

**Case No. 10-70008**

**IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT**

**WILLIE JEROME MANNING,  
Petitioner-Appellant & Cross-Appellee**

**v.**

**CHRISTOPHER EPPS, COMMISSIONER,  
MISSISSIPPI DEPARTMENT OF CORRECTIONS,  
And JIM HOOD, ATTORNEY GENERAL,  
Respondents-Appellees & Cross-Appellants**

**Appeal from the United States District Court  
For the Northern District of Mississippi**

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**SUPPLEMENTAL BRIEF OF PETITIONER-APPELLANT**

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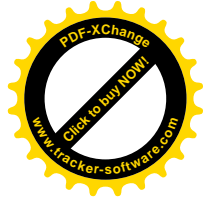
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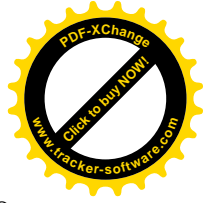
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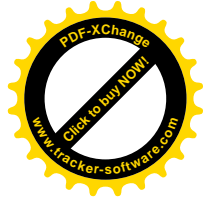
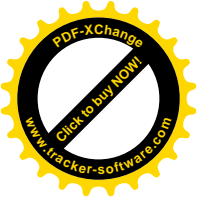
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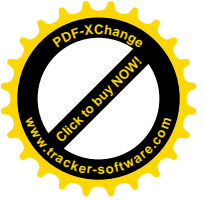


## SUPPLEMENTAL BRIEF

On July 15, 2011, this Court asked for supplemental briefing to address the grounds on which the District Court granted a certificate of appealability and the grounds raised by Respondents in their cross-appeal. Petitioner relies principally on his prior submissions and focuses much of this supplement on developments occurring since he filed his reply and response to the cross-appeal on December 15, 2010.

### I. THE STATE VIOLATED *BATSON V. KENTUCKY*, AND THIS GROUND FOR RELIEF IS NOT BARRED.

Petitioner alleged that the prosecutor's racially discriminatory exercise of peremptory strikes violated *Batson v. Kentucky*, 476 U.S. 79 (1986). In the alternative, Petitioner asserted that if this ground were barred due to a failure of trial counsel, then he was denied the effective assistance of counsel. Respondents contended that the claim was procedurally barred and that the state court's alternative merits ruling was not unreasonable. The District Court rejected Respondents' procedural bar argument, but found that Petitioner was not entitled to relief. The District Court granted a certificate of appealability, and Respondents appealed the ruling with respect to the procedural bar. Petitioner addresses both the merits of the claim and Respondents' cross-appeal in this section. As discussed below, there are three reasons why the *Batson* claim is not barred: 1) Petitioner is

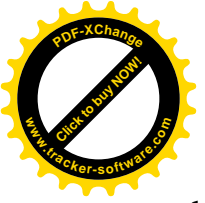


allowed to rely on new theories to challenge a strike as long as the evidence was before the trial court; 2) the state court's ruling in post-conviction proceedings lifted the bar; and 3) the rulings of the state court that prevented Petitioner from developing the *Batson* claim amounted to an unreasonable application of *Batson* and thus cannot serve as the basis of a procedural bar. Petitioner also briefly addresses the merits of the claim but does not treat the merits extensively; instead, he relies on his prior briefing.

A. The District Court Correctly Applied Controlling Precedent in Rejecting the Application of a Procedural Bar.

Tracking the decision of the Mississippi Supreme Court on direct appeal, Respondents contend that this ground for relief is procedurally barred because trial counsel did not attempt to rebut the allegedly race neutral reasons proffered by the prosecutor to rationalize his exercise of peremptory strikes. Brief for Resp. at 16-17; *Manning v. State*, 726 So. 2d 1152, 1183 (Miss. 1999). However, this Court has squarely held that in capital cases a Petitioner may offer new theories, including a comparison of African-American jurors and white jurors, to support a challenge to a peremptory strike. *Woodward v. Epps*, 580 F.3d 318 (5<sup>th</sup> Cir. 2009); *see also Reed v. Quarterman*, 555 F.3d 364 (5<sup>th</sup> Cir. 2009).

Respondents overlook *Woodward* as well as *Miller-El v. Dretke*, 545 U.S. 231, 252 (2005), and *Snyder v. Louisiana*, 552 U.S. 472 (2008), the Supreme Court decisions providing the basis for this Court's decision to disregard the procedural



bar. In both *Miller-El* and *Snyder*, the Supreme Court addressed reasons offered by the Petitioner for challenging the strikes even though some of those reasons had not been presented to the trial court. As the Court explained, there is a “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. . . .” *Miller-El*, 545 U.S. at 241 n.2.<sup>1</sup> The juror questionnaires and voir dire transcript were before the state courts in this matter as well. Consequently, the District Court was correct in rejecting Respondents’ assertion of a procedural bar.

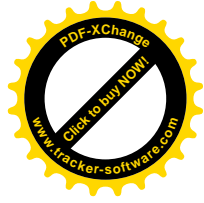
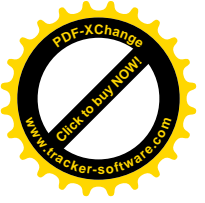
B. *Hodges v. Epps* Also Supports a Finding that a Procedural Bar Is Inapplicable to the *Batson* Claim.

On direct appeal, the Mississippi Supreme Court found Manning’s *Batson* claim procedurally barred but reached the merits in an alternative holding. As discussed in the preceding section (and in Petitioner’s brief and reply), the procedural rule is inapplicable. Nevertheless, the state court’s subsequent treatment of the *Batson* claim provides an additional reason for rejecting the bar.

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<sup>1</sup> Given the clear directive in *Miller-El*, it is no surprise that other federal courts consider the entire record before the state court and not simply the particular arguments presented in state court. See, e.g., *United States v. Torres-Ramos*, 536 F.3d 542, 560 (6<sup>th</sup> 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 v. Nibco, Inc.*, 372 Fed. Appx. 757, 759 (9<sup>th</sup> Cir. 2010) (“a comparative juror analysis is required on appeal, even when, as in this case, it was not requested or attempted below”).





