



provided credible testimony that none of the witnesses at the scene of the shooting could have identified the assailant. Mr. Wilson’s testimony provides corroborating evidence to buttress the recantations of [trial witnesses] Mr. Stepp and Mr. Davis. Coupled with the evidence in the record that Petitioner had an alibi, this Court does not believe that any jury would now convict Christopher Dunn under these facts.

Order, *State ex rel. Dunn v. Bowersox*, 17TE-CC00059, at 19 (22<sup>nd</sup> Cir. Ct. Mo, Sept. 23, 2020) (Hickle, J.) (*See Exhibit A, Order & Judgment*).

Yet while Judge Hickle found that Christopher Dunn (“Dunn”) is innocent of the murder of Ricco Rogers, Judge Hickle was unable to overturn Dunn’s unjust conviction because Rule 91 habeas corpus jurisprudence inexplicably limits freestanding innocence claims only to those cases in which the death penalty has been imposed. (*See Ex. A at 16-17*) (“Unless *Lincoln* is overruled or another division of our appellate court decides differently, controlling precedent would appear to limit freestanding claims of actual innocence to capital punishment cases.”), citing *State ex rel. Lincoln v. Cassady*, 511 S.W.3d 11 (Mo. App. W.D. 2016). This Court is not so constrained. Section 547.031, RSMo. authorizes this Court to do what Judge Hickle could not and set aside a judgment where it finds—as Judge Hickle outlines—clear and convincing evidence of actual innocence undermining its confidence in the judgment.

No evidence remains to support Dunn’s conviction. *See e.g., State ex rel. Amrine v. Roper*, 102 S.W.3d 541, 548 (Mo. 2003) (“This case thus presents the rare circumstance in which no credible evidence remains from the first trial to support the conviction.”). The Missouri Supreme Court has previously held that “under these rare circumstances, there is

clear and convincing evidence of [a defendant's] innocence. As such, confidence in his conviction and sentence are so undermined that they cannot stand and must be set aside.” *Id.* at 548-49. The same result is compelled here.

Dunn was convicted and sentenced to life without parole for the murder of Ricco Rogers (“Rogers”) based solely on the eyewitness testimony of then fifteen-year-old DeMorris Stepp (“Stepp”) and twelve-year-old Michael Davis, (“Davis”) who testified at trial that Dunn was the person who shot Rogers on the night of May 18, 1990. That testimony is now known to be false. Stepp and Davis have since recanted their testimony under oath and admitted that they lied when they identified Dunn as the perpetrator. These recantations are corroborated by the sworn affidavit and hearing testimony of an independent eyewitness, as well as other evidence. (*See* Exhibit B, Eugene Wilson Affidavit; Exhibit C, Nicole Bailey Affidavit; Exhibit D, Rule 91 Hearing Transcript).

Presented with this evidence and Judge Hickle’s ruling, the Circuit Attorney is now in possession of clear and convincing evidence of Dunn’s actual innocence that significantly undermines any confidence in his conviction. Pursuant to her duty to ensure that “justice is done,” *State v. Long*, 684 S.W.2d 361, 365 (Mo. App. 1984), quoting *Berger v. United States*, 295 U.S. 78, 88 (1935), the Circuit Attorney now moves this Court to vacate Christopher Dunn’s unjust conviction and end his decades of wrongful incarceration.

## VENUE

Section 547.031(1) provides that venue is appropriate “in the jurisdiction in which a person was convicted of an offense.” Because Dunn was convicted in the Circuit Court of the City of St. Louis, this Court is the appropriate venue for this motion.

## STANDARD OF REVIEW

Upon a Motion by the Prosecuting Attorney, §547.031(3) authorizes this Court to set aside a judgment where it finds clear and convincing evidence of actual innocence that undermines its confidence in the judgment. 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.

To determine actual innocence, §547.031(3) requires that the Court consider (1) all evidence presented at the original trial, (2) any additional evidence presented in direct appeals or post-conviction proceedings, and (3) any and all information and evidence presented at a hearing on this motion. §547.031(3), RSMo.

