

IN THE CIRCUIT COURT OF THE SEVENTH JUDICIAL CIRCUIT
SANGAMON COUNTY, ILLINOIS

FILED

JUL 21 2014



Anthony P. Selby

Clerk of the
Circuit Court

THE PEOPLE OF THE STATE OF ILLINOIS,)
)
Plaintiff,)
)
v.) NO. 90-CF-328
)
THOMAS MCMILLAN,)
)
Defendant/Petitioner.)

**PETITION FOR POST-CONVICTION RELIEF
PURSUANT TO 725 ILCS 5/122-1**

NOW COMES Defendant/Petitioner THOMAS MCMILLAN, hereinafter "Petitioner,"
PRO SE, and in support of his PETITION FOR POST CONVICTION RELIEF PURSUANT TO
725 ILCS 5/122-1 states to this Honorable Court as follows:

This petition is filed pursuant to the Post Conviction Hearing Act, 725 ILCS 5/122-1 et
seq. Under the Act, there is no statute of limitations that applies when raising claims of actual
innocence. 725 ILCS 5/122-1(a-5)(c).

Petitioner was convicted in Sangamon County of First Degree Murder in July of 1991.
His conviction rested solely on the testimony of Donald "Goose" Johnston who claimed to have
participated in the abduction of the victim Melissa Koontz, and five (5) in-custody informants
who claimed petitioner made jailhouse admissions to allegedly committing the abduction and
murder of 19 year-old Melissa Koontz.

Petitioner asserts a claim of actual innocence as a free-standing post-conviction claim
based on evidence recently discovered and not available at the time of trial.¹ If presented at the

¹ Petitioner adopts in support of petition for post-conviction relief all facts and supporting affidavits filed in support
of Petitioner's Motion For Post-Conviction Forensic DNA Testing Pursuant to 725 ILCS 5/116-3 that was filed on
Nov. 12, 2009. An order granting the right to DNA testing was issued by the Court on June 16, 2010.

time of trial, this newly discovered evidence would have created reasonable doubt, which would have changed the outcome of the jury verdict.

I. NEWLY DISCOVERED AFIS TESTING OF A PREVIOUSLY UNKNOWN FINGERPRINT LEFT ON THE REAR VIEW MIRROR OF THE VICTIM'S CAR NOW IDENTIFYING MICHEAL DOWNEY AS A SUSPECT IN THE KIDNAPPING AND MURDER OF MELISSA KOONTZ, IF PRESENTED AT THE TIME OF TRIAL WOULD HAVE CHANGED THE OUTCOME OF THE JURY VERDICT

In 1997, Illinois became one of the first states in the country to enact post-conviction forensic testing to prove actual innocence.² As the title of the act explicitly states, fingerprint testing is the type of forensic evidence that the law recognizes that will support a claim of actual innocence claim. "Motion for Fingerprint, Integrated Ballistic Identification System, or Forensic Evidence not Available at Trial Regarding Actual Innocence." 725 ILCS 5/116-3

On June 24, 1989, at approximately 10:06 p.m. Melissa Koontz was last seen leaving work at Cub Foods located at 3001 S. Veterans Parkway in Springfield, IL. She worked as a cashier. Police know the approximate time she left the store. At 10:06 p.m. Melissa Koontz purchased a nectarine before exiting the store, according to the cash register receipt. (FOIA00319). About an hour later, her vehicle, a black Ford Escort hatchback, was discovered abandoned on the Waverly Blacktop Road, a rural country road that led to her parent's home in Waverly, IL, approximately 15.2 miles from Cub Foods. (FOIA00568)

At 10:50 p.m. Robert Sturm who lives on the Waverly Blacktop Road noticed the black Ford Escort parked on the roadway facing south. (FOIA#00364)³. A few minutes later, at 11:05 p.m., Sturm called 911. (FOIA# 00299-302). At approximately 11:50 p.m., Deputy Sample

² Carso, Kathryn E., Amending the Illinois Post-conviction Statute and Including Ballistic Testing, 56 DePaul Law Review 695 (2006-07).

³ Documents of the police investigation were obtained pursuant to the Illinois Freedom of Information Act. These records have been sequentially bates stamped starting at number "FOIA #00001." All references to the FOIA numbered documents within this petition refer to the CD Rom. A copy of the CD is included in the affidavit of William Clutter in Support of Petition for Post-conviction Relief Pursuant to 725 ILCS 5/122-1.

arrived at the scene. He found the car stopped in the middle of the southbound lane of traffic. The headlights were on, the keys were in the ignition, and the engine was turned off. Nothing appeared to be disturbed inside of the vehicle. A purse was located on the front passenger seat. Deputy Sample went through the purse and found the driver's license of Melissa Koontz. He requested that the dispatcher contact the registered owner of the vehicle, that being Robert Koontz, Melissa's father. Unable to make contact with the owner, Deputy Sample pushed the vehicle approximately 30-50 feet off of the road, into a farm-field entrance. At 12:48 a.m., Deputy Sample cleared the scene. (See also FOIA#00303 thru 318: Audio Transcript of Deputy Sample's conversation with Dispatch and Lt. Streckenrider).

Illinois State Police Crime Scene Technician Paul Schuh processed the vehicle the next morning after the family made a missing person report. Schuh testified at trial that there was an unknown fingerprint on the rear-view mirror inside the vehicle that did not match any of the defendants or the victim. (See trial transcript July 17, 1991 testimony of Paul Schuh pp. 151-154).

On July 1, 1989, a week after she disappeared, Melissa Koontz's body was found in close proximity to Cub Foods. Sgt. John Lewis and Lt. Terry Castleman observed the condition of the crime scene. She was lying on her back six rows into a corn field. Her left foot was bare, and her left shoe was found to the right of the body. She was wearing a peach-colored floral skirt that appeared "to have been rolled upwards." (FOIA#00423 thru 424: *July 1, 1989 report by Lt. Terry Castleman*). Dr. Grant Johnson, who conducted the autopsy observed several stab wounds through the clothing that penetrated both layers of the skirt that had been pulled up. She was assaulted and stabbed where she lay. Dr. Johnston observed that the plastic clasp on the front of her bra was broken and her shirt had two buttons that were unfastened and a third button was

missing and “apparently has been torn away.” (See PC Exhibit #1, Clutter Affidavit attachment #10, *Autopsy report of Dr. Grant Johnson*) Melissa Koontz’s shirt had been torn open, and her bra clasp was forcibly broken.

Every suspect who was investigated by police had their fingerprint standards compared with the fingerprint that was recovered from the rearview mirror of the victim’s car. Police also conducted an extensive investigation in an effort to run elimination prints of persons who may have had contact with the victim’s vehicle. This included family members, friends, police officers, as well as co-workers of the victim. (See PC Exhibit #1, Affidavit of William Clutter in Support of Petition for Post-conviction Relief).

At the request of private investigator, Bill Clutter, the Sangamon County Sheriff agreed to submit the unknown fingerprint into the Integrated Automated Finger Identification System (IAFIS) administered by the Illinois State Police. The person who left the unknown fingerprint was identified as Michael Downey. (See PC Exhibit #1, Clutter Affidavit attachment#4, Illinois State Police latent fingerprint report of Gary Havey)

When interviewed by sheriff detectives, Downey claimed that he had been inside of Melissa Koontz’s car the day before she died. He said he was a friend of Melissa’s brother, Robert Koontz Jr. He claimed that Rob and his sister shared the black Ford Escort. When asked to explain how his fingerprints wound up on the rearview mirror, “Downey said it was possible that he drove the car on that day but did not remember.” (See PC Exhibit #1, Clutter Affidavit attachment#6, Sangamon County Sheriff’s interview of Downey dated 9/29/08)

However, police reports indicate that Robert Koontz, Jr. was working at Bonanza Steakhouse on Clearlake Ave. at the intersection of Dirksen Parkway on the evening his sister disappeared, and had his own transportation to and from work that evening. (FOIA#00676).

Michael Downey was never identified by family members in the original investigation as someone who had access to Melissa Koontz's black Ford Escort.

Downey has a history of violence toward women, including a former spouse who expressed fear over his display of a large knife. Michael Downey's fingerprints were entered into AFIS following an arrest in 1992 for battery of a girlfriend that occurred three years after Melissa Koontz's murder. (See PC Exhibit #1, Clutter affidavit paragraphs 16 thru 19). This evidence was unavailable at the time of trial.

The person who killed Melissa Koontz would have shed skin cells on the bra of the victim, which was torn open by her assailant. Recently, private investigator Bill Clutter contacted Michael Downey to get his cooperation to voluntarily provide a DNA standard. Downey refused to provide a sample of his DNA and insisted that he would only do so if compelled by a court order. (See PC Exhibit #1, Affidavit of William Clutter par. 25). At the time Mr. Clutter contacted Downey, post-conviction DNA testing had been performed by Orchid Cellmark on the clothing of Melissa Koontz pursuant to the Court granting an order to perform DNA testing. DNA testing from cuttings of the lace area of the bra from Melissa Koontz revealed a mixture that included at least one male profile. Thomas McMillen was excluded as a possible contributor of DNA to this mixture. (See Exhibit #1, Clutter affidavit, par. 23)

Witnesses at Cub Foods support theory that Melissa Koontz was abducted from the employee parking lot and that her killer drove the victim's car.

