Case No. 10-70008

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

WILLIE JEROME MANNING,
Petitioner-Appellant & Cross-Appellee

v.

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

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

BRIEF FOR APPELLANT-CROSS-APPELLEE

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CERTIFICATE OF INTERESTED PARTIES

Willie Jerome Manning,
Appellant-Cross-Appellee

v. Case No. 10-70008

Christopher B. Epps, Commissioner,
Mississippi Department of Corrections,
And Jim Hood, Attorney General,
Appellees-Cross-Appellants

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

1. Petitioner -- Willie Jerome Manning
2. Respondents -- Christopher B. Epps, Jim Hood
3. Counsel for Petitioner -- David P. Voisin, Robert S. Mink
4. Counsel for Respondents – Marvin L. White, Jr.
5. Family of Jon Steckler
6. Family of Tiffany Miller
7. Trial Prosecutor -- Forrest Allgood
8. Trial Counsel – Mark Williamson, Richard Burdine

s/ David P. Voisin
Counsel for Willie Jerome Manning

REQUEST FOR ORAL ARGUMENT

This is a death penalty case in which the District Court granted a certificate of appealability on two grounds for relief: 1) racially discriminatory exercise of peremptory challenges in violation of *Batson v. Kentucky*; and 2) ineffective assistance of counsel at the penalty phase. Petitioner respectfully requests oral argument in the belief that it will assist this Court in resolving these matters.

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JURISDICTIONAL STATEMENT

The district court exercised jurisdiction over the matters addressed herein pursuant to 28 U.S.C. § 2254. This Court has jurisdiction pursuant to 28 U.S.C. §§ 1291 and 2253, the district court having granted a certificate of appealability on the issues addressed in this brief.

This appeal is timely. The district court denied relief on December 29, 2009, R.E. Tab D, R. 2059-2184,[1] and denied a timely filed motion to alter or amend the judgment on March 2, 2010. R.E. Tab E, R. 2185. The notice of appeal was filed on March 26, 2010. R.E. Tab B, R. 2242.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

I. Whether Manning is entitled to habeas corpus relief due to the prosecutor's racially discriminatory exercise of peremptory challenges in violation of *Batson v. Kentucky.*

II. Whether Manning is entitled to relief due to trial counsel's failure to develop and present evidence in mitigation of punishment.

[1] "R.E." refers to Record Excerpts. "R" refers to the record on appeal; "T" refers to the transcript of the state court trial; "C.P." refers to the Clerk's Papers filed in connection with the state court trial; and "PCR Ex" refers to exhibits filed in connection with state post-conviction pleadings; "PCR T." refers to the transcript of the state court evidentiary hearing, and "PCR Hearing Ex." refers to exhibits introduced at that hearing.

STANDARD OF REVIEW

Petitioner's constitutional claims are reviewed *de novo*. *Garcia v. Dretke*, 388 F.3d 496, 500 (5th Cir. 2004). This Court may not grant relief unless the state court adjudication (1) resulted in a decision that was contrary to or involved an unreasonable application of clearly established federal law, or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the record presented in state court. 28 U.S.C. § 2254(d); *Wiggins v. Smith*, 539 U.S. 510, 520 (2003).

STATEMENT OF THE CASE

I. PROCEDURAL HISTORY

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

Court likewise denied all post-conviction relief. *Manning v. State*, 929 So. 2d 885 (Miss. 2006) ("*Manning II*").

After Petitioner filed a petition for a writ of habeas corpus in the District Court, Respondents moved for summary judgment based on an alleged violation of the statute of limitations. 28 U.S.C. § 2244(d). The District Court, however, denied the State's motion, finding that Petitioner was entitled to equitable tolling. R. 595. The District Court allowed Petitioner to expand the record after it granted a motion requiring the Department of Human Services to disclose records concerning Petitioner and his family and ordered Petitioner to supplement the record with affidavits from trial counsel regarding their strategy with respect to the penalty phase. R. 1879, 1938. The District Court granted a motion for funding to allow neuropsychological testing, R. 2009, but denied Petitioner's subsequent request for funds for an expert in fetal alcohol spectrum disorders. R.E. Tab G, R. 2051.

The District Court denied relief on December 29, 2009, but granted a certificate of appealability on the two issues discussed herein. R.E. Tab D, R. 2061. After the District Court denied timely a timely post-judgment motion, Petitioner filed a notice of appeal on March 26, 2010. R. E. Tab B, R. 2242.

II. STATEMENT OF FACTS

A. Overview of Trial Testimony

Petitioner discusses the evidence used against him in greater detail in the Motion to Expand the Certificate of Appealability. In brief, Jon Steckler and Tiffany Miller, two white students at Mississippi State University, were murdered on December 11, 1992. Law enforcement believed that the murders were linked to a car burglary that occurred shortly before the murders, but there was no conclusive evidence establishing that fact. The sheriff believed that Steckler and Miller surprised someone stealing items from a car in a fraternity parking lot. The sheriff opined that the burglar kidnapped the victims, forcing them into Miller's Toyota MR2, a car with only two seats. The perpetrator sat in the passenger seat with Miller on his lap and made Steckler drive the MR2. He forced Steckler to drive to a remote location, and then shot the students. The assailant then left the car at an apartment complex close to where Miller lived, about ten miles from Manning's house. T. 874.

The State had no eyewitnesses or forensic evidence linking Manning to the murders, though he did help pawn a portable CD player taken in the car burglary. His then-girlfriend, Paula Hathorn, attempted to link him to other goods taken and also to bullets found at the murder scene. Hathorn, however, was eager to cooperate with the State. She had about fifty bad check charges pending and could

have been indicted as a habitual offender. She also secretly worked as an informant in an unsuccessful attempt to induce Manning to make an incriminating statement. After trial, most of the charges against Hathorn were ultimately dropped, and she received $17,500 in reward money.

The State also relied on two jailhouse informants desperate to cut a deal. Earl Jordan faced indictment as a habitual offender, committed crimes on the university campus, and was a suspect in the murders. After unsuccessfully trying to link two other individuals to the murders, he supposedly overheard Manning "confess" just one day after Manning was arrested on the charges. Frank Parker, another snitch, claimed to overhear Manning talk about disposing the gun. Parker lied about the Texas charges that he faced, even going so far as to claim that all charges against him had been dropped.

The prosecutor argued that the case boiled down to credibility of witnesses: "practically the only thing you have to determine when you go back into that jury room is who are you going to believe." T. 1529. To boost its case and the credibility of its witnesses, the State capitalized on false evidence and suppressed exculpatory evidence. The fairness of Manning's trial was also compromised by trial ineffectiveness and by restrictions placed on the right to confront witnesses.

B. Discriminatory Use of Peremptory Challenges

In selecting the petit jury, the prosecutor exercised nine peremptory strikes, six against African-American jurors. T. 559. When selecting alternates, the State used one of two strikes against an African-American juror. Only two African-Americans served on the jury even though 28 out of 85 members of the venire were African-American.

Defense counsel objected after the prosecutor used four of his first six peremptory strikes against African-American jurors. T. 534. The trial court did not find that defense counsel made a prima facie showing of discrimination; however, it required the prosecutor to provide race neutral reasons for the strikes. T. 534.

In explaining his strike of Shirley Wooten (Juror #12), the prosecutor mischaracterized her responses during voir dire and on her questionnaire regarding the death penalty. He also thought that she would hold the State to a higher burden of proof even though she stated that she would follow the judge's instructions regarding the reasonable doubt standard. At the same time, the prosecutor accepted white jurors who held similar views about the death penalty and the State's burden of proof. C.P. 1637, 1517. The prosecutor also struck Wooten because she supposedly did not want to serve on the jury, but she said nothing about any such

reluctance during voir dire, and the prosecutor did not ask her about any possible reservations she had about serving.

The prosecutor's first reason for striking James Graves (Juror #14) was not even race neutral, and it was false. Graves was found unsuitable because he read "liberal" publications that had "a lot" of articles espousing O.J. Simpson's innocence. T. 536. The magazine in question was Jet, and it did not espouse Simpson's innocence. The judge interjected to point out that Graves was supposedly unemployed, and the prosecutor agreed that Graves' lack of employment was another basis for striking him. Graves, however, was employed. C.P. 1338-39. Even if he had been unemployed, this explanation would have been pretextual; the prosecutor accepted white jurors who lacked jobs.[2]

The prosecutor based his strike of Ronald Henry (Juror #18) on a mischaracterization of Henry's responses regarding the death penalty. Also, the prosecutor eliminated Henry from the jury because a member of Henry's family had been convicted of a crime, but the prosecutor's concerns about families' criminal record vanished when considering white jurors. As he had with Wooten, the prosecutor asserted that Henry did not wish to serve on the jury, but the prosecutor did not broach this matter during voir dire.