## FACTUAL BACKGROUND

On the night of May 18, 1990, 14-year-old DeMorris Stepp, 12-year-old Michael Davis, and 15-year-old Ricco Rogers sat on the porch of Marvin Tolliver’s house at 5607 Labadie Ave, when Rogers was shot and killed. At trial, Stepp testified he saw Dunn standing in the gangway of the house next door just a few minutes before he heard shots

ring out.<sup>1</sup> The three boys tried to run away, but Rogers was killed as he tried to escape. Stepp and Davis both testified that Dunn was the person who fired the fatal shots.

The State's case at trial was based entirely on the eyewitness testimony of Stepp and Davis. No physical evidence linked Dunn to the murder. Based solely upon the testimony of the two boys, on July 18, 1991, a jury convicted Christopher Dunn for the murder of Ricco Rogers as well as of two counts of assault in the first degree and three counts of armed criminal action arising out of the same occurrence. Dunn was sentenced to life without parole for the murder and received consecutive sentences of ninety years for the other charges. For more than 30 years, Dunn has never wavered in his claims of innocence.

### **I. Postconviction Appeals**

After his conviction, Dunn filed a timely notice of appeal and a timely Rule 29.15 Motion, which raised, among other claims, ineffective assistance of counsel for failure to present Dunn's alibi defense. At a brief evidentiary hearing<sup>2</sup> in support of that motion, Dunn testified that he informed his trial counsel of numerous witnesses who could testify as to his location on the night of the crime, but those witnesses were never contacted. Two such witnesses, Martha Dunn and Arnetta Dunn, testified at the 29.15 hearing. Martha, Dunn's mother, and Arnetta, his sister, both testified that Dunn was home with them at the time of the crime. (Exhibit I, 29.15 Hearing Transcript at 10-20). They had been watching

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<sup>1</sup> Police reports initially indicate that neither Stepp nor Davis saw the perpetrator prior to the shooting; they only say they saw the perpetrator as the shots were being fired. It was only during the course of their interviews with Detective Gary Stittum that the children changed their stories, stating that they saw the person who killed Rogers before the shots began.

<sup>2</sup> The hearing transcript spans just 34 pages. (Ex. I).

television together, when Dunn got on the phone around midnight to speak with Nicole, a friend of his who had just given birth the day before. (Ex. I at 12, 17). They were on the phone for about 30 minutes. Dunn's trial counsel also testified and admitted to several failures, including that she did not speak to a number of exculpatory witnesses and that she failed to use an audiotape to impeach Stepp with his prior inconsistent statements about the location of the perpetrator before the shooting and the location of Stepp himself when the shooting took place. (*Id.* at 23, 29-31). Despite this evidence, the Missouri Court of Appeals, Eastern District affirmed Dunn's convictions and the denial of his post-conviction motion, finding counsel's omissions could be justified as trial strategy. *State v. Dunn*, 889 S.W.2d 65 (Mo. App. E.D. 1994).

Dunn continued to fight his conviction through every process available. In 1997, Dunn unsuccessfully pursued federal habeas corpus relief, which was denied in 2000, *see* Memorandum and Order, *Dunn v. Dormire*, Case. No. 4:97CV0331 (MLM), E.D.Mo (Mar. 27, 2000). Dunn continued. On February 15, 2017, Dunn filed a Rule 91 petition for habeas corpus in the Circuit Court of Texas County. *See State ex rel. Dunn v. Bowersox*, 17TE-CC00059 (22<sup>nd</sup> Cir. Ct. Mo, Feb. 15, 2017). At an evidentiary hearing in 2018, Judge Hickle heard the recantations of Stepp and Davis, along with the testimony of Eugene Wilson, Curtis Stewart, and Nicole Bailey. Eugene Wilson ("Wilson") was an independent eyewitness to the shooting; he was present on the porch when the crime occurred. Wilson signed a sworn affidavit and testified before Judge Hickle that Stepp and Davis could not have possibly seen Dunn shoot Rogers because it was too dark that night and, more importantly, Dunn was not the person who killed Rogers. (Ex. B; Ex. D). Curtis Stewart

(“Stewart”) testified that while incarcerated with Stepp, he heard Stepp admit that Stepp did not know who shot Rogers and intended to lie at Dunn’s trial. (Ex. D at 48-54). Nicole Bailey (“Bailey”) provided alibi testimony for Dunn that was corroborated by both medical records and a TV Guide. (*Id.* at 56-63). Based upon this evidence, Judge Hickle found that no reasonable juror would convict Dunn when presented with these facts. (Ex. A at 19). Dunn was ultimately denied relief because in Missouri, actual innocence is only cognizable in cases where the defendant was sentenced to death, while Dunn had been sentenced to life without parole. (Ex. A at 16-17), citing *Lincoln*, 511 S.W.3d at 11.