Because the Mississippi Supreme Court found the *Batson* claim barred due to counsel's failure to offer rebuttal at trial, Petitioner challenged counsel's handling of the *Batson* issue in post-conviction proceedings. Although it denied relief, the Mississippi Supreme Court found that the issue had been preserved and that it had reviewed the claim on direct appeal. The state supreme court's treatment of this issue is as follows:

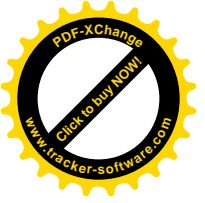
The State argues Manning is wrong to assert that defense counsel did not preserve *Batson* claims. The defense attorney did raise a claim under *Batson*, and the trial court required the State to give race-neutral reasons for its peremptory challenges. Those reasons were then reviewed by this Court on appeal.

*Manning v. State*, 929 So. 2d 885, 904 (Miss. 2006).<sup>2</sup> When faced with two state court decisions regarding a particular claim, a federal habeas court “begin[s] by

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<sup>2</sup>In its Response before the state supreme court, the Attorney General reversed the position taken on direct appeal and asserted that trial counsel's performance could not have been deficient because the *Batson* claim was in fact adequately raised before the trial court. The State's position was as follows:

Manning contends that trial counsel was ineffective in failing to preserve a claim under *Batson v. Kentucky*, 476 U.S. 79 (1986), for review by this Court on direct appeal. However, this is not what the record reflects. Trial counsel did raise a claim under *Batson* at trial. However, the trial court found that Manning had failed to make out a *prima facie* case of discrimination, but then required the State to give reasons for its strikes. ***What more could trial counsel do?*** In any event this Court under the precedent of *Hernandez v. New York*, 500 U.S. 352, 359, 111 S. Ct. 1859, 114 L.Ed.2d 395 (1991), held that once the prosecution states reasons for the exercise of peremptory strikes they can be reviewed. This Court then proceeded to do just that. See 726 So. 2d at 1182-87, ¶¶



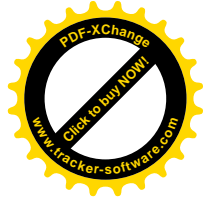
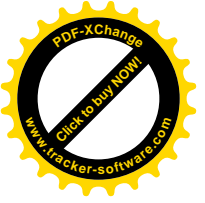
asking which is the last *explained* state-court judgment.” *Ylst v. Nunnemaker*, 501 U.S. 797, 805 (1991) (emphasis in original). Here, the state post-conviction court addressed the ineffectiveness claim, found that counsel was not deficient because he had preserved it for appellate review, and then noted that it had previously reviewed the merits of the claim. *Manning*, 929 So. 2d at 904. The post-conviction court, relying on the State’s concession that trial counsel did everything possible to preserve the claim, found no deficient performance. To reach this conclusion, the Mississippi Supreme Court necessarily reversed its prior finding of default because counsel had preserved the claim for review and reaffirmed its position on the merits. Moreover, because the last state court opinion did not rest on, or even acknowledge the possibility that defense counsel may have defaulted the *Batson* claim, this Court must address the merits of the claim. *See Harris v. Reed*, 489 U.S. 255, 263 (1989); *Caldwell v. Mississippi*, 472 U.S. 320, 327 (1985).

This Court recently applied these principles under analogous circumstances in *Hodges v. Epps*, \_\_\_ F.3d \_\_\_, 2011 WL 3211197 (5<sup>th</sup> Cir. July 29, 2011). There, this Court affirmed the grant of habeas relief in part due to a flawed

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107-39. Therefore, the underlying substantive claim was held to be without merit and is thus *res judicata* and cannot be relitigated in this application for post-conviction review.

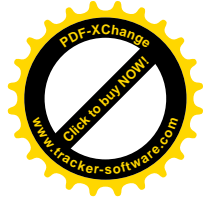
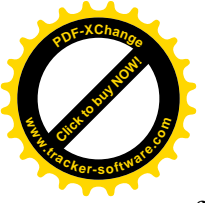
Resp. to App. for Leave to File Pet. for P-C Relief, *Manning v. State*, No. 2001-DR-00230-SCT, at pp. 37-38 (filed July 31, 2002) (emphasis added).



sentencing instruction regarding the consequences of jurors' failure to agree on an appropriate sentence. Before reaching the merits of the claim, this Court rejected Respondents' suggestion that the claim was procedurally barred.

As with the *Batson* issue in this case, the state supreme court initially found the instructional issue barred but also addressed the merits. Hodges renewed the instructional issue in post-conviction proceedings. In denying relief on that claim in post-conviction proceedings, "the Mississippi Supreme Court did not mention a procedural bar; instead, it quoted extensively from the merits discussion in its earlier opinion on direct appeal" and found the claim barred by *res judicata*. *Hodges*, at \*2. Because the state court reached the merits without mentioning the procedural bar, this Court found that the state court removed the previously imposed procedural bar. *Id.* (citing *Ylst v. Nunnemaker*, 501 U.S. 797, 801 (1991)); *see also Cone v. Bell*, 129 S. Ct. 1769, 1781 (2009) (a state court's decision not to review the merits of a claim because it has already done so "creates no bar to federal habeas review").

The state court's treatment of Manning's *Batson* claim is similar. When Manning raised a challenge to counsel's handling of the *Batson* claim, the state court did not refer to the underlying claim having been barred. In fact, the gist of its decision was that counsel raised the *Batson* claim, thereby preserving it for review, and it had been reviewed on the merits. Because the post-conviction court

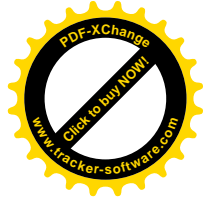
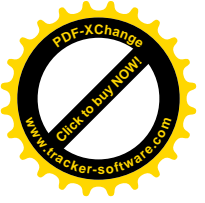


found that the *Batson* claim had been raised (and by implication was not procedurally defaulted), then there is no bar to this Court's merits review.

C. The State Courts' Mishandling of the *Batson* Issue Satisfies § 2254(d) and Provides No Basis for the Application of a Procedural Bar.