[2] The prosecutor also struck Graves because he hung sunglasses in his shirt, and wore chains and an earring. T. 536.

The prosecutor struck Joyce Merritt (Juror #19) for reasons that were either non-race neutral or false. Merritt read "liberal" publications, i.e., Jet and Ebony, that supposedly espoused O.J. Simpson's innocence. The prosecutor challenged her due to her alleged "wishy-washiness" on the death penalty; however, as with jurors Wooten and Henry, the prosecutor misstated her responses. The prosecutor also falsely stated that a member of Merritt's family had been convicted of a crime. He also struck her because she was unemployed. Merritt, however, was disabled, but several white jurors were unemployed; thus, employment status was a pretext. The prosecutor also struck her because she watched a great deal of television and because she made eye contact with defense counsel.

After the prosecutor explained his challenge of those four jurors, the judge asked defense counsel for his peremptory strikes. T. 538. After the prosecutor raised a *Batson* challenge, the trial judge required race neutral reasons from defense counsel. After hearing race neutral explanation from both parties, the trial court stated that it "*voices no opinions* on the State's reasons or on the defendant's reasons." T. 542 (emphasis added). Before the parties proceeded with jury selection, defense counsel renewed the *Batson* challenge, but the trial court overruled it, deeming it "premature" and made no findings. T. 543.

After the prosecutor exercised two additional peremptory strikes, one of which was against an African-American juror, defense counsel renewed the *Batson*

challenge. T. 543. The prosecutor explained that he struck Christi LaMarque Robertson (Juror #35), who strongly agreed with the death penalty, because Robertson supposedly failed to fill out most of his questionnaire. T. 544. This explanation was false; moreover, the prosecutor accepted a white juror who failed to complete his questionnaire. The prosecutor was also troubled because Robertson read periodicals that discussed the Simpson case. Robertson noted that he read Time, Newsweek, and Gentleman's Quarterly, and the prosecutor accepted white jurors who read Time or Newsweek. The prosecutor also challenged Robertson because he lived in the "functional equivalent of Brooksville Garden," which is a predominantly African-American housing project in Starkville.

The State exercised an additional challenge against Troy Fairley, an African-American juror, prior to selecting alternate jurors, and used one strike against a black juror when selecting the alternates. T. 548-49. The trial judge, however, did not require an explanation for striking Fairley. Defense counsel again renewed the challenge to the exercise of peremptory strikes and asked the trial court to dismiss the panel. T. 550-51. The trial court, however, declined to take up the motion at that time, but assured defense counsel that he would give him the opportunity "to develop that motion more fully at your leisure." T. 551, 557, 559. When defense counsel again raised issue the next day, the trial court stated that it had "already ruled on this on the *Batson* challenges." T. 560. Overlooking defense counsel's

request of the previous day, the trial court added that "[u]ndoubtedly both sides were satisfied with those race neutral for the exercise of peremptory challenges since no further request was made of the Court for any hearings thereon." T. 560. Finally, in an attempt to bolster his ruling, the trial court noted the irrelevant fact that "[t]he defendant did not exhaust all peremptory challenges in the exercise of or during the course of voir dire and jury selection." T. 560.

C. Deficient Penalty Phase Performance

Manning was represented by Mark Williamson and Richard Burdine. Williamson took responsibility for preparing for the culpability phase, and Burdine was to prepare for the penalty phase. During his guilt phase investigation, Williamson learned of a number of leads for mitigating evidence. Williamson also heard from John Holdridge, an attorney specializing in capital cases, who alerted Williamson to avenues of mitigation to explore, including fetal alcohol syndrome, extreme poverty, neglect, and abuse. PCR Ex. 34, 39. Williamson forwarded this information to Burdine. C.P. 375; 393. However, Burdine did not follow up with this information. As a result, he had but two witnesses for the penalty phase: an elderly aunt who did not know Manning well and who did little more than ask the jury to spare her nephew's life, and Manning's mother, who provided scant details about her son's life, but who also testified that she was a good mother, though she had abandoned Manning when he was very young. All told, the penalty phase

testimony comprised only 10 pages. As set out in greater detail in the argument section, the District Court granted leave to supplement the record with additional mitigating evidence, including the results of a neuropsychological evaluation and records from the Department of Human Services.

SUMMARY OF ARGUMENT

I. The State exercised it peremptory challenges in a racially discriminatory fashion. When the prosecutor was asked to explain his strikes, he provided some explanations that were not race neutral. Other justifications were inconsistent with the record, based on mischaracterizations of juror responses during voir dire, or equally applicable to white jurors. The state courts unreasonably applied *Batson v. Kentucky*.

II. The District Court found trial counsel's preparation for the penalty phase to have been deficient, but erred in finding that Petitioner had not established prejudice. There is at least a reasonable probability that at least one juror would have voted for a life sentence counsel had presented evidence of neurological problems, likely fetal alcohol spectrum disorder, abandonment, neglect, exposure to violence, and extreme poverty.

ARGUMENT

I. PETITIONER WAS DENIED HIS RIGHT TO EQUAL PROTECTION OF THE LAWS BY THE STATE'S RACIALLY DISCRIMINATORY USE OF PEREMPTORY STRIKES

A. Relevant Legal Principles

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

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

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

A reviewing court is generally deferential to the credibility findings made by the trial judge. However, "deference does not imply abandonment or abdication of judicial review." *Miller-El I*, 537 U.S. at 340. Moreover, in this case, the trial judge made no specific findings regarding any reason given by the prosecutor. Thus, if a reason is shown to have been problematic, this Court cannot conclude that the trial judge relied on other reasons when ruling on the strike. *See Snyder, supra*.

B. The State's Discriminatory Use of Peremptory Strikes

1. Shirley Wooten (Juror #12).

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

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

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

Wooten's responses are hardly much different from the responses of Ola Lee Smith (Juror #41) and Wilma Oliver (juror #20), white women who were selected to serve on the jury. Smith went so far as to indicate on her questionnaire that she could not impose the death penalty. C.P. 1637. Only during voir dire did she confirm that she could impose the death penalty. T. 324. Oliver, like Wooten, noted on her jury questionnaire that she had no opinion about the death penalty and

that she could not vote for it except in "extreme circumstances." C.P. 1517. During voir dire, she altered her answer, explaining that she "could vote for it if – if [she] felt it was guilt." T. 319.

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

The prosecutor also referenced Wooten's remark that she could vote for the death penalty if the State could prove guilt "beyond a shadow of a doubt." T. 535. In sequestered voir dire, Wooten stated that evidence needed to prove the defendant was guilty "beyond a shadow of a doubt." T. 419. She subsequently confirmed that she would follow the law on reasonable doubt and not hold the State to a higher burden of proof. T. 424. It appeared during voir dire that the prosecutor attempted to distort Wooten's responses. Even the trial judge cautioned the prosecutor not "to argue with the witness now," and pointed out that the prosecutor was "trying to . . . put in your words what she is saying." T. 422.

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

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

worked for law enforcement, T. 335, Wooten "should have been an ideal juror in the eyes of a prosecutor seeking a death sentence." *Id*. at 247.

2. James Graves (Juror #14).

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

The prosecutor's assertion that Jet espoused O. J. Simpson's innocence is also false. There were not "a lot of articles" in Jet taking that point of view. *See*

R. 1076-1105 (articles in Jet discussing the Simpson case and appearing before Petitioner's trial).[3]

The trial judge interrupted to suggest that Graves has no occupation. The prosecutor agreed: "he has no occupation, your Honor. That would be another factor." T. 536. This is problematic for several reasons. First, the trial judge improperly interjected himself on behalf of the prosecutor to concoct additional reasons to justify the strike. The "pretextual significance [of a peremptory strike] does not fade because a trial judge . . . can imagine a reason that might not have been shown up as false." *Miller-El II*, 545 U.S. at 252. Second, the fact that the prosecutor only came up with this justification after being prompted by the trial judge "reeks of afterthought." *Id*. at 246. Third, four white people indicated either that they were unemployed or did not indicate an occupation on their questionnaires but were acceptable to the prosecutor, and one of them, Earl Bolinger (Juror #37), served on the jury.[4] Finally, and most importantly, the reason is false. Graves indicated on his questionnaire that he worked at Forrest General Hospital. C.P. 1339.