Sangamon County Sheriff Deputy Al Sample, who found Melissa's abandoned vehicle, reported the next morning that there was no evidence of any struggle where the car was found. He suggested to his supervisor: "The only other remote thing that I could think of would be to have someone go to Cub Foods and just see if anything out of the ordinary happened." (FOIA#00315).

Everett Cruz and his wife Karen were exiting Cub Foods at around 10 p.m. after shopping and observed a dark colored car parked in the south parking lot. According to the report of Deputy Clifford Jones, "they noticed a white male and a white female sitting in a dark colored car in Cub's south parking lot. Mr. Cruz stated that he couldn't remember anything else about the vehicle but the occupants were facing each other and tried to duck down when his headlights illuminated them." When interviewed by private investigator Bill Clutter, Mr. Cruz stated that the man was in the driver's seat, and the woman was in the front passenger's seat, and that the vehicle occupants appeared to be in a heated argument. (See PC Exhibit #1, attachment #5, Affidavit of Everett A. Cruz; see also FOIA#00650: *July 7, 1989 report by Dep. Clifford Jones*).

This disturbance between a man and a woman involving a dark colored vehicle occurred around the time Melissa Koontz would have been going to her car that was parked in south parking lot. What Mr. Everett describes is consistent with the victim being abducted against her will. The act of ducking down suddenly when the lights illuminated the inside of the vehicle suggests an attempt to avoid detection.

Other witnesses also reported a suspicious individual in the employee parking lot on the south side of the store shortly before Melissa Koontz completed her shift. At approximately 9:30 p.m. three witnesses, Deanna Brawner, her roommate Andrea Mott, and Mott's ten-year-old son Carl exited Cub Foods and were driving through the employee parking lot to exit the store. As they passed the south wall of the store, they observed a suspicious white male sitting between some bushes. He was holding what appeared to be a bottle of liquor. Brawner told Sgt. J.D. Rachford that she used to work at Cub Foods. The man was sitting in the area where store employees parked their personal cars. (FOIA#00713: *July 2, 1989, report of Sgt. J.D. Rachford*).

They exited the store's south parking lot along the same route that the Cruz family took to exit the parking lot.

Another witness, Debbie Havenar, called the Sangamon County Sheriff's Department and reported that she too, had observed a young man lurking in the south parking lot. At approximately 10 p.m. she parked her car in the south parking lot on the south side of the building. As she walked toward the store Det. Hinsey reported, "she 'felt' that someone was watching her." She then observed the man standing between two cars. Det. Hinsey reported, "He did not appear to be getting in or out of any of the cars. His stare made her feel uncomfortable and she avoided eye contact." (FOIA#00524: *July 3, 1989 report of Det. S. Hinsey*).

These witness accounts support Deputy Sample's suggestion that Melissa Koontz may have been abducted as she walked to her car, parked in the employee parking lot. These witnesses were not presented at trial by either the State or by defense counsel.

The location where the body of Melissa Koontz was found also supports a theory that she was abducted in the parking lot when she left work. Her body was found in a cornfield not far from Cub Foods. Exiting the south parking lot, to arrive at the location where Melissa Koontz's body was found one would make a right turn onto West White Oaks Drive and travel a short distance to West Isles Avenue and make a left turn. From there, the cornfield was a straight drive. The total drive distance is 2.5 miles between Cub Foods and the cornfield where the body of Melissa Koontz was found. Melissa was abducted from work and driven to the closest cornfield outside of the city limits. (See PC Exhibit #1, Attachment #3 Clutter Affidavit Nov. 3, 1997, par.13 thru 15).

II. DONALD JOHNSTON'S RECANTATION OF HIS TRIAL TESTIMONY IN WHICH HE ADMITTED THAT HE PROVIDED A FALSE CONFESSION TO THE CRIME AND THAT HE WAS NOT PRESENT TO WITNESS THE CRIME, IS CORROBORATED BY OBJECTIVE EVIDENCE INCLUDING NEWLY DISCOVERED MENTAL HEALTH RECORDS REQUIRES REVERSAL OF TOM MCMILLEN'S CONVICTION

On July 20, 2008, Donald Johnston was interviewed by private investigator Bill Clutter.

In a video-recorded statement, Johnston recanted his trial testimony:

Bill Clutter (BC): Alright. And I'd like to ask you, were you involved in the murder of Melissa Koontz in any way?

Donald Johnston (DJ): (Shakes head to indicate "no.")

BC: You're shaking your head, can you reply verbally?

DJ: No.

BC: And let me ask you, when you testified in the case, in Tom's case on July 17, 1991, you testified that you were present when Tom pulled the girl out of the car and he stabbed the girl in the arm, Tom did, and Gary was in the girl's car. Was that testimony truthful when you gave that testimony on July 17, 1991?

DJ: That was false.

(See *Motion For Post-conviction Forensic DNA Testing* pp.80-101, July 20, 2008 video interview of Donald Johnston, transcript pp. 2, 5)

On Nov. 11, 2008, a second video recorded interview was conducted by Professor Richard Leo, one of the foremost authorities on the psychology of false confessions. During this interview, Johnston gave further details recanting his trial testimony. (See *Motion For Post-conviction Forensic DNA Testing* pp. 133-167, Transcript and DVD of video recorded interview of Donald Johnston). After the interview, Johnston signed an affidavit in which he again

admitted that he lied when he claimed to be an eyewitness to Melissa Koontz' abduction. (See *Motion For Post-conviction Forensic DNA Testing* pp. 168-170, Affidavit of Donald Johnston).

In affirming Tom McMillen's conviction, the appellate court observed, "They [McMillen and co-defendant Gary Edgington] were not arrested earlier because, until Johnston agreed to cooperate . . . the police did not have enough evidence to file any charges against any other suspects." (See *People v. Thomas McMillan*, 4th Dist. App. 1993, 239 Ill. App. 3d 467, at 475; 607 N.E.2d 585, at 591; 180 Ill. Dec. 516).

On July 14, 1989, Donald "Goose" Johnston was the only person charged with the abduction and murder of Melissa Koontz. The State announced it was seeking the death penalty against Johnston. (See docket sheet, *People v. Donald Johnston*, case #89-CF-368). Johnston's arrest occurred ten months before the State charged McMillen and Gary Edgington.

Prior to his arrest, Johnston gave numerous statements to police that are demonstrably false and highly improbable that raised questions about his mental fitness to testify. On September 18, 1989, Judge Scott ordered Donald Johnston to undergo psychiatric and psychological testing. On November 2, 1989, Johnston's attorney requested a continuance of the trial setting, scheduled for November 6, 1989, due to the unavailability of a psychological report regarding Johnston's fitness to stand trial. In the meantime, Johnston agreed to cooperate in exchange for a deal that spared him from the death penalty. After he testified in McMillen's case, the State dismissed capital murder charges against Donald Johnston. Johnston pled guilty to an amended charge of Armed Robbery, pursuant to a negotiated plea. (See docket sheet at p. 6 case No. 89-CF-368)

On May 15, 1990, Tom McMillen and Gary Edgington were charged by way of Information with First Degree Murder, Armed Robbery, and Kidnapping for the same offense for

which Johnston had already been charged. The State elected to seek the death penalty against both McMillen and Edgington.

1. **Newly discovered evidence not available at the time of trial consisting of Donald Johnston's mental health records support Johnston's assertion that he lied to police about being involved in the murder of Melissa Koontz**

On July 20, 2008, Donald Johnston granted permission to private investigator Bill Clutter to obtain his psychiatric records. Clutter used the release to obtain his psychological records from the McFarland Mental Health Center. When Johnston was a teenager he fired a shot gun through a fence, injuring his neighbor. His brother reportedly told him to shoot the gun through a wooden privacy fence, and he did as his brother instructed him to do, which prompted the mental health evaluation. He was diagnosed as person with intellectual disabilities based on IQ testing.

The McFarland Mental Health Center records reveal that Donald Johnston had a full scale IQ test score of 54, well below the level of 70 which many states adopted as the definition of intellectual disability [formerly known as mental retardation] after the U.S. Supreme Court forbid states from executing persons with intellectual disabilities in *Atkins v Virginia* 536 U.S. 304, 321 (2002). On May 27, 2014, the U.S. Supreme Court reversed the execution of a person who scored 71 on IQ testing, citing a five point margin of error in IQ testing. *"A further reason for not imposing the death penalty on a person who is intellectually disabled is to protect the integrity of the trial process. These persons face a special risk of wrongful convictions, are often poor witnesses, and are less able to give meaningful assistance to their counsel."*⁴ (See Exhibit #1, attachment #12, *Hall v. Florida*, (2014) slip opinion at p. 7).

⁴ Johnston was the first person to be charged with the abduction and murder of Melissa Koontz based on his admission to police that he may have "stuck her" with a knife. Johnston was facing capital murder charges when he decided to cooperate with police and prosecutors against McMillen.

Mental health professionals observed about Johnston: "He showed signs of strong dependency and vulnerability to suggestion. He formed strong relationships with male authority figures but remained towards the bottom of the social hierarchy." Psychologist Peter W. Tracy reported: "His level of perceptual accuracy indicates poor reality testing. Several responses were indicative of a tendency to jump to unwarranted conclusions by sizing up a situation on insufficient evidence. . . Reality testing appears to be impaired. There appears to be a tendency for 'accidental' thinking, that is to say arriving at conclusions that are based on insufficient evidence." (See PC Exhibit #1, Clutter Affidavit attachment #11, McFarland Mental Health Center records of Donald Johnston).

