2004-DR-00164 SCT

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Petitioner's Rebuttal to State's response to his application for leave to file Motion for post-conviction relief

IN THE SUPREME COURT OF MISSISSIPPI

Mississippi Supreme Court No. 2004-DR-00167-SCT

MARLON LATODD HOWELL,
Petitioner

v.

STATE OF MISSISSIPPI,
Respondent

PETITIONER'S REBUTTAL TO STATE'S RESPONSE TO HIS APPLICATION FOR LEAVE TO FILE MOTION FOR POST-CONVICTION RELIEF

COMES NOW, Petitioner Marlon Howell, through undersigned counsel[1] and pursuant to M.R.A.P. 22(c)(5)(ii), and files this rebuttal to the State's response to his application for leave to file a petition for post-conviction relief. Petitioner's request for post-conviction relief is pursuant to the First, Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, Article 3, §§ 14, 26 and 28 of the Mississippi Constitution, as well as other federal and state law set forth therein as well as below.

I. INTRODUCTION

In reviewing the State's Response, one is reminded of the scene in the classic film "The Wizard of Oz" in which the Great and All-Powerful Wizard upon fear of being discovered as a fraud commands Dorothy and her friends not to look behind the curtain. The State's Response is nothing

[1] Howell is an indigent inmate and has previously been adjudged indigent as set forth in Petitioner's prior filings in the Summer of 2000 following his arrest on the charges at issue. See Affidavit of David O. Bell and attachment. (PCR Ex. 27) Undersigned counsel is representing Petitioner in a voluntary pro bono capacity.

more than a plea that this Court not look behind the curtain of lies, half-truths and misrepresentations promulgated by the State that have served as the foundation of Petitioner's prosecution, conviction and direct appeal. Unfortunately, this is no children's fantasy, and these matters are literally those of life and death for an innocent man. It is Petitioner's position as set forth in his prior filings as well as this Rebuttal that the curtain of lies must be pulled back and the truth exposed.

In response to Petitioner's application, the State inaccurately summarizes and, in some instances, completely ignores both the evidence against Howell and the factual bases and evidence in support of the grounds he raises. The State encourages this Court to dismiss the evidence of grave errors and misconduct both at the trial and appellate levels affecting fundamental constitutional rights with inappropriate procedural bars. Further, the State continues to offer false, perjured testimony from at least one public official in support of its positions. In the reply below, Petitioner clarifies some of the factual misunderstandings and/or misrepresentations, summarizes the numerous applicable exceptions to the procedural bars raised by the State that allow this Court to grant relief on the merits of Howell's claims and responds to the State's assessment of the merits of his claims for relief.

II. STANDARD OF REVIEW

In reviewing the competing positions of each party at this stage of the process, this Court is concerned only with two narrow questions: (1) whether Petitioner has made a substantial showing of the denial of a state or federal right. Miss. Code § 99-39-27(5); *Foster v. State*, 687 So.2d 1124 (Miss. 1996); and (2) whether "it appears from the face of the application, motion, exhibits and prior record that the claims presented by such are not procedurally barred under Section 99-39-21." Miss. Code § 99-39-27(5). Procedurally, this Court's review is analogous to a review of a motion to dismiss for failure to state a claim filed pursuant to Rule 12(b)(6) of the Mississippi Rules of Civil

Procedure. See *Neal v. State*, 525 So.2d 1279 (Miss. 1987); *Billiott v. State*, 515 So.2d 1234, 1236 (Miss. 1987): *Horton v. State*, 584 So. 2d 764, 767 (Miss. 1991). Petitioner's factual allegations and all reasonable inferences from those allegations must be taken as true. *Simon v. State*, 857 So. 2d 668, 678 (Miss. 2003); *Lewis v. State*, 776 So. 2d 679, 680 (Miss. 2001): *Myers v. State*, 583 So.2d 174, 176 (Miss. 1991). Petitioner is entitled to an evidentiary hearing unless it appears beyond doubt that Petitioner can prove no set of facts in support of his claim which would entitle him to relief. *Robertson v. State*, 669 So. 2d 11 (Miss. 1996).

Petitioner relies, references and incorporates by reference as if set forth fully herein the discussion and statement of facts set forth in his prior filings and grounds for relief and will focus primarily on addressing the State's asserted defenses as related to those claims addressed herein. For the most part, the State provides little in the way of credible support in its Response to Petitioner's Application for Post-Conviction Relief and in reply to the mounds of evidence gathered and presented by counsel for Petitioner supporting his entitlement to post-conviction relief. Further, the State has continued in its overzealous attempt to condemn an innocent man by presenting perjured and blatantly false testimony from a public official to this Court as to be demonstrated herein and set forth fully in Grounds Z and AA.

Under § 99-39-27(7)(a), this Court has the power to grant the requested relief by vacating the conviction and discharging the Petitioner because of his innocence, or in the alternative, ordering a new trial. Petitioner's previously filed motion and evidence as well as this reply demonstrates that the Court should do so. But if the Court believes that inappropriate, it should follow the alternative course set out in § 99-39-27(7)(b) and allow the filing of the Petitioner's post-conviction motion in the trial court so that the trial court can hold a hearing and determine whether the conviction and sentence should be vacated.

III. ARGUMENT IN REBUTTAL

A. THE STATE FAILED AND CONCEDES A BRADY VIOLATION IN THE FAILURE TO DISCLOSE EXCULPATORY INFORMATION CONCERNING PRIMARY STATE WITNESS CHARLES RICE.

The record is clear that Petitioner's trial counsel sought discovery pursuant to Rule 9.04 and wrote to the prosecutor specifically requesting exculpatory information on witnesses, including but not limited to Charles Rice. (PCR Ex. 13 and 58) One of the prosecutors now provides an affidavit admitting that he did not even look for, much less disclose, the wealth of impeachment material concerning this star witness. Because the rule of *Brady* is clear that the duty of disclosure rests on the prosecutor and that the prosecutor's good faith is irrelevant, the State has conceded that it violated Howell's due process rights. *Brady v. Maryland*, 373 U.S. 83, 87 (1963)

The State's representation is that the District Attorney's office turned over all documents that were discoverable. (Response, p. 31) However, this does not address the issue of any other information possessed by the State other than that held by the District Attorney, to include but not limited to law enforcement agencies regarding Rice's criminal history or activity as a drug user prior or subsequent to the murder of Mr. Pernell. The State has an obligation and a duty to exercise due diligence. *Brady*, 373 U.S. at 87; *Swindle v. State,* 755 So.2d 1158, 1179 (Miss. Ct. App. 1999) It is equally irrelevant if the undisclosed evidence was in the hands of the police rather than the prosecution. *Kyles v. Whitley*, 514 U.S. 419, 437-38 (1995); *see also United States v. Antone*, 603 F.2d 566 (5th Cir. 1979); *Barbee v. Warden*, 331 F.2d 842, 846 (4th Cir. 1964); *Boone v. Paderick*, 541 F.2d 447, 450-51 (4th Cir. 1976); *United States v. Perdono*, 929 F.2d 967 (3rd Cir. 1991); *Banks v. Dretke*, 540 U.S. 668 (2004). Moreover, even raw notes or informal statements must be disclosed to the defense. *See, e.g., United States v. Pelullo*, 105 F.3d 117 (3rd Cir. 1997).

The State represents that the District Attorney's office ran no NCIC report on Charles Rice.

(Response, p. 31) However, the affidavit of Kelly Luther, Assistant District Attorney involved in the trial and conviction at issue in Union County, Mississippi, makes no mention of an NCIC report. (State's Exhibit 1) In addition, the State makes no statements and produces no evidence regarding any such background checks run on Rice or any other individuals by law enforcement to include but not limited to police.[2] The only reference by the State is to any such checks run by the Union County District Attorney's office under the direction of Assistant D.A. Luther. In addition, Assistant D.A. Luther does not deny that his office did run criminal background checks on Petitioner's family, but yet by his own account, they failed to run a check on their star witness. The prosecutor, as representative of the State, has a duty not just to win but to ensure that "justice shall be done." *Kyles*, 514 U.S. at 439 (quoting *Berger v. United States*, 295 U.S. 78, 88 (1935)). Thus, 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." *Kyles*, 514 U.S. at 437.

The State adds that "petitioner had every opportunity to request an NCIC check be run by the State on Rice but failed to do so."[3] (Response, p. 31-32) However on July 26, 2000, Petitioner's trial counsel filed a Rule 9.04 Motion as well as made a specific written request on March 2, 2001 regarding any exculpatory materials or information relevant to the State's witnesses to include

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[2] In support of its position that local law enforcement was aware of Rice's criminal activity, Petitioner has produced an affidavit from Private Investigator Joel Morris regarding his investigation into Charles Rice and his interviews with various witnesses, neighbors and individuals with knowledge of activities at Rice's residence of 203 Broad Street and the surrounding neighborhood, including but not limited to at least one law enforcement officer.

[3] As for the statement by the State that the failure of Petitioner's trial counsel to request this information bars Petitioner from asserting this claim, this statement only goes to support the ineffective assistance of counsel claims at both the trial and initial appellate stages should this Court find that this failure by prior counsel does represent such a bar. Counsel for Petitioner would refer the Court to Grounds D, I, O, P, Q, S, U, V, W, X, BB, and DD as it relates to the multiple issues of ineffective assistance of counsel.

Charles Rice. (PCR Ex. 58 & 13) The State failed to exercise due diligence in its response to these requests. Further, the State, specifically the District Attorney's office, breached its sworn duty to present credible, reliable evidence to the jury and to ensure that no false or misleading impressions are presented to the fact finder, particularly in a capital murder trial where the potential outcome is the most severe of sanctions–death.

As for the issue of Rice's substantial criminal history, the State now notes and concedes Rice's incarceration in Illinois for the crime of burglary committed on September 2, 1983. The criminal record states "The defendant and two co-defendants entered a residence and removed several rifles, shotguns, and ammunition. The defendant's confession indicated he intended to sell the weapons to a drug dealer." (PCR Ex. 9, p. 10) The State makes no mention, and therefore, does not contest Rice's criminal history as set forth in his record. This history includes theft of vehicle (April 22, 1981); theft (October 27, 1981); domestic battery (April 3, 1993); domestic battery (April 29, 1993); theft of property (October 9, 1993); and DUI (August 6, 1994). (PCR Ex. 9 and Petition, p. 23-24)

These offenses alone raise serious questions regarding Rice's credibility and reliability as does his intent at the time of the burglary to sell his stolen goods to a drug dealer. The issue of Rice's testimony regarding the period of time from 1984 to 1989 when he worked for a Cadillac dealership in Illinois goes to his credibility as he was not released from prison to the Mandatory Work Release (MWR) program until September 18, 1985 where he remained under the supervision of the Illinois Department of Corrections MWR program until September 8, 1987. Further, the fact is that these issues were never brought to the attention or knowledge of Petitioner's trial counsel nor was a jury made aware of the State's star witness' criminal past and prior incarceration for crimes directly related to his truthfulness and reliability as a witness.

As for Rice's gang activity, the State acknowledges and points out Rice's own self-serving statement made on September 13, 1984 while in prison regarding his involvement with the Disciples. (PCR Ex. 9, p. 18) The State, however, fails to point out that, prior to his involvement with the Disciples, Rice had also acknowledged his membership in the Simon City Royals, another gang in which he had been a member for a period of two to three years. (Id.) The State also makes no reference to, and therefore concedes, the fact that Rice was cited while in prison for "Gang Activity" on September 28, 1984 as set forth in his prison disciplinary sheet included with his criminal record. (Id., p. 17) This gang activity by Rice was noted only 15 days after he made his statement to prison authorities on September 13, 1984 that he would never again be involved in any gangs. (Id., p. 18) This contradicts Rice's self-serving statement to a prison official that he was no longer involved in gangs and also contradicts the representation of the State that Rice was not part of a gang while in prison. (Response, p. 33) Once again, this goes to Rice's credibility and his reputation for truthfulness and reliability where he tells prison officials he is no longer participating in gangs only to be cited and punished two weeks later for gang activity. Rice was the individual who D.A. Hood said "chooses to be one of those people in society who contributes" and vouched for his credibility before the jury judging Petitioner. (T.p. 1002)

The State next references the statements provided by several witnesses regarding Rice's reputation in the community at the time of the May 15, 2000 killing of David Pernell as a drug user. With respect to these affidavits, the State attacks their form, but implicitly corroborates their content via the State's affidavit of Charles Rice. Rice has provided an affidavit to the State in addition to two affidavits to Petitioner. None of these affidavits contain a denial by Rice of his drug use, his criminal history or the fact that he would have seen Howell in the neighborhood surrounding 203 Broad Street prior to May 2000. *Cf. Sims v. Georgia*, 389 U.S. 404, 406 (1967) (vacating conviction

because State failed to take opportunity to contradict evidence offered by petitioner regarding voluntariness of confession).

Witness Chris Collins has provided a statement outlining his knowledge regarding Charles Rice which was signed and witnessed by two individuals, Juan D. Wheat, Jr. and Joel W. Morris. (PCR Ex. 10) Both Wheat and Morris are residents of North Carolina, and Morris is a licensed private investigator, as well as a notary public in the State of North Carolina. The State misrepresents the content of the Statement as the bulk of the statement goes toward Rice's testimony at trial that he had never seen Petitioner prior to his claim that he saw him on the night of Mr. Pernell's murder. Of course, Collins does possess knowledge of Rice's history of using and purchasing drugs as do many individuals in that area and he describes the basis for this knowledge in his statement. Again, the State concedes Rice's criminal history and reputation as a drug user. Information denied to Petitioner's trial and appellate counsel. Likewise and as it relates to any allegation of a procedural bar for failure to raise this issue at trial or on direct appeal, this evidence was obviously not available due to the admitted failure to disclose the evidence, and thus this matter could not have been raised previously. *See Simon v. State,* 857 So.2d 668, 679 (Miss. 2003).

Collins along with several neighbors and individuals with knowledge of the area surrounding Rice's residence at 203 Broad Street have provided statements that Rice had seen and even talked with Petitioner on numerous prior occasions. See PCR Ex. 10, 11, 15, & 16. Collins testifies in his statement that Rice saw Marlon often two times a week prior to the morning of the shooting. (PCR Ex. 10, p. 1) This evidence along with that of all the other witnesses casts further suspicion on Rice's identification of Petitioner as the individual who murdered Mr. Pernell. Further, the contents of the Collins statement are not contested by Rice in any of his affidavits, including the State's.

The statement of Gilliam is based on his observations of Rice as well as admissions made

by Rice to him. Gilliam's statement is again witnessed by Joel Morris, a private investigator and North Carolina notary public. Gilliam specifically states

> "Charles Rice I know very well. He was really into drugs & partying at the time of May of 2000. He told me that he did not know who shot Mr. Pernell. (Rice) said he pick (sic) who the police wanted him to. I asked him why he got involved he said he was on his porch that morning drinking coffee & smoking a joint & saw Mr. Pernell begging for his life."

(PCR Ex. 11, p. 1) Gilliam also describes Rice has having a temper and recounts how Rice:

> "would constantly fight w/ Melody & in addition to doing marijuana, he would do prescription drugs, cocaine & drink alcohol. He partied constantly & I would give him drugs & party w/him."

(Id., p. 2) The State describes this as a self-serving statement, but it is difficult to see how these statements are self-serving to Gilliam.

The State makes much ado of the fact that the statements of Collins and Gilliam are not notarized or sworn statements. At the time these statements were provided and during the interviews with these witnesses, Petitioner's pro bono counsel did not have access to nor the services of a Mississippi notary public. (Rebuttal Exhibit 1, p. 3-4) While Petitioner's counsel did have a notary available for the statements of the majority of witnesses, it was impossible for Petitioner's counsel to be able to have all of these statements sworn given the fact that his attorneys are working pro bono and must travel from North Carolina to investigate these claims with no law office or little in the way of resources while in Mississippi. (Id. & Rebuttal Exhibit 2) However, these statement were witnessed by Joel Morris, a North Carolina notary who is prepared if necessary to testify regarding the circumstances surrounding the signing of these statements. In a sworn affidavit, Morris confirms the statements of Petitioner's counsel in Rebuttal Exhibit 1 that a notary was not available for the

statements of Collins or Gilliam, as well as the Statement of Tonya Peterson, but he witnessed the signing of the statements and attests to their authenticity. (Rebuttal Exhibits 1 & 2) Of the 26 affidavits offered in support of Petitioner's application for post-conviction relief, only the statements of Collins, Gilliam and Peterson were not notarized[4]. (PCR Ex. 4, 5, 6, 7, 8, 10, 11, 12, 15, 16, 20, 21, 22, 24, 25, 27, 28, 32, 43, 48, 50, 51, 52, 53, 56, and 57)

Further, the State makes comments as to allegations of "patent falsehoods" in Petitioner's affidavits and evidence. (Response, p. 35) It should be noted that Petitioner has already demonstrated one falsehood in the representations of the State regarding Rice's on-going prison gang activities. As will be evidenced later in this Rebuttal, this only begins to address the serious and blatant falsehoods and misrepresentations perpetuated by the State in this case both in its attempts to uphold the conviction and to discredit his counsel.

Despite the State's representations to the contrary, Miss. Code Ann. § 99-39-9(1) allows for exceptions if an affidavit is not reasonably or readily available. Further, each statement was witnessed by an individual or individuals who could attest to the statement and testify should there be some later issue regarding the circumstances surrounding the statement or its authenticity. Mississippi case law is replete with instances where the Court has recognized that affidavits are not essential if Petitioner can prove a claim through other documents or his own attestation. *Ford v. State*, 708 So. 2d 73 (Miss. 1998); *Lewis v. State,* 776 So. 2d 679 (Miss. 2000); *Brewer v. State*, 819 So. 2d 1169, 1175 (Miss. 2002) (court considered unsworn statement from victim's mother); *Hannah v. State*, 943 So. 2d 20, 23 n. 1 (Miss. 2006) (noting that petitioner submitted an unsworn affidavit in support of ineffectiveness challenge and ultimately granted relief); *Callins v. State*, _____ So. 2d

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[4] This total does not include the six notarized affidavits attached to Petitioner's Rebuttal.

____, 2007 Miss. App. Lexis 243 (Miss. App. April 17, 2007) (granting evidentiary hearing despite failure to supply trial court with affidavits from witnesses noted in the petition).

As it relates to Petitioner's claim regarding the failure to produce Rice's criminal background, the State asserts this issue is barred because it was not raised at trial or on direct appeal. It is Petitioner's position that these matters are not barred, but to the extent this claim may be defaulted in any sense, Petitioner has alleged in the alternative that trial counsel as well as counsel on direct appeal was ineffective in handling this issue as well as numerous others. See Grounds D, I, O, P, Q, S, U, V, W, X, BB and DD. Further, prior counsel has acknowledged and admitted his ineffectiveness in handling these issues. (PCR Ex. 21) Trial and direct appellate counsel's ineffectiveness would also constitute cause for any alleged default.

As the factual allegations and all reasonable inferences from those allegations must be taken as true, Petitioner is entitled to an evidentiary hearing unless it appears beyond a doubt that Petitioner can prove no set of facts in support of his claim. *Simon v. State*, 857 So. 2d 668, 678 (Miss. 2003); *Lewis v. State*, 776 So. 2d 679, 680 (Miss. 2001); *Myers v. State*, 583 So.2d 174, 176 (Miss. 1991); *Robertson v. State*, 669 So. 2d 11 (Miss. 1996). Based on the cumulative effect of all the facts as set forth herein and in Petitioner's prior filings, the Petitioner is entitled to post-conviction relief in the form of a reversal of his conviction, a new trial, or at a minimum, a remand to the circuit court for an evidentiary hearing and additional discovery and fact development.

B. CHARLES RICE TESTIFIED FALSELY THAT HE DID NOT KNOW PETITIONER PRIOR TO MAY 15, 2000

The State responds to Petitioner's evidence from individuals living in the area surrounding 203 Broad Street and familiar with both Charles Rice and Marlon Howell regarding the likelihood and the fact that Rice would have known Petitioner or at least seen him on occasions prior to May

15, 2000. The State argues this claim and the supporting evidence is barred from consideration as Petitioner failed to raise this claim at trial or on direct appeal. (Response, p. 35) It is Petitioner's position that these matters are not barred, but to the extent this claim may be defaulted in any sense, Petitioner has alleged in the alternative that trial counsel as well as counsel on direct appeal was ineffective in handling this issue as well as numerous others. See Grounds D, I, O, P, Q, S, U, V, W, X, BB and DD. Further, prior counsel has acknowledged and admitted his ineffectiveness in handling these issues. (PCR Ex. 21) Trial and direct appellate counsel's ineffectiveness would constitute cause for any alleged default.

As for the substance of the State's argument, it once again misses the point as it relates to this evidence and its impact on the credibility and reliability of the eyewitness identification of Petitioner by Rice. State's witness Charles Rice failed to reveal any knowledge of Petitioner before the May 15, 2000 incident at issue at trial. This evidence was material and critical.

At trial, Rice testified that he did not know Petitioner prior to the evening of May 15, 2000. He was asked by DA Hood on redirect examination if he knew Marlon Howell to which the witness responded: "No, sir." (T.p. 613) D.A. Hood referred to Rice's contention that he did not know Petitioner prior to the shooting again in his closing argument when he stated that "Charles Rice didn't know Marlon Howell." (T.p. 1002) Rice was represented to the jury as a disinterested witness with no prior knowledge of any of the parties.

Rice's lack of familiarity or knowledge of Petitioner prior to the May 15, 2000, shooting bolstered his identification of Petitioner in the line-up. A critical part of the testimony related to the line-up was that Rice did not know Petitioner prior to the shooting so he must be recognizing him from the incident not from some previous encounter. Therefore, it was the State's position that the line-up procedures were fair and designed to produced a reliable identification when, to the contrary,

Rice simply selected the one familiar face in the line-up. Rice admitted this in his statements to Chris Collins as outlined in his affidavit. (PCR Ex. 10)

Charles Rice has provided two sworn affidavits to Petitioner's counsel in which he specifically states that "there is a strong possibility that I had previously seen Marlon Howell prior to May 2000." (PCR Ex. 4 & 5) In his second affidavit, Rice states "No attorney or investigator for Marlon Howell asked me about my identification of Marlon Howell prior to getting on the stand nor did they bring to my attention the fact that I had very likely seen or met him prior to May 15, 2000. If they had brought this fact to my attention, I would have had very real and substantial reasonable doubt as to whether or not Marlon Howell was the man I saw that morning of May 15, 2000." (PCR Ex. 5)

The State in materials in support of its response has produced an affidavit from Charles Rice[5]. (State's Exhibit 2) Within this affidavit, Rice does not deny nor does he recant the fact that he had very likely seen or met Petitioner prior to May 15, 2000. (Id.) The State's affidavit from Rice does not state that the witness did not see Petitioner prior to May 15, 2000 nor does the affidavit contest the testimony provided in the statements of Chris Collins, Timothy Grisham, Tulane Simmons or Mary Simmons as it relates to Rice's prior knowledge of Howell. (Id.) Further, Rice does not dispute his criminal history or drug use. (Id.)

As the factual allegations and all reasonable inferences from those allegations must be taken as true, Petitioner is entitled to an evidentiary hearing unless it appears beyond a doubt that Petitioner can prove no set of facts in support of his claim. *Simon v. State*, 857 So. 2d 668, 678 (Miss. 2003); *Lewis v. State*, 776 So. 2d 679, 680 (Miss. 2001); *Myers v. State*, 583 So.2d 174, 176 (Miss. 1991);

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[5] The substance of Rice's third affidavit as well as the arguments put forward by the State regarding this statement are addressed in greater detail in Ground E herein.

Robertson v. State, 669 So. 2d 11 (Miss. 1996). Based on the cumulative effect of all the facts as set forth herein and in Petitioner's prior filings, the Petitioner is entitled to post-conviction relief in the form of a reversal of his conviction, a new trial, or at a minimum, a remand to the circuit court for an evidentiary hearing and additional discovery and fact development.

C. THE STATE PRESENTATION OF FALSE AND MISLEADING TESTIMONY ABOUT RICE'S IDENTIFICATION OF PETITIONER AT THE MURDER SCENE; THE INHERENTLY UNRELIABLE AND UNTENABLE NATURE OF RICE'S IDENTIFICATION OF PETITIONER; AND THE STATE'S USE OF IMPERMISSIBLY SUGGESTIVE AND INHERENTLY UNRELIABLE LINE-UP PROCEDURES

The State's response does not even attempt to rebut or respond to the bulk of the evidence presented by Petitioner in regard to this claim. There is no dispute regarding the facts or findings set forth in the Report of Geoffrey R. Loftus, Ph.D. nor does the State contest the substance of the affidavit of Investigator Joel Morris. Further and despite the fact that the State obtained an affidavit from Charles Rice, this affidavit does not dispute the fact that Rice had seen and knew Petitioner prior to the events of May 15, 2000, casting doubts on the reliability of his line-up identification of Petitioner.

The State alleges that this claim is procedurally barred as it was considered and ruled upon by this Court on direct appeal. This is not true as the basis for Petitioner's Ground C is newly discovered evidence gathered by Petitioner's current post-conviction counsel. Further, this case is exceptional as the substance of the volumes of new evidence supports not only Petitioner's innocence, but also demonstrates the State deprived him of constitutional protections to which a criminal defendant is entitled. Petitioner's case as outlined in prior filings and herein fit within both the statutory and constitutional exceptions to the procedural bars that the State argues should prevent him from obtaining some relief from his unconstitutional conviction and imprisonment.

The substance of the State's remaining argument in response to this claim and the supporting evidence is that it is barred from consideration as Petitioner failed to raise this claim at trial or on direct appeal. It is Petitioner's position that these matters are not barred, but to the extent this claim may be defaulted in any sense, Petitioner has alleged in the alternative that trial counsel as well as counsel on direct appeal was ineffective in handling this issue as well as numerous others. See Grounds D, I, O, P, Q, S, U, V, W, X, BB and DD. Further, prior counsel has acknowledged and admitted his ineffectiveness in handling these issues. (PCR Ex. 21) Trial and direct appellate counsel's ineffectiveness would also constitute cause for any alleged default.

As the factual allegations and all reasonable inferences from those allegations must be taken as true, Petitioner is entitled to an evidentiary hearing unless it appears beyond a doubt that Petitioner can prove no set of facts in support of his claim. *Simon v. State*, 857 So. 2d 668, 678 (Miss. 2003); *Lewis v. State*, 776 So. 2d 679, 680 (Miss. 2001); *Myers v. State*, 583 So.2d 174, 176 (Miss. 1991); *Robertson v. State*, 669 So. 2d 11 (Miss. 1996). Based on the cumulative effect of all the facts as set forth herein and in Petitioner's prior filings, the Petitioner is entitled to post-conviction relief in the form of a reversal of his conviction, a new trial, or at a minimum, a remand to the circuit court for an evidentiary hearing and additional discovery and fact development.

D. INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM AS TO GROUNDS A THROUGH C

In the State's Response regarding Ground D, it does not disagree with nor contest the fact that it was ineffective assistance of counsel for Petitioner's trial and direct appeal counsel, Duncan Lott, not to conduct a criminal background check on Charles Rice, the State's primary witness. (PCR, p. 57-60) While the State cites *Thorson v. State* for reiterating the test for establishing a claim for ineffective assistance of counsel, the State does not contradict nor dispute in any fashion

Petitioner's argument as supported by the facts and the evidence to include but not limited to the affidavits of Attorney James Parish and Lott that trial counsel was ineffective.

The State offers no evidence disagreeing nor argument disputing that the failure to obtain information of Rice's extensive criminal history in order to call into question his credibility and undercut the representations of the prosecution as to the witness' background and reliability amounted to gross ineffective assistance of counsel. The State supports Petititioner's position as well as the resulting prejudice, stating in its Response to Ground A:

> Furthermore, the petitioner had every opportunity to request an NCIC check be run by the State on Rice but failed to do so. In failing to request this information, which was readily discoverable at trial and on direct appeal, the petitioner is barred from asserting this claim by the applicable provisions of Miss. Code Ann. §99-39-21(1).

