that the evidence in this case was fatally botched.[10] Jim Weber wrote that Det. Davis was

> supposed [sic] to bring the bat and the fingerprints to the lab on more than one occasion, I went through the sheriff's dept evidence room Thursday looking for the latent prints from the crime scene….The prints are not in evidence, therefore I believe they have been misplaced by the sheriff's department…the blue baseball bat, with the red "specks" that was photographed and videotaped was in evidence. . . it had no chain of custody form and I have no idea how it got there. Correct me if I'm wrong, but when you and I reviewed the evidence, that blue bat wasn't in there… **I don't even want to tell you how disorganized the evidence room is, not to mention our evidence.**

(Ex. 41 at 7)(emphasis added). As a result of this sloppiness, physical evidence that could have excluded Michael and identified the real perpetrator was not collected or available for testing.

[10] Another email exchange revealed that no one knew if fingernail scrapings had been taken from the victim; they had not. In a July 12, 2000, email, an Assistant Attorney General commented, "Idea: How a bout [sic] checking with the ME and learn wether [sic] we can dig up Rita's body and get those fingernail scrapings? She wasn't cremated was she? Please call the ME and learn wether [sic] we can do this and fix his flub up." (Ex. 41 at 6).

Suicide Attempt

On January 5, 1999, exactly one month after the death of his mother, Michael tried to kill himself while detained at a juvenile detention facility. When Juvenile Detention Officer Jerri Johnson told Michael family would be visiting in a few days, he said "I won't be alive." (Ex. 61, Suicide Attempt Incident Report and Related Notes, at 5). Around 2:15 p.m., Michael was found on his toilet tying a sheet to a ceiling vent. (*Id.* at 3). When asked why he was trying to kill himself, Michael said he did not want to live because he has not cared since they killed his mom. The State, however, alleges that Michael spontaneously exclaimed "I am have not cared since December 5th, that's when I killed my mom." What he actually said has been hotly disputed ever since.

Michael's explanation of what he said and why is corroborated by notes taken by his counselor, Karon Blankenship, who was called to his cell as he was trying to kill himself. (Ex. 61 at 4). When asked why he was upset, he explained his fear that he would be tried as an adult for the murder of his mother, and that he had to move to another room and had lost privileges. (*Id.* at 10). According to her detailed notes, he did not mention anything about involvement in his mother's death as a cause for his distress. Indeed, Blankenship's initial notes of the suicide attempt did not include *any* inculpatory statements by Michael.

Yet, later, "at the urging" of Deputy Officer Cheryl Graham, Blankenship amended her report.[11] (*Id.* at 13). Only in this amended report did she write that, as she and Graham

[11] In a letter from Blankenship to Graham on January 14, 1999, Blankenship explains: "You asked me to execute a witness statement documenting what Michael had shouted

entered Michael's cell, he shouted, "I haven't cared since I killed my mom December 5th." (*Id.* at 10). Notes written by Johnson state that Michael "spontaneously yelled," "I haven't cared since December 5th. That's when I killed my mom." (*Id.* at 12). These notes containing the alleged inculpatory statements, like the rest of the State's evidence against Michael, were only created after investigators had decided Michael was the perpetrator. And there was nothing Michael could do to fight these allegations: despite cameras and recorders in the facility, no audio recordings of what occurred in Michael's cell that day were ever disclosed.

Nonetheless, at every point before and after this alleged admission, Michael asserted his innocence to his family and others. For example, just a few months later in April 1999, Michael was transferred from the Juvenile Detention Center to the Washington County Jail and placed on suicide watch once again. (Ex. 28 at 17). While at the jail, Michael told Sheriff's Officer Tammy Belfield, "I wish my mom was here. She would tell everyone that I didn't do it." (*Id.*).

Michael Rejects Plea Offer of Voluntary Manslaughter & Only 11 More Years of Incarceration

Prior to trial, the State offered Michael a plea bargain: a 15-year sentence in exchange for a plea to voluntary manslaughter. Michael's new public defender advised Michael that he would receive time served for the years he had already spent in detention,

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while we were on the way to his cell. I wrote a statement, which you asked me to re-write because you thought it was incomplete. I took the form back to my office and wrote a more complete statement. On January 6, 1999, I delivered to your office the re-written statement." (Ex. 61 at 13).

meaning he would only serve about a decade more. But Michael rejected the offer. (T. 759-60). He steadfastly maintained innocence and refused to plead guilty to a crime he did not commit.

The State Relentlessly Bullies Josh in an Effort to Turn Him into a State Witness

Fueled by their singular focus on making a case against Michael, law enforcement relentlessly tried to work Josh for years, using an arsenal of tactics known to overpower youth and produce unreliable information, to try to flip him into a witness against Michael. (*See* Ex. 31, Fax from FBI to Washington County Sheriff's Department, December 21, 1998.) Despite their extreme and dogged efforts, Josh remained consistent and his story always corroborated Michael's memory of events and Michael's innocence. Thus, even though he was interrogated eight times, charged with crimes in an effort to force helpful testimony, and granted immunity, Josh did not testify for the State. The State did not call him because he had nothing helpful to say.

Trial

By the time the case went to trial in January 2002, Michael was 18 years old, 4 inches taller, 30 pounds heavier, and a far cry from the adolescent he was when his mother died. This man was the person the jury observed and convicted. When presented with evidence regarding 14-year-old Michael's reactions, behavior, and statements, they had no choice but associate them with the grown man in front of them, rather than the kid he was at the time.

The State's theory at trial of Michael's guilt rested on the purported evidence of arson, and Michael's shoes were the centerpiece of case. The gasoline found on his shoes

was the *only* physical evidence tying him to the crime. Fire Marshal Jim Holdman was the State's star witness: he conclusively testified that the fire was intentionally set using an accelerant. Fire Marshal Investigator Bob Jacobsen and Fire Marshal Investigator Bob Jacobsen testified that Michael had gasoline on his shoes, as confirmed by both laboratory testing and a canine.

To shore up its circumstantial case, the State played up law enforcement's misinformed, biased interpretation of Michael's response to his mother's death after the fire as guilty and remorseless. The State focused on Michael's behavior following his mother's death—the behavior of a fourteen-year-old who just witnessed his mother burning on the floor—to spin a narrative that Michael was cold, emotionless, and remorseless. Eric Aubuchon, a volunteer firefighter who responded to the fire at the Politte residence, recalled that when he arrived on scene, Michael was not screaming or shouting, but he also noted that Michael was not "calm" and that Michael's eyes looked red, as if maybe he'd been crying.[12] (T. 234). Davis and Holdman testified about Michael's statements during the series of interrogations on the day of his mother's death. Davis theorized that Michael was "acting normal, not concerned about what had happened, no visible signs of remorse." (T. 460-61). Davis testified that Michael did not seem emotional until he realized he was a suspect and angrily exclaimed, "Dad, this is a bunch of shit, they're trying to pin something on me that I didn't do." (T. 469.) Holdman reiterated his belief that Michael was guilty,

[12] Aubuchon did not provide an official statement to law enforcement about his alleged interactions with Michael on the morning of the fire, which occurred in 1998, until November of 2001, three years after the murder. (T. 237-38).

based on Michael's behavior and statements during his interrogations. Defense counsel did nothing to challenge any of this character assassination.

The State also presented testimony from Juvenile Officers Jerri Johnson and Cheryl Graham regarding Michael's alleged admission during his suicide attempt. Notably, the State did not call Karen Blankenship to corroborate this testimony, and presented no physical evidence of this allegedly damning statement because despite the presence of cameras, no audio was recorded.

Finally, the State also tried to present motive evidence through Derek Politte, Rita's ex-boyfriend, who testified about an argument Michael had with Rita about money for a motorcycle part. (T. 180).

Additionally, pathologist Dr. Michael Zaricor testified that he failed to take fingernail clippings or scrapings during the autopsy. (T. 394-97). Dr. Zaricor had previously testified under oath that he had taken fingernail scrapings during the initial autopsy because he "thought [he] had." (T. 420). However, Rita's body had to later be exhumed[13] to collect samples. (T. 395-97).[14]

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[13] Officer Charles Lalumondire testified about the exhumation of Rita's body in February 2001 to collect fingernail scrapings. (T. 548-49).

[14] Other State's witnesses included Roger LaChance, a first responder to the scene (T. 241-49); former Washington County Deputy Sheriff Tammy Belfield, who collected evidence at the crime scene (T. 504-46); Diane Bayes, from the St. Louis Division of the FBI's Evidence Response Team, who testified about the blood pattern evidence in Rita's room (T. 550-85); Deseree Herndon, a latent print examiner who testified that two prints in Michael's own home were matched to him (T. 586-600); and Carrie Maloney, who testified about the DNA evidence, including that several items were taken from the scene excluded as the murder weapon. (T. 600-33).

Neighbors Leigh Ann and Chuck Skiles were also called by the State. Leigh Ann testified about calling 911 on the morning of December 5, 1998, and stated Michael had no cuts, scratches, or blood on him that day. (T. 204). Chuck Skiles corroborated Leigh Ann's account, recalling that Leigh Ann called him around 6:30 am, and he ran down to Rita's trailer and saw Josh and Michael. (T. 215). Chuck was there when Michael began to grasp the reality of what was happening. Michael told him, "There's my mom. She's on fire. She's dead." (*Id.*). Chuck later saw Michael at his relative's next door; Michael was screaming and obviously very upset. (T. 226-27). Like Leigh Ann, Chuck did not see any blood, scratches, or other wounds on Michael that morning. (T. 227). Chuck recalled that the water hose was lying on the floor in the house, consistent with Michael's and Josh's statements that they had tried to extinguish the fire before Chuck arrived. (T. 217).

Michael's defense lasted less than half a day, despite the reality that he was on trial for his life. He was represented by a new public defender, who called only three witnesses: (1) Karen Blankenship, who testified that she only changed her report "at the urging" of Deputy Officer Graham, but whom was not effectively utilized as a witness because she was not asked about or shown her initial statement, nor was she asked to refresh her memory with documents or impeached with prior inconsistent testimony; (2) Patsy Skiles, Michael's aunt, who testified that Michael was in shock when she saw him the morning of the fire, and that he did not have any blood, cuts, or scratches on him, and about her observations before Michael's juvenile certification hearing on March 31, 1999, of Officer

Graham and Attorney Shawn McCarver (who represented the State Juvenile Office at the hearing) approaching Blankenship and "exchang[ing] words during a heated conversation"; and (3) William Mal Gum, the Washington County Coroner, who testified that Rita's time of death was likely between 6:00-6:15 a.m., though Gum could not give an exact range. (T. 748-49). The only witness who could corroborate Michael's account of the evening—Josh Sansoucie—was not a defense witness. After being relentlessly interrogated and bullied by the State over the course of years, he was not available to testify. *See* Claim IV., *infra*.

Defense counsel essentially did nothing to challenge the State's case. He did not rebut, challenge, or even investigate the evidence of gasoline on Michael's shoes or the arson evidence, law enforcement's biased misinterpretation of Michael's behavior and statements, or the State's theory of motive. *See* Claim VI, *infra*. No evidence was presented about alternative suspects—Ed Politte was not even mentioned. Instead, in closing, counsel focused on the fact that there was absolutely no physical evidence connecting Michael to the crime (failing to acknowledge, let alone challenge, the State's false gasoline and fire evidence), and that although there was significant blood at the scene, Michael did not have any blood on him, "not one speck." (T. 784-85).

Jury Focused on the Shoes & Michael Convicted of Second-Degree Murder

There is simply no question that the fire evidence – particularly the gasoline on Michael's shoes – was critical to Michael's conviction. The gasoline was the lynchpin of the whole case. During its 4.5 hours of deliberation, the jury asked for several pieces of evidence: first, requesting all photographs, videos, and notes admitted into evidence, (T.

816), and second, *asking to examine Michael's tennis shoes.* (T. 817). Lastly, they asked for a clarification on whether there was a possibility of parole for several sentence options, but the Court responded that it could not give any further instruction. (T. 817). It took several votes for the jury to come to a decision. (*See* Ex. 22, Affidavit of Victor Thomas.) But the jury ultimately returned with a guilty verdict, and Michael was wrongfully convicted of the second-degree murder of his mother. (T. 818).

Pleas of Michael's Innocence at Sentencing

A few months later on April 19, 2002, Michael's older sisters, Chrystal and Melonie Politte, testified in support of Michael at his sentencing hearing. The sisters testified that from the very beginning they knew he was innocent and that their family would be denied justice. Michael's oldest sister, Melonie, addressed the Court first, telling the Court that she believed her mother's real killer was still at large. (T. 832). Chrystal Politte put it most succinctly, telling the court "[t]oday, you guys are putting an innocent person in jail." (T. 833).

ARGUMENT

CLAIM 1: MICHAEL'S CONVICTION VIOLATES DUE PROCESS BECAUSE IT WAS BASED ON FALSE SCIENTIFIC TESTIMONY

Michael's conviction violates his rights under the Fourteenth Amendment Due Process Clause because it was based on false scientific testimony that there was gasoline on Michael's shoes, as well as unreliable expert testimony that the fire was ignited with gasoline. The State now concedes that there was *no gasoline on Michael's shoes*, and thus it is now undisputed that the testimony from two experts that there was gasoline on

his shoes was false.[15] (*See* Ex. 63 (11.06.20 Letter from Michael J. Baker to Michael Spillane)("I would report this case as no ignitable liquid identified on the shoes."). Because Petitioner's conviction was predicated on scientific evidence and expert testimony proven to be fundamentally unreliable – and indeed factually false – the admission of that testimony "so infected Petitioner's trial with unfairness as to make the resulting conviction a denial of due process." *Darden v. Wainwright*, 477 U.S. 168, 181 (1986); *Lee v. Superintendent Houtzdale* SCI, 798 F.3d 159 (3d Cir. 2015); *Gimenez v. Ochoa*, 821 F.3d 1136, 1145 (9th Cir. 2016). Absent this invalid evidence, Michael would not have been convicted.

A. There was No Gasoline on Michael's Shoes, Even the State Agrees

Crime Lab Supervisor Carl Rothove testified at trial that Michael's shoes had gasoline on them, conclusively stating that "gasoline was found on the shoes," (T. 641), and that while he could not know "how much of this accelerant had soaked into the shoes," (T. 647), or if it was "leaded or unleaded," (T. 648), he was sure that it was gasoline. (*Id.*). Rothove's testimony was bolstered by testimony from Fire Marshall Bob Jacobsen, who testified that his police canine made three positive alerts to Michael's shoes, indicating the presence of accelerants. (T. 441). While Jacobsen could not recall the results of laboratory testing on Michael's shoes, he assured the jury that dogs can detect accelerants that lab testing cannot because a dog's nose is more sensitive than lab

[15] Petitioner's post-conviction expert Paul Bieber has also explained why the expert testimony that the fire must have been started with gasoline is wholly unreliable. *See* Claim I, section B, *supra*.

equipment. (T. 444).

This testimony was false. Even the State now concedes, admitting there was *no gasoline on Michael's shoes*. (*See* Ex. 65 ("I would report this case as no ignitable liquid identified on the shoes."). Instead, the substances were simply compounds commonly used in the shoe manufacturing process.[16] John Lentini, one of the country's foremost experts in chemical analysis,[17] reviewed the chromatography evidence produced pre-trial. Lentini concluded the substance on Michael's shoes was not gasoline, but instead an aromatic solvent from the manufacturing of the shoes.[18] (Ex. 1, Affidavit of John Lentini, at 7).

To be correctly identified as gasoline, a residue *must have alkanes*. (*Id.* at 4. *See also* Ex. 65 (MHSP Criminalist agrees that MHSP Crime Lab's current identification criteria require the presence of alkanes to report a finding of gasoline)). Although gasoline is dominated by aromatics, if a substance does not contain alkanes, then it is <u>not</u> gasoline. (Ex. 1 at 4). Here, Lentini determined that the samples from Michael's shoes did not contain gasoline because (1) the shoes did not also contain alkanes and (2) the

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[16] Other defendants have been exonerated on this exact basis. For example, George Souliotes's conviction was based, in part, on the State's evidence that his shoes contained evidence of an accelerant (medium petroleum distillates). After John Lentini proved that the chemicals in Souliotes's shoes were a result of the manufacturing process, rather than an accelerant, Souliotes was found actually innocent by a federal court and granted habeas relief based on his trial counsel's ineffectiveness to adequately challenge the arson evidence. *Souliotes v. Hedgpeth*, No. 1:06-CV-00667 AWI, 2012 WL 1458087 (E.D. Cal. Apr. 26, 2012).

[17] Lentini has served as Chair of the American Society for Testing and Materials Committee on Forensic Sciences

[18] Paul Bieber, a certified fire and explosion expert, also corroborates Lentini's conclusions. (Ex. 2 at 3).

testing results showed the shoes contained approximately the same amount of aromatic solvent on each shoe. (*Id.* at 6). As Lentini explained, if the shoes contained gasoline, it is unlikely that the same amount would fall on each shoe. (*Id.*). If the compounds came from the manufacturing process, however, an equal number of compounds on each shoe would be expected. (*Id.*).[19] This new scientific evidence disproves the only physical evidence allegedly tying Michael to the scene.[20]

B. Fire Marshall's Conclusion of Accelerant-Ignited Fire was Unreliable

Not only does new evidence prove there is no link between Michael and the fire, new evidence also disproves the State's entire trial theory: the fire that killed Rita Politte was ignited with an accelerant. At trial, the State presented Fire Marshall Holdman as an expert to testify, with certainty, that the fire was set using an accelerant, and that the fire showed a burn pattern similar to that of the fire Michael admitted started on the railroad ties the night of Rita's death. Both of these conclusions have now been debunked.

Specifically, Fire Marshall Holdman testified that, based upon his visual inspection, "it was clearly evident that a liquid accelerant had been" used to set the fire. (T. 295). The prosecutor, in closing argument, underscored that "[e]verybody's been pretty consistent it

[19] The State also concedes that "it is now known that solvents found in footwear adhesives have similarities to gasoline." (Ex. 65.)

[20] According to the State's own representations, this evidence is new. *See* Ex. 65 ("At the time of analysis, analysts relied heavily upon pattern comparisons. Over time, the forensic science community began to learn that certain components were necessary for confirmation of gasoline, the MHSP Crime Lab adopted new identification criteria. . . . At the time of analysis, the analyst would not have known that alkanes were also necessary to confirm the presences of gasoline. Furthermore, the analyst would not have known that solvents used to manufacture footwear could closely resemble gasoline.")

was an accelerant." (T. 768), and the prosecutor specifically called the accelerant gasoline says during closing argument, telling the jury Michael poured gasoline over her his mother's face to "set[] her on fire." (T. 764). *See* Claim III, *infra*.

Carl Rothove admitted that the carpet samples taken from the scene "did not yield the presence of an ignitable liquid" upon testing, (T. 643), but unfazed by the scientific evidence from the lab in front of him, Rothove provided an alternative theory—that the accelerant used must have "burned up," so it could not be detected. (T. 643-44).

We now know that all of the indicators that Fire Marshall Holdman relied upon to deem this an arson by accelerant have been found to exist in a naturally occurring fires as well, and tell us nothing about the cause or origin of a fire. The modern requirements and standards for fire investigation are set out in NFPA 921, the "Guide for Fire and Explosion Investigations," published by the National Fire Protection Association (NFPA). Its purpose is "to establish guidelines and recommendations for the safe and systematic investigation or analysis of fire and explosion incidents."[21] The importance of NFPA 921 and its recommendations cannot be overstated. Every fire investigation must begin with the NFPA methods and guidelines. The recommendations are so critical to making accurate findings that courts considering arson cases today will exclude expert opinions inconsistent with NFPA 921 methods and guidelines as unreliable at trial.[22]

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[21] NFPA 921, section 1.2.1.

[22] *See, e.g., Travelers Cas. Ins. Co. of Am. ex rel. Palumbo v. Volunteers of Am. Ky., Inc.*, No. 5:10-301-KKC, 2012 LEXIS 117789, at *6-8 (E.D. Ky. 2012) (explaining that NFPA 921 requires deviations from its procedures to be justified and requires that the scientific method be used in every case); *Werth v. Hill-Rom, Inc.*, 856 F. Supp. 2d 1051, 1060-63 (D. Minn. 2012) (holding expert testimony inadmissible for failure to apply NFPA 921

According to Certified Fire and Explosion Investigator (CFEI) Paul Bieber, "[t]oday, NFPA 921 serves a de facto Standard of Care on how to conduct a thorough and objective fire or explosions investigation."[23] (Ex. 2 at 4).

According to Bieber, who reviewed Fire Marshall Holdman's reports and testimony as well as photographs and diagrams of the fire scene, Holdman's conclusions and testimony were wrong, unreliable, and in violation of NFPA 921 from start to finish. (Ex. 2 at 12-13). The details of Holdman's errors are set out in detail in Claim III.B., i*nfra*. If presented in court today, Holdman's testimony would be excluded because it violated NFPA 921. *See* footnote 23.

C. Habeas Relief is Warranted Because Michael's Conviction is Premised Upon False Scientific Evidence & False Expert Testimony

The Third, Sixth, and Ninth Circuits have all recognized that habeas petitioners can allege a constitutional violation from the introduction of flawed scientific testimony at trial if they show that the introduction of the evidence "undermined the fundamental fairness of the entire trial." *Lee v. Superintendent Houtzdale* SCI, 798 F.3d 159 (3d Cir.

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methodology); *United States v. Myers*, No. 3:10-00039, 2010 U.S. Dist. LEXIS 67939, *7-9 (S.D. W.Va. 2010) (excluding evidence of a dog's alerts unconfirmed by laboratory tests, as required by NFPA standards); *Barr v. Farm Bureau Gen. Ins. Co.*, 806 N.W.2d 531, 534 (Mich. Ct. App. 2011).

[23] While NFPA released its first edition of 921 in 1992, establishing guidelines and recommendations for the systematic investigation of fire incidents and laying out specific procedures for the collection and analysis of evidence (*Id.* at 8), it was not widely dispersed and recognized. Since its first publication, its "influence within the fire investigation community has steadily grown." (*Id.*) "Now in its eight edition, NFPA 921 has been formally endorsed and accepted as the standard of practice by both of the nation's largest fire investigator professional associations, the International Association of Arson Investigators (IAAI) and the National Association of Fire Investigators." (*Id.*)

2015); *Gimenez v. Ochoa*, 821 F.3d 1136, 1145 (9th Cir. 2016). At least one state court has followed suit. *See Ex Parte Henderson*, 384 S.W.3d 833 (Tex. Crim. App. 2012)(granting a new capital murder trial, and finding that the inadvertent use of false scientific evidence was sufficient to establish a due process violation).[24]

In *Lee*, the Third Circuit affirmed habeas relief because the "admission of the fire expert testimony undermined the fundamental fairness of the entire trial because the probative value of [the fire expert] evidence, though relevant, is greatly outweighed by the prejudice to the accused from its admission." 798 F.3d at 162. Specifically, the district court granted relief because "the verdict . . . rest[ed] almost entirely upon scientific pillars which have now eroded" *Id.* (citing *Lee v. Tennis*, No. 08-1972, 2014 WL 3894306, at *15-16 (June 13, 2014), and the state failed to show other "ample evidence of guilt upon which the jury could have relied." *Id.*

The *Lee* testimony – from which the "scientific pillars" had eroded – were precisely the same types of arson and accelerant testimony presented by the State in Michael's case, including (1) testimony that visual indicators at the scene led to the

[24] While no Missouri court has yet granted habeas relief on this basis, the Eighth Circuit has not foreclosed the validity of such a claim. *See Rhodes v. Smith*, 950 F.3d 1032, 1036 n. 2 (8th Cir. 2020)(denying habeas relief because the conviction was independently supported by other evidence, and declining to decide whether introduction of flawed expert testimony can amount to a constitutional violation); *Feather v. United State*s, No. CIV 18-4090, 2020 U.S. Dist. LEXIS 167612 (D.S.D. Sep. 14, 2020)(while scientific evidence presented at habeas stage regarding child sexual assault did not prove the trial testimony false, the court assumed without decided that new scientific information demonstrating a conviction was product of false testimony could amount to a violation of due process).

conclusion that the fire was deliberately started with an accelerant, (2) evidence that the fire burned exceptionally hot (more heat and energy than a "normal" fire), and (3) evidence that the petitioner's shirt and pants had accelerant on them, linking him to the arson. *Id.* at 157. The *Lee* Court recognized that scientific developments have rendered this arson testimony "invalid." *Id.* With regard to the testimony about accelerant on the petitioner's clothing, the Court found that scientific developments and retesting of materials "undermined the reliability" of the trial testimony. *Id.*

Here, the new scientific evidence is perhaps even more damning than in *Lee* because the retesting regarding Michael's shoes not only undermined the reliability of testimony about the presence of gasoline on his shoes, the new testing conclusively proved there was *no* gasoline on his shoes. The false gasoline testimony tying Michael to his mother's death, was presented by not one, but two separate expert witnesses. With regard to the arson testimony, just as in *Lee*, Fire Marshall Holdman's conclusions were based upon "arson science" now found to be invalid.

This testimony is not harmless. First, the gasoline evidence was the only physical evidence presented by the State to tie Michael to this crime. Second, scientific expert testimony is uniquely damaging, particularly when it goes unrebutted by the defense. Jurors are predisposed to trust and rely upon experts, particularly when multiple experts corroborate each other, and when the defense does not challenge those experts with its own defense expert. Expert testimony is particularly persuasive to jurors, and thus particularly problematic when it is false. *See Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 595 (1993) ("Expert evidence can be both powerful and quite

misleading because of the difficulty in evaluating it."); *see also United States v. Frazier*, 387 F.3d 1244, 1263 (11th Cir. 2004) ("[E]xpert testimony may be assigned talismanic significance in the eyes of lay jurors, and, therefore, the district courts must take care to weigh the value of such evidence against its potential to mislead or confuse."); *United States v. Hines*, 55 F. Supp. 2d 62, 64 (D. Mass. 1999)("[A] certain patina attaches to an expert's testimony unlike any other witness; this is 'science,' a professional's judgment, the jury may think and give more credence to the testimony than it may deserve."). Testimony regarding scientific testing of Michael's shoes, the use of an accelerant, and the reliability of dog sniffs are "precisely the type of scientific evidence that juries are likely to consider objective and infallible." Keith A. Findley, *Innocents At Risk: Adversary Imbalance, Forensic Science, and the Search for Truth*, 38 SETON HALL L. REV. 893, 943 (2008).

Here, a juror has come forward and unambiguously stated that she would have voted to acquit had she known that there was no gasoline on Michael's shoes. Juror Linda Dickerson-Bell stated, in a sworn affidavit, "the gasoline was the whole case to me." (Ex. 69 at ¶10). She further explained that she had serious doubts about Michael's guilt even at trial, but she ultimately voted guilty because she was "pressured by some of the other jurors" because she "did not feel Michael's attorney gave [the jury] anything to work with." (*Id.* at ¶4). She concluded "the gasoline on Michael's shoes was the nail in the coffin for me. It is it the reason I voted guilty. If I had known there was not gasoline on his shoes, I would have voted to acquit." (*Id.* at ¶10).

