IN THE SUPREME COURT OF MISSISSIPPI
NO. 2023-DR-01076

WILLIE JEROME MANNING

Petitioner

v.

STATE OF MISSISSIPPI

Respondent

MOTION FOR LEAVE TO FILE SUCCESSIVE PETITION FOR POST-CONVICTION RELIEF

DAVID P. VOISIN
P.O. Box 804
Hammond, LA 70404
(601) 949-9486
david@dvoisinlaw.com

KRISSY C. NOBILE
MISS. OFFICE OF CAPITAL POST-CONVICTION COUNSEL
239 North Lamar Street, Suite 404
Jackson, MS 39201
(601) 359-5733
knobile@pcc.state.ms.us

ROBERT S. MINK, SR.
5760 I-55 North, Suite 300
Jackson, Mississippi 39211
(601) 351-5519
robmink@holcombgroup.com

Counsel for Petitioner Willie Jerome Manning

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INTRODUCTION

Willie Manning is sentenced to die for a crime he did not commit. Newly discovered evidence shows that Willie Manning was wrongly convicted of the murders of two Mississippi State students on the basis of false evidence. Earl Jordan testified at trial that Manning "confessed" to him. Jordan lied. Earl Jordan has now provided a sworn affidavit admitting: "[m]y trial testimony was not true. My statements to the sheriff about Manning's confession were also not true. Manning never told me that he killed anyone." Ex. 1, ¶ 3 (affidavit of Earl Jordan). Jordan added that he lied after receiving an implicit assurance from the sheriff that he would not be charged as a habitual offender. *Id.* ¶ 5.

Frank Parker testified that he overheard Manning make incriminating statements about disposing of the murder weapon when talking in jail to Henry Richardson, aka "Miami." Parker lied. Richardson has provided an affidavit stating that Manning never made any admission in his presence *and* that he made that clear to law enforcement. Ex. 2, ¶¶ 4-5 (affidavit of Henry Richardson).[1] Neither of these affidavits was previously available.

This is not the first time that this Court has seen evidence of the State securing a conviction of Willie Manning based on untruthful testimony of witnesses with every incentive to cut a deal with the State, even if that meant testifying falsely. In another

[1] Petitioner below sets forth additional reasons demonstrating Parker's propensity to lie.

case involving Manning, this Court granted post-conviction relief and vacated his convictions for murdering two elderly women in Starkville. There, the Court found that the State withheld information that would have demonstrated that its star witness lied to further his own interest and to ensure that his girlfriend was not charged with a crime. *Manning v. State,* 158 So. 3d 302 (Miss. 2015). As in the case of the students, law enforcement had difficulty finding someone to arrest and turned to desperate people willing to testify falsely to better their own position.

No doubt there was great pressure to find someone accountable for the shocking murders of the students and elderly women. But it is now apparent that the State's methods for attempting to solve the crimes was fundamentally flawed. It concocted a case based on the dubious testimony of highly incentivized witnesses and fanciful theories.

A study to determine factors leading to erroneous conviction concluded that false testimony or accusations were the single largest factor in wrongful homicide convictions between 1989 and 2012, contributing to 66% of the cases studied. Samuel R. Gross & Michael Shaffer, National Registry of Exonerations, Exonerations in the United States, 1989-2012 (2012), at 54.[2] Overall, perjury contributed to 52% of wrongful convictions. *Id.*[3] A study by Northwestern University School of Law's Center on Wrongful Convictions found that 45.9% of all wrongful capital convictions in the

[2]https://www.law.umich.edu/special/exoneration/Documents/exonerations_us_1989_2012_full_report.pdf

[3] The Registry's findings confirm an earlier, pre-DNA-era study finding approximately 33% of 350 erroneous convictions studied were due to "perjury by prosecution witnesses." Hugo Adam Bedau & Michael Radelet, Miscarriages of Justice in Potentially Capital Cases, 40 Stan. L. Rev. 21, 60-61 n.184 (1987).

United States resulted from the false testimony of an informant, making "snitches the leading cause of wrongful convictions in U.S. capital cases."[4]

In addition to the affidavits of Jordan and Richardson, additional, previously unavailable evidence undermines aspects of the prosecution's case, either because it would have impeached key witnesses or undermined the State's timeline of events. For instance, Paula Hathorn has provided new evidence regarding the consideration she received for her cooperation with law enforcement and about Manning's whereabouts the day after the murders. Ex. 3.