(Response, p. 31-32) Rice was the State's star witness by prosecution's own admission at trial, so the failure of defense counsel to secure even the most cursory of background checks was certainly material and ineffective assistance on the part of defense counsel. Likewise, the failure of trial and direct appeal counsel to interview individuals in the neighborhood possessing knowledge of Rice's history of drug use also is the equivalent of ineffective assistance. These failures, of course, prejudiced Petitioner in that this information as set forth herein and in the prior filings, if presented to the jury, would have cast a long shadow over Rice's credibility, as well as the State's credibility, and would have caused a jury to question the reliability and accuracy of his identification of Petitioner. Lott admits that he did not check or verify Petitioner's request that he question Rice about his past, specifically to include his drug use. (PCR Ex. 21) As Lott also notes in his affidavit, the information related to Rice's criminal history would have "completely changed the trial" and "the failure to obtain exculpatory information on Mr. Charles Rice (along with a lack of funding) led to the conviction and death sentence of Marlon Howell." *(Id.*, p. 2 and 4) This is the very definition

of prejudice, and it is not contested by the State. Therefore and at the very least, an evidentiary hearing is appropriate in regards to Ground D.

The State does address the several individuals who have come forward to provide statements placing Rice and Howell together in the neighborhood prior to May 2000. While the State describes the statements as speculation, these witnesses each provide testimony in which they place Petitioner in close proximity to Rice on numerous occasions. Further, many of these witnesses provide insight into Rice's history and reputation as a drug user which goes directly to his reliability and credibility as a witness. The cumulative evidence calls into serious question Rice's testimony at trial that he did not know and had never seen Petitioner prior to before 5:15 a.m. on the morning of May 15, 2000, as well as whether or not he was a credible witness. The testimony of these witnesses also casts serious doubts on the unconstitutional line-up conducted by the State on May 16, 2000 in which Rice identified Petitioner. As Rice stated in his two sworn affidavits, "there is a strong possibility that I had previously seen Marlon Howell prior to May 2000." (PCR Ex 4 & 5) Again, Rice's prior knowledge and observations of Petitioner are not contested nor disavowed in the State's affidavit of Charles Rice or any of the evidence offered in support of its Response. (State's Exhibit 2)

The State completely and totally ignores the affidavits of Duncan Lott, James Parrish and Marlon Howell in regard to this issue.

Petitioner states in his affidavit:

> As it relates to the trial of my case, I told Mr. Duncan Lott, my trial attorney, during my trial that I recognized Charles Rice from seeing him in the Broad Street area prior to May 15, 2000. I knew then that he had probably recognized me in the line-up from seeing me around the neighborhood prior to May 15, 2000. I also knew of Mr. Rice's reputation in the neighborhood as a drug user. I also asked Mr. Lott to question Mr. Rice about his drug use, but Mr. Lott ignored my request. Since my trial, I have been shown Mr. Rice's arrest and prison record and I have read the affidavit of other witnesses related to his reputation for using drugs. If Mr. Lott had listened to me, he could have found this out and used this at trial.

(PCR Ex. 43, p. 2-3) Lott confirms this request and states in his affidavit that he did not pursue Petitioner's request that he check and verify Rice's history of drug use as described now in statements obtained by Howell's current post-conviction counsel. (PCR Ex. 21, p. 3) As Parish notes in his affidavit:

> It would have taken very little effort, expense or resources to canvass the neighborhood....By canvassing the neighborhood Rice's reputation would have come into play as numerous neighbors commented on about (Rice's) drug usage, he (sic) previous encounters with Howell and his reliability.

(PCR Ex. 22, p. 4) Further, Parish adds that the failure to follow up on Howell's statements regarding prior occasions where he had seen Rice amounted to ineffective assistance of counsel, stating:

> At the very least it should have alerted Lott to run a record check on Rice. But it would conclusively prove Rice had numerous opportunities to observe Mr. Howell prior to that night – the importance of which cannot be stressed enough.

(Id.)

Once again, the failure to interview these individuals was prejudicial in that it robbed Petitioner of the opportunity to impeach the State's star witness as to whether or not he had seen Howell prior to May 15, 2000. Further, this would have called into substantial doubt the basis of both the line-up identification, as well as any in-court identification by questioning whether Rice was recognizing Petitioner from the early morning and dark hours of May 15, 2000 or one of numerous occasions he had seen him in the neighborhood surrounding Broad Street. The evidence would also have gone to the credibility and reliability of Rice, as well as the State's case against Petitioner. Clearly, the failures of counsel in this regard resulted to prejudice against Petitioner.

As it relates to trial and direct appeal counsel's failure to adequately attack or call into question the eyewitness identification of Petitioner by Charles Rice, the State does not dispute that

defense counsel failed to produce any witnesses or solid evidence related to the lack of visibility at the time of the shooting. While defense counsel introduced a U.S. Naval Observatory Astronomical Application on Sun and Moon Data for May 15, 2000 for New Albany, Union County, Mississippi (T.p. 918) which reflected civil twilight at 5:26 a.m. and sunrise at 5:54 a.m, he did nothing to provide testimony to the jury as to the actual amount of light or lack of light at the location of the shooting at 5:12 a.m. on the morning of May 15, 2000. The State does not contest that no experts were called to explain these facts nor were any attempts made regarding the testimony of any investigators regarding their observations at the scene during this time of day. Likewise, no evidence was offered regarding the effect of light coming from inside the house interfering with the ability to see outside a window. No evidence was offered regarding night vision versus day vision and the differences in how people perceive images in light as opposed to darkness. No evidence was offered on the subjection of dark adaptation or light blindness to explain how even with the headlights of the vehicles outside turned on that it would be virtually impossible to distinguish facial features. For this reason, the jury was left with the mistaken, but material impression that there was ample light available for Rice to see and distinguish facial features sufficiently to make a later identification of Mr. Pernell's attacker. The State represents that the line-up and identification of Petitioner by Rice was previously considered by this Court. However, Ground D is based on the ineffective assistance of counsel to present evidence which as described by Petitioner expert Parrish could have obtained an expert as to the lighting and eyewitness expert about lighting "with very little effort." (PCR Ex. 22, p. 4) The State does not dispute nor contest the findings of Petitioner's expert, Geoffrey Loftus, specifically to include but not limited to the following:

> Given the evidence that I have reviewed in this case, it is apparent that the circumstances of Mr. Rice's initial perception (of) the shooter were highly unfavorable for Mr. Rice's formation of an initial memory of the shooter's

> appearance. These circumstances include (1) most importantly, poor lighting conditions which .... engendered a plethora of sub-problems, (2) the distance from Mr. Rice to the shooter, and (3) that Mr. Rice's identification was cross-racial. In addition, Mr. Howell's appearance in the line-up provided a clear source of post-event information. The conclusion is that in this case the jury should have been provided, ideally via testimony from an expert witness in perception and memory, enough information about the workings of perception and memory to (1) understand the near-impossibility of Mr. Rice's having perceived the shooter sufficiently well to be able to accurately identify him later and (2) to strongly consider the likelihood that the high confidence displayed by Mr. Rice in his identification of Mr. Howell should be discounted as an index of accuracy of his identification.

(PCR Ex. 19, p. 8) Given the time of day and other lighting conditions, it was physiologically "near-impossible" for Rice to have made an accurate identification. (Id.) The State does not dispute that this testimony had it been presented by trial counsel to the jury would have had a significant impact on the reliability and credibility given Rice's identification of Petitioner. As stated by Parrish in his affidavit, Petitioner was "cheated" out of a fair trial by the deficient performance of trial counsel as set forth herein and in prior filings. (PCR Ex. 22, p. 7) Clearly, the failures of counsel in this regard resulted in prejudice against Petitioner.

It is Petitioner's position that these matters are not barred, but to the extent any claim related to these matters were defaulted in any sense, Petitioner has alleged that trial counsel as well as counsel on direct appeal was ineffective in handling this issue as well as numerous others. See Grounds D, I, O, P, Q, S, U, V, W, X, BB and DD. Further, prior counsel has acknowledged and admitted his ineffectiveness in handling these issues. (PCR Ex. 21) Trial and direct appellate counsel's ineffectiveness as set forth in prior filings and herein would also constitute cause for any alleged default.

As the factual allegations and all reasonable inferences from those allegations must be taken as true, Petitioner is entitled to an evidentiary hearing unless it appears beyond a doubt that Petitioner can prove no set of facts in support of his claim. *Simon v. State*, 857 So. 2d 668, 678 (Miss. 2003);

Lewis v. State, 776 So. 2d 679, 680 (Miss. 2001); *Myers v. State*, 583 So.2d 174, 176 (Miss. 1991); *Robertson v. State*, 669 So. 2d 11 (Miss. 1996). Based on the cumulative effect of all the facts as set forth herein and in Petitioner's prior filings, the Petitioner is entitled to post-conviction relief in the form of a reversal of his conviction, a new trial, or at a minimum, a remand to the circuit court for an evidentiary hearing and additional discovery and fact development.

E. AFFIDAVITS OF CHARLES RICE REMAIN AS SUFFICIENT BASIS TO GRANT PETITIONER'S REQUEST FOR AN EVIDENTIARY HEARING ON THESE ISSUES

On June 7, 2005 and June 9, 2005, Charles Rice, the State's primary witness, provided two affidavits in which he recanted his "identification and testimony of Marlon Howell as the shooter/killer." (PCR Ex. 4 & 5) In addition to recanting his prior testimony and identification, Rice also stated the following:

> It has come to my attention that Marlon Howell frequented my neighborhood in the year 2000. That means that there is a strong possibility that I had previously seen Marlon Howell prior to May 2000.

(Id.) Rice also testified in his sworn affidavit of June 9, 2005 that:

> No attorney or investigator for Marlon Howell asked me about my identification of Marlon Howell prior to getting on the stand nor did they bring to my attention the fact that I had very likely seen or met him prior to May 15, 2000. If they had brought this fact to my attention, I would have had very real and substantial reasonable doubt as to whether or not Marlon Howell was the man I saw that morning of May 15, 2000.

(Id.) The State has now produced an affidavit more than two years later in which Rice attempts to recant portions of a prior statement. (State's Exhibit 2) In this third affidavit, Rice states he provided a prior statement "as a result of continuous pressure that was applied to me by the investigator and other persons on the behalf of Marlon Howell." (Id.) Rice also now says that he "was not aware of

the legal significance of the statement that I gave them." (Id.)

Rice's current allegations regarding the "continuous pressure" placed on him is highly questionable where he specifically asserts in both his prior affidavits that:

> This statement is true and correct to the best of my ability and made of my own free will in the presence of my fiancé, Melody Handley. After numerous private conversations with Melody and after much deep thought, it has made me even more certain of the accuracy of this statement.

(PCR Ex 4& 5) This statement is in direct contradiction to Rice's later statement alleging continuous pressure placed on him by private individuals. No details are provided regarding the nature of this pressure, but it is difficult to understand what pressure could have been placed on Rice. Unlike the State, neither Petitioner nor his attorney nor their investigator have any authority or power to exert any kind of pressure or coercion on Rice. It is also interesting that the State would produce this affidavit at this time given the corroborated evidence of coercion and pressure placed on witnesses by the State in this case. Given the affidavits of Curtis Lipsey, Brandon Shaw, Tonya Peterson and Terkecia Pannell, the more likely scenario here is the State has placed pressure on Rice to recant his prior affidavits . (See PCR Ex. 6, 8, 24, & 51)

In the June 2005 affidavits, it is clear that Rice took time to deliberate over his decision and his recollection of the events of May 15, 2000. (PCR Ex. 4 & 5) In fact, he had two days between the statements to reflect on these matters. It is also clear that he had serious doubts regarding his identification of Marlon Howell. (Id.) The State continues to point out in its Response that this Court disfavors recanted testimony, but by that assertion, this Court must also look with particular disfavor on recantations of previously recanted testimony as produced by the State in Exhibit 2 of its Response. If nothing else, the multiple statements provided by Rice and his "flip-flopping" on the topic of his identification of Rice only go toward his lack of credibility and reliability as it relates

to his ability to state with sufficient certainty that it was Petitioner he saw during the early morning hours of May 15, 2000.

It is significant that no where in Rice's newest affidavit does he dispute that he knew Marlon Howell nor that he saw him prior to May 15, 2000. Further, Rice does not dispute his criminal record as provided to this Court nor his history of drug use as described in numerous affidavits produced as part of Petitioner's post-conviction exhibits. Finally, Rice continually refers to the statement that he gave, but he does not refer to which statement he is referring or if he is referring to both statements produced by Petitioner or neither.

As for the affidavit of Ben Creekmore, the current District Attorney for the Third Circuit Court District of Mississippi, he does not state in his affidavit that Rice made any other statements other than those set forth in his affidavit. (State's Exhibit 3) No mention is made of Rice disputing his criminal history, drug use or prior knowledge of Petitioner prior to May 15, 2000. (Id.)

Petitioner first received the State's affidavits of Charles Rice and Ben Creekmore with the receipt of the State's Response on or about October 24, 2007. Prior to receipt of these materials, Petitioner's counsel had no knowledge of any formal recanting by Rice of any portions of his prior statements. Attorney Richardson and Leonard Sanders both acknowledge in their attached affidavits that there was a meeting which they attended with Rice and his wife, Creekmore, and Tim Kent also present. At the meeting, Rice was only asked by D.A. Creekmore why he lied on the stand as to the identification of Howell to which Rice replied that he did not lie. (Rebuttal Exhibits 3 & 4) However, Rice did not dispute that he had seen Howell on prior occasions before May 2000 and does not dispute this fact to this day. (Id.) Rice also stated and acknowledged at the meeting he had doubts as to his identification of Howell and that he could have been mistaken in his testimony at trial, both as also reflected in his June 2005 affidavits. (Id.) His statements at the meeting regarding

his trial testimony were consistent with Rice's statement in his June 9, 2005 affidavit that had he known about the likelihood of prior contact with Howell then he "would have had very real and substantial reasonable doubt as to whether or not Marlon Howell was the man I saw that morning of May 15, 2000." (PCR Ex. 5 & Id.) Also, Rice did not verbally disavow anything in his prior affidavits at the meeting nor recant those affidavits. (Id.) Finally, neither Petitioner's counsel nor Sanders recall any statements by Rice at the meeting regarding pressure being placed on him by Howell's attorneys or anyone acting on his behalf. (Id.)

At trial, Rice testified that he had never seen Howell before, but in his affidavits to Petitioner, he acknowledges that this was not true. (PCR Ex. 4 & 5) He also states in his June 9, 2005 affidavit that had this fact been brought to his attention then he would have had doubts regarding his identification at the time he testified at trial. Because he was not made aware of these facts, he believed that he was telling the truth on the stand. At the meeting, he stated that given what he later learned he believed he could have been mistaken in his testimony and identification. This is again consistent with his prior affidavits. The substance of the meeting described by Mr. Creekmore in his affidavit did nothing but to confirm that at the time of his trial testimony Rice believed he was accurate in his identification of Howell, but upon the subsequent presentation of new information and evidence which was not presented to him by either the State or Petitioner's trial counsel prior to or during the trial, he later possessed serious and substantial beliefs that he was mistaken in identifying Howell as the man he saw.

It was only upon receipt of Rice's most recent affidavit provided by the State that Petitioner's counsel was made aware of the statements contained therein. These statements are not consistent with the meeting or the recollection of Petitioner's counsel or Sanders. (Id.) As outlined above, Rice did not disavow or revoke the prior affidavits provided by the witness despite the representations of

the State. As for State's allegations of the intentions of Petitioner and his counsel to deal with this Court in an honest manner, it is shocking the State would throw stones considering the glass house it has constructed with the presentation of twice-perjured testimony from Chief Grisham both to the lower court, as well as to this Court in the form of his current affidavit. Further, examples of the State's other misrepresentations and inappropriate conduct are replete in this case establishing that it is the State that has demonstrated a pattern and practice of dealing dishonestly with this Court.

Given Rice's criminal history and reputation in the community as a known drug user, as well as his prior false statements to law enforcement officials, it is consistent with his total lack of credibility and reliability that he would provide the affidavit currently offered by the State. The lack of credibility and reliability of the State's star witness goes to the very heart of its case and Petitioner's conviction. The importance of Rice's testimony and identification is summarized by Asst. DA Kelly Luther in his closing arguments when he states: " To be honest with you we thought about at the conclusion of Mr. Rice's testimony to stop because what is evidence at that point." (T.p. 1006) Rice was held up by the prosecution as a model citizen who got up early that morning of May 15, 2001 and "chooses to be one of those people in society who contributes." (T.p. 1002) According to the prosecution, Charles Rice "had his alarm set for that morning so he could get up and make his living." However, his current affidavit in conjunction with his prior statements is only further proof of the ultimate unreliability of his trial testimony and demands an evidentiary hearing to resolve the issues regarding Rice's identification of Howell.

It is Petitioner's position that these matters are not barred, but to the extent any other portions of Ground E may be defaulted in any sense, Petitioner has alleged in the alternative that trial counsel as well as counsel on direct appeal was ineffective in handling this issue as well as numerous others. See Grounds D, I, O, P, Q, S, U, V, W, X, BB and DD. Further, prior counsel has

acknowledged and admitted his ineffectiveness in handling these issues. (PCR Ex. 21) Trial and direct appellate counsel's ineffectiveness would also constitute cause for any alleged default.

As the factual allegations and all reasonable inferences from those allegations must be taken as true, Petitioner is entitled to an evidentiary hearing unless it appears beyond a doubt that Petitioner can prove no set of facts in support of his claim. *Simon v. State*, 857 So. 2d 668, 678 (Miss. 2003); *Lewis v. State*, 776 So. 2d 679, 680 (Miss. 2001); *Myers v. State*, 583 So.2d 174, 176 (Miss. 1991); *Robertson v. State*, 669 So. 2d 11 (Miss. 1996). Based on the cumulative effect of all the facts as set forth herein and in Petitioner's prior filings, the Petitioner is entitled to post-conviction relief based on the ineffective assistance of counsel to preserve the federal appellate issue in the form of a reversal of his conviction, a new trial, or at a minimum, a remand to the circuit court for an evidentiary hearing and additional discovery and fact development.

F. COERCION OF ADAM RAY BY THE STATE

The State's Response represents to the Court that this same claim was argued on direct appeal. This is not true. The basis of Ground F rests on the coercion placed on Adam Ray by law enforcement to provide incriminating evidence in the form of a written statement against Petitioner. This claim is also based on new evidence in the form of the subsequent recanting of Ray's pre-trial statements as set forth in his June 9, 2005 affidavit. It is also based on other new evidence in the form of Ray's school records which were not obtained by Petitioner's previous counsel during either the trial or direct appeal phases. The failure to obtain these materials and information by trial and appellate counsel is addressed in Petitioner's ineffective assistance of counsel claim set forth in Ground I.

The State focuses on the fact that another witness was allowed to testify regarding what Ray told him, but this is not the basis for Petitioner's claim. However, when the Court did consider the

issue of the trial court allowing another witness to testify as to Ray's statements, the evidence currently before this Court in the form of Ray's affidavit did not exist. It is true and Petitioner pointed out in his prior filings that Ray's affidavit does call into serious question the testimony of Brandon Shaw stating that Ray implicated Howell as the shooter. Shaw has also provided an affidavit which corroborates Ray's affidavit as it relates to Ray's intoxication at the time he provided written statements to law enforcement.

The basis for Petitioner's claim is the coercion described in Ray's affidavit which subsequently tainted his statements to law enforcement implicating Howell. Further, Petitioner produces evidence as to corroborate this coercion of witnesses in this case via the affidavits of Curtis Lipsey, Brandon Shaw, Tonya Peterson and Terkecia Pannell. (See PCR Ex. 6, 8, 24, & 51) The affidavit of Terkecia Pannell further calls into doubt the pre-trial statements of Adam Ray in that she testifies in her sworn statement that Ray and Lipsey acknowledged in her presence they were responsible for the murder of David Pernell and not Marlon Howell. (PCR Ex. 51)

It is true that Ray's statement was not challenged as being the product of coercion at the trial level. Petitioner's appellate counsel also failed to raise this issue on direct appeal. This goes to Petitioner's Ineffective Assistance of Counsel claim set forth in Ground I.

The State represents that Petitioner fails to offer any support for the claim of coercion. This is not true. The affidavit of Ray itself is evidence of the coercion as is the affidavits of Lipsey, Shaw, Peterson and Pannell described above and in prior filings[6]. (See PCR Ex. 6, 8, 24, & 51) Ray was coerced by the treat of prosecution as well as by the false statements made by law enforcement that Marlon Howell was in custody and providing incriminating testimony against Ray and his co-

[6] The State's coercion of witnesses is also addressed in Grounds F, G, H, L and CC.

defendant and cousin, Curtis Lipsey. (PCR Ex. 7) Further, Ray states that due to his level of intoxication at the time of the shooting he has no idea as to the identity of the shooter of Mr. Pernell. (Id.)

Specifically, Ray states in his sworn affidavit:

> "On the evening of May 15, 2000, I was highly intoxicated after having drunk most of the night. I never saw the shooting due to my state of intoxication."

(Id., p. 1) Ray later adds:

> "I do not recall and did not see the gun at any time that night so I do not know where the gun came from."

(*Id.*, p. 1)

While Ray did not testify at trial, his admission that he never saw the shooting due to his state of intoxication and did not see Petitioner shoot Mr. Pernell is relevant as the trial court allowed witness Brandon Shaw to testify over the objection of defense counsel as to an alleged statement made by Ray that Petitioner had shot someone. (T.p. 645) A statement that Ray has now recanted, stating that he does not know who shot Mr. Pernell. The State makes much out of the fact that Ray's affidavit does not state that Howell did not shoot Pernell, but it definitely does not say that Howell did shoot him. Instead, Ray states the he does not know who shot Pernell. This is in direct contradiction to Ray's prior statements and the trial testimony of Brandon Shaw.

It is Petitioner's position that these matters are not barred, but to the extent this claim may be defaulted in any sense, Petitioner has alleged in the alternative that trial counsel as well as counsel on direct appeal was ineffective in handling this issue as well as numerous others. See Grounds D, I, O, P, Q, S, U, V, W, X, BB and DD. Further, prior counsel has acknowledged and admitted his ineffectiveness in handling these issues. (PCR Ex. 21) Trial and direct appellate counsel's ineffectiveness would also constitute cause for any alleged default.

As the factual allegations and all reasonable inferences from those allegations must be taken as true, Petitioner is entitled to an evidentiary hearing unless it appears beyond a doubt that Petitioner can prove no set of facts in support of his claim. *Simon v. State*, 857 So. 2d 668, 678 (Miss. 2003); *Lewis v. State*, 776 So. 2d 679, 680 (Miss. 2001); *Myers v. State*, 583 So.2d 174, 176 (Miss. 1991); *Robertson v. State*, 669 So. 2d 11 (Miss. 1996). Based on the cumulative effect of all the facts as set forth herein and in Petitioner's prior filings, the Petitioner is entitled to post-conviction relief in the form of a reversal of his conviction, a new trial, or at a minimum, a remand to the circuit court for an evidentiary hearing and additional discovery and fact development.

G & H COERCION OF CURTIS LIPSEY AND SUPPRESSION OF LIPSEY'S EXCULPATORY STATEMENT IN VIOLATION OF BRADY

Ground G of Petitioner's filing for post-conviction relief is related to evidence of coercion by the State, specifically law enforcement, in securing statements and trial testimony from Curtis Lipsey. These are statements and testimony which Lipsey has subsequently recanted in the form of a sworn affidavit.

The coercion is evident in the statement provided by Lipsey, stating:

> Despite this they pushed me for a statement. My first statement which I signed angered the officers. They ripped it up without my permission and told me that I was going to get death or life if I did not cooperate.
>
> If not for them threatening me, lying to me about Marlon & my confused state due to alcohol & marijuana, I would not have said Marlon shot Mr. Pernell. I really do not know who shot him as I did not see a gun or the shooting.
>
> Also, given the fact that the police tore up my first statement, threatened me & kept questioning me even though I was obviously drunk & confused I felt trapped into standing by my second statement at trial even though it was wrong. ***I now wish to correct & change that statement as untrue***.

(PCR Ex. 6, p. 3) This coercion by the State in this case is well documented and corroborated in the

affidavits of Adam Ray, Brandon Shaw, Tonya Peterson and Terkicia Pannell. (See PCR Ex. 6, 8, 24, and 51) In addition to the coercion, Lipsey has also recanted his trial testimony implicating Petitioner as untrue.

In addition to the above evidence in support of Ground G, Petitioner has also produced evidence in support of a claim that the State knowingly and deliberately destroyed and/or suppressed exculpatory evidence in the form of a written statement provided by Curtis Lipsey. These matters are set forth in Ground H of the Post-Conviction Petition.

The State's Response does not dispute nor disagree with the fact that Lipsey's initial statement provided to law enforcement was exculpatory. The State does not contest the fact that the initial statement provided by Lipsey did not implicate Howell in any fashion. Further, the State does not dispute the fact that Lipsey's initial statement should not have been destroyed, but should have been preserved. It is not contested in any fashion that this statement would have aided Petitioner in his defense to include impeaching the trial testimony of Lipsey, Shaw and Rice. As stated in the petition and not disputed by the State, the destruction of exculpatory evidence in the form of Lipsey's initial statement calls into question the integrity of all other evidence presented by the State as well as any other exculpatory evidence that may have been destroyed by law enforcement or not produced to defense counsel prior to trial.

Rule 9.04 of the Uniform Rules of Circuit and County Court Practice provides in pertinent part that the State, upon request, must disclose:

> [N]ames and addresses of all witnesses in chief proposed to be offered by the prosecution at trial, together with a copy of the contents of any statement, written, recorded or otherwise preserved of each such witness and the substance of any oral statement made by any such witness.

Likewise, under Rule 9.04(A)(6), the State must disclose "[a]ny exculpatory material concerning the

defendant."

Clearly, this rule is frustrated and made meaningless where law enforcement officers take it upon themselves to destroy exculpatory evidence during the course of an investigation. The State does not dispute this fact in its Response.

In addition, the State violates due process when it deliberately suppresses evidence favorable to the accused. *Pyle v. Kansas*, 317 U.S. 213, 216 (1942). In addition, the State must disclose all evidence that can be used to impeach its witnesses. *Giglio v. United States*, 405 U.S. 150 (1972); *see also Banks v. Dretke*, 540 U.S. 668 (2004).

The Mississippi Supreme Court has also roundly condemned the State for destroying evidence where the exculpatory value of the evidence is apparent.

> [T]he State's duty to preserve evidence is limited to evidence that is expected to play a significant role in the defense. To play a significant role in the defense, the exculpatory nature of the evidence must have been (1) apparent before the evidence was destroyed and (2) of such a nature that the defendant could not obtain comparable evidence by other reasonable means.

Banks v. State, 725 So. 2d 711, 715 (Miss. 1997) (discussing *Cailfornia v. Trombetta*, 467 U.S. 479, 489 (1984)); *see also State v. McGrone*, 798 So. 2d 519 (Miss. 2001). Here, the exculpatory nature of the initial statement was apparent and is not contested. Under the circumstances, given Lipsey's decision at the time of trial to testify in accordance with the wishes of the State, there was no practical way for the defense to learn the contents of the initial statement. Any argument by the State that this claim is barred from consideration as Petitioner failed to raise this claim at trial or on direct appeal fails to recognize or acknowledge the fact that all of the evidence provided in support of this claim is newly discovered evidence and not previously available. This information as related to Lipsey's recanted testimony and his description of the information in the destroyed statement were

obtained by Petitioner's current post-conviction counsel. In light of this flagrant violation of elementary principles of due process, Petitioner is entitled to post-conviction relief.

As for Lipsey's own guilty plea and his own failure to pursue post-conviction relief, Petitioner is not in a position to comment on any plea deals worked out between Lipsey, his attorneys and the State nor does it possess any knowledge regarding Lipsey's decisions in those matters nor are they relevant to the issues currently before this Court. Petitioner's counsel is also at a loss as to the State's allegations regarding inducements or pressure placed on Lipsey to obtain the affidavit. (Response, p. 61, Fn. 5) These statements are baseless with no evidence to support them. In fact, they are not worthy of a response.