Finally, the *Lee* Court noted the "mutually reinforcing" nature of the now-

debunked evidence of arson and now-debunked evidence that Lee had accelerants on his clothes. As in Michael's case, the prosecution in *Lee* hammered this home in closing argument, emphasizing "the mutually reinforcing link between the fire-science and chromatography evidence, which together showed that the fire was set by someone who intended to kill an occupant of the cabin and matched the mix of chemicals allegedly used to start it with the mix found on Lee's clothes." *Id.* at 167. (*See also* T. at 768 ("he had gasoline on his shoes . . . . Tested. Had gasoline on it. . . . Everybody's pretty consistent it was [started with an] accelerant.")).

While the Third Circuit "implied that habeas relief should be denied if there is 'ample other evidence of guilt,'" the *Lee* Court did not find sufficient evidence of guilt to sustain Lee's conviction.[25] The same is true here. The arson and gasoline evidence was the heart of the State's theory of the crime. Without their "scientific" evidence, all that is left is weak and biased circumstantial evidence – no evidence remains related to the actual murder.

In fact, the categories of other evidence of guilt presented by the State in *Lee* are strikingly similar to that presented here, and the *Lee* Court found the other evidence insufficient to sustain the conviction. In *Lee*, the state argued there were "three remaining sources of evidence [to] provide the 'ample' evidence needed," including (1) evidence that the victim (who was the petitioner's daughter) had been murdered separate and apart from the arson, (2) "testimony that in the hours and days after the fire Lee's demeanor

[25] It is critical to note, however, that this analysis does not require a showing of innocence. See *Lee*, 798 F.3d at 162.

showed little signs of grief," and (3) "evidence attacking the veracity of Lee's account of what happened the night of the fire," such as inconsistencies in his story over time. *Id.* at 168. The *Lee* Court disagreed that this constituted ample other evidence of guilt. *Id.* Particularly relevant here, similar to the police's misinterpretation of a youth's response to trauma, *see* section F.1, *infra*, the Court concluded that the purported evidence of the petitioner's lack of remorse resulted from cultural misunderstanding, given that the petitioner was Korean. *Id.* The Court also concluded that the evidence of dishonesty is " better characterized as minor details mentioned on some occasions and omitted on others," *id.*, as is the case here with Michael and Josh's statements.

Where the only physical and/or direct evidence tying Michael to the crime has been scientifically disproven, and all that remains is speculative, biased circumstantial evidence, there can be no question that the admission of the faulty scientific testimony at trial "fundamentally undermined the fairness of [Michael]'s trial because the probative value of [the fire and gasoline evidence], though relevant, [was] greatly outweighed by the prejudice to the accused from its admission." *Lee*, 798 F.3d at 162. This Court should grant habeas relief on the basis alone.

D. This Court May Review These Errors.

Because Michael did not have a post-conviction appeal and because Michael only recently discovered the falsity of the physical evidence used to convict him, this claim was not presented previously.[26] It is properly before this Court. Regardless, to the extent the

[26] Despite being told by his father, Ed Politte, that the same firm who Ed had hired for

Court believes there is any procedural bar, this Court may review this claim because Michael can demonstrate cause and prejudice, and because Michael is actually innocent.

To demonstrate cause, the petitioner must show that something external to the defense resulted in the procedural default. *Coleman v. Thompson*, 501 U.S. 722, 753 (1991) (citing *Murray v. Carrier*, 477 U.S. 478, 488 (1986) ("We think that the existence of cause for a procedural default must ordinarily turn on whether the prisoner can show that some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule.")); *State ex rel. Engel v. Dormire*, 304 S.W.3d 120, 125-26 (Mo. banc 2010). To demonstrate prejudice, a petitioner must show a reasonable probability that, but for the alleged constitutional violations, the result of the proceeding would have been different. *See, e.g., Hunt v. Houston*, 563 F.3d 695, 704 (8th Cir. 2009) (citing *Easter v. Endell*, 27 F.3d 1343, 1347 (8th Cir. 1994)).

The State's use of false evidence and expert testimony was not known to Michael at the time of trial. Because of its exculpatory nature, Missouri law allows this evidence to be received and considered by this Court in support of his due process claim in habeas corpus proceedings pursuant to Rule 91. "If a habeas record establishes a showing of the gateway of cause and prejudice, then the habeas court is entitled to review the merits of constitutional claims associated with that showing." *State ex rel. Koster v. McElwain*, 340 S.W.3d 221, 245 (Mo. Ct. App. W.D. 2011). Further, the prosecutor's "failure to disclose

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Michael's direct appeal was also handling Michael's post-conviction appeal, no appeal followed. Attorney Arthur Margulis, of Margulis & Margulis, P.C. in St. Louis, confirms that he was never hired by Ed. (Ex. 23, Affidavit of Art Margulis).

evidence material to the defense can satisfy the cause and prejudice test to excuse a defendant's failure to raise a claim in an earlier proceeding." *Id.* at 248 (citing *Amadeo v. Zant*, 486 U.S. 214 (1988)).

Missouri cases follow the straightforward Supreme Court rule: corresponding to the second *Brady* line of cases component (evidence suppressed by the State), a petitioner shows "cause" when the reason for his failure to develop facts in state-court proceedings was the State's suppression of the relevant evidence; coincident with the third *Brady* component (prejudice), prejudice within the compass of the "cause and prejudice" requirement exists when the suppressed evidence is "material" for *Brady* purposes. *Banks v. Dretke*, 540 U.S. 668, 691 (2004) (citing *Strickler v. Greene*, 527 U.S. 263, 282 (1999)); *see also Ferguson v. Dormire*, 413 S.W.3d 40, 60 (Mo. Ct. App. W.D. 2013) (agreeing that "the prejudice prong of the gateway of cause and prejudice . . . is coextensive with the third element of a *Brady* violation").

As described above, the State's presentation of false evidence was not known to Michael at the time of his appeal. This establishes cause for his failure to assert this claim previously in State court. All of this evidence was material, which also satisfies his obligation to show prejudice flowing from the State's use of false evidence.

Even if a prisoner cannot satisfy the cause-and-prejudice exception to the procedural bar rule, "the principles of comity and finality that inform the concepts of cause and prejudice 'must yield to the imperative of correcting a fundamental, unjust incarceration.'" *House v. Bell*, 547 U.S. 518, 536 (2006) (quoting *Murray*, 477 U.S. at 495). Thus,

Michael's innocence also overcomes any potential procedural bar. *Schlup v. Delo*, 513 U.S. 298 (1995). *See* Claim III, *infra*.

CLAIM II: MICHAEL'S RIGHT TO DUE PROCESS WAS VIOLATED WHEN THE PROSECUTION KNOWINGLY PRESENTED FALSE AND MISLEADING FIRE TESTIMONY

Even if this Court concludes that a conviction based on false and fundamentally unreliable scientific testimony does not violate the Constitution, it should still grant habeas relief because the State knew, or at least it should have known, that the scientific testimony it presented was false.[27] The State violates due process when it knowingly presents false testimony and/or evidence. *Napue v. Illinois*, 360 U.S. 264, 269-70 (1959); *Giglio v. United States*, 405 U.S. 150 (1972).

As set forth above, the State presented testimony from multiple witnesses, including experts, that there was gasoline on Michael's shoes and that the fire was ignited with gasoline, both of which the State either knew or should have known was false, in violation of Michael's right to due process pursuant to the Fourteenth Amendment. Specifically, both Fire Marshal Bob Jacobsen and Missouri State Highway Patrol Crime Laboratory Criminalist Supervisor Carl Rothove testified that Michael had gasoline on his shoes, and Fire Marshall Holdman testified with certainty that the fire was an incendiary fire which

[27] The State cannot have it both ways. Either the evidence is new, and the conviction should be overturned because new scientific evidence fundamentally undermined the fairness of his proceedings and/or proved Michael to be actually innocent, or the evidence is old such that the State knew or should have known that the evidence they presented was false. The State concedes that the MSHP Crime Laboratory "transitioned from gas chromatography with flame ionization detection (GC-FID) to gas chromatography mass spectrometry (GC-MS)" in the late 1990s.

someone intentionally set using an accelerant. **Each of these allegations from the State's key witnesses was false**.

It is the duty of the prosecutor to seek justice, and not merely to convict. *Berger v. United States*, 295 U.S. 78, 88 (1932). The due process clause of the 14th Amendment protects criminal defendants from the prosecution's use of false evidence:

> As long ago as *Mooney v. Holohan*, 294 U.S. 103, 112 (1935), this Court made clear that deliberate deception of a court and jurors by the presentation of known false evidence is incompatible with "rudimentary demands of justice." This was reaffirmed in *Pyle v. Kansas*, 317 U.S. 213 (1942).

Giglio, 405 U.S. at 153-54 (1972). A prosecutor not only has a duty to refrain from the use of testimony which he knew or should have known to be false, he also has an affirmative obligation to advise the trial court that the testimony from State's witnesses was false. "In *Napue v. Illinois*, 360 U.S. 264 (1959), [the Supreme Court] said, 'the same result obtains when the State, although not soliciting false evidence, allows it to go uncorrected when it appears.'" *Id.* at 153.

Rather than comply with their constitutional duty, the prosecutors presented false testimony by State law enforcement officers, as experts. *See United States v. Blade*, 811 F.2d 461, 465 (8th Cir. 1987) (noting the expert testimony enjoys an "aura of special reliability"); *see also Souliotes v. Grounds*, No. 1:06-CV-00667 AWI, 2013 WL 875952, at *41 (E.D. Cal. 2013) (recognizing that "a certain patina attaches to an expert's testimony unlike other witnesses: this is 'science,' a professional's judgment, the jury may think and give more credence to the testimony than it may deserve") (quoting *United States v. Hines*, 55 F. Supp. 2d 62, 64 (D. Mass. 1999) (citing *Michigan Millers Mut. Ins. Corp. v. Benfield*,

140 F.3d 915, 920 (11th Cir. 1998) ("The use of 'science' to explain something occurred has the potential to carry great weight with a jury.")). The State's misconduct violated Michael's right to due process.

A. The State Knew or Should Have Known Testimony That Laboratory Testing Proved Gasoline On Michael's Shoes was False & Failed to Correct

As explained in section I.A., *supra*, and III.B., *infra*, we now know, with scientific certainty, that Michael's shoes did not in fact have any gasoline on them. But, damningly, the State actually knew at the time of Michael's trial that their testing method was scientifically invalid and produced unreliable results. *See* Ex. 65. The State now admits that the testing method used by the crime lab in 1998 to test the shoes is invalid, and it that the crime lab adopted the updated, valid testing method in "the late 1990s" – before Michael's 2002 trial. *Id.* To put it more simply, the State knew its centerpiece evidence was invalid, but it did not retest the evidence with its current methods. (*See* Ex. 3 at 31-32 (Report of James Trainum (concluding law enforcement had duty to retest evidence after recognizing its former testing produced unreliable results). Instead, the State went ahead and presented the invalid evidence to the jury as good, solid evidence, proven with scientific certainty, upon which the jury can and should rely to convict and send a kid to prison for life for killing his own mother. **The fact that the State knew that the key forensic evidence presented at trial was procured with outdated testing and thus wholly unreliable is all that this Court needs to know to grant relief to petitioner.**

The State has admitted knowledge. Even if they had not made this damning concession, however, the State would not be able to avoid imputed knowledge for the

following reasons. The testing method used by Michael's post-conviction expert John Lentini to identify or exclude gasoline has been around since 1994. (Ex. 1 at 4). Even the State now concedes that this method has existed since the 1990s, and that the Missouri Crime Lab adopted this method in "the late 1990s." (Ex. 65.) Also, the issue of mistakenly identifying accelerants in shoes had been known since at least 1996, (Ex. 1 at 5); multiple papers were published on this phenomenon in the mid-1990s.[28] The State now concedes this as well, noting today "a disclaimer stating the footwear cannot be ruled out as the source of an ignitable liquid would be included in the report." (Ex. 63.)

The significance of the State's concession that the very same crime lab that conducted the testing in this case – and conclusively found gasoline on Michael's shoes – adopted the exact testing method used by Michael's post-conviction expert to exclude gasoline with scientific certainty years before Michael's trial - "in the late 1990s" - simply cannot be overstated. This means that the lab's "transition" in testing methods occurred either at the same time as or on the heels of their outdated testing of the key physical evidence in this case. By the time of Michael's trial, the State was not only aware that a new testing method was required for gasoline identification, the State lab

[28] In 1996, the Michigan State Police noted this issue when one of their forensic analysts presented a paper titled, "Arsonists Shoes: Clue or Confusion?" (Ex. 1 at 5). In 2000, Lentini himself conducted research and co-authored a peer-reviewed paper entitled "The Petroleum-laced Background," which explained that tennis shoes are full of compounds from the manufacturing process that could be mistakenly identified as ignitable liquids. (*Id.* at 20). At the time of the trial in 2002, the State thus knew or should have known that this testimony from Rothove was false and misleading.

was actually using that new testing method. (*See* Ex. 3 at 31-32 (Report of James Trainum (concluding law enforcement had duty to retest evidence after recognizing its former testing produced unreliable results). No explanation has been offered for why the State did not retest the centerpiece evidence in this case when the crime lab updated its testing method. Indeed, it is difficult to think of an innocuous explanation, other than the State did not want to jeopardize this conviction.

To infringe Michael's due process rights, the false testimony at issue need not rise to perjury; it is enough that it was misleading or created a false impression. *See Alcorta v. Texas*, 355 U.S. 28, 31 (1957). Similarly, it need not be intentional. The U.S. Supreme Court has explained that "whether the nondisclosure [of the truth] is a result of negligence or design, it is the responsibility of the prosecutor." *Giglio*, 405 U.S. at 154. When, as here, the State's expert provides knowingly false or misleading "scientific" evidence, a defendant's due process rights are violated. *Miller v. Pate*, 386 U.S. 1, 7 (1967).

It does not matter whether the defense knew about the false testimony and failed to object or to cross-examine the witness. Defendants "'c[an]not waive the freestanding ethical and constitutional obligation of the prosecutor as a representative of the government to protect the integrity of the court and the criminal justice system.'" *Sivak v. Hardison*, 658 F.3d 898, 909 (9th Cir. 2011) (quoting *N. Mariana Islands v. Bowier*, 243 F.3d 1109, 1122 (9th Cir. 2001)).

Michael's shoes—the only physical evidence the prosecution used to directly connect Michael to the murder—do not in any way link him to the fire that caused his mother's death. There can be no question that this created a "false impression," and much

more, for the jury; the State directly told the jury that the gasoline on the shoes was what started the fire that killed his mother. *See Alcorta*, 355 U.S. at 31. The prosecution's knowing presentation false expert testimony that Michael's shoes tested positive for gasoline alone entitles Michael to relief.

B. The State Violated Michael's Right To Due Process When It Presented Unreliable & Misleading Canine Evidence

To make matters worse, the State bolstered Rothove's false testimony with Jacobsen's testimony that a canine sniff also proved accelerants were on the shoes. (T. 441). Jacobsen even told the jury that dogs can detect accelerants that labs cannot. (T. 443, 444). This testimony, like the testimony about the lab testing, was misleading and inaccurate, the State should have known this, and the testimony thus violated Michael's constitutional rights.

Canines commonly provide false positives for accelerants, particularly in shoes, and thus verification by laboratory testing is required. ADC's lack of discrimination between compounds, the high rate of false positives for accelerants, and the need for lab confirmation is neither new nor novel. Studies and articles have addressed these issues since at least the early 1990s, and all of the leading relevant professional organizations warn against the admission of ADC alerts without laboratory confirmation due to a canine's inability to discriminate between ignitable liquids and the chemically-similar gasses released by the burning of ordinary household products. NFPA 921 § 15.5.4.7.1; S. Katz & C.R. Midkiff, *Unconfirmed Canine Accelerant Detection: A Reliability Issue*

in Court, 43 J. FORENSIC SCI. 329 (1998); M. Kurtz et al., *Effect of Background Interference on Accelerant Detection Canines*, 41 J. FORENSIC SCI. 868 (1996).

Specifically, in 1994, the International Association of Arson Investigators ("IAAI")[29] released a position paper making "it clear that an unconfirmed ADC alert lacks the reliability to be of any value in a courtroom." (Ex 2 at 2-3). In a 2012 position statement, the Canine Accelerant Detection Association ("CADA")—the oldest dog sniff organization in the country—went further, stating it neither supports nor recommends dog sniff handlers testify or encourage testimony on ignitable liquids without confirmation through laboratory analysis. (*Id.* at 3). In 1996—two years before the crime—the NFPA added to the NFPA 921 to ratify this position with an emergency amendment that noted "[a]ny canine alert not confirmed by laboratory analysis should not be considered validated." (*Id.* at 3).[30]

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[29] The International Association of Arson Investigators is an international professional association of more than 8,000 fire investigation professionals, united by a strong commitment to suppress the crime of arson through professional fire investigation. *See About IAAI*, INTERNATIONAL ASSOCIATION OF ARSON INVESTIGATORS, https://www.firearson.com/About-IAAI/.

[30] The NFPA 921 reads:

> 16.5.4.7.1-In order for the presence or absence of an ignitable liquid to be scientifically confirmed in a sample. That sample should be analyzed in a laboratory.... Any canine alert not confirmed by laboratory analysis should not be considered validated.
>
> 16.5.4.7.2-Research has shown that canines have responded or have been alerted to pyrolysis products that are not produced by an ignitable liquid and have not always when an ignitable liquid accelerant was known to be present.

Here, Jacobsen's false and misleading testimony regarding the accelerant detecting dog's alerts to Michael's shoes was particularly damning because it was coupled with the false testimony from Rothove. Other than the false expert testimony from Rothove and Jacobsen that there was gasoline on Michael's shoes, no physical evidence connected Michael to the crime. An uncorroborated alert by an accelerant-detection canine simply cannot support an opinion on fire causation, and the State was on notice of this issue—yet, Jacobsen testified definitely that this was arson on that basis, in violation of Michael's constitutional rights.

> 16.5.4.7.3-Specifically, the ability to distinguish between ignitable liquids and background materials is even more important than sensitivity for detection of any ignitable liquids or residues. Unlike explosive- or drug-detecting dogs, these canines are trained to detect substances that are common to our everyday environment.... [M]erely detecting [traceable] quantities [of these substances] is of limited evidential value.
>
> 16.5.4.7.5-The proper objective of the use of canine/handler teams is to assist with the selection of samples that have a higher probability of laboratory confirmation.
> 16.5.4.7.6-Canine ignitable liquid detection should be used in conjunction with, and not in place of the other fire investigation and analysis methods described in this guide.

NFPA 921.

C. The State Violated Michael's Right To Due Process When It Permitted Holdman To Testify That He Could Identify The Use Of An Accelerant And Determine An Incendiary Fire Based Solely On Visual Inspection.

Similarly, the State should have known that Fire Marshall Holdman's testimony that he could conclude with certainty that the fire was intentionally set with an accelerant was false and wholly unsupported by science or evidence. The science debunking this evidence was known and available at the time of Michael's prosecution. **The NFPA 921 – "a benchmark for the training and expertise of everyone who purports to be an expert in the origin and cause determination of fires" – was adopted in 1996, *two years before* the fire investigation in this case**. *See, e.g.*, NATIONAL INSTITUTE OF JUSTICE, U.S. DEP'T OF JUSTICE, *Fire and Arson Scene Evidence: A Guide for Public Safety Personnel* 6 (2000), https://www.ncjrs.gov/pdffiles1/nij/181584.pdf. In 2000, the U.S. Department of Justice formally endorsed NFPA 921 for fire investigations. *See Fire and Arson Scene Evidence*, *supra*, at 6 ("[NFPA 921 is] a benchmark for the training and expertise of everyone who purports to be an expert in the origin and cause determination of fires."). Yet, all of the State's testimony about the alleged evidence of arson and Michael's connection to the fire violated NFPA 921, as well as other scientific research available at the time, in multiple significant ways.

First, visual inspection is an inadequate basis for determining the presence of an accelerant. It is firmly established and widely accepted today that presence of an accelerant must be confirmed via laboratory testing. According to Paul Bieber, "NFPA 921 demands laboratory confirmation to validate the presence or absence of an ignitable

liquid" because "fire patterns and burn damage created by an ignitable liquid are visually indistinguishable from those created by the melting and burning of other common items." (Ex. 1 at 5). While experts previously believed they could identify the use of an accelerant from a pour pattern, new science shows that such patterns also exist in natural fires and "fire patterns resulting from burning ignitable liquids are not visually unique."[31] For example, it is now known that "several common household items, including thermoplastics and polyurethane foam when burned or melted will produce irregularly shaped fire patterns that can be erroneously identified as ignitable liquid patterns." (*Id.* at 7 (citing NFPA 921)).

Specifically, NFPA 921 states: "In order for the presence or absence of an ignitable liquid to be scientifically confirmed in a sample, that sample should be analyzed by a laboratory in accordance with 17.5.3." (*Id.* at 8). Here, the State actually did follow-up laboratory testing. And the tests came back *negative* for an ignitable liquid. According to Bieber, those results indicate that "fire debris analysis failed to reveal any evidence of the presence of gasoline." (*Id.* at 8). Without laboratory results confirming the presence of an accelerant, "there is no evidence on which to base a conclusion that an ignitable liquid was present at this fire." (*Id.*).[32] Yet Holdman testified that an accelerant must have been used anyways.

[31] NFPA 921 6.3.7.8 states that "Irregular, curved, or 'pool-shaped' patterns on floors and floor coverings should not be identified as resulting from ignitable liquids on the bases of visual appearance alone" and "the determination of the nature of an irregular pattern should not be made by visual interpretation of the pattern alone." (*Id.*).

[32] In more detail, Bieber concluded that "where an examination of the fire scene by an accelerant detecting canine and laboratory examination of fire debris samples were all

Second, Holdman's conclusion that the fire "burned very fast and for not a long period of time" was similarly unfounded and in violation of NFPA 921. (Ex. 3 at 4). Holdman told the jury that the speed and intensity of the fire further proved it was started with an accelerant: "With a liquid accelerant you are not looking at a very long period of time. Ten, twenty minutes approximately." (*Id.*) Just like his accelerant conclusions, Holdman appeared to base his conclusion about the speed and intensity of the fire upon the patterns and burn damage at the scene. But, like accelerant analysis, this has no basis in science. While it was a common practice in the past, it is no longer acceptable or valid. (*Id.* at 5.)

Third, Holdman's conclusion that the fire was incendiary also violated NFPA 921 because it was based upon his unfounded conclusion that an accelerant was used, in combination with his conclusion that all available accidental and natural causes had been eliminated. (Ex. 2 at 9, 12-13.) But NFPA 921 precludes Holdman from making these conclusions: "It is improper to base hypotheses on the absence of any supportive evidence. That is, it is improper to opine a specific fire cause, ignition source, fuel or cause classification that has no evidence to support it even though all other such hypothesized elements were eliminated." (*Id.* at 9 (quoting NFPA 921)). The only classification of this fire that would comply with NFPA 921 is "undetermined." (*Id.*)

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negative for the presence of an ignitable liquid, there is simply no evidence to support Fire Investigator Holdman's conclusion."

Moreover, Holdman's conclusion that this was an incendiary fire[33] required him to inappropriately "analyze and measure the human intent and deliberation that was present or absent the fire was first ignited." (*Id.* at 11 (quoting NFPA 921).) Such analysis is "far outside [Holdman's] expertise as a fire investigator and beyond the scientific methodologies provided by NFPA 921." (*Id.*)

Fourth, and finally, Holdman testified that the fire and burn patterns, which he asserted were caused by an accelerant, matched the patterns of the burn at the railroad ties that Michael admitted starting. The State repeatedly emphasized this false link between the two fires, explicitly telling the jury that Michael had been "practicing," (*Id.*; T. at 808), and implying that he had a fire modus operandi. But there is no valid scientific basis for this conclusion either. The patterns do not indicate a match, or any unique similarity, for all of the reasons set forth above.

Holdman's misleading testimony in violation of NFPA 921 was central to the State's trial theory that Michael intentionally set his mother on fire with an accelerant. Without Holdman's testimony, the gasoline on Michael's shoes – also false evidence – would have been circumstantial and less critical. From opening to closing arguments, the State hammered home that Rita's body was covered in accelerant and then lit on fire. Multiple state witnesses vouched for Holdman's false and unreliable and conclusion. First, Holdman testified that fire patterns showed an accelerant was used. (T. 282). Then Jacobsen testified that based on the patterns and damage to the room, an accelerant had

[33] NFPA 921 defines an incendiary fire as a "a fire that is deliberately set with the intent to cause a fire to occur in an area where the fire should not be."

been utilized. (T. 446). Even pathologist Dr. Michael Zaricor testified that the fire *appeared* to be confined to a small area from an *accelerant*, (T. 384). In closing, the State tied it all together for the jury: "everybody's been pretty consistent it was an accelerant." (T. 768). This was false and violated Michael's due process rights.

There is no question that this false scientific testimony by the Fire Marshall affected the jury's determinations and ultimate decision, particularly when presented with the "mutually reinforcing" false evidence that Michael had the gasoline on his shoes the morning of the crime.

D. Michael Politte Would Have Been Acquitted Absent The State's False Expert Testimony.

Under *Napue* and *Giglio*, Michael is entitled to relief if the false or misleading evidence could have affected the deliberations of the jury:

> A lie is a lie, no matter what its subject, and, if it is in any way relevant to the case, the district attorney has the responsibility and duty to correct what he knows to be false and elicit the truth. . . . That the district attorney's silence was not the result of guile or a desire to prejudice matters little, for its impact was the same, preventing, as it did, a trial that could in any real sense be termed fair.

Napue, 360 U.S. at 269-70. Courts have noted that the materiality standard for when the State has knowingly used false testimony is "comparatively low: a reasonable possibility that the false or perjured testimony contributed to the conviction." *Ex Parte Henderson*, 384 S.W.3d at 835 (comparing this materiality standard to the materiality standards for "a continuum of due process violations," with a "bare claim of actual innocence" at one end

of the spectrum, and "a claim that false evidence was inadvertently used to obtain a conviction" at the other end of the spectrum).

That standard is met – and exceeded – here, where the prosecution's case was built almost entirely on circumstantial evidence, and the only direct evidence was false expert testimony that that the State should have known was false. The introduction of this faulty scientific evidence at trial was fundamentally unfair under *Napue* and unquestionably affected – most likely, was dispositive on – the jury's deliberations.[34] *See* Ex. 69 (juror Dickerson-Bell said "the gasoline was the whole case to me" and "the gasoline on Michael's shoes was the nail in the coffin for me. It is the reason I voted guilty.")). Because of the critical nature of the fire evidence and the State's lack of direct evidence, it is reasonably likely "that the false testimony could have affected the judgment of the jury." *United States v. Agurs*, 427 U.S. 97, 103 (1976).