Now having seen these records for the first time, petitioner's former counsel, Michael Costello prepared an affidavit in support of post-conviction relief. "Had the mental health records of Donald Johnston been disclosed prior to trial I would have challenged Donald Johnston's mental competency to testify. Knowledge of this report would have allowed me to pursue a line of cross examination of Mr. Johnston about the fact that he is someone who has been diagnosed with mental retardation; has been observed by psychiatric professionals as a person who forms strong relationships with male authority figures i.e. police detectives; has an impaired sense of reality; and is the type of person who arrives at unwarranted conclusions.. This mental health report is the type of information I was hoping to find when I requested the mental health records of Donald Johnston". (See PC Exhibit #2, Affidavit of Michael J. Costello).

Had these records been made available to defense counsel at the time of trial, it would have provided compelling exculpatory evidence that would have devastated the credibility of the State's key witness, Donald Johnston.

On July 12, 1991, prior to trial Petitioner's counsel, Michael Costello, filed a motion to produce the psychiatric records of Donald "Goose" Johnston. The motion asserted that the "co-defendant, Donald Johnston, is the only occurrence witness who will testify in this cause to the crime . . . [h]is credibility is directly in (sic) issue . . . [i]t will deny due process of law to petitioner if he cannot examine the Psychiatric and Psychological records to prepare for the cross examination of this crucial witness. . . The defendant requests that these records be produced forthwith especially since the State's Attorney undoubtedly has possession of these records." (See PC Exhibit#2, Costello Affidavit attachment *Defense Motion for Psychological Records*).

During the motion hearing seeking disclosure of Johnston's psychological records, petitioner's attorney, Michael Costello argued that granting the motion for production "may lead me to some relevant and material evidence which would directly affect his credibility and my ability to destroy his credibility on the stand . . . I wish it only for the purpose of seeking to obtain any relevant and material information that might be of help in destroying his credibility and truthfulness of the witness . . . If, in fact, that report would say by a psychiatrist that Mr. Johnston is, for example, a paranoid schizophrenic and fantasizes and is incapable of separating reality from fiction and fantasy and cannot tell the truth, I would think the Court would, if it's in the record, say well, at least he's got a right to let that credibility issue of that witness be testified to competently by someone who's made that diagnosis." (See PC Exhibit #2, attachment Transcript of July 12, 1991 hearing, pp. 7,8,11)

The State, and counsel for Johnston, both objected to the disclosure of Johnston's psychiatric records, asserting that the disclosure of the records would constitute a breach of the physician-patient privilege. The trial court denied the Petitioner's motion without conducting an in camera inspection to see what the records might have shown. Following petitioner's

conviction, Notice of Appeal was filed on December 24, 1991. Four issues were raised on appeal. The first point of error was that the trial court denied defendant of his Sixth Amendment right to confront and cross-examine the witnesses against him by denying his motion for the production of Donald "Goose" Johnston's mental health records, and by limiting the scope of the cross-examination of Johnston.

Denial of the mental health records, under the exclusive control of the State, violated petitioner's right to due process. Fundamental fairness requires a reversal of the conviction. No rational trier of fact would have believed the trial testimony of Donald Johnston if evidence of his mental retardation had been disclosed by the State.

Defense counsel could have used the psychological records to give context to the police interrogation of Donald Johnston. Detectives noted throughout their interviews that he kept changing his story from one day to the next and from one statement to another. As noted by mental health professionals, Johnston had a "tendency to jump to unwarranted conclusions by sizing up a situation on insufficient evidence." This psychological insight into Johnston's state of mind revealed by these records demonstrates the mind of a child who has no real appreciation for what is real and what is fiction. "Reality testing appears to be impaired," according to the McFarland report. (See PC Exhibit #1, McFarland Mental Health Center records of Donald Johnston).

2. The many conflicting pre-trial statements Donald Johnston made to police raise reasonable doubt about his claims of being present when Melissa Koontz was killed

a. Johnston's June 28, 1989 pre-trial statement conflicted with the known facts

On June 28, 1989, Macoupin County Sheriff Deputy Gary Ewin reported that late that night he had given Donald Johnston a ride home in his squad car. Johnston was found wandering around, knocking on doors late at night in the town of Modesto. While in Deputy

Ewin's squad car, Johnston noticed a missing person flyer and asked Deputy Ewin about the young woman whose picture was displayed. The deputy told Johnston that the woman in the picture was Melissa Koontz. Deputy Ewin explained that she was a missing person. In response to this information, Johnston declared that he had seen Melissa Koontz earlier that day, which was the first of many false statements that Johnston would make. Deputy Ewin notified the Sangamon County Sheriff on June 28 that Johnston claimed he had seen Melissa Koontz at Bob Conlee's house in Carlinville earlier that day around noon. (See FOIA#00177: *June 28, 1989 report of Gary Ewin*). There is no record that Sangamon County authorities investigated this information. Johnston never mentioned that Melissa Koontz was dead.

This first statement to Deputy Ewin conflicted with the known facts of the crime.

On June 24, 1989, at approximately 10:06 p.m. Melissa Koontz was last seen leaving work at Cub Foods located at 3001 S. Veterans Parkway in Springfield, IL, where she worked as a cashier. About an hour later, her vehicle, a black Ford Escort hatchback, was discovered abandoned on the Waverly Blacktop Road, a rural country road. A nearby resident notified 911. (FOIA#00299 thru 300).

A week after she disappeared the body of Melissa Koontz was discovered in a cornfield 2.5 miles due west of Cub Foods. (FOIA#00423 thru 425) According to the pathologist who conducted the autopsy, Mellissa Koontz had been killed within a short time frame of when she was last seen alive. (See trial testimony of Dr. Grant Johnson).

The first statements Johnston made to Deputy Ewin were clearly false. Melissa Koontz was not alive on the day Johnston claimed to have seen her at Bob Conlee's house in Carlinville.

b. Johnston's July 8, 1989 pre-trial statement conflicted with the known facts

Johnston's next statement is also contradicted by the known facts of the crime. Late at night on July 8, 1989, Johnston was being booked into the Macoupin County jail on unrelated charges of public intoxication, urinating in public, and suspicion of theft. While at the police station, Johnston saw Macoupin County Sheriff Deputy Gary Ewin.

Now highly intoxicated, Johnston made the declaration to Deputy Ewin that he knew who killed Melissa Koontz. Johnston claimed that Tom McMillen was the person who murdered her. According to Deputy Ewin's report, "This RO asked Goose how did he know that Tom was the one who killed the girl and he said because I was there and I watched." However, when pressed to provide further details, Johnston provided one false statement after another. According to Deputy Ewin's report, "Goose also told this RO that he had known Melissa Koontz for about thirteen years and that he knew her mother too." This statement was likewise, false. Johnston was asked to identify where the murder occurred: "This RO asked Goose 'where was the girl killed' and he said Madison Street. I asked if that street was in Springfield & he said yes." This statement was also false. When asked to describe the manner in which the victim was killed, Johnston erroneously told Deputy Ewin, "Tom choaked (sic) her to death." (See FOIA#00178-79: *July 8, 1989 report of Gary Ewin*). This statement was false, and conflicted with the autopsy findings of the medical examiner.

c. Johnston's July 9, 1989 pre-trial statement reveals he was intoxicated when he first implicated Tom McMillen in the murder of Melissa Koontz

Sangamon County Detective James Mitchell was contacted shortly after midnight on July 9, 1989. According to Mitchell's report, "Deputy Ewin stated that Mr. Johnston was very intoxicated and appeared to be a little 10-96 . . . "I advised Dep. Ewin that R/D would be down

to talk to Mr. Johnston later during the day after Mr. Johnston had sobered up.” (See FOIA#00005: *July 9, 1989 report of Det. James Mitchell*).

On Dec. 11, 2010, former deputy Gary Ewin was interviewed by private investigator Bill Clutter. He explained that his communication to Det. Mitchell that Johnston was “10-96” is a law enforcement code for describing a person with mental disabilities. He had other encounters with Johnston in the past, mostly related to alcohol. Johnston was an alcoholic and was known to be mentally slow, said Ewin. (See PC Exhibit 1, attachment #14, 12/11/2010 interview of Gary Ewin).

By the time Det. Mitchell arrived in Carlinville, twelve hours later, Johnston’s version of the events had already changed. Det. Mitchell reported, “I asked Mr. Johnston if he would tell me what he knows about the murder that he was talking about. Mr. Johnston stated that all he knows is the fact the Tom McMillan (sic) had shown him a poster of Melissa Koontz and stated something about murder...he said ...it was posted at the Shell Gas Station in Girard.” (FOIA#00007).

d. Johnston’s July 11, 1989 pre-trial statement conflicted with the known facts

Two days later, on July 11, 1989, Det. Mitchell re-interviewed Donald Johnston, accompanied by Det. Leonard. Johnston repeated the statement about seeing the missing person poster of Melissa Koontz. Det. Mitchell then asked Johnston the leading question: “I looked at Don and I said Don did you see something in the road?” (FOIA #00016) Johnston responded by saying he did see a car in the road. He stated that he was walking towards Carlinville when he came across the car. He said the car was running and that there was a cornfield next to it.

The car was actually found next to a bean field. The keys were in the ignition, but the engine had been shut off when it was found by police. (FOIA#00303 thru 318: Audio Transcript of Deputy Sample's conversation with Dispatch and Lt. Streckenrider).

