IN THE
SUPREME COURT OF MISSOURI



**STATE EX REL. REGINALD CLEMONS,**

Petitioner,

vs. No. SC90197

**STEVE LARKINS,**

Respondent.

# FINAL REPORT OF THE SPECIAL MASTER TO THE SUPREME COURT OF MISSOURI

## Introduction

The murders on the Chain of Rocks Bridge resulted in three trials and three death sentences. Of the three death sentences, one was carried out, one was commuted, and the third -- the one leading to my involvement in Reginald Clemons' case -- remains to be resolved 22 years after the murders, and counting. Since my appointment as Special Master a little over four years ago, I have learned it is impossible to focus just on the isolated facts raised by Clemons' *habeas corpus* Petition. To comprehend this case, one must understand the evidence of the horrific events of April 5, 1991, and the investigation they triggered.

Although there were three separate trials in the cases arising out of the Chain of Rocks murders, and three different opinions handed down by this Court, State v. Gray, 887 S.W.2d 369 (Mo *en banc.* 1994), *cert. den.*, 514 U.S. 1042 (1997); State v. Clemons, 946 S.W.2d 206 (Mo. *en banc.*), *cert. den.,* 522 U.S. 968 (1997); State v. Richardson, 923 S.W.2d 301 (Mo. *en banc.*), *cert. den.*, 519 U.S. 972 (1996), the description of the facts elicited at trial in each opinion was necessarily truncated, since evidence admitted at one trial would often not be admissible in the other two. Additionally, in the interests of brevity, this Court undoubtedly did not include facts in its original opinions that were not necessary to resolve the criminal cases, but which may have a bearing on issues in the *habeas corpus* claim. Moreover, since the most recent decision was handed down 16 years ago, no one who was on this Court then, is on the Court now. For that

reason I will attempt to present a more comprehensive review of the events of April 4 and 5, 1991, and the investigation that followed, than has previously appeared in the opinions handed down in the 1990s.

To that end I heard three days of evidence last September in St. Louis. It became apparent that much of the evidence I heard would not make sense without a review of the record in the original criminal case, necessitating acquisition of a great deal of material, including the trial transcript of the Clemons criminal case (consisting of 15 volumes with 3,661 pages); the transcript of the Clemons Post-Conviction Relief Hearing (another eight volumes with 1,480 pages); the Legal File in the Clemons direct appeal (573 pages); and the Legal File in the Clemons Rule 29.15 appeal (1,402 pages). As I read more of the original Clemons trial and the later post-conviction proceedings, it became evident that I needed to look at materials from the two companion cases, so I requested the transcript of the Marlin Gray trial (2,741 pages); the Gray Rule 29.15 hearing transcript (a mere 65 pages); the transcript of the Antonio Richardson trial (11 volumes with 2,274 pages); various police reports; witness statements; IAD statements; court orders and filings; and appellate briefs. (The parties and the Clerk of the Supreme Court have been very helpful in obtaining records that were, in some cases, over two decades old.)

I have not read all of these documents; until my retirement last week, I have kept my day job of presiding over a combined civil, criminal, and family law docket that requires my attention, and time did not allow me to look at everything. For example, since jury selection is not something I view as within the scope of the *habeas corpus* Petition, I did not read the first 1,264 pages of the Clemons trial transcript, but I did read the other 2,400 pages, some more carefully than others. The same thing is true of the transcripts of the Gray and Richardson trials. I also have reviewed the transcript of the evidence I heard last September. It is safe to say that some of the documents I reviewed were not admitted at the Clemons or other trials or at the *habeas corpus* hearing, but they were submitted to me by the parties and provide valuable context in figuring out how this case got to where it is. For example, the Appellant's Brief of Marlin Gray (kindly retrieved by the Clerk's Office of the Supreme Court from some dusty archive) gives an excellent description of the crime scene; I borrow liberally from that source in this Report. Petitioner submitted a large binder of materials before the September 2013 hearing as part of a Background Memorandum submitted to me in March of 2010, that included police

Incident Reports that I found very useful in filling in some of the gaps in this case, especially relating to the course of the investigation of the Chain of Rocks Murders.

So that the record is as clear as it can be, I may refer to the following documents with abbreviations as noted:

Clemons Trial Transcript: "(T.__)."

Clemons Rule 29.15 Transcript: "(29.15 T.__).

Clemons Trial Exhibits: "(Ex.__)."

Clemons Direct Appeal Legal File: "(29.15 L.F.__)."

Clemons Appellant's Brief: "(App. Brief__)."

Clemons Petition for Writ of *Habeas Corpus*: "(HC Petition___)."

Clemons Exhibits to Petition for Writ of Habeas Corpus: "(HC Pet. Ex.___)."

Clemons *Habeas Corpus* Background Memorandum Exhibits: "(Background Ex.___)."

Clemons *Habeas Corpus* Transcript: "(H.C.T.__)."

Clemons *Habeas Corpus* Hearing Exhibits: "(H.C.Ex.__)."

Gray Trial Transcript: "(Gray T.__)."

Gray Suppression Hearing Transcript: "(Gray Supp. T.__)."

Gray Rule 29.15 Transcript: "(Gray 29.15 T.___)."

Gray Appellant's Brief: "(Gray App. Brief__)."

Richardson Trial Transcript: "(Richardson T.__)."

Richardson Appellant's Brief: "(Richardson App. Brief__)."

I would be remiss if I did not acknowledge the excellent lawyers on both sides of this case who made my task much easier. Some of the lawyers participating in the current proceeding have been working on the Chain of Rocks Bridge Murders for well over a decade (Mark Arnold goes back at least 17 years in this case), and they have been patient with my fumbling and my never-ending request for more information. They have been zealous advocates for their respective positions, while maintaining the kind of professional collegiality one expects from exemplary attorneys.

## Dramatis Personae

Seven people directly experienced the life-altering events of April 5, 1991. Five were men; two were women; four were Caucasian; three were African-American. They ranged in age from 15 to 23 years; three were 19 years old. Their educational achievements varied from high school dropouts to Honors Students in college. It may be helpful for this Court to know something about the background of the people present on the Chain of Rocks Bridge at 1:00 a.m. on April 5, 1991.

### Julie Kerry[1]

Julie Kerry was 20 years old when she went to the Chain of Rocks Bridge late on April 4, 1991. She was the second of four daughters born to Dr. Richard Kerry and Virginia Kerry. Julie attended the University of Missouri at St. Louis ("UMSL"), where she was an Honors Student with a 4.0 grade point average. She was majoring in literature, and in that regard she was the Assistant Poetry Editor for UMSL's literary journal.

Julie was approximately 5' 1" tall and weighed 110 pounds (Gray T. 1045). On April 4, 1991, she owned a gold Seiko watch, which she was wearing that night (T. 1529).

Julie was socially conscious, having worked on the Clean Air Act for the Missouri Public Interest Research Group. She also served as a tutor for the Salvation Army Family Haven Shelter, helping disadvantaged children. She was active as an organizer for the Voter Registration Campaign and worked to help the homeless. She volunteered to raise money for the St. Louis Food Bank while working two jobs, in addition to going to school.

In August of 1989, when she was an idealistic 18 year old, Julie and her best friend, Holly McClain, painted a poem on the Chain of Rocks Bridge entitled, "Do the Right Thing," about promoting racial harmony (T. 3365).[2] Ironically, this poem would play a major part in bringing the parties together on April 5, 1991, but not in the way the poets intended.

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[1] This description of Julie Kerry comes from testimony elicited during the penalty phase of the Clemons trial, commencing at page 3,349 of the transcript. I will refer to Julie Kerry as "Julie" hereafter so as to avoid confusion with her sister, Robin Kerry; the same will be true with Robin. No disrespect is intended to either.

## Robin Kerry[3]

At 19, Robin Kerry was a year younger than her sister, Julie. Like her older sister, Robin was a very bright young woman, receiving a full four year scholarship to UMSL. She was also an Honors Student at UMSL, studying linguistics. Like Julie, she tutored disadvantaged children. She worked a number of different jobs, starting when she was 15, while attending college and high school.

Robin was the same height as her sister, 5' 1," and weighed 97 pounds (T. 1527).

Victim impact evidence at the trials established that both sisters were beloved by family and friends. Although much is in controversy surrounding the events of April 5, 1991, there was no dispute that the loss of these fine young women was a profound and senseless tragedy.

## Thomas Cummins[4]

Thomas Cummins was also 19 years old in April of 1991; his date of birth was November 2, 1971. He lived with his parents, Gene and Marilyn Cummins, in Gaithersburg, Maryland, a suburb of Washington, D.C. Cummins graduated from high school and the fire academy before going to work for Montgomery County Fire and Rescue as a career firefighter (Gray T. 1151).

Cummins' father, Gene Cummins was an engineer, a retired naval officer, a Deacon in the Catholic Church, and the Chaplain of the same fire department where Thomas Cummins worked. He was the brother of Virginia Kerry, the mother of Julie and Robin Kerry, making them Thomas Cummins' cousins.

Cummins was 5' 10" tall and weighed 210 pounds on April 5, 1991 (HC Ex 8).

## Marlin Gray

Marlin Gray was certainly the most loquacious of the four men eventually prosecuted for the Chain of Rocks murders. He was also the oldest person on the Bridge that night; he was born on September 29, 1967, making him 23 years of age on April 5, 1991. Gray was the largest of the four people accused of killing the Kerry sisters: he weighed 200 pounds and stood 6' 4" tall.

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[2] Presumably, the poem was inspired by the Spike Lee film, *Do the Right Thing*, that premiered in the summer of 1989.

[3] Information about Robin in taken from T. 3349, *et seq.* and Gray T. 2565-2566.

[4] For reasons that I cannot explain, Tom Cummins' last name is misspelled "Cummings" in the Clemons transcript. It is spelled correctly everywhere else.

Gray was originally from St. Louis, but he moved to Wentzville where he lived with his girlfriend, Eva Altadonna, in a house belonging to the grandparents of one of his friends, Dennis Doyle. Gray seemed to depend on acquaintances in Wentzville to support him, including a man named Joe Troncale, also known as "The Flamester."[5] Gray used the washing machine at Troncale's house to wash his clothes.

Gray testified at his trial that he was an accomplished singer and choreographer. A review of his trial transcript reveals an articulate, bright young man who probably had strong narcissistic tendencies. When not singing or choreographing, he worked nights at a gas station in Wentzville until he reported that the station was robbed. When a police detective in Wentzville went to Gray's residence to interview him about the robbery, Gray let him in and the police had reason to believe Gray pocketed the money and falsely claimed it was taken in a robbery. The detective ending up arresting Gray for stealing, but he was more impressed by the opportunity to sign up Gray as a low-level informant about the Wentzville drug trade than he was in getting a conviction for the theft. Thus, did Marlin Gray enter the glamorous lifestyle of undercover operative in the War on Drugs.

In testimony at his trial, Gray talked about his work as a member of the "MEG," the local drug task force. He described doing various "operations" for them, passing on information about the drug trade in St. Charles County (Gray T. 2177-2178). He insinuated that he was running a covert operation in St. Louis on April 4, 1991, when (he claimed) the MEG gave him "authorization" to work there (Gray T. 2176).

The police had a different view of Gray's activities. They described a low-level snitch who had to set up three drug buys to "work off" criminal liability for the gas station caper (Gray T. 2390-2391, 2400-2401). According to one of the MEG officers handling Gray, he was never authorized to operate in St. Louis (Gray T. 2390). At best, Gray's career as an undercover operative was not a resounding success; he frequently failed to show up for buys (Gray T. 2404). Perhaps this was due to an excessive fondness for the substances he had been enlisted to combat.

**Reginald Clemons**

Along with Robin Kerry and Tom Cummins, Reginald Clemons was also 19 years old

[5] Troncale's real name is a matter of some dispute. Marlin Gray called him John and Joe Troncale, but said his nickname was "The Flamester" (Gray T. 2179). Daniel Winfrey called him Joe (Gray T. 1667). To add to the confusion, when The Flamester testified at the Clemons trial, he said his name was *Robert* Troncale (T. 2294).

on April 5, 1991, born on August 30, 1971. Of the four suspects, he was the second biggest, at six feet tall, weighing 165 pounds. He was also the most enigmatic.

Clemons was the youngest of seven children born to Vera Thomas. His father was Roosevelt Clemons and is described in various records as a paranoid schizophrenic who used to beat his wife and children. He and Clemons' mother divorced when Reginald Clemons was very young. Subsequently, Ms. Thomas married Reynolds Thomas. Mr. Thomas eventually became pastor of a church in St. Louis.

Because his parents worked long hours, Clemons' up-bringing was left to older siblings. Clemons had trouble in school, apparently because of ADHD and a learning disability. As a result, he repeated the second and seventh grades. He ended up attending a special school with indifferent success.

Despite these problems, Clemons appears to have been bright. His overall IQ in one test was 120. He was described by some as very shy, but he was also described as being a "lady's man" who dated a large number of young women. Cedric Richardson, called by Clemons as a witness at his Rule 29.15 hearing, testified that in the six years before the murders, he frequently visited Clemons' home, and a lot of other people would come over, mostly females (29.15 T. 740). Cedric Richardson testified that Clemons dated many young women and that, "Reginald was quiet, except when it come to talking to females, that's the only thing he would do." (29.15 T. 748-749.)

At the hearing on the 29.15 Motion, his attorneys presented evidence that Clemons had a "dependent personality disorder" which made it unlikely he would lead others. On the other hand, Cummins told the police shortly after the incident on the Bridge that Clemons appeared to be the person in charge (Background Ex. 2 at SLPD 00029; Richardson T. 1587).

At the time of the Chain of Rocks Murders, Clemons lived with his mother and step-father at 6616 Barken in Northwoods, Missouri. He worked for Imo's Pizza, delivering pizzas. As part of his job, he used a large, black flashlight, commonly known as a "kel-light," to find addresses on houses at night. That flashlight would be a critical part of the evidence at all three trials.

In April of 1991 Clemons had a distinctive hairstyle, shown on one of the photographs (Ex. 107), taken after he was arrested:

*Marlin Gray booking photo, taken April 8, 1991*

**Antonio Richardson**

Antonio Richardson was born on September 30, 1974; he was only 16 years old at the time of the murders. The police reports show that he was 5'5" tall on the night of the murders and weighed 140 pounds.

Richardson had a difficult childhood. He was the oldest of three sons raised by a single mother who abused drugs. When Richardson was 12 years old, she would disappear periodically, leaving him in charge of his younger brothers, sometimes as long as five days at a time (Richardson T. 2131, 2140, 2144-2145).

As a result, the Division of Family Services got involved with his family when Richardson was 13. DFS had him tested for intelligence; his IQ was 70 (Richardson T. 2164). Eventually, he dropped out of high school and enrolled in Job Corps (Richardson T. 2177). He was in Job Corps at the time of the murders.

At his criminal trial the State disputed that Richardson's IQ was as low as DFS testing suggested (Richardson T. 2199). At Richardson's PCR hearing he presented additional IQ evidence suggesting that he "functioned within a mildly retarded range of intellectual functioning." (Richardson App. Brief at 16.) The State presented its own expert who disputed this finding, but even he acknowledged Richardson had "borderline intellectual functioning, at a level below 96 percent of the population." (Richardson App. Brief at 16.)

Richardson was convicted of one count of Murder in the First Degree and one Count of Murder in the Second Degree, the most successful outcome of any of the Chain of Rocks defendants who went to trial. Nonetheless, when the jury could not agree on the appropriate sentence for the First Degree Murder count, the trial judge imposed the death penalty. That sentence was upheld by this Court in State v. Richardson, *supra.*

However, Richardson was the beneficiary of the 2002 United States Supreme Court decision in Ring v. Arizona, 536 U.S. 584, in which the Court held that a jury rather than a judge has to decide the eligibility of a capital defendant for the death penalty. Since the jury could not agree that Richardson should be executed, in Case No. 76059 this Court entered an Order on October 28, 2003, vacating Richardson's death penalty and commuting his sentence to life in prison without the possibility of parole (popularly called "LWOP").[6]

**Daniel Winfrey**

At 5'5" and 120 pounds, Daniel Winfrey was the smallest of the perpetrators of the Chain of Rocks Bridge Murders. He was also the only Caucasian defendant and the youngest; born on September 3, 1975, he was only 15 years old when he went to the Chain of Rocks Bridge on April 4, 1991, after an evening of drinking.

One might reasonably wonder why Winfrey was out at midnight on a school night. In April of 1991 he was a student at Wentzville High School, living in an apartment with his father next door to Troncale (T. 2004). About a week or two before the murders, he met Marlin Gray through The Flamester (Gray T. 1667).

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[6] Even if the Court had not commuted his sentence on that basis, it is doubtful Richardson would have been executed after this Court's decision in State ex. rel. Simmons v. Roper, 112 S.W.3d 397 (Mo. *en banc.* 2003), holding that imposition of the death penalty for a defendant convicted of a murder he committed when he was less than 18 years of age would be unconstitutional. Simmons' holding was affirmed in Roper v. Simmons, 543 U.S. 551 (2005). Simmons likely would have precluded execution of Richardson since he was only 16 when he participated in the murders on the Chain of Rocks Bridge, In re Sparks, 657 F.3d 258, 262 (5th Cir. 2011).

Along with his co-defendants, Winfrey was indicted on June 21, 1991, for two counts of Murder in the First Degree, two counts of Forcible Rape, one count of Robbery in the First Degree, three counts of Felonious Restraint, and one count of Assault in the First Degree (L.F. 562-564). Although all four defendants were charged in the same case, on February 21, 1992, on the motion of Marlin Gray, Judge Mummert ordered that they be tried separately (L.F. 508; Gray Supp. T. 2-3).

Winfrey copped a plea shortly before the beginning of the Gray trial in 1992. Under Missouri law he never could have been executed because he was only 15 years old at the time of the murders, and R.S.Mo §565.020.2 (1990 Cum. Supp.), provided that persons under the age of 16 were not eligible for the death penalty. He was initially offered a plea bargain that would have resulted in LWOP. That was not much of an offer since it was the maximum penalty he could have ever received. The deal his attorney eventually worked out was that he would plead guilty to two counts of Murder in the Second Degree, two counts of Forcible Rape, and one count of Robbery in the First Degree (Gray T. 1665). Under the terms of Winfrey's plea agreement, after the last of the Chain of Rocks cases went to trial, he would be sentenced with the understanding that he would receive no more than 30 years in prison (Gray T. 1717). This plea was conditioned on his truthful testimony at the three trials of his co-defendants.

At the Gray trial in 1992, Winfrey testified that he hoped to get out of prison in six years (*Ibid.*). In reality, he would not be released from prison until 2007, having spent 16 years (and all of his adult life) behind bars. He was a 15 year old boy when he was first incarcerated; he left prison as a 31 year old man. As will be seen, he earned every day of his sentence.

**The Scene**

The Appellant's Brief filed by Marlin Gray contains an excellent description of the Chain of Rocks Bridge from which much of the following narrative is derived, some of it verbatim (Gray App. Brief at 3-4). Information is supplemented by the 5/21/91 Incident Report prepared by the St. Louis Police Department (H.C. Pet. Ex. E; Background Ex. 2 at SLPD 00022).

The Chain of Rocks Bridge crosses the Mississippi River at the northernmost tip of the City of St. Louis. It was completed in 1929 and became part of the famous "Route 66." Abandoned but not destroyed in 1968 when a modern highway bridge for Interstate 270 opened just to its north, it is an engineering monstrosity with a massive girdered superstructure, paved

deck only twenty feet wide, and a sharp bend towards the middle. It is just under a mile long. The Bridge derives its name from its location, at a point where the river bed is relatively shallow and altered by a low-water dam. Just south of it are, successively, the St. Louis City Waterworks complex, a boat dock, and a railroad track on the Missouri side of the river. In the river below the Waterworks is Mosenthien Island (Gray T. 1057-1069, 1073-1075, 1081-1086, 1956, 1966).

The bend in the Bridge is one of its more unusual characteristics, since one would expect that engineers, even in 1929, knew that the shortest distance between two points is a straight line. It was explained on the National Park Service webpage as follows:

> Riverboat men protested the planned bridge because it was to run near two water intake towers for the Chain of Rocks pumping station. Navigating the bridge piers and the towers at the same time, the river captains argued, would be extremely treacherous for vessels and barges. Besides, the initial straight line would have put the bridge over a section of the river where the bedrock was insufficient to support the weight of the piers. Either way, the bridge had to bend.

http://www.nps.gov/nr/travel/route66/chain_of_rocks_bridge_illinois_missouri.html.

The structure of the bridge is supported by a series of massive concrete piers. These piers rise out of the riverbed to support the structure of the bridge. The top of the piers measure 30 feet north to south (perpendicular to the surface of the Bridge) and 15 feet east to west. At each of these piers there are manholes in the southern side of the pavement on the surface of the bridge, allowing access to the span's metal substructure and the piers themselves. By 1991, the manhole covers had disappeared.

Below each manhole is a small steel platform suspended from the surface of the Bridge by steel rods. The platform involved in this case was seven feet east to west (parallel to the direction of the bridge) and five feet north to south. It was suspended about five feet below the surface of the Bridge. About three feet above the platform and two feet below the manhole was an "I" beam. Since it was five feet from the manhole to the platform, one gained access to the platform from the manhole by first stepping onto the "I" beam and then dropping onto the platform. The east end of the platform is about three feet above the concrete pier, so it is possible to step down from the platform to the pier (Gray T. 1418).

Earthen mounds six to twelve feet high, at the entrances to the bridge deck, blocked vehicular traffic from accessing the bridge, but only a chainlink fence near the adjacent Riverview Boulevard restricted pedestrians from exploring the area for their amusement. The

bridge became a gathering place for many young people in the St. Louis area, who cut a hole in the fence and frequently went out on the deck by night to party in ways their parents may not have approved, printing graffiti and climbing on the girders and substructure (Gray T. 1791-1794, 1798, 1812-1815.) Gray testified that on weekend nights, it was not uncommon for 100 young people to congregate on the bridge.

**The Events of April 4 and 5, 1991**

Shortly before 2:00 in the morning on April 5, 1991, Eugene Shipley was driving a truck south on Riverview Drive near the entrance to the St. Louis Waterworks when he saw a young white man step onto the road to flag him down. That young man, whom he described as scared, wet, and crying, was Thomas Cummins. Shipley observed that Cummins' hair was wet and messed up (T. 1588, 1591, Gray T. 1522-1523). Cummins said he needed help, that his cousins had been raped, and that he had been thrown off the bridge. Shipley told Cummins to stay at the entrance to the Waterworks while Shipley summoned assistance. Shipley drove to a local McDonald's and called the police.

At 2:01 a.m. Patrol Officers Samuel Brooks and Don Sanders of the St. Louis Metropolitan Police Department were dispatched to the scene; they arrived at 2:08 a.m. Upon arriving, Cummins told the patrol officers a more detailed version of what he told Shipley. Officer Brooks observed that Cummins was wet, and because it was cold, his teeth were chattering. His clothes were muddy and wet; his hair was messed up (T. 2368; Gray T. 1031). Brooks and his partner put Cummins in the back of their police car to warm up.

At 2:30 a.m. Detective Sgt. Daniel Nichols of the Homicide Unit was contacted by the two patrol officers' supervisor, Lt. Michael Blanks. Blanks related to Nichols what the patrol officers told him about what Cummins had told the patrol officers and, among other things, that although Cummins' clothing was wet, "his hair appeared to be dry and neatly combed." (SLPD Incident Report of 5/21/91, Background Ex. 2 at SLPD 00018.)

For reasons that will be apparent later, the condition of Cummins' hair became a matter of great concern in the course of the investigation of what happened on the Chain of Rocks Bridge, since it would seem to contradict his claim that he had jumped in the river. No witness ever testified under oath at any of the three trials that Cummins' hair was "neatly combed," and Off. Brooks denied that he ever told anyone that it was (Gray T. 1032), but Nichols' description

of what he thought Lt. Blanks said he thought Brooks and Sanders said would be just the first of many false leads in this case.

The alarm went out after Cummins told his story. An ambulance was called as well as a helicopter, an underwater recovery team, the United States Coast Guard, the St. Louis Fire Department Rescue and Marine Squads, and other agencies, all desperately searching for the Kerry sisters. Sergeant Nichols and Det. Raymond Ghrist arrived at the scene at about 3:05 a.m. (T. 2618). Cummins was still in Off. Brooks' patrol car at the time (T. 2618). Nichols and Ghrist moved Cummins to an ambulance present at the scene, where he was provided with blankets and a yellow firefighter's jacket. The Incident Report dated 5/21/91, relates that at that time Cummins' hair appeared to be "dry and neatly combed." (Background Ex. 2 at SLPD 00025.) (By this time Cummins had been out of the water for about an hour and a half, so his hair may well have been dry.) However, that description was disputed by Det. Ghrist, who testified that Cummins' hair did *not* appear neatly combed (T. 2620). Indeed, he later testified at trial that the hair looked as was shown in Exhibit 203, a picture taken by a local TV crew while Cummins was in the back of the ambulance:

**Cummins' Initial Statements to the Police**

When Cummins was first contacted by Brooks and Sanders a little after 2:00 a.m., he told them briefly what happened to him. It does not appear that the patrol officers wrote down what was said, but they did relate what they recalled to Lt. Blanks, who (as was noted earlier) passed on the information to Sgt. Nichols. Nichols' third-hand version appears in the 5/21/91 Incident Report (Background Ex. 2, SLPD 00018-19). After that initial contact, Det. Ghrist and Sgt. Nichols conducted their own interview of Cummins in the back of the ambulance, starting sometime after 3:00 a.m. The interview in the ambulance was not recorded, but the detectives' impressions of what Cummins said is also part of the 5/21/91 Incident Report (Background Ex. 2 at SLPD 00025-29). Subsequently, at about 5:00 a.m. Cummins' father, Gene Cummins, arrived at the Waterworks with dry clothing. When it got light enough to see, Cummins and police officers went out on the Bridge, where Cummins showed them the location of various events that had taken place earlier that morning, including a manhole involved in the incident. Finally at 7:40 a.m. they left the Bridge and went to the Detective Division at the headquarters of the St. Louis Police Department. Cummins was placed in Interview Room #2, and at 9:02 a.m. he gave the first of two recorded statements to the police. This statement was taken by Det. Ghrist and Det. Gary Stittum and lasted until 10:30 a.m. (Ex. 236). The second recorded statement was conducted by Det. Richard Trevor and Det. John Walsh and lasted from 11:25 a.m. until 12:40 p.m. (Ex. 237). By the time the latter statement was concluded, Cummins had been awake continuously since 8:00 a.m. on April 4, 1991, or nearly 28 hours (T. 1921).

The accounts related by Cummins to the police from 2:00 a.m., when he first talked to Off. Brooks, until 12:40 p.m., when the second taped interview concluded, were remarkably consistent, especially in light of Cummins' lack of sleep and the extreme trauma he had experienced. It was also consistent in all major details with what he said at the three trials of the Chain of Rocks defendants.

Cummins told police that he was a firefighter in Montgomery County, Maryland. He was in St. Louis County, visiting his grandfather for about a week before April 5. His cousins, Julie and Robin Kerry, also lived in St. Louis County. The preceding summer Julie and Cummins had both been visiting family in Florida, and they became very close, although they were not

romantically involved. Cummins and Julie had done a lot of tourist things in St. Louis during his week in town. Julie wanted to take Cummins to the Chain of Rock Bridge to show him the poem that she and Holly McClain had painted on the deck of the Bridge, but for various reasons, they were unable to do that before Thursday, April 4, 1991.

Cummins and his family planned to leave for Maryland early on Friday, April 5. The Kerry sisters and their mother came to have dinner at the house of Cummins' grandfather Thursday evening, and Julie suggested that Cummins go out with her one more time. Cummins' parents said he could not go since they were leaving early the next morning. Nonetheless, Cummins and Julie later agreed by telephone that he would sneak out after everyone went to bed and meet her up the street from his grandfather's home.

At 11:35 p.m. on Thursday night, Julie and Robin picked up Cummins in Julie's car, a 10 year old Chevrolet Chevette. Cummins got in the right front passenger seat; Robin got in the back; Julie was driving. One of the girls suggested they go to the Bridge, and Cummins agreed, although he was not enamored by the idea.

They arrived at the Bridge at around midnight. Julie parked her car on the west side of Riverview Drive, and the three got out. Although there was a chainlink fence blocking access to the Bridge, the sisters knew of a hole that they were able to go through. There was a half moon that night, but it did not provide a great deal of illumination, so they could not see very far down the Bridge, but there was enough light that Cummins was able to see the manholes on the surface of the Bridge. When they first got there, the Bridge was deserted.

As they headed east on the Bridge, near the bend they saw a group of four men coming from the Illinois side. Cummins suggested getting out of there, but the Kerry sisters disagreed. (For ease of reference, the Kerry sisters and Cummins may be referred to collectively as the "group of cousins," and the four young men they encountered on the Bridge will be referred to as the "group of four.")