Further, William Tobin, who provided an expert affidavit regarding bullet comparison in Manning's 2013 successive petition, has provided a new affidavit summarizing recent scientific developments that remove all confidence in the reliability of such comparisons. Ex. 4.

Though this new evidence independently demonstrates the unreliability of Manning's convictions, it does not stand alone. In prior efforts to obtain relief, he documented additional facts demonstrating significant flaws with the State's case, and even turned up other evidence of the State relying on the testimony of dubious witnesses and suppressing facts undermining the credibility of those witnesses. Any accounting of whether Manning is entitled to post-conviction relief must factor in the cumulative effect of that evidence.

[4] Rob Warden, Center on Wrongful Convictions, *The Snitch System: How Snitch Testimony Sent Randy Steidl & Other Innocent Americans to Death Row* 3 (2004), http://www.innocentproject.org/docs/SnitchSystemBooklet.pdf

SUMMARY OF PRIOR PROCEEDINGS

Manning was convicted of the murders of Jon Steckler and Tiffany Miller and sentenced to death in 1994. This Court affirmed the judgment below. *Manning v. State*, 726 So. 2d 1152 (Miss. 1998). Certiorari was denied on April 5, 1999. *Manning v. Mississippi,* 526 U.S. 1056 (1999).

Twice the Circuit Court of Oktibbeha County appointed post-conviction counsel, and twice, those attorneys moved to withdraw in large part because they were unfamiliar with state post-conviction and federal habeas corpus practice. Ex. 5 (pleadings and orders related to efforts to obtain counsel). During that period, a highly experienced lawyer sought appointment. The circuit court ignored that attorney's motion.

Because of the inability to secure competent counsel, no state court petition was filed prior to April 5, 1999, the date on which the statute of limitations for federal habeas corpus cases expired, nor did the appointed attorneys even file a skeletal federal petition to toll the limitations period.

Ultimately, after the creation of the Mississippi Office of Capital Post-Conviction Counsel, Manning obtained lead counsel who met the qualifications of the prior version of Rule 22(d), MRAP. The former director of OCPC also contracted with Robert S. Mink to serve as co-counsel. Respondent, however, successfully moved to have Mr. Mink disqualified because he did not meet the stringent requirements of former Rule 22(d), even though he had felony appellate experience and had been

appointed counsel in capital trial cases. Ex. 6. Manning filed his PCR petition on October 8, 2001.[5]

Initially, this Court unanimously granted post-conviction relief and vacated Manning's convictions due to the intervening decision in *Weatherspoon v. State*, 732 So. 2d 158 (Miss. 1999) (holding that witnesses should not be allowed to testify about their offers to take polygraph examinations).[6] After that, the Mississippi Supreme Court granted the State's motion for rehearing. The Court then also remanded the case to the Circuit Court of Oktibbeha County on a separate issue and for a hearing to determine whether the State suppressed surreptitiously recorded telephone conversations between Manning and Paula Hathorn, his former girlfriend.

At the behest of law enforcement, Hathorn agreed for her conversations with Manning to be recorded. On the recordings, Hathorn made a number of statements at odds with her trial testimony as she attempted in vain to induce Manning to incriminate himself. The lower court denied relief. This Court affirmed the decision of the lower court. As for the *Weatherspoon* issue, the Court held for the first time that it would apply the nonretroactivity principles of *Teague v. Lane,* 489 U.S. 288 (1989), to its own new decisions.[7] *Manning v. State,* 929 So. 2d 885 (Miss. 2006) ("*Manning II*").

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[5] On February 2, 2001, Manning filed a pro se motion for appointment of counsel and had to file his petition by October, even though one of his attorneys was removed from the case and even though the circuit court denied all requests for additional expert and investigative assistance.

[6] This Court found that pending discovery motions, including a motion to inspect the physical evidence, were moot. Order on Motion #2003-3019, *Manning v. State,* No. 2001-DR-00230-SCT (entered May 27, 2004).

[7] Compare *Danforth v. Minnesota*, 552 U.S. 264, 282 (2008) (States are not bound to apply *Teague* retroactivity analysis in their post-conviction jurisprudence).

Manning then sought federal habeas corpus relief. The District Court denied relief on the merits of the claims raised but granted permission to appeal on two issues: the discriminatory use of peremptory strikes and trial counsel's failure to develop and present mitigating evidence. 695 F. Supp. 2d 323 (N.D. Miss. 2009).