## **II. New Evidence**

### ***A. The State’s Eyewitnesses Recant***

Over a decade after testifying against Dunn, DeMorris Stepp recanted his trial testimony in 2005 and signed a sworn affidavit admitting he committed perjury when he identified Dunn as the person he saw shoot and kill Rogers. (*See* Exhibit E, DeMorris Stepp Affidavit). In his affidavit, Stepp admitted that it was too dark on the night of May 18 to see who shot Rogers; he could not have identified anyone (*Id.*). But police and prosecutors pressured Stepp to falsely identify Dunn. (*Id.*). Stepp was further coerced into testifying against Dunn when the State offered Stepp a guarantee of probation, as opposed to jail time, for his serious pending felony charges. (*Id.*). Stepp continues to maintain that his testimony against Dunn was false, again recanting his statement to police and trial testimony under oath in open court at the 2018 evidentiary hearing in Texas County. (Ex. D at 5-47).

Stepp's recantation is corroborated by the testimony of Curtis Stewart, who was incarcerated with Stepp in the St. Louis City workhouse prior to Dunn's trial. Stewart testified during Rule 91 proceedings that he overheard Stepp tell someone on a phone call that Stepp did not know who shot Rogers. (*See* Ex. D at 48-54). Stepp's recantation is also corroborated by the timing and testimony of Stepp at his plea hearing in 1991. After Dunn's Rule 91 evidentiary hearing, the record was reopened to admit a transcript from Stepp's 1991 guilty pleas. (*See* Exhibit F, DeMorris Stepp Guilty Plea Transcript). The transcript confirms that Stepp understood he was receiving a deal from the prosecution for his pending criminal charges in exchange for his testimony against Dunn:

THE COURT:       And in agreement for your testifying in the case I'm presently trying, the State has dismissed the Armed Criminal Action, and recommended fifteen (15) years, is that correct?

DEFENDANT:       Yes, sir, it is.

(*Id.* at 3).<sup>3</sup> As a result of that agreement, the State recommended concurrent sentences of fifteen years for a pending robbery charge, one year on a pending weapons charge, and one year on a pending tampering charge—a far cry from the potential 30 year or life sentence Stepp was facing on the robbery charge alone, and an additional seven or five years on the remaining charges, respectively. (*Id.* at 4). Stepp's counsel further argued, contrary to the pre-sentence investigation report, that Stepp should receive probation because Stepp was

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<sup>3</sup> The timing of Stepp's plea is also relevant: The transcript reveals that Stepp pleaded guilty before Judge Michael Calvin (the same judge presiding over Dunn's trial) on the same day that he testified against Dunn—July 17, 1991. (Ex. D).



only 15 years old and because his testimony was “instrumental” in obtaining Dunn’s conviction. (*Id.* at 9). Remarkably, the prosecutor did not offer any counter arguments to the defense’s request nor did the State ask the court to follow the original plea deal. (*Id.*). As a result, Judge Calvin sentenced Stepp to three years probation and suspended the imposition of the sentences on all three charges without asking for the State’s recommendation; the assistant prosecutor remained silent until after Stepp’s sentence of probation was imposed. (*Id.* at 14).

Like Stepp, Michael Davis also recanted his testimony against Dunn in a sworn affidavit and under oath. (*See* Exhibit G, Michael Davis Affidavit). Davis’s affidavit, like the affidavit of Stepp, indicates that he committed perjury when he identified Dunn as the person who shot Rogers because it was too dark to see the shooter from his location on the porch that night. (*Id.*). He also provided his reason to lie: At the time of the trial, Stepp and Davis were members of the Bloods gang. Davis and Stepp decided to testify against Dunn because they believed Dunn was a member of the rival Crips gang in their neighborhood. (*Id.*).<sup>4</sup>

