IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

Case No. 2013-CA-00882-SCT

WILLIE JEROME MANNING,
Petitioner-Appellant

v.

STATE OF MISSISSIPPI,
Respondent-Appellee

Appeal from the Circuit Court of Oktibbeha County, Mississippi

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BRIEF FOR APPELLANT

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CERTIFICATE OF INTERESTED PARTIES

Willie Jerome Manning,
Appellant

v. Case No. 2013-CA-00882-SCT

State of Mississippi,
Appellee

The undersigned counsel of record certifies that the following listed persons as described in Rule 28.2.1 have an interest in the outcome of the case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

1. Appellant -- Willie Jerome Manning
2. Counsel for Petitioner -- David P. Voisin, Robert S. Mink
3. Counsel for Respondents – Marvin L. White, Jr., Melanie Thomas, and Cameron Benton
4. Family of Alberta Jordan and Emmoline Jimmerson
5. Trial Prosecutor -- Forrest Allgood
6. Trial Counsel – Mark Williamson, Richard Burdine

Date: December 12, 2013

By: *David P. Voisin*
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STATEMENT OF ISSUES

I. The State violated Manning's due process rights by failing to provide favorable, material evidence, the cumulative effect of which puts the case in a different light and undermines confidence in the verdict.

II. The State violated Manning's due process rights through its knowing use of false testimony.

III. Manning was denied his right to the effective assistance of counsel guaranteed by the Sixth and Fourteenth Amendments and the Mississippi Constitution.

IV. Manning is entitled to post-conviction relief due to the cumulative effect of these errors.

V. Manning was denied his right to due process of law guaranteed by the Federal and State Constitutions due to the failure to allow him to inspect law enforcement files or admit portions of the files into evidence.

STATEMENT OF THE CASE

This appeal involves a wrongful conviction, and the most salient facts are not in dispute. The record of the proceedings below shows:

- Kevin Lucious claimed to have seen Willie Manning push his way into the victims' apartment. Lucious testified he witnessed this from his apartment across the street from the victims.

- The State itself claimed that it would not be able to prosecute Manning without the testimony of Lucious. CP 273; T. 57.[1]

- Lucious lied; he could not have seen Manning because Lucious did not move into the apartment across from the victims until two weeks **after** the crimes.

- Law enforcement interview notes made shortly after the crimes indicated that the apartment that Lucious moved into later was indeed vacant; records of the apartment complex confirm that the apartment was vacant at that time of the murders.

- The law enforcement notes were not disclosed to defense counsel.

Lucious admitted at the post-conviction 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' recantation of his trial testimony was corroborated by Likeesha Jones, his former girlfriend, Marshon Manning, and Teresa Bush, who lived in the building next to the victims.

The State also conceded that crime lab notes related to a shoe print found near a victim were not disclosed to defense counsel. The undisclosed crime lab reports show that Manning could not have been the source of the print.

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[1] "T." refers to the transcript of Petitioner's 1996 capital trial; "PCR T." refers to the transcript from the 2011 post-conviction evidentiary hearing. "CP" refers to the Clerk's Papers from the appeal following the trial. "PCR CP" refers to the Clerk's Papers for post-conviction proceedings before the Circuit Court. "PCR Ex" refers to exhibits introduced at the post-conviction evidentiary hearing. "RE" refers to record excerpts.

Based on these and other facts discussed below, Petitioner demonstrates that his trial was marred by state misconduct and trial counsels' ineffectiveness. Before addressing the specific constitutional violations, Petitioner reviews the procedural history of his case, summarizes the evidence from his 1996 capital trial, and discusses the evidence presented at the post-conviction evidentiary hearing.

Procedural History

Willie Manning was indicted on August 2, 1994, for the capital murder of Alberta Jordan and Emmoline Jimmerson, who were mother and daughter. CP 12. The murders occurred on January 18, 1993. Mark G. Williamson and Richard Burdine represented Manning at trial. He was found guilty on July 24, 1996, and sentenced to death the following day. On direct appeal, Manning was represented by Mark G. Williamson and Clive A. Stafford Smith.

On March 31, 1999, this Court rejected most of Manning's direct appeal but remanded for a hearing based on *Batson v. Kentucky*, 476 U.S. 79 (1986). *Manning v. State*, 735 So. 2d 323 (Miss. 1999). Following an evidentiary hearing, the trial court rejected the *Batson* claim, and this Court affirmed the lower court's findings. *Manning v. State*, 765 So. 2d 516 (2000). The United States Supreme Court denied a petition for a writ of certiorari on March 5, 2001. *Manning v. Mississippi,* 532 U.S. 907 (2001).

Manning then filed a petition for post-conviction relief. The Mississippi Supreme Court granted the petition and remanded the case to the Circuit Court for an evidentiary hearing on a number of claims of state misconduct and ineffective assistance of counsel at the culpability phase of Petitioner's trial. *Manning v. State,* 884 So. 2d 717 (Miss. 2004). The Circuit Court heard motions on July 30, 2010, and held an evidentiary hearing on January 11-12, 2011.

Testimony was also taken on April 26, 2011. After receiving post-hearing briefs, the Circuit Court denied all relief. (RE 2; PCR CP 1139) Manning filed a notice of appeal. (PCR CP 1152)

Statement of Facts

A. At trial, the State relied on Kevin Lucious and other dubious witnesses.

At approximately 8:30 p.m. on January 18, 1993, neighbors found the bodies of Alberta Jordan and Emmoline Jimmerson on the floor of their apartment in Building 10D of the Brookville Garden Apartments. The women were last seen alive around 5:30-5:45 earlier that afternoon. Both were badly beaten with an iron found in a back bedroom of the apartment, and both suffered slash wounds to the front of their necks. *Manning v. State,* 735 So. 2d 323, 331 (¶¶ 1-3) (Miss. 1999).

Forensic evidence yielded no clues as to the perpetrator. There were no prints found on the weapons used against the victims, and law enforcement found no DNA, fibers, prints, or other physical evidence that pointed to any suspect. Law enforcement made no arrest for well over a year following the homicides. Willie Manning first became a suspect when the sheriff received a tip from Nancy Elliott, who lived in Brookville Garden, that Herbert "Bean-eye" Ashford had information about the crimes. (T. 691; *see also* T. 450) Sheriff Dolph Bryan visited Ashford in jail in Beaumont, Texas. Ashford told the sheriff that he saw Willie Manning in the breezeway of Building 10 when Ashford went to the apartment across from the victims to buy beer. (T. 427) Ashford also claimed that about two weeks after the crimes, he overheard Manning talking about the offenses. (T. 431) Despite having written to law enforcement asking for assistance with his federal charges, Ashford claimed that he received no consideration for his testimony. (T. 433-40)

According to the State, Ashford led investigators to talk to Kevin Lucious, who was, without question, the State's most important witness. After approaching Lucious, who had moved to Missouri, investigators obtained two statements in March 1994 in which Lucious claimed to have heard Manning confess to the crimes. Because Lucious had been arrested in Missouri for murder, the State faced significant obstacles arranging for his appearance at Manning's trial. At least twice the State moved for a continuance due to difficulties in arranging with authorities in Missouri for Lucious' transportation for trial, despite extensive efforts on the part of the District Attorney. (CP 234; CP 272) In one of the continuance motions, the State emphasized "[t]hat without the presence of said Kevin Lucious the State would be unable to bear its burden of proof." CP 284. *See also* T. 57 (testimony from an assistant District Attorney that without Lucious, "the State of Mississippi would not be able to prove its case").

In the statements taken in 1994,[2] Lucious said nothing about seeing Manning enter the victims' apartment; he first told that tale in June 1996 when the District Attorney came to interview him in Missouri. (T. 405)

In its direct appeal opinion, this Court summarized Lucious' trial testimony:

> ¶ 4. Kevin Lucious testified that he saw Willie "Fly" Manning at Brooksville Gardens around 6:30 p.m. on the day of the murders. Manning was tipsy from drinking beer, and the two men had a conversation during which Manning mentioned that he needed some money. After their conversation, Lucious went back to his apartment and saw Manning go to Ms. Jimmerson and Ms. Jordan's apartment. Lucious watched Manning knock on the door, and when one of the women opened the door, he pushed the door open, went in and closed the door behind him. Lucious never saw Manning leave within the next twenty to forty-five minutes.
>
> ¶ 5. A couple of weeks after the murders, Lucious saw Manning at Club Essex. Manning had been drinking and said that if he'd known "they" only had twelve dollars, he wouldn't have done anything to "them." Manning's brother Marshon

[2] Those statements, taken on the same day, were introduced at the PCR hearing as PCR Exhibits 2 and 3.

> told him to shut up, and Manning told Marshon that he'd kill him, too. Manning then described pushing his way into the "old ladies' " apartment and said that when he went in one of them was in the living room and the other was in the back room, but came up front. Marshon told him to shut up again, which Manning did. Two or three days after the incident at Club Essex, Lucious saw Manning and Marshon at Brooksville Gardens again. Manning was waving a .25 automatic around "saying that it ain't nothing to kill somebody and you know, sometimes you have to kill people in order to get your respect that you deserve."

Manning, 735 So. 2d at 331 (¶¶ 4-5). Lucious provided elaborate details about what he supposedly witnessed from his apartment across from the victims. (T. 392-93) He stated that after he returned to his apartment and put his daughter in her swinger, he looked out of his window to see Manning knock on the door of the victims' residence. (T. 392) After seeing Manning push their door open, Lucious "sat in the window for about 20 minutes and in the process, my baby's mother had came [sic] out of the bedroom and I told her to go back in the room, and I was just sitting in the window when I never did see he come back out." (T. 393) After a brief period of time, Lucious went to another neighbor's apartment to use a telephone (T. 393)

Although Lucious was by far the most significant witness against Willie Manning, the State also attempted to show that Manning was seen in Brookville Garden on the day of the murders. The State also presented testimony that a shoeprint was found near one of the victims but that the print was not sufficient to draw conclusions about the make or size of the shoe. (T. 539) The defense in turn sought to show that James Jimmerson, the son and grandson of the victims, was responsible for the crimes.

B. Facts Developed in Post-Conviction Proceedings.

1. Unimpeachable records, including undisclosed police notes, show that Lucious lied about living across the street from the victims.

Kevin Lucious could not have seen Willie Manning push his way into the victims' apartment from his own apartment across the street because he and his girlfriend, Likeesha Jones, did not move into Brookville Garden apartment 11-E until February 1, 1993, about two weeks **after** the murders.

Within days of the murders, law enforcement learned that apartment 11-E was vacant. Shortly after the murders, the Starkville Police Department sent teams to Brookville Garden to interview residents for the purpose of identifying anyone who might have information relevant to the murder investigation. (PCR T. 202) The notes of the canvass of residents were introduced at the evidentiary hearing as PCR Ex. 9. (RE 3) The notes list each apartment by number, and for each apartment the officers wrote the names of individuals found to be living in the apartment at the time of the investigation. Experienced law enforcement officers John Outlaw and Karen Burr were assigned to interview residents in Building 11, which is directly across from Building 10, where the victims lived. (PCR T. 249) Page 16 of the canvass notes identifies Apartment 11-E, and in the box for 11-E is the word, "Vacant." (RE 3 at 16) David Lindley, who was the lead investigator on this case for the Starkville Police Department, testified that this was in fact the notation of a police officer indicating that Apartment 11-E was vacant when the officers went by after the murders. (PCR T. 242)

Records from Brookville Garden, admitted as PCR Ex. 1 (RE 4), confirm that apartment 11-E was vacant from September 3, 1992, until February 1, 1993, when it was leased to Likeesha Jones, Lucious's girlfriend at the time. (*See* RE 4 at 1, ¶ 5) Pages 22 – 26 of the records are the apartment lease signed by Likeesha on February 1, 1993. (RE 4 at 22-26) Page 43 of the

records is a Vacancy Losses record listing apartments that were vacant in 1992 and 1993. (*Id.* at 43) Apartment 11-E is on the list, with an entry showing "Jackie Bush" as "Tenant," a "Move-out Date" of 9-3-92 and a "Next Move in Date" of 2-1-93. (*Id.*)

Likeesha easily recalled the date of her move into Brookville Garden because she was concerned about moving directly across the street from the murder scene. Before Likeesha moved into 11E, she met with Harold Williams, manager of Brookville Garden, in late January or early February of 1993 and brought up the murders:

> Q. Did you talk to Mr. Williams about the murders of Ms. Jordan and Ms. Jimmerson?
> A. Yes, sir.
> Q. Why?
> A. Because I was scared to move over there. And I thought – everyone was telling me that the murder took place in the apartment I was moving into. I didn't want to live in an apartment where people were murdered inside of.
> Q. Did you tell Mr. Williams that?
> A. Yes, sir.
> Q. What did he say to you?
> A. He was – he just let me know that the murders did not take place in the apartment that I was going to reside in. That the murders took place across the street from the apartment that I was going to move in. And he let me know that it was – that apartment, had no one stayed in there and that I could – wasn't no problem with me moving in. Just reassured me that everything was going to be okay if I moved into that apartment.

