IN THE CIRCUIT COURT OF COLE COUNTY, MISSOURI

In re:	)	
DARRYL BURTON,	)	
	)	
Petitioner,	)	
v.	)	**Case No: 06AC-CC00312**
DAVID DORMIRE,	)	
Superintendent,	)	
Jefferson City Correctional Center,	)	
	)	
Respondent.	)	

FINDINGS OF FACT AND CONCLUSIONS OF LAW AND JUDGMENT

Now on this 18th day of August, 2008, the Court again takes up this matter for the purpose of entering its final Judgment.

This case is a proceeding in habeas corpus under Missouri Supreme Court Rule 91. For the reasons stated below, this Court grants Petitioner relief and, in a Writ separately issued, orders Petitioner discharged from Respondent's custody in fifteen days unless the Office of the St. Louis Circuit Attorney requests that he be returned to its jurisdiction for retrial, in which case Petitioner should be transferred to the Sheriff of St. Louis City to be held pending final resolution of the charges against him.

Petitioner Darryl Burton was convicted in 1985 of capital murder and armed criminal action. The Circuit Court of the City of St. Louis imposed a sentence of life imprisonment without the possibility of parole for 50 years for capital murder, to be followed by a consecutive sentence of 25 years for armed criminal action.

Mr. Burton seeks release from his conviction and confinement based on the following grounds:

1. The State violated Mr. Burton's right to due process when it failed to disclose the full criminal history of its primary witness at trial, Claudex Simmons.

The failure to disclose this critical impeachment information was highly prejudicial to Petitioner because Mr. Simmons testified that he had only two convictions when, in fact, he had been convicted of at least seven felonies and five misdemeanors. Mr. Burton asserts that the failure to disclose all of Simmons' extensive criminal history violated Petitioner's right to due process under *Brady v. Maryland*, 373 U.S. 83 (1963). *See also State v. Parker*, 198 S.W.3d 178 (Mo. Ct. App. W.D. 2006).

2. Because the *Brady* claim was not raised in Mr. Burton's direct appeal or in any state post-conviction proceeding, it may be considered "defaulted" and therefore cannot provide a ground for relief ***unless*** Mr. Burton can show "cause" and "prejudice" for failing to raise the claim in a prior proceeding ***or*** because new evidence of Mr. Burton's innocence satisfies the "miscarriage of justice" standard of *Clay v. Dormire*, 37 S.W.3d 214 (Mo. 2000).

This Court concludes that the failure of the State to disclose Mr. Simmons' full criminal history was so prejudicial that it violated Mr. Burton's right to due process under the *Brady* doctrine. Because of this failure, Mr. Simmons was able to testify falsely and without challenge that he had only two prior convictions when he had several times that many. This Court also concludes that, although the *Brady* claim has been procedurally defaulted, this Court may grant relief because Mr. Burton has satisfied both the "cause and prejudice" standard and the innocence standard of *Clay*.

In addressing Mr. Burton's claims, the Court has had the opportunity to consider both the evidence presented at trial as well as newly discovered evidence presented in a two-day evidentiary hearing held April 10 and April 11, 2007. The trial record reveals that evidence of guilt presented at trial was not strong and that Mr.

Burton was convicted solely on the basis of Mr. Simmons' testimony and testimony from another alleged eyewitness, Eddie Walker. If Mr. Simmons had been impeached with his multiple criminal convictions and if the jury had heard other newly discovered evidence, "it is more likely than not that no reasonable juror would have convicted" Mr. Burton in light of that new evidence. *See Clay*, 37 S.W.3d at 217.

I. STATEMENT OF CUSTODY AND PARTIES

Mr. Burton is confined in the Jefferson City Correctional Center in Cole County. David Dormire, superintendent of the Jefferson City Correctional Center, is the proper party Respondent in a Rule 91 action challenging confinement in the Jefferson City Correctional Center. The Circuit Court of Cole County is the proper party venue for an initial habeas petition challenging Mr. Burton's confinement.

II. MR. BURTON'S CLAIMS

In his Petition for Writ of Habeas Corpus, Mr. Burton raised three claims:

1. That new evidence establishes that Mr. Burton is innocent of the murder of Donald Ball and that he is entitled to relief based on an "independent" or freestanding claim of actual innocence.

2. That Mr. Burton's trial counsel was constitutionally ineffective for failing to investigate and present available evidence that would have disproved the State's case.

3. That the State's failure to disclose exculpatory evidence, including evidence of Mr. Simmons' full criminal history, violated due process under the doctrine of *Brady v. Maryland*, 373 U.S. 83 (1963).

Because this Court grants relief as to Claim #3, it does not address Claim #2, which raises ineffective assistance of counsel. This Court also does not address claim #1, which raises an "independent" or "freestanding" claim of innocence, but instead addresses whether Mr. Burton meets the less demanding innocence standard of *Clay*, which, if satisfied, allows the Court to address the defaulted *Brady* claim on the merits.

III. STANDARD OF REVIEW IN HABEAS CORPUS

Missouri law provides that a writ of habeas corpus under Missouri Supreme Court Rule 91 may be issued when an individual is restrained of his or her liberty in violation of the constitution or laws of the state or federal government. *State ex rel. Nixon v. Jaynes*, 63 S.W.3d 210, 214 (Mo. 2001). Although the interests protected by the writ are fundamental, relief is limited to avoid repeated challenges to final judgments. *Clay*, 37 S.W.3d at 217. Generally, a petitioner cannot raise claims in a Rule 91 habeas proceeding that could have been raised, but were not raised, on direct appeal or in a post-conviction proceeding. *Id*. Such claims are considered to be procedurally defaulted. *Jaynes*, 63 S.W.3d at 214.

There are exceptions, however, to the general rule that defaulted claims may not be considered in a Rule 91 proceeding. Such claims are cognizable if (1) the petitioner can show "cause" and "prejudice" excusing the failure to raise the claims in the prior proceeding; <u>or</u> (2) the petitioner presents newly discovered evidence showing that "it is more likely than not that no reasonable juror would have convicted him in light" of the new evidence. *Clay*, 37 S.W.3d at 217; *Brown v. State*, 66 S.W.3d 721, 726 (Mo. 2002). The exception for newly discovered evidence allows courts to

consider a defaulted claim on the merits when the failure to do so would constitute a "manifest injustice." *Clay*, 37 S.W.3d at 217. These standards are discussed more fully below.

IV. PROCEDURAL HISTORY

On March 27, 1985, a jury in the Circuit Court of the City of St. Louis found Darryl Burton guilty of one count of capital murder and one count of armed criminal action in the death of Donald Ball. On April 25, 1985, the court sentenced Mr. Burton to life imprisonment without possibility of parole for 50 years and also to a consecutive sentence of 25 years. The Missouri Court of Appeals affirmed his conviction and sentence. *State v. Burton,* 710 S.W.2d 306 (Mo. Ct. App. 1986). Mr. Burton then filed a motion for post-conviction relief under Missouri Supreme Court Rule 27.26 (now repealed and replaced by Rule 29.15), which was denied following an evidentiary hearing. Mr. Burton unsuccessfully appealed this denial to the Missouri Court of Appeals. *Burton v. State*, 817 S.W.2d 928 (Mo. Ct. App. 1991). Mr. Burton filed a motion to recall the mandate, which also was denied by the Missouri Court of Appeals.

On April 11, 1997, Mr. Burton filed in the United States District Court for the Eastern District of Missouri his Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254. He raised several claims, including actual innocence, ineffective assistance of trial counsel and *Brady* claims. [1]

[1] The claims raised by Mr. Burton in this Court, although bearing some similarity to those raised in federal court, are significantly different than those claims and they are

The United States district court denied Burton's Petition, and he appealed. In an opinion issued July 8, 2002, the Eighth Circuit affirmed the denial of Mr. Burton's claims, but reached its decision "with no small degree of reluctance." *Burton v. Dormire*, 295 F.3d 839, 842 (8th Cir. 2002). The Eighth Circuit stated that mounting new evidence of innocence "shakes the limbs of the prosecution's case" and creates the suspicion "that the wrong man may have been convicted of capital murder and armed criminal action." *Burton,* 295 F.3d at 842. Although obstacles in federal habeas compelled the court to deny relief, the Eighth Circuit expressed the hope that "the State of Missouri may provide a forum (either judicial or executive) in which to consider the mounting evidence that Burton's conviction was procured by perjurious or flawed eyewitness testimony." *Id*. at 849. Mr. Burton sought review by the Supreme Court, which denied his petition for writ of *certiorari*. *Burton v. Dormire*, 538 U.S. 1002 (2003).