On appeal, the Fifth Circuit dismissed the petition, finding that Manning's federal habeas petition was filed too late and that he was not entitled to equitable tolling. The Fifth Circuit blamed Manning for the failure of two different court-appointed lawyers to file a timely state court petition to toll the limitations period, finding that he could have retained his own lawyer or filed his own petition. *Manning v. Epps,* 688 F.3d 177, 187 (5th Cir. 2012), *cert. denied,* 568 U.S. 1251 (2013).

In March 2013, Manning filed a successive petition for post-conviction relief, including a request for DNA testing and other forensic analysis. This Court denied relief. *Manning v. State,* 2013 Miss. LEXIS 186 (Miss. Apr. 25, 2013). This Court also scheduled Manning's execution.

After receiving letters from the Department of Justice admitting the scientific unreliability of the hair *and* ballistics testimony at Manning's trial, Manning filed another post-conviction petition on May 6, 2013. On May 7, 2013, the Mississippi Supreme Court stayed Manning's execution. *Manning v. State,* 112 So. 3d 1082 (Miss. 2013). On July 23, 2013, the Court granted Manning's second motion for the limited purpose of allowing him to proceed in circuit court with his request for DNA testing and fingerprint comparison. *Manning v. State,* 119 So. 3d 293 (Miss. 2013).

Manning filed his PCR petition with the Circuit Court on October 11, 2013. The lab selected for testing was unable to develop mitochondrial DNA profiles on hair evidence used against Manning at trial because the samples were either too small or degraded. The lower court denied a motion to transfer the hair fragments to a lab specializing in developing profiles from degraded evidence.[8] This Court affirmed the ruling of the lower court. *Manning v. State,* 2022 Miss. LEXIS 175 (Miss. June 30, 2022). A petition for a writ of certiorari is pending.

STATEMENT OF FACTS

Manning first reviews law enforcement's frustrating inability to make an arrest soon after the murders and the shaky evidence it compiled to make a case against Manning. Manning also reviews the weaknesses of the State's case that were apparent even at the time of the trial. Finally, he describes the recently discovered evidence and examines it in conjunction with evidence obtained in earlier post-conviction proceedings. The net result shows that there is no longer any reliable evidence linking Manning to the murders.

A. How the State Built Its Case Against Manning.

Tiffany Miller and Jon Steckler were found murdered in the early morning hours of December 11, 1992, on Pat Station Road in Starkville, MS. Miller's Toyota

[8] Items designated Q32 through Q52 by the Mississippi Crime Lab were sweepings and debris removed from Miller's car. *Id.* Q43 and Q44 were of primary interest to Manning because these items contained several hair fragments that were admitted at trial as evidence that Manning had been in Miller's car. (State's Ex. 49 and Ex. 50; Trial T. 1041-42, 1044-45).

As noted, the DOJ has now admitted that the FBI's hair analysis testimony at Manning's trial was unreliable and false.

MR2 was found double-parked in the parking lot of an apartment building on Old Mayhew Road. Miller and Steckler died of gunshot wounds, and Steckler had been run over by someone driving Miller's car. His blood was found on the underside of the car.

Sheriff Dolph Bryan believed that the murders were linked to a car break-in occurring earlier in the parking lot outside of a fraternity house on the Mississippi State University campus because a brass restroom token[9] was found near the murder victims, and John Wise, the owner of the car that was broken into, said he had a token in his car. T. 852. Steckler was a member of that fraternity, and he was seen there with Miller around approximately 12:50 a.m. T. 607. Wise informed the police of other items missing from his car, including a leather jacket, a portable CD player, a silver huggie, and about $10 in change. T. 633. The sheriff speculated that Miller and Steckler came upon someone breaking into Wise's car, and the perpetrator then made Miller and Steckler get in Miller's car with him or her. While Miller sat on the culprit's lap, Steckler drove the car as ordered to Pat Station Road, where they exited the car only to be shot. The murderer then drove the car to the Old Mayhew Apartments, where he or she abandoned the car.

The sheriff acknowledged that he had no actual evidence *at all* to support his kidnapping theory. T. 849. He also had no evidence about how the killer left the Old Mayhew Apartments. T. 863.

[9] At the time of the murders, certain businesses in Mississippi used tokens on their coin-operated restrooms. T. 941.