This Court may review this State misconduct and these errors for the same reasons set forth in Claim I.C., namely that Michael is actually innocent and the State's misconduct, of which Michael had no awareness, constitutes cause and prejudice.

[34] As set forth in the Statement of Facts at 16-17, the jurors asked to examine Michael's shoes, indicating the gasoline on the shoes was significant to their deliberations and verdict, required significant time and repeated votes to reach a guilty verdict, and they did not do so until a holdout juror was pressured by the judge. *See also* Claim V, *infra*.

CLAIM III: THE PROSECUTION'S CLOSING ARGUMENT MISREPRESNTEED CENTRAL EVIDENCE AND THUS VIOLATED MICHAEL'S DUE PROCESS RIGHTS

As the State now admits, the prosecution relied upon and exploited false physical evidence during its closing argument. What's even worse, the prosecutor also made a leap in closing argument that was unsupported by the evidence, and not testified to by the State's experts. Specifically, the prosecutor told the jury that Michael poured gasoline on his mother's face and lit her on fire. While arguing mens rea to the jury, the prosecutor asserted: "cooly reflecting is going outside and grabbing those . . . gas cans . . ., putting something her face, dousing it with . . . gasoline, and setting her on fire . . . . That's clearly deliberation." (T. 764.)

This was not supported by the testimony of State experts, even before the evidence that there was gasoline on Michael's shoes was proven false. While Fire Marshall Holdman testified that an accelerant started the fire, he never testified definitively that the accelerant was gasoline. In fact, he could not give such testimony because there was no evidence of gasoline at the scene; laboratory testing came back negative for gasoline (or any other accelerant). This inflammatory testimony was highly prejudicial, not supported by any testimony, and now we know it was absolutely false.

It is also worth noting that there was no testimony establishing that any accelerant was poured on the victim's face, or that the fire started on her face. The prosecutor once again misrepresented the evidence, in a highly prejudicial way, later in closing argument when he told the jury that Michael covered his mother's face with his shirt before lighting

her face on fire. The prosecutor claimed this was how Michael destroyed evidence that would have implicated him, i.e. his shirt that may have had gasoline on it. "Ladies and gentleman, to help pull that fire down, to keep it from flashing, perfect chance to get rid of the evidence, take it off and lay it on her face, and you set it aflame." (T. 815.)

"'The State has wide latitude in closing arguments, but closing arguments must not go beyond the evidence presented; courts should exclude statements that misrepresent the evidence or the law, introduce irrelevant prejudicial matters, or otherwise tend to confuse the jury.'" *State v. Holmsley*, 554 S.W.3d 406, 410 (Mo. banc 2018) (quoting *State v. Deck*, 303 S.W.3d 527, 543 (Mo. banc 2010)). A defendant is prejudiced to the extent of requiring a new trial when "'there is a reasonable probability that the outcome at trial would have been different if the error had not been committed.'" *Id.* (quoting *Deck*, 303 S.W.3d at 540). A prosecutor arguing facts beyond the record is "highly prejudicial." *State v. Storey*, 901 S.W.2d 886, 901 (Mo. banc 1995). "A party may argue inferences justified by the evidence, but not inferences unsupported by the facts." *State v. Barton*, 936 S.W.2d 781, 783 (Mo. banc 1996).

There is no doubt that the prosecution's portrayal of Michael pouring gasoline on his mother's face and setting her on fire "misrepresent[ed] the evidence" and "tend[ed] to confuse the jury." *Holmsley*, 554 S.W.3d at 410 This error on this critical issue was unfairly prejudicial and warrants a new trial. "Although in addressing the sufficiency of the evidence, this Court views the evidence in the light most favorable to the State, it does not do so when evaluating the potential prejudice of trial error." *State v. Banks*, 215

S.W.3d 118, 12 (Mo. banc 2007) (internal citation omitted). As a result, prejudice is more readily found in an otherwise close case.

State v. Brightman, 388 S.W.3d 192, 203 (Mo. App. 2012); *see also State v. Hammonds*, 651 S.W.2d 537, 539 (Mo. App. 1983) ("The strength of the state's case is a prime factor in the determination of whether the error committed by the trial court resulted in a manifest injustice or a miscarriage of justice."); *United States v. Johnson*, 968 F.2d 768, 771 (8th Cir. 1992) ("If the evidence of guilt is overwhelming, an improper argument is less likely to affect the jury verdict. On the contrary, if the evidence of guilt is weak or tenuous, the existence of prejudice is more easily assumed.").

Juror Dickerson-Bell admitted the "gasoline was the whole case" for her. (Ex. 69). The prosecution's overselling of the State's evidence regarding the gasoline almost certainly misled the jury and impacted their deliberations and ultimate vote. Michael's case Nash's like one of those in which this Court has "often held that arguing facts outside the record is error warranting reversal." *See Storey*, 901 S.W.2d 886, 901 (Mo. 1995 en banc) (collecting cases).

This issue was not raised on direct appeal and has not been considered by the Court, and Michael may obtain habeas relief on this basis in light of his successful gateway claim of actual innocence. *See Clay v. Dormire*, 37 S.W.3d 214 (Mo. banc 2000).

MICHAEL IS ACTUALLY INNOCENT & SATISFIES THE PROCEDURAL GATEWAY

Michael Politte is innocent. He has steadfastly maintained his innocence since the day his mother died. He refused to accept a deal, with which he would have walked out of prison within a decade, in his mid-20s, with his whole life to live. Instead, he was certified as an adult at 15 years old, proceeded to trial for murder and, sentenced to life because he simply could not plead guilty to something he did not do. Now, new evidence conclusively proves his innocence, permitting this Court to both overturn his conviction on a substantive claim of innocence and reach his constitutional claims through an innocence gateway claim.

No reasonable juror would have convicted Michael had they been presented with the new evidence now before this court, including that: (1) Michael's shoes did not have gasoline on them; (2) there is no evidence to indicate the fire was even started with gasoline, overturning the State's entire trial theory[35]; (3) Michael did not have any

[35] Many arson convictions across the country have been overturned on precisely this basis. There have been at least 79 exonerations of individuals convicted of arson in the U.S. because it has been proven that the indicators long used by fire investigators to deem something an arson are actually meaningless. *See* NATIONAL REGISTRY OF EXONERATIONS, https://www.law.umich.edu/special/exoneration/Pages/detaillist.aspx?View={FAF6EDDB-5A68-4F8F-8A52-2C61F5BF9EA7}&FilterField1=Group&FilterValue1=A (last viewed June 6, 2021).

For example, George Souliotes was convicted and sentenced to two life sentenced in California for killing his tenants in a 1997 house fire. After 17 years of incarceration, he was exonerated and released because the Court agreed that the arson "science" upon which he was convicted was false and unreliable, including evidence that he had accelerant on his shoes, and because his trial attorney failed to present experts to rebut the State's fire experts. *Souliotes v. Hedgpeth*, No. 1:06-CV-00667 AWI, 2012 WL 1458087

motive; (4) new witnesses with compelling, reliable evidence that consistently points to another perpetrator, (5) a new witness providing additional evidence pointing to Ed Politte, and (6) a new witness, former law enforcement involved in the investigation of this case, has come forward because she believes Michael is innocent, and to explain flaws in this investigation and the invalid reasons for their immediate, singular focus on Michael, and the reasons she suspects Ed Politte actually committed this crime. This affidavit, combined with new law enforcement expert analysis, demonstrates that the investigation of this case was fatally undermined by tunnel vision and confirmation bias, such that the outcome cannot be credited.

Jurors from Michael's trial agree. Juror Linda Dickerson-Bell unambiguously asserts, in a sworn affidavit, that she would have voted to acquit had she known that there was not gasoline on Michael's shoes; for her, "the gasoline was the whole case." (Ex. 69 at ¶10, 13). Dickerson-Bell also said that the new evidence regarding alternative suspects "would have made a difference" to her. (*Id.* at ¶11.) She concluded: "After learning about the new evidence, my guilt has only grown. I now firmly believe Michael is innocent and that we made a terrible mistake." (*Id.* at ¶24.) Juror Jonathan Ray Peterson also "do[es] not believe justice was served when we, the jury, found Michael Politte guilty of his

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(E.D. Cal. Apr. 26, 2012). Han Tak Lee was convicted and sentenced to in Pennsylvania for a 1989 fire that killed his daughter. After 26 years of incarceration, he was exonerated and released because the science that convicted him has been debunked, including evidence that he had accelerant on his clothing. *See* National Registry of Exonerations, Case Summary, available atlaw.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=4820.

mother's murder." (Ex. 21 at ¶6). Jury foreman Victor Thomas agrees; he noted the new evidence about the substance on Michael's shoes not being gasoline, and stated that he does not believe the jury would have voted to convict Michael had they "heard about the victim's contentious divorce and possible alternate suspects." (Ex. 22 at ¶9-10). Based on this new evidence, foreman Thomas "believe[s] Michael Politte is innocent" and that he "should be freed to correct this wrong." (*Id.* at ¶10).

What's left of the State's weak case – law enforcement's misinformed, biased judgments about Michael's behavior and Michael's alleged, hotly disputed statement while trying to kill himself – are also fatally undermined by new evidence, including science and expert analysis. The State's case was always thin, but this compelling new evidence leaves it utterly threadbare.

A. *Schlup v. Delo* Standard for Actual Innocence Gateway

In anticipation of procedural objections by the Attorney General,[36] Michael's innocence serves as a gateway claim overcoming any procedural bar. That is, even if any

[36] The Attorney General's Office has opposed overturning the conviction in every single exoneration case in the past decade on procedure. These cases include:

(1) Thirteen reversals of convictions through newly discovered evidence presented in state habeas corpus proceedings, with twelve ultimately resulting in exonerations. In every single case, the Attorney General's Office opposed relief. In 9 of these 13 cases, either the Missouri Supreme Court or the Courts of Appeals unanimously upheld relief. *See State ex rel Woodworth v. Denney*, 396 S.W.3d 330 (Mo. 2013); *State ex rel. Engel v. Dormire*, 304 S.W.3d 120 (Mo. 2010); *State ex rel. Hawley v. Beger*, 549 S.W.3d 507 (Mo. App. 2018); *State ex rel. Robinson v. Cassady*, SC95892, 2016 Mo. LEXIS 554 (Mo. Dec. 20, 2016); *Ferguson v. Dormire*, 413 S.W.3d 40 (Mo. App. 2013*); State ex rel. Koster v. Green*, 388 S.W.3d 603 (Mo. App. 2012); *State ex rel. Koster v. McElwain*, 340 S.W.3d 221 (Mo. App. 2011); *Callahan v. Griffin*, No. SC95443, (Mo. Order dated May 29, 2020); *Nash v. Payne*, No. SC97903 (Mo. Order dated July 3, 2020); *but see State ex rel. Griffin v. Denney*, 347

of Michael's constitutional claims are procedurally barred, this Court may review and grant relieve on those bases if his new evidence shows "that it is more likely than not that no reasonable juror would have convicted him." *Schlup v. Delo*, 513 U.S. 298, 327 (1995).

S.W.3d 73 (Mo. 2011). In the two cases that did not reach an appellate court, *Kidd* and *Kezer*, the circuit court found that the petitioners had successfully presented freestanding claims of innocence. *See Kidd v. Pash*, No. 18DK-CC00017 (43rd Cir. Ct. Mo. Order dated Aug. 14, 2019); *Kezer v. Dormire*, No. 08AC-CC00293 (19th Cir. Ct. Mo. Order dated Feb. 17, 2009); *Irons v. State*, No. 18AC- CC00510 (Mo. Order dated July 1, 2020.

(2) Four exonerations resulting from extrajudicial action or outlier proceedings, including: one pardon, Rodney Lincoln (the Attorney General opposed relief in every one of Lincoln's post-conviction proceedings, including *In re Lincoln v. Cassady*, 517 S.W.3d 11 (Mo. App. 2016)); *State v. Amick*, 462 S.W.3d 413 (Mo. 2015) (Amick was acquitted during retrial proceedings after the Missouri Supreme Court overturned his conviction.); *Wilkerson v. Stringer*, No. 16BU-CV03327 (Mo. Dec. 6, 2016) (habeas corpus relief granted based on lack of pretrial evaluation of his mental condition prior to pleading not guilty by reason of mental disease or defect. The Attorney General's Office opposed habeas relief. The Circuit Court granted relief—and 17 years after the conviction, new DNA testing showed that another man committed the crime.); and, *State v. McKay*, No. ED101298 (Mo. App. 2014) (conviction overturned and remanded for new trial where charges were later dismissed). In each of these four cases, the Attorney General's Office opposed relief.

(3) Three exonerations arising from motions for new trial based on newly discovered evidence, where the Attorney General's Office opposed relief and the conviction was overturned by a unanimous Missouri Supreme Court. *See State v. Stewart*, 313 S.W.3d 661 (Mo. 2010); *State v. Terry*, 304 S.W.3d 105 (Mo. 2010); *see also State v. Faria*, No. ED100964 (Mo. App. Order dated Feb. 24, 2015); and

(4) Three exonerations resulting from post-conviction proceedings where the Attorney General's Office opposed relief in all three cases. *See Hall v. State*, No. SD31870 (Mo. App. Opinion dated May 1, 2013); *Buchli v. State*, No. WD67269 (Mo. App. Opinion dated Nov. 13, 2007); *Smith v. State*, No. SD30971 and SC92127, (Mo. Opinion dated Oct. 11, 2011).

(5) Two cases in which the office that prosecuted the defendant agrees that the defendant is innocent. *See Strickland v. Brewer*, No. 21DK-CC00019 (43rd Cir. Ct.); *Johnson v. Falkenrath*, No. 21AC-CC00254 (19th Cir. Ct.).

See also Clay v. Dormire, 37 S.W.3d 214, 217–18 (Mo. 2000) (adopting *Schlup* gateway). Because "habeas corpus is, at its core, an equitable remedy," *Schlup*, at 319, "the ultimate equity on the prisoner's side [is] a sufficient showing of actual innocence," *Withrow v. Williams*, 507 U.S. 680, 700 (1993) (O'Connor, J., concurring in part and dissenting in part).

In *Schlup*, the Supreme Court explained that the threshold for the innocence gateway or "miscarriage of justice" exception is lower than the "extraordinarily high" threshold for freestanding claims of innocence for two reasons. *Schlup*, 513 U.S. 315–16. First, the "miscarriage of justice" exception does not itself provide an independent basis for relief; the basis for relief is the claimed underlying constitutional violations. *Carriger*, 132 F.3d at 477–78. Second, and more importantly, because "a petitioner claiming he falls within the miscarriage of justice exception asserts constitutional error at trial, his conviction is not entitled to the same degree of respect as one concededly free of constitutional taint." *Id.* (citing *Schlup*, 513 U.S. at 316). Accordingly, a petitioner asserting both innocence and constitutional error "need carry less of a burden" with respect to innocence than a petitioner who claimed only innocence. *Id.* While a petitioner making an actual innocence claim must present evidence of innocence so strong that his conviction would be "'constitutionally intolerable' *even if* it was the product of a fair trial, a petitioner making a gateway claim need only present evidence of innocence strong enough 'that a court cannot have confidence in the outcome of the trial *unless* the court is also satisfied that the trial was free of nonharmless constitutional error.'" *Id.* (emphasis in original). In

the latter case, "the petitioner should be allowed to pass through the gateway and argue the merits of his underlying claims." *Id.*

"'[N]ew evidence' in the context of an actual innocence claim [is described as] 'new reliable evidence'—whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence—that was not presented at trial." *McKim v. Cassady*, 457 S.W.3d 831, 846 (Mo. Ct. App. W.D. 2015). New evidence may be raised at any time: "[I]n *McQuiggin,* the United States Supreme Court held that 'new evidence' in connection with an actual innocence habeas claim is any evidence that was 'unavailable' at the time of trial without regard to whether the evidence could have been discovered with reasonable diligence at the time of trial." *Id*. (quoting *McQuiggin v. Perkins*, 569 U.S. 383 (2013)).

This Court, applying any rigorous test that balances the newly discovered evidence against the existing evidence, should conclude that Michael has met his burden to prove actual innocence as a gateway claim. A reasonable juror looking at the totality of evidence, as it now stands today, would find that Michael is actually innocent[37]: there remains no credible evidence left to convict Michael, and a jury would have no choice but to find him not guilty.

B. New Evidence Proves No Gasoline on Michael's Shoes & Refutes that the Fire was Even Started with Gasoline

As set forth in Claims I and II, *supra*, we now know – and the State has now conceded – that the only physical evidence that purportedly tied Michael to his mother's death was false: there was *no gasoline on Michael's shoes*. Ex. 65 ("I would report this

[37] *See, e.g.*, Ex. 21, 22, and 69.

case as no ignitable liquid identified on the shoes.").[38] This evidence of innocence is sufficient to permit Michael to pass through the *Schlup* actual innocence gateway and enable this Court to review any procedurally barred constitutional claim. *See, e.g.*, *Bryant v. Thomas*, 274 F. Supp. 3d 166 (S.D.N.Y. 2017) (finding *Schlup* actual innocence where new serological evidence disproved the serological evidence presented at trial); *Floyd v. Vannoy*, 894 F.3d 143 (5th Cir. 2018) (finding *Schlup* actual innocence, despite confession, based in part on new forensic evidence); *Souliotes v. Hedgpeth*, No. 1:06-CV-00667 AWI, 2012 WL 1458087 (E.D. Cal. Apr. 26, 2012) (finding *Schlup* actual innocence based on debunked arson science and new tests which prove no accelerant on the defendant's shoes, as asserted at trial); *Letemps v. Sec'y, Fla. Dept of Corr.*, 114 F. Supp. 3d 1216 (M.D. Fla. 2015) (finding *Schlup* actual innocence based on new serological blood type evidence).

Michael's shoes were the centerpiece of the State's case: the shoes were (1) the only evidence purportedly linking him to the fire, and (2) the only direct evidence of an accelerant, to support of the fire marshal's otherwise unfounded theory that this was an incendiary fire started by an accelerant. Fire investigators testified at trial, as experts, with certainty at trial that the fire in the Politte's trailer home was intentionally set with an accelerant, specifically gasoline, and Michael was the arsonist *because* they found gasoline on his shoes. We now know that Michael's shoes did not contain gasoline, or any other ignitable liquid. The State agrees. (Ex. 65.)

[38] While the testing to prove the substance on Michael's shoes was not gasoline was available at the time of trial, according to the State, (Ex. 65), this evidence is new because the State did not disclose the fact that the crime lab had changed its testing and the State did not re-test the evidence before Michael's trial.

Not only does new evidence prove there is no link between Michael and the fire, new evidence also disproves the State's entire trial theory. The gasoline and fire evidence were thus particularly damning because they were "mutually reinforcing." *Han Tak Lee*, 798 F.3d 159, 167 (3d Cir. 2015). The false gasoline evidence was the linchpin at trial because it was paired with the "mutually reinforcing" testimony from Fire Marshall Holdman that the fire was intentionally set using gasoline, thus linking Michael to the fire. *Id.*

Without the gasoline and fire evidence to tie Michael to the crime, a reasonable juror would have had more than a reasonable doubt about Michael's guilt. *Schlup*, 513 U.S. at 327;, 37 S.W.3d at 217–18. We know for a fact that the gasoline on the shoes mattered to the jury because (1) they asked for the shoes during their deliberations, (T. 817), and (2) a juror has come forward to assert she would have voted not guilty if she had known Michael did not have gasoline on his shoes, (Ex. 69 (Affidavit of Linda Dickerson-Bell) at ¶9-10). Fire evidence was the only direct evidence in the State's case against Michael. There is simply no case without it. It is difficult to imagine this case going to trial without the fire and accelerant evidence but, if it did, the jury would not have convicted.

C. New Evidence Rebuts State's Attenuated Motive Theory

At trial, the prosecution told the jury that Michael had a motive to kill his mother because they had a fight a couple of weeks before over money for a part to fix his motorcycle. The State's motive theory rested entirely upon the brief testimony of Derek Politte, a former boyfriend of Rita, presented as the very first witness at trial. Derek testified that he witnessed an argument between Michael and his mother, that

subsequently Michael flicked a lighter on and off, and that Derek left to go home because he was uncomfortable. (T. 174-78). The prosecutor leaned heavily on this theory during his opening statement, detailing the argument at length and telling the jury Derek thought the lighter flicking was "eerie" and that "Derek felt so uncomfortable he left." (T. 135-36). The prosecutor drove it home in his closing argument:

> I know that it may seem a little bit insignificant to you, but I think when you put it all together it makes sense, and it's for this reason. He gets mad at her. There's an argument. He's mad at her. . . . But what is his reaction? To let it go? No. He sits there, and he's sending a message to his mother. He's sending a message to her. But the message did not end with a stare. The message continued with Derek and Rita went into the other room, and the defendant follows them in, takes his mother's cigarette lighter, and begins to flight in on and off, on and off, to the point that Rita gest upset and has to take it from him. Derek, the boyfriend, is so spooked by this; he leaves. He's uncomfortable. I'm getting out of here.

(T. 769)

But none of this was true. Derek Politte has now provided the truth in a notarized affidavit. He explains why he left Rita's house that night, why he felt uncomfortable, and that, in fact, he was not at all afraid of Michael:

> **No one asked me why I felt uncomfortable about what happened between Rita and Bernie.** It seemed to me that Bernie was upset that his mother was dating other men, and he did not want me there. **That night at Rita Politte's I remember what it was like to be a child in the middle of a divorce. I left because I did not want to be a part of it. That is what made me uncomfortable.**

(Ex. 11 at 1). This makes a lot of sense; more sense than the story told by the State at trial. And Derek went even further in his affidavit, directly refuting the State's false characterization of Derek's testimony at trial. Derek asserts: "**Had someone asked, I would have testified that Bernie was a good kid and I did not feel threatened by him. I did not think he was threatening his mother.**" (*Id.* at 2).

Derek's explanation makes clear that the State misrepresented and exploited his testimony with highly inflammatory results. They took his limited testimony and spun a story of an angry kid who decided to kill his mother because she would not give him what he wanted. During closing, the prosecutor made the leap from the minor incident described by Derek to this:

> [W]hen you couple [Derek's story], compare it with the statements the defendant made later . . . when . . . he notices [police] are messing his motorcycle (sic). . . . It upsets him. It bothers him. I don't know the right word. It bothers him. . . . He then begins to ask about his mother's truck on the way to the sheriff's department. . . . Who's going to pay for the autopsy. It's money . . . . The defendant, 14 and a half-year-old boy that he is, is upset because his mom is not going him money for his motorcycle, is not giving him the things that he wants, all right. And I know it's hard to understand, but for some reason the defendant decided, well this is the way I'm going to handle it.

(T. 770.)

Without Derek's testimony, the State's tale of motive unravels. A reasonable juror presented with Derek's accurate testimony would be left only with questions about why 14-year-old Michael would kill his mother – no answers. They may even have sympathy for a kid in the middle a contentious divorce and his mother's struggle to rebuild her life after escaping her abusive ex-husband.

A. Deputy Sheriff Who Investigated Rita's Murder Believes Michael is Innocent

Tammy Nash, formerly Tammy Belfield, who was a deputy sheriff in 1998 and involved in the investigation of this case has come forward because she believes Michael is innocent. (Ex. 66 at 1, 5, Affidavit of Tammy Nash). Ms. Nash always had doubts about Michael's guilt, and ultimately she did not think there was enough evidence to

convict him. (*Id.* at 2). She reports that the investigative team was split on whether Michael was guilty. While some of the officers focused on Michael right away, it was simply because they thought he was acting odd. (*Id.* at 2.) But Nash disagreed: "Michael was a fourteen year old kid who had just found his mom dead. I wondered how did they expect him to act after this trauma. Personally, I know we all respond differently to situations, especially 14 year olds." (*Id.* at 2). Nash did not see anything in Michael's behavior that morning that she found suspicious. (*Id.*) But she recalls Curt Davis driving this narrative that Michael was not acting right, but his perspective on this "never sat right with [her]." (*Id.*)

Nash also worked the jail while Michael was in custody. She remembers him crying a lot and saying things like "if my mama was here, she would tell them I would never hurt her and I did not do this." (*Id.* at 4). After getting to know him a bit, her doubts about his guilt grew because he did not seem "savvy enough to pull this off" or "capable of masterminding this crime." (*Id.* at 5).

Nash always thought Ed Politte was a more likely suspect. (*Id.*) She questioned why he was pushed out of the suspect pool so quickly.

B. New Compelling Evidence Points to Alternative Perpetrator(s)

In addition to the new scientific evidence that eliminates the only physical evidence implicating Michael and disproves the State's theory of the case, there is now also additional compelling, reliable evidence implicating two much more likely perpetrators. The new evidence comes independently from multiple witnesses. These new witnesses corroborate each other. New evidence implicating alternative suspects is

sufficient to satisfy *Schlup*. *See, e.g.*, *House v. Bell*, 547 U.S. 518, 548-54 (2006) (evidence pointing to alternative suspect reinforced doubts as to petitioner's guilt and, coupled with challenges to other evidence and lack of motive, satisfied the *Schlup* gateway standard).

1. Johnnie Politte

Multiple new witnesses have now come forward with consistent and reliable evidence pointing to Johnnie Politte, Ed Politte's cousin, as the true perpetrator. First, two unconnected witnesses report seeing Johnnie Politte near Rita Politte's home the morning of the murder, walking away from the direction of her home, extremely close in time to when the fire started, and right as the first responders were arriving at the scene. No one has ever suggested that Johnnie may have been contacted about the fire before this time – which would be the only way to explain his presence there so soon after the fire started.