Like Stepp, Davis was also pressured to identify Dunn as the person who killed Rogers. Davis’s mother had moved Davis to California just a few weeks after the shooting. However, he was brought back to Missouri by prosecutors to offer testimony against Dunn at the 1991 trial. (*Id.* at 2). During the police interviews, Davis was hesitant about whether he could identify Dunn as the person who shot Rogers. (*Id.* ). But when he hesitated, police

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<sup>4</sup> No motive was ever established for the crime, and no gang involvement was mentioned during the trial.

showed the boy gruesome photos of Rogers' corpse, and pressured him, asking "Are you gonna let them do this to your friend?" (*Id.* at 3). Police also arranged to have Rogers' mother call Davis, who through tears pushed him to testify and get rid of this "monster." (*Id.*). Just 12 years old, in the face of all this pressure, Davis was convinced to appear in court and identify Dunn as the shooter. (*Id.*).

***B. Independent Eyewitness and Forensic Evidence Corroborates Davis's and Stepp's Recantations***

Another witness, Eugene Wilson, was also present on the porch the night that Rogers was shot and killed. Wilson (aka Geno) signed a sworn affidavit and later testified under oath at the 2018 hearing. (Ex. D). In his affidavit, Wilson stated that while he, Stepp, Davis, and Rogers were sitting on the porch, they heard several gunshots from the front of the house to the west. (*Id.*). It was too dark outside to see who was firing the shots. (*Id.*). When they heard the gunfire, everyone but Rogers ran away; Rogers had been shot. (*Id.*).

Wilson indicated that Dunn's name was mentioned among the group as a potential shooter shortly after the shots were fired. (*Id.*). According to Wilson, many of the young kids in the neighborhood did not like Dunn, who was in a rival gang to theirs. (*Id.*). But the suggestion of Dunn's name was merely speculation as it was too dark for anyone to see the shooter on the night of the crime. And Wilson is certain that none of the boys could have positively identified anyone because of where they were positioned during the time of the shooting. (*Id.*). When Wilson was told about Davis's and Stepp's testimony, he stated that neither of the two could have seen the shooter and he therefore believes the testimony of Davis and Stepp is false. (*Id.*).

Judge Hickle found Wilson's testimony at the 2018 hearing to be credible. (*See* Ex. A at 11-12). Moreover, Wilson's testimony was corroborated by the medical examiner at trial, who testified that the trajectory of the bullet that was found in the skull of Rogers went from back to front. This trajectory supports Eugene Wilson's testimony that Rogers, Stepp, and Davis were facing *away* from the shooter and therefore could not have identified the perpetrator. (Exhibit J, Trial Transcript at 172 ; Ex. D.).

***C. Additional Independent Evidence Supports Dunn's Innocence***

Catherine Jackson ("Jackson") and Nicole Bailey ("Bailey"), who are not related to Dunn, have provided sworn affidavits regarding Dunn's alibi, further supporting Dunn's innocence. (*See* Exhibit H, Catherine Jackson Affidavit; Ex. C). Jackson and Dunn were friends, and she and Dunn spoke frequently on the phone. (Exhibit H). Jackson stated that on the night of the crime, she spoke with Dunn on the phone, starting sometime between 10:00 and 11:00 p.m. and lasting between thirty and sixty minutes. (*Id.*). Jackson recalls Dunn was acting normal and happy on the phone and that he did not give off any indication that he had been involved in an altercation or dispute. (*Id.*).<sup>5</sup>

Nicole Bailey also testified at the 2018 evidentiary hearing that she, like Jackson, spoke on the phone with Dunn the night that Rogers was shot. (Ex. C; Ex. D). The phone call was memorable to Bailey because it occurred while she was in the hospital the night after giving birth to her first child. Bailey is certain that the call happened on the night Rogers was killed because she tried to call Dunn again that night and was told by Dunn's

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<sup>5</sup> Jackson did not testify for Dunn at trial because her mother was opposed to her participating. (*Id.*).

sister that the police had come to Dunn's residence in connection to the killing of Rogers. (*Id.*). Bailey's hearing testimony was corroborated by medical records (Ex. D at 58), a TV Guide (*id.* at 60), and the testimony of Martha and Arnetta Dunn (Ex. I).

### **DISCUSSION**

The Circuit Attorney has concluded that Christopher Dunn is innocent of first-degree murder, assault in the first degree and three counts of armed criminal in the death of Ricco Rogers. § 547.031(3), RSMo. And she is not alone. When presented with the same evidence, Judge Hickle found that Dunn's innocence is corroborated by the evidence presented, and that "[no] jury would now convict Christopher Dunn under these facts." (Ex. A at 19).