It is Petitioner's position that these matters are not barred, but to the extent either of these claims may be defaulted in any sense, Petitioner has alleged in the alternative that trial counsel as well as counsel on direct appeal was ineffective in handling this issue as well as numerous others. See Grounds D, I, O, P, Q, S, U, V, W, X, BB and DD. Further, prior counsel has acknowledged and admitted his ineffectiveness in handling these issues. (PCR Ex. 21) Trial and direct appellate counsel's ineffectiveness would also constitute cause for any alleged default.

As the factual allegations and all reasonable inferences from those allegations must be taken as true, Petitioner is entitled to an evidentiary hearing unless it appears beyond a doubt that Petitioner can prove no set of facts in support of his claim. *Simon v. State*, 857 So. 2d 668, 678 (Miss. 2003); *Lewis v. State*, 776 So. 2d 679, 680 (Miss. 2001); *Myers v. State*, 583 So.2d 174, 176 (Miss. 1991); *Robertson v. State*, 669 So. 2d 11 (Miss. 1996). Based on the cumulative effect of all the facts as set forth herein and in Petitioner's prior filings, the Petitioner is entitled to post-conviction relief based on the ineffective assistance of counsel to preserve the federal appellate issue in the form of a reversal of his conviction, a new trial, or at a minimum, a remand to the circuit court for an

evidentiary hearing and additional discovery and fact development.

I. INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM AS TO GROUNDS F, G AND H RELATED TO DEFENDANTS RAY AND LIPSEY

As set forth above, the State does not dispute that the initial statement provided by Curtis Lipsey was exculpatory. The State attacks Lipsey's affidavit, but conveniently ignores that he exonerates Howell. It is alleged by the State that trial counsel challenged his prior statement, but on the page referenced in the State's Response and quoted therein, there is no objection noted by trial counsel. Next, the State represents that trial counsel proceeded to question Lipsey about his initial statement and cites transcript pages 724-27. A clear reading of these pages, however, demonstrates this is not accurate. Trial counsel is specifically asking about the second statement during this line of questioning and not the initial, destroyed statement.

Petitioner's trial counsel made no objection to the admission of Lipsey's second statement or Lipsey appearing as a witness for the State. Trial counsel also failed to raise the issue of the destruction of exculpatory evidence in violation of *Brady v. Maryland* and other law discussed in the previous grounds for relief before the trial judge. In fact, no issue was made by defense counsel at trial regarding the fact that one of the State's primary witnesses produced a written and signed statement which the State destroyed and, therefore, no one could cross-examine or question the witness as to his prior statement based on the writing. The failure to address this issue to the trial judge, as well as before the jury is clearly ineffective assistance of counsel. As noted by Parish in his opinion, the failure to adequately document the destruction of the initial statements is reprehensible. (PCR Ex. 22, p. 5)

Next, the Petitioner addresses the failure of trial and direct appeal counsel to adequately investigate the statements of Ray and Lipsey and the circumstances under which they were provided.

Petitioner's trial counsel acknowledges in his affidavit that he failed to adequately investigate Howell's case to include contacting and interviewing witnesses. (PCR Ex. 21)

Lipsey states in his affidavit the following:

> If Marlon's first lawyer asked for this information I would have told him. Also, given the fact that the police tore up my first statement, threatened me & kept questioning me even though I was obviously drunk & confused. I felt trapped into standing by my second statement at trial even though it was wrong.

(PCR Ex. 6)

Brandon Shaw confirmed that both Ray and Lipsey smelled of alcohol when he took them to the police station to provide their initial statements. (PCR Ex. 8) Shaw also describes the coercion and pressure placed on witness by law enforcement and the State. (Id.) Defense counsel failed to investigate the competency of either Ray or Lipsey at the time they incriminated Petitioner or the reliability of their testimony of events given their drug and alcohol use. These are factors which justice demanded the defense counsel to explore as part of even cursory trial preparation, especially in a capital murder trial. To allow someone to be convicted and sentenced to death based in part on the statements and testimony of witnesses who were under the influence of controlled substances at the time these statements were given without calling into question their level of intoxication and ability to recall events nor even investigate these matters is ineffective assistance of counsel.

As it relates to Ray and Lipsey's background, both individuals have issues in their past that are ripe for impeachment of their testimony both at trial and prior to trial. Ray's school records note his tendency "to blame his problems on someone else" as well as his aggressive and impulsive tendencies. (PCR Ex. 23) Clearly, this is relevant and material not only to the credibility given to any statements made by Ray, but also as to the issue of determining Mr. Pernell's assailant. Likewise, an investigation into Lipsey background would have revealed his violent tendencies and

reputation, earning him the nickname "Killer." (PCR Ex. 51) Petitioner's trial attorney admits he did not contact nor interview Terkecia Pannell who has provided an affidavit in which she describes Lipsey's violent reputation. (PCR Ex. 53 and Rebuttal Exhibit 5)

While it is true that Dr. Hayne did not exclude a left or right hand shooter, he stated that it was more likely that the person who shot Mr. Pernell was right handed. (T.p. 820) Rice indicated the shooter was right handed, and the State alleged that Lipsey could not have fired the gun as he had a cast on his right hand. (T.p. 719-720) The issue of Lipsey's broken arm was of critical importance to the defense in regard to the possibility that he was the assailant. Therefore, defense counsel had a duty to fully explore this injury. While medical records were available related to the injury, defense counsel took no steps to call as a witness the physician who treated Lipsey for the injury despite having this identity within the records. Defense counsel took no steps to attempt to consult with a medical expert regarding Lipsey's injury and the theory that he still could have pulled the trigger that ended Mr. Pernell's life.

It is Petitioner's position that these matters are not barred, but to the extent this claim may be defaulted in any sense, Petitioner has alleged in the alternative that trial counsel as well as counsel on direct appeal was ineffective in handling this issue as well as numerous others. See Grounds D, I, O, P, Q, S, U, V, W, X, BB and DD. Further, prior counsel has acknowledged and admitted his ineffectiveness in handling these issues. (PCR Ex. 21) Trial and direct appellate counsel's ineffectiveness would also constitute cause for any alleged default.

As the factual allegations and all reasonable inferences from those allegations must be taken as true, Petitioner is entitled to an evidentiary hearing unless it appears beyond a doubt that Petitioner can prove no set of facts in support of his claim. *Simon v. State*, 857 So. 2d 668, 678 (Miss. 2003); *Lewis v. State*, 776 So. 2d 679, 680 (Miss. 2001); *Myers v. State*, 583 So.2d 174, 176 (Miss. 1991);

Robertson v. State, 669 So. 2d 11 (Miss. 1996). Based on the cumulative effect of all the facts as set forth herein and in Petitioner's prior filings, the Petitioner is entitled to post-conviction relief in the form of a reversal of his conviction, a new trial, or at a minimum, a remand to the circuit court for an evidentiary hearing and additional discovery and fact development.

J & K. AFFIDAVITS OF RAY AND LIPSEY AND RECANTED TESTIMONY AS GROUNDS FOR EVIDENTIARY HEARING

In its Response, the State warns this Court against recanted testimony, citing cases that are not applicable to the facts currently at hand. This is not a case where only some of the trial witnesses have changed or withdrawn prior testimony. This is a case where the State's primary witnesses, including its star witness, have all recanted their trial testimony in varying degrees. (See PCR Ex. 4, 5, 6, 7, & 8)

The State cites *Russell v. State*, 849 So.2d 95 (Miss. 2003), but in *Russell*, only some of the numerous trial witnesses who testified as to the incident at issue changed their version of events after the trial. (Response, p. 68-69) This is contrary to the current case in which not only Ray and Lipsey, but also Brandon Shaw and Charles Rice, the State's star witness, have changed their testimony. Ray and Lipsey have provided detailed statements in which they provide reasons for their prior testimony, a well as their recanting the testimony at this time. In the *Russell* opinion, the Court cites *Bradley v. State*, 214 So.2d 815, 817 (Miss. 1968) for the proposition that when a witness recants, all circumstances of the case must be examined. When that is done in this case, not only does the corroborating evidence establish that the recantations of Ray and Lipsey are real, but it is also clear that without Lipsey's testimony, Ray's out-of-court statements and calling into question Rice's identification of Petitioner given his admitted prior knowledge, it is clear there would be no case against Petitioner. Further, Petitioner specifically contends these matters related to Ground J & K

as it relates to the recanted testimony are sufficient to support an evidentiary hearing before the circuit court for a review of all the circumstances of the case.

In *Hardiman v. State*, 789 So.2d 814 (Miss. App. 2001), a case in which the State produced a witness at trial who provided circumstantial evidence as well as the eyewitness testimony of the victim/witness, the Court of Appeals ordered an evidentiary hearing on the issue of the recanting victim/witness, stating:

> Our review of Mississippi case law discovers no precedent in which an evidentiary hearing was avoided when a motion for post-conviction relief is based upon an affidavit in which the sole witness to a crime recants his testimony. *Turner v. State*, 771 So.2d 973, 976 (Miss.Ct.App.2000); *Yarborough v. State*, 514 So.2d 1215, 1220 (Miss. 1987); *Tobias v. State*, 505 So.2d 1014, 1015 (Miss. 1987); *Sanders v. State*, 439 So.2d 1271, 1276-77 (Miss.1983).

789 So.2d at 816. The court went on to quote from *Yarborough:*

> Experience teaches all courts a healthy skepticism toward recanted testimony.... Our skepticism does not translate into callousness, however.

Id., citing *Yarborough*, 514 So.2d at 1220. In *Manning*, the Court granted leave to proceed on an application for post conviction relief, in part based on a recanting witness, when only one of the several witnesses who testified that Willie Manning was near the crime scene recanted his testimony.

The affidavits of Curtis Lipsey, Brandon Shaw, Tonya Peterson and Terkecia Pannell corroborate the extensive pressure placed on witnesses by law enforcement in this case, as well as a pattern and practice of not just law enforcement but also the district attorney's office to coerce witnesses to provide false testimony. (PCR Ex. 6, 8, 24, & 51) Ray and Lipsey's affidavit, as well as Shaw's statement also corroborate each other as it relates to Lipsey and Ray's high level of intoxication when they came to the police station and gave their statements.

As with Charles Rice, Lipsey's testimony served as a cornerstone of the State's case against Petitioner. Lipsey has now come forward and recanted his testimony implicating Petitioner as the

individual who shot Mr. Pernell and admitting this was untrue. Under the precedents set forth in Petitioner's prior filings and herein, an evidentiary hearing must be held so that the trial court can better evaluate these matters.

The issues raised by the State's Response regarding the new affidavit of Charles Rice were addressed previously in Grounds E of this Rebuttal. The State's contentions regarding the criminal history and record check on a juror are addressed in Grounds M and N to follow.

It is Petitioner's position that these matters are not barred, but to the extent this claim may be defaulted in any sense, Petitioner has alleged in the alternative that trial counsel as well as counsel on direct appeal was ineffective in handling this issue as well as numerous others. See Grounds D, I, O, P, Q, S, U, V, W, X, BB and DD. Further, prior counsel has acknowledged and admitted his ineffectiveness in handling these issues. (PCR Ex. 21) Trial and direct appellate counsel's ineffectiveness would also constitute cause for any alleged default.

As the factual allegations and all reasonable inferences from those allegations must be taken as true, Petitioner is entitled to an evidentiary hearing unless it appears beyond a doubt that Petitioner can prove no set of facts in support of his claim. *Simon v. State*, 857 So. 2d 668, 678 (Miss. 2003); *Lewis v. State*, 776 So. 2d 679, 680 (Miss. 2001); *Myers v. State*, 583 So.2d 174, 176 (Miss. 1991); *Robertson v. State*, 669 So. 2d 11 (Miss. 1996). Based on the cumulative effect of all the facts as set forth herein and in Petitioner's prior filings, the Petitioner is entitled to post-conviction relief in the form of a reversal of his conviction, a new trial, or at a minimum, a remand to the circuit court for an evidentiary hearing and additional discovery and fact development.

L. THE STATE'S COERCION OF OTHER WITNESSES IN ADDITION TO LIPSEY AND RAY INTO PROVIDING FALSE TESTIMONY AND RECANTED TESTIMONY OF BRANDON SHAW

The State first contends in response to Ground L of Petitioner's application for post-

conviction relief that the claim is procedurally barred for not being raised on direct appeal. This is not the case, as here this claim is based on newly discovered evidence in the form of the recanted testimony of Brandon Shaw, as well as affidavits from other witnesses detailing and corroborating the coercive tactics of law enforcement and the State in this case.

Further, this claim is not procedurally barred because Petitioner was represented on direct appeal by the same counsel who represented him at trial. Howell was represented both at trial and during his direct appeal by Attorney Duncan Lott. (PCR Ex. 21) The version of M.R.A.P. 22 in effect at the time of Howell's trial provided that:

> [i]ssues which may be raised in post-conviction proceedings may also be raised on direct appeal. Where the appellant is represented by counsel who did not represent the appellant at trial, the failure to raise such issues on direct appeal shall constitute a waiver barring consideration of the issues in post-conviction proceedings.

This rule made raising such issues on direct appeal permissive unless different counsel represented the appellant, in which event it would have been mandatory to raise the issues. In this case, Lott represented Petitioner at trial and on appeal so there is no waiver.

Likewise and to the extent this claim may be defaulted in any sense, Petitioner has alleged in the alternative that trial counsel as well as counsel on direct appeal was ineffective in handling this issue as well as numerous others. See Grounds D, I, O, P, Q, S, U, V, W, X, BB and DD. Further, prior counsel has acknowledged and admitted his ineffectiveness in handling these issues. (PCR Ex. 21) Trial and direct appellate counsel's ineffectiveness would also constitute cause for any alleged default.

In his affidavit, Brandon Shaw recants a significant portion of his trial testimony and all of his trial testimony as it relates to any statements that Marlon Howell was the killer of Hugh David Pernell. The State, once again, mischaracterizes the statements made by Shaw in his affidavit as well

as blatantly misquoting and misrepresenting Shaw's trial testimony regarding the events of the early morning hours of May 15, 2000.

In its Response, the State quotes a portion of the trial transcript in support of its contention that Shaw never testified that Petitioner went behind the house[7]. (Response, p. 74) The State, however, does not provide this Court with the portions of Shaw's trial testimony where he states that Howell did go behind the house, such as the following:

> Q: What did you do at that time?
>
> A. Adam he was standing by his grandmother's car and I was coming out of the door and I got ready to come walk down the steps ***I seen Marlon coming from around the house.***
>
> Q: Like what do you mean an (sic) around the house?
>
> A: ***Like on the back side of the house*** the corner of the house.

(T.p. 648-649) (Emphasis Added) On cross-examination, Petitioner's defense counsel asked the following series of questions:

> Q: But as I understand after you dropped everybody off and came back to your house you went and ***looked in the back yard*** and found this gun?
>
> A: I seen it, yes, sir.

(T.p. 685) (Emphasis Added)

> Q: And how long was it before you ***went out back*** and found the gun?
>
> A: It was a while. It wasn't as soon as I got back to the house.

(T.p. 686)(Emphasis Added)

> Q: My question to you is when you went ***around behind your house*** that

---

[7] While this does not go directly to the issue of the State's coercion, it must be addressed as it goes to the credibility and reliability of Shaw's affidavit as well as the State's on-going gross misrepresentations to this Court regarding the facts and evidence in this case.

morning was the gun in a bag?

A: I don't remember seeing it in no bag.

(T.p. 687)(Emphasis Added)

Further, the State asked the following question on re-direct examination:

Q: And when Marlon came back from ***behind the house***. How did he have the shirt at that time?

A: It was sort of like wrapped around his hand but he didn't have it up under his arm like he was coming back to the car like walking holding his hand.

(T.p. 696)(Emphasis Added)

The State in its desperation and due to the weakness of its position has resorted to word games in addition to misrepresenting testimony in its attempts to discredit Shaw's affidavit and Petitioner's evidence. For the State to seriously attempt to draw a distinction between "coming from around the house" as well as Shaw's trial testimony that Marlon was behind the house where he later discovered the gun and Shaw's recanted testimony that Petitioner never went behind the house where the gun was found is simply ridiculous.

The clear testimony at trial was that he saw Marlon come from "the back side of the house" and he agreed during questioning by both the State and Petitioner's trial counsel that he saw Marlon come from behind the house. In the State's on question re-direct found on page 696 of the trial transcript, it is the clear and undisputed understanding that Shaw is and had previously testified that he saw Marlon coming from behind his house.

This testimony was critical to the State's case as it had no physical evidence linking Petitioner to the gun and no witnesses testified seeing Petitioner dispose of a gun. Shaw's now recanted testimony provided a necessary and vital link in the State's evidence between the dubious identification of Rice, the self-serving pre-trial statements and trial testimony of Ray and Lipsey and

the discovery of the gun behind Shaw's house. The State's evidence was that the reason Shaw knew where to find the gun was that he had seen Marlon come from the location where it was later discovered. Shaw admits in his affidavit that this is not true and recanted this prior testimony among other statements. He now admits that he learned where the gun was from Ray and Lipsey, recanting his prior testimony that he learned the gun's location from seeing Howell come from "around" and/or "behind" the house:

> I then asked Kurt (sic) & Adam where the gun was at & they told me the gun was behind the house near the shed. That is how I knew where it was at.
>
> Marlon never went behind the house & never took his hands from out of the shirt wrapped around his hand until he got to his house.

(PCR Ex. 8) Shaw also states in his affidavit that:

> When I testified that Marlon had his shirt wrapped around his hand & it made me think he had a gun he was hiding I was surprised that when he got out of the car at this house he unwrapped his hands & had no gun. I never saw a gun.

(Id.)

Shaw also recants his trial testimony that Marlon made a comment about robbing anyone. (T.p. 637) In his sworn affidavit, Shaw states that: "Marlon never mentioned wanting to rob anyone." (PCR Ex. 8) The State represents in its Response that Shaw "maintains in his most recent testimony that Howell did state he needed money to pay his probation officer," but this is not true. (Response, p. 73) Shaw in his affidavit makes no mention of Howell saying he need money to pay his probation officer, but does state that "Marlon did not ever show any intention to rob someone that night." (PCR Ex. 8) Shaw does state the following as accurately noted by the State:

> When I told the police that he mentioned there goes an easy lick in Tupelo that was meant to say sell someone fake drugs or to trick them. The police knew this. Also, if Marlon's attorney had asked me I would have said Marlon did not mean robbery w/ a gun. He never said anything near that.

(PCR Ex. 8) This newly discovered evidence from Shaw recanting his trial testimony also go to the issue of sufficient proof of a robbery to support a conviction for capital murder.

In his affidavit, Shaw also explains the extreme pressured place on him and other witnesses to testify falsely against Howell, stating:

> My girlfriend refused to testify despite the police putting pressure on her to do so. They kept trying to get her to say that she heard Marlon say he killed Mr. Pernell or see the gun. In fact, this continued in the witness room at trial. She felt trapped & scared.

(Id.) He also describes the pressure placed on him to testify falsely, adding:

> Finally, the police throughout the case & trial kept trying to get me to say I saw a gun, that Marlon said he shot the man, that Marlon needed & wanted to rob someone. The pressure was scary & unbelieveable (sic).

(Id.)

Shaw's affidavit and the evidence of coercion by the State is supported and corroborated by the affidavits of Tonya Peterson and Terkecia Pannell. (PCR Ex. 24 and 51) These witnesses also describe the pressure placed on witnesses by the State. (Id.) The State argues that Pannell's statement is of no value as she did not testify at trial. The reason she did not testify is that she was sent home by the district attorney for refusing to testify falsely against Petitioner. (PCR Ex. 51). Peterson states in a sworn affidavit that she observed an exchange between a young woman she later learned was Pannell and a law enforcement officer in which she heard the woman say that she would not lie. (PCR Ex. 24, p. 1) She then watched as the woman tell an elderly woman that:

> they could go because she was not going to say Marlon was there with them that night. She said that (the State) was not going to let her testify because she was going to tell the truth. She said she was not going to lie and say he was there when she knew he was not.

(Id, p. 1-2) If pressure and coercion was used in these instances as outlined by not only Shaw, but Peterson, Pannell, Ray and Lipsey, this calls into question the tactics used by the State on all of the

witnesses to implicate Petitioner in this matter.

It is Petitioner's position that these matters are not barred, but to the extent this claim may be defaulted in any sense, Petitioner has alleged in the alternative that trial counsel as well as counsel on direct appeal was ineffective in handling this issue as well as numerous others. See Grounds D, I, O, P, Q, S, U, V, W, X, BB and DD. Further, prior counsel has acknowledged and admitted his ineffectiveness in handling these issues. (PCR Ex. 21) Trial and direct appellate counsel's ineffectiveness would also constitute cause for any alleged default.

As the factual allegations and all reasonable inferences from those allegations must be taken as true, Petitioner is entitled to an evidentiary hearing unless it appears beyond a doubt that Petitioner can prove no set of facts in support of his claim. *Simon v. State*, 857 So. 2d 668, 678 (Miss. 2003); *Lewis v. State*, 776 So. 2d 679, 680 (Miss. 2001); *Myers v. State*, 583 So.2d 174, 176 (Miss. 1991); *Robertson v. State*, 669 So. 2d 11 (Miss. 1996). Based on the cumulative effect of all the facts as set forth herein and in Petitioner's prior filings, the Petitioner is entitled to post-conviction relief in the form of a reversal of his conviction, a new trial, or at a minimum, a remand to the circuit court for an evidentiary hearing and additional discovery and fact development.

M & N. BATSON AND JUROR CONCEALED MATERIAL INFORMATION

Upon receipt of the State's Response and the Affidavit of Michael Reed, Petitioner respectfully withdraws these claims as set forth below. Counsel for Petitioner, after receiving the State's Response and as related to Grounds M & N, reviewed the materials obtained in regard to the criminal background check conducted on Juror Reed and attached to the prior petitions as Exhibit 25. The criminal record check on Michael J. Reed, DOB 01/01/1962 with address listed as 213 N. Glenfield Road, New Albany, MS 38652-2200, Union County resulted in identifying an individual

with the same name and birth date with a criminal history in Arkansas to include Keeping a Gambling House. (PCR Ex. 25, p. 4-5) At the request of Petitioner's counsel, private investigator Joel Morris ran another criminal background check on Juror Reed and obtained the same results. (Rebuttal Exhibit 6) Investigator Morris then conducted further investigation and determined that the date of birth of the Michael Reed with the Arkansas criminal history was actually 01/13/62 and not 01/01/62 as indicated in the Report attached to Exhibit 25. (Id.)

Based on these findings, Petitioner again respectfully withdraws Ground M and N in light of the evidence produced by the State.

O. INEFFECTIVE ASSISTANCE OF COUNSEL FOR FAILURE TO PRESERVE FEDERAL ISSUE AS WELL AS FAILURE TO FULLY INVESTIGATE THE BATSON CLAIM

In its Response to Ground O, the State does not dispute or contest the fact that it was ineffective assistance of counsel for Attorney Lott to fail to preserve a vital federal issue related to the refusal to provide the lesser included offense instruction. Both this Court as well as the United States Supreme Court have also commented on the failure of trial and appellate counsel to preserve this federal issue, this Court's January 24, 2005 opinion noted:

> Petitioner's brief in the State Supreme Court did not properly present his claim as one arising under federal law. In the relevant argument, he did not cite the Constitution or even any cases directly construing it, much less any of this Court's cases. ... As we recently explained in a slightly different context, '[a] litigant wishing to raise a federal issue can easily indicate the federal law basis for his claim in a state-court petition or brief ... by citing in conjunction with the claim the federal source of law on which he relies or a case deciding such a claim on federal grounds or by simply labeling the claim 'federal.'

Howell v. Mississippi, 125 S.Ct. 856, 858 (2005). Likewise, Justice Scalia noted during oral arguments that:

> "it seems to me counsel should stand up on his two feet and say, we're raising a Federal question. Why is that too much of an imposition when the statute requires that you raise a Federal question?"

Howell v. Mississippi, 2004 WL 2845976, p. 8 (U.S.). Justice Scalia also noted:

> "I don't think it's too much to ask counsel for the defense to say, we are raising a Federal question. And it solves the problem."

Id.

This issue is fully documented and supported in Ground O of the Petition to include testimony from Lott admitting his failure to preserve the issue, as well as Parish's assessment that:

> The Court's opinion dismissing Howell on a clear error due to failure to preserve is self-proving, and very damaging toward counsel's effectiveness. This issue alone is ample grounds for a new trial. However, it is only symptomatic of larger woeful ineffectiveness.

(PCR Ex. 22) As Parish notes, the failure by appellate counsel to adequately brief and preserve the Constitutional issue of the lesser included instruction in Petitioner's direct appeal was "critical and amounts to ineffectiveness per se." (PCR Ex. 22, p. 2-3) The failure of the State to dispute these facts amounts to a concession that Petitioner's position is accurate. As Attorney Lott has acknowledged his failure and in light of the reasons given by the United States Supreme Court for dismissing the petition, an evidentiary hearing is not necessary.

As the State does not contest this aspect of Ground O and both the deficient performance of appellate counsel and the prejudice suffered by Petitioner are clear, Petitioner is entitled to immediate post-conviction relief.

Petitioner has withdrawn its previously asserted *Batson* claims set forth in Ground M and N given the new evidence provided by the State regarding the criminal history of Juror Michael Reed and as set forth above. Given this fact, no further response is necessary in regard to Petitioner's *Batson* claims or any related claims for ineffective assistance of counsel in that regard.

It is Petitioner's position that these matters are not barred, but to the extent the remaining portion of Ground O as it relates to the preservation of the appellate issue may be defaulted in any sense, Petitioner has alleged in the alternative that trial counsel as well as counsel on direct appeal was ineffective in handling this issue as well as numerous others. See Grounds D, I, O, P, Q, S, U, V, W, X, BB and DD. Further, prior counsel has acknowledged and admitted his ineffectiveness in handling these issues. (PCR Ex. 21) Trial and direct appellate counsel's ineffectiveness would also constitute cause for any alleged default.

As the factual allegations and all reasonable inferences from those allegations must be taken as true, Petitioner is entitled to an evidentiary hearing unless it appears beyond a doubt that Petitioner can prove no set of facts in support of his claim. *Simon v. State*, 857 So. 2d 668, 678 (Miss. 2003); *Lewis v. State*, 776 So. 2d 679, 680 (Miss. 2001); *Myers v. State*, 583 So.2d 174, 176 (Miss. 1991); *Robertson v. State*, 669 So. 2d 11 (Miss. 1996). Based on the cumulative effect of all the facts as set forth herein and in Petitioner's prior filings, the Petitioner is entitled to post-conviction relief based on the ineffective assistance of counsel to preserve the federal appellate issue in the form of a reversal of his conviction, a new trial, or at a minimum, a remand to the circuit court for an evidentiary hearing and additional discovery and fact development.

P. INEFFECTIVE ASSISTANCE OF COUNSEL IN REGARDS TO FAILURE TO SEEKING ADDITIONAL FUNDING FOR EXPERTS OR RETAIN SUCH EXPERTS IN ORDER TO REBUT THE STATE'S EVIDENCE

The State's Response in this claim is solely based on the continued misrepresentation that Petitioner was not indigent and was not determined to be so initially by the lower courts. This status as an indigent never changed. The State attempts to point to this Court's determination that Petitioner did not proceed as an indigent. However, the finding by this Court was based on a misrepresentation by the State at the appellate level, as well as the failure of both trial and appellate

counsel for Petitioner to properly preserve, document, maintain and present to this Court his indigency status.

In Ground Q of the Petition for Post-Conviction Relief as well as this Rebuttal, Petitioner addresses the indigency issue, the supporting evidence in the possession of the State, as well as the State's on-going misrepresentation. In regard to this issue, Petitioner incorporates by reference as if set forth verbatim herein his arguments contained in Ground Q of both his Petition as well as the Rebuttal as well as all evidence previously set out in the prior filings in support of Petitioner's indigency status.

