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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REPLY BRIEF OF APPELLANT

ORAL ARGUMENT REQUESTED

David P. Voisin
PO Box 13984
Jackson, MS 39236-3984
Phone: 601-949-9486
Fax: 601-354-7854
david@dvoisinlaw.com

Robert S. Mink
Wyatt, Tarrant & Combs, LLP
Post Office Box 16089 (39236-6089)
4450 Old Canton Road, Suite 210
Jackson, MS 39211
Phone: 601-987-5300
Fax: 601-987-5353
rmink@wyattfirm.com

ATTORNEYS FOR APPELLANT

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REQUEST FOR ORAL ARGUMENT

Appellant, Willie Manning, respectfully requests oral argument. Because this appeal is part of a capital case, oral argument should be granted pursuant to Rule 34(a), MRAP, which provides that "[o]ral argument will be had in all death penalty cases." Oral argument is also appropriate because this case involves substantial allegations of state misconduct resulting in a wrongful conviction. In fact, the Circuit Court found that the State failed to disclose exculpatory material but found that the suppressed evidence was not material. Appellant, however, shows that documentary evidence, including suppressed documents, show that the State's primary witness committed perjury, and thus the error could not have been harmless. Other constitutional violations discussed in Appellant's Brief also contributed to the wrongful conviction.

INTRODUCTION

For much of its brief, the State remains in deep denial. Despite records and other evidence clearly showing that Kevin Lucious, its indispensable witness, lied at trial, the State insists that it "did not present false testimony from Kevin Lucious." State's Br. at 48. On those occasions when it briefly acknowledges that Lucious may have given false testimony, the State argues that "there is no definitive evidence to prove when the lies took place, as opposed to when Lucious told the truth." *Id.* But there is no mystery, and law enforcement's own notes prove it. Lucious testified falsely when he claimed that he stood in his apartment across the street from the victims and saw Willie Manning force his way into their apartment. Records from the apartment complex and a number of other witnesses confirm this point. As *amici*, Professor Samuel R. Gross and The Innocence Network point out, a vast number of wrongful convictions result from perjured testimony or violations of *Brady v. Maryland*, 373 U.S. 83 (1963). *See* Brief of *Amicus Curiae*, Prof. Samuel R. Gross, *Manning v. State,* No. 2013-CA-00882-SCT at 8; Brief of *Amicus Curiae*, The Innocence Network, *Manning v. State,* No. 2013-CA-00882-SCT at 3-4, 8. In fact, Prof. Gross reports that perjured testimony is the most common cause of wrongful convictions, especially in capital cases. Gross Br. at 8.[1] As The Innocence Network explains, the use of incentivized witnesses, such as Kevin Lucious and Herbert Ashford, contribute to these false convictions. Innocence Network Brief at 4-5.

To avoid confronting these uncomfortable facts, the State resorts to a number of desperate arguments. It suggests that somehow Manning "waived" his arguments arising

[1] Besides *Brady* violations, Prof. Gross also notes that other factors contributing to wrongful convictions are evidence in Manning's case, including the length of the investigation, the fact that this was a capital case involving female victims and the recantation of a key witness.

under *Brady v. Maryland,* 373 U.S. 83 (1963), even though Manning plainly raised the matter. It attempts to shift the blame to defense counsel, even though defense counsel sought discovery pursuant to *Brady* and even though the District Attorney was representing that he had an "open file" policy. The State contends that as many as "six different individuals have given repeated, consistent testimony in this case that corroborates the testimony Kevin Lucious gave during Manning's trial." State's Br. at 55. This is a brazen misstatement of the facts of the case. Only one witness, Herbert "Bean-eye" Ashford, could actually offer any testimony that could corroborate Lucious' testimony, but only regarding an alleged "confession," not Lucious' testimony that he saw Manning enter the victims' apartment, and no one's life should hinge on the testimony of Ashford whose post-conviction testimony was riddled with inconsistencies. Two law enforcement personnel recounted their efforts to secure statements from Lucious, but those officers could not corroborate what Lucious purported to see. No one else purported to see Manning enter the victims' apartment or overhear a "confession."

The State engages in wholesale speculation that perhaps Lucious was squatting in the apartment across from the victims, even though a trusted officer of rank noted that the apartment, which was located across a short breezeway from a satellite office of the Starkville Police Department, was vacant. No one who actually saw anyone squat anywhere in Brookville Garden was called to testify.

These touch on some of the more outrageous claims that the State made. Manning addresses these and other distortions of case law, misstatements of the record, and twisted logic in the argument below.

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.