It remains unexplained why Johnnie was there, heading away from her home, and how he knew that "something had happened" to Rita. These new witness reports are consistent with each other, they corroborate and strengthen preexisting suspicious information about Johnnie, and they have significant indicia of reliability. Neither witness was known or presented at trial.

a. Larry Lee

First, at 6:30 am on the morning of the murder, near the time the fire was set, a witness named Larry Lee saw Johnnie Politte walking up the railroad tracks to Hopewell Road, coming from the direction of Rita's trailer. (Ex. 8 at 1, Affidavit & Video of Larry

Lee). Larry, who left for work every morning around 6:30, easily recognized Johnnie Politte because he had known Johnnie for 20 years. Johnnie was wearing blue jeans and a light-colored shirt and appeared to be wet, which Larry found odd. (*Id.* at 2) Larry also thought it was strange that Johnnie was so far from where he lived. Johnnie would come to the area for Politte family gatherings sometimes, but it was unusual for him to be on Hopewell Road so early in the morning. When Larry pulled over to talk to Johnnie and say hello, as the flashing lights of first responders were coming from Rita's trailer, Johnnie said something had happened to Rita. He said someone killed Rita. (Ex. 8 (Transcript). No explanation has ever been offered for how Johnnie knew that something had happened to Rita.

b. Kevin Politte

A second witness, Kevin Politte, Johnnie's uncle, saw Johnnie's two-tone Ford pickup truck parked in the lot near The Hopewell Church of God. (Ex. 10 at 1, Affidavit of Kevin Politte & Video). Kevin knew the truck because Johnnie had bought it from his brother. Like Larry, Kevin found it peculiar that Johnny's truck was parked there because Johnnie lived on Highway U, three or four miles from Rita's trailer. (*Id.* at 2). Kevin saw the truck on his way to work near daybreak, close to the time that Michael discovered Rita's body. (*Id.* at 1). Also, according to Kevin, Johnny got "a brand new pickup truck" shortly after Rita's murder, which he found "odd" because Johnny was having "financial problems and was in debt" at that time. (*Id.* at 2).[39]

[39] Kevin also shared that Ed gave Johnny all of the furniture from Rita's trailer within about three days after her death. (*Id.)*

c. Carolyn Lee

Carolyn Lee, Larry's wife, got a disturbing visit from Johnnie shortly after Rita's death. (Ex. 9, Affidavit of Carolyn Lee, at 1). Johnnie told Carolyn that he and Ed were mounting their own investigation into Rita's death and that he'd heard she'd seen something and had been talking in town. (*Id.*) He demanded that Carolyn tell him what she saw and became very angry and threatening after Carolyn told him that she had not seen anything.

d. New Witnesses Implicating Johnnie Politte are Reliable and Mutually Corroborating

This new compelling evidence implicating Johnnie Politte builds upon documented suspicious behavior from Johnnie even before Michael went to trial. Most significantly, on December 8, 1998, the police received a bloody tire tool that Johnnie and his wife claimed to have found in Michael's closet.[40] According to Johnnie, he and his wife, Gretchen, entered the crime scene without permission from the police and suddenly "discovered" an alleged murder weapon in Michael's closet. (*See* Ex. 38, Attorney General Interview of John and Gretchen Politte). (*See also* Ex. 66 at 3-4).But Officer Belfield testified under oath that she had thoroughly searched the scene at the time of the crime, seized all potential weapons and submitted them for testing, and did not observe a tire tool in the trailer on the day of the murder—it was absolutely not there.

[40] It is worth noting that this tool was presented at the detention and certification hearing where the Court ordered that Michael be tried as an adult for first-degree murder as evidence strongly implicating Michael. (Ex. 67). At that time, the lab had not completed testing so it was not yet known that the substance claimed to be blood was in fact rust. (*Id.*).

(T. 545-46). She testified that the tire tool found its way into the Politte home sometime after the initial processing of the crime scene. (T. 546). Off. Belfield, not Nash, confirms the veracity of her testimony in a newly signed affidavit, and reaffirms her certainty that the tire tool was not in Michael's closet when she searched the scene. (Ex. 66 at 3-4). Inexplicably, law enforcement did nothing to follow up on how this tool ended up there, and why Johnnie wanted the police to think it was there at the time of the crime, and covered in blood. (See Ex. 3 at 28-29 (Trainum concluding this "should have raised red flags for the investigators," yet does not appear there was follow-up investigation)).

These firsthand witness accounts implicating Johnnie Politte are reliable because (1) they are consistent between each other, (2) the witnesses are not involved in the crime, not related to petitioner, and thus have no apparent motive to fabricate (in fact, one witness is related to Johnnie Politte and thus his statement is arguably against his interest); and (3) are corroborated by and bolsters what was known before trial. (Ex. 28 at 11.). Further, Johnnie was incredibly close with the other alternate suspect – his cousin Ed Politte, who was also Rita's ex-husband.

1. Ed Politte

While much of the evidence regarding the viability of Ed Politte as the true perpetrator is not new, it is important context for the new evidence implicating Ed and his cousin Johnnie Politte. During the years Michael sat in juvenile detention awaiting trial, significant evidence implicating Ed accumulated, but it was all but ignored by police. Ed had clear motive for Rita's murder, and he had the propensity for and demonstrated history of violence, particularly against Rita. In the words of the Attorney General: "Ed is

a suspect because he had gone through a nasty divorce from Rita. [Michael] was wanting to live with his father but Rita got custody. Ed appealed and lost an [sic] regarding money he was to pay for child support or attorney fees of Rita. The Tuesday before the murder he had been in court regarding his appeal and the judge ordered him to pay Rita $1000." (Ex. 41 at 1). When Ed lost in court, he threatened Rita, saying "You will never see the day when you'll get the money." *Id.* (Ex. 20, Affidavit of Dan Grothaus).

Ed had a significant history of abusing Rita, physically, sexually, and emotionally. Rita's daughter, and Michael's older sister, Chrystal, told police early in their investigation that her mother was only scared of two people—Ed and his friend Rick DeMaris, who worked with Ed at Ford. (Ex. 26 at 25). Michael himself had observed Rita and Ed fight; he recalled "an incident in which his mother badly burned herself cooking, and his father seemed strikingly unconcerned with her well-being and simply watched without helping while she crawled to the car." (Ex. 4 at 6). Michael also witnessed Ed punch and choke his mother when Ed was collecting his belongings from their house. (Ex. 4 at 7; Ex. 53, Domestic Violence Incident Report, 7/13/1997, at 3).

Ed's brother, Michael "Mick" D. Politte, told police Ed encouraged Mick to have sex with Rita while they were still married, but Rita "wouldn't have anything to do with" him. (Ex. 26 at 21). Ann DeMaris, the wife of Ed's close friend and co-worker, Rick DeMaris, gave a revealing interview with law enforcement on December 23, 1999, telling police Rita had said to her that Ed, Christal Barnett (Ed's mistress and then wife, after divorcing Rita) and her husband, and Rick wanted to "swap wives and engage in sexual activity." (Ex. 34, Attorney General Interview with Ann DeMaris, at 2).

Ed and Rita got divorced in 1998, after Ed left Rita for Christal Barnett. (Ex. 47, Dissolution Case Docket Sheet, at 1). The divorce was finalized on July 1, and Ed was required to pay to Rita—terminable only upon remarriage or death—$635 per month in child support, $300 per month in monthly maintenance, and a $2,000 one-time maintenance. (Ex. 52, Judgment and Decree of Dissolution of Marriage, at 3-5). Ed was also ordered to equally divide his Ford Motor Company pension with Rita, give Rita 40% of his 401k value, surrender ownership of the jointly owned land and mobile home to Rita, and transfer title of one motorcycle to Rita, even though Rita never held a steady job throughout the marriage. (*Id.* at 5-6). Ed appealed the outcome of the divorce proceedings. The appeal ended the Tuesday before Rita was killed, when the court affirmed the financial and property award in Rita's favor and ordered Ed to pay Rita $1,000 in attorney's fees. (Ex. 47 at 6). Ed promised Rita that she would "never see a penny of this." This statement disturbed Rita, as she understood it as a threat. (Ex. 20, Affidavit of Dan Grothaus). That same evening, Ed called Rita at her job at Steven and Colleen's Bar and threatened to kill her. (Ex. 40, Attorney General Interview with Rick Jarvis, at 2). While Ed purportedly had an alibi for the time of the murder,[41] that did not preclude him from hiring someone else, such as his cousin Johnnie, to kill Rita for him.

[41] According to police reports, on Friday, December 4, Ed checked into work at the Ford Motor Company in Hazelwood, Missouri, St. Louis County, where Ed also lived, at 4:45 pm. (Ex. 28 at 7). Ed took his lunch break and went home from 9:15-11:00 pm, then went back to work until he checked out at 2:18 am. (*Id.*). Ed washed his truck from 2:40-3:10 am and arrived at home again around 3:30 am, where he chatted with his live-in girlfriend, Crystal Barnett, until about 4:30 am, when they went to sleep. (*Id.* at 2). Ed heard about the fire when he received a phone call from his sister, Patsy Skiles, at 7:00 am on December 5, and he headed to Hopewell. (*Id.*). (It would have taken Ed around 1 hour and 30 minutes

Michael and Ed's relationship imploded after Rita's murder. Law enforcement reported that Michael refused a visit from his father on June 6, 1999, at the Washington County Jail. (Ex. 28 at 19-22). When Ed insisted Michael that Michael say no to his face, guards brought him out and heard him say to Ed "Buzz off, […]. You set me up," and Ed left shortly after. (*Id.* at 19). A few days later, Michael told an officer that he believed his dad was involved in his mother's murder. (*Id.* at 23). Michael said, "I know my dad had someone kill my mom." (*Id.*). Their relationship ended when Michael learned that his father lied when he told him he hired an attorney to file a R. 29.15 post-conviction petition for him, causing Michael to miss a critical post-conviction deadline and effectively closing the court's doors to him until now.

Michael's trial counsel, Wayne Williams, also described suspicious behavior by Ed before Michael went to trial. He explained: "Ed approached me almost immediately after I was assigned the case. He asked me whether there had been any DNA evidence collected or tested at the scene. He did not seem concerned with any of the State's evidence outside of DNA." (Ex. 24 at ¶8). Notably, he did not ask how he could help with his son's defense. Williams added that "Ed's other children also suspected him of committing the crime." (*Id.*)

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to drive from his home in Hazelwood down to the Hopewell area. (Ex. 32, Google Maps Drive Estimate from Ed Politte's Home to Rita Politte's Home)).

Notably, Davis took no action to verify Ed's alibi before arresting Michael. He also did not inquire further into Ed's relationship with Rita, including their past conflict, or Ed's possible involvement in her death.

Ed and Johnnie's guilt, supported by the affidavits from new witnesses Larry Lee, Carolyn Lee, and Kevin Politte, is corroborated by statements made by law enforcement officers themselves. When Sheriff Skiles was interviewed in 2016, he stated that he had always suspected that Ed Politte was involved in this crime. He confirmed that he still believes this to this day. (Ex. 64 (Transcript & Video of Ronnie Skiles Interview)). Tammy Nash, formerly Belfield, also asserts that she suspected Ed because of his "odd behavior" after the crime, and the arguments she witnessed between him and Michael while Michael was in custody. In her 2021 affidavit, Nash describes overhearing Michael asking Ed to pay for an attorney to represent him, and pleading that he was letting him take the fall for this crime he did not do instead of just pay to help him. (Ex. 66 at 2-3).

2. A Reasonable Juror Presented with New Alternative Perpetrator Evidence Would Have a Reasonable Doubt

A reasonable juror presented with this new reliable and compelling evidence pointing to Johnnie Politte as the true perpetrator, likely at the behest of Ed Politte, would have had at least a reasonable doubt about Michael's guilt. We know this for certain because jurors have come forward to assert this. (Ex. 22 (juror Victor Thomas says jury would "not have voted to convict Michael Politte" had they heard "evidence about the victim's contentious divorce and possible alternate suspects" and that, "[a]fter hearing this evidence," he believes Michael is innocent); Ex. 69 (juror Linda Dickerson-Bell questioned why the jury did not hear any evidence about the Ed or other possible suspects, and said "[t]his evidence would have made a difference to me")).

When considered with the new evidence showing there is no evidence to connect Michael to the crime, a reasonable juror would have much more than a doubt. This satisfies *Schlup*. *See House v. Bell*, 547 U.S. 518, 548-54 (2006); *Munchinski v. Wilson*, 694 F.3d 308, 338 (3d Cir. 2012) (evidence that implicated other suspects was reliable such that it satisfied the *Schlup* standard); *Munchinski v. Wilson*, 694 F.3d 308, 338 (3d Cir. 2012) (evidence that implicated other suspects was reliable such that it satisfied the *Schlup* standard). The case that remains is certainly stronger against Johnnie and Ed, than any case against Michael.

C. All Remaining Purported Evidence of Michael's Guilt has been Undermined

Without the gasoline or fire evidence to implicate Michael, or any evidence of motive, all that remains is (1) the State's inflammatory presentation to the jury of Michael as a remorseless, cold-blooded killer, and (2) the State's claim that Michael admitted killing his mother as he tried to kill himself. Without the fire evidence – and, in the absence of any other actual evidence implicating Michael – it is unlikely that a reasonable juror would convict Michael on this alone. But this Court does not even have to engage in that inquiry because these remains of this case have also been fatally undermined.

1. The State's Portrait of Michael as a Remorseless "Hardened, Cold-Blooded Killer" was Wholly Unreliable, Biased, and Far More Prejudicial than Probative

At trial, the State ensured Michael's conviction by using his reaction to witnessing his mother's death against him. Law enforcement presumed Michael's guilt because he did

not react to his mother's death how they thought he should. (*See, e.g.,* Ex. 64 (Transcript of Ronnie Skiles Interview) at 5-6) (comparing Michael's reaction to his own, when his own mother died when he was 13 years old, and commenting on what he perceived as Michael's lack of emotion). They concluded not only that Michael was a liar and must have killed his mother, but that he had no remorse. This theme dominated the trial from start to finish.

The prosecutor dedicated much of his opening and closing arguments to smearing Michael in this way, with damning effect. (*See* (T. 139) (You're going to also hear from [volunteer fireman] that he didn't see any signs of remorse on the part of the defendant"); (T. 150) ("the defendant did not show any visible signs of remorse"); (T. 775) ("The defendant shows no remorse. . . . He says things . . . that indirectly indicate he was hiding something."); (T. 808) ("You have the defendant after his mother is brutally murdered showing no remorse, wondering, what's going to happen to mama's truck"); (T. 826) ("has shown no remorse or responsibility for this offense. You have before you, in my opinion, a hardened, cold-blooded killer.")).

The witness testimony that the prosecutor relied upon from State witnesses included but was not limited to the following. Firs, volunteer fireman Eric Abuchon was asked by the prosecutor to confirm that Michael was not crying, not screaming, not shouting, and that his voice was not "quivering." (T. 224-25). Abuchon refused, however, to agree with the prosecutor that Michael was "calm." (*Id.*) Fire Marshal Holdman testified that Michael "appeared to be very calm," and he confirmed that he did not see Michael cry or hear him express "any sadness about his mother being killed" or "desire to get the person that killed

his mother." (T. 314-15). Detective Curt Davis testified that Michael "was just acting normal" and "didn't act too concerned of what had just taken place in the residence." (T. 461). Davis specifically confirmed, in response to a question from the prosecutor, that Michael did not show any "visible signs of remorse." (*Id.)*

New evidence rebuts this biased, misguided theory and demonstrates that law enforcement's misinterpretation of Michael's words and actions was wholly unreliable and of no evidentiary value. [42]

a. Remorse is Not Visible in Behavior or Expression

As an initial matter, research demonstrates that there is no universal indicator of remorse; remorse cannot be read off of someone, particularly youth. *See, e.g.*, Susan A. Bandes, Remorse, Demeanor, and the Consequences of Misinterpretation, 3 Journal of Law, Religion, and State 170, at *22 (2014) ("Unfortunately, the folk knowledge view of what remorse looks like fails to account for several key aspects of adolescent development."). As one child psychiatrist put it "Fourteen-year-olds do not appear remorseful, almost categorically. They feel relatively powerless within the system and react by rebelliousness, which feels authentic to them." *Id.*

[42] This is evidence is new since trial, but it is worth noting that it is not necessary that the unreliability of this purported "evidence" of guilt be proven by evidence that is new. Under *Schlup* and *Clay*, all of the evidence, old and new, must be considered when evaluating what a reasonable juror would do when presented with the new evidence of innocence. *House*, 547 U.S. at 538 (quoting *Schlup*, 513 U.S. at 327.).

b. Law Enforcement's Misinformed Judgments Not Unusual in Wrongful Conviction Cases

Law enforcement expert James Trainum explains that false consensus bias, a type of cognitive bias "where people tend to believe that their own behavioral choices and judgments are relatively common and appropriate . . . while viewing alternative responses as uncommon, deviant, or inappropriate," has been a factor in wrongful conviction cases where the innocent person, often a family member present for the murder of a loved one, was "not responding to a situation in a way that the investigator considered to be appropriate (i.e., too emotional or not emotional enough)"). (Ex. 3 at 4).

c. Michael's Reaction was a Normal Adolescent Reaction to Severe Trauma

Michael's reaction to his mother's death, including the statements and behavior found by the State to indicate deception, guilt, and remorselessness, was evaluated by Dr. Jeffrey Aaron, a clinical and forensic adolescent psychologist.[43] Dr. Aaron concluded that Michael's reaction was not abnormal for a traumatized adolescent who had just experienced what he had, did not indicate deception or guilt, and certainly should not have been the basis for focusing the entire investigation of this murder on the victim's 14-year-old son. (Exs. 4 and 4b). Dr. Aaron's analysis is evidence that this Court must weigh when

[43] Dr. Aaron has served as the Clinical Director of an adolescent unit, the Forensic Coordinator, and the Chair of the Ethics Committee of the Commonwealth Center for Children & Adolescents in Virginia. He is also an Assistant Clinical Professor of Psychiatry & Neurobehavioral Sciences at the University of Virginia Medical School, Clinical Assistant Professor of Psychology at the University of Virginia, and associate faculty at the Institute of Law, Psychiatry & Public Policy at the University of Virginia. His CV is appended to Exhibit 4. (Ex. 4 at 23-33).

conducting the *Schlup/Clay* actual innocence analysis. *See, e.g.*, *Floyd v. Vannoy*, 894 F.3d 143, 158 (5th Cir. 2018) (holding that evidence of a forensic psychologist's examination of petitioner which rendered him vulnerable to police coercion were relevant new *Schlup* evidence, and holding that petitioner satisfied *Schlup* innocence gateway in part based on that evidence); *see also Bryant v. Thomas*, 274 F.Supp.3d 166, 186-189 (S.D.N.Y. 2017) (considering an expert report (Saul Kassin) regarding police interrogation tactics to constitute new evidence for purpose of the *Schlup* actual innocence gateway).

Specifically, Dr. Aaron explained that: (1) a lack of emotion can be a common reaction to trauma (Ex. 4 at 20), and "adolescents' emotional expression is often quite difficult for others to decipher" and "that adults frequently misunderstand or misread adolescents' emotions—both in meaning and intensity," particularly when the adolescents are in emotionally intense or activating situations; (2) while Aubuchon and Davis testified that Michael was acting "calm" and "normal," Dr. Aaron explains that "[i]t is not uncommon for people who are distressed, angry, or frightened to attempt to mask those feelings,…particularly male adolescents," (*Id.* at 20);[44] (3) Michael had a family history of "managing emotional distress through avoidance rather than overt expression," which would contribute to him seeming preternaturally calm in the aftermath of his mother's

[44] Dr. Aaron further explained why this may have been particularly likely for Michael, based on his review of his records. Dr. Aaron concluded that Michael was immature and reactive, like most kids his age. Dr. Aaron opines that Michael was actually "less" mature "in some ways" than peers but because of his lack of parental involvement and his relative independence, he had a "'pseudomaturity' in which he presented and perhaps thought of himself as more mature and capable than he in fact was." (*Id.* at 12). This pseudomaturity and masking would not have served Michael well in his interrogations with police.

death, and (4) Michael had a history of depression, which may have made him seem even more muted or non-reactive. (*Id.* at 9, 13).

d. Michael was Wrongly Targeted as the Prime Suspect because of His Adolescence & His Trauma

Since Michael's trial, we have learned a lot more about adolescent brain development and behavior, and the ways in which those differences matter to their interactions with law enforcement and the judicial system. Scientific research also demonstrates that trauma alters a person's behavior and interactions, especially for youth. We now know that law enforcement is at significant risk of misclassifying youth, particularly traumatized youth, as deceptive and guilty, and the consequences of that misclassification can be dire – all too often, ending in wrongful conviction. Research further makes clear that the tool used by police in this case to confirm their suspicions – CVSA – is also wholly unreliable. Here, Michael's youthful and traumatized behavior not only meant that he was misclassified by police, it also ultimately sealed the deal on his conviction. Even though he was certified as an adult, it was his youth that got him convicted.

1. Michael was Immediately Misclassified by Law Enforcement as Guilty & Deceptive

Police are trained in behavioral analysis to believe that they are "human lie detectors capable of distinguishing truth from deception at high, if not near perfect, rates of accuracy. *See* Richard A. Leo, *False Admissions: Causes, Consequences, and Implications*, 37 J. AM. ACAD. PSYCHIATRY & L. 332, 334-35 (2009). For example, they are taught that a person who averts his gaze, slouches, shifts his body posture, chews his fingernails is lying and

must be guilty. *Id.* (internal citation omitted). Similarly, a person who is guarded, uncooperative, or offers broad, general denials is also lying and must be guilty. *Id.* But behavioral analysis has been debunked, proving that even "experts" trained in behavioral analysis fare no better than chance when determining if someone is lying. *See also* (Ex. 3, J. Trainum Report at 3-4) (behavioral analysis does not work).[45] Although scientific studies have consistently debunked this practice—showing that people, even specially trained people, are poor lie detectors and unable to evaluate truth verses deception any better that a rate of 50% (a coin toss), (*Id.),*[46]—police still maintain and rely on this practice in their investigations. *See generally* Fred Inbau et al., CRIMINAL INTERROGATION AND ADMISSIONS (5th ed. 2011).

According to law enforcement and interrogation expert Jim Trainum, many of the purported indicators of deception in behavioral analysis are "actually normal responses to the stress caused by an accusatory interrogation and are often exhibited by persons telling the truth." (Ex. 3 at 4). Trainum further explains:

> Once the investigator has concluded that a suspect is guilty, the investigator begins asking more guilt-presumptive questions, which often causes the suspect to respond defensively and exhibit behavior considered to be a Behavioral Analysis deception indicator. This, in turn, creates a vicious circle, with the investigator becoming more

[45] While this evidence need not be new to be considered by this Court, it is new. The studies showing that behavioral analysis simply does not work were published between 2003-2008, and the White Paper that most widely publicized the debunking of behavioral analysis was not published until 2009. Thus, this evidence is new, post-dating Michael's trial and conviction.

[46] *See also* C.F. Bond & B.M. DePaulo, *Accuracy of Deception Judgments*, 10 PERS. SOC. PSYCHOL. REV. 214 (2006); Maria Hartwig et al., *Police Officers' Lie Detection Accuracy: Interrogating Freely vs. Observing Video*, 7 POLICE Q. 429 (2004); Saul M. Kassin & Christina T. Fong, *"I'm Innocent!": Effects of Training on Judgments of Truth and Deception in the Interrogation Room*, 23 L & HUM. BEHAV. 499 (1999).

> aggressive in their questioning and the subject responding by becoming more defensive and exhibiting more "symptoms" of deception.

(Id. at 4).[47]

For youth, a police investigator's belief that he is a human lie detector is particularly problematic because many of the supposed cues of deception, such as slouching, silence, and nail chewing, are instead normal conduct by any adolescent. (*Id.* at 3-4). As a result, normal teenage behavior can make a kid a suspect. Today, it is well-known and widely accepted that "children are different;" their brains are different and, as a result, they behave differently. *See Miller v. Alabama*, 567 U.S. 460, 471 (2012). It is not uncommon for the actions, words, and even facial expressions of youth to be misinterpreted by adults. Dr. Aaron underscores that "adolescents often express emotions in ways that differ from typical adult emotional expression" and because "[r]eactions like fear, anger, sadness, and shock are often challenging to accurately identify in adolescents," their "responses are often misunderstood." (Ex. 4b, Addendum of Dr. Jeffrey Aaron at 1). When this happens in the context of a criminal investigation by law enforcement, the consequences can be devastating.

If you add trauma to the equation – such as the unimaginable trauma of finding your mother's burning body – it is almost inevitable that a youth will embody deception, according to behavioral analysis cues. According to Dr. Aaron, "it is common for people who have experienced trauma to appear emotionally disengaged when in fact the opposite

[47] Citing Saul M. Kassin, Christine C. Goldstein, and Kenneth Savitsky, "Behavioral Confirmation in the Interrogation Room: On the Dangers of Presuming Guilt." Law and Human Behavior, Vol 27, No. 2 (2003), pg. 189.

is true." (Ex. 4b at 3). It is not uncommon for a trauma response to make someone appear stoic, cold, or – in the State's words – remorseless. *See Id.*

Once someone is misclassified as a liar and guilty, often as a result of erroneous behavioral analysis, the investigation focuses on that suspect and police fall victim to tunnel vision, wherein all evidence is filtered through the presumption of guilt, rather than the presumption of innocence, and contrary evidence, such as evidence pointing to other suspects, is ignored. *See* Findley & Scott, *supra*, at 293-95. (See Ex. 3 at 1-4). In this way, the entire police investigation and all resulting evidence, including any statements made by the youth, becomes tainted by the erroneous misclassification of the youth as deceptive and/or guilty. *Id.*

That is precisely what happened here: Michael did not grieve or respond to trauma in the way the police expected, and law enforcement read his behavior as cues that he was a liar and guilty. (Ex. 3 at 1, 9-12). This set the stage for everything that happened after. Michael became the prime suspect, and the investigation focused, almost exclusively, on making a case against him.

2. Debunked Voice Stress Test Exacerbated Misclassification & Used by Law Enforcement as Coercive Tool

Michael's misclassification and law enforcement's subsequent misguided rush to judgment was further fueled by the computerized voice stress test. According to law enforcement, Michael failed this test, confirming their theory that he was lying and guilty. New evidence now reveals, however, that voice stress analysis – like behavioral

analysis – does not work.[48] *See also* (Ex. 3 at 6-7). CVSA is inherently unreliable and "no better than flipping a coin when it comes to detecting deception." (*Id.*) The National Institute of Justice (NIJ) conducted a study on two of the most popular CVSA programs used by police departments across the country and published the results in 2008." (*Id.*)

Moreover, according to law enforcement expert Jim Trainum, law enforcement have "an unjustified faith in the reliability of polygraph and CVSA to detect deception, and use them as shortcuts in the investigative process, and ultimately "faith in the results often overwhelms a critical evaluation of the evidence." (Ex. 3at 6-7, 12). Tammy Nash, who was involved in this case, agrees and thought it was a mistake to rely on with Michael. (Ex. 66 at 11.) What's worse, law enforcement then use lie detectors, like CVSA, during interrogations as an interrogation ploy. (*Id.* at 6). Given the inherent unreliability of CVSA, this constitutes a false evidence ploy, and such ploys are particularly problematic when used with juveniles, according to expert Trainum. (*Id.*). Trainum pointed out that Mike was given the CVSA test at the beginning of his interrogation, messaging to him that police were certain in his guilt. (*Id.*).

[48] Kelly R. Damphousse, *Voice Stress Analysis: Only 15 Percent of Lies About Drug Use Detected in Field Test, National Institute of Justice*, NATIONAL INSTITUTE OF JUSTICE (March 16, 2008), https://nij.ojp.gov/topics/articles/voice-stress-analysis-only-15-percent-lies-about-drug-use-detected-field-test. The DOJ study involved interviewing arrestees about their recent drug use and noted the difficulty of CVSA tests in determining if stress is deception-related or just stress. *Id.* This difficulty would be especially prevalent when testing Michael, who would naturally have been under significant levels of stress. Yet, this unreliable test tainted the rest of the police investigation.