The State in its Response does not dispute in any fashion the portion of the Petition which addresses the failure of Petitioner's trial counsel to obtain these experts for trial even upon refusal of funding from the court. As noted by Parish in his affidavit, "(i)t would have taken very little effort, expense or resources to ...hire an eyewitness expert about lighting and conditions of the natural elements." (PCR Ex. 22, p. 4) Parish recognizes after reviewing the evidence as acquired by Petitioner's current counsel that "(s)cientifically, it is impossible to identify features on a stranger at that distance and time of night." (*Id.*) Parish also states that:

> Simply put, the failure of police, district attorney and Mr. Lott to adequately investigate this case deprived the jury of essential evidence and opportunity to find the truth.

(*Id.*)

As also noted by Parish:

> While I fee for Mr. Lott and that his hands were tied by the State's failure to provide even minimal resources for a proper defense such as an investigation, psychological evaluation, second counsel and other experts, it did not relieve Mr. Lott of his responsibilities to provide these services himself. Had he done so he would have been armed with the tools a lawyer needs to adequately defend Mr. Howell.

(*Id.*, p. 3)

This failure to investigate can also be applied to the examination of the fingerprint evidence which while not sufficient to identify an individual is evidence capable of eliminating Petitioner as the source of the prints. (PCR Ex. 52, p. 3) Further, the examination of the firearm by Petitioner's expert raises serious questions not raised at trial related to the testing methods used by the state and whether or not the weapon at issue was, in fact, used in the death of Mr. Pernell. (PCR Ex. 58, pp. 2-3) Failure to inform the jury of these aspects of the evidence also deprived them of an essential element of the case as well as limited their ability and opportunity to find the truth. The State does not dispute these contentions nor provide any contrary evidence to that presented by Petitioner.

It is Petitioner's position that these matters are not barred, but to the extent this claim may be defaulted in any sense, Petitioner has alleged in the alternative that trial counsel as well as counsel on direct appeal was ineffective in handling this issue as well as numerous others. See Grounds D, I, O, P, Q, S, U, V, W, X, BB and DD. Further, prior counsel has acknowledged and admitted his ineffectiveness in handling these issues. (PCR Ex. 21) Trial and direct appellate counsel's ineffectiveness would also constitute cause for any alleged default.

As the factual allegations and all reasonable inferences from those allegations must be taken as true, Petitioner is entitled to an evidentiary hearing unless it appears beyond a doubt that Petitioner can prove no set of facts in support of his claim. *Simon v. State*, 857 So. 2d 668, 678 (Miss. 2003); *Lewis v. State*, 776 So. 2d 679, 680 (Miss. 2001); *Myers v. State*, 583 So.2d 174, 176 (Miss. 1991); *Robertson v. State*, 669 So. 2d 11 (Miss. 1996). Based on the cumulative effect of all the facts as set forth herein and in Petitioner's prior filings, the Petitioner is entitled to post-conviction relief in the form of a reversal of his conviction, a new trial, or at a minimum, a remand to the circuit court for an evidentiary hearing and additional discovery and fact development.

Q. STATE MISREPRESENTED PETITIONER'S INDIGENT STATUS TO COURT AND INEFFECTIVE ASSISTANCE OF COUNSEL AS RELATED TO INDIGENT STATUS

The State continues in its Response to misrepresent to this Court Petitioner's status as an indigent. The Response makes no reference to the content of the sworn affidavit of Attorney David O. Bell who was appointed to represent Marlon Howell as an indigent defendant. Attorney Bell specifically states in his affidavit that he was appointed to represent Petitioner as an indigent and this was based on a finding of indigence by the trial court. Bell's affidavit includes a copy of the Itemized Statement and Order issued by the trial court and approving his pay and costs, specifically stating that the authorization for pay is "...as and for attorney fees incident to his representation of the above named *indigent*." (PCR Ex. 27) (Emphasis added) The State does not dispute the facts as set forth within Bell's affidavit or the Circuit Court's order, but merely states it "does not, in any way, support the Petitioner's claim." (Response, p. 88) It is difficult to understand how a court order finding and describing the Petitioner as indigent does not support his claim of indigence. Petitioner was indigent and had been declared and determined to be so by the court since after his initial arrest in the Summer of 2000, was treated as an indigent and proceeded as an indigent. (Id.) Unfortunately, Petitioner's counsel for his trial and direct appeal failed to obtain this information and present it to the Court in response to the State's misrepresentations and in support of Howell's proof of indigency.

The State misrepresents to this Court Petitioner's status by saying he hired Duncan Lott to represent him both at the trial and appellate levels. The truth is set forth in Attorney Lott's own affidavit provided as Exhibit 21 of the Petition for Post-Conviction Relief where Lott specifically states that he represented Petitioner pro-bono. (PCR Ex. 21) The fact that an attorney agrees to represent a client pro-bono does not in any way change their status as an indigent nor does it mean

any claim of indigence ceases to exist. The State has no support for its position that the willingness of an attorney to represent a client found by the court to be indigent on a pro bono basis changes that client's status from indigent to non-indigent.

Despite the finding of the lower court that Petitioner was indigent as demonstrated in the affidavit of David O. Bell and the supporting materials attached thereto along with Lott's affidavit, the State continues to misrepresent Petitioner's status to this Court in its Response. Further, the State also argues in response to this claim and the supporting evidence is that it is barred from consideration as Petitioner "had every opportunity to raise a claim related to indigence on direct appeal and failed to do so." (Response, p. 87) The State appears to, at least implicitly, agree that the failure to raise this claim at trial or on direct appeal amounts to ineffective assistance of counsel. See Ground P of Petition for Post-Conviction Relief and above. It is Petitioner's position that these matters are not barred, but to the extent this claim may be defaulted in any sense, Petitioner has alleged in the alternative that trial counsel as well as counsel on direct appeal was ineffective in handling this issue as well as numerous others. See Grounds D, I, O, P, Q, S, U, V, W, X, BB and DD. Further, prior counsel has acknowledged and admitted his ineffectiveness in handling these issues. (PCR Ex. 21) Trial and direct appellate counsel's ineffectiveness would also constitute cause for any alleged default.

R. PETITIONER IS INNOCENT

The substance of the State argument in response to this claim and the substantial supporting evidence of Petitioner's innocence is that it is barred from consideration as Petitioner failed to raise this claim at trial or on direct appeal. However, the State fails to recognize or acknowledge the fact that all of the evidence provided in support of Petitioner's innocence is newly discovered evidence that was not previously available. The State also mischaracterizes the evidence offered by Petitioner

as all being in the form of recanted testimony. While there is recanted testimony offered, there is also other newly discovered evidence including but not limited to the perjured testimony of Chief Grisham, the documentation and evidence supporting the fact that Petitioner was arrested and detailed on an illegal arrest warrant, the proof of Petitioner's indigency, Charles Rice's extensive criminal record, as well as fingerprint and firearm/ballistics evidence to name a few of the pieces of evidence presented in support of Petitioner's application for post-conviction relief and establishing his innocence. Further, Petitioner did plead not guilty at trial to the charges upon which he was ultimately convicted. It is Petitioner's position that these matters are not barred, but to the extent this claim may be defaulted in any sense, Petitioner has alleged in the alternative that trial counsel as well as counsel on direct appeal was ineffective in handling this issue as well as numerous others. See Grounds D, I, O, P, Q, S, U, V, W, X, BB and DD. Further, prior counsel has acknowledged and admitted his ineffectiveness in handling these issues. (PCR Ex. 21) Trial and direct appellate counsel's ineffectiveness would also constitute cause for any alleged default.

As the factual allegations and all reasonable inferences from those allegations must be taken as true, Petitioner is entitled to an evidentiary hearing unless it appears beyond a doubt that Petitioner can prove no set of facts in support of his claim. *Simon v. State*, 857 So. 2d 668, 678 (Miss. 2003); *Lewis v. State*, 776 So. 2d 679, 680 (Miss. 2001); *Myers v. State*, 583 So.2d 174, 176 (Miss. 1991); *Robertson v. State*, 669 So. 2d 11 (Miss. 1996). Based on the cumulative effect of all the facts as set forth herein and in Petitioner's prior filings, the Petitioner is entitled to post-conviction relief in the form of a reversal of his conviction, a new trial, or at a minimum, a remand to the circuit court for an evidentiary hearing and additional discovery and fact development.

S. IMPROPER AND PREJUDICIAL PROSECUTORIAL ARGUMENT AND INEFFECTIVE ASSISTANCE OF COUNSEL

The State first responds to Petitioner's claim by stating that this claim is barred as not having been raised at trial or on direct appeal. It is Petitioner's position that these matters are not barred, but to the extent this claim may be defaulted in any sense, Petitioner has alleged in the alternative that trial counsel as well as counsel on direct appeal was ineffective in handling this issue as well as numerous others. See Grounds D, I, O, P, Q, S, U, V, W, X, BB and DD. Further, prior counsel has acknowledged and admitted his ineffectiveness in handling these issues. (PCR Ex. 21) Trial and direct appellate counsel's ineffectiveness would also constitute cause for any alleged default.

Furthermore, this claim is not procedurally barred because Petitioner was represented on direct appeal by the same counsel who represented him at trial. Howell was represented both at trial and during his direct appeal by Attorney Duncan Lott. The version of M.R.A.P. 22 in effect at the time of Howell's trial provided that:

> [i]ssues which may be raised in post-conviction proceedings may also be raised on direct appeal. Where the appellant is represented by counsel who did not represent the appellant at trial, the failure to raise such issues on direct appeal shall constitute a waiver barring consideration of the issues in post-conviction proceedings.

This rule made raising such issues on direct appeal permissive unless different counsel represented the appellant, in which event it would have been mandatory to raise the issues. In this case, Lott represented Petitioner at trial and on appeal so there is no waiver. This same argument applies to all allegations by the State in its Response that Petitioner has waived an issue for failure to raise the issue at trial or on direct appeal.

The State next raises the issue that no contemporaneous objection to the argument or statements by prosecutor was made at trial. This acknowledgement by the State goes to the support Petitioner's ineffective assistance of counsel claim as outlined in Ground S. Petitioner has alternatively pled that trial counsel was ineffective in failing to object and preserve this issue for

appeal and Petitioner was prejudiced by the deficient performance. Reviewing courts have found defense counsel to have been ineffective for not objecting to improper prosecutorial arguments. *See, e.g, Eure v. State*, 764 So.2d 798 (Fla. Dist. Ct. App. 2000); *Ross v. State*, 726 So.2d 317 (Fla. Dist. Ct. App. 1998); *Fossick v. State*, 453 S.E.2d 899 (S.C. 1995); *People v. Tillman*, 589 N.E.2d 587 (Ill. App. Ct. 1991).

As it relates to prosecutorial misconduct, the State relies on *Manning v. State*, 929 So.2d 885 (Miss. 2006), in support of its position that no such misconduct occurred in the current case. (Response, p. 91) This case is inappropriate to the facts currently at hand as the portion of *Manning* cited by the State focuses on religious or biblical references by a prosecutor in closing arguments. While *Manning* does cite *Berry v. State*, 703 So.2d 269 (Miss. 1997), for the proposition that counsel may draw from literature, history, science, religion, and philosophy for material for his argument, neither *Manning* nor *Berry* allows a prosecutor to draw on racial stereotypes or allegations unsupported by the evidence.

Here, Petitioner's claim is based on the repeated unsupported and racist portrayal by the prosecutor of Petitioner as a warrior and gang leader who struck fear into the hearts of his alleged followers, Ray and Lipsey. (T.p. 1034, 1035, 1037, 1038, 1040, 1043, 1113, 1116) To the contrary, Lipsey testified at trial that he had never had any arguments with Petitioner. (T.p. 716) There was no evidence at trial and the State has produced no evidence in its Response to support any accusations or statements by the prosecutor that Petitioner was the leader of some type of gang. The sole purpose of these statements by the prosecutor was to prejudice Petitioner and to secure the conviction by introducing allegations of bad character and stirring racial stereotypes.

The following are examples of the references made by the then-District Attorney, now

Attorney General Jim Hood in his closing argument to Petitioner as "Big Chiefa"[8] or referenced "Big Chiefa's warriors":

> Would it be reasonable for a friend of somebody to come in a courtroom and go up against a ***Big Chiefa***? (T.p. 1034) (Emphasis Added)
>
> I submit to you that the car lights would allow you to pick out somebody back here in this back corner of the room. Back here particularly if you put a little light on the subject. You can probably see one of ***Big Chiefa's warriors***[9] back here now. (T.p. 1035)(Emphasis Added)
>
> They could have taken the witness stand and refused to talk instead of go up and against the ***Big Chiefa***. (T.p. 1037)(Emphasis Added)
>
> Scared to death of the ***Big Chiefa***. (Id.)(Emphasis Added)
>
> You know they forget about the fact that eye witness testified that the ***Big Chiefa*** threw his hands up. (T.p. 1037-1038)(Emphasis Added)
>
> I'm the ***Big Chiefa*** and this makes me big. I submit to you. That the ***Big Chiefa*** is a coward. (T.p. 1038)(Emphasis Added)
>
> We could have called Adam Ray but you heard testimony that boy is not all their (sic). But that is who the ***Big Chiefa warriors*** were. That is who hauled him around to do his dirty work. (T.p. 1040)(Emphasis Added)
>
> You know the lethal piece of evidence in this whole case is the ***BigChiefa's*** mouth to think he was stupid enough and the law enforcement officers were stupid enough to believe he was in Corinth with a whore. (T.p. 1040)(Emphasis Added)
>
> But when he got the power of the gun and became the ***Big Chiefa***. (T.p. 1043)(Emphasis Added)

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[8] In fact, "Big Chiefa" was not Petitioner's nickname and there was no evidence he was ever referred to as "Big Chiefa."

[9] Here, it is clear that the prosecutor is making a crude racist statement to portray an African-American defendant as a gang member as well as imply that African-American members of the court audience appearing in support of Petitioner at his trial or simply present in the courtroom are "Big Chiefa's warriors." This not only plays into racial stereotypes but makes a clear representation to the all-white jury that members of some kind of gang were present in the courtroom at the instruction of Petitioner. This is blatantly false and not supported by any of the evidence nor is it proper in a closing argument.

D.A. Hood also made improper references to Petitioner as "Big Chiefa" during his closing statement of the sentencing phase as well, stating:

> They want you to put a guilt trip on you about this poor poor ***Big Chiefa***. (T.p. 1113)(Emphasis Added)
>
> They are doing 30 years in the penitentiary because they were followers of the ***Big Chiefa.*** (T.p. 1116)(Emphasis Added)
>
> All for the ***Big Chiefa***. (T.p. 1116)(Emphasis Added)

These crude appeals to racist stereotypes were improper, see, e.g., *Moore v. Morton*, 255 F.3d 95 (3rd Cir. 2001), as was the prosecutor's fiction-based argument. *See Davis v. Zant*, 36 F.3d 1538 (11th Cir. 1994). If nothing else, the egregious misconduct so infected the trial as to amount to a violation of Petitioner's right to due process. *Darden v. Wainwright*, 477 U.S. 168, 182 (1985). Further, the name used by the prosecutor in his closing argument was not the nickname given the Petitioner nor was it used in a manner consist with the meaning of the nickname as described in the petition. The moniker of "Big Chiefa" adopted by the prosecutor to refer to Petitioner was not used for any admissible purpose such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. Despite the representations of the State, the sole purpose for referring to Petitioner in this fashion was to falsely and blatantly represent to the jury unsupported evidence of other crimes, wrongs or acts to attack his character and paint him as a stereotypical angry, violent young African-American gangbanger.

As the factual allegations and all reasonable inferences from those allegations must be taken as true, Petitioner is entitled to an evidentiary hearing unless it appears beyond a doubt that Petitioner can prove no set of facts in support of his claim. *Simon v. State*, 857 So. 2d 668, 678 (Miss. 2003); *Lewis v. State*, 776 So. 2d 679, 680 (Miss. 2001); *Myers v. State*, 583 So.2d 174, 176 (Miss. 1991); *Robertson v. State*, 669 So. 2d 11 (Miss. 1996). Based on the cumulative effect of all the facts as

set forth herein and in Petitioner's prior filings, the Petitioner is entitled to post-conviction relief in the form of a reversal of his conviction, a new trial, or at a minimum, a remand to the circuit court for an evidentiary hearing and additional discovery and fact development.

T. NO PROBABLE CAUSE FOR ARREST

The substance of the State argument in response to this claim is that it is barred from consideration as Petitioner failed to raise this claim at trial or on direct appeal. However, the State fails to recognize or acknowledge the fact that all of the evidence provided in support of Petitioner's claim is newly discovered evidence that was not previously available. This evidence is in the form of the Transcript of the Court Proceedings of May 15, 2000 (PCR Ex. 31); the Affidavit of Stephen Livingston (PCR Ex. 32); the certified notes of then Clerk of Court Stanford (PCR Ex. 33); and the handwritten note of Clerk Stanford on the Motion for Citation for Contempt (PCR Ex. 34). Besides relying on an unsupportable procedural bar, the State does nothing more in Response to this claim other than simply repeating what the Court found on direct appeal without regard to this new evidence that conclusively proves the prior findings were wrong. The State does not dispute the validity or authenticity of this new evidence which when read in conjunction with the other evidence produced by Petitioner establishes that the State lacked probable cause of Petitioner's arrest and presented false testimony regarding the circumstances surrounding the arrest.

In its Response, the State does not contest Petitioner's claim that there was no probation violation as Petitioner did appear in court on the morning of May 15, 2000 and did obtain a continuance until June 12, 2000. Further, the State does not dispute the fact that there was no authority to issue any warrant based on a non-existent probation violation, and, therefore, the warrant upon which Petitioner was detained cannot serve as the basis for Howell's arrest by the New Albany Police Department on the evening of May 15, 2000. The State does not contest that, at the time of

the arrest, the State of Mississippi had no probable cause to issue an arrest warrant. The State was aware of the lack of probable cause at the time of arrest both via the knowledge of Nance as well as that of Asst. DA Luther who represented the State at the May 15, 2000 probation hearing during which Petitioner received his continuance. Again, there is no dispute of these facts by the State in its Response. Further, Asst. D.A. Luther does not contest these matters nor shed any light on these issues in his affidavit presented by the State as Exhibit 1 to its Response. Petitioner is entitled to immediate post-conviction relief as it relates to this claim.

It is Petitioner's position that this ground is not barred, but to the extent this claim may be defaulted in any sense, Petitioner has alleged in the alternative that trial counsel as well as counsel on direct appeal was ineffective in handling this issue as well as numerous others. See Grounds D, I, O, P, Q, S, U, V, W, X, BB and DD. Further, prior counsel has acknowledged and admitted his ineffectiveness in handling these issues. (PCR Ex. 21) Trial and direct appellate counsel's ineffectiveness would also constitute cause for any alleged default.

As the factual allegations and all reasonable inferences from those allegations must be taken as true, Petitioner is entitled to an evidentiary hearing unless it appears beyond a doubt that Petitioner can prove no set of facts in support of his claim. *Simon v. State*, 857 So. 2d 668, 678 (Miss. 2003); *Lewis v. State*, 776 So. 2d 679, 680 (Miss. 2001); *Myers v. State*, 583 So.2d 174, 176 (Miss. 1991); *Robertson v. State*, 669 So. 2d 11 (Miss. 1996). Based on the cumulative effect of all the facts as set forth herein and in Petitioner's prior filings, the Petitioner is entitled to post-conviction relief in the form of a reversal of his conviction, a new trial, or at a minimum, a remand to the circuit court for an evidentiary hearing and additional discovery and fact development.

U. INEFFECTIVE ASSISTANCE OF COUNSEL AS TO LACK OF PROBABLE CAUSE AND ILLEGAL ARREST

The State next represents to this Court in its Response to this claim that this issue has previously been examined by this Court. This is not true, as the basis for this claim is the failure of Petitioner's trial and direct appeal counsel to investigate and present to both the trial court and this Court those critical issues identified in Ground T both in the Petition and above. For the purpose of this claim, those issues include the illegal arrest of Marlon Howell. It was only through the efforts and investigation of Petitioner's current post-conviction counsel that the extent of the failures of prior counsel were uncovered.

Furthermore, this claim is not procedurally barred because Petitioner was represented on direct appeal by the same counsel who represented him at trial. Howell was represented both at trial on during his direct appeal by Attorney Duncan Lott. The version of M.R.A.P. 22 in effect at the time of Howell's trial provided that:

> [i]ssues which may be raised in post-conviction proceedings may also be raised on direct appeal. Where the appellant is represented by counsel who did not represent the appellant at trial, the failure to raise such issues on direct appeal shall constitute a waiver barring consideration of the issues in post-conviction proceedings.

This rule made raising such issues on direct appeal permissive unless different counsel represented the appellant, in which event it would have been mandatory to raise the issues. In this case, Lott represented Petitioner at trial and on appeal so there is no waiver.

Lott acknowledges in his sworn affidavit that he failed to obtain copies of the materials related to Petitioner's May 15, 2000 probation hearing, stating:

> I did not obtain minutes kept by the Circuit Clerk of Union County as to Marlon Howell's probation violation hearing held the day of his arrest, to establish Marlon Howell was improperly arrested on the probation officer's blue warrant for probation violation.

(PCR Ex. 21, p. 3) Attorney Lott's failure to investigate the basis for the arrest to include acquiring

the court transcript and clerk's notes from Petitioner's May 15, 2000 probation violation hearing along with interviewing relevant witnesses, as well as failure to present this evidence at the appropriate time to the lower trial court prior to trial, ensuring these materials were part of the record is ineffective assistance of counsel. Further, this claim is based on newly discovered evidence not available nor presented at either the trial or on direct appeal due to this ineffective assistance of counsel.

Had counsel conducted an adequate investigation into the record as related to the May 15, 2000 probation hearing and the lack of probable cause for the arrest warrant, they could easily have developed additional and material evidence and information with which to attack the arrest as well as all tainted evidence gathered as a result of the illegal arrest. The newly acquired evidence as set forth in the proceeding ground would also have called into serious question the representations of the State as to the basis for the arrest, as well as the theory of its case and the existence of a robbery. As noted by Attorney Parish in his sworn affidavit:

> There were numerous waivers of key appellate issues which deprived Howell, the Mississippi Supreme Court and the U.S. Supreme Court of the opportunity to correct crucial errors in the trial of this case these include but are not limited to:
>
> e. The failure to preserve the wrongful arrest of Mr. Howell as a simple check of the clerk's docket proves that Mr. Howell's hearing on the failure to comply with his probation was continued on the morning of his arrest until June 12, 2000 and that a partial payment was made. Since the hearing was continued and officials knew that it was completely improper to arrest him, interview him under this arrest and require him to participate in a line-up. The Appellate Courts as well as the Trial Court has no documentation of this hearing or continuance and they could not rely on the State making proper representation of the hearing.

(PCR Ex. 22, p. 5-6) These failures not only demonstrate ineffective assistance of counsel as noted by Attorney Parish, but they also show that Howell did not receive a fair trial due to lack of adequate

counsel advocating for him. (*Id.*, p. 6)

Likewise, the prejudice test of *Strickland* "is not a sufficiency of evidence test." *Kyles v. Whitley*, 514 U.S. 419, 434 (1995). Thus, the appropriate question is whether counsel's conduct so undermined the proper functioning of the adversarial process that this Court cannot be confident that the outcome of the trial would have been the same. In the context of a capital trial, the Supreme Court also explicitly provided that a reviewing court must consider all evidence even if that evidence "does not undermine or rebut the prosecution's death-eligibility case." *Williams*, 529 U.S. at 398. Finally, the resulting prejudice from counsel's errors must be "considered collectively, not item-by-item." *Kyles*, 514 at 436; *Williams*, 529 U.S. at 397 (a reviewing court applied controlling precedent unreasonably when "it failed to evaluate the totality of the available mitigating evidence"). Thus, the court must consider the cumulative prejudice of counsel's errors, as opposed to considering the prejudice based only on each individual instance of inadequate representation by counsel.

Likewise, counsel has been found ineffective for not preserving meritorious issues for direct appeal and for not adequately presenting meritorious issues for appellate review. *See, e.g., Roe v. Delo*, 160 F.3d 416 (8th Cir. 1998) (failure to request review for plain error); *Mayo v. Henderson*, 13 F.3d 528 (2nd Cir. 1994); *Freeman v. Lane*, 962 F.2d 1252 (7th Cir. 1991); *Matire v. Wainwright*, 811 F.2d 1430 (11th Cir. 1987).

It is difficult to overstate the effect that striking the evidence procured as a result of the illegal warrant and resulting from effective performance by Petitioner's counsel would have had on the trial. Howell's initial statement would be inadmissible as would the line-up and its results. While these results have now been recanted by the eyewitness, the line-up would not even have been admissible had trial counsel effectively investigated the basis for the arrest and the illegal nature of the warrant. As it relates to Petitioner's statement to law enforcement, this illegally obtained statement was used

against Howell at trial to discredit him as untruthful and attack his alibi defense as well as the testimony of his father and sister that Petitioner was at home at the time of the incident at issue. Therefore, the prejudice to Petitioner at trial is clear and post-conviction relief is appropriate.

It is Petitioner's position that this ground is not barred, but to the extent this claim may be defaulted in any sense, Petitioner has alleged in the alternative that trial counsel as well as counsel on direct appeal was ineffective in handling this issue as well as numerous others. See Grounds D, I, O, P, Q, S, U, V, W, X, BB and DD. Further, prior counsel has acknowledged and admitted his ineffectiveness in handling these issues. (PCR Ex. 21) Trial and direct appellate counsel's ineffectiveness would also constitute cause for any alleged default.

As the factual allegations and all reasonable inferences from those allegations must be taken as true, Petitioner is entitled to an evidentiary hearing unless it appears beyond a doubt that Petitioner can prove no set of facts in support of his claim. *Simon v. State*, 857 So. 2d 668, 678 (Miss. 2003); *Lewis v. State*, 776 So. 2d 679, 680 (Miss. 2001); *Myers v. State*, 583 So.2d 174, 176 (Miss. 1991); *Robertson v. State*, 669 So. 2d 11 (Miss. 1996). Based on the cumulative effect of all the facts as set forth herein and in Petitioner's prior filings, the Petitioner is entitled to post-conviction relief in the form of a reversal of his conviction, a new trial, or at a minimum, a remand to the circuit court for an evidentiary hearing and additional discovery and fact development.

V. INEFFECTIVE ASSISTANCE OF COUNSEL AS TO MOTION FOR CHANGE OF VENUE

The State next responds to Petitioner's ineffective assistance of counsel claim as it relates to the change of venue motion at the trial level with the standard accusation that this is merely an attempt to relitigate an issue decided on direct appeal. To the contrary, this issue is based on new evidence and information obtained by Petitioner's current post-conviction counsel related to the

failures of trial and direct appeal counsel in regard to the change of venue motion.

Furthermore, this claim is not procedurally barred because Petitioner was represented on direct appeal by the same counsel who represented him at trial. Howell was represented both at trial on during his direct appeal by Attorney Duncan Lott. The version of M.R.A.P. 22 in effect at the time of Howell's trial provided that:

> [i]ssues which may be raised in post-conviction proceedings may also be raised on direct appeal. Where the appellant is represented by counsel who did not represent the appellant at trial, the failure to raise such issues on direct appeal shall constitute a waiver barring consideration of the issues in post-conviction proceedings.

This rule made raising such issues on direct appeal permissive unless different counsel represented the appellant, in which event it would have been mandatory to raise the issues. In this case, Lott represented Petitioner at trial and on appeal so there is no waiver.

As part of Petitioner's post-conviction efforts, Jim Parish, capital defense attorney with 29 years of experience in both state and federal cases as prosecutor and defense counsel, has reviewed the transcript and materials related to Howell's trial, conviction and appeal. It is Parish's expert opinion that Petitioner did not receive a fair trial and that justice was frustrated in part due to the ineffective assistance of defense counsel on multiple issues to include but not limited to the change of venue motion.