When the group of four got closer, Cummins was able to see their faces clearly. He saw that three of them were black, and one was white. The two groups exchanged pleasantries, and Cummins observed that the tallest black man talked the most; Cummins later identified him as Marlon Gray (T. 1730). The second tallest black man did not say much, but he had a distinctive "puff" of hair in the back of his head; Cummins thought that this individual looked like he was the oldest of the four (Background Ex. 2 at SLPD 00029; T. 1831-1832; Richardson T. 1564-

1565).[7] Cummins later identified this man as Reginald Clemons (T. 1731). He later identified the shortest and youngest black male as Antonio Richardson (T. 1726-1727). The young white male was later identified as Daniel Winfrey (T. 1726). (While Cummins later learned the names of the group of four, he did not recall their names when he spoke to police after the crimes.) There is no indication that the Kerry sisters recognized Clemons, and no one testified that Clemons acknowledged them. Indeed, Clemons kept quiet for the most part (T. 1676). (This was uncharacteristic of Clemons because he was usually very talkative around young women, 29.15 T. 748-749.)

During this time Gray told the group that he was "high." He said it was neat to go down through the manholes with "your woman," and to demonstrate, he climbed over the railing on the north side of the Bridge and down the steel frame to the concrete pier below, and then up through the manhole.

The four were very friendly, assuaging any concerns Cummins had. Gray mentioned that he was from Wentzville, which stuck out in Cummins' memory because he had visited a relative in Wentzville the day before. One of the four said they were on their way to a nightclub, and others asked for cigarettes. Julie and Robin gave them Marlboros and Salems. They told the sisters and Cummins that there was really good graffiti farther east on the bridge. Everyone shook hands, and the two groups started to go their separate ways. As they parted, one of the group of four mentioned that they were looking for a black flashlight they had misplaced on the Bridge (Gray T. 1161). (It later turned out this was Clemons, H.C.T. 352.) Cummins estimated the encounter with the group of men lasted about "ten minutes or so." (Richardson T. 1507.)

Cummins and the sisters continued on toward the Illinois side and got to the point were the Bridge extended over land. They saw a campfire and people on the shore. At that point they heard footsteps and saw people approaching from the west. Cummins was afraid it was the police and that they would get in trouble for being on the Bridge. He was relieved to see that it was the same four guys they seen earlier. The youngest of the black men yelled at the people on the shore.

Cummins told the police that his best estimate was that it was about 1:00 a.m. at this point (Ex. 236 at 31).

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[7] That was a mistaken belief by Cummins. In fact, Marlin Gray was 23 and Clemons was 19 (Background Ex. 25 at SLPD 00119-120), but of course Cummins could only go by his impressions.

The three cousins started walking back to Missouri. Two of the group of four walked ahead of them; two walked behind, effectively surrounding them. At the bend, Julie said to Cummins, "I don't like this." Shortly after they passed the bend, Marlin Gray grabbed Cummins and said he needed to talk to him. He walked him back to the east and said, "Man, this is not your lucky day, you're in trouble. This is a robbery." (Ex. 236 at 34.) Although he did not display a weapon, Gray told Cummins he had a gun (*Ibid.*; Ex. 237 at 26). Gray told Cummins to lie facedown on the surface of the bridge, spread-eagled, and he said that "if you look anywhere but straight down, if you move your head or move your body, I'll kill you." (Ex. 236 at 36; Ex. 237 at 26.) Cummins did as he was told (Ex. 237 at 26).

He could not see much at that point; Cummins heard Robin scream once, but not again (Background Ex. 2 at SLPD 00026). Julie screamed a number of times, begging the men not to hurt her *(Ibid.*; Ex. 236 at 37). Cummins believed that for a while Gray continued to stand guard over him while the other three assaulted the Kerry sisters. Eventually, Gray left and other members of the group took his place watching Cummins (Ex. 236 at 38). He heard one of the men say, "I ain't never had the pleasure of poppin' somebody." (*Ibid.*) He was unsure of who said this, but he did not believe it was Gray (*Ibid.* at 39).

Cummins heard Julie continue to scream and he could hear sounds of struggle. He heard one of the men tell one of the sisters to take off her pants or he was going to throw her off the bridge. He also asked whether she wanted to die; she said no. The man began a countdown and then stopped. After that, all Cummins heard was sobbing (Ex. 236 at 40). He continued to look straight down.

At some point another man came to Cummins and sat on the small of his back. Winfrey later identified this man as Clemons. He asked Cummins if he had any money; Cummins gave him around $20. He also pulled out the keys to his grandfather's house and put them on the pavement (Ex. 236 at 41-42), and he gave Clemons his Swatch watch (Background Ex. 2 at SLPD 00027).

Clemons eventually removed Cummins' wallet from his hip pocket. When he opened it, he saw a badge and "freaked." (Background Ex. 2 at SLPD 00027.) Winfrey testified that Clemons asked Cummins if he was a police officer, and said, "Don't lie to me motherfucker." (T. 2044.) Cummins told Clemons that he was not a cop, but a firefighter (*Ibid.*). Later, Clemons returned the wallet to Cummins, but threw the badge in the river. Cummins also had a condom in

his wallet that was missing after the wallet was returned (Ex. 236 at 44-45). (He had the condom in his wallet for around six months before this evening.)

As Cummins lay there, various people approached him. One man rubbed something along his head and said it was Cummins' driver's license and that if he told anyone what happened, "I know where you live, I know who you are, and I'll come get you." (Ex. 236 at 47.) At about this time Cummins was told to get up and keep his head down. He was walked some distance down the Bridge toward the Missouri side, where he was forced to lie face down again (*Ibid.* at 48). Someone checked out his shoes and his coat and told him he was a rich, fat boy and that he was going to die. At about this time someone pulled Cummins' coat collar up over his head; he believed he was about to be executed (*Ibid.*). A man came up and said he liked Cummins and was going to let him live. Another man came over and said to the first, "Man, I'm gonna kill him." At that point, the two men argued about whether Cummins would live or die (Ex. 236 at 47-48). Cummins later told police, "I really thought I was gonna die. I didn't know what they were gonna do but, you know, I was really scared." (Ex. 237 at 30.)

During this ordeal, Winfrey asked Cummins if things like this happen in D.C.; when Cummins said not to him, Winfrey said, "Well, you're in St. Louis now." According to Cummins, Winfrey also told Cummins he was lucky that "none of them were faggots or they probably would have gotten a piece of me, too." (Ex. 236 at 49.)

A few minutes later the second tallest man, the man Cummins mistakenly believed to be the oldest of the group, the man with a "puff" of hair in the back, the man who appeared to be in charge of the group (Background Ex. 2 at SLPD 00029; Richardson T. 1587), the man Cummins later identified as Reginald Clemons, approached Cummins and used his foot to press Cummins' face into the concrete and said, "I fucked your girl. How does that make you feel?" Cummins replied, "She's not my girl. She is my cousin." (Ex. 236 at 50; Background Ex. 2 at SLPD 00029.) Clemons then told Cummins to get up and keep his head down. He walked him over to the manhole and had him sit on the edge (Ex. 236 at 51). Cummins could see the I-beam below the opening. Clemons told him to get down there, and Cummins complied (*Ibid.*).

Once he went through the manhole, Cummins could see the Kerry sisters lying on their backs, next to each other on the steel platform. So far as he could tell, they were silent, not crying or saying anything (*Ibid.* at 52).

Cummins was told to lie face down to the left of Robin (*Ibid.*). (Since she was lying on her back, this was Robin's right side.) Because the platform was not very large, Cummins' right arm was touching Robin's right side. Julie was on the other side of Robin. Other than his cousins, Cummins did not see anyone else on the platform when he went through the manhole, but after he lay down, he heard two thuds, like two sets of feet dropping onto the metal plate (Ex. 236 at 53; Ex. 237 at 36; Background Ex. 2 at SLPD 00027-28).

After he heard the two sets of feet land, Cummins began to feel Robin being pushed back and forth, which he believed was caused by someone raping her (*Ibid.*):

A I didn't dare look. But she was laying next to me on my right and my arm was up resting along side her body.

Q. Okay.

A. And I could tell she was moving back and forth

Q. Are you saying one of them was having sex with her?

A. I believe so at that point, yes.

Q. Okay.

A. I believe so.

(Ex. 236 at 54; Background Ex. 2. at SLPD 00028.) While Robin was being subjected to this final act of degradation, Cummins heard Julie trying to reassure her younger sister, "Just relax, Robin. It'll be over soon." (Ex. 236 at 53.) She was right about that.

The last rape took three or four minutes, and then, Cummins said, "they told me to get up at this time and move to my left...and step down on to the concrete pier." (*Ibid.* at 54.) Cummins did as he was told, and then Robin was helped onto the pier. She was nude. Robin put her arms around Cummins' left arm as he stood there shaking. Julie joined them on the platform; she was wearing a shirt but no pants (Ex. 236 at 55-56). The three stood huddled there, hugging each other when they heard a voice say, "Stop touching each other. Don't look at us." (Ex. 236 at 57.) Cummins could not see how many people (besides the victims) were on the platform, but he believed both people he heard land on the platform were still there, although he could only see one (Ex. 236 at 58).

Cummins described what happened next:

> They were just standin' there and they told us not to look at each other or anything, and just a split second, they pushed one after another right off the bridge – just – there was no warning at all. None.

(Ex. 236 at 60.) In the tape-recorded statement he gave at police headquarters, Cummins said he believed that the person who pushed them off the Bridge was the youngest of the three black males (which turned out to be Antonio Richardson) (*Ibid.* at 61). In the non-recorded interview he gave in the ambulance sometime after 3:00 a.m., the police wrote that Cummins said that he saw a "black" arm reach out and push Julie off the bridge, and then "[e]ither the same arm or another 'black' arm . . . shoved Robin off." (Background Ex. 2 at SLPD 00028.) He heard both women scream all the way down from the Bridge until they hit the water.

Cummins was then told to jump by, he believed, the youngest black male (Ex. 236 at 62). In the non-recorded interview in the ambulance, he said "one of the subjects said either he jump, or they would shoot him. When he heard that, he jumped." (Background Ex. 2 at SLPD 00028.)

When Cummins jumped, it seemed to take a long time before he hit the water. When he did, it was very cold. By the time he came to the surface, the current had already carried him at least 100 feet south of the Bridge (Ex. 236 at 63). Cummins was able to see both Robin and Julie in the water. Shortly after that, Robin was no longer in sight, and he never saw her again (Ex. 236 at 64-66). (Robin Kerry's body has never been located.)

Cummins had gone through life-guard training, but he had on a heavy winter coat that made it difficult to swim, so he quickly got rid of the coat. He also had on high-top tennis shoes that impeded his ability to swim. He attempted to get the shoes off repeatedly, but the knots were wet and he could not get free of them (Ex. 236 at 64-65). He tried a number of different strokes, but none worked very well because of the shoes, until he started doing a backstroke (*Ibid.* at 65).

Cummins yelled at Julie to pick out a landmark to head towards. He picked out a five or six story building with red lights on top. (This would later be identified as the "coagulant house" of the St. Louis Waterworks, Background Ex. 2 at SLPD 00024; Gray T. 1882-1884.) The strong current carried Cummins past his point of reference. At one point Julie got very close to Cummins and panicked. She tried grabbing him, but Cummins knew from his life-guard training that if a person is drowning, he or she can drag down the rescuer, killing them both, so he pushed her away (Ex. 236 at 66). About five minutes later he could no longer see Julie, and he never saw her again (Background Ex. 2 at SLPD00028). (Julie Kerry's decomposed body would be recovered three weeks later in Pemiscot County.)

Eventually, Cummins made it to shore in a wooded area, exhausted (Ex. 236 at 6; Background Ex. 2 at SLPD 00028). The river bank at that location was muddy and steep, and he had a hard time climbing it. Eventually, he got over the bank and walked to the west, where he came to a railroad track which he followed to Riverview Drive. He tried to wave down many vehicles but none stopped until he was able to flag down the truck driven by Eugene Shipley, and help eventually arrived (Ex. 236 at 69-71).

The St. Louis Police Department immediately began an investigation into what had happened. Much of the initial phase of this investigation is recounted in the 5/21/91 Incident Report noted earlier.

A crime scene technician went to the scene and collected evidence from the Bridge. Near the manhole in question, this included the label for a 40 ounce bottle of Olde English Malt Liquor, an unused condom in a red plastic wrapper, and a used condom (Background Ex. 2 at SLPD 00023). At another location officers located a black, three cell flashlight with "Horn 1" etched on it (*Ibid.* at SLPD 00023). The technician also made some measurements. He documented that the manhole involved in this case was approximately 570 yards east of the Bridge entrance on the Missouri side (*Ibid.* at SLPD 00022), and the flashlight was found 900 yards east of the Missouri entrance to the Bridge (*Ibid.* at SLPD 00023). Finding the flashlight would turn out to be one of the most important discoveries of the investigation.

As the day worn on, while Cummins was being interviewed by Ghrist and Stittum, Sgt. Nichols attempted to enlist the assistance of the Missouri State Water Patrol in searching for the Kerry sisters. He spoke with a Corp. James McDaniel, who was not optimistic that the sisters would be located any time soon. In the course of that conversation, McDaniel dropped a bombshell that seemed to contradict Cummins' account:

> Corporal McDaniel explained that the search process would be difficult. There is a strong current and extremely strong whirlpool at the south of the bridge and the river bottom, making it unsafe for searchers to drag the bottom. He then explained that to accomplish the feat Thomas C. claimed to have, ie: jump into the river from the bridge, swim against the strong current and through the extremely strong whirlpool to reach the Missouri bank, would be extraordinary. Discounting the factor of the strong whirlpool, the current at that location would carry a person to Chouteau Island, or the Illinois river bank. The fact that the water temperature was fifty-four degrees is suggestive of hypothermia, which in turn would cause a swimmer to drown.

(H.C. Ex. 8 at SLPD 00043.) Nichols then contacted the Coast Guard Operations Control Center and spoke with Chief Ed Moreland who reiterated what McDaniel said:

> Moreland was asked if he could empirically gauge the height of the bridge in reference to the current river stage. He answered that at the time of incident the lowest "Metal Structure" of the Chain of Rocks Bridge was ninety feet above water level. He advised that a person would be traveling at eighty miles per hour when he struck the water if he'd jump from that height. If his head, neck, and extremities were not perfectly aligned, they would likely be broken; at the very least bruised.

(*Ibid.*)

After Sgt. Nichols obtained this information, and after Cummins' first recorded interview ended at 10:30 a.m., a meeting was held in the office of Lt. Steven Jacobsmeyer, Deputy Commander of the Crimes Against Persons Unit. Also present were Sergeants Nichols and Guzy, and Detectives Richard Trevor, John Walsh, Ghrist, and Stittum. According to an Incident Report of 5/31/91, the "fact" that Cummins' hair was completely dry and combed when Off. Brooks first saw him, caused the detectives to believe that it was possible Cummins did not jump off the bridge (H.C. Ex. 8 at SLPD 00044). They pointed out an inconsistency in Cummins' first recorded statement when he first said that he was kicked by one of the people on the Bridge, then said he was "nudged." The detectives could not understand why Cummins did not simply fight off the four assailants since none of them ever actually pulled a gun on him. They pointed out that Cummins told Nichols and Ghrist in the ambulance that he had sexual yearnings for Julie and that he was disappointed when Robin went with them that night. Also, *he carried a condom in his wallet* (which, unlike other more dissolute venues, is apparently a practice unheard of in the puritan enclave of St. Louis). When added to the information about the Maelstrom of the Mississippi next to the Bridge, the physics lesson provided by the Coast Guard Chief, and the other "expert" opinions from the Coast Guard and Water Patrol, the detectives smelled a rat and decided another statement was in order.

Pause for a the moment to examine the accuracy of these premises. The information about distance from the concrete pier to the water and the current turned out to be wrong, as was the tale of the powerful whirlpool next to the Bridge (Gray T. 1068, 1880-1881; 1965-1966; 1978; 1970-1972; 1975). Eugene Shipley, the first person to see Cummins after he got out of the river, said his hair was wet and messed up (Gray T. 1523). Brooks and Ghrist said the same

(Gray T. 1025-1026; 1031-1032; 1389; 1397). The pictures taken of Cummins at the scene do not show "neatly combed hair." (Ex. 203.)

Contrary to what was said in the conclave in Jacobsmeyer's office, in the report of what Cummins said in the ambulance at the Waterworks, there is no indication that he expressed sexual yearnings for Julie Kerry (Background Ex. 2 at SLPD 00025). Nor did he say that he did not want Robin to be present. Indeed, the 5/21/91 incident Report says that in talking to Julie about meeting late on the evening of April 4, "he had talked to Julie on the phone and made arrangements for her *and Robin* to pick him up at Redman and Fair Acres...." (*Ibid.* at SLPD 00025; emphasis added.)

Suggesting that Cummins' credibility was suspect because he did not simply give a good thrashing to his four assailants -- one of whom claimed to be armed and threatened to kill him -- boggles the mind. It is one thing for a trained police officer who has the benefit of carrying a sidearm to take on four bad guys, but a pudgy, unarmed 19 year old kid? Can anyone seriously doubt that if Cummins had tried to play Rambo that night, there would have been three murder victims instead of two?

And the condom. It has been a long time since I was 19 years old -- long before 1991 -- but I have a vague recollection that, at one time at least, for a significant part of the 19 year old male American population, carrying a condom in one's wallet was a sort of rite of passage. Perhaps not in St. Louis in 1991.

In any event Detectives Trevor and Walsh, armed with the information about all of these inconsistencies, the whirlpool, and the condom took a second recorded statement from Cummins at 11:25 am on April 5, about 27 and a half hours after Cummins had last slept. That statement was transcribed as Exhibit 237. A summary of what the detectives *claim* Cummins said in the second recorded statement appears in the 5/31/91 Incident Report (H.C.R.Ex. 8, SLPD 00045-00050).

A comparison of that summary with the actual transcript of that statement is illuminating:

> Thomas C. advised while visiting relatives in Florida, he had met Julie Kerry on 6-4-90. During the time in Florida, the two spent much time together and became very close. At one point, Thomas explained they were close to having sex, however, Julie stated they were cousins and it would be very wrong for them to have sex.

(H.C. Ex. 8 at SLPD 00045.) In reality Cummins never said that "Julie stated they were cousins and it would be wrong for them to have sex." The closest anything in the transcript that approximates the summary is the following:

Q Were you two close enough to have sex?

A No, sir.

Q You never did?

A Uh – we – we never had sex.

Q Uh-huh.

A We – uh – we became very close when we were in Florida, and it was very difficult for both of us while we were down there; uh – because we had never known each other. You know. And it was like meeting somebody totally new. You know, I was meeting this brand new girl. I wasn't meeting my cousin who I see at family reunions and Thanksgiving dinners. And – uh – you know, we – we definitely fell for each other real quick. And that was it. And we both laid down the ground rules right away. Uh – I had a girlfriend and she had a boyfriend –

Q So there was no type of intimacy at all?

A No, sir. If – if – you know, it was always – wow, you know – if the circumstances were different –

Q Uh-huh

A —we may, you know, but never. Not once.

(Ex. 237 at 50.)

The Incident Report ominously notes that when the sisters picked up Cummins, "Robin got out and got in the back seat allowing him to sit in the front, next to Julie." (HC Ex. 8 at SLPD 00046.) The Incident Report leaves out Cummins' explanation for why he was in the front seat. Julie Kerry drove a 1981 Chevrolet Chevette with almost no leg room in the back seat. Robin was short -- 5' 1" -- while Cummins was 5' 10," and Robin could fit in the back seat a lot easier (Ex. 237 at 13).

But the statement and the Incident Report really diverge towards the end of the interview. The Report says this:

> Thomas was confronted with the information from the Missouri Water Patrol and the Coast Guard regarding the height of the bridge and the injuries an individual would sustain after falling from the same. Thomas stated he was not injured in any manner and added he had no indications of any bruising.
>
> While interviewing Thomas, the detectives observed he had a scratch on his left cheek. When asked about it, Thomas stated he did not know where he'd scratched his face.
>
> Due to the apparent inconsistencies of his statement and observed fact, he was asked if his statement was truthful. Thomas stated everything was accurate except for the statement that he'd jumped off the bridge after the girls were pushed. *He then stated that he ran from the bridge and his clothes became wet when he jumped into the water from the bank and started swimming the shoreline searching for the girls. He stated he swam from the bridge south to the boat ramp.*

(H.C.Ex. 8 at SLPD 00050; emphasis added.) Of course, the detectives claimed this made no sense at all. How did Cummins get past the two men on the platform and run off the Bridge? This statement undercut the rest of his story about the sisters being pushed off the Bridge by unknown assailants, thereby pointing the finger at Thomas Cummins.

But the reality is that the second taped interview says *absolutely nothing* about confronting Cummins with the (mistaken) information from the Coast Guard or Water Patrol, nor does it contain his purported statement that he ran off the Bridge instead of jumping. That whole section of the Incident Report is made up out of whole cloth; it does not appear in the transcript of the second recorded statement (Ex. 237).

Cummins was asked if he would submit to a polygraph examination. He agreed to, and the examination was commenced at 1:30 p.m., just shy of 30 hours after he had last slept.

I find the administration of the polygraph examination under those circumstances to be, quite simply, inconceivable.

In State v. Biddle, 599 S.W.2d 182, 185 (Mo. *en banc*. 1980), this Court held that: "The results of polygraph examinations are inadmissible as evidence in a criminal trial because they lack scientific support for their reliability." The same is true of offers or refusals to undergo a polygraph examination, *Ibid. Accord*: State v. Rios, 314 S.W.3d 414, 424 (Mo.App. 2010).

Polygraph examinations are an attempt to measure certain physiological responses to questions asked by a trained examiner to detect a conscious attempt to deceive. The process was described by Judge Floyd Gibson in U.S. v. Alexander, 526 F.2d 161, 163 (8th Cir. 1975):

> The polygraph technique is based on the premise that an individual's conscious attempt to deceive engenders various involuntary physiological changes due to an acute reaction in the sympathetic parts of the autonomic nervous system. The polygraph machine is an electromechanical instrument which measures and records these physiological fluctuations that are detected with the aid of three basic components: (1) the pneumograph which monitors the respiration rate of the examinee; (2) the cardiosphygmograph which gauges blood pressure and pulse rate; and (3) the galvanometer which measures the galvanic skin reflex or electrodermal response -- skin resistance to electrical current (perspiration flow of electrical current). Some of the more recent polygraph machines have incorporated a device that detects unobservable muscular activity believed to accompany intentional attempts tot control the other responses that are recorded by the polygraph. All of the physiological responses detected by these components are transmitted by a recording pen onto a constantly moving piece of graph paper, a polygram. The function of polygraph practitioners, or polygraphists, is to study and interpret the markings on the polygram and make a determination as to whether the recorded physiological and emotional pressures evince the psychological and emotional pressures which normally accompany intentional attempts to deceive. It is clear, therefore, that the polygraph does not detect lies, but merely records physiological phenomena which are assumed to be related to conscious deception.

Judge Gibson cites to the leading authority on polygraphs when Alexander was decided: J. Reid & F. Inbau, *Truth and Deception*: *The Polygraph ("Lie Detector") Technique* (1966). The Court also notes that various concerns had been expressed about "numerous constituents which may individually or collectively operate to result in an inaccurate reading," including physiological abnormalities of the person being tested, such as "extreme fatigue during the examination," and "extreme nervousness or emotional tension by an innocent person. . . ." 526 F.2d at 165. The Court also quotes John Reid as to the questionable effect of examining persons under "traumatic circumstances." *Ibid.*

As early as 1966 Reid and Inbau noted that extraneous factors could have an effect on a person subjected to a polygraph test that had nothing to do with an intent to deceive. These included extreme emotional tension, excessive interrogation prior to the test, adrenal exhaustion, overanxiety, and concern over neglect of duty. *Truth and Deception, supra*, at 169-177.

The federal government makes extensive use of polygraph examinations in personnel and security matters, but departments using them have strict controls to assure accuracy. In 1985 the Department of Defense revised its policies for the conduct of polygraph examinations by investigators in the Department. Section C2.1.2.2 of DOD 5210.48-R requires that before administering a test, the examiner shall ensure "that the person being examined has not been

subjected to a prolonged interrogation immediately before the polygraph examination."[8] Section C2.1.4 provides that an examiner can decline to conduct an examination if he or she has doubts that the examinee is physically or mentally fit to be tested. In that connection Section C3.4.6 says that polygraph tests should not be given to an examinee who is mentally or physically fatigued or who is unduly emotionally upset. Section 3.4.3 says that the test is "not to be utilized as a psychological prop in conducting interrogations."

A 1987 United States Justice Department paper by an FBI expert on polygraph tests, posted on the National Criminal Justice Reference System, noted that:

a. Persons who are not in sufficiently sound physical or mental condition will not be afforded a polygraph examination.
b. A person to be examined should have adequate food and rest before the examination.[9]

In hearings before the House Subcommittee on Government Operations of the 93rd Congress in 1974 on *The Use of Polygraph and Similar Devices by Federal Agencies*, the Committee heard testimony by one witness that certain persons should not have polygraph examinations, including individuals who have experienced:

1. Excessive Fatigue
2. Prolonged interrogation;
3. Physical Abuse

(*Ibid.* at 333.)

The Webpage of John E. Reid and Associates (the "Reid" of Reid & Inbau, *supra*) notes that, "An important part of an examiner's training is to identify those subjects who are at risk for producing erroneous results."[10] This includes identification of unsuitable subjects: "The subject's mental state is also an important consideration. Fatigue, intoxication, anguish, and trauma may render a subject unsuitable for the polygraph technique."

In the 30 hours before Thomas Cummins was given a polygraph test, he had no sleep. He was physically assaulted and assured repeatedly that he would die. He was present when his

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[8] The Department of Defense regulations from 1985 can be accessed on this website: http://content.taonline.com/SecurityClearances/docs/DoDPolygraphProgram.pdf

[9] Fungerson, "Polygraph Policy Model for Law Enforcement," The FBI paper can be found at this website: https://www.ncjrs.gov/pdffiles1/Digitization/143916NCJRS.pdf

[10] http://www.reid.com/educational_info/r_tips.html?serial=321090728120738

cousins were viciously gang-raped and, eventually, murdered. He had to jump into the Mississippi River and later break away from his cousin, as a result of which she perished. Then he was interrogated by police officers for about 11 hours. Has any polygraph examinee ever been less suitable for the test? Could any competent examiner acting in good faith even consider giving a test to someone in Cummins' circumstances?

Nonetheless, the examination went forward at 1:30 p.m. on the afternoon of April 5. After the test, the examiner informed Cummins that the test showed he was "deceptive." Of course, given the circumstances under which the test was given -- assuming that the test really did show deception -- no one who knew much about polygraphs would give the results any credence, and as has already been noted, its evidentiary value was nonexistent, State v. Biddle, *supra.* Given the fact that the test results were not worth the paper they were written on, why give the test in the first place?[11]

A reasonable inference is that it was administered, not to get the truth, but to try to get a confession out of Cummins. The use of polygraph results -- including falsely representing such results -- is not unheard of as a tactic in law enforcement, State ex. rel. Kemper v. Vincent, 191 S.W.3d 45 (Mo. *en banc.* 2006). And to the extent the test enlisted an ally in the case of Thomas Cummins, it was a success.

After telling Cummins that he had failed the test, detectives went to work on Gene Cummins, telling him about the information obtained from the Water Patrol and Coast Guard, indicating that his son could not have survived jumping off the bridge. Then Sgt. Guzy delivered the *coup de grace*, telling him that his son's polygraph test had been classified as deceptive (HC Ex. 8 at 00051). At that point, the police succeeded in turning father against son.

Gene Cummins was allowed in to talk to his son. He said that he wanted Thomas Cummins to tell the truth. According to the 5/31/91 Incident Report, Cummins "repeated his original statement however this time he stated it was the taller black male who stated he was from Wentzville." (*Ibid.*) (This implied that Cummins was changing his story, but in fact he never identified *anyone but* the tallest male as the person who said he was from Wentzville, Ex. 236 at 20; Ex. 237 at 19.) When Cummins said he had jumped from the Bridge, his father said that was hard to believe since "if he had jumped from that height, he would have been injured."

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[11] Another pertinent inquiry might be: Did the test results *really* show deception, or was the representation as to the results some sort of ploy?

(H.C.Ex. 8 at SLPD 00051.) The police claimed that Cummins then changed his story again to say he ran off the bridge, jumped in the water, but only up to his neck so his hair would stay dry, and then ran for help (*Ibid.).*

Of course, none of this was on tape. Cummins later denied under oath that he ever said he ran off the Bridge instead of jumping off (T.1905; Gray T. 1275; 1280). The one thing he did admit was that his own father turned against him momentarily, something he described as the worst part of his treatment by the police (T.1920; Gray T. 1296).

So began the final, and most controversial, part of Thomas Cummins' interaction with police. Two radically different narratives of what went on in Interview Room #2 emerged. The police narrative begins with Gene Cummins' departure:

> Gene Cummins and Detective Trevor then left the Interview Room.
>
> Lieutenant Steven Jacobsmeyer, DSM 8447, Deputy Commander of Crimes Against Persons Division, was made aware of the above statement.
>
> Lieutenant Jacobsmeyer along with Detectives Pappas and Trevor re-interviewed Thomas C. and asked him which version was true.
>
> The detectives related to Thomas C. that they suspected he had harbored sexual longings for Julie. They noted that he had a condom with him on the bridge and that he was upset when he saw Robin in the car as he wanted to be alone with Julie.
>
> *Thomas stated that the real truth was exactly as the detectives indicated earlier. When pressed, he stated he must have made an advance toward Julie as she sat on the railing. In his mind the overt act was not sexual; he just wanted to hug her but she became startled, lost her balance and fell into the river. He became hysterical and blacked out. This is when Robin must have jumped into the river to save her sister.*
>
> Thomas then began crying and stated, "That's the truth, believe me."
>
> Thomas was given the option to make a video taped statement and he agreed.
>
> While escorting Thomas to the Television Studio in the Police Academy, he informed the detectives that he did not want to make the taped statement, adding that he did not kill the girls. Thomas C. was returned to the Homicide Office.

