

argument on *State v. Thompson*, 723 S.W.2d 76 (Mo. App. S. D. 1987), which could be distinguished by any first year law student.

In *State v. Thompson*, the defendant made no showing of innocence, admitted his guilt and was in no way attempting to meet the threshold of actual innocence that acts as the gateway for procedurally barred claims to be heard in a habeas petition. Rather, the defendant in *Thompson* argued that his re-incarceration subjected him to double jeopardy and violated his due process rights. 723 S.W.2d 76, 89-90 (Mo. App. S.D. 1987). The court noted that the exact same argument made by the defendant had previously been made in a habeas proceeding that was denied by the Supreme Court. *Id.* The appellate court was therefore bound by that decision on direct appeal based upon Rule 91.22. *Id.* However, Rule 91.22 does not apply to situations where a petitioner subsequently alleges his innocence and meets the cause and prejudice gateway for a habeas petition with claims allegedly procedurally barred.

Ferguson has provided clear and convincing evidence of his innocence including, *inter alia*, affidavits from the only two witnesses against him swearing that their trial testimony was false and that the prosecutor knowingly suborned perjury. The *Thompson* case has no relevancy to the issues raised by the *Ferguson* petition for habeas relief.

Ferguson and Preston's Jury Selection Processes Are Identical

The Appellate Court for the Eastern District has described the precise jury selection procedure used to select Ferguson's jury as a "fundamental and systematic" departure from the jury selection statutes. *Preston v. State*, 325 S.W.3d 420, 426 (Mo. App. E.D. 2010). The opt-out practice employed by Lincoln County was so egregious

that the Appellate Court held the defendant need not demonstrate prejudice to be entitled to relief under Rule 29.15. *Id.* Ferguson’s habeas petition should be granted on this basis alone.

The Attorney General does not dispute that the exact same procedure was employed in Ferguson’s case as in *Preston*. The Attorney General also does not attempt to distinguish *Preston*, or cite to any case that overrules *Preston*. Instead, the Attorney General tries to elevate form over substance by arguing that the issue is procedurally barred. However, the Attorney General’s position is without merit.

Cause Analysis Irrelevant: Demonstration of Prejudice Unnecessary

The Attorney General claims the first *Ferguson* habeas petition was focused on the narrow issue of whether there was cause for petitioner’s failure to present the jury selection issue properly. That is precisely the point Ferguson is making here, the cause analysis is irrelevant when a threshold argument of actual innocence is made. Therefore, Judge Callahan’s decision regarding cause is not only not res judicata; it is irrelevant to the allegations before this Court.

Ferguson’s showing of actual innocence renders the jury selection issue cognizable in these proceedings. In the prior habeas petition Judge Callahan held that the issue was barred by default because it was not raised earlier and specifically no claim of innocence was advanced.¹ *Ferguson v. Dormire*, No. 08AC-CC00721 (p.p. 2-7). The habeas claim was denied because no gateway claim of innocence was made. Ferguson’s

¹ *Preston* notes that the opt-out procedure was used outside of the defendant’s presence, and that the defendant could not have discovered the practice sooner through *reasonable* diligence. The court held that refusing to consider the claim would therefore result in “fundamental unfairness.” *Id.* at 423.

current habeas petition maintains the requisite gateway claim of innocence. Unlike here, the jury selection issue addressed in Ferguson's previous habeas never met this threshold. Therefore, no ruling has been made by any court as to the *Preston* issue raised by Ferguson within the context of actual innocence. "[P]rocedurally defaulted claims can be resurrected in a habeas corpus proceeding under...a gateway claim of innocence." *State ex rel Koster v. McElwain*, No. WD73211 at p. 4 (fn.6) (Mo. App. W.D. 2011). "Justice requires that this Court consider all available evidence uncovered following [a defendant's] trial that may impact his entitlement to habeas relief." *State ex rel. Engel v. Dormire*, 304 S.W.3d 120, 126 (Mo. banc. 2010). Because Ferguson's new evidence of actual innocence was never presented to the Western District Appellate Court or the Missouri Supreme Court in the prior habeas proceedings, his jury selection claim must now be considered in light of this new evidence and his claims of actual innocence.

It should be noted that Judge Callahan held that "[t]he community service option employed in Lincoln County clearly violates [Chapter 494, RSMo]."

Preston was Correctly Decided

Because the Attorney General's other arguments are so clearly wrong, it maintains that *Preston* was "wrongly decided." The Missouri Supreme Court denied the Attorney General's motion for an extension of time to file the application for transfer. As a result of the Attorney General's procedural failure, the Missouri Supreme Court declined to hear the case. *Preston v. State*, No. SC91256. The Attorney General further argues that the jury selection procedure did not impinge on the fairness of Ferguson's trial. However, the *Preston* Court held otherwise when it deemed the procedure a

violation of a defendant's constitutional rights and afforded relief under Rule 29.15. In fact, as noted *supra*, the *Preston* Court held the procedure to be so fundamentally contrary to the jury selection statutes that the defendant need not even demonstrate prejudice for the conviction to be overturned.

Recent Western District Appellate Order on Ferguson's Second Habeas Petition

One issue completely ignored by the Attorney General in its Response is that the Western District recently ruled on the *Preston* issue in Ferguson. On March 25, 2011, Petitioner filed for a Writ of Habeas with the Western District Appellate Court, raising precisely the same issues raised before this Court on the jury selection issue. The Western District **dismissed the appeal without prejudice**. (Order attached and incorporated herein as Exhibit A). The Western District neither dismissed it with prejudice nor did they cite Rule 91.22. It is reasonable to argue that the Western District has therefore not denied Ferguson's Writ with regards to the jury issue, once it was presented with the gateway evidence of his actual innocence and by denying his Petition without prejudice, clearly demonstrating that this argument is not barred.

Jerry Trump

Mr. Trump has submitted two sworn statements, setting forth precisely the type of pressure imposed upon him by the prosecutor and how that pressure led to Trump's false trial testimony. In his December 28, 2010 affidavit, Trump states that he "cannot testify with any certainty that [he] saw Ferguson in the parking lot the night Mr. Heitholt was killed." This is absolutely contrary to Trump's prior trial testimony.

But amazingly, the Attorney General writes that “The December 28, 2010 affidavit does not recant the trial testimony.” (Response, p. 12). This assertion is absolutely false and constitutes a violation of all applicable ethical rules. Of course the affidavit is a recantation. At trial, Trump identified Ferguson as being present in the parking lot at the time Mr. Heitholt was killed. Now, Trump states that is not true. Thus, Trump has recanted.

Contrary to its obligations, the Attorney General ignores the other issue raised by Trump. In both affidavits, Trump explains what was done to him by the prosecutor. Contrary to the story concocted by the State at trial, Trump now unequivocally states that he did not receive a newspaper in prison and identify Ferguson. Trump now explains that the first time he met with the prosecutor; the prosecutor showed him the newspaper article. Trump also explains that the prosecutor basically told him to identify Ferguson at trial. Trump, a convicted sex offender, had no choice but to go along with the prosecutor’s plan.

However, in its response, the Attorney General did not even attempt to refute Trump’s statements about the pressure placed upon him and the fabrication of evidence by the prosecutor. Indeed, the Attorney General did not even address Trump’s description of the prosecutorial misconduct that took place.

The Attorney General’s conduct ignores the spirit of the recent Appellate Court order. Therein, the Court stated:

This is not to say the issues in this case do not give us pause. The sole evidence tying Ferguson to the crime was the testimony of Erickson and the identification of Trump.

Unfortunately, the Attorney General continues to ignore the aspects of this case that gave the Court pause, wasting time and resources and continuing to delay justice for Ferguson.

Charles Erickson

Charles Erickson submitted an affidavit with Ferguson's petition. In that affidavit, Erickson makes it clear that all of his testimony implicating Ferguson in the murder was false. Just like Trump, he explains that his testimony was the result of prosecutorial pressure.

In addressing Erickson's affidavit, the Attorney General first notes that a November 22, 2009 videotaped statement of Erickson was not attached to the Petition. The Attorney General is suggesting that because the statement was not submitted, something improper has occurred. Like all of the Attorney General's misdirected accusations, the suggestion is false. Ferguson has no obligation to present the videotaped statement, written and presented by Erickson without the assistance of counsel. Further, the videotaped statement has been disclosed and was even quoted in the media. It was submitted to the Appellate Court and reviewed by that Court.

Referring to the videotaped statement, the Attorney General writes "Erickson still placed Ferguson at the crime scene with sufficient detail for a jury to convict Ferguson of felony murder." (Response at p. 15). That is another false assertion. Nothing in the videotaped statement suggests Ferguson was guilty of any crime. The videotaped statement places Ferguson at the scene, nothing more. The Attorney General should be

well aware that a defendant's mere presence at the scene of a murder does not implicate him in the murder.

The Attorney General writes that the videotaped statement placed Ferguson at the scene "aiding and encouraging Erickson while Erickson committed the robbery and murder." (Response p. 15). This too is false. Nothing in the videotaped statement even remotely suggests Ferguson was encouraging Erickson in any way.