As Parish notes in his affidavit which is attached as Exhibit 22 and incorporated in full herein as if set forth verbatim, he identifies the following as one of several items related to "key appellate issues which deprived Howell, the Mississippi Supreme Court and the U.S. Supreme Court of the opportunity to correct crucial errors in the trial of this case":

> The failure to document and adequately preserve the Change of Venue Motion. There was no documentation of other Union County cases' venue hearings which would have shown venue changes in far less public cases. There was inadequate briefing and proof of the local knowledge of the case. This was one of the most

critical pre-trial motions and the documentation was severely lacking.

(PCR Ex. 22, p. 6).

In support of the motion for change of venue, defense counsel presented only seven "brief identical" affidavits along with the newspaper articles and television broadcasts related to the case at issue. No documentation was produced to the court regarding other Union County cases in which change of venue was granted nor was evidence offered as to other cases in which change of venue was granted in other similar counties under similar circumstances. A presentation of this information would have demonstrated when change of venue had been granted or a denial of change of venue overturned in several cases prior to Petitioner under similar circumstances or circumstances with far less publicity.

It is Petitioner's position that this ground is not barred, but to the extent this claim may be defaulted in any sense, Petitioner has alleged in the alternative that trial counsel as well as counsel on direct appeal was ineffective in handling this issue as well as numerous others. See Grounds D, I, O, P, Q, S, U, V, W, X, BB and DD. Further, prior counsel has acknowledged and admitted his ineffectiveness in handling these issues. (PCR Ex. 21) Trial and direct appellate counsel's ineffectiveness would also constitute cause for any alleged default.

As the factual allegations and all reasonable inferences from those allegations must be taken as true, Petitioner is entitled to an evidentiary hearing unless it appears beyond a doubt that Petitioner can prove no set of facts in support of his claim. *Simon v. State*, 857 So. 2d 668, 678 (Miss. 2003); *Lewis v. State*, 776 So. 2d 679, 680 (Miss. 2001); *Myers v. State*, 583 So.2d 174, 176 (Miss. 1991); *Robertson v. State*, 669 So. 2d 11 (Miss. 1996). Based on the cumulative effect of all the facts as set forth herein and in Petitioner's prior filings, the Petitioner is entitled to post-conviction relief in

the form of a reversal of his conviction, a new trial, or at a minimum, a remand to the circuit court for an evidentiary hearing and additional discovery and fact development.

W. INEFFECTIVE ASSISTANCE OF COUNSEL RELATED TO THE FAILURE TO PRESENT MITIGATING EVIDENCE

In support of this claim, Petitioner has established in his Petition, prior filings and herein that his trial attorney failed in his basic duty to gather records, interview witnesses and consult with experts. Defense counsel did not obtain Petitioner's school or medical records nor did he contact and call to trial sufficient witnesses to provide testimony on the issue of mitigation. Counsel in capital cases have an elementary duty to gather records, interview witnesses, and consult with reasonably necessary experts before they can be in a position to make strategic decisions about what evidence to present. *See Tokman v. State*, 564 So. 2d 1339, 1343 (Miss. 1990) ("At a minimum, counsel has a duty to interview potential witnesses and to make an independent investigation of the facts and circumstances of the case."). It should be clear that the necessary pretrial preparation was not done.

While the State questions the calling of Ray, Lipsey or Shaw to testify as to Petitioner's non-violent nature, each of these individuals have provided signed statements in which they testify that Howell did not have a reputation for violence. (PCR Ex. 6, 7 & 8) Further, each of these individuals have recanted prior testimony in which they implicated Petitioner. (Id.) The State has produced no evidence to dispute these affidavits or their contents. Both Ray and Lipsey state in their affidavits that had Petitioner's trial attorney asked them questions regarding those matters set forth in their affidavits that they would have provided it. (Id.) However, trial counsel never explored these issues nor asked these witnesses questions in this regard. Trial counsel also failed to call any of the other witnesses identified by current counsel including but not limited to Chris Collins, Timothy Gilliam,

Tonya Peterson, Tulane Simmons, Mary Simmons, or Terkicia Pannell.

The State questions the validity of Petitioner's school records. However, the critical issue regarding the school records is that there is no reports, reprimands, or evidence of misbehavior of any kind by Petitioner set forth in the records. Petitioner's trial counsel has acknowledged that he failed to obtain these records. (PCR Ex. 21) By failing to do so, he missed an opportunity to demonstrate that Petitioner had no violent history while in school substantial enough to warrant noting in his records. This is in sharp contrast to the records produced by New Albany Schools in reference to Adam Ray. (PCR Ex. 23) Unfortunately, Petitioner's trial counsel failed to pursue this line of mitigating evidence.

In addition, defense counsel failed to produce mitigating evidence at trial related to Howell's nickname "Chiefa." The State consistently used the nickname "Big Chiefa" in an ongoing effort to paint Petitioner as a warrior-like, gang leader in order to aggravate the passions of the jury. (T.p. 1034, 1035, 1037, 1038, 1040, 1043, 1113, 1116) Under Mississippi case law, this amounted to improper reliance on evidence of alleged bad character. *See Edwards v. State,* 737 So. 2d 275 (Miss. 1999). During his investigation, Joel Morris, investigator for Petitioner's post-conviction counsel, learned the true meaning of Howell's nickname was the opposite of what was represented to the jury by the State. In interviewing acquaintances of Howell, Morris discovered that the nickname "Chiefa" had "no connection to any leadership or gang role, particularly as Marlon did not participate in gang activity." (PCR Ex. 28, p. 3) Morris learned that, to the contrary, the nickname referenced Petitioner's "non-violent nature as well as his tendency to smoke marijuana in the context of 'Chiefa smokes peace pipe.'" (*Id.*) This is supported by several witnesses among them Curtis Lipsey. (PCR Ex. 6, p. 4) Unfortunately, defense counsel failed to learn of this evidence as he did not conduct a complete investigation. Morris states that:

> This is important and material information that would have been uncovered with any effort as part of a competent and complete investigation either by law enforcement or the defendant's investigator. It was a miscarriage of justice for the jury to be given the false impression of Marlon Howell as some kind of tribe-like, gang leader who dominated and bullied his co-defendants based on the misinterpretation of his nickname of "Chiefa."

(*Id.*, p. 3)

As the first witness in the sentencing phase of the trial, the State called Probation Officer Jim Nance. Nance testified as to facts related to Petitioner's probation as well as the issue of fees to be paid by Howell to their probation officer. In Ground T of the Post-Conviction Petition, Petitioner sets out facts and evidence discovered by his post-conviction counsel regarding Nance's appearance in court on the morning of Petitioner's May 15, 2000 hearing as well as the fact that Petitioner had obtained a continuance and that Nance signed an arrest warrant based on a non-existent probation violation. (PCR, p. 136-139) Had trial counsel properly investigated this case then he would have discovered those matters set forth in Ground T of the Post-Conviction Petition which would have provided ample material to impeach the testimony of Nance in the sentencing phase. Unfortunately, this was not done.

The State in its Response ignores the fact that defense counsel has acknowledged his failure, stating:

> I did not obtain records related to Marlon Howell's education background or medical history for the purpose of obtaining mitigating evidence for the penalty phase. Further, while I was limited in my ability to put on witnesses due to the collapse of Marlon Howell's mother after the guilty verdict, I did not interview other witnesses or consult with any experts in order to present a mitigation defense.

(PCR Ex. 21, p. 3-4) Prior counsel also admitted the following:

> I failed to adequately investigate Marlon Howell's case due to complete lack of resources and the State's failure to assist me. I could not hire an investigator to

canvas the neighborhood or investigate other witnesses. I sought funding but was denied.

(*Id.*, p. 1)

The prejudice suffered by the ineffectiveness of his trial counsel in properly investigating his case and preparing his mitigating evidence is self-evident. The State suggests that failures were strategic decisions. However, this is not supported by the admissions of Petitioner's trial counsel. In addition, this is contrary to established case law. "[O]ur case law rejects the notion that a 'strategic' decision can be reasonable when the attorney has failed to investigate his options and make a reasonable choice between them." *Horton v. Zant*, 941 F.2d 1449, 1462 (11th Cir. 1991); *see also Foster v. Lockhart*, 9 F.3d 722 (8th Cir. 1993) (though deference given to strategic decisions, counsel's preparatory activities must be closely scrutinized); *Bouchillon v. Collins*, 907 F.2d 589, 597 (5th Cir. 1990). "Failing to interview witnesses or discover mitigating evidence relates to trial preparation and not trial strategy." *Kenley v. Armontrout*, 937 F.2d 1298, 1304 (8th Cir. 1991)

Petitioner was prejudiced by not having appropriate and available mitigating evidence presented during the sentencing phase of his trial. Here, "[counsel's] failure to investigate or present . . . mitigating evidence undermined the adversarial process and rendered the death sentence unreliable." *Austin v. Bell*, 126 F.3d 843, 848 (6th Cir. 1997). Had trial counsel conducted an adequate investigation, produced substantive mitigating witnesses at trial and secured adequate expert assistance, there is at least a reasonable probability that the sentencer would have been moved to show mercy and vote for a life sentence. *Hendricks*, 70 F.3d at 1044; *see also Emerson v. Gramley*, 91 F.3d 898, 907 (7th Cir. 1996) (noting that counsel had to convince only one of twelve jurors to refuse to go along with a death sentence).

It is Petitioner's position that this ground is not barred, but to the extent this claim may be

defaulted in any sense, Petitioner has alleged in the alternative that trial counsel as well as counsel on direct appeal was ineffective in handling this issue as well as numerous others. See Grounds D, I, O, P, Q, S, U, V, W, X, BB and DD. Further, prior counsel has acknowledged and admitted his ineffectiveness in handling these issues. (PCR Ex. 21) Trial and direct appellate counsel's ineffectiveness would also constitute cause for any alleged default.

As the factual allegations and all reasonable inferences from those allegations must be taken as true, Petitioner is entitled to an evidentiary hearing unless it appears beyond a doubt that Petitioner can prove no set of facts in support of his claim. *Simon v. State*, 857 So. 2d 668, 678 (Miss. 2003); *Lewis v. State*, 776 So. 2d 679, 680 (Miss. 2001); *Myers v. State*, 583 So.2d 174, 176 (Miss. 1991); *Robertson v. State*, 669 So. 2d 11 (Miss. 1996). Based on the cumulative effect of all the facts as set forth herein and in Petitioner's prior filings, the Petitioner is entitled to post-conviction relief in the form of a reversal of his conviction, a new trial, or at a minimum, a remand to the circuit court for an evidentiary hearing and additional discovery and fact development.

X & Y. CUMULATIVE ERRORS AT BOTH THE TRIAL AND APPELLATE LEVELS AS RELATED TO INEFFECTIVE ASSISTANCE OF COUNSEL AS WELL AS WELL AS ALL OTHER ERRORS

In regard to Claims X and Y of the Petition for Post-Conviction Relief, Petitioner incorporates by reference as if set forth verbatim herein his arguments and all evidence previously set out in the prior filings, including but not limited to those matters set forth in this Rebuttal.

It is Petitioner's position that this ground is not barred, but to the extent these claims may be defaulted in any sense, Petitioner has alleged in the alternative that trial counsel as well as counsel on direct appeal was ineffective in handling this issue as well as numerous others. See Grounds D, I, O, P, Q, S, U, V, W, X, BB and DD. Further, prior counsel has acknowledged and admitted his

ineffectiveness in handling these issues. (PCR Ex. 21) Trial and direct appellate counsel's ineffectiveness would also constitute cause for any alleged default.

As the factual allegations and all reasonable inferences from those allegations must be taken as true, Petitioner is entitled to an evidentiary hearing unless it appears beyond a doubt that Petitioner can prove no set of facts in support of his claim. *Simon v. State*, 857 So. 2d 668, 678 (Miss. 2003); *Lewis v. State*, 776 So. 2d 679, 680 (Miss. 2001); *Myers v. State*, 583 So.2d 174, 176 (Miss. 1991); *Robertson v. State*, 669 So. 2d 11 (Miss. 1996). Based on the cumulative effect of all the facts as set forth herein and in Petitioner's prior filings, the Petitioner is entitled to post-conviction relief in the form of a reversal of his conviction, a new trial, or at a minimum, a remand to the circuit court for an evidentiary hearing and additional discovery and fact development.

Z & AA. FALSE AND MISLEADING TESTIMONY AND LACK OF COUNSEL AND REPRESENTATION AT IDENTIFICATION LINE-UP OF MAY 16, 2000

As to these two claims, the State argues this claim could have been raised on direct appeal. The State ignores the fact that Chief Grisham falsely testified under oath that Petitioner had counsel, specifically Attorney Regan Russell, at the line-up of May 16, 2000. (PCR Ex. 45 and T.p. 104-107) Due to the State's misrepresentations both in pre-trial hearings and on appeal, it was presumed by Petitioner's trial and direct appeal counsel, the trial court as well as this Court that Petitioner had counsel at this adversarial proceeding. In fact, Chief Grisham was lying and continues to lie in his account of these events. The State now represent to this Court that Attorney Tom McDonough represented Petitioner at the line-up. (State's Exhibit 5) As with Chief Grisham's prior testimony, this is not true. Attorney McDonough has provided affidavits in which he explicitly states that he at no time represented Marlon Howell to include the May 16, 2000 line-up. (Rebuttal Exhibits 7

and 8) Further, McDonough testifies in his sworn affidavit that he told Chief Grisham that he did not represent Howell nor was he present at the line-up. (Rebuttal Exhibit 8, p. 2) Chief Grisham and the State provided a false affidavit to this Court. Despite the attempts by the State to twice falsely represent otherwise to this Court, Marlon Howell had no representation at the line-up. This fact was only discovered as part of the investigation conducted by Petitioner's current post-conviction counsel. Petitioner could not raise this issue on direct appeal.

The State next contends that the issue of the line-up was considered on appeal. However, this Court's prior consideration of the May 16, 2000 line-up was based on false testimony that Petitioner had counsel. Testimony that has since been twice proven false. The State attempts to rehabilitate Grisham's prior perjured testimony with more lies. Now, Grisham and the State would have this Court believe that it was not Regan Russell as he originally testified, but Tom McDonough. However, Attorney McDonough has provided two affidavits to Petitioner specifically stating that he has had no involvement in the representation of Marlon Howell and was not present at the May 16, 200 line-up. (Rebuttal Exhibits 7 and 8) The continued attempts by the State to rely on false evidence clearly demonstrates that the State, its attorneys and Chief Grisham have no intention of dealing honestly with this Court in this matter. It also demonstrates the desperate measures the State will go to in order to legitimize this unconstitutional and prejudicial line-up. It also questions all of Chief Grisham's testimony, as well as the entire criminal investigation led by the Chief and law enforcement.

The claim of lack of representation at the line-up could not have been raised on direct appeal due to the State's presentation of false and misleading evidence in the form of the testimony of Chief Grisham. Further, the issue of the sufficiency of the line-up as addressed by this Court on direct appeal was based on the State's misrepresentations and the false testimony of Chief Grisham. The

claims related to the false and misleading testimony of the State as well as the lack of representation at the line-up are based on newly discovered evidence obtained by Petitioner's current counsel as part of the post-conviction investigation.

The United States Supreme Court has held that the State's knowing use of or 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 there is no reasonable likelihood that the error affected the verdict. *United States v. Agurs*, 427 U.S. 97, 103 (1976); *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). Petitioner is entitled to relief even if the State is not aware that a witness has testified falsely where there is a reasonable probability that the result would have been different but for the false testimony. *Killian v. Poole*, 282 F.3d 1204 (9th Cir. 2002); *Hall v. Director of Corrections*, 343 F.3d 976 (9th Cir. 2003).

The State attempts to rely on *Lattimore v. State*, 958 So.2d 192 (Miss. 2007), for its position that the absence of counsel would not warrant Petitioner's claim for relief. This reliance is misplaced as the facts at hand are distinguishable from *Lattimore*. In the present case, Charles Rice was the State's only non-interested eyewitness to the crime at issue. Immediately prior to Rice testifying in the case, the State called Police Chief David Grisham as a witness[10]. Chief Grisham

[10] The reliability of Chief Grisham (or lack thereof) given his previous perjured testimony has been discussed at length both in this Rebuttal as well as prior filings.

during the course of his time on the stand testified at length on direct examination as to the unconstitutional identification line-up, as well as Rice's identification of Howell at the line-up. (T.p. 514-520) Chief Grisham also testified that Rice identified Petitioner as the assailant in the line-up. (T.p. 522, lines 12-24) Charles Rice was the State's next witness to be called immediately after Chief Grisham with no recess or break between the two witnesses' testimony[11]. (T.p. 546) A reading of Rice's testimony shows that his in-court identifications were tainted by the impermissible line-up. (T.p. 554; 572-573, & 612-613) In addition to Chief Grisham, Rice also testified during his direct examination regarding his identification of Petitioner in the line-up. (T.p. 560-563) In fact, it was after his testimony regarding the line-up and his identification of Petitioner that the following exchange took place:

Q: Is the person that shot Mr. Pernell and killed Mr. Pernell on the morning of May 15th, 2000 present in the courtroom today?

A: Yes, sir.

Q: Can you point that person out to us?

A: Mr. Howell.

By Mr. Luther: The record indicate that the witness has identified the defendant.

By the Court: So reflect.

(T.p. 572-573) Rice also testified on re-direct regarding the line-up and his prior identification of Petitioner. (T.p. 612-613) After his testimony on re-direct regarding the line-up, the State solicited the following testimony:

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[11] As with Chief Grisham, the reliability of Charles Rice in his testimony is seriously suspect given his multiple statements as well as drug activity and his history of providing false statements to include his statements regarding his gang activity while in prison.

Q: Is the person that shot Hugh David Pernell on the morning of May 15th, 2000 present in the courtroom today?

A: Yes, sir.

Q: Would you point that person out to us?

A: Marlon Howell.

(T.p. 614) While Rice had another in-court identification of Petitioner during his trial testimony (T.p. 554), his entire testimony is tainted by the impermissible line-up, especially given the fact that he knew or had seen Howell on occasions prior to May 15, 2000, as well as his subsequent doubts and the physiological near-impossibility of Rice being able to identify Mr. Pernell's shooter given the conditions at the time.

The extensive trial testimony regarding the line-up and the identification of Petitioner by Rice at the line-up establishes that, unlike the facts of *Lattimore*, here it is certainly not "clear that (Charles Rice's) in-court identification was based upon (his) view of the defendant at the scene and not based upon the line-up." *Lattimore*, 958 So.2d 192, P13. If nothing else, the testimony of Chief Grisham prior to Rice supports the fact that his in-court identification was not based on Rice's view at the scene, but was instead the result of his line-up identification. The testimony of Chief Grisham regarding the unconstitutional pre-trial line-up only serves to bolsters Rice's in-court identification and the credibility of this identification with the jury. Rice also testified at trial that he had never seen the Petitioner prior to the events of May 15, 2000, but this has proven to be false with the statements of individuals who know both Rice and Howell, as well as Rice's own sworn and still uncontested statements, acknowledging the likelihood that he had seen Petitioner on prior occasions. (PCR Ex. 4, 5, 10, 11, 15 & 16) Rice has not recanted any prior knowledge of Petitioner nor does the State dispute the fact that Rice admits this in his June 7, 2005 and June 9, 2005 sworn affidavits.

In *Lattimore,* this Court held that the line-up in question did constitute constitutional error. *Id.* The Lattimore Court found that it was clear that the eyewitness' in-court identification was based upon her view of the defendant at the scene of the crime and not based on the lineup. *Id.* at para. 13. There is no mention in *Lattimore* of prior trial testimony by law enforcement or any trial testimony by any witness regarding an identification line-up and the results of any such line-up. To the contrary, the sole reference in *Lattimore* is to trial testimony related to the in-court identification by the victim's wife. *Id.* at para. 6.

As the line-up identification was conducted in violation of Petitioner's constitutional rights, the State has the burden of establishing by clear and convincing evidence that the in-court identifications were not tainted. In *Lattimore*, this Court held that

> Where constitutional error in pre-trial identification has occurred, ***the state must show by clear and convincing evidence that subsequent in-court identifications are not based upon the offensive lineup, but instead have an independent origin***.

Id. at para. 15, *citing Gilbert*, 388 U.S. at 271, 87 S.Ct. 1951, 18 L. Ed. 2d 1178; *York v. State*, 413 So.2d 1372, 1375 (Miss. 1982) (Emphasis Added) In *Neil v. Biggers*, 409 U.S. 1888, 198, 93 S.Ct. 375, 34 L.Ed. 2d 401 (1972), the United States Supreme Court provides five factors to be considered in evaluating the likelihood of a misidentification and whether an in-court identification is free from the taint of the impermissible line-up. This Court has recently relied on these factors in the case of *Brooks v. State*, 903 So.2d 691 (Miss. 2005) as well as *Lattimore.* These factors include (1) opportunity of witness to view the criminal at time of crime; (2) witness's degree of attention, (3) accuracy of witness's prior description of the criminal, (4) level of certainty demonstrated by the witness at the confrontation, and (5) length of time between the crime and the confrontation. *Lattimore* at para. 16.

Also in *Lattimore*, this Court noted that while the preference is for trial courts to make specific findings regarding each of these factors, this Court "will look at the totality of the circumstances in determining whether the in-court identification has been impermissibly tainted by a faulty pre-trial lineup." *Id.* The totality of the circumstances here point to nothing if not an in-court identification irrepairably tainted and bolstered by a faulty, unconstitutional pre-trial line-up. In the current case, the State has provided no evidence of any kind to show that subsequent in-court identifications are not based upon the offensive lineup. The State certainly cannot meet its burden of clear and convincing evidence that Rice's identification was not tainted by the improper and unconstitutional line-up. The witness viewed the incident from a distance of more than seventy (70) feet while looking out his window at a time approximately 45 minutes prior to sunrise with lights on in his house. He stated that he observed the individual for 3 to 4 seconds and described him as in his early 20's, clean cut, 6 ft. tall and with no mustache. (T.p. 584) This description was inaccurate. Howell's arrest photo of May 15, 2000 shows that he had a mustache. The description is consistent with Lipsey, but he did not participate in any line-up. Rice's description of the clothes worn by the assailant are inconsistent with those worn by Petitioner[12]. Petitioner has also offered uncontested and uncontroverted evidence that given the lighting conditions as well as other factors outlined in the report of Geoffrey R. Loftus, Ph.D. that it was physiologically "near-impossible" for Rice to perceive and see Pernell's shooter sufficiently to be able to identify him later. (PCR Ex. 19, p. 8) Finally, other than the now recanted self-serving trial testimony of Curtis Lipsey, Rice's identification of Petitioner is the only evidence linking Howell to the death of Mr. Pernell.

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[12] At trial, Rice testified the shooter was wearing blue jeans, a t-shirt and a red and black plaid over shirt or flannel jacket (T.p 583 & 590) Shaw testified later that Howell had not worn a red and black plaid over shirt or jacket, but a green Polo brand short sleeve shirt. (T.p. 672-673)

Rice provided two in-court identifications during his direct and re-direct testimony after testifying as to his pre-trial identification of Petitioner in the line-up. Rice also testified that he had never seen Petitioner before, but he has acknowledged that he probably had seen Petitioner in the neighborhood prior to the morning of May 15, 2000 which is also supported by affidavits from individuals living in the area. (PCR Ex. 4 & 5 and PCR Ex. 10-11 & 15-16) While Rice has recanted portions of at least one of his June 2005 affidavits,[13] there is no dispute that he had seen Petitioner prior to the morning of May 15, 2000 nor does he contest the affidavits of individuals living in the area of Broad Street that Rice was familiar and had seen Petitioner on occasions prior Mr. Pernell's death. (State's Exhibit 2) For the reasons outlined herein, a evidentiary hearing is warranted.

It is Petitioner's position that this ground is not barred, but to the extent this claim may be defaulted in any sense, Petitioner has alleged in the alternative that trial counsel as well as counsel on direct appeal was ineffective in handling this issue as well as numerous others. See Grounds D, I, O, P, Q, S, U, V, W, X, BB and DD. Further, prior counsel has acknowledged and admitted his ineffectiveness in handling these issues. (PCR Ex. 21) Trial and direct appellate counsel's ineffectiveness would also constitute cause for any alleged default.

As the factual allegations and all reasonable inferences from those allegations must be taken as true, Petitioner is entitled to an evidentiary hearing unless it appears beyond a doubt that Petitioner can prove no set of facts in support of his claim. *Simon v. State*, 857 So. 2d 668, 678 (Miss. 2003); *Lewis v. State*, 776 So. 2d 679, 680 (Miss. 2001); *Myers v. State*, 583 So.2d 174, 176 (Miss. 1991);

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[13] The recantation of prior recantations only goes to demonstrate the fundamental unreliability of Charles Rice as a witness. This unreliability is further supported by his previous statements while in prison in which he disavowed being involved in gangs only to be cited for gang activity within two weeks of making this statement. Further, Rice does not dispute the allegations made by others regarding his drug use and reputation for drug use.

Robertson v. State, 669 So. 2d 11 (Miss. 1996). Based on the cumulative effect of all the facts as set forth herein and in Petitioner's prior filings, the Petitioner is entitled to post-conviction relief in the form of a reversal of his conviction, a new trial, or at a minimum, a remand to the circuit court for an evidentiary hearing and additional discovery and fact development.

BB. INEFFECTIVE ASSISTANCE OF COUNSEL AS TO CLAIMS Z AND AA (BOTH INDIVIDUALLY AND COLLECTIVELY)

In its Response to Petitioner's claim, the State first turns to position that all the underlying substantive claims related to the identification line-up were decided on direct review. This is simply not true as the falsity of the State's testimony by Police Chief Grisham was not before this Court on direct appeal. It was only discovered through the efforts of Petitioner's current counsel that Chief Grisham has now twice committed perjury in regard to statements that Howell had an attorney at the initial line-up on May 16, 2000. Further, the State has now twice presented false testimony to this Court in support of its contention that Petitioner was represented by counsel[14]. But for the efforts of Petitioner's current counsel, the truth would have remained hidden behind the curtain of lies promulgated by the State in its desire to execute an innocent man.

Likewise, the State also misrepresents the contentions of Petitioner as well as the positions held by his experts in regard to the evidence on the issue of fingerprints as well as firearms and ballistic tests. The State represents that Petitioner's firearms/ballistics expert states in his affidavit that the bullets match. However, this is not true. Firearms Examiner Eugene Bishop specifically

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[14] One has to ask how difficult it would have been for the Attorney General's office to contact Attorney Tom McDonough to confirm Chief Grisham's revised recollection of events prior to submitting the Chief's affidavit to this Court. To the contrary, McDonough states in his affidavit that no one from the Attorney General's office contacted him regarding this matters and if they had then he would have told him that he did not represent Howell and was not present at the line-up. (Rebuttal Exhibit 8)

states in his sworn affidavit:

> However, ***the Q-1 bullet and tests lack sufficient microscopic agreement to establish whether or not K-1 fired Q-1.*** Likewise, the cartridge case designated as Q-2 has a similar fire pin impression as the test fired in the K-1 pistol, but ***both the Q-2 cartridge case and tests lack sufficient microscopic detail to establish whether or not K-1 fired Q-2. Based on my findings, I cannot find sufficient similarities to establish that K-1 fired Q-1 or Q-2.***

(PCR Ex. 57, p. 2) The State in its Response represents that Petitioner's expert provides nothing new and parrots the testimony of the State's expert at trial. (Response, p. 114) Again, this is not true and is a clear misrepresentation by the State. Starks Hathcock, the State's firearms/ballistics expert, testified at trial that in his opinion both the bullet and the cartridge case found at the scene came from the gun in question. (T.p. 854-857) This is contrary to Examiner Bishop's findings in which he cannot establish sufficient similarities to say that the gun in question fired the bullet or the cartridge case. (PCR Ex. 57, p. 2) As this is the sole basis for the State's contention that trial counsel was not ineffective as it related to the firearms/ballistics evidence, Petitioner would submit that Petitioner has established a claim commensurate with the requirements of *Strickland, supra*. Petitioner has established how trial counsel was deficient in failing to obtain experts, as well as in his failure to adequately question the State's witness Hathcock in regard to his findings.[15] The gun at issue was a critical piece of the State's evidence. Casting doubt as to whether this was, in fact, the weapon that murdered Mr. Pernell effectively casts doubt upon the entire investigation of this crime by law enforcement and impeaches the State's credibility in front of the jury.