Mr. Burton then returned to state court and filed the present Petition for Writ of Habeas Corpus under Rule 91 in April 2006. On April 10 and April 11, 2007, this Court held an evidentiary hearing during which it heard the testimony of 23 witnesses. Because of confinement or disability, three additional witnesses testified in depositions that were videotaped and stenographically recorded. In addition, this Court heard oral argument in this case on June 20, 2007, and March 5, 2008.

In addition to the original pleadings (Petition, Response and Traverse), the parties have submitted Post-Hearing Briefs and Proposed Findings of Fact and Conclusions of Law. Also, the Midwest Innocence Project, a non-profit organization

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now supported by a complete factual record. Mr. Burton was not granted an evidentiary hearing in federal court.

affiliated with the Law School at the University of Missouri - Kansas City, filed an *amicus* brief in support of Mr. Burton in this case.

V. THE TRIAL

The evidence of guilt at Mr. Burton's trial was limited to two men, Claudex Simmons and Eddie Walker, who claimed to be eyewitnesses to a nighttime shooting at a St. Louis gas station. Both identified Mr. Burton to police as the assailant and both identified him at trial. The prosecution presented no physical evidence and no evidence of motive. The evidence may be summarized as follows:

On June 4, 1984, just before 10 p.m., Donald Ball pulled up to a gas pump at the Amoco Service Station at Delmar and Goodfellow. (App. 962-63).[2] Within moments, he was pursued by a gunman on foot who chased him across the lot and shot him several times. (*Id*.)

Witnesses located by the police after the shooting were not able to identify the assailant. (App. 962-67). Claudex Simmons, who was in the vicinity, initially told police he did *not* see the shooter. (App. 971-72, police report; Trial Tr. 364-65). Later, though, after being charged with attempted second-degree robbery in an unrelated case, Simmons decided he *had* seen something and could identify the shooter. (App. 972-73; 978-79; Trial Tr. 336). Simmons testified at his deposition: "I had caught a case. I asked to talk to one of them [the police]." (App. 736; Trial Tr. 336, 367).

[2] References to "App." refer to the Petitioner's Appendix. References to "Trial Tr." refer to the trial transcript, and references to "H. Tr." refer to volumes I or II of the April 2007 evidentiary hearing transcript.

During the police investigation, Simmons identified Mr. Burton from a photograph and also picked him out in a live line up. (Trial Tr. 337-41, 344). Cross examination during trial showed, however, that his story shifted in important respects. For instance, Simmons initially told police that he had been exiting the liquor store next to the gas station when he heard the shots and saw the shooter chasing the victim. (App. 973-74). At trial, however, Simmons stated that he was at the liquor store *before the shooting* and that he was standing in line to buy cigarettes at the station when he heard shots and observed the shooting. (Trial Tr. 325-26, 334-35, 347, 354-55, 368, 372). Simmons denied his earlier statement that he had been exiting the liquor store when he heard the shots. (Trial Tr. 371).

Although he was well acquainted with Darryl Burton, Simmons falsely told police that he did *not* know him, and Simmons stuck with that statement even after identifying Burton from a photograph. (App. 974). At trial, Simmons shifted, acknowledging that he knew Burton. (Tr. 328, 342-343). When interviewed by police, Simmons had described the shooter as having his hair in "corn rows." At trial, however, he denied that he had mentioned "corn rows" in his description and stated he had told officers that the shooter wore his hair in "curls." (Trial Tr. 369).

Simmons testified that, after the shooting, the assailant ran in a northerly direction off the lot and turned right on Goodfellow. (Tr. 331-33, 359-60; App. 728-29). Notably, Simmons' testimony on this point contradicted that of the other "eyewitness," Eddie Walker, who gave an entirely different description of the shooter's escape.

During trial, Simmons testified that he had only two convictions – both for stealing over $150 – and that he was awaiting sentencing in a case where he had just pled guilty to attempted second degree robbery. (Trial Tr. 323-24). Simmons gave a confused description of his plea deal. On direct examination, he stated that under the terms of his plea deal, he would receive a three year sentence if he did not testify against Mr. Burton and would receive a one year sentence if he did testify. (Trial Tr. 324). Then, on cross-examination, he stated he was *already* on probation as part of a deal to testify at Burton's trial. (Tr. 373). Then, on redirect he changed his testimony again, stating he was not on probation and that he had pled guilty to an attempted robbery charge carrying a penalty of one to three years. If he testified truthfully, he would get one year, and if he did not, he would get three years. (Tr. 374-75; *see also* Tr. 323-24).

No physical evidence connected Burton to the shooting of Ball. The prosecution's case rested *entirely* on the word of Simmons and the second alleged eyewitness, Eddie Walker.

According to testimony at trial, officers patrolling the neighborhood a few days after the shooting ran into one "Tampa Red," a street informant. "Tampa Red," who was not identified by his real name in the police report, introduced police to one Eddie Walker, who claimed to have seen the shooting. (App. 970-71; Trial Tr. 167). According to the police report, Walker was standing on the Amoco lot next to the liquor store when he saw the victim drive onto the lot and start to put gas in his car. (App. 970-71). Walker allegedly saw the shooter walk from the south side of Delmar, approach the victim, and start shooting. (App. 970-71). Walker told police that the

assailant chased the victim while shooting continuously, then "ran back south across Delmar" and entered a 1976 blue Buick. (App. 971).[3] At trial Walker testified that he saw the shooter, but stated that he never saw a gun in the shooter's hand. (Trial Tr. 165, 194, 208).

The police report does not contain a description of the assailant from Walker,[4] but states that Walker identified Mr. Burton from a photograph and then identified him in a line-up. (App. 971, 977-78; Trial Tr. 169-70, 173).

During subsequent statements and testimony, however, Walker's account shifted dramatically. In addition, Walker ultimately gave three different versions of how the shooter supposedly left the lot.

Although Walker told police two days after the murder that he had known Burton for "ten years," Walker testified at his deposition that he did not know Burton at all, but only knew *of* him, and had known *of him* for only *one year*. (App. 322-23; 930-31, 971; Trial Tr. 209). At trial, Walker reversed course again, stating he had only known Burton *by sight* for about ten years and denying that he had made any statement to police about knowing Burton for ten years. (Tr. 200, 218) Adding to these contradictions, Walker told police he had known Ball for "at least ten years." (App. 971). But, in his deposition and trial testimony, he stated that he had never met Ball and had never even seen him before the night of the shooting. (App. 317, 925; Tr. 200, 203, 219).

[3] As noted above, Walker's account of the assailant's escape contradicts that of Simmons, who stated that the shooter ran off the lot in a northerly direction.
[4] Walker testified at trial that he did not give police a physical description of the shooter. (Trial Tr. 210).

Walker also told police he saw Burton approach the Amoco station from the south and also saw the victim drive up and begin to put gas in his car. (App. 970-71). At trial, however, he flatly denied making these statements to police, claiming instead that he *never saw Ball in his car*, and, in fact, never saw Ball's car at all. (Tr. 188, 196, 201). He also denied telling police that he saw the shooter walk on the lot from the south side of Delmar. When asked about his statements to the detective, he repeatedly said: "No, I did not tell him that" and "I don't remember saying that." (Trial Tr. 196, 201, 213-14).

At trial, Walker testified that his attention was drawn to the lot when he heard the first shot and turned around, away from the side of the liquor store where he was drinking from a "half pint" of gin or vodka, and conversing with acquaintances. (App. 921; Tr. 162, 178, 180-92, 203, 219-220). Although Walker stated there was some lighting on the lot, he was unable to recall key aspects of the shooter's features. When asked about the shooter's appearance at trial, Walker could not recall whether the man had a beard or moustache, or the hairstyle or clothing he wore. (App. 928, Trial Tr. 191). At trial, he claimed that the shooter wore his hair in "corn rows," then claimed the shooter wore his hair in a "curl." Then, when asked if the shooter wore a "short Afro," he stated: "I don't remember." (Trial Tr. 205). At his pretrial deposition, Walker had been similarly vague and unable to provide any description of the assailant. When asked specific questions about the shooter's appearance at his deposition, Walker had stated: "I'm trying to think. I can't say. You know, I'm getting confused and stuff now. I don't know." (Trial Tr. 207).