I. 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 violated *Brady v. Maryland* by failing to produce canvass notes of the Starkville Police Department which showed that Lucious did not live in Brookville Garden at the time of the murders. The notes were obviously favorable to Manning because they could have been used to impeach Lucious's testimony that he saw Manning force his way into the victims' apartment from the window of his own 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)

I. A. 1. The record clearly reveals that Manning did not "waive" this claim.

Before delving into the substance of the *Brady* claim, the State first notes "an irregularity between the issue Manning presented in his PCR application, and the issue which this Court gave Manning leave to argue before this Court." State's Br. at 21. Though acknowledging that Manning raised a *Brady* claim, the State asserts that this Court only gave Manning leave to pursue a claim that there had been a violation of *Napue v. Illinois,* 360 U.S. 264 (1959), and not *Brady v. Maryland,* 373 U.S. 83 (1963). *Id.* Thus, the State contends, this Court should find that Manning either waived the *Brady* claim or failed to present sufficient evidence to support the *Napue* claim.

Setting aside the obvious point that a party squarely raising an issue does not waive it, the State is wrong in its reading of the record. In response to Manning's *Brady* claim, found at PCR CP at 407-10, the Court granted a hearing. *Manning v. State,* 884 So. 2d 717, 727-28 (Miss. 2004). Although this Court cited *Napue*, it also cited *Giglio v. United States,* 405 U.S. 150 (1972), in which the United States Supreme Court granted relief based on *Brady*. In *Giglio*, the Court observed that "whether the nondisclosure was a result of negligence or design, [nondisclosure] is the responsibility of the prosecutor." *Id.* at 154. This is precisely the argument that Manning raised in his post-conviction relief petition. C.P. 409. This Court may not have cited *Brady* when remanding this ground for relief for a hearing, but it cited a case that applied *Brady*. Thus, there is no "irregularity," and no impediment to this Court's review.

The State also asserts that Manning did not cite *Napue* in his PCR application, which it deems to be "a critical error, even if the error itself was the product of oversight." State's Br. at 23. Manning did not cite *Napue* in Ground I of his petition because that section dealt with *Brady*. However, Manning raised *Napue* and other cases dealing with the knowing presentation of false evidence in Grounds A and B, and this Court granted a hearing on those grounds. *Manning,* 884 So. 2d at 722-23.

There was no "waiver" and no "irregularity" in the Court's opinion. The *Brady* claim is procedurally viable.

I. A. 2. Manning meets the requirements of *Brady* because the prosecution maintained an "open file policy."

The State argues that Manning has no *Brady* claim arising from the State's failure to disclose the canvass notes because he has not shown that his trial attorneys could not have "obtained the cards by reasonable diligence." (State's Br. at 26.)

In *Strickler v. Greene* and *Banks v. Dretke*, the Supreme Court examined the question of diligence in the context of a *Brady* challenge and held that defense counsel are not required to inquire further about *Brady* material if the prosecution maintains an "open file policy" and states, as the prosecutor did in this case, that "everything in its file" had been or would be produced.

In *Strickler v. Greene*, an eye-witness at trial claimed to be very confident in her identification of the defendant as the person who abducted a victim at a mall. 527 U.S. 263, 272-73 (1999). The defendant asserted a *Brady* claim arising from the State's failure to disclose letters and notes from this witness, and an investigating officer's notes, which cast serious doubt on the reliability of the witness's testimony. *Id*. at 273-75. Defense counsel discovered the notes during federal habeas proceedings and alleged that the State had violated *Brady* in failing to disclose them. *Id.* at 278.

The Fourth Circuit held that the *Brady* claim was procedurally barred because the factual basis for the claim was available to petitioner when he filed his state habeas petition. According to the Fourth Circuit, because it was known that the eye witness had been interviewed by police officers, "reasonably competent counsel would have sought discovery in state court" of the police files, and it is likely that the state court "would have ordered the production of the files . . . in response to this simple request." *Id.* at 279.

The Supreme Court reversed, finding that petitioner had reasonably relied on the prosecution's "open file policy" as fulfilling the prosecution's duty to disclose such evidence:

> [I]t was reasonable for trial counsel to rely on, not just the presumption that the prosecutor would fully perform his duty to disclose all exculpatory materials, but also the implicit representation that such materials would be included in the open files tendered to defense counsel for their examination.

> [. . . .] Although it is true that petitioner's lawyers . . . must have known that Stoltzfus had had multiple interviews with the police, it by no means follows that they would have known that records pertaining to those interviews . . . existed and had been suppressed. Indeed, if respondent is correct that Exhibits 2, 7, and 8 were in the prosecutor's "open file," it is especially unlikely that counsel would have suspected that additional impeaching evidence was being withheld.

Strickler v. Greene, 527 U.S. 263, 284-85 (1999).