The State does not dispute the fact that the fingerprints taken from the scene effectively

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[15] Examiner Bishop includes in his affidavit a litany of questions trial counsel failed to ask the State's expert on the issue of his findings and opines that based on his experience in law enforcement as well as in testifying at trials that trial counsel demonstrated a poor and substandard job in cross-examining the witness and obtaining information regarding his testing procedures and findings in regard to this case.

eliminate Petitioner as a suspect.[16] Fingerprints taken from the door rail of the victim's vehicle by law enforcement were examined by Mississippi Crime Lab technicians who testified at trial that there were "no prints of value that could be compared to anyone to make an identification." (T.p. 839) Petitioner's trial counsel failed to have these fingerprints reviewed by an expert prior to trial nor did he dispute the State's findings at trial or as part of the initial appeal. Petitioner's current counsel has obtained these fingerprints as well as the fingerprints of Marlon Howell only after filing a motion to compel. While it is true that the prints are not of any value to positively identify the assailant, the prints are of sufficient quality to eliminate both Petitioner and Adam Ray as the source of the prints. (PCR Ex. 52 and 56) This fact was not presented to the jury by either the State or Petitioner's own trial counsel. The State does not address nor dispute this fact, but merely points out that Howell's prints were not present. However, Petitioner's expert could not eliminate Curtis Lipsey as the source of the fingerprints taken from Pernell's vehicle due to the nature of the prints provided by the State. (PCR Ex. 56) This supports and corroborates the theory that it was not Petitioner, but Curtis Lipsey who actually committed these crimes.

The State does not dispute the facts set forth by Petitioner, but simply states it fails to satisfy the requirements of *Strickland.* Due to the ineffectiveness of counsel, the jury did not learn that the fingerprints taken at the scene eliminated Petitioner. The jury only heard evidence that the prints were not sufficient to positively identify Pernell's assailant. No testimony was elicited from the State's fingerprint expert by Attorney Lott that the fingerprints taken from the vehicle effectively eliminated him as a potential suspect. Further, no investigation was conducted at all to establish

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[16] In his interview with Investigator Morris, Rice stated that Pernell's assailant placed his hand the victim's car while leaning over and the State retrieved fingerprints from this section of the vehicle.

conclusively that the fingerprints found by the State eliminated Curtis Lipsey as a suspect.

As it relates to the issue of trial and direct appeal counsel's failure to contact Regan Russell, the representation at issue fails to meet even a minimal level of effectiveness. This defense was not competent, adequate nor was it effective in any aspect as related to this issue. Had counsel conducted an adequate investigation into the matter at issue as well as the statements by Chief Grisham as to representation by counsel, they could easily have developed additional and material evidence related to the absence of representation as well as the reliability or lack thereof as it relates to the line-up. Counsel could have undermined the reliability of the line-up procedures. Further, it provided an opportunity to strike the line-up and prevent its presentation to the jury as well as present this issue to the appellate court as grounds for a new trial. Petitioner's trial and appellate counsel could also have impeached the testimony of Chief Grisham and the reliability of the entire investigation and evidence presented by the State against Howell. Counsel's failure to completely undermine the credibility of a key State's witness, as well as the case assembled by Chief Grisham and the State resulted in prejudice. *See also Rios v. Rocha*, 299 F.3d 796 (9th Cir. 2002) (finding prejudice because if counsel had performed effectively, the testimony of the eyewitness would have been severely impeached); *Foster v. Gibson*, 282 F.3d 1283 (10th Cir. 2002); *Dixon v. Snyder*, 266 F.3d 693 (7th Cir. 2001). This also represents failure on the appellate level as counsel was unable to present this information to this Court for its review on direct appeal.

In the current case, Grisham continues to present false testimony as to whether Petitioner had representation at the line-up. The State used this false evidence to bolster the identification line-up procedures by giving both the lower court and this Court the false impression that the Petitioner had an attorney at the line-up to protect his interests and this counsel did not object to the proceedings and/or that Petitioner had been advised of his rights by counsel at the time of these adversarial

proceedings. In fact, this was not the case.

The identification by Rice at trial and the admissibility of the line-up were material evidence affecting the weight the jury would give the testimony of Charles Rice as well as the reliability of his identification of Petitioner. As Rice's line-up identification was the main cornerstone of the State's case, the inadmissibility of the line-up would have certainly had an affect on the jury and its ultimate decision to convict. Further, the investigation of Chief Grisham and his testimony at trial was also important to the State's case as it relates to the line-up and the evidence accumulated by law enforcement. Grisham's perjury calls into question all testimony by this witness and the police investigation.

To demonstrate ineffectiveness of counsel, Petitioner must show that counsel's performance fell below an objective standard of reasonableness and that but for counsel's deficient performance there is a reasonable probability that the result of the proceeding would have been different. *Id.* at 688, 692. The failure to discredit key state witnesses, such as fingerprint expert Gill, firearms/ballistics expert Hathcock, Rice or Grisham, with available information has been found to constitute ineffective assistance of counsel. *See, e.g., Steinkuehler v. Meschner*, 176 F.3d 441 (8th Cir. 1999); *State v. Dillard*, 998 S.W.2d 750 (Ark. 1999); *Pauling v. State*, 503 S.E.2d 468 (S.C. 1998); *Commonwealth v. Bolden*, 622 A.2d 950 (Pa. Super. Ct. 1993); *Catalan v. Cockrell*, 315 F.3d 491 (5th Cir. 2002).

Under *Strickland*, Petitioner "must show that there is a reasonable probability that, but for counsels' unprofessional errors, the result of the proceeding would have been different." 466 U.S. at 694; *Wiggins v. Smith*, 123 S. Ct. 2527, 2542 (2003). *Strickland* defined "reasonable probability" as a "probability sufficient to undermine confidence in the outcome" of the proceeding. *Id.* at 692; *see also Williams v. Taylor*, 529 U.S. 362, 391 (2000). This test is not, however, an

outcome determinative inquiry. *Strickland* made it clear that applicant does not have to prove that the outcome would have been different, *Id.* at 693-94, because "[t]he result of a proceeding can be rendered unreliable, and hence the proceeding itself unfair, even if the errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome." *Id.* at 694.

It is Petitioner's position that this ground is not barred, but to the extent this claim may be defaulted in any sense, Petitioner has alleged in the alternative that trial counsel as well as counsel on direct appeal was ineffective in handling this issue as well as numerous others. See Grounds D, I, O, P, Q, S, U, V, W, X, BB and DD. Further, prior counsel has acknowledged and admitted his ineffectiveness in handling these issues. (PCR Ex. 21) Trial and direct appellate counsel's ineffectiveness would also constitute cause for any alleged default.

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CC. EXCULPATORY STATEMENTS OF TERKECIA PANNELL

It is difficult to accept as credible the State's position that Terkecia Pannell's statements as set forth in her sworn affidavit are not exculpatory. Her testimony is that she never heard Howell mention needing money or robbing anyone, as well as stating that after Ray, Lipsey and Howell left the house where she was staying with Brandon Shaw, only Ray and Lipsey returned without Howell.

(*Id.*, para. 3, p. 2) She states that she saw Lipsey and Ray in the car with Howell when they left the house and Ray was driving with Lipsey sitting in the front passenger seat and Howell in the back seat. (*Id.*, para. 4, p. 2-3) It is Pannell's recollection that Lipsey always rode in the front passenger seat when his cousin, Adam Ray, was driving.[17] (*Id.*) After Ray and Lipsey returned alone about one hour after leaving, Pannell states that Ray had a gun, and both Lipsey and he were acting scared and saying "We shot a white guy." (*Id.*, para. 3, p. 2) She then heard Lipsey tell Ray to take the gun and hide it because it was evidence. (*Id.*) Ray then walked out of the house with something in her hand which she believes was the gun. (*Id.*) Again, Pannell states in her affidavit that:

> Once I told the district attorney what I knew as described above to include the fact that Marlon was not with Adam and Curt when they returned from New Albany, that Adam and Curt had the gun and hid it, but that Marlon never had a gun and that both Adam and Curt were acting scared and made a statement that they shot someone, then I was not called to testify and was sent home.

(*Id.*, para. 7, p. 4)

The fact that Pannell implicated Ray and Lipsey as the murderers of Mr. Pernell to the district attorney instead of Petitioner is clearly "favorable to an accused." *Brady v. Maryland*, 373 U.S. 83, 87 (1963) Further, favorable evidence includes items that either are directly exculpatory or that can be used for impeachment purposes. *Giglio v. United States*, 405 U.S. 150 (1972); *see also Banks v. Dretke*, 540 U.S. 668 (2004). The State also conveniently ignores the corroborative nature of Pannell's statements as it relates to Petitioner's defense, as well as the position that Howell was not in need of any money nor did he plan to rob anyone at the time in question. The statements is also corroborative as it relates to the intense pressure placed on Pannell and other witnesses, such as

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[17] The location of Curtis Lipsey as sitting in the front passenger seat is important as testimony from Charles Rice was that the person who shot Mr. Pernell was sitting in the front passenger seat and got out of the car from this position.

Brandon Shaw and Tonya Peterson, to testify falsely against Petitioner at trial. Finally, her affidavit corroborates the sworn affidavit and recanted testimony of Brandon Shaw that it was Ray and Lipsey who told him that the gun was behind his house as Ray was the one who placed it there at the instruction of Lipsey.

In its Response, the State does not deny that Pannell provided this information to the State, specifically the district attorney. Further, the State does not dispute that this information from Pannell was not turned over to nor produced in any fashion to Petitioner's trial counsel. This counsel had specifically made a formal Rule 9.04 Motion specifically asking the State for witness statements as well as all "Brady Material" along with a specific written March 2, 2001 request. (PCR Ex. 58 & 13) The State does not deny these facts nor does it deny its ongoing duty to supplement any *Brady* information subsequent discovered nor its failure to supplement.

By denying Petitioner knowledge of Pannell's exculpatory statements, the State stripped his defense of the opportunity to pursue this line of investigation as well as the chance to call Pannell as a witness. Attorney Duncan Lott adds in his sworn affidavit that if he had been provided this information he would have very likely called her as a witness to attack the credibility of Ray and Lipsey as well as to provide evidence to the jury of other parties responsible for the murder of Mr. Pernell. (PCR Ex. 52, p. 2) It also impeaches the identification of Howell by Rice in that Pannell states it was Curtis Lipsey in the front seat of the vehicle and not Petitioner. Ms. Pannell's exculpatory information is also relevant in the sentencing phase as it relates to the jury's decision to sentence Petitioner to death without learning of evidence implicating others as the responsible parties. (*Id.*) These were clearly prejudicial to Petitioner's ability to mount an effective defense at trial. Clearly, the State had a duty to at the very least alert Petitioner's trial counsel to the availability of this witness and the substance of her testimony. The State's Response does not deny this duty,

but merely attempts to once again ignore the substance of these grounds for relief in hopes this Court will not delve deeper into the basis for Petitioner's claims.

It is Petitioner's position that this ground is not barred, but to the extent this claim may be defaulted in any sense, Petitioner has alleged in the alternative that trial counsel as well as counsel on direct appeal was ineffective in handling this issue as well as numerous others. See Grounds D, I, O, P, Q, S, U, V, W, X, BB and DD. Further, prior counsel has acknowledged and admitted his ineffectiveness in handling these issues. (PCR Ex. 21) Trial and direct appellate counsel's ineffectiveness would also constitute cause for any alleged default.

As the factual allegations and all reasonable inferences from those allegations must be taken as true, Petitioner is entitled to an evidentiary hearing unless it appears beyond a doubt that Petitioner can prove no set of facts in support of his claim. *Simon v. State*, 857 So. 2d 668, 678 (Miss. 2003); *Lewis v. State*, 776 So. 2d 679, 680 (Miss. 2001): *Myers v. State*, 583 So.2d 174, 176 (Miss. 1991); *Robertson v. State*, 669 So. 2d 11 (Miss. 1996). Based on the cumulative effect of all the facts as set forth herein and in Petitioner's prior filings, the Petitioner is entitled to post-conviction relief in the form of a reversal of his conviction, a new trial, or at a minimum, a remand to the circuit court for an evidentiary hearing and additional discovery and fact development.

DD. INEFFECTIVE ASSISTANCE OF COUNSEL AS TO TERKICIA PANNELL

In its response to this claim, the State continues in its attempts to play word games with the language of the affidavits in hopes of casting doubt on the statement's clear meaning. In her sworn affidavit, Pannell states:

> To my knowledge, I was never interviewed by Marlon's attorney or anyone identifying themselves as his attorneys prior to his trial. Also, I do not recall be asked questions related to these matters by Marlon's attorneys. If I had been asked, I would have told them that Marlon was not there when Curt and Adam came back from New Albany, that it was Adam and Curt who were saying that the two of them

> shot someone and that Adam was told by Curt to hide the gun because it was evidence. I felt bad after the trial because I really wanted to testify, but never was called after that day at the courthouse.

(PCR Ex. 51, para. 6, p. 3-4) It again smacks of desperation on the part of the State to suggest that this statement does not establish that Pannell was not contacted by Petitioner's attorneys. The State attempts to attack the use of the phrase "To my knowledge" as somehow indicating that Pannell was not contacted by Petitioner's attorneys. The question presents itself as to whose knowledge the State believes Pannell would be attesting to if not her own. In any affidavit, the affiant is testifying to their own knowledge or observation of events. The facts as well as all reasonable inferences taken from her statement is that prior to Petitioner's current post-conviction counsel, Pannell was never contacted by attorneys for Petitioner. Further, the State once again ignores relevant evidence in the form of Attorney Lott's affidavit in which he specifically states that had he been advised of the exculpatory information held by the State in regard to Pannell then he would have contacted her. (PCR Ex. 53) This is an acknowledgement and admission by Attorney Lott that he did not contact Pannell as he had no knowledge of her statements outside of what had been produced by the State prior to trial.

The State does not dispute in its Response that trial counsel was ineffective for not interviewing this witness and obtaining this information in order to exonerate Howell and implicate, as well as impeach Ray and Lipsey. Curtis Lipsey was a primary witness for the State who testified that he saw Howell shoot the victim. Therefore, failure to secure this vital witness who was willing and able to testify that it was Ray and Lipsey who shot Pernell was certainly material and ineffective assistance on the part of defense counsel. The State has not disagreed with Petitioner's position that a failure to investigate and contact this witness is equivalent to ineffective assistance of counsel. The State merely contests whether Attorney Lott actually interviewed the witness.

Lott has provided another affidavit in which he definitively and with no reservation states that he did not contact nor interview Pannell as part of his representation both at trial and on direct appeal. (Rebuttal Exhibit 5) As the State does not contest the failure to contact Pannell was ineffective assistance of counsel, an evidentiary hearing on this matter is warranted and is appropriate relief.

It is Petitioner's position that this ground is not barred, but to the extent this claim may be defaulted in any sense, Petitioner has alleged in the alternative that trial counsel as well as counsel on direct appeal was ineffective in handling this issue as well as numerous others. See Grounds D, I, O, P, Q, S, U, V, W, X, BB and DD. Further, prior counsel has acknowledged and admitted his ineffectiveness in handling these issues. (PCR Ex. 21) Trial and direct appellate counsel's ineffectiveness would also constitute cause for any alleged default.

As the factual allegations and all reasonable inferences from those allegations must be taken as true, Petitioner is entitled to an evidentiary hearing unless it appears beyond a doubt that Petitioner can prove no set of facts in support of his claim. *Simon v. State*, 857 So. 2d 668, 678 (Miss. 2003); *Lewis v. State*, 776 So. 2d 679, 680 (Miss. 2001): *Myers v. State*, 583 So.2d 174, 176 (Miss. 1991); *Robertson v. State*, 669 So. 2d 11 (Miss. 1996). Based on the cumulative effect of all the facts as set forth herein and in Petitioner's prior filings, the Petitioner is entitled to post-conviction relief in the form of a reversal of his conviction, a new trial, or at a minimum, a remand to the circuit court for an evidentiary hearing and additional discovery and fact development.

IV. CONCLUSION

As the facts presented in Petitioner's application as well as herein, it is apparent that Howell is innocent and was convicted solely because his trial and appeal were afflicted with serious violations of the fundamental protections of the Constitution as well as ineffective assistance

of counsel. It is likewise apparent that his attempts to seek post conviction relief have been afflicted with similar ongoing misrepresentations on the part of the State. This Court, pursuant to the claims for relief laid out in his application and further supported herein, can grant relief by vacating his sentence and putting an end to his unconstitutional incarceration. At the bare minimum, a remand to the circuit court for an evidentiary hearing and additional discovery and fact development is also reasonable and necessary.

WHEREFORE, Petitioner moves this Court to grant him relief on the merits of his claims for relief and vacate his unconstitutional conviction and order a new trial, or in the alternative, to order an evidentiary hearing on the merits of his claims.

RESPECTFULLY SUBMITTED, this 4 day of December, 2007.

By: _____

WILLIAM O. RICHARDSON
Attorney for Marlon Howell, pro hac vice
PO Box 2917
Fayetteville, NC 28302
North Carolina Bar No.: 9433
Phone: (910) 678-7100
Facsimile: (910) 678-9099

By: _____ signed with permission by _____

JIM WAIDE
Waide and Associates, PA
332 N. Spring Street
Tupelo, MS 38804-3955
Mississippi Bar No.: 6857
Phone: (662) 842-7324
Facsimile: (662) 842-8056

CERTIFICATE OF SERVICE

I, counsel for Marlon Howell, in the above-entitled action, hereby certify that this date I served a copy of the foregoing document upon the individuals listed below by placing a copy in the United States Post Office at Fayetteville, North Carolina, with first class mail postage prepaid and addressed to:

Jim Hood
Attorney General
State of Mississippi
PO Box 220
Jackson, MS 39205

Marvin L. White, Jr.
Assistant Attorney General
State of Mississippi
PO Box 220
Jackson, MS 39205

This 4th day of December, 2007.

By: _____

WILLIAM O. RICHARDSON
Attorney for Marlon Howell, pro hac vice
PO Box 2917
Fayetteville, NC 28302
North Carolina Bar No.: 9433
Phone: (910) 678-7100
Facsimile: (910) 678-9099

IN THE CIRCUIT COURT OF UNION COUNTY, MISSISSIPPI

Mississippi Supreme Court No. 2004-DR-00167-SCT

Union County Criminal Cause No. U-2000-82

Union County Civil Cause No. U-2004-023

Marlon LaTodd Howell

v.

State of Mississippi

AFFIDAVIT OF WILLIAM O. RICHARDSON

RE: CIRCUMSTANCES SURROUNDING PRO BONO REPRESENTATION OF INDIGENT MARLON HOWELL AS WELL AS EXPLANATION/JUSTIFICATION FOR UNSWORN AND/OR UNNOTARIZED BUT WITNESSED STATEMENTS

Affiant, William O. Richardson, swears, deposes and says:

My name is William O. "Billy" Richardson. I am an attorney licensed to practice law in the State of North Carolina. I am a resident of Fayetteville, North Carolina where I am a law partner in the law firm of Mitchell, Brewer, Richardson. I am currently representing indigent Petitioner Marlon Howell on a pro bono basis in his application for post-conviction relief to the Mississippi Supreme Court.

I and my law firm have represented Marlon Howell pro bono since August 2004. My representation of Marlon Howell began due in large part to the involvement and encouragement of my daughter, Caroline. During the Summer of 2004, Caroline interned with my law firm prior to starting her freshman year at college. Caroline would often work at my desk during that summer, and it was while working at my desk that she received e-mails sent to my attention from a relative of Marlon Howell. This individual had heard about a capital case that I had worked on earlier in my career, and she was attempting to contact me to aid in Marlon's appeal to the United States Supreme Court which was going on at that time.

Without my knowledge, Caroline began corresponding with this relative of Marlon's. She discussed the case with me at length, and I responded that given my case load at the time that I could not get involved in a case so far from our home and clients in North Carolina. However, my daughter takes after her mother and is nothing if not persistent. The next thing I knew I was being roused at 5:15 a.m., so that my daughter could make me look out the window of our home while she went some distance into the street to prove to me that no one could see what State's witness Charles Rice testified he saw on May 15, 2000.

Given her persistence and as a father-daughter trip prior to her going off to college, I agreed to travel with her to Mississippi to meet Marlon Howell, his relatives and visit the scene on Broad Street in July 2004. It was my full intent not to get involved with the case, but to use this as a learning experience for my daughter. Well, it turned out that I was the one who learned a valuable lesson. After meeting with Marlon's family, visiting the scene, and talking with some of the neighbors who lived in the area of Broad Street where the shooting took place regarding Charles Rice, I began to believe that my daughter might be on to something with her belief in Marlon Howell. This belief was cemented when I reviewed the trial transcript and the evidence presented at trial and on appeal. This young man needed help.

Since the Summer of 2004, I have made countless trips to Mississippi to meet with witnesses, review evidence, visit with Marlon and/or his family and prepare the materials which are included in with Petitioner's application for post-conviction relief. Due to our committment to Marlon and his indigent status, my firm and I have had to cover any expenses incurred to aid in his defense, such as travel and hotel expenses for myself and our team, not to mention the hours spent in preparing these materials to be presented to the Court. We have also paid for numerous experts who have provided valuable testimony in support of Petitioner's application for post-conviction relief. These include a lighting and

eyewitness expert, a fingerprint expert, as well as a ballistics/firearms expert. These expenses in the post-conviction appeal of Marlon Howell have not cost the State of Mississippi anything. However, our resources are limited.

During the course of our investigation, we have interviewed many witnesses. While I try to have a notary available at each meeting with a witness or when they sign a statement, this is not always possible. For example, some witnesses may be in prison. It is then sometimes difficult to have something notarized as a notary may not be available in the prison as was the case with the Statement of Chris Collins. I often have to meet with witnesses after hours or late at night to accommodate their schedules and it is not always possible to have a notary present. This was the case with the Statement of Timothy Gilliam. On other occasions, I have to meet with the witness at their place of business or employment. Due to scheduling circumstances or conflicts, a notary is not always available. This was the situation with the Statement of Tonya Peterson.

Unfortunately, I do not maintain a permanent office in Mississippi. I am often only in the State for a week at the time when I am able to visit to conduct business on this case. While I try to schedule these witnesses in advance, scheduling is often difficult and makes it harder to ensure the availability of a notary. I have received some assistance from local counsel in Mississippi, but interviewing witnesses often requires travel to various parts of the State where I do not have access to a notary. Of the 26 affidavits offered in support of Petitioner's application for post-conviction relief, only three are not notarized--the statements of Chris Collins, Timothy Gilliam and Tonya Peterson. This does not include the six affidavits offered in support of Petitioner's Rebuttal which are all notarized. I have been fortunate in that I have been able to locate the services of a notary for the bulk of the affidavits that I have secured. When possible, I have used the services of Leonard Sanders, an investigator and notary from Tupelo, Mississippi who, when able, has notarized statements of certain witnesses in this case. Where

I am unable to obtain or locate a notary, I make certain to have each statement witnessed by at least one individual, usually Investigator Joel Morris, who is a North Carolina notary and travels with me when I am in Mississippi. Investigator Morris' background in law enforcement in North Carolina is impeccable and his work experience is summarized in his affidavits. The purpose of having these statements witnessed is to ensure that there is an individual who can be called to testify as to the fact that the witness did sign the statement and the signature on the statement is that of the witness. Further, the witness to the statement can also testify, if necessary, as to the circumstances surrounding the signing of the statement.

Of course, my preference would be to have the statements notarized, but this is not always possible given the realities of my pro bono representation, the nature of my visits to Mississippi from North Carolina and the situation of each individual witness as described above. It is my hope this Court will accept and understand the special circumstances in this case, as well as the reasons for not having some of the statements notarized, but instead having them witnessed. The failure to have the statements notarized is no reflection on the truthfulness of the information contained therein nor should the lack of a notary be held against Marlon Howell given the nature of the punishment he is facing and the seriousness of the matters before this Court.

Further your affiant sayeth naught.

This 4 day of December 2007

William O. Richardson

Sworn to and subscribed before me,

this 4 day of December, 2007.

Notary Public

My Commission Expires: 7-19-2011

ROBYN G. DOERSAM NOTARY PUBLIC CUMBERLAND COUNTY, N.C.

IN THE CIRCUIT COURT OF UNION COUNTY, MISSISSIPPI

Mississippi Supreme Court No. 2004-DR-00167-SCT

Union County Criminal Cause No. U-2000-82

Union County Civil Cause No. U-2004-023

Marlon LaTodd Howell

v.

State of Mississippi

AFFIDAVIT OF JOEL MORRIS

RE: EXPLANATION/JUSTIFICATION FOR UNSWORN AND/OR UNNOTARIZED BUT WITNESSED STATEMENTS

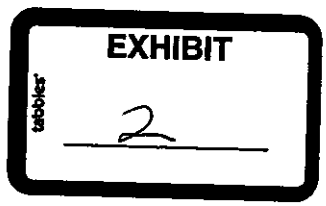
Affiant, Joel Morris, swears, deposes and says:

My name is Joel Morris. I have been a lifelong resident of North Carolina. I am 66 years old and I live in Sanford, North Carolina.

My credentials, experience and work history are outlined in my prior affidavits and are incorporated by reference as if set forth verbatim herein. I am a licensed private investigator and a notary in the State of North Carolina.

Since the Summer of 2004, I have made countless trips to Mississippi with Attorney Billy Richardson to meet with witnesses, review evidence, visit with Marlon and/or his family and prepare the materials which are included in with Petitioner's application for post-conviction relief.

During the course of our investigation, we have interviewed many witnesses. While we try to have a notary available at each meeting with a witness or when they sign a statement, this is not always possible. For example, some witnesses may be in prison. I will attempt prior to meeting with a witness in prison to determine if a notary is available in the prison, but that is not always possible.



It is then sometimes difficult to have something notarized as a notary may not be available in the prison as was the case with the Statement of Chris Collins. We often have to meet with witnesses after hours or late at night to accommodate their schedules and it is not always possible to have a notary present. This was the case with the Statement of Timothy Gilliam. On other occasions, we have to meet with the witness at their place of business or employment. Due to scheduling circumstances or conflicts, a notary is not always available. This was the situation with the Statement of Tonya Peterson.

Unfortunately, we do not have a permanent office in Mississippi, and we are often working out of hotel rooms. We are often only in the State for a week at the time. While I try to schedule these witnesses in advance, scheduling is often difficult and makes it harder to ensure the availability of a notary. Interviewing witnesses often requires travel to various parts of the State, where we do not have access to a notary.

When possible, we have used the services of Leonard Sanders, an investigator and notary from Tupelo, Mississippi who, when able, has notarized statements of certain witnesses in this case. Where we are unable to obtain or locate a notary, Mr. Richardson makes certain to have each statement witnessed by at least one individual, usually me. As a notary in North Carolina and with my background in law enforcement, I am experienced in witnessing statements for individuals as it relates to both civil and criminal cases. The purpose of having these statements witnessed is to ensure that there is an individual who can be called to testify as to the fact that the witness did sign the statement and the signature on the statement is that of the witness. Further, the witness to the statement can also testify, if necessary, as to the circumstances surrounding the signing of the statement. I can attest that I have reviewed the Statements of Chris Collins, Timothy Gilliam and

Tonya Peterson. I was present and witnessed each of these statements being signed by these individuals. The statements were, in fact, signed by these individuals, and signed of their own free will and with knowledge of the contents of each of the statements after agreeing to the truth of the matters set forth within.

Further your affiant sayeth naught.

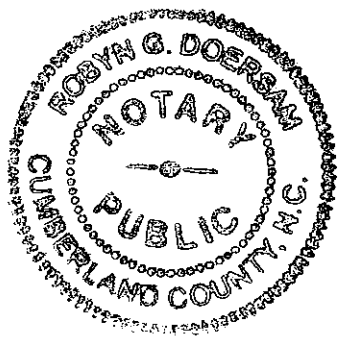
This 4th day of December, 2007.