Trainum also pointed out that it was problematic that Holdman conducted the CVSA test because of his personal involvement in the investigation; it is possible that his subjective impressions tainted the analysis of the results "as he would be seeking confirmation of what he and other investigators already believed to be true." (*Id.* at 13). "The test result would in turn unjustifiably increase the investigators belief in Michael's and Josh's guilt." *Id.*

3. Law Enforcement Used Statements Against Michael that were Elicited Using Psychologically Coercive Tactics Known to Be Dangerous with Youth

Law enforcement claimed, and the State presented at trial, that Michael's statements were inconsistent, indicating deception, and at times odd or surprising, indicative of guilt and motive. But, according to Dr. Aaron, "[i]naccuracies…would be expected in such a situation," where Michael was understandably experiencing intense emotions (described by Michael as "panic") and trauma, "further magnified by [Michael's] developmental status." (*Id.* at 18). And Michael was just trying to figure out what had happened to his mother. (*Id.* at 18) ("it would make sense that a boy who knows his mother has been killed by someone else would want to know whether the killer might be identified"). More generally, Dr. Aaron explained that a "14-year-old who had just witness his mother burning to death might exhibit responses that would be difficult to accurately interpret." (*Id.*)

As Dr. Aaron highlighted, "the police, who understood the system and presumably had training in interrogation techniques, were simply outsmarting and manipulating a vulnerable 14-year-old by offering comments to elicit responses." (Ex. 4 at 19-20). Dr. Aaron concluded, "[i]n that context, especially given the expected impact of intense

emotional activation on a 14-year old boy, the idea that [Michael] could have simply wished for the ordeal of police questioning to be over and to be home and with family rather than in a police station seems both credible and consistent with known information." (*Id.*). Indeed, new research on the coercive effects of police interrogation on youth is critical to consider when evaluating any statements purportedly made by Michael while being interviewed and interrogated by police in the hours, days, and weeks after his mother's death.

Once law enforcement misclassified Michael as a liar who killed his mother, they proceeded to interrogation; they relentlessly accused and confronted him for the 48 hours following his mother's murder. Interrogation is designed not to end until a confession is elicited. While Michael withstood the pressure and never confessed—a strong indication of his actual innocence—the State used things he said (byproducts of hours of psychological manipulation) as evidence at his trial. (Ex. 3 at 13-20). But the new science regarding adolescent brain development and behavior also explain why youth fare significantly worse under the psychologically coercive and manipulative pressures of interrogation than adults.[49]

The police interrogations of Michael – as well as the interrogations of Josh Sansoucie – demonstrate law enforcement's willingness to use psychologically coercive

[49] The science showing that youth are different in ways that significantly matter in the interrogation room, including for purposes of behavioral analysis, did not develop and become widely known until 2005, when the U.S. Supreme Court embraced it in its decision to overturn the juvenile death penalty. *See Roper v. Simmons*, 543 U.S. 551 (2005) (internal citations omitted).

interrogation tactics widely accepted to be inappropriate and problematic for youth. *See* Section IV, *infra* (explaining the science and case law establishing that standard police interrogation tactics are unacceptable for use with youth). Police honed in on Michael and aggressively treated him a suspect, as he reacted to and grieved his mother's death. They accused and confronted him, deceived him with junk science (telling him he failed the CVSA test, indicating deception), deceived him with a false story that his friend was "spilling the beans" on him, and implied that the only way to save himself was to confess. (Ex. 3 at 19). They even threatened him, by encouraging him to think about "what happens to kids in prison." (*Id.*). Each of these tactics are common to the most widely used police interrogation tactic—the Reid Technique—and none should be used on children.[50] *Colorado v Connelly*, 479 U.S. 157, 166 (1986) (holding that police unconstitutionally "overreach" when their questioning "exploit[s]" known weaknesses of a vulnerable suspect). If and when they are used by police on kids, unreliable results should be expected.

The interrogation-elicited statements must be evaluated in that context, and all of the evolving research and caselaw explaining why youth are more likely to falsely confess equally applies to a kid, like Michael, who may have made some "inconsistent" or odd statements, as well as Josh Sansoucie, who the police tried to pit against Michael, *see* Claim IV. The record leaves no question that law enforcement employed interrogation tactics in this case that are now widely accepted to be psychologically coercive, particularly for youth. *See also* (Ex. 3 at 4-5, 13-19, 21, and 23). It is thus unsurprising that Michael may

[50] The record makes clear that at least Holdman was trained in Reid tactics. (Ex. 3 at 14).

have said some inconsistent or misunderstood things under that intense psychological pressure and when he was just looking for a way to make it stop.

e. A Reasonable Juror Would Have Doubts

Expert testimony from Dr. Aaron and Jim Trainum, in combination, would have dismantled the State's most emotionally powerful trial theme – that Michael was a remorseless, cold-blooded killer. They also would have provided the jury a cogent and detailed explanation for why the police's basis for suspecting Michael in the first place was wrong, rooted in debunked "science," and also rebutted any so-called evidence presented that things Michael said indicated his deception and guilt. Finally, Dr. Aaron and Trainum's testimony would have elicited sympathy for a 14-year-old kid who was mischaracterized by police as a guilty liar on the day his mother died, judged for his normal adolescent trauma response, and then subject to extremely coercive, manipulative interrogation tactics for days.

At trial, the jury was not provided any explanation or context for the State's assault on Michael's character. But a properly educated jury, particularly one provided with new research and science regarding how youth respond to trauma and how law enforcement's psychologically interrogation tactics mischaracterize and manipulate youth, would have had the tools to question and reject the State's inflammatory attempt to smear Michael. A reasonable juror presented with this testimony would have had serious doubts. When a reasonable juror considered this new evidence along with the complete lack of physical evidence (as the evidence now stands) and the compelling

evidence pointing to other suspects, they would acquit. *See House v. Bell*, 547 U.S. 518, 548-54 (2006).

D. New Evidence Undermines Michael's Purported Admission

Dr. Aaron's report also constitutes new evidence that significantly undermines Michael's purported admission. As an initial matter, it is a stretch to even call this purported evidence an admission.[51] Michael has always adamantly denied he said he killed his mom as he was trying to kill himself. Instead, he said the detention workers asked why he was trying to kill himself, and he explained he doesn't want to live, and hasn't wanted to live since *they* killed his mom. His explanation –he said he doesn't want to live, and hasn't wanted to live since *they* killed his mom – makes much more logical sense than the notion of a kid crying out a formal admission, including a specific date, as he hangs himself. And it is critical to note that this is the only time – during the past twenty-five years – that Michael has ever potentially said anything other than "I am innocent."

Even if this Court credits the State's story, Dr. Aaron rebuts the notion that this is an admission at all, much less a true and reliable one. The credibility of Michael's purported admission must be evaluated in light of the new evidence. *Floyd*, 894 F.3d at 157 (recognizing that evidence that undermines the defendant's admission is evidence of "actual-innocence" "because it supports [the defendant's] assertions his admissions were

[51] The State has always called this a confession. But expert James Trainum explains that this is not a confession because "a confessions is a fully corroborated statement during which the suspect accepts personal responsibility for committing a crime." (Ex. 3 at 27.) Trainum explains Michael's alleged statement does not constitute a confession because he "offered no details that could undergo dependent or independent corroboration." (*Id.*)

false"); *McQuiggin*, 569 U.S. at 386 (citing *Schlup*, 513 U.S. at 329). Even if Michael said what the State claims, there are still innocuous explanations. As Dr. Aaron explains:

> There are still a variety of possible explanations, considering Mr. Politte's likely mental state at the time. The statement could have signified feelings of guilt for not protecting her, as he was present in the home. It could have been a statement of what others clearly thought and were vigorously asserting. It could have been a statement of guilt over an act he did in fact commit. . . .
> [A] common element of an emotional crisis is the lack of rational, clear-headed, and logical reasoning, and thus the statement could reasonably be seen as offering little in terms of definitive or supportable factual information.

(Ex. 3 at 21).

The State's exploitation of Michael's suicide attempt and mischaracterization of what he said in its aftermath is apiece with its handling of the investigation of this case and prosecution of Michael, revealing a willingness to overlook exonerating evidence, or even fabricate incriminating evidence. (*See, e.g.*, Ex. 69 at ¶13-14 (juror Dickerson-Bell did not believe that Michael actually confessed). The initial report on the suicide did not include any mention of inculpatory statements by Michael—an inexplicable omission if this was really said. (*See* Ex. 61; *See also* Ex. 37 at 156-160) (Transcript of Certification Hearing)). There was no mention in any report of Michael's "admission" until ten days later when Michael's psychologist, who met with him immediately after the suicide attempt, amended her report "at the urging" of police. (Ex. 61 at 13). This suspicious amended report and the testimony of other juvenile officers are inconsistent with Michael's assertion that he is innocent, which has maintained from the day of his mother's death to today. The report and testimony should not be trusted.

E. The Integrity of the Investigation & State's Case is Tainted by Law Enforcement's Bias Against Michael, as Illustrated by New (and Old) Evidence

The investigation of Rita Politte's murder, and Michael's eventual conviction, was pervasively tainted by tunnel vision and bias, rendering the outcome – Michael's conviction – unreliable. *See (*Ex. 3 at 1, 3-4, 8). After reviewing all law enforcement reports in this case, law enforcement expert Jim Trainum observed that law enforcement's focus on Mike as the prime suspect on the day of the crime was "not based on any substantive evidence," and concluded that this "rush to judgment combined with false consensus[52] and confirmation bias[53] adversely impacted the rest of the investigation." (*Id.* at 1, 9). According to Trainum, "[o]nce the investigators concluded that Michael had killed his mother, they fell victim to confirmation bias," "result[ing in] them ignoring evidence of Michael's innocence as well as any alternative suspects." (*Id.* at 1, 28). Law enforcement prematurely shifted from an evidence based investigation to a suspect based investigation, leading them to view things through a guilt-presumptive lens. (*Id.* at 3, 11). Statements from witnesses, like Josh Poucher, corroborate the officers' bias. According to Poucher, Curt Davis told him "Bernie [Michael]'s going to

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[52] False consensus bias is "where people tend to believe that 'their own behavioral choices and judgments are relatively common and appropriate . . . while viewing alternative responses as uncommon, deviant, or inappropriate.'" (*Id.* at 4 (quoting Lee Ross, David Green, and Pamela House, The "False Consensus Effect": An Egocentric Bias in Social Perception and Attribution Process (1977), *Journal of Experimental Social Psychology* (13), pg. 280)).

[53] Confirmation bias is where an investigator believes that the suspect is guilty from the start and, as a result, tends to look for what they believe are indicators of deception or guilt, and ignores indicators pointing to innocence. (*Id.* at 28).

get what he deserves. He's going to rot in prison. He's going to get (bleep) in the (bleep)." (Ex 18b (Video Transcript of Josh Poucher)).

Law enforcement also failed to properly document their investigation. This is particularly problematic with regard to their interrogations of Michael and Josh, and the statements allegedly elicited. (*Id.* at 4-6, 7, 8-9). While law enforcement had audio and video recording equipment, they did not use it except for one of Josh's statements. Best practices require recording interrogations in their totality in order to capture questions asked, information provided, and tactics wielded. (*Id.* at 7, 9). Without this documentation, it is impossible to know what exactly what happened in the interrogation room and what tactics were used with these adolescent witnesses. (Ex. 3 at 7).

F. The State's Weak Case at Trial is Wholly Dismantled

When the new, compelling evidence is considered, nothing remains of the State's case. The State's case was always thin, but now it is non-existent. The only physical evidence allegedly tying Michael to the crime has been proven false. *See, e.g., Rivas v. Fischer*, 687 F.3d 514, 552 (2d Cir. 2012) (actual innocence established when credible and compelling testimony calls into serious doubt the central evidence linking petitioner to the crime). The credibility of key State's witnesses have been called into serious question, leaving the jury unable to rely upon state witnesses and the central evidence that they presented, or to trust the prosecutor who knowingly presented their false and unreliable testimony. *See Bragg*, 128 F. Supp. 2d at 603 (finding *Schlup* actual innocence based, in part, on new evidence discrediting key state law enforcement witness because

finding a state witness "not worthy of belief, and [that he] would not be believed by any reasonable juror, is sufficient to satisfy the *Schlup* standard"). And the State's allegations that Michael confessed or was remorseless have been proven unreliable.

This Court need not second-guess the jury that convicted Michael, although even those jurors say they would have voted differently had they known of this new evidence. (Ex. 69 at ¶10-11 (juror Linda Dickerson-Bell said she would have voted to acquit if she knew there was no gas on Michael's shoes, and she questioned why the jury did not hear any evidence about the Ed or other possible suspects, and said "[t]his evidence would have made a difference to me"); Ex. 22 (juror Victor Thomas says jury would "not have voted to convict Michael Politte" had they heard "evidence about the victim's contentious divorce and possible alternate suspects" and that, "[a]fter hearing this evidence," he believes Michael is innocent). Instead, this Court must evaluate what that jury, or any reasonable juror, would do if faced with the evidence as it now stands – with no physical evidence connecting Michael to the crime. If Michael was tried today, the jury would hear:

- No physical evidence connects Michael to the fire;
- There is no evidence that an accelerant was used to start the fire and cause of fire is unknown;
- There would be no evidence or witness to motive;
- Key state witnesses Fire Marshall Holdman, Fire Marshall Jacobsen, and criminalist Rothove would likely be precluded or limited in their testimony – to

the extent they would be permitted to testify, they would be impeached with the scientific evidence;

- Johnnie Politte was seen coming from the area of Rita Politte's home soon after the fire started, and he had no explanation for how he knew her home was on fire or why he was there; he was harassing people afterwards about what they knew about Rita's death; he brought the police a bloody tire iron which he lied and said he found in Michael's closet, and that he inexplicably appeared to come into some money soon after her death;
- Ed Politte had motive, had recently threatened Rita, and had opportunity by hiring someone (his cousin, Johnnie) to commit the murder;
- Both Johnnie and Ed were seen dredging the bottom of a lake on Johnnie's property;
- Expert testimony that law enforcement's basis for suspecting Michael was unfounded, misinformed, and biased;
- Expert testimony that law enforcement's investigation of this crime was deficient, characterized by tunnel vision and cognitive bias once they focused solely on Michael;
- Expert testimony that Michael's alleged admission is unreliable.

If this case could even make it to a retrial, it is "more likely than not that no reasonable juror would [find]" Michael "guilty beyond a reasonable doubt." *Schlup*, 513 U.S. at 327. *See, e.g., House v. Bell*, 547 U.S. 518, 548-54 (2006) (evidence pointing to

alternative suspect reinforced doubts as to petitioner's guilt and, coupled with challenges to other evidence and lack of motive, satisfied the *Schlup* gateway standard). This new evidence is "so strong that [this Court] cannot have confidence in the outcome of the trial." *Schlup*, 513 U.S. at 298. Accordingly, this Court should consider any and all of Michael's constitutional claims, even if the Court finds any to be procedurally barred. *Schlup*.

G. Courts Across the Country have Overturned Convictions in Situations Analogous to This Case.

Courts across the country have overturned convictions based on now-debunked arson evidence, including new scientific evidence disproving the presence of accelerants on the defendants. For example, George Souliotes' case was remarkably similar to Michael's. Mr. Souliotes was convicted based on now debunked indicators of arson, including pour patterns and evidence that the fire was especially hot and intense, as well as purported evidence of gasoline found on Souliotes' clothes. After an evidentiary hearing on actual innocence, a federal magistrate concluded that it could not be determined whether the fire was accidental or incendiary, and that the chemicals on Souliotes' shoes were not gasoline and rather a byproduct of the manufacturing process. The court held Souliotes satisfied the *Schlup* actual innocence standard because "[t]he evidence remaining after the scientific evidence was removed is insufficient to support a finding of . . . guilt beyond a reasonable doubt." 2012 WL 1458087, at *59–60. Further, the remaining evidence against Souliotes was stronger than here because there was an eyewitness identification. *Id.* The Third Circuit found *Schlup* actual innocence in a

similar case because the indicators of arson were subsequently debunked, as was the evidence that the defendant had accelerant on his clothing. *See also Lee v. Superintendent Houtzdale* SCI, 798 F.3d 159 (3d Cir. 2015).

Courts across the country have also overturned convictions and/or dismissed charges of young defendants who were misclassified as guilty based on their behavior and/or statements which were misinterpreted as a lack of remorse. For example, Michael Crowe was 14 years old when his sister was murdered. Police arrested him, in part, because they did not believe his reaction to be appropriately emotional.[54] After six months of incarceration, charges were dropped because DNA evidence identified the true killer. Han Tak Lee, like Michael, was convicted of arson and murder for a fire that killed his daughter. Lee, 798 F.3d 159. He became the prime suspect because the police did not think he showed appropriate grief. (*Id.* at 168).

This Court should find Michael has provided sufficient evidence that he is actually innocent to pass through the actual innocence gateway and this Court should review all of his constitutional claims on that basis.

CLAIM IV: MICHAEL'S FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS WAS VIOLATED WHEN POLICE INTIMIDATED A CRITICAL CORROBORATING WITNESS FROM TESTIFYING.

A defendant's right to offer the testimony of witnesses on his behalf is a right guaranteed by the Sixth and Fourteenth Amendments to the Constitution. *See generally Washington v. Texas*, 388 U.S. 14, 18 (1967); *State v. Allen*, 800 S.W.2d 82, 86 (Mo. Ct.

[54] They found him "distant and preoccupied" while the rest of his family grieved.

App. 1990). It is fundamental that a criminal defendant has a right to present competent, material evidence in his defense, including witnesses. *Id.* at 86-87; *see also Webb v. Texas*, 409 U.S. 95, 98 (1972); *State v. Campbell*, 147 S.W.3d 195, 200 (Mo. Ct. App. S.D. 2004. In fact, "[f]ew rights are more fundamental than that of an accused to present witnesses in his own defense." *Chambers v. Mississippi*, 410 U.S. 284, 302 (1972).

Michael's due process right to present witnesses in his defense was violated when law enforcement intimidated a crucial exculpatory witness: Josh Sansoucie, the only other person present the night of Rita Politte's murder and the only person who could affirm Michael's account of events. Josh gave an account consistent with Michael's from the moment they were interviewed at the scene of the crime. But law enforcement doggedly pursued Josh, over the course of years, in hopes of flipping him against Michael. While defendants are often left to speculate about law enforcement's intentions and tactics, the State's misconduct was laid bare by a series of emails.

A. Factual Background

From the night of Rita's murder to the time of Michael's trial in 2002, Josh was questioned on eight (8) separate occasions, two of which were under oath. Josh, who was fifteen years old at the time, was questioned at least twice on the day of the crime, December 5, 1998. (Ex. 28 at 3-5). (*See also* Ex. 3 at 13-19). That day, he also wrote out a statement and was given a CVSA—Computer Voice Stress Analyzer—test. (Ex. 55, Joshua Sansoucie CVSA Test Report; Ex. 57, Written Statement of Joshua Sansoucie). Each time, Josh's account corroborated Michael's.

But law enforcement was convinced Josh was not being truthful, so they approached Josh's mom to try to gain leverage. (Ex. 3 at 16, 20 (Trainum explaining how interrogators used Josh's mother against him, as a tool of coercion). Holdman reported: "We told [Josh's mom] Darla we felt her son was not being truthful and we were requesting her assistance, if she could talk to her son at home." (Ex. 26 at 15). Then, on December 7, Josh was questioned two more times. (Ex. 28 at 7-8). And on December 14, investigators pushed Josh to undergo a polygraph examination. (Ex. 6, 20 (according to Trainum, confronting witnesses with polygraph and/or CVSA test is a common coercion tactic, but noting these are unreliable and over-relied upon by police as shortcuts). After the test, officers approached Josh and attempted, once again, to get him to say more. But Josh could offer no new details about the murder of Rita or Michael's alleged involvement. Even with Josh's consistency over time, corroboration of Michael's statements, and persistent insistence that he had no additional facts to share, the State continued to strategize about how to bully Josh into becoming a witness against Michael.

Correspondence just weeks after the crime confirms the State's plan to exploit Josh. In late December 1998, the FBI's National Center for the Analysis of Violent Crime sent a memo to the Washington County Sheriff's Department detailing strategies to manipulate an admission. (Ex. 31, Fax from FBI to Washington County Sheriff's Department, December 21, 1998). Recommended techniques included "Minimization of the crime," "Projection of the crime onto others [Michael] or the victim herself," and "transference of evidence from Joshua to the crime scene where the evidence should not be." (*Id.* at 2). Nowhere in this fax was there any contemplation that the boys may not have been involved,

or any recognition that these inherently psychologically coercive tactics carried significant risk when used with youth. (Ex. 3 at 4-6, 20 (Trainum explaining why these tactics are inherently coercive and recognized to produce false statements).)

In July 1999, seven months after the crime, law enforcement still found themselves wondering how to pressure Josh. Investigator Jim Weber asked an Assistant Attorney General, "Is Josh going to be certified as an adult? [Detective] Davis seems to feel strongly that if he is, he will spill his guts as to what happened that night." (Ex. 41). To advance their strategy, the State began to build a criminal case against Josh. In October 1999, he was charged with two crimes—Tampering with Physical Evidence and Property Damage in the first degree.[55] In February 2000, Josh pleaded guilty to a misdemeanor charge of Property Damage in the second-degree and was given a suspended imposition of sentence; the tampering charge was nolle prossed. (Ex. 43, Objections to Witness Immunity, at 2). Through all of this, Josh's statements remained consistent.

After those charges were resolved, the State immediately applied for witness immunity for Josh in the case against Michael. Shortly before the immunity proceedings, the Attorney General's Office wrote to Investigator Jim Weber and asked that Weber, Davis, Holdman, and prosecutor John Rupp "jump on Josh and do a long interview with him." (Ex. 41 at 4). They agreed that they would not accept "I don't remember" or "I don't

[55] Josh was charged in juvenile court with Tampering with Physical Evidence for throwing a marijuana plant out of the window of the trailer before the arrival of law enforcement at the crime scene and Property Damage in the first-degree for "pouring accelerates [sic] on a railroad tire near the Politte home" for the attempt to burn the railroad tie with . (*See* Ex. 19, Affidavit of Curt Davis, at 1; Ex. 44, Transcript of Joshua Sansoucie Witness Immunity Proceedings, at 7).

know" as answers from Josh. (*Id.* at 5). Despite Josh's attorney's insistence that Josh had fully cooperated with law enforcement, knew nothing about what happened to Rita, and had nothing new to add, immunity was granted on April 3, 2000. (Ex. 45, Order Granting Witness Immunity; Ex. 44, Transcript of Joshua Sansoucie Witness Immunity Proceedings at 6).

Finally, in January 2002, shortly before Michael's trial, Josh was deposed—his eighth and final time being questioned by the State. Once more, Josh reiterated the facts he had told law enforcement from the very beginning, including that when he observed Rita and Michael on the night before the fire, there was no arguing; Michael never mentioned he was mad at Rita. (Ex. 58 at 44-45). Michael was acting normal; he did not appear angry or agitated. (*Id.* at 69-70). When Josh woke up in the middle of the night, he didn't hear or smell anything. (*Id.* at 51-52). Most importantly, he was clear that he never saw Michael leave his bedroom that night. (*Id.* at 69). The police had previously "put words in Josh's mouth" about whether Josh could see Michael sleeping in his bed when he woke up during the night. (*Id.* at 77, 101-02). Josh provided further exculpatory information: The next morning, after the boys realized that the fire was coming from Rita's bedroom, Michael looked "worried and scared." (*Id.* at 57). Michael had no noticeable blood, cuts, or scratches on him that morning. (*Id.* at 61-62). Lastly, Josh explained that the police had done everything they could to try to pressure him—questioning him multiple times, vacillating between being nice to him and screaming and cursing at him, and calling him a liar. (*Id.* at 73-74).

Despite their belief for years that Josh would be their best witness against Michael, the State never called Josh as a witness at trial. Because Josh never changed his account or gave in to their pressure; he never gave them any evidence that pointed toward Michael's guilt, so he was of no use to them. But the games they played leading up to trial caused the defense to think that Josh was not available to them as a witness either. The State subdued Josh into silence.

B. Law Enforcement Coerced & Manipulated Josh Sancoucie, Michael's Key Defense Witness, Into Silence

Police conduct and intimidation need not include physical violence to be coercive and violate the Constitution. *Crowe v. County of San Diego*, 608 F.3d 406, 431 (9th Cir. 2010) (holding the interrogation of two minors, aged 14 and 15, one of whom was related to victim, violated substantive due process). In *Crowe,* on the heels of the murder of a 12-year-old girl, the victim's brother, Michael Crowe, and his friend were "subjected to hours of interrogation, cajoled, threatened, lied to, and relentlessly pressured by teams of police officers," *Id.* at 432, who used psychologically coercive and manipulative tactics known to be wholly inappropriate for a child, as well as deceptive tactics like a CVSA which police said proved they were involved. *Id.* at 419.

The FBI memo on interrogation tactics for interviewing Josh included some of the very conduct which *Crowe* condemns, in addition to the deceptive use of the CVSA:

> 4. talking [to police or prosecutors] would clear the appearance of wrongdoing, 5. [Josh must have been] unwittingly pulled into the crime because of friendship, which may not be as true as one might think; 6. emphasis might be placed on [Josh's] upbringing; generally good child, but because of [Michael]

> wrong place at the wrong time; 7. emphasis on parents, who must also live with this.

(Ex. 31 at 2) (*See also* Ex. 3 at 4-6, 14-20 (Trainum concluding tactics used on Josh that are widely recognized to be inappropriate for youth witnesses/suspects, and risk false statements, and particularly highlighting the problem of exploiting parent as tool of coercion).

Josh's own description of his interactions with police showed that, like the minors in *Crowe*, he felt threatened and relentlessly pressured. (*Id.* at 18-19.) In his pretrial deposition, Josh explained that sometimes investigators were nice and caring "and then next thing they will, you know, be hollering at me and cussing at me. And then they will tell me that [Michael] said this and that. You know, he was saying I was a liar and then they would be telling me everything." (Ex. 58 at 74). Josh felt that police twisted his words: when Josh said he could not see Michael when he woke up in the middle on the night from his place on the floor, the police manipulated this statement as if Josh told them Michael definitively was not there. (*Id*. at 77; Ex. 5 at 3). (*See also* Ex. 3 at 4-6, 14-20 (Trainum explaining these are standard Reid interrogation tactics, designed to manipulate and coerce, some of which Reid itself advises against using with youth).

Throughout the years of intimidation, Josh felt confused and scared, especially when he was questioned for hours at a time while tired and hungry. (Ex. 58 at 78-79, 85; *see* Ex. 5 at 2-3). Davis, in particular, would get in Josh's face and place his hand on Josh's leg while interrogating him, which made Josh feel uneasy. (Ex. 58 at 82-83). Davis lied to Josh that Michael was in the next room "snitching" on him and that "whoever talked first was

going to get a deal," (Ex. 5 at 2). a deceptive tactic recognized to be inappropriate for use with youth (Ex. 3 at 4, 19-20). Even Juvenile Officer Johnson treated Josh like a suspect—she was "mean," screamed in his face, threatened him with a life in prison, and questioned him like an interrogator. (Ex. 58 at 86-88; Ex. 5 at 2). (*See also* Ex. 3 at 18-19 (Trainum explaining that the juvenile officers in this case acted inappropriately because they are supposed to be there solely to protect the youth's rights)).