(PCR T. 85-86)[3]

Likeesha recalled that on the night of the murders, she and Lucious were at his mother's house in Chapel Hill, also referred to as Sessums. (PCR T. 101, 105)

At the hearing, Lucious admitted that he did not live in Brookville Garden at the time of the murders; instead, he was living with his mother in Chapel Hill. Likeesha and her infant

[3] Likeesha also shared her concerns about moving into Brookville Garden after the murders with her grandmother, Mildred Jones, whose affidavit was admitted as PCR Ex. 6. Mildred Jones died before the evidentiary hearing.

daughter were staying with Lucious and his mother in Chapel Hill on some occasions, and on others she would stay at her own mother's place on Harlem Street. (PCR T. 66)

Teresa Bush provided even more corroboration. Teresa Bush testified that she was living with Herbert Ashford at the time of the murders, with their one-year old son, in Building 8, which is adjacent to Building 10, where the murders occurred. (PCR T. 147) She remembered that apartment 11-E was vacant at the time of the murders. (PCR T. 149, 160) She knew Likeesha Jones and recalled that Likeesha came to her on Groundhog Day to ask about making a deposit to get the electricity turned on in 11-E. (PCR T. 149) Teresa remembered that this was after the murders. (*Id.*)

2. The State did not disclose the records of the canvass.

Police notes showing that apartment 11-E was vacant, and thus not occupied by Lucious and his girlfriend, were not disclosed to defense counsel. David Lindley identified the canvass notes (PCR Exhibit 9) and confirmed that the notes were part of the police department file created prior to trial and that the notation of "vacant" on 11-E was made by one of his officers. (PCR T. 242) The officers who conducted the door-to-door interviews of the odd-numbered buildings, including building 11, were John Outlaw and Karen Burr. Lindley testified that Outlaw and Burr were officers "of rank"; they were experienced officers and he trusted their work. (PCR T. 249) Mr. Lindley did not remember considering whether Lucious should be confronted about the fact that the canvas notes showed 11-E to be vacant. (PCR T. 244)

Lindley did not recall doing anything to verify where Lucious lived. (PCR T. 244) He did not request records from Brookville Garden' management that showed who the residents were. (*Id.*) He claimed that he did not ask Likeesha Jones whether Lucious lived in Brookville Garden at the time of the murders. (*Id.*)

Lindley explained that someone in his office copies everything in the police department file and gives a copy of the file to the district attorney's office. (PCR T. 244-45) Neither he nor anyone else in his office has any input on what the district attorney decides to send to defense counsel in discovery. (PCR T. 245)

District Attorney Forrest Allgood did not see the police department notes indicating that apartment 11-E was vacant at the time of the murders until after Manning's petition for post-conviction relief was filed. (PCR T. 308)[4]

Allgood testified that if he had known that there was an issue about whether Lucious really lived in Apartment 11-E, he would have investigated. "Quite frankly, if I'd known it was an issue, I would have made an effort to ferret that out myself. I would have wanted to know just exactly what was going on in that particular situation. But I didn't know that at the time." (PCR T. 305) When Allgood learned about the post-conviction evidence that Lucious did not live in the apartment, he "called over there and asked about that." (PCR T. 305)

He added:

> I will concede the point of this. Had I known that the documentation showed that they weren't there, I would certainly have said, okay, what's up with this, and I would have gone back and I would have tried to figure out what was happening by going to Lucious, going to the apartments to see if the apartment had made an error because that's perfectly possible, also, and I would try to figure out and reconcile what was happening.

(PCR T. 307-08)

Allgood acknowledged that Kevin Lucious "absolutely" was an important witness. (PCR T. 308) "If what you're wanting is an acknowledgment from me that Kevin Lucious was a very

[4] Sheriff Bryan testified that he had not seen the interview notes showing a vacancy for apartment 11-E. (PCR T. 162)

important witness in the case, you got that. . . . He was a very important witness in the case. . . . [O]bviously I felt like that he was a big, big, big piece of the prosecution." (PCR T. 309)

Mark Williamson, who represented Manning at trial, testified that he was not provided the canvass notes in discovery. (PCR T. 327) The canvass note showing "vacant" for apartment 11-E would "definitely" have been an important piece of evidence for Manning's defense. (PCR T. 327) Williamson remarked that Lucious's testimony "was extremely important." (PCR T. 325) The prosecution, according to Williamson's recollection, "placed a great emphasis on [Lucious's] testimony," (PCR T. 325) and in Williamson's estimation the State could not have made out a case against Mr. Manning without Lucious's testimony. (PCR T. 326, 334) Any evidence that Lucious did not live in the apartment he claimed to have been living in at the time of the murders would have been "extremely important" to Williamson. (PCR T. 326)

Williamson also reviewed the Brookville Garden records, including the affidavit of Denise Davis showing that 11-E was vacant from September 1992 until February 1, 1993 (RE 4), and he testified that he "certainly" would have used this evidence if he had possessed it at the time of trial. (PCR T. 328-29)

Mr. Burdine, the other attorney who represented Manning at trial, testified that he was not provided with any information indicating Lucious did not live in Brookville Garden at the time of the murders. (PCR T. 209) If he had known of such information, he would have brought it out. (PCR T. 210) Burdine added that he did not know anything about Likeesha Jones. (PCR T. 210)

3. Lucious lied about hearing Manning "confess" to the murders.

Testifying about seeing Manning enter the victims' apartment was not the only lie that Lucious told at trial. At the post-conviction hearing, Lucious testified that **none** of his trial

testimony was true. He did not see Manning on the day of the murders, he did not see Manning knock on the victims' door or push his way into the apartment, and in fact he was not in Brookville Garden at the time. (PCR T. 50) He did not have a conversation with Manning in Brookville Garden, either before or after the murders, in which Manning said that he needed money or that he had gone into the victims' apartment. (PCR T. 51) He did not have a conversation with Manning at Club Essex. (PCR T. 51) He did not overhear Manning say anything to Marshon about these murders in particular or about killing anyone in general. (PCR T. 51) Lucious explained that because of the lies he told at trial, "my consciencness [sic] been bothering me about this situation. I feel like it's time for me to tell the truth." (PCR T. 77)

Marshon Manning, Willie's brother, confirmed Lucious' post-conviction recantation. Marshon was aware that Lucious had testified that he and Marshon had engaged in conversations with Willie Manning at Brookville Garden and at the Club Essex, in which Willie Manning had talked about killing the victims. Marshon testified that there were no such conversations and that none of the incidents described by Lucious involving Marshon had ever occurred. (PCR T. 130-132) No one from Willie Manning's defense team contacted Marshon about Lucious' pre-trial statements. (PCR T. 132)[5]

Teresa Bush provided additional support for Lucious' post-conviction recantation. She testified that she knows with certainty that Herbert Ashford's testimony about overhearing Manning's conversation with Kevin Lucious was false. (PCR T. 148, 150) Ashford was using and selling drugs at the time, and he discussed his illegal drug activity with her. (PCR T. 147) If Ashford had heard Manning talking to Lucious about the murders, "he would have brought it to [Teresa's] attention right . . . then and there." (PCR T. 148) (*See also id.* at 150 ("I'm 100

[5] Mark Williamson had no recollection of interviewing Marshon Manning. (PCR T. 332)

percent that he did not hear that." (PCR T. 153) Teresa recalled spending time on her porch on the day of the murders and never seeing Manning. (PCR T. 154-57) Teresa added that she would have testified at Manning's trial if she had been asked, but no one ever contacted her about that. (PCR T. 161-62)

In an unsuccessful effort to undermine Bush's credibility, Sheriff Dolph Bryan testified at the post-conviction hearing that Bush, whom he referred to as "Moophie," suggested that he contact Ashford. (PCR T. 180) At trial, however, Sheriff Bryan testified that information from Nancy Elliott led him to Ashford. (T. 691)

4. Lucious' false trial testimony was a result of pressure brought by the State.

When asked why he gave false testimony at trial and in his pre-trial statements, Lucious explained, "One reason is because I was told . . . that I could possibly be charged with the crime with him because of the information they had from an individual by the name of Bean-eye (Herbert Ashford) who I don't know, and that my daughter's mother could possibly be charged with the crime for withholding information." (PCR T. 53-54; see also id. at 56, 73) (*See also id.* at 73 ("He (Allgood) told me that I could be charged with the crime as well as my child's mother. She could be charged with withholding evidence, and I could be charged with conspiracy to those murders.")))

Lucious hoped that his false statement would lead to a plea agreement in Manning's case and that he would not be charged or called to testify:

> So in regards to the statement, it was false. I figured if I gave it to them that this situation – I mean, the trial situation wouldn't never happen, and that they would just leave me alone about the situation. I felt if I gave – said something that they possibly wanted to hear that, you know – I mean, I wouldn't have to go through – or they would leave me alone about the situation all together period.

(PCR T. 54)

Lucious also testified that Allgood and Sheriff Bryant knew that Lucious did not live in Brookville Garden at the time of the murders. (PCR T. 56)[6]

Likeesha also felt pressure from law enforcement to implicate Manning. Likeesha testified that Sheriff Bryan and others visited her on many occasions to talk to her about giving a statement about the murders. On one occasion, Likeesha was asked to go to the jailhouse to meet with Sheriff Bryan. Sheriff Bryan gave her some money to help with diapers and formula for her child, and according to Likeesha, Sheriff Bryan asked that Likeesha provide a statement about the murders in return for the money. (PCR T. 88-89). Likeesha persisted in telling the sheriff that she did not know anything about the murders and that she did not live in Brookville Garden at the time. (PCR T. 90-91, 95)

Not surprisingly, the sheriff disputed this point and even asserted that Likeesha gave a statement implicating Manning. (PCR T. 179) Her statement was introduced as PCR Ex. 8. (PCR T. 230) However, the statement actually pertained to Tyrone Smith, a man with mental difficulties who claimed responsibility for the murders. Although defense counsel called Smith at trial to elicit his "confession," the State never found Smith to be credible and established that Smith claimed to have committed the murders in a misguided effort to gain respect and that he lied about being with Manning at the time of the crimes. (T. 659-60)

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[6] The sheriff disputed this point. Lucious supposedly told the sheriff that he (Lucious) stayed in Apartment 11-E "with the guy that lived there until that guy moved out. When they moved out, he (Lucious) rented it and moved in." (PCR T. 172). The sheriff did not know who "that guy" was, nor did he provide any explanation for records showing the apartment to be vacant. If this were true, then the sheriff violated Manning's right to due process by failing to correct Lucious' trial testimony or call the defense's attention to Lucious' inconsistent statements about the person with whom he was living. The sheriff was with Allgood in St. Louis when Lucious described what he supposedly saw and was present in the courtroom when Lucious testified about living with his girlfriend across the street from the victims. (T. 680-81)