In *Banks v. Dretke*, the State failed to produce information showing that an important prosecution witness was a paid informant. 540 U.S. 668, 675 (2004). The State argued there was no *Brady* claim arising from this failure because the defendant's attorneys, before trial and during post-conviction proceedings, never attempted to locate and interview the witness or the investigating officers to determine the witness's status as an informant. *Id.* at 695. The Fifth Circuit agreed and denied the *Brady* claim on the basis of this "lack of appropriate diligence." *Id.*

The United States Supreme Court reversed, relying in part on the fact that the prosecution represented to defense counsel, before trial, that it would provide "all discovery to which you are entitled," without the necessity of a formal discovery request. *Id.* at 675. The Court held that defense counsel were entitled to rely on this representation, and stated further,

> Our decisions lend no support to the notion that defendants must scavenge for hints of undisclosed *Brady* material when the prosecution represents that all such material has been disclosed. As we observed in *Strickler,* defense counsel has no "procedural obligation to assert constitutional error on the basis of mere suspicion that some prosecutorial misstep may have occurred."

Banks v. Dretke, 540 U.S. 668, 695-96 (2004).

An "open file policy" exists where the prosecution makes its entire file available to defense counsel. *Strickler*, 527 U.S. at 283, fn. 22 ("While the precise dimensions of an 'open

file policy' may vary from jurisdiction to jurisdiction, in this case it is clear that the prosecutor's use of the term meant that his entire prosecution file was made available to the defense.")

There was an "open file policy" in Manning's case. District Attorney Forrest Allgood testified that it was the policy of his office always to provide defense counsel with its entire file. "Whatever was in our file was given to defense counsel. . . . [O]ur policy has always been . . ., [w]e give them the file. Whatever's in our file, we give it to them." (PCR T. 293 Allgood testified that the responsibility to produce the entire file was entrusted to a staff member whom he referred to as the "discovery person":

> And her sole job was to make sure that every piece of paper we have in [the] file gets given to defense counsel. And there would have been a certificate made showing that. And defense counsel would have signed and said this is what I received. And the whole idea is to try to prevent things like this where people are accusing you not giving everything that you have.

(PCR T. 293-94)

The prosecutor's file in Manning's case was supposed to include the entire file of the Starkville Police Department, which had its own "open file policy." When police chief David Lindley was asked about his department's production of its files to the district attorney, he testified, "We copy those in the police department and forward a copy of everything in its totality to the district attorney's office." (PCR T. 232) The police department was not selective in deciding what to send to the district attorney: "Q. You don't select parts of the file that you think are important and then leave out parts that you think are not relevant? A: No, sir." (*Id.* at 245.) Under these circumstances, Lindley stated, he "would find it hard to believe" that any part of the police file in this particular case was not delivered to the district attorney. (*Id.* at 232)

Manning's attorneys requested discovery of information that included *Brady* material before trial. (CP 43-45) The State responded in accordance with its "open file policy" (*Strickler*, 527 U.S. at 283-84) by including everything in the district attorney's possession. (PCR T. 293) Under these circumstances, the defense attorneys were 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).

If the prosecutor's file did not contain the entire police department file, including the canvass notes, then the responsibility for that omission is imputed to the prosecutor for the purposes of *Brady*, regardless of whose failure actually caused the omission. *Kyles v. Whitley,* 514 U.S. 419, 437 (1995) (the individual prosecutor has an affirmative duty "to learn of any favorable evidence known to the others acting on the government's behalf in the case, *including the police*") (emphasis added). It cannot reasonably be imputed to Manning because of any alleged lack of diligence on the part of his attorneys.

Diligence on the part of Manning's lawyers had nothing to do with the ultimate discovery of the canvass notes. In support of its argument that Manning's trial attorneys were not diligent in seeking discovery of the cards, the State argues out that the post-conviction attorneys were able to obtain their discovery with nothing more than "a single discovery motion." (Brief for the Appellee at 26) In other words, if post-conviction counsel discovered the cards so easily, then trial could have done the same if they had simply been more diligent. (*Id.*)

The Supreme Court rejected this argument in both *Strickler* and *Banks*. Virtually every *Brady* case involves post-conviction discovery of exculpatory material that had been suppressed; thus, the State's position would essentially do away with *Brady*. Moreover, for Manning, post-

conviction counsel had the benefit of Rule 22(c) of the Mississippi Rules of Appellate Procedure which provides access to the files of the prosecution and all law enforcement agencies involved in the case. Manning's post-conviction counsel served a subpoena on the Starkville Police Department in 2001 asking it to make its "complete file" available for inspection and copying,[2] which is essentially what trial counsel did in 1995 by serving a comprehensive discovery request on the district attorney and then relying on the district attorney to comply with his open file policy. The only difference is that in 2001 the canvass notes were disclosed, and in 1995 they were not. The difference is not attributable to any higher level of diligence employed by post-conviction counsel. If for some reason the police department had chosen not to include the canvass notes in the production of its file in 2001, post-conviction counsel would have known no better. They would have assumed, as was their right, and as trial counsel did in 1995, that the police had "discharged their official duties" and that nothing had been left out.