Law enforcement had no leads, but because he was convinced there was a link between the murders and the car burglary, Sheriff Bryan compiled a list of (only) Black men who were suspected of engaging in car break-ins. T. 811-12, 841-42. The list of possible suspects included Earl Jordan, who had been arrested for burglary on the Mississippi State campus. The sheriff decided to offer a reward for anyone coming forward with information relevant to the case and prepared a Crime Stoppers video illustrating his theory of the case. T. 833.

According to the sheriff, Manning did not become a primary suspect until April 1993 after John Wise's silver huggie was found near Industrial Park Road approximately five miles from where Manning lived with his mother. T. 882; *Manning I,* 726 So. 2d at 1165 (¶ 10). The sheriff did not explain why the discovery of the huggie (which did not belong to Miller or Steckler) would have made Manning a suspect—since there is no evidence as to how long the huggie had been there *and* because most of Starkville lies within a five-mile radius of Industrial Park Road. As the sheriff conceded, "[t]here was nothing on the huggie that would link Willie Jerome Manning to the huggie." T. 883.

Moreover, there was no other physical evidence directly linking Manning to either the car burglary or murder. Deputy Elmore was careful to preserve the bullet casings for prints. T. 776. There were none. There were none on the token. T. 855.

There were footprints at the scene, but they did not match any footwear found in Manning's house. T. 858-59. No gun was ever found linking anyone to the crime—

let alone linking Manning to the crime. T. 866.[10] There is also no proof that the items supposedly missing from the victims – two watches, a class ring, and perhaps a necklace – were actually stolen.[11] They were never recovered by police or conclusively linked to Manning. T. 866-67.[12] At most, witnesses gave confusing and conflicting descriptions of *similar* items they had seen, including a class ring linked to someone other than Manning.[13]

With no physical evidence or eyewitnesses, the State turned to jailhouse informants or others desperate to receive favorable treatment. The State's key witness, Earl Jordan, claimed that Manning confessed to him. According to Jordan, Manning said he committed the crime with Jessie Lawrence. Manning supposedly told Jordan that he and Lawrence forced the victims at gunpoint to get in Miller's MR2, and that Manning and Lawrence rode with them to the murder scene. According to Jordan:

> Uh, he (Manning) told me that him and Jessie Lawrence was, uh, wind up out there at Mississippi State some kind

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[10] The State checked on every .380 transferred in the area in over a year, sending them all to the FBI lab for comparison. T. 831.

[11] Steckler wore a gold high school ring from Cathedral High in Natchez, and a watch with a leather band, and little clocks decorating the main face. T. 609. Paula Hathorn had listed all the things that Manning had supposedly stolen, and nowhere on the list was the class ring that the prosecution alleged that he stole from Steckler. T. 714-15.

[12] Nothing in the ashes of burned material at Manning's house linked him to the crime. T. 913.

[13] For example, Carl Rambus gave a statement early on to the authorities about another person who had been seen in possession of a ring matching the description of Jon Steckler's class ring, which was white gold with a green stone. T. 1318, 1324-25. Barbara Duck and Ginger Ryals claimed to have seen Manning with a class ring and a watch that *looked like* Steckler's. T. 1053-54, 1087-88. Even leaping to the conclusion that they were the same ring and watch worn by Steckler, Duck wrongly identified the ring as yellow gold with a blue or turquoise stone, T. 1061-63, and her testimony is wholly refuted by that of Tommy Cotton. Also, it was night when Ryals supposedly saw Manning with the items, and she was unable to identify what color stone was in the class ring she saw—and, in any event, Ryals described a ring that was yellow gold. T. 1087, 1093-95.

> of way. He was fixin' to, uh, get ready to go into a car when, uh, Jessie told him to watch out. He, uh - dat when he looked up and he saw the two students. He went over to the stu - two, pulled the gun and, uh, he hollered for Jessie to come on, and, uh, that, uh, he, uh, told the student to get into the car, and, uh, him and Jessie got into the car; they drove off; uh, he didn't say what road; uh, when they got to wherever it was that, uh, he den ask the student to get out the car and, uh, he asked Jessie what - what they going to do with them, and Jessie told him that we got to get rid of 'em, and uh, say he suggested that he make 'em walk down the road, but, uh, Jessie told him that, uh, he had to get rid of 'em. And, uh, when, uh, dis was taking place I guess Jessie supposed to been going to the - going through the car, and, uh, and - and, uh, they was discussing what they was going to do with it still, and that, uh, Jessie walked - walked away from the car and he asked Jessie where was he going, and Jessie, uh, told him just do it, and he said that when he pulled up the gun and shot them.