5. The State failed to disclose exculpatory evidence about a shoeprint found at the crime scene.

The State found a shoeprint at the crime scene and sent it to the Mississippi Crime Lab for analysis. As mentioned earlier, the Crime Lab analyst testified that a shoeprint was found near one of the victims but that the print was not sufficient to draw conclusions about the make or size of the shoe. (T. 506, 539). However, records obtained in post-conviction proceedings indicated that the shoe leaving the print was a size 8. (RE 5; PCR Ex. 4)

The records from the Mississippi Crime Lab show that it was asked to analyze a bloody shoe print found near the body of one of the victims. (PCR Ex. 4). The Crime Lab files contain the following notations:

- Page 16: Evidence Submission Form, lists Exhibit 5, a "SEALED PAPER SACK CONTAINING CUT PIECE OF CARPET SHOWING SHOE PRINT IN BLOOD MARKED '93010705'";
- Page 13: "Examinations Requested," states, "Please examine Exhibit # 5 for shoe size and possible shoe type";
- Page 14: "Laboratory Report" stating, "Results: It is the opinion of this examiner that the impression on Exhibit 5 does not contain sufficient detail for a footwear examination opinion of value to be rendered."
- Page 18, "Footwear Case Notes," states, at the top, "Could not identify brand." A chart near the center of the page shows that the shoe print was a size 8. (*See* RE 5)

This print could not have been left by Manning. His clothing records from the Department of Corrections were admitted into evidence as PCR Ex. 5, and those records show that the shoes issued to Manning are sizes 10 ½ and 11. Brandon Davis, owner of B Davis Shoes in Starkville, was allowed to measure Manning's feet using a Brannock device that he uses as part of his profession as a shoe salesman, and he testified that Manning's shoe size was 11 to 11 ½ . (PCR T. 122, 124)

The State did not disclose the report identifying the size of the shoe print to Manning's defense attorneys. In fact, officials testified that they were unaware that such a report existed. Lindley testified that he remembered there was evidence of a shoe print near one of the bodies, and he remembers that analysis of the print was requested of the crime lab. He testified that the police department received nothing from the crime lab showing the size of the print. (PCR T. 222) The Mississippi Highway Patrol did the initial investigation of the crime scene and for that reason the crime lab would have sent its reports to that agency, but the Starkville Police Department would have received copies. (PCR T. 223) Lindley was shown page 18 of the crime lab, the page that shows the size of the print (RE 5), and he testified that he did not recall seeing that page. He did recall seeing pages 14 and 17, which reference the shoe print but do not disclose the size. (PCR T. 236-37) Lindley testified that he reviewed the post-conviction records with counsel for the State during the week of the post-conviction hearing. To his knowledge page 18 of the crime lab records is the only page of the crime lab record not included in the police department file. (PCR T. 238)

The District Attorney also denied knowing about this portion of the Crime Lab files. Allgood testified that page 18 of the records (RE 5) appeared to be "notes" that are not included with crime lab records ordinarily sent to the district attorney's office. "I don't remember any cases that we get these notes on." (PCR T. 292) His office would have received records such as page 15 of the crime lab records, which in this case was inconclusive. (PCR T. 297) If defense counsel requests the crime lab notes, then the district attorney's office calls the crime lab and asks for them. When his office receives the notes from the crime lab it produces them in discovery to defense counsel. (PCR T. 292) The district attorney's office always gives its entire file to defense counsel. (PCR T. 293)

Allgood testified that someone "absolutely" thought the size of the shoe print was important, because the crime lab was asked to determine the size of the print. (PCR T. 299) Allgood also thought that the size of the print could have been important because it was found next to the body of one of the victims: "Q. What if the print were found next to the body? A. Well, I mean, I think obviously a print next to the body might very well have some probative value, yes." (PCR T. 304)[7]

Mark Williamson testified that he was not provided a copy of page 18 of the crime lab records (RE 5) which showed the shoe print to be a size eight. (PCR T. 330) If he had possessed that evidence, he would have used it. (PCR T. 331) This is especially true in light of his defense theory at trial, which was to show that the evidence implicating a different suspect was better than the evidence against Manning. (PCR T. 331)

Similarly, Richard Burdine never received the Crime Lab report regarding shoe size. At the PCR evidentiary hearing, he listened to the transcript of the trial testimony of Stanley Sisk, regarding the crime lab records of the shoe print, and he stated that he had not received any information that the print was not the same size as Manning's shoe size. If he had known the print found at the crime scene did not match Manning's shoe size, he would have used that information at trial or reminded Mark Williamson to use it. (PCR T. 211-12) Burdine added that he and Williamson did receive some reports from the crime lab, but he does not remember seeing anything in discovery about the size of the shoe print. (PCR T. 214)

[7] Sheriff Bryan testified that he had not seen the report showing the size of the bloody shoe print. (PCR T. 189)

6. Herbert Ashford further undermined his own credibility.

The State called Herbert Ashford as a witness at the evidentiary hearing to rebut testimony from Teresa Bush, who questioned the veracity of Ashford's trial testimony about overhearing Manning discuss the crimes. Ashford reaffirmed his trial testimony and claimed that he did not share everything with Bush (PCR T. 263), but much of his post-conviction testimony was riddled with inconsistencies and contradictions. For instance, Ashford was asked about Dera Mae Hall, who lived across a breezeway from the victims. Ashford claimed that he was not aware that she sold beer from her apartment and that he never bought anything from her. (PCR T. 267-68). At trial, however, Ashford testified that he supposedly saw Manning in that breezeway and that Ashford himself made several trips to Hall's apartment to buy beer. (T. 428-29, 431) Ashford also claimed that he was not selling drugs at the time of the murder. (PCR T. 268). However, Teresa Bush recalled that Ashford used and sold drugs at the time and discussed his drug activity with her. (PCR T. 147). Moreover, law enforcement notes reflect that David Lindley asked Ashford whether it was possible that he had been keeping money or a drug stash at the victims' apartment. (PCR Ex. 15 at 10; PCR T. 333).

At the time of trial, Ashford was serving time for a federal offense and testified that he did not receive a reduction of his sentence despite asking law enforcement for assistance. (PCR Ex. 11; PCR T. 279) The federal court, however, reduced Ashford's sentence from 60 to 45 months. (PCR T. 282, PCR Ex. 13 and 14). After reading the federal court's order, Ashford maintained that his sentence was not reduced, and he testified that the "changed circumstances" referred to in the order as the basis of the reduction did not have anything to do with Manning's trial. (PCR T. 283)

7. Facts Supporting Additional Grounds for Relief.

Besides raising claims concerning suppression of evidence regarding Lucious and shoeprint size, as well as claims concerning trial counsel's failure to call Marshon Manning or Teresa Bush to impeach Lucious and Ashford, Manning raised several other ineffectiveness challenges. For instance, Manning alleged in the alternative that trial counsel should have impeached Lucious. The alternative ground is based on Likeesha Jones' post-conviction testimony that she alerted Mark Williamson to the falsity of Lucious' testimony. During Manning's trial, Likeesha saw a newspaper report indicating that Lucious had testified in Manning's trial, that he had claimed to have witnessed Manning go into the murder victims' apartment, and that he had seen this happen from the window of the apartment where he lived with Likeesha and his daughter. (PCR T. 92) She became upset when she read this article because she knew the testimony was untrue, and she called Mark Williamson, Manning's attorney, to report what she knew. (*Id.*) She called Mark Williamson again after she read that a verdict had been returned finding Manning guilty. (PCR T. 93) Williamson did not follow up with Likeesha on either occasion. (PCR T. 94-95, 110)

Likeesha testified that she was subpoenaed to testify at Manning's trial in 1993, but she was not called as a witness. (PCR T. 94) She was willing to testify and to tell the truth about where she and Kevin Lucious were living at the time of the murders, but neither side called her at trial. (PCR T. 96)

Manning also alleged that counsel's performance was deficient in other respects, such as failing to investigate other possible suspects and not rebutting the testimony of Larry Harris, who claimed that he saw Willie Manning in Brookville Garden on the night of the crimes. Harris claimed at trial that he saw Manning at the apartment of Manning's stepfather, Kelvin Bishop.

However, law enforcement notes do not indicate that Bishop lived in Brookville Garden at the time. Moreover, for over a year, no one else reported seeing Manning in Brookville Garden, as documented in law enforcement files containing investigative notes and reports made shortly after the offense. (PCR Exhibits 9 and 15)

Manning also alleged that counsel were ineffective for not investigating other suspects, such as Jo Jo Robinson or Roosevelt and Eugene Davis. Law enforcement recorded interviews with individuals who claimed to see them running near the victims' apartment around the time of the murder. *See, e.g.,* PCR Exhibit 7 (affidavit of Nettie Mae Thompson), Exhibits 9 and 15. At the post-conviction hearing, trial counsel had no recollection of any investigation into these other suspects. (PCR T. 210-13, 332-33).

SUMMARY OF ARGUMENT

Manning's convictions for the murders of Alberta Jordan and Emmoline Jimmerson were based on the eye-witness testimony of Kevin Lucious, who claimed that Manning entered the victims' apartment at about the time of the murders while Lucious was watching from the window of his own apartment directly across the street. Police canvass notes documenting door-to-door interviews within days of the murders prove that Lucious did not live anywhere in the apartment complex at the time of the murders. The notes are corroborated by records of the Brookville Garden Apartments which show that Lucious did not move into the apartment across the street from the victims until two weeks after the murders. The State failed to provide Manning's attorneys with information about the canvass notes, which is a violation of Manning's due process rights under *Brady v. Maryland* entitling him to post-conviction relief.

Evidence of a bloody shoe print found near the body of one of the victims was introduced at trial. A crime lab report, not disclosed to Manning's attorneys, showed that the print had been

made by a size eight shoe. Because Manning wears at least size 10 ½ shoes, the report showed that the print could not have been left by Manning. Failure to disclose the report was another violation of *Brady* causing prejudice to Manning's defense, which sought to show that other suspects were more likely to have committed the murders.

The State was in possession of evidence that Kevin Lucious did not live in the victims' apartment complex at the time of the murders and thus knew or had reason to know his testimony could not have been true. The State also knew or had reason to know that Lucious' testimony was the result of coercion, and yet it presented the testimony and allowed it to go uncorrected. This knowing use of false testimony requires post-conviction relief.

In the alternative, Manning was prejudiced by ineffective assistance of counsel resulting from his attorneys' failures to investigate and impeach witnesses Kevin Lucious and Herbert Ashford, their failure to investigate the shoe print found at the scene, and other failures prejudicing Manning's defense.

The cumulative effect of the foregoing errors was to deny Manning a fair trial, requiring post-conviction collateral relief from the convictions and sentences of death imposed at trial.

Manning was also denied due process as a result of the lower court's failure to require certification of the complete files produced by the Starkville Police Department and by failing to admit into evidence all items of the police file produce to Manning's post-conviction counsel.

ARGUMENT

I. The State violated Manning's due process rights by failing to provide favorable, material evidence, the cumulative effect of which puts the case in a different light and undermines confidence in the verdict.

A. The convictions must be set aside because of the State's failure to disclose police canvass notes showing that Kevin Lucious did not live in Brookville Garden at the time of the murders.

The State violates a defendant's right to due process if it withholds evidence that is favorable to the defense and material to the defendant's guilt or punishment. This includes evidence of impeachment. *Smith v. Cain*, 132 S. Ct. 627, 630 (2012); *Connick v. Thompson*, 131 S. Ct. 1350, 1381 (2011).

The defendant's rights are violated whether the State withheld the evidence intentionally or merely failed to disclose the evidence through inadvertence or oversight. *Strickler v. Greene*, 527 U.S. 263, 288 (1999) ("[U]nder *Brady* an inadvertent nondisclosure has the same impact on the fairness of the proceedings as deliberate concealment."). Failure to disclose favorable evidence violates due process "irrespective of the good faith or bad faith of the prosecution." *Kyles v. Whitley*, 514 U.S. 419, 432 (1995)

The prosecution must disclose favorable material evidence in the possession of police whether the prosecutor knows about the evidence or not. "[T]he individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police." *Id.* at 437. Favorable material evidence must be disclosed "even though there has been no request by the accused." *Strickler v. Greene*, 527 U.S. 263, 280 (1999).