### **COUNT I – ACTUAL INNOCENCE**

The State's case against Dunn relied on the eyewitness testimony of Stepp and Davis, but both of these witnesses have recanted. Their recantations are supported by the testimony of Eugene Wilson, and of alibi witnesses who account for Dunn's location on the night of the crime. No physical evidence has ever implicated Dunn in the crimes for which he was convicted. No evidence remains to support his conviction.

With the retraction of the identification testimony that was the lynchpin of Dunn's conviction, Dunn's case is indistinguishable from Joseph Amrine's, in which the Missouri Supreme Court held:

This case thus presents the rare circumstance in which no credible evidence remains from the first trial to support the conviction. This Court...determines based on this record that

under these rare circumstances, there is clear and convincing evidence of Amrine's innocence. As such, confidence in his conviction and sentence are so undermined that they cannot stand and must be set aside.

*Amrine*, 102 S.W.3d at 548-49. For the same reasons, justice demands that Dunn's conviction and sentences be set aside.

In *Amrine*, the Missouri Supreme Court recognized a freestanding claim of actual innocence where no credible evidence remained to convict the defendant. *Id.* at 543-44. In that case, the defendant was convicted of murdering an inmate at Jefferson City Correctional based solely on the testimony of three fellow inmates. At trial, Amrine presented evidence of his own innocence, including evidence that one of the State's witnesses committed the crime and alibi evidence from six witnesses that Amrine was playing poker in a different part of the room at the time. *Id.* at 544. The jury nonetheless found Amrine guilty, and he was sentenced to death. *Id.*

In the course of Amrine's state and federal appeals, all three State's witnesses recanted. *Id.* at 544-45. Amrine petitioned the Missouri Supreme Court for habeas corpus relief, and the Court granted the writ on the basis of Amrine's innocence, finding that the incarceration of an innocent person sentenced to death is a manifest injustice. *Id.* at 545. With the recantation of all identification testimony, the Court held that "[i]n light of the resulting lack of any remaining direct evidence of Amrine's guilt... Amrine has already met the clear and convincing evidence standard." *Id.* at 544.

The Court explained that its "confidence in the outcome of the first trial is sufficiently undermined by the recantation of all the key witnesses against him in the first

trial to require setting aside his conviction and sentence of death.” *Id.* In particular, 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.” *Id.* at 548, quoting *In re T.S.*, 925 S.W.2d 486, 488 (Mo. Ct. App. E.D. 1996). Under this standard, evidence supporting the conviction must be viewed and reassessed in light of all the evidence now available. *Id.*

The evidence of Dunn’s innocence is clear and convincing. The only two witnesses to the crime have now recanted their identifications. These recantations are corroborated by the credible testimony from Eugene Wilson that none of them could have seen the perpetrator—it was too dark, and they were facing the wrong direction. Wilson’s testimony is supported by the autopsy and ballistic evidence that show that the shots came from behind the boys’ position on the porch. Dunn also had an alibi: he was home, watching TV with his family and on the phone with his friend Nicole, who had given birth the day before. Multiple witnesses corroborate his alibi and their testimony is supported by medical records and a TV guide.

Considered in their totality and balanced against the lack of any physical or direct evidence of Dunn’s guilt, this evidence constitutes clear and convincing evidence that Christopher Dunn 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....”). Where, as here, “no credible evidence remains from the[]trial to support the conviction,” there is clear and convincing evidence of Dunn’s

actual innocence. *Id.* at 548–49. As such, this Court should find that the confidence in Dunn’s convictions is so undermined that they cannot stand and must be set aside.

### **CONCLUSION**

Christopher Dunn has spent thirty-three years of his life incarcerated for a crime he did not commit. The State of Missouri respectfully asks this Court end this injustice and to set aside the verdict in the above-captioned case. Because clear and convincing evidence establishes that Christopher Dunn is actually innocent and that he should not remain in custody a day longer, the State prays this Court to expeditiously set a hearing on this matter, examine the evidence, set aside Christopher Dunn’s judgment, and grant any further relief as the Court deems equitable and just.

Respectfully Submitted,

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