T. 1140; *see also* Ex. 6 (statements of Earl Jordan to law enforcement).

Jordan's account was an implausible account given that Lawrence was incarcerated in Alabama at the time, and that it was impossible to fit four people into the two-seater MR2. Moreover, Jordan had initially given an earlier statement implicating Johnny Lowery and Anthony Reed, who were two early suspects.[14] Jordan told the police that he had seen them in the victim's car with Tiffany. T. 1164-65. In addition, Jordan, who could have been indicted as a habitual offender, found his pending charge for burglary reduced to looting shortly after giving his statement to law enforcement.

Jordan admitted that he was previously convicted of two burglaries and that he was awaiting trial on looting charges. T. 1134. Jordan, however, tried to assure

[14] Earl Jordan had said that he "believe[d] that this [Tiffany] is the girl that I would see with Anthony [Reed]." T. 1188.

the jury that he really had not wanted to become involved, but that someone else who also heard Manning confess reported the incident to the sheriff, and the sheriff then summoned Jordan. T. 1141. Significantly, there is no record of any statement taken from anyone else about this "confession." Jordan also denied that he had any kind of a deal with the prosecutor's office. T. 1154.

A timeline as to Jordan's false testimony against Manning is as follows:

Dec. 10-11, 1992	Jon Steckler and Tiffany Miller are murdered.
Dec. 30, 1992	Jordan is arrested for the burglarizing a MSU fraternity house. Jordan had two prior felony convictions for burglary in 1987 and 1989 and could be indicated as a habitual offender.
Jan. 5, 1993	Appointment order appointing counsel for Jordan.
May 20, 1993	Willie Manning is arrested for the murders of Miller and Steckler.
May 21, 1993	Jordan signs a statement for Sheriff Bryan saying Manning confessed to the murders of Miller and Steckler while in jail.
July 1993	Jordan is indicted for looting—but *not* indicted as a habitual offender. Jordan could have been indicted in January 1993 during grand jury term, but he was not indicted then and not indicted until after his statement to Sheriff Bryan.
November/December 1994 and after	Jordan testifies against Manning. Jordan's looting trial is continued until after he testifies against Manning. Jordan eventually gets three years, but he gets credit for time served and is then released.

In closing argument, the prosecutor argued that Earl Jordan did not gain anything from testifying. If anything, "it cost him, and it cost him a whole lot more

than any benefit he will get." T. 1542. The prosecutor, who declared that Jordan is "credible," T. 1544, also argued that Jordan was not seeking any benefit. T. 1604.[15]

Frank Parker was another desperate jailhouse informant. He faced criminal charges in Texas. According to Parker, he was on the run, happened to be in Starkville, and decided to turn himself in. T. 1117. On May 12, 1993, Parker shared a cell in the Oktibbeha County Jail with Willie Manning and Henry "Miami" Richardson. Two days later, Parker supposedly overheard a conversation between Manning and Richardson about the student murders. Specifically, Parker testified that Manning mentioned that he sold the gun that he used to commit the crime on the street. T. 1120; *see also* Ex. 8 (statement of Frank Parker).

Parker admitted at trial that at one point he had a burglary charge lodged against him. T. 1116. However, he added that he "had written the governor of Texas and the sheriff asking them to drop all charges against me and they did." Parker denied receiving any consideration for his testimony and reiterated that the charges against him in Texas had been dropped. T. 1121.

On cross-examination, Parker added details about the process by which he supposedly secured the dismissal of his charges in Texas. He testified that he wrote about having his charges dismissed in June or July 1993 and then again in August 1993. T. 1125. According to Parker, someone from Texas supposedly wrote to Sheriff Dolph Bryan claiming that all charges against Parker had been dismissed, and that

[15] The State attempted to salvage Jordan's credibility by eliciting a comment that he volunteered to take a polygraph. T. 1182. As this Court later held, such testimony is unreliable and must not be admitted. *Weatherspoon, supra.*

when one of the jailers submitted his name to NCIC, his status came back "completely clear." T. 1126. Parker added that, "I just know that my charges were dismissed by the governor and the sheriff of Frio County." T. 1129. Parker also said that he had almost wished that he had not said anything to Sheriff Bryan because he was required to stay in the Oktibbeha County jail for about sixteen months even though he had no charges pending against him. T. 1130. Parker also tried to minimize the seriousness of the Texas charges, stating that if the charges had not been dropped, he would only have had to serve "approximately six weeks in a drug rehab." T. 1132.