Evidence is "material" within the meaning of *Brady* when there is "a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different." *Smith*, 132 S. Ct. at 630. The accused is not required to prove that the undisclosed

evidence, more likely than not, would have led to an acquittal. *Kyles*, 514 U.S. at 433. Undisclosed evidence is material if it "could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *Id*. at 435.

A determination of materiality must be based on the *cumulative* effect of the undisclosed evidence. *Id.* at 436 (materiality of undisclosed evidence must be "considered collectively, not item by item").

The United States Supreme Court recently set aside a conviction that, like Manning's, was based primarily on the testimony of a single eye witness. In *Smith v. Cain*, 132 S. Ct. 627 (2012), Juan Smith was convicted of first-degree murder in the killings of five people during an armed robbery. Smith was linked to the crime at trial by a single eye witness, Larry Boatner, who testified that Smith was the first gunman to come through the door. Boatner claimed that he had been face to face with Smith during the initial moments of the robbery. No other witnesses and no physical evidence implicated Smith in the crime. *Smith*, 132 S. Ct. at 629.

During post-conviction proceedings, Smith obtained police investigation files which contained notes made by the lead investigator indicating that, on the night of the murders, Boatner had stated that he "could not . . . supply a description of the perpetrators other then [sic] they were black males." Five days after the crime, Boatner told the investigator that he "could not ID anyone because [he] couldn't see faces" and "would not know them if [he] saw them." The files also included a typewritten report of the lead investigator stating that Boatner "could not identify any of the perpetrators of the murder." *Smith*, 132 S. Ct. at 629-30.

Smith asked that his conviction be vacated under *Brady* because the prosecution had failed to disclose the investigator's notes. The trial court denied relief and the appellate courts

declined to review the case. *Id*. at 630. The Supreme Court granted certiorari and reversed Smith's conviction. *Id.*

The State in *Smith v. Cain* did not dispute that the investigator's notes were favorable to Smith and had not been provided to the defense. The only question was whether the notes "were material to the determination of Smith's guilt." *Id.* The Court held that they were material:

> We have observed that evidence impeaching an eyewitness may not be material if the State's other evidence is strong enough to sustain confidence in the verdict. That is not the case here. Boatner's testimony was the only evidence linking Smith to the crime. And Boatner's undisclosed statements directly contradict his testimony: Boatner told the jury that he had "[n]o doubt" that Smith was the gunman he stood "face to face" with on the night of the crime, but Ronquillo's notes show Boatner saying that he "could not ID anyone because [he] couldn't see faces" and "would not know them if [he] saw them." Boatner's undisclosed statements were plainly material.

Smith, 132 S. Ct. at 630 (citations omitted). The State presented several theories arguing that the undisclosed evidence would not have made a difference in the outcome:

> The State and the dissent advance various reasons why the jury might have discounted Boatner's undisclosed statements. They stress, for example, that Boatner made other remarks on the night of the murder indicating that he could identify the first gunman to enter the house, but not the others. That merely leaves us to speculate about which of Boatner's contradictory declarations the jury would have believed. The State also contends that Boatner's statements made five days after the crime can be explained by fear of retaliation. Smith responds that the record contains no evidence of any such fear. Again, the State's argument offers a reason that the jury could have disbelieved Boatner's undisclosed statements, but gives us no confidence that it would have done so.

Smith, 132 S. Ct. at 630.

A. 1. Kevin Lucious gave crucial eye-witness testimony at trial.

A review of Lucious's testimony shows that the prosecutor sought to emphasize *exactly* where Lucious lived and was sitting at the time of the murders, specifying the distance and the angle in order to show that Lucious had a particularly strategic vantage point from which to view what he claimed to have seen:

Q. Where were you living on that day?
A. Across the street from their apartment.
Q. From whose apartment?
A. From the old ladies' apartment.
Q. . . . . And, and your apartment was right across the street from their apartment?
A. I mean, in an angle. My, mine was on the, the right and their's was on the left. So you could look directly at their door.
Q. How far was your apartment from theirs, ball park figure?
A. Approximately from home plate a little bit past second base, something like that.
Q. Home plate, that would be about 20 yards? Would that be fair?
A. Yes. Something like that.
Q. Now, who all was living in that apartment with you at the time?
A. Uh, it was myself, my baby's mother and my daughter.
Q. Okay. How old was your daughter at the time?
A. Four months.

(T. 387-88)

Lucious then testified that he talked to Manning and to Manning's brother, Marshon, in the street outside his own apartment, near the victims' apartment, at about 6:30 p.m. on the day of the murders. Lucious's four-month-old daughter was present, presumably in Lucious's arms. (*Id.* at 389-90) At the conclusion of this conversation, Lucious walked back to his own apartment:

A. After the conversation was over with, I started walking back to my apartment.
Q. Which was?
A. Uh. Right across the street.
Q. All right. Tell the ladies and gentlemen of the jury what happened and what you saw.
A. All right. Uh, as I, as I was walking back towards my apartment, he was walking towards their apartment, but at first I though he was going to buy another beer or something.
Q. When you say their apartment, what do you mean? Whose apartment?
A. Building 10.
Q. Building 10.
A. Yeah, he was walking toward building 10. I thought he was going to buy another beer or something.
A. All right. Now building 10 is where both the old ladies lived and where Delia Mae Hall lived, right?

A. Right.
Q. Go ahead[.]
A. And when I went in, I put my daughter in her swinger and I looked out the window, but when I looked out the window he wasn't standing in front of Delia Mae's house. He was standing in front of the old ladies' apartment.
Q. What did he do as he stood there in front of the old ladies' apartment?
A. At first he was standing there looking around and then he began knocking on the door.
Q. What happened at that point?
A. When, when I sitting in the window, he was knocking on the door. I can't say which old lady answered the door, but one of them opened the door and when they opened the door, he kind of like pushed the door open and went in and closed the door behind him.
Q. What happened after that?
A. I sat in the window for about 20 minutes and in the process, my baby's mother had came out of the bedroom and I told her to go back in the room, and I was just sitting in the window when I never did see he come back out.
Q. What did you and your family do? What did y'all finally do?
A. I called my mother and told her to tell me [sic] stepfather to come and pick us up and we went back out to the country.
Q. About how long was it after he went inside that apartment that y'all went out to the country?
A. Well, like I say, I sat in that window like about 20 minutes, and after he didn't, after I didn't ever see him come out, I went up, up, up the steps and used other neighbor's phone and I called my mother and I say within the next 30 to 45 minutes my stepfather had came.
Q. And I believe it was the next morning that you learned that the old ladies had been killed in that apartment, is that correct?
A. Right.

(T. 392 - 93)

A. 2. <u>The lower court's ruling on the State's failure to disclose the canvass notes.</u>

The lower court rejected Manning's claim that he was denied due process as a result of the State's failure to disclose the canvass notes. The *sole* basis of the court's ruling was that the canvass notes were not "material" within the meaning of *Brady*:

> The first issue before this Court is whether the State's failure to disclose the existence of canvass notes made by police after the murders, which listed Brookville Garden Apartment 11-E as "vacant" at the time of the murders, constitutes a violation under Brady. The Petitioner argues that had these canvass

> notes been produced, his trial attorney could have used them to impeach Kevin Lucious' trial testimony that Lucious saw the Petitioner force his way into the two victims' apartment from Lucious' apartment, located across the street.
>
> The Respondent concedes that these canvass notes were within the State's possession at the time of trial (in the actual physical custody of the Starkville Police Department) and were never disclosed to the Petitioner. However, the Court finds that these notes are insufficient to undermine confidence in the verdict reached at Petitioner's trial. Neither Lucious' trial testimony, nor any statement given by Lucious prior to 2010, mentioned apartment 11-E, or indicated that there was an issue regarding where he lived at the time of the murders. Therefore, even if these canvass notes had been disclosed, there would have been no reason to introduce them for impeachment purposes, leading the Court to the conclusion that the canvass notes are insufficient to create a reasonable probability that, had they been disclosed, the proceedings would have been different.

(RE 2; PCR CP 1142-43)

The lower court erred in its resolution of this issue. There was most certainly "an issue regarding where [Lucious] lived at the time of the murders." In fact it was central to his testimony and was "material" for purposes of *Brady*, as the following discussion demonstrates.

A. 3. The lower court erred when it concluded that the police canvass notes were not "material" within the meaning of Brady.

Contrary to the lower court's ruling, the canvass notes were favorable to Manning and would have been material to his defense. If defense counsel had known about the canvass notes showing not only that 11E was vacant, but that Lucious lived *nowhere* in the complex, he could have used the notes to impeach Lucious's testimony that he saw Manning force his way into the victims' apartment from the window of *his* apartment across the street. (T. 392) The location of this particular apartment, in relation to the victims' apartment, was something that the prosecutor and Lucious took pains to establish. As Lucious sat in the window of his apartment, he was at a distance "a little bit past second base," "about twenty yards" away, "in an angle" that allowed him to "look directly at their door." (T. 387-88)

The prosecutor also took pains to establish that Lucious was at this particular location not as a matter of happenstance, *but because he lived there.* His first question to Lucious about the events of January 18, 1993, was, "Where were you *living* on that day?" (T. 387 (emphasis added)) The testimony that Lucious *lived* at this location made Lucious more credible because he was testifying about a location that he knew well. The prosecutor understood that it was important to establish not only *where* Lucious was located at the moment in question, but also *why* he was there – i.e., it was his residence. There is simply no support in the record for the lower court's conclusion that there was no issue in this case "regarding where [Lucious] lived at the time of the murders."

The fact that Lucious *lived* in an apartment across the street from the victims also provided a basis for Lucious to supply other corroborating details. The prosecutor asked, *"Now, who all was living in that apartment with you at the time?"* – prompting Lucious to testify about his four-month-old daughter and the daughter's mother, Likeesha Jones. Lucious's testimony that he had just placed his daughter in her swing when he saw Manning from his apartment window, and that Likeesha came out from the back bedroom, gave the impression that Lucious's memory was accurate because he could recall other details about the day in question, and the testimony that he was caring for his four-month-old child, in an apartment that he shared with the child's mother, gave him an air of some responsibility and trustworthiness.

If defense counsel had known about the canvass notes showing that Lucious did *not* live in Brookville Garden on the day of the murders, and that that apartment he later moved into with Jones was vacant, he could have completely dismantled the compelling story constructed on direct, beginning with, "Isn't it true, Mr. Lucious, that you did not move into your apartment at Brookville Garden until two weeks after the murders?" The canvass notes provide a basis to

show that Lucious was not sitting at a window in Brookville Garden as he had claimed, not putting his daughter in a swing, not seeing Likeesha Jones come out of a bedroom, and not doing any of the other things he claimed to be doing at that time, including watching Willie Manning push his way through the victims' door.

Knowledge of the canvass notes would have prompted follow-up, not merely by defense counsel, but by the prosecutor himself to determine whether Lucious was in fact living where he claimed to be living at the time of the murders. This would have led to the production of the Brookville Garden records (RE 4), including the "Vacancy Losses" report and a signed copy of the apartment lease, which show that Apartment 11E was vacant for a period of five months encompassing the date of the murders, and that Lucious and Jones did not move into the complex until February 1, 1993. Knowledge of the canvass notes would have prompted the calling of Likeesha Jones to testify at trial as she testified in the post-conviction hearing in 2011, that she and Lucious lived with Lucious's mother outside Starkville on the day of the murders.

