IN THE SUPREME COURT OF MISSISSIPPI

No. _____

WILLLIE MANNING

PETITIONER

V.

STATE OF MISSISSIPPI

RESPONDENT

MOTION FOR LEAVE TO FILE SUCCESSIVE PETITION FOR POST-CONVICTION RELIEF INCLUDING DNA TESTING AND OTHER FORENSIC ANALYSIS

I. INTRODUCTION

Petitioner, Willie Manning, respectfully requests that the Court grant his motion to file a successive petition for post-conviction relief from his convictions and death sentences for the murders of Jon Steckler and Tiffany Miller. Petitioner has always maintained his innocence of these charges and believes that testing of the biological evidence collected in the course of law enforcement's investigation of this case will demonstrate that he was not involved with the crimes. For the biological evidence, Petitioner requests DNA testing of the scrapings taken from beneath the nails of both Jon Steckler and Tiffany Miller, hair found in Miller's right hand, hair found in Steckler's left hand, and the hair fragments identified by an FBI examiner as supposedly coming from an African-American and found in Miller's car. Petitioner also requests an opportunity to inspect the rape kit, which was not available when he previously was allowed to inspect the evidence stored at the Oktibbeha County Sheriff's Department. No DNA testing has

been done on this evidence. Moreover, much of the technical means for testing the sample was not available when the crime occurred in December 1992.

With respect to the DNA testing, Petitioner makes this request pursuant to the Mississippi Uniform Post-Conviction Collateral Relief Act, Miss. Code Ann. § 99-39-1, *et seq.*, as amended by S.B. No. 2709 (effective March 16, 2009). This statute became effective after Manning's prior effort to obtain post-conviction relief. He also relies on 42 U.S.C. § 1983. *See Skinner v. Switzer,* 131 S. Ct. 1289 (2011) (denial of right to access of biological evidence for DNA testing violates due process). Petitioner also seeks expert analysis and comparison of fingerprints found in the victim's car. Although the Crime Lab ruled out Manning as the source of the prints, it did not compare the prints found in the car to prints in any major database.

Manning also asks the Court to address additional grounds for relief. First, jailhouse informant, Earl Jordan, has recanted his trial testimony. At trial, Jordan alleged that Manning "confessed" to him. Petitioner has attempted to interview Jordan several times, but Jordan has not wished to talk about Petitioner's case. Recently, however, Jordan admitted that Manning never admitted to killing the students, and that he understood that he would receive consideration for inculpating Manning. In light of this new evidence, Petitioner asks the Court to consider the cumulative effect of other constitutional errors. Petitioner also asks the Court to revisit the allegation that the prosecutor violated *Batson v. Kentucky*, 476 U.S. 79 (1986), in the exercise of his peremptory strikes. This issue is properly before the Court in light of intervening decisions of the United States Supreme Court. *See Miller-El v. Dretke*, 545 U.S. 231 (2005); *Snyder v. Louisiana,* 552 U.S. 472 (2008). Finally, Petitioner asks the Court to address whether he was

denied the effective assistance of counsel at the penalty phase in light of new evidence not available when he previously sought post-conviction relief.[1]

II. RELEVANT PROCEDURAL HISTORY

Petitioner, Willie Jerome Manning was convicted and sentenced to death for the murders of Jon Steckler and Tiffany Miller, two students at Mississippi State University. The Mississippi Supreme Court affirmed the judgment on direct appeal. *Manning v. State,* 726 So. 2d 1152 (Miss. 1999) ("*Manning I*"). This Court initially granted post-conviction relief in a unanimous opinion but granted Respondents' motion for rehearing and remanded the case to the Circuit Court of Oktibbeha County for a hearing to determine whether the State suppressed surreptitiously recorded telephone conversations between Manning and his former girlfriend. The lower court denied relief, and the Mississippi Supreme Court likewise denied all post-conviction relief. *Manning v. State,* 929 So. 2d 885 (Miss. 2006) ("*Manning II*").

During the course of post-conviction proceedings, Manning sought to inspect the State's files to determine whether there was any evidence suitable for DNA testing.[2] When this Court initially granted relief,[3] it held that the discovery motion was moot. Later, when the Court granted rehearing and denied post-conviction relief, Petitioner renewed the discovery motion. On March 9, 2006, however, the Court denied the discovery motion. Order, *Manning v. State,* No. 2001-DR-00230-SCT (Miss. Mar. 9, 2006).

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[1] Petitioner's Verification is attached as Successor Ex. 50, and the proposed petition to be filed with the Circuit Court is attached as Successor Ex. 59.

[2] Manning first sought the discovery prior to the filing of his petition. The motion was not heard by the Circuit Court until after the petition for post-conviction relief was filed. The Circuit Court had stayed proceedings after the State challenged the qualifications of one of Petitioner's attorneys. Petitioner had to file his petition before the discovery motions could be heard to comply with the Court's deadlines.

[3] This Court initially vacated Petitioner's convictions in a unanimous opinion that applied the intervening decision of *Weatherspoon v. State,* 732 So. 2d 158 (Miss. 1999). However, the Court granted rehearing and ultimately denied relief.

When Petitioner sought federal habeas corpus relief, the District Court granted his motion to inspect the State's evidence. After determining that key biological evidence remained in the custody of the Oktibbeha Sheriff's Department, Petitioner sought DNA testing. Successor Ex. 1. The District Court, however, denied the request. Order, *Manning v. Epps,* No. 1:05-cv-00256-WAP (Dkt #65) (N.D. Miss. Oct. 3, 2008). Successor Ex. 2. The District Court explained the request was denied because the request for testing did not relate to the grounds raised in the petition. *Id.* at 4 ("Petitioner has failed to establish that DNA testing of the fingernail scrapings and the hair found in the victims' hands is reasonably necessary to pursue the claims in his petition, nor is there a basis for the Court to authorize inspection of the sexual assault kit performed on Miller"). Under federal habeas procedure, there is no right to DNA testing comparable to the provisions of Mississippi's amended statute. Miss. Code Ann. § 99-39-9(1).

The District Court denied relief on the merits of the claims raised but granted permission to appeal on two issues: the discriminatory use of peremptory strikes and trial counsel's failure to develop and present mitigating evidence. 695 F. Supp.2d 323 (N.D. Miss. 2009).

On appeal, the Fifth Circuit dismissed the petition, finding that Manning's federal habeas petition was filed too late and that he was not entitled to equitable tolling of the applicable time limitation. The Fifth Circuit blamed Manning for the failure to file a timely state court petition to toll the limitations period, finding that he could have retained his own lawyer or filed his own petition. *Manning v. Epps,* 688 F.3d 177, 187 (5th Cir. 2012). The Fifth Circuit disregarded Manning's indigency as well as this Court's realization that death row prisoners are not capable of representing themselves. *See Jackson v. State,* 732 So. 2d 187 (Miss. 1999). Petitioner has filed a petition for a writ of certiorari to review the Fifth Circuit's judgment.

III. STATEMENT OF FACTS

Willie Jerome Manning, who is an African-American, was convicted and sentenced to death for the murders of Tiffany Miller and Jon Steckler, who are both white. The State did not produce any physical evidence linking Manning to the crime. The closest tangible evidence the State had was testimony that some hairs found in Miller's car came from an African-American. Other items of physical evidence were collected but were either not tested or DNA testing technology was not sufficiently advanced for testing.

A. Forensic Evidence that Can Be Tested and Used to Exonerate Manning.

1. DNA Testing

Dr. Steven Hayne conducted the autopsies of Tiffany Miller and Jon Steckler. Dr. Hayne took scrapings beneath the nails of both victims and forwarded those scrapings to the Mississippi Crime Lab. Likewise, he took a sexual assault kit, which was forwarded to the Crime Lab. Hair was found in Ms. Miller's right hand and in Mr. Steckler's left hand. Law enforcement meticulously vacuumed Ms. Miller's car and searched for other trace evidence. The sweepings were also sent to the Mississippi Crime Lab ("MCL") and the FBI also collected material from the car.

At the MCL, these exhibits were given the following numbers:

- MCL Exhibit 5 hair from Ms. Miller's right hand
- MCL Exhibit 8 sexual assault kit taken from Ms. Miller
- MCL Exhibit 9 right finger nail scrapings from Ms. Miller
- MCL Exhibit 10 left finger nail scrapings from Ms. Miller
- MCL Exhibit 19 right finger nail scrapings from Mr. Steckler
- MCL Exhibit 20 left finger nail scrapings from Mr. Steckler

- MCL Exhibit 24 hair from Mr. Steckler's left hand
- MCL Exhibits 42-51 pillboxes of hair and fiber taken from Ms. Miller's car

The inventory of this evidence is attached as Successor Exhibit 3.

Petitioner has received a certified copy of the Crime Lab reports. It appears that no testing was done on MCL Exhibits 5 and 24. Hair was found in MCL Exhibit 8, but Petitioner has seen no indication that any examination was made of that hair. The rape kit was not with the evidence when Petitioner conducted his inspection of the evidence.[4] The nail scrapings from both victims underwent serological testing, but there was no follow up testing and no attempt at DNA testing.

Examination of hair taken from Ms. Miller's car played a prominent role at Petitioner's trial. The inventory of items sent to the FBI is attached as Successor Ex. 5, and the FBI's report on the hair comparison is attached as Successor Ex. 6. The FBI conducted an examination of evidence samples Q43 and Q44 and noted "hair fragments of Negroid racial origin." Successor Ex. 6. Chester Blythe, an expert from the F.B.I., testified at trial that the hair found in Miller's car and collected as samples Q43 and Q44, though not sufficient for comparison purposes, originated from an African-American. T. 1048.[5]

The prosecutor repeatedly stressed the importance of this hair evidence in his summation:

> [O]ut of all the people that could have been a burglar of John Wise's car, **how many of them could leave hair fragments in the car**, **hair fragments that came from a member of the African-American race** because that's what they find when they vacuum the sweepings of the car, that's what they find in both significantly the passenger's seat and the driver's seat, just like it would be if the man rode out there as a passenger and came back as a driver. . . . **How many people, ladies and gentlemen, who could leave those fragments**, how many of those also left his home

[4] Petitioner wrote to the sheriff about not finding the rape kit with the evidence but did not receive a response. The letter is attached as Successor Exhibit 4.

[5] "T." refers to the trial transcript; "PCR T." refers to the transcript of the PCR evidentiary hearing; "C.P." refers to the Clerk's Papers from Petitioner's trial.

> on the morning of December 9th. . . . How many people could have committed this crime, ladies and gentlemen, that **could have left those fragments**, that left their home carrying a gun and some gloves . . . . **How many people could leave those hair fragments**, how many people left their house that morning with the gun and the gloves . . . . **How many people could leave those hair fragments**, left the house with the gun and the gloves, was trying to sell a ring and a watch like Jon Steckler's, and also had the jacket from John Wise's car . . . . **How many people could leave the fragments**, left his house with gun and gloves, were trying to sell rings and watches like Jon Steckler's, had a jacket from the burglary, and undeniably had the CD player from that burglary . . . .

T. 1546-47 (emphasis added). The prosecutor continued in this vein, each time reminding the jury of the hair fragments.

In his rebuttal argument, the prosecutor attempted to answer the defense's position that no physical evidence linked petitioner to the murder scene. After discussing the token that was found at the murder scene, the prosecutor added, "there's even some additional proof inside that vehicle and that's the hair fragments." T. 1607.

Defense counsel made no attempt to have testing done on any of this evidence.

2. Fingerprint Analysis

The state theorized the Jon Steckler and Tiffany Miller were abducted from the Sigma Chi parking lot. The perpetrator forced both Steckler and Miller to climb into Miller's car, which was a Toyota MR2 designed to hold only two people. The perpetrator also got into the car. T. 915-18. Law enforcement spent seven hours dusting for fingerprints and checking for blood, hair, and fibers. T. 1400. Numerous prints suitable for comparison were found. The latent lifts of those prints were compared to prints on file for a number of individuals, including petitioner, thought to have been involved in car burglaries in the Starkville area. The prints found in the car did not match any of the prints on file. Thus, no fingerprint evidence tied petitioner to the car. Likewise, the state found no hair, blood, or fibers that linked petitioner to

the MR2 or crime scene. T. 876. The state circumvented this gap in its proof with rank speculation that petitioner wore gloves during the kidnapping.

Throughout his trial, petitioner steadfastly maintained his innocence. The state had no direct evidence linking him to the crimes. Petitioner believes that the fingerprints of the actual killer may be among the latent prints that were not matched to anyone. Currently, technology exists that allows law enforcement to scan latent prints into a system and compare those prints to prints taken from individuals who have been arrested. There is a substantial likelihood that the fingerprints of anyone else who may have committed this crime would be in the system.

B. The State's Shaky Case for a Conviction

Without eyewitnesses or physical evidence linking Manning to the murders, the State cobbled together a theory based on a purported link between the murders and a car burglary occurring on the Mississippi State campus and testimony of witnesses receiving undisclosed consideration for their testimony.

1. The Tenuous Links to a Car Break-in

There was no firm proof linking the murders to the burglary. Jon Steckler and Tiffany Miller were found murdered in a deserted area in Oktibbeha County. They were last seen at roughly 1:00 a.m. on December 11, 1992, leaving Steckler's fraternity house. They planned to go to Miller's trailer in her Toyota MR2, a two-seat sports car. T. 605-09.

The car of John Wise was broken into that night while parked at the fraternity. The stolen items included a CD player, a brown leather bomber jacket, a silver monogrammed huggie, and several dollars in change from the console. T. 634. The State speculated that the car burglary was tied to the murders. The prosecution presented evidence trying to link Manning to the theft from Wise's car. Paula Hathorn, Manning's girlfriend, produced a jacket that she said

belonged to Manning. Wise identified the bomber jacket as having been taken from his car, T. 641, although he had not been able to identify the jacket at first, and the FBI was unable to conclude that the jacket had belonged to Wise. T. 647, 1582.[6]

The prosecution then tried to link the theft from the car to the scene of the murder. Wise identified a token found at the scene of the murder, T. 638, as coming from a public rest room in Grenada. He said it had lost its shine sitting on his console. T. 638. However, the one found at the scene was, according to Sheriff Dolph Bryan, a bright shiny gold color. T. 784. There was no evidence how it got there, and there were no fingerprints on the token. T. 855. This was the only evidence linking the murder to the car theft in any way. T. 856-57. The State speculated that the victims walked up on a car burglary in progress. T. 852. However, Sheriff Bryan admitted that no evidence supported this. T. 854.

Miller's trailer was within view from where her car was found. T. 871. This might suggest that her killer may have known her or been a perverted admirer from the area around her trailer. On the other hand, there was no link between Manning and the victims, T. 874, and Manning lived ten miles from where her car was abandoned. T. 874.

As noted previously, no physical evidence from the car linked Manning directly to the crime. There were no prints on bullet casings or the token. T. 776, 855.[7] There were footprints at the scene, T. 858, but no footwear found in Manning's house matched them. T. 859. The murder weapon was never found. T. 866.[8] None of the items supposedly missing from the

[6]The investigators had looked at 100 jackets, and the jacket at issue is a popular brand. T. 830.

[7] Some hairs were found on the victims and in the MR2. None were linked to Manning. The District Court denied Manning's motion to test these items for DNA. R. 1886.

[8]They checked on every .380 transferred in the area in over a year, sending them all to the FBI lab for comparison. T. 831.

victims – two watches, a class ring and perhaps a necklace, T. 866-67[9] – were ever linked to the accused.[10] They were linked to other people.[11] The sheriff acknowledged the lack of evidence. T. 877.[12]

What supposedly 'led' the sheriff to Manning was finding a huggie supposedly in the proximity of where Manning lived. T. 882. Actually, the huggie was found five miles from his house. T. 882.

2. The State Relied on Informants with Doubtful Credibility

In the end, the State made its case only through informants and snitches. Paula Hathorn was "number one on [Sheriff Bryan's] list" for receiving a large part of the $25,000 reward for solving this crime. T. 886. Even the sheriff acknowledged that Hathorn was untrustworthy. T. 887. According to law enforcement, Hathorn showed the authorities a tree where there were four bullets that allegedly matched the bullets in the victims. T. 996 *et seq.* However, Hathorn initially told law enforcement that she had not seen Manning fire into the tree, T. 695-96. Even if the overstated ballistics evidence were accepted at face value, the sheriff conceded that others could still have been responsible: "Once a gun gets in the street in the street hoodlum's hands, it can pass many, many times." T. 902.

Earl Jordan claimed to have overheard Manning confess to committing the crime with Jessie Lawrence. Manning supposedly told Jordan that he and Lawrence forced the victims at

[9]Nothing in the ashes of burned material at Manning's house linked him to the crime. T. 913.
[10] Steckler wore a gold high school ring from Cathedral High in Natchez, and a distinctive watch with a leather band and little clocks decorating the main face. T. 609. Hathorn had listed all the things that Manning had supposedly stolen, and nowhere on the list was the class ring that the prosecution alleged that he stole from Steckler. T. 714-15.
[11]For example, Carl Rambus gave a statement early on to the authorities about another person who had been seen in possession of the ring allegedly stolen from Steckler. T. 1332-33.
[12]The FBI did exhaustive work on gleanings from the case, including seventeen prints that were not from the victims, but could not match them to Manning. T. 832, 1498.

gunpoint to get in Miller's MR2, and that Manning and Lawrence rode with them to the murder scene, an implausible account given that Lawrence was incarcerated in Alabama at the time, and that it was impossible to fit four people into the MR2. Moreover, Jordan had initially given a statement to the police linking Anthony Reed, an early suspect, to the crimes. Jordan told the police that he had seen Reed in the victim's car with Tiffany. T. 1164-65, 1188. Jordan, who could have been indicted as a habitual offender, found his pending charge for burglary reduced to looting shortly after giving his statement to law enforcement.