Josh was only fifteen years old during these relentless coercive interrogations. The police should have known better than to use such tactics on a child. (Ex. 3 at 5-6). There is now near-universal agreement that youth are particularly vulnerable to police pressure, S. Kassin et al., *Police-Induced Admissions: Risk Factors and Recommendations*, 34 L. & HUMAN BEHAV. 3, 19 (2010), and that the constitutionality of police tactics must be "judged by a higher standard when police interrogate a minor." *Crowe*, 608 F.3d at 431. The Supreme Court has found that "[i]t is beyond dispute that children will often feel bound to submit to police questioning when an adult in the same circumstances would feel free to leave," and, accordingly, that the "risk [of false admissions] is all the more troubling—and recent studies suggest, all the more acute—when the subject of custodial interrogation is a juvenile." *J.D.B. v North Carolina*, 564 U.S. 261, 264, 269 (2011).[56] For these reasons, the Court has long recognized that police tactics acceptable for an adult may not be for a child. *See In re Gault*, 387 U.S. 1, 52. (1967) (explaining that "authoritative opinion has cast

[56] *See also* Christine Scott-Hayward, *Explaining Juvenile False Admissions: Adolescent Development and Police Interrogation*, 31 L. & PSCYHOL. REV. 53, 69 (2007) (explaining that juveniles are more susceptible than adults to external influences, and more compliant toward authority figures)..

formidable doubt upon the reliability and trustworthiness of 'confessions' by children"); *Gallegos v. Colorado*, 370 U.S. 49, 54 (1962) (noting that "a 14-year-old boy, no matter how sophisticated, is unlikely to have any conception of what will confront him when he is made accessible only to the police"); *Haley v. Ohio*, 332 U.S. 596, 599 (1948) (explaining "that which would leave a man cold and unimpressed can overawe and overwhelm a lad in his early teens"). More recently, the Supreme Court explicitly recognized that adolescents' interactions with police must be viewed through the lens of their youth. *See Miller v. Alabama*, 567 U.S. 460, 477-78, 481 (2012) (recognizing the fundamental truth that "children are different" than adults and that the "incompetencies associated with youth [including] [their] inability to deal with police officers" "put[s] them at a disadvantage" in interactions with law enforcement and criminal proceedings).

Law enforcement also recognize this risk: "Over the past decade, numerous studies have demonstrated that juveniles are particularly likely to give false information—and even falsely confess—when questioned by law enforcement."[57] John E. Reid & Associates, the firm that markets the most commonly used interrogation technique in the country, agrees that "[i]t is well accepted that juvenile suspects are more susceptible to falsely confess than adult suspects,"[58] and warns that investigators must take great care when interviewing or

[57] INT'L ASSOC. OF POLICE CHIEFS, *Reducing Risks: An Executive's Guide to Effective Juvenile Interview and Interrogation* , https://www.theiacp.org/resources/document/reducing-risks at 1 (last visited August 18, 2021).

[58] JOHN E. REID & ASSOC., INC., *Take Special Precautions When Interviewing Juveniles or Individuals With Significant Mental or Psychological Impairments*, (https://reid.com/resources/whats-new/2012-interrogators-should-exercise-special-

interrogating a juvenile. Police clearly did not take such care when interviewing Josh. (Ex. 3 at 5-6, 13-24).

Josh withstood the relentless pressure and never falsely implicated Michael, but the fact that he never confessed or gave information pointing to Michael does not cure the problem of the State's misconduct. The police's improper tactics intimidated Josh, which prevented him from assisting Michael's defense.

C. Josh Would Have Been a Compelling Defense Witness But For the State's Intimidation

If Josh had testified, he could have served as an exculpatory witness on Michael's behalf. In an affidavit Josh signed in 2018, he asserted that he would have testified to the initial statement he gave law enforcement. Josh is the only person who was there the night of Rita Politte's murder and who could corroborate Michael's account of events – the only witness who could corroborate Michael's actual innocence. In addition, he would have told the jury that Michael did not seem angry at his mother on the night before her death and that Josh was sleeping right next to Michael's bed and never noticed Michael leaving or re-entering the room. (Ex. 5 at 1, 4). He would have testified that Michael had no blood, cuts, scratches, or other injuries on the morning of the murder. (*Id.* at 2). And he would have testified about the continual pressure the police placed on him and his family for years. Without the testimony of Josh, Michael was substantially prejudiced. Josh could have testified that Michael was innocent, and also negated the already weak motive

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precautions-when-interviewing-juveniles-or-individuals-with-mental-or-psychological-impairments (last visited August 18, 2021).

evidence He would have provided an alternative picture of Michael as a normal, 14-year-old adolescent with no motive or opportunity to kill his mother.

D. Law Enforcement's Coercive Manipulation of Michael's Key Defense Witness Violated His Constitutional Rights

The State's coercive measures effectively drove Josh from the witness stand and deprived Michael of due process. But for repeated intimidation, Josh would have served as a witness on Michael's behalf. (*Id.* at 3-4). Like in *Washington v. Texas*, here, the prosecution "arbitrarily denied him the right to put on the stand a witness who was physically and mentally capable of testifying to events he had personally observed, and whose testimony would have been relevant and material to the defense." 388 U.S. at 23. Similarly, in *State v. Brown*, the prosecutor informed a defense witness he could later be charged with a crime, asked the witness if he had sought counsel, and asked if he was familiar with his *Miranda* rights, which the court found was "clearly designed to dissuade the witness from testifying." 543 S.W.2d 56, 59 (Mo. Ct. App. 1976).

Similarly, the actions of the State here were deliberately designed to confuse, intimidate, and dissuade Josh from testifying on Michael's behalf. The State's intimidation of Josh led to the omission of Josh's testimony, and deprived the jury of exculpatory evidence that corroborated Michael's testimony, prejudicing Michael. Because the actions of the State prevented Michael from presenting a witness crucial to his defense, his due process rights were again violated.

E. This Court May Review This Claim

As with Claims I and II, *supra*, prior to the Rule 91 filing in Cole County Circuit Court, Michael has not previously presented this claim as he has never had a postconviction appeal. It is new and properly presented here. Nevertheless, Michael has also satisfied any potential procedural bar both because he is actually innocent, see Claim III, *infra*, and through his satisfaction of cause related to the state misconduct and prejudice, as described above in this claim. *Murray*, 477 U.S. at 485-88. Because Michael's rights were violated, this Court should grant him a new trial.

CLAIM V: MICHAEL'S RIGHT TO DUE PROCESS WAS VIOLATED WHEN THE COURT IMPROPERLY INTERFERED WITH THE JURY'S DECISION-MAKING.

Michael's right to due process of law under the Sixth and Fourteenth Amendments was violated when the trial judge interfered with the jury's deliberations. *See also* MO. CONST. art. I, § 10. At Michael's trial, the judge initiated a private conversation with a juror who was hesitant to vote Michael guilty. According to the jury foreman, Victor Thomas, it took several votes, approximately four or five, for the jury to finally come to a unanimous decision. (Ex. 22, Affidavit of Victor Thomas, at 1. *See also* Ex. 69 (juror Dickerson-Bell saying she "felt pressured by a couple of other jurors to vote for guilt")). Prior to their ultimate determination of guilt, there were several hold-out jurors. (*Id.*) One was a woman who empathized with Michael because she had a son around his age—but she was eventually "pressured" into a guilty vote by other jurors. (*Id.*). And the jurors were rushed in their deliberations. (Ex. 69 at ¶23 (Juror Dickerson-Bell said she felt "we were very

rushed in our deliberations" and "[e]veryone's attitude seemed to be let's get this done and get home," "Everyone just wanted to get home)).

Another one of the other dissenters was Jonathan Ray Peterson. Even at the time of trial, Mr. Peterson believed that Michael could not have killed his mother by himself and he did not want to convict. (Ex. 21, Affidavit of Jonathan Peterson, at 1). In a recent sworn affidavit, Mr. Peterson explained that for this reason, he frustrated his fellow jury members by voting against a guilty verdict several times. (*Id*.). After several rounds of discussion and voting, Judge Pratte called Mr. Peterson out of the jury room to speak privately in his chambers. (*Id*.). There, in a one-on-one conversation, Judge Pratte told Mr. Peterson that he needed to come to a decision about Michael's guilt and make up his mind. (*Id*.)

The Supreme Court has held repeatedly that a jury's verdict "must be based upon the evidence developed at the trial." *Irvin v. Dowd*, 366 U.S. 717, 722 (1961). The Court has made clear that "trial by jury in a criminal case necessarily implies at the very least that the 'evidence developed' against a defendant shall come from the witness stand in a public courtroom where there is full judicial protection of the defendant's right of confrontation, of cross-examination, and of counsel." *Turner v. Louisiana*, 379 U.S. 466, 472-73 (1965). Addressing specifically the constitutional effect of juror misconduct the Court well over a century ago made clear, in the broadest terms,

> [i]t is vital in capital cases that the jury should pass upon the case free from external causes tending to disturb the exercise of deliberate and unbiased judgment. Nor can any ground of suspicion that the administration of justice has been interfered with be tolerated.

Mattox v. United States, 146 U.S. 140, 149-50 (1892) (citing Wharton Crim. Pl. §§ 821, 823, 824, and cases cited). And for those reasons, "[p]rivate communications, possibly prejudicial, . . . between jurors and third persons" render the verdict unconstitutional "unless their harmlessness is made to appear." *Id.* at 150.

Missouri courts have long emphasized the necessity of a jury's independence, particularly after retiring to deliberate. *See State v. Meagher*, 49 Mo. App. 571 (1892); *Chinn v. Davis*, 21 Mo. App. 363 (1886). In order to preserve the defendant's right to "be present in court at every stage of trial," any additional or supplemental jury instructions must be delivered in open court. *Meagher*, 49 Mo. App. at 590 (reversing defendant's conviction when judge gave jury an additional instruction after deliberations had begun without the presence or knowledge of either party). "'*No matter how honest the purpose of the judge*,'" private communications between the court and the jury are improper. *State v. Cooper*, 648 S.W.2d 137, 141 (Mo. Ct. App. W.D. 1983) (quoting *Sullivan v. Union Elec. Light & Power Co.*, 56 S.W.2d 97, 103 (Mo. 1932)).

As the Western District held in *Cooper*, "*the mere opportunity for improper influence*" after deliberations have begun is grounds for reversal. 648 S.W.2d at 140. There, one juror approached the judge of their own accord and expressed that they did not want to deliberate further because their mind would not be changed. The judge issued an instruction to only that juror, urging them rejoin the jury and attempt to reach a verdict. *Id.* at 139. On appeal, Cooper's conviction was overturned not because the instruction was substantively improper, but because private communication between the judge and the juror required the state "'affirmatively show[]'" that there was no "'improper influences'"

exercised. *Id.* at 140 (quoting *State v. Edmonson*, 461 S.W.2d 713, 723 (Mo. 1971)). The state failed to present any evidence on the matter and the presumption of prejudice held fast to uphold Cooper's constitutional right to a just trial.

This situation is nearly identical of that in *Cooper*, if not more egregious. In *Cooper*, the judge issued an instruction to an individual dissenting juror to return to deliberations and try to reach a unanimous verdict. *Cooper at 139*. In Michael's case, however, the judge himself initiated the communication with the juror. (Ex. 21 at 1). Even more concerning is the fact that counsel for neither the state nor Michael were ever informed on the record of the conversation. Even if the instruction given was well-intentioned and not a blatant misstatement of the law, reversal is the default solution "no matter how honest the purpose[.]" *Sullivan*, 56 S.W.2d at 103.

While a juror's testimony typically may not be used to impeach a jury's verdict, an exception extends to cases where misconduct occurs outside the jury room. *Storey v. State*, 175 S.W.3d 116, 130 (Mo. banc 2005).[59] When a showing of private communications between a juror and third party are shown, prejudice is presumed and the State then carries the burden of "affirmative[ly] show[ing]" that no harm was done. *Edmonson*, 461 S.W.2d at 723. That burden factually cannot be met here, given the strong similarity between the instruction here and the instruction in *Cooper*. Moreover, the harm is made plain by Peterson himself: "[i]t was the conversation with Judge Pratte that convinced [Peterson] to vote with the rest of the jury. [He] felt pressured by the judge to make a decision." (Ex. 21

[59] It is irrelevant that this claim is first asserted by the movant in a post-conviction proceeding rather than on direct appeal. *Koster*, 340 S.W.3d at 256.

at 1). Judge Pratte led Mr. Peterson to vote for Michael's guilt, and condemned Michael Politte to life imprisonment for a crime he did not commit. The prejudice is heightened here because we know at least one other juror was inclined to hold out for not guilty, and she may have been swayed by Peterson changing his vote. (Ex. 69 (juror Dickerson-Bell pressured into a guilty vote and felt it was wrong even at the time of trial)).

Assuming that a typical determination of prejudice must apply here, Judge Pratte's behavior directly affected the result of Michael's trial and prejudiced him. But for this conversation with Judge Pratte, Mr. Peterson would have continued to dissent from the other jury members and Michael's trial may have resulted in a hung jury or acquittal. "Due process means a jury capable and willing to decide the case solely on the evidence before it, and a trial judge ever watchful to prevent prejudicial occurrences and to determine the effect of such occurrences when they happen." *Smith v. Phillips*, 455 U.S. 209, 217 (1982). Rather than being "ever watchful to prevent [prejudice]," the judge caused the prejudice here—and because of this, Michael is entitled to relief.[60] *Id.*

[60] Judge Pratte not only violated Michael's right to due process, but also the judicial code he had sworn to uphold. In addition to well-established case law regarding the integrity of the jury's verdict from outside interference, the Missouri Code of Judicial Conduct also guarantees certain protections to defendants by requiring appropriate judicial behavior. Judicial communication with jurors must "be patient, dignified, and courteous," Mo. Sup. Ct. R. 2-2.8(B), while also providing that the judge "shall not commend or criticize jurors for their verdict." *Id.* at 2-2.8(C). Additionally, the rules dictate that the judge "shall not *initiate*, permit, or consider ex parte communications, or consider other communications made to the judge outside the presence of the parties or their lawyers." *Id.* at 2-2.9(A) (emphasis added). Missouri rules dictate that a fair and impartial judge must refrain from discussing any information which bears upon the substance of the matter at hand with any juror in that case, before, during, or after deliberation. The court's interference in juror

Juries are "'essential in the administration of justice and the protection of individual freedom, and any undue interference therewith, no matter by whom, will be rebuked[.]'" *In re Williams*, 128 S.W.2d 1098, 1106-07 (Mo. Ct. App. 1939) (quoting 2 Thornton on Attorneys at Law 1243 (1914)). Respecting this sanctity requires a reversal "[i]f a single juror is improperly influenced," because "the verdict is as unfair as if all were." *United States v. Delaney*, 732 F.2d 639, 643 (8th Cir. 1984) (quoting *Stone v. United States*, 113 F.2d 70, 77 (6th Cir. 1940)). The jury's independence and traditional notions of acceptable judicial contact were directly violated here through Judge Pratte's ex parte communications with Juror Peterson.[61] Thus, Michael's constitutional right to due process may only be preserved through a reversal on this claim.

CLAIM VI: TRIAL COUNSEL WAS INEFFECTIVE IN VIOLATION OF MICHAEL'S SIXTH AMENDMENT CONSTITUTIONAL RIGHTS.

"Michael did not get a defense at trial."

– Juror Linda Dickerson-Bell

The Sixth Amendment to the United States Constitution entitles Michael to effective assistance of counsel at trial. U.S. CONST. amend. IV. To prove that he received ineffective assistance, Michael must show: (1) counsel performed deficiently and (2) this deficient

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deliberations process, and pressuring a juror to find guilt against a defendant, is a complete abdication of the judicial code he was supposed to follow.

[61] Like Claims I-V above, before the filing of a Writ of Habeas Corpus in Cole County Circuit Court, this Claim has also never been heard on the merits by any Court as Michael did not have a post-conviction appeal, and Judge Green denied Michael's petition without prejudice and without an evidentiary hearing. Because of this and because of Michael's innocence, this Court may reach this claim.

performance prejudiced his defense. *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984); *Vaca v. State*, 314 S.W.3d 331, 335 (Mo. banc 2010). To satisfy the first prong of deficient performance, Michael "must show that counsel's representation fell below an objective standard of reasonableness." *Strickland*, 466 U.S. at 688. Objective reasonableness of counsel's representation, in turn, is measured against prevailing professional norms. *Id.* The context and fact-specific circumstances of each case should guide any deficient-performance inquiry. *Wiggins v. Smith*, 539 U.S. 510, 522 (2003). To satisfy the second prong, prejudice, the petitioner "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. This analysis considers the totality of the evidence that would be before the jury had counsel performed reasonably. *Strickland*, 466 U.S. at 695; *Williams v. Taylor*, 529 U.S. 362, 397–98 (2000).

In short, and as explained below, Michael's trial counsel provided constitutionally ineffective assistance when he failed to investigate and present: (1) failed to investigate, consult with or present rebuttal experts, or effectively challenge the false physical evidence allegedly tying Michael to the crime – the gasoline on his shoes; (2) failed to investigate, consult with or present rebuttal experts, or effectively challenge the State's testimony and evidence that a canine sniff reliably determined the presence of an accelerant on Michael's shoes; (3) failed to investigate, consult with or present rebuttal experts, or effectively challenge the State's arson evidence and expert testimony that this fire was ignited with an accelerant; (4) failed to object and request that the State call

Michael Politte by his proper name rather than a prejudicial and misleading nickname; (5) failed to failed to object or investigate, consult with or present rebuttal experts, or effectively challenge the State's inflammatory characterization of Michael as a cold-blooded, remorseless killer; (6) failed to investigate and effectively challenge the State's claim that Michael was a firebug; (7) failed to investigate, consult with or present rebuttal experts, or effectively challenge the State's claim that Michael admitted to killing his mother; (8) failed to investigate or effectively challenge the State's weak theory of motive and failed to investigate or present rebuttal testimony regarding Michael's close and loving relationship with his mother; (9) admittedly failed to investigate and present evidence supporting Michael's statements to police about what the occurred the night and morning of the crime; (10) advised Michael not to testify in his own defense, where that decision was not informed by a reasonable investigation; (11) admittedly failed to adequately investigate or present evidence of viable alternative suspects; and (12) admittedly failed to adequately investigate or present evidence of viable alternative suspects. Unfortunately, counsel did not investigate or present any of this. These deficiencies are not mere trifles. Independently and collectively, they prejudiced Michael. Because he received prejudicial ineffective assistance of counsel, Michael is entitled to a new trial.

A. Trial Counsel Failed to Investigate, Consult with or Present an Expert, or Otherwise Challenge the False Physical Evidence Against Michael

Where there is alleged physical evidence tying a defendant to a crime, it is incumbent upon trial counsel to investigate and do everything possible to challenge it. Such

was true for the State's evidence that Michael had gasoline on his shoes, and that the fire was ignited with gasoline. Counsel should have investigated that evidence and consulted with an expert witness. He then could have presented expert testimony or, at a minimum, effectively cross-examined the State witnesses, including their expert witnesses.

This is particularly true in this case where the testimony that there was gasoline on Michael's shoes was provably false, using testing methods that the Missouri crime lab was in fact using at the time of trial. Investigation would have revealed this fact, as well as the fact that the Missouri crime lab should have known the evidence was false, and enabled Michael's attorney to disprove the State's key evidence and thus eviscerate the State's case.

Trial counsel knew or should have known that the lab testing was outdated and unreliable and resultant testimony that Michael had gasoline on his shoes was false, for all the reasons set forth in Claim II, *supra.* Even if he did not know, a competent expert would have enabled him to question the testing done by the State in 1998 and request new testing, if not retain a defense expert to conduct independent testing. At the very least, an expert would have explained why the State's lab testing was outdated and enabled trial counsel to poke holes during cross-exam.

Instead, trial counsel did essentially nothing to investigate or rebut this centerpiece of the State's case. Such a failure violated counsel's essential duty to make an adequate factual investigation "which can only be viewed as an abdication—not an exercise—of his professional judgment." *McQueen v. Swenson,* 498 F.2d 207, 216 (8th Cir. 1974). Trial counsel has a duty to investigate, particularly when issues are unfamiliar to the attorney, involve scientific matters, or are otherwise complex. The duty to investigate specifically

embraces impeachment of a key state's witness, including testimony to contradict the witness's testimony. *Hadley v. Groose*, 97 F.3d 1131 (8th Cir. 1996). The duty to investigate also includes the duty to request discovery, *Kimmelman v. Morrison*, 477 U.S. 365, 385 (1986), and to consult with experts, where necessary. The duty of investigation is at its apex when counsel has notice of the issues to be investigated. The failure to investigate is not a matter of trial strategy; it is simply inept performance. *Chambers v. Armontrout*, 907 F.2d 825, 828 (8th Cir. 1990) (en banc).

The failure to conduct independent forensic testing of physical evidence can be sufficient to establish ineffective assistance of counsel. *See Detrich v. Ryan*, 740 F.3d 1237, 1254, 1257–58 (9th Cir. 2013) (concluding IAC claim was "sufficiently plausible" to warrant a remand where counsel failed to conduct independent forensic testing after State analyst admitted to skipping a step). *See, e.g.*, *Draughon v. Dretke*, 427 F.3d 286 (5th Cir. 2005) (failure to investigate ballistic trajectory evidence); *Jones v. Wood*, 114 F.3d 1002 (9th Cir. 1997) (failure to investigate blood evidence); *Harris v. Wood*, 64 F.3d 1432 (9th Cir. 1995) (failure to investigate ballistic and forensic evidence). The failure of Michael's counsel to independently investigate the gasoline evidence is analogous to the facts of *Elmore v. Ozmint*, in which the Fourth Circuit concluded "the gross failure of Elmore's 1984 trial lawyers to investigate the State's forensic evidence . . . had a palpably adverse effect on the defense." 661 F.3d 783, 851 (4th Cir. 2011). There, as here, the defense "conducted no independent analyses of the State's forensic evidence." *Id.* at 853. Despite the client's claims of innocence, trial counsel accepted the State's unreliable conclusions, overlooked the fact that laboratory testing of samples from the scene did not show gasoline,

or any accelerant, and at bottom, failed to meaningfully perform their adversarial function. *Id.* at 854, 862–66.

"'Expert evidence can be both powerful and quite misleading because of the difficulty in evaluating it.'" *Daubert*, 509 U.S. at 595, (citing Weinstein, Rule 702 of the Federal Rules of Evidence is Sound; It Should Not Be Amended, 138 F.R.D. 631 (1991)). While expert testimony is not required in every case, when expert testimony is at "the core of [the State's] case," it is ineffective not to challenge it, either with rebuttal expert testimony, impeachment, or both. *See, e.g., Souliotes*, 2013 WL 875952, at *41; *see also Duncan v. Ornoski*, 528 F.3d 1222, 1235 (9th Cir. 2008) ("[W]hen the prosecutor's expert witness testifies about pivotal evidence or directly contradicts the defense theory, defense counsel's failure to present expert testimony on that matter may constitute deficient performance.").

Counsel's failure to investigate and challenge the State's gasoline and arson evidence was unquestionably prejudicial. As it was, the State's fire evidence—though false and without scientific merit—was presented to the jury without serious – and, in some instances, *any* – challenge. Indeed, rather than challenge Rothove's conclusion that "gasoline was found on the shoes," trial counsel simply accepted it during cross-examination, implicitly validating the State's false testimony:

> Q: And on the item you tested on the shoes, you don't know obviously how much of this accelerant had soaked into the shoes, right?
> A: That's correct.
> Q: You don't know how much gasoline had soaked in there?
> A: That's correct.
> Q: And this was gasoline, right?

A: Yes.
Q: Do you know if this was leaded or unleaded?
A: No, we don't distinguish.
Q: Okay. Just that it was gasoline?
A: Yes.
MR. WILLIAMS: All right. No further questions, judge.

(T. 647-48).

Without expert testimony from the defense, the jury was left with no reason at all to be skeptical of the critical gasoline evidence, which the State presented with scientific certainty.

B. Defense Counsel Failed To Investigate, Consult with or Present an Expert, or Otherwise Challenge the Canine Evidence Regarding Gasoline at Trial

Similarly, trial counsel was ineffective for failing to investigate the reliability of the dog sniff evidence that purportedly corroborated the lab testing, failing to consult with and present an expert regarding the reliability of a canine's detection of accelerants, or, at a minimum, conduct a cross-examination informed by a reasonable investigation. As set forth in Claim II, *supra*, canines cannot reliably detect accelerants and defense counsel was on notice of this fact, for all the reasons set forth therein, including but not limited to because NFPA 921 set forth this requirement in the early 1990's.[62] A proper investigation, and testimony from a fire expert, would have shown the jury why this testimony was inaccurate and would have provided the support necessary to cross-examine and rebut the State's witness. *See Richey*, 498 F.3d at 362-63; *Dugas v. Coplan*, 428 F.3d 317, 328 (1st

[62] Katz & Midkiff, *supra*; Kurtz et al., *supra*; Tindall & Lothridge, *supra*.

Cir. 2005); *Souliotes*, 2013 WL 875952, at *42-45. But trial counsel took none of these steps.

On cross-examination of Jacobsen, the only topic addressed with Jacobson was that the dog could not determine what type of accelerant was on Michael's shoes. (T. 444-46). Cross-examination, especially deficient cross-examination, is not a proper substitution for independent investigation or a defense's own expert. In *Souliotes*, the court noted that when forensic evidence is the centerpiece of the state's case or there are gaps in proof—just like here—then cross-examination may not be a sufficient substitution. 2013 WL 875952, at *42-45. This deficient performance prejudiced Michael because it allowed the jury to wrongly believe there was physical evidence linking him to the murder.

C. Defense Counsel Failed To Investigate Consult with or Present an Expert, or Otherwise Challenge Fire Marshall Holdman's Arson Testimony, and Unsupported Conclusion that Fire Started with Accelerant

Arson testimony was central to the State's case against Michael, for all the reasons set forth in Claims I and II. *Dugas*, 428 F.3d at 328. Defense counsel did essentially nothing to challenge Holdman's testimony, despite the entire case hinging on it. At a minimum, defense counsel should have cross-examined Holdman about the subsequent lab testing which refuted his conclusion that gasoline was used to ignite the fire. An effective attorney would have consulted with and presented rebuttal testimony from an arson expert, who could explain the myriad ways that Holdman's conclusions violated NFPA 921 and were unreliable. *See* Claims I-III, *supra*. Trial counsel was on notice for all of the reasons set forth in Claim II, including but not limited to the fact that NFPA 921 was issued in 1996,

two years before the investigation of this crime and six years before Holdman's trial testimony. No reasonable strategy could exist for trial counsel's failure.