Prosecutor Allgood implicitly conceded the materiality of the canvass notes when he testified that, if he had known there was an issue about whether Lucious really lived in Brookville Garden at the relevant time, he himself would have investigated: "Quite frankly, if I'd known it was an issue, I would have made an effort to ferret that out myself." (PCR T. 305) When Allgood did learn about the evidence that Lucious and Jones did not live in the complex at the time of the murders, he "called over there and asked about that," (Id.) despite the fact that this discovery was not made until years after the trial. The impact of this information, causing Allgood to pick up the phone years later, leaves no doubt that *he* considered the evidence material. Allgood testified:

> I will concede the point of this. Had I known that the documentation showed that they weren't there, I would certainly have said, okay, what's up with this, and I

> would have gone back and I would have tried to figure out what was happening by going to Lucious, going to the apartments to see if the apartment had made an error because that's perfectly possible, also, and I would try to figure out and reconcile what was happening.

(PCR T. 307-08)

The lower court's conclusion that there was no issue regarding "where he lived at the time of the murders" appears to be based in part on the fact that, at trial, no one referred to Kevin Lucious's apartment as "Apartment 11E." This is no basis for finding that the canvass notes had no value for impeachment. The canvass notes refer to *every* apartment in the complex and show that Lucious lived in *none* of them. A total of twenty-seven buildings were canvassed. (PCR Ex. 9 at 43; RE 3) David Lindley testified that page 43 of the canvass notes reflects his instructions to his officers "to go to each one of the numbered apartments on this list." (PCR T. at 239-40.) The door-to-door interviews began on January 26, 1993, eight days after the murders. (*Id.* at 240) None of the notes identify Kevin Lucious or Likeesha Jones as a resident or occupant. In the twenty-two pages of canvass notes documenting the door-to-door interviews, Kevin's and Likeesha's names do not appear once. The notes do not merely specify that 11-E was vacant within days of the murder; they show that neither Kevin Lucious nor Likeesha Jones lived anywhere in the complex at the relevant time.

The State argued in its brief to the lower court that Kevin Lucious could have been "flopping" in an apartment on the day in question (i.e., staying with a male friend and not with Likeesha Jones (PCR CP 1037-38; Respondent's Post-Hearing Memorandum at 33-34)). The State proposed this as a theory for why Kevin Lucious could have been telling the truth at trial despite the fact that he was not living in 11E with Likeesha Jones. First of all, there is no *evidence* that Lucious was "flopping." The only reference to such a theory is the statement of Forrest Allgood during the post-conviction hearing that he had been *told* that "people flop in

those apartments." (PCR T. 294 ("I called somebody about that . . . . *And the answer I got was* that's not surprising because people flop in those apartments.") Allgood's statement is hearsay. Petitioner objected to the testimony as hearsay but was overruled. (PCR T. 295) The hearsay objection should have been sustained. Second, the canvass notes show that apartment 11-F, directly across the breezeway from 11-E, was a satellite office of the Starkville Police Department since well before the murders (PCR T. 241), precluding the possibility that Lucious might have been "flopping" without the police knowing about it. Finally, Kevin Lucious's testimony at trial was not that he was "flopping" with a male friend, but that he was living in an apartment with Likeesha Jones and their daughter. The materiality of the canvass notes must be considered in light of what Kevin Lucious actually said at trial, not what he might have said. The canvass notes showing that Lucious lived nowhere in Brookville Garden at the time of the murders would have been useful regardless of Lucious's explanation. If Lucious, when confronted with the canvass notes, attempted to "explain" the contradiction by claiming that he was "flopping" with a friend instead of living with Jones in 11E, Manning would still have benefited from the change in Lucious's story and the consequent damage to his credibility.

Manning's conviction, like the conviction in *Smith v. Cain*, was based on the eye witness testimony of a single witness. No one other than Lucious claimed to have seen Manning go into the victims' apartment at about the time of the murders. Although Herbert Ashford testified that he had overheard Manning say he "should have did more than he did to the ladies," (T. 431) Ashford's testimony would not have been sufficient to sustain a conviction if evidence of the vacant apartment had been available to undermine Lucious's testimony.

The State's witnesses conceded that Lucious's testimony was crucial and that, without it, there was no reasonable likelihood of a conviction. Prosecutor Allgood testified:

> If what you're wanting is an acknowledgment from me that Kevin Lucious was a very important witness in the case, you got that. [. . . O]bviously . . . he was a big, big, big piece of the prosecution. [I]f we subtract the testimony of Kevin Lucious, if I don't get past the direct verdict, then, I mean, obviously he was an essential witness.

PCR T. 309-10.

The indispensability of Lucious's testimony is also established by the actions of the State in seeking two continuances of the trial because of difficulties it faced in procuring Lucious's transport from the State of Missouri, emphasized by the testimony of the prosecutors themselves:

> For the benefit of the record, how essential, how important is Kevin Lucious to this particular case? I would say without it that, uh, the State of Mississippi would not be able to prove its case.

(T. 57)

If Manning's attorneys had been provided with the canvass notes showing Lucious to be living nowhere in Brookville Garden at the time of the murders, they would have been armed with impeachment evidence going to the very heart of the State's case. There was constitutional error in the failure of the State to disclose this evidence impeaching the testimony of its one and only eye witness. On this point Manning's conviction must be set aside.[8]

[8] The State argued in its brief to the lower court that Manning had no Brady claim regarding the canvass notes because his trial counsel were not diligent in pursuing discovery that would have included the notes. (PCR CP 1029) This is contrary to Supreme Court precedent. Defense counsel requested discovery of information that included Brady material before trial (CP 43-45), and the State responded in accordance with the prosecutor's "open file policy" (*Strickler*, 527 U.S. at 283-84) by including everything in the prosecutor's possession. (PCR T. 293) Under these circumstances the defense is entitled to rely on "the prosecution's representation that it had fully disclosed all relevant information its file contained." *Banks v. Dretke*, 540 U.S. 668, 693 (2004).

B. The convictions must be set aside because of the State's failure to disclose the crime lab report showing that the bloody shoe print could not have been left by Manning.

The State's obligation to disclose exculpatory evidence includes evidence in the possession of a crime lab. *In re Brown*, 952 P.2d 715, 719 (Cal. 1998) (habeas relief granted on basis of Brady violation where crime lab failed to provide defense with copy of worksheet attached to defendant's toxicology report, even though prosecutor was unaware of error); *United States v. Sebring*, 44 M.J. 805 (N. M. App. 1996) (citing *Kyles v. Whitley*, setting aside conviction on basis of *Brady* violation where lab test unknown to prosecutor was not disclosed to defense; prosecutor's "obligation to search for favorable evidence known to others acting on the Government's behalf . . . extends to a laboratory that conducts tests to determine the presence of controlled substances"); *Damian v. State*, 881 S.W.2d 102, 107 (Tex. App. 1994) ("Any evidence in the Brazoria County crime lab was within the effective care and control of the prosecution; as such, it could have and should have been disclosed to the appellant if it was favorable to his defense.") *See also Connick v. Thompson,* 131 S. Ct. 1350, 1358 (2011) (State conceded that prosecutors' knowing failure to disclose crime lab report showing blood type different from defendant was violation of *Brady*).

In *Kyles v. Whitley*, the State argued that no Brady violation should be found because "some of the favorable evidence . . . was not disclosed even to the prosecutor until after trial," and that the prosecutor "should not be held accountable . . . for evidence known only to police investigators." The Court rejected this argument, stating:

> To accommodate the State in this manner would . . . amount to a serious change of course from the *Brady* line of cases. In the State's favor it may be said that no one doubts that police investigators sometimes fail to inform a prosecutor of all they know. But neither is there any serious doubt that "procedures and regulations can be established to carry [the prosecutor's] burden and to insure communication of all relevant information on each case to every lawyer who

> deals with it." Since, then, the prosecutor has the means to discharge the government's Brady responsibility if he will, any argument for excusing a prosecutor from disclosing what he does not happen to know about boils down to a plea to substitute the police for the prosecutor, and even for the courts themselves, as the final arbiters of the government's obligation to ensure fair trials.
>
> This means, naturally, that a prosecutor anxious about tacking too close to the wind will disclose a favorable piece of evidence . . . This is as it should be. Such disclosure will serve to justify trust in the prosecutor as "the representative ... of a sovereignty ... whose interest ... in a criminal prosecution is not that it shall win a case, but that justice shall be done."

Kyles v. Whitley, 514 U.S. 419, 438-40 (1995) (citations omitted).

In determining whether undisclosed evidence is material, the court must consider its probative value in combination with all other items of undisclosed evidence. *Id.* at 436.

Evidence that the bloody shoe print found at the scene of the crime, next to the body of one victim, was also in the possession of the State at the time of trial. Page 18 of the crime lab records (RE 5) shows the print to be a size 8, which could not have been left by Manning, who wears at least size 10 ½ shoes. It is undisputed that page 18 was not provided to defense counsel. (PCR T. 292-93; RE 5; PCR CP 1143)

Evidence that the print was made by someone wearing a size eight shoe would have been favorable to Manning and material to his defense. Allgood conceded that the shoe print was important: "I think obviously a print next to the body might very well have some probative value, yes." (PCR T. 304) Williamson testified that if he had been provided with page 18 of the crime lab records, he would have brought out the fact that it showed a shoe size significantly smaller than Manning's. (PCR T. 331) Williamson went to great lengths at the trial of the case to show that there were other suspects besides Manning who were more likely to have committed the murders. (*Id.*) Evidence that the bloody print could not have been made by Manning would have played a crucial role in that theory of defense. Whether the prosecutor knew about the

evidence or not, the failure to disclose the information was a violation of Manning's due process rights.

The lower court found that Manning could not show prejudice because of the possibility that the print could have been made by someone who went to the crime scene. (RE 2; PCR CP 1143-44) Manning, however, is not required to prove more likely than not that the addition of this evidence would have led to an acquittal. *Kyles*, 514 U.S. at 433. He need only show, and the record does show, that there is a reasonable probability of a different result. *Smith*, 132 S. Ct. at 630. This is especially true if the probative value of the shoe print is considered in combination with the evidence that Lucious did not live in Brookville Garden at the time of the murders. It is the cumulative effect of the undisclosed evidence that determines whether evidence is material. *Kyles v. Whitley*, 514 U.S. at 436.

The crime lab report showing that Manning could not have left the bloody shoe print near the body of one of the victims, and the canvass notes showing that Kevin Lucious did not live in Building 11 at the time of the murders, "put the whole case in . . . a different light." *Kyles* at 435. The verdict that was rendered in the *absence* of this evidence is not worthy of this Court's confidence. *Id.*

II. The State violated Manning's due process rights through its knowing use of false testimony.

The State's knowing use of false testimony, its failure to correct false testimony, or its presentation of evidence which creates a materially false impression of the evidence violates a defendant's right to due process. *Mooney v. Holohan*, 294 U.S. 103 (1935); *Napue v. Illinois*, 360 U.S. 264 (1959); *Miller v. Pate*, 386 U.S. 1 (1967); *Alcorta v. Texas*, 355 U.S. 28 (1957). If the state presents or fails to correct false or misleading evidence, or allows a false impression of the evidence to go uncorrected, then 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 (2nd 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).

A different standard of materiality applies to the use of false testimony. Under that standard, "[a] new trial is required if the false testimony could have . . . in any reasonable likelihood affected the judgment of the jury." *Barrientes v. Johnson*, 221 F.3d 741, 756 (5th Cir. 2000) (citing *Napue v. Illinois*, 360 U.S. 264, 271 (1959) and *Giglio v. United States*, 405 U.S. 150, 153-54 (1972)); *see also United States v. MMR Corp.*, 954 F.2d 1040, 1047 (5th Cir. 1992) ("[I]f the government used false testimony and knew or should have known of its falsity, a new trial must be held if there was any reasonable likelihood that the false testimony affected the judgment of the jury."). The State must prove the absence of this likelihood beyond a reasonable doubt. *United States v. Agurs*, 427 U.S. 97, 103 (1976).