The State also turned to Frank Parker, another jailhouse informant. According to Parker, Manning had a conversation with someone called "Miami" about the gun used in the crime. T. 1120.

3. The Defense Challenge to the State's Case

Manning consistently maintained his innocence. At trial, he pursued an alibi defense, sought to discredit the State's informants, and pointed to evidence suggesting that someone else was responsible for the homicides. For instance, the defense called a witness who saw Miller's car parked at the Mayhew Apt. complex at 1:00 a.m., which is when the prosecution thought Manning was committing the kidnapping and murder. Later, two students saw a car traveling at a high rate of speed near Miller's apartment around the time that the bodies of Miller and Steckler were found. T. 1339-41.

The defense sought to establish that Manning was elsewhere – the 2500 Club – at the time of the crime. Gene Rice, one of the few visitors at the 2500 Club that night who had no criminal record, recalled seeing Manning at the club that night. As the prosecutor so aptly pointed out, if this was the case, Manning "could not possibly have committed this crime. . . ."

T. 1302. Since Rice did not like Manning, there was little reason for him to lie. Others also saw Manning at the club.[13]

Manning also undermined Hathorn's testimony about his whereabouts the day after the murders. At trial, Hathorn, who lived with Manning at the time, testified that she did not see Manning the morning just after the murders. Lindell Grayer, however, testified that he picked Manning up the next morning at Manning's house. T. 1413.

B. Evidence Developed Post-Conviction Undermines Any Confidence in the Outcome of the Trial

With no eyewitnesses and no physical evidence providing a link between Manning and the murders, it is no wonder that the State had to resort to urging the jury to accept the credibility of its witnesses. Most of the testimony of theses witnesses has turned out to be false or greatly undermined.

1. Manning did not Confess to Earl Jordan

Earl Jordan's testimony was likewise filled with false or dubious statements. Most notably, Jordan has recanted his testimony that Manning "confessed" to the crimes. Until recently, Jordan had not been willing to talk about his role in securing Manning's convictions. However, he recently admitted that Manning "never said he killed them." Successor Exhibit 7 (affidavit of Sheila O'Flaherty). Three times during the conversation with Manning's current counsel, Jordan admitted that Manning did not confess to the crimes. *Id.* Jordan, however, would not sign a statement, but Petitioner should have the right to require his testimony at a hearing.

[13] King Hall saw Willie Manning at the 2500 Club sometime after 11:30 or 12:00. T. 1273. Landon "Poncho" Clayborne saw him around 11:00 p.m. T. 1283. Mario Hall saw him sometime after 12:00 a.m. T. 1256. Keith Higgins saw him there possibly up to 12:30 a.m. T. 1216.

Other false statements from Jordan were developed during earlier post-conviction proceedings. At the outset of Manning's case-in-chief, defense counsel called Doug Miller to ask him whether it was true, as Jordan had alleged, that Manning had pulled a gun on him, intending to elicit a denial from Miller that this had ever happened. T. 1199. The prosecutor objected, arguing that because defense counsel had not asked Jordan about the incident, defense counsel failed to lay a proper foundation prior to questioning a witness about a prior inconsistent statement of another witness. T. 1200. The trial judge sustained the objection. T. 1201. Defense counsel stated that he still had Earl Jordan under subpoena and that he would call Jordan back to the stand at a later time to lay the proper foundation for this line of questioning. *Id.* Defense counsel neglected to call Jordan back to the stand, however, and there was no follow-up concerning Miller. However, in post-conviction proceedings, Miller stated that Manning never pulled a gun on him. Successor Exhibit 8.

Another aspect of Jordan's testimony was false but went uncorrected. To support his allegation that he had not made a deal with the State, Jordan testified that the attorney representing him on his pending charge did not know that he would be testifying against Manning. T. 1170 -1181. This was not true. Jordan's attorney was Bruce Brown, a public defender for Oktibbeha County. Mr. Brown had also been appointed to represent Manning. He moved to withdraw from his representation of Manning, noting that he had been told by the State that Jordan was expected to be a witness against Manning. T. 11. The prosecutor confirmed this, T. 20, and Brown was allowed to withdraw.

2. Hathorn's Undisclosed Deal with the State and Role as an Informant

As developed in the prior post-conviction proceeding, there were numerous reasons for not believing Hathorn, but the jury did not hear those due either to the State's suppression of evidence or trial counsel's ineffectiveness.

Hathorn testified that she received no assistance on the charges she was facing in exchange for her testimony against Manning. T. 690. The sheriff testified similarly. T. 838-39. That, however, was not true. In an affidavit filed in post-conviction proceedings, Hathorn acknowledged:

> . . . [A]fter I testified against Willie, my charges were passed to the file, and I have not served any time. I was worried about this before I was approached by Sheriff Bryan, but *he told me not to worry about going to jail.*

Successor Ex. 9 (emphasis added). She had much to worry about:

> When I was approached to help Sheriff Bryan, I had about thirteen bad check charges in Oktibbeha County. I also had about twenty bad check charges in Lowndes County. There were also bad check charges in Macon, Clay, and Jackson Counties. Altogether, I owed more than $10,000 in fraudulent checks and court fees.

Id. Hathorn understood that she could probably have gotten as much as eight to ten years for her pending charges. However, because of her cooperation with law enforcement, she realized that she would receive favorable treatment.

Because of the assurances from the sheriff, Hathorn agreed to waive her right to counsel and plead guilty to charges in Justice Court in Oktibbeha County. *Id.* At her plea, she received only a slap on the wrist. On one charge, she received a $100 fine, and five days in jail, suspended for two years on good behavior. On a second charge, she was sentenced to pay a $300 fine, spend thirty days in jail, suspended for two years on good behavior, and pay

restitution and court costs. Successor Ex. 10 (Oktibbeha County Justice Court file, *Hathorn v. State*, sentences imposed September 28, 1993).

Mild treatment at the hands of law enforcement was only part of the consideration Hathorn received. The sheriff testified that he would recommend that Hathorn receive a reward. No one, however, disclosed the magnitude of the reward: $17,500. Successor Ex. 9. Furthermore, it was never disclosed that the sheriff held out the hope for a reward when he first approached Hathorn to make a case against Manning. Successor Ex. 9.

Hathorn also testified falsely about her own criminal record. In April 1991, Mark G. Williamson, who represented Manning at trial, represented Paula Hathorn on two false pretense charges. In case number 12-183, she was indicted for writing a bad check for $120.92. *See* Successor Exhibit 11. In case number 12-184, she was indicted for writing a bad check for $265. Successor Ex. 12. Williamson negotiated a plea bargain. Although Hathorn had written many bad checks (see Successor Ex. 13, listing bad checks written between 1989 and the time of Petitioner's trial), the State agreed to retire case number 12-184 to the file and recommended a sentence of three years probation on the other charge. Hathorn was required to pay restitution on all bad checks and was ordered to the Pascagoula Restitution Center. Hathorn violated the terms of her probation, her probation was revoked, and she was sent to the penitentiary. Successor Ex. 11. At trial, she testified that after her release, she attempted to turn her life around by giving tips to law enforcement. T. 698, 700.[14]

On cross-examination, defense counsel delved into Hathorn's criminal record. Hathorn admitted that she had approximately fourteen or fifteen misdemeanor false pretense charges *prior* to being sent to prison, and about six false pretense charges after her discharge from prison.

[14] The sheriff admitted that before Hathorn was sentenced to the penitentiary, he felt that she had no credibility whatsoever. T. 887.

T. 690. She denied receiving any assistance from the prosecution on the six misdemeanor offenses that she committed after returning from prison.[15] She denied having a lawyer for those charges, adding that those cases were resolved when she agreed to make payment. T. 692.

The prosecution obviously felt that Hathorn's credibility had been called into question. To restore Hathorn's credibility and undermine the defense, the prosecutor engaged Hathorn in the following colloquy:

> Q: Miss Hathorn, a number of things, first those checks that you had difficulties with in Columbus, those six checks that you just got through testifying about that you had problems with in Columbus.
>
> A: Yes.
>
> Q: Explain for the ladies and gentlemen of the jury why that came up and how that came up, if you would, please, ma'am.
>
> A: Because Mark Williamson was my appointed attorney; he told me that he was going to take care of those checks, which he didn't.
>
> Q: An be – you thought what, Miss Hathorn?
>
> A: He had tooken (sic) care of them.
>
> Q: And so you didn't do anything on them, is that correct?
>
> A: No. Then they charged me with a fine.
>
> Q: And –
>
> A: – for his wrongdoing.

T. 720. *See also* T. 724.

Hathorn's surprise testimony leveling the blame for her legal difficulties on Mark Williamson was false. A review of Successor Exhibit 11, Case No. 12-183, reveals nothing amiss about Williamson's representation of Hathorn. He negotiated a favorable settlement for her, allowing her to avoid going to prison, and he arranged to have another case, No. 12-184,

[15] As noted above, Hathorn greatly understated the number of charges she faced.

retired to the file. Successor Ex. 12. According to the District Attorney's Office, Hathorn owed $7,432.49 in restitution as of July 29, 1991. *See* Successor Ex. 11. Later, the State moved to revoke the suspension of her sentence because she "failed to complete the program at the Pascagoula Restitution Center and failed to make full and complete restitution on all outstanding checks by absconding from said restitution center" and because she "failed to pay fine and costs." *Id.* Because she failed to abide by the conditions of her probation, the court revoked her probation and sentenced her to the penitentiary. *Id.* There is no indication in Hathorn's records that Williamson did anything that could have exacerbated her legal problems. *See* Successor Ex. 14, ¶¶ 10-11.

Whether through the suppression of evidence or trial counsel's failure to conduct an adequate inspection of the State's files, the jury never learned of secretly recorded telephone conversations between Hathorn and Manning. If those recordings had been known, the jury would have learned that Hathorn was acting as a state agent, was willing to – and actually did – say whatever the sheriff asked her to say, and was testifying at trial inconsistently with the statements on the tapes.

Unbeknownst to Petitioner, the sheriff arranged for Manning's calls from jail to Hathorn to be recorded. The sheriff provided Hathorn with a number of questions to ask Manning in the hope of getting him to incriminate himself. Two microcassettes in the custody of the Sheriff's Department contained a number of these conversations, and the sheriff had arranged for the transcription of at least one of these conversations. PCR T. 27-28; Successor Ex. 15; *see also* Successor Exhibit 14.

The prosecutor did not disclose the transcripts or the tapes to defense counsel. Successor Ex. 14. Moreover, the prosecutor's paralegal testified that the District Attorney's office never

had the tapes. PCR T. 23-24. Trial counsel maintained they were never informed that Hathorn was acting as a state agent, and were never told of the taped conversations between Hathorn and Manning. PCR T. 48-50. The State belatedly suggested that the sheriff made all evidence available to defense counsel, but the sheriff could not even definitively prove that the tapes were actually made available, and there is no question that the transcripts were never provided.[16] Even if defense counsel had the opportunity to inspect the tapes but failed to do so, the bottom line is that the jury never heard this essential impeachment evidence in a case in which Hathorn's credibility played such a crucial role.

In the transcript prepared by the sheriff's department, Hathorn covered most, if not all, of the topics that the sheriff wanted her to cover. She failed to elicit an incriminating statement from Manning, and made several statements contradicting her trial testimony or the testimony of Sheriff Bryan. With respect to possessing a gun, Manning said nothing incriminating.

Regarding the bullets in the tree, Hathorn was emphatic about not knowing anything when discussing the matter on the telephone with Manning:

> Uh huh, asking me about those bullets and stuff that they got out of some tree, which I told them *I don't know nothing about it. I don't know who been out there shooting.*

Successor Ex. 15 (emphasis added). Hathorn did not challenge Manning's contention that he was at the 2500 Club the night of the students' death and that he came home after being at the club. *Id.* In the suppressed recordings, Hathorn also ventured her own opinion of the evidence: "I said [to the sheriff] I know Fly [Manning] didn't do that." *Id.*

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[16] In state post-conviction pleadings, the State never alleged that the sheriff disclosed the tapes to defense counsel. In its Motion for Rehearing, the State even admitted that the cassettes and transcripts had not been disclosed to the defense. *See* State's Motion for Rehearing, dated June 18, 2004. Not until the evidentiary hearing did the State allege that the Sheriff had disclosed the tapes to defense counsel. The Circuit Court ultimately found that the Sheriff had disclosed the tapes; however, that finding was unreasonable in light of the record before the state court.

The secret recordings captured other statements inconsistent with Hathorn's trial testimony. At trial, Hathorn testified that she saw Manning with a CD player on December 14. T. 678. On tape, however, Hathorn said that she told law enforcement that she did not know about a CD player. Successor Ex. 15, pp. 3, 11. At trial, there was some discussion as to whether Hathorn ever saw Manning with a class ring. T. 711. In the undisclosed telephone conversations, however, Hathorn denied any knowledge of a class ring. Successor Ex. 15, p. 4.

A discussion about the leather jacket proved no more incriminating; in fact, it demonstrated that law enforcement believed that Manning bought the jacket, not that he had stolen it. As Manning explained to Hathorn:

> See Bone [Deputy Sheriff Jesse Oden] came back, I mean Bone came in our house 'bout two months ago saying that somebody told him that I bought the jacket off the street. He never came back after that so I didn't think nothing of it which I was thinking about that long brown jacket.

Successor Ex. 15, p. 1. When Manning denied having any of the items that he allegedly stole, Hathorn did not contradict him. *Id.*, p. 4.

Hathorn also did not dispute Manning's contention that he was at the 2500 Club the night of the students' death and that he came home after being at the club. *Id.*, pp. 11-12.[17] Of course, at trial Hathorn testified that Manning was gone from December 9 until December 14. Since she was living with him at the time, she would have known that he really was home on the morning of December 11. As Williamson pointed out, the Manning house was "so small you just about have to step over each other. It's a very small house. She would have known him if he was there." PCR T. 60. Williamson pointed out that on the tape, Hathorn did not dispute Manning's statement. Her silence in the face of Petitioner's account amounts to a tacit

[17] At trial, Lindell Grayer testified that he picked Manning up the next morning at Manning's house. T. 1413.

admission on the part of Hathorn, who was working as a state agent at the time of the conversation.

On the secret recordings, Hathorn declared several times that she was being threatened with prosecution. For example, Hathorn informed Manning that the sheriff threatened to charge her as an accessory after the fact to murder and push for a prison sentence of at least ten years. In a discussion about some papers taken from Manning's house, Hathorn mentioned, "They talking about arresting me." Successor Ex. 15, pp. 2, 8, 10.

The handwritten section of the transcript references additional coercion applied to Hathorn. She told Manning, "Well, Dolph [told] me if he come to me again to get me he gonna be coming to pick me up to arrest me talking bout you know something." *Id.* (handwritten section). Later, Hathorn returned to the threats of prosecution: "Well, Dolph told me that I would be accessory after the fact of murder that I could get 10 yrs what's that." *Id.* In another conversation, which was not transcribed until after the evidentiary hearing, Hathorn confided to Manning that the Sheriff accused her of participating in a cover-up, specifically hiding the murder weapon.[18]

Finally, the jury never learned that Hathorn was actively working as a state agent in an attempt to gather evidence against Manning.

As expressed in the State's closing argument, the case turned heavily on whether the jury believed its witnesses, primarily Paula Hathorn:

> [L]adies and gentlemen, really what you are going to have to determine and **practically the only thing you have to determine** when you go back into that jury room **is who are you going to believe**. Genuinely, ladies and gentlemen that is your really only issue in the case. Who are you going to believe, because if you

[18] Although sheriff testified that Hathorn was merely "role playing" by repeating what he wrote down for her to say, PCR T. 85, there are no notes asking her to mention that she was being accused of hiding the murder weapon.

> believe the state's witnesses, then he did it. It's just that simple. . . . **Who are you going to believe**?

T. 1529 (emphasis added). The evidence developed since Petitioner's trial provides many reasons for questioning Hathorn's veracity.

3. Frank Parker's testimony was filled with lies.

Frank Parker was another informant willing to say anything in the hope of advancing his position. According to Parker, he came to the jail in Starkville because he was on the run from charges in Texas and decided to turn himself in. T. 1117. There, he supposedly overheard Manning mention that he sold the gun that he used to commit the crime on the street. T. 1120; *see also* Successor Ex. 16.

Parker testified that at one point he had a burglary charge lodged against him. T. 1116. However, he added that he "had written the governor of Texas and the sheriff asking them to drop all charges against me and they did." Parker denied receiving any consideration for his testimony and reiterated that the charges against him in Texas had been dropped. T. 1121.

On cross-examination, Parker testified that he wrote about having his charges dismissed in June or July 1993 and then again in August 1993. T. 1125. According to Parker, someone from Texas supposedly wrote to Sheriff Dolph Bryan claiming that all charges against Parker had been dismissed, and that when one of the jailers submitted his name to NCIC, his status came back "completely clear." T. 1126. Parker added that, "I just know that my charges were dismissed by the governor and the sheriff of Frio County." T. 1129. Parker also tried to minimize the seriousness of the Texas charges, stating that if the charges had not been dropped, he would only have had to serve "approximately six weeks in a drug rehab." T. 1132.