The State also relied on Paula Hathorn, Manning's girlfriend in December 1992. In fact, she became the person who was "number one on [Sheriff Bryan's] list" for receiving a large part of the $25,000 reward for solving this crime. T. 886. Sheriff Bryan explained how Hathorn became a witness, testifying that on or about April 27, 1993, he saw Hathorn around the courthouse and asked to see her. When they eventually met, the sheriff asked her whether Willie Manning had a leather jacket. Paula responded that Manning had given her a jacket. T. 687. She provided the sheriff with the jacket, and John Wise claimed that it was similar to his leather jacket. T. 641.

The sheriff also testified that he asked Hathorn if Manning had a gun, and she told the sheriff that she had seen him shooting into a tree. T. 703. She admitted, however, that she had originally said that she had *not* seen Manning shoot into the tree. T. 695-96; Ex. 9 (Hathorn statement). The prosecution presented testimony that the bullets allegedly removed from the tree near Manning's house were

consistent with the bullets found in the victims. T. 1078-79. Significantly, as the sheriff acknowledged, Hathorn provided the only link between Manning and a firearm that may have been used in the shooting. T. 896.

Hathorn testified that she saw Manning on December 9, 1992. At that time, they lived together. According to Hathorn, Manning was supposed to be going to Jackson. She then stated that she did not see him again until December 14, 1992, and that when he returned, he no longer had a gun that he allegedly possessed before going to Jackson. T. 686. In contrast to Hathorn, the defense presented evidence that Manning returned home after being at the 2500 Club on the night of the crimes. T. 1480 (Lindell Grayer testified that he picked Manning up at his home on the morning of December 11).

Hathorn also testified that when Manning returned from Jackson, he had a carload of clothing, jewelry, electronics, and other materials. Although one inference that could be drawn from Hathorn's testimony was that Manning was in possession of stolen goods, none of those things was positively linked to the items taken from John Wise or the murder victims.

Hathorn denied receiving any deals or consideration for her testimony even though she had a number of charges pending against her. T. 687.[16] The sheriff, in turn, denied that he had the authority to enter into deals with witnesses. T. 838. Nevertheless, the sheriff testified that he would recommend that Hathorn receive a

[16] As discussed below, Hathorn testified falsely about the number of charges pending against her, made false statements blaming Manning's trial attorney for her legal problems, and admitted that the sheriff told her that she did not have to worry about the pending charges. *See* also Petition for Post-Conviction Relief, pages 62-70 (filed October 8, 2001).

monetary reward for her cooperation. T. 885. Previously, the sheriff described her as untrustworthy: "you couldn't believe a word Paula said." T. 887.

The State also relied on some forensic evidence. John Lewoczko of the FBI testified that bullets taken from a tree in Manning's yard were fired by the same gun used to kill the victims, "to the exclusion of every other firearm – every other barrel, in the world . . . . It's like fingerprints are to you." T. 1092. At trial, the defense did not have an expert but elicited a concession from the sheriff that there was no definitive link between Manning and the gun used because "[o]nce a gun gets in the street in the street hoodlum's hands, it can pass many, many times." T. 902.

The State also relied on expert testimony regarding hairs found in Miller's car. Chester Blythe, an expert from the F.B.I., testified at trial that the hair found in Miller's car and collected as samples Q43 and Q44, though not sufficient for comparison purposes, originated from an African-American. T. 1048. The prosecutor repeatedly stressed the importance of this hair evidence in his summation:

> [O]ut of all the people that could have been a burglar of John Wise's car, **how many of them could leave hair fragments in the car**, **hair fragments that came from a member of the African-American race** because that's what they find when they vacuum the sweepings of the car, that's what they find in both significantly the passenger's seat and the driver's seat, just like it would be if the man rode out there as a passenger and came back as a driver. . . . **How many people, ladies and gentlemen, who could leave those fragments**, how many of those also left his home on the morning of December 9th. . . . How many people could have committed this crime, ladies and gentlemen, that **could have left those fragments**, that left their home carrying a gun and some gloves . . . . **How many people could leave those hair fragments**, how many people left their house that morning with the gun and the gloves . . . . **How many people could leave those hair fragments**, left the house with the gun and the gloves, was trying to sell a ring and a watch like Jon Steckler's, and also had the jacket from

> John Wise's car . . . . **How many people could leave the fragments**, left his house with gun and gloves, were trying to sell rings and watches like Jon Steckler's, had a jacket from the burglary, and undeniably had the CD player from that burglary . . . .