Walker also gave three entirely different, mutually exclusive accounts of how the shooter left the Amoco station. In his initial statement to police, Walker stated that he saw the suspect run south across Delmar "in the vicinity of the McDonald's restaurant" (which is located to the east) and enter a 1976 blue Buick. (App. 971). In his second statement to police, given when he viewed the line up, Walker changed his story, stating that the shooter ran in a "southwesterly" direction and that he did not see where the shooter ended up. (App. 977-78). At his deposition, Walker stuck with his story that the shooter ran in a southwesterly direction down Delmar. (App. 318-19, 925-930). But, he denied that he saw Burton entering a vehicle, as he had originally told police. (App. 315-23; 931). At trial, Walker combined aspects of his two previous versions, stating that the shooter ran toward him (to the east), then "turned around to his right" and "circled" and "ran across the street" and ended up "on the lot of the car wash." (Tr. 192-93, 204). At trial, Walker repeatedly denied that he ever told police that the shooter ran across Delmar in the vicinity of McDonald's and that the shooter entered a 1976 Buick. (Tr. 193, 198).

Each of Walker's three accounts conflicted with the account of Simmons, who testified that the assailant ran off the lot in a northerly direction and turned right on Goodfellow. *See supra.*

During the trial, three other eyewitnesses – all employees at the station – testified, but none of them viewed the assailant long enough to make an identification. One of them, cashier Joan Williams, was working in the booth when Ball was shot. She told the police that the shooter was a black male, 20 to 21 years old, 5'5" to 5'6", thin build, with a short Afro, and wearing a yellow t-shirt and khaki pants. (App.

966). The other two witnesses, Carolyn Lindsey and daughter Stacy Lindsey, also worked at the station but were not working that night and had just driven up to buy gas. (App. 965). The Lindseys' description of the shooter was almost identical to that given by Ms. Williams. Stacy Lindsey also added that the shooter had a "thin build" and "medium skin." (App. 965).

All three women testified at trial, with Joan Williams and Carolyn Lindsey repeating the description they gave police. (Trial Tr. 257, 263, 269, 293-94, 297, 301, 312). Because none of the three got a close up view of the suspect, they were unable to make any identification of the assailant, however. (*Id*.)

The only evidence tying Mr. Burton to the shooting were the accounts of Mr. Simmons and Mr. Walker. The prosecution presented no evidence of motive.

VI. EVIDENCE OBTAINED AFTER TRIAL

The only evidentiary hearing Mr. Burton has had regarding his *Brady* claim and his innocence claim was held in this Court in April 2007. Although he raised a claim of innocence in his federal habeas proceedings, no hearing was held, and the district court and Court of Appeals relied only on the affidavits presented by Mr. Burton.[5]

[5] Mr. Burton did not rely on an innocence claim in his state post conviction proceedings. The only witness mentioned in the state PCR proceedings who testified in the April 2007 evidentiary hearing was Elijah Horne. In his state post-conviction appeal, Mr. Burton argued that his trial attorney rendered ineffective assistance of counsel because she did not interview several potential witnesses, including Elijah Horne. The state court rejected the claim because Mr. Burton did not support his claim with a factual record. *Burton v. State*, 817 S.W.2d 928, 929 (Mo. Ct. App. 1991). Mr. Horne later testified in the April 2007 hearing regarding admissions allegedly made to him by Claudex Simmons. In making an innocence finding, however, this Court did not rely on the testimony of Mr. Horne.

The evidence from this Court's hearing is briefly summarized here, though only a portion of it is relied upon by this Court in its Findings of Fact and Conclusions of Law, as stated below. The Court notes that, in general, it does not find testimony from inmate witnesses credible. In making the innocence finding under *Clay*, however, the Court does rely, as discussed below, on the testimony of Joan Williams, Carolyn Lindsey and Stacy Lindsey. Although none of these witnesses could identify the shooter, key aspects of their accounts rule out Mr. Burton as the assailant.

The evidence presented to this Court (initially in the form of affidavits, followed by live testimony in the April 2007 hearing) may be grouped as follows:

1. **Evidence of the recantation by Claudex Simmons**. Five months after Mr. Burton's trial, Claudex Simmons stated in an affidavit and later told several individuals (who also provided affidavits) that he had perjured himself at Mr. Burton's trial, that he did not see Mr. Burton murder Donald Ball, and that he wanted to "withdraw" his testimony. (App.889-90, 865-67, 870-71, 873-75, 879-880, 894-95, 896-97, 1478, 1500). In the affidavit, he stated that he had testified against Mr. Burton "due to the immunity given in agreement." (*Id*.) The "immunity" Mr. Simmons was referring to in the affidavit was not explained, as no evidence showed that Mr. Simmons was granted immunity.

In the April 2007 hearing in this Court, Mr. Simmons stated that he lied in his testimony at Mr. Burton's trial. Mr. Simmons' testimony at the hearing was internally inconsistent, however, and his demeanor was hostile. Thus, this Court is not relying on that testimony, nor is it relying on testimony by several witnesses (Benjamin Gregory, Antonio Weber, Elijah Horne, Robert Ingram, Gregory Joiner, Arbary

Jackson, and Herbert Carter) who testified that Mr. Simmons told them he lied about Mr. Burton. This Court does not find inmate testimony credible and does not rely upon the testimony of any of these witnesses, all of whom were incarcerated with Mr. Simmons at various times.

2. Evidence contradicting or otherwise impeaching the account of Eddie Walker, the other eyewitness. Mr. Walker died in 1996 after an illness. Mr. Burton presented evidence contradicting Mr. Walker's account and attacking his credibility. This evidence included testimony from Danny Pennington, a friend of Walker's who said he was standing around the corner with him at the time of the shooting and that neither of them viewed either the shooting or the shooter. Danny's sister, Beverly Pennington, a former live-in girlfriend of Walker's, testified that Walker told her that he lied about Mr. Burton. A former wife (Mary Alice Brown) and a live-in partner of Walker's (Melvia Washington[6]) testified that Walker was a chronic drinker, had poor eyesight, and often was untruthful. A former employer, Father James Moll, testified that Walker had worked for him at a neighborhood parish. Moll testified that Walker was very unreliable and would show up at work intoxicated.

This Court found that the above-listed witnesses had varying degrees of credibility, with Father Moll being the most credible. Although their testimony was of some value, this Court finds it unnecessary to rely on this testimony as Walker's testimony at trial was fraught with contradictions and is entitled to little weight in this Court's analysis.

[6] Ms. Washington is disabled and testified by deposition rather than in the courtroom.

3. Evidence pointing toward the alleged real killer, Jesse Watson. Mr. Burton also presented evidence suggesting that the real killer was Jesse Watson, an alleged drug rival of Mr. Ball's who engaged in an ongoing feud with Mr. Ball. Three individuals testified that Mr. Watson made admissions to them, either admitting that he killed Ball or was going to do so. One of them, Warren Hentley, testified in the April 2007 hearing. The other two, Joseph Smith and Michael Smith (who are not related), were in jail and therefore testified by deposition. All of these witnesses have extensive criminal histories, and this Court therefore chooses not to rely on their testimony, although expressing no opinion on whether or not Mr. Watson (whose name first surfaced in the police report) shot and killed Donald Ball.

4. Other eyewitnesses who contradict Simmons and Walker. The strongest and most credible testimony at the hearing was from other witnesses who saw the shooter and whose accounts clearly exclude Mr. Burton as the assailant. These eyewitnesses include three employees of the Amoco station – Joan Williams, Carolyn Lindsey, and Stacy Lindsey Branch. A fourth eyewitness, Sam Coleman, a neighborhood resident, also testified. Although aspects of Mr. Coleman's testimony were corroborated by photographs of the scene (one of which depicted Coleman's vehicle at a gas pump adjacent to Mr. Ball's car), there were some unexplained contradictions in Coleman's account. It was also unclear whether the unknown black male whom Coleman saw (and said was not Burton) was indeed the shooter. In any event, this Court need not rely on Mr. Coleman's testimony as the testimony of the employee-witnesses is both credible and compelling.