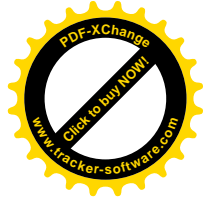
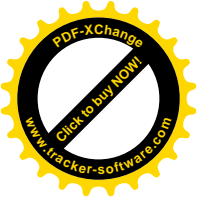
As Petitioner explained in his prior briefing, the trial court failed to give his attorney the opportunity to rebut the prosecutor's reasons for strikes against African-American jurors. For instance, after hearing the prosecutor's reasons for the first four strikes of African-American jurors, the trial judge stated that he "voices no opinion on the State's reasons." T. 542. Although defense counsel renewed the *Batson* challenge, the trial court found it "premature." T. 543. After the prosecutor struck a fifth African-American juror, defense counsel objected for the third time. T. 543. Although the prosecutor again gave various rationalizations for the strikes, the trial court again made no findings. The trial judge did not require the prosecutor to explain a strike against a sixth African-American juror, and the defense again renewed its objection. T. 550-51.

After *Batson* was raised for the fourth time, the trial court declined to take up the motion but promised to allow the defense to "develop that motion more fully at your leisure." T. 551, 557, 559. The next morning, when defense counsel raised the *Batson* objection for the fifth time, the trial court remarkably found that it had "already ruled on this on the *Batson* challenges." T. 560.



The trial judge's aborted promise to allow the defense an opportunity to develop the *Batson* claim amounted to an arbitrary denial of the opportunity to develop a federal ground for relief. *See Michel v. Louisiana*, 350 U.S. 91, 93-95 (1955) (rejecting claim for failure to file objections before deadline established by state procedure, but noting that “[t]he test is whether the defendant has had ‘a reasonable opportunity to have the issue as to the claimed right heard and determined by the State court’” (collecting authorities; citation omitted)). Moreover, the state court's actions involved an unreasonable application of *Batson*, which requires the trial judge to make findings, based on the record, as to whether Petitioner established that the strikes were based on race. *See, e.g., Wade v. Cain*, 372 Fed. Appx. 549, 551-52 (5<sup>th</sup> Cir. 2010) (rejecting state's procedural bar argument and conducting comparative juror analysis when trial court did not afford that opportunity at trial); *Moody v. Quarterman*, 476 F.3d 260, 267-68 (5<sup>th</sup> Cir. 2007) (federal court need not defer to state trial court's findings “because it failed to make any findings of fact relative to the heart of [the *Batson* claim]”); *Coombs v. Diguglielmo*, 616 F.3d 255 (3<sup>rd</sup> Cir. 2010) (reaching the merits of *Batson* challenge despite state court procedural bar because trial court precluded development of issue).

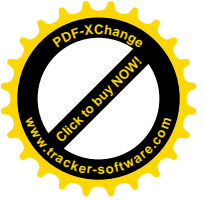
D. The State Court Unreasonably Applied *Batson* When It Failed to Look Beyond Whether the Strikes were Facially Race Neutral.



On direct appeal, the Mississippi Supreme Court did little more than erroneously rely on a procedural bar and ascertain whether the proffered reasons were race neutral. *Batson* demands more; the court must review the entire record before it to discern if the prosecutor struck jurors on the basis of race. *See Miller-El, supra; Riley v. Taylor*, 277 F.3d 261, 286 (3<sup>rd</sup> Cir. 2001) (en banc); *Dolphy v. Mantello*, 552 F.3d 236, 239 (2<sup>nd</sup> Cir. 2009); *Reynoso v. Hall*, 395 Fed. Appx. 344 (9<sup>th</sup> Cir. 2010). Moreover, the District Court found numerous instances in which the prosecutor gave reasons unsupported by the record or reasons that were equally applicable to white jurors, but upheld the strikes because it found at least one reason to support the strike that could not be rebutted. Such a mechanistic approach to salvaging peremptory strikes flies in the face of the Supreme Court's admonition in *Miller-El* that jurors are "not products of a set of cookie cutters." 545 U.S. at 247 n.6. For these reasons and the reasons set forth previously, this Court should deny Respondents' cross-appeal and reject the application of a procedural bar, and reverse the lower court's denial of habeas corpus relief.

## II. PETITIONER WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL AT THE PENALTY PHASE OF HIS CAPITAL TRIAL.

The District Court found that trial counsel provided deficient performance at the penalty phase but Petitioner failed to show prejudice. In deciding this issue, the District Court considered evidence, such as social service records, affidavits from trial counsel, affidavits from staff with the Department of Human Services,

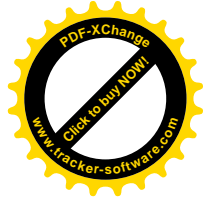
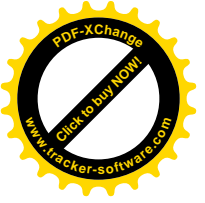


and the report of a neuropsychologist. In *Cullen v. Pinholster*, 131 S. Ct. 1388 (2011), the Supreme Court held that review under § 2254(d)(1) “is limited to the record that was before the state court that adjudicated the claim on the merits”). However, Petitioner’s claim of ineffective assistance of counsel at the sentencing phase of his trial is not affected by *Pinholster*. Although the district court in this case allowed Petitioner to supplement the state-court record, the supplemental evidence was limited to information that the state court had prohibited Petitioner from obtaining during the state post-conviction process.

The state court thwarted Petitioner’s efforts to fully develop the ineffectiveness claim, first, by rejecting the claim on the merits on direct appeal,<sup>3</sup> when the worst that should befall the defendant under Mississippi law is an adverse ruling that does not prejudice his right to raise the issue in post-conviction proceedings. *Read v. State*, 430 So. 2d 832, 841 (Miss. 1983) Second, the trial court and state supreme court on post-conviction review refused to give Petitioner access to certain evidence (later allowed by the federal court) that would bolster his ineffectiveness claim, including social assistance records of his own family in the possession of the Department of Human Services and funding for neuropsychological testing. Finally, when Petitioner presented additional

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<sup>3</sup> *Manning v. State*, 726 So. 2d at 1170-71, ¶¶ 39-44)



evidence<sup>4</sup> to support the claim in post-conviction proceedings, the court held that the claim was barred by *res judicata*.<sup>5</sup>

By addressing the claim on the merits on direct appeal, when it could not be fully developed,<sup>6</sup> and then holding that the claim was barred by *res judicata* on post-conviction review, the court denied Manning an adequate opportunity to present the constitutional claim, depriving its decision of any deference under the 28 U.S.C. § 2254(d)(1). *Panetti v. Quarterman*, 551 U.S. 903, 952, 954 (2007) (where state court “failed to provide petitioner with a constitutionally adequate opportunity to be heard” despite substantial showing of due process violation, federal court considers claim on merits “without deferring to the state court’s finding”). *See also Wellons v. Hall*, 130 S.Ct. 727, 729 (2010) (remanding for evidentiary hearing to allow petitioner to develop claim of juror misconduct; “procedural morass” had occurred when claim was denied on direct appeal for inadequate record, and Petitioner was prohibited from developing claim on post-conviction on grounds of *res judicata*).