Parker's testimony was false. Parker, a long-time thief, often stole from his own family, forcing his uncle to padlock the doors within the house to prevent Parker from stealing valuables.

Successor Ex. 17 (affidavit of Chester Blanchard, Parker's uncle). Around March 11, 1993, while his aunt and uncle were out of town, Parker cleaned out their house and pawned their valuables. *Id.* A short time later, Parker called his family and admitted his wrongdoing. His uncle taped the telephone conversation and pressed charges. Successor Ex. 18 (Offense Report listing property stolen); Successor Ex. 19 (Declaration of Complaint signed by Chester Blanchard); Successor Ex. 20 (statement of Carolyn L. Blanchard and Stacey L. Blanchard); Successor Ex. 21 (Investigation Bureau Supplementary/Follow Up Report).

The Bexar County Sheriff's Department learned that Parker was in custody in Mississippi on May 14, 1993. Parker's uncle, Chester Blanchard, recalled receiving a call from a sheriff's department in Mississippi at around 2:00 a.m. stating that Parker was in custody and was going to be a witness in a murder trial. Successor Ex. 17 (affidavit of Chester Blanchard). During that conversation, Blanchard informed the authorities in Mississippi about the charges he had pressed against his nephew. *Id.*

In August, when Parker said that the charges were supposedly dropped, a Texas grand jury indicted him for theft. Successor Ex. 22 (True Bill of Indictment, *Parker v. State*, No. 93-CR-5281, filed August 11, 1993). Furthermore, Parker was under indictment in Texas for almost the entire duration of his residency in the Oktibbeha County jail.

Parker tried to minimize the seriousness of his charges, stating that he would have been sentenced to no more than six weeks in a drug rehabilitation center. Under Texas law, however, he faced a sentence of two to ten years. Successor Ex. 23. Parker also testified that charges against him in Frio County had been dropped; however, he never faced charges in that county. Successor Ex. 24 (note from Frio County Clerk of Court on fax).

This lying was characteristic of Frank Parker. As his uncle explained,

> I have known Frank since he was very young, and he lived in my house for more than ten years. In my opinion, Frank has a reputation for dishonesty. I would not take his word for anything. I have no idea about whether the defendant in Mississippi is guilty or innocent, but I would not let anything that Frank said have any bearing at all on any case.

Successor Ex. 17 (affidavit of Chester Blanchard).

This information was either known or should have been known by the prosecution. Law enforcement has the means to determine whether someone from another jurisdiction faces charges. In addition, the sheriff's department spoke to Parker's uncle and knew about the nature of the charges facing Parker. Successor Ex. 17. More significantly, Parker made it clear in correspondence addressed to the District Attorney and the trial judge that he faced theft charges. Successor Exhibits 25 and 26 PCR Exhibits 19, 20 (letter from Frank Parker to Forrest Allgood, dated March 24, 1994, and a letter addressed to Forrest Allgood and Judge Lee Howard, with an envelope postmarked March 25, 1994). This correspondence was never disclosed to defense counsel. Successor Ex. 14 (affidavit of Mark G. Williamson).

This correspondence also provides a clue to Parker's true motivation for testifying: reward money. Although it appeared that Parker may not have received any reward money, nothing was said about the Texas charges, which suggests that there may have been an understanding that authorities in Mississippi would try to help with his Texas charges.

When Parker finally returned to Texas, he pled guilty to theft. The trial judge was initially going to reject the plea bargain. The prosecution then apparently explained to the judge that Parker's incarceration and testimony factored into the plea bargain. After hearing this, the judge accepted the plea bargain and sentenced Parker to three years probation. Successor Ex. 27

(Transcript, Plea of Guilt and Sentencing, *State v. Parker*, No. 93-CR-5281, 144th Judicial District, dated April 10, 1995).[19]

4. Additional Witnesses Support Petitioner's Alibi

To support his alibi at trial, Petitioner located several witnesses who saw him at the 2500 Club the night that the students were murdered. The defense presentation had two weaknesses. Most of the witnesses saw Manning no later than around 11:00 p.m., which, according to the sheriff, would have given Manning sufficient time to somehow make his way to the other side of town to break into John Wise's car and abduct and kill Jon Steckler and Tiffany Miller. Two other witnesses saw Manning later, but their testimony was subject to impeachment. *See, e.g.,* T. 1258 (testimony of Mario Hall about seeing Manning around 11:00 p.m.); T. 1283 (testimony of Landon Clayborne about seeing Manning around 11:00 p.m.); T. 1293-98 (testimony of Gene Rice).[20]

Keith Higgins testified that he saw Manning at the club sometime between 11:00 p.m. and 12:30 a.m. T. 1216. He also testified that the sheriff had threatened to prosecute him for perjury if he testified on behalf of Manning. T. 1218. He also said that he was reluctant to become involved because he also had brothers in jail facing serious charges. On cross-examination, the prosecution impeached Higgins with a tape made of a conversation he had with law enforcement in which Higgins made it seem that Manning was pressuring him to make up an

[19] Parker violated the terms of his probation and was required to serve a term of three years in the Texas Department of Corrections. Successor Ex. 28 (Commitment Notice, *State v. Parker*, No. 93-CR-5281, 144th Judicial District, October 24, 1995).

[20] Gene Rice testified that he got into an argument with Manning at the club. Based on his testimony, it appears that he and Manning had their confrontation sometime between 12:30 and 1:00 a.m. He claimed that they squabbled because he danced with Hathorn. The problem that emerged with Rice's testimony was that no one else who was at the club recalled seeing either him or Hathorn that night, and thus his testimony lacked corroboration.

alibi for him. Higgins tried to explain that he had the conversation because of threats made against his brothers. T. 1225. Nevertheless, the damage was done.

The State agreed that Manning appeared at the 2500 Club early in the evening. Thus, it did not seriously dispute the testimony of Mario and King Hall or Landon Clayborne. T. 1535. On the other hand, the state criticized the defense for not being able to present any reliable witnesses who could have placed Manning at the 2500 Club any later.

Witnesses located during the post-conviction investigation also support Manning's alibi. Sherron Armstead Mitchell recalled going to the 2500 Club on the night of December 10, 1992. She remembered the night for two reasons. First, that was the night Steve Moore shot himself. Second, she had recently gotten married, and her husband was not happy that she was going out. Successor Ex. 29 (affidavit of Sherron Armstead Mitchell).

She recalled seeing Manning, and even remembered what he was wearing that night. She knew that she saw him inside the club at 12:30 a.m. because she "was fixing to leave because I knew that my husband would be mad at me for being out so late." She knew that when she left it was almost 1:00 a.m., and Manning was still at the club. Mitchell recalls arriving at her house at around 1:15 a.m. because she and her husband fought; in fact, her husband became abusive. *Id.* Mitchell added that prior to the trial, she had gone to the Delta for a period of time, and that when she returned, she did not realize how she could have contributed to Manning's defense; otherwise, she would have come forward. *Id.*

Doug Miller also recalled seeing Manning at the club that night. He first saw Manning outside drinking beer. He later saw Manning a couple of times inside the club drinking beer. Due to the passage of time, Miller is not absolutely certain exactly when he last saw Manning,

whether it was 12:15 or 12:20. He is sure, however, that it was after 12:00. Successor Ex. 8 (affidavit of Doug Miller).

Troylin Jones also remembers seeing Manning at the 2500 Club. Successor Ex. 30 (affidavit of Troylin Jones). She arrived at the club around 9:30 p.m. At the time, she saw Manning outside talking to a group of other men. She remembers people discussing the incident at Arby's involving Steve Moore. *Id.* She later saw Manning in the club at midnight, if not a little later. She also adds that even though it was chilly that night, Manning was not wearing gloves. *Id.*

The State's case was never strong, and it rested on the weak foundation of the credibility of witnesses with powerful incentives to assist the State in any way possible to benefit themselves. Although this Court did not find that Manning suffered a violation of his constitutional rights, it should be clear that his convictions are unreliable.

5. Evidence from Petitioner's Second Case Reveals the State's Pattern of Basing Its Case Against him on False or Unreliable Evidence.

As the Court is aware, Petitioner is also challenging his separate convictions for the murders of two elderly women in Starkville. This Court remanded for an evidentiary hearing on several grounds of state misconduct and ineffective assistance of counsel. *Manning v. State,* 884 So. 2d 717 (Miss. 2004).

At the hearing of this second case, the State's primary witness admitted that he testified falsely at Manning's trial. Kevin Lucious testified at trial that on January 18, 1993, he saw Manning push his way into the victims' apartment from his own apartment across the street. He testified that he lived in apartment 11-E of Brookville Gardens at the time with his girlfriend, Lekeesha Jones, and their infant daughter. This Court granted a hearing based on law enforcement notes indicating that the apartment was actually vacant at the time of the murders,

and based on affidavits from Jones and her grandmother stating that Jones and Lucious did not move into Brookville Gardens until after the crimes.[21]

Lucious admitted at the hearing that he lied not only about seeing Manning on the day of the crimes but also about hearing Manning make incriminating statements on two occasions following the murders. Lucious said he testified falsely at trial because the prosecutor told him that he and Jones both could be charged with crimes related to the murders – Lucious with conspiracy and Jones with withholding evidence. (Successor Ex. 33 at 24-25; *see also id*. at 27, 44.) Lucious' recantation of his trial testimony was corroborated at the hearing by Jones and two other witnesses. *See, e.g.,* Successor Ex. 34

As noted, Lucious also recanted his testimony about Manning supposedly confessing to the crimes. Lucious had originally testified that Manning confessed to him on two occasions when he was with Manning and Manning's brother, Marshon. At the post-conviction hearing related to that case, Marshon Manning also testified that there had been no confession and that the conversations that Lucious mentioned at trial never took place. *See* Success Ex. 48.

The State conceded that it did not disclose law enforcement notes showing that Lucious's apartment was vacant at the time of the murders, and it conceded that Kevin Lucious's trial testimony was essential to Manning's convictions. *See* Successor Exhibits 51 and 52 (testimony of David Lindley and Forrest Allgood).

The State also conceded that it did not disclose crime lab notes pertaining to a shoe size found at the crime scene. The documents disclosed to trial counsel did not indicate a shoe size of a print found at the crime scene. *See* Successor Ex. 51 and 52. Crime lab notes disclosed

[21] Attached as Successor Exhibits 31 and 32 are law enforcement notes showing that Lucious's residence, Apartment 11-E, was vacant immediately following the murders, and Brookville Gardens records showing Apartment 11-E was unoccupied from September 3, 1992, until February 1, 1993.

subsequent to trial showed that the Crime Lab had in fact noted that the print came from a size 8 shoe. Brandon Davis measured Manning's feet at the hearing and determined that Manning wears a size 11 shoe and thus could not have been the source of the print. Successor Ex. 49.

The evidence from Manning's second case shows a pattern of State reliance on dubious and self-interested witnesses, and a willingness to present unreliable evidence to secure a conviction.[22]

IV. ARGUMENT IN SUPPORT OF THE GRANT OF POST-CONVICTION RELIEF

Ground I. Petitioner is Entitled to DNA Testing of Biological Evidence that Has not Been Tested and Which Would Exonerate Him and Other Necessary Forensic Examinations

As noted at the outset of the discussion of the facts, law enforcement collected numerous items of physical evidence. No DNA testing was performed on the hair or nail scrapings; indeed, the technology was not sufficiently advanced at the time to permit testing on the hairs. DNA testing, if possible, would exonerate Manning. For example, the prosecution used the hair fragments as evidence that Manning had been in Miller's car. If the hair originated from someone other than Manning or the students, it would make unlikely that Manning had been in the car. Likewise, DNA originating from someone else other than Manning or the students in the nail scrapings or the hands of the victims would point to the actual killer and all but eliminate the likelihood of Manning's involvement in the crimes.

This Court has recognized the exculpatory power of DNA evidence and has guaranteed access to DNA testing, at all stages of criminal proceedings, that is capable of proving a person's innocence. *Richardson v. State*, 767 So.2d 195, 199 (Miss. 2000). Mississippi Code § 99-39-9,

[22] The post-conviction hearing in Manning's second case was completed in April, 2011. Manning submitted his post-hearing brief to the Circuit Court on March 2, 2012, and the State submitted its brief on February 28, 2013.

the portion of the Post-Conviction Relief Act pertinent to DNA testing, requires a Petitioner to show three things:

> 1. That "there exists a reasonable probability that the petitioner would not have been convicted . . . if favorable results had been obtained through DNA testing at the time of the original prosecution";
>
> 2. "That the evidence to be tested was secured in relation to the offense underlying the challenged conviction and (i) was not previously subjected to DNA testing, or (ii) although previously subjected to DNA testing, can be subjected to additional DNA testing that provides a reasonable likelihood of more probative results"; and
>
> 3. "That the chain of custody of the evidence to be tested established that the evidence has not been tampered with, replaced or altered in any material respect."

Miss. Code Ann. § 99-39-9(1)(d).

Petitioner request satisfies all three criteria.

A. Petitioner's Request Satisfies The First Requirement Under The DNA Testing Provision Because There Is A Reasonable Probability That He Would Not Have Been Convicted If DNA Testing At The Time Of Trial Had Excluded Him As The Murderer.

Mississippi's post-conviction DNA testing law requires that the Court order testing if the Petitioner is able to show that the evidence sought for testing would raise a reasonable probability that the verdict or sentence would have been more favorable had exculpatory DNA testing results been available at the time of trial. In other words, the DNA testing law presumes that the results of the test, had such testing actually been conducted, would have been favorable to the defendant. Petitioner therefore bears no burden whatsoever to show that DNA testing would have been exculpatory. To satisfy the "reasonable probability" prong of the DNA testing law, an inmate seeking relief must only show that favorable testing results in his or her case would have made a difference in the verdict or sentence at trial.

Petitioner easily meets this standard. Although the Mississippi Legislature did not specifically define what a Petitioner must show to demonstrate a "reasonable probability " of a more favorable outcome at trial, this Court has stated, "[a] reasonable probability is a probability sufficient to undermine confidence in the outcome." *Davis v. State*, 897 So.2d 960, 967 (Miss. 2004) (citing *Williams v. Taylor*, 529 U.S. 362, 390-91 (2000)). The "reasonable probability" prong requires the Court to consider the probative value of favorable test results on the case, not whether it thinks it is likely—as a matter of fact—that Petitioner is actually innocent.

Petitioner satisfies this "reasonable probability" standard. A number of items of biological evidence were collected. The State believed that at least some of those items came from the assailant. Testing will determine whether Petitioner can be excluded as the source of the evidence. Moreover, DNA could develop a profile from the semen that matches the DNA of a convicted offender contained in the DNA databank, thereby affirmatively identifying the person who committed these crimes.

In the event that testing yields scientifically conclusive DNA results establishing Petitioner's innocence, such results (especially taken in conjunction with the evidence developed in post-conviction proceedings) would outweigh the evidence used to convict him at trial. No physical evidence linked Petitioner to the crime scene. Fingerprints in the victim's car did not match him, and the State could not match the hairs to him.

Nina Morrison, a Senior Staff Attorney with the Innocence Project, confirms that the type of biological evidence collected in Petitioner's case has often provided the basis for an exoneration. Successor Exhibit 35. Morrison summarized six cases in which this type of DNA evidence exonerated an individual. For instance, at John Jerome White's trial, a hair analyst compared hair collected from the crime scene with hairs from White and testified that the hairs

were "similar enough to say that they have the same origin." In 2007, DNA analysis established that White was not the perpetrator. Successor Exhibit 35. Likewise, mitochondrial DNA testing exonerated Keith Richardson in 1998.

Morrison also recounts the case of Michael Blair, who was convicted in 1994 of the murder of a seven year old girl. A hair analyst testified that hairs in Blair's car had a "strong association" with hairs from the victim. In 2008, however, prosecutors dismissed charges after DNA evidence exonerated him. *Id*. Similarly, post-conviction DNA testing of hairs collected from the victim's socks and underwear exonerated Charles Fain, who spent 18 years on death row for a crime he did not commit. *Id*.

Morrison reviewed materials discussing the available biological evidence in this case and concluded "biological testing of the evidence in Manning's case is warranted." *Id*.

B. The Biological Evidence Was Not Subject to Testing.

The statute requires that the evidence was not subject to testing. As shown in the various reports, the collected hairs, scrapings, and rape kit were not subject to DNA testing. At the time, testing for much of this evidence, especially hair, was not available. As Morrison points out, Short Tandem Repeat Testing or Y-STR testing of the fingernail scrapings and rape kit, and mitochondrial DNA testing of the hair fragments was not available at the time of Manning's trial. Successor Exhibit 35.

Petitioner has learned that two different types of DNA testing may be required. For the scrapings, STR (Short Tandem Repeat Testing) or Y-STR testing may be required. For the hair samples, Petitioner requires mitochondrial DNA testing.

1. Short Tandem Repeat Testing

Short Tandem Repeat (STR) DNA testing offers several advantages not witnessed in the first generation of tandem repeat DNA tests. [23]First, it requires a minuscule amount of biological material. Second, it can be used on degraded samples. Third, it can be used to detect and decipher mixtures. Fourth, it can be used to detect masking so different profiles can be properly dissected into its components. And fifth, it is highly discriminatory.