Trial counsel not only failed to present counter expert testimony from an expert like Bieber, he also failed to conduct a minimally adequate cross-examination of Holdman. As explained above, he inexplicably did not ask about the lab results refuting his conclusions. He also did not ask *a single question* during cross-examination about the standards for fire investigation, whether those standards were followed, or how those standards conflicted with Holdman's determination that the fire was incendiary and an accelerant was used based solely on a visual examination. Indeed, NFPA 921 was never mentioned or referenced.

Lay jurors lack the ability to independently evaluate the accuracy of scientific evidence and rely upon experts to accurately interpret the results of the testing. (*See, e.g.*, Ex. 69 at ¶10 (juror Dickerson-Bell said "the gasoline was the whole case to me" and "the gasoline on Michael's shoes was the nail in the coffin for me. It is the reason I voted guilty.")). The testimony of the State's witnesses on this subject is "precisely the type of scientific evidence that juries are likely to consider objective and infallible." Findley, *supra*, at 943. "Given the level of practical experience of [the fire investigators], two individuals who had dedicated their professional careers to public service, and the strength of their convictions that the fire was intentionally set, reasonably effective counsel would have anticipated their testimony having a very strong impact on the jury." *Souliotes*, 2013 WL 875952, at *42. Because of this, it was imperative Michael's counsel consult with appropriate experts and independently investigate the State's claims, but this scientific

evidence was allowed to go unchallenged. See *Daubert*, 509 U.S. at 595; *Dugas*, 428 F.3d at 328;

Courts have held the failure to investigate and challenge scientific evidence, including specifically accelerant and other arson evidence, to be ineffective assistance of counsel. For example, the Sixth Circuit has held that a trial attorney's failure to properly attack arson evidence constituted ineffective assistance of counsel in *Richey v. Bradshaw*, 498 F.3d 344 (6th Cir. 2007), as has the First Circuit in *Dugas*, 428 F.3d at 328. In *Dugas*, the First Circuit noted the lawyer, like Michael's trial counsel, "lacked any knowledge of arson investigation and had never tried an arson case. . . . Yet he decided to accept the characterization of the fire scene by the state's experts rather than conduct an independent investigation." *Id.* at 329-30. There, the Court ultimately concluded that there was an "inescapable need for expert consultation in this case," where the arson evidence was the "cornerstone of the state's case," there was little other evidence, and counsel had reason to believe the State's fire testimony may be flawed. *Id.* at 329-31.

Dugas is on all fours with this case: the State's strongest – indeed only evidence – against Michael was its gasoline and fire science evidence, the balance of the evidence was extremely weak. Michael's trial counsel had no knowledge of arson cases, and he did minimal or no investigation of the fire evidence and underlying science. Thus, trial counsel here similarly had an "inescapable need for expert consultation in this case" to challenge "cornerstone of the state's case." His failure to do so was ineffective, and there is no question that it prejudiced Michael's defense.

Had counsel adequately challenged the fire evidence and Holdman's conclusions that violated NFPA 921, it would have undercut the State's trial narrative that Michael intentionally set the fire with an accelerant. The prosecution's "scientific evidence" does not prove what it purports to and Michael's counsel performed deficiently because he failed to properly investigate or challenge the one piece of physical evidence pointing to Michael. Michael's counsel accepted this false testimony and allowed scientifically inaccurate expert testimony to be presented to the jury. This prejudiced Michael and violated his Sixth Amendment rights.

D. Trial Counsel Failed to Request that the State Call Michael Politte "Michael" Instead of "Bernie"

The prosecutor and the State's witnesses all called Michael by his nickname "Bernie" throughout trial. Juror Linda Dickerson-Bell explained that she assumed that Michael was nicknamed "Bernie" because he was a firebug and he liked to burn things. (Ex. 69 at ¶19). In fact, Dickerson-Bell actually assumed the spelling of the name was "Burny." (*Id.)* She explained "the prosecutor told us repeatedly that he really liked to burn things," so I just assumed that was why he was called Bernie. (*Id.*) The juror's affidavit makes the prejudice of trial counsel's failure clear. The uncorrected, and unexplained, repetitive use of the nickname Bernie reinforced and exacerbated the State's inflammatory trial theme that Michael was a dangerous firebug who had been practicing the type of burn used to kill his mother.

Defense counsel did not object or request that the State call him by his proper name, Michael, or Mr. Politte, or file a motion making such a request. At a minimum,

trial counsel should have explained the nickname, that "Bernie" is short for Michael's middle name "Bernard." This was ineffective because counsel failed to recognize the risk that jurors may make incorrect assumptions about the origin of and reasons behind Michael's nickname when his nickname was paired with the State's relentless narrative that Michael was a firebug who loved to burn things.

E. Trial Counsel Failed To Investigate and Challenge the State's Characterization of Michael as a Remorseless Killer, via Expert or Witness Testimony or Otherwise

At trial, the State used Michael's reactions to witnessing his mother's death against him. *See* Claim III.F.1-2, *supra*. The State's inflammatory strategy was particularly effective because Michael was a grown, muscular man at the time of his trial – he built himself up to survive four years of incarceration with adult men, after all – and the jury was looking at him as the State painted a picture of a remorseless killer, rather than looking at the 14 year old kid Michael. (*See, e.g.*, Ex. 21 at ¶7 (juror Peterson commented that it "bothered me that the system waited until Michael was an adult to hold his trial. Michael was a boy when his mother was murdered, and he should have stood trial when he was a boy")).

Counsel should objected to the State's prejudicial and unreliable characterization of his client. He also could have rebutted this character assassination in multiple ways, including but not limited to objecting to this State testimony and the prosecutor's exploitation of it in closing argument, presenting witnesses to testify to Michael's genuine distress, grief, and trauma, as well as testimony from an expert psychologist, like post-

conviction expert Dr. Jeffrey Aaron, who could have explained to the jury that Michael's reaction not abnormal for a fourteen-year-old in his situation, and post-conviction expert Jim Trainum, who could have explained to the jury how and why law enforcement mischaracterized Michael as a guilty, remorseless liar based on their behavioral analysis and interrogation training, now known to place youth at heightened risk.

First, trial counsel failed to produce any testimony that Michael had, in fact, exhibited significant signs of distress over losing his mother. Josh Sansoucie, Tammy Belfield and Chrystal and Melonie Politte all could have testified as to Michael's state upon finding his mother burning on the floor of her bedroom. Josh would have testified that Michael ran back into the trailer to try and save his mom, and that when he came out, he was "breathing heavy and his eyes were wide." (Ex. 5 at 2). Michael told Josh that someone had killed his mom and he was going to find out who. (*Id*.). Tammy Belfield would have testified that while at the jail, Michael told her, "I wish my mom was here. She would tell everyone that I didn't do it." (Ex. 28 at 17; Ex. 66 at 4). Melonie saw Michael in the police car shortly after he escaped the trailer; she could see the tear streaks on his soot-covered face. (Ex. 7 at 3; Ex. 6 at 7-8). Counsel also should have rebutted the State's narrative of Michael as a remorseless, cold-blooded killer with evidence and argument that an innocent person would have no reason to show remorse. (*See* Ex. 4 at 20) ("[a]s a simple matter of psychology, an expression of guilty feelings would not be expected from someone who was not guilty" and so the lack of remorse is not a sign of guilt.).

Second, Dr. Aaron could have contextualized Michael's behavior and statements to the police on the day of the crime. *See* Claim III.F., *supra*, for details that an expert witness

like Dr. Aaron could have provided to the jury. The failure to do so constituted ineffectiveness. Dr. Aaron's conclusions[63] are critically relevant to an appropriate evaluation of Michael's conduct and statements the day of his mother's death and after. "At the time of Rita Politte's death, [Michael] was facing a convergence of circumstances that would have strongly influenced his emotions and their expression," (Ex. 4 at 14), including, but not limited to, the immaturity and diminished control over emotions and judgment of a typical adolescent; the chronic stress of his family problems and his resulting depression; the impact of the childhood trauma of witnessing his father abuse his mother; and, most immediately, the shocking trauma of witnessing his mother burn to death.

Third, Jim Trainum could have helped the jury understand how and why law enforcement so egregiously misjudged Michael, and the dire consequences of the misclassification, including an investigation solely focused on Michael thereafter, ignoring all other evidence and suspects, as well as a manipulative, coercive interrogation process that produced unreliable statement evidence from Michael, and resulted in the loss of critical defense witness Josh Sancousie.

Together, Dr. Aaron and Trainum could have rebutted the State's narrative that Michael's statements during hours of relentless manipulative police interrogation prove he is a remorseless, cold-blooded killer. Michael knew he was the prime suspect and Michael was "frightened, deeply distressed, and tired;" he had not slept since he awoke in the middle

[63] Dr. Aaron reviewed Michael's mental health, education, and juvenile records so his conclusions are specific to Michael, his mental status, his family background, and his developmental status. (*See* Ex. 4 at 1).

of the night and he had been held by police for hours at the scene and then in the police station. (*Id. at 18*). He just wanted to go home, a reaction common to almost every juvenile when interrogated. (*Id.*) He was understandably "angry" and "agitated." (*Id.* at 18-19). He had learned that "whatever he said and whatever explanation of his behavior he offered, the police would not listen to him and persisted in accusing him of murdering his mother." (*Id.* at 19).

Where mental state and motive of a defendant is at issue, the failure to consult with an appropriate expert may constitute ineffective assistance. *See, e.g., Johnson v. United States*, 860 F.Supp.2d 663, 818-820 (N.D. Iowa 2012)(finding ineffective assistance of counsel in conspiracy to commit murder case where defense counsel failed to consult with and present an expert on "Battered Women's Syndrome" after the prosecution focused on defendant's mental state and alleged a revenge motive). " [T]he failure to present readily available evidence, including expert evidence, concerning battered woman's syndrome, was deficient (citing *Showers v. Beard*, 635 F.3d 625, 632; *Duncan v. Ornoski*, 528 F.3d 1222, 1235. *Id.*

Absent testimony from an expert like Dr. Aaron and Trainum, and rebuttal lay witness testimony, the jury was left with the impression that Michael was a remorseless cold-hearted killer. The damage of this deficient performance was profound. Expert testimony would have changed the narrative, accurately showing the jury that Michael was an extremely vulnerable, traumatized adolescent. Instead of fearing Michael, the jury would have sympathized with him. And the result of the trial likely would have been different.

F. Trial Counsel Failed To Investigate and Adequately Challenge The State's Claim that He was a "Firebug"

Holdman further testified that Michael was a "firebug," insinuating Michael "played with fire" often (T. 360, 368). Defense counsel did not present any evidence to challenge this characterization of Michael, despite that this behavior was common for Hopewell teenagers, (Ex. 17, Affidavit of Michael Glore, Jr., at 1), and that Michael was honest about every one of his childhood antics involving fire, including burning railroad ties on the night of the crime and his own leg while burning a bottle on fire the previous Tuesday. (T. 344, 346, 360-62).

Counsel should have investigated how common it was for teens in Hopewell to experiment with fire. Had counsel investigated, he would have uncovered, and presented evidence proving that this was part of teen culture in the town. (*See* Ex. 17 at 1; Ex. 13, Affidavit of Jerry Burch, at 2 (explained his grandson Josh Hulsey and other boys in Hopewell would ride their bikes by the railroad tracks and play with fireworks, "[j]ust doing the things boys their age do in the country."); (Ex. 18 at 2 Affidavit of Poucher) ("All us Hopewell boys played with fireworks.")).

G. Trial Counsel Failed To Investigate and Adequately Challenge The Alleged Admission

In addition to Michael's behavior immediately after the murder, the State used his suicide attempt and alleged admission against him. In fact, the prosecutor began his opening argument by touting Michael's alleged admission. (T. at 133). The very first words of the State's case were "'I haven't cared since December 5th. That's when I killed my mom.' That's what the defendant said exactly one month after the day his other was found

dead in her own bedroom." (*Id.*) And the prosecutor closed his case in the same way: "Now, we have to know who did it. You know, ladies and gentleman. I will tell you how you know it. The murderer told you he did it . . . in front of three witnesses." (T. 812).

Admission evidence is so powerful to juries that it almost ensures conviction.[64] *See Connelly*, 479 U.S. at 182 (Brennan, J., dissenting) ("Triers of fact accord confessions such heavy weight in their determinations that the 'introduction of a confession makes the other aspects of a trial in court superfluous.'" (citing E. Cleary, McCormick on Evidence 316 (2d ed. 1972)). confessions are universally recognized as one of the most powerful forms of evidence that can be presented in a criminal trial. *See also State ex rel. Clemons v. Larkins*, 475 S.W.3d 60, 80–81 (Mo. banc 2015) ("A confession is like no other evidence" (quotation marks and alterations omitted)). This may be true for even alleged "admissions" as tenuous as this one, particularly when defense counsel fails to give the jury reason to question or doubt the alleged admission. For this reason, defense counsel must do everything possible to prevent a client's admission from coming in at trial. Where the client is a juvenile, this duty is heightened.

As an initial matter, it is a stretch to even call this purported evidence an admission. In short, the statement as offered has no value in determining guilty. An expert at trial could have explained this to the jury. Counsel should have consulted with and presented a

[64] As of 2004, 81% of false confessors whose cases went to trial were wrongfully convicted. Steven A. Drizin & Richard A. Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C. L. REV. 891, 963 (2004). This statistic is under-representative because it does not include the significant number of false confessors who plead guilty, foregoing a trial that is extremely likely to end in conviction. *Id.* at 960.

psychologist expert to explain Michael's behavior and undercut the State's presentation of Michael's statements to the jury. When counsel failed to hire a mental health expert, he failed to provide adequate counsel for Michael. *See, e.g.*, *Johnson* 860 F. Supp. at 818-820.

Indeed, after interviewing and evaluating Michael, Dr. Aaron reported: "Mr. Politte['s] assert[ion] that someone else committed the crime is consistent with the statement of his friend, Joshua Sansoucie, who was present at the time of Rita Politte's death (footnote omitted). Mr. Politte reported to me that he had suspicions that his father was responsible from the murder from the day of his mother's death, and struggled with acknowledging that thought even to himself. He indicated that internal conflict was in part the reason for the use of the word "they," as well as the thought that there might have been more than one culprit." (Ex. 4 at 21) .[65] Dr. Aaron would have testified that Michael's outburst after his suicide attempt could not have come from a calm or rational place,

[65] Dr. Aaron further notes that even if Michael said what the State claims, there are still innocuous explanations. As Dr. Aaron explains:

> [T]here are still a variety of possible explanations, considering Mr. Politte's likely mental state at the time. The statement could have signified feelings of guilt for not protecting her, as he was present in the home. It could have been a statement of what others clearly thought and were vigorously asserting. It could have been a statement of guilt over an act he did in fact commit. Those are speculations and there is not a way to determine from the statement itself which if any of these was the meaning, if in fact that was the statement that was uttered. However, a common element of an emotional crisis is the lack of rational, clear-headed, and logical reasoning, and thus the statement could reasonably be seen as offering little in terms of definitive or supportable factual information.

(Ex. 4 at 21).

making it difficult for the surrounding staff to interpret and record his statement correctly, but even if it was correct, there are many explanations beside guilt for such an outburst.

Instead of showing the jury why the alleged "admission" had no evidentiary value, trial counsel conducted minimal cross-examination of the State's witnesses about Michael's mood the day of his suicide attempt. He asked Johnson, Graham, and Blankenship whether Michael seemed upset on the day of the outburst; they confirmed he was upset, but presumably the jury could have reached this conclusion given his suicide attempt. (T. 658, 708, 677).

Trial counsel now admits that this was a failure, and not a reasonable strategic decision. With "nearly seventeen more years of experience under [his] belt," defense counsel is now clear that he "would have handled Michael's post-arrest statement while in juvenile detention differently" and "should have cross examined the officers further about how Michael's statement came about in order to provide context for the jury." (Ex. 24, Affidavit of Wayne Williams).

Counsel's failure to investigate Michael's statement and present expert testimony prejudiced Michael. The jury was left with no reason to question that Michael actually confessed to killing his mother. Counsel had no strategic reason for not investigating this alleged admission, or consulting with a psychologist about it. Counsel's decision not to further investigate the admission or obtain a mental health expert is unreasonable under *Wiggins*.

H. Trial Counsel Failed to Rebut Motive & Failed to Present Evidence that Michael Had Loving Relationship with His Mother & Was Not Violent

Trial counsel was also ineffective when he failed to investigate and present evidence rebutting the State's weak, and false, theory of Michael's motive to kill his mother. Had counsel interviewed Derek Politte, counsel would have learned that Derek thought Michael was a good kid and did not believe that Michael was threatening his mother, as set forth in Claim III.C., *supra*. (Ex. 11). Counsel then would have been in a position to eviscerate the State's motive theory through a simple cross-examination. At a minimum, counsel would have been on notice that the State misrepresented Derek's statements during closing argument. Counsel's failure to object to this prosecutorial misconduct constituted an additional instance of prejudicial ineffectiveness. Counsel's failure to rebut the motive theory, and object to the prosecutor's inflammatory misrepresentation of Derek's testimony in closing, prejudiced Michael because effective representation would have eliminated a key piece of the State's case: the motive.

Moreover, trial counsel had easy access to, and was on notice of, several witnesses close to Michael who would have testified on his behalf to his loving relationship with his mother, and his lack of motive, including but not limited to:[66] Chrystal Politte (Michael had no problems with his mother (Ex. 35, Attorney General Interview of Chrystal Politte, September 1, 1999, at 1; Ex. 36, Attorney General Interview of Chrystal Politte, December

[66] Other witnesses in the police file also account for Michael's relationship with his mother. Cristal Barnett, Ed Politte's then-fiancée, stated she was not aware of any problems between Michael and his mother. (Ex. 37, Attorney General Interview of Cristal Barnett, at 1). Yet counsel did not speak with her either.

16, 1999, at 1)); Melonie Politte ("[Michael] and his mother had a good relationship," and she "had never heard any threats between them," and "they rarely fought" (Ex. 26 at 28; Ex. 39, Attorney General Interview of Melonie Politte, at 2)); Melinda Glore (Michael was "a respectful young man, and he loved his parents" (Ex. 15 at 2)); Michael Glore, Sr. (Michael was "a respectful young man" and he had "never heard a cross word out of that young man the whole time I knew him." (Ex. 16 at 1)); Joshua Poucher (Michael would tell him "he missed his mother when she was away at work," and Josh thinks "it was hard on [Michael], having her gone." (Ex. 18 at 1)); and Tammy Nash (overheard Michael crying frequently and talking about his mother when she was jail administrator (Ex. 66 at4)). Michael's sisters also could have testified about the incident described by Derek Politte, further discrediting the State's version of events. We know at least one juror was waiting expectantly to hear from Michael's family, present throughout trial by his side in the courtroom, and made negative assumptions when trial counsel failed to deliver their testimony. (Ex. 69 at ¶18). Juror Dickerson-Bell admitted: "I was waiting for someone from Michael's family to testify. They were there with Michael every day supporting him so I assumed we would hear from them. . . . When we did not hear from them, it left me with questions. While I had doubts, I questioned my instincts because I thought if he did not do this, his family would have testified in his defense." (*Id.*)

Counsel also should have investigated and presented evidence that Michael was not violent. At trial, the pathologist testified to blunt trauma, (T. 407-08), and law enforcement described a bloody crime scene, (T. 407-08). (T. 284). Yet, no one ever knew Michael to be a violent person. The Glores always knew Michael to be "a respectful young man" that

"loved his parents." (Ex. 15 Affidavit of Melinda Glore at 2; Ex. 17 at 3). They "never heard a cross word out of [him]" the whole time they knew him, and he was over quite often. (Ex. 16 Affidavit of Michael Glore, Sr. at 1). Dr. Aaron further noted that throughout all the reports about Michael, "[h]e was not violent toward others," though he may be "crass" or "join[] with peers to cause disruption." (Ex. 4 at 15). Instead, there was "an absence of indicators suggesting the likelihood of significant interpersonal violence, emotional disengagement from or a callous disregard for others, or planned serious criminal activity." (*Id.* at 22). Had the jury heard this critical information, it would have discounted the State's attempts to paint Michael as a callous deviant with motive to kill. (*See* Ex. 22 (juror foreman Thomas believed there was tension between Michael and his mother, demonstrating the prejudice of allowing State's portrayal and Michael and theory of his of motive to go uncontested) *See also* Ex. 69 (juror Dickerson-Bell, on the other hand, did not buy the State's theory of evidence but she lamented that Michael's attorney did not the jurors anything to work with)). Similar to *Wiggins,* counsel's failure to conduct minimal investigation into motive evidence precluded a fully informed and deliberate decision about whether to challenge the State's motive theory.

I. Trial Counsel Failed To Investigate And Present Evidence Supporting Michael's Statements About What Had Occurred

Trial counsel breached his duty to both conduct a reasonable investigation and call vital witnesses of which trial counsel had actual notice. Counsel himself now admits "I also regret that I did not perform more field investigation in this case." (Ex. 24). Missouri Courts have found that the right to effective counsel granted by *Strickland* imposes a duty on

counsel to both perform reasonable investigation and present witnesses vital to the accused's defense. *See State v. Butler*, 951 S.W.2d 600, 609-10 (Mo. banc 1997) (reversing movant's conviction based on an ineffective assistance of counsel claim for failure to investigate); *Hutchison v. State*, 150 S.W.3d 292, 304-05 (Mo. banc 2004). A failure to investigate is not a matter of trial strategy; it is simply inept performance. *Chambers*, 907 F.2d at 828-30. Indeed, counsel here already admitted the failure to investigate was not a strategic decision. (Ex. 22). Such a failure violates counsel's essential duty to make an adequate factual investigation "which can only be viewed as an abdication—not an exercise—of [counsel's] professional judgment." *McQueen*, 498 F.2d 216. Trial counsel failed to investigate adequately when he did not interview witnesses who saw Michael on the morning of the murder, challenge the only physical evidence allegedly tying Michael to the crime, or challenge the State's assertion that Michael could not have slept through the crime.

First, counsel should have interviewed and presented witnesses regarding the lack of physical evidence connecting Michael to the crime. The crime scene was bloody, but it was undisputed that there was no blood on Michael. The nature of Rita's injuries and the bloody scene evidence a violent struggle, but it is also undisputed that Michael did not have any injuries or scratches, or tears in his clothing. A reasonable investigation and competent performance by defense counsel would have produced evidence casting doubt upon any physical connection between Michael and the murder. (*See* Ex. 12, Affidavit of Janet Politte, at 1) ("Bernie did not have any scratches on him"). But trial counsel failed to call these witnesses; this was ineffective. This failure was especially prejudicial because

defense counsel hinged his strategy on the lack of evidence linking Michael to the crime – closing his case with argument that there was "not a speck of blood" on Michael – but he failed to support this argument with readily available evidence.

Second, trial counsel failed to present evidence that Michael was a sound sleeper. The State's insinuation that it would have been impossible for Michael and Josh to sleep through Rita's murder was incorrect. Multiple witnesses could have rebutted this falsehood. (Ex. 15 at 1) (mother of Michael's best friend said she didn't even "try to stay quiet" when Michael was staying over with her son, because "you could turn on the smoke alarm at one end of the house and [the boys] would sleep right through it"); (Ex. 16 at 1) ("[t]he kids would never wake up when I would come home," late at night after work, even though he would "have to step over [them] to get to my bedroom" and Melinda and I would be talking in the same room where they slept). But trial counsel never spoke to the Glores, and this evidence was never presented to the jury. All of this would have been important because Holdman's testimony at trial implied that there was no way that Michael and Josh could have slept through the attack on Rita because "sound moved easily throughout the trailer." (T. 368). This was simply not true.

The State was openly skeptical of Michael's claim that he slept through the murder, asking the jury during closing argument to use their common sense and ask, "'Is that really possible?'" (T. 768). Taken alone, the fact that Michael was a heavy sleeper may have been of little consequence to the jury. However, when combined with Michael's clear assertion of innocence, this seemingly trivial fact would have mattered a great deal.

Third, counsel's failure to call Josh Sansoucie as a defense witness went beyond a mere matter of trial strategy; it amounted to ineffectiveness. In cases involving the failure to call a witness, a defendant may succeed on ineffective assistance of counsel where he can demonstrate that "1) trial counsel knew or should have known of the existence of the witness, 2) the witness could be located through reasonable investigation, 3) the witness could testify, and 4) the witness's testimony would have produced a viable defense." *Hutchison*, 150 S.W.3d at 304; *see also Jackson v. State*, 465 S.W.2d 642, 646 (Mo. 1971) (utilizing a similar analytical framework to the same claim). A witness would have provided a viable defense if their testimony would have negated an element of the crime for which a movant was convicted. *Ferguson v. State*, 325 S.W.3d 400, 416-17 (Mo. Ct. App. W.D. 2010).

Here, counsel obviously knew not only about Josh's existence but also his whereabouts,[67] and he had to have known the importance of Josh's testimony to corroborate Michael's version of events and Michael's actual innocence. Josh was the only person, aside from Michael, that was inside the trailer at the time of Rita's death. His testimony would have illuminated for the jury the mystery of what happened inside the trailer in the final hours of Rita's life and provided a more complete story that exculpated Michael. Josh was deposed by defense counsel on January 18, 2002, just 11 days before

[67] Even the most cursory of research into Josh's whereabouts at the time of the trial reveals that hardly any investigation would have been required to locate him. An affidavit signed by Josh in April 2018 reveals that during the trial, he was sitting in the hallway, waiting to be called to testify. (Ex. 5 at 3).

trial. His deposition testimony was entirely consistent his prior recorded statements and with Michael's account of the night leading up to and morning of the murder.

Josh's ability to testify at the trial was never in dispute. There was no indication that his testimony at the deposition on January 18 was given reluctantly or against his will. Josh was not only able to testify at the trial, he was judicially compelled to do so. After an application for immunity was filed by the state under MO. REV. STAT. § 491.205, the Court both granted Josh immunity from prosecution and ordered that he must "give testimony" in the proceeding against Michael. (Ex. 45). Despite this order, the State chose not to call Josh as one of their witnesses, likely because his recent deposition testimony did not support their theory of the case. The order, combined with Josh's statement that he was in the courthouse during the trial, is evidence of his ability to testify.

As *Ferguson* points out, a witness's testimony would have provided a viable defense if it negated an element of the crime for which the defendant was charged. *Ferguson*, 325 S.W.3d at 416-17. Josh's testimony would have negated opportunity, as well as motive. A central element of the state's case at trial revolved around their conjured motive for Michael, that his mother had refused to give him money for a replacement motorcycle part after an argument weeks before the murder (T. 769). He could have testified that Michael did not argue with Rita, did not speak about his motorcycle the day of her death, or express any frustration or anger with his mother. (Ex. 58 at 44-45). His testimony thus would have negated any notion of premeditation. Further, prior to going to sleep, Michael gave Josh the option of sleeping on the floor of his bedroom, or on the couch in the living room—

which is inconsistent with someone who had premeditated plans to commit murder that night. (*Id.* at 39). Yet, this evidence instead went unheard by the jury.