As reflected in the Findings of Fact below, Ms. Williams, Ms. Lindsey, and Ms. Lindsey Branch all described the shooter to police in similar terms (black male, 20 to 21 years old, 5'5" to 5'6", with a short Afro, wearing a yellow t-shirt and khaki pants). (App. 965-66). Ms. Williams explained at the April 2007 evidentiary hearing that she did not get a close look at the shooter's face and thus could not make a positive identification. (H. Tr. I 154-55). However, she did see the shooter long enough to get a clear view of his skin color, and observed that the shooter was definitely "light complected." (H. Tr. I 156-57; *see also* H. Tr. I 132-33, 135-36, 153-54). Ms. Williams was not asked about the shooter's skin color at trial, and thus did not testify about his light complexion. During the hearing, however, she looked at Mr. Burton, described him as being very dark, and testified that she has "no doubt" that Burton was not the shooter. (H. Tr. I 138, 142).

If Ms. Williams had been asked this question at trial, she would have given the same testimony then. (H. Tr. I 142). Ms. Williams' testimony is corroborated in important respects by the testimony of Carolyn Lindsey and Stacy Lindsey Branch. *See* Findings of Fact, listed below. This Court credits their testimony.

5. Evidence of Mr. Simmons' criminal history. Mr. Simmons' criminal history was far more extensive than the two convictions he acknowledged in his trial testimony. Court records show that Mr. Simmons had six or seven prior felony convictions and at least five misdemeanor convictions. At the time of Burton's trial, Simmons also had two cases pending against him, not just one. As the Findings of Fact and Conclusions of Law below reflect, the concealment of Mr. Simmons' extensive criminal history caused enormous prejudice to Mr. Burton, as Simmons was

the main witness against him.[7] A complete disclosure of Mr. Simmons' history would have shown that he was not just an occasional thief, but was an experienced criminal.

As reflected in the Findings of Fact and Conclusions of Law below, this Court relies only on the testimony of the three employees (Ms. Williams, Ms. Lindsey and Ms. Lindsey Branch), and the evidence of Mr. Simmons' undisclosed criminal history in reaching its conclusions regarding the *Clay* innocence standard and the *Brady* "materiality" standard. Although this evidence constitutes only a portion of the evidence presented by Mr. Burton, it provides an ample basis for relief.

VII. DISCUSSION OF APPLICABLE LAW

A. "Cause and Prejudice" Standard

As discussed above, Mr. Burton may obtain review of his defaulted *Brady* claim on the merits if he can establish "cause" and "prejudice" for the failure to raise the claim on direct appeal or in state post-conviction proceedings. *Brown v. State*, 66 S.W.3d 721, 726 (Mo. 2002). The "cause" of 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 Nixon v. Jaynes*, 63 S.W.3d 210, 215 (Mo. 2002) (quoting *Murray v. Carrier*, 477 U.S. 478, 488 (1986)); *see also Covey v. Moore*, 72 S.W.3d 204, 210 (Mo. Ct. App. W.D. 2002). To establish "prejudice," the petitioner must show that the error "worked to his actual and substantial disadvantage, infecting his entire trial with error of

[7] Although Eddie Walker also provided an "eyewitness" account, his testimony was riddled with contradictions and he stated that he never saw a gun in the shooter's possession.

constitutional dimensions." *Jaynes*, 63 S.W.3d at 215-16 (quoting *United States v. Frady*, 456 U.S. 152, 170 (1982)); *see also Brown*, 66 S.W.3d at 726.

For the reasons stated in the Conclusions of Law, this Court concludes that Mr. Burton has satisfied the cause-and-prejudice standard.

B. *Clay* Innocence Standard

Because this Court concludes that Mr. Burton has established both "cause" and "prejudice," this Court need not address whether a "manifest injustice" has occurred. This Court nonetheless addresses this point, which provides an alternative avenue of reaching Mr. Burton's otherwise defaulted *Brady* claim.

The "manifest injustice" standard applies to a "narrow class of cases" in which the petitioner has shown that "it is more likely than not that no reasonable juror would have convicted him in light" of new evidence of innocence. *Clay v. Dormire*, 37 S.W.3d 214, 217 (Mo. 2000); *see also Jaynes*, 63 S.W.3d at 216 (same). A showing of actual innocence allows the petitioner, in an "extraordinary case," to pass through a "gateway" to have his defaulted claims considered on the merits. *Clay,* 37 S.W.3d at 217. *See also House v. Bell*, 126 S. Ct. 2064, 2076-78 (2006) (petitioner asserting innocence as a "gateway" to defaulted claims must establish that, in light of new evidence, "it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt").

In evaluating a "gateway" innocence claim, a court must consider all of the evidence, whether incriminating or exculpatory, and make a "probabilistic determination about what reasonable, properly instructed jurors would do." *House*, 126 S. Ct. at 2077. The standard is demanding and permits review only in the

extraordinary case. *Id*. At the same time, the standard does not require "absolute certainty" about the petitioner's guilt or innocence. *Id*. at 2078. Because the gateway claim involves evidence the trial jury did not have before it, the inquiry requires the court to assess how reasonable jurors would view the new evidence. *Id*. Depending on the nature of the new evidence, the court may have to make credibility determinations. *Id*.

For the reasons stated in the Conclusions of Law, this Court finds that Mr. Burton has satisfied the "gateway" standard of *Clay* and therefore may also rely on this avenue (in addition to "cause" and "prejudice") to have his *Brady* claim considered on the merits. In concluding that Mr. Burton has satisfied the *Clay* standard, this Court has relied on its assessment of the credibility of witnesses presented at the April 2007 hearing.

C. The *Brady* Doctrine

Mr. Burton's entitlement to habeas relief under Rule 91 rests on the merits of his claim under *Brady v. Maryland*, 373 U.S. 83 (1963). Mr. Burton asserts that because the State failed to disclose the full and extensive criminal history of its key witness, Claudex Simmons, and instead presented Mr. Simmons as someone with only a minor criminal record, the State violated Mr. Burton's right to due process under the *Brady* doctrine.

The *Brady* doctrine imposes on the State a "broad duty" to disclose evidence in the State's possession "that is favorable to the accused and material to guilt or punishment." *State v. Parker*, 198 S.W.3d 178, 179 (Mo. Ct. App. W.D. 2006) (citing *State v. Goodwin*, 43 S.W.3d 805, 812 (Mo. 2001) and *Brady*, 373 U.S. at 87);

Buchli v. State, 242 S.W.3d 449 (Mo. Ct. App. W.D. 2007). The *Brady* doctrine "protects an accused's due process right to a fair trial." *McMillian v. Johnson*, 88 F.3d 1554, 1567 (11th Cir. 1996). Under *Brady,* the State must disclose impeachment evidence as well as evidence that is directly exculpatory. *Brady,* 373 U.S. at 87, *Strickler v. Greene*, 527 U.S. 263 (1999); *Giglio v. United States*, 405 U.S. 150 (1972).

To prove a *Brady* violation, the defendant must show that: (1) the evidence was favorable to him; (2) the evidence was suppressed; (3) the evidence is material. *Parker*, 198 S.W.3d at 179; *Strickler v. Greene*, 527 U.S. 263 (1999). The prosecutor's state of mind is irrelevant; it does not matter whether the evidence was withheld intentionally or inadvertently. *Parker*, 198 S.W.3d at 179; *Buchli*, 242 S.W.3d at 453-54. The *Brady* rule extends to evidence that is "known only to police investigators and not to the prosecutor." *Strickler,* 527 U.S. at 281. Therefore, to comply with *Brady*, the individual prosecutor has a "duty to learn of any favorable evidence known to others acting on the government's behalf in [the] case, including the police*."* *Strickler*, 527 U.S. at 281, citing *Kyles v. Whitley*, 514 U.S. 419, 437 (1995). The *Brady* rule imposes on the State the affirmative duty to disclose exculpatory evidence even in the absence of a request from the defense. *Buck v. State*, 70 S.W.3d 440, 443 (Mo. Ct. App. E.D. 2000) .