(H.C. Ex. 8 at SLPD 00052.) The highlighted language above was a watered-down revision of an earlier draft, an Incident Report of 5/6/91, which said:

> Thomas stated the truth was had he tried to have sex with Julie, however she refused. She did not want to have sex because they were cousins and it would not be right. He continued that Julie was sitting on the metal guard railings with her back to the south. They began arguing, at which time he accidentally pushed Julie. This push caused her to fall backward into the river. Thomas continued that he became frightened and must have blacked out because when he realized what happened, Robin was also gone. Thomas stated he believed Robin either jumped in the river trying to save Julie, or he may have pushed her in.
>
> Thomas then began crying and stated, "That's the truth, believe me."

(H.C. Ex. 6 at 9.)

Neither of these versions of what happened would be helpful to the State in its later attempts to prosecute the group of four, because both indicate that the man who would be a critical witness for the State was the killer, rather than any of the group of four. But that is getting ahead of our narrative.

At 7:15 p.m. on the evening of April 5, 1991, almost 36 hours after he got up on April 4, Cummins was arrested for First Degree Murder in connection with the deaths of the Kerry sisters (H.C. Ex. 6). The announcement that the police had solved the Chain of Rocks Murders was disseminated to the media in St. Louis. In the filings that were part of his Rule 29.15 Motion, Clemons included an article from the *St. Louis Post-Dispatch* of April 11, 1991, that noted the police claimed Cummins had originally admitted guilt in connection with the deaths of the sisters (29.15 L.F. at 762-763). It is apparent that defense counsel had access to at least some of the police reports because in the Gray and Clemons trials, the heart of the defense was that Cummins was the actual perpetrator, and Cummins was extensively cross examined, using verbatim quotations about what he allegedly said in the 5/31/91 Incident Report.

But there was another side to the story. The April 11 *Post-Dispatch* article gave a hint of this second narrative when it noted that Gene Cummins was angry because of the way his son was treated and that he was consulting an attorney. (By that time Cummins had been cleared by the police, so why would his father be talking with a lawyer? A lawsuit perhaps?) The Captain in charge of the homicide unit that initially arrested Cummins engaged in some defensive preemption, denying any police misconduct and claiming that Cummins' false confession was a product of his weakness of character (29.15 L.F. at 763).

The second narrative was initially described during the cross examination of Cummins at the Gray trial. He testified that after his father left, Lt. Jacobsmeyer and two other detectives came in.[12] It was suggested by the detectives that Cummins had startled Julie, causing her to fall in the river, and that Robin jumped in after her, but Cummins adamantly denied ever agreeing with the police that that happened (Gray T. 1283). When asked if the police ever abused him, Cummins said they did (Gray T. 1285). He said Lt. Jacobsmeyer told him if he did not tell them what they wanted to hear, "he was going to put me in the hospital that night and he had witnesses that said I resisted arrest." (Gray T. 1289.) Cummins testified that the police yelled and screamed at him (Gray T. 1289), and that he was told to sit on his hands, at which time one of the detectives twisted his neck while another hit him repeatedly in the back of the head (Gray T. 1285-1286).

A similar scenario played out in the Clemons trial. Cummins testified that when Lt. Jacobsmeyer and Det. Pappas and a third detective came in, Jacobsmeyer referred to the group as "Jacobsmeyer and Company." (T. 1947.) He reiterated his testimony from the Gray trial that Jacobsmeyer threatened to put him in the hospital if Cummins did not tell him what he wanted to hear (T. 1910) and that one detective would hold his head and twist his neck, while others struck the back of his head if they did not like the answers he gave (T. 1908). While the police suggested repeatedly that he wanted to have sex with Julie, and that she had fallen off the bridge due to his actions, Cummins denied ever admitting that (T. 1907).

Ironically, after the cross examination of Cummins, *Clemons* called Jacobsmeyer as a defense witness to testify that neither he nor Det. Pappas beat or abused Cummins and that he really did admit to all the things alleged in the 5/31/91 Incident Report (T. 2808-2810). Jacobsmeyer also denied ever threatening Cummins (T. 2820). On cross examination by the State, Jacobsmeyer admitted that they did not record the damning statements they claimed Cummins made (T. 2817). No explanation was ever offered as to why they recorded the earlier statements but not the one in which Cummins was alleged to have made critical admissions leading to his arrest.

Pappas was also called by the defense. He testified that he and Lt. Jacobsmeyer and Det. Trevor interviewed Cummins together on the late afternoon of April 5, 1991 (T. 2828-2830). He

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[12] From the 5/31/91 Incident Report adverted to earlier, we know that the other two detectives in the room with Cummins and Lt. Jacobsmeyer were Chris Pappas and Richard Trevor (H.C. Ex. 8 at SLPD 00052).

denied that he or anyone else ever threatened or physically abused Cummins (T. 2831-2833; 2885-2886). He reiterated that Cummins said Julie fell from the Bridge when he made an advance toward her, etc. (T. 1833-1834). Pappas was the only detective who interviewed Gray, Clemons, and Cummins; all three accused him of abusing them (T. 2866-2867).

Interestingly, on cross examination Pappas acknowledged an intriguing aspect of the case: When the Incident Reports about Cummins' admissions were formally prepared (i.e. the 5/6/91 Report and the 5/31/91 Report, H.C. Ex. 6 and 8), Cummins had long since been cleared by the police, and no one still claimed he was responsible for causing the deaths of the Kerry sisters (T. 2892). Cummins was released on April 8 or 9, 1991, and allowed to go home to Maryland (29.15 L.F. at 763), because about the same time he was getting thumped in Interview Room #2, other detectives besides Jacobsmeyer and Company were about to make a breakthrough in the case.

**The Flashlight**

A little over an hour after Cummins was arrested on Friday, April 5, for murdering the Kerry sisters, a homicide detective took a call from Lori Smith of Pine Lawn, Missouri. Ms. Smith was married to Ronald Whitehorn, Sr., a former part-time police officer with the Pagedale Police Department (Gray T. 1377; Background Ex. 25 at SLPD 000124). She told the detective that she had received a number of calls from neighbors who had seen television news stories about the search for the owner of a black flashlight engraved with "Horn 1." Because her husband had a police-issue flashlight like the one described on TV, she checked their house trying to locate it, but she was unsuccessful (*Ibid.*). She told the detective her husband's regular employment was as a bus driver and that he was in Memphis that evening. She promised to try to contact him (Background Ex. 25 at SLPD 00124). Later that same evening Whitehorn spoke with detectives and told them that he owned a black Kel-Lite flashlight with "Horn 1" marked on it. He said that he believed that a teenager named Antonio Richardson had taken the flashlight about a week earlier. He gave detectives an address for Richardson on Edgewood.

That same evening two detectives went to the house on Edgewood and learned it was the residence of Irene Ramsey. She told them that Richardson was her grandson and that he was living at the Job Corps Center. Although he had visited her house earlier in the day on April 5, Richardson was not there when the detectives arrived.

The next day (Saturday, April 6) detectives went to the Job Corps Center and were told that Richardson was not there. However, they obtained contact information regarding his mother, Gwen Richardson. They called her, and she told them that she had not seen her son since Thursday, two days earlier. They also got the name of Cedric Richardson, Antonio Richardson's brother.

Shortly after noon on Saturday, detectives interviewed Cedric Richardson. He told them that "the word on the street" was that his brother and some of his friends were out on the Bridge on the night of the murders. He said he had not seen his brother since April 4 (*Ibid.* at SLPD 000128). Detectives spent the rest of Saturday looking for Antonio Richardson without success.

On Sunday Detectives Brauer and Trevor resumed the search, and at 11:35 that morning, they located Antonio Richardson at the corner of Barken and Edgewood, about half a block from Clemons' residence. Richardson told the detectives that he had information about the murders, and he agreed to talk. Thus, began a frenetic 18 hours for Homicide detectives.

They took Richardson downtown to the Homicide Unit where he was placed in Interview Room #1 shortly before noon on April 7. Richardson told the officers that he had been on the Chain of Rocks Bridge late Thursday night when he saw a group of four men -- three black and one white -- confronting a group of two white females and one white male:

> Staying close to the dark side of the bridge, attempting not to be seen, he observed that the three black males and the white male suspects were holding down the white male victim. Each of the black males were tearing off the clothes of the white females. He could see the white females and noticed that they were yelling and putting up a fight. After the white females' clothes were torn from their bodies, each was raped repeatedly by the black males and the white male suspect. Each of the suspects took turns holding the victims down on the bridge while the others raped them.
>
> As he stopped on the bridge in a dark area, shaded from the bright moonlight, he noticed that the suspects took the victims to a manhole on the bridge. He watched as each suspect pushed the victims into the manhole onto a steel beam. After the victims were on the concrete pillar, he could hear them all screaming. A short time elapsed and all the victims were pushed into the water. After the victims were in the river, he looked over the rail of the bridge and saw the victims screaming for help. He then ran from the bridge and hid until the suspects left the area. He then returned home and did not say anything to anyone, as he feared retaliation.

(Background Ex. 25 at SLPD 00129.)

While this description was not identical to Cummins' account, it confirmed a lot of what he said; e.g. that the cousins' group had been confronted by a group of three black males and one

white male; that the Kerry sisters were raped repeatedly; that all three went down through the manhole, onto the concrete pier; and all ended up in the water. Trevor and Brauer immediately realized that Richardson's statement corroborated significant elements of Cummins' account (*Ibid.* at SLPD 00129). More importantly, it appeared to demolish the allegation against Cummins that he was responsible for what happened to the Kerry sisters.

Det. Brauer pressed Richardson for details, and he admitted he knew one of the suspects, Reginald Clemons; that he had been at Clemons' house earlier in the evening; and that Clemons gave him a ride to the Bridge. He said that he met a man named Marlin at Clemons' house, along with an unidentified black male and white male (*Ibid.*). He then added, "I didn't want to, but Marlin forced me to participate in this, or he (Marlin) said that he would seriously hurt me." (*Ibid.* at SLPD 00130.)

Suddenly, Richardson went from being an observer hiding in the shadows to one of the group of five.[13] He elaborated that he had been at Clemons' house at 6616 Barken earlier in the evening. At about 12:30 a.m. Marlin (whose last name he claimed not to know) arrived, along with a never-identified black male, and a white male who was introduced by Marlin, but whose name Richardson could not recall. Marlin said everything was good in Wentzville, and he suggested the group go out to the Bridge. Richardson rode with Clemons in his car, while the other two went with Marlin. On the way to the Bridge, they stopped and got $20 worth of 40 ounce bottles of beer before arriving at the Bridge around 1:00 a.m. Clemons had the flashlight that Richardson took from Whitehorn's house which, according to Richardson, was marked "Horn 1."

The group of five went on the Bridge. They did not see anyone until they were almost to the Illinois shore, where they saw a campfire burning, and Marlin yelled some things at the people near the fire. They started back to Missouri when they saw three white people on the Bridge. Richardson then gave an account that included raping the Kerry sisters and robbing Cummins, all of whom he identified from photographs, pushing the sisters off the Bridge and telling Cummins to jump. Many of the details in this second statement were never repeated by anyone else -- e.g. he claimed that one of the sisters kicked Gray in the groin while Cummins and the sisters were on the steel platform with Marlin and Clemons. He also minimized his own

[13] The unidentified black male makes his only appearance in Richardson's account, so that the group of four is temporarily expanded to a group of five. Everyone else described the perpetrators as numbering four young men.

participation in the crimes, although he admitted to raping one of the women under the duress of Gray (*Ibid.* at SLPD 00131-133.) Richardson was asked how many people participated in the assaults; he answered, "four...I mean five." (*Ibid.* at SLPD 00133). As his lawyer observed at Richardson's PCR hearing, he was "not the brightest bulb on the street at all." (Richardson App. Brief at 16.)

The second version of Richardson's account provided still more independent corroboration for what the man sitting in jail for the murders -- Thomas Cummins -- said happened. Richardson confirmed that Marlin was from Wentzville, that he pulled Cummins aside on the Bridge and said they needed to talk, that he forced Cummins to lie facedown on the Bridge, that the victims were Cummins and the Kerry sisters, and that Cummins was told to jump in the river or he would be shot.

Richardson said the group went home after the crimes and agreed to never talk about them again (*Ibid.* at SLPD 00133). He kept his end of the agreement until April 7.

Antonio Richardson agreed to repeat his statement on videotape. I have watched the video and it does not appear to me that Richardson was coerced by the officers. (Indeed, I am unaware of any claim that Richardson was ever coerced into saying anything.)

The videotaped statement began at 3:25 p.m. In the video statement Richardson claimed to have been at "Reggie's" house on Barken Street earlier Thursday night, but not to know Reggie's last name. He said that while he was at Reggie's house, "a couple" of his friends came over, including Marlin, an unknown black male, and an unknown white male. About 12:30 a.m. they left Reggie's house and bought $20 worth of Milwaukee's Best Beer and Old England [*sic*] Malt Liquor in 40 ounce bottles. Then they went to a mountain in Illinois where they got drunk. After that they drove to a vacant bridge where they got drunker. Reggie had a police flashlight that Richardson had given to him. Richardson said he got that flashlight from Ron Whitehorn's stepson.

According to Richardson, the group of five still had some beer left at the bridge, so they drank that and then walked to Illinois, where they saw some people on the land below the bridge by a campfire, and Reggie talked to them. Then they went back toward the Missouri side where they saw two young women and a male. Based on pictures shown to him on the videotape, Richardson identified the women as Julie and Robin Kerry and the man as Cummins.

Marlin said to rob them. Marlin hit the man, and the two women attacked him. Most of the rest of the story was similar to what he said earlier. This time Richardson admitted unequivocally that he went through the manhole with the rest of the people, so that there were seven people on the 5' x 7' platform. Eventually, the victims were pushed off.

The videotaped statement concluded at 3:58 p.m. The two detectives and Richardson then went to the Chain of Rocks Bridge where they made a videotape of a walkthrough of where various events happened according to what Richardson said. That videotape was shown to the jury at Clemons' trial with the sound muted (Ex. 149; T. 2437).

After the statement was completed, the police released Richardson to the custody of his mother (Background Ex. 25 at SLPD 00134). (This may seem odd, since Richardson had admitted to participating in the rape of at least one of the sisters, but police reasoned that he did so, by his account, under threat from Marlin.) Before he left, Richardson gave police Reggie's address: 6616 Barken.

There were many problems with Richardson's accounts, not the least of which was that he never told the same story twice, but it had two important effects: it largely eliminated Cummins as a viable suspect, and it gave Homicide detectives many leads to follow up.

Sgt. Nichols contacted the Wentzville police and gave them information about a man named Marlin, seeking additional information about Marlin's last name and address. Since Marlin Gray had an arrest record in Wentzville, and since he was snitching there, it did not take Wentzville long to provide a last name to Sgt. Nichols, along with an address for him in St. Louis. Two detectives went to that address and contacted Gray's mother, Jean Doss. She said Gray was now residing in Wentzville, but she had no address for him there. She had last seen him a week earlier.

At 6:00 p.m. on April 7, Detectives Pappas and Walsh went to 6616 Barken where they eventually made contact with Reginald Clemons. They told Clemons that his name came up in the investigation of the murders on the Bridge and asked him to go to St. Louis Police Headquarters. Clemons voluntarily agreed to go with them; he was not under arrest when they left his house (*Ibid.* at SLPD 00135-136).

At the Homicide Office Clemons was taken to Interview Room #1 where, according to police, he was mirandized. (Clemons would later dispute just about everything about this

description; this is the police account of what happened, but Clemons vehemently disagrees with it.)

According to the police, they told Clemons he was implicated in the Chain of Rocks Murders. Clemons exclaimed, "you've got the wrong man!" Det. Brauer asked him if he owned a flashlight; he said it was not his, but Richardson gave it to him recently. He said it had been lost on the Bridge when he was there with "Marlin, Tony, and Danny." (*Ibid.*) He confirmed that the flashlight had been etched with "Horn 1."

The police asked him if he knew Julie and Robin Kerry; he denied knowing them, but he asked if they were "the two girls on the bridge with the white dude?" (*Ibid.* at SLPD 00137.) Police claim he then said, "Wait a minute, I didn't kill them...it was Marlin and Tony." According to police, Clemons then agreed to give a tape-recorded statement.

I have listened to the audiotape; Clemons' voice was a monotone for the first several minutes until he was asked to look at photographs of the Kerry sisters. At that point he began sobbing. What follows is a synopsis by the police of what Clemons said on the tape (at times I have included my editorial comments about some parts of the synopsis that do not accurately match the transcript of Clemons' recorded statement):

> On Thursday April 4, 1991, Reginald and Tony were at Reginald's house. While there, Marlin and his friend from Wentzville came over. Marlin wanted to show his friend (later identified as Danny W., a juvenile) the Chain of Rocks Bridge. They drove to the bridge in two separate cars. When they arrived, he (Reginald C.) had the flashlight.[14] As they walked on the bridge, they looked at the graffiti on the bridge with the flashlight. During that time, the flashlight was lost. As they were walking on the bridge, they came across a white guy and two white girls.
>
> They talked with the victims for two to three minutes and then left, walking toward the west side of the bridge to leave.
>
> At that time (9:45 p.m.), Detectives Pappas and Brauer presented Reginald C. with three separate photographs of the victims. Reginald C. viewed the photograph of Thomas Cummins and identified the same. Further, Reginald C. placed the date, time and his name upon the front of the photo along with those of Detectives Pappas and Brauer.

[14] The synopsis refers to Danny W., Antonio R., and Marlin G. Police later determined that the white male on the Bridge was Daniel Winfrey, but in the recorded statement, his name is never used. (Recall, the synopsis was prepared on May 29, 1991.) He is either Marlin's "friend from Wentzville," or the "white guy." Additionally, neither Richardson's nor Gray's last names are used on the tape; they are referred to, simply, as Tony and Marlin.

Immediately after being shown the photo of Thomas Cummins, Reginald C. was presented with the photograph of the victim, Julie Kerry. As he viewed this photo, Reginald C. became visibly shaken and began to cry. As Reginald C. regained his composure, Reginald C. placed his initials, date and time upon the reverse side along with Detectives Pappas' and Brauer's.

After identifying Julie Kerry, Detective Pappas presented Reginald C. with a photograph of the third victim, Robin Kerry. Reginald C. viewed same and again began to cry. With his voice breaking up, he positively identified this photo as the third victim on the bridge. As Detective Brauer left the interview room to get some tissue for Reginald C., Reginald C. placed his initials on the reverse side with the date and time. Detectives Pappas and Brauer signed the photograph on the reverse side.

All photographs mentioned have been properly marked, packaged and retained as evidence. All items are properly identified in the PIRS section of this report.

Reginald C. resumed his narration: As they were leaving the bridge, Tony came up with the idea that they could go rob the "white dude" and rape the girls. They all agreed to do that. They re-entered the bridge and walked toward the Illinois side. They saw some campers on the shore line and began to talk with them. While they were walking, they talked about who would grab the male and who would grab the girls.

After speaking with the campers, they walked back toward the Missouri side and came up to the victims. Marlin tapped the male victim on the shoulder and said, "Hey dude, come here. I got to talk to you." Marlin walked the male victim away and he (Reggie) walked with the male victim and Marlin. Marlin told the male to lie down while Reggie told the victim to do as he was told or he would "get shot." As he stood over the male victim, Marlin, Tony and the white suspect grabbed the girls.

Marlin and Tony were tearing off the girl's clothes, when Tony punched one of the girls because she was fighting with them. After Marlin and Tony took her clothes off, they each raped her. Marlin's friend, the white suspect, took the clothes off the other girl. Then the white suspect went to the male victim, who was lying on the floor of the bridge and stood over him while he (Reginald C.) raped one of the girls. Reginald C. was shown a photo of both female victims and identified Robin Kerry as the person he had raped. He advised that Tony and Marlin raped both girls. He advised that he does not think that the white male suspect raped the girls but is unsure, as it was dark and everything happened so fast.

After the three of them (Reginald C., Marlin G. and Antonio R.) had raped the two girls, they took them to the manhole and put the two girls on the platform below the hole. After they were down on the platform, the suspects caused them to lie down, side by side. They were going to leave them and walk off the bridge, but Marlin and Tony turned back around and ordered the two girls and the male onto the concrete bridge support below the platform. [*The synopsis is wrong at this point. Clemons' statement said that Gray and Winfrey were already walking off the Bridge when Richardson, acting alone, had the*

*three victims get on the concrete pier. Ex. 137 at 15. Clemons then joined Richardson on the platform, Ibid.]* While Reginald C. was standing on the platform above the bridge support, they stood the victims up. Tony pushed one of the girls off of the bridge support and attempted to push the other girl off, but she grabbed his arm. After she grabbed his arm, he (Tony) punched her and she fell from the bridge support into the river below, as did the other girl. They turned to the male victim and told him, "Jump motherfucker or we'll shoot you." [*The synopsis is wrong again at this point: Clemons' statement does not use the word, "motherfucker," but it* ***does*** *say that Cummins was threatened that he would be shot if he did not jump.*] The male victim jumped from the bridge.

At that time, Detective Brauer asked what had happened to the clothes of the two girls. Reginald C. stated he did not know. He advised that it was Tony's idea to push the girls off the bridge. He (Tony) told them, "I don't want to leave any witnesses."

When asked who held the girls down while they were being raped, Reginald C. stated that Tony held one of the girls down while Marlin raped her. After Marlin finished, he (Reginald C.) raped her while Tony held her down. While he was raping the one girl, the white suspect was with the other girl. The white suspect was ripping the clothes off the girl. He (the white suspect) restrained one of the girls. While that was happening, he was with the male victim.

Marlin went to the other girl and while she was being held down by the white suspect, Marlin raped her. While that was occurring, Tony raped the other girl. Reginald C. remained with the male victim.

After Marlin G. finished raping the second girl, he went to the victim (later identified as Robin Kerry) and he raped her. After Marlin finished raping the second girl, Marlin relieved Reggie, who was guarding the male victim and Marlin guarded the male victim.

One victim was raped three times. The other victim was raped, but he could not recall how many times.

Tony later told him that he had one of the girls perform oral sodomy on him. To the best of his knowledge, Reginald said no one in the group had anal sex with either victim.

Reginald C. advised that both victims were struck repeatedly in the face. While being raped, both victims were conscious and aware of what was taking place. One of the victims told the other to cooperate so they would not be injured anymore.

After they finished raping the girls, all four of them moved the victims to the platform below the bridge. They were all present when Tony pushed in the one victim. [*Again, the synopsis is wrong. Clemons' statement said that only he and Richardson were present when Richardson pushed the women off.*] When Tony tried to push in the other victim, she grabbed his arm. She was trying to prevent herself from falling, when Tony punched her. The force of the punch forced her to let go of his arm and fall to the water below.

> After the victims fell to the water and the male victim jumped in, he could hear the victims yelling for help.
>
> When asked by Detective Pappas, Reginald C. advised that the rape of the two girls was a "planned thing" to do; the male victim was to be restrained and the girls to be raped.
>
> Detective Brauer asked if it was the idea of the group members to each restrain and rape the girls. Reginald C. responded, stating, "Yes."
>
> Reginald C. has known Tony since he was six years old. He has known Marlin G. for three to four years. He had never met the White suspect before.
>
> He advised that he believes that this episode was Tony's second time at the bridge. He and Marlin have been to the bridge many times before that night.
>
> After the incident, Reginald C. advised that they all went to Alton, Illinois, to a mountain. There, they talked about the rapes of the girls and agreed that it was wrong that they were killed. They felt it was unnecessary. All agreed never to speak of the incident again. He spoke to no one further of the incident until interviewed by the detectives.

(Background Ex. 25 at SLPD 00137-00140.)

After the statement concluded, the detectives asked Clemons to give a videotaped statement, but he declined. He was arrested and taken to prisoner processing.

The focus of the police investigation now turned to Marlin Gray. Somehow police knew that Gray was friends with Mike Schaffner of Normandy, Missouri. While Brauer and Pappas were interrogating Clemons, Detectives Trevor and Walsh drove to Schaffner's residence around 9:00 p.m. on April 7, accompanied by Normandy police officers. They were allowed into Schaffner's house where they found Gray and took him into custody. While at his house, detectives also talked to Schaffner. He told them that on the evening of April 4, Gray, Clemons, Richardson, and an unknown white guy who was 15-16 years old came over to his house. They drank beer and left around 11:00 p.m. to go to the Chain of Rocks Bridge.

After police took Gray into custody, eventually he ended up (according to police) in Interview Room #2 at the St. Louis Police headquarters. At 11:25 p.m. that evening, a marathon interrogation session began, initially with Pappas and Trevor. (By that time, Pappas had completed his interaction with Clemons.)

Police claimed that Gray waived his right to an attorney and agreed to talk to them "as he had nothing to hide." (Background Ex. 25 at SLPD 000143.) (As was the case with Clemons,

Gray would later vigorously deny this, claiming that he consistently asked for an attorney and that he was eventually beaten into making a statement.) Initially, Gray claimed that he never left Wentzville the evening of April 4, and that he and his girlfriend went to a local park and smoked dope. He flatly denied being on the Bridge that night.

When asked about Schaffner, he said he was initially confused when he claimed to be smoking pot at the park; instead, he admitted he had been at Schaffner's house the night of April 4, but he claimed that after he left Schaffner's, he went home at 2:30 a.m. and went to bed.

Gray was asked if he had a friend named "Reggie." He said he did and that Reggie was also at Schaffner's house that night. Gray elaborated that he, Clemons, "Tony," and "Danny" went to Schaffner's house in Normandy at about 9:30 on April 4, where they drank 40 ounce bottles of beer, and left at 11:30 p.m. Gray and Danny went back to Wentzville, smoked dope in a park, and Gray got home at 2:30 a.m. (*Ibid.* at SLPD 00143-144).

At this point detectives interrupted their interview of Gray to talk with other witnesses until 3:00 a.m. on April 8. When Pappas and Trevor resumed talking with Gray, they told him they had reason to believe he was on the Bridge that night. Gray posed a hypothetical question: "What if a person was there...on the bridge, but did not take an active part in the incident?" (*Ibid.* at SLPD 00145.)

At this point Trevor left and Det. Brauer came in. Eventually, Gray said that they had gone to Schaffner's, left, and got more 40 ounce bottles of Old [*sic*] English and Old Milwaukee.[15] They went to the Bridge in two cars:

> Upon arrival at Riverview and I-270, they parked their vehicles on the side of the road, exited their vehicles and walked through a hole in the fence. As they entered the fenced area that encompassed the bridge, they walked up a path. Reggie, who had a flashlight, led the way. When they entered the bridge, they climbed on the steel beams and walked to the Illinois side of the river.
>
> On the Illinois side, Reggie began yelling at some people below the bridge. Later on, they walked back toward the Missouri side of the river and came upon some white people. As they were approaching the white people (one white male and two white females), Tony brought up the idea of robbing the white male and raping the girls.

[15] In the Supplemental Incident Report of 5/29/91, officers said this part of the interview started at 2:25 a.m. Earlier they said they did not resume the interview until 3:00 a.m. (Background Ex. 25 at SLPD 00145-146).

> They began to talk with the victims and Marlin told the male to give him some money. As he talked with the male victim, Danny grabbed one girl and Tony grabbed the other one around her neck, stating, "Shut up, bitch." Tony grabbed the male's wallet and threw it over the bridge into the water. Just before Reggie and Tony raped the girls, Reggie handed out rubbers to everyone to use on the girls. He remained with the male victim while Danny held the female victims and Reggie and Tony raped them.
>
> After they finished raping the girls, Reggie and Tony took the victims down a manhole into a platform. From the platform, the victims were moved onto a concrete pillar that supports the bridge. Reggie and Tony pushed the two girls into the river below and ordered the male victim to jump or be shot. The male victim jumped as ordered.
>
> When asked if he participated in the rapes of the victims or if he took any property from either of the three victims, he stated he did not.
>
> After the incident, they all left and went to Alton, Illinois to a mountain.
>
> There (a location he could not describe other than as a mountain), they all talked about the rape and murder of the victims. As they left the mountain, Tony gave him a watch. Tony told him that he had gotten it from the male victim when he guarded him while he (Marlin G.) raped the other girl. After he took the watch, they all stopped at a gasoline station (location unknown) and purchased some gas for both cars and bought some cigarettes. After buying the items, they all left, agreeing never to talk of the incident again.
>
> When asked what happened to the watch that Tony had given him, Marlin G. advised that he went out to a house in Wentzville where his friend, "the Flamester," lives. He provided the number of 327-7310 as the Flamester's telephone number. There, he was talking with the Flamester and sat down in a chair in the living room. While doing so, he removed the watch from his pocket and sat down in a chair in the living room. While doing so, he removed the watch from his pocket and stuffed it down in the chair. He stated the Flamester did not know that the watch was in his house, inside the chair.

(*Ibid.* at SLPD 00146-147.)

As the early morning went by, more details filtered out. Gray acknowledged that the flashlight had "Horn 1" inscribed on it (*Ibid.* at SLPD 00147). He admitted that there were actually two meetings with the group of cousins. The first included a friendly conversation that lasted 10 minutes in which they talked about where they were from, and Gray mentioned he was from Wentzville (*Ibid.* at SLPD 00148). The two groups parted, and the group of four decided to rob the male and rape the females. He then described how the crimes had occurred (*Ibid.* at SLPD 00148-149).

Up to this point all of the conversations were unrecorded. At 5:10 a.m. on April 8, Gray agreed to give a recorded statement. This is the police synopsis of that recorded statement at the point when the group of four arrived at the Bridge:

> When they arrived at the bridge, they climbed onto same. He and Reggie were looking at the graffiti, using a flashlight that he and Reggie shared. While walking on the bridge, they encountered the three victims who were entering while they were leaving. They had a brief conversation and Marlin G. led the victims to a manhole. He showed them how to get in and out of the manhole, but they did not want to. They decided to leave and they (victims) went to the other side of the bridge, the Illinois side.
>
> As they reached the end of the bridge near a 6' high berm, they began to discuss how pretty the girls were. Tony said he wanted to mess around with the girls and get their money. Everybody agreed to at least getting the money. As they proceeded back over the hill and walked toward the victims, Reginald C. handed out condoms. Walking to the Illinois side, they had a conversation with some people down below the bridge. After the conversation ended, the four of them, with the victims, started walking back toward the Missouri side of the bridge.
>
> As they were walking, Tony told them that the password was "five". They assumed various assignments. Marlin was to subdue the male victim, while Danny and Tony were to grab the girls. Reggie was to help with the male victim in case he put up a fight.
>
> As they approached the victims, Tony said "on five" and he (Marlin G.) tapped the male victim on the shoulder and asked him to step back so he could speak to him.
>
> As he stepped back five or six paces, Marlin G. told him to get on the ground so they could take his money. The male victim did not hesitate, so Marlin G. did not hit him, and he lay down on the ground. Tony and Danny grabbed the girls. Danny and Tony put their hands over the mouths of the girls to muffle their voices.
>
> Reginald C. then came over to Marlin G. to make sure that the male victim was under control and could not get away.
>
> Marlin G. left the male victim in his custody, and Marlin went to one of the girls and grabbed her. He told her if she cooperated she would not be hurt.
>
> Tony and Marlin were with the first female victim. He ripped off her clothes and threw them over the side of the bridge. He also threw a wallet over the side of the bridge that belonged to the male victim. He (Tony) proceeded to have sex with the first female victim. As Tony gained control of the first female victim, Marlin moved away and went to the second female victim, who was being restrained by Danny.

Marlin pulled her panties down and proceeded to have sex with her. After he finished having sex with her, he got up and went back to the first female and proceeded to have sex with her.

At 5:21 a.m., Detective Brauer left the interview room to get photos of the three victims and a photo of the flashlight that was recovered on the bridge. At 5:22 a.m., Detective Brauer entered the interview room with the aforementioned photos.

Detective Pappas showed photos of the female victims and a photo of the male victim. Marlin G. identified same.

After viewing the photos, Marlin G. advised that Danny had hold of Julie Kerry and Tony had hold of Robin Kerry. He identified Thomas Cummins, the male victim, whom he had held on the ground as did the others.

Marlin G. advised that he took the clothes off of Julie and Tony took the clothes off of Robin. When asked who was watching the male victim, he advised that Reginald C. relieved him of that duty, and to his knowledge Reggie was guarding the male victim.

When asked if the girls had put a fight, he advised that they did, however, eventually realized that it was in their best interest not to resist any longer.

After he took the clothes off of Julie, Marlin stated he and Julie Kerry had sex, but amended his wording to "raped her" and while doing so, Tony was raping Robin. After he finished raping Julie, he went to Robin's location and raped her for about three minutes, but failed to reach a climax in her.

Marlin stated that while he was raping Robin, no one was holding her down, but rather Reginald was holding his hands over her eyes. At that time, Tony was holding Julie and Danny was watching the male victim.

Marlin stated that while he was raping Robin, he observed Tony walking toward the Illinois side of the bridge and he actually lost sight of him.

After Marlin finished with Robin, he observed Reginald C. begin to rape her. He then stated that he was not sure if Reginald actually raped her, but saw that he was lying next to her.

When asked, Marlin G. stated that both girls had their bottoms (pants) off. He stated he had sex with both girls while Tony had sex with only one. Neither Danny or Reggie had sex with any of the girls to the best of his knowledge.

He advised that there was no one else around other than the three victims and the four of them.

After he finished raping Robin, he went to the male victim and threatened him. He told him not to tell anyone about this and said that they had friends who would hunt him down if he told the police. The male victim said he would not tell.

Danny was yelling at the male victim, also. He (Marlin G.) asked Danny where Tony was going with victim Julie. He lost sight of Tony and Julie and ran down the Missouri side of the bridge, looking for them. As he ran by a manhole, he would yell down, "Hey," and wait for an answer. He would wait briefly, then leave. He ran to the end of the bridge because he thought Tony took Julie there. Marlin G. stated, "I thought that Tony took Julie there, the end of the bridge, to maybe...drown her there or something." Marlin G. ran down to the end of the path and did not see Tony. He ran back to the bridge to tell Reggie. When he got to the hill, he saw Danny. When he asked Danny about Tony, Danny told him that Tony was at the hole on the bridge that he must have passed up.

When asked specifically about where he thought Tony was, Marlin G. stated, "After I realized I passed up Tony, I knew Tony was in a manhole. This manhole that I'm talking about is directly over a concrete pillar that holds up the bridge."

As he returned, Reggie and Tony ran down and told him that they (Tony and Reggie) had the victims down the manhole and pushed the girls in, and that they told the male victim to jump, and he did so.

When asked about the condom being on the bridge, Marlin G. advised that it was his condom. He started to use the condom with Julie, but stated, "I didn't use it properly, so I decided not to use it."

He took off the condom and left it on the bridge.

He described the flashlight as a black police issued flashlight that belonged to Reginald C., who had gotten it out of his car. While they were on the bridge, they lost the flashlight on the bridge.

He advised that the robbery was planned, but that they weren't planning to hurt those people. He had never met or seen the victims before. He was then asked by Detective Brauer, "you mentioned that there was no talk of raping the girls, that it was just a joke. Why did you rape the girls?" Marlin G. answered, "Things got serious."

Detective Brauer then asked, "After this was all over, did someone later on give you anything that belonged to the victims?" Marlin answered that Tony gave him a man's Swatch watch with a black band.

Marlin explained that he held on to it until the next day. He stated that he was with a friend of his, Don Troncotti [*sic*], and at the time he didn't believe that they really made the victims jump off the bridge. Reginald said that they did it, but he didn't hear any water splash. The next day Don Troncotti was telling him (Marlin) how some people got killed on the Chain of Rocks Bridge, and they had a conversation about it. When Don

told him that the victims had not been found, but the white male victim survived, he took the watch and put it in the chair in Don's house. The watch is still there to best of his knowledge."

Marlin G. advised that he had mistaken his friend's name; it was Joseph and not Don Troncotti. This friend is referred to as "the Flamester" because of a car that he once owned.

After they left the bridge, they all went to Alton to a place called "the chair" and talked. Before they arrived there, they stopped and bought some gas for his car and Reggie's car, along with some cigarettes.

(*Ibid.* at SLPD 00150-153.) Gray's recorded statement ended at 5:51 a.m. on April 8. He was then booked for murder.

This account added a new feature not previously known to police, namely that Gray claimed to have run off the Bridge, looking for Richardson and one of the Kerry sisters, before the murders actually took place. Neither Cummins nor Clemons provided this detail. As will be seen, there would be independent corroboration of this aspect of Gray's story.

At this point police had recorded statements from three of the group of four. All of the statements were inconsistent in affixing blame for who killed the Kerry sisters. Not surprisingly, none of them admitted culpability for pushing the Kerry sisters off the Bridge. Richardson claimed that Clemons and Gray each killed one of the sisters. Clemons said Richardson pushed off both of them. Gray said he was off the Bridge when the sisters were killed, so all he knew was what Richardson said, namely that "they [i.e. Richardson and Clemons] had thrown the victims off of the Bridge." (*Ibid.* at SLPD 000152.) They all admitted the rapes, but not being part of the murders. Two of the three agreed that Winfrey did not kill or rape anyone, although he assisted in the rapes.

Each of the three gave constantly changing accounts of what part they had personally played in what happened. Richardson went from being a secret observer, hiding in the shadows, to being a reluctant rapist. Clemons went from having nothing to do with the crimes on the Bridge, to admitting to rape, but not murder. Gray went from claiming that he spent the night smoking dope in a park in Wentzville to admitting rape, not murder.

Less than eight hours after Gray finished his recorded statement, it was Winfrey's turn. St. Louis Detectives Bender and Walsh went to Wentzville High School at around 1:30 p.m. the afternoon of April 8, accompanied by two Wentzville detectives. They took Winfrey into

custody and he was eventually taken to the St. Charles County Juvenile Center, where he was joined by his parents, along with Douglas Patton, a Deputy Juvenile Officer. Patton informed Winfrey of his rights; Winfrey agreed to talk to the police and gave this account (*Ibid.* at SLPD 00156):

> Daniel W. stated he was present on the bridge on 4/5/91, but denied assaulting the victims or pushing them off the bridge. Daniel went to the bridge with his friend, Marlin G., who had picked him up earlier and taken him to "a guy named Mike's" house in North County. While at the house, they met with Tony and Reggie, who are friends of his and Marlin's, but he does not know their last names. Daniel has been to Reggie and Tony's house before.
>
> They were all drinking beer and started talking about going up to the bridge because Daniel had never been there before.
>
> Daniel and Marlin left in Marlin's girlfriend's car to go to the bridge. After they arrived, Reggie and Tony showed up at the bridge. Either Reggie or Tony had a flashlight, which he described as a "cop's" flashlight, black in color, and longer than the average flashlight. They stayed on the bridge a while drinking and climbing on the structure.
>
> As they were leaving the bridge, they encountered the victims, whom he described as two white females and a white male. They started talking to the victims and he borrowed a cigarette from one of the girls and her lighter. They then continued walking off the bridge and the victims walked to the center of the bridge.
>
> After walking off the bridge, they started talking and everybody decided to go back and rob the victims. They then went back on the bridge and ran to the other side, where they met the victims. They then walked with the victims toward the center of the bridge and Daniel borrowed another cigarette from one of the girls. He also again borrowed her lighter.
>
> Marlin then said to the white male, "man, I got to talk to you." He put his arm around him and started walking away from the rest of the group. Marlin then struck the white male and forced him to lie face down on the ground. They then started to attack the girls and one of the girls swung her fist and tried to strike him, at which time he pushed her down and held her while Reggie jumped on top of her. He watched as Tony and Reggie raped the girls and Marlin called him over to watch the male.
>
> He then put his foot on the back of the male victim while Marlin raped one of the girls. They took the girls' clothing and threw the clothing into the river. They then put the girls and the male in the manhole area.
>
> Marlin had started walking off the bridge. At that point, he saw Tony and Reggie jump down into the manhole area and he turned and started walking toward Marlin. Tony and

> Reggie then came running back and said they pushed the girls off and had told the male to jump. All left the bridge and drove around, drinking more beer. Daniel denied taking part in the sexual assault of the victims, however, he admitted that he went back on the bridge to rob the victims.

(*Ibid.* at SLPD 00156-157.) Winfrey wrote out a very abbreviated version of these facts that recounted that he was chasing after Gray at the time of the murders.

Winfrey testified to this version at all three trials, with some elaboration. Interestingly, his account was pretty similar to Marlin Gray's in that both he and Gray agreed that Gray had gone off the Bridge in a wild goose chase, looking for Richardson who had actually disappeared down the manhole.

Significantly, the evidence was uncontroverted that no one pressured Winfrey or suggested to him that he say anything he did not believe. The Juvenile Officer who was present for his statement verified that Winfrey's parents were present when police talked to him (T. 2182). Like Richardson, there was never any claim that his statement was the product of duress.

On April 26, 1991, the decomposed body of Julie Kerry was discovered in a slough of the Mississippi River in Pemiscot County, Missouri, some 217 miles south of the Chain of Rocks Bridge (Gray T. 2043). The body was clad only in a bra and a gold Seiko watch (*Ibid.)*. Julie's corpse was unrecognizable; her identity was confirmed by dental records. Robin Kerry's body has never been recovered.

**The Internal Affairs Investigation**

After Clemons and Gray were arrested, they were booked. Eventually, they both filed complaints with the Internal Affairs Division ("IAD") of the St. Louis Police Department, alleging that they had been beaten by the detectives who interrogated them. On April 9, 1991, Sgt. William Swiderski and Sgt. Jack Huelsmann of the IAD interviewed Clemons at 3:13 p.m. at the jail. His attorney was present for this interview (H.C.Pet. Ex. L at 1).

Clemons told the investigators that on April 7 he was taken into an interview room and that the detectives started asking him questions. (Detectives Pappas and Brauer would dispute what Clemons said, but the account that follows is taken from what he told the IAD investigators.) When he said he wanted a lawyer, one of the detectives slapped him in the back of the head (*Ibid.* at 6). He also threatened to bounce Clemons off the wall if he did not talk

(*Ibid* at 8). He told the detectives he had nothing to do with the murders on the Bridge, then he stopped talking. At some point he was told to scoot back from the table where he was sitting, and he said, "I was told to sit on my hands." (*Ibid.* at 9.) At that point one of the detectives slammed the back of his head into the wall (*Ibid.*). When he still refused to talk, Clemons' head was again slammed against the wall and he was choked (*Ibid.* at 11). After that, one of the detectives hit him in the chest. He told the IAD investigators both detectives continued to strike him repeatedly. Eventually he lost consciousness (*Ibid.* at 15).

Finally, Clemons did not want to get hit any more, so he agreed to make a statement (*Ibid.* at 17). The officers wrote out what they wanted Clemons to say (*Ibid.* at 18). They had him read it over and over, so he could remember what to say (*Ibid.* at 20). The notes called for Clemons to say he was the one who pushed the women off the bridge (*Ibid.* at 21), but he refused to say that, so they had him say he raped one of the women and restrained the guy.

The detectives did not like the first tape, so they threw it away and ordered him to make a new tape after beating him some more (*Ibid.* at 24-25). After resisting, Clemons said he would make another tape, but he would not admit to murder (*Ibid.* at 28-30).

Clemons reviewed the "script" before the second recording, but did not read from it during the taping (*Ibid.* at 34). Clemons confessed to crimes (not including murder) on the second tape.

Clemons saw Gray once that evening. He was crying (*Ibid.* at 43).

Eventually Clemons was booked after the second tape.

After they interviewed Clemons, Swiderski and Huelsman took a statement from Marlin Gray a little before 5:00 p.m. on April 9 (H.C. Pet. Ex. O). Gray's attorney was present for the interview.

Gray said that when he was arrested the night of Sunday, April 7, he was taken to the Homicide Unit and placed in Interview Room #1, where he was handcuffed to the table (H.C. Pet. Ex. O at 9). Gray claimed that the detectives never advised him of his rights. They asked him where he was the night of April 4 and he got his days mixed up, telling them the wrong thing initially (*Ibid.* at 11). Then he told the officers that on Thursday, he, Reggie, Danny, and Tony were at Mike Schaffner's place and decided to go to the bridge. He explained that Tony was a friend of Reggie's and that Danny was a guy from Wentzville that Gray hung out with (*Ibid.* at 11-12). The detectives asked Gray some questions, but they were not happy with his

answers. One of them asked Gray if he had been to the Bridge. At that point he said he asked for a lawyer, but one of the detectives said he could not have an attorney until they were finished with him (*Ibid.* at 15). Then one of the detectives threatened to bounce him off the walls and "beat the fuck out of me." (*Ibid.* at 16.) When Gray refused to talk, one of the detectives struck him in the head (*Ibid.* at 17). Gray said that eventually they uncuffed him "and I was instructed to sit on my hands," at which point one of the detectives punched Gray five times in the chest (*Ibid.* at 18). When he still refused to talk, one of the detectives picked up a thick book and struck Gray "real hard" with the book on the back of the head. He was struck in the head approximately 20 times with the book over about five minutes, with the detectives taking turns hitting him (*Ibid.* at 19-20). One of the detectives warned him they could keep this up all night. Gray defied them, saying, "Well if you feel like hitting me, go right ahead, cause I'm not saying anything." (*Ibid.* at 21.) One of the detectives had him stand up, and he pummeled Gray in the stomach "very hard." (*Ibid.* at 21.) When he put up his hands to deflect the blows, one of the detectives twisted Gray's neck (*Ibid.* at 22).[16] Eventually they stopped beating Gray and left the room for 10 to 15 minutes.

When they came back in, they asked if he was ready to talk; when he was not, Gray said the beating began anew (*Ibid.* at 23-24). He was struck another 10 times in the head with a thick book (*Ibid.* at 24).

Eventually, they moved Gray to Interview Room #2 where they shoved him into a table, injuring his left knee (*Ibid.* at 27-28). At that point Gray began weeping hysterically and screaming for help because he was in severe pain (*Ibid.* at 29). They left Gray alone for a while and then returned and told him to get up. Eventually, Gray sat down in a chair and another detective came in. That detective was introduced as a supervisor. He told Gray that they knew he was at the Bridge. Then he left (*Ibid.* at 32).

The other two detectives started telling Gray what he had done at the Bridge. One of them told Gray that he (Gray) had grabbed the guy while his friends grabbed the girls. Then Gray and the others raped the sisters and eventually killed them (*Ibid.* at 33).

Gray denied all this. (This was all before any statement was taken on tape.) The detectives insisted that the other guys were saying that Gray killed the sisters and that he had to

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[16] From his description of the detectives, it appears this was Det. Pappas.

admit something, or he would get the death penalty. They opened the door, and there was Reginald Clemons with his right eye swollen (*Ibid.* at 36).

After that the detectives went over with Gray what they wanted him to say, written out on legal pads for about half an hour (*Ibid.* at 37-39). Eventually, Gray gave a tape-recorded statement that he claimed was a bunch of lies (*Ibid.* at 39).

Gray did admit to the IAD investigators that he was on the Bridge that night, but he said, "I had no encounters with those people." (*Ibid.* at 46.)

After he made the tape-recorded statement in the Homicide Office, Gray was booked at the jail (*Ibid.* at 48). At times in the jail, Gray had contact with Clemons, but Gray insisted they did not discuss the beatings or the case (*Ibid.* at 49).

**The Trials Begin: Marlin Gray**

Judge Thomas Mummert III granted Marlin Gray's motion to sever the trials (L.F. 508; Gray Supp. T. 3). He also conducted a hearing on Gray's motion to suppress his statement to the police in July of 1992.

The State called Sgt. Swiderski at the suppression hearing. He testified that he had taken a statement from Gray on April 9, 1991. He said that Gray had no visible injuries from the beatings he claimed to have endured (Gray Supp. T. 37).

Sgt. Huelsman also testified. He said that as a result of the complaint he interviewed all police employees at the jail to see what injuries they observed or complaints by Gray. He also interviewed non-police employees, including people in the pre-trial release office (*Ibid.* at 49).

Detective Trevor testified that he and Det. Pappas initially interviewed Gray in Interview Room #2 at 11:25 p.m. on April 7. Trevor left at about 2:00 a.m. on April 8, when Det. Brauer came in. No one beat Clemons while Trevor was there (*Ibid.* at 57-59).

Detective Brauer also testified. He had also participated in getting the statement from Clemons (*Ibid.* at 80.) Brauer testified that after that statement was completed, Clemons was arrested and taken to the jail before Gray arrived at the Homicide Office (which means Gray could not have seen Clemons there as he claimed) (*Ibid.* at 80). Brauer interviewed Gray but never hit him or threatened him (*Ibid.* at 84).

Marlin Gray testified at his suppression hearing; his testimony was similar to what he said in the IAD interview, claiming that the recorded statement was the product of a beating and

that he did not voluntarily speak with police. He claimed that before doing his taped statement, detectives went over what his co-defendants had said, along with what Cummins said happened (*Ibid.* at 133).

On cross examination Gray admitted that the part of his statement that said he and the others in the group of four went to the Bridge on the evening of April 4 was true (*Ibid.* at 138-139). But in Gray's words, "that was the truth caused by beating." (*Ibid.* at 140.) He admitted that when he was on the Bridge that night, he saw "those people," i.e. the Kerry sisters and Cummins (*Ibid.* at 140-141). He talked with them and then left the Bridge (*Ibid.* at 141). He told the police that he had seen the cousins' group, and that statement was not due to any beating (*Ibid.* at 142).

Gray denied doing anything to the Kerry sisters, and he said no one did anything to them in his presence (*Ibid.* at 144). He admitted that one of the people in the group of four had a black flashlight that was lost on the Bridge (*Ibid.* at 148-149).

Judge Mummert denied Gray's Motion to Suppress.

Trial commenced on Gray's case on October 5, 1992; it lasted until October 23, 1992. The State called 34 witnesses during its case in chief. Defendant called 12 witnesses during his case. The State countered with 11 rebuttal witnesses and Gray had one surrebuttal witness.

In her opening statement, Gray's counsel signaled her intent to use the accusations against Cummins as the cornerstone of the defense. Gray's counsel claimed that Cummins' account was contrary to scientific fact, for which reason he could not be telling the truth. She said that it would be physically impossible for Cummins to survive a jump off the Bridge. She said the defense would call Corp. McDaniel of the Water Patrol, whom she described as an expert on injuries caused by jumping from great heights, and said that he would opine that Cummins would have broken something -- most likely his neck -- if he had jumped 90 feet, which she said was the distance from the Bridge to the surface of the river (Gray T. 992). Even if Cummins somehow survived landing in the water, she described the large whirlpool under the Bridge that would have sucked him down and drowned him if he somehow survived jumping into the river (Gray T. 987). And she noted that even if he survived the fall and avoided the massive whirlpool, she would prove that anyone jumping in the river would have died of hypothermia (Gray T. 988). She also stated that according to the initial responding officers,

Cummins' hair was dry and neatly combed, inconsistent with his claim that he had jumped off the Bridge (Gray T. 989).

Counsel said that she would prove Cummins almost had sex with Julie the summer of 1990, and that he was upset that Robin was along when Julie picked him up on April 4, and that he was "carrying a condom in his wallet." (Gray T. 990.) She emphasized that Cummins repeatedly changed his story about what happened on the Bridge, until he admitted that he made an advance toward Julie that caused her to fall (Gray T. 991). She gave full voice to the Gray-could-not-be-guilty-if-Cummins-was-the-killer defense.

When the evidence commenced, Cummins testified consistently with his previous statements, which did not prevent Gray's lawyer from going after him full bore on cross examination. She tried to get him to admit that he told the police that he had been disappointed Robin was going along the night of April 4; he denied saying any such thing (Gray T. 1229). He admitted that he and Julie became good friends in Florida the year before, but denied that he wanted to have sex with her or that he told the police he had sexual longings for her (Gray T. 1231, and he denied telling police that he came close to having sex with Julie (Gray T. 1268). He admitted that, after they turned off the tape recorder at the end of the second recorded statement, the police confronted him with the immutable "facts" they had gotten from the "experts" at the Water Patrol and Coast Guard (Gray T. 1274). He agreed that the police accused him of lying about jumping off the Bridge, but insisted that he never changed his story by telling them that he had run off the Bridge, instead of jumping (Gray T. 1275).

Since Winfrey witnessed things Cummins did not, he was able to provide details that Cummins did not know about. Other witnesses verified aspects of the State's case. With Gray's confession presented to the jury, this Court summarized the evidence presented in the State's case in State v. Gray, *supra,* 887 S.W.2d at 374-376:

> Twenty-year-old Julie Kerry and her sister, nineteen-year-old Robin Kerry, made arrangements with their nineteen-year-old cousin, Thomas Cummins, to meet them shortly before midnight on April 4, 1991. Cummins, who was visiting at his grandparents' home in St. Louis, sneaked away shortly before midnight to meet the girls at a prearranged location. The Kerry sisters were intent on showing Cummins a graffiti poem the girls had painted on the Chain of Rocks bridge. The Chain of Rocks bridge had been abandoned some years earlier. It spans the Mississippi River at St. Louis and has been a site of drinking and partying by trespassers since its abandonment. The three arrived at the bridge, climbed through an opening in the fence, and went onto the Missouri side of

the bridge.

Earlier that same evening, defendant Marlin Gray, Reginald (Reggie) Clemons, Antonio (Tony) Richardson and Daniel Winfrey met at the home of a mutual friend in St. Louis. The latter two individuals were juveniles, being sixteen and fifteen years old respectively. Defendant was the oldest and largest of the group. At defendant's suggestion, the four left for the Chain of Rocks bridge to "smoke a joint" that defendant had acquired from someone at the house where the four met. The defendant's group had been at the bridge sometime before the Kerry sisters and Cummins arrived.

As the two victims and their cousin were walking toward the Illinois side of the bridge, they encountered [Gray] and his three companions. After a brief exchange of greetings, Winfrey asked for cigarettes, which were supplied by one of the Kerr sisters. As he had done earlier for his cohorts defendant demonstrated to Cummins and the girls how to climb down a manhole on the deck of the bridge to a metal platform which leads to a concrete pier that supports the bridge. [Gray] told Cummins the platform was a good place to be "alone with your woman." The two groups then separated, with the Kerrys and Cummins walking eastward toward Illinois and the [Gray's] group walking toward Missouri.

While walking away, Clemons suggested that they rob Cummins and the Kerrys. [Gray] smiled, clapped his hands, and replied, "Yeah, I feel like hurting somebody." The four then turned and began walking back toward the east end of the bridge. While walking, Clemons and defendant engaged in some conversation. When defendant handed Winfrey a condom, he responded to the implication by saying he "wasn't going to do anything. At that point, [Gray] and Clemons pushed Winfrey against the bridge railing and said, "You're gonna do it." Winfrey then agreed to "do it."

[Gray's] group continued walking toward the Illinois side and again came upon the Kerrys and Cummins. The girls were watching a campfire that had been built by someone on the Illinois side of the river. Richardson went to the side of the bridge and yelled something at the people by the campfire. At that point, the Kerrys and Cummins began walking back toward the Missouri side of the bridge. [Gray] and his three associates followed at a close distance.

As the group passed a bend in the bridge, [Gray], on a prearranged signal, put his arm around Cummins and walked him back ten to fifteen feet telling him, "This is a robbery. Get down on the ground." Cummins complied. [Gray] told Cummins that if he looked up, [Gray] would kill or shoot Cummins. At the same time, Clemons, Winfrey and Richardson grabbed Julie and Robin Kerry. The girls screamed. One of the assailants said, "Do you want to die?" and ordered the girls to stop screaming or the speaker would "throw you off this bridge." This statement, if not made by defendant, was made within earshot of defendant. Winfrey held Robin Kerry on the ground, covering her face with her coat. Clemons ripped off Julie Kerry's clothing and raped her as she was held by Richardson. At some point, while Julie and Robin were being raped

by Clemons and Richardson, [Gray] went to Cummins, who was still lying face down on the ground. [Gray] stated, "I've never had the privilege of popping somebody . . . if you put your head up or try to look, I'm going to pop you." [Gray] then went to where Winfrey was holding Robin Kerry on the ground. [Gray] told Winfrey to watch Cummins. Then, with the assistance of Clemons, [Gray] tore off Robin Kerry's clothing and raped her. Clemons then forced Cummins to surrender his wallet, wristwatch, some cash and keys. Clemons apparently became agitated upon finding Cummins firefighter's badge, thinking he might be a police officer. One of the assailants then forced Cummins to get up and, while holding Cummins' head down so he could not see who it was, walked him a short distance on the bridge and made him lie down again. There [Gray] and Winfrey warned Cummins not to talk to police. One of them showed Cummins his driver's license and said, "We know who you are and if you tell anybody, we're going to come and get you." Cummins heard two voices discussing whether he would live or die.

While [Gray] was in the act of raping Robin Kerry, Richardson forced Julie Kerry into the manhole and followed her. When [Gray] finished, he went to Winfrey, who was still watching Cummins, and asked where Richardson had gone. Winfrey pointed toward the Missouri side of the river. Defendant then ran off toward the Missouri side in search of Richardson and Julie Kerry, running past the manhole. According to [Gray], he thought Richardson had taken her "to the end of the bridge, where he could take her by the river and maybe drown her or somethin'."

Clemons, after completing his rape of Robin Kerry, forced her down the same manhole where Richardson had taken Julie. Clemons then returned to Cummins and, putting Cummins' coat over his head, forced him down the same manhole where Richardson and the two girls were located. Clemons then followed, as did Winfrey. However, Winfrey was told by Clemons to go find the [Gray], which he did.

Clemons ordered Cummins and the Kerry sisters to step out onto the concrete pier below the metal platform. The three were told not to touch each other. Julie Kerry and then Robin were pushed from the pier of the bridge, falling a distance of fifty to seventy feet to the water. Cummins was then told to jump. Believing his chances of survival were better if he jumped instead of being pushed, he jumped from the bridge.

Meanwhile, Winfrey caught up with [Gray]. The two were returning back onto the bridge and were near a rock pile at the entrance of the bridge when they were met by Clemons and Richardson. Clemons said, "We threw them off. Let's go." The group ran to their cars, drove to a gas station in Alton, Illinois, and bought food and cigarettes with the money they had taken from the victims. The group then drove to an observation point over the Mississippi River called the Chair, where they sat and watched the river. While there, Clemons remarked, "They'll never make it to shore." Gray praised Richardson for being "brave" to push the Kerry sisters off the bridge.

Later, in police custody, Gray admitted to participating in raping both of the girls but denied that he had been involved in the murders. His tape recorded

statement, although he claims it was obtained by police coercion, was admitted in evidence and was consistent in most essentials with the above statement of facts.

Although Cummins survived and testified at trial, Julie and Robin Kerry were killed. The body of Robin Kerry was never recovered. Julie Kerry's body was found three weeks later in the Mississippi River by the sheriff of Pemiscot County Missouri.

Since this Court's Opinion in State v. Gray focused on the facts necessary to make a submissible case, it was unnecessary to discuss the core of Gray's defense, which was that he had nothing to do with *any* of the crimes on the Bridge: not the murders, not the rapes, not the robbery. Nothing.

In support of that defense, Gray testified at trial. I did not see him testify, but it must have been something. He emphasized that he had no prior convictions and that on April 4, 1991, he left Wentzville because he had "gained authorization from my MEG unit" to go into St. Louis County (Gray. T. 2176). He explained that the MEG was a drug enforcement task force in St. Charles County that did liaison work with St. Louis County (*Ibid.*). By April 4, he claimed to have been working for the MEG for four months, entering "the lines of drug areas and [gaining] access to prospective drug dealers, primarily cocaine." (*Ibid.* at 2177.) The purpose of the contacts was to "solicit their services for the police." (*Ibid.*) The police had expanded his area of operations to include not just cocaine dealers, but "larceny, grand theft auto, whatever I found." (*Ibid.*) In order to protect the confidentiality of his undercover police contacts, they only used first names and did their work in the dark of night (*Ibid.* at 2178).

Gray was driving around in the 10 year old Chevy Citation owned by his girlfriend, Eva Altadonna (*Ibid.* at 2181), and his first stop was at the house of Joe Troncale, better known as "The Flamester."(*Ibid.*) At The Flamester's he saw 15 year old Danny Winfrey, and since he had gained authorization to go into St. Louis County, naturally he took young Winfrey with him (*Ibid).*[17] From there, Gray was not sure where he was going: "I was just going on as I went along and I decided to go into St. Louis since I had just been authorized that I could do so." (*Ibid.* at 2180.) Eventually, the duo ended up at Reginald Clemons' house between 5:30 and 6:00 p.m. (*Ibid.* at 2181). When they got there, Antonio Richardson was also there. Clemons introduced Richardson as his cousin (*Ibid.* at 2182). Someone suggested they get some alcoholic beverages, which everyone agreed was a good idea. Winfrey and Gray left in Eva Altadonna's car, while

[17] Think Batman; think Robin.

Clemons and Richardson left in Clemons' car. They went to a convenience store and Clemons went into buy the liquor (*Ibid.* at 2184). (Since he was only 19 at the time, it is unclear how Clemons accomplished that. Maybe he looked older than his age.)

After that, they went to Mike Schaffner's house in Normandy, where several other people were present. They watched a hockey game, and because he was musically-inclined, Gray entertained the crowed with his songs (*Ibid.* at 2185). (At this point in his testimony, Gray amplified his accomplishments as a singer, song-writer, drummer, dancer, and choreographer *Ibid.* at 2186). During the three hours or so that they were at Schaffner's house, they only had one "40 ounce" each (*Ibid.*). Gray also received a joint at Schaffner's house as a kind of free sample (*Ibid.* at 2190).

The subject of the Chain of Rocks bridge came up. Before April 4, 1991, Gray had been out there 100 times, and never had any serious problems (*Ibid.* at 2187). The group of four decided to go out there and left for the Bridge sometime after 10:30 p.m. Gray was unsure as to what time they got there (*Ibid.* at 2187-2188).

As they went on the Bridge, Clemons led the way because he had a black, police-issue flashlight with the inscription, "Horn 1." (*Ibid.* at 2189.) Gray showed Richardson how to gain access to the platforms under the deck of the Bridge by going through the manhole (*Ibid.* at 2190). Gray had done that plenty of times before (*Ibid.*).

No one else was on the Bridge when they first got there. As many as 125 people go out on the Bridge on weekends (*Ibid.* at 2192). The four walked almost to the Illinois side of the river and saw a campfire with plenty of people around it. They decided to turn around and head back to Missouri, where they encountered the group of cousins (*Ibid.* at 2193).

Gray introduced himself and said he was from Wentzville. The cousins introduced themselves, and everyone shook hands. Gray talked about coming to the Bridge so that he could sing, and the sisters talked about their musical tastes. The male of the group -- Cummins -- did not say much; he just stared at Gray (*Ibid.* at 2194). Gray demonstrated how he could climb over the side of the Bridge and come up through the manhole (*Ibid.* at 2195). Eventually, the group of four left for the Missouri shore, but not before Clemons told the other group that he had lost his flashlight (*Ibid.* at 2196).

When the group of four got off the Bridge on the Missouri shore, 16 year old Antonio Richardson wanted to go back and get the phone numbers of the two college students, so he and

Clemons and Winfrey turned around and went back on the Bridge. Gray said to the other three, "hey, go ahead and do that and meet me back at the car. I'm going to grab a pencil and paper and have that ready for you." (*Ibid.* at 2197.)

In reality, according to Gray, he wanted to go back to the car so he could smoke the joint he got at Mike Schaffner's house without having to share with the other three. So he did just that, going back to the car, smoking some dope, listening to some music, and just chilling (*Ibid.* at 2198). He had no idea what was going on with the other three, *since he was not there.*

After a half-hour or more of smoking dope and listening to music, Gray was "just sort of relaxed" (*Ibid.*), but he wondered where the other three fellows were, so he walked back toward the bridge. Just past the dirt mound, he encountered Winfrey moving at a pretty fast pace. Winfrey told Gray that the two girls just went over into the river (*Ibid.* at 2201). Gray did not believe him because "that's not an everyday occurrence." (*Ibid.*) Then he saw Clemons, and he (Clemons) was like, "Man, damn," which was very unusual for Clemons because he is usually a really laid back guy, but something had him really shaken up (*Ibid.*). Next came Richardson running pretty fast, and he blurted out that he had "robbed that guy and threw the girls into the river." (*Ibid.* at 2202.) All four ran back to the cars and went to a gas station.

In Eva Altadonna's Chevy Citation, Gray reverted to character and started grilling Winfrey about what happened because he (Gray) was irritated and curious (*Ibid.* at 2204-2205). At the gas station Richardson came over and showed Gray a Swatch watch. He said he did not want it and tossed it into the car between Gray and Winfrey (*Ibid.* at 2205). (This was Cummins' Swatch watch.) Gray, instincts honed by his experience in the MEG, figured the watch was the key to whatever had happened, so he decided to hold on to it (*Ibid.* at 2206).

The four then went to Alton, Illinois to "the Chair," a hangout on a river bluff. When they got up to the Chair, Richardson was "upset for some reason." (*Ibid.* at 2208.) Then Clemons told Gray what happened, and "I got pretty upset. I mean I hadn't seen anything or nothing, but I was upset that, you now, I hadn't been there to see what happened." (*Ibid.* at 2209.) So, Richardson was upset for some reason, unflappable Reginald Clemons was shaken up ("Man, damn"), and now Gray had evolved from being irritated to upset. But no one -- not even MEG operative Gray -- called the cops.

Eventually, Gray took Winfrey home to Wentzville, and then he went home to Eva. When he came to bed, he was wearing Cummins' Swatch, and because he needed an excuse for

why he was so late, and because he did not want to reveal to Altadonna that he had been on a mission for the MEG, he told her a lie about getting the watch in a fight on the Bridge (*Ibid.* at 2212-2213). Then he went to sleep.

Later on Friday morning, Gray got up about 11:00 a.m. and took a load of laundry to the Troncales' house. The Flamester was excited about news reports of the events on the Bridge. He told Gray that two women had died out there. Of course, until he saw it on TV, Gray did not believe anything had really happened, but then he realized "somebody was in deep trouble." (*Ibid.* at 2215.) On top of that, he was wearing Cummins' Swatch! Then his law enforcement experience kicked in, and he wanted to bring in Clemons, Winfrey, and Richardson to the MEG so that he could "take it through channels, so to speak." (*Ibid.* at 2215.)

In the meantime, Gray knew he had to keep the Swatch safe because it could be the key to cracking the whole case, so he put the Swatch where any resourceful undercover operative who wanted to protect critical evidence would put it: He stuffed it in the green naugahyde recliner at The Flamester's house (*Ibid.* at 2216). (Eventually, The Flamester's wife discovered the watch when she moved the recliner to vacuum the carpet, and turned the Swatch over to the police. Apparently, Gray did not take such an eventuality into account when trying to secure this critical piece of evidence.)

Later that day (this is still April 5), rather than call the police about the Swatch and what he had learned about someone being in "deep trouble," Gray visited a friend named Lewis Eman who had been involved in a "certain accident" with Gray a month earlier, in which he had sustained a broken leg and ribs and a broken neck. Gray generously took Eman and his pit bulls out for a walk instead of calling law enforcement about his knowledge of the murders (*Ibid.* at 2215-2216).

Eventually, Gray ended up at the Troncales' house again and ran into Winfrey. At trial when Gray was asked about how long he had known Winfrey, he said he did not really know him. When asked if they were friends, he explained that he met Winfrey in the course of an MEG operation, "and you kind of made it a point when you're doing stuff like that not to get too close to somebody." (*Ibid.* at 2219.) Nonetheless, he grilled Winfrey for information to "take to the guys" at the MEG (*Ibid.* at 2220).

Since he had had a pretty stressful day on April 5, Gray went to a party that night at Dennis Doyle's house. Winfrey, Richardson, and Clemons all showed up, since they too had

been through some stressful events. There were a number of other people there, and they sat around playing cards and drinking Jack Daniels (*Ibid.* at 2221). In between Jack Daniels and cards, Gray managed to interrogate Richardson and Clemons further about the events on the bridge. Eventually, the party broke up, so naturally they all went to *another* party in Wright City with a number of kids from 15 to 22 years old (*Ibid.* at 2222-2223).[18]

On the night of April 7, Gray was again in party mode, this time at Mike Schaffner's house in Normandy with a number of other people.[19] The murders on the Bridge were a popular topic of conversation, and someone said Clemons had been taken down for questioning. This caught Gray's attention, and he was afraid Eva Altadonna would get mad if he got taken downtown, so he tried to figure out how to tell her what was going on. After discussing matters with her, he asked her to decide whether he should go in voluntarily or wait to be picked up. The police solved that dilemma by showing up at Schaffner's house (*Ibid.* at 2226). As they took him away, Gray told Eva Altadonna to get him a lawyer (*Ibid.* at 2228).

Eventually, Detectives Trevor and Walsh took Gray and two other men at Schaffner's house to the Homicide Office in St. Louis. Gray's testimony about his interaction with the police in the Homicide Office was largely the same as what he told IAD investigators. He claimed that his confession that had been played during the State's case was fabricated because of the savage beating he sustained at the hands of the police.

At the close of his direct examination, Gray denied raping anyone, robbing anyone, or killing anyone (*Ibid.* at 2263).

After Gray's performance on direct, the prosecutor did not have to do much on cross. When pressed about hiding the Swatch in the recliner, Gray claimed he had to do that to keep it safe until he could turn it over to MEG on Monday, April 8 (*Ibid.* at 2284). He claimed that all of the people who testified against him, including Cummins and Winfrey, even The Flamester, were not being truthful (*Ibid.* at 2289-2300). He denied becoming a snitch to "work off" criminal charges he picked up when he got caught stealing from the gas station where he worked; instead, he insisted he was a paid informant (*Ibid.* at 2304-2305). He admitted the doctor who examined him after the alleged beatings could find no evidence of any injuries, despite what Gray described as a savage mauling (*Ibid.* at 2311). He admitted that even though he had serious

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[18] In Gray's world, apparently no one ever slept.

[19] It seems there were *always* a lot of people at Schaffner's house

reason to believe that some very bad things had occurred on the Bridge that night, he made no effort to contact the police, despite his close association with law enforcement (*Ibid.* at 2317-2320). His excuse for that was the need to go "through channels" and tell the MEG since he was working for them, and they were not available until Monday (*Ibid.* at 2320).

Gray's testimony opened the door for the State to bring in a good part of the MEG to testify. Sgt. Harry Belcher of the Wentzville Police Department told the jury that Gray had been caught stealing money from his employer (*Ibid.* at 2385-2386). Rather than prosecute him, Gray was referred to the MEG (*Ibid.*).

Officer David Buehrle testified that he was part of the MEG in March and April of 1991. Gray snitched for the MEG to "work off" his stealing charges. He was never authorized to go into the City of St. Louis or St. Louis County to develop cases. Gray tried to set up several buys in St. Charles County, but only two ever took place (*Ibid.* at 2389-2391).

Officer David Wait was the MEG member who recruited Gray to be a snitch on March 8, 1991, while he was in jail for stealing. Gray had to sign a contract agreeing to set up three deals to get three people arrested. In exchange for that, Officer Wait agreed to work with the prosecutor to make the stealing charges go away. Gray had to agree that he was not to buy, sell, or possess any drugs on his own (*Ibid.* at 2400-2403). Unfortunately, Gray was a flop as a snitch; the only person he ever turned in was a friend. Frequently, he failed to show up for drug deals (*Ibid.* at 2404). Of course, the MEG members undercut Gray's claim that he had been working cases for four months, when he had just signed his snitch contract less than a month before the events on the Chain of Rocks Bridge.

Aside from claiming that he had nothing to do with any of the crimes on the Bridge, the other major component of Gray's defense was to go after Cummins, advancing the initial theory by the police. In that regard, his counsel vigorously cross-examined Cummins about the statements he allegedly made to the police about sexual longings for Julie and running off the Bridge, and startling Julie so that she accidentally fell off into the river. Cummins adamantly denied he had ever made the statements to the police that Jacobsmeyer and Company claimed. Even though she was fully armed with the alleged prior inconsistent statements in the 5/31/91 Supplemental Incident Report, Gray's counsel could not get Cummins to back down.

The so-called immutable physical facts that Gray's attorney promised to prove in the defense opening, based on the investigation by police the morning of April 5 -- the distance from

the bridge to the river, the speed someone would be traveling when hitting the water, the massive whirlpool, etc. -- became a whole lot more mutable when exposed to the light of day in court.

Gray called Corp. James McDaniel of the Missouri State Water Patrol as his first witness. (Recall, McDaniel had told Sgt. Nichols that there was a whirlpool to the south of the bridge that would suck someone swimming under the water, and that the strong current would make it difficult to reach the Missouri shore, and that the water temperature would cause hypothermia, which would cause drowning, Background Ex. 25 at SLPD 00043.) McDaniel testified at trial that his patrol area included the Meramec, Gasconade, and Mississippi Rivers south to Perryville (Gray T. at 1945). McDaniel became involved in the search for the sisters on April 6, 1991, the day after the murders. He talked to Sgt. Nichols initially on the moming of April 5 (*Ibid.* at 1947). He said that when the river level is low at the Chain of Rocks Bridge, the current is very swift. He saw a whirlpool on April 6 near the Bridge (*Ibid.* at 1949). McDaniel also testified that the water temperature was 55 degrees on April 6. In his opinion that would cause hypothermia (*Ibid.* at 1953). (No foundation was laid to establish McDaniel's qualifications to render such an opinion, but there was also no objection made for that reason.) The defense did not tap into McDaniel's alleged expertise about injuries caused by falling great distances.

On cross examination McDaniel admitted that he had not been near the Chain of Rocks Bridge for a year before the search he commenced on April 6, 1991 (*Ibid.* at 196). He admitted that whirlpools do not stay in fixed locations, but change, sometimes as frequently as day-to-day (*Ibid.* at 1965-1966; 1978). (Obviously, if he was not present at the Bridge on April 5, he had no way of knowing if there was a whirlpool there when Cummins jumped.) He admitted that he did not know the water temperature at the Bridge when he talked to Sgt. Nichols on April 5 (*Ibid.* at 1970). He also admitted he is not an expert on hypothermia and did not know if Thomas Cummins would get it on April 5 (*Ibid.* at 1972). He admitted that the current at the bridge was not uniform and a strong swimmer could end up on the Missouri shore (*Ibid.* at 1975). He also acknowledged that it is possible to go off a Bridge without bruising or fractures (*Ibid.* at 1987). He denied telling Sgt. Nichols anything about the distance from the Bridge to the river surface (*Ibid.* at 1976).

The source for the information about the alleged 90 foot distance from the Bridge to the river was an unswom, out of court statement by a Chief at the Coast Guard Operation Center. The Chief was not called as a witness by the defense to establish that distance, or to testify about

his statement to Nichols that Cummins would have achieved a terminal velocity of 80 miles per hour when he hit the river, or that the fall would have broken his neck.[20] Nor did Gray call any other witnesses to establish these "facts." But the State certainly called witnesses to demolish them.

In that regard the State produced a crime scene investigator who testified that on September 23, 1992, he measured the distance from the top of the pier (where Cummins jumped) to the river surface, and it was 67 feet, six inches (Gray T. at 1068). Unfortunately, no one measured the distance on April 5, 1991, but the State produced other evidence that the river level on April 5, 1991 was actually two feet, two inches *higher* than on September 23, 1992, so that the distance to the surface of the river was 65 feet, three inches on the date of the murders (*Ibid.* at 1880-1881).

No one on either side translated that distance into Cummins' velocity when he hit the water, but the State presented evidence of at least three other people who jumped off the Chain of Rocks Bridge and got to the Missouri side of the river without reporting any broken bones (*Ibid.* at 1027-1028; 1881-1882). In fact, *Gray's counsel* elicited testimony from Gray's friend, Dennis Doyle, that he (Doyle) had jumped off the bridge one time during the month of November when it was cold (*Ibid.* at 1815-1816).[21] Doyle jumped off the Bridge to commit suicide, but changed his mind. He swam to the Missouri side of the river and did not have to go to the hospital (*Ibid.* at 1816-1817).

Significantly, Dr. Michael Graham, the St. Louis City Medical Examiner, testified that when he performed the autopsy on Julie Kerry's body, she had no bruises or abrasions (*Ibid.* at 1047), and she had no fractures (*Ibid.* at 1045; 1050-1057), including no injuries to the spinal chord or broken vertebrae (*Ibid.* at 1048). He also testified that he would not necessarily expect deep bruising from someone who jumped into the water from a height of 60 feet (*Ibid.* at 1051-1052). The State put the "Cummins-could-not-have-survived" claim to rest.

Without a whirlpool, hypothermia, a 90 foot drop, or an 80 mile-an-hour unguided Cummins crashing into the Mississippi, the only immutable fact left was Cummins' coiffure. Defendant elicited evidence that Cummins' hair was dry (an hour and a half after he got out of

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[20] Since he was not called as a witness, we will never know what qualifications the Chief possessed to opine about any of these things.

[21] One gets the distinct impression that Gray's counsel violated the axiom familiar to all trial lawyers that you never ask a question to which you do not know the answer.

the river), but that was about it. In contrast, the State presented Eugene Shipley, the truck driver who was the first person to see Cummins after he came out of the Mississippi. He testified that when he saw Cummins a little before 2:00 a.m. (which was probably a half hour after he got out of the water), "He was wet and he was scared and crying." (*Ibid.* at 1522.) He also said, "His hair was all messed up and he was just wet." (*Ibid.* at 1523.) Officer Brooks, the first officer at the scene a little after 2:00 a.m., testified that Cummins' hair was not neatly combed and dry (*Ibid.* at 1025-1026). On cross examination he reiterated that Cummins' hair was mussed; Brooks specifically denied ever telling anyone that Cummins' hair was "dry and neatly combed." (*Ibid.* at 1031-1031.)

According to Det. Ghrist, who saw Cummins in the ambulance about an hour and a half after he got out of the water, Cummins' hair appeared dry, but it looked the way it appears in Exhibits 200-204 (*Ibid.* at 1389). While he acknowledged that the Incident Report of 5/21/91 (Background Ex. 2) stated that Nichols believed Blanks said Brooks said Cummins' hair appeared neatly combed, Ghrist did not put that in the Report (*Ibid.* at 1397).

Gray called Sgt. Nichols to testify and he did state that at 3:05 a.m., Cummins' hair appeared dry (*Ibid.* at 2044). On cross examination he admitted that when he saw Cummins, he had been out of the water for an hour and a half (*Ibid.* at 2045), so it is not surprising it did not appear wet. Nichols said nothing about Cummins' hair being "neatly combed," nor did any other witness.

The bottom line about Cummins' hair was this: The "dry-and-neatly-combed" myth was most likely a consequence of the law enforcement equivalent of the game of telephone: repeating what someone else said, Brooks-to-Blanks-to-Nichols, until the final message was distorted by the time it ended up memorialized forever in the Incident Report of 5/21/91 (Background Ex. 2).

Eventually, the evidence ended and the case was submitted to the jury. When the case was submitted to the jury, I assume the trial court gave an instruction concerning Gray's confession based on MAI-CR 310.06, which provided:

> Evidence has been introduced that the defendant made certain statements relating to the offense for which he is on trial.
>
> If you find that a statement was made by the defendant, and that the statement was freely and voluntarily made under all of the circumstances surrounding and attending the

making of the statement, then you may give it such weight as you believe it deserves in arriving at your verdict.

However, if you do not find and believe that the defendant made the statement, or if you do not find and believe that the statement was freely and voluntarily made under all of the circumstances surrounding and attending the making of the statement, then you must disregard it and give it no weight in your deliberation.

(I assume this because I do not have a copy of the jury instructions given in the Gray case, but they should be part of the Legal File in the Gray appeal to this Court, and it is inconceivable that an experienced attorney like his counsel did not tender a 310.06 in his case.)

Gray's attorney went mostly into Cummins-killed-the-sisters mode in closing argument, claiming that he was a pathological liar in claiming that the police falsely accused him of saying that he ran off the Bridge and caused the death of the sisters. Counsel was offended that he would accuse the police of doing a poor job of investigating the case (Gray T. 2503).

Apparently, members of the jury believed Cummins and Winfrey, and disbelieved Gray's story, because they convicted Gray and recommended that he be executed. He appealed his conviction to this Court. While the appeal was pending, he also filed a Rule 29.15 Motion.

The Rule 29.15 Motion alleged, among other things, that trial counsel, Dorothy Hirzey, was ineffective for failing to depose Winfrey. The heart of the criticism was that if she had deposed Winfrey, Ms. Hirzey would have learned that Winfrey would testify that he and Gray were off the bridge when the murders were committed so as to allow her to argue for a lower level of culpability to Rape and Second Degree (Felony) Murder. (If Gray had been convicted of Rape and Felony Murder, he could not have received the death penalty.) At the hearing on the Rule 29.15 Motion, Ms. Hirzey testified that she did not believe such a strategy was viable in light of Gray's insistence that he had nothing to do with *any* crime on the bridge because he was smoking dope and listening to music while the rapes and murders were being perpetrated. Ms. Hirzey testified that she had tried over 50 murder trials in her career, of which 16 were capital murder cases (Gray 29.15 T. 45). She was successful in avoiding the death penalty in 14 of those 16 cases (*Ibid.*). In that connection she knew what any good trial lawyer knows: the most important asset the lawyer has is his or her credibility. She testified that arguing for second degree murder on the basis of Winfrey's testimony would have compromised her credibility with

the jury since the foundation of Gray's defense was the only thing he did that constituted a crime was smoking dope by the road while the rapes and murders took place (Gray 29.15 T. 52). Of course, the strategy was a direct consequence of Gray's insistence that he did nothing to Cummins or to the Kerry sisters (*Ibid.* at 53). When Gray claimed that, it tied his counsel's hands.

The Appellant's Brief filed by Gray raised 13 points. Of those, four had to do with jury selection (Points IV, V, VI, and VII); three with jury instructions (III, IX and X); one with the sufficiency of the evidence (I); one with the admission of evidence of uncharged misconduct (VIII); one with prosecutorial misconduct (XI); one with ineffective assistance of counsel (II); one with the proportionality of the death penalty (XII); and one with the cumulative effect of the other errors (XIII).

Point XIII contained the only claim pertaining to his confession. There was no elaboration of this point in the argument portion of the Brief (Gray App. Brief at 134-135).

In State v. Gray, *supra*, the Court rejected these arguments, discussing extensively why the evidence was sufficient to convict Gray even though, according to the State's evidence, he was not on the bridge when the sisters were pushed off, 887 S.W.2d at 376-377. The Court also rejected any claim that Hirzey was ineffective for failing to depose Winfrey since she already knew what he was going to say based on discovery she obtained from the State, 887 S.W. 2d at 380-381. The Court further rejected Gray's cumulative error point, including the claim that the trial court erred in admitting his confession, presumably because the argument did not develop the point, State v. Nunley, 341 S.W.3d 611, 623 (Mo. *en banc*. 2011), *citing* Coleman v. Gilyard, 969 S.W. 2d 271, 273 (Mo.App. 1998); *accord*: Krame v. Waller, 849 S.W.2d 236, 239 (Mo.App. 1993) (issue raised in point relied on but not developed in argument portion of brief "did not preserved the issue for appellate review").

## The Clemons Trial

After Gray's trial, Clemons was next in line. Trial commenced in his case on January 25, 1993, before Hon. Edward M. Peek. The trial lasted until February 18, 1993.

The Court conducted a hearing on Clemons' motion to suppress his statement to the police on February 1, 1993. Clemons presented testimony by various witnesses who saw

Clemons the evening of April 8 and in Judge Michael David's courtroom on April 9, 1991. They testified that his face was swollen on the right side to the point that his right eye was swollen shut (T. 1264-1266; 1270-1272; 1289-1290; 1338; 1380-1381; 1390-1393). Clemons' mother noted that Judge David ordered that Clemons be taken to the hospital (T. 1382).

Judge David's actions were much commented on. I can say having been a judge myself, I am not competent to make medical diagnoses, but I have ordered people taken to get medical assistance on the basis of a prisoner's subjective complaints because I think it is better to be safe than sorry. In this case, Clemons' trial counsel testified much later at the Rule 29.15 hearing that Judge David told him that he did not see too much to complain about, but when anybody says he is hurt, Judge David said, "I automatically make sure they get to the infirmary." There is no evidence in the record that Judge David made an independent determination that Clemons was hurt (29.15 T. 247).

The detectives who interrogated Clemons, including Det. Pappas, testified at the suppression hearing. They denied beating Clemons (T. 1303; 1347).

Defense counsel cross examined Pappas about the fact that he also interrogated Cummins (along with Jacobsmeyer and Trevor). Pappas denied that anyone beat Cummins (T. 1330-1331).

Clemons also testified at the suppression hearing. He claimed his statement was the product of the beating administered by Pappas and Brauer (T. 1412-1418). Interestingly, he said nothing about being told to sit on his hands at the suppression hearing. He did not testify about what actually happened on the Bridge, and the court refused to allow the State to cross examine him about events transpiring the night of April 4-5 (T. 1421-1425).

Clemons had a transcript of Cummins' testimony in Marlin Gray's trial in which Cummins said he was beaten by the police while he was alleged to have made statements that led to his arrest for the murders of the Kerry sisters. That transcript was offered into evidence at the suppression hearing to prove the proclivity of the police to beat Clemons (T. 1435). The offer of proof did not extend to showing any alleged similarity in tactics employed by the police in interrogating Cummins and Clemons (e.g. telling both of them to sit on their hands). The trial court sustained an objection to the offer of proof and denied Clemons' motion to suppress the statement.

The State's evidence in Clemons' trial commenced on February 2, 1991. The defense fought just about everything at trial. The defense claimed that there was no proof that either of

the Kerry sisters had died, disputing that the body recovered in Pemiscot County was really Julie's.[22] The defense claimed that Julie and Robin were guilty of trespass when they went on the Bridge -- sort of a contributory negligence defense. The defense blamed the sisters' parents for what happened because they got divorced, and there was a suggestion that being from a broken home caused the sisters to be, well, *wild* (T. 3266-3267). During his cross examination of Virginia Kerry, Clemons' counsel interrogated her about whether her daughters were wearing underwear on the night in question (T. 1528-1529). He also criticized Ms. Kerry for allowing her daughters to go out to the bridge at 11:30 at night (T. 1525).

It got so bad that eventually Clemons claimed that his trial counsel was ineffective by being a jerk with Virginia Kerry. In his First Amended 29.15 Motion, Clemons argued:

> While trial counsel's questions were intended to illustrate that Ms. Kerry lacked credibility; that Julie was immoral; and that both Julie and Robin were in violation of the law on the night they were pushed off the Chain of Rocks bridge, the questions only served to inflame the passion of the jury against [Clemons].
>
> Trial counsel's questions implied that had Julie and Robin complied with the misdemeanor law against trespass, they would NOT have been killed. Moreover, trial counsel's questions implied that the victims as well as their mother were partially responsible for the untimely death of Julie and Robin. Trial counsel's cross-examination of Virginia Kerry was reckless, irresponsible and ineffective assistance of counsel. Questions which implied that the victims were in some way partially responsible for their deaths did NOT tend to support or advance any reasonable defense theory. As a direct result of counsel's ineffectiveness, [Clemons] was prejudiced.

(29.15 L.F. 1263.)

Nonetheless, the State's case went pretty much as it had in the Gray trial. Clemons' counsel could not resist making Cummins' credibility and his responsibility for the murders the focus of his defense. Even though that did not work so well for Gray, Clemons' counsel was drawn to the Cummins-is-the-killer defense like a moth to flame. The outcome was predictable.

One difference in the two trials was that, unlike Gray, Clemons did not testify. This was so even though he had no criminal record that could have served as a basis for impeachment. Of course, Clemons had an absolute right to not testify under the Constitution, but in this case the only person who could dispute the detectives' claims that they did not coerce him into confessing was Reginald Clemons.

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[22] The defense served up a family dentist -- who was also a relative of Clemons -- to dispute the testimony by the State's forensic dentist who established Julie's identity by her dental records. The result was not pretty.

Interestingly, in his pro se Motion to Vacate, Clemons alleged that he was denied his Constitutional right to testify because his lawyer refused to put him on the witness stand. He claimed that this was especially prejudicial because he was the only witness who could have refuted Pappas' and Brauer's testimony that they did not beat him (29.15 L.F. 1387-1389).[23] The pro se Motion to Vacate was contradicted by Clemons' testimony near the end of the defendant's case that he had talked to his family and counsel and decided not to testify (T. 3113). At the State's request, Judge Peek asked a series of follow up questions, including:

> **The Court**: Mr. Constantinou has indicated that he has discussed this matter with you. I assume Miss Moenckmeier has also discussed the matter with you, and that they have advised you as to what they think you should do.
>
> **Mr. Clemons**: Yes
>
> **The Court**: And you have considered their advice?
>
> **Mr. Clemons**: I have considered their advice, among others.
>
> **The Court**: Among other things. You have talked to your family?
>
> **Mr. Clemons**: Yes, and evaluation the situation, and the conclusion is, I'm not going to testify.
>
> **Mr. Constantinou**: That's your decision?
>
> **Mr. Clemons**: Yes.

(T. 3114.) One of Clemons' trial counsel testified at the Rule 29.15 hearing that they were unsure whether to call Clemons as a witness at trial, but after seeing his testimony in the suppression hearing, they decided not to call him as a witness in front of the jury (29.15 T. 409).

At trial, as he had at the suppression hearing, Clemons presented witnesses who testified that he appeared battered when they saw him, mostly 24-48 hours after he claimed to have been beaten by the police. Of course no one could testify that they saw the police inflict those wounds.

Additionally, the defense suffered from overreach in describing the wounds. His sister testified that his face was so swollen that it appeared "lopsided" and she could not see his right eye due to the swelling (T. 2910-2912). Donald Robinson testified to similar effect (T. 3101).

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[23] Clemons signed his Motion to Vacate, which included this statement on October 22, 1993 (Ex. FFF at 3).

The problem came when Clemons called the emergency room physician who treated him, Dr. Stephen Duntley. Dr. Duntley had Clemons' medical records with him. He saw Clemons on April 9, 1991 at 7:50 p.m. (T. 2922-2923). He found some swelling and tenderness on the right cheek. He could see asymmetry in Clemons' face. Clemons' history and physical examination was consistent with "mild facial trauma." (T. 2925.) There was no swelling around his eye (*Ibid.*). Although Clemons complained of a lip laceration, Dr. Dentley could not find a significant injury to his lip (T. 2926).

On cross examination the doctor said that "mild swelling" on Clemons' cheek meant "it wasn't impressive." (T. 2928.) He acknowledged that the injury could be the product of someone hitting his face against a wall (T. 2829). He also testified, contrary to two of Clemons' witnesses, that his eye was not swelled shut (*Ibid.*). Clemons had no complaints of chest pain or tenderness in his chest area (T. 2930). Nor did he complain of scalp injury (T. 2930-2931). Dr. Duntley was unable to locate *any* laceration to Clemons' lip, despite his complaint of injury there. If he had a laceration, it was so minute that the doctor did not include it in the records (T. 2931).

The evidence that was adduced by the State in its case in chief was set out in this Court's Opinion on the direct appeal in State v. Clemons, *supra*, 946 S.W.2d at 215-217. The description of facts is similar to State v. Gray, *supra*.

Before closing arguments, the State moved in limine to prohibit argument by defense counsel that the police beat Clemons since the only evidence presented was that he had injuries, but not how they were sustained. Since the police denied causing the injuries, and since Clemons did not dispute the officers' testimony by providing competent evidence as to who was responsible for inflicting the injuries, the trial court held that there was no evidentiary basis to argue that the police coerced Clemons' confession (T. 3220). In so holding, Judge Peek noted that "he could have been hurt anywhere along the line." (T. 3222.) The court did permit Clemons to argue that *Cummins* was roughed up because that was in evidence (T. 3222). Clemons did not appeal the restriction of his closing argument.

The verdict-directing instructions given by the trial court allowed the jury to find that Clemons was guilty of murder if, *inter alia,* either he or Richardson pushed the Kerry sisters off the Bridge. For example, Instruction No. 6 permitted the jury to find Clemons guilty of the First Degree Murder of Julie Kerry if Clemons *or* Richardson pushed her off the Bridge, provided

there was a basis for finding accomplice liability if Clemons did not do the pushing (L.F. 149). A similar instruction was given as to Robin Kerry (L.F. 161). In his closing argument the prosecutor argued that the jury did *not* have to find that Clemons caused the death of Julie Kerry: "You do not have to believe that he pushed her. You can believe that Tony did it, or you can believe he did it, it doesn't make any difference. That's the way the instruction is. That's the way the law is." (T. 328.)

The jury found Clemons guilty of two counts of murder, and eventually it recommended the death penalty. The trial court imposed that sentence and eventually Clemons appealed his conviction to this Court. The resolution of that appeal and Clemons' Rule 29.15 Motion will be discussed below.

Meanwhile, the last of the three trials was about to begin.

**The Antonio Richardson Trial**

The trial of Antonio Richardson commenced on the Ides of March in 1993 before the Hon. Jack L. Koehr. It concluded on March 27, 1993. Compared to the first two trials, it was a sedate affair.

Defense counsel only cross examined one of the first eight witnesses called by the State. Eugene Shipley testified once more that Cummins' hair looked like he had just come out of the water (Richardson T. 1377). Richardson's counsel asked him no questions on cross.

Brooks said again that Cummins was wet and his hair was messed up (Richardson T. 1284). Not a peep from defense counsel. Detective Ghrist testified without objection that Cummins told him at the scene that Clemons appeared to be in charge (Richardson T. 1457).

The cross of Cummins was very restrained. He was asked if the police suggested that he had done certain things that he denied. And then counsel asked, "Those things are not what you told them." He replied, "No, ma'am, they are not." (Richardson T. 1580). Then he was asked about the details of the abuse he suffered (*Ibid.* at 1581-1582).

Counsel elicited testimony that Cummins thought Clemons was the oldest of the group of four and the one in charge (*Ibid.* at 1587). She elicited testimony that it was Clemons who moved Cummins to the manhole and then into the manhole (*Ibid.* at 1598-1599). After he got down onto

the platform, Richardson's counsel elicited testimony that Cummins heard two thuds as if two people jumped down there (*Ibid.)*.

The State commenced its presentation of evidence on March 22 and rested March 24, 1993. Richardson called no witnesses during the guilt phase.

The closing argument by Richardson's counsel was sympathetic to what Cummins and his cousins went through (Richardson T. 2008). She hammered on the fact that when Winfrey first wrote that Clemons said, "*I* pushed them off," when he and Richardson came running off the Bridge, which he later changed to "We pushed them off." (*Ibid.* at 2023.) (Ultimately, Winfrey said he changed the written statement because he was mistaken and that Clemons said, "*We* pushed them off.") Defense counsel admitted that Richardson raped one of the girls and that he would be going away to prison for a long time (*Ibid.* at 2028).

The jury found Richardson guilty of the First Degree Murder of Julie Kerry and Second Degree Murder of Robin Kerry (*Ibid.* at 2047).

In the penalty phase Richardson's counsel argued: "[W]e have always told you this, and we have never said anything else, Tony is a person who must be punished for what happened." (*Ibid.* at 2259.) The jury was unable to agree on sentencing (*Ibid.* at 2276). On June 18, 1993, the trial court sentenced Richardson to death (*Ibid.* at 2283). The sentence was upheld on May 28, 1996, State v. Richardson, *supra*. Ultimately, as was noted earlier, the death sentence was commuted to LWOP.

## I. THE *HABEAS CORPUS* PETITION FILED BY CLEMONS

Clemons filed his Petition for Writ of *Habeas Corpus* with the Supreme Court on June 12, 2009. Briefly stated, the Petition claimed that newly discovered evidence established Clemons' actual innocence, namely the fact that Cummins filed a lawsuit against members of the St. Louis Police Department in which he alleged they assaulted him in an attempt to coerce a confession, which Clemons alleges supports his claim that his confession was physically coerced (Petition at 1-2). As a second ground he claimed he had a right to have the proportionality of his death sentence reviewed, even though this Court had already conducted a proportionality review as part of his original review (Petition at 3). I was appointed as Special Master by the Supreme Court on June 30, 2009.

I conducted a hearing in St. Louis last September to hear evidence from both sides. The delay of over three years was occasioned by repeated difficulty in obtaining DNA test results of evidence that had been preserved for some 22 years, and the desire of the parties to obtain additional discovery. Since Clemons was not going anywhere, and since his execution was stayed, no one objected to fully developing the record in this case.

Since the original Petition was filed, the grounds for relief asserted by Clemons have expanded. He now claims that he is entitled to assert what are commonly called "cause and effect" claims and "actual innocence" claims. Finally, he claims he is entitled to a new proportionality review.

Before directly addressing the merits of these claims, I think it would be helpful to discuss what I perceive as the limited nature of the review that I understand this Court will undertake. In doing that, I understand this Court does not need me to guide it concerning the law of post-conviction relief, but I discuss the structure that, as I understand it, informs how I must view the evidence. I fully understand that so far as I attach significance to the evidence in this case, my explication of the legal framework will be subject to de novo review, Matter of W K M v. W E M, 537 S.W.2d 183, 186 (Mo.App. 1976) (conclusions of law in a Special Master's Report "should be reviewed as in suits of an equitable nature"); Carrier Corporation v. Royale Investment Company, 366 S.W.2d 346, 348 (Mo. 1963) (on appeal in equitable cases, Supreme Court reviews questions of law de novo).

## II. OVERVIEW OF APPLICABLE LAW

When a criminal defendant has been convicted of a felony, he or she has a variety of remedies available to try to set aside the conviction or to obtain a new trial. After suffering a guilty verdict, the defendant may move for a judgment of acquittal, notwithstanding the jury's verdict, on the ground that the State failed to prove guilt beyond a reasonable doubt, Supreme Court Rule 29.07(c). Alternatively, he or she may move for a new trial, based on errors alleged to have been committed by the trial judge, Rule 29.11. The two motions are typically made alternatively in the same pleading. In nearly all case, a motion for new trial must include specific allegations of error which the defendant claims require a new trial, Rule 29.11(d). As a predicate

to raising an allegation of error in a motion for new trial, the defendant must have properly objected at trial. State v. Overstreet, 694 S.W.2d 491, 494 (Mo.App. 1985).[24]

If a post-trial motion is denied, the defendant's next step is to appeal his or her conviction, R.S.Mo. § 547.070 (2000). (In criminal cases, as will be seen, there may be more than one appeal; the appeal from the conviction is commonly called the "direct appeal.") Under Article V, § 3 of the Missouri Constitution, the Supreme Court of Missouri has exclusive jurisdiction to hear death penalty appeals. Once a defendant gets to the Supreme Court, he or she must file a brief that properly raises the errors claimed to require a new trial or outright acquittal, State v. Letica, 356 S.W.3d 157, 168-169 (Mo. *en banc*. 2004). Except in fairly rare cases of plain error, a defendant may not raise issues on appeal that were not included in the motion for new trial, State v. Clay, 975 S.W.2d 121, 134 (Mo. *en banc*. 1998). Even if errors are preserved in a motion for new trial, if they are not raised in the appellate brief, they are deemed to be abandoned. State v. Boyd, 256 S.W.2d 765 (Mo. *en banc*. 1953). The practical effect of this is that if a defendant fails to preserve issues for appeal, the appellate court will most likely not consider the merit of the argument he or she raises. This process narrows the scope of appellate review to only those issues that are preserved through each stage of the proceedings, from the trial court to the appellate court.

In cases where issues have not been preserved for appeal in the trial court or on appeal, there is a limited, alternative form of review, commonly called post-conviction relief, or "PCR," as provided by Rule 29.15. This rule and its predecessors replaced a hodge-podge of common law remedies and is "designed to provide a single, unitary post-conviction remedy, to be used in place of other remedies, including the writ of *habeas corpus*." State ex rel. Nixon v. Jaynes, 63 S.W.3d 210, 214 (Mo. *en banc*. 2001).

Rule 29.15 allows a convicted felon to seek limited review in a variety of circumstances, including, most commonly, "claims of ineffective assistance of trial and appellate counsel," Rule 29.15(a). The vehicle to seek relief created by this rule is formally called a "motion to vacate, set aside, or correct the judgment or sentence," Rule 29.15(b); in practice, the motion is often referred to as a "Rule 29.15 motion." A Rule 29.15 motion is a separate civil action, although the party filing the motion, called "the movant," was the defendant in the underlying criminal case. Typically, a movant files a pro se motion, using a form (called a "Form 40") provided by the

[24] An exception to that general rule is for plain errors, Rule 29.12.

Department of Corrections. The motion is filed with the court that originally heard the criminal case and imposed sentence. Most inmates filing a Rule 29.15 motion are indigent, and the trial court appoints counsel -- usually, the appellate public defender -- to represent them, Rule 29.15(e). In virtually all cases, appointed counsel files an amended motion to vacate that includes grounds an unsophisticated, pro se litigant failed to include in the original motion. This is important because a Rule 29.15 motion *must* include every ground known to the movant that may serve as a basis for relief under the rule, or it is waived, McLaughlin v. State, 378 S.W.3d 328, 340 (Mo. *en banc.* 2012).

The current practice is for Rule 29.15 motions to be filed after the direct appeal is decided, but in the mid-1990s, when Clemons' direct appeal was being considered, the rule required that the motion to vacate be filed *before* the appeal was resolved in most cases. If the trial court denied the Rule 29.15 motion, the movant could appeal that decision, and the appellate court would usually consolidate the appeal from the denial of the motion with the direct appeal.[25]

A Rule 29.15 motion is not a substitute for direct appeal, nor does it serve as a "second appeal," State v. Jones, 979 S.W.2d 171, 181 (Mo *en banc.* 1998). In my experience as a trial judge, the overwhelming majority of Rule 29.15 motions involve claims that trial counsel was ineffective in preparation and trial of the criminal case, including allegations that counsel was ineffective by failing to adequately investigate the case, by failing to call witnesses at the trial who would have helped bolster the defense, or by failing to object at trial and thereby preserve issues for appeal. (This is not an exhaustive list; there are many, many different ways in which convicted felons accuse their trial counsel of having been ineffective.) Under these circumstances, the Rule 29.15 motion serves as a safety net, potentially allowing review of issues that trial counsel may not have preserved by, for example, failing to make a proper objection at trial, or failing to raise errors as grounds for a new trial in a post-trial motion or appellate brief, provided such failures were the result of ineffective assistance of counsel.

The rights afforded by these procedures exact an obligation on the person convicted of a felony. As the Court noted in State ex rel. Simmons v. White, 866 S.W.2d 443, 446 (Mo. *en banc.* 1993):

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[25] Before 1996, Rule 29.15 motions had to be filed within 30 days of the filing of the transcript on appeal if the defendant appealed his or her conviction, former Rule 29.15(b). The rule now allows the motion to be filed within 90 days after the appellate court disposes of the direct appeal.

> This state has established a procedural system that provides a timely review of criminal convictions. It allows for direct appeal and for post-conviction review of certain constitutional protections pursuant to Rules 29.15 and 24.035. Neither these proceedings nor habeas corpus, however, was designed for duplicative and unending challenges to the finality of a judgment.
>
> A person who has suffered criminal conviction is bound to raise all challenges thereto timely and in accordance with the procedures established for that purpose. To allow otherwise would result in a chaos of review unlimited in time, scope, and expense.

Clemons followed this process. After the jury found him guilty at his criminal trial, Clemons filed a timely 21 page "Motion for Judgment of Acquittal Notwithstanding the Verdict of the Jury; or, in the Alternative, for a New Trial" on March 15, 1993 (L.F. 54), which was overruled on April 2, 1993 (L.F. 47). Clemons filed his Notice of Appeal to the Supreme Court four days later, on April 6, 1993 (L.F. 17). He filed the Record on Appeal with this Court on October 1, 1993.

On November 1, 1993, he filed his 28 page pro se Motion to Vacate, Set Aside, or Correct the Judgment or Sentence in the Circuit Court of St. Louis City (H.C. Ex. FFF). On February 4, 1994, appointed counsel filed a First Amended Motion to Vacate, Set Aside or Correct Judgment and Sentence (hereafter, "Amended Motion"). The Amended Motion was 344 pages long and incorporated by reference Clemons' pro se Motion to Vacate (29.15 L.F. 1066). The Amended Motion asserted 27 claims in addition to those made in the pro se Motion, mostly focusing on ineffective assistance of trial counsel, and it was supplemented by a 95 page Memorandum of Movant in Support of Claims II, III, and XV of the Amended Motion (29.15 L.F. 126). The parties filed many, many documents with the court in the 29.15 Motion proceeding; the Legal File eventually filed with the Supreme Court on the PCR matter is over 1,400 pages long. Between April 12, 1995, and September 29, 1995, the motion court conducted an eight-day evidentiary hearing on the Rule 29.15 motion. The evidence taken at that hearing occupies an eight volume transcript that is 1,480 pages long. (Judge Peek, who presided over Clemons' criminal trial, also heard the evidence on his Rule 29.15 Motion.)

Claim XV of the Amended Motion was that trial counsel was ineffective in failing to conduct a proper suppression hearing, thereby resulting in the admission of Clemons' confession at trial (29.15 L.F. at 1300). The Amended Motion alleged that trial counsel was aware that Clemons claimed he had been beaten by police officers and that police had exhibited the same conduct when questioning Cummins, "yet counsel failed to present evidence on the matter during

the suppression hearing." (29.15 L.F. 1301.) He argued that despite Pappas' and Brauer's insistence that Clemons was never beaten, "the fact that the only surviving victim was beaten in an effort to secure a confession supports [Clemons'] allegation that he was beaten prior to making a statement." (29.15 L.F. 1307) The Amended Motion further alleges that Clemons' counsel was aware of Cummins' allegations since he had a transcript of Cummins' testimony to that effect at the Gray trial (*Ibid.*). Although Clemons' trial counsel attempted to offer the transcript from the Gray trial at the suppression hearing in Clemons' case, the First Amended Motion alleged that she failed to make an offer of proof or call Cummins as a witness at the hearing.

On March 18, 1996, Judge Peek entered his 49 page "Findings of Fact, Conclusions of Law, Order and Judgment." (H.C. Ex. III.) Among other things, Judge Peek denied Claim XV, ruling that Clemons' trial counsel was not ineffective since the court properly excluded evidence of *Cummins*' experience because it was irrelevant as to what happened to *Clemons* (29.15 L.F. 46-47). He also overruled the balance of the Rule 29.15 Motion, and Clemons appealed. That appeal was eventually consolidated with the direct appeal from the death sentence.

On November 26, 1996, Clemons filed his Appellant's Statement, Brief and Argument with this Court.[26] The Brief is 118 pages long and raises eleven points. Ten of them concern the direct appeal from the murder conviction; one concerns the denial of the Rule 29.15 Motion. Of the points raised by the direct appeal, three related to prosecutorial misconduct (Points I, II and V); one related to the admission of his confession (III); one related to the failure of the trial court to obtain funds for Clemons to hire experts; three related to instructional error (VI, VII, and VIII); one had to do with the sufficiency of the evidence (IX); and one had to do with proportionality of the death sentence (X). The single point raised by the appeal from the Judgment in the Rule 29.15 Motion proceeding had to do with error in failing to find counsel ineffective in representing Clemons at the suppression hearing, the guilt phase of the trial, and the penalty phase (XI).[27]

This Court affirmed Clemons' conviction and denial of his Rule 29.15 Motion on May 27, 1997, State v. Clemons, *supra.* The Court found that even if he did not push off the Kerry

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[26] Although some of the names have changed, the same law firms representing Clemons on this habeas corpus Motion filed his Brief in 1996, nearly 17 years ago.

[27] While the Point Relied On concerning the Rule 29.15 Motion only consists of one point, it asserts five different ways in which Clemons claims his trial counsel was ineffective.

sisters himself, there was sufficient evidence to find him guilty of accomplice liability. In doing that, the Court relied heavily on its analysis in State v. Gray, where Marlin Gray's conviction was upheld even though he was off the Bridge at the time of the crimes. The Court also found that the trial court's refusal to suppress his statement as being a product of coercion was not error:

> The trial court had the opportunity to judge the credibility of the witnesses and obviously found the state's witnesses' testimony more credible than appellant's. While there was additional testimony from appellant's family that appellant's face was swollen, all of these observations were made some 48 hours or more after appellant's interview and confession. The evidence, including the hospital records, simply does not demonstrate either when or how appellant incurred any injury. Nor does it establish that an injury actually occurred at the hands of the police officers conducting his interview. Appellant failed to meet his burden. We find no abuse of discretion in failing to suppress appellant's confession on these grounds.

946 S.W.2d at 218.

Interestingly, Clemons did not claim on his direct appeal that the trial court erred in excluding the transcript of Cummins' testimony at the Gray trial in which he described being abused by Jacobsmeyer and Company. Accordingly, this Court did not address that argument in its Opinion. While Clemons argued in his Appellant's Brief that that his trial counsel was ineffective in his presentation of the suppression motion for various reasons (App. Brief at 107-112), he did not include among those reasons (as he did in his Rule 29.15 Motion) that trial counsel was ineffective by failing to make an offer of proof as to the contents of the Gray transcript or by failing to call Cummins to testify at the suppression hearing. Hence, this Court could not address an issue not developed in the argument section of the Appellant's Brief, Krame v. Waller, *supra,* 849 S.W.2d at 239. This Court rejected the claim that counsel was ineffective in presenting the motion to suppress Clemons' confession for the reasons advanced by Clemons' Appellant's Brief, *Ibid.* at 220-221.

After Clemons' appeal was denied, he filed a petition for writ of certiorari with the United States Supreme Court. That petition was denied without comment on November 10, 1997, 522 U.S. 968.

Clemons subsequently filed a petition for writ of *habeas corpus* in the United States District Court for the Eastern District of Missouri, where the case was assigned to Judge

Catherine Perry. Clemons' federal petition raised 15 claims that (he alleged) mandated the vacation of his death penalty. Among those was the claim that his statements were the product of coercion so that they were obtained in violation of his Fifth Amendment privilege against self-incrimination, Clemons v. Luebbers, 212 F.Supp.2d 1105, 1109 (E.D.Mo. 2002). In describing that claim, the District Court noted:

> Clemons claims that Detectives Pappas and Brauer beat him to obtain his April 7, 1991, confession, and that they ignored his invocation of his *Miranda* rights and his request for counsel. *He relies, in part, on the manner in which the police obtained the initial and now refuted confession of Thomas Cummins. Essentially Clemons argues that the coercion of a confession from Cummins shows a pattern of police coercion, and shows that he (Clemons) was treated the same way as Cummins and his confession was similarly coerced.* Clemons also relies on his own statement made to the police Internal Affairs Department on April 9, retracting the confession and claiming coercion.

*(Ibid.* at 1116; emphasis added.) In rejecting this argument, the District Court cited to this Court's holding that Judge Peek could have found that Mark Kelly's testimony (that Clemons face was swollen 14 hours after the interrogation by Pappas and Brauer) was refuted by the testimony of Warren Williams, who saw Clemons a few minutes before Kelly and saw no sign of injury, *Ibid., citing* 946 S.W.2d at 218. The District Court noted that all of the other witnesses who said they observed injuries to Clemons' face saw him 48 hours or more after his confession, 212 F.Supp.2d at 1116-1117. The District Court cited with approval this Court's conclusion that, "The evidence, including the hospital records, simply does not demonstrate either when or how appellant incurred any injury. Nor does it establish that an injury actually occurred at the hands of the police officers conducting his interview." *Ibid.* at 1116-1117, *citing* 946 S.W.2d at 218. The District Court said this conclusion was not undermined by Cummins' testimony that *he* was beaten:

> Clemons' did not invoke his right to counsel at any point during the questioning, and he was properly advised that he could do so. His later attempt to claim otherwise before the Internal Affairs Department, *and his reliance on what happened with the Cummins confession* do not change the facts about what happened to Clemons *before* he made the statements. When the circumstances as a whole are considered, it is clear that Clemons voluntarily, knowingly and intelligently waived his right to counsel.

(212 F.Supp.2d at 1119; emphasis added.) Thus, while Clemons may not have argued the effect of Cummins' testimony about being physically abused in either of his appeals to this Court, he clearly did so in his federal *habeas* claim.

Clemons also asserted an actual innocence claim in the federal *habeas corpus* claim. Specifically, he submitted an affidavit by Christopher Dunn, an inmate who claimed that Marlin Gray told him that Clemons was not on the Bridge when the Kerry sisters were pushed off and that he had not raped them, 212 F.Supp.2d at 1111. Judge Perry was not impressed by this claim because (1) Dunn's claim about what Gray told him was rank hearsay, and (2) Gray's hearsay statement was wholly inconsistent with what he testified to at his own trial, which was that he was not on the Bridge at the time of the murders because he was in his car, smoking dope, listening to music, relaxing.[28]

Judge Perry also reviewed Clemons' claim that there was insufficient evidence to establish that Clemons' culpability under a theory of accomplice liability. She cited with approval this Court's three prong test to establish accomplice liability for First Degree Murder: (1) Defendant committed acts that aided his codefendant in killing the victims; (2) Defendant's conscious purpose in committing the acts was that the victims be killed; and (3) Defendant committed the acts after coolly deliberating on the victims' deaths for some amount of time, no matter how short. The District Court cited the following recitation of the evidence adduced at Clemons' trial in holding that "a rational juror could easily find all elements of the crime – including the necessary deliberation -- from the evidence. . . ." *Ibid.* at 1115:

> In State v. Gray, 887 S.W.2d 369 (Mo. *en banc.* 1994), a companion case, this Court addressed the question of accessory liability. In examining the evidence, the Court noted three circumstances that appear "highly relevant in determining if accomplice deliberation may be inferred." *Ibid.* at 376. The first circumstance is whether there is a statement or conduct by the defendant or by a codefendant in the presence of defendant prior to the murder indicating a purpose to kill someone. *Ibid.* Another is evidence that the murder was committed by means of a deadly weapon and the accomplice was aware that the deadly weapon was to be used in the commission of the crime. *Ibid.* at 377. Finally, evidence of deliberation will be found where it appears that the defendant either participated in the homicide or continued in the criminal enterprise even after it became apparent that a victim was to be killed. *Ibid.*
>
> In this case, there is ample evidence of statements or conduct by the defendant or in the defendant's presence indicating a purpose to kill. When the plan was first conceived, Marlin Gray announced that he "felt like hurting someone." While the rapes were occurring, someone--by inference either [Clemons] or Antonio Richardson--said to Julie Kerry: "You stupid bitch, do you want to die? I'll throw you off the bridge if you don't stop fighting." [Clemons] threw the sisters' clothes off of the bridge. After the rapes,

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[28] If Gray claimed to be off the Bridge, in his car, how could he have firsthand knowledge about where Clemons was at the time of the murders, or whether Clemons had participated in raping the sisters?

> first Richardson and then [Clemons] each put one of the Kerry sisters through the manhole to the platform below the bridge deck, from which the sisters were pushed to their deaths. Appellant then returned to the bridge deck where, after robbing Cummins, he discussed with Winfrey whether Cummins should live or die. Gray or Richardson could not have taken part in this discussion because Richardson was under the bridge and Gray had already started to walk off the bridge. Someone told Cummins that he had never had the pleasure of "popping" someone before. If [Clemons] did not say this, it was said in his presence. Appellant then took Cummins and moved him next to the manhole, ordering him to lie down. Someone--either [Clemons] or Winfrey--said, "You're going to die," after which [Clemons] put Cummins into the manhole, before sending Winfrey to look for Gray and following Cummins through the manhole to the platform beneath the bridge himself. Once underneath the bridge, either [Clemons] or Richardson pushed the Kerry sisters from the bridge and ordered Cummins to jump into the river. Afterward, [Clemons] bragged, "We threw them off."
>
> Statements made by [Clemons] or in his presence indicated an intention to kill. [Clemons] continued to play an active role in the death-producing events, even after it became abundantly clear that the victims would be killed. The evidence of deliberation in this case is substantial, compelling, and without doubt. The trial court did not err in submitting the charges of first degree murder to the jury.

212 F.Supp.2d at 1114-1115, *citing,* State v. Clemons, 946 S.W.2d at 216-217.

Despite losing on the claim that his confession was coerced, Clemons scored a victory on another ground in the District Court. Judge Perry found that Judge Peek had improperly excused some potential jurors during jury selection, 212 F.Supp.2d at 1119-1122. In all other regards the District Court denied Clemons federal *habeas corpus* petition, *Ibid.* at 1135. The District Court ordered that Clemons' death penalty be vacated, and that he either be resentenced to LWOP or given a new trial on the State's request for the death penalty. In all other respects the District Court denied Clemons' *habeas corpus* claims. However, the District Court issued a Certificate of Appealability on four of Clemons' *habeas* claims relating to prosecutorial misconduct and a claim that one of the venirepersons was improperly excused for cause, *Ibid.* at 1135. In all other respects -- including Clemons' claim that his confession was coerced -- the District Court denied Clemons a Certificate of Appealability, finding that reasonable jurists could not differ on those claims, *Ibid.*[29]

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[29] Under federal law, a party wishing to appeal a denial of *habeas corpus* must obtain a Certificate of Appealability ("COA") from a circuit justice or a circuit or district judge, Rule 22(b)(1), F.R.A.P., 28 U.S.C. § 2253(c)(1)(A). The COA must indicate the issues for which appeal is allowed, 28 U.S.C. § 2253(c)(3). To be entitled to a COA, the applicant must make a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). The Supreme Court has construed this language to mean that an applicant must show "that reasonable

Even this limited victory was short-lived. The State appealed the District Court's judgment.[30] The Eighth Circuit reversed that part of the District Court's Judgment vacating Clemons' death sentence, but it affirmed the Judgment insofar as it denied the balance of Clemons' *habeas* claims, Clemons v. Luebbers, 381 F.3d 744 (2004), *cert. den. sub nom.* Clemons v. Roper, 546 U.S. 828 (2005). As to the sufficiency of the evidence of deliberation, the Eighth Circuit agreed "that Clemons failed to make the requisite showing of actual innocence." 381 F.3d at 754. On that latter point the Court added a footnote:

> There are several troubling aspects to this case. Apparently, Cummins, one of the alleged victims, initially made a confession to police that *he* had murdered his two cousins by pushing them off of the bridge. After the four eventual suspects were caught, Cummins retracted and said that he had been mistreated by police and coerced into giving the confession. In his petition for *habeas corpus*, Clemons makes similar allegations of police brutality and coercion. * * * * However, in his actual innocence claim and elsewhere, Clemons does *not* argue that he was not with the group of four that encountered the Kerrys and Cummins on the bridge, nor does he point to Cummins as the real culprit; instead, he alleges that he was not at the place on the bridge where the Kerrys were actually pushed. His best evidence of this, though, is the hearsay testimony of Marlin Gray's prison cellmate. The district court's conclusion that Clemons' evidence of actual innocence is not credible is not clearly erroneous.

381 F.3d at 754 n.7. (Emphasis added.)

With all due respect to the Eighth Circuit, it is wrong when it says that "apparently" Cummins confessed to the murders and then recanted after the arrests of the group of four. In fact, as has been previously demonstrated, Cummins has consistently maintained that he *never* confessed, for which reason he had nothing to recant. Only the police claimed that Cummins confessed when he was not being recorded.

After the Supreme Court of the United States denied him a writ of certiorari, Clemons made one more trip to federal court. On July 9, 2007, he was part of a group of death-row inmates who filed suit in the United States District Court for the Western District of Missouri, challenging the constitutionality of the method by which the State of Missouri executes prisoners sentenced to death, Clemons v. Crawford, Case No. 07-4129-CV-C-FJG. Ultimately, Judge Fernando Gaitan granted judgment against the plaintiffs on the pleadings, and the Eighth Circuit

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jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were 'adequate to deserve encouragement to proceed further." Miller-El v. Cockrell, 537 U.S. 322, 336 (2003). "If the district judge has denied the certificate, the applicant may request a circuit judge to issue it." Rule 22(b)(1), F.R.A.P.

affirmed that judgment in late 2009, Clemons v. Crawford, 585 F.3d 1119, *cert. den.*, 130 S.Ct. 3507 (2010).

## Missouri Habeas Corpus

Under the principles noted earlier, by May of 1997 Clemons had exhausted nearly all of the avenues of relief available to him under Missouri law; after he exhausted his federal *habeas* rights in 2005, his sole remaining remedy was to seek a writ of *habeas corpus* under Missouri law, which is "the last judicial inquiry into the validity of a criminal conviction and serves as a bulwark against convictions that violate fundamental fairness." State ex rel. Woodworth v. Denney, 396 S.W.3d 330, 337 (Mo. *en banc.* 2013).

At common law a writ of *habeas corpus* was directed to the custodian of a prisoner, requiring the custodian to show "the basis for which the prisoner was being held." Nixon v. Jaynes, *supra,* 63 S.W.3d at 214. It is available "when a person is held in detention in violation of the constitution or laws of the state or federal government." *Ibid.* However, its scope in Missouri has narrowed considerably in recent years. Rule 29.15 proceedings have, for the most part, supplanted *habeas* litigation in Missouri courts, Nixon v. Jaynes, *supra,* 63 S.W.3d at 214. For that reason "[c]ollateral review by *habeas corpus* is extremely limited, especially where there was a previous opportunity to litigate." *Ibid.* Hence, if a defendant fails to raise claims of error -- even claims arising out of the Missouri or United States Constitutions -- on his direct appeal or in his Rule 29.15 motion, "the defendant waives them and cannot raise them in a subsequent petition for *habeas corpus.*" *Ibid.* In the nomenclature of PCR litigation, a party who fails to raise claims by direct appeal or in a 29.15 motion "is said to have *procedurally defaulted* on those claims." *Ibid.* (Emphasis added.) As Judge Stith noted recently in Woodworth, *supra,* 396 S.W.3d at 337: "*Habeas* review . . . is not meant to serve as a substitute for post-conviction relief claims cognizable on direct appeal or in Rule 29.15 motions." A contrary holding would permit "duplicative and unending challenges to the finality of a judgment. . . ." *Ibid.*

Nonetheless, there are three narrow exceptions to the general rule barring *habeas* relief in Missouri when the petitioner has procedurally defaulted:

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[30] Unlike the petitioner in a *habeas corpus* case, seeking review of the district court's judgment, the State is not required to obtain a COA in order to appeal a judgment granting a writ, Rule 22(b)(3).

> [Missouri permits] review of procedurally barred claims in a *habeas* proceeding if: (1) the claim relates to a jurisdictional (authority) issue; or (2) the petitioner establishes manifest injustice because **newly discovered evidence** makes it is more likely than not that no reasonable juror would have convicted the petitioner (a "**gateway of innocence**" claim); or (3) the petitioner establishes the presence of an objective factor external to the defense, which impeded the petitioner's ability to comply with the procedural rules for review of claims, and which has worked to the petitioner's actual and substantive disadvantage infecting his entire trial with error of constitutional dimensions (a "**gateway cause and prejudice**" claim). Thus "[a] showing either of **cause and prejudice** or of **actual innocence** acts as a 'gateway' that entitles the prisoner to review on the merits of the prisoner's otherwise defaulted constitutional claims." [State ex rel. Amrine v. Roper, 102 S.W.3d 541, 546 (Mo. *en banc.* 2003).]

State ex rel. Koster v. McElwain, 340 S.W.3d 221, 244-245 (Mo.App. 2011)(emphasis added).

These exceptions to the general rule are called "gateway claims" because they provide "a gateway through which a *habeas* petitioner must pass to have his otherwise barred constitutional claim considered on the merits. . . ." Clay v. Dormire, 37 S.W.3d 214, 217 (Mo. *en banc.* 2000). In the case at bar Clemons does not claim that the trial court lacked jurisdiction to impose the death penalty in his case; instead, he focuses on gateway claims of actual innocence and cause and prejudice. Those two claims will be addressed separately below.

## III. ACTUAL INNOCENCE

Clemons argues that newly discovered evidence establishes that he is actually innocent. Before looking at his evidence, it is important to understand the parameters of the actual innocence gateway.

The seminal Missouri case on freestanding actual innocence claims is State ex rel. Amrine v. Roper, 102 S.W.3d 541 (Mo. *en banc.* 2003). Amrine was an inmate at the Jefferson City Correctional Center, who was convicted of murdering another inmate. He was sentenced to death.

At his trial two inmates -- Randy Ferguson and Jerry Poe -- testified that they saw Amrine stab Gary Barber. Another inmate, Terry Russell, testified that Amrine told him he killed Barber. In the defense case, Amrine called six fellow inmates who testified that Amrine was playing poker somewhere else at the time of the stabbing. Additionally, one of the prison guards testified that he saw Barber chase Terry Russell across a room before Barber pulled a

knife out of his back, collapsed, and died. Later, after Amrine was convicted, Russell, Ferguson, and Poe all recanted their trial testimony.

In recognizing a freestanding claim of actual innocence based on newly discovered evidence, this Court held that, "the evidence of actual innocence must be strong enough to undermine the basis for the conviction so as to make the petitioner's continued incarceration and eventual execution manifestly unjust even though the conviction was otherwise the product of a fair trial." 102 S.W.3d at 547. The burden of proof to make a showing of actual innocence goes beyond a mere preponderance of the evidence: "The appropriate burden of proof for a *habeas* claim based upon a freestanding claim of actual innocence should . . . require the petitioner to make a clear and convincing showing of actual innocence that undermines confidence in the correctness of the judgment." *Ibid.* at 548. "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 is left with an abiding conviction that the evidence is true." *Ibid.* In Amrine that burden was satisfied:

> Amrine has met his burden of providing clear and convincing evidence of actual innocence that undermines our confidence in the correctness of the judgment. In reviewing a claim under this standard, the evidence supporting the conviction must be assessed in light of all of the evidence now available. Although the evidence at trial was constitutionally sufficient to support the conviction, the evidence was not overwhelming. There was significant evidence indicating Amrine's innocence from the beginning. At trial, Officer Noble identified Terry Russell as the perpetrator. He did not identify Amrine as the killer. Nor did the six inmates who testified that Amrine was playing cards in another part of the recreation room. There was no physical evidence linking Amrine to the murder. Instead, Amrine was convicted solely on the testimony of three fellow inmates, each of whom have now completely recanted their trial testimony.
>
> This case thus presents the rare circumstance in which no credible evidence remains from the first trial to support the conviction. This Court, sitting as an original habeas 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.

*Ibid.* at 548-549.

In Paragraph 15 of his Petition for Writ of *Habeas Corpus,* Clemons seems to revert to his old argument of trying to blame Thomas Cummins for the murders of the Kerry sisters. Similarly, at pages 6-8 of the Background Memorandum Clemons provided me before the *habeas corpus* hearing in St. Louis last fall, he once again dredges up all the dreck about

Cummins' confessions, the impossibility of surviving, etc., which established (according to Clemons) that "Cummins was an unreliable witness who had provided a continually shifting account of the events on the bridge." (Background Memorandum at 7.) The same Memorandum breathlessly reveals:

> More shockingly, a draft police report provided only recently to Clemons' counsel reveals that Cummins admitted to the police in much more graphic detail that he "tried to have sex with [his cousin]," they "began arguing, at which time he accidentally pushed [her]" and "caused her to fall backward into the river," and his other cousin "either jumped into the river" or Cummins "may have pushed her in" as well.

(Background Memorandum at 8.)

Of course, if newly discovered evidence would make it more likely than not that no reasonable juror would have convicted Clemons because Cummins was the perpetrator, then that dog might hunt, but the truth is, it will not. The time has finally come to drive a stake through the heart of the shibboleth that Thomas Cummins is the murderer responsible for the deaths of the Kerry sisters.

The police suspected Cummins because of flawed factual premises that turned out to be wrong: the whirlpool, the 90 foot drop, the 80 mile-an-hour impact, neatly-combed hair, etc. The siren song that Cummins was the killer was also a ready-made defense for Clemons and the other defendants, but in reality none of those things were ever proved, and that was for a good reason: *They were unprovable because they were false.* If they were true, why did none of the three defendants convicted of the Bridge Murders put on evidence to substantiate them? How hard would it be to bring in an engineer to testify that it really was 90 feet from the pier to the river surface? Why not bring in a biomechanical expert to testify that someone of Cummins' size, jumping the distance he jumped, would likely break his neck (or other body parts)? Why not call a witness to testify that if McDaniel saw a whirlpool on April 6, it *likely would have been there* at 1:00 a.m. on April 5? Could it be that the failure of proof was attributable to the fact, as McDaniel admitted on cross, river whirlpools are transient things that can change from day to day?

I do not fault the police for initially buying into superficially plausible nonsense. Hindsight is 20-20, and they were working under pressure to get the case solved. I do fault them for taking the easy way out by drawing unsupported conclusions about Cummins lusting after Julie Kerry by distorting what he really said in order to quickly wrap up this case. I especially

find fault in the use of what police had to know at the time was an invalid and inappropriate investigative technique -- a polygraph examination of someone in Cummins' circumstances -- not to discover the truth, but for the transparently obvious purpose of enlisting Gene Cummins in the effort to convince his son to confess. The fact that the police twice recorded Cummins when he was saying things that in no way implicated him, while *not* recording him when they claimed he was making inculpatory statements, speaks volumes. It is blindingly obvious to me that some people at the St. Louis Police Department -- Jacobsmeyer and Company -- thought in good faith that Cummins was the killer, and they just wanted to help nature along, first by claiming that he said things he did not say, and then by physically abusing him to get him to make a recording. A nice, simple confession would have meant no muss, no fuss, case solved. Ironically, Cummins is the only man in this whole sorry affair with the strength of character to resist blatant violations of his constitutional rights.

Then, just when the police had "solved" the mystery of who killed the Kerry sisters by arresting Cummins, the process unraveled when ownership of the flashlight came to light. When that flashlight led to Antonio Richardson and Daniel Winfrey -- leave out Clemons and Gray for the moment -- the possibility that Cummins was the killer vanished. No one ever has claimed that either Richardson or Winfrey were coerced into saying what they said (even if much of what Richardson said made no sense). Consider just a few things that Cummins said to the police between 3:00 a.m. and 12:40 p.m. on April 5 that Richardson and Winfrey substantiated:

**1. Marlin Gray told Cummins he was from Wentzville**: If things did not go as Cummins claimed, how is it both Richardson and Winfrey put Gray on the Bridge making that statement?

**2. As the group of cousins walked back to Missouri, Gray grabbed Cummins and pulled him aside, and then forced him down onto the surface of the Bridge**: On April 7, Richardson told police he saw Gray do just that; Winfrey said the same thing on April 8. How did Cummins get two of the group of four to corroborate what he said happened while he (Cummins) was sitting in jail on murder charges?

**3. After he was forced down, Cummins' cousins were raped by at least part of the group of four:** Richardson agreed this happened when he talked to police on April 7; so did Winfrey on April 8. How did they know about the rapes, and why did they agree to their own

complicity in the rapes, if the rapes did not happen (which, obviously, they did not if Cummins pushed the sisters off the Bridge)?

**4. All three of the victims eventually were forced to go down the manhole**: Richardson and Winfrey both confirmed this. Where did they come up with that detail if Cummins pushed the sisters off the Bridge surface?

**5. The sisters were pushed off the Bridge, and Cummins was told that he would be shot if he did not jump:** Richardson told police both of these things happened when he was interviewed -- *before he was let go* -- on April 7. Where did he get those details? Is it just coincidence that they match what Cummins said?

Consider these additional details:

**6. Marlin Gray ended up with the Swatch:** Gray admitted at his trial that he had the Swatch after the events on the Bridge. How did he get Cummins' Swatch if it was not by robbery as Cummins and Winfrey testified? Why hide it in The Flamester's recliner if he knew it was material evidence unless he was trying to cover up his involvement in the Bridge crimes?

**7. DNA evidence:** The DNA evidence established conclusively that Gray had sex with at least one of the Kerry sisters, despite his claim that he was smoking a joint while listening to the radio when the rapes were taking place.

**8. Winfrey confessed his culpability for, and pled guilty to, two murders and two rapes:** Why did Winfrey plead guilty to two counts of murder and two counts of rape if he did not do anything? If Clemons still wants to pin this crime on Cummins, how does he account for Winfrey's willingness to plead guilty to a crime *Cummins* committed? Clemons has claimed at times that Winfrey was trying to save his own hide by testifying against Clemons (T. 3295). Save his own hide *from what?* Why would he cut a deal requiring him to plead guilty to *murder and rape,* knowing that he was going to serve at least part of a 30 year sentence --16 years as it turned out -- if he had nothing to do with killing the Kerry sisters because they were the victim of a lust-crazed Tom Cummins?

**9. Why did Richardson's lawyer agree that he should go away to prison for a very long time, if Cummins was the killer?** After all, if, as the police originally claimed, and Clemons apparently still believes, Cummins caused Julie Kerry to fall off the Bridge, why would his lawyer say at trial that Richardson deserved to go to prison for something *he did not do*? Why did Richardson not accuse his counsel of ineffective assistance for making that argument if

he was taking the blame for *Cummins*' crime? Why not claim his lawyer was ineffective for failing to go after Cummins since he "confessed" to killing the Kerry sisters? After all, we know how successful that strategy was when used by counsel for Gray and Clemons.

**10. Why does Clemons *still* refuse to answer questions about his participation in the rapes and deaths of the Kerry sisters?** While he had a right to decline to testify at his criminal trial, we are *way* past that point now. A *habeas* proceeding is civil in nature and there is no right to assert the privilege against self incrimination in a civil proceeding, without serious consequences. That is the clear holding of a case heavily relied on *by Clemons* before the habeas hearing last September, Bean v. Calderon, 166 F.R.D. 452 (E.D. Cal. 1996); *accord,* State ex rel. Myers v. Sanders, 204 W.Va. 544, 526 S.E.2d 320 (1999).

At the *habeas* hearing, Clemons refused to answer questions about his participation in the events on the Bridge, including whether the statements he made in the recording he gave to the police were true or false (H.C.T. at 383). He also refused to answer whether he threatened to shoot Cummins, whether he raped one or both girls, whether he told Gray and Winfrey, "We took them and put them down on the platform in the manhole;" whether Marlin Gray and Danny Winfrey left the Bridge after the girls were raped; whether he is the one who walked Cummins to the edge of the platform and put him down there; whether he told Cummins to jump or he would be shot; whether he was the one who ripped the clothes off the girls; whether he was the one who took Cummins' wallet out of his pocket; whether he told Winfrey and Gray after Clemons and Richardson ran off the Bridge, "We threw them off." (H.C.T. 383-388.) After refusing to answer those questions on the ground that they might tend to incriminate him, I made the following record with Clemons:

> **The Court**: Before you step down, Mr. Clemons, you understand --you were present when we've had conversations about the effect of you taking the Fifth Amendment in response to the questions asked by counsel for the State; is that right, sir?
>
> **The Witness**: Yes.
>
> **The Court**: You understand the inference I will draw from your refusal to answer those questions?
>
> **The Witness**: Yes.
>
> **The Court**: You understand I will take from your refusal to answer those questions that your testimony would be unfavorable to you?

**The Witness**: Yes.

(H.C.T. 390.) At that point I suggested to Clemons that he confer with his counsel over the lunch hour to see if he wanted to reconsider his refusal to answer. As to the foregoing questions, he did not. I infer from his refusal to answer those questions that, if he were *truthful,* Clemons' answers to every one of those questions would have been damaging to him.

I do not believe the so-called newly discovered evidence of the earlier draft of what the police claimed Cummins said would have made one bit of difference in the outcome of Clemons' trial because the earlier draft tries to sell the notion that *Cummins* killed the sisters. Two different juries heard the nonsense about Cummins running off the bridge instead of jumping, and the claim that he startled Julie Kerry and caused her to fall. They also heard Cummins deny that he ever said those things. If two different juries understood that Cummins never made those statements, how likely is it that they would believe an even more extreme version of the same? Two juries saw Tom Cummins testify; he gave an account that was internally consistent in all major details through several iterations and which was borne out by independent testimony of Daniel Winfrey, who was hardly his friend. I saw Mr. Cummins testify, and I can understand why three juries found him to be the most honest man in this forest of deceit.

To his credit, Clemons' actual innocence claim has evolved since he filed his Petition in this case four years ago. At arguments before me on March 18, 2013, the following colloquy occurred:

> THE COURT: You're not claiming today that Cummins did this [i.e. committed the murders]?
>
> MR. LEVINE [one of Clemons' counsel]: No, that's not my contention, Judge.

(H.C.T. 796.)

Instead, the claim of actual innocence is that newly discovered evidence establishes that Clemons' confession was involuntary so that it never should have been played for the jury, in which case the basis for a finding of deliberation by him before the murders goes away, and he could not be guilty of First Degree Murder.[31]

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[31] Significantly, he does not claim that the evidence fails to support a finding of felony murder or rape, but neither of those crimes would support the death penalty, State v. Gray, *supra,* 887 S.W.2d at 376.

In that regard Clemons claims that newly discovered evidence of the settlement of the lawsuit filed by Cummins, resulting in payment of $150,000 to him, establishes Clemons' innocence because it undercuts the admissibility of his confession since the circumstances described by Cummins are similar to what Clemons claimed in his IAD Statement (H.C. Pet. Ex. L).

As a preliminary matter it seems appropriate to ask whether the evidence of the lawsuit, which was not filed until after Clemons' trial, was really new. As early as April 11, 1991, the *Post-Dispatch* published an article that indicated Gene Cummins was consulting with an attorney after his son had been cleared of any crime, because he was angry about the way Thomas Cummins had been treated by the police (29.15 L.F. 763). During the State's closing argument at the Gray trial, Prosecutor Nels Moss made this argument:

> [Cummins] didn't say he made an advance, that he had sexual longings. He didn't say that he advanced toward the lady. He didn't say that she fell off or that he blacked out. He didn't say that Robin jumped in. That's nonsense, that's nonsense. *And sure the police will protect their butts 'cause they know damn good and well that probably a lawsuit for false arrest is looming right down the road, okay.*

(Gray T. 2531; emphasis added.) The lawsuit was not filed until later, but this argument was made on October 21, 1992, four months before Clemons' trial. It did not take a rocket scientist to foresee that a lawsuit by Cummins was coming.[32] Indeed, Clemons' defense counsel in his closing argument noted that, "There was some mention of a suit, possible suit." (T. 3293.) There has been no showing that, if Cummins had been asked about whether he planned on filing a lawsuit, he would not have been forthcoming. In the exercise of due diligence, defense counsel could have taken Cummins' deposition and asked that question. If that happened, and Cummins denied that intention, then I might be more sympathetic to his claim.

More importantly, Clemons knew about the basis for the lawsuit before his trial. That is, he knew that Cummins claimed he had been beaten by the police because that came out in his testimony at the Gray trial. Clemons' counsel had that transcript. I do not believe this constitutes newly discovered evidence of actual innocence because the basis for the suit was known to

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[32] The possibility of future litigation explains particularly scurrilous testimony by Trevor, a member of Jacobsmeyer and Company, who testified at Gray's trial that Gene Cummins said his son was a "pathological liar." (Gray T. 1508.) This testimony came in without objection, although it was clearly inadmissible as hearsay and as an opinion about the credibility of a witness, State v. Smith, 314 S.W.3d 802, 810 (Mo.App. 2010) ("personal opinion as to a witness's truthfulness and veracity is immaterial and not admissible"), *citing* State v. Schell, 843 S.W.2d 382, 384 (Mo.App. 1992).

Clemons and used by him in his cross examination of Cummins when he was taking the position that Cummins had confessed to being culpable for the deaths of the sisters.

One other factor troubles me about the notion that the lawsuit was "new evidence." It was filed on April 2, 1993. The *St. Louis Post-Dispatch* carried an article the next day, entitled, "Kerrys' Cousin Sues Police Here for $1.1 Million." The text of the article states that the police, among other things, "assaulted him and lied that he had confessed to the murders, when he had not confessed." (29.15 L.F. at 786.) (Clemons was obviously aware of this article because he filed it with the trial court deciding his Rule 29.15 Motion.) The suit was settled by a Release executed on April 5, 1995 (H.C. Pet. Ex. K). The fact that Cummins settled his suit against the police was announced in another article in the *Post-Dispatch* on April 7, 1995, entitled, "Wrongly Held in Two Deaths, Man Settles Suit." The text of the article said, "Terms are confidential, but one of the plaintiff's lawyers said the cousin, Tom Cummins, will get a substantial sum of money." (29.15 L.F. at 764.) Obviously, Clemons was aware of all this when he filed the *Post-Dispatch* articles in the Rule 29.15 case on August 16, 1995 (29.15 L.F. at 756).

So, when Clemons filed his federal *habeas corpus* petition in 1997, around two years *after* the settlement, why did he not allege that the 1995 settlement of Cummins' lawsuit for a "substantial sum of money" constituted "new evidence" supporting his claim of actual innocence? Why wait until he filed his Petition with this Court, 14 years after he learned of the settlement? Since he could have raised the issue of the Cummins' lawsuit and settlement in the federal *habeas* proceeding, Clemons does not explain why the District Court's Order, denying his claim that Cummins' testimony warranted vacation of his death penalty, is not conclusive at bar, State v. Isa, 850 S.W.2d 876, 888 (Mo. *en banc.* 1993).

And yet, I am troubled by the effect of the evidence that Cummins was beaten. When Judge Peek presided over the suppression hearing, Clemons did not testify that he was told to sit on his hands by the police. (He said that in his IAD statement, but there is no indication that statement was reviewed by Judge Peek.) There is no indication that Clemons' trial counsel brought Cummins' testimony at Gray's trial (that he was also told to sit on his hands) to the attention of Judge Peek when counsel offered the transcript of Cummins' testimony. Of course, that was evidence known to Clemons and his lawyers at the time of the suppression hearing. I have to say, having been a trial judge for nearly 13 years, if that kind of evidence were brought

to my attention, I would scrutinize it carefully. At the *habeas* hearing, Sgt. Huelsmann, who has undoubtedly heard a lot of accusations of police brutality, said that he had never heard the accusation that a police officer told a suspect to sit on his hands before administering a beating (H.C.T. 589). Yet, in this case not one, but *three* suspects said the same thing. While I can understand Gray and Clemons colluding, but Grey and Clemons *and Cummins?* Having had the benefit of seeing Cummins testify, and knowing of the similarity between his testimony and Clemons,' I might think long and hard on this, but Judge Peek did not have the benefit of evidence that I have seen, *because defendant chose to not present it at the suppression hearing*, although it was available to defense counsel at the time.[33]

Would I have suppressed the statement? That is hard to say. As a trial judge I have suppressed statements where it was clear that a suspect asked for a lawyer and the police admitted they continued to interrogate him, but I have never had a case where the two sides told diametrically opposed stories, as they did in this case. Remember, at the suppression hearing, Pappas and Brauer adamantly denied beating Clemons. Judge Peek had to weigh that evidence against the testimony by Clemons that he was beaten. He may have thought that the better course was to let the jury figure out who was telling the truth, and there is case law that seems to support that resolution. In State v. Anderson, 800 S.W.2d 465, 467 (Mo.App. 1990), the Eastern District held in a case appealed from the City of St. Louis:

> Once a defendant objects to the admission of a confession, there must be a clearcut determination, prior to admission, that the confession was, in fact, voluntary. [Citation omitted.] The state bears the burden of proving, by a preponderance of the evidence, that defendant gave his confession voluntarily. State v. Brown, 698 S.W.2d 9, 11 (Mo.App.1985). Where there is conflicting evidence regarding the voluntariness of a statement, the admissibility is a matter of trial court discretion, which is not lightly disturbed. State v. Royal, 610 S.W.2d 946, 949 (Mo. *en banc.* 1981).

As was noted earlier, the trial court instructed the jury that it had to find that Clemons' statement was voluntary in order to give it any weight (L.F. 183). Since Clemons chose not to testify in front of the jury, it would have been impossible for the jury to discern the similarity of what Clemons said with what Cummins said. If I had seen that evidence as the trial judge, I do not know that I would have allowed the statement to be played, but that does not mean Judge Peek abused his discretion in deciding to let the jury decide the issue, Anderson, *supra.*

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[33] By that, I mean he did not hear testimony that the detectives told Clemons to sit on his hands, nor did he know the detectives interrogating Cummins two days earlier told him to do the same thing. That evidence was available to

Moreover, the choice to not present the strongest possible case on the alleged involuntariness of his statement was Clemons.' I believe his failure to make that case to Judge Peek during the suppression hearing, and later to the jury, amounts to a self-inflicted wound constituting procedural default. Ultimately, since this Court will review the law of this case de novo, it may well come to a contrary conclusion.

Clemons also points to new evidence that it was *possible* that Clemons *may* have told Cummins he was going to live. When Cummins testified at trial, he did not identify who said he was going to live (T. 1692). Clemons argues that Cummins now agrees Clemons *could* have been the one making the statement, from which he infers it *must* have been him. He bases that argument on testimony in the deposition Cummins gave on August 28, 2012, 21 years after the events he was recalling:

Q. * * * Is it true that at some point on the bridge, one of the individuals told you that they were going to let you live? Someone made a comment to you that they were going to let you live?