Unlike its predecessor–VNTR testing–STRs are comprised of much smaller repeats units, from 2 to 7 bases (as compared to 8 to 80 bases in VNTRs), and the total size of an STR is smaller, usually less than 500 bases (as compared to a thousand or several thousand base pairs in VNTRs). *See* NAT'L INST. OF JUST., THE FUTURE OF DNA TESTING: PREDICTIONS OF THE RESEARCH AND DEVELOPMENT WORKING GROUP 39-40 (2000). The smaller number of base pairs means very minute amounts of biological material–less than 1 nanogram (1 billionth of a gram)–can be easily amplified using polyermease chain reaction (PRC).[24] As one prominent DNA textbook explained:

> Modern-day PCR methods... are powerful because minuscule amounts of DNA can be measured by amplifying them to a level where they may be detected. Less than 1 ng of DNA can now be analyzed with multiplex PCR amplification of STR alleles compared to 100 ng or more that might have been required with RFLP only a few years ago.

JOHN M. BUTLER, FORENSIC DNA TYPING: BIOLOGY, TECHNOLOGY, AND GENETICS OF STR MARKERS 146 (2d 2005). The shorter base pairs also allows STR testing to be used on degraded samples:

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[23] The first generation of DNA test to focus on tandem reports was Variable Number of Tandem Repeats (VNTRs). *See* NAT'L INST. OF JUST., THE FUTURE OF DNA TESTING: PREDICTIONS OF THE RESEARCH AND DEVELOPMENT WORKING GROUP 37-39 (2000).

[24] VNTRs generally required 50 nanograms of DNA material before it could be amplified by PCR. *Id.* at 39.

> Fortunately, because STR loci can be amplified with fairly small product sizes, there is a greater chance for the STR primers to find some intact DNA strands for amplification. In addition, the narrow size range of STR alleles benefits analysis of degraded DNA samples because allele dropout via preferential amplification of the smaller allele is likely to occur since both alleles in a heterozygous individual are similar in size.
>
> ...
>
> The potential for analysis of degraded DNA samples is an area where multiplex STR systems really shine over previously used DNA markers.

Butler, *supra*, at 146, 147.

STR testing can detect and decipher mixtures. Mixtures "arise when two or more individuals contribute to the sample being tested." Butler, *supra*, at 154. Prior to STR and PCR, detecting mixtures was "challenging." However, as "detection technologies have become more sensitive with PCR sensitivity... the ability to see minor components in the DNA profile of mixed samples has improved dramatically over what was available with RFLP methods only a few years ago." *Id*. In particular, using "highly polymorphic STR markers with more possible alleles translates to a greater chance of seeing differences between the two components of a mixture." *Id.* at 155.

STR testing is the most discriminatory type of DNA testing. As one federal appellate court recently conceded:

> As far as scientists have determined, DNA is the most reliable means of identifying individuals. There is an infinitesimal chance that any two individuals will share the same DNA profile unless they are identical twins. Thus, a DNA match between two samples excludes the rest of the population from suspicion to a near 100% certainty.

Banks v. United States, 490 F.3d 1178 (10th Cir. 2007).[25]

[25] *Accord United States v. Boose*, 498 F.Supp.2d 887, 890-91 (N.D. Miss. 2007) (STR testing is "the most widely used by DNA labs... because it is capable of a high degree of accuracy, showing an overwhelmingly large probability that a suspect's DNA matches an evidence sample."); *United States v. Sczubelek*, 402 F.3d 175 (3rd Cir. 2005) (commenting that modern-day DNA technology has "greater precision" compared to the "traditional methods of identification").

2. Y-STR Testing

Y-chromosome testing is valuable in forensic settings because it is found only in males; male sex chromosomes possess an X and a Y chromosome (X, Y), whereas females possess two X chromosomes (X, X). Because the vast majority of crimes where DNA is helpful, particularly sexual assaults, involve male perpetrators, Y-STR tests can prove invaluable and more beneficial than autosomal DNA tests in certain circumstances. *See* Sudhir K. Sinha, Bruce Budowle, Ranajit Chakrabort, et al., *Utility of the Y-STR Typing Systems Y-Plex 6 and Y-Plex 5 in Forensic Casework and 11 Y-STR Halotype Database for the Three Major Population Groups in the United States*, 49 J. FORENSIC SCI. 691 (2004); Cassie Johnson, *Validation and Uses of a Y-Chromosome STR 10-Plex for Forensic and Paternity Laboratories*, 48 J. FORENSIC SCI. 6 (2003). For instance, Y-chromosome tests can produce interpretable results where autosomal tests are limited by the evidence, such as in mixture samples where high levels of female DNA may overwhelm the minor amounts of male DNA. However, using "Y chromosome specific PCR primers can improve the chances of detecting low levels of the perpetrator's DNA in a high background of the female victim's DNA." Butler, *supra*, at 203.[26]

3. Mitochondrial DNA (mtDNA)

STR testing requires nuclear DNA (nDNA) or DNA from the chromosome's nucleus. Mitochondrial DNA tests, however, focus on the cell's mitochondria, which are energy-producing organelles residing in the cell's cytoplasm (located outside the cell's nucleus). Unlike

[26] *See also Profile: Killer Instinct; Melinda Elkins works seven years to prove her husband's innocence in murder of Judy Johnson and rape of Brooke Sutton*, Dateline NBC, Oct. 7, 2007 (discussing how Y-STR played a critical role in Clarence Elkins's exoneration); Chief Justice Thomas J. Moyer & Stephen P. Anway, *Biotechnology and the Bar: A Response to the Growing Divide Between Science and the Legal Environment*, 22 BERKELEY TECH. L.J. 671, 688 n.91 (2007) (discussing Clarence Elkins's case and the importance of Y-STR testing).

the nucleus–where there can only be one per cell–there are several hundred mitochondria per cell. However, similar to the nucleus, mitochondria contain their own DNA, which differs from nDNA, and which is inherited from the individual's mother.

Compared with traditional nDNA analysis, mtDNA offers three primary benefits. First, its structure and location in the cell make mtDNA more stable, enabling investigators to test old or degraded samples. *E.g.,* Butler, *supra*, at 242 (noting it is "this amplified number of mtDNA molecules in each cell that enables greater success (relative to nuclear DNA markers) with biological samples that may have been damaged").[27] Second, mtDNA is available in larger quantities per cell, enabling the testing of smaller samples. *E.g., State v. Council*, 515 S.E.2d 508, 516 & n.12 (S.C. 1999). Finally, and perhaps most importantly, mtDNA can be extracted from samples in which nDNA cannot, specifically bone fragments and hair shafts. *E.g.,* Butler, *supra*, at 241; *United States v. Coleman*, 202 F. Supp. 2d 962, 965 (E.D. Mo. 2002) (observing that bone and hair shafts can be tested for mtDNA).[28] Mitochondrial DNA's primary limitation is that–unlike with nDNA–maternal relatives share identical copies of mtDNA, so mtDNA is not a unique identifier.

Should this Court grant Petitioner testing at a reliable lab equipped with advanced DNA capabilities, that testing is likely to yield a profile that will determine once and for all whether or not Manning committed the crime he is currently sentenced to die for.

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[27] *See also* Alice R. Isenberg, *Forensic Mitochondrial DNA Analysis: A Different Crime-Solving Tool*, 71 FBI L. ENFORCEMENT BULL. 8, at 16 (2002) (noting that mtDN''s location in the cell and its circular structure "protect[] it from deterioration"); Charlotte J. Word, The Future of DNA Testing and Law Enforcement, 67 BROOK. L. REV. 249, 251 (2001) (reporting mtDNA's use in post-conviction cases and other cases in which samples are very old).

[28] Mitochondrial DNA is universally accepted by courts these days, *e.g.*, *United States v. Chase*, 2005 WL 757259, at *3, *5 (D.C. Super., Jan. 10, 2005); *United States v. Coleman*, 202 F. Supp. 2d 962 (E.D. Mo. 2002); *State v. Council*, 515 S.E.2d 508 (S.C. 1999).

C. Petitioner's request satisfies the statute's chain of custody requirement.

Mississippi Code § 99-39-9(d) states that evidence that has been in the custody of law enforcement, other government officials, or a public or private hospital, shall be presumed to satisfy the chain-of-custody requirement. Miss. Code Ann. § 99-39-9(d). At the time of trial, Dr. Hayne, one of the State's testifying experts, sent evidence from the investigation to the Mississippi Crime Lab following all required chain of custody procedures. Other evidence was sent to the FBI for analysis. Following the testing, the physical evidence was returned to the Oktibbeha County Sheriff's Department.

D. The Court Should Also Grant Leave to Seek Fingerprint Analysis.

As noted in the Statement of Facts, the Crime Lab eliminated Petitioner as the source of a number of prints found inside the victim's car. Many of these prints did not originate from Miller or Steckler and thus could have come from the murderer, if, as the State suggested, the victims were kidnapped from campus and driven to the scene of the murder. Law enforcement has successfully used automated fingerprint identification systems to solve crimes, even crimes that were committed before law enforcement obtained the technology. *See* Successor Ex. 58 (email from Matt Marvin of Ron Smith and Associates). *See, e.g., People v. Tenny*, 586 N.E.2d 403 (Ill. App. 1991) (in 1987 prints of codefendant found on item taken from scene of crime that occurred in 1978); *People v. Ferrari*, 155 Misc.2d 749, 589 N.Y.S.2d 983 (N.Y. County Ct. 1992) (defendant arrested in 1991 after prints were linked to 1986 burglary); *State v. Gilmer*, 604 So.2d 117 (La. 1992) (latent prints taken from crime scene in 1987 matched to defendant in 1990); *State v. Johnson*, 943 S.W.2d 285 (Mo. App. 1997) (defendant's prints found to match latent prints lifted from items from a crime that occurred twelve years earlier); *People v. Myers*,

220 A.D.2d 272, 632 N.Y.S.2d 111 (N.Y. S. Ct. App. Div. 1995) (defendant's prints linked to crime that occurred seventeen years before); *Scott v. State*, 968 S.W.2d 574 (Tex. Crim. App. 1998) (in 1995 trial, defendant's prints were matched to items taken from a crime occurring in 1982); *Tweedell v. State*, 546 S.E.2d 306 (Ga. App. 2001) (defendant's prints linked by computer scan in 1998 to crime that took place in 1992); *Beasley v. State*, 536 S.E.2d 825 (Ga. 2000) (in 1998, defendant's prints linked to 1994 crime); *State v. Amerson*, 925 P.2d 399 (Idaho App. 1996) (1990 computer scan linked defendant to latent prints taken from the inside and outside of a car involved in a 1986 crime); *State v. Wells*, 2000 WL 1818567 (Ohio App. Dec. 11, 2000) (1998 scan linked defendant to 1985 murder).

Petitioner has conferred with Matt Marvin of Ron Smith and Associates. Marvin and other analysts are expert fingerprint examiners and are willing to review the fingerprints in the custody of the Crime Lab and assess whether they are suitable for comparison with prints in the AFIS (Automated Fingerprint Identification System) or IAFIS (Integrated Automated Fingerprint Identification System). For these reasons, this Court should remand this matter for DNA and print analysis.

Ground II. <u>This Court Should Remand for a Hearing Because of the Recantation of Earl Jordan, the Jailhouse Snitch</u>

The State relied heavily on Earl Jordan's testimony that Willie Manning "confessed" to him. Without Jordan, the State had no direct evidence tying Manning to the crimes, and most of the State's evidence, especially concerning goods supposedly taken during the break-in of the car, was inconsistent. Jordan, however, purported to relate Manning's account of the crime. As it turns out, though, Jordan's testimony was false. Manning did not confess to him. Moreover, Jordan was motivated by the expectation that he would receive favorable treatment from the

State if he provided a statement that would incriminate Manning. *See* Successor Ex. 7 (affidavit of Sheila O'Flaherty).

At the time of the student murders, Jordan faced indictment as a habitual offender and had even been a suspect in the murders. He had been arrested for a burglary on the Mississippi State campus. Successor Ex. 53. Desperate to deflect attention from himself, Jordan initially gave a statement implicating Anthony Reed, another suspect. Successor Ex. 54. He even managed to pass a polygraph about his statement against Reed. Successor Ex. 55.

Just two months after Jordan reported Manning's "confession," the State reduced his charges, indicting him only for looting and not as a habitual offender. Successor Ex. 56. PCR Exhibit 7. His case was continued until after Petitioner's trial. T. 1170. Shortly after the trial, Jordan entered his plea of guilty to looting and was sentenced to three years. Successor Ex. 57. He denied, however, that he had a deal with the State. Jordan testified that while he and Manning were walking around the jail, Manning admitted that he killed the two students. T. 1136-40.

Until recently, Jordan had not been willing to talk about his role in securing Manning's convictions. However, he recently admitted that Manning "never said he killed them." Successor Exhibit 7. Three times during the conversation with Manning's current counsel, Jordan admitted that Manning did not confess to the crimes. *Id*. Jordan, however, would not sign a statement, but Petitioner should have the right to require his testimony at a hearing.

The Mississippi Post Conviction Relief Act creates an exception for successive and untimely motions for relief based on newly discovered evidence. As Jordan noted, until recently, he has refused to talk to those working on behalf of Willie Manning. Recently, however, Jordan broke his silence and admitted that Manning never admitted to killing anyone. Because these

facts were not previously available despite efforts by Manning to obtain them, this issue satisfies the threshold for bringing a successive petition.

When any major witness recants, let alone the only witness to whom the defendant allegedly confessed in a case with little firm evidence linking the defendant to the crime, the defendant is entitled to an evidentiary hearing to determine whether the recantation or the original trial testimony is true. This Court addressed precisely this issue in Petitioner's case regarding unrelated murders. As this Court explained, "[w]hen an important witness to a crime recanted his testimony and offered a reason for having given false testimony at trial, the defendant/petitioner is entitled to an evidentiary hearing to determine whether the witness lied at trial or on his affidavit." *Manning v. State*, 884 So.2d 717, 723 (Miss. 2004). Jordan knew the sheriff wanted to put together a case against Manning, and Jordan understood that he would improve his own position if he provided assistance.

Petitioner is also entitled to an evidentiary hearing pursuant to *Brady v. Maryland,* 373 U.S. 83 (1963). To establish that nondisclosure violated the *Brady* rule, "[t]he evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued." *Banks v. Dretke,* 540 U.S. 668, 691 (2004) (quoting *Strickler v. Greene*, 527 U.S. 263, 281-82 (1999)); *see also Graves v. Dretke,* 442 F.3d 334, 339-40 (Miss. 1986). "*Brady* applies equally to evidence relevant to the credibility of a key witness in the state's case against a defendant." *Graves,* 442 F.3d at 339. Under the *Brady* rule, favorable evidence that is suppressed is material if disclosure of the evidence creates a reasonable probability of a different result. As the United States Supreme Court explained, "the adjective [reasonable] is important," and "[t]he question is not whether the defendant would more likely

than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence." *Kyles v. Whitley*, 514 U.S. 419, 434 (1995). Under *Brady,* the good faith of the prosecutor is irrelevant. It does not even depend on whether the prosecutor had actual knowledge of the exculpatory evidence. The key issue is whether the defendant received a fair trial. A conviction based on false evidence going to a central issue in the case cannot stand. Of course, if the prosecutor was aware, or should have realized, that the witness's testimony was false, the Court should reverse the convictions, and the state must show, beyond a reasonable doubt, that the error could not have affected the verdict. *United States v. Agurs*, 427 U.S. 97, 103 (1976); *Hayes v. Brown*, 399 F.3d 972, 988-89 (9th Cir. 2005) (en banc); *Jenkins v. Artuz*, 294 F.3d 284, 294 (2d Cir. 2002); *Brown v. Wainwright*, 785 F.2d 1457 (11th Cir. 1986); *Boone v. Paderick*, 541 F.2d 447 (4th Cir. 1976) (prosecutor knew or should have known that false evidence was being presented where witness denied deal at trial).

The fact that Jordan had an understanding with the sheriff regarding a deal also undermines the reliability of Manning's conviction. When the credibility of a witness is a key factor in a case, suppression of evidence that could have been used to impeach that witness is often material. *See, e.g., Giglio v. United States*, 405 U.S. 150, 154-55 (1972). Here, Jordan had an implicit understanding with the sheriff that he would supply evidence against Manning in exchange for assistance with his pending charges.