Not every suppression of exculpatory evidence violates *Brady*, however. The evidence must be "material." In evaluating materiality, the question is "whether the favorable evidence could reasonably be taken to put the whole case in such a different

light as to undermine confidence in the verdict." *Parker*, 198 S.W.3d at 180 (quoting *Strickler*, 527 U.S. at 290). In *Kyles*, the United States Supreme Court stated:

> The question is not whether the defendant more likely than not would have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence.

Kyles, 514 U.S. at 434.

In *Parker*, the Missouri Court of Appeals, Western District, addressed materiality, stating that evidence is "material" if it would have provided the defendant with "plausible and persuasive evidence to support his theory of innocence." *Parker*, 198 S.W.3d at 180; *see also Buchli*, 242 S.W.3d at 454 (granting relief where undisclosed portion of videotape cast doubt on state's murder time line theory).

Mr. Burton's *Brady* claim is based on the State's failure to disclose the full criminal history of the prosecution's primary witness, Claudex Simmons. That evidence consisted of a total of 12 or more criminal convictions (six or seven felonies, at least five misdemeanors), not just two convictions, as Mr. Simmons had falsely testified. Under Missouri law, misdemeanors as well as felonies may be used for impeachment. *State v. Wolfe*, 13 S.W.3d 248, 258 (Mo. 2000). A pending criminal charge may also be used for impeachment if it shows the witness's motivation to testify favorably for the state or prove that the witness testified based on an expectation of leniency from the state. *State v. Lockhart*, 507 S.W.2d 395, 396 (Mo. 1974); *State v. Scroggins*, 859 S.W.2d 704, 708 (Mo. Ct. App. W.D. 1993).

Numerous court decisions establish that the failure to disclose a witness's criminal history violates *Brady* and requires the granting of relief. In *Buck*, the

Missouri Court of Appeals held that prosecutors must disclose, even without a request, exculpatory evidence, including evidence that may be used to impeach a prosecution witness. *Buck*, 70 S.W.3d at 445. In *Buck,* the Missouri Court of Appeals granted relief where the prosecutor failed to disclose five of six prior misdemeanor convictions of a key witness named Braddy. *Id*. The Court held that the non-disclosure violated due process because the suppressed evidence was central to Braddy's testimony as to one of two charges of witness tampering. The Court stated:

> ***In this situation, credibility is of dominant importance. Buck was entitled to Braddy's prior convictions because they tend to discredit Braddy's testimony, which in turn enhances Buck's opportunity to create reasonable doubt.*** . . [T]he evidence presented by the State and the role that the nonproduced evidence would have played suggest Buck suffered prejudice as a result of the nondisclosure. As viewed by this court, Buck's tampering trial as to the count involving Braddy was fundamentally unfair.

Buck, 70 S.W.3d at 446 (emphasis added). Cases in other jurisdictions also establish that the failure to disclose impeachment information concerning a witness's criminal history violates due process and requires the granting of relief. *See State v. Bright*, 875 So.2d 37 (La. 2004) (relief granted because the State had suppressed the criminal history of the only witness who identified the defendant in a case without physical evidence); *State v. Nelson*, 749 A.2d 380 (N.J. 2000) (when reliability of a witness may well be determinative of guilt or innocence, prosecution's withholding of evidence affecting credibility justifies a new trial, regardless of the good faith or bad faith of the prosecution); *Crivens v. Roth*, 172 F.3d 991 (7th Cir. 1999) (disclosure of key witness's criminal record would have allowed impeachment of that witness and could have led to different outcome at trial); *Salt Lake City v. Reynolds*, 849 P.2d 582

(Utah Ct. App. 1993) (failure to disclose prior convictions of victim/witness for aggravated assault, public intoxication, disorderly conduct and carrying a concealed weapon violated *Brady*; defendant entitled to new trial); *United States v. Strifler*, 851 F.2d 1197, 1202 (9th Cir. 1988) (information in government witness's probation file including criminal record was relevant to credibility and should have been provided to defendant).

When evaluating whether suppressed evidence is material under *Brady*, the court must consider the undisclosed evidence collectively, not item by item. *Kyles*, 514 U.S. at 437. Thus, the *Brady* inquiry focuses on the cumulative effect of all of the suppressed evidence.

VIII. FINDINGS OF FACT

1. Between 9:30 and 10:00 p.m. on June 4, 1984, an armed assailant shot and killed Donald Ball on the parking lot of the Amoco station at Delmar and Goodfellow in St. Louis. (App. 961-63).

2. Two days after the shooting, Sergeant Herb Riley spoke with a street informant, "Tampa Red," who introduced him to Eddie Walker. (App. 970-71). Mr. Walker told police he had seen the shooting at the Amoco station, and he identified Darryl Burton. Police showed him mug shots, and he identified Burton as the shooter. (App. 971). He later identified Burton in a live line-up. (App. 977-78).

3. The first contact police had with Simmons was on the night of the shooting. He did not wait for the arrival of homicide detectives, so police only took his name and contact information. (App. 967). When police interviewed him three days after the shooting, he said he was coming out of the liquor store next to the gas station

when he heard gunshots and ran across the street to the bus stop. He told police he did not see the shooter. (App. 971-72).

4. Simmons only became an eyewitness after he was charged in an unrelated case four days later. (App. 973-74). He then identified Mr. Burton from a group of four mug shots. (App. 974). He later identified Burton in a live line-up. (App. 978-79).

5. Mr. Burton was subsequently charged and convicted of capital murder and armed criminal action in the death of Donald Ball. At the trial, in March 1985, assistant prosecuting attorney Anthony Gonzalez prosecuted Mr. Burton. Dorothy Hirzy represented him at trial and on appeal.

6. After being sentenced by the Circuit Court of the City of St. Louis to life without possibility of parole for 50 years and a consecutive 25 years, Mr. Burton was denied relief in his direct appeal, his state post-conviction action and in his subsequent federal habeas case. *State v. Burton,* 710 S.W.2d 306 (Mo. Ct. App. 1986); *Burton v. State*, 817 S.W.2d 928 (Mo. Ct. App. 1991); *Burton v. Dormire*, 295 F.3d 839, 842 (8th Cir. 2002).

7. The evidence presented against Mr. Burton at trial was scant. There was no physical evidence, and the State presented no evidence of motive. The only evidence tying Mr. Burton to the shooting of Donald Ball was the testimony of Claudex Simmons and Eddie Walker.

8. The testimony of Simmons and Walker was generally weak and fraught with inconsistencies. Both men were repeatedly impeached.

9. Simmons did not tell police he saw anything until he (in his words) "caught a case." He then told police he did not know the shooter, but could identify him from a photograph. He then selected the mug shot of Darryl Burton, a man he *did* know.

10. Other questions arise from Simmons' identification of Burton. Simmons told police the shooter had his hair in "corn rows." The mug shot of Burton taken about two years before the Ball killing, which was shown to Simmons, indeed shows that Burton had "corn row" (braids) at the time the photo was taken. (*See* Exh. 29). However, at the time of the Ball shooting, Burton was wearing his hair in a longer, curlier style called the "jeri curl." Thus, Simmons' description of Burton suggests that he was giving a description based on the photograph and *not* based on what he saw the night of the shooting. Conveniently, at trial, Simmons changed the description, denying that he had described the shooter to police as having "corn rows" and claiming that the shooter had worn his hair in "curls." (Trial Tr. 369). Simmons' shifting story about the shooter's hairstyle raises serious questions about his credibility.

11. Simmons had falsely told police he did not know the shooter. By the time of trial, he changed his story on this point and admitted that he indeed knew Burton and was acquainted with him because they had previously been housed in the same correctional facility together. (Trial Tr. 328, 342-43).