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

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

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

3. Ronald Henry (Juror #18).

The prosecutor offered three reasons to justify striking Henry. First, the prosecutor noted that on the questionnaire, Henry stated that "he had no opinion; today he said he did have an opinion." T. 536. During voir dire, however, Henry simply stated that "I really have to review the evidence and make up my mind at that time." T. 317. He did not deny that he could vote for the death penalty. Later, during individual voir dire, Henry repeated, "it depends on the evidence. If the evidence points toward that, I can vote for it." T. 435. Henry explained that any reluctance about the death penalty expressed on his questionnaire had to do with whether the evidence was clear that the person deserved it. The prosecutor quizzed Henry as to whether he would hold the State to a higher burden, but Henry declared that "it'd have to be upon a reasonable – a doubt before I could – can do that." T. 437. As noted in the discussion of juror Wooten, similarly situated white jurors were acceptable to the State.

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

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

4. Joyce Merritt (Juror #19)

The prosecutor recited many of the same reasons for striking Merritt as he had used for striking other African-American jurors. Most of these reasons are false or could have been applicable to white jurors. For instance, he complained about her "wishy-washiness about the death penalty." T. 537. According to the prosecutor, on her questionnaire, Merritt indicated that she had no opinion on the death penalty, but during voir dire she stated that she did have an opinion. T. 537. The prosecutor, however, mischaracterized the record. Though Merritt responded on her questionnaire that she had no opinion about the death penalty, she also noted on her questionnaire that she could vote to impose it. C.P. 1470. During voir dire, Merritt reaffirmed her questionnaire response and told the prosecutor that "[u]pon the evidence I could go with the death penalty." T. 317. Without waiting for the prosecutor to complete his next question, Merritt declared that "[w]ithout a doubt all completely all the evidence points to a verdict of guilt, I can return the death penalty." T. 317.[5] Merritt never wavered about her ability to vote for a death sentence, and thus did not display any "wishy-washiness."[6]

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

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

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

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

The prosecutor also found Merritt unworthy of jury service because she "reads some of those publications which I perceive or – or have had articles in them on the O. J. Simpson trial, once again espousing the innocence of O. J. Simpson." T. 537. On her questionnaire, the publications listed by Merritt

included Ebony and Jet. C.P. 1468.[7] As indicated in the discussion of juror Graves, this reason is not even race neutral. Moreover, Jet merely covered the trial as a news story without "espousing" any position regarding Simpson's guilt or innocence. Ebony did little more than solicit range of views from prominent individuals but did not take a position on the Simpson case. *See* R. 1076-1123.

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

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

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

On his questionnaire, Robertson indicated that he strongly agreed with the death penalty and could vote to impose it. C.P. 1581. At no point did the prosecutor ask to voir dire Robertson individually. Nevertheless, the prosecutor struck Robertson. To justify the strike of someone who "should have been an ideal juror in the eyes of a prosecutor seeking a death sentence," *Miller-El II,* 545 U.S. at 247, the prosecutor explained that the juror "lives in an extremely bad neighborhood," "the functional equivalent of Brooksville Gardens in this community." T. 544. Brooksville Garden is a virtually all-black housing area in Starkville. Thus, the prosecutor struck a black juror for living in a black neighborhood. This asserted reason is not race neutral. *See, e.g., Com. v. Horne,* 635 A.2d 1033, 1034 (Pa. 1994) (striking juror for living in "high crime area" is not race neutral); *Ex Parte Bird,* 594 So. 2d 676, (Ala. 1991) ("bare allegation" that juror lives in "high crime" area is constitutionally deficient).

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

C.P. 1507. Similarly, the prosecutor accepted Tonya Beisel, a white juror, even though she responded that she read Newsweek. C.P. 1118.

Finally, the prosecutor asserted that Robertson did not complete his questionnaire "and the incompleteness of the form made me obviously question the – the veracity of his responses to begin with . . . ." T. 544. Once again, the prosecutor's reason was false; Robertson completed most of the questionnaire. C.P. 1574-1581. There may have been some blank portions of the questionnaire, but those blanks are explainable. For instance, Robertson described himself as single and childless. Thus, questions pertaining to children and spouses were left blank. Robertson had always lived at the same address, and he listed his employer, salary, and duties. C.P. 1576. Many of the follow-up questions regarding prior involvement with the legal system were left blank because Robertson answered that he had not had any involvement with the legal system. Robertson answered questions about his church involvement, hobbies, reading habits, television shows he watched, his neighborhood, whether he worked in a mental health, welfare, or social work setting, and his nonmembership in organizations that seek to influence public policy. As noted previously, Robertson indicated a pro-prosecution position with respect to the death penalty. C.P. 1581.

The prosecutor did not apply this reason about the allegedly incomplete questionnaire even-handedly to white jurors. For example, juror Earl Bolinger

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

6. Troy Fairley (Juror #42)

The State gave no reason for striking Juror #42 Troy Fairley (C.P. 1314), an African-American woman. T. 548. Because the defense had clearly established a prima facie case of discrimination with the prosecutor having exercised six out of nine strikes up to that point, the prosecutor was obliged to come forward with race neutral reasons to explain the strike. Because the prosecution failed to present any reasons, there is nothing to rebut the prima facie case, and therefore Petitioner has established a violation of *Batson*. *See Price v. Cain*, 560 F.3d 284 (5th Cir. 2009).

C. AEDPA Does Not Preclude the Grant of Habeas Relief.

Even though Petitioner establishes that *Batson* has been violated, this Court need not grant relief unless the state court adjudication of this claim was either contrary to or involved an unreasonable application of *Batson*, 28 U.S.C. § 2254(d)(1), or the state court's adjudication resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in state court. 28 U.S.C. § 2254(d)(2). Because the state courts made a shambles of this issue, Petitioner is entitled to relief under either portion of § 2254(d). First, the trial court made no findings about the establishment of a prima facie case. A trial court's clearly erroneous failure to find a prima facie case "heighten[s]" "concerns about the court's determination as to the remaining portions of the *Batson* analysis." *Miller-El I,* 537 U.S. at 347. Due to this failure, the trial court neglected to require the prosecutor to provide race neutral reasons for all strikes. Thus, there was no explanation given for striking juror Fairley. Moreover, once the prosecutor provides reasons, the trial judge must make findings to determine whether the strike was motivated by race. *Hernandez v. New York,* 500 U.S. 352 (1991). As the prosecutor gave his rationalizations, the trial judge simply declared *Batson* to be "premature" and expressed no opinion on the matter. T. 542, 543. This dereliction amounts to an unreasonable application of *Batson* and *Hernandez*. *See also Moody v. Quarterman,* 476 F.3d 260, 267-68 (5th Cir. 2007) (federal court

need not defer to state trial court's findings "because it failed to make any findings of fact relative to the heart of [the *Batson* claim]").

The one instance in which the trial judge made a finding, when he insinuated that juror Graves should be struck due to the juror's alleged unemployment, the judge was clearly wrong. Only after reneging on his promise to allow defense counsel to make a record on the *Batson* issue did the trial judge state that the reasons were race neutral, and even then the trial judge relied in part on the fact that defense counsel did not exhaust his peremptory strikes, overlooking the fact that it is the prosecutor's strikes that matter. T. 560.

The state supreme court's opinion likewise involved an unreasonable application of *Batson.* On direct appeal, Petitioner pointed out that some reasons should not have been deemed race neutral as when the prosecutor struck jurors who read Jet, an entertainment magazine marketed to black readers. In addition, Petitioner demonstrated that other reasons were pretextual primarily because the prosecutor treated similarly situated white jurors differently. The state supreme court, after pointing out defense counsel's objections at trial, observed that the trial judge's failure to find that defense counsel established a prima facie case of discrimination was moot because the prosecutor offered race neutral reasons. *Manning v. State*, 726 So. 2d 1152, 1182-83 (Miss. 1998) (citing *Hernandez v. New York*, 500 U.S. 352, 359 (1991)). However, the state supreme court failed to

note the trial court's failure to require an explanation for striking juror Fairley, and thus unreasonably applied *Batson*.