After taking a break for lunch, Johnston told a different story. Det. Mitchell reported: "I asked Don if he would tell R/D what happened. Don states that Mary Pocklington's car ran out of gas and Mary Pocklington, Don Johnston, Tina Johnston, and Tom McMillan, (sic) Jeff Pocklington all started walking down the road. He said that a car was coming towards them and Tom and Mary and Jeff stopped the car by standing in front of the car waiving (sic) their arms up. . . Don stated that Henry [his brother] was drinking and Henry was driving his truck and that it was Tom's idea to stop the car. I asked Tom where Henry's (sic) truck come from. He stated that Henry was driving and Tina his wife, was in the truck with her two babies." He said the girl started screaming and said 'Somebody's going to get in trouble.' (See FOIA#00014 thru 21, at 16-17: *July 11, 1989 report of Det. James Mitchell*).

This story also conflicted with facts already known to police. During the investigation, police had interviewed a couple, Ann Bramblett and Don Cox. They were driving southbound on the Waverly Blacktop Road and saw the black Ford Escort hatchback belonging to Melissa Koontz slow to a stop ahead of them at the location where the car was found by police. There was no one in the roadway flagging the car to stop. According to a police interview Bramblett and Cox, "observed what appeared to be a dark blue or black small economy type Ford that had been in front of them travelling in the same direction southbound start to slow down and then stop in the roadway. Ann stated that the vehicle upon stopping in the roadway had to be passed by her companion to avoid striking the vehicle." (FOIA#00371). Ann stated that she looked at her clock when she got to her home in Waverly: the time was 10:55 p.m. (FOIA#00395)

The Sangamon County Sheriff's department was notified of the abandoned vehicle by a different individual. Approximately 10:50 p.m. (about five minutes after Ann Bramblett saw the car stop) Robert Sturm who lives on the Waverly Blacktop Road noticed the car parked on the roadway facing south. (FOIA#00364). A few minutes later, at 11:05 p.m., Sturm called 911. (FOIA# 00299-302). Within this short window of time, none of the witnesses saw what Johnston claimed happened. None of these witnesses observed any one standing in the middle of the Waverly Blacktop Road flagging the car to stop.

Later in the interview Det. Mitchell reported: "After talking to Don Johnston his story changes once again." (FOIA#00017). Now Johnston claimed that he was walking from New Berlin to Carlinville when a man in a small red and white pickup truck with blue dice hanging from the mirror picked him up to give him a ride. As they were driving along, they passed a small car and the man said that was her, that's her license plate. The man then turned around and came back towards the girl's car. The man parked the truck and stepped out in the roadway raising his hands to get her to stop. When she stopped, the man reached in and pulled the hood latch to raise the hood and grabbed the girl by the arm pulling her towards the truck. The girl was yelling and screaming and calling the man a bastard. The man pushed her into the truck and then asked Johnston if he wanted a ride to the New Berlin Tavern. The man took the girls wallet and took out the driver's license and credit cards and threw some of it out the window. The man stopped at a tavern in New Berlin and let Johnston out, and drove off with the girl.

Det. Mitchell knew that this story also conflicted with the known facts of the crime. The hood of the car was not up when Sangamon County Sheriff Deputy Al Sample arrived on the scene forty minutes after the 911 was received from the neighbor. At approximately 11:50 p.m., Deputy Sample found the car stopped in the middle of the southbound traffic lane, pointed

toward the south. The headlights were on, the keys were in the ignition, and the engine was turned off. Nothing appeared to be disturbed inside of the vehicle. A purse was located on the front passenger's seat. Deputy Sample went through the purse and found the driver's license of Melissa Koontz. He requested that the dispatcher contact the registered owner of the vehicle, that being Robert Koontz, Melissa's father. Unable to make contact with the owner, Deputy Sample pushed the vehicle approximately 30-50 feet off of the road, into a farm-field entrance. At 12:48 a.m., Deputy Sample cleared the scene. (See also FOIA#00303 thru 318: Audio Transcript of Deputy Sample's conversation with Dispatch and Lt. Streckenrider).

After taking a twenty-minute break, at 2:30 p.m. when the interview resumed Johnston now claimed that he saw the unknown man stab the girl in the chest. (FOIA#00018).

At 4:30 p.m. another break was taken in which Johnston was allowed to eat dinner. (FOIA#00018). When the interview resumed, Det. Mitchell reported: "R/D then went back over the story that Don Johnston had told R/D at the beginning of this report. I asked Don Johnston why he had fabricated a story previously." (FOIA#00019).

This lengthy interrogation on July 11 was an evolution of one lie, followed by another. At no time during this interview did he implicate Tom McMillen in the murder of Melissa Koontz.

e. **Johnston's July 13, 1989 pre-trial statement names Gary Angelo as the killer, which was a false statement**

Two days later, on July 13, 1989, Det. Mitchell and Det. Leonard re-interviewed Johnston again. Johnston was released from the Macoupin County Jail. They drove Johnston to the Still Tavern in New Berlin, then to the scene where Melissa Koontz's car was found. Det. Leonard noted that investigators were getting a different story from Johnston's 15-year-old cousin Danny Pocklington. Danny told police that a man named Gary Angelo was present when

Melissa Koontz's car was flagged down. Danny told police that he, Donald Johnston, and Angelo "were the only ones there." Then, after detectives informed Johnston that Danny claimed that Gary Angelo was present, Johnston then adopted this story and now claimed that Gary Angelo drove by in a red pick-up truck, stopped and declared: "I'm going to kidnap that girl." Johnston then recited an entirely different version of alleged events: one that involved himself and his 15 year-old cousin Danny Pocklington being witnesses to Mr. Angelo allegedly stopping the car, pulling the girl out, and then dragging the victim to Angelo's red pickup truck. According to Johnston's statement, Angelo stabbed the girl once in the chest while he was dragging her to the truck. Johnston claimed that Angelo pulled in behind one of the grain bins where "Gary Angelo stabbed the girl three more times in the stomach and chest." (FOIA#00042-43). After receiving this statement, detectives purchased Kentucky Fried Chicken for Johnston, as he was reportedly getting hungry. (FOIA#00040 thru 44).

This version of Johnston's story was yet another lie. Gary Angelo was not involved in the murder of Mellissa Koontz. Again, this new version did not implicate Tom McMillen.

After dinner, Det. Leonard "then asked Don Johston if it was possible that whenever he grabbed Melissa Koontz when she got out of the car that Melissa Koontz might have accidently stuck herself on a knife. Don Johnston stated, 'yes it was possible and that if Danny said it happened it happened,' that she could of stuck herself on a knife." (FOIA #00044). Johnston admitted having his pocket knife out when they stopped the car cleaning his fingernails. Johnston admitted that it was his knife that was used to stab Melissa Koontz and that he pulled it out of her chest. (FOIA #00044).

f. **Johnston's July 14, 1989 pre-trial statement names Gary Edgington as the killer**

On the following day, July 14, 1989, Johnston was re-interviewed again. Det. Leonard reported, "Donald Johnston finally admitted that Gary was really Gary Edgington not Gary Angelo." Johnston ended the interview by stating, "I want to get a lawyer here to straighten this out." Johnston was taken back to the Sangamon County jail. (FOIA#00050 thru 51).

After the July 14, 1989 interview ended, Donald "Goose" Johnston was charged with Capital Murder. Later that day, he made his first appearance and was appointed a public defender, Peter K. Woody. (See *Docket sheet, People v. Donald Johnston, case #89-CF-368*).

3. **Because of intellectual disability Donald Johnston was highly susceptible to falsely confess to a crime he didn't commit, which further corroborates the recantation**

A review of the DNA exoneration cases in the United States by the National Innocence Project found that 25 percent involved a false confession by the person who was wrongly convicted. According to The National Innocence Project, "Some false confessions can be explained by the mental state of the confessor. . . People with mental disabilities have often falsely confessed because they are tempted to accommodate and agree with authority figures." (www.innocenceproject.org/understand/False-Confessions.php).

In Illinois, The Governor's Commission on Capital Punishment, impaneled to study the flaws in the death penalty process in the cases of the 13 death row exonerations that were identified at the time, also reported a similar problem involving a number of defendants who falsely confessed, but were ultimately exonerated:

It is common for mentally retarded suspects to succumb to coercive attempts to elicit confessions. It is not only that a retarded suspect may be abnormally "susceptible to coercion and pressure." Even when no pressure is exerted, a retarded suspect "may be inclined to give a false confession out of a desire to please someone perceived to be an authority figure." Mental health

experts have long been aware of the risk that a mentally retarded suspect's eagerness to please authority figures will lead him to confess falsely. (See *Report of the Governor's Commission on Capital Punishment*, State of Illinois April 15, 2002, at p. 31.

Donald Johnston's recantation is corroborated by the affidavit of Richard Leo and is supported by the social science research on the psychology of false confessions. See *Motion For Post-conviction Forensic DNA Testing* pp. 102-132, Affidavit of Richard Leo, at pp. 110-111. Dr. Richard Leo's social science research on false confessions along with his colleague, Richard Ofshe, has been admitted in many jurisdictions to educate jurors, judges and lawyers on the psychology of false confessions. The advent of DNA testing that came after the conviction of Mr. McMullen made it possible for social science researchers like Leo and Ofshe to study the psychological interrogation tactics and factors that were found to lead an innocent person to confess falsely to a crime. If called as a witness in post-conviction proceedings, Dr. Leo would state:

Social science research indicates that the mentally retarded are especially vulnerable to making false confessions. Donald "Goose" Johnston's mental health records indicate that he was diagnosed as fitting the criteria of mental retardation based on his low IQ score. He is an individual who is especially vulnerable to coercive interrogation tactics by police. However, because of his mental handicap he is also someone who would provide police with false information without coercive interrogation tactics being applied in an effort to please an authority figure. See *Motion For Post-conviction Forensic DNA Testing* pp. 102-132, Affidavit of Richard Leo, at p. 106.