In *Tassin v. Cain*, 517 F.3d 770 (5th Cir. 2008), the defense had requested information about potential deals. The State responded that it had no information about a deal, and a witness testified accordingly. *Id*. at 773. In post-conviction proceedings, however, the witness testified that she believed she would receive a ten year sentence for her role in the offense though she

could have been sentenced to as many as 90 years. *Id*. at 774 In affirming the grant of relief, this Court held: "*Giglio* and *Napue* set clear precedent, establishing that where a key witness has received consideration or potential favors in exchange for testimony and lies about those favors, the trial is not fair." *Id*. at 778. The State had argued that precedent requires a formal deal or explicit promise of future benefit in exchange for testimony. The Fifth Circuit rejected that contention: "Although *Giglio* and *Napue* use the term 'promise' in referring to covered-up deals, they establish that the crux of a Fourteenth Amendment violation is deception. A promise is unnecessary. Where, as here, the witness's credibility 'was . . . an important issue in the case . . . evidence of *any understanding or agreement as to a future prosecution* would be relevant to his credibility and the jury was entitled to know of it.'" *Id*. (quoting *Giglio*, 405 U.S. at 154-55) (emphasis added by Fifth Circuit)). The Fifth Circuit also approved the district court's reliance on *Bagley*, which addressed circumstances in which the prosecution did not disclose even the possibility of a reward for favorable testimony. As the Supreme Court held in *Bagley*: "This possibility of a reward gave [the witnesses] a direct, personal stake in respondent's conviction. The fact that the *stake was not guaranteed through a promise or binding contract*, but was expressly contingent on the Government's satisfaction with the end result, *served only to strengthen any incentive to testify falsely* in order to secure a conviction." *Id.* at 778 (quoting *United States v. Bagley*, 473 U.S. 667, 683 (1985) (opinion of Blackmun, J., joined by O'Connor, J.) (emphasis added by Fifth Circuit)).

Based on Jordan's recantation of his trial testimony, this Court should grant post-conviction relief or remand to the Circuit Court for an evidentiary hearing.

Ground III. The State Exercised Peremptory Strikes on the Basis of Race

A. This Ground is **not** procedurally barred.

On direct appeal, Petitioner unsuccessfully argued that the State violated his right to due process when the prosecutor exercised peremptory strikes to discriminate against African-American jurors. Although Petitioner presented this ground for relief on direct appeal, he asks this Court to revisit the issue pursuant to Miss. Code Ann. § 99-39-5, which permits the Court to address a ground for relief based on an intervening change in the law. Ordinarily, Petitioner would be barred from relitigating the claim under principles of *res judicata*. Miss. Code § 99-39-21(2). Despite this provision, however, the Supreme Court will reconsider an issue in light of an intervening decision. Miss. Code §§ 99-39-5, 99-39-23(6) and § 99-39-27(9). Decisions from the United States Supreme Court and the Fifth Circuit make absolutely clear that this Court erred in finding this ground for relief procedurally barred on direct appeal.

On direct appeal, Petitioner challenged the prosecutor's discriminatory use of peremptory strikes. Six African-American jurors were struck, and the prosecutor's reasons for striking them were either inconsistent with the record or equally applicable to several white jurors. In some instances, the reasons could not fairly be said even to be race neutral, as when the prosecutor struck at least two African-American jurors because they read Jet or Ebony.

This Court denied relief, finding Petitioner's argument procedurally barred because defense counsel did not make a rebuttal argument when the prosecutor exercised those strikes. That procedural ruling, however, is inconsistent with clearly established law. In *Miller-El v. Dretke*, 545 U.S. 231 (2005), the Supreme Court made clear that a petitioner may make arguments that were not presented to the trial judge and drew a sharp distinction between

evidence available to the state court and theories presented in support of the challenge to the peremptory strikes. As long as the relevant facts are before the trial court, it is not necessary that particular arguments had been made to show pretext.

For the final part of *Batson's* three-part test, the trial judge is charged with determining whether the defendant has shown purposeful discrimination. *Miller-El v. Cockrell*, 537 U.S. 322, 328-29 (2003); *see also Moody v. Quarterman*, 476 F.3d 260, 266-67 (5th Cir. 2007); *Rivera v. Nibco, Inc.,* 372 Fed. Appx. 757, 759 (9th Cir. 2010) ("[T]he third step of *Batson* primarily involves the trier of fact," which "must evaluate the record and consider each explanation within the context of the trial as a whole") (quoting *Kesser v. Cambra,* 465 F.3d 351, 359 (9th Cir. 2006) (en banc)). The Supreme Court has not imposed a requirement that the defense articulate every conceivable argument to rebut the prosecutor's race neutral reasons proffered to justify a peremptory strike. Instead, the trial judge must consider the strike "in light of all evidence with a bearing on it." *Miller-El v. Dretke,* 545 U.S. 231, 252 (2005). *See also United States v. Alanis,* 335 F.3d 965, 968 (9th Cir. 2003) ("We hold that a defendant's original objection to a prosecutor's allegedly discriminatory peremptory strikes, even after it is met with a prosecutor's gender-neutral explanation, imposes on the trial court an obligation to complete all steps of the *Batson* process without further request, encouragement, or objection from counsel"). On further review, the party opposing the peremptory strikes may advance additional theories based on the record.

The Supreme Court made clear that a reviewing court may consider arguments not presented at trial, provided that the evidence was available to the trial court. In *Miller-El,* the dissent complained that the petitioner advanced reasons for challenging the strike that had not been presented to the trial court. *See Miller-El,* 545 U.S. at 278 (Thomas, J., dissenting)

("Miller-El did not even attempt to rebut the State's racially neutral reasons at the hearing. He presented no evidence and made no arguments."). The majority, however, cautioned against "conflat[ing] the difference between evidence that must be presented to the state courts to be considered by federal courts in habeas proceedings and theories about that evidence. . . . There can be no question that the transcript of voir dire, recording the evidence on which *Miller-El* bases his argument and on which we base our result, was before the state courts. . . ." *Id.* at 241 n. 2.

Similarly, in *Snyder v. Louisiana,* 552 U.S. 472 (2008), the dissent criticized the majority for relying on a comparison of certain white and black jurors because Snyder had not made that argument before the trial court. In fact, the dissent pointed out that the comparison of a black juror and two white jurors was not even made in the petition for certiorari but was only discovered when the brief was drafted following the grant of certiorari. The dissent asserted that "[w]e have no business overturning a conviction, years after the fact and after extensive intervening litigation, based on arguments not presented to the courts below." *Id.* at 489. Needless to say, the majority rejected the dissent's contention and granted relief to Snyder.

The Fifth Circuit applied these principles in *Reed v. Quarterman,* 555 F.3d 364 (5th Cir. 2009), and *Woodward v. Epps,* 580 F.3d 318 (5th Cir. 2009). In *Reed,* the petitioner had offered a comparative analysis of white jurors acceptable to the state and black jurors who were struck peremptorily. The Texas Court of Criminal Appeals refused to consider the comparative analysis because the analysis was not raised at the *Batson* hearing. *Id.* at 369. On habeas review, the state raised the procedural bar. The Fifth Circuit examined the *Miller-El* decision, carefully noting the majority "soundly rejected" the dissenting opinion. *Id.* at 372. Further, the Fifth Circuit observed that "the Court even referred to the comparative analysis as something it would

conduct, not something that the parties must submit." *Id.* (citing *Miller-El,* 545 U.S. at 241). As the Fifth Circuit concluded, "*Miller-El* entailed virtually the exact same procedural posture as this case." *Id*. at 373. The bottom line is that the record supporting the comparative analysis was before the state courts, and the state courts were obliged to consider this complete record in applying *Batson*.

In *Woodward v. Epps,* 580 F.3d 318 (5th Cir. 2009), the Fifth Circuit noted that Woodward did not rebut the State's race-neutral reasons for some of the peremptory challenges. Citing *Miller-El* and *Snyder,* Woodward argued that "as long as the relevant facts were before the trial court, it was not necessary that particular arguments be made in support of a showing of pretext." *Id*. at 337. The State, in turn, contended that Woodward waived the *Batson* issue by failing to rebut the race-neutral reasons when they were offered at trial. After reviewing *Miller-El,* the Court of Appeals "decline[d] to find that Woodward waived any *Batson* claim based on a comparative analysis." *Id*. at 338. *See also United States v. Torres-Ramos,* 536 F.3d 542, 560 (6th Cir. 2008) (there is "an affirmative duty on the district court to examine the relevant evidence that is easily available to a trial judge before ruling on a *Batson* challenge," which includes "examining the juror questionnaires"); *Rivera*, 372 Fed. Appx. at 759 ("a comparative juror analysis is required on appeal, even when, as in this case, it was not requested or attempted below").

These decisions allow Petitioner to avail himself of the provisions allowing reconsideration of an issue based on an intervening decision. Petitioner raised a contemporaneous objection at trial, raised the issue on direct appeal, received an unfavorable ruling on the merits of the claim, and after his direct appeal, the United States Supreme Court

made clear in *Miller-El, supra,* that this Court's approach to resolving *Batson* challenges was flawed.

Under similar circumstances, this Court has addressed the merits of intervening decisions. For example, in *Ballenger v. State*, 761 So.2d 214 (Miss. 2000), the petitioner pointed out that she had raised on direct appeal a challenge to the trial court's refusal to instruct the jury on the elements of the offense of robbery. The Supreme Court rejected the claim. After Ballenger's direct appeal, however, this Court issued intervening decisions reaching a result contrary to the result reached in Ballenger's direct appeal. In light of these intervening decisions, this Court held that Ballenger established cause for circumventing the bar against relitigating claims that had been addressed on direct appeal. 761 So.2d at 219-220; *see also Stringer v. State*, 638 So.2d 1285 (Miss. 1994) (finding that *Maynard v. Cartwright*, 486 U.S. 356 (1988) and *Clemons v. Mississippi*, 494 U.S. 738 (Miss. 1990), were intervening decisions requiring the grant of post-conviction relief); *Nixon v. State*, 641 So.2d 751 (Miss. 1994) (finding that *Powers v. Ohio*, 499 U.S. 400 (1991), was an intervening decision but declining to grant relief due to the petitioner's failure to demonstrate prejudice); *Gilliard v. State*, 614 So.2d 370 (Miss. 1992).

This Court held that an intervening change in the law applies only to those decisions that are retroactively applicable. *See Manning v. State,* 929 So. 2d 885, 893-900 (Miss. 2005) (discussing *Teague v. Lane,* 489 U.S. 288 (1989)). The nonretroactivity principles, however, do not apply to this issue. In *Miller-El* and *Snyder*, the Supreme Court was clear that it was not applying a new rule of procedure; rather, it was simply applying the well-settled principles of *Batson*. Under similar circumstances, the Texas Court of Criminal Appeals has determined that *Miller-El* was a new legal decision allowing a petitioner to overcome a bar against successive

petitions even though *Miller-El* is not "new" as a matter of federal law. *See Ex parte Arthur Williams*, 2009 WL 1165504 (Tex. Crim. App. Apr. 29, 2009). What *Miller-El* and *Snyder* make clear is that this Court was misapplying the *Batson* test when it automatically found barred any challenge on appeal that went beyond what transpired during jury selection. In light of those decisions, which would have made a difference in the outcome, this Court should address the merits of this ground for relief.

B. Relevant Legal Principles

The Equal Protection Clause prohibits the racially discriminatory use of peremptory strikes. *Batson v. Kentucky,* 476 U.S. 79 (1986). The Supreme Court has established a test for assessing whether a prosecutor based peremptory strikes on race:

> First, a defendant must make a prima facie showing that a peremptory challenge has been exercised on the basis of race. . . . Second, if that showing has been made, the prosecution must offer a race-neutral basis for striking the juror in question. . . . Third, in light of the parties' submissions, the trial court must determine whether the defendant has shown purposeful discrimination.

Miller-El v. Cockrell, 537 U.S. 322, 328-29 (2003) (*"Miller-El I"*). A party may show discriminatory intent if the prosecutor's reasons are not supported by the record, if the prosecutor did not strike similarly situated white jurors, or if the prosecutor failed to question African-American jurors about traits that the prosecutor deemed significant when making the strike. *See generally Snyder v. Louisiana,* 552 U.S. 472 (2008); *Miller-El v. Dretke,* 545 U.S. 231 (2005) (*"Miller-El II"*). Here, the prosecutor gave multiple reasons that were either: 1) not race neutral; 2) false, or 3) equally applicable to white jurors.

A reviewing court is generally deferential to the credibility findings made by the trial judge. However, "deference does not imply abandonment or abdication of judicial review." *Miller-El I*, 537 U.S. at 340. Moreover, in this case, the trial judge made no specific findings

regarding any reason given by the prosecutor. Thus, if a reason is shown to have been problematic, this Court cannot conclude that the trial judge relied on other reasons when ruling on the strike. *See Snyder, supra*.

C. The State's Discriminatory Use of Peremptory Strikes

1. Shirley Wooten (Juror #12).

Shirley Wooten was the first African-American juror whom the prosecutor struck. The prosecutor explained that he struck Wooten for three reasons. First, he claimed that she indicated on her questionnaire that "she did not know what she would do with the death penalty," but that "today [in voir dire] she said that she could give it depending on the evidence." T. 535. He also indicated that he struck Wooten because she wanted to determine if the State had shown "beyond a shadow of a doubt" that Manning was guilty. T. 535. Finally, the prosecutor asserted that he struck her because she supposedly told deputies that she did not want to serve on the jury, and he "wanted to accommodate her." T. 535-36. The prosecutor's distortion of Ms. Wooten's responses and his failure to challenge similarly situated white jurors are indicative of pretext.

The prosecutor overstated any alleged inconsistency in Wooten's responses on her questionnaire and during voir dire. On her questionnaire, Wooten responded that she had no opinion on the death penalty, and that she did not know if she could vote for it. C.P. 1716. She explained that "I have to have the circumstances in front of me, the evidence weighed to outweigh both sides whether he's innocent or guilty, all the evidence brought before me before I can give a death penalty." T. 315. Wooten added, "If I have all the evidence showing that he is guilty and there is a death penalty, I'm quite sure that I could, you know, vote for the death penalty." T. 315.

Later, during individual voir dire, the prosecutor returned to her questionnaire response that she did not know if she could impose the death penalty, but Wooten again reaffirmed that she could vote for the death penalty: "If the evidence proved that he is guilty beyond of a [sic] shadow of a doubt, then I could vote for the death penalty." T. 419.

Wooten's responses are hardly much different from the responses of Ola Lee Smith (Juror #41) and Wilma Oliver (juror #20), white women who were selected to serve on the jury. Smith went so far as to indicate on her questionnaire that she could not impose the death penalty. C.P. 1637. Only during voir dire did she confirm that she could impose the death penalty. T. 324. Oliver, like Wooten, noted on her jury questionnaire that she had no opinion about the death penalty and that she could not vote for it except in "extreme circumstances." C.P. 1517. During voir dire, she altered her answer, explaining that she "could vote for it if – if [she] felt it was guilt." T. 319.

There was never an inconsistency in Wooten's position, and thus the prosecutor's rationale has no support in the record. Moreover, Wooten never expressed any reservations about her ability to vote for a death sentence, and her responses on her questionnaire and during voir dire were not materially different from those of Oliver and Smith. "Comparing [the prosecutor's] strike with the treatment of panel members who expressed similar views supports a conclusion that race was significant in determining who was challenged and who was not." *Miller-El II*, 545 U.S. at 252.

The prosecutor also referenced Wooten's remark that she could vote for the death penalty if the State could prove guilt "beyond a shadow of a doubt." T. 535. In sequestered voir dire, Wooten stated that evidence needed to prove the defendant was guilty "beyond a shadow of a doubt." T. 419. She subsequently confirmed that she would follow the law on reasonable doubt

and not hold the State to a higher burden of proof. T. 424. It appeared during voir dire that the prosecutor attempted to distort Wooten's responses. Even the trial judge cautioned the prosecutor not "to argue with the witness now," and pointed out that the prosecutor was "trying to . . . put in your words what she is saying." T. 422.

Significantly, at least one white juror also indicated that he would hold the state to a higher burden of proof. Daniel Bean (juror #43), a white male who served on the jury, wrote on his questionnaire: "Under the right circumstances I feel the death penalty would be justified; (if there is proof without a *shadow* of doubt)." C.P. 1104 (emphasis in original). Not only did the prosecutor accept Bean as a juror, the prosecutor did not even voir dire Bean about this matter. The failure even to voir dire Bean on this point, much less exercise a peremptory strike against him, undercuts the plausibility of this reason for the strike. *Miller-El II*, 545 U.S. at 255 (noting that disparity during voir dire is indicative of discrimination).

The prosecutor's final reason for striking Wooten was her alleged desire not to serve on the jury. T. 535. This rationale is also suspect. The prosecutor alleged that he had second- or third-hand information that Wooten did not want to serve on the jury, but when the trial judge asked the venire if jury service would be a hardship, Wooten did not respond affirmatively. T. 281-82. Moreover, the prosecutor did not ask Wooten any questions about her alleged unwillingness to serve when he questioned her on voir dire. As the Court observed in *Miller-El II*, the prosecutor would have questioned the juror if concerns about her willingness to serve "had actually mattered." 545 U.S. at 246. In short, given her unequivocal answers that she could vote for the death penalty, in addition to the fact that she worked for law enforcement, T. 335, Wooten "should have been an ideal juror in the eyes of a prosecutor seeking a death sentence." *Id*. at 247.

2. James Graves (Juror #14).

The prosecutor's main reason for striking Graves was that the juror "reads some very liberal publications which are the type of publications which have lately been carrying a lot of articles on the O. J. Simpson trial espousing O. J. Simpson's innocence." T. 536. The so-called "liberal" publication that Graves read was Jet magazine. C.P. 1342. This is not even race neutral: an African-American juror was struck for reading a magazine marketed to African-Americans. *See, e.g., Ricardo v. Rardin,* 189 F.3d 474, 1999 WL 561595 at *2 (9th Cir. 1999) (prosecutor's decision to strike black juror who was reading The Autobiography of Malcolm X was not race neutral). Moreover, there is no evidence that Jet is "liberal," unless "liberal" is a code word for "black." Moreover, simply because Graves read a magazine marketed to African-Americans by no means suggests that he would agree with everything in that magazine or that anything appearing in a magazine about a particularly famous case would have any influence on how he would view Petitioner's case. The prosecutor did not ask Graves any questions about his reading preferences.