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

In the alternative to the alleged waiver, the state supreme court purported to address the merits of the claim, but with the exception of a discussion of juror Henry, the state supreme court did no more than declare that the proffered reasons were race neutral. Thus, the state supreme court did not reach the third step of the *Batson* test even though Petitioner catalogued the numerous problems with the

prosecutor's stated reasons. *Id*. at 1183-86. *See Lewis v. Lewis*, 321 F.3d 824, 834 (9th Cir. 2003) (finding that the AEDPA did not preclude relief where "[t]he trial court did not conduct a meaningful step-three analysis"); *Riley v. Taylor*, 277 F.3d 261, 286 (3rd Cir. 2001) (en banc) ("Deference in a *Batson* case must be viewed in the context of the requirement that the state courts engage in the three-step *Batson* inquiry. . . . Here, the state courts failed to examine all the evidence to determine whether the State's proffered race-neutral explanations were pretextual.").[8]

Indeed, a review of the state supreme court's discussion of the *Batson* claim underscores the perfunctory nature of its review. For instance, with respect to juror Graves, the state supreme court discussed the asserted reason that Graves was struck because he wore gold chains. *Manning*, 726 So. 2d at 1184.[9] The state supreme court did not address the trial judge's interjection of the factually erroneous rationale that Graves was supposedly unemployed, nor did the state's high court touch on the fact that Graves was struck because he read Jet. For juror Robertson, the state court did nothing more than quote the prosecutor's stated

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

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

reasons and then find this challenge procedurally barred. 726 So. 2d at 1184-85. The state court did not even assert that the reason for striking Robertson was race neutral.

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

For juror Merritt, the state court overlooked the prosecutor's false statement that the juror had a family member who had been arrested. Furthermore, the state supreme court added another reason that the prosecutor had not mentioned. According to the state supreme court, "The prosecutor asked her if the evidence was anything less than without a doubt if she could impose the death penalty and she responded that she could not." *Manning*, 726 So. 2d at 1186. What actually occurred was that the prosecutor asked Merritt whether she would hold the state to a higher burden of proof, and she answered that she would be satisfied with a standard of beyond a reasonable doubt. T. 439. Thus, besides not applying step three of the *Batson* inquiry, the state supreme court's findings are clearly unreasonable based on the record before it and thus 28 U.S.C. § 2254(d)(2) does

not bar relief. "Where the facts in the record are objectively contrary to the prosecutor's statements, serious questions about the legitimacy of a prosecutor's reasons for exercising peremptory challenges are raised." *McClain v. Prunty*, 217 F.3d 1209, 1221 (9th Cir. 2000).

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

on voir dire that he could vote for it but only after hearing the evidence. T. 317, 435.

With respect to several jurors, the state court's resolution of key factual matters involved an unreasonable application of the facts based on the state court record or were clearly wrong as a matter of law. 28 U.S.C. § 2254(d)(1) and (2). For instance, the state courts accepted as "race neutral" complaints that jurors read magazines marketed to blacks. Under no circumstances could such a reason be fairly categorized as "race neutral." Similarly, the judge accepted as "race neutral" a reason that a juror lived in a neighborhood comparable to Brooksville Garden, i.e., a predominantly black neighborhood.

Finally, as in *Miller-El II*, and as set forth in detail above, the state courts credited as acceptable reasons without record support or reasons that were equally applicable to acceptable white jurors. Under these circumstances, AEDPA does not preclude the grant of relief, and Petitioner is entitled to have the writ of habeas corpus issue on his behalf. *See Miller-El, supra.*

D. This Issue is not Procedurally Barred, but in the Alternative, Trial Counsel Were Ineffective.

On direct appeal, Petitioner explained why the prosecutor's reasons were pretextual, relying on the record available to the trial judge. The Mississippi Supreme Court, however, found most of this ground for relief barred because trial counsel did not articulate reasons for discounting the prosecutor's reasons for

striking African-American jurors. *See, e.g., Manning I*, 726 So. 2d at 1184. The trial judge, however, did not afford an adequate opportunity for rebuttal. More importantly, however, there is no requirement that trial counsel articulate every possible reason to reject a prosecutor's justification for a peremptory challenge. In *Miller-El*, the Court cautioned against "conflat[ing] the difference between evidence that must be presented to the state courts to be considered by federal courts in habeas proceedings and theories about that evidence." *Id*. at 241 n.2; *see also Reed v. Quarterman*, 555 F.3d 364, 372 (5th Cir. 2009).

This matter should also not be barred because in post-conviction proceedings, when Petitioner raised this as an instance of trial counsel's ineffectiveness, the Mississippi Supreme Court found that the issue had been preserved and that it had reviewed the claim on direct appeal:

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

Manning v. State, 929 So. 2d 885, 904 (Miss. 2006).[10] Thus, the state supreme

[10] In post-conviction proceedings, the Attorney General reversed the position taken on direct appeal and asserted that trial counsel's performance could not have been deficient because the *Batson* claim was in fact adequately raised before the trial court:

(continued…)

court found that trial counsel had preserved the claim, and thus it should not have been found barred on direct appeal.

Finally, and in the alternative, if this claim is found to be defaulted, then trial counsel was constitutionally ineffective, and Petitioner is entitled to relief. *See, e.g., See Davis v. Crosby,* 341 F.3d 1310, 1316 (11th Cir. 2003) (per curiam).

E. The District Court Misapplied *Miller-El* and *Snyder*

The District Court recognized that some of the prosecutor's reasons for striking a number of jurors were false. R.E. Tab D, R. 2080 (regarding juror Graves' employment status); R.E. Tab D, R. 2081 (regarding juror Robertson's questionnaire). Nevertheless, the lower court opined that "the issue is not accuracy but intent." *Id*. The District Court, however, overlooked the other false reasons, including the mischaracterization of the record regarding the responses of some of the jurors to questions about the death penalty. In both *Snyder* and *Miller-El II*, the

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(…continued)

> Manning contends that trial counsel was ineffective in failing to preserve a claim under *Batson v. Kentucky*, 476 U.S. 79 (1986), for review by this Court on direct appeal. However, this is not what the record reflects. Trial counsel did raise a claim under *Batson* at trial. However, the trial court found that Manning had failed to make out a *prima facie* case of discrimination, but then required the State to give reasons for its strikes. *What more could trial counsel do?*

R. 1164-65 (Resp. to App. for Leave to File Pet. for Post-Conviction Relief, *Manning v. State*, No. 2001-DR-00230-SCT, at pp. 37-38 (emphasis added).

Court found that reasons that lacked support in the record were indicative of pretext. Overlooking those cases, the District Court relied on *Rice v. Collins,* 546 U.S. 333, 341-42 (2006). R.E. Tab D, R. 2076. In *Rice,* however, the trial judge carefully considered several reasons for a strike, determined whether certain reasons were acceptable, and made express findings of credibility. The trial judge discounted a reason given that was based on gender but accepted a reason that the juror was young and had no ties to the community. The Supreme Court also noted that the prosecutor struck a similarly situated white juror. This consistent treatment of white and black jurors supported a finding of credibility. In contrast to *Rice,* there were no findings of credibility in Petitioner's case; the trial judge, who interjected one of the false reasons, did not carefully sift through the reasons proffered.

The District Court noted in several places that the prosecutor's proffered justifications were equally applicable to white jurors. *See, e.g.,* R.E. Tab D, R. 2081 (pointing out jurors who read Time or Newsweek); *id.* at 2083 (noting jurors who have relatives with criminal histories). Although disparate treatment of jurors is indicative of pretext, the District Court found that the prosecutor's strike may be permissible if the prosecutor relied on additional race neutral reasons. *Id*. at 2079. As this Court held in *Reed*, however, "[W]e do not need to compare jurors that exhibit *all* of the exact same characteristics . . . . If the State asserts that it struck a

black juror with a particular characteristic, this is evidence that the asserted justification was a pretext for discrimination." 555 F.3d 376 (emphasis in original). *See also Miller-El II*, 545 U.S. at 247 n.6. Thus, in *Hayes v. Thaler*, 2010 WL 183395 (5th Cir. 2010), this Court granted *Batson* relief without requiring the petitioner to establish that a white juror shared all characteristics with a black juror before finding the basis of the strike to have been pretextual.