Joel Morris
Morris Investigations
4410 Fox Run Road
Sanford, NC 27330

Sworn to and subscribed before me,

this 4th day of December, 2007.

Notary Public
My Commission Expires: 7-19-2011



IN THE CIRCUIT COURT OF UNION COUNTY, MISSISSIPPI

Mississippi Supreme Court No. 2004-DR-00167-SCT

Union County Criminal Cause No. U-2000-82

Union County Civil Cause No. U-2004-023

Marlon LaTodd Howell

v.

State of Mississippi

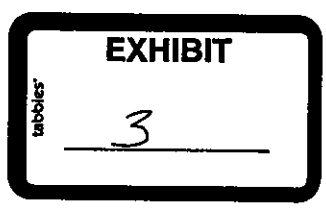
AFFIDAVIT OF WILLIAM O. RICHARDSON

RE: MEETING WITH CHARLES RICE, BEN CREEKMORE AND OTHERS IN REFERENCE TO RICE'S TRIAL TESTIMONY

Affiant, William O. Richardson, swears, deposes and says:

My name is William O. "Billy" Richardson. I am an attorney licensed to practice law in the State of North Carolina. I am a resident of Fayetteville, North Carolina where I am a law partner in the law firm of Mitchell, Brewer, Richardson. I am currently representing indigent Petitioner Marlon Howell on a pro bono basis in his application for post-conviction relief to the Mississippi Supreme Court.

I attended a meeting at the New Albany City Hall in which Joel Morris, Leonard Sanders, Charles Rice, Melody Rice, Tim Kent and Ben Creekmore were also present. The purpose of this meeting was to discuss Rice's trial testimony, his identification of Marlon Howell and his doubts regarding that testimony as set forth in his two affidavits of June 7, 2005 and June 9, 2005



which I notarized. It was my desire to bring to the attention of D.A. Creekmore the serious doubts that Rice had expressed to me both verbally and in his two affidavits regarding his identification of Marlon Howell as the shooter of Mr. David Pernell. At the meeting, the question asked to Rice by Creekmore was as follows:

"Did you lie on the stand?"

Rice replied that he did not lie on the stand as related to his identification of Howell, but he added that he later believed he was mistaken at trial based on the information that he had been provided by Morris and myself bringing to his attention that Howell frequented his neighborhood prior to May 2000. At the time of his June 2005 affidavits, Rice also spoke with Geoffrey Loftus, Ph.D., on the telephone regarding his identification and Professor Loftus' findings. At the meeting, he was specifically asked if he could have been mistaken about his identification given this new information and he said, "Yes." He stated in his June 2005 affidavits, there was a strong possibility that he had seen Howell prior to the incident at issue. At the meeting, Rice did not dispute that he had seen Howell prior to May 15, 2000. During the meeting, Rice at no point disavowed or withdrew those prior affidavits. Rice did not mention any pressure of any kind placed on him by anyone in connection to the June 2005 affidavits either when he signed them in my presence or at the meeting with Creekmore and others.

When Rice signed the June 2005 affidavits he appeared to be signing and did sign them of his own free will and appeared to understand the contents and meaning of the affidavits. In fact, I stressed to him that he did not have to sign and should do so only if he wished to. He also appeared to get along well and did get along well with Morris and myself and gave no indication that he was under any kind of coercion, and I saw no evidence of any kind of coercion or

pressure of any kind placed on Rice. Neither I nor anyone working on behalf of Marlon Howell placed any pressure on Rice other than asking him to tell the truth. At the meeting with Creekmore, it was clear that Rice was uncomfortable talking about these matters, but he was clear at that time in his statement that he did not lie on the witness stand, but later and as described in his June 2005 affidavits, he felt he was mistaken in his identification. Also, I asked him at the time he signed the June 2005 affidavits if he was being truthful and he said that yes and that he had serious doubts.

I have reviewed the October 19, 2007 affidavit of Charles Rice. It is my understanding this has been provided by the State in its Response to Howell's filings with the Mississippi Supreme Court. This affidavit is inconsistent with my knowledge of the facts surrounding Rice's signing of the June 2005 affidavits. I was present when Rice signed both affidavits and saw no evidence of any pressure placed on him by anyone. He appeared to understand the significance of the documents he was signing and gave no indication otherwise as he reviewed them prior to signing. I also said after he signed the first affidavit that we would let him reflect on this and be back in two days to sign a typed statement. It was explained that this would give him more time to reflect on these matters. As evidenced, he then signed the typed second statement on June 9, 2005. At the time of signing the affidavits, Rice confirmed that the contents were true and accurate and he had real doubts regarding his identification of Howell as the shooter of David Pernell. He did mention that Melody and he either had plans to go or had recently gone to Alabama and gotten married, but did not indicate this was a problem or that we were intruding on anything regarding their marriage. Further, Rice made no mention at the meeting of any pressure placed on him to sign the prior affidavits or he "had given that statement in an

attempt to make the persons acting on behalf of Marlon Howell leave me alone." This is simply not true.

I had no knowledge of any other statements made by Rice other than those outlined herein until I received the copy of the State's Response on or about October 24, 2007. At that time, I was in trial and did not have an opportunity to review the materials until the trial was completed after November 5, 2007. It was at that time that I was made aware of the State's affidavit of Charles Rice, and began preparing Petitioner's Rebuttal evidence.

Further your affiant sayeth naught.

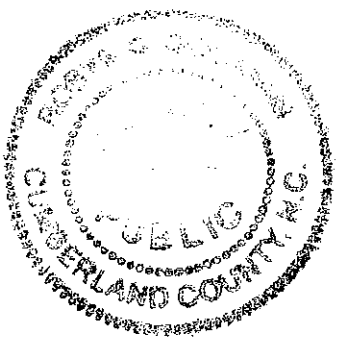
This 4 day of December 2007

William O. Richardson

Sworn to and subscribed before me,

this 4th day of December, 2007.

Notary Public
My Commission Expires: 7-19-2011



IN THE CIRCUIT COURT OF UNION COUNTY, MISSISSIPPI

Mississippi Supreme Court No. 2004-DR-00167-SCT

Union County Criminal Cause No. U-2000-82

Union County Civil Cause No. U-2004-023

Marlon LaTodd Howell

v.

State of Mississippi

AFFIDAVIT OF LEONARD SANDERS

RE: MEETING WITH CHARLES RICE, BEN CREEKMORE AND OTHERS IN REFERENCE TO RICE'S TRIAL TESTIMONY

Affiant, Leonard Sanders, swears, deposes and says:

My name is Leonard Sanders I am a resident of Tupelo, Mississippi, as well as a private investigator and notary.

I attended a meeting at the New Albany City Hall in which Billy Richardson, Joel Morris, Charles Rice, Melody Rice, Tim Kent and Ben Creekmore were present. The purpose of this meeting was to discuss Rice's trial testimony, his identification of Marlon Howell and his doubts regarding that testimony as set forth in his two affidavits of June 7, 2005 and June 9, 2005 which I notarized. At the meeting, the question asked to Rice by Creekmore was as follows:

"Did you lie on the stand?"

Rice replied that he did not lie on the stand as related to his identification of Howell, but he added that he later believed he was mistaken at trial based on the information that he had been provided by Morris and Richardson bringing to his attention that Howell frequented his

EXHIBIT

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neighborhood prior to May 2000. At the meeting, he was specifically asked if he could have been mistaken about his identification given this new information and he said, "Yes." He stated in his June 2005 affidavits, there was a strong possibility that he had seen Howell prior to the incident at issue. At the meeting, Rice did not dispute that he had seen Howell prior to May 15, 2000. Rice did not mention any pressure of any kind placed on him by anyone in connection to the June 2005 affidavits either when he signed them in my presence or at the meeting with Creekmore and others.

When Rice signed the June 2005 affidavits he appeared to be signing and did sign them of his own free will and appeared to understand the contents and meaning of the affidavits. He also appeared to get along well and did get along well with Richardson and Morris and gave no indication that he was under any kind of coercion, and I saw no evidence of any kind of coercion or pressure of any kind placed on Rice other than asking him to tell the truth. At the meeting with Creekmore, Rice was clear that he did not lie on the witness stand, but then had doubts as set out in his June 2005 affidavits and felt he was mistaken in his identification.

I have reviewed the October 19, 2007 affidavit of Charles Rice. It is my understanding this has been provided by the State in its Response to Howell's filings with the Mississippi Supreme Court. This affidavit is inconsistent with my knowledge of the facts surrounding Rice's signing of the June 2005 affidavits.

There was never any coercion, pressure, threats, bribes or anything of that nature directed toward Rice in my (Leonard Sanders) presence, and Rice never showed the slightest sign or indication that he was feeling any kind of pressure or coercion. He appeared to

understand the significance of the documents he was signing and gave no indication otherwise as he reviewed then prior to signing. At the time of signing the affidavits, Rice confirmed that the contents were true and accurate and he had real doubts regarding his identification of Howell as the shooter of David Pernell. Further, Rice made no mention at the meeting of any pressure placed on him to sign the prior affidavits or he "had given that statement in an attempt to make the persons acting on behalf of Marlon Howell leave me alone." In my opinion, the contents of Charles Rice's affidavit date October 19, 2007, are untrue.

Further your affiant sayeth naught.

This 4th day of ~~November~~ December 2007

Leonard Sanders

Leonard Sanders

Sworn to and subscribed before me,
this 4th day of December, 2007.

Lynn Sanders

Notary Public

My Commission Expires

LYNN SANDERS, LEE COUNTY, MS
NOTARY PUBLIC
My Commission Expires June 22, 2009

IN THE CIRCUIT COURT OF UNION COUNTY, MISSISSIPPI

Mississippi Supreme Court No. 2004-DR-00167-SCT

Union County Criminal Cause No. U-2000-82

Union County Civil Cause No. U-2004-023

Marlon LaTodd Howell

aka Marlon Cox

v.

State of Mississippi

AFFIDAVIT OF DUNCAN LOTT

Affiant, Duncan Lott, swears, deposes and says:

I am Duncan "Bubba" Lott. I am 55 years old and live in Booneville, Mississippi. I attended Mississippi State University during the years 1970-1974 and received my undergraduate degree in General Business. I attended Cumberland School of Law and graduated in1977. I passed the Mississippi Bar and have practiced law in Mississippi from 1977 to present. I have previously provided two sworn affidavits in this case. These prior affidavits are accurate and true and I incorporate what is stated in those affidavits herein by reference.

The purpose of this affidavit is to state definitively that I never during my representation of him at trial or on appeal contacted or interviewed Terkecia Pannell. I was prohibited in much of what I could do on behalf of Marlon due to my failure to receive adequate funds from the State to investigate his case despite his position as an indigent and my handling his case on a

EXHIBIT

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5

pro bono basis.

I stated in my affidavit of April 11, 2006 that I did not contact Ms. Pannell when I specifically said that I was never informed by the State of Ms. Pannell's exculpatory statements regarding Mr. Howell which implicated Curtis Lipsey and Adam Ray, and that "[i]f I had been informed of this information, I would have contacted Ms. Pannell and very likely called her as a witness in Mr. Howell's defense in order to attack the credibility of Adam Ray and Curtis Lipsey as well as provide evidence that other parties were responsible for the murder of Mr. Pernell."

Further your affiant sayeth naught.

This 4 day of December, 2007.

Duncan Lott
Post Office Box 382
Booneville, MS 38829

Sworn to and subscribed before me,

this 4 day of December, 2007.

Melissa L. Barnes
Notary Public

My Commission Expires:

STATE OF MISSISSIPPI
MELISSA L. BARNES
ID. NO. 75852
Commission Expires
October 24, 2011
NOTARY PUBLIC
PRENTISS COUNTY

IN THE CIRCUIT COURT OF UNION COUNTY, MISSISSIPPI

Mississippi Supreme Court No. 2004-DR-00167-SCT

Union County Criminal Cause No. U-2000-82

Union County Civil Cause No. U-2004-023

Marlon LaTodd Howell

v.

State of Mississippi

AFFIDAVIT OF JOEL MORRIS

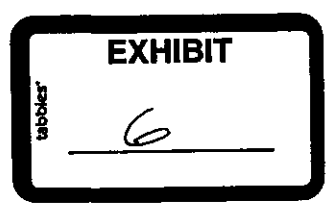
RE: FINDINGS IN REFERENCE TO CRIMINAL BACKGROUND CHECK ON JUROR MICHAEL REED

Affiant, Joel Morris, swears, deposes and says:

My name is Joel Morris. I have been a lifelong resident of North Carolina. I am 66 years old and I live in Sanford, North Carolina.

My credentials, experience and work history are outlined in my prior affidavits and are incorporated by reference as if set forth verbatim herein.

I had previously provided a sworn affidavit signed on September 15, 2005 in which I detailed criminal record checks that I performed on the members of the Howell jury, specifically Michael Joe Reed of 213 N. Glenfield Road, New Albany, Mississippi. On or about June 22, 2005, I conducted a criminal record check on Juror Michael J. Reed with address listed as 213 N. Glenfield Road, New Albany, MS 38652-2200, Union County as he reported on his juror questionnaire. This check resulted



in a report providing information about Mr. Reed to include his birth date of January 1, 1962, as well as identifying an individual with the same name and birth date with a criminal history in Arkansas to include Keeping a Gambling House. A copy of the results of this criminal record check are attached hereto.

After receipt of the State's Response and the Affidavit of Michael Reed, Mr. Richardson asked that I conduct another criminal background check on Juror Reed to confirm my earlier findings in light of the evidence produced by the State. I obtained the same results regarding Mr. Reed's criminal history to include the record in Arkansas. A copy of these results are attached hereto as well. I then conducted further investigation and determined that the date of birth of the Michael Reed with the Arkansas criminal history was actually 01/13/62 and not 01/01/62 as indicated in the Reports that I had been provided.

Due to this new evidence, I withdraw my prior affidavit as it relates to any criminal charges against Michael Reed of New Albany, Mississippi in that it now appears that this is not the same individual as the one who has the criminal record in Arkansas. Given the similarities in name and the identical birth date provided to me as a result of my prior record checks, my prior findings regarding Mr. Reed's criminal record were not unreasonable, but were mistaken. Once we discovered and confirmed an error, there was no question, but we needed to provide this information to the Court.

I am not withdrawing and stand by my statements and opinions set forth in my other affidavits particularly including but not limited to my opinions regarding Marlon Howell's innocence, the investigation conducted by Mississippi law enforcement and the State's case against Marlon.

Further your affiant sayeth naught.

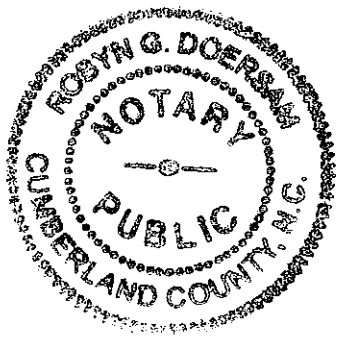
This 4th day of December, 2007.

Joel Morris
Morris Investigations
4410 Fox Run Road
Sanford, NC 27330

Sworn to and subscribed before me,

this 4th day of December, 2007.

Notary Public
My Commission Expires: 7-19-2011



Custom Comprehensive Report

Custom Comprehensive Report
Date: 06/22/05
Reference Code: HOWELL

Report Legend:
S - Shared Address
D - Deceased
✔ - Probable Current Address

Subject Information:
Name: MICHAEL J REED DOB:01/01/1962
SSN: 587-21-xxxx
Age: 43

Names Associated With Subject:
MICHAEL J REED 587-27-xxxx DOB:01/1962 Age: 43
MIKE REED 587-21-xxxx Age:

Others Associated With Subjects SSN:
(DOES NOT usually indicate any type of fraud or deception)
[None Found]

Driver's License Information:
[None Found]

Address Summary:
213 N GLENFIELD RD, NEW ALBANY MS 38652-2200, UNION COUNTY (Jan 1983 - Apr 2005)
RR 5 BOX 213, NEW ALBANY MS 38652, UNION COUNTY (Feb 1987 - Jan 1995)
213 GLENFEILD RD, NEW ALBANY MS 38652, UNION COUNTY (Aug 1987)
119 N GLENFIELD RD, NEW ALBANY MS 38652-2211, UNION COUNTY (Apr 1985 - Oct 1985)
208 S GLENFIELD RD L, NEW ALBANY MS 38652-2613, UNION COUNTY (Jan 1983)

Previous And Non-Verified Address(es):
MICHAEL J REED - 213 N GLENFIELD RD, NEW ALBANY MS 38652-2200, UNION COUNTY (Jan 1983 - Apr 2005)
Current phones listed at this address:
REED MICHAEL & PENNY (662) 534-5846
(662) 534-5846

MIKE REED - RR 5 BOX 213, NEW ALBANY MS 38652, UNION COUNTY (Feb 1987 - Jan 1995)

MICHAEL J REED - 213 GLENFEILD RD, NEW ALBANY MS 38652, UNION COUNTY (Aug 1987)

MICHAEL J REED - 119 N GLENFIELD RD, NEW ALBANY MS 38652-2211, UNION COUNTY (Apr 1985 - Oct 1985)

MICHAEL J REED - 208 S GLENFIELD RD L, NEW ALBANY MS 38652-2613, UNION COUNTY (Jan 1983)
Current phones listed at this address:
REED JOE D & PAT (662) 534-5649
(662) 534-5846

Possible Criminal Records:
Arkansas Court:
Name: MICHAEL REED
State of Origin: Arkansas
DOB: 01/01/1962
Race: White
Sex: Male

Offenses:

Offense #1
Case Number: 09 2000 161B
Case Type: AR STATEWIDE CRIMINAL
Component: 1
Number Counts: 01

Offense Date: 11/09/1999
Arrest Level/Degree: Felony
Court Description: CHICOT
Court Case Number: 09 2000 161B
Court Plea: GUILTY
Court Statute: KEEPING A GAMBLING HOUSE
Court Disposition: FOUND GUILTY
Court Level/Degree: Misdemeanor

Court Activity:
[NONE FOUND]

Possible Relative Summary: *(Click on name to link to more details within this report - No Charge)*

> PENNY J DEAN , Age 42
>> PENNY JO - (AKA)
>> PENNY JO REED - (AKA), Age 42
> JOE D REED , Age 71

Possible Relatives:

PENNY J DEAN 307-70-xxxx DOB:03/1963 Age: 42
Names Associated with Relative:
PENNY JO 307-70-xxxx Age:
PENNY JO REED 307-70-xxxx DOB:03/14/1963 Age: 42
Previous And Non-Verified Address(es):
PENNY JO - S 213 N GLENFIELD RD, NEW ALBANY MS 38652-2200, UNION COUNTY (Apr 1984 - Apr 2005)
PENNY JO REED - S RR 5 BOX 213, NEW ALBANY MS 38652, UNION COUNTY (Jan 1993)
PENNY JO - S 119 N GLENFIELD RD, NEW ALBANY MS 38652-2211, UNION COUNTY (Apr 1985 - Aug 1985)

JOE D REED 425-70-xxxx DOB:11/13/1933 Age: 71
Active Address(es):
JOE D REED - S ✓ 208 S GLENFIELD RD # L, NEW ALBANY MS 38652-2613, UNION COUNTY (Jan 1983 - Apr 2005)
REED JOE D & PAT (662) 534-5649

Previous And Non-Verified Address(es):
JOE D REED - 705 RIDGELAND DR, NEW ALBANY MS 38652-4626, UNION COUNTY (Mar 1980 - Feb 1988)
JOE D REED - 231 HIGHLAND ST, NEW ALBANY MS 38652-3922, UNION COUNTY (Jan 1983)
JOE D REED - 101 PINEWOOD DR, NEW ALBANY MS 38652, UNION COUNTY (Jan 1983)

Comprehensive Report

Comprehensive Report
Date: 11/27/07
Reference Code: 230452

Report Legend:
S - Shared Address
D - Deceased
✔ - Probable Current Address

Report processed by:
Mitchell, Brewer, Richardson, Adams, Burge & Boughman PLLC
225 Ray Ave.
Fayetteville, NC 283015009
(910) 678-7100 Main Phone
(910) 678-9099 Fax

Subject Information

Name: MICHAEL J REED
Date of Birth: **01/01/1962**
Age: **45**
SSN: 587-21-xxxx issued in **Mississippi** between **01/01/1975** and **12/31/1975**

AKAs (Names Associated with Subject)

MICHAEL J REED
DOB: **01/1962** Age: **45** SSN: 587-27-xxxx
MIKE REED
SSN: 587-21-xxxx

Indicators

Bankruptcy: **No**
Property: **Yes**
Corporate Affiliations: **No**

Address Summary

✔213 N GLENFIELD RD, NEW ALBANY MS 38652-2200, UNION COUNTY (Jan 1983 - Oct 2007)
Phone at address: (662) 534-5846 **REED MICHAEL & PENNY**
Neighborhood Profile (2000 Census)
Average Age: **34** Median Household Income: **$15,648** Median Home Value: **$46,700** Average Years of Education: **11**

RR 5 BOX 213, NEW ALBANY MS 38652, UNION COUNTY (Feb 1987 - Jan 1995)
Neighborhood Profile (2000 Census)
Average Age: **39** Median Household Income: **$29,028** Median Home Value: **$59,200** Average Years of Education: **12**

213 GLENFEILD RD, NEW ALBANY MS 38652, UNION COUNTY (Aug 1987)
Neighborhood Profile (2000 Census)
Average Age: **39** Median Household Income: **$29,028** Median Home Value: **$59,200** Average Years of Education: **12**

119 N GLENFIELD RD, NEW ALBANY MS 38652-2211, UNION COUNTY (Apr 1985 - Oct 1985)
Neighborhood Profile (2000 Census)
Average Age: **34** Median Household Income: **$15,648** Median Home Value: **$46,700** Average Years of Education: **11**

208 S GLENFIELD RD L, NEW ALBANY MS 38652-2613, UNION COUNTY (Jan 1983)
Phone at address: (662) 534-5649 **REED JOE D & PAT**
Neighborhood Profile (2000 Census)
Average Age: **49** Median Household Income: **$34,063** Median Home Value: **$79,500** Average Years of Education: **12**

Others Associated With Subjects SSN:

(DOES NOT usually indicate any type of fraud or deception)
[None Found]

Comprehensive Report Summary: (Click on Link to see detail)

Bankruptcies:
None Found
Liens and Judgments:
None Found
UCC Filings:
None Found
People at Work:
None Found
Driver's License:
None Found
Address(es) Found:
1 Verified and 4 Non-Verified Found
Possible Properties Owned:
2 Found
Motor Vehicles Registered:
13 Found
Possible Criminal Records:
1 Found
Sexual Offenses:
None Found
Professional Licenses:
None Found
Possible Associates:
None Found
Possible Relatives:
1st Degree - 2 Found
2nd Degree - None Found
3rd Degree - None Found
Neighbors:
1st Neighborhood - 6 Found
2nd Neighborhood - None Found
3rd Neighborhood - 6 Found
4th Neighborhood - 5 Found

Bankruptcies:

[None Found]

Liens and Judgments:

[None Found]

UCC Filings:

[None Found]

People at Work:

[None Found]

Driver's License Information:

[None Found]

Address Summary:

✔213 N GLENFIELD RD, NEW ALBANY MS 38652-2200, UNION COUNTY (Jan 1983 - Oct 2007)
RR 5 BOX 213, NEW ALBANY MS 38652, UNION COUNTY (Feb 1987 - Jan 1995)
213 GLENFEILD RD, NEW ALBANY MS 38652, UNION COUNTY (Aug 1987)
119 N GLENFIELD RD, NEW ALBANY MS 38652-2211, UNION COUNTY (Apr 1985 - Oct 1985)
208 S GLENFIELD RD L, NEW ALBANY MS 38652-2613, UNION COUNTY (Jan 1983)

Active Address(es):

MICHAEL J REED - ✔213 N GLENFIELD RD, NEW ALBANY MS 38652-2200, UNION COUNTY (Jan 1983 - Oct 2007)
REED MICHAEL & PENNY (662) 534-5846
Property Ownership Information for this Address
Property:
Parcel Number - 009N-36-009.00
Book - 000144
Page - 000358
Owner Name 1 - REED MICHAEL J

Address - 213 N GLENFIELD RD, NEW ALBANY MS 38652-2200, UNION COUNTY
Owner's Address - 213 N GLENFIELD RD, NEW ALBANY MS 38652-2200, UNION COUNTY
Land Usage - SFR
Total Value - $69,310
Land Value - $6,250
Improvement Value - $63,060
Sale Price - $0
Sellers Name 1 - OWNER RECORD
Legal Description - PT SW1/4 DBOOK 144 PG 358 00/00/1982
Data Source - A

Neighborhood Profile (2000 Census)
Average Age: 34
Median Household Income: $15,648
Median Owner Occupied Home Value: $46,700
Average Years of Education: 11

Previous And Non-Verified Address(es):

MICHAEL J REED - RR 5 BOX 213, NEW ALBANY MS 38652, UNION COUNTY (Feb 1987 - Jan 1995)

Neighborhood Profile (2000 Census)
Average Age: 39
Median Household Income: $29,028
Median Owner Occupied Home Value: $59,200
Average Years of Education: 12

MICHAEL J REED - 213 GLENFEILD RD, NEW ALBANY MS 38652, UNION COUNTY (Aug 1987)

Neighborhood Profile (2000 Census)
Average Age: 39
Median Household Income: $29,028
Median Owner Occupied Home Value: $59,200
Average Years of Education: 12

MICHAEL J REED - 119 N GLENFIELD RD, NEW ALBANY MS 38652-2211, UNION COUNTY (Apr 1985 - Oct 1985)

Neighborhood Profile (2000 Census)
Average Age: 34
Median Household Income: $15,648
Median Owner Occupied Home Value: $46,700
Average Years of Education: 11

MICHAEL J REED - 208 S GLENFIELD RD L, NEW ALBANY MS 38652-2613, UNION COUNTY (Jan 1983)
REED JOE D & PAT (662) 534-5649

Property Ownership Information for this Address

Property:
Parcel Number - 017N-06-073.00
Book - 000130
Page - 000204
Lot Number - 5
Owner Name 1 - REED JOE D
Address - 208 S GLENFIELD RD, NEW ALBANY MS 38652-2613, UNION COUNTY
Owner's Address - 208 S GLENFIELD RD, NEW ALBANY MS 38652-2613, UNION COUNTY
Land Usage - SFR
Total Value - $49,560
Land Value - $5,500
Improvement Value - $44,060
Sale Price - $0
Sellers Name 1 - OWNER RECORD
Legal Description - PT LOT 5 DENTON DBOOK 130 PG 204 00/00/1979
Data Source - A

Neighborhood Profile (2000 Census)
Average Age: 49
Median Household Income: $34,063
Median Owner Occupied Home Value: $79,500
Average Years of Education: 12

Possible Properties Owned by Subject:

Property:
Parcel Number - 009N3600900
Owner Name 1 - REED MICHAEL J ET AL
Owner's Address - 213 N GLENFIELD RD, NEW ALBANY MS 38652-2200, UNION COUNTY
Land Usage - SFR
Total Value - $0
Land Value - $0
Improvement Value - $0
Sale Price - $0
Legal Description - PT SW1/4

Data Source - A

Property:
Parcel Number - 009N-36-009.00
Book - 000144
Page - 000358
Owner Name 1 - REED MICHAEL J
Address - 213 N GLENFIELD RD, NEW ALBANY MS 38652-2200, UNION COUNTY
Owner's Address - 213 N GLENFIELD RD, NEW ALBANY MS 38652-2200, UNION COUNTY
Land Usage - SFR
Total Value - $69,310
Land Value - $6,250
Improvement Value - $63,060
Sale Price - $0
Sellers Name 1 - OWNER RECORD
Legal Description - PT SW1/4 DBOOK 144 PG 358 00/00/1982
Data Source - A

Motor Vehicles Registered To Subject:

Vehicle:
Description: 1998 Plymouth Grand Voyager SE/Express - Sport Van
License Plate: 979 UNK
VIN: 1P4GP44G4WB585912
State of Origin: Mississippi
Engine Size: 201
Number of Cylinders: 6
Body: Sport Van
Record Type: Current
Expiration Date: 08/31/2008
Registrant(s)
Name: MIKE REED
Address: 213 N GLENFIELD RD, NEW ALBANY MS 38652, UNION COUNTY

Name: PENNY REED
PENNY REED SSN: 307-70-xxxx
Address: 213 N GLENFIELD RD, NEW ALBANY MS 38652, UNION COUNTY

Lien Holder
None

Vehicle:
Description: Burgundy / Maroon 2002 Chevrolet Astro Van - Extended Cargo Van
License Plate: 546 UP3
VIN: 1GCDM19X12B122692
State of Origin: Mississippi
Engine Size: 262
Number of Cylinders: 6
Body: Extended Cargo Van
Record Type: Current
Expiration Date: 03/31/2008
Registrant(s)
Name: MIKE REED
Address: 213 N GLENFIELD RD, NEW ALBANY MS 38652, UNION COUNTY

Name: PENNY REED
PENNY REED SSN: 307-70-xxxx
Address: 213 N GLENFIELD RD, NEW ALBANY MS 38652, UNION COUNTY

Lien Holder
None

Vehicle:
Description: Red 2005 Dodge Grand Caravan SXT - Sport Van
License Plate: 044 UPB
VIN: 2D4GP44L05R158585
State of Origin: Mississippi
Title Number: C592137 02
Title Date: 01/11/2007
Engine Size: 230
Number of Cylinders: 6
Body: Sport Van
Record Type: Current
Expiration Date: 12/31/2007
Owner(s)
Name: MIKE REED

Address: 213 N GLENFIELD RD, NEW ALBANY MS 38652, UNION COUNTY

Name: PENNY REED
PENNY REED SSN: 307-70-xxxx
Address: 213 N GLENFIELD RD, NEW ALBANY MS 38652, UNION COUNTY

Registrant(s)
Name: MIKE REED
Address: 213 N GLENFIELD RD, NEW ALBANY MS 38652, UNION COUNTY

Name: PENNY REED
PENNY REED SSN: 307-70-xxxx
Address: 213 N GLENFIELD RD, NEW ALBANY MS 38652, UNION COUNTY

Lien Holder
None

Vehicle:
Description: 1997 - Truck Trailer
License Plate: TLRJ5771P
VIN: 4FPFB1017VG016417
State of Origin: Mississippi
Body: Truck Trailer
Record Type: Current
Expiration Date: 10/31/2007
Registrant(s)
Name: MIKE REED
Address: 213 N GLENFIELD RD, NEW ALBANY MS 38652, UNION COUNTY

Name: PENNY REED
PENNY REED SSN: 307-70-xxxx
Address: 213 N GLENFIELD RD, NEW ALBANY MS 38652, UNION COUNTY

Lien Holder
None

Vehicle:
Description: Maroon 2002 Chevrolet Astro Van - Extended Cargo Van
License Plate: 693UNP
VIN: 1GCDM19X12B122692
State of Origin: Mississippi
Vehicle Use: Private Individual(s)
Mileage: 71,613
Title Number: 9371893
Title Date: 04/02/2004
Engine Size: 262
Number of Cylinders: 6
Body: Extended Cargo Van
Record Type: Historical
Expiration Date: 03/31/2005
Owner(s)
Name: REED MIKE OR PENNY
PENNY REED SSN: 307-70-xxxx
Address: 213 N GLENFIELD RD, NEW ALANY MS 38652, UNION COUNTY

Registrant(s)
Name: REED MIKE OR PENNY
PENNY REED SSN: 307-70-xxxx
Address: 213 N GLENFIELD RD, NEW ALANY MS 38652, UNION COUNTY

Lien Holder
None

Vehicle:
Description: White 1998 Plymouth Grand Voyager SE/Express - Sport Van
License Plate: BVY830
License Plate Type: Passenger
VIN: 1P4GP44G4WB585912
State of Origin: Mississippi
Vehicle Use: Private Individual(s)
Mileage: 54,650
Title Number: 7802444
Title Date: 09/05/2000
Title Status: Titled
Engine Size: 201
Number of Cylinders: 6

Body: Sport Van
Record Type: Historical
Expiration Date: 08/31/2003
Owner(s)
Name: REED MIKE OR REED PENNY
PENNY REED SSN: 307-70-xxxx
Address: 213 N GLENFIELD RD, NEW ALBANY MS 38652, UNION COUNTY

Registrant(s)
Name: REED MIKE OR REED PENNY
PENNY REED SSN: 307-70-xxxx
Address: 213 N GLENFIELD RD, NEW ALBANY MS 38652, UNION COUNTY

Lien Holder
None

Vehicle:
Description: 1997
License Plate: BWH573
License Plate Type: Passenger
State of Origin: Mississippi
Vehicle Use: Private Individual(s)
Title Number: 9550843
Title Status: Dummy
Record Type: Historical
Expiration Date: 07/31/2003
Registrant(s)
Name: REED MIKE OR REED PENNY
PENNY REED SSN: 307-70-xxxx
Address: 213 N GLENFIELD RD, NEW ALBANY MS 38652, UNION COUNTY

Lien Holder
None

Vehicle:
Description: Black 1997
License Plate: 49710H
License Plate Type: Trailer
VIN: 4FPFB1017VG016417
State of Origin: Mississippi
Vehicle Use: Private Individual(s)
Title Number: 8515869
Title Date: 11/16/1999
Title Status: Titled
Record Type: Historical
Expiration Date: 10/31/2002
Owner(s)
Name: REED MIKE OR REED PENNY
PENNY REED SSN: 307-70-xxxx
Address: 213 N GLENFIELD, NEW ALBANY MS 38652, UNION COUNTY

Registrant(s)
Name: REED MIKE OR REED PENNY
PENNY REED SSN: 307-70-xxxx
Address: 213 N GLENFIELD, NEW ALBANY MS 38652, UNION COUNTY

Lien Holder
None

Vehicle:
Description: 1989 - Truck Trailer
License Plate: 84557P
License Plate Type: Trailer
VIN: 587219247
State of Origin: Mississippi
Vehicle Use: Private Individual(s)
Title Number: 5227761
Title Status: Dummy
Body: Truck Trailer
Record Type: Historical
Expiration Date: 06/30/2002
Registrant(s)
Name: REED MICHAEL
Address: 213 NORTH GLENFIELD, NEW ALBANY MS 38652, UNION COUNTY

Lien Holder

None

Vehicle:
Description: White 2002 Ford Escape XLS - 4 Dr Wagon Sport Utility
License Plate: 835UNT
VIN: 1FMYU01162KA54050
State of Origin: Mississippi
Vehicle Use: Private Individual(s)
Mileage: 70,925
Title Number: 9483379
Title Date: 04/11/2005
Engine Size: 181
Number of Cylinders: 6
Body: 4 Dr Wagon Sport Utility
Record Type: Historical
Expiration Date: 03/31/2006
Owner(s)
Name: REED MIKE OR PENNY
PENNY REED SSN: 307-70-xxxx
Address: 213 N GLENFIELD RD, NEW ALBANY MS 38652, UNION COUNTY

Registrant(s)
Name: REED MIKE OR PENNY
PENNY REED SSN: 307-70-xxxx
Address: 213 N GLENFIELD RD, NEW ALBANY MS 38652, UNION COUNTY

Lien Holder
None

Vehicle:
Description: Red 1989 Chevrolet Astro Van - Van
License Plate: BWC561
License Plate Type: Passenger
VIN: 1GCDM15Z6KB233052
State of Origin: Mississippi
Vehicle Use: Private Individual(s)
Mileage: 79,517
Title Number: 6030586
Title Date: 02/11/1993
Title Status: Titled
Engine Size: 262
Number of Cylinders: 6
Body: Van
Record Type: Historical
Expiration Date: 06/30/2003
Owner(s)
Name: REED MICHAEL J
Address: 213 N GLENFIELD, NEW ALBANY MS 38652, UNION COUNTY

Registrant(s)
Name: REED MICHAEL J
Address: 213 N GLENFIELD, NEW ALBANY MS 38652, UNION COUNTY

Lien Holder
Holder: LIENHOLDER NUMBER:64011678000
Lien Date: 01/19/1993
Address:

Vehicle:
Description: White 1990 Dodge Grand Caravan LE - Sport Van
License Plate: BVJ646
License Plate Type: Passenger
VIN: 1B4FK54R8LX190813
State of Origin: Mississippi
Vehicle Use: Private Individual(s)
Mileage: 17,988
Title Number: 5807457
Title Date: 07/23/1991
Title Status: Titled
Engine Size: 201
Number of Cylinders: 6
Body: Sport Van
Record Type: Historical
Expiration Date: 06/30/2003
Owner(s)
Name: REED MICHAEL &/OR PENNY J

PENNY J REED SSN: 307-70-xxxx
Address: 213 N GLENFIELD RD, NEW ALBANY MS 38652, UNION COUNTY

Registrant(s)
Name: REED MICHAEL &/OR PENNY J
PENNY J REED SSN: 307-70-xxxx
Address: 213 N GLENFIELD RD(PLCD 06/03), NEW ALBANY MS 38652, UNION COUNTY

Lien Holder
Holder: LIENHOLDER NUMBER:90001518000
Lien Date: 07/12/1991
Address:

Vehicle:
Description: Black 1996 Honda Accord EX/EXR - Sedan 4 Door
License Plate: BVF373
License Plate Type: Passenger
VIN: 1HGCD5653TA107416
State of Origin: Mississippi
Vehicle Use: Private Individual(s)
Mileage: 29,980
Title Number: 7149526
Title Date: 04/09/1998
Title Status: Titled
Engine Size: 132
Number of Cylinders: 4
Body: Sedan 4 Door
Record Type: Historical
Expiration Date: 03/31/2003
Owner(s)
Name: REED MIKE OR PENNY
PENNY REED SSN: 307-70-xxxx
Address: 213 NORTH GLENFIELD, NEW ALBANY MS 38652, UNION COUNTY

Registrant(s)
Name: REED MIKE OR PENNY
PENNY REED SSN: 307-70-xxxx
Address: 213 NORTH GLENFIELD, NEW ALBANY MS 38652, UNION COUNTY

Lien Holder
Holder: LIENHOLDER NUMBER:64011678000
Lien Date: 03/10/1998
Address:

Possible Criminal Records:

Arkansas Court:
Name: MICHAEL REED
State of Origin: Arkansas
DOB: 01/01/1962
Race: White
Sex: Male

Offenses:
Offense #1
Case Number: 09 2000 161B
Case Type: AR STATEWIDE CRIMINAL
Component: 1
Number Counts: 01

Offense Date: 11/09/1999
Arrest Level/Degree: Felony
Court Description: CHICOT
Court Case Number: 09 2000 161B
Court Plea: GUILTY
Court Statute: KEEPING A GAMBLING HOUSE
Court Disposition: FOUND GUILTY
Court Level/Degree: Misdemeanor

Court Activity:
[NONE FOUND]

Sexual Offenses:

[None Found]

Professional License(s):
[None Found]

Possible Associates:
[None Found]

Possible Relative Summary: *(Click on name to link to more details within this report - No Charge)*
> PENNY J DEAN , Age 44
>> PENNY JO - (AKA)
>> PENNY D REED - (AKA), Age 44
>> PENNY JO REED - (AKA), Age 44
> MIKE J REED

Possible Relatives:
PENNY J DEAN DOB: 03/1963 Age: 44
307-70-xxxx issued in Indiana between 01/01/1973 and 12/31/1973
Names Associated with Relative:
PENNY JO Age:
307-70-xxxx issued in Indiana between 01/01/1973 and 12/31/1973
PENNY D REED DOB: 03/14/1963 Age: 44
PENNY JO REED DOB: 03/14/1963 Age: 44
307-70-xxxx issued in Indiana between 01/01/1973 and 12/31/1973
Previous And Non-Verified Address(es):
PENNY JO - S 213 N GLENFIELD RD, NEW ALBANY MS 38652-2200, UNION COUNTY (Apr 1984 - Oct 2007)
PENNY JO - S 119 N GLENFIELD RD, NEW ALBANY MS 38652-2211, UNION COUNTY (Apr 1985 - Aug 1985)

MIKE J REED Age:
307-70-xxxx issued in Indiana between 01/01/1973 and 12/31/1973
Active Address(es):
MIKE J REED - S ✔ 213 N GLENFIELD RD, NEW ALBANY MS 38652-2200, UNION COUNTY (Feb 1987 - May 2005)
REED MICHAEL & PENNY (662) 534-5846

Neighbors:
Neighborhood:
213 N GLENFIELD RD, NEW ALBANY MS 38652-2200, UNION COUNTY (Dec 2004 - Aug 2007)
Residents:
MICHAEL J REED DOB: 01/01/1962 Age: 45
587-21-xxxx issued in Mississippi between 01/01/1975 and 12/31/1975
MIKE J REED Age:
307-70-xxxx issued in Indiana between 01/01/1973 and 12/31/1973
PENNY D REED DOB: 03/14/1963 Age: 44
PENNY JO REED Age:
307-70-xxxx issued in Indiana between 01/01/1973 and 12/31/1973
REED MICHAEL & PENNY (662) 534-5846

Address(es):
✔ 211 N GLENFIELD RD, NEW ALBANY MS 38652-2200, UNION COUNTY (Oct 1990 - Oct 2007)
Residents:
MALCOLM E REEVES DOB: 08/12/1928 Age: 79
430-34-xxxx issued in Arkansas between 01/01/1936 and 12/31/1951
MALCOM E REEVES DOB: 08/12/1928 Age: 79
430-34-xxxx issued in Arkansas between 01/01/1936 and 12/31/1951
RODNEY BARKLEY REEVES DOB: 06/27/1965 Age: 42
427-25-xxxx issued in Mississippi between 01/01/1975 and 12/31/1976
WILLMA REEVES Age:
WILMA B REEVES DOB: 06/13/1928 Age: 79
427-64-xxxx issued in Mississippi between 01/01/1952 and 12/31/1953
REEVES MALCOM E (662) 534-3177

✔ 210 N GLENFIELD RD, NEW ALBANY MS 38652-2201, UNION COUNTY (Jul 1996 - Oct 2007)
Residents:
ALCIE MCALEXANDER Age:
ALICE E MCALEXANDER DOB: 1938 Age: 69
511-34-xxxx issued in Kansas between 01/01/1952 and 12/31/1954

ALICE S MCALEXANDER DOB: 09/23/1936 Age: 71
ED MCALEXANDER DOB: 12/14/1976 Age: 30
425-57-xxxx issued in Mississippi between 01/01/1987 and 12/31/1987
EDWARD MCALEXANDER Age:
425-57-xxxx issued in Mississippi between 01/01/1987 and 12/31/1987
LEWIS E MCALEXANDER SR DOB: 10/13/1937 Age: 70
495-40-xxxx issued in Missouri between 01/01/1954 and 12/31/1956
MCALEXANDER LEWIS E (662) 534-9733

✔204 N GLENFIELD RD, NEW ALBANY MS 38652-2201, UNION COUNTY
Residents:
CURTIS VAN BAGWELL DOB: 10/16/1914 Age: 93
428-12-xxxx issued in Mississippi between 01/01/1936 and 12/31/1951
FRANCES J BAGWELL DOB: 10/10/1916 Age: 91
BAGWELL CURTIS (662) 534-5621

✔302 N GLENFIELD RD, NEW ALBANY MS 38652, UNION COUNTY
HILLCRAFT FURNITURE MANUFACTURING CO (662) 534-3544

✔307 N GLENFIELD RD, NEW ALBANY MS 38652-2210, UNION COUNTY (Dec 2004 - Oct 2007)
Residents:
ADDIE D JOHNSON Age:
ADDIS D JOHNSON Age:
330-44-xxxx issued in Illinois between 01/01/1965 and 12/31/1967
JOHNSON ADDIS (662) 538-6013

✔420 N GLENFIELD RD, NEW ALBANY MS 38652-2203, UNION COUNTY
H CI (662) 538-0000

Neighborhood:
213 GLENFEILD RD, NEW ALBANY MS 38652, UNION COUNTY (Aug 1987)

Neighborhood:
119 N GLENFIELD RD, NEW ALBANY MS 38652-2211, UNION COUNTY (Oct 1985)

Address(es):

✔113 N GLENFIELD RD, NEW ALBANY MS 38652-2211, UNION COUNTY (Aug 2005 - Oct 2007)
KENNETH A JOHNSON Age:
257-04-xxxx issued in Georgia between 01/01/1972 and 12/31/1973
JOHNSON KENNETH A (662) 538-5886

✔107 N GLENFIELD RD, NEW ALBANY MS 38652-2208, UNION COUNTY
F L HILL Age:
HILL F L (662) 534-7210

✔202 N GLENFIELD RD, NEW ALBANY MS 38652-2201, UNION COUNTY
LITTLE MIRACLES (662) 534-0704

✔204 N GLENFIELD RD, NEW ALBANY MS 38652-2201, UNION COUNTY
Residents:
CURTIS VAN BAGWELL DOB: 10/16/1914 Age: 93
428-12-xxxx issued in Mississippi between 01/01/1936 and 12/31/1951
FRANCES J BAGWELL DOB: 10/10/1916 Age: 91
BAGWELL CURTIS (662) 534-5621

✔210 N GLENFIELD RD, NEW ALBANY MS 38652-2201, UNION COUNTY (Jul 1996 - Oct 2007)
Residents:
ALCIE MCALEXANDER Age:
ALICE E MCALEXANDER DOB: 1938 Age: 69
511-34-xxxx issued in Kansas between 01/01/1952 and 12/31/1954
ALICE S MCALEXANDER DOB: 09/23/1936 Age: 71
ED MCALEXANDER DOB: 12/14/1976 Age: 30
425-57-xxxx issued in Mississippi between 01/01/1987 and 12/31/1987
EDWARD MCALEXANDER Age:
425-57-xxxx issued in Mississippi between 01/01/1987 and 12/31/1987
LEWIS E MCALEXANDER SR DOB: 10/13/1937 Age: 70
495-40-xxxx issued in Missouri between 01/01/1954 and 12/31/1956
MCALEXANDER LEWIS E (662) 534-9733

✔211 N GLENFIELD RD, NEW ALBANY MS 38652-2200, UNION COUNTY (Oct 1990 - Oct 2007)

Residents:
MALCOLM E REEVES DOB: 08/12/1928 Age: 79
430-34-xxxx issued in Arkansas between 01/01/1936 and 12/31/1951
MALCOM E REEVES DOB: 08/12/1928 Age: 79
430-34-xxxx issued in Arkansas between 01/01/1936 and 12/31/1951
RODNEY BARKLEY REEVES DOB: 06/27/1965 Age: 42
427-25-xxxx issued in Mississippi between 01/01/1975 and 12/31/1976
WILLMA REEVES Age:
WILMA B REEVES DOB: 06/13/1928 Age: 79
427-64-xxxx issued in Mississippi between 01/01/1952 and 12/31/1953
REEVES MALCOM E (662) 534-3177

Neighborhood:
208 S GLENFIELD RD L, NEW ALBANY MS 38652-2613, UNION COUNTY (May 1988 - Feb 2003)
Residents:
JOE D REED DOB: 11/13/1933 Age: 74
425-70-xxxx issued in Mississippi between 01/01/1954 and 12/31/1955
MICHAEL J REED DOB: 01/01/1962 Age: 45
587-21-xxxx issued in Mississippi between 01/01/1975 and 12/31/1975
PAT REED Age:
PATRICIA G REED Age:
426-86-xxxx issued in Mississippi between 01/01/1959 and 12/31/1960
Current phones listed at this address:
(662) 534-5846
REED JOE D & PAT (662) 534-5649

Address(es):

✔ 207 S GLENFIELD RD, NEW ALBANY MS 38652-2612, UNION COUNTY (Jul 2006 - Aug 2007)
Residents:
ANN L TAYLOR Age:
312-42-xxxx issued in Indiana between 01/01/1957 and 12/31/1959
ANNIE L TAYLOR Age:
312-42-xxxx issued in Indiana between 01/01/1957 and 12/31/1959
NATHAN TAYLOR Age:
426-41-xxxx issued in Mississippi between 01/01/1982 and 12/31/1982
PHILLIP N TAYLOR Age:
426-41-xxxx issued in Mississippi between 01/01/1982 and 12/31/1982
TAYLOR NATHAN (662) 538-0260

✔ 209 S GLENFIELD RD, NEW ALBANY MS 38652-2612, UNION COUNTY (Feb 2006 - Oct 2007)
ROBIN D BENNETT DR Age:
428-41-xxxx issued in Mississippi between 01/01/1982 and 12/31/1982
BENNETT ROBIN DR OPT (662) 534-0054

✔ 210 S GLENFIELD RD, NEW ALBANY MS 38652-2613, UNION COUNTY (Feb 1999 - Oct 2007)
Residents:
L DROKE Age:
LINDA A DROKE DOB: 03/31/1943 Age: 64
428-84-xxxx issued in Mississippi between 01/01/1959 and 12/31/1960
DROKE L (662) 534-9040

✔ 205 S GLENFIELD RD, NEW ALBANY MS 38652-2612, UNION COUNTY (Sep 2003)
Residents:
JEFFREY PANNELL Age:
JERRELL M PANNELL DOB: 05/19/1959 Age: 48
427-17-xxxx issued in Mississippi between 01/01/1974 and 12/31/1974
JERRELL L PANNELL DOB: 11/25/1932 Age: 75
426-60-xxxx issued in Mississippi between 01/01/1951 and 12/31/1952
MARK TATE PANNELL DOB: 10/05/1962 Age: 45
426-29-xxxx issued in Mississippi between 01/01/1976 and 12/31/1977
MARY TATE PANNELL DOB: 12/17/1938 Age: 68
587-30-xxxx issued in Mississippi between 01/01/1966 and 12/31/1966
MARY M PANNELL DOB: 12/17/1938 Age: 68
PANNELL JERRELL (662) 534-6246

✔ 202 S GLENFIELD RD, NEW ALBANY MS 38652-2613, UNION COUNTY (Oct 2006 - Oct 2007)
Residents:
CURRY CURRY Age:
425-48-xxxx issued in Mississippi between 01/01/1936 and 12/31/1951
IMOGENE H CURRY DOB: 09/01/1929 Age: 78
425-48-xxxx issued in Mississippi between 01/01/1936 and 12/31/1951
J E CURRY DOB: 12/1927 Age: 79

426-42-xxxx issued in Mississippi between 01/01/1936 and 12/31/1951
JAMES E CURRY Age:
426-42-xxxx issued in Mississippi between 01/01/1936 and 12/31/1951
JAMES D CURRY Age:
426-06-xxxx issued in Mississippi between 01/01/1971 and 12/31/1972
JAMES E CURRY Age:
LOU A CURRY Age:
426-06-xxxx issued in Mississippi between 01/01/1971 and 12/31/1972
LOUANN ANN CURRY Age:
426-06-xxxx issued in Mississippi between 01/01/1971 and 12/31/1972
CURRY JAMES E (662) 534-4344

IN THE CIRCUIT COURT OF UNION COUNTY, MISSISSIPPI

Mississippi Supreme Court No. 2004-DR-00167-SCT

Union County Criminal Cause No. U-2000-82

Union County Civil Cause No. U-2004-023

Marlon LaTodd Howell

v.

State of Mississippi

AFFIDAVIT OF THOMAS D. MCDONOUGH

Affiant, Thomas D. McDonough, swears, deposes and says:

I am Thomas D. McDonough. I am an attorney in New Albany, Mississippi where my practice includes criminal defense representation. During the course of my practice as an attorney, I have never represented Marlon Howell in relation to the May 15, 2000 murder of Hugh David Pernell.

I did not represent Mr. Howell at the May 16, 2000 line-up nor did I communicate with him in any way in regard to the line-up which he participated in on May 16, 2000.

This 7 day of November, 2005.

Thomas D. McDonough

Sworn to and subscribed before me,

this 7 day of November, 2005.

Notary Public

My Commission Expires: MISSISSIPPI STATEWIDE NOTARY PUBLIC MY COMMISSION EXPIRES JUNE 11, 2007 BONDED THRU STEGALL NOTARY SERVICE

EXHIBIT 7

IN THE CIRCUIT COURT OF UNION COUNTY, MISSISSIPPI

Mississippi Supreme Court No. 2004-DR-00167-SCT

Union County Criminal Cause No. U-2000-82

Union County Civil Cause No. U-2004-023

Marlon LaTodd Howell

v.

State of Mississippi

AFFIDAVIT OF THOMAS D. MCDONOUGH

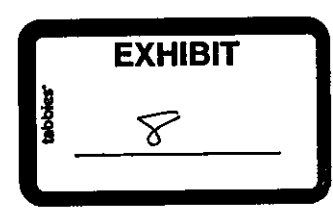
Affiant, Thomas D. McDonough, swears, deposes and says:

I am Thomas (Tom) D. McDonough. I am an attorney in New Albany, Mississippi where my practice includes criminal defense representation. During the course of my practice as an attorney, I have never represented Marlon Howell in relation to the May 15, 2000 murder of Hugh David Pernell.

I did not represent Mr. Howell at the May 16, 2000 line-up nor did I communicate with him in any way in regard to the line-up which he participated in on May 16, 2000.

I was originally contacted in this matter by attorneys for Marlon Howell in November 2005. At that time, I signed an affidavit stating that I did not represent Marlon Howell at his line-up or in relation to the May 15, 2000 murder of Hugh David Pernell. A copy of that original affidavit is attached hereto and incorporated by reference.

Recently, attorneys for Marlon Howell provided me with a copy of a sworn affidavit signed Police Chief David Grisham in which he states that I represented Marlon Howell at a line-up. It is my understanding that this affidavit has been produced to the Mississippi Supreme



Court by the Attorney General's office as part of the State's case in the Post-Conviction appeal of Mr. Howell.

Again, I state that I have never represented Marlon Howell in any capacity. Prior to receiving the State's affidavit, I was told by Chief Grisham that I was the attorney representing Mr. Howell at this line-up. I informed Chief Grisham then that I was not at the line-up, and I was never involved in Mr. Howell's case.

I did not hear anything else about this after speaking with Chief Grisham until I was contacted by the attorneys for Mr. Howell this month. I have never been contacted by the Attorney General's office or anyone with their office to confirm Chief Grisham's affidavit. If I had then I would have explained to them what I have set forth in this affidavit, as well as my prior sworn affidavit that I was never involved in representing Marlon Howell in any capacity.

This 30 day of November, 2007.

Thomas D. McDonough

Sworn to and subscribed before me,

this 30th day of November, 2007.

Paulette G Coltharp

Notary Public

My Commission Expires: _____

STATE OF MISSISSIPPI
NOTARY PUBLIC
ID # 87376
PAULETTE G. COLTHARP
Commission Expires
Oct. 14, 2011
UNION COUNTY

IN THE CIRCUIT COURT OF UNION COUNTY, MISSISSIPPI

Mississippi Supreme Court No. 2004-DR-00167-SCT

Union County Criminal Cause No. U-2000-82

Union County Civil Cause No. U-2004-023

Marlon LaTodd Howell

v.

State of Mississippi

AFFIDAVIT OF THOMAS D. MCDONOUGH

Affiant, Thomas D. McDonough, swears, deposes and says:

I am Thomas D. McDonough. I am an attorney in New Albany, Mississippi where my practice includes criminal defense representation. During the course of my practice as an attorney, I have never represented Marlon Howell in relation to the May 15, 2000 murder of Hugh David Pernell.

I did not represent Mr. Howell at the May 16, 2000 line-up nor did I communicate with him in any way in regard to the line-up which he participated in on May 16, 2000.

This 7 day of November, 2005.

Thomas D. McDonough

Sworn to and subscribed before me,

this 7 day of November, 2005.

Notary Public

My Commission Expires: MISSISSIPPI STATEWIDE NOTARY PUBLIC MY COMMISSION EXPIRES JUNE 11, 2007 BONDED THRU STEGALL NOTARY SERVICE