The prosecutor's assertion that Jet espoused O. J. Simpson's innocence is also false. There were not "a lot of articles" in Jet taking that point of view. *See* Successor Exhibit 46 (articles in Jet discussing the Simpson case and appearing before Petitioner's trial).[29]

The trial judge interrupted to suggest that Graves has no occupation. The prosecutor agreed: "he has no occupation, your Honor. That would be another factor." T. 536. This is problematic for several reasons. First, the trial judge improperly interjected himself on behalf of the prosecutor to concoct additional reasons to justify the strike. The "pretextual significance [of a peremptory strike] does not fade because a trial judge . . . can imagine a reason that might not

[29] This justification also fails because Linda Ann Moore, a black female who was accepted by the prosecutor, also reported on her questionnaire that she read Jet. C.P. 1484. If the prosecutor had been truly concerned with jurors reading Jet, he would have struck her.

have been shown up as false." *Miller-El II,* 545 U.S. at 252. Second, the fact that the prosecutor only came up with this justification after being prompted by the trial judge "reeks of afterthought." *Id.* at 246. Third, four white people indicated either that they were unemployed or did not indicate an occupation on their questionnaires but were acceptable to the prosecutor, and one of them, Earl Bolinger (Juror #37), served on the jury.[30] Finally, and most importantly, the reason is false. Graves indicated on his questionnaire that he worked at Forrest General Hospital. C.P. 1339.

The prosecutor also found Graves objectionable because he had sunglasses hung in his shirt, wore gold chains, and had an earring. The trial judge made no finding with respect to this proffered justification. When this irrelevant factor is considered with the false reasons given for striking Graves, there is no plausible conclusion other than the prosecutor struck Graves on account of his race.

3. Ronald Henry (Juror #18).

The prosecutor offered three reasons to justify striking Henry. First, the prosecutor noted that on the questionnaire, Henry stated that "he had no opinion; today he said he did have an opinion." T. 536. During voir dire, however, Henry simply stated that "I really have to review the evidence and make up my mind at that time." T. 317. He did not deny that he could vote for the death penalty. Later, during individual voir dire, Henry repeated, "it depends on the evidence. If the evidence points toward that, I can vote for it." T. 435. Henry explained that any reluctance about the death penalty expressed on his questionnaire had to do with whether the evidence was clear that the person deserved it. The prosecutor quizzed Henry as to whether he would hold the State to a higher burden, but Henry declared that "it'd have to be upon a

[30] Bobbi Jo Dearman (WF, No. 7, C.P. 1298); Earl J. Bolinger (WM, No. 37, C.P. 1130); Sharron Nell Roberts (WF, No. 46, C.P. 1567); and Robert Frank Blackney III (WM, No. 53, C.P. 1122).

reasonable – a doubt before I could – can do that." T. 437. As noted in the discussion of juror Wooten, similar statements were made by white jurors, who were acceptable to the State.

The prosecutor also struck Henry because "a member of his family has been convicted of a crime. His brother was convicted of statutory rape." T. 536. This rationale is likewise pretextual, for the prosecutor found acceptable white jurors who had been arrested. For example, Walter Mixon was arrested for DUI. C.P. 1475. Terry Gill, an alternate, was arrested for DUI. C.P. 1333. Phillip White was arrested for public drunkenness. C.P. 1689. In addition, Mary Palmer (Juror #9) had a brother-in-law arrested for carrying a weapon while on parole, possession of drugs, and attacking a narcotics officer. C.P. 1522. Robert Bartee (Juror #22) had a son arrested for the sale of marijuana. C.P. 1093. The disparate treatment of similarly situated white and black jurors is indicative of discrimination.

Finally, the prosecutor alleged that he struck Henry because when the court mentioned to the prospective jurors the possibility of being sequestered, "Mr. Henry was steadily shaking his head, uh, shutting his eyes. Uh, it was apparent to this attorney that he did not want to serve on this jury." T. 536. Henry, however, did not respond when the court asked jurors about hardships. More importantly, the prosecutor did not mention this concern at all to Henry, which is something that the prosecutor would have done if this purported concern "had actually mattered." 545 U.S. at 246.

4. Joyce Merritt (Juror #19)

The prosecutor recited many of the same reasons for striking Merritt as he had used for striking other African-American jurors. Most of these reasons are false or could have been applicable to white jurors. For instance, he complained about her "wishy-washiness about the death penalty." T. 537. According to the prosecutor, on her questionnaire, Merritt indicated that

she had no opinion on the death penalty, but during voir dire she stated that she did have an opinion. T. 537. The prosecutor, however, mischaracterized the record. Though Merritt responded on her questionnaire that she had no opinion about the death penalty, she also noted on her questionnaire that she could vote to impose it. C.P. 1470. During voir dire, Merritt reaffirmed her questionnaire response and told the prosecutor that "[u]pon the evidence I could go with the death penalty." T. 317. Without waiting for the prosecutor to complete his next question, Merritt declared that "[w]ithout a doubt all completely all the evidence points to a verdict of guilt, I can return the death penalty." T. 317.[31] Merritt never wavered about her ability to vote for a death sentence, and thus did not display any "wishy-washiness."[32]

The prosecutor also rationalized his strike against Merritt by stating that "[s]he also has some member in her family who is convicted of a crime." T. 537. This rationale is also inconsistent with the record. On her questionnaire, Merritt responded "no" to the question as to whether any one in her family or a close friend had ever been the defendant in a criminal case. C.P. 1467. *See Riley v. Taylor*, 277 F.3d 261, 279 (3rd Cir. 2001) (en banc) (*Batson* violation found where prosecutor's assertion was "entirely unsupported by the record").

The prosecutor also stated that he struck Merritt because she was unemployed. T. 537. Ms. Merritt, however, indicated on her questionnaire that she was disabled. C.P. 1464. Moreover, as indicated in the discussion concerning juror Graves, the prosecutor did not have similar concerns about employment where white jurors were concerned. *See Miller-El II*, 545 U.S. at 250 n. 9. ("it would have been hard to square that explanation with the prosecution's tolerance for a number of [similarly situated] white panel members").

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[31] The prosecutor later asked Merritt whether she would hold state to a higher burden of proof, and she answered that she would be satisfied with a standard of beyond a reasonable doubt. T. 439.

[32] Furthermore, as discussed in connection with Wooten, the prosecutor accepted white jurors who displayed a similar, if not greater, degree of "wishy-washiness."

The prosecutor also found Merritt unworthy of jury service because she "reads some of those publications which I perceive or – or have had articles in them on the O. J. Simpson trial, once again espousing the innocence of O. J. Simpson." T. 537. On her questionnaire, the publications listed by Merritt included Ebony and Jet. C.P. 1468.[33] As indicated in the discussion of juror Graves, this reason is not even race neutral. Moreover, Jet merely covered the trial as a news story without "espousing" any position regarding Simpson's guilt or innocence. Ebony did little more than solicit range of views from prominent individuals but did not take a position on the Simpson case. *See* Successor Exhibit 47.

The prosecutor also alleged two other reasons for striking Ms. Merritt: she watches "a tremendous amount of TV" and "[s]he was making some eye contact with defense counsel and the lawyers who were, uh, not the lawyers, but the – the other men that were over there with defense counsel during some recesses." T. 537. It would not be surprising that someone who did not work outside the home would watch television. Moreover, the prosecutor did not ask Merritt about her television viewing. With respect to the "eye contact," it should not be surprising that any prospective juror would at some point make eye contact with the attorneys. Moreover, the trial judge made no findings about these justifications. More fundamentally, when these weak reasons are viewed in conjunction with the factually inaccurate reasons already noted, the pretextual nature of the prosecutor's rationalizations is apparent.

5. Christi La Marque Robertson (Juror #35).

On his questionnaire, Robertson indicated that he strongly agreed with the death penalty and could vote to impose it. C.P. 1581. At no point did the prosecutor ask to voir dire Robertson individually. Nevertheless, the prosecutor struck Robertson. To justify the strike of someone

[33] Ms. Merritt also listed Ladies Home Journal and Newsweek. C.P. 1468.

who "should have been an ideal juror in the eyes of a prosecutor seeking a death sentence," *Miller-El II,* 545 U.S. at 247, the prosecutor explained that the juror "lives in an extremely bad neighborhood," "the functional equivalent of Brooksville Gardens in this community." T. 544. Brooksville Garden is a virtually all-black housing area in Starkville. Thus, the prosecutor struck a black juror for living in a black neighborhood. This asserted reason is not race neutral. *See, e.g., Com. v. Horne,* 635 A.2d 1033, 1034 (Pa. 1994) (striking juror for living in "high crime area" is not race neutral); *Ex Parte Bird,* 594 So. 2d 676, (Ala. 1991) ("bare allegation" that juror lives in "high crime" area is constitutionally deficient).

The prosecutor also stated that "Mr. Robertson is a[n] individual who once again reads those magazines, the – the press which has had those articles on O. J. Simpson and things of that nature in it – contained in it." T. 544. Robertson listed in his questionnaire the following publications: Gentlemen's Quarterly, Time, and Newsweek. C.P. 1579. The prosecutor found juror Charles Newcomer, a white male, acceptable when selecting the alternates even though Newcomer read Time. C.P. 1507. Similarly, the prosecutor accepted Tonya Beisel, a white juror, even though she responded that she read Newsweek. C.P. 1118.

Finally, the prosecutor asserted that Robertson did not complete his questionnaire "and the incompleteness of the form made me obviously question the – the veracity of his responses to begin with . . . ." T. 544. Once again, the prosecutor's reason was false; Robertson completed most of the questionnaire. C.P. 1574-1581. There may have been some blank portions of the questionnaire, but those blanks are explainable. For instance, Robertson described himself as single and childless. Thus, questions pertaining to children and spouses were left blank. Robertson had always lived at the same address, and he listed his employer, salary, and duties. C.P. 1576. Many of the follow-up questions regarding prior involvement with the legal system

were left blank because Robertson answered that he had not had any involvement with the legal system. Robertson answered questions about his church involvement, hobbies, reading habits, television shows he watched, his neighborhood, whether he worked in a mental health, welfare, or social work setting, and his nonmembership in organizations that seek to influence public policy. As noted previously, Robertson indicated a pro-prosecution position with respect to the death penalty. C.P. 1581.

The prosecutor did not apply this reason about the allegedly incomplete questionnaire even-handedly to white jurors. For example, juror Earl Bolinger (juror #37), who served on the jury, left blank far more questions than Robertson did. Bolinger did not note the age of his children or any information about his wife other than her name. C.P. 1129. Unlike Robertson, he failed to note how far he went in school, his occupation, employer, income, and job description. At least four pages of the questionnaire were left completely blank except to indicate that he lived at another address in the past ten years and did not serve in the military. C.P. 1130-33. Unlike Robertson, Bolinger did not list hobbies, organizations, newspapers, magazines, or favorite television programs. If anything, the prosecutor should have had greater cause to question the "veracity" of Bolinger's responses.

6. Troy Fairley (Juror #42)

The State gave no reason for striking Juror #42 Troy Fairley (C.P. 1314), an African-American woman. T. 548. Because the defense had clearly established a prima facie case of discrimination with the prosecutor having exercised six out of nine strikes up to that point, the prosecutor was obliged to come forward with race neutral reasons to explain the strike. Because the prosecution failed to present any reasons, there is nothing to rebut the prima facie case, and

therefore Petitioner has established a violation of *Batson*. *See Price v. Cain,* 560 F.3d 284 (5th Cir. 2009).

D. Applying *Miller-El* and *Snyder*, Petitioner is Entitled to Relief.

On direct appeal, this Court noted that the trial court "ruled that each of the reasons given by the prosecution was a race-neutral reason, and there was no intentional discrimination." *Manning v. State,* 726 So. 2d 1152, 1182-83 (Miss. 1998). Despite finding that the trial court ruled on the merits of the *Batson* objection, this Court also found "that, with the exception of one juror whom the prosecution offered no reason for striking, Manning has waived his right to contest the striking of these potential jurors because defense counsel offered no rebuttal to the prosecution's challenges, and thus, failed to timely object to their dismissals so as to preserve this issue for review." *Id.* at 1183. As noted previously, this holding is at odds with the recent Supreme Court and Fifth Circuit decisions. As the Supreme Court explained in *Miller-El II,* the trial judge is responsible for review of the entire record before it is to discern if the prosecutor struck jurors on the basis of race. 545 U.S. at 252. *See also Woodward v. Epps,* 580 F.3d 318, 337 (5th Cir. 2009).

In the alternative to the alleged waiver, this Court for the most part did little more than assess whether the proffered justification for the strikes was race neutral. (The exception pertained to a discussion of juror Henry). Contrary to *Miller-El,* this Court did not reach the third step of the *Batson* test even though Petitioner catalogued the numerous problems with the prosecutor's stated reasons. *Id.* at 1183-86. *See Lewis v. Lewis*, 321 F.3d 824, 834 (9th Cir. 2003) (granting *Batson* relief where "[t]he trial court did not conduct a meaningful step-three analysis"); *Riley v. Taylor*, 277 F.3d 261, 286 (3rd Cir. 2001) (en banc) ("Deference in a *Batson* case must be viewed in the context of the requirement that the state courts engage in the three-

step *Batson* inquiry. . . . Here, the state courts failed to examine all the evidence to determine whether the State's proffered race-neutral explanations were pretextual.").[34]

Indeed, a review of this Court's discussion of the *Batson* claim shows how its methodology is contrary to the more searching review undertaken in *Miller-El*. For instance, with respect to juror Graves, this Court discussed the asserted reason that Graves was struck because he wore gold chains. *Manning*, 726 So. 2d at 1184.[35] This Court did not address the trial judge's interjection of the factually erroneous rationale that Graves was supposedly unemployed, nor did it touch on the fact that Graves was struck because he read Jet. For juror Robertson, this Court simply quoted the prosecutor's stated reasons and then found this challenge procedurally barred. 726 So. 2d at 1184-85.

In the discussion of juror Wooten, this Court seemed to collapse steps two and three of the *Batson* inquiry. It mentioned her alleged "equivocation on the death penalty and found that this was "not pretextual or discriminatory, but was race-neutral." *Id*. at 1185. This Court did not discuss her actual answers on voir dire or the similarities between Wooten and several white jurors.

For juror Merritt, this Court overlooked the prosecutor's false statement that the juror had a family member who had been arrested. Furthermore, this Court added another reason that the prosecutor had not mentioned. According to the state supreme court, "The prosecutor asked her if the evidence was anything less than without a doubt if she could impose the death penalty and she responded that she could not." *Manning*, 726 So. 2d at 1186. What actually occurred was that the prosecutor asked Merritt whether she would hold the state to a higher burden of proof,

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[34] *See also Dolphy v. Mantello,* 552 F.3d 236, 239 (2d Cir. 2009).

[35] For juror Fairley, the state court found the challenge procedurally barred because defense counsel did not object when voir dire proceeded without the prosecutor giving a race neutral reason for the strike. The state court then suggested reasons to justify the prosecutor's strike. 726 So. 2d at 1183.

and she answered that she would be satisfied with a standard of beyond a reasonable doubt. T. 439. "Where the facts in the record are objectively contrary to the prosecutor's statements, serious questions about the legitimacy of a prosecutor's reasons for exercising peremptory challenges are raised." *McClain v. Prunty*, 217 F.3d 1209, 1221 (9th Cir. 2000).

For juror Henry, this Court acknowledged that Petitioner had presented an argument regarding the disparate treatment of white and black jurors. The state court recognized that white jurors shared some of the characteristics that the prosecutor found objectionable in Henry; however, this Court indicated that the strike would be acceptable if the white jurors did not share all characteristics with Henry. Nevertheless, as the Supreme Court pointed out in *Miller-El*, "[n]one of our cases announces a rule that no comparison is probative unless the situation of the individuals compared is identical in all respects, and there is no reason to accept one . . . . A per se rule that a defendant cannot win a *Batson* claim unless there is an exactly identical white juror would leave *Batson* inoperable; potential jurors are not products of a set of cookie cutters." *Id*. at 247 n. 6. Moreover, this Court did not address all reasons set forth by Petitioner on direct appeal, including the position that the prosecutor misrepresented the record when recounting Henry's attitude toward the death penalty. Contrary to the insinuation that Henry flip-flopped when answering about the death penalty, Henry explained on voir dire that he could vote for it but only after hearing the evidence. T. 317, 435.

With respect to several jurors, this Court did not look to determine whether several of the reasons given were even race neutral. For instance, it accepted as "race neutral" complaints that jurors read magazines marketed to blacks. Under no circumstances could such a reason be fairly categorized as "race neutral." Similarly, the judge accepted as "race neutral" a reason that a

juror lived in a neighborhood comparable to Brooksville Garden, i.e., a predominantly black neighborhood.

Finally, as in *Miller-El II*, and as set forth in detail above, this Court credited as acceptable reasons without record support or reasons that were equally applicable to acceptable white jurors. This Court would have conducted this inquiry if *Miller-El* had been available prior to the direct appeal decision in Petitioner's case. By applying the appropriate methodology for *Batson* analysis spelled out in intervening decisions such as *Miller-El, supra,* this Court would have granted relief and reversed Petitioner's convictions.

Ground IV – Petitioner is Entitled to Relief Due to the Cumulative Error at the Culpability Phase of his Trial

In his prior attempt to obtain post-conviction relief, Petitioner raised a number of claims of state misconduct (and in the alternative, ineffective assistance of counsel) regarding the suppression of exculpatory evidence. Much of this evidence supporting these claims was reviewed in the Statement of Facts to this petition. In brief, the State (1) failed to disclose a deal with Paula Hathorn, (2) failed to disclose that she acted as a state informant and gave numerous statements that would have been helpful to the defense at trial, (3) relied on Hathorn's false testimony about her prior record and the representation she received from Mark Williamson, (4) failed to disclose evidence that would have impeached Frank Parker's credibility, (5) relied on false evidence from Earl Jordan regarding threats Manning supposedly made to Doug Miller, and (6) relied on dubious and inappropriate testimony from Earl Jordan and his alleged offer to take a polygraph test. *Manning v. State,* 929 So. 2d 885, 893-900 (Miss. 2006).

This Court should reconsider those allegations in light of evidence that the State failed to disclose its deal with Earl Jordan and the State's reliance on Jordan's false testimony regarding Manning's alleged "confession." To determine materiality of the suppression of evidence (or

trial counsel's ineffectiveness), a reviewing court must consider the relevant evidence "collectively, not item by item." *Kyles v. Whitley,* 514 U.S. 419, 436 (1995). To refuse to address the cumulative impact of the evidence that the jury never heard would give the State an unwarranted windfall and result in the denial of Petitioner's right to a fair trial.

The fact that Petitioner presented some of the claims previously does not bar review of this claim. In *Schledwitz v. United States,* 169 F.3d 1003, 1012 (6th Cir. 1999), the Court of Appeals found that *Brady* claims involve exceptions to the res judicata rule. The only way to consider the full impact of any suppressed evidence would be to consider all evidence in the aggregate. Failure to do so would result in the suppressed evidence being considered in isolation, which is directly contrary to *Kyles*. *See also United States v. Basciano,* 2010 U.S. Dist. LEXIS 85502, 20-21 (E.D.N.Y. 2010) ("[T]he mandate rule has a more limited application when a defendant asserts new *Brady* claims in addition to *Brady* claims that have already been asserted on appeal. Because the materiality of suppressed information must be 'considered collectively, not item-by-item,' a district court must consider the defendant's new claims cumulatively with the materiality of all the defendant's *Brady* claims, including those that the defendant appealed.") (quoting *Kyles, supra*); *Hopkinson v. Shillinger,* 781 F. Supp. 737, 745-46 (D. Wyo. 1991); *State ex rel. Engel v. Dormire,* 304 S.W.3d 120, 126 (Mo. 2010). This Court should grant post-conviction relief or remand this matter to the Circuit Court for an evidentiary hearing regarding all evidence not previously presented to Petitioner's jury.

Ground V – Manning Received the Ineffective Assistance of Counsel at the Penalty Phase of his Trial.

A. This Ground is Not Procedurally Barred.

Petitioner supports this ground for relief with evidence not previously seen by this Court. Through no fault of Petitioner, he was not able to develop this evidence when he first sought post-conviction relief.

During earlier post-conviction proceedings, Petitioner sought discovery of records pertaining to him and his family from the Department of Human Services. The Circuit Court denied his motion for access to the records. Likewise, Petitioner sought funding for neuropsychological testing, but the Circuit Court denied that request. After this Court denied post-conviction relief, Petitioner obtained the results of critical mental health testing and has obtained records detailing the deprivation he suffered as a child. Moreover, he obtained additional affidavits from trial court confirming that their failure to present any of this information was not the result of a strategic decision. Miss. Code Ann. § 99-39-5 allows Petitioner to circumvent the bar on successive petitions with facts not previously available. Moreover, Petitioner's demonstration that he was denied the effective assistance of counsel at the penalty phase of his trial implicates a fundamental right, and this Court overlooks bars to vindicate the denial of fundamental rights. *Rowland v. State*, 98 So.3d 1032, 1036 (2012) ("In addition to the statutory exceptions afforded by the [UPCCRA], we have provided that an exception to the procedural bars exists for errors affecting certain constitutional rights.").[36]

[36] Petitioner raised this ground for relief in federal habeas proceedings. The District Court found that trial counsel's performance was deficient but ruled that Petitioner did not show prejudice. *Manning v. Epps,* 695 F. Supp.2d 323 (N.D. Miss. 2009). Although the District Court granted permission to appeal, the Fifth Circuit dismissed the case, blaming Manning for not satisfying

B. Trial Counsel's Deficient Penalty Phase Performance.

This Court must consider 1) whether counsel's performance was deficient; and 2) whether Petitioner suffered prejudice as a result. *See Strickland v. Washington,* 466 U.S. 668 (1984); *Wiggins v. Smith*, 539 U.S. 510 (2003). To show deficient performance, Petitioner must demonstrate that "counsel's representation fell below an objective standard of reasonableness." *Anderson v. Johnson*, 338 F.3d 382, 391 (5th Cir. 2003); *see also Strickland*, 466 U.S. at 687. Counsel has an "obligation to conduct a thorough investigation of the defendant's background." *Porter v. McCollum,* 130 S. Ct. 447, 452-53 (citing *Williams v. Taylor,* 529 U.S. 362, 396 (2000)); *see also Wiggins v. Smith*, *supra*, at 510 (quoting ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases, Section 11.4.1 (1989)).

Counsel in capital murder cases are required to discover and present "information concerning the defendant's background, education, employment records, mental and emotional stability, family relationships, and the like," so that the jury can take these into account in determining the sentence. *Williams v. Taylor*, 529 U.S. 362, 396 (2000) (citing ABA Standards for Criminal Justice, Section 4-4.1). *See Sears v. Upton*, 130 S. Ct. 3259 (2010) (sentence reversed for counsel's failure to discover evidence of parents' abusive relationship, defendants' history of head injuries, deficits in mental cognition and reasoning, drug and alcohol abuse).

Manning's trial counsel conducted virtually no preparation for the penalty phase. Manning was represented at trial by two attorneys: Mark Williamson and Richard Burdine. Both attorneys have provided affidavits regarding their penalty phase preparation. Successor Exhibits 36 and 37. The affidavits showed that Williamson and Burdine divided responsibilities so that Williamson would handle the innocence/guilt phase of the case and Burdine would handle

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the federal statute of limitations even though two state court appointed lawyers failed to file pleadings on Manning's behalf to toll the limitations period. 688 F.3d 177, 184 (5th Cir. 2012).

sentencing. Successor Ex. 36; Successor Ex. 37.[37] Although Williamson took primary responsibility for the innocent/guilt phase, he wrote letters to Burdine to provide information for Burdine's use in preparing a mitigation defense. Successor Ex. 37 and attachments to that exhibit. This information included the identities and contact information of individuals who had volunteered to testify for Manning, and a list of categories of information of the kind listed in the commentary to Section 4-4.1 of the ABA Standards for Criminal Justice. *Id.* Williamson also sent Burdine information and recommendations from John Holdridge, a capital defense attorney who conducted an interview with Manning and his mother and recommended follow-up on issues such as neurological impairment, fetal alcohol effects, head injuries, grinding poverty, abandonment, trauma and childhood neglect. Successor Ex. 38 (affidavit of John Holdridge) R. 1969, 1978-84. Holdridge also recommended that trial counsel seek the assistance of a psychologist and a social worker. Successor Ex. 38.

Burdine did not contact any of the witnesses identified in Williamson's letters, and he did not investigate, much less offer, any information about topics disclosed in Holdridge's notes. Burdine called only two witnesses -- Manning's mother and aunt -- whom he had interviewed *just prior to putting them on the stand.*[38]

This Court has not hesitated to find deficient performance on similar facts. In *Davis v. State,* 87 So.3d 465 (Miss. 2012), for instance, this Court squarely rejected an argument that failure to call penalty phase witnesses was reasonable trial strategy: "It takes no deep legal analysis to conclude that an attorney who never seeks out or interviews important witnesses and

[37] The affidavits supplemented what had been presented to this Court in the earlier post-conviction proceeding. See PCR Ex. 39, 44. Burdine's state court affidavit was filed with the rebuttal in support of Manning's petition for post-conviction relief.

[38] In his affidavit submitted to the state court, Burdine stated that he interviewed Manning's mother and aunt "during the penalty phase" of the trial. PCR Ex. 44. In the affidavit submitted with this petition, he stated that he did not remember when the interviews took place. Successor Ex. 37.

who fails to request vital information was not engaging in trial strategy." *Id.* at 469. The Court explained, "[Trial counsel] had a duty to conduct a reasonable, independent investigation to seek out mitigation witnesses, facts, and evidence for the sentencing phase of Davis's trial. Instead, he conducted no independent investigation." *Id.* The Court noted that:

> Almost all of [trial counsel's] interviews of mitigation witnesses and preparation for the penalty phase of Davis's trial took place the day before trial. Shaddock made no attempt to obtain and review Davis's medical, school, or military records; he never interviewed any of the prison personnel where Davis was incarcerated prior to trial; and he did not produce any evidence that described the alleged abuse Davis had suffered as a child, at the hands of his father.

Davis, 87 So.3d at 467.

Because of trial counsel's failure to perform his constitutional duty to Mr. Davis, this Court granted penalty phase relief. The facts of Manning's case are similar. A minimal investigation was performed, but no records were obtained, and only the most minimal penalty phase case was presented.

In *Wilson v. State*, 81 So.3d 1067 (Miss. 2012), this Court held that Wilson was entitled to an evidentiary hearing on his claim of ineffective assistance of counsel at the penalty phase: "A thorough review of the direct-appeal record and the exhibits offered by Wilson in support of his post-conviction motion appear to show that Bristow and Johnstone conducted virtually no investigation to obtain mitigation evidence. A defendant facing the death penalty has the right to provide the jury with mitigating evidence." *Id.* at 1084. Citing *Porter v. McCollum*, 130 S.Ct. 447, 452-453 (2009), and *Williams v. Taylor*, 529 U.S. 362 (2000), this Court held that "Counsel must conduct an adequate investigation in order to be able to present that mitigating evidence to the jury." *Wilson*, 81 So.3d at 1075.

Based on the leads available to counsel, including information about childhood deprivation and neurological problems, trial counsel's penalty phase preparation was objectively unreasonable.

C. Petitioner was Prejudiced by Counsel's Deficient Performance.

To show prejudice resulting from his attorney's failures, Manning must show "that there is a reasonable probability that, but for counsels' unprofessional errors, the result of the proceeding would have been different." *Strickland v. Washington*, 466 U.S. 668, 694 (1984). This requires evaluation of "the totality of the available mitigation evidence -- both that adduced at trial, and the evidence adduced in the habeas proceeding -- in reweighing it against the evidence in aggravation." *Williams v. Taylor*, 529 U.S. 362, 397 (2000). "If we can conclude that a juror could have reasonably concluded that the death penalty was not an appropriate penalty in this case based on the mitigating evidence, prejudice will have been established." *Lockett v. Anderson*, 230 F.3d 695 (5th Cir. 2000) (citing *Emerson v. Gramley*, 91 F.3d 898, 907 (7th Cir. 1996) (noting that counsel had to convince only one of twelve jurors to refuse to vote for death). *See also Wiggins*, 539 U.S. 510, 537 ("Had the jury been able to place petitioner's excruciating life history on the mitigating side of the scale, there is a reasonable probability that at least one juror would have struck a different balance").

Burdine had been made aware of several issues relevant to mitigation before trial. Even more evidence came to light later. During the post-conviction stage of the case, Manning submitted the affidavit of Gary Mooers, a Ph.D. in Social Work from the University of Mississippi. Dr. Mooers referred to medical records which verified the earlier reports of head injuries and showed that Manning had been hospitalized for at least two of them. In addition, there was a finding of spina bifida. Dr. Mooers opined that Manning's extreme poverty and poor

nutrition, together with excessive use of alcohol beginning at age fourteen, likely interfered with his neurological and psychological development. Dr. Mooers also noted specific incidents of violence and trauma that are sure to have affected Manning psychologically: he had been shot as a bystander during the attempted robbery of a convenience store, he had witnessed his mother being beaten by her husband, and he was present when his mother stabbed her husband. Successor Exhibit 39. (PCR Exhibits 37 and 47).

Since the prior post-conviction proceedings, Manning obtained his records from the Department of Human Services. Copies of reports found in the Social Services Case Record on Melvina Manning are attached as Successor Exhibit 40. These reports provide objective and unbiased evidence of the impoverished conditions in which Willie Jerome Manning was raised. According to the records, Manning was "deserted" by his mother, Ruth Manning, when he was two years old, and left with his grandmother, Melvina Manning, who was fifty years old at the time, had a "low mentality," could not read or write her name, and had no income other than a small monthly social security payment. Ruth Manning had a second son, Marshon, who was likewise left with Melvina when Willie was about six. Successor Exhibit 40 at 1, 8. Ruth Manning came and went, leaving the parental responsibilities to Melvina. Although Melvina did her best to provide for the children, she could barely manage to take care of herself. As the following excerpts demonstrate, she was constantly running out of money, could not afford food, and lived at times in places that had no bathroom, no running water and only firewood for heat:

> Mrs. Manning came into the office today with her two grandchildren saying she . . .had purchased half of her stamps for this month and her money had run out and didn't have food. Ex. 40 at 1.
>
> Client's income is so low for three people, she is constantly running out of money. It just isn't enough to go around. *Id.* at 7.

> Worker is pleased that client has finally found a house in town, which will be very convenient, and is a little more comfortable and at least has gas and running water in the house also a bath room, which she hasn't had, all of this will make life a little easier for her and her children. *Id.*
>
> Mrs. Manning recently moved from the Brooksville Garden apartments to the country paying $6.00 a month rent. She states the house has water, and will use wood for heating. *Id.* at 1.
>
> She has had a hard time keeping firewood and is looking for another place to live. . . . . When spring gets here she will have less expense and will not have such a struggle. *Id.* at 2.
>
> [Melvina] found a house out Rock Hill Road. . . . She was very pleased over this house because it had running water and gas heat. Rent $35.00 per month. *Id.* at 4.
>
> Melvina needs a better house and hopes to find one. She has had a very hard struggle this winter as it has been so cold. Things will be better when spring arrives. *Id.* at 6.
>
> She is very dis-satisfied with the house she has, it is badly in need of repairs looks real bad in places, landlord won't repair, and when worker suggested not paying rent until she repairs the house, she threatened to make her move, and not being able to find another place she had to pay her rent of $30.00. *Id.* at 8.
>
> Although Melvina loved her grandchildren dearly, she complained to Ruth and to the

DHS social worker that she was not capable of providing adequate care to very young children:

> She wanted to talk about her daughter Ruth. She said that Ruth had to go to the hospital and she had to keep her baby, and she had a hard time, because she wasn't used to seeing after a small child. Exhibit 40 at 2.
>
> She also stated her daughter, Ruth, moved there with her baby and promised to help her, but instead has brought the baby there and dumped it and has been in the road or somewhere ever since. *Id*. at 1.
>
> [S]he told her daughter that she wasn't able to take care of her and her baby and they would have to move. *Id.*
>
> Mrs. Manning is complaining about her daughter going off when she gets ready and leaves her baby there for her to take care of it. She said that she was going to get out and look for her another place to live and just let her daughter and baby live there. I explained that this wouldn't solve her problem that she would still follow her and bring the baby to see her often. *Id.* at 2.

> [Melvina] doesn't want baby place[d] in Foster home. [Mother w]ants her daughter be made to care for child. *Id.* at 3.

Melvina and the social worker were both concerned Ruth would have more children and that Melvina would be faced with the prospect taking care of the additional children as well:

> She stated that Ruth was living over in Lowndes Co. and was expecting another baby. I told her if she didn't put her foot down that she would come back there and leave this baby. She said that she wasn't going to take any more of her children's. Ex. 40 at 4.

> Melvina's daughter, mother of Willie and Marshon[,] has had her baby. Worker had advised Mrs. Manning that she had her hands full & she must not let her come back there to her house or let her dump this baby off on her. She finally states she is not. *Id.* at 6.

> Ms. Manning daughter recently had a baby this makes two she has with her. Worker counseled with Ms. Manning about not taking any more of her grandchildren. *Id.* at 8.

The records show that Willie Jerome Manning, at a very young age, was required to help his illiterate grandmother perform the fundamental tasks of daily living:

> Her grandson attends school regularly and . . . is lots of help as Mrs. Manning can't read or dial the telephone. She depends on him to do these things for her. *Id.* at 2.

> Willie attends school regular and is such a big help to his grandmother since she doesn't read or write, and with help she has learned to dial and call on the telephone and can count her money. *Id.* at 7.

> She is over 56 years old, no education, can't read nor write her name, has health problems. She has had Willie since a baby. He is now 9 years old and very smart and seems to be doing real well in school. He has to dial the telephone and help his grandmother shop, when a service worker or a friend doesn't go with her. *Id.* at 5.