The District Court also relied on "implicit factual findings by the trial court regarding the credibility of the proffered reasons . . . ." R.E. Tab D, R. 2077. The District Court's reasoning, however, flies in the face of *Snyder*. There, the Supreme Court found that one of the reasons offered for striking a juror, student teaching requirements, to be inconsistent with the record and also comparable to a characteristic of a white juror. The prosecutor offered a second reason, that juror's demeanor, to justify the strike. The Court rejected that reason. Since the trial court made no specific finding about demeanor, there was no basis to conclude that the reason was true or if the trial court relied on that reason for striking the juror. The situation for Petitioner is no different. The prosecutor alleged that he struck Merritt because of her "eye contact" with a member of the defense team, juror Graves because he wore chains and hung sunglasses in his shirt, and juror Henry because he shook his head as though he did not want to serve. When the strikes were made, the trial judge not only made no findings, he expressly disavowed the

need to make findings. Yet the District Court relied on deference allegedly owed to these sorts of "implicit" findings to salvage the strikes. Such an approach renders *Batson* meaningless

For a number of other reasons given to deny relief, the District Court did nothing more than assert that certain reasons given were race neutral. As already discussed, such a finding addresses only the second part of the *Batson* test. A full review of the reasons given for striking the African-American jurors demonstrates that the reasons relied on were false, equally applicable to white jurors, or not significant enough for the prosecutor to delve into during voir dire.

The District Court also found that Petitioner did not show that the state court "implicit" fact findings were unreasonable by clear and convincing evidence. R.E. Tab D, R. 2076-77. The District Court, however, improperly conflated the requirements of 28 U.S.C. § 2254(d)(2) and (e)(1). "AEDPA does not require petitioner to prove that a decision is objectively unreasonable by clear and convincing evidence." *Miller-El I*, 537 U.S. at 341. Section 2254(d)(2) is applicable when a habeas court bases its decision on the state court record and can assess the reasonableness of any fact findings in light of that record.

Petitioner can establish a violation of *Batson* if he can show that even a single juror was excluded for an impermissible reason such as race. *Snyder, supra.* The prosecutor impermissibly based his peremptory strikes on race, and the state

court's treatment of this ground for relief was objectively unreasonable and based on unreasonable findings of facts. For these reasons, Willie Manning is entitled to habeas corpus relief.

II. PETITIONER WAS DENIED HIS RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL IN THE SENTENCING PHASE OF HIS CASE.

A. The District Court was correct in concluding that counsel's performance was deficient.

The district court agreed that Manning's trial counsel failed to conduct an adequate investigation of the mitigation evidence available for use at sentencing. Therefore the only question regarding this ground for relief is whether Manning was prejudiced by counsel's failures. In other words, taking into account the evidence that *could* have been offered at trial (regarding abandonment, chronic and dire poverty, head injuries, neurological dysfunction, alcoholism), is there a reasonable probability that the outcome of the sentencing would have been different?

Counsel in capital murder cases are required to discover and present "information concerning the defendant's background, education, employment records, mental and emotional stability, family relationships, and the like," so that the jury can take these into account in determining the sentence. *Williams v. Taylor*, 529 U.S. 362, 396 (2000) (citing ABA Standards for Criminal Justice, Section 4-4.1). *See Sears v. Upton*, 561 U.S. ___, 2010 WL 2571856 (sentence

reversed for counsel's failure to discover evidence of parents' abusive relationship, defendants' history of head injuries, deficits in mental cognition and reasoning, drug and alcohol abuse).

The district court was correct in concluding that the necessary background investigation was not performed in this case. Manning was represented at trial by two attorneys: Mark Williamson and Richard Burdine. Both attorneys submitted affidavits to the district court in response to the court's order directing Manning to obtain affidavits "concerning the investigation and strategies employed by trial counsel for the sentencing phase of Petitioner's trial." R. 1938 The affidavits showed that Williamson and Burdine divided responsibilities so that Williamson would handle the innocence/guilt phase of the case and Burdine would handle sentencing. (Williamson Affidavit, R. 1954; Burdine Affidavit, R. 1986)[11] Although Williamson took primary responsibility for the innocent/guilt phase, he wrote letters to Burdine to provide information for Burdine's use in preparing a mitigation defense. R. 1955-62, 1969-72, 1978-85. This information included the identities and contact information of individuals who had volunteered to testify for Manning, and a list of categories of information of the kind listed in the

[11] The affidavits submitted to the district court are similar to affidavits that were provided by Williamson and Burdine to the state court. See PCR Ex. 39, 44. Burdine's state court affidavit was filed with the rebuttal in support of Manning's petition for post-conviction relief.

commentary to Section 4-4.1 of the ABA Standards for Criminal Justice. *Id*. Williamson also sent Burdine information and recommendations from John Holdridge, a capital defense attorney who conducted an interview with Manning and his mother and recommended follow-up on issues such as neurological impairment, fetal alcohol effects, head injuries, grinding poverty, abandonment, trauma and childhood neglect. R. 1969, 1978-84. Holdridge also recommended that trial counsel seek the assistance of a psychologist and a social worker. R. 1978.

Burdine did not contact any of the witnesses identified in Williamson's letters, and he did not investigate, much less offer, any information about topics disclosed in Holdridge's notes. Burdine called only two witnesses -- Manning's mother and aunt -- whom he had interviewed *just prior to putting them on the stand*.[12]

The district court concluded as follows:

> Having reviewed all of the evidence presented at trial, the evidence that went unused at trial, and the supplemental affidavits and reports filed in this cause, the Court determines that no reasonable

[12] In his affidavit submitted to the state court, Burdine stated that he interviewed Manning's mother and aunt "during the penalty phase" of the trial. PCR Ex. 44. In the affidavit submitted to the district court, he stated that he did not remember when the interviews took place. R. 1987. The State did not challenge the accuracy of the Williamson and Burdine affidavits submitted to the district court; nor did the State respond to the supplement filed by Manning submitting the affidavits. Doc. # 72, R. 1944.

> investigation was made as to the sentencing phase of Petitioner's trial. The record clearly supports a finding that Burdine did not make a reasonable investigation, therefore, there is no presumption that his decision not to introduce additional character witnesses or mitigating evidence was reasonable. No follow-up was conducted after recommendations were made by Williamson and Holdridge. [. . . .] Holdridge's notes suggested a family history of alcoholism, potential brain injuries or birth defects, poverty, and violence in the home. A reasonably competent attorney would have investigated these factors, and defense counsel's investigation was unreasonably limited in light of the available evidence.

R.E. Tab D, R. 2158 (citations omitted).

The district court denied relief on Petitioner's claim of ineffectiveness, however, on the grounds that Petitioner was not prejudiced by Burdine's failures. According to the court, there was "no reasonable probability that the omitted evidence would have changed the conclusion that the aggravating circumstances outweighed the mitigating circumstances and, hence, warranted the capital punishment sentence that was imposed." R.E. Tab D, R. 2164.

The district court identified two bases for the conclusion that Petitioner was not prejudiced by counsel's failures: (a) the omitted mitigation evidence in Petitioner's case "is not comparable to" the evidence omitted in *Williams v. Taylor* and *Wiggins v. Smith* (R.E. Tab D, R. 2162), and (b) evidence of Petitioner's brain dysfunction is "double-edged" in that it might have worked against defense counsel's efforts to obtain a sentence of life imprisonment. R.E. Tab D, R. 2163. For reasons stated below, both bases identified by the district court are flawed.

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

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

Burdine had been made aware of several issues relevant to mitigation before trial. Even more evidence came to light later. During the post-conviction stage of the case, Manning submitted the affidavit of Gary Mooers, a Ph.D. in Social Work from the University of Mississippi. Dr. Mooers referred to medical records which

verified the earlier reports of head injuries and showed that Manning had been hospitalized for at least two of them. In addition, there was a finding of spina bifida. Dr. Mooers opined that Manning's extreme poverty and poor nutrition, together with excessive use of alcohol beginning at age fourteen, likely interfered with his neurological and psychological development. Dr. Mooers also noted specific incidents of violence and trauma that are sure to have affected Manning psychologically: he had been shot as a bystander during the attempted robbery of a convenience store, he had witnessed his mother being beaten by her husband, and he was present when his mother stabbed her husband. (PCR Exhibits 37 and 47). *See also* R 1931, 1936.

During the federal habeas proceedings, Manning was finally allowed access to the records of his family in the possession of the Department of Human Services. (Order, Doc. # 65 at 7-8; R. 1885-86.) According to the DHS records, Manning was "deserted" by his mother Ruth when he was two years old and left with his grandmother, Melvina Manning, who was fifty years old at the time, had a "low mentality," could not read or write her name, and had no income other than a small monthly social security payment. R. 1893, 1905, 1912. Ruth had a second son, Marshon, who was likewise left with Melvina when Willie was about six. *Id*. Ruth came and went, leaving the parental responsibilities to Melvina. Although Melvina did her best to provide for the children, she could barely manage to take

care of herself. She was constantly running out of money, could not afford food, and lived at times in places that had no bathroom, no running water and only firewood for heat. *Id.*

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

> Her grandson attends school regularly and . . . is lots of help as Mrs. Manning can't read or dial the telephone. She depends on him to do these things for her. R. 1895, 1906.
>
> Willie attends school regular and is such a big help to his grandmother since she doesn't read or write, and with help she has learned to dial and call on the telephone and can count her money. R. 1895, 1911.
>
> She is over 56 years old, no education, can't read nor write her name, has health problems. She has had Willie since a baby. He is now 9 years old and very smart and seems to be doing real well in school. He has to dial the telephone and help his grandmother shop, when a service worker or a friend doesn't go with her. R. 1895, 1909.