Well before the time of trial, the State had possession of police department canvass notes showing that Lucious lived nowhere in the Brookville Garden Apartments at the time of the murders. Thus it "knew or should have known" of the falsity of Lucious' trial testimony. *Id.* The State now has the burden of showing beyond a reasonable doubt that there was no "reasonable likelihood" that Lucious' testimony affected the verdict. That is an impossible task.

Further, Lucious testified at the PCR hearing that he gave false testimony at trial as a result of coercion. According to Lucious, Allgood "told me that I could be charged with the crime as well as my child's mother. She could be charged with withholding evidence, and I could be charged with conspiracy to those murders." (PCR T. 73) Lucious also testified that

Allgood knew that Lucious did not live in Brookville Garden at the time of the murders. (PCR T. 56) ("Yes, me and Mr. Allgood spoke about that. [. . . .I]t was like he didn't hear it. He was adamant about this situation, that Mr. Manning had committed the crime.") [9]

Likeesha Jones testified that she was interviewed numerous times by Sheriff Bryan and other members of law enforcement, and that she was being pressured to testify. She told the authorities repeatedly that she did not know anything about the murders and that she did not live in Brookville Garden at the time. (PCR T. 90-91) On one occasion Sheriff Bryan gave Likeesha some money to help with diapers and formula for her child, and according to Likeesha, Sheriff Bryan asked that she provide a statement about the murders in return for the money. (PCR T. 88-89). Likeesha's grandmother finally intervened: "They came back several times. And one . . . particular time they came back my grandmother, Mildred Jones, she angrily went off on Dolph Bryan and told him that I did not know anything. I wasn't living in the Gardens. She didn't understand why they constantly kept coming to me wanting information from me that I didn't know." (PCR T. 90-91) *See also* PCR Exhibit 6 (affidavit of Mildred Jones)[10]

This testimony also shows that the State knew or had reason to know that Lucious's eye-witness allegations could not be true, but it presented the testimony nevertheless and allowed it to go uncorrected. The burden is on the State to show beyond a reasonable doubt that the error

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[9] At the post-conviction hearing, the sheriff testified that Lucious said that he (Lucious) stayed with some unnamed "guy" in Brookville Garden at the time of the trial. (PCR T. 172) If that were true and Lucious actually said that to the sheriff, then the State had the obligation to correct Lucious' false testimony or at least make the defense aware of Lucious' inconsistent statements.

[10] The lower court chose not to believe the testimony of either Lucious or Jones on these points, finding the testimony of the State's witnesses to be more credible. (*See* PCR T. 178, 179 (Sheriff Bryan); PCR T. 225-26 (Lindley); PCR T. 290 (Allgood); RE 2, PCR CP 1144-45)). This finding was clearly erroneous, like the finding that there was no issue in the testimony regarding "where [Lucious] lived at the time of the murders."

could not have affected the verdict. *United States v. Agurs*, 427 U.S. 97, 103 (1976). Given the State's concessions that there would have been no case against Manning without Lucious's testimony, that burden could not possibly be met, and for that reason Manning is entitled to post-conviction relief.

III. Petitioner was Denied his Right to the Effective Assistance of Counsel Guaranteed by the Sixth and Fourteenth Amendments and the Mississippi Constitution

A. Overview of Legal Standard for Assessing a Challenge to Counsel's Effectiveness.

A conviction cannot stand if counsel's ineffective assistance rendered the trial unfair and its result unreliable. *See Johns v. State*, 926 So. 2d 188, 195 (Miss. 2006). To establish that trial counsel was ineffective, a petitioner must show that (i) counsel's performance fell below an objective standard of reasonableness and (ii) there is a reasonable probability that but for counsel's unprofessional errors, the result of the proceeding would have been different. *See Strickland v. Washington*, 466 U.S. 668, 687, 694 (1984). A reasonable probability is a probability that is sufficient to undermine confidence in the outcome. *Id.* at 694. *Doss v. State,* 19 So. 3d 690, 695 (¶ 8) (Miss. 2007).

Defense counsel cannot rely solely on discovery provided by the State. "'[A]t a minimum, counsel has a duty to interview potential witnesses and to make *independent* investigation of the facts and circumstances of the case.'" *Johns*, 926 So. 2d at 196 (¶ 38) (emphasis in original); *Wilson v. State,* 81 So. 3d 1067, 1083 (¶ 18) (Miss. 2012) ("Counsel must conduct an independent investigation."); *Ferguson v. State,* 507 So. 2d 94, 96 (Miss. 1987). Although counsel may make strategic decisions that render certain investigations unnecessary, such decisions must be reasonable under the circumstances. *See Strickland*, 466 U.S. at 691;

Spicer v. State, 973 So. 2d 184, 190 (¶ 12) (Miss. 2007) (reasonable professional judgment must support limitations on investigation).

This Court has emphasized that a defendant is entitled to a "basic defense," which includes a complete investigation of all material facts, both favorable and unfavorable; familiarity with the scene of the crime; interviewing and obtaining statements from material witnesses; and learning all information held by the State. *Johns,* 926 So. 2d at 198 (¶ 43) (citing *Triplett v. State*, 666 So. 2d 1356, 1361 (Miss. 1995)); *see also Harrison v. Quarterman,* 496 F.3d 419, 425 (5th Cir. 2007) (a lawyer must interview all relevant witnesses and make an independent investigation of the facts of the case). Counsel "must at least conduct a sufficient investigation to make an informed evaluation about potential defenses." *Wilson,* 81 So. 3d at 1075 (¶ 10) (quoting *Ross v. State,* 954 So. 2d 968, 1005 (Miss. 2007)).

"[A] lawyer who fails adequately to investigate, and to introduce into evidence, evidence that demonstrates his client's factual innocence, or that raises sufficient doubt as to that question to undermine confidence in the verdict, renders deficient performance." *Riley v. Payne*, 352 F.3d 1313, 1318 (9th Cir. 2003); *White v. Roper*, 416 F.3d 728, 732 (8th Cir. 2005) ("the presumption of sound trial strategy founders in this case on the rocks of ignorance"); *Ramonez v. Berghuis,* 490 F.3d 482, 490-91 (6th Cir. 2007) (counsel's failure to interview witnesses was prejudicial because the jury heard no evidence contradicting state's witness). The cumulative effect of counsel's deficiencies must be considered to determine whether there is at least a reasonable probability that the result would have been different. *Goodman v. Bertrand*, 467 F.3d 1022, 1030 (7th Cir. 2006) ("the cumulative effect of trial counsel's errors sufficiently undermines our confidence in the outcome of the proceeding").

B. Failure to Investigate and Impeach Kevin Lucious.

Manning has alleged that the State suppressed exculpatory evidence related to Kevin Lucious. *See* Argument I, *supra.* The State failed to disclose law enforcement notes showing that Lucious did not live across the street from the victims at the time of the offense as he claimed at trial. Although the State's suppression of evidence entitles Manning to relief, he alleges, in the alternative, that trial counsel were ineffective for conducting an inadequate investigation regarding these matters and for not impeaching Lucious. If this Court believes that trial counsel could have uncovered these facts through the exercise of due diligence, then trial counsel were ineffective, and Manning is entitled to a new trial. *Peoples v. Lafler,* 734 F.3d 503 (6th Cir. 2013) (counsel found ineffective for failing to use available evidence to impeach the credibility of witness tying defendant to crime).

Although Lucious was identified as a material witness for the State and defense counsel were aware of the effort that the State was going through to secure Lucious's presence from Missouri, counsel did not arrange to interview Lucious or his girlfriend to verify the truth of Lucious's statements. (PCR T. 57, 96, 210) Similarly, Manning's trial attorneys did not seek records from Brookville Garden. Counsel cannot simply rely on discovery provided by the State; instead, he must conduct an independent investigation. *See Johns, supra.*

Moreover, after learning of the details of Lucious's testimony, Jones contacted lead attorney Mark Williamson, but he failed to follow through. (PCR T. 92-95) Given the significance of Lucious's testimony, this failure amounted to deficient performance. *See Grant v. Lockett*, 709 F.3d 224 (3rd Cir. 2013) (counsel's performance deficient due to failure to investigate and impeach key witness for state).

For the reasons discussed previously in the discussion of the state misconduct claims, Petitioner was prejudiced by counsel's failure. Without Lucious's purported eyewitness testimony, there is at least a reasonable probability that the results of the proceeding would have been different. Mark Williamson recognized that Lucious' testimony "was extremely important." (PCR T. 325-26) In fact, Williamson did not believe the State had a case without Lucious. (PCR T. 334) The District Attorney shared Williamson's assessment of the importance of Lucious' testimony: "He was a very important witness in the case . . . obviously I felt like that he was a big, big piece of the prosecution." (PCR T. 309) *See Grant v. Lockett,* 709 F.3d 224 (3rd Cir. 2013) (prejudice resulted from failure to impeach an essential witness).

The trial court denied relief on this alternative ground for relief for three reasons. First, the lower court found Likeesha Jones' testimony about contacting Mark Williamson about Lucious' false testimony "unpersuasive." (RE 2; PCR CP 1147) In fact, the lower court found it "unlikely" that Jones made those phone calls. *Id.* The Court also found that Jones and Lucious were not pressured by state agents. (RE 2; PCR CP 1146) Second, the lower court found that Manning failed to show that counsel's performance was deficient. (RE 2; PCR CP 1147) Finally, the lower court found a lack of prejudice for the same reasons discussed in the *Brady* claim. (RE 2; PCR CP 1148 ("Lucious' residence was never an issue during the trial."))

The lower court's findings regarding Jones' credibility, including her efforts to contact Williamson, are clearly erroneous. "A finding of fact is "clearly erroneous" when, although there is evidence to support it, the reviewing court, on the entire evidence, is left with the definite and firm conviction that a mistake has been made." *Johns v. State,* 926 So. 2d 188, 194 (¶ 29) (Miss. 2006). A review of the complete record supports Jones' testimony and establishes that the trial court's factual findings are clearly erroneous.

Although Williamson did not recall speaking to Jones, he did not deny that the call took place. Moreover, other unimpeachable evidence confirms Jones' truthfulness on other points. Law enforcement records and records from the apartment complex corroborate Jones' testimony that she did not live across from the victims' at the time of the crimes. Without contrary evidence from Williamson and other evidence confirming Jones' credibility on other matters, the lower court erred in finding Jones' testimony about Williamson "unpersuasive."

Similarly, the record does not support the lower court's decision not to credit Jones' testimony regarding her interactions with the State in the course of its investigation. Despite denials from state agents about bringing pressure to bear on Jones and Lucious, there is no other plausible basis for Lucious to have testified falsely against Manning. Lucious was friends with Marshon, and there was no indication of any animus between Lucious and Willie Manning. Moreover, Lucious did not receive any consideration in Missouri for his testimony against Manning. The only conceivable reason for Lucious to have lied so brazenly was to deflect attention from himself or protect Jones from further harassment.

Even if the trial court's factual findings regarding Jones' testimony are accepted, Manning, is nevertheless entitled to relief on this alternative basis if this Court denies relief on the misconduct claims. Trial counsel had a duty to conduct an *independent* investigate Lucious and determine the accuracy and credibility of his statements. *Johns, supra.* Rather than fulfilling this duty, counsel relied solely on what the State provided during discovery. *See Ferguson,* 507 So. 2d at 96 (counsel ineffective for not conducting independent investigation and relying on material furnished by the State during discovery). Lucious was thus able to testify without fear of being contradicted on the most graphic and sensational aspect of his testimony.

The trial court also found that counsel's performance was not deficient because "where Kevin Lucious lived, at the time of the murders, was never an issue at trial." (RE 2; PCR CP 1148) According to the lower court, because the location of Lucious' residence was not an issue, counsel had not duty to investigate. For reasons stated in Section I above, the record sharply contradicts the court's conclusion that there was no issue concerning where Lucious lived at the time of the murders. Moreover, the lower court failed to consider counsel's duty to conduct an *independent* investigation. Defense counsel knew that Lucious claimed to live across the street from the victims with his girlfriend and provided vivid testimony about seeing Manning push his way into the victims' apartment. Counsel should have interviewed Lucious and his girlfriend to determine precisely where Lucious lived. Otherwise, they could not have ascertained the view that Lucious supposedly had, the lighting conditions, and other factors that could challenge his testimony. This reasonable investigation would have led counsel to uncover the truth about Lucious' residency and enabled them to establish Lucious' lack of credibility before the jury. Put another way, counsel's failure to make Lucious' residence an issue at trial amounted to deficient performance.