> Mrs. Manning has moved into the new project on Long St. for elderly & disabled people. . . . Ms. Manning is so thrilled & happy over her apartment. Worker along with manager went over . . . how to use the appliances and the heat pump & also the cooling. Her grandson Jerome is very bright & has been lots of help to his Grandmother because he can read & write. He could set the heat pump. *Id.* at 9.

One of the social workers assigned to Melvina Manning's case was Catherine Jones, who remembers seeing Melvina and Willie Jerome Manning on several occasions in the DHS office.

Ms. Jones remembers with specificity the support and affection the boy showed for his grandmother:

> Ms. Manning was limited to a certain degree in her ability to read and recall information, and she relied on Jerome to help. Jerome did most of the talking during our meetings because he knew and remembered his grandmother's address, telephone number and birth date, even though he was only eight or nine years old at the time. I remember Ms. Manning asking Jerome, "Baby, what is our address?" and "Baby, what is our telephone number?" Jerome was always well-mannered. He really helped take care of his grandmother and helped her get to appointments. It was obvious to me that he loved and adored his grandmother.

Successor Ex. 41 Declaration of Catherine Jones.

The following report, dated April 8, 1980, is the earliest indication of Petitioner's troubles with the law. He was eleven years old at the time:

> Worker was told by Youth Counselor Howard Brown – that Jerome had stolen a motor cycle and was found on side of road. He was picked up & brought back to Melvina's house. Brown wanted Melvina to keep him until he could get papers & arrangements made to put him in a group home for boys in Jackson.
>
> Melvina has been very much upset and heart broken over the way Jerome has acted. She let him go back to his mother because she couldn't make him mind & keep up & check on what he was doing. She thought he was going to school when he would be goofing off & hanging out with Louise Sharp's boys which are bad boys.

Successor Exhibit 40 at 10.

Within a year of this incident, Petitioner was sent to the Columbia Training School for Juveniles. During this period of his life, when he was not in training school, Petitioner was spending more time with his mother, Ruth Manning. Ruth Manning's inability to provide parenting for her children was already well documented by DHS. Petitioner was allowed to live with his mother nevertheless:

> Mrs. Manning has had problems with her grandson Jermone [sic]. He was a good boy and attended school, got in with a bad bunch of boys, started playing hookey from school, getting into trouble with the law, stealing and etc. He was getting to be such a problem, until we thought it would be best if he want back to live with his mother, thinking she would be able to manage him. He was soon back with Mrs. Manning.

[. . . .]

> Jerome had gone to spend the night with his mother . . . . It seems he wants to visit and be with his mother more than he did before he had to go to Columbia. Worker is still concerned about Jerome especially him wanting to be at his mothers. His mother Ruth is very bad influence for Jerome. Ms. [Melvina] Manning is aware of this.

Successor Exhibit 40 at 11-12.

Petitioner was sent to another training school when he was twelve, this time to Piney Woods:

> Worker picked up Ms. Manning and Jerome this a.m. to go shopping for clothes and a suit case for Jerome as he will be leaving 01-04-82 for Pin[e]y Woods School for boys. Worker purchased two pair of shoes and pair of dress pants at J.C. Penney's. Suit case at Wal-Mart and his clothes at Ashley's. All came to around $170.00. Worker got several pair of jeans, two sweaters, shirts, jacket, socks, underwear and T-shirts and thermo underwear. Jerome seemed very pleased and happy over his clothes.

Id. at 13

> Worker called this a.m. to check to see if Mr. Brown had picked Jerome up. Jerome was still at home, but expected Mr. Brown around 10 o'clock.
>
> Worker called back and Ms. Manning stated that they left around 10:30. She stated Jerome cried when he kissed her good bye.

Id.

The circumstances never improved for Melvina Manning, Willie Manning or any of his siblings. The social worker's fear that Ruth Manning would leave other children with her aging mother did indeed come to fruition. In fact, Melvina obtained legal custody of Marshon in 1980. (Successor Exhibit 42). Ruth gave birth to three more sons after Willie and Marshon (Walter, Deon and Draper), and at least two of them ended up living with Melvina.

> Mrs. Kathy Kimbrell called concerning Melvina and her grandchildren. Her maid had an occasion to be in this home and was appalled at the lack of clothing and food. These are Ms. Manning's grandchildren by her daughter Ruth. Mrs. Kimbrell assumed that Ruth was in prison somewhere.

> Worker discussed this with Mrs. Manning. She has become a lot more feeble. Somehow there was difficulty over her food stamps and her ADC check. She was given food from the pantry and a visit was arranged 9/14/86. Worker found Melvina and four year old Draper at home. Ms. Manning's legs are very swollen from diabetes, according to client. The apartment showed that she has not the strength to clean it. She stated that Ruth will not be home from prison for five years. She is having too much difficulty in caring for these children. It appears that they are not being fed and clothe[d] properly.

Successor Exhibit 40 at 14.

> Worker will work on the possible placement of these children, Draper, Deon and Marshon. Mrs. Ford and Mr. Ford are in very poor health. The apartment furnishings were filthy, torn and dangerous as wire springs were visible on couch and chairs. The mother of these boys is in prison. She was sentenced for five years, but will possibly get out on parole in about 2 ½ years. The grandparents are unable to control Marshon's behavior and the apartment manager has asked that they move or ask Marshon to move. We are trying to locate his putative father as a possible placement. Caseworker will work on possible placement of these boys, Marshon, Deon, Draper due [to] the grandparent inability to provide adequate care or supervision."

Id. at 15.

Since prior post-conviction proceedings, Manning has been evaluated by Dr. Marc Zimmermann. Dr. Zimmermann conducted several kinds of testing and concluded as follows:

> a. Manning exhibits "dysfunction in executive function and working memory," a deficit in his ability "to hold geometric figures in memory," which is "consistent with reading disorders and parietal lobe deficits or deficits of memory." Successor Exhibit 44.
>
> b. Manning has "a 73 % probability of brain dysfunction" and "borderline intellectual functioning." *Id*.
>
> c. Manning may be diagnosed with fetal alcohol spectrum disorders, in particular, alcohol-related neurodevelopmental disorder (ARND), because "[h]is mother drank during pregnancy, and there is evidence of a complex pattern of behavioral or cognitive abnormalities inconsistent with developmental level and unexplained by genetic background or environmental conditions." *Id.*[39]

[39] Zimmermann's affidavit contains the following report concerning Manning's younger brother Draper, which supports the probability that Manning suffers from fetal alcohol effects: "An indication as to how heavily Ruth drank throughout her life may be found in Draper Manning's Community Counseling records. According to the counselor, Ruth reported that she was drunk when Draper was born and that the doctors told Ruth that Draper was drunk and had to have his stomach pumped when he was born. Draper later had behavioral problems in school, and was arrested." Successor Ex. 44.

d. further consultation should be obtained from a medical professional "with an expertise in the field of Fetal Alcohol Spectrum Disorder." *Id*.

e. Manning's development was impacted negatively by "lack of adequate support or supervision, chaos, and poverty during his childhood and early adolescence," which prevented him from learning skills to compensate for his neuropsychological deficits. *Id.*

This new evidence unquestionably could have altered the balance between mitigating and aggravating factors. Unlike the mother and aunt who testified at trial, the DHS employees were not related to Manning and therefore were unbiased. They were objective, trained professionals who had actually recorded information about Manning and his family for reasons unrelated to the prosecution. At least one of the jurors who sentenced Manning to die may well have voted for life if they had known about the evidence disclosed in the DHS records, including the extreme poverty, the lack of adequate food, clothing and heat, the nefarious influence of Manning's mother, and the image of Manning as a nine-year-old child assisting his only real parent, his mentally challenged grandmother, in such basis tasks as dialing a telephone number. This evidence would have humanized Manning and allowed the jury to view him as a whole person. The findings of Dr. Zimmermann likewise could have altered the balance. The Supreme Court has recognized that evidence of the kind identified by Dr. Zimmermann is sufficient to support a finding of prejudice if it is omitted from the jury's consideration. *See Williams* at 370 (evidence that defendant "*might* have mental impairments organic in origin" was factor in finding prejudice).[40]

[40] The information provided by Dr. Zimmermann should also be taken into account in assessing the 1994 pretrial evaluation performed by the Mississippi State Hospital. The doctor who authored the 1994 report provided an affidavit stating:

> In the report that I completed in January 1994, we did not have information from Mr. Manning's mother about her drinking during pregnancy, records from the Department of Human Services and other information about Mr. Manning's social history. If we had

Manning has shown *numerous* categories of unused mitigation evidence that are exactly the kind recognized by the Supreme Court as indispensable. Moreover, there is an extreme imbalance in this case between the evidence that was offered at trial and the evidence that was available but ignored. The two witnesses called by Burdine had not been prepared to discuss anything beyond the identities of Manning's other family members, the fact that Manning did not know his father, and the fact that his mother sometimes bought him toys and candy when he was younger. Not only did this testimony fail to provide anything helpful or illuminating about Manning's upbringing (*cf. Porter v. McCollum,* 130 S. Ct. 447, 449 (2009) (evidence presented at sentencing "left the jury knowing hardly anything about him other than the facts of his crimes")); it was in fact misleading because it created the impression that Manning's life had been ordinary. [41] In this respect the mitigation case presented at trial was like that presented in *Sears v. Upton*, in which the jury was led to believe that the defendant's family relationships were "stable, loving and essentially without incident," when in fact his parents were physically abusive toward one another, he had deficits in mental cognition and reasoning, had suffered head injuries and had abused drugs and alcohol. *Porter*, 130 S. Ct. 3259, 3261-62. In fact, the deprivations at issue in *Sears* were no more severe than those affecting Manning -- evidence of abusive parents, behavior problems, deficits in mentality and impulse control, head injuries and

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> been aware of information that Mr. Manning's mother drank alcohol when she was pregnant with him, I would have considered the possibility that Mr. Manning may have suffered from fetal alcohol syndrome at birth and I would have included this as a mitigating factor.

Successor Exhibit 45 (Statement of W. Criss Lott, Ph.D.)

[41] By testifying that she had been a good mother to Manning, Ruth Manning actually contradicted the potentially useful truth that she had been "an alcoholic, absentee mother" like the mother in *Wiggins v. Smith,* 539 U.S. 510, 535 (2003).

substance abuse also exists in Manning's case in equal degrees. And unlike Manning, the defendant in *Sears* had not been shot and had not spent part of his childhood homeless.[42]

The State may assert that some of the proffered mitigating evidence is "double-edged." However, evidence of brain injury and mental impairment are unquestionably important in mitigation. *Frazier v. Huffman*, 343 F.3d 780, 794-96 (6th Cir. 2003) (counsel ineffective for failing to present evidence of brain injury and lack of impulse control that reasonably resulted from it). As noted above, Dr. Zimmermann did in fact find a 74% probability of brain dysfunction, borderline intellectual functioning and a probable diagnosis of alcohol-related developmental disorder. Successor Exhibit 44.

More to the point, however, *the possibility that mitigation evidence might portray the defendant in a negative light does not detract from its value in presenting the defendant as a whole person*. Many courts have recognized this, including the Supreme Court, as the following from *Sears* demonstrates:

> [T]he fact that along with this new mitigation evidence there was also some adverse evidence is unsurprising, given that counsel's initial mitigation investigation was constitutionally inadequate. Competent counsel should have been able to turn some of the adverse evidence into a positive – perhaps in support of a cognitive deficiency mitigation theory. In particular, evidence of Sears' grandiose self-conception and evidence of his magical thinking, were features, in another well-credentialed expert's view, of a "profound personality disorder." This evidence might not have made Sears any more likable to the jury, but it might well have helped the jury understand Sears, and his horrendous acts – especially in light of his purportedly stable upbringing.

Sears v. Upton, 130 S. Ct. 3259, 3264 (2010).

[42] Other courts have found prejudice for the omission of evidence similar to that in this case. *See Johnson v. Mitchell*, 585 F.3d 923, 943-45 (6th Cir. 2009) (petitioner was beaten and threatened by father as a child, petitioner used drugs extensively, developed paranoia, was intellectually competent but was impulsive and antisocial); *Williams v. Anderson*, 460 F.3d 789, 804-05 (6th Cir. 2006) (petitioner's father left family when petitioner was young; petitioner had alcoholic mother, became addicted to cocaine and suffered from personality disorders).

The Fifth Circuit has also recognized the value of mitigation evidence, despite its negative aspects, in a case that is close to Manning's facts. In *Adams v. Quarterman*, the court reasoned:

> The State contends that the post-conviction affidavits are "double-edged," and that if the affiants had so testified at trial, the State would have impeached any mitigating evidence with evidence of, *inter alia,* Adams's childhood thefts, teenage marijuana use, absence without leave from the Army, gang affiliation, and racist attitude. We recognize that the State may have followed such a strategy at the trial's punishment phase, but we cannot conclude that the aggravating effect of this evidence would have outweighed the mitigating evidence in a reasonable jury's minds.
>
> [. . . .]
>
> We conclude that Pickett's insufficient investigation prevented his discovery of substantial, readily available mitigating evidence of Adams's childhood abuse, neglect, and abandonment. A reasonable probability exists that, absent these errors (and even when considering the aggravating aspects of Adams's crime), a jury would have determined that "'the balance of aggravating and mitigating circumstances did not warrant death.'"

Adams v. Quarterman, 324 Fed. Appx. 340, 352, 2009 WL 1069330, *8 (5th Cir. 2009).

In *Johnson v. Mitchell*, 585 F.3d 923 (6th Cir. 2009), the court found prejudice because in light of the new mitigating evidence, "a drastically different portrait of the petitioner emerge[d]." *Id.* at 945. The new evidence showed that the petitioner "endured hardships and traumatic experiences" and developed a personality disorder that helped explain aspects of his conduct. There was evidence of cocaine abuse and a psychological report found that the petitioner could react to situations in emotional outbursts. *Id.* The court held that it was prejudicial for defense counsel not to present evidence of petitioner's personality disorder:

> [A]lthough not absolving him of responsibility for his crimes, [the disorder] helped explain why certain circumstances would be viewed by the petitioner in certain ways and would prompt certain abnormal responses. The jury might also have seen Johnson as an individual struggling to act appropriately in the face of paranoia and a distorted world view, a struggle that was only exacerbated by drug abuse. To hold in this case that serious consideration of such evidence could not

> have "change[d] the calculation the jury previously made when weighing the aggravating and mitigating circumstances of the murder," . . . is -- in our judgment -- to ignore reality.

Johnson, 585 F.3d at 945. *See also Thomas v. Horn*, 570 F.3d 105, 129 (3rd Cir. 2009) (finding prejudice even though petitioner's "mental health history . . . paint[ed] him in a negative light . . . . A single juror may well have believed that this unifying factor explained Thomas' horrific actions in a way that lowered his culpability and thereby diminished the justification for imposing the death penalty."); *Correll v. Ryan*, 539 F.3d 938, 955 (9th Cir. 2008) (finding prejudice even though mitigating evidence would have opened the door to "damaging rebuttal" evidence, including escapes from mental health facilities and hostage taking situations; evidence could "have been used to support Correll's claims of dysfunctional upbringing and continuing mental disorder.")

Virtually any evidence can be taken as "either dehumanizing or mitigating, depending on the context and history given for each cited fact." *Id.* The jury had already determined that he had murdered Jon Steckler and Tiffany Miller. There is little possibility that their negative perception of Petitioner would have been significantly worsened if they had also known of Petitioner's history of poverty, neglect and violence. Petitioner's chances of obtaining a life sentence could not have been reduced by evidence that he was damaged by forces beyond his control.

The failure of Manning's mitigation defense is that it did not include *additional* evidence needed to present him as a whole person, and left the jury without an explanation for the factors that led to his problems. Dr. Zimmermann's testimony regarding fetal alcohol effects could have provided this kind of explanation. As his affidavit states, "Mr. Manning's history of impulsive behavior, poor judgment and involvement with the criminal justice system, deficits in executive

function, poor academic history, problems with reading and arithmetic, and problems with memory are some of the problems associated with pre-natal exposure to alcohol." Successor Ex. 44.

Willie Manning is prejudiced within the meaning of *Strickland* if confidence in the verdict is undermined by trial counsel's errors. The available evidence is extensive. In light of the available evidence and trial counsel's failures, "there is a reasonable probability at least one juror reasonably could have determined that death was not an appropriate sentence." *Neal v. Puckett*, 286 F.3d 230, 241 (5th Cir. 2002).

V. CONCLUSION.

Wherefore, for the foregoing reasons, Petitioner asks this Court to grant the following relief:

- Order that MCL Exhibits 9, 10, 19, and 20 (all nail scrapings) be subjected to DNA testing;
- Order that FBI exhibits Q43 and Q44, which were examined by the FBI, and MCL Exhibits 5 and 24 be sent for mitochondrial DNA analysis;
- Order that Petitioner's counsel be allowed to inspect the rape kit to determine if testing could be probative;
- Order that Petitioner's counsel be allowed to be present when the evidence is packaged for shipment to the labs;
- Allow funding sufficient to cover the initial costs of determining whether DNA comparison of the samples is feasible;
- Grant Post-conviction relief or at least an evidentiary hearing on the remaining claims.

Respectfully submitted, this the ___ day of March 2013.

WILLIE JEROME MANNING

By: _____
COUNSEL FOR PETITIONER

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CERTIFICATE OF SERVICE

I, David P. Voisin, hereby certify that I have served this day a copy of the foregoing Motion to counsel for Respondents:

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_____
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