12. Simmons' story also shifted with respect to central facts. Simmons told police he had been exiting the liquor store next to the gas station when he heard the shots and then saw the shooter chasing the victim. (App. 973-74). At trial, however, Simmons gave an entirely different account, stating he had left the liquor store and

was already on the station lot, standing in line to buy cigarettes when he heard the shots. (Trial Tr. 325-26, 334-35, 347, 354-55, 368, 372). Simmons told police that the shooter had worn blue jeans, had stood over the wounded victim before running off and that the shooter put away his gun in his right front shirt pocket. At trial, *Simmons denied making all of these statements.* (Trial Tr. 368-70). He stated that he did not know what the shooter was wearing and never saw him put his gun in his shirt pocket. (Trial Tr. 368-70).

13. Despite these inconsistencies, the State was forced to depend heavily on Simmons at trial. The other eyewitness, Eddie Walker, was impeached even more extensively. Also, Walker testified that he never saw a gun in the shooter's hand. (Trial Tr. 165, 194, 208).

14. Simmons was asked at trial about his criminal convictions. He testified that he had only two convictions, both for stealing over $150. (Trial Tr. 323-24). This testimony was later established to be false. *See* Findings, *infra*. Simmons' testimony on direct examination was as follows:

> Q. [H]ow many times have you actually been convicted?
>
> A. Twice.
>
> Q. Okay. Can you tell the jury what you've been convicted of?
>
> A. Stealing over a hundred fifty.
>
> Q. Okay. And that would be twice?
>
> A. Yes.

15. Simmons also testified that he had one pending case where he was awaiting sentencing for attempted second-degree robbery. He testified that, under the

terms of his plea deal, he would receive a three year sentence if he did not testify against Mr. Burton and would receive a one year sentence if he did. (Trial Tr. 374-75; 323-24). Simmons never admitted he had a second, pending case – this one in St. Louis County, for stealing, third offense. Even if he did not have a "deal" to testify in this case, the case should have been – but was not – disclosed to defense counsel.

16. The other witness who identified Mr. Burton, Eddie Walker, had no criminal history, but was repeatedly impeached on key points that rendered his testimony less than believable.

17. Walker was allegedly standing on the Amoco lot, next to the liquor store, at time of the shooting. However, his name does not appear in the police report as one of the persons present when officers arrived. When police encountered Walker two days after the shooting while they were talking to "Tampa Red," Walker said he saw the shooting. He named Burton as the shooter and selected his photograph. (Trial Tr. 169-70, 173). The police report does not contain any description from Walker of the shooter, however, and Walker testified at his deposition that he did not provide one. (App. 936).

18. Aspects of Walker's testimony are incredible on their face. After telling police he had known the shooter for ten years and had known the victim for "at least ten years," Walker testified at his deposition that he did *not* know Burton at all, but only knew *of* him, and had known *of him* for only one year. (App. 322-23; 930-31; 871; Trial Tr. 209). At trial, Walker reversed course again, stating he had known Burton *by sight* for about ten years and denying his previous statement to police. (Trial Tr. 200, 218). Walker also totally disavowed his previous statement about

knowing Ball for ten years, testifying that he had never even seen Ball before the night of the shooting. (App 317, 925; Trial Tr. 200, 203, 219).

19. Walker's various accounts of the shooting are also wildly inconsistent. Walker had told police that he saw the shooter approach the Amoco station from the south and that he saw the victim drive up and begin to put gas in his car. (App. 970-71). At trial, he denied making these statements to police, claiming he never saw Ball in his car and, in fact, never saw Ball's car at all. (Trial Tr. 188, 196, 201). Walker also denied telling police that he saw the shooter walk onto the lot from the south side of Delmar. He repeatedly testified: "No, I did not tell him that" and "I don't remember saying that." (Trial Tr. 196, 201, 213-14).

20. When asked at trial about the shooter's appearance, Walker could not recall his clothing, whether the shooter had facial hair, or what kind of hairstyle he wore. After saying the shooter wore his hair in corn rows or the "curl," Walker changed his mind and said: "I don't remember." (Trial Tr. 205).

21. Walker's account of the shooter's escape changed every time he stated it. He originally told police he had seen the shooter enter a 1976 blue Buick, and then he later denied he had seen the shooter enter any vehicle at all. (App. 971; Trial Tr. 315-23, 198, 193). Walker also repeatedly changed his story to police about how the shooter fled, and, at trial, combined parts of two previous versions to say the shooter ran toward him (to the east) before turning right, then "circled" and "ran across the street" and ended up "on the lot of the car wash." (Trial Tr. 192-93, 204).

22. The three employee eyewitnesses – Joan Williams, Carolyn Lindsey, and Stacy Lindsey – all testified, but did not identify Burton (or anyone else) because they

had not seen the shooter long enough to remember his facial features. They generally testified as to their descriptions of the shooter, with Carolyn Lindsey and Ms. Williams both describing the shooter's clothing as yellow t-shirt and khaki pants.

23. The State presented no evidence of motive. The jury convicted Mr. Burton solely on the basis of the testimony by Simmons and Walker.[8] Overall, the State's case against Mr. Burton was weak.

24. Subsequent investigation by counsel and investigators on behalf of Mr. Burton establish that Mr. Simmons lied under oath about his criminal history. Mr. Simmons did not have just two convictions for stealing over $150. He had a total of twelve or more convictions – six or seven felonies and at least five misdemeanors.

25. The criminal convictions, summarized in an exhibit by Petitioner and established by certified court records provided during the April 2007 hearing, are as follows:

Date of disposition	Charge	Court
July 1979	Stealing under $150	City of St. Louis
November 1979	Stealing under $50	City of St. Louis
November 1979	Stealing under $50	City of St. Louis
November 1979	Tampering, 2nd degree	City of St. Louis
August 1980	Stealing under $150	City of St. Louis
January 1981	Theft over $150	St. Clair County, Ill.
October 1981	Stealing over $150	St. Louis County
October 1981	Carry concealed weapon	St. Louis County
October 1981	Stealing over $150	St. Louis County
January 1983	Att. Steal. over $150	St. Louis County
March 1983	Stealing over $150	St. Louis County
March 1983	Stealing over $150	St. Louis County

[8] It is interesting to observe that in *House*, the Supreme Court noted the importance of motive evidence in an eyewitness case, observing that "when identity is in question, motive is key." *House*, 126 S. Ct. at 2079.

26. When testifying at the April 2007 evidentiary hearing, prosecutor Gonzalez stated that he did not know about any criminal convictions of Simmons other than the ones that he had disclosed to defense counsel, Dorothy Hirzy. (H. Tr. 294-97; 303). He stated that he generally left it to his investigator to find out about a witness's criminal history, and that if any additional information had been discovered about Simmons by anyone in his office, it was not told to him. (H. Tr. II 300). When asked if Mr. Simmons had lied to him about his criminal history, Mr. Gonzalez said, "Yes." (H. Tr. II at 303).

27. Although Mr. Gonzalez stated he had no further information about Mr. Simmons' criminal history other than the two convictions the State disclosed through Simmons' testimony, a review of Simmons' pending case in the City of St. Louis – the case in which he was charged with attempted second degree robbery and in which he received leniency for his testimony – shows that Simmons was charged as a prior and persistent offender. (App. 1891). The information filed on November 8, 1984, listed four prior felony convictions, one in the City and three in the County:

> On January 31, 1983, defendant pled guilty to the felony of Attempt Stealing Over $150 in the Circuit Court of the City of St. Louis, State of Missouri, and
>
> On March 17, 1983, defendant pled guilty to the felony of Stealing Over $150 in the Circuit Court of St. Louis County, Missouri, and
>
> On March 17, 1983, defendant pled guilty to the felony of Stealing Over $150 in the Circuit Court of St. Louis County, Missouri, and
>
> On October 27, 1981, defendant pled guilty to the felony of Stealing Over $150 in the Circuit Court of St. Louis County, Missouri.

(App. 1891; Information from certified copy of court file in *State v. Simmons*, Case No. 841-1400 (City of St. Louis)).

28. The second degree robbery case against Simmons was being prosecuted by the same prosecutor's office (the City of St. Louis) that was prosecuting Burton, and the robbery case provided the basis for the one year "deal" that secured Simmons' testimony against Burton. Thus, while the St. Louis prosecutor charged Simmons as a prior and persistent offender (with four or more priors) in an Information filed November 8, 1984, no disclosure of these additional convictions occurred during Simmons' February 1985 deposition in Burton's case nor during his March 1985 testimony at Burton's trial. Simmons' false testimony that he had only two prior convictions for stealing went totally unchallenged and left the jury with the impression that Simmons had a minimal criminal history.