I. A. 3. The canvass notes are "material."

The State also argues that the canvass notes are not "material" for purposes of *Brady*, alleging that there is no reasonable probability of a different outcome if the canvass notes had been used to impeach Lucious. In support of this argument the State presents a few "possible scenarios" that might have been used to rehabilitate Lucious even if he had been impeached with the notes. According to the State, although Lucious admittedly was not living with Likeesha Jones directly across from the victims' apartment as he claimed, he could have been at some other location in the complex – "flopping" with a male friend, visiting another resident in a different apartment, or standing on the sidewalk – and he mistakenly "juxtaposed two memories into one." (Brief for the Appellee at 34; *see also id.* at

[2] Post-Conviction Clerk's Papers at 30.

67 ("Lucious did not have to be living in Brooksville Gardens with Jones in order to see Manning enter the victims' apartment.")

First, the State's argument requires the Court to *speculate* about what Lucious might have said during the effort to rehabilitate him. None of the "possible scenarios" is in evidence – Lucious did not testify that he was flopping,[3] that he was in someone else's apartment or that he was on the sidewalk. Nor did anyone testify to that effect.

Second, the State's argument requires the Court to speculate about what the *jury* might have concluded if (a) Lucious had been confronted with the canvass notes and (b) Lucious had given one of the "possible scenarios" as his explanation for testifying falsely on direct. The United States Supreme Court in *Smith v. Cain* has already rejected the notion that a court can speculate about what a jury *might* have concluded if it had known about suppressed evidence:

> 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 . . . . 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. [. . . .] 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.

Third, it is ludicrous to suggest that Lucious could have been rehabilitated at all. He had given detailed testimony about the window of his apartment being at just the right distance and angle to allow him to see Manning clearly. He testified that he had just put his

[3] The only reference to the "flopping" theory was the post-conviction testimony of Forrest Allgood that he had been *told* that "people flop in those apartments." (PCR T. 294) Petitioner's contemporaneous objection to this statement as hearsay should have been sustained. (PCR T. 295)

daughter in her swing in the apartment, and he recounted what he said to Likeesha Jones when she came from the bedroom after he saw Manning push the victims' door open. If Lucious had been confronted at that point with police records showing that neither he nor Likeesha Jones lived anywhere in Brookville Gardens on the day in question, none of the "possible scenarios" identified by the State could have rehabilitated him.

In further support of its argument that the canvass notes present no reasonable probability of a different outcome, the State alleges, incredibly, that there were six other categories of evidence sufficient to convict Manning in the absence of Lucious's testimony about seeing Manning go into the victim's apartment. (State's Br. at 35-36) First, the State has already admitted that there would have been no conviction without Lucious's testimony.[4] Second, of the six categories of other evidence cited by the State as sufficient to convict Manning, *three of them come from the testimony of Kevin Lucious*. (State's Br. at 36 (items 1, 4 and 5)) Apparently the State believes that even if the canvass notes impeached Lucious's testimony about seeing Manning go into the victims' apartment, the jury still would have believed everything else that Lucious said.

I. 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.

Manning explained in his initial brief that the State also violated *Brady* by failing to disclose a Mississippi Crime Lab report showing that a bloody shoe print found next to the body of one victim was a size 8. Because Manning wears a size 10 ½ shoe, the print had to have been

[4] *See* T. 57, testimony of prosecutor that without Lucious's testimony, "*the State of Mississippi would not be able to prove its case* (emphasis added);" PCR T. 309-10, testimony of prosecutor implying that without Lucious's testimony, there was a likelihood that the State would not "get past the direct[ed] verdict."

left by someone else, a fact that would have significantly aided Manning's defense theory that other identified individuals were more likely to have committed the crimes than Manning. Prosecutor Allgood conceded, "I think obviously a print next to the body might very well have some probative value, yes." (PCR T. 304) When considered in conjunction with the canvass notes, the missing crime lab report contributes to a combination of evidence that could have placed Manning's "whole case in . . . a different light." *Kyles* at 435.

The State argues that there is no Brady violation on this issue because the Mississippi Crime Lab is not a "state actor" for purposes of *Brady*, and it accuses Manning of "quietly avoid[ing] the issue." (State's Br. at 40, fn. 6) Manning addressed this issue squarely in his initial brief at page 33 by stating, "The State's obligation to disclose exculpatory evidence includes evidence *in the possession of a crime lab*" (emphasis added), and by citing cases from three other states expressly finding *Brady* violations in the failure to disclose information in the possession of a crime lab.[5] Moreover, whether the crime lab is itself a "state actor" is irrelevant in light of the fact that the *prosecutor* must disclose material information in the lab's possession whether the prosecutor knows about the information or not. *Kyles,* 514 U.S. at 438-40.