T. 1546-47 (emphasis added). The prosecutor continued in this vein, each time reminding the jury of the hair fragments.

In his rebuttal argument, the prosecutor attempted to answer the defense's position that no physical evidence linked petitioner to the murder scene. After discussing the token that was found at the murder scene, the prosecutor added, "there's even some additional proof inside that vehicle and that's the hair fragments." T. 1607.

B. Even at Trial, It was Obvious that the State's Theory was Weak.

The State's theory of the case suffered from inherent weaknesses. It had no physical evidence—instead, all the state had was perhaps a link between Manning and a portable CD player belonging to John Wise (*not* the murder victims). The state's underlying theory also was implausible. According to the State, Manning went to the 2500 Club on December 10, 1992, and stayed at least until 11:00. Somehow, he managed to make it to the Mississippi State campus, which was miles away, though it did not even speculate how he got there.

While supposedly breaking into a car and pulling out a leather jacket, CD player, huggie, about $10-12 in change, and a token, he managed to pull a gun when he was caught by Steckler and Miller. Instead of simply running away, he abducted the pair, making Miller sit on his lap in her MR2 and forcing Steckler to drive to a

deserted location where he shot them execution style and ran over Steckler. Manning then supposedly dropped the car off at an apartment complex on Old Mayhew Road. Having no other vehicle, he walked approximately 13 miles to his home on a cold night carrying an armful of stolen property.

The defense challenged the State's theory of the timing of the shooting. For instance, Melanie Brown, who lived at the Old Mayhew Apartments, returned to her home just before 1:00 a.m. on December 11, 1992, and remembers parking next to a white car, which turned out to be Miller's MR2. T. 1361. According to the State, however, Miller and Steckler were seen at the fraternity house shortly before then. T. 607.[17]

Given the inherent weaknesses, the State needed the jury to believe its incentivized witnesses. As expressed in the State's closing argument, the case turned on whether the key witnesses were credible:

> [L]adies and gentlemen, really what you are going to have to determine and **practically the only thing you have to determine** when you go back into that jury room **is who are you going to believe**. Genuinely, ladies and gentlemen that is your really only issue in the case. Who are you going to believe, because if you believe the state's witnesses, then he did it. It's just that simple. . . . **Who are you going to believe**?

T. 1529 (emphasis added). The prosecutor then spent the bulk of his argument arguing why the jury should find witnesses such as Earl Jordan and Paula Hathorn credible. The new evidence now shows that the State's witnesses were not believable.

[17] If Miller and Steckler left the fraternity house around approximately 12:50 a.m., they could have made it to Old Mayhew Apartments (where there was a party) by 1:00 a.m. – corroborating Melanie Brown's statement.

In fact, key witnesses lied.

C. Evidence Uncovered Since Trial Undermines All Facets of the State's Case Against Manning.

Manning has additional evidence, previously unavailable, that removes any doubt that he was wrongly convicted. This new evidence supplements evidence provided in prior proceedings detailing deals Hathorn made with the sheriff, documenting with Texas court records proving Frank Parker lied, and providing expert analysis and concessions from the FBI about the fatally flawed hair and ballistics forensics evidence that the State relied on to convict Manning.

There are already compelling reasons to question the reliability of the convictions. When the totality of available evidence is reviewed, there is no longer any reliable basis for Manning's convictions to stand.

1. Earl Jordan admits his trial testimony was false.

The most damning evidence against Manning, an alleged confession, was fabricated. Earl Jordan testified that Manning admitted to killing the two students, but Jordan lied. Jordan now admits that his trial testimony was false: "My trial testimony was not true. My statements to the sheriff about Manning's confession were also not true. Manning never told me that he killed anyone." Ex. 1, ¶ 3.

Jordan explained why he made up the story about the confession. At the time, Jordan was in jail expecting to be charged as a habitual offender. He had been previously convicted of a burglary on two occasions. After serving prison time, he returned to Starkville in July of 1992 and was arrested for a burglary on the Mississippi State campus. According to a statement submitted to the sheriff's

department, Jordan entered a fraternity house on November 14, 1992, took money from a student's wallet, threatened to take the student's car, and made threats alleging the he was "not afraid to kill anybody." Ex. 10 (Statement of Luther Wade). Later, Jordan pulled a knife on Preston O'Neal. *Id.* On December 30, 1992, Jordan was arrested and charged with burglary of a fraternity house. Ex. 11 (arrest warrant for Earl Jordan).