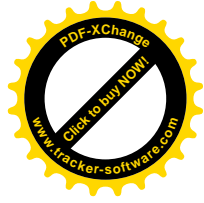
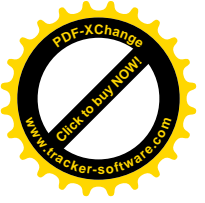
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<sup>4</sup> Petitioner’s attorneys were able to present some additional mitigation evidence despite the court’s refusal to allow access to others.

<sup>5</sup> *Manning v. State*, 929 So. 2d at 905 ¶ 23

<sup>6</sup> *Archer v. State*, 986 So. 2d 951 (Miss. 2008) (finding it “absolutely inappropriate” for trial counsel to raise an ineffectiveness claim on direct appeal). *Havard v. State*, 928 So. 2d 771, 784 (Miss. 2006) (ineffectiveness claims not typically raised on direct appeal because they require evidence beyond the trial record.); *Dunn v. State*, 693 So. 2d 1333, 1339-40 (Miss. 1997) (same); *Hymes v. State* 703 So.2d 258 (Miss. 1997) (same).

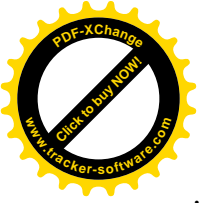




Because no deference was due to the state court's handling of this claim under 28 U.S.C. 2254(d)(1), *Pinholster* is inapplicable.

Further, the State did not object to any of the motions filed by Petitioner in district court to request additional discovery or funding for expert assistance (*see, e.g.*, Docs. 12, 62, 63, 74, 78, 79), and the State did not object to or appeal any of the district court's orders allowing expansion of the record (Docs. 65, 67, 69). Consequently the State has waived the issue. *Richards v. Quarterman*, 566 F.3d 553, 563 n. 2 (5<sup>th</sup> Cir. 2009) (state waived argument that evidence outside state court record could not be subject of evidentiary hearing); *Fairchild v. Workman*, 579 F.3d 1134, 1145-46 (10<sup>th</sup> Cir. 2009) (even though evidence presented by petitioner in state court "was far less specific and probative than evidence he later sought to present in federal court," and even though "[t]he State did challenge [petitioner's] diligence in its response to the District Court," the State "has effectively abandoned the argument by failing to make it in its appellate brief.").

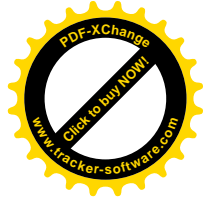
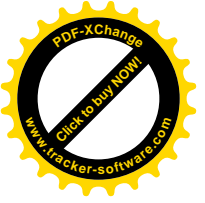
The state court acted unreasonably when it applied a novel procedural rule arbitrarily and faulted Petitioner for not presenting evidence supporting the ineffectiveness claim on direct appeal; thus, Petitioner satisfied § 2254(d), and *Pinholster* does not bar review of additional evidence presented in federal proceedings. However, the evidence and allegations made in state post-conviction proceedings did establish a violation of *Strickland*. The state court record,



including the clerk's papers on direct appeal and material submitted during post-conviction proceedings, fully supports the finding that trial counsel were deficient at the penalty phase of the case. The evidence presented during post-conviction proceedings also provides the evidentiary support needed for a finding of prejudice, including affidavits from Attorney John Holdridge, Dr. Gary Mooers, and Dr. Marc Zimmermann, discussing violence in the home, head injuries, poverty, possible fetal alcohol issues, alcoholism, and neurological dysfunction. The additional evidence obtained as a result of the district court's decision to expand the record provided corroboration for the evidence presented in state court.

Although *Pinholster* provides that the analysis under § 2254(d) should be limited to the record before the state court, it did nothing to challenge the holding in *Williams v. Taylor*, 529 U.S. 410 (2000), that a petitioner may obtain an evidentiary hearing (or be allowed to expand the record) if he acted diligently in state court to obtain the evidence. Respondents never disputed that Petitioner acted with diligence in seeking additional fact development in state court. Thus, the District Court properly considered the additional evidence presented in habeas proceedings. As Petitioner explained, however, the District Court erred in not finding prejudice as a result of trial counsel's deficient performance.

### III. SUPPLEMENTAL RESPONSE REGARDING THE STATUTE OF LIMITATIONS.



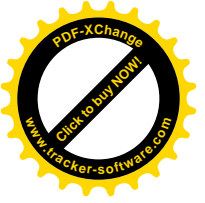
A. The District Court Did Not Abuse Its Discretion in Granting Equitable Tolling.

Respondents cross-appeal from the District Court's order denying their motion for summary judgment and finding that Petitioner was entitled to equitable tolling. The District Court found that the record "suggests Petitioner was effectively prevented from filing an application for state post-conviction relief within one year of the date his conviction became final on direct review due to the mishandling of his case in State court." R. 598.

In summarizing the obstacles to filing the state post-conviction petition, the District Court noted that Petitioner's first state court-appointed post-conviction attorney moved to withdraw based on his lack of qualifications.<sup>7</sup> Several months later, the Mississippi Supreme Court suspended the filing deadline. During this period, Petitioner sought the assistance of Clive Stafford Smith, a qualified attorney, but the state court took no action on this motion and instead appointed a second unqualified attorney, who moved to withdraw due to his lack of qualifications. Again, the Mississippi Supreme Court suspended the deadlines for filing a petition for post-conviction relief until the Circuit Court could address the matter regarding counsel. R. 598.

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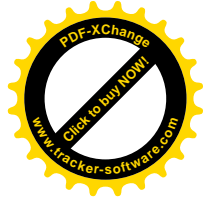
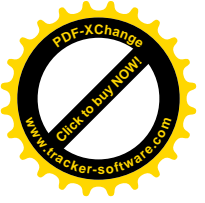
<sup>7</sup> Petitioner incorporates by reference his more detailed statement of the facts set out in his Resp. to Cross-Appeal and Reply Brief, filed December 15, 2010.



The newly-created Office of Capital Post-Conviction Counsel was appointed to represent Petitioner on November 17, 2000, but that Office was not served with a copy of the appointment order. Although the Office had not learned of its appointment, it assisted Petitioner in filing a pro se skeletal petition, which the state supreme court dismissed without prejudice, even though it had accepted such petitions from numerous other death row prisoners.

Ultimately, Petitioner learned of the order appointing the Office, and the Circuit Clerk acknowledged the failure to serve a copy on the Office notifying it of its appointment. Petitioner filed a post-conviction petition on October 8, 2001, and a motion asking the state court to accept the filing effective April 1, 2000, in order to comply with the federal limitations period. This motion was granted in part and denied in part. R. 599. Petitioner filed his federal habeas petition while proceedings were pending in state court.

The District Court determined that November 17, 2000, the date on which the second admittedly unqualified lawyer was allowed to withdraw and current counsel appointed, “marks the earliest date Petitioner could fairly begin the state post-conviction review process.” R. 599. The District Court that Petitioner acted diligently because he filed his state court petition within a year of November 17, 2000.



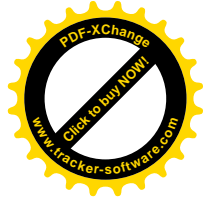
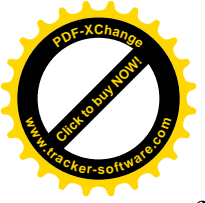
The District Court found that Petitioner had a justified expectation that the State would follow through on its promise to appoint competent and qualified counsel. R. 600. Because the state supreme court twice suspended the filing deadlines for the post-conviction application due to inaction of the judicial system and appointed counsel, “[i]t would be unfair to now state that Petitioner should not have relied upon that suspension.” *Id.*

The District Court concluded:

To argue Petitioner should have earlier filed a *pro se* petition despite having the promise of appointed counsel, the suspension of filing deadlines, and an unserved and misfiled court order is unreasonable and belies the ‘unique circumstance of incarceration’ that demands equitable tolling in this case.

R. 600 (quoting *McNeil v. United States*, 508 U.S. 106, 113 (1993)).

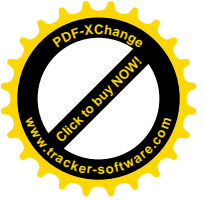
To receive equitable tolling, Petitioner must show that he has pursued his rights diligently and that some extraordinary circumstance stood in his way and prevented timely filing. *Holland v. Florida*, 130 S. Ct. 2549, 2562 (2010). “The flexibility inherent in equitable procedure enables courts “to meet new situations [that] demand equitable intervention, and to accord all the relief necessary to correct . . . particular injustices.” *Id.* at 2563 (quoting *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 248 (1944)). A court must act “with awareness of the fact that specific circumstances, often hard to predict in advance, could warrant special treatment in an appropriate case.” *Id.* at 2563. An attorney’s



failure to satisfy a professional standard of care may amount to extraordinary circumstances giving rise to equitable tolling. *Id.* at 2562; *see also id.* at 2568 (Alito, J. concurring in part and concurring the judgment) (“Common sense dictates that a litigant cannot be held constructively responsible for the conduct of an attorney who is not operating as his agent in any meaningful sense of that word”).

This Court reviews the “grant or denial of equitable tolling only for an abuse of . . . discretion.” *Hulsey v. Thaler*, 2011 WL 1304912, \*2 (5<sup>th</sup> Cir. Apr. 6, 2011) (citing *Cousin v. Lensing*, 310 F.3d 843, 847-48 (5<sup>th</sup> Cir. 2002)); *Henderson v. Thaler*, 626 F.3d 773, 779 (5<sup>th</sup> Cir. 2010). “[T]he AEDPA statute of limitations should not be applied too harshly.” *Watts v. Brewer*, 416 Fed. Appx. 425, 428 (5<sup>th</sup> Cir. 2011) (quoting *Windland v. Quarterman*, 578 F.3d 314, 317 n.5 (5<sup>th</sup> Cir. 2009)).

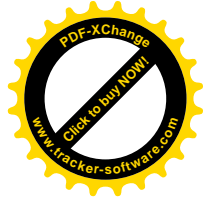
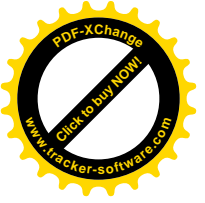
Respondents do not dispute the facts giving rise to the District Court’s decision to grant equitable tolling, including the decision of the state court to appoint to unqualified attorneys who abandoned Petitioner and the trial judge’s failure to appoint a qualified attorney seeking appointment. Instead, they raise irrelevant points obscuring the extraordinary circumstances giving rise to equitable tolling.



For instance, Respondents allege that the Public Defender Commission's Standards for appointment of counsel in capital cases are irrelevant because they did not have the force of law, and the standards enacted by the Mississippi Supreme Court through Rule 22 of the Mississippi Rules of Appellate Procedure were not effective until after the appointment of Pearson Liddell, the first unqualified attorney selected to handle Manning's post-conviction proceedings. However, if the Rule 22 standards went into effect a little more than a month after Liddell's appointment, then the trial court should have been vigilant about quickly moving to replace Liddell after he filed the motion along with Clive Stafford Smith. Moreover, it would have been incumbent upon the trial judge to heed the standards when he did replace Liddell. Instead, the judge merely substituted one unqualified lawyer for another.