The State used the lack of witnesses who were inside the home at the time of the murder and its resulting ambiguity to its advantage, as it added to the theory that Michael was the sole person with the opportunity to commit the murder. But as he testified in his deposition, Josh was asleep in Michael's room when he woke up because he was having trouble breathing. After he woke up, he testified that he witnessed Michael rising up from his bed as well. The timing of this string of events would have been critical information for the jury to hear and weigh against the weak evidence of opportunity presented by the state. Josh was the *only* witness, save for Michael himself, with the ability to testify about the crucial seconds between waking up to smell the smoke and realizing that Rita had been murdered. His testimony would have informed the jury that at the time that Michael was allegedly attacking Rita, he was asleep in the same room as Josh.

Finally, Josh's absence from the defense case left a gaping hole that must have seemed suspicious to the jury. The State made clear that Michael and Josh were present in the home at the time of the murder. His testimony was thus vital to Michael's defense of innocence and negated elements of both first- and second-degree murder as submitted to the jury, meeting the standard required by *Hutchinson* and *Ferguson*.

Attacking the State's theory of what occurred inside the home on the morning of Rita's murder was crucial to Michael's defense of innocence. A reasonably competent attorney would have realized as much and presented the above evidence. Because "the state's case was entirely circumstantial," besides the erroneous fire investigation which linked

Michael's shoes to the crime, *Butler*, 951 S.W.2d at 610, evidence supporting the idea that a third-party killed Rita would have affected the outcome of Michael's trial, when taken in conjunction with over evidence.

J. Trial Counsel was Prejudicially Ineffective for Advising Michael Politte Not to Testify

Trial counsel was ineffective for advising Michael Politte not to testify for two reasons: (1) he was a critical defense witness, pursuant to the *Hutchison* analysis, and (2) Michael wanted to testify in his own defense to his actual innocence, and counsel's advice to not take the stand was not be a reasonable strategic decision because it was not based on adequate investigation.

First, Michael satisfies the first three prongs of the *Hutchison* test: counsel knew of Michael's existence and he was present throughout the entire trial; Michael was not only able to testify—he wanted to testify; and Michael's testimony was central to a viable defense. Michael's testimony would have been wholly consistent with the statements from the only other eyewitness in close proximity to the crime as it occurred, Josh. Both boys gave a consistent recounting of events when interviewed at the scene: they woke up, realized the house was on fire, ran outside, and attempted to extinguish it with the hose while Josh ran to the neighbor's home get help. (Ex. 28 at 3). The statements made over the following days never wavered from their original assertions; rather, their statements became more specific as the questioning became more specific. The fact that the stories of Michael and Josh matched without the boys having time to meet and corroborate their versions of events would have been a strong indication to the jury that it was the truth. Yet

the jury was not able to conduct its own assessment. Michael's testimony would have also negated the key element of premeditation in the state's first-degree murder charge, as he was the *only* witness that could have testified to his own mindset in the hours leading up to the murder.

The effects of counsel's failure to conduct a reasonable investigation were aggravated by his decision not to call the two witnesses most vital to Michael's innocence defense. The prejudice of counsel's failure to call Josh was thus compounded by the decision not to call Michael himself. The jury did not hear nor get to consider all the evidence relevant to the ultimate factual issue of his guilt. The only remedy is the constitutionally-required reversal of his conviction, so that he may have the opportunity to present an adequate defense at a new trial.

Second, as he told the presiding judge during his sentencing hearing, Michael had specifically requested that he testify on his own behalf prior to the trial. Rather than help prepare him for his testimony, defense counsel waited until the third day of the trial to inform Michael that he should not testify because he wasn't ready. (T. 842).

A defendant's decision to testify "is a fundamental right waivable only by that individual." *Simmons v. State*, 100 S.W.3d 143, 146 (Mo. App. E.D. 2003)(citing *Kuhlenberg v. State*, 54 S.W.3d 705, 708 (Mo.App.2001)). Like any waiver of a constitutional right, waiving the right to testify must be knowing and voluntary. *Hurst v. State*, 301 S.W.3d 112, 118 (Mo. App. E.D. 2010) (citing *Rock v. Arkansas*, 483 U.S. 44, 49, 107 S.Ct. 2704, 97 L.Ed.2d 37 (1987)). In making the decision on whether to testify or not, the defendant "is entitled to reasonably competent advice." *State v. Dees*, 916

S.W.2d 287, 301 (Mo. App. W.D. 1995). Any advice that is considered "sound trial strategy" would not be ineffective assistance of counsel. *Jackson v. State*, 205 S.W.3d 282, 286 (Mo. App. E.D. 2006). Michael's counsel's advice, however, was not based on sound trial strategy because counsel did not undertake a minimal level of investigation into Michael's testimony. The deficient advice not to testify was prejudicial as Michael's testimony would have affected the outcome of the trial.

While there are any number of reasons a defense attorney may advise their client not to testify, there was no valid reason for Michael not to testify. *See Strickland* 466 U.S. at 689-90; *See e.g., Copher v. State*, 570 S.W.3d 178, 183-84 (Mo. App. S.D. 2019) (Valid trial strategy to advise defendant not to testify because of his criminal history and possible admissibility of previously suppressed statements); *Dees*, 916 S.W.2d at 301-02 (Counsel worried that jury would see Dees as mastermind of crime if she testified and came across smarter than her co-defendants). Michael had no prior criminal history. His statements to the police had remained consistent over years and he maintained his innocence throughout. Additionally, Michael was the only person able to dispute the claim that he had confessed during a suicide attempt. Counsel made no assessment of the jury's possible perception of Michael. Michael's testimony was likely to be compelling and exonerating as only he and Josh could speak to what happened in the moments after they woke up. Every factor weighed in favor of Michael's testimony.

Discussions about whether to testify require trust, adequate time, adequate information based on reasonable investigation, and thorough consultation with the client to ensure that he understands the pros and cons of this critical decision. None of these

factors were present for Michael. In a murder case, with a juvenile suspect, that took years to get to trial, counsel spent only "about nine hours" with Michael. (T. at 842.) In the week leading up to trial, counsel had promised he would prep Michael to testify, but "[counsel] never showed up. And the third day of [Michael's] trial he pulled me out there, he said, I don't think you should testify because you're not ready." (*Id.* at 842-43.) Michael reluctantly acquiesced to counsel's advice, which he was even more inclined than an average client to do because of his youth and lack of experience with the criminal justice system. The final decision to not testify was made after a brief conversation on the final day of trial while in the courthouse. (T. at 842.) Despite defense counsel's awareness of Michael's desire to testify, a thorough discussion never took place. Counsel did not show up, as promised, to prepare Michael for trial or to gather further facts.

At trial, counsel told Michael he was unprepared and therefore should not testify. The decision was not part of counsel's larger trial strategy. It was the result of a lack preparation, investigation, and consultation with Michael. Advice not to testify cannot constitute sound trial strategy when that advice is based on inadequate investigation and preparation. *See Williams v. Taylor*, 529 U.S. 362, 373, 396 (2000) (failure to contact witness for testimony was not strategic choice but failure to conduct an adequate investigation into client's background). Because counsel's advice was not based on sound trial strategy, Michael's misinformed decision not to testify amounted to deficient performance by counsel.

Michael was prejudiced by counsel's failure to provide reasonable advice.

> In assessing prejudice on this issue, the appellate courts have historically inquired whether the defendant expressed a desire to testify, what the substance of the defendant's testimony would have been had [he] testified, whether the defendant had been misled by [his] trial counsel regarding [his] right to testify, and whether the defendant was ignorant of [his] right to testify.

Kenney v. State, 46 S.W.3d 123, 129 (Mo. App. W.D. 2001). Michael wanted to testify; counsel acknowledged this and promised to follow up, but never did. Michael's testimony likely would have changed the outcome of the trial (especially if presented in conjunction with Josh's testimony) Even without preparation, Michael's prior consistency in statements to authorities suggest he would have been able to credibly testify.

K. Trial Counsel Failed To Investigate Or Present Evidence Of Alternative Suspects.

Deficient and prejudicial assistance of counsel occurs when counsel fails to investigate and present evidence of alternative suspects. *See Butler*, 951 S.W.2d at 609-10 (Mo. 1997); *Henderson v. Sargent*, 926 F.2d 706, 714 (8th Cir. 1991); *but see Wolfe v. State*, 446 S.W.3d 738, 747-49 (Mo. Ct. App. S.D. 2014) (holding that counsel was not ineffective when they made a *thorough* investigation into alternative suspects and chose to not present alternative suspects as a matter of reasonable trial strategy). Here, trial counsel was ineffective when he conducted no meaningful investigation and presented no evidence of alternative suspects, despite readily available leads.

As set forth in Claim III, *supra*, significant evidence pointed to Ed Politte as a viable suspect for his ex-wife's murder. From the beginning, even after honing in on Michael, police and prosecutors believed Ed Politte may have been involved. Ed had a clear motive,

as set forth above, and a demonstrated propensity for violence, particularly with Rita. On the same day that he interrogated Michael, Detective Curt Davis spoke with Ed Politte and inquired into Ed's alibi. (Ex. 28 at 7). E-mails between members of the Attorney General's Office reveal that they also believed that Ed had something to do with the murder. When the Missouri Attorney General's Office joined the Rita Politte investigation in the summer of 1999, Ed Politte was on their radar as an alternative suspect. In a June 1999 e-mail from an Assistant Attorney General to Investigator Jim Weber, the Assistant Attorney General explained, "We have [Michael] and two suspects we must investigate further. The suspects are [Josh] Sansoucie and the Defendant's father, Charles Edward Politte 'Ed.'" (Ex. 41 at 1). He continued:

> Ed is a suspect because he had gone through a nasty divorce from Rita. [Michael] was wanting to live with his father but Rita got custody. Ed appealed and lost an [sic] regarding money he was to pay for child support or attorney fees of Rita. The Tuesday before the murder he had been in court regarding his appeal and the judge ordered him to pay Rita $1000. He made a remark something like, 'You will never see the day when you'll get the money' or something kinda threatening like that. Also interesting was a visit Ed had with his son in jail and Bernie was obviously pissed and yelled out, "You MF'er, you framed me."
> The relationships were not good among the members of this family. Apparently, Ed had abuse [sic] Rita reportedly physically and sexually.

(*Id.*). The Assistant Attorney General and Weber continued to suspect Ed's involvement throughout their investigation. And, in 2016, Sherriff Skiles still believed Ed may have done it. (Ex. 64 at 5-6).

Even so, despite the strong motive and Ed's history of violence and threats toward Rita, the State only pursued charges against Michael and defense counsel never pursued these investigative leads as a defense either. Counsel did nothing to investigate Ed Politte's motive, whether his alibi was in fact solid, and critically, the possibility that Ed worked with someone else to have Rita killed. Had he done so, he would have uncovered significant evidence that suggests that Ed may have elicited the help of his cousin of close friend, Johnnie Politte, in order to pull off the murder. Witnesses connect Johnnie to the area of the crime at the time of Rita's murder, which trial counsel could have uncovered with investigation. *See* Claim III.E., *supra*. After Rita was murdered, Johnnie was able to buy a new truck despite previous financial troubles. *Id.*

Counsel now admits that he regrets "not perform[ing] more field investigation in this case." (Ex. 22). Upon learning about the witnesses who saw Johnnie Politte walking "at the train tracks near Michael's home on the evening of the murder, he concluded "[h]ad I performed more field investigation, I may have uncovered this witness as well as other possible avenues." (Id.) Specifically, with regard to Ed, counsel explained that Ed's children "suspected him of committing the murder." (*Id.*) He also described how Ed "approached [him] almost immediately after [he] was assigned to the case," and "asked [him' whether there had been any DNA evidence collected or tested at the scene." (*Id.*) Counsel noted that Ed "did not seem concerned with any of the state's evidence outside of DNA." (*Id.*) Counsel today says: "I regret not doing more to investigate Ed Politte as an alternative suspect." (*Id.*)

As a result, the jury never heard the significant motive evidence that existed for Ed to kill Rita nor did it hear any evidence suggesting that Ed had committed the crime with someone else. This was deficient performance. Had counsel investigated these leads and developed this evidence, he could have gotten this critical evidence admitted at trial pursuant to the direct connection rule. *See State v. Woodworth*, 941 S.W.2d 679, 690 (Mo. App. Ct. W.D. 1997)(ordering a new trial where third-party guilt evidence was excluded at trial "[b]ecause of the weakness of the State's case and the lack of motive on the part of [petitioner] to commit the murder"). Ed had clear motive and propensity for this crime, and Johnnie had the opportunity and the direct connection of being seen leaving the scene of the crime as first responders were arriving. Had counsel conducted an adequate field investigation, which he admittedly did not, he would have had sufficient evidence to satisfy the direct connection rule.

Had the jury been informed of evidence implicating Ed and Johnnie Politte and the behavior of each following Rita's murder, there "is a reasonable probability that . . . [they] would have had a reasonable doubt." *Strickland*, 466 U.S. at 695. We know this is true because two jurors have directly told us so. (Ex. 22 (jury foreman Thomas believes jury would have not voted to convict had they heard the evidence about the victim's contentious divorce and possible alternate suspects); Ex. 69 (juror Dickerson-Bell asserts that this evidence pointing to other suspects would have made a difference)). In closing argument, the State ridiculed the defense theory as relying on a "phantom intruder," (T. 773), and calling this phantom intruder the "luckiest man in the world." (*Id.*). Had defense counsel introduced evidence of alternative suspects Ed and Johnnie Politte, and presented actual

evidence of their suspicious behavior, their theory of the crime would have been much more than a "phantom intruder." As it stood at the end of the trial, the jury had no other plausible theory to believe regarding someone else killing Rita. (*See* Ex. 69 (juror Dickerson-Bell stated "I did not feel Michael's attorney gave us anything to work with."); Ex. 22 (jury foreman Thomas stated "After learning of the evidence the jury never saw at trial, I firmly believe the defense attorney did a bad job of defending Michael.") They'd heard about no one else who had the means or motive or opportunity to do so. But Ed had a very strong motive to kill his ex-wife; their relationship had always been contentious, and he'd just threatened her over their divorce decree a few days earlier. And Johnnie had means and opportunity; he was near the crime scene on the morning of the murder, and he easily could have entered the Politte home that morning to hurt Rita through their unlocked door. Defense counsel's failure to present evidence of an alternative suspect to the jury clearly prejudiced Michael.

L. Trial Counsel Failed to Deliver on Promises Made in Opening Statement

In his opening statement, trial counsel promised the jury that they would hear a wealth of evidence. But when it came time for the defense to present its case, he only put on three witnesses who presented extremely limited testimony. Counsel did not deliver any of the evidence he promised in his opening statement. And the prosecutor noticed. In closing argument, the prosecutor repeatedly slammed Michael's attorney for things he promised but failed to deliver:

> Now, Mr. Williams at that time said you're going to see evidence that three walls separated the defendant from his mother. . . . He said that you will hear evidence

> that this interrogation of his client lasted hours and hours. Absolutely no evidence of that at all. . . . You also heard that the juvenile officers wrote notes to law enforcement officers during this interrogation or these interviews. Absolutely no evidence of that. . . . [Y]ou heard, so and so is going to come in here and say they seized the clothes. You never heard evidence of that. . . . Now I tell you all this, because there were other things said in the opening statement that you heard absolutely no evidence about whatsoever.

(T. 771-773). The prosecutor effectively exploited trial counsel's failure and drew the jurors' attention to all the holes in the defense's case. The jurors noticed too. (*See* 69 (juror Dickerson-Bell said she kept waiting for Michael's attorney to give them something to work with, but he never did)).

It is deficient performance for a defense attorney to make promises to the jury at the outset of the case and fail to deliver on them. *See Blankenship v. State*, 23 S.W.3d 848 (Mo. Ct. App. 2000) (granting new trial, and holding that defense counsel was unreasonable where his promises to the jury in opening statement went unfulfilled as a "direct result of deficiencies in [defense counsel's] own performance"); *Midgyett v. State*, 392 S.W.3d 8 (Mo. Ct. App. 2012)("When a defense attorney promises during opening statements that the attorney will present certain evidence and then does not present that evidence, the attorney opens himself up to criticism of the effectiveness—or ineffectiveness—of his representation of the defendant.") In *Blanksenship*, the appellate court noted the "most serious flaw in counsel's representation was his telling the jury in opening statement that he would produce Finley as an expert witness on accident reconstruction, and then failing to follow through by calling him to the stand." As in Michael's case, in *Blankenship*, "[t]he prosecutor understandably leaped on the defense

in closing argument for this omission, thereby impairing defense counsel's and his client's credibility in the eyes of the jury. *Id.* at 851.

"A defendant's opening statement prepares the jury to hear his case. If the defense fails to produce promised expert testimony that is critical to the defense strategy, a danger arises that the jury will presume that the expert is unwilling to testify and the defense is flawed." *United States v. Gonzalez-Maldonado*, 115 F.3d 9, 15 (1st Cir. 1997). *See also Williams v. Woodford*, 859 F. Supp. 2d 1154, 1165 (E.D. Ca. 2012) (Kozinski, A.) (finding ineffective assistance where trial counsel failed to present several key witnesses promised in opening statement and collecting cases from other circuits holding same).[68] "Those broken promises themselves supplied the jury with reason to believe that there was no evidence contradicting the State's case, and thus to doubt to validity of [petitioner's] case." *U.S. ex rel. Hampton v. Leibach*, 347 F.3d 219, 257 (7th Cir. 2003); *Toliver v. Pollard*, 688 F.3d 853, 862 (7th Cir. 2012). Some courts have even held that such an unfulfilled promise to be prejudicial as a matter of law in certain circumstances. *Gonzalez-Maldonado*, 115 F.3d 9 at 15.

[68] *See Williams*, 859 F. Supp. 2d at 1170-71 (discussing *Ouber v. Guarino*, 293 F.3d 19 (1st Cir. 2002); *Anderson v. Butler*, 858 F.2d 16 (1st Cir. 1988) (defense counsel's unfulfilled promise during opening statement to present key expert psychiatric witnesses constituted deficient performance); *Harris v. Reed*, 894 F.2d 871, 879 (7th Cir. 1990) (defense counsel's unfulfilled promise during opening statement to present two key witnesses constituted deficient performance, in part, because "the jury likely concluded that counsel could not live up to the claims made in the opening"); *McAleese v. Masukiewicz*, 1 F.3d 159, 166 (3d Cir. 1993) ("The failure of counsel to produce evidence which he promised the jury during his opening statement that he would produce is indeed a damaging failure sufficient of itself to support a claim of ineffectiveness of counsel.").

Here, Michael was prejudiced by trial counsel's unfulfilled promises in his opening statement. Trial counsel unnecessarily gave the prosecutor easy ammunition against him and his defense case for closing argument. As the *Blankenship* court observed, counsel's broken promises also damaged counsel's credibility in the eyes of the juror – damage that cannot be underestimated – and left the jury "with reason to believe there was no evidence contradicting the State's case." *Hampton*, 347 F.3d at 257. This prejudice cannot be disputed here because two jurors have come forward to criticize the effectiveness of trial counsel. (*See* Ex. 69 and 22).

M. Appellate Counsel was Ineffective

To the extent appellate counsel could have or should have raised any of the above deficiencies of trial counsel, or other constitutional violations, in Michael's direct appeal, he was ineffective for failing to do so. When a state provides an appeal from a criminal conviction as of right, the appeal implicates the fairness of the trial and acts as "an integral part of the . . . system for finally adjudicating the guilt or innocence of a defendant." *Lucey*, 469 U.S. at 393 (quoting *Griffin v. Illinois*, 351 U.S. 12, 18 (1956)). "The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Strickland*, 466 U.S. at 686; *State v. Harvey*, 692 S.W.2d 290, 292 (Mo. banc 1985) (quoting *Strickland*). As an extension of the right to counsel, a determination of whether the right to effective appellate counsel has been violated likewise "hinges upon the fairness of the trial and the reliability of the judgment of conviction resulting therefrom." *Goodwin v. Johnson*, 132 F.3d 162, 174 (5th Cir. 1997).

N. Trial Counsel's Deficient Performance Prejudiced Michael Politte

Absent trial counsel's deficiencies, Michael Politte would have been acquitted. To demonstrate prejudice, a petitioner must show there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. The prejudice of counsel's myriad deficiencies must be evaluated cumulatively, considering the totality of the evidence that would be before the jury had counsel performed reasonably. *Strickland*, 466 U.S. at 695; *Williams v. Taylor*, 529 U.S. 362, 397–98 (2000).

The State's case against Michael was weak, resting on little actual evidence (all of which has since been proven false), and based primarily upon misinformed judgments and biased speculation by law enforcement. This was a close case where effective representation with regard to any one of the myriad deficiencies detailed above could have made the difference for Michael. *See, e.g.*, *Luna v. Cambra*, 306 F.3d 954, 966 (9th Cir. 2002) (citing *Strickland*, 466 U.S. at 696)("[A] verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support.") The jury was divided, with multiple hold-out jurors. And the jury was focused on the gasoline evidence; they asked to examine Michael's shoes themselves during deliberations. The jury was waiting throughout trial for trial counsel to give them something "to work with," but he did not. (Ex. 69 at ¶4). The hold-out jurors needed something to substantiate their doubts and defend their position during deliberations, but trial counsel gave them nothing. (*Id.*) Jurors have come forward today to

unequivocally assert that had trial counsel investigated and presented the evidence of viable alternative suspects, and challenged the State's gasoline evidence, they would have acquitted. (Ex. 22; Ex. 69). Thus, the prejudice is clear.

Jurors unequivocally state that trial counsel was not effective, and that it impacted their deliberations and verdict. Jury Foreman Victor Thomas agreed that defense counsel failed: "I firmly believe the defense attorney did a bad job of defending Michael." (Ex. 22.) Juror Linda Dickerson-Bell said succinctly "Michael did not get a defense at trial." (Ex. 69). She elaborated: "I had a lot of doubts about Michael's guilt even back then, but his defense attorney did not give us anything to work with. I kept waiting for him to give us something, and he never did. I do not remember the defense putting on evidence or explaining why the prosecution's evidence did not mean anything." (Ex. 69 at ¶16). With regard to reasonable doubt, Dickerson-bell explained: "I also do not recall the defense attorney speaking to us about what reasonable doubt does not mean, and I felt none of us actually understood the meaning of reasonable doubt." (Ex. 69 at ¶17).

Trial counsel admits his failures, concedes he did not have strategic reasons for them, and recognizes the prejudice of his deficient performance. He believes Michael is innocent and would do things differently now that he is a more experienced trial attorney. Today, Williams states: "I believed [Michael] was innocent at the time of my representation, and I continue to believe in his innocence to this day. . . . With nearly seventeen more years under my belt now, I can say that I would have handled my representation of Michael differently. . . . Had I performed more field investigation, I may have uncovered this witness [regarding Johnnie Politte's presence near the scene] as well

as other possible avenues. . . . I regret not doing more to investigate Ed Politte as an alternative suspect." (Ex. 24).

Finally, the prejudice to Michael is made further evident by the many ways the prosecutor exploited trial counsel's failure during his closing arguments. Counsel's failure to deliver any evidence about the true perpetrator(s) allowed him to mockingly argue a "phantom intruder" must have committed this crime, the "luckiest man in the world." (T. 773). Counsel's failure to in any way challenge the State's claim that Michael admitted this crime allowed the prosecutor to start and end his case with the short and sweet argument that all the jury needs to know to vote guilty is that Michael told him he is guilty. And, finally, counsel's broken promises in opening argument allowed the prosecutor to eviscerate any credibility counsel, and Michael's case, had in the jury's eyes. In a weak, close case like this one, there is simply no question that the result likely would have been different had counsel been effective.

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Prior to the Rule 91 filing in Cole County Circuit Court, no court has ever been presented with the failures of Michael's trial counsel and the many ways counsel's performance prejudiced Michael's trial, and no court has ever held an evidentiary hearing related to these issues. It is nonetheless clear that Michael's defense was insufficient and violated his constitutional right to counsel. This petition represents the first time that Michael's rights can be vindicated by any court on these new claims and they are thus

properly presented. Moreover, Michael's actual innocence overcomes any potential procedural bar. *See* Claim III, *supra*.[69]

WHEREFORE, for the reasons stated above and more fully explained in the Suggestions in Support of this petition, Michael Politte respectfully prays that this Court:

A. Grant the Writ of Habeas Corpus discharging Michael Politte from custody based upon his illegal confinement and the record before the court; or

B. In the alternative, enter its order Requiring Respondent to Answer Michael Politte's Petition for Writ of Habeas Corpus;

C. Allow counsel for Petitioner a reasonable time within which to reply to Respondent's Answer;

D. Expand the record to include the exhibits set forth in the appendix submitted herewith;

E. In the alternative, appoint a Special Master pursuant to Supreme Court Rule 68.03;

[69] Additionally, it is noteworthy that the law is well-settled that ineffective assistance of counsel can constitute cause to excuse a procedural default. "[I]f the procedural default is the result of ineffective assistance of counsel, the Sixth Amendment itself requires that responsibility for the default be imputed to the State, which may not 'conduc[t] trials at which persons who face incarceration must defend themselves without adequate legal assistance.'" *Murray v. Carrier*, 477 U.S. 478, 488 (1986) (quoting *Cuyler v. Sullivan*, 446 U.S. 335, 344 (1980)). To the extent that the State argues that any claim should have been "knowable" or presented at trial, trial counsel's ineffectiveness would constitute cause and prejudice permitting that claim to be heard now. The same is true of appellate counsel. *Nash v. Payne*, No. SC97903 (Mo. Order dated July 3, 2020); *Evitts v. Lucey*, 469 U.S. 387 (1985).

E. Conduct an evidentiary hearing on the allegations of this petition;

F. Granting such further relief as the Court deems consistent with the ends of justice.

Dated: October 13, 2021

Respectfully submitted,

/s/ *Megan Crane*
Megan Crane, MO Bar #71624
Roderick & Solange
MacArthur Justice Center
3115 South Grand Blvd., Suite 300
St. Louis, MO 63118
Phone: (314) 254-8540
megan.crane@macarthurjustice.org

/s/ *Rachel K. Wester*
/s/ *Tricia J. Bushnell*
Rachel K. Wester, MO Bar #67826
Tricia J. Bushnell, MO Bar #66818

Midwest Innocence Project
3619 Broadway Boulevard, #2
Kansas City, MO 64111
(816) 221-2166 (phone)
rwester@themip.org
tbushnell@themip.org

/s/ *Robert Langdon*
/s/ *Mark Emison*
/s/ *Alex Thrasher*
Robert Langdon, MO Bar #23233
Mark Emison, MO Bar #63479
Alex Thrasher, MO Bar #71207
Langdon & Emison, LLC
911 Main Street
Lexington, MO 64067

(660) 259-9901 (phone)
mark@lelaw.com
alex@lelaw.com
bob@lelaw.com