Alternatively, the crime lab is a "state actor" under the reasoning of *King v. State*, 656 So. 2d 1168 (Miss. 1995). In *King*, this Court considered whether two psychiatrists

[5] *See* Brief for Appellant at 33 (*citing 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.")

were "members of the prosecutorial team" for purposes of *Brady* and found that they were not, in part because the prosecutor had no authority over them. *Id.* at 1176 ("the requirement that the government possess the evidence can be satisfied if the evidence was in the possession of the prosecutor or anyone over whom the prosecutor had authority.") The fact that the prosecutor had authority over the crime lab in Manning's case is established by the following testimony from the prosecutor himself:

> Q: Could defense counsel . . . get discovery from the crime lab?
>
> A: Well, I mean, he could ask for discovery from us and say, gee, I want the notes. And, I mean, that's done sometimes. And then we have to call down to the crime lab, and we say, gee, they want the notes; we got to give them up. And they send up copies, and we give it out.

(PCR T. 292). The fact that the Mississippi Crime Lab would have produced the missing report at the direction of the prosecutor demonstrates that it is an agency "over whom the prosecutor had authority." For this additional reason, the crime lab should be considered a "state actor" for purposes of *Brady*.

II. THE STATE'S KNOWING USE OF FALSE TESTIMONY AT TRIAL

Manning alleged that the State knowingly presented false testimony from Kevin Lucious at the capital murder trial. The State devotes the bulk of its brief to contending that it "did not present false testimony of Kevin Lucious." State's Br. at 48. It repeated this claim toward the conclusion of this subsection: "the evidence is insufficient to show that Kevin Lucious gave false trial testimony." State's Br. at 61. It went so far as to assert that six individuals corroborated Lucious's trial testimony. State's Br. at 55. Occasionally, the State admits that Lucious perhaps made some false statements, but adds that a problem for Manning "is that there is no definitive evidence to prove when the lies took place." State's

Br. at 48; *see also* State's Br. at 46 (noting that it is not "clear what part of Lucious's testimony at trial testimony was allegedly false and coerced").

The record, however, is plain that Lucious lied, and there is no mystery about when he lied. He claimed that from his vantage point in his apartment, he witnessed Willie Manning force his way into the victims' apartment. The State's own investigation revealed that to be false, but the State did not disclose those notes. Records from the apartment complex – an unimpeachable source – confirm that Lucious did not live across the street from the victims and thus that he lied at Manning's trial. These records also confirm that Lucious testified truthfully at the post-conviction hearing.[6]

The State devotes much of its brief to the various statements that Lucious has given: his trial testimony, several statements that he signed, and his post-conviction testimony. According to the State, the most reliable of these statements is Lucious's trial testimony, because it is the most "consistent with the testimony of other witnesses." (Brief for the Appellee at 61) This is baseless, for the simple reason that no other witness even addressed the subject matter of Lucious's trial testimony: i.e., that Manning entered the victims' apartment at about the time of the murders and that Lucious saw Manning do this from the window of the apartment he occupied with his daughter and Likeesha Jones.

The State even claims, "No less than six different individuals have given repeated, consistent testimony in this case that corroborates the testimony Kevin Lucious gave during Manning's trial." (State's Br. at 55) The six individuals apparently are those

[6] The State reviews a number of cases involving recanted testimony. State's Br. at 48-52. Those cases are readily distinguishable in that they do not involve a charge of state misconduct. Thus, a reviewing court applies a different standard for assessing whether the recanted testimony was prejudicial. Here, in sharp contrast, the Circuit Court found that the State had failed to disclose exculpatory evidence. RE 2, PCR CP at 1142.

identified in the State's brief on pages 53 – 55: Sheriff Dolph Bryan, Police Chief David Lindley, Prosecutor Forrest Allgood, Likeesha Jones, Herbert Ashford and Larry Harris. Of these six individuals, only three testified more than once to conceivably qualify as having given "repeated, consistent" testimony (Bryan, Lindley and Ashford), and the only points they could have corroborated did not pertain to what Lucious claimed to have seen and heard on the day of the murders. None of these six individuals were even in a position to corroborate Lucious's claim that he saw Manning push his way through the victims' door.

The only parts of the record that either corroborate or contradict Lucious's testimony in any relevant respect are the canvass notes and Brookville Garden Apartment, records (R.E. 4), both of which show that Lucious did not live in Brookville Gardens at the time of the murders.