Dr. Leo would further testify: "In evaluating whether a witness is providing police with reliable information, a person who claims to have witnessed a murder should be able to accurately relate details to police that match up with the crime scene evidence. They should be able to provide facts of the crime that would not be generally known to the public. Based on my review of all available statements, Donald Johnston was never able to provide accurate details to

police.” See *Motion For Post-conviction Forensic DNA Testing* pp. 102-132, Affidavit of Richard Leo, at p. 110.

There are other indications of a false confession in this case. The fact that Johnston was highly intoxicated when he first declared his knowledge of the crime is significant. According to Dr. Leo, “Individuals who are intoxicated often make false declarations to police.” See *Motion For Post-conviction Forensic DNA Testing* pp. 102-132, Affidavit of Richard Leo, at pp. 110-111.

On Nov. 11, 2008, Dr. Leo conducted a video-taped forensic interview of Donald Johnston. Dr. Leo provided a detailed analysis of the many conflicting statements Donald Johnston made to police; reviewed the newly discovered mental health records of Donald Johnston, and the evidence contradicting the trial testimony of Donald Johnston. Dr. Leo concluded: “it is my opinion that Donald Johnston almost certainly falsely confessed to police about being a witness and a participant in the abduction and murder of Melissa Koontz.” See *Motion For Post-conviction Forensic DNA Testing* pp. 102-132, Affidavit of Richard Leo, at p. 105.

4. **The absence of ANY bloodstain evidence on the Waverly Blacktop Road or inside the vehicle Johnston claims was used to transport the victim proves that Donald Johnston’s trial testimony was false when he said he witnessed Tom McMillen stab Melissa Koontz in the arm while standing on the Waverly Blacktop Road**

At Petitioner’s trial, Johnston testified that he and his 15-year-old cousin Danny Pocklington lived with Danny’s mother Mary Pocklington on Nine Mile Lane in rural Modesto, IL. Johnston stated that earlier in the day, he and his cousin Danny were at his mother’s house in Carlenville, and they walked 30 miles back to Mary Pocklington’s house. He said they were drinking beer most of the day and into the night. Johnston testified that at 10 p.m. he and Danny left the house with Gary Edgington and Tom McMillan in Mary Pocklington’s car, a white ’72

Chevy. "We wanted to go get some more beer," said Johnston. He said that Tom McMillan was driving, and that Gary Edgington was in the front seat, while he and Danny rode in the back seat. They drove towards New Berlin. "Tom was talking about stopping the first car that come along the road," said Johnston. They were going to rob the person for beer money. Standing in the middle of the road, waving their hands, Johnston said Tom and Gary stopped a car. "When the car stopped . . . Tom pulls the girl out of the car and he stabbed the girl in the arm, Tom did, and Gary was in the girl's car . . . The girl says, 'Son of a bitch, somebody is going to be in trouble,' is what that the girl said. . . Then he drug her—him and Gary Edgington drug her to their car . . . and they drug her down the road. . . They were holding her by both of the arms and dragging her," said Johnston. He claimed that the girl was placed in the back seat of the car, and that they drove toward Springfield. Johnston claimed that he and his cousin did not want to go to Springfield, but instead walked "about twenty miles up the road." They started walking towards New Berlin and when they reached the expressway at I-72 they figured out they were headed the wrong way. So they turned around and walked toward Modesto. They then back-tracked, passing by the victim's car. He said that Danny closed the passenger door that was open using his feet. He then saw a brown and white police car "out there" so he and Danny hid in the field. He said the police officer was "looking for the girl . . . He had a poster out." Johnston then claimed that he and Danny were given a ride home by a woman and a man with a little baby and a dog; "a friend of mine. I can't recall his name offhand." (See Trial testimony of Donald Johnston July 17, 1991, Tr. Pp. 58-77).

Analysis of the crime scene proves that Donald Johnston's trial testimony (i.e. that Tom McMillen pulled Melissa Koontz out of her car, stabbed her in the arm and then drug her down the Waverly Blacktop Road and into the backseat of Mary Pocklington's white Chevy) was false.

THERE WAS NO BLOOD EVIDENCE at the scene, nor was there any indication of a struggle. (FOIA#299 thru 300, see also FOIA#00303 thru 318). The absence of blood in the area where Melissa Koontz's car was found refutes the trial testimony of Donald Johnston. (See PC Exhibit #1, Affidavit of William Clutter).

Police also searched Mary Pocklington's white Chevy. No evidence of blood or a crime scene could be found. Mary Pocklington was interviewed by private investigator Bill Clutter. She described police searching her vehicle for evidence when she was interviewed by police in July of 1989. She stated that the car was disabled and parked in front of her house in rural Modesto, IL. See *Motion For Post-conviction Forensic DNA Testing* pp. 182-191, DVD and transcript of interview of Mary Pocklington.

Her interview is corroborated by Sangamon County Sheriff reports. When Mary Pocklington was interviewed by Sangamon County Deputies on July 12, 1989, detectives noted that she owned a white 1977 Chevy license NG5381. (FOIA#00029-30) While one set of detectives were interviewing Mary Pocklington, another set of detectives questioned Thomas McMillen about the car. McMillen reported that on June 24th (the date Melissa Koontz disappeared) the vehicle was not operational. The vehicle was parked in the yard. McMillen told detectives that on June 15, 1989, he punctured the radiator backing over a rocking chair. Mary Pocklington drove the vehicle unaware of the puncture and overheated the engine. According to the report: "The vehicle is now sitting in the yard of the residence [of Mary Pocklington in Medesto on] . . . 9 mile Road approximately 9 miles West of Virden." (FOIA#00031). Later that same afternoon according to police records, "McMillen gave R/D's [Deputy Brian Walker] permission to look around his house and grounds. (Note: A white Chevrolet was parked in the front yard). Det. Hinsey then took some Polaroid photos of this

vehicle.” (FOIA#00039). However, no blood evidence was ever observed inside this vehicle by police, despite Johnston’s claim the following day that Melissa Koontz was placed inside this vehicle bleeding from a stab wound allegedly inflicted by Thomas McMillen. (FOIA#00042-44).

This evidence contradicting the trial testimony of Donald Johnston was not presented to the jury that convicted Mr. Millen.

5. Witness Ann Bramblett proves that Donald Johnston’s trial testimony was false when he told jurors that Melissa Koontz had been abducted on the Waverly Blacktop Road

Ann Bramblett was not called as a witness at trial. Her testimony would have disproved the trial testimony of Donald Johnston, in which he claimed that Melissa Koontz had been abducted by Tom McMillen and Gary Edginton while standing in the middle of the Waverly Blacktop Road where they flagged Melissa Koontz’s car to a stop.

On June 26, 1989, two days after Melissa Koontz disappeared; Sangamon County Sheriff Det. John Pinneo interviewed a woman named Ann Bramblett. She was a passenger in a vehicle driven by Don Cox. They were headed south on the Waverly Blacktop “approximately 3 miles south of New Berlin [the location according to crime scene reports where Melissa Koontz’s car was found] they observed what appeared to be a dark blue or black small economy type Ford that had been in front of them travelling in the same direction southbound start to slow down and then stop in the roadway. Ann stated that the vehicle upon stopping in the roadway had to be passed by her companion to avoid striking the vehicle.” (See FOIA#00371).

Bramblett was re-interviewed again immediately after the body of Melissa Koontz was discovered and after the missing person investigation shifted to a homicide case. On July 1, 1989, Det. R.W. Vose went to Bramblett’s home in Waverly to conduct a second interview. Additional details were asked. She stated that she looked at her clock when she got home: the

time was 10:55 p.m. (FOIA#00395) The Sangamon County Sheriff's department was notified at approximately 11:05 of the abandoned vehicle.

Mrs. Bramblet, as she is now married, was interviewed by private investigator Bill Clutter on Feb. 21, 2009, and she agreed to a video-taped interview. She was never called as a defense witness, nor was she ever interviewed by defense attorneys at the time of trial in 1991. (See *Motion For Post-conviction Forensic DNA Testing* pp.171-180, DVD and transcript of Feb. 21, 2009 interview of Ann Bramblet n/k/a Manning)

Her observations would have disproved the trial testimony of Donald "Goose" Johnston, who claimed that multiple people stood in the middle of the Waverly Blacktop Road for the purpose of robbing the first vehicle they saw for beer money. Her testimony corroborates the recantation of Donald Johnston.

6. Alibi testimony presented at the trial provides additional corroboration to Donald Johnston's recantation that Thomas McMillen was not involved in the disappearance and murder of Melissa Koontz

On July 18, 1991, defense counsel presented an alibi defense. The defendant's mother and father, Alberta and Vernon McMillen, presented testimony contradicting the trial testimony of Donald "Goose" Johnston. (See trial transcript of defense alibi witnesses Vernon and Alberta McMillen; Billy Pocklington; Tom McMillen; and Mary Pocklington).