More importantly, Respondents overlook the Mississippi Supreme Court's decision in *Jackson v. State*, 732 So. 2d 187 (Miss. 1999), which guaranteed the right to effective post-conviction counsel. *Jackson* was decided in January 1999, well before the appointment of Liddell.

In *Jackson*, the state court explained: “[t]he reality is that post-conviction efforts, though collateral, have become an appendage, or part, of the death penalty appeal process at the state level.” *Id.* at 190; *see also id.* at 191 (“state post-conviction efforts, though collateral, have become part of the death penalty appeal



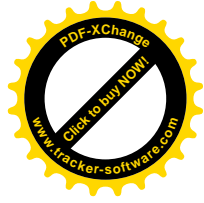
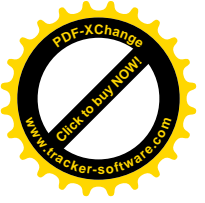
process at the state level”). The Court, however, realized that incarcerated death row inmates were incapable of undertaking this type of litigation on their own:

Applications for post-conviction relief often raise issues which require investigation, analysis and presentation of facts outside the appellate record. The inmate is confined, unable to investigate, and often without training in the law or the mental ability to comprehend the requirements of the [state post-conviction statute]. The inmate is in effect denied meaningful access to the courts by lack of funds for this state-provided remedy.

*Id.* at 190.

The Mississippi Supreme Court was keenly aware of the link between state post-conviction and federal habeas proceedings: “The importance of state post-conviction remedies is heightened by the requirement that, with few exceptions, state remedies must be exhausted before relief can be sought through federal habeas corpus.” *Id.* at 190. Thus, the state court held that death row prisoners had the right to effective counsel and reasonable resources to develop claims for relief. *See also Puckett v. State*, 834 So. 2d 676, 677 (Miss. 2003) (noting that under the post-conviction statute and *Jackson v. State* death-sentenced inmates were “assured competent counsel”); *see also id.* at 680 (pursuant to *Jackson*, “Puckett was clearly entitled to appointed competent and conscientious counsel to assist him with his pursuit of post-conviction relief”). The trial judge disregarded the intent of the Mississippi Supreme Court when he first appointed Liddell.

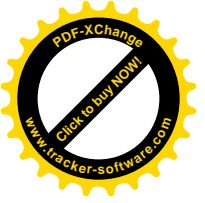




Respondents assert that Petitioner could have filed a federal petition while the state courts failed to fulfill its promise to provide competent counsel. This position overlooks the finding of the state supreme court that death row inmates are not capable of representing themselves, and the expectation that Manning would rely on orders of the state supreme court to suspend deadlines for filing a post-conviction action while the courts sorted out the issue regarding the appointment of qualified counsel. As aptly described by the District Court, such a position is “unreasonable.”

Moreover, the state supreme court understood the need for competent post-conviction counsel to exhaust federal claims if the pursuit of federal habeas corpus relief becomes necessary. The state court’s concern for enabling a post-conviction petitioner the opportunity to exhaust federal claims is also consistent with the structure of the federal habeas corpus statutes, which require exhaustion of state court remedies. 28 U.S.C. § 2254(b). Similarly, § 2244(d)(2) “provides a powerful incentive for litigants to exhaust all available state remedies before proceeding in the lower federal courts.” *Duncan v. Walker*, 533 U.S. 167, 180 (2001). “A diminution of statutory incentives to proceed first in state court would also increase the rise of the very piecemeal litigation that the exhaustion requirement is designed to reduce.” *Id.* As the Court emphasized:

AEDPA’s clear purpose [is] to encourage litigants to pursue claims in state court prior to seeking federal

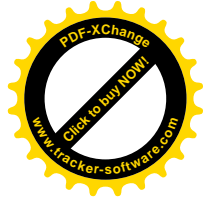
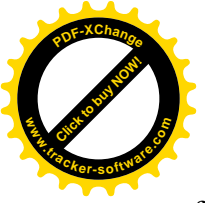


collateral review. *See, e.g.*, §§ 2254(b), 2254(e)(2), 2264(a). Section 2244(d)(1)'s limitation period and § 2244(d)(2)'s tolling provision, together with § 2254(b)'s exhaustion requirement, encourage litigants *first* to exhaust all state remedies and *then* file their federal habeas petitions as soon as possible.

*Id.* at 181 (emphasis in original). The Supreme Court recently reaffirmed that “the broader context of the statute as a whole . . . demonstrates Congress’ intent to channel prisoners’ claims first to the state court. *Cullen v. Pinholster*, 131 S. Ct. 1388, 1398-99 (2011); *see also id.* at 1401 (“Section 2254(d) is part of the basic structure of federal habeas jurisdiction, designed to confirm that state courts are the principal forum for asserting constitutional challenges to state convictions”).

This Court has likewise “recognized ‘the interrelationship between the filing of federal and state habeas petitions.’” *Williams v. Thaler*, 400 Fed. Appx. 886, 888 (5<sup>th</sup> Cir. 2010) (quoting *Critchley v. Thaler*, 586 F.3d 318, 320 (5<sup>th</sup> Cir. 2009)). “While the petitioner could have taken his claims to federal court at any time, *federal law required him to exhaust his claims in state court.*” *Id.* (emphasis added).

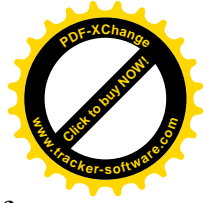
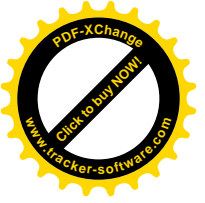
The federal habeas statute is structured to push inmates to seek relief in state court before turning to federal court, and the state supreme court promised counsel to ensure that they could fulfill the exhaustion requirement. Thus, it was reasonable for Petitioner to expect appointed counsel to seek relief in the state courts before turning to federal court. When these factors are combined with the



failure to appoint competent counsel, counsel's abandonment of Petitioner, and the suspension of deadlines, it was hardly an abuse of discretion for the District Court to find equitable tolling appropriate.