One of the social workers assigned to Melvina Manning's case was Catherine Jones, who remembered seeing Melvina and Willie Jerome Manning on several occasions in the DHS office. Ms. Jones remembers with specificity the support and affection the boy showed for his grandmother:

> Ms. Manning was limited to a certain degree in her ability to read and recall information, and she relied on Jerome[13] to help. Jerome did most of the talking during our meetings because he knew and remembered his grandmother's address, telephone number and birth date, even though he

[13]When he was a child, Manning went by his middle name, Jerome.

> was only eight or nine years old at the time. I remember Ms. Manning asking Jerome, "Baby, what is our address?" and "Baby, what is our telephone number?" Jerome was always well-mannered. He really helped take care of his grandmother and helped her get to appointments. It was obvious to me that he loved and adored his grandmother.

R. 1920-21.

The district court also allowed Manning to be examined by a neuropsychologist, Dr. Marc Zimmermann. *See* Order, Doc. #73, R. 2002. Dr. Zimmermann conducted several kinds of testing and concluded as follows:

> a. Manning exhibits "dysfunction in executive function and working memory," a deficit in his ability "to hold geometric figures in memory," which is "consistent with reading disorders and parietal lobe deficits or deficits of memory." R. 2030.
>
> b. Manning has "a 73 % probability of brain dysfunction" and "borderline intellectual functioning." R. 2031.
>
> c. Manning may be diagnosed with fetal alcohol spectrum disorders, in particular, alcohol-related neurodevelopmental disorder (ARND), because "[h]is mother drank during pregnancy, and there is evidence of a complex pattern of behavioral or cognitive abnormalities inconsistent with developmental level and unexplained by genetic background or environmental conditions." (*Id.*)[14]
>
> d. further consultation should be obtained from a medical professional "with an expertise in the field of Fetal Alcohol Spectrum Disorder." R. 2031-32.

[14] Zimmermann's affidavit contains the following report concerning Manning's younger brother Draper, which supports the probability that Manning suffers from fetal alcohol effects: "An indication as to how heavily Ruth drank throughout her life may be found in Draper Manning's Community Counseling records. According to the counselor, Ruth reported that she was drunk when Draper was born and that the doctors told Ruth that Draper was drunk and had to have his stomach pumped when he was born. Draper later had behavioral problems in school, and was arrested." R. 2024.

> e. Manning's development was impacted negatively by "lack of adequate support or supervision, chaos, and poverty during his childhood and early adolescence," which prevented him from learning skills to compensate for his neuropsychological deficits. R. 2022.

The new evidence adduced during the federal habeas proceedings unquestionably could have altered the balance between mitigating and aggravating factors. Unlike the mother and aunt who testified at trial, the DHS employees were not related to Manning and therefore were unbiased. They were objective, trained professionals who had actually recorded information about Manning and his family for reasons unrelated to the prosecution. At least one of the jurors who sentenced Manning to die may well have voted for life if they had known about the evidence disclosed in the DHS records, including the extreme poverty, the lack of adequate food, clothing and heat, the nefarious influence of Manning's mother, and the image of Manning as a nine-year-old child assisting his only real parent, his mentally challenged grandmother, in such basis tasks as dialing a telephone number. This evidence would have humanized Manning and allowed the jury to view him as a whole person.

The findings of Dr. Zimmermann likewise could have altered the balance. Although the district court refused Manning's request to obtain a more definitive diagnosis of fetal alcohol effects as Dr. Zimmermann recommended (R.E. Tab G, R. 2051-52), the Supreme Court has recognized that evidence of the kind identified

by Dr. Zimmermann is sufficient to support a finding of prejudice if it is omitted from the jury's consideration. *See Williams* at 370 (evidence that defendant "*might* have mental impairments organic in origin" was factor in finding prejudice).[15]

C. The District Court's comparison of Manning's case to *Williams* and *Wiggins* is inaccurate and inapposite.

The district court held that "the potentially mitigation evidence available in Petitioner's background is not comparable to that in *Williams* and *Wiggins*." R.E. Tab D, R. 2162. In support of this conclusion, the court referred to some of the aspects of Manning's upbringing that were either positive or could be viewed in a positive light: the mentally-challenged, destitute grandmother who raised him was at least "a loving grandmother;" the social services workers, who were visiting the home because they were concerned about the children's safety, noted on some visits that Manning and his brother "were healthy, clean, and loved." *Id.* In

[15] The information provided by Dr. Zimmermann should also be taken into account in assessing the 1994 pretrial evaluation performed by the Mississippi State Hospital, which the district court mentioned in its Memorandum Opinion. R. 2163. The doctor who authored the 1994 report provided an affidavit stating:

> In the report that I completed in January 1994, we did not have information from Mr. Manning's mother about her drinking during pregnancy, records from the Department of Human Services and other information about Mr. Manning's social history. If we had been aware of information that Mr. Manning's mother drank alcohol when she was pregnant with him, I would have considered the possibility that Mr. Manning may have suffered from fetal alcohol syndrome at birth and I would have included this as a mitigating factor.

(Declaration of W. Criss Lott, Ph.D., R. 2225.)

comparing Manning's case to *Williams*, the court concluded, "Petitioner's childhood, while far from ideal, was not 'nightmarish.'" *Id.*

Manning has shown *numerous* categories of unused mitigation evidence that are exactly the kind recognized by the Supreme Court as indispensable. To require Manning to demonstrate that the violence, trauma, neglect and poverty in his background were as severe as those in the reported cases is to require too much of him. Manning is required only to show "a reasonable probability" that one juror's view of the totality of the evidence may have been altered. *See Lockett, supra. If* the deprivations and hardships in Manning's background were not as severe as those in one of the reported cases, that difference does not prevent him from meeting his burden of proof.

There is an extreme imbalance in this case between the evidence that was offered at trial and the evidence that was available but ignored. The two witnesses called by Burdine had not been prepared to discuss anything beyond the identities of Manning's other family members, the fact that Manning did not know his father, and the fact that his mother sometimes bought him toys and candy when he was younger. Not only did this testimony fail to provide anything helpful or illuminating about Manning's upbringing (*cf. Porter v. McCollum*, 130 S. Ct. 447, 449 (2009) (evidence presented at sentencing "left the jury knowing hardly anything about him other than the facts of his crimes"); it was in fact misleading

because it created the impression that Manning's life had been ordinary.[16] In this respect the mitigation case presented at trial was like that presented in *Sears v. Upton*, in which the jury was led to believe that the defendant's family relationships were "stable, loving and essentially without incident," when in fact his parents were physically abusive toward one another, he had deficits in mental cognition and reasoning, had suffered head injuries and had abused drugs and alcohol. *Porter*, 130 S. Ct. 3259, 3261-62. In fact, the deprivations at issue in *Sears* were no more severe than those affecting Manning -- evidence of abusive parents, behavior problems, deficits in mentality and impulse control, head injuries and substance abuse also exists in Manning's case in equal degrees. And unlike Manning, the defendant in *Sears* had not been shot and had not spent part of his childhood homeless.[17]

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

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

The district court's conclusion that Manning's mitigation evidence was "not comparable" to the evidence adduced in *Williams* and *Wiggins* unduly heightened the burden of proof for Manning and should be reversed.

D. The District Court erred in finding that the "double-edged" nature of some mitigation evidence supports the conclusion that Manning was not prejudiced.