Vernon McMillen testified that on June 24, 1989, he saw his son at approximately 3:30 in the afternoon when his son's girlfriend, Mary Pocklington, dropped him off at his parents' home. Mary was driving her white 1973 Chevy Caprice. Their son, Tom McMillen, came into the house, took a bath, and ate supper with his mother and father. Vernon testified that his son became anxious when his girlfriend Mary had not returned to pick him up, and he was unable to reach her. Vernon asked his wife where Tom went, and upon learning that he was walking back

to Mary Pocklington's house, Vernon went to give Tom a ride, because it was too far to walk. He did not know what time it was, but it was dark when he got there. When they arrived, Donald Johnston was on the porch with his 15 year-old cousin, Danny Pocklington (Mary's son). Danny's other brother Billy Pocklington came running out of the house. Mary's car was not there. Vernon dropped his son off and came home. Vernon testified that when he returned home, the 10 o'clock news was on, and it was approximately 15 minutes into the news.

Alberta McMillen corroborated her husband's alibi testimony. She remembered her husband arriving back home around 10:10 p.m.

The defense also called Billy Pocklington. He testified that he was 12 years old. He knew the defendant, because he lived with his mother, Mary Pocklington. Billy testified that Tom McMillen was at the house when he went to bed. He testified that he saw his 15 year old brother, Danny and Donald Johnston sleeping under a tree out in the yard. They did not leave the house that night. Billy said he fell asleep on the loveseat in the living room, and later woke up in the middle of the night, and curled up in bed, where Tom McMillen was asleep.

Thomas McMillen took the witness stand in his own defense. He testified that he is unable to read or write. On June 24, 1989, in the afternoon, Mary Pocklington drove him to his parent's home, where he bathed, and ate dinner. Mary had told him that she was going to be with Gary Edgington that night. After eating dinner, he called Mary's house to see if she was there. He phoned her mother and spoke to her twice and her dad by once, but was unable to find Mary. He grew tired of waiting, and decided to walk back to Mary's house because he did not want to leave her son Danny and Donald Johnston alone at the house. Tom McMillen testified that his father drove up as he was walking down the road and gave him a ride to Mary's house. When they arrived, Danny, Billy and Donald Johnston were there at the house. He testified he

sat on the front porch and waited up for Mary, but she did not come home that night. He saw Danny and Donald Johnston sleeping under a tree outside. He remembered smoking his last cigarette and looking at his watch at 1 a.m. When he went to bed, Billy had fallen asleep on the loveseat in the living room. Sometime during the night, Billy came into his bed and curled up next to him. He said he told Billy he had to get out of the bed in case Mary came home. When he woke up at 5 a.m. Mary was still not home.

Mary Pocklington was the last alibi witness for the defense. She testified that she drove Tom McMillen over to his parents' home in the afternoon, at approximately 3 p.m. She returned to her house, and left at approximately 7 p.m. and was gone all night and did not come home until morning.

7. The crime scene evidence showing money in the victim's vehicle and purse that was found in her car proves that Johnston's trial testimony that Melissa Koontz's car was stopped in order to rob her was false, and further corroborates the recantation.

At trial, Donald Johnston testified that they needed money for beer and that robbery was the motive for the murder. (July 17, 1991 Trial Tr. pp. 63, 65)

Q. Why were they going to stop a car?

A. To rob her.

Q. Did you know that they - you knew that going to rob this girl or rob the next car that

A. Yeah, that they was talking about it.

(July 17, 1991 Trial Tr. pp. 65, 73).

However, robbery did not appear to be the motive for the crime according to the investigation conducted by law enforcement. Crime scene evidence contradicts the trial testimony of Donald Johnston.

At approximately 11:50 p.m. on June 24, 1989, Sangamon County Sheriff Deputy Al Sample arrived upon the scene at the Waverly Blacktop Road and conducted a brief search of Melissa Koontz's car. A purse was located on the front passenger's seat. Deputy Sample went through the purse and found the driver's license of Melissa Koontz. Nothing appeared to be missing from the vehicle. At 6:57 a.m. Deputy Sample returned to the vehicle and called Lt. Streckenrider and reported his observations. After learning that the victim's purse was still in the car Lt. Streckenrider asked: "Is there money in the purse?" Deputy Sample replied: "Money in the purse, loose money inside the car." Deputy Sample reported "all her possessions that we are aware of are accounted for in the car." (FOIA#00306 thru 309, 316)

The next day, on June 25, 1989, Sangamon County Sheriff Det. S. Hinsey interviewed the mother and father of Melissa Koontz and reported: "According to the Koontz's the car and it's (sic) contents appear to be in normal condition. There was money in the ash tray as normal practice. There was little or no money in the purse which was normal because Melissa never carried large sums of money. The check book in her purse seemed to be in order. The purse contained a deposit slip dated 6-24-89, 10:33 AM at the Marine Bank indicating Melissa had deposited her whole check of \$122.39. Her easy answer card was in her purse intact." (FOIA#00274 thru 277: June 25, 1989 report of Det. S. Hinsey, at p. 3). None of this evidence was strongly established at trial.

A FOIA request was made recently requesting crime scene photographs from the Illinois State Police. One of these photos shows a wade of several rolled up dollar bills in plain view inside the ashtray of the vehicle's front seat dashboard area. (See PC Exhibit #1 Clutter Affidavit, attachment #13).

The crime scene evidence very clearly indicates that no money was ever stolen, and corroborates the recantation of Donald Johnston when he admitted that his trial testimony was false. He never participated in flagging down a car on the Waverly Blacktop Road to commit a robbery.

8. A recent interview of Danny Pocklington corroborates the recantation of Donald Johnston.

A silver necklace (People's Exhibit #9) was introduced as evidence by the State to bolster the improbable testimony of Donald "Goose" Johnston. This exhibit was first introduced through the testimony of the State's first witness, Anna Koontz, the victim's mother. Melissa Koontz's mother testified that she had purchased an inexpensive 24-inch silver chain for her daughter. She testified that the chain she purchased for her daughter hung over the car's rear view mirror. She testified that she had seen the necklace hanging there a few days before, but that it was missing when police discovered the car on the Waverly Blacktop Road. (July 19, 1991 Trial Tr. pp. 84-87: Testimony of Anna Koontz). Shown the necklace at trial, the mother of Melissa Koontz could only say that the necklace looked identical to the one she gave her daughter, but she could not say for certain that the State's necklace exhibit, People's Exhibit 9, was, in fact, that necklace. (July 16, 1991 Trial Tr. pp. 84-87)

However, Mrs. Koontz' testimony conflicted with material statements she and her family made to police during the investigation and prior to trial, which suggested that nothing appeared to be missing from the vehicle or from their daughter's body. Shortly after the family reported their daughter missing, Deputy Al Sample met Melissa Koontz's father and brother at the scene where the car was found. Nothing was reported missing from the vehicle. (FOIA#299 thru 300). In fact, during the initial investigation no jewelry was reported missing by Melissa's family. On June 25, 1989, Sangamon County Sheriff Det. S. Hinsey interviewed the mother and father after

their daughter's car was found abandoned. Mrs. Koontz told detective Hinsey that her daughter was wearing a topaz and diamond class ring, and a gold necklace with a teardrop pendant containing garnet and two diamonds on the day she disappeared. (FOIA#00274 thru 277: June 25, 1989 report of Det. S. Hinsey). The family did not tell police about a silver chain necklace, or that one was missing from the vehicle. Trial counsel did not call Det. Hinsey as a witness and neither did the State.

When the body was found, all of the jewelry that had been described by the family during the missing person investigation was recovered. During autopsy Dr. Grant observed that the victim was wearing a gold chain around her neck, and she was wearing a class ring on her ring finger. (See PC Exhibit #1, Clutter Affidavit).

Detective John Pinneo testified that on July 14, 1989, Mary Pocklington gave him a silver necklace.⁵ (July 18, 1991 Trial Tr. pp. 12-13). When Danny was questioned about the necklace after police received it from his mother: "Danny said, 'he got it from Goose.' [Det. Pinneo] asked Danny where Goose got it and Danny stated, 'from the girl, Goose took it off of her.'" (Leonard interview of Danny Pocklington July 14, 1989 FOIA #72) Police knew this statement was false. The victim had been wearing a gold necklace that she was still wearing at the time of autopsy. No report had been made of a silver necklace having been taken. According to a review of the Sangamon County Sheriff reports, police detectives did not even bother to show this silver necklace to the mother and father of Melissa Koontz to have it identified. (See PC Exhibit #1, Affidavit of William Clutter)

⁵Detective Pinneo testified at trial that he met Mary Pocklington on July 14, 1989, when he walked in to the room when Detective Brenda Campbell was finishing her interview of Mary Pocklington and that is when Mary Pocklington pulled out the necklace and gave it to him, (July 18, 1991 Trial Tr. pp. 10-13). The report of Detective Campbell of the Mary Pocklington interview makes no reference to a silver necklace nor identified Detective Pinneo as being present. (FOIA# 63-65) Although the necklace is shown on the police evidence log (FOIA#1085), no police report was ever made by Detective Pinneo regarding the collection of the silver necklace from Mary Pocklington. The State did not call Danny Pocklington or Mary Pocklington to establish a chain of custody.