29. In addition to the pending charge of attempted second-degree robbery in the City, Simmons also had a pending charge of stealing - third offense in the County. *State v. Simmons*, Case No. 518712. (App. 1916) This pending case was not disclosed to the defense or the jury, and prosecutor Gonzalez testified that he was unaware of it. (H. Tr. 257). A review of the Information in the County case reveals an additional felony conviction for stealing, in 1981, that was not listed in the St. Louis City case. (App. 1916, 1891).

30. Although Mr. Gonzalez does not recall knowing about all of these convictions of Simmons, knowledge of the convictions may be imputed to the State for the purpose of this Court's analysis.

31. The prosecutor who brought the robbery case against Simmons had sufficient knowledge to charge Simmons as a prior and persistent offender. A review of the charges in both pending cases (City and County), would have revealed a total of five prior felony convictions for stealing. Moreover, additional investigation established that, when he testified against Burton, Simmons had a total of six or seven felony convictions and at least five misdemeanor convictions.

32. Simmons lied under oath about his criminal history. Had his lie been exposed at trial, the jury would have likely discredited the entirety of Simmons' testimony.

33. The State disclosed only two of Simmons' twelve criminal convictions. If the State had disclosed Simmons' entire criminal history, the defense would have been able to impeach Simmons by showing he was dishonest – a practiced thief and experienced traveler in the criminal justice system.

34. The central issue at Burton's trial was witness credibility. The failure to disclose the full criminal history of Simmons, who was the prosecution's key witness, caused enormous prejudice to Mr. Burton.

35. Station cashier Joan Williams was working in the booth when Ball was shot. Two other employees, Carolyn Lindsey and her daughter Stacy Lindsey, were present on the lot to buy gas. They all told the police that the shooter was a black male, 20 to 21 years old, 5'5" to 5'6", with a short Afro, and wearing a yellow t-shirt and khaki pants. (App. 965-66). Both Williams and Stacy Lindsey said the shooter had a "thin build." (App. 965-66). Also, Stacy Lindsey said the shooter had a "medium complexion." (App. 965).

36. All three women testified at Burton's trial, with Joan Williams and Carolyn Lindsey repeating the description they gave police. (Trial Tr. 257, 263, 269, 293-94, 297, 301, 312). Because none of the three got a close up view of the suspect, they testified that they were unable to make any identification of the assailant, however. (*Id*.)

37. Joan Williams now resides in Baltimore. She traveled to Jefferson City to testify at the April 2007 hearing. (H. Tr. I 117).

38. This Court observed Ms. Williams' demeanor as she testified. Ms. Williams was a credible witness. She had no motive to lie, and her manner was confident and straightforward. She testified that her memory of the shooting was clear. (H. Tr. I 151).

39. Consistent with her trial testimony, Ms. Williams described the shooter as wearing khaki pants and a yellow shirt. (H. Tr. I 127). She also recalled she had told police the shooter was a black male, 20 to 21 years old, 5'5" to 5'6" tall, with a thin build and short afro. (H. Tr. I 135, 160).

40. Williams testified that she heard shots and saw the shooter and the victim run toward the cashier booth, then behind it. (*Id*.). She lost sight of them at that point. (H. Tr. 127-30).

41. Williams did not see the victim fall, but as the assailant fled across the lot, she saw him run toward Goodfellow. (H. Tr. I at 129-31, 134).

42. While the assailant was running from the lot, Williams got a quick look at his face. (H. Tr. 131-32). She did not see him long enough to note his features, but saw that he was "light skinned" and had a "low haircut." (H. Tr. I at 132; 135).

Williams said the shooter was an African American, "but with just light skin." (H. Tr. I at 133, 153).

42. Williams acknowledged that, in her trial testimony, she stated she had not seen the shooter's face. (H. Tr. I 147). During the evidentiary hearing, she explained that her testimony was correct, she had not seen the shooter's face long enough to notice the features and could not have identified him. (H. Tr. I 154-55). However, she did see him long enough to notice that he was a light-complected African-American. (H. Tr. I at 153, 157).

43. Williams spoke to police the night of the shooting. (H. Tr. I 134-35). She next spoke with authorities at the courthouse, before her testimony. (H. Tr. I 136-37). She believes she spoke to police officers or deputies, but she does not recall who they were. (*Id*.). The law enforcement officers showed her photographs of dark-skinned suspects. (H. Tr. I 136-37, 158). Williams told them that the shooter was "a real light skinned person." (H. Tr. 136, 139, 158). She told them they had the "wrong man." (H. Tr. I 151-52). The officers did not say anything when Williams told them the people in the photographs were too dark to be the man she saw. (H. Tr. I 146). Williams recalled that she went to the courtroom 10 to 15 minutes later and testified. (H. Tr. 139).

44. When Williams was in the courtroom, she noticed that Burton had a big afro. (H. Tr. 140). No one ever asked her whether the person in the courtroom was the man she saw do the shooting. (H. Tr. 140). She did not volunteer the information because, she said "it wasn't my place to just say anything." (H. Tr. 140). Williams testified that, at the time of the trial, she was younger and "wasn't a talker." "I was a

quiet person. If you didn't ask me anything I wasn't going to say anything. But I'm a little older and I'm speaking, you know – back then I wouldn't hardly open my mouth." (H. Tr. I 148).

44. During the hearing, Williams was asked to look at Mr. Burton in the courtroom and describe him. She described him as "dark skinned." (H. Tr. I 138). She testified that Burton was not the man she saw doing the shooting. (H. Tr. I 138). She stated she had "no doubt whatsoever" that Burton was not the assailant. (H. Tr. I 142). If Ms. Williams had been asked this question at trial, she would have given the same testimony then. (H. Tr. I 142).

45. During her testimony, Williams recalled that two of her co-workers had been on the lot that night, buying gas. (H. Tr. 141).

46. The employees purchasing gas were Carolyn Lindsey and Stacy Lindsey (who now has the last name Branch).

47. Carolyn Lindsey testified that she presently lives in a suburb of St. Louis and that in June 1984, she was working at a stationery printing company and also at the Amoco station at Goodfellow and Delmar. (H. Tr. II 48-49). On the night of the shooting, she was on the lot with her daughter, Stacy Lindsey, buying gas. (H. Tr. II 50).

48. As she was sitting in her car, she heard gunshots and saw a man being shot at; he ran past her car then back around the cashier's cage. (H. Tr. II 54). Ms. Lindsey saw the shooter run off the lot in the direction of Goodfellow. (H. Tr. II 55, 57). She did not know where he went after that. (H. Tr. II 65).

49. Consistent with her description to police, Ms. Lindsey recalled that the shooter wore a light-colored or yellow t-shirt and khaki pants. (H. Tr. II 55). She did not see the face of the assailant and could not describe his skin color. (H. Tr. II 62).

50. Stacy Lindsey testified that Branch is her married name and that she presently lived in a suburb of St. Louis. (H. Tr. II 67). In June 1984, she was a part-time cashier at the Amoco station, and, on the night of the shooting, was at the lot with her mother to purchase gas. (H. Tr. II 68).

51. Ms. Lindsey Branch's mother was driving, and their car was pulled up, facing toward the station. (H. Tr. II 69). She noticed a car to her left pull up to a nearby pump. (H. Tr. II 70). She noticed that the man trying to pump gas in that car had a limp arm. (H. Tr. II 70-71). (Mr. Ball's autopsy report noted that Ball had an old gunshot injury to the left arm and that the arm was "deformed due to the absence of a portion of the humerus.") (App. 951).

52. Lindsey Branch heard "pops," then heard her mother yell at her to get back in the car. (H. Tr. II 72-73). She saw one man chasing another; both were running toward the cashier's booth. (H. Tr. II 73). The victim fell over "near the ice machines" and the shooter ran toward Goodfellow. (H. Tr. II 77).

53. Lindsey Branch stated she no longer remembered what the shooter looked like and could not recall his clothing. (H. Tr. II 74, 76).