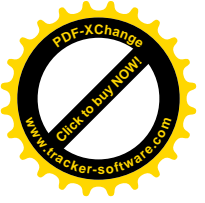
Respondents question whether Petitioner exercised diligence. As the Supreme Court held, “[t]he diligence required for equitable tolling purposes is reasonable diligence, not maximum feasible diligence.” *Holland v. Florida*, 130 S. Ct. 2549, 2565 (2010). Petitioner, through Clive Stafford Smith, sought the appointment of qualified counsel, but the trial judge overlooked the motion and instead appointed another attorney, who did nothing more but move to withdraw. Moreover, as the District Court found, Petitioner moved expeditiously after Dudley Williams, the second unqualified lawyer was removed from the case. Even before receiving notice of the appointment of the state office to represent him, Petitioner filed a *pro se* skeletal petition, the same type of petition that the state court had been accepting from other death row prisoners. Petitioner then filed his post-conviction petition, with supporting evidence, less than a year following the removal of Williams, and filed a federal petition even when his state court petition was pending. Under these circumstances, the District Court did not abuse its discretion in finding equitable tolling appropriate.

Respondents contend that Stafford Smith could not have been appointed because he had represented Manning on direct appeal and would have been in the



position of having to assert that his co-counsel on the appeal, who was one of Manning's trial attorneys, was ineffective. Respondents Reply at 8. However, there would have been no conflict of interest preventing Stafford Smith from claiming that a trial attorney was ineffective. In addition, if there was any question about this, the trial judge could have held a hearing to make any inquiries that he found relevant. More importantly, even if the trial judge felt that Stafford Smith's representation on direct appeal was problematic, he was still on notice that Liddell was not qualified, and he was obliged to appoint another qualified attorney, and not turn to another inexperienced attorney.

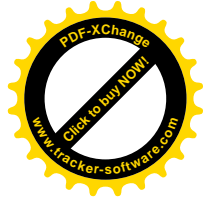
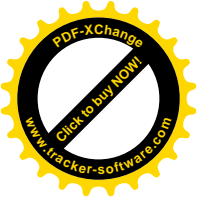
Respondents acknowledge that they moved to have Mr. Mink, one of the attorneys assisting the Office removed from the case in June 2001 due to his alleged lack of qualifications, but believe that its actions were irrelevant because the federal limitations period had expired and because Petitioner had filed a *pro se* skeletal petition. Respondents, however, overlook the state court order dismissing the skeletal petition without prejudice. Moreover, as Petitioner explained, *see* Resp. to Cross-Appeal at 16-17, 24-26, Respondents asked for Mink's removal supposedly to comply with the opt-in provisions of AEDPA. The opt-in provisions could not have been available to the state if prior unqualified counsel had allowed a one-year federal limitations period to lapse, yet the Respondents wanted to strike Mink to be able to take advantage of a shorter limitations provided for in the opt-in



statute. Given the concern about Mink's qualifications, it is hard to understand Respondents' inaction when the trial judge appointed two unqualified attorneys. Respondents complain that they did not receive were notice of some of the actions, but even they admit that they were aware of Liddell's involvement no later than November 5, 1999, when the Mississippi Supreme Court extended the time for filing the state court petition, and they were aware of Dudley Williams' involvement by February 15, 2000.

Respondents acknowledge that Petitioner had "a state created right to counsel," but such right is beside the point because "that did not constitutionalize the right to counsel." Reply at 13. As the District Court found, however, Petitioner had "a justified expectation that the State [would] follow-through on its promise to appoint qualified, competent counsel." R. 600.

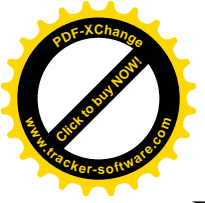
Moreover, since the District Court's ruling on the limitations question, the Mississippi Supreme Court has affirmed that death row prisoners have a federal right to the effective assistance of post-conviction counsel, and that it has recognized this right since 1999. *Stevens v. Epps*, No. 2011-DR-00637-SCT (filed May 5, 2011) (unpublished order attached as Appendix A). This development does not adversely affect the appropriateness of the District Court's decision regarding equitable tolling; instead, it serves to underscore the need for tolling to



ensure that Petitioner does not suffer prejudice as a result of the denial of a constitutional right.

Respondents rely heavily on *Lookingbill v. Cockrell*, 293 F.3d 256 (5<sup>th</sup> Cir. 2002), yet that case is distinguishable. First, *Lookingbill*, with the assistance of counsel, had the opportunity to seek state habeas relief. *Id.* at 259. Moreover, a central issue in that case was whether a motion for appointment of federal counsel tolls the limitations period. In addition, as this Court found, “[o]verall, *Lookingbill*’s arguments for equitable tolling constitute garden variety claims of excusable neglect.” *Id.* at 265. In contrast, Manning represents the very different situation in which appointed counsel effectively abandoned him during the state post-conviction process, and the trial judge did nothing to rectify the situation despite a decision assuring Manning of his right to counsel. Furthermore, Petitioner is not arguing that the timely appointment of competent counsel in state court would have tolled the limitations period, but the appointment of competent and effective counsel would have enabled Petitioner to take appropriate steps to toll the federal limitations period. As the District Court found, Petitioner acted with diligence once the impediments to filing a state post-conviction petition were removed.

After considering the unique and undisputed circumstances of this case, the District Court granted equitable tolling. Respondents have not shown that the

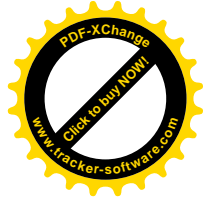
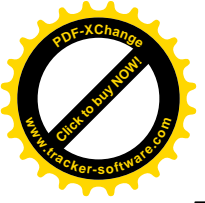


District Court abused its discretion, and thus this Court should affirm the decision to grant equitable tolling.

B. In the Alternative, Petitioner Is Entitled to Statutory Tolling.

Petitioner has also argued, in the alternative, that he is entitled to statutory tolling because the Mississippi Supreme Court granted, at least in part, his motion that his post-conviction petition be accepted as though filed on April 1, 2000, which would have made it timely for federal limitations purposes. He also argued that he was entitled to statutory tolling pursuant to 28 U.S.C. § 2244(d)(1)(B) and (D). Petitioner relies on the arguments made in his Response to Cross-Appeal and Reply Brief at 28-41. However, he supplements those arguments with a discussion of *Stevens v. Epps, supra*, in which the Mississippi Supreme Court noted that it has recognized a federal right to the effective assistance of post-conviction counsel in capital cases since 1999. *See* Appendix A.