The Sangamon County Sheriff, however, did report a second silver chain being shown to the victim's parents. Six months after police received People's Exhibit #9, Danny Pocklington brought another silver necklace to school. On Jan. 3, 1990, Det. Leonard prepared a report of their meeting with Richard T. Wilson, Superintendent of Schools for the Gillespie School District. Superintendent Wilson gave detectives a silver chain that Danny Pocklington brought to class. Danny told his teacher, Marian Mayfield, that the necklace belonged to "Lissa" Koontz and that he "found it in the field." (FOIA #00213). The next day, Det. Leonard and Pinneo showed this second silver chain to Mr. and Mrs. Koontz and their daughter Jennifer. All three "stated that the necklace was not one of Melissa Koontz's." (FOIA # 00215).

A few days later, on Jan. 17, 1990, detectives re-interviewed Danny Pocklington. Detective Pinneo "told Danny that he has told the police several different versions as to what had happened the night he was with 'Goose' and that R/D really needed to talk to Danny and obtain the whole story . . . Danny stated that once placing the girl into the cornfield Goose took the necklace to Gooses' girlfriend in Peoria named Nancy Pocklington. Goose later gave the necklace to Danny. (FOIA #218-19).

Danny Pocklington was unavailable to testify at trial, as he was found unfit to testify. He was recently interviewed by private investigator Bill Clutter. Danny was 15 years old when he was interviewed by police in 1989. Like Donald Johnston, Danny is also mentally disabled. He has been receiving social security disability since he was ten years old. Danny said he served six years in juvenile DOC for a crime he didn't commit. According to Danny, police told him if he did not confess to the murder of Melissa Koontz, his cousin Donald Johnston would receive the death penalty. Danny admitted that he falsely told police that he and Goose were present when Gary Angelo killed Melissa Koontz. Danny was incarcerated in juvenile DOC for six years and

was released upon his 21st birthday. He and his cousin Donald were handcuffed together and were driven to a place out in the country where police said Melissa Koontz's car was found. Danny told detectives he had never been there. Goose said he didn't know the place either. Detectives drove them to a cornfield where they said the body was found. Police showed him life and death photos of Melissa Koontz. Goose told Det. Leonard we don't know the girl. Danny said he remembers Det. Leonard pulling out a silver necklace that was in a plastic bag. Danny said Goose told Det. Leonard that he had never seen that necklace before. (See PC Exhibit #1, attachment #15 Affidavit of Danny Pocklington and transcript of 8/13/08 video interview).

Count VII of the charges against Petitioner alleged that Defendant committed armed robbery by taking a silver chain necklace from Melissa Koontz by the use of force. (C.15) However, no evidence was presented at trial showing that Defendant took the necklace from Melissa Koontz.

The first reported statement that Donald Johnston made about a silver necklace occurred after Tom McMillen was indicted. On Nov. 15, 1990, Det. Pinneo reported: "Johnston also advised R/D that the necklace from the girl that ended up with the police was taken off the dead girl's body and given to Danny Pocklington by Tom." (FOIA# 00208).

This statement, contradicted by the crime scene evidence, became the basis of Johnston's trial testimony. At trial, Goose Johnston testified that he saw Tom McMillen give Danny Pocklington the silver chain, which he identified as People's Exhibit #9. (See July 17, 1991 Trial Tr. at pp.82, 83).

None of the contradictions described above were presented to the trier of fact.

III. NEWLY DISCOVERED EVIDENCE CHALLENGES THE RELIABILITY OF THE TESTIMONY OF FIVE JAILHOUSE INFORMANTS WHOSE TESTIMONY WAS USED TO SECURE THE CONVICITION OF THOMAS MCMILLEN.

At trial the State presented the testimony of five (5) jailhouse informants, each of whom claimed that Defendant, while in custody in the county jail awaiting trial, implicated himself in the crimes against Melissa Koontz.

1. DEXTER HUDDLESTON

On Nov. 8, 2011, private investigator Bill Clutter conducted an audio recorded interview of Dexter Huddleston, one of the five jail-house informants whose trial testimony helped convict Thomas McMillen:

BC: Ok. And we just had a conversation where I explained to you that we're here on the case of Thomas McMillen.

DH: Yes

BC: And one of the things that we talked about very briefly is whether or not you expected any benefits for your trial testimony in his case on July 17th 1991. And you indicated yes you expected benefits at the time you testified.

DH: Yes

BC: Does that summarize what you just told us now?

DH: Yes

BC: Alright. And you also stated just a few moments ago that you basically lied in this case.

DH: Yes I did lie.

BC: Ok. And that you stated that everybody did lie in his case.

DH: Yes it was a plot.

BC: Can you tell us about how that developed.

DH: ... it was 20 years ago man. It was a lot of people we was facing times, you know. We wanted to get back to our families. We were poor, we didn't have any money. . . We found some information and we all put it together and we all agreed . . . and that's what happened.

BC: What kind of different benefits did you get in Schuyler County?

DH: They give you cigarettes, you know. You get free phone calls and things of that nature.

DH: Man, I had sex in this, this county building a few times with, with the woman I was gonna marry at the time and uh, you know, just stuff like that. You know, 'course I was facing six years I didn't get six years . . . they gave...leniency on, on the case.

BC: Ok . . . Where did you have sex with your girlfriend? Where did that take place?

DH: In the state's Attorney's office.

BC: In the State's-

DH: They put us in a little room and then they let me stay in there for like an hour or something with her. Do it. So you know, they knew what we were doing I'm sure.

BC: And -

DH:- used to do that like once every time they brought me back to court hearing for my court date they'd have her here. And then I'd get to spend an hour with her you know. I was housed in Schuyler County. . . cause they were putting my case on hold until they could finish this so I could receive the deal. But they will tell you don't...we're not giving you a deal... but...

BC: And you just winked now. So this is kind of a wink and nod that we're not going to give you any benefits but-

DH: Just do what we say and you'll... you know..you'll, you'll get out basically.

BC: But one of the benefits you got even before you testified was having sex with your girlfriend.

DH: Yeah. Yeah.

BC: In the office ... do you remember who's office it was in the State's Attorney's office?

DH: It was Cadigan.

BC: Don Cadigan's Office.

DH: Not his office, but he was... he was...

BC: He was the state's attorney.

DH: Right. So you know, whatever it was... I guess he was like the head. So you know what I'm saying?

BC: Do you remember which State's Attorney let you have sex in their office?

DH: Man, They... Cadigan was on the case so he orchestrated everything through his ..not puppets...but his workers.

(See PC Exhibit #1 Clutter Affidavit attachment 16, CD and Transcript of 11/08/2011 interview of Dexter Huddleston).

Huddleston at the time of the interview was facing criminal felony charges in Sangamon County. Investigator Clutter prior to the interview received permission from Huddleston's attorney to conduct the interview.

Later that afternoon, investigator Clutter tracked down Huddleston's former girlfriend, Stephanie R. Shepherd. She confirmed the information Huddleston had relayed earlier that morning. Below is a summary of the interview:

I asked her if she remembered a time when she was allowed to have private contact visits with Dexter at the Sangamon County courthouse. She replied, "Yes, I remember that". She stated that a woman from the courthouse facilitated the visits after Dexter's court hearings. She stated that the woman was an older woman. She remembers the room being a small room. They were able to hug and kiss. She stated that she asked Dexter why they were allowing him to have private contact visits with her. "He said, 'Oh I get special privileges'".

Q: Did this happen more than once?

A: Yeah, it happened more than one time.

Q: Were these conjugal visits?

A: Yeah, we did.

(See PC Exhibit #1 Clutter Affidavit attachment #17, Nov.8, 2011 interview report of Stephanie Shepherd).

Huddleston's admitted motive to fabricate a jailhouse confession is further supported by the circumstantial evidence, as well. On July 31, 1990, Huddleston's attorney Matthew Maurer filed (in Case #90-CF-410) a Motion to Allow Inmate Marriage, naming Stephanie Shepard (sic) as the woman he desired to marry while he was facing two separate Class X felony charges. This was denied. On Aug. 13, 1990, while still in jail Huddleston wrote Judge Cavanagh "This is Dexter Huddleston I going to get married from here but was denied for what I don't know. . . Judge Cavaunough (sic) if you can do anything please let me know. (See PC Exhibit #1, attachment #18, 90-CF-410, FOIA002341-42).

After getting no help from the Court, Huddleston became an in-custody informant and on Nov. 15, 1990, provided Sangamon County Sheriff Detective John Pinneo a statement relating an alleged jailhouse confession by Tom McMillen. (FOIA000205).

Huddleston testified that at the time of trial he had two prior felony drug possession convictions and a felony theft conviction and was presently in jail for felony home invasion and

for unlawful use of a weapon by a felon. Huddleston testified that on June 10, 1990, Defendant told him that he and Gary Edgington intended to rob someone, they stopped someone, took her to a secluded area, robbed her, took her to a secluded area and raped her, and then killed her to prevent her from identifying them, with Defendant stabbing her twice and then numerous times more; that they placed the body in a cornfield; and that Defendant returned to the field the next day because he was worried that the police had a chain from Mary Pocklington. (July 17, 1991 Tr. pp. 187-195)

Contrary to the testimony of Huddleston, there was no evidence that Melissa Koontz had been robbed of any money or credit cards.

Although Huddleston claimed no promises from authorities for his testimony, he knew that he was facing a minimum of a six year prison sentence on the home invasion charge because of his record. (*Id.* at pp. 190-92)

Huddleston testified for the State against McMillen on July 17, 1991. Two days later, on July 19, 1991, judgment and sentenced was entered in case #90-CF-410, in a plea agreement with the State in which Huddleston received a sentence of two (2) years in the Illinois Department of Corrections that was to run concurrent with a second case 90-CF-416. He was given credit for 401 days already served. (See PC Exhibit #1 Clutter Affidavit attachment #18, FOIA002344). He was essentially allowed to go free on two serious felony cases in exchange for his cooperation with the State.