The State also asserts that even if Lucious lied, the State did not know he was lying or coerce him. State's Br. at 61. However, ***law enforcement's*** notes showed that the apartment across the street from the victims' apartment was vacant, and the apartment that Lucious and Likeesha Jones eventually moved into was across a breezeway from a satellite office of the Starkville Police Department. Testimony at the evidentiary hearing did not bolster the State's position. For instance, the sheriff testified at the post-conviction hearing that Lucious reported to living with "the guy that lived there [in Apartment 11E] until that guy moved out." PCR T. 172. There was no mention of that "guy" at Manning's trial. Finally, this is not the only time that this District Attorney's office has presented false testimony at a capital trial. In *Hodges v. Epps,* 2010 U.S. Dist. LEXIS 95406, *44 (N.D. Miss.

Sept. 13, 2010), *aff'd on other grounds,* 648 F.3d 283 (5th Cir. 2011),[7] the District Court granted the writ of habeas corpus after finding that the District Attorney should have known that testimony from his assistant was false.

As even the State admits, if this Court finds that the State knowingly presented false testimony, then Manning is entitled to a new trial. State's Br. at 66-67. However, as Manning discussed in Issue I, he is also entitled relief even if the State acted in good faith and inadvertently failed to disclose the exculpatory information. Under either scenario, this Court should reverse the judgment below and grant post-conviction relief.

III. APPELLANT WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL IN VIOLATION OF HIS RIGHTS GUARANTEED BY THE SIXTH AND FOURTEENTH AMENDMENTS AND MISSISSIPPI LAW.

A. Counsel's failure to impeach Kevin Lucious.

Although Manning detailed how the suppression of information about Kevin Lucious' residence violated *Brady v. Maryland,* 373 U.S. 83 (1963), he also asserted, in the alternative, that trial counsel were ineffective in not uncovering and presenting that evidence. Manning pointed out that trial counsel did not interview Lucious or his girlfriend, and if they had, they may have also uncovered that they had been threatened. The State's response to this ground for relief is contradictory, confusing, illogical, and inconsistent with controlling precedent.

The State begins by claiming that "[t]rial counsel cannot be deficient for failing to investigate canvas [sic] cards showing Lucious did not live in Apartment 11E, when Lucious did not testify to living in 11E." State's Br. at 71. In the very next paragraph, however, the State "acknowledges defense counsel could have obtained evidence verifying Lucious's

[7] Because the Fifth Circuit affirmed the judgment of the lower court on an unrelated claim of trial counsel's ineffectiveness, it did not address the false evidence claim. *Hodges,* 648 F.3d at 285, n.1.

residency at the time of the murders . . . ." State's Br. at 71. Thus, while defense counsel could conceivably have uncovered the information, they would not have been alerted to look for it. If, as the State suggests here, defense counsel had little incentive to determine Lucious's residence based on what they knew prior to trial, then the State's prior suggestion that the *Brady* claim fails due to counsel's lack of diligence falls by the wayside.

The State contends that Manning cannot successfully charge trial counsel with not finding out about the threats against Lucious and Likeesha Jones because that evidence did not come to light until six years after Manning's trial. State's Br. at 71. Likewise, the State contends that Manning cannot prevail on a claim that counsel should have interviewed Likeesha Jones because Manning did not obtain her affidavit until 2002. However, ***all*** allegations of trial counsel's ineffectiveness relying on extra-record facts will be developed in post-conviction proceedings. Direct appeal claims are limited to the facts in the trial record. Rule 22(b), MRAP, Rule 10, MRAP. Ineffectiveness claims require the development of additional evidence and cannot be raised until post-conviction proceedings, especially in capital cases, which require the appointment of new post-conviction counsel. *See Jackson v. State*, 732 So. 2d 187, 190 (Miss. 1999) (noting that claims of counsel's ineffectiveness must be deferred until post-conviction proceedings). Manning followed the appropriate procedure and filed a timely post-conviction petition with affidavits supporting his allegations, and this Court granted an evidentiary hearing on these claims.

The State also finds that an ineffectiveness challenge involving Likeesha Jones cannot succeed because she was subpoenaed and thus "had the opportunity to testify on behalf of Manning and ***chose not to***. . . ." State's Br. at 73. Witnesses do not "choose" whether they will testify. They must be called by a lawyer. Manning's attorneys had no

recollection of actually speaking to Jones about Lucious. Jones's only tangential involvement that the defense counsel would have been aware of, and the reason she was likely subpoenaed, arose because she heard Tyrone Smith, a man with mental difficulties, take responsibility for the murders. PCR Ex. 8. Defense counsel called Smith at trial to elicit that he had confessed, but the State made clear that it found his confession to lack credibility. T. 659-60.

The State falsely claims that Manning "has failed to submit how, absent counsel's alleged deficiencies, the jury would have convicted Manning or sentenced him to death." State's Br. at 73. Manning discussed how counsel's awareness of the canvass notes and/or interviews with Likeesha Jones would have affected the course of the trial and relies on his prior submissions.

B. Counsel's failure to interview and call Marshon Manning as a witness.

Manning charged trial counsel with being ineffective for not interviewing Marshon Manning, Appellant's brother, especially since Kevin Lucious claimed that Marshon was present when Willie Manning made incriminating statements about the crime. Based on the evidence presented at the hearing, the Circuit Court assumed that Marshon testified accurately about not being interviewed by trial counsel but nevertheless found that counsel's performance was not deficient. RE 2, PCR CP 1150. The State does not acknowledge the Circuit Court finding with respect to whether Marshon had been interviewed and pretends that the record was insufficient to support such a finding. State's Br. at 74-75. Marshon, however, was clear that he was not interviewed; for his part, Mark Williamson, the attorney primarily responsible for the culpability phase of the trial, did not recall talking to Marshon.

The State insists that "[f]rom counsel's perspective at the time of trial," it was not deficient performance to fail to interview Marshon. State's Br. at 75. It gives two reasons for this bizarre perspective. First, it claims that "Marshon was not central to Manning's defense." State's Br. at 75. Second, it asserts that "Marshon's proposed testimony is itself discreditable." State's Br. at 76. Neither reason is tenable.

There are two flaws about the claim that not interviewing Marshon was excusable because he was not central to his brother's defense. Determining the best defense to raise depends on a thorough pre-trial investigation. Defense counsel were in no position to make a reasonable decision about Marshon's role in the defense without at least interviewing him. In addition, there is nothing inconsistent with relying on Marshon to rebut Lucious's assertions about Willie Manning's alleged confession and also pursuing a theory that someone else committed the murder. In fact, using Marshon to rebut the confession testimony could have only strengthened the defense that another person committed the murder.

The State also accuses Manning of failing to present evidence that "the jury verdict would have been different had Marshon impeached Lucious." State's Br. at 76. Setting aside the State's glaring misstatement of law – Manning need only show a reasonable probability of a different outcome – the State is simply incorrect. Marshon's testimony provides the evidence of prejudice. Marshon would have denied Lucious' testimony that his brother confessed to the murder. A direct challenge to Lucious's credibility would likely have gone a long way toward undermining Lucious's credibility and thus the likelihood that the State would have secured a conviction. Without Marshon, defense counsel may not have done enough to raise challenges to Lucious.

The State's suggestion that Marshon's testimony was "discreditable" is also dubious. First, without interviewing Marshon, counsel could not make any determination about his credibility. Second, not calling Marshon reinforced Lucious's testimony because the jury surely would have noted the omission of Marshon to challenge Lucious. Finally, Marshon would not have been any less credible than either Lucious, a murderer, or Ashford, a drug dealer desperately begging assistance from the State with his federal conviction. No plausible reason could justify not interviewing Marshon, and had he been called, there is at least a reasonable probability that the outcome would have been different.

C. Counsel's failure to investigate Ashford or interview Teresa Bush.

Herbert Ashford testified at trial that he overheard Manning make incriminating statements. Manning alleged that a reliable investigation into Ashford's allegations would have involved interviewing Teresa Bush, the woman with whom Ashford lived at the time of the murders, which was in the building next to the one in which the crime occurred. Bush testified at the post-conviction hearing that Ashford never mentioned anything about hearing a discussion of the murders to her. She also testified about Ashford's drug dealing, noted that she never saw Willie Manning in Brookville Garden that day, and recalled Lucious and Likeesha Jones moving into Apartment 11-E after the murders.

The State's primary response is to deny that trial counsel was deficient "in failing to investigate whether Herbert Ashford lied, when Ashford asserts he did not and there is no evidence to suggest he did." State's Br. at 77. *Strickland* requires an assessment of the reasonableness of counsel's decisions at the time those decision were or should have been made. This inquiry avoids the distortions of hindsight. The State, however, asks the Court to find counsel's performance to have been adequate based on Ashford's post-conviction

testimony. Once defense counsel learned the substance of Ashford's statements to law enforcement, they had a duty to investigate the witness's veracity, especially since defense counsel knew that Ashford was a convict seeking a deal.

Regarding the contention that there is no evidence that Ashford lied, Manning directs the Court to his brief detailing the numerous false statements that Ashford made. *See* Appellant Br. at 49-50.

Finally, the State claims that Manning cannot show prejudice because allegations regarding Ashford's perjury "are unsupportable and irrelevant." State's Br. at 78. Anything undermining Ashford's credibility would have been relevant, and, as noted, Manning supports his allegations against Ashford with Bush's testimony, the docket of Ashford's federal case, a comparison of Ashford's post-conviction and trial testimony, and notes from law enforcement.

D. Failure to Investigate the Shoe Print.

The State asserts a lack of prejudice about the shoe print because other people were at the crime scene. The prejudice inquiry of *Strickland* requires a reviewing court to review the new evidence and determine whether there is a reasonable probability that the result would have been different. While the State may have been free to argue that others were at the crime scene, the point here is that the ***jury*** did not have an opportunity to make that determination. Moreover, the State treated the shoe print as though it originated from the suspect. Otherwise, it would not have been sent to the Crime Lab for analysis. Also, even though other people arrived at the crime scene, there was no suggestion that anyone walked through the scene. Had the jury learned that the shoe print could not have been left

by Manning, there is a reasonable probability that the result of the trial would have been different.

E. Additional instances of counsel's ineffectiveness.

The State alleges that Manning did not "explore these issues in this evidentiary hearing." State's Br. at 79. Manning, however, discusses the evidence in his brief. Appellant Br. at 50-52. Any shortcoming in the evidence stemmed from the denial of discovery of the complete law enforcement file or the refusal to admit portions of law enforcement's files. *See* Issue V.

IV. Cumulative Effect of the Errors.

The State accuses Manning of not presenting this ground for relief to the Circuit Court. State's Br. at 80. This assertion is false. *See* PCR CP at 926-28. For a review of the devastating cumulative effect of the constitutional errors in this case, Manning refers the Court to his principal brief. Appellant's Br. at 52-53.

V. Failure to Permit Inspection of Evidence and Erroneous Failure to Admit Documents.

Manning claimed that the lower court erred in refusing his motion to inspect all of law enforcement files and for not allowing him to introduce into evidence many of the documents collected in PCR Ex. 15. Incredibly, the State asserts that "Petitioner does not identify or provide any information to this Court regarding PCR Exhibit 15." State's Br. at 81.The State goes further and charges that none of the transcript pages that Manning cited have anything to do with the matter raised. *Id.* The State is wrong. The pages cited indeed pertain to the issue concerning the records. Transcript pages 166-68 and 258-60 appear in Volume 10 of the record before this Court; transcript pages 317-18 appear in Volume 11.

The State suggests that this issue may somehow be barred because when this Court remanded this case for an evidentiary hearing, "Petitioner was not given leave to argue to this Court that the trial court erred in its evidentiary rulings on post-conviction." State's Br. at 82. This contention is illogical. The Circuit Court's erroneous evidentiary and discovery rulings occurred ***after*** the remand order; this Court could not have given leave to pursue a matter that had not yet occurred.

With respect to the substance of Manning's argument, the State overlooks the genesis of this issue in pre-hearing proceedings when Manning asked for access to the complete files to ensure that he would have the complete file. The State successfully blocked access, and then during the hearing, complained that Manning was not offering the complete file.

The State also faults Manning for not offering PCR Exhibit 15 into evidence. State's Br. at 84. But Manning would not have had to have the files marked for identification if he had been allowed to have them admitted as evidence. The State also claims that Manning could have offered the exhibits through trial counsel, Mark Williamson. State's Br. at 84. Williamson, however, could not have authenticated the documents as being from the State's files, and even offering documents through Williamson would have been futile since the Circuit Court accepted the State's argument based on the faulty understanding of the completeness doctrine.

As Manning discussed in his brief, the completeness doctrine applies to documents, not to entire files. Because of the misapplication of the completeness doctrine and the error in denying Manning access to law enforcement's complete files, this Court should reverse the decision of the lower court.

CONCLUSION

For the foregoing reasons, and for reasons stated in the Brief for the Appellant, 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 21st day of May, 2014.

WILLIE JEROME MANNING

By: *David P. Voisin*
David P. Voisin (MSB #100210)

By: *Robert S. Mink*
Robert S. Mink (MSB #9002)

David P. Voisin (MSB #100210)
David P. Voisin, PLLC
P. O. Box 13984
Jackson, MS 39236-3984
(601) 949-9486

Robert S. Mink (MSB #9002)
Wyatt, Tarrant & Combs, LLP
4450 Old Canton Road, Suite 210
Jackson, MS 39211
(601) 987-5324

ATTORNEYS FOR APPELLANT

CERTIFICATE OF SERVICE

I, the undersigned attorney for the Appellant, do hereby certify that on this date I filed a copy of the foregoing Reply Brief of the Appellant by means of the Court's electronic filing system, and have thereby caused a copy of the foregoing to served on the following Counsel for the State of Mississippi:

Melanie Thomas
Cameron Benton
Special Assistant Attorney General
PO Box 220
Jackson, MS 39205
mthom@ago.state.ms.us
cbent@ago.state.ms.us

This the 21st day of May, 2014.

By: *Robert S. Mink*
Robert S. Mink (MSB #9002)