The trial court also found that Manning could not show prejudice if trial counsel's failure to uncover the truth about where Lucious lived was deficient performance. (RE 2; PCR CP 1148) The trial judge relied on the same basis for finding a lack of prejudice on the *Brady* claim: he found that Manning failed to show that the location where Lucious lived was an issue at trial. Lucious never specifically said that he lived in Apartment 11-E. (*Id.*) The trial court found that even if counsel had the canvass notes or apartment records, "there is still nothing in the record that would have made this information material at the time of Petitioner's trial." (*Id.*) However, as discussed previously, the notes would have shown that neither Lucious nor his girlfriend lived

anywhere in Brookville Garden, much less in Building 11, which is directly across from Building 10. This knowledge would have enabled defense counsel to impeach Lucious and thoroughly discredit his testimony. For these reasons, this Court should reverse the judgment of the lower court and find that trial counsel were ineffective if the Court denies relief on the state misconduct claims.

C. Failure to Interview and Present the Testimony of Marshon Manning.

Although Lucious told law enforcement that Marshon Manning was present when his brother Willie purportedly "confessed" to the murders, trial counsel never interviewed Marshon or called him as a witness. This prejudicial failure to investigate was unreasonable. Kevin Lucious told law enforcement that he participated in conversations in which Willie Manning implicated himself in the deaths of the victims. Lucious also testified that Manning's brother, Marshon, was present during the conversations. (PCR Ex. 2 and 3; PCR T. 53, 55; T. 395-97) Defense counsel did not call Marshon to rebut Lucious' testimony. In fact, defense counsel did not even speak to Marshon Manning. As a result, Lucious' testimony was undisputed, which no doubt contributed to the jury's erroneous conclusion that Lucious was truthful.

Lucious testified that about one and a half to two weeks after the murders, he was with Willie and Marshon Manning outside of Club Essex, and Willie made an incriminating statement. (T. 395) After Marshon supposedly told his brother to "shut up," Willie Manning threatened to kill Marshon. (T. 396) Lucious also asserted that another conversation with Marshon and Willie Manning allegedly took place several days after the conversation at Club Essex. According to Lucious, Willie waved a gun and told his younger brother that "it ain't nothing to kill somebody." (T. 397)

Trial counsel did not speak to Marshon Manning, much less call him to rebut Lucious' false statement. (PCR T. 132, 332) In fact, law enforcement did not interview Marshon. (PCR T. 132) Marshon acknowledged that he was friends with Lucious but emphatically denied that the conversations with Lucious and his brother ever took place. (PCR T. 130) Marshon denied that his brother ever admitted anything about the murders, that he and his brother spoke to Lucious about the murders in Brookville, that he and his brother had a conversation with Lucious outside of Club Essex, that Lucious hit him with a beer bottle, or that his brother ever told him that he had to kill someone to get respect. (PCR T. 130-131)

Even Lucious now admits that he lied at trial, thereby confirming Marshon's testimony at the evidentiary hearing. Lucious testified that the conversations at Brookville Garden and Club Essex did not take place and that he never heard Willie Manning say anything about the murders or killing anyone. (PCR T. 51)

Prejudice resulted "when counsel fail[ed] to call a witness who is central to establishing the defense's theory-of-the-case, and the jury is thereby allowed to draw a negative inference from that witness's absence." *Harrison v. Quarterman,* 496 F.3d 419, 427 (5th Cir. 2007). Reviewing courts have found trial counsel to have been ineffective when trial counsel did not even interview a potential witness. *See, e.g., Washington v. Smith*, 219 F.3d 620 (7th Cir. 2000) (affirming 48 F. Supp. 2d 1149 (E.D. Wis. 1999)); *Lord v. Wood*, 184 F.3d 1083 (9th Cir. 1999); *Holsomback v. White*, 133 F.3d 1382 (11th Cir. 1998).

As all agreed at the evidentiary hearing, Lucious was the most significant witness against Willie Manning. Lucious testified that he heard Manning make incriminating statements in the presence of Marshon. Given the obvious importance of Lucious' testimony, trial counsel obviously should have interviewed Marshon and called him to rebut Lucious' fabrications. If

trial counsel had presented a witness who could have rebutted Lucious' coerced and fabricated testimony, there is at least a reasonable probability that the results of the proceeding would have been different.

The lower court assumed that Marshon's testimony about not being interviewed by trial counsel was accurate. (RE 2; PCR CP 1150). The lower court also found nothing in the record as to why trial counsel would not have conducted this investigation. *Id.* Nevertheless, the lower court denied relief. As the lower court explained, "given the strong presumption that counsels' conduct falls within a wide range of reasonable professional assistance, that this action might be considered trial strategy, and absent any evidence to the contrary, the Court must find this issue to be without merit." *Id.*

The lower court's application of *Strickland*'s test for counsel's performance is unreasonable. The court overlooked the requirement that trial counsel conduct a reasonable investigation. As this Court has emphasized, trial counsel must undertake a complete investigation of all material facts, both favorable and unfavorable and interview and obtain statements from material witnesses. *Johns,* 926 So. 2d at 198 (¶ 43) (citing *Triplett v. State*, 666 So. 2d 1356, 1361 (Miss. 1995) It is inconceivable how a decision not even to interview Marshon can be considered reasonable since he supposedly overheard a detailed confession. *Spicer v. State,* 973 So. 2d 184, 190 (¶ 12) (Miss. 2007) (reasonable professional judgment must support limitations on investigation). Thus, the lower court's finding that counsel's performance was within the range of reasonable professional assistance is erroneous.

The lower court did not address the question of prejudice. For the reasons previously discussed, there is a reasonable probability that the results of the proceeding would have been difference had counsel's performance not been deficient.

D. Failure to Investigate Herbert Ashford and Interview Teresa Bush.

Trial counsel were also ineffective due to their failure to conduct a reasonable investigation to impeach Herbert Ashford and obtain additional evidence regarding the residence of Jones and Lucious at the time of the murders. Much of this evidence would have come from Teresa Diane Bush, who lived with Ashford in apartment 8D, which was in the building next to where Alberta Jordan and Emmoline Jimmerson lived. (PCR T. 146) Bush and Ashford dated for three years before they had a child. (PCR T. 146) Bush and Ashford were "very much close," but Ashford sold and used crack cocaine. (PCR T. 147) After the murders, Ashford was arrested and was held in Beaumont, Texas. Bush was no longer involved with Ashford after he was sent away. (PCR T. 161)

On the day of the murders, Bush spent a great deal of the day on the porch of her building but did not see anything regarding the murder. (PCR T. 147-48) She spoke to the police at least twice. (PCR T. 148)

Bush learned that Ashford was claiming to have overheard a conversation between Manning and Kevin Lucious. (PCR T. 148) This came as a surprise to Bush, who "knew it was a lie." (PCR T. 148) Bush is certain that if Ashford had overheard such a conversation, he would have "brought it to my attention right there then and there." (PCR T. 148) She was "100 percent sure because we never kept anything from each other, anything about his drug activity, using. There's nothing that we kept from each other." (PCR T. 148; *see also* PCR T. 150, 152)

Bush also stated that she did not see Lucious or Manning in Brookville Garden on the day of the murders even though she spent most of the day where she could see activity outside of her building. (PCR T. 149, 153-54) She saw several people near the breezeway of the victims' building because a neighbor of the victims was a bootlegger. (T. 161) However, she did not see

Willie Manning. (PCR T. 159) She also knew that no one lived in the building across the street from the victims. One of the downstairs apartments in the building across from the victims was a police precinct, and no one lived in the other downstairs apartment. (PCR T. 149, 160) She recalled that Jones moved in after Groundhog Day. *Id.*

Bush was never contacted by Manning's lawyers, but she would have been willing to testify on his behalf if she had been called. (PCR T. 162) Trial counsel did not recall anything about Teresa Bush. (PCR T. 212-13, 332-333, 338-339)

Counsel should have uncovered that she lived with Herbert Ashford at the time Ashford allegedly overheard Manning make incriminating remarks and interviewed her. It would have been important to see if she could corroborate Ashford's tales or if she could help establish that Ashford was giving false statements. Because she lived with Herbert Ashford, counsel should have been on notice to interview her. *Johns, supra.* Counsel had no reasonable basis for limiting their investigation into one of the State's key witnesses.

Manning suffered prejudice because of trial counsel's failure to interview Bush. She could have refuted Ashford's dubious tale of overhearing Manning talking to Lucious about the murders. Bush could have also discussed Ashford's illegal activities, thereby undermining his credibility further. Furthermore, she could have testified that she never saw Willie Manning in Brookville Garden on the day of the crimes even though she was outside a great deal of the day. (RE 3; *see generally* PCR Ex. 15 (no law enforcement notes taken shortly after the murders even referred to Manning being near the victims' apartment))

The lower court denied relief on this allegation of trial counsel's ineffectiveness in part because Ashford testified at the post-conviction hearing that he did tell Bush what he overheard Manning supposedly say. (RE 2; PCR CP 1149). Furthermore, the lower court found "Bush's

bare assertion that Ashford gave false testimony is insufficient to place trial counsel's conduct outside the objective standard of reasonableness." *Id.* The lower court also found no prejudice from the failure to interview Bush. *Id.*

The trial court misapplied the *Strickland* test and made clearly erroneous findings. First, the question at hand was whether trial counsel should have further investigated Herbert Ashford. The lower court did not address this issue; instead, it simply mischaracterized Bush's post-conviction testimony as a "bare assertion." As discussed above, except for Lucious, Ashford provided the *only* testimony linking Manning to the crimes. Because Ashford only spoke to law enforcement after he was in federal prison and desperate for assistance (PCR Ex. 11 and 12), trial counsel should have investigated to determine whether Ashford's credibility could be impeached. As part of this investigation, trial counsel should have approached Teresa Bush.

The lower court mischaracterized Bush's testimony as little more than a "bare assertion." However, Bush provided details about her relationship with Ashford, his illicit activities, what she witnessed on the day of the murders, and her familiarity with when Lucious and Jones moved into Building 11. Her testimony is corroborated by records regarding Building 11 and law enforcement notes indicating Ashford's involvement with illegal drug sales. (PCR Ex. 15 at 10) Moreover, Bush's clear and detailed testimony compares favorably to Ashford's litany of lies. At the post-conviction hearing, Ashford denied receiving a reduction of his federal sentence, even when presented with a federal court order granting a reduction. (PCR T. 280 and PCR Ex. 13 and 14) Ashford denied knowing that Dera Mae Hall, a neighbor of the victims, sold alcohol, but in his trial testimony, he mentioned that he bought beer from Hall. (T. 428-29, 431) Ashford even denied being involved with drugs at the time of the crimes, but law enforcement records show that David Lindley approached Ashford to determine whether

Ashford kept money or a stash at the victims' apartment. (PCR Ex. 15 at 10) At the post-conviction hearing, Ashford provided ample reason to question the veracity of his trial testimony. Any implicit suggestion by the trial court that it credited Ashford's post-conviction testimony is clearly erroneous.

The post-conviction court provided no explanation for its conclusion that Manning failed to establish prejudice. (RE 2; PCR CP 1149) As discussed above, testimony from Teresa Bush would have discredited Ashford and removed a key piece of evidence on which the State relied to convict Manning. The lower court erred in denying relief on this ground.