Evidence of brain injury and mental impairment are unquestionably important in mitigation. *Frazier v. Huffman*, 343 F.3d 780, 794-96 (6th Cir. 2003) (counsel ineffective for failing to present evidence of brain injury and lack of impulse control that reasonably resulted from it). The district court recognized this when it reconsidered Manning's request for neuropsychological testing and ordered that the testing should occur. R. 2002. As noted above, Dr. Zimmermann did in fact find a 74% probability of brain dysfunction, borderline intellectual functioning and a probable diagnosis of alcohol-related developmental disorder. R. 2030-32. The district court discounted this evidence in its final opinion, however, by concluding that evidence of neurological dysfunction is "double-edged." R.E. Tab D, R. 2163. "Evidence of brain abnormalities can just as easily show that the defendant is a future threat to others because he has poor impulse control and an inability to learn from his mistakes.") In this context, the district court also pointed out that Manning "had received a diagnosis of Antisocial Personality Disorder from the staff of the Mississippi State Hospital, who found

him competent and sane, and he had more than a dozen arrests at the time he was charged with this crime." *Id.*

The district court cited several cases in which the Fifth Circuit concluded that no prejudice had resulted from the omission of mitigation evidence, in part because it could have been used by the prosecution in arguing for aggravation. First, all of the cases cited by the court are distinguishable.[18] Second, and more to the point, *the possibility that mitigation evidence might portray the defendant in a negative light does not detract from its value in presenting the defendant as a*

[18] In *Smith v. Quarterman*, the denial of habeas relief turned primarily on the court's finding that counsel's performance was not deficient. 515 F.3d 392, 405 (5th Cir. 2008). Additionally, an expert psychiatric opinion submitted in habeas proceedings was compiled by an expert who did not actually see the petitioner. In Manning's case, the performance of trial counsel was unquestionably deficient and, as in *Rompilla*, there is a neuropsychological report of brain dysfunction based on the expert's first-hand examination.

In *Johnson v. Cockrell*, 306 F.3d 249 (5th Cir. 2002), the Fifth Circuit also found that counsels' performance was acceptable because they had investigated and discovered the available mitigation evidence but then made a strategic decision not to use it. The Court's alternative finding of no prejudice must be considered in the context of Texas' death penalty statute, which requires jurors to find whether the defendant will be dangerous in the future. If the jury unanimously makes that finding, the defendant may be sentenced to death. In Mississippi, the jury is not required to make a finding on future danger, and there is no requirement of unanimity – Manning is entitled to habeas relief if there is a reasonable probability that only one juror would have found the omitted evidence mitigating and voted in favor of a life sentence.

In *Santellan v. Cockrell*, 271 F.3d 190 (5th Cir. 2001), the Fifth Circuit provided no information about the petitioner's mitigation evidence other than to say that it included an allegation of organic brain damage. *Id*. at 198. The case is also distinguishable on the grounds that the state court's action was reviewed "under the deferential standard of Section 2254(d)." Manning did not have an opportunity to present additional mitigating evidence on direct appeal, and he was denied a full and fair opportunity to develop this claim in state court. Thus there was a denial of due process which allows the district court and this Court to address his claim without the limitations of Section 2254(d). *See Panetti v. Quarterman*, 127 S. Ct. 2842 (2007).

whole person. Many courts have recognized this, including the Supreme Court, as the following from *Sears* demonstrates:

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

Sears v. Upton, 561 U.S. ___, 2010 WL 2571856 (slip op. at 5 - 6).

The Fifth Circuit has also recognized the value of mitigation evidence, despite its negative aspects, in a case that is closer to Manning's facts than the cases cited by the district court. In *Adams v. Quarterman*, the court stated:

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

> probability exists that, absent these errors (and even when considering the aggravating aspects of Adams's crime), a jury would have determined that "'the balance of aggravating and mitigating circumstances did not warrant death.'"

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

Other courts have reached similar conclusions. In *Thomas v. Horn*, 570 F.3d 105 (3rd Cir. 2009), the court found prejudice even though some of the petitioner's mental health history could have been used by the prosecution as evidence in aggravation:

> While we agree with the Commonwealth that some of Thomas' mental health history paints him in a negative light, we are not convinced that the death penalty is a *fait accompli* even if evidence of Thomas' mental health history were available at sentencing. Certainly, evidence that Thomas is a sadistic and dangerous sexual deviate who committed at least one prior act that bears resemblance to the crime in this case is not mitigating. Additionally, the quantity of aggravating evidence that the jury already did consider was significant. But Thomas' mental health history acts as a common thread that ties all this evidence together. A single juror may well have believed that this unifying factor explained Thomas' horrific actions in a way that lowered his culpability and thereby diminished the justification for imposing the death penalty.

Thomas v. Horn, 570 F.3d at 129.

In *Johnson v. Mitchell*, 585 F.3d 923 (6th Cir. 2009), the court found prejudice because in light of the new mitigating evidence, "a drastically different portrait of the petitioner emerge[d]." *Id.* at 945. The new evidence showed that the petitioner "endured hardships and traumatic experiences" and developed a personality disorder that helped explain aspects of his conduct. There was

evidence of cocaine abuse and a psychological report found that the petitioner could react to situations in emotional outbursts. *Id.* The court held that it was prejudicial for defense counsel not to present evidence of petitioner's personality disorder:

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

Johnson, 585 F.3d at 945. *See also Correll v. Ryan*, 539 F.3d 938, 955 (9th Cir. 2008) (finding prejudice even though mitigating evidence would have opened the door to "damaging rebuttal" evidence, including escapes from mental health facilities and hostage taking situations; evidence could "have been used to support Correll's claims of dysfunctional upbringing and continuing mental disorder.")

Virtually any evidence can be taken as "either dehumanizing or mitigating, depending on the context and history given for each cited fact." *Id.* The jury had already determined that he had murdered Jon Steckler and Tiffany Miller. There is little possibility that their negative perception of Petitioner would have been significantly worsened if they had also known of Petitioner's history of poverty,

neglect and violence. Petitioner's chances of obtaining a life sentence could not have been reduced by evidence that he was damaged by forces beyond his control.

One of the cases cited by the district court warrants further discussion. In *Kitchens v. Johnson*, 190 F.3d 698 (5th Cir. 1999), the court found that counsel's performance was not deficient – he had investigated and discovered the available mitigating evidence and made a sound strategic decision not to use it. Counsel elected not to use the evidence for fear that it would open the door to other evidence, such as petitioner's extensive use of drugs. *Id.* at 703. The court found there was no prejudice in counsels' decision not to use the evidence, because of the risk that the prosecution "would have countered with evidence of other violent acts." *Id*.

In Manning's case there is no similar justification for withholding mitigation evidence. The jury heard testimony in the guilt phase of the case about other bad acts, such as Manning's alleged beatings of Paula Hathorn. In Manning's case, the "door" to other evidence was already opened. The failure of Manning's mitigation defense is that it did not include *additional* evidence needed to present him as a whole person, and left the jury without an explanation for the factors that led to his problems. Dr. Zimmermann's testimony regarding fetal alcohol effects could have provided this kind of explanation. As his affidavit states, "Mr. Manning's history of impulsive behavior, poor judgment and involvement with the criminal justice

system, deficits in executive function, poor academic history, problems with reading and arithmetic, and problems with memory are some of the problems associated with pre-natal exposure to alcohol." R. 2031.

Willie Manning is prejudiced within the meaning of *Strickland* if confidence in the verdict is undermined by trial counsel's errors. The district court has already recognized that trial counsel failed to conduct *any* reasonable investigation of the available mitigation evidence. R.E. Tab D, R. 2158. The available evidence is extensive. In light of the available evidence and trial counsel's failures, "there is a reasonable probability at least one juror reasonably could have determined that death was not an appropriate sentence." *Neal v. Puckett*, 286 F.3d 230, 241 (5th Cir. 2002).

The district court was wrong to conclude that Manning had not been prejudiced by trial counsel's ineffective assistance at the sentencing phase of his trial. This Court should reverse that finding and should grant the relief requested in the Petition for Writ of Habeas Corpus. In the alternative, the Court should remand the case to the district court with instructions to allow funding for assessment by a specialist in the diagnosis of fetal alcohol effects, and for further investigation by a specialist in social work. R.E. Tab F, R. 1884-85; R.E. Tab G, R. 2051-52.

E. AEDPA Does Not Restrict this Court's Ability to Grant Relief on this Ground for Relief

The limitations of 28 U.S.C. § 2254(d) do not bar this Court from granting relief because the state court unreasonably applied *Strickland v. Washington*, 466 U.S. 668 (1984). The state court did not afford Manning a meaningful opportunity to present this ground for relief; instead, it deviated from long-standing practice to refuse him an opportunity to develop evidence in support of this ground.