In *Stevens*, a death row prisoner filed a successive state court petition challenging the performance of prior post-conviction counsel. He also sought a stay of execution because the United States Supreme Court had stayed other executions to consider cert petitions raising challenges to the performance of post-conviction counsel. Respondents opposed Stevens' petition, in part because this Court had previously interpreted decisions decided subsequent to *Jackson v. State*,



732 So. 2d 187 (Miss. 1999), as having overruled the guarantee of competent post-conviction counsel. *See Stevens v. Epps*, 618 F.3d 489, 501-505 (5<sup>th</sup> Cir. 2010).

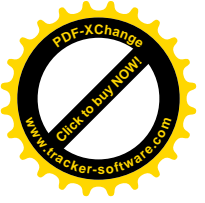
The Mississippi Supreme Court found that it was unnecessary to grant a stay of execution to Stevens due to cases pending before the United States Supreme Court regarding whether there is a federal right to effective post-conviction counsel. As the state supreme court found, “[t]his is a moot point in the State of Mississippi, for we have recognized that right since 1999, in *Jackson v. State*, 732 So. 2d 187 (Miss. 1999), and have granted claims of ineffective assistance of post-conviction counsel.” Appendix A at 1-2. The Mississippi Supreme Court then denied the challenge to post-conviction counsel’s representation on the merits. *Id.* at 2.

Respondents asked the Mississippi Supreme Court to clarify or reconsider its decision in *Stevens*, but the state court denied the request. Order, *Stevens v. Epps*, No. 2011-DR-00637-SCT (filed May 9, 2011) (unpublished order attached as Appendix B).<sup>8</sup>

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<sup>8</sup> In two recent cases, the Mississippi Supreme Court addressed the merits of challenges to post-conviction counsel’s performance. The state supreme court remanded a case for a second evidentiary hearing in *Goodin v. State*. There, the Court granted a hearing on three issues related to Goodin’s mental health, *Goodin v. State*, 856 So. 2d 267, 284-85 (Miss. 2003). Post-conviction counsel (who was not the same attorney who filed the initial petition), called just one ill-prepared lay witness and rested. He did not seek an evaluation, and did not call trial counsel or an expert who saw Goodin prior to trial even though they gave favorable affidavits. Goodin’s attorney also did not introduce medical records documenting prior findings of mental retardation and schizophrenia. A new post-conviction attorney challenged the performance of the hearing attorney. After hearing oral argument, the Mississippi Supreme Court entered an unpublished





To invoke § 2244(d)(1)(B), Petitioner must show “(1) he was prevented from filing a petition (2) by State action (3) in violation of the Constitution or federal law.” *Egerton v. Cockrell*, 334 F.3d 433, 436 (5<sup>th</sup> Cir. 2003). This Circuit has rejected the notion that a Petitioner must show that the State took “an affirmative action . . . to impede the filing of a habeas application.” *Id.* at 438.<sup>9</sup> Here, he was denied the effective assistance of post-conviction counsel, who failed to take any action on his behalf, and as a result, allowed his federal limitations period to expire. Counsel’s failures were compounded by the actions of the trial judge, who failed to appoint counsel qualified counsel. Based on the state-created impediments to filing, including the violations of Manning’s constitutional rights,

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order remanding for a new evidentiary hearing. The Court did not mention the performance of post-conviction counsel, nor did it explain its order other than to note that the remand was “through no fault of the trial court.” Order Dismissing Case, *Goodin v. State*, No. 2007-CA-00972 (filed August 27, 2009) (unpublished order attached as Appendix C).

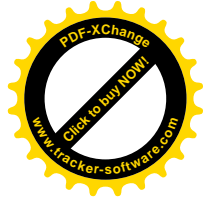
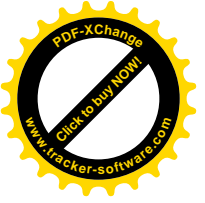
In *Gray v. State*, the Mississippi Supreme Court denied a challenge to post-conviction counsel’s performance on the merits. *Gray v. State*, No. 2011-DR-00510-SCT (filed April 20, 2011) (unpublished order attached as Appendix D).

<sup>9</sup> If any of the claims satisfy the limitations period calculated pursuant to this section, then the entire application is timely:

[Section 2244] directs the court to look at whether the ‘application’ is timely, not whether the individual ‘claims’ within the application are timely. The statute provides a single statute of limitations, with a single filing date, to be applied to the application as a whole. The statute also provides that this single deadline shall run from the ‘latest of’ several possible triggering dates contained in subparagraphs (A) through (D).

*Walker v. Crosby*, 341 F.3d 1240, 1243 (11<sup>th</sup> Cir. 2003).





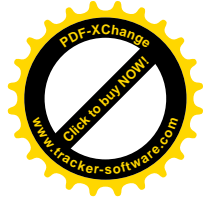
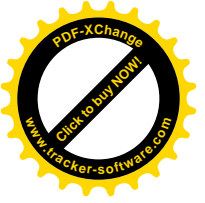
**CERTIFICATE OF COMPLIANCE**

Pursuant to Fed. R. App. P. 32(a)(7)(C) and 5<sup>th</sup> Cir. R. 32.3, the undersigned certifies that this brief complies with the type-volume limitations of 5<sup>th</sup> Cir. R.

32.2. The foregoing Supplemental Brief of Appellant/Cross-Appellee, exclusive of this Certificate, the Certificate of Service, and the tables of contents and authorities, contains 6,237 words. The document was created with Microsoft Word 2007. It is printed using Times New Roman font in 14 point variable space font and 12 point variable space font in the footnotes.

I understand that a material misrepresentation in completing this certificate, or circumvention of the type-volume limits, may result in the Court's striking the brief and imposing sanctions against the person signing the brief.

s/ David P. Voisin  
DAVID P. VOISIN



**CERTIFICATE OF SERVICE**

I, Robert S. Mink, hereby certify that a true and correct copy of the foregoing has been served upon the following, through the court's electronic filing system, on this the 8th day of August, 2011:

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