54. When interviewed by police, Lindsey Branch described the shooter as a black male, 20 to 21 years old, 5'5" to 5'6", with a short Afro, thin build, ***medium skin***, yellow t-shirt and khaki pants. (H. Tr. II 76). She stated that she had no present recollection of giving that description, including the description of "medium" skin

color, but testified that she had no reason to disagree with her interview as documented in the police report. (H. Tr. II 75-76).

55. When asked in the courtroom to describe Mr. Burton's skin tone, Lindsey Branch described him as "dark skinned." (H. Tr. 77).

56. This Court carefully observed all three employee witnesses, Williams, Lindsey and Lindsey Branch. This Court found them highly credible. None had any motive to lie or falsify their account. The demeanor of all three was relaxed and confident. Their original descriptions were strikingly similar, suggesting they were telling the truth on the night of the shooting. Also, all three women were very clear about what they remembered and did not remember, and appeared to be making every effort to truthfully recall what they had seen the night of the shooting.

57. The consistency in the original descriptions given by all three women support a finding that Ms. Williams' observations on the night of the shooting were accurate. Ms. Williams' clear and unequivocal testimony before this Court that she saw the shooter long enough to notice his complexion was credible. Her further testimony that Mr. Burton – whom she described as dark-skinned – was definitely not the "light complected" assailant is also credible. Ms. Williams testified, believably, that she had "no doubt whatsoever" that the shooter was not Burton. This Court finds that a jury would have found Ms. Williams' testimony credible and, further finds that Ms. Williams' testimony would have created reasonable doubt in the mind of any reasonable juror.

IX. CONCLUSIONS OF LAW

A. Cause and Prejudice Finding

Mr. Burton did not raise his *Brady* claim in his direct appeal or in his state post-conviction action. He may be excused from this default, however, because he can establish both "cause" and "prejudice." A factor external to the defense – the State's failure to comply with its obligation to disclose impeachment information, as required by the *Brady* doctrine – constitutes an objective factor, "external to the defense," which "impeded counsel's efforts" to raise the *Brady* claim at an earlier juncture. *See Jaynes*, 63 S.W.3d 210, 215 (Mo. 2002) (quoting *Murray v. Carrier*, 477 U.S. 478, 488 (1986)).

Mr. Burton can also satisfy the "prejudice" prong of the cause-and-prejudice standard. Clearly, the failure to disclose Mr. Simmons' full and extensive criminal history – six or seven felonies and at least five misdemeanors – prevented the defense from effectively attacking his credibility. Because Mr. Simmons was the *key* witness against Mr. Burton, the failure to disclose his criminal history (which would have revealed he was a habitual thief) "worked to the actual and substantial disadvantage" of Mr. Burton and "infect[ed] his entire trial with error of constitutional dimensions." *Jaynes*, 63 S.W.3d at 215-16 (quoting *United States v. Frady*, 456 U.S. 152, 170 (1982)); *see also Brown*, 66 S.W.3d at 726.

The satisfaction of the cause-and-prejudice standard allows Mr. Burton to have his otherwise defaulted *Brady* claim considered on the merits.

B. *Clay* Innocence Standard

In the alternative, this Court concludes that Mr. Burton has satisfied the *Clay* innocence standard. Passing through the *Clay* innocence "gateway" provides an alternative means for Mr. Burton to obtain review on the merits of his *Brady* claim.

A petitioner passes through the "gateway" if he can show that, in light of the new evidence, "it is more likely than not that no reasonable juror would have convicted him." *Clay* 37 S.W.3d at 217. In evaluating a "gateway" innocence claim, a court must consider all of the evidence, whether it is incriminating or exculpatory, and make a "probabilistic determination about what reasonable, properly instructed jurors would do." *House*, 126 S. Ct. at 2077.

Applying this standard, this Court concludes that the evidence of guilt presented at trial was extremely weak. Both Mr. Simmons and Mr. Walker were repeatedly impeached, and the gross inconsistencies in Mr. Walker's account necessarily left Mr. Simmons as the State's primary witness. If Mr. Simmons had been impeached with his entire criminal record (most importantly the six or seven felonies), reasonable jurors would have accorded his testimony little or no weight. Moreover, if the jury had been presented with the exculpatory eyewitness evidence, "it is more likely than not" that reasonable, properly instructed jurors would not have found Mr. Burton guilty. *See House*, 126 S. Ct. at 2077.

Ms. Williams' testimony was clear, credible and powerful. Her original description of the shooter was corroborated in all key respects by the descriptions given the night of the shooting by Carolyn Lindsey and Stacy Lindsey. Ms. Williams' demeanor, her consistent answers, and her lack of any motive to falsify made her testimony in this Court very believable. If the jury had heard her exculpatory testimony excluding Mr. Burton as the assailant, "it is more likely than not" that no reasonable juror would have convicted Mr. Burton. *See House*, 126 S. Ct. at 2077.

Mr. Burton therefore passes through the *Clay* innocence "gateway" – thereby securing an alternative avenue for the review of his *Brady* claim.

C. Mr. Burton's *Brady* Claim

The State has a "broad duty" to disclose exculpatory and impeaching evidence. *Parker*, 198 S.W.3d at 179. It does not matter whether the evidence was withheld intentionally or whether the suppression occurred inadvertently. *Id*. Thus, this Court need not address that question.

What is undisputed, however, is that the defense was not provided with the full and extensive criminal history of Mr. Simmons. That history included not just two convictions for stealing, but a total of six or seven felonies, and five or six misdemeanors. The number and frequency of Mr. Simmons' convictions showed that he was a repeat offender and habitual criminal. The failure to disclose his history allowed the State to portray him as someone with just a minor criminal record when, in fact, he was an experienced criminal who had learned how to "work the system." Moreover, at the time of trial, Mr. Simmons faced sentencing in not just one, but two, pending cases – and was charged in both as a repeat offender.

The criminal history of Claudex Simmons was, in every sense, "material" to this case. He was a key witness, and his credibility was the central issue in the case. Looking at the entire record, one may readily conclude that the failure to disclose this evidence deprived Mr. Burton of a fair trial and resulted in a verdict that was worthy of no confidence. *Kyles*, 514 U.S. at 434.

In *Parker*, the Missouri Court of Appeals, Western District, addressed materiality, stating that evidence is "material" if it would have provided the defendant

with "plausible and persuasive evidence to support his theory of innocence." *Parker*, 198 S.W.3d at 180. In the present case, the impeachment value of Simmons' criminal history was great. Certainly this evidence would have provided Mr. Burton with "plausible and persuasive evidence" of the defendant's innocence.

The failure to disclose Simmons' background rendered Mr. Burton's trial fundamentally unfair. Clearly, the verdict was not worthy of confidence. Mr. Burton is therefore entitled to a new trial. This court grants the requested relief and separately issues a writ of habeas corpus.

So ordered this 18th day of August, 2008.

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Richard G. Callahan
Circuit Court Judge, Division II

IN THE CIRCUIT COURT OF COLE COUNTY, MISSOURI

In re: DARRYL BURTON, Petitioner, v. DAVID DORMIRE, Superintendent, Jefferson City Correctional Center, Respondent.	)))))))))))	Case No. 06AC-CC00312

WRIT OF HABEAS CORPUS

THE STATE OF MISSOURI TO:

SUPERINTENDENT
Jefferson City Correctional Center
8200 No More Victims Road
Jefferson City, Missouri 65101

The Court having determined that Petitioner is entitled to relief on his Petition for Writ of Habeas Corpus, as ordered in this Court's Findings of Fact and Conclusions of Law and Judgment entered on this 18th day of August, 2008, you are hereby commanded to release from your custody Darryl Burton, inmate number 153063, within fifteen days from this date unless the St. Louis Circuit Attorney requests that Mr. Burton be returned to her jurisdiction for retrial, in which case Mr. Burton should be transferred to the custody of the St. Louis City Sheriff pending final resolution of the charges against him.

_____
Richard G. Callahan
Circuit Court Judge, Division II

copies to: Ms. Cheryl A. Pilate, Attorney for Petitioner
Mr. Michael Spillane, Attorney for Respondent
St. Louis Circuit Attorney