At that time, Jordan knew that law enforcement was working to determine who killed Jon Steckler and Tiffany Miler and realized that he was a suspect because of his crimes on campus. The sheriff was his lifeline. Though careful to avoid making an explicit deal, the sheriff "had a way of making it clear that he would help me out if I helped him with Manning. The sheriff said he knew I could be charged as a habitual offender and that time was running out." Ex. 1, ¶ 5.

On May 21, 1993, just one day after Manning was arrested, Ex. 12 (arrest warrant for Willie Manning), Jordan made up the story about Manning's confession. The sheriff helped him fashion his statement: "I talked to the sheriff about four or five times. The sheriff told me the way he thought Willie had done the murder, and I changed some words to the way the sheriff said he thought it happened. The sheriff was satisfied." Ex. 1, ¶ 6.

Just two months after reporting Manning's "confession" to the sheriff, the State reduced charges against Jordan and indicted him only for looting and did not indict him as a habitual offender. Ex. 13 (indictment of Earl Jordan). Although Jordan was apparently willing to plead guilty to looting, his case was continued until after

Manning's trial. T. 1170. At trial, Jordan testified that he did not have a deal with the prosecutor but did not say anything about the understanding reached with the sheriff. Shortly after Manning's trial, Jordan entered his plea of guilty to looting and was sentenced to three years. Ex. 14 (sentencing order for Earl Jordan). Jordan received credit for time served and was then released.

In his closing argument, the prosecutor claimed that he did not know that Jordan could have been indicted as a habitual offender. T. 1623. Even if the prosecutor's self-serving account can be taken at face value, the sheriff was aware and ensured that Jordan received his reward for coming up with the alleged confession.

Manning previously presented additional information showing Jordan's desperation to appease law enforcement by trying to pin the blame on others for the murders of Steckler and Miller. When Jordan was first arrested, he knew that Johnny Lowery (aka "Judy") and Anthony Reed were lead suspects in the murder investigation. Facing a burglary charge (and likely indictment as a habitual offender) and realizing that he was a suspect, Jordan gave information on Reed and Lowery. Jordan told the sheriff that he had heard that "the girl that got killed she is the one that rides around with the guy that's friends with Judy Lowery." Ex. 15 (statement of Earl Jordan, dated December 30, 1992). Jordan added that he had "seen Anthony (Reed) with a white girl on several occasions in a small Toyota." *Id.* Jordan informed law enforcement that he had "seen Anthony with this girl several times and people notice because it was a white girl with a black man." *Id.* Finally, Jordan stated that

"I have looked at a picture of Pam [sic] Miller and I believe that this is the girl that I would see with Anthony." *Id.*

Jordan agreed to take a polygraph about his December 30, 1992 statement. According to a document entitled "Underlying Facts and Circumstances," Jordan took a polygraph and "cleared the test very well." Ex. 16. After the sheriff dropped the investigation regarding Lowery and Reed, Jordan smoothly transitioned to making a statement against Manning.

Manning also documented other false testimony from Jordan. For instance, Jordan asserted that Manning pulled a gun on Doug Miller. T. 1199. In earlier proceedings, Miller provided an affidavit denying that he had been threatened by Manning. Ex. 17 (affidavit of Doug Miller). Jordan also testified falsely about whether his attorney knew he was going to be a witness against Manning. T. 1170-1181. His attorney had to have known. Jordan's attorney was Bruce Brown, a public defender for Oktibbeha County. Mr. Brown had also been appointed to represent Manning. He moved to withdraw from his representation of Manning, noting that he had been told by the State that Jordan was expected to be a witness against Manning. T. 11. The prosecutor confirmed this, T. 20, and Brown was allowed to withdraw.

With his most recent affidavit, Jordan now admits that the most damning portions of his testimony against Manning were false. He did not hear a confession, but made this up after learning from the sheriff that he could expect to benefit if he cooperated.

2. Frank Parker lied about hearing Manning make inculpatory statements.

Newly discovered evidence also shows that Frank Parker lied about overhearing Manning have a conversation about disposing of a gun. T. 1120. Parker testified that Manning made the incriminating remark in a conversation with another detainee named Henry Richