

IN THE SUPREME COURT OF MISSOURI

STATE OF MISSOURI	)	
<i>ex rel.</i>	)	
KEVIN STRICKLAND,	)	
	)	
Petitioner,	)	
v.	)	
	)	Case No. SC99096
CHRIS BREWER,	)	
Warden, Western Missouri	)	
Correctional Center	)	
	)	
Respondent.	)	

**AMICUS CURIAE SUGGESTIONS IN SUPPORT OF PETITION FOR A WRIT
OF HABEAS CORPUS**

Comes now Jackson County Prosecuting Attorney as *amicus curiae* and makes the following suggestions in support of Petitioner Kevin Strickland’s Petition for a Writ of Habeas Corpus.

STATEMENT OF INTEREST OF AMICUS CURIAE

The Jackson County Prosecuting Attorney’s Office (“Prosecuting Attorney”, or “Office”) represents the state of Missouri in state-level criminal offenses occurring in Jackson County. The Office is led by Jean Peters Baker, who was re-elected in November 2020 after having served two terms. The Office is bound by ethical and professional obligations to ensure that the laws of Missouri are upheld and justice is served. Among those duties is a clear charge to protect the innocent: “When a prosecutor knows of clear and convincing evidence establishing that a defendant in the prosecutor’s jurisdiction was

convicted of an offense that the defendant did not commit, the prosecutor shall seek to remedy the conviction.” Model Rules of Prof’l Conduct R. 3.8 (h) (1983).

The Prosecuting Attorney prosecuted Petitioner in the 16th Circuit Court of Jackson County, Missouri in *State v. Kevin Strickland* CR79-0361, which is the basis for the underlying Petition. Petitioner was convicted of capital murder and sentenced to life without eligibility for parole for 50 years, pursuant to § 565.008.1, RSMo (1978) (repealed 1984) a punishment available in Missouri statutes for only six years. Petitioner has served 43 years of his sentence. After a thorough, independent investigation as well as consultation with all relevant law enforcement partners, the Office has clear and convincing evidence that Mr. Strickland is actually innocent. The Prosecuting Attorney now seeks to fulfill its ethical duties by imploring this Court to set aside Mr. Strickland’s conviction.

SUGGESTIONS IN SUPPORT

A prosecutor’s interest “that justice shall be done” is nowhere more pronounced than in the case of Petitioner Kevin Strickland. *Berger v. United States*, 295 U.S. 78, 88 (1935). The Prosecuting Attorney has clear and convincing evidence that Mr. Strickland was wrongfully convicted in her jurisdiction and, in accordance with her ethical obligations, seeks to remedy the conviction. See Model Rules, 3.8 (h). Petitioner was found guilty on the testimony of Cynthia Douglas who later determined she made a grave mistake. Douglas’ credible recantation places Petitioner in the “rare circumstance” of Joseph Amrine where “no credible evidence remains from the . . . trial to support the conviction.” *State ex rel. Joseph Amrine v. Roper* 102 S.W. 3d 541, 548 (Mo., 2003). Similarly, “the resulting lack of any remaining direct evidence of . . . guilt” is sufficient to meet the clear

and convincing evidence standard. *Id.*, at 544. Because the identification, recantation and corroboration happened over a course of years, and because the Petitioner was acting largely *pro se*, no Court has reviewed the evidence in its entirety.

The prosecutor's duties in this matter extend beyond her procedural remedies. But her obligation "to seek justice within the bounds of the law" forms the basis of this *amicus curiae*. ABA Crim. Justice Standards for the Prosecution Function R. 3-1.2 (b). ("The primary duty of the prosecutor is to seek justice within the bounds of the law, not merely to convict.")

The Prosecuting Attorney Cannot Stand By Strickland's Conviction

The tragedy of this case is matched only by its believability. In 1979 Petitioner Kevin Strickland was convicted of one count of capital murder and two counts of second-degree murder on the testimony of Cynthia Douglas. Ms. Douglas was the sole surviving victim of a heinous crime and her identification was the only direct evidence against Petitioner. As early as 1979 Douglas realized she was mistaken in her identification of Strickland and informed multiple parties. In 2009 Douglas made a formal request to the Midwest Innocence Project stating she had made a mistake and asking for help. The Jackson County Prosecuting Attorney's Office was made aware of Douglas' recantation in November 2020, when counsel for Petitioner contacted the Deputy Prosecuting Attorney to request consent for additional fingerprint testing. After learning more about Petitioner's case, the Deputy not only consented to the testing but also opened an investigation with the

Office's Conviction Integrity Unit ("CIU")¹. The full contents of that investigation are attached to this pleading and constitute the substance of the Prosecuting Attorney's extraordinary decision to file an *amicus* in this matter. *Kevin Strickland Conviction Review*, Attachment A.

The central question in the investigation was the weight of Douglas' recantation and whether the Office could stand behind Strickland's conviction without it. There is no evidence Douglas was encouraged or influenced by anyone to recant. No allegation has been made that Douglas stood to receive any benefit from recanting. Moreover, the credibility of Douglas' recantation is closely related to the reliability of her initial identification.

Eyewitness identification is frequently crucial evidence but can also be fallible without sufficient safeguards. *See, e.g., Perry v. New Hampshire*, 565 U.S. 228, 249-250 (2012) (Sotomayor, J., dissenting) ("This Court has long recognized that eyewitness identifications' unique confluence of features—their unreliability, susceptibility to suggestion, powerful impact on the jury, and resistance to the ordinary tests of the adversarial process—can undermine the fairness of a trial."). An analysis of the first 250 DNA exonerations found that 76% of those exonerations involved misidentifications while 36% involved multiple eyewitnesses who were wrong. Brandon L. Garrett, *Convicting the Innocent: Where Criminal Prosecutions Go Wrong*, 8-10, 50 (2011).

¹ The Prosecuting Attorney established a Conviction Integrity Unit in 2017 to thoroughly and systematically review credible wrongful conviction claims.

A misidentification in any case does not infer a misidentification in every case. But their existence impels prosecutors and courts alike to heed caution. In *Perry v. New Hampshire*, the Supreme Court addressed the issue of eyewitness identification, noting both its “importance” and “fallibility.” *Perry*, 565 U.S. at 245. While the Court declined to extend the protections of identifications made with suggestive state influence to those without improper state conduct, the Court underlined the safeguards necessary to ensure that identifications were reliable. Among them were instructions that educated the jury about factors which undermine the reliability of an identification. *Id.* at 246. To address the concerns raised in *Perry*, Missouri adopted jury instructions in 2015 which inform the jury of factors “that bear on the likelihood of misidentification.” *Id.* at 423 (internal quotation and citation omitted). They include “any intoxication,” “whether the witness was affected by any stress or other distraction or event . . . such as the presence of a weapon,” “length of time the witness had to observe the person in question,” and “the passage of time between the witness’s exposure . . . and identification of the defendant,” among other factors of reliability. MAI 310.02 (2016). *Perry*, and the Missouri Approved Instructions that followed, guide the Prosecuting Attorney’s assessment of eyewitness identification in every case and informed the assessment of Douglas’ identification of Strickland.

At the time of the crime Douglas was under the influence of marijuana and cognac, and she stated she only got ‘a glance’ of the perpetrator. The assailants shot Douglas and murdered her friends in front of her, an event of unimaginable stress. The evening of the crime Douglas named two of the perpetrators -- Vincent Bell and Kilm Adkins -- whom

she knew. She named Strickland the following day after discussion with others. The circumstances of Douglas' initial identification of Strickland raise grave reliability concerns given the Court's guidance in *Perry* and Missouri's attendant jury instructions.

Douglas' claim she made a mistake is corroborated by three of the known culprits who each have stated consistently over four decades that Petitioner was not present. Co-defendants Vincent Bell and Kilm Adkins pled guilty and were sentenced to 20 years, each of them serving less than 10 years. Bell and Adkins, each of whom admitted their own guilt, affirmatively denied Strickland's involvement. A third, uncharged co-conspirator told an investigator in 2019 that Petitioner was not involved. Att. at 3.

Douglas' claim of mistaken identification is not controverted by any other known evidence. She simply was the only direct evidence of Strickland's guilt; the case rested almost entirely on her identification.

In addition to making a credibility assessment of the recantation, the CIU closely examined the circumstantial evidence in Strickland's case: the shotgun shells, his fingerprints in Bell's car, and his disrespectful comments to law enforcement. None of these tend to prove Strickland's guilt in the absence of direct evidence. Indeed, Strickland and his co-defendants never denied that they were associated. They lived in the same neighborhood, had family connections and spent time together on the day of the homicides. Strickland admitted to having driven Bell's car and to giving Bell shotgun shells weeks earlier. Strickland was forthcoming about these facts, as well as his previous police contacts. We have no indication that Strickland lied to law enforcement.

Evidence is clear and convincing when it “instantly tilts the scales in the affirmative when weighed against the evidence in opposition, and the fact finder’s mind is left with an abiding conviction that the evidence is true.” *Amrine*, 102 S.W.3d at 548 (quoting *In re T.S.*, 925 S.W.2d 486, 488 (Mo.App.E.D. 1996)). Taken individually, the problems with the initial identification, the corroborating co-defendant statements, and the recantation are troubling. Taken in totality -- and in the balance against no other direct evidence -- they constitute clear and convincing evidence that Kevin Strickland is actually innocent. *See Id.* at 544 (“In light of the resulting lack of any remaining direct evidence of Amrine’s guilt from the first trial, Amrine has already met the clear and convincing evidence standard ...”).

While Petitioner and Amrine were both convicted of murder solely on eyewitness testimony, Amrine was sentenced to death and Strickland received a “Hard 50,” pursuant to § 565.008.1, RSMo (1978) (repealed 1984). Petitioner’s sentence was available in Missouri from 1978-1984 and was mandatory on a capital murder charge when the state did not seek the death penalty. *Id.* The statute required 50 years of confinement before an individual was eligible for parole on a life sentence. In *Amrine*, this Court surmised that it is “difficult to imagine a *more* manifestly unjust and unconstitutional result than permitting the execution of an innocent person.” *Amrine*, 102 S.W.3d at 547 (emphasis added). But when faced with Petitioner’s case it is not difficult to imagine another manifestly unjust and unconstitutional result: the continued confinement for 50 years of an innocent person.

The Prosecuting Attorney is an Officer of Court

The Prosecuting Attorney knows firsthand the competence and integrity of our state law enforcement partners and the Missouri courts. Accordingly, a critical part of the CIU investigation was working with those partners to incorporate their knowledge, experience, and sense of justice in Petitioner's case. In contacting partners the Office provided our findings, as well as key portions of Petitioner's file, and invited guidance on how to proceed. The CIU presented Petitioner's file to the United States Attorney's Office for the Western District of Missouri, members of the Board of Police Commissioners, the Mayor of Kansas City, and the Presiding Judge of the 16th Circuit Court of Jackson County, Missouri. The Office also contacted the former prosecutors and investigator who worked on behalf of the state of Missouri in obtaining and defending Strickland's conviction. None of these entities or individuals saw grounds on which to object to the credibility of Douglas' recantation and each recognized Douglas' centrality to the conviction of Kevin Strickland. Att. A at 3-4, 20. Nearly all went as far as to unambiguously affirm that Strickland's conviction should be set aside. *Id.*

While there is no dispute regarding a prosecutor's obligations, there are considerable limitations on her procedural remedies. This Court held in *State v. Lamar Johnson* that the Prosecuting Attorney's power to initiate further proceedings ends with the disposition of the criminal case in the trial court. 617 S.W.3d 439, 441 (2021) (The role of the local prosecutor "appearing on behalf of the State ceased as soon as the circuit court entered final judgment and Johnson appealed.") Members of this Court have suggested other possible independent actions in equity, but none of those are readily available and they would result in years of litigation at the expense of assessing the merits of Petitioner's

claim. *Id.* at 445 (Draper, J. concurring). The Office sincerely seeks to remedy the intolerable wrong it helped create in *State v. Kevin Strickland*, and to do so expediently within the settled procedural landscape. Remaining silent or reflexively defending our conviction would be not only an abdication of duty, but a delegitimization of the system we uphold every day.

CONCLUSION

Because clear and convincing evidence establishes that Petitioner is actually innocent and because his continued confinement for 50 years constitutes a manifest injustice, *Amicus* prays this Court examine the evidence in the Petition, issue the Writ of Habeas Corpus discharging Petitioner from his conviction and sentence, and grants such further relief as the Court deems equitable and just.

Respectfully submitted,

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Jackson County Prosecutor

/s/ Kate E. Brubacher

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CERTIFICATE OF COMPLIANCE

I hereby certify that these suggestions will be electronically served by the e-filing system on all participants in this case on this 10th day of May.

/s/ Kate E. Brubacher

Kate E. Brubacher