Trial counsel for McMillen following his client's conviction filed a Post-Trial Motion which raised issue with undisclosed benefits that the five in-custody informants received after they testified as prosecution witnesses against McMillen. Trial counsel alleged that although the State "repeatedly advised the jury that no promises or leniency" had been made in exchange for

their cooperation, in fact, after Mr. McMillen was convicted they all received some form of leniency.

Huddleston's recent interview provides newly discovered evidence that was not available at the time of trial. The fact that employees of the State's Attorney's office facilitated contact visits between Huddleston and Shepherd, allowing them to have sexual liaisons, would have provided powerful support to trial counsel's assertions that the State had given undisclosed benefits to in-custody informants. Had this evidence been known to the jury, or to the judge, it would have raised serious questions about the conduct of the State with respect to the issue of undisclosed benefits to in-custody informants. For the jury, this evidence would have provided a basis for the jury to reject the testimony of Huddleston. For the judge, this revelation would have provided sufficient evidence in support of the post-trial motion filed by defendant's trial counsel to vacate the conviction.

It should be also be noted that when the trial judge ruled on the defense motion to move the trial venue, he acknowledged that there had been extensive pre-trial publicity, even on the week before trial, which "detailed in great detail the participation of this defendant as outlined by some other figure in this case, allegedly stating that he indeed was the knife-wielder and said how many times he used the knife." (Trial Tr. June 11, 1991, pp. 2-3: Statement of Judge C. Joseph Cavanagh)

All of the jail house informants claimed in their testimony that they had no knowledge about the case from the media. However, Huddleston's recent interview confirms that he and the others gained information about the case from the pre-trial publicity that was reported by the media.

In fact, many of the admissions against penal interest which the informants claimed Defendant made are contradicted by other evidence.

2. CARL BOWLES

In-custody informant Carl Bowles was arrested in April 1990 for burglary of a home and had a prior retail theft conviction. Bowles was in the Sangamon County jail and shared a cell with Richard Bottoms and William Reed, [two of the other jail house informants who testified against Defendant]. Bowles testified that in July 1990 when he and his cell mates were smoking cigarettes and discussing their cases, Defendant, who was housed in the cell next to him, told him that he and three others—Johnston, another man and a young kid who was kind of slow—waited on the side of the road to rob someone to get beer money, but got carried away and raped the girl, then loaded her up and dumped her in a cornfield in New Berlin, leaving the girl's car where they found it. Bowles testified that Defendant told him that Defendant was not going to be convicted because his parents were going to cover for him in that he was babysitting. Bowles testified that Defendant stated they cut X's over the victim's breasts and also cut her feet so she could not run away. Bowles also testified that the girl went to school with Donald Johnston. (July 16, 1991, Trial Tr. pp. 110-135)

Contrary to Bowles testimony, the autopsy on Melissa Koontz, revealed no cuts on her feet (July 17, 1991 Trial Tr. p.33; see also Autopsy report of Dr. Grant Johnson and trial testimony). Contrary to Bowles testimony, the State's trial evidence indicated the body was not found in or near New Berlin, but just outside Springfield. (July 16, 1991 Trial Tr. pp. 110-135) Although Bowles testified that he did not discuss his testimony with his cell mates or other inmates, and simply decided to convey Defendant's statements to detectives, (July 16, 1991, Trial Tr. pp.122-23), his cell mates' testimony was very similar. Bowles also admitted that he

became a jail trustee just days after he gave his statement to the detectives, although he attributed this trustee position to a reason unrelated to the Defendant's case. (*Id.* at pp. 118-19, 125-26, 133) Moreover, Bowles admitted that his written statement to police said nothing about Defendant stating that his parents were going to lie for him and that he had not thought of that until he testified. (*Id.* at 126)

3. RICHARD BOTTOMS

Richard Bottoms, a cell mate of Bowles, testified that he was in Sangamon County Jail having been arrested on June 9, 1990; and that Defendant told him on June 13, 1990, that he stabbed a lady; that Defendant was with Danny, Donny and Gary and that they ran out of beer money and were going to Springfield "to get some money one way or another"; that they pulled over a girl that Defendant recognized; that Defendant stabbed the girl; and that Defendant's girlfriend found a gold necklace in the back seat of the car and turned it in to police. Bottoms also testified that Defendant confessed to him almost every other day and never denied committing the crime. (July 16, 1991 Trial Tr. pp. 136-145)

Contrary to Bottoms' testimony, the State's occurrence witness, Donald Johnston, did not place Mary Pocklington at the crime scene and other evidence presented by the State was that Mary Pocklington, Defendant's girlfriend, turned a silver necklace over to the police which apparently came from her son. (July 18, 1991 Tr. pp. 12-13: Testimony of Mary Pocklington; July, 17, 1991 Tr. p. 83) Moreover, the autopsy report identified a thin yellow metal chain around the neck of the body. In addition, Bottoms admitted that he discussed with another inmate named Davis about what Defendant had told him [another inmate to testify against Defendant was Jonathon Davis] and he never said anything to the police until March 20, 1991, because it was bothering him and he was losing sleep.. (*Id.* at pp. 139, 140, 142-44) At the time Bottoms

testified he was serving a probation sentence for cannabis possession and had two pending driving on revoked license charges pending against him, but no promises were made to him. (*Id.* at pp. 136, 140, 144-45)

4. WILLIAM REED

William Reed (the other cell mate of informant Bowles) testified that on June 19, 1990 [the same day Defendant is alleged to have confessed to informant Huddleston] Defendant told him that he had left the house of his girlfriend, Mary, and went to his father's house at about 2:30 p.m. on June 24, 1989; that he stayed at his father's house for dinner and his father drove him back to Mary's house, arriving there between 8:30-9:30 p.m.; that Mary was present along with Johnston, Edgington and Danny Pocklington; that he, Donald Johnston, Gary Edgington and Danny Pocklington left the house about 10:00 p.m. intending to pull over someone driving on the road in order to get money for beer; that about 10:30-11:00 p.m. Defendant forced the girl out of a car and into their car; that they took the girl to a cornfield off the Waverly blacktop and forced her out of the car to molest her; that Johnston made the girl disrobe; and that they then killed her to prevent her from identifying them, with Defendant stabbing her seven times at first and then numerous times after that; that they left the girl's nude body in the cornfield; that they took a necklace from the girl which necklace was later found by a young girl in the backseat of the Chevy in which they had abducted the girl. Reed further testified that on the night of June 23, 1990, Defendant was real nervous and came to talk to him; that Defendant told Reed that without the weapon they could not find him guilty; and that he said that this was one year since the girl was killed and Defendant was upset that everyone was testifying against him. At the time he testified, Reed had a prior felony theft conviction and was awaiting sentencing on a felony

possession of drugs with intent to deliver, but no promises of any benefit had been made to him.
(July 18, 1991 Trial Tr. pp. 20-32)

Contrary to Reed's testimony, the State's evidence at trial indicated the body was found fully clothed, and that no girls were present at the time of the crime according to the State's key witness Johnston. Contrary to Reed's testimony, Johnston never testified nor told police that he had anything to do with molesting Melissa Koontz. Moreover, it is simply not believable that the Defendant in confessing his crime to a fellow inmate a year after the crime was supposed to have been committed would be telling this inmate the precise time of day when events happened.

5. JONATHAN DAVIS

Jonathan Davis, with whom informant Bottoms discussed Defendant's alleged confession, testified that Defendant told him on July 11, 1990, that he had stabbed the girl so many times and he was crying at the time; and that he asked Davis to keep this to himself as the only other person who knows is Bottoms. Davis testified that at the time of trial he had a prior felony theft conviction and was serving a probation sentence and was in custody for possession of a stolen motor vehicle. Davis testified that he knew nothing about the case prior to speaking with Defendant but that after speaking with Defendant other inmates told him why Defendant was in custody. (July 18, 1991 Trial Tr. pp. 32-37)

In 2002, the Governor's Commission on Capital Punishment studied flaws in the Illinois death penalty system that led to innocent persons being convicted. The Commission reported that "[t]estimony from in-custody witnesses has often been shown to have been false, and several of the thirteen cases of men released from death row involved, at least in part, testimony from an in-custody informant." (See *Report of Governor's Commission on Capital Punishment*, George H. Ryan Governor, State of Illinois, at p. 122).

WHEREFORE, PETITIONER, PRO SE, PRAYS THAT THE HONORABLE COURT GRANT HIS PETITION FOR POST-CONVICTION RELIEF PURSUANT TO 725 ILCS 5/122-1 BY VACATING HIS CONVICTION.

VERIFICATION

I, Thomas McMillen, hereby swear under oath under penalty of perjury that the contents of this petition are true and accurate.

By: *Thomas McMillen*
THOMAS MCMILLEN


Signed and sworn to before me this 26 day of June, 2014.

MS
NOTARY PUBLIC



PROOF OF SERVICE

The undersigned, William R. Clutter, certifies that a copy of the Petition for Post-Conviction Relief and supporting affidavits, and Motion for Appointment of Counsel were hand delivered on July 21, 2014, to the Sangamon County State's Attorney's Office located at 200 S. 9th Street Room 402, Springfield, IL 62701.



A handwritten signature in black ink, appearing to read 'W R Clutter', is written above a solid horizontal line.