E. Failure to Investigate the Shoeprint Found at the Crime Scene.

In Argument I, Manning discussed the State's failure to disclose crime lab notes regarding the evaluation and size of a shoeprint found at the crime scene. If the Court believes that trial counsel could have obtained the notes through the exercise of due diligence, then trial counsel performed deficiently in not uncovering the notes. The lower court did not focus on trial counsel's performance, electing instead to find a lack of prejudice. (RE 2; PCR CP 1150) For the reasons discussed in Argument I, Manning was prejudiced by counsel's deficient performance and thus there is a reasonable probability that the result of the trial would have been different.

F. Additional Instances of Counsel's Ineffectiveness.

Manning also alleged that counsel's performance was deficient in other respects, such as failing to investigate other possible suspects and not rebutting the testimony of Larry Harris, who claimed that he saw Willie Manning in Brookville Garden on the night of the crimes. With respect to Harris, he claimed that he saw Manning at the apartment of Manning's stepfather, Kelvin Bishop. However, law enforcement notes do not indicate that Bishop lived in Brookville

Garden at the time. (RE 3) Moreover, for over a year, no one else reported seeing Manning in Brookville Garden, as documented in law enforcement files containing investigative notes and reports made shortly after the offense. (RE 3 and PCR Ex.15)

Because Manning informed law enforcement that he had not been to Brookville Garden on the day of the murders, the State sought witnesses, including Larry Harris, who could place him there. It was imperative for counsel to try to interview or at least try to discredit these witnesses. Counsel, however, did not do so. At the hearing, they claimed not to recall anything about Harris. (PCR T. 332-333, 338-39) The failure to investigate Harris' erroneous recollection amounts to deficient performance, which was also prejudicial to Manning's case.

Manning also alleges that counsel were ineffective for not investigating other suspects, such as Jo Jo Robinson or Roosevelt and Eugene Davis, especially since no one around the time of the crimes reported seeing Willie Manning in Brookville Garden. Law enforcement recorded interviews with individuals who claimed to see these suspects running near the victims' apartment around the time of the murder or who saw other individuals near the victims' apartment. (PCR Ex. 15 at 34, 37, 47, 48, 49, 56, 72, 83, 87, 93, 95-96)[11] At the post-conviction hearing, trial counsel had no recollection of any investigation into other suspects. Even though counsel's primary trial strategy was to show that James Jimmerson was responsible for killing his mother and grandmother, counsel could have shown good reason to investigate other suspects as well, including Robinson and the Davis brothers, and created reasonable doubt to show that no one who saw anything suspicious at the time of the murders said anything about Willie Manning. (PCR Ex. 7 (affidavit of Nettie Mae Thompson), RE 3 and PCR Ex. 15). Trial counsel's failure to present evidence of other suspects was unreasonable, and Manning suffered prejudice as a

[11] Pages 49 and 72 were introduced as part of PCR Ex. 9. (RE 3)

result of this deficient performance. The lower court did not address this ground in its order denying relief. This Court should find that Manning is entitled to post-conviction relief or remand this matter for additional proceedings.

IV. Manning is Entitled to Post-Conviction Relief Due to the Cumulative Effect of these Errors.

Although each of the errors discussed above warrants reversal of Manning's convictions, it is clear that "[w]hen all errors are taken together, the combined prejudicial effect requires reversal." *Randall v. State*, 806 So. 2d 185, 234-35 (Miss. 2001) (citing *Williams v. State*, 445 So. 2d 798, 810 (Miss. 1984)). It is also imperative that with respect to allegations of counsel's ineffectiveness and violations of *Brady v. Maryland*, 373 U.S. 83 (1963), the Court must consider the cumulative impact of the specific errors. *Williams v. Taylor*, 529 U.S. 362 (2000) (instances of ineffective assistance of counsel considered cumulatively); *Kyles v. Whitley*, 514 U.S. 419 (1995) (*Brady* claims considered cumulatively); *see also Smith v. Secretary, Dep't of Corr.,* 572 F.3d 1327, 1348-49 (11th Cir. 2009); *Simmons v. Beard,* 590 F.3d 223, 233 (3rd Cir. 2009); *Goodman v. Bertram,* 467 F.3d 1022 (7th Cir. 2006); *Gonzales v. McKune*, 247 F.3d 1066, 1078 (10th Cir. 2001) ("we can see no basis in law for affirming a trial outcome that would likely have changed in light of a combination of *Strickland* and *Brady* errors, even though neither test would individually support a Petitioner's claim for habeas relief"): *Banks v. Reynolds*, 54 F.3d 1508, 1515 n.14 (10th Cir. 1995).

Absent the constitutional violations, there is at least a reasonable probability that the result of the proceeding would have been different. Indeed, the State would not have been able to try Manning if the truth had been known. The prosecutor admitted the overwhelming importance of Lucious' testimony. There can be no doubt now that Lucious lied: he did not and could not have seen Willie Manning push his way into the victims' apartment from his own

apartment because Lucious did not live across the street from the victims. Records, including law enforcement's own files, confirm this. Instead, Lucious did not move into Brookville Garden until at least two weeks after the murders.

This fact alone warrants a new trial for Petitioner; however, the evidence produced at the hearing undermines other portions of the State's case. Lucious did not hear Manning make any incriminating statements, and Marshon Manning and Teresa Bush corroborate Lucious' recantation. Likeesha Jones and her grandmother also could have introduced evidence of State coercion to secure Petitioner's conviction. Lucious, too, has admitted that his false trial testimony resulted from coercion and threats applied by State agents.

Without the constitutional violation discussed above, the jury would have heard that Manning could not have left the shoeprint found near one of the victims, but there were numerous other suspects who were seen near, or even running from, the victims' apartment. Finally, the jury could have also heard evidence calling into question the State's attempt to show that Manning was seen in Brookville Garden around the time of the homicides.

Manning is entitled to a new trial if the constitutional violations undermine confidence in the jury's verdict. He has more than carried his burden and is therefore entitled to post-conviction relief.

V. Willie Manning was Denied his Right to Due Process of Law Guaranteed by the Federal and State Constitutions due to the Failure to Allow him to Inspect Law Enforcement Files or Admit Portions of the Files into Evidence.

Prior to the evidentiary hearing, Manning filed a motion for discovery, which included a request for certified copies of files from the Starkville Police Department and Oktibbeha County Sheriff's Department. (PCR CP 774). He also asked to inspect the files. Manning explained that those files would be relevant to the state misconduct and ineffective assistance claims for which

this Court had remanded for a hearing. *See generally Kyles v. Whitley,* 514 U.S. 419 (1995); *Strickland v. Washington,* 466 U.S. 668 (1984). The trial court is authorized to grant discovery pursuant to Miss. Code Ann. § 99-39-15.

At a motions hearing, the State objected, noting that no one from the State was going to certify copies of records, and arguing that the request to inspect the files was nothing more than a "fishing expedition." (PCR T. 8-11) Manning explained that he needed to ensure that he had all relevant documents from the files, and that he needed to authenticate some the documents that he intended to offer into evidence at the evidentiary hearing. Petitioner offered to disclose to the State the documents that he wished to introduce at the evidentiary hearing. (PCR T. 12). The lower court indicated that it did not anticipate that Petitioner would have problems having the documents offered into evidence authenticated. (PCR T. 13)

At the evidentiary hearing, Manning was able to have a number of law enforcement documents introduced. (RE 3). These documents included the notes of the canvass of the Brookville Garden apartments. However, the lower court refused to allow Manning to introduce additional records, though they were marked for identification. (PCR Ex. 15; PCR T. 168). The State objected when Manning proposed to introduce the records contained in PCR Ex. 15 because those documents did not constitute the *complete* Starkville Police Department file. The State accused Petitioner of having "cherry picked" the files. (PCR T. 167) Petitioner pointed out that based on the earlier motions hearing, he forwarded copies of the documents to the State, which acknowledged that the materials came from law enforcement files. (PCR T. 166) Additionally, Petitioner indicated that he would have no objection if the State wished to introduce additional materials, but the State persisted with its objection. (PCR T. 166-67)

During the cross-examination of David Lindley, Petitioner was able to introduce a number of pages of documents from the Starkville Police Department. (RE 3) Petitioner sought to have additional materials admitted, but the State again objected because the documents did not comprise the complete file of the Starkville Police Department.

Petitioner reminded the lower court that he had sought certified copies of the complete files but had been turned down, and that in the alternative, he had agreed to disclose documents he intended to introduce as evidence to see if the State could authenticate the records as coming from law enforcement files. (PCR T. 256-57) Petitioner asked that Lindley be allowed to review the proposed exhibit to confirm that the materials came from law enforcement files. (PCR T. 258)

The State complained that Petitioner had sufficient time to obtain certified copies of the records. (PCR T. 260) However, the State ignored that it had opposed Petitioner's request to obtain certified copies six months prior to the evidentiary hearing. The lower court sustained the State's objection and barred admission of PCR Exhibit 15.

When the records were finally marked for identification, the State again complained that Petitioner was only asking to introduce a portion of the police files. (PCR T. 317) The Court reiterated its decision to sustain the State's objection based on the "completeness doctrine," explaining that "[i]f a piece of evidence is introduced that is not complete, then sometimes it's possible to object to the introduction of that evidence without the remainder of the evidence also being included to show that completeness." (PCR T. 318)

The lower court abused its discretion in applying the rule of completeness, codified in Rule 106, MRE, to preclude admission of the documents offered by Petitioner. Rule 106 provides that "[w]hen a writing or recorded statement or part thereof is introduced by a party, an

adverse party may require him at that time to introduce any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it." The purpose of the rule is to prevent a factfinder from being misled by evidence taken out of context. *Washington v. State,* 726 So. 2d 209, 216 (Miss. 1998); *see also* Rule 106, MRE, comment.

Generally, Rule 106 prevents a party from introducing only select, misleading portions of particular documents. Thus, in *Kniep v. State*, 525 So. 2d 385 (Miss. 1988), the Court reversed a lower court's decision to allow only a portion of an autopsy report into evidence. Not allowing additional portions of the autopsy report misled the jury about the autopsy findings. *See also Carr v. State*, 655 So. 2d 824, 835 (Miss. 1995) (upholding decision of trial judge not to allow a defendant "slice out the harmful portions" of a statement).

Here, Manning never sought to introduce a portion of any particular document. To be sure, he had selected some materials out of a larger collection of materials, but Rule 106 does not stretch so far as to preclude admission of any document only because it was included in a file containing numerous other documents. Further, Rule 106 permits the introduction of additional materials to prevent a fact finder from being misled. At no point did the State explain how the introduction of any of the additional materials posed a risk of misleading the factfinder. Even when Manning acknowledged that the State was free to introduce any portion of the record that it felt was necessary, the State persisted with its objection.

The failure to permit the introduction of the records into evidence prevented Manning from fully developing grounds of ineffective assistance of counsel and possibly state misconduct. Without being able to establish what was in law enforcement's files, Manning could not determine whether there were other documents that the State should have disclosed, and other documents that his trial counsel failed to pursue.

Moreover, the failure to permit the admission of these additional documents (or even allow Petitioner to inspect or obtain certified copies) deprived him of a full and fair hearing. This Court remanded this matter to permit Petitioner an opportunity to develop a number of claims challenging the reliability of his conviction. The lower court's restrictions on Petitioner's ability to use these materials to develop additional evidence denied his right to due process guaranteed by the state and federal constitutions. *See generally Ford v. Wainwright*, 477 U.S. 399 (1986).

CONCLUSION

Wherefore, for the foregoing reasons, this Court should reverse the decision of the lower court, find that Willie Manning is entitled to post-conviction relief, and vacate his unconstitutionally obtained convictions. In the alternative, this Court should, at a minimum, reverse the lower court's ruling to bar the admission of evidence related to law enforcement's investigation and remand the case to the Circuit Court for additional proceedings.

Respectfully submitted, this the 12th day of December, 2013.

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CERTIFICATE OF SERVICE

I, the undersigned attorney for the Appellant, do hereby certify that I have this date caused a copy of the foregoing and a copy of the Appellant's Record Excerpts to be served on the following Counsel for the State of Mississippi by electronic service:

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