The Attorney General also mischaracterizes the videotaped statement, writing that it was "taken by Zellner." The truth is that Erickson presented the statement he alone prepared. The Attorney General knows that, but again seeks to suggest something improper was done and that Zellner "took the statement."

Then, the Attorney General writes "In short, Erickson's multiple statements before, during and after trial consistently placed Ferguson at the murder scene with Ferguson strangling the victim." This assertion is bizarre. The videotaped statement references nothing that could be interpreted to suggest Ferguson strangled the victim, nor could the affidavit be reasonably interpreted that way. Again, the Attorney General's assertion is false and is a lame attempt to mislead this tribunal. Even the Appellate Court's most recent decision noted that at trial "Ferguson's trial counsel was successful in illustrating that Erickson had made various prior statements that seriously undermined Erickson's credibility." (Ap. Ct. Op. at 26).

The Attorney General's citation to irrelevant case law is consistent with its false statements as to the facts. The Attorney General cites "*In re Davis*, 2010 3385081 (S.D. Ga. Aug 24, 2010). In that case, the witness whose testimony was at issue admitted he had not been coerced and did not admit his prior testimony was false. Here, Erickson has

made it clear he testified falsely because of prosecutorial misconduct. Also, he repeatedly states that his prior testimony was false. Nothing in *Davis* guides relates to this case.

Without any evidence whatsoever that something improper has occurred, the Attorney General writes “perhaps it is a different form of ‘pressure’ that has led Erickson to issue his latest statements.” The Attorney General does not explain what this statement means, but it obviously is an accusation of impropriety. Apparently, the Attorney General feels comfortable making false accusations, but such behavior should not be tolerated.

The Attorney General claims Ferguson is presenting arguments the Attorney General knows he is not making. For example, the Attorney General writes that Erickson now claims “he does not remember anything.” (Response at p. 17). That is untrue. Erickson’s position is clear, he knows that his prior testimony was false. He testified and implicated Ferguson because he was pressured and lied to about Ferguson making a deal with the prosecutor. Again, instead of properly addressing the issues, the Attorney General is attempting to mislead this tribunal.

Shawna Ornt

The Attorney General completely fails to address the importance of Shawna Ornt’s new testimony. Ms. Ornt’s affidavit sets forth the potential motive for Michael Boyd to have attacked Mr. Heitholt. Ornt explains the animosity between Boyd and Heitholt and Boyd’s obsession with Mr. Heitholt. None of this evidence was available at

the 29.15 hearing, which the Attorney General inexplicably quotes at length. (Response at p. 19-19).

In summary, the Attorney General's Response contains false assertions calculated to mislead this tribunal. It contains malicious and baseless accusations that have no place in this legal proceeding. One can only hope the Attorney General will modify its behavior and proceed in accordance with the ethical principles that should guide its conduct. Then, the merits of Ferguson's claims can be resolved and justice served.

Duties of the Attorney General

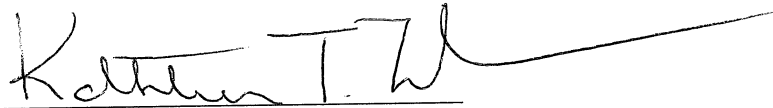
In his Petition for a Writ of Habeas Corpus, Mr. Ferguson presented strong new evidence and made serious claims that the evidence against him was fabricated. He established that the prosecutor pressured witnesses into falsely accusing him and suborned perjury at his trial. In response, the Attorney General has ignored this new evidence and presented frivolous arguments with no basis in law or fact.

The Attorney General's behavior is an insult to the justice system. The Missouri Code of Ethics requires that *"A prosecutor has the responsibility of minister of justice and not simply of that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice and that guilt is decided upon the basis of specific evidence."* The Supreme Court Rules require that *"A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law or fact for doing so that is not frivolous."* (S.C.R. 4-3.1). Further, the Rules provide that *"a lawyer shall not knowingly make a false statement of fact or law to a tribunal."* (S.C.R. 4-3.3). Rather than act in accord with these rules, the

Attorney General continues to make false allegations and present frivolous arguments.

The Attorney General wastes a lot of paper and ink and most importantly, days in the life of Ryan Ferguson in its thinly veiled attempt to use procedure to prevent justice.

Respectfully submitted,



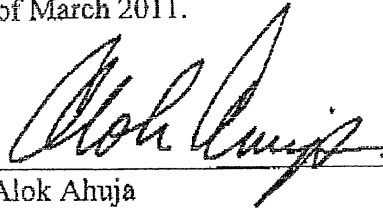
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Dated in Kansas City, Missouri, this 29th day of March 2011.



Alok Ahuja
Presiding Judge - Writ Division

Martin, J., concurs.

cc: Joseph Dandurand
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