A. Yes, I -- I remember something about that.

Q. Do you remember when that was?

A. It was on the bridge.

Q. When on -- when during the events on the bridge?

A. Oh, no, I don't.

Q. Do you know who it was who made that comment to you?

A. No, I don't.

Q. Is it possible it was Reginald Clemons?

A. It's possible that it was Reginald Clemons.

(H.C. Ex. 37 at 68.) That is another way of saying it is possible it was Marlin Gray. Or Antonio Richardson. Or Daniel Winfrey.

That is a silly argument. It is equally plausible that it was one of the other three members of the group of four. When he was talking to Ghrist and Nichols in the back of the ambulance sometime after 3:00 a.m. on April 5, 1991, he said, "the tall subject, who initially pulled him from the girls [*a/k/a Marlin Gray*] told him that if he was quiet, he would make sure they don't

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Clemons' counsel, but he chose not to present it at the suppression hearing.

kill him." (Background Ex. 2 at SLPD 00026.) Around six hours later on the morning of April 5, Cummins said one of the assailants told him, "I like you. I'm gonna let you live. I'm gonna let you live." (Ex. 236 at 49.) At that time Cummins was unable to recall who said that (*Ibid.*). The testimony elicited from Cummins' deposition, 21 years after the fact, is not the kind of evidence that constitutes a clear and convincing showing of actual innocence that undermines confidence in the correctness of the original judgment in the criminal case, Amrine v. Roper, *supra,* 102 S.W.3d at 548.

Moreover, evidence is only "new" if it was "not available at trial and could not have been discovered earlier through the exercise of due diligence." State ex. rel. Nixon v. Sheffield, 272 S.W.3d 277, 284 (Mo. App. 2008). In this case evidence that Cummins was uncertain as to who promised him mercy was available by reading his first tape-recorded statement, given on April 5, 1991 (Ex. 236 at 49). The 2012 deposition provides no "new" evidence not available at the time of trial.[34]

Clemons also points to new testimony *he* gave at the *habeas corpus* hearing, that he did not kill Julie or Robin Kerry and that he was unaware of any plan to kill them. That argument suggests that someone can voluntarily decline to testify at trial, wait 20 years, file a *habeas* petition, and then testify, thereby providing "new evidence" of actual innocence that serves as a gateway for actual innocence. He cites no authority for that proposition. If that were the law, then no criminal conviction would ever be final if a defendant chose to exercise his right not to testify. I am unaware of any authority that suggests it is that easy to prove actual innocence, and it is contrary to the idea in this State that habeas corpus review is extremely limited, Nixon v. Jaynes, *supra*, 63 S.W.3d at 214. Clemons certainly had a "previous opportunity to litigate" the claim that his own testimony would exonerate him: It was called a trial, *Ibid.*

Evidence is only "new" if it was "not available at trial," Nixon v. Sheffield, *supra,* 272 S.W.3d at 284. In this case Clemons' testimony was available at his trial. He cannot use it to establish actual innocence now.

I do not believe Clemons has established a gateway claim of actual innocence.

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[34] I realize Cummins' first recorded statement does not say that Clemons *could* have been the one making the statement about letting him live, but he does say he does not know who made it. That statement is indistinguishable from what he said in his 2012 deposition. Neither one, in my view, is a sufficiently strong reed to undermine confidence in the original criminal judgment.

## IV. CAUSE AND PREJUDICE

In order for Clemons to prevail on a claim of cause and prejudice, he must first show "cause;" namely, "that an effort to comply with the State's procedural rules was hindered by some objective facts external to the defense." State ex. rel. Woodworth v. Denney, 396 S.W.3d 330, 337 (Mo. *en banc.* 2013). To establish prejudice, he must show a reasonable probability of a different result, *Ibid.* at 338. In this regard the showing of prejudice is the same as that necessary to find a violation under Brady v. Maryland, 373 U.S. 83 (1963); Woodworth, *supra,* 396 S.W.3d at 338. He must show "a reasonable probability of a different result," *Ibid.*

Under Brady, if the State suppresses evidence favorable to a defendant and material to either the guilt or penalty phase, due process is violated, Johnson v. State, -- S.W.3d --, SC92448, Slip Opinion at 9 (Mo. *en banc.* July 16, 2013). Clemons asserts three different Brady violations that establish (he claims) the cause and prejudice gateway.

First, he claims that the State refused to give him a copy of a draft of an Incident Report that would have assisted him in pointing the finger at Cummins. The critical language in the draft report is set out verbatim at page 30 of this Report, *supra* (H.C.Ex. 6 at 9).

The short answer to that argument is that Clemons knew of the existence of this document at the time of trial. His attorney was allowed to review it and used a tape recorder to dictate verbatim the paragraph that talks about Cummins accidentally pushing Julie Kerry. Indeed, when the State refused to make a copy of the draft, Clemons filed a Motion to Compel on January 25, 1993, in which the language that was later watered-down is set out word for word (L.F. 271). So far as I can tell, Judge Peek never ruled on that Motion, and Clemons' counsel never made a record asking that he rule on the motion.

The rule in Brady is limited to discovery, after trial, of information which had been known to the prosecution, but unknown to the defense, Nassar v. Lissel, 792 F.2d 119, 121 8th Cir 1986). Thus, evidence is not suppressed for Brady purposes "if the defendant had access to the evidence prior to trial by the exercise of reasonable diligence," U.S. v. Stuart, 150 F.3d 935, 937 (8th Cir. 1998). "If the defendant had knowledge of the evidence at the time of trial, the State cannot be faulted for nondisclosure." State v. Salter, 250 S.W.3d 705, 714 (Mo. *en banc.* 2008). Moreover, to get this Court to undertake *habeas* review of Clemons' claim, he must "establish that the grounds relied on were not 'known to him' during his direct appeal or post-conviction case." State ex rel. Engel v. Dormire, 304 S.W.3d 120, 126 (Mo. *en banc.* 2010)

I do not believe the evidence presented to me established a Brady violation simply because the State refused to produce a record whose existence was fully known to Clemons. His failure to make a record in which the trial court ruled one way or the other on his Motion to Compel was a procedural default. It was not a consequence of an objective factor external to the defense.

Clemons next claims that the State failed to produce a rape kit performed on Julie Kerry's body three weeks after she was pushed into the Mississippi River; the rape kit did not show the presence of seminal fluid on the vaginal, oral, or rectal swabs (H.C.T. 181-182). Clemons does not show that there is even a remote possibility that a rape kit performed under the circumstances existing in this case could reasonably be expected to show *anything*. He did not call any expert witnesses to testify that usable evidence could be expected from the rape kit performed on Julie Kerry's body.

Dr. Graham, the Medical Examiner who performed the autopsy on Julie Kerry, testified that her body was "moderately decomposed" when it was recovered (Gray T. 1043). "Moderately decomposed" in this case meant the decomposition was sufficiently advanced that she had no scalp hair remaining, and she had to be identified by a forensic odontologist using dental records, since she was unrecognizable (T. 1554, Richardson T. 1360-1361).

Dr. Graham examined her vaginal area (Gray T. 1045). The lining of the vaginal vault "had begun to decompose and basically slipped off" (T. 1537) and was "basically gone." (Gray T. 1052). The decomposition was such that even if there had been semen in the vagina at one time, after three weeks in the river, it would not be present (*Ibid.* at 1053).

It is Clemons' burden to show that he is entitled to habeas corpus relief, Woodworth, *supra*, 396 S.W.3d at 337. To do that, he must show that the undisclosed evidence was material, that is "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." Johnson, *supra,* Slip Opinion at 9. A possibility of prejudice is not enough; Clemons must show that the failure to provide him with the rape kit "worked to his actual and substantial disadvantage, infecting his entire trial with error of constitutional dimensions." Nixon v. Jaynes, *supra,* 63 S.W.3d at 215. In this case I do not believe Clemons has established that disclosure of the rape kit would have caused the result of the trial to be different.

Which brings us to Warren Weeks. Clemons claims a Brady violation in connection with the State's failure to disclose critical evidence about what Weeks knew and the alteration of a record he helped prepare. To prevail on a Brady claim, Clemons must prove three things: "(1) The evidence at issue must be favorable to him, either because it is exculpatory or because it is impeaching of an adverse witness; (2) that evidence must have been suppressed by the State, whether willfully or inadvertently; and (3) he must have been prejudiced." Woodworth, *supra,* 396 S.W.3d at 338.

Weeks was endorsed by the State as a witness (along with a number of other persons) in a Memorandum filed by the State on September 16, 1992; a copy of that Memorandum was sent to counsel for all defendants, including Clemons, on the same date (L.F. 505). Mr. Weeks was identified as being with "Pre-trial Release" at "7 N. 7th St." in the Memorandum, but no other identifying information was provided. Charles Daniel, another individual with Pre-trial Release, was endorsed in the same document. It does not appear the defense was ever provided with any additional information concerning Weeks.

Weeks testified by deposition in the proceeding before me, albeit after the evidentiary hearing in St. Louis last September.[35] He formerly worked for the State of Missouri, but that was a long time ago. He currently lives in Texas and works in the private sector.

In April of 1991 he was a Probation/Parole Officer working for the Missouri Board of Probation and Parole, a division of the Department of Corrections. His assignment in April 1991 was serving as a bond investigator in the Pre-Trial Release Unit in the holdover area at the St. Louis Police Department. His job was to screen recent arrestees to see if they qualified for release on their own recognizance or a low bond so that they could be moved out of the jail.[36] In that connection he worked with a Court Commissioner from the Circuit Court who would make preliminary decisions as to whether a prisoner should be given pretrial release immediately, or held over until he or she could go before a judge. Weeks' job was to interview arrestees to get information for the Commissioner (App. 9, Weeks Depo. at 14).

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[35] By agreement of the parties, the record was held open so that Weeks' deposition could be taken after the evidentiary hearing in September of 2012. His deposition was taken on October 24, 2012, and a video of the deposition was played for me on March 18, 2013, when I heard arguments in this case. I have also read the transcript of Weeks' deposition, which is part of Appendix 9 of the exhibits tendered to me by Petitioner, along with his proposed Findings of Fact.

[36] I assume that St. Louis had the same problem as other urban venues in having more prisoners than available space in the jail, so the pressure is unrelenting to bond out people charged with non-violent, low level offenses, if possible.

In that regard Weeks would fill out a three page document called a Pre-Trial Release Form and give it to the Commissioner (*Ibid.* at 21). The form required information about the prisoner's employment, residence, criminal background, and mental or physical problems (*Ibid.* at 12).

Weeks went on duty at 10:50 p.m. on April 7, 1991, and his shift extended into April 8 (*Ibid.* at 15-17). Yvonne Edwards was the Commissioner working during most of Weeks' shift (*Ibid.* at 16). Around 5:25 a.m. on April 8, Weeks recalls Reginald Clemons coming in for processing (*Ibid.* at 22). Weeks has a specific recollection of Clemons because of the notoriety attached to the Bridge Murders (*Ibid.* at 18). Weeks recalls that when he came in, Clemons had a large bump, which he described as being between the size of a golf ball and a baseball, on his right cheek (*Ibid.* at 18-19, 37). Weeks made a written notation on page 3 of the Pre-Trial Release Form that said either "bump" or "bruise." (*Ibid.* at 23.) Weeks also put down "no problem" concerning physical problems for Clemons, because that is what he said (*Ibid.*). Clemons did not say what the source of the bump was (*Ibid.* at 19). The Pre-Trial Release Form completed regarding Clemons was admitted at the *habeas corpus* hearing as Petitioner's Exhibit 3. Weeks filled out most of Exhibit 3, and gave the Form to Commissioner Edwards, who also made some entries. Weeks talked to an intermediate supervisor about what he had seen.

Weeks did not see the Form again after he gave it to Commissioner Edwards. When he was deposed, Weeks was shown a copy of the Form. On page 3, where wrote "bump" or "bruise," the handwritten notation was scratched out, something Weeks did not do (*Ibid.* at 24). He offered no opinion as to who was responsible for altering the record. Weeks testified that he was never interviewed by the IAD investigators about what he saw on April 8 (*Ibid.* at 32),

About six or seven months after his interview with Clemons, Weeks was called in by his supervisor, Ben Coleman. He wanted to talk to Weeks about the injuries to Clemons that he observed on April 8. Coleman challenged Weeks' ability to have seen *any* injury to Clemons (*Ibid.* at 27-28). He also told Weeks to go see Prosecutor Nels Moss. Weeks assumed that Moss wanted to talk about Clemons' injury (*Ibid.* at 30).

Moss discussed with Weeks what he had written on the Pre-Trial Release Form. He also showed Weeks some photographs that did not show any injuries to Clemons (*Ibid.* at 30-31). Moss seemed irritated by what Weeks said, and "he made it very clear that he didn't think that I was describing it accurately based on the pictures," but he did not pressure Weeks to change his

mind (*Ibid.* at 31). Moss told Weeks that if he needed to see him again, he would call him. Moss never did, nor did anyone from the Prosecutor's Office (*Ibid.* at 32). Although he was endorsed as a witness in September of 1992, Weeks was not called to testify at Clemons' trial.

At the *habeas* hearing, Moss was called as a witness by Clemons and testified that he had a vague recollection of having met with Weeks before Clemons' trial (H.C.T. 184). He recalled that Weeks may have made some reference to Clemons' left or right cheek being swollen; he could not recall that he communicated what Weeks said to Clemons' counsel (*Ibid.* at 185). When asked if a witness, who had seen Clemons with injuries immediately after he had been interrogated by the police, would have been important to the defense, since Clemons was claiming that his confession was a product of physical coercion by the police, Moss answered: "I don't know. I would assume so." (*Ibid.* at 184.)

When IAD investigated the complaints of Clemons and Gray that they had been beaten, they talked to employees in the Pre-Trial Release Office. The results of that investigation are documented in a Report that is 51 pages long and summarizes the actions taken by the investigators.[37] It will be referred to herein as "App. 7."

The IAD Report says that Clemons was taken to the Men's Holdover at 2:39 and the Photo Unit on 2:40 on April 8, which would seem to suggest a time when photographs shown to me at the *habeas* hearing were taken (App. 7 at IAD00046). The Report goes on to note:

> Sergeant Huelsmann retrieved documents from the Pre-Trial Release Commissioner's Office pertaining to Mr. Clemons and Mr. Gray. This State agency uses office space in the holdover. It's [*sic*] personnel are employees of the St. Louis Circuit Court and the Board of Probation and Parole. It's [*sic*] function is to interview prisoners charged with felony and misdemeanor offenses and then determine their eligibility for bond. Copies of the documents are attached.
>
> According to these documents, Reginald Clemons was interviewed by Probation Officer Warren Weeks at 5:25 a.m., on April 8, 1991. As part of the interview process, Mr. Weeks is required to complete a form. . . . To complete the form, the prisoner is asked if he had any . . . physical problems. Mr. Weeks indicated the only problem Mr. Clemons related to him was that he was an "Ashmatic" (sic – should be asthmatic).
>
> After Mr. Weeks' interview, Mr. Clemons was interviewed by Pre-Trial Release Commissioner Yvonne Edwards at 5:42 a.m. Sgt. Huelsmann interviewed Ms. Edwards.

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[37] In his Proposed Findings of Fact, Petitioner gave me three very thick volumes of exhibits and copies of cases. One of the exhibits is a copy of the IAD Report, which is found in Appendix 7 to the Proposed Findings Petitioner would like me to adopt. There is a representation that the IAD Report was admitted at the *habeas* hearing as Respondent's Exhibit D, but the transcript of the *habeas* does not show that Respondent's Exhibit D was ever received. So that the Court may review the IAD Report, I am submitting it with this report.

> She stated she personally talked to Mr. Clemons. She did not see any injuries on him, nor did he complain to her of any abuse.

(App. 7 at IAD00047.) Huelsmann only interviewed Commissioner Edwards and not Weeks (H.C.T. 575), but what he perceived from the records and his interview with the Commissioner is obviously different than what Weeks said happened. Despite the fact that IAD investigators claimed that both Weeks and Commissioner Edwards would substantiate that Clemons had no obvious injuries, neither was called at Clemons' trial.

The IAD Report also notes that investigators did a similar review of the Pre-Trial Release records of Marlin Gray. According to the Report, Gray was interviewed by Probation Officer Charles Daniel at 10:58 a.m. on April 8. Daniel told Sgt. Huelsman that "he saw no injuries on Mr. Gray, nor did Mr. Gray tell him of any injuries or abuse." (App. 7 at IAD00050.) Daniel was called as a witness in rebuttal of Gray's testimony that he was battered and dazed after being interrogated by police (Gray T. 2367-2376). His testimony was consistent with what the IAD investigators attributed to him.

The first Brady issue is whether the Weeks' evidence was favorable to the defense. Obviously, it was. When this Court affirmed the admission of Clemons' confession, it noted that most of the witnesses who said that Clemons' showed signs of injuries saw him more than 48 hours after his interrogation by police, 946 S.W.2d at 218. The one exception was Michael Kelly, his former attorney, who saw Clemons at 2:15 p.m. on April 8; Kelly testified that the right side of his face was swollen. The Court said Kelly's testimony was refuted by Sgt. Warren Williams, who saw Clemons shortly *before* Kelly, around 2:00 p.m. on April 8; Williams said he saw no signs of injury, *Ibid.* The testimony by Daniels that he saw Clemons less than three hours after he was booked, and *more than eight hours before* Williams, could serve to contradict Williams. This is especially so in light of the fact that -- unlike the other defense witnesses who testified for Clemons on this issue -- Weeks had no ties to Clemons.

The second Brady issue is whether the State suppressed the information, either willfully or inadvertently. There is no indication that the State ever informed the defense about what Weeks observed on April 8, and I believed Weeks when he testified that he recorded his observations of Clemons on the Pre-Trial Release Form. Moss had a vague recollection of talking to him. I do not know who crossed out Weeks' description of the injury on that Form, but it had to be someone who had it on behalf of the State. I believe Clemons satisfied the

second element. At the very least, had Clemons known about Weeks' observations, he could have called him as a witness at the suppression hearing.

As to the third issue, Clemons does not have to demonstrate that disclosure of Weeks' knowledge of injury and the obscured form "would have resulted ultimately in [Clemons'] acquittal." Woodworth, 396 S.W.3d at 338. It is enough if there is a reasonable probability of a different result, *Ibid.* This element is satisfied "when the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." Engel v. Dormire, *supra.* 304 S.W.3d at 128.

I believe Clemons has satisfied that standard. The importance of Warren Williams' testimony was emphasized by this Court in its original Opinion, affirming the trial court's denial of the motion to suppress Clemons' confession, 946 S.W.2d at 218. The contradiction of his testimony by Weeks is a method of impeachment, Maugh v. Chrysler Corp., 818 S.W.2d 658, 661 (Mo.App. 1991). In the criminal case, Weeks' testimony may have resulted in the trial court sustaining the motion to suppress, in which case, Clemons' confession would never have been heard by the jury.

The State has suggested that harmless error would protect the jury verdict, even if Clemons' confession had been suppressed. It seems to me that the State's argument is contrary to Kyles v. Whitley, 514 U.S. 419, 434 (1995), where the Supreme Court held that once a violation of Brady and its progeny is shown, "there is no need for further harmless-error review."

This is a troubling outcome for me, because we do not know if Weeks' recollection of the evidence is consistent with other people in the Pretrial Release Unit, for example, Commissioner Edwards, who, according to the IAD Report, observed no injuries to Clemons at 5:49 a.m. I am dubious that the suppression of Clemons' statement would have made much difference in this case, due to the strength of the evidence, but the holding of Kyles, *supra.* would seem to suggest that the question of harmless error is not pertinent where there is a Brady violation.

I would find in Clemons' favor on the issue of a Brady violation concerning suppression of evidence possessed by Warren Weeks.

## V. PROPORTIONALITY

Clemons also contends his death penalty was disproportionate because he was a teen-ager at the time with no criminal record and no one saw him push the sisters off the Bridge (at least no

one who lived to tell about it, who was able to identify him), for which reason he says the evidence against him was weak, especially if the confession is out of the picture. In that regard, he says the confession was the only evidence he was under the Bridge.

The question of proportionality is largely one of law. The only "evidence" on this point was a professor whose affidavit was presented in lieu of his live testimony. The Court does not need me to ascertain the credibility of an affidavit that it can read itself.

While Clemons compares his case to other unrelated cases, it seems to me the benchmark for proportionality in a case involving accomplice liability is much easier to find: Marlin Gray. While Marlin Gray was not even on the Bridge when the sisters were pushed off, this Court held that his sentence was not disproportionate, 887 S.W.2d at 389-390.

So far as the strength of the evidence is concerned, recall that this Court found that the evidence of Clemons' deliberation was "substantial, compelling, and without doubt." *Ibid.* at 217. At the *habeas* hearing, Clemons asserted his privilege against self incrimination when asked about whether he did the following: raped the Kerry sisters; assisted in raping them; put one of them down the manhole by himself; put Tom Cummins down the manhole; went down onto the platform with Richardson, after the sisters and Cummins were on the steel platform; along with Richardson, forced the three to get on the concrete pier; and told Marlin Gray and Daniel Winfrey, "We threw them off the bridge." (H.C.T. 383-388.) I infer from this testimony that Clemons refused to answer those questions because the answers would have further solidified his complicity in the murders and rapes of the Kerry sisters on April 5, 1991.

That conclusion is bolstered by the damning testimony adduced in three different murder trials. After Thomas Cummins was forced to lie facedown on the steel platform, he heard two sets of footsteps land, as if two people jumped down there. He assumed that there were two people down there with the group of cousins (Richardson T. 1599-1600). We know from Winfrey's testimony that he and Gray were off the Bridge, which leaves Richardson and Clemons as the two men who jumped down onto the platform. The man who seemed to be in charge was Clemons (Richardson T. 1587). One of the two apparently raped Robin Kerry on the platform as Cummins and Julie lay next to her (Ex. 236 at 53-54). After they were told to get on the pier, Cummins heard a voice say, "Don't look at *us*." (Ex. 236 at 57; Richardson T. 1641.)

Were there two assailants on the platform below the deck of the Bridge? Why would there be only one? With Gray and Winfrey off the Bridge, why would the guy in charge put one

140 pound 16 year old with an IQ of 70 alone with three people, one of whom was a male who outweighed Richardson by 70 pounds? Why would Clemons or Richardson rape Robin Kerry on the platform, unless someone was watching his back while he perpetrated his crime? And we know that Cummins heard two people jump down on the deck.

Consider what did Clemons told Gray as he and Richardson ran off the Bridge: "*We* threw them off the bridge." (Gray T. 1694, 1745; T. 2049, emphasis added.) Later, after the group of four went to the Chair in Alton to contemplate their evening's activities, Clemons explained to Gray that he told the victims "that he was going to kill them." (Gray T. 1700.) Why did Clemons tell the young women he was going to kill them, and later announce that he and Richardson had thrown them off the Bridge, unless he had involvement in their murders?

In Engel this Court says that, "Justice requires that this Court consider all available evidence uncovered following [petitioner's] trial that may impact his entitlement to habeas relief." 304 S.W.3d at 126. This includes evidence "uncovered over the years between various judicial reviews. . . ." *Ibid.*

A good part of the record in Clemons' Rule 29.15 Motion had to do with the alleged ineffectiveness of his trial counsel in failing to call psychologists to testify in the penalty phase of his criminal trial. His PCR counsel filed over 1400 pages of materials, much of it deady dull, but one document is of particular interest. It is a Social History by a psychologist named Marie Clark. This Social History is 46 pages long and goes into great detail about his parents' lives, his siblings lives, and Reginald Clemons' life (29.15 L.F. at 189-234). It appears Ms. Clark interviewed 20 people in obtaining information about Clemons, including his parents, siblings, friends, neighbors, and Clemons himself, twice (29.15 T. 527). Vera Thomas, Clemons' mother, has read the History, is familiar with everything in the report, and agreed with everything in it (29.15 T. 1183).

Clemons told Clark that he was expelled from school his senior year for a liquor-related incident (*Ibid.* at 220). He had a 3.5 grade point average in high school, although he was bored in school (*Ibid.* at 221). During his teenage years, Clemons began to associate with a group of guys who called themselves, "The Kings," a group Clemons described as "basically party animals." (*Ibid.* at 199.) They drank copious amounts of liquor and after his graduation from high school, Clemons said they partied "one month straight." (*Ibid.* at 200.)

At about age 18 Clemons developed a new set of friends:

> He also reported spending a considerable amount of time with his maternal cousin, Angela Robins and a friend, Carmen Smith. Reginald stated that he "cannot really relate to or deal with people my age because I have always related well with my older brothers. (This is supported by comments in his school records, indicating his difficulsty in relating to his peers). *Others in his peer group included Julie and Robin Kerry, the victims in this case.* According to Buffie Garnett and her grandmother, Maureen Garnett, who reside across the street from the Thomas' home, *Julie and Robin were frequent visitors to Reginald's home*; along with several other teens. Their visits occurred during the day; while Vera and Reynolds Thomas were working. According to Maureen Garnett, the Kerry sisters visited the Thomas' home prior to 1989, based on her recall of discussing it with her husband; who died in 1989. At one time, she spoke to one of the sisters about parking in her driveway. Mrs. Garnett recalls that she viewed Reginald as being quiet and shy, and therefore, assumed that the girls were visiting his brothers.

(*Ibid.* at 200-201; emphasis added.) Mrs. Garnett's opinion of Clemons' shyness was not shared by everyone. Cedric Richardson testified Clemons went out with members of the opposite sex frequently, they would come over to his house, and while he was often quiet, that was not the case when he was around young women (29.15 T. 740-742; 748-749).

On July 21, 1995, when Clemons' Rule 29.15 counsel was preparing for his evidentiary hearing, she filed a list of the witnesses she intended to call, along with a description of their expected testimony (29.15 L.F. 1007). This list included Maureen Garnett, described as a neighbor of Clemons, who would testify about his disabilities and personality. "She will further testify to the connection between Reginald and the victims of the crime." (*Ibid.* at 1015.) The list also includes Buffie Garnett, who would also be a witness on, *inter alia,* the subject of Clemons' connection to the Kerry sisters (*Ibid.* at 1016).

Neither Marie Clark, Maureen Garnett, nor Buffie Garnett testified on the connection between Clemons and the Kerry sisters. So far as I know, Clemons has never acknowledged that he knew the victims, and he told the police that he had never seen them before.

One way to look at this evidence is to view it as a reason why Clemons would not participate in killing him since they had been members of his peer group, although not for a couple of years. Another, more sinister view would be that it provided a motive for murder. There is nothing in the record in this case that indicates that the Kerry sisters recognized Clemons during their interaction on the Bridge. After all, it had been two years since the Kerry sisters had been to his house according to Maureen Garnett (29.15 L.F. 200). We do not know if Clemons recognized them, but we do know that he was rather quiet on the Bridge when the two groups met, something that was uncharacteristic for him when it came to young women. There was no evidence that the sisters had ever met anyone else in the group of four

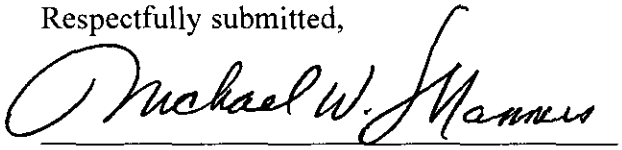
before April 5, 1991, and Marlin Gray (to the extent he can be believed) told the police he was surprised Richardson and Clemons threw the girls off the Bridge, since he did not believe they would ever be able to identify them and Tom Cummins seemed thoroughly intimidated (which is consistent with how Cummins described himself). Gray's belief was not unreasonable: two young women are raped in the middle of the Mississippi River by four strangers. How likely is it they would ever be able to identify the perpetrators?

Unless they knew one of the group. Even if they did not acknowledge Clemons, what assurance would he have that they would not remember him at a later date? So 120 IQ Clemons had two options: (1) Walk away from the Bridge after having participated in a vicious gang-rape of the sisters, a crime for which the punishment would be quite severe if he were caught, on the chance that they would not remember him; or (2) Leave nothing to chance and make sure that the women who had been to his house numerous times could never identify him. Is it likely 70 IQ Antonio Richardson would have the same concerns about the long-term consequences of his acts? In that time after Cummins was stuffed in the manhole, until he heard the two sets of footsteps land on the platform, what were Clemons and Richardson talking about? Could Clemons -- the one who seemed to be in charge -- have been telling his young cousin what needed to be done? Is that why he told Gray and Winfrey, "We threw them off the bridge"?

It is not surprising that Clarke and the Garnett women were not asked about the connection between Clemons and Julie and Robin Kerry at the Rule 29.15 hearing.

Of course, we do not know if this is what was going through Clemons' mind, and he is not talking. Perhaps the statement he gave the police sheds some light on what he was thinking, despite the fact that I think he was coerced into making it. I have listened to that tape, and his voice is a monotone until he is shown the photograph of Julie Kerry, at which point he suddenly begins sobbing uncontrollably. After gaining control for a moment, he did the same thing when he saw Robin's photograph. It sounded authentic, maybe because of his fear of what was going to happen to him, or maybe for some other reason. Maybe.

Respectfully submitted,



MICHAEL W. MANNERS, SENIOR
JUDGE AND SPECIAL MASTER

Dated: August 6, 2013

I certify a copy of the above was emailed this 6th day of August, 2013, to:

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Missouri Supreme Court

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