Manning first raised this ground on direct appeal because Burdine's performance at the penalty phase was abysmal. Williamson continued to represent Manning, but Clive Stafford Smith succeeded Burdine. Ordinarily, claims of ineffective assistance of counsel are not raised on direct appeal, especially if the defendant continues to be represented by at least one of his trial attorneys, as was the case here. *Lynch v. State*, 951 So. 2d 549, 551-52 (Miss. 2004); *Archer v. State*, 986 So. 2d 951 (Miss. 2008) (finding it "absolutely inappropriate" for trial counsel to raise an ineffectiveness claim on direct appeal). In addition, grounds of ineffective assistance of counsel are typically not raised on direct appeal when they require evidence beyond the trial record. *Havard v. State*, 928 So. 2d 771, 784 (Miss. 2006); *Dunn v. State*, 693 So. 2d 1333, 1339-40 (Miss. 1997); *Hymes v. State* 703 So.2d 258 (Miss. 1997) ("even where different counsel appears on direct appeal, a post conviction relief proceeding is the usual avenue for ineffective assistance claims"); *Vielee v. State*, 653 So. 2d 920 (Miss. 1995); *Read v. State*,

430 So. 2d 832 (Miss. 1983). Moreover, Stafford Smith only raised the challenge to Burdine's penalty phase performance because he understood that under state law, relief should have been denied without prejudice if the Court concluded that the claim required the presentation of extra-record evidence. *See* PCR Ex. 46 (filed in connection with Petitioner's Rebuttal).

Contrary to this well-settled law, the Mississippi Supreme Court denied relief with prejudice. It found insufficient evidence in the record to support Manning's argument that Burdine had failed to interview promising mitigation witnesses:

> Manning does not tell us in his brief what other witnesses should have been called or what mitigation they might have been able to offer. Further, there is nothing in the record to suggest that Burdine failed to contact these other witnesses about whom Williamson wrote to him. The reason for not calling these witnesses simply cannot be gleaned from the record. Absent a record, Manning has not shown deficient performance by Burdine.

Manning I, 726 So. 2d at 1170, ¶ 39. The state court concluded "Manning has not shown any resulting prejudice sufficient to meet the stringent standard set out in *Strickland*. This claim is meritless." *Id.* at 1171 ¶ 44.[19]

[19] The Court also held that Burdine's closing argument, "when read as a whole," was "not incoherent." *Id.* at 1171, ¶ 44. The court compared Burdine's closing argument to the arguments at issue in two cases cited in Petitioner's brief, and held that "Burdine did a considerably better job than either of the defense attorneys in the cases cited." *Id.* at 1170-71, ¶¶ 42-43.

In post-conviction proceedings, the state courts denied Manning funding to develop this ground for relief. R. 1730-41, 1820-23, 1859. Nevertheless, Manning submitted some evidence bolstered by reports based on preliminary reviews of some records from Dr. Mooers and Dr. Zimmermann. The Mississippi Supreme Court acknowledged that there was mitigation evidence that apparently went unused, but it limited its consideration to facts that Manning had argued on direct appeal:

> The record indicates there were witnesses who had knowledge of Manning's family and were willing to cooperate with defense counsel. Specifically, there are letters from Mark Williamson (defense counsel) to Richard Burdine (co-counsel) suggesting witnesses for the mitigation portion of the penalty phase of trial. Those witnesses were apparently never contacted. Furthermore, Manning includes affidavits from an attorney in Louisiana and an investigator which declare the existence of valuable mitigating evidence that was never presented at trial.

Manning II, 929 So. 2d at 905 ¶ 22.

The court did not mention the Affidavits of Dr. Mooers or Dr. Zimmermann; nor did it address the concerns about alcoholism, poverty, violence or head injuries raised in the affidavits.

The state supreme court held that "failure to present a case in mitigation during the sentencing phase of a capital trial is not, per se, ineffective assistance of counsel." *Id.* Second, the court concluded that Burdine "*did* present a case in

mitigation for the jury to consider." *Id.* at ¶ 23 (emphasis added). Third, the court noted that Manning's claim of ineffective assistance during the sentencing phase of his case had already been raised on direct appeal and was procedurally barred and that, at any rate, Manning had not shown prejudice "related to trial counsel's failure to call other witnesses." *Id.* The state court nowhere discussed *Williams v. Taylor*, 529 U.S. 362 (2000) or *Wiggins v. Smith*, 539 U.S. 510, 523 (2003) or the need for counsel to conduct a meaningful investigation for mitigating evidence.

By reaching the merits of this claim on direct appeal, at a time when Manning had not had an opportunity to develop additional facts, and then limiting itself on post-conviction review to facts contained in the appellate record, the court departed from its own precedent and deprived Manning of adequate review of this claim. *Read v. State*, 430 So. 2d 832, 841 (Miss. 1983) (if court finds insufficient evidence of ineffective assistance of counsel on direct appeal, it must resolve appeal "without prejudice to the defendant's right to raise the issue of ineffective assistance of counsel through appropriate post-conviction proceedings."). This arbitrary procedure violated federal law as well. *Kimmelman v. Morrison*, 477 U.S. 365 (1986) (state court must provide procedural mechanism for adequate factual development of claims of counsel's ineffectiveness); *Brecheen v. Reynolds*, 41 F.3d 1343, 1363-64 (10th Cir. 1994) ("This need to give a meaningful opportunity to assess and develop a claim of ineffective assistance of counsel,

coupled with the fact that such claims may require an opportunity to develop additional facts, compel the conclusion that ineffective assistance claims may be brought for the first time collaterally." (quoting *Osborn v. Shillinger*, 861 F.2d 612, 622 (10th Cir. 1988)). Because the state court denied Manning due process and a meaningful opportunity to present this ground for relief, the state court unreasonably applied *Strickland*. *See Panetti v. Quarterman*, 127 S. Ct. 2842 (2007).

Further, the question whether trial counsel was reasonable in limiting his investigation of mitigation evidence, and the question whether a defendant was prejudiced by that limitation, must be determined on the basis of "the totality of the available mitigation evidence -- both that adduced at trial, and the evidence adduced in the habeas proceeding -- in reweighing it against the evidence in aggravation." *Williams v. Taylor*, 529 U.S. 362, 397 (2000). The state court's failure to consider any evidence presented in post-conviction proceedings and thus consider the totality of available evidence is another aspect of its unreasonable application of *Strickland*.

The state supreme court also rejected this ground for relief because it is not *per se* ineffective not to present a case in mitigation, and Burdine presented a case in mitigation. *Manning II*, 929 So. 2d at 905. The state court, however, ignored *Strickland*'s emphasis that any decision of counsel must be based on a reasonable

investigation, and the undisputed evidence was that Burdine failed to conduct such an investigation and even ignored significant leads. *See also Wiggins*, *supra*.

On direct appeal, the state court noted that additional character witnesses would not have tipped the balance of mitigating and aggravating factors in Manning's favor. *Manning I*, 726 So. 2d at 1170; *see also Manning II*, 929 So. 2d at 905. This conclusion involves an unreasonable application of *Strickland*. As noted, Manning did not have the opportunity to present evidence on direct appeal. Moreover, the conclusion rests entirely on speculation; without knowing what witnesses would say, the state court had no way of determining if at least one juror would have reached a different decision. In addition, the new evidence suggested that expert evidence and other records would have been a crucial part of a case in mitigation. An adequate penalty phase presentation would have involved more than character evidence.

For these reasons, this Court should find that the state court's treatment of this claim was objectively unreasonable and find that Manning is entitled to habeas corpus relief.

CONCLUSION

This Court should grant habeas corpus relief in this case because of the prosecutor's racially discriminatory exercise of peremptory challenges. The Court should also grant relief because Manning was prejudiced by his counsels' failure to

present readily available mitigation evidence at sentencing. In the alternative, the Court should remand the case to the district court with instructions to allow funding for a social worker with expertise in mitigation investigation, and for the evaluation of Petitioner by an expert in the diagnosis of fetal alcohol syndrome and effects.

Respectfully submitted

WILLIE JEROME MANNING

By: s/ David P. Voisin
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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C) and 5th Cir. R. 32.3, the undersigned certifies that this brief complies with the type-volume limitations of 5th Cir. R. 32.2. The foregoing exclusive of this Certificate, the Certificate of Service, and the tables of contents and authorities, contains 14,304 words. The document was created with Microsoft Word 97-2003. It is printed using Times New Roman font in 14 point variable space font and 12 point variable space font in the footnotes.

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

s/ David P. Voisin
DAVID P. VOISIN

CERTIFICATE OF SERVICE

I, David P. Voisin, hereby certify that a true and correct copy of the foregoing has been served upon the following, through the court's electronic filing system, on this the 28th day of July, 2010:

Marvin L. White, Jr.
Assistant Attorney General
P.O. Box 220
Jackson, MS 39205-0220

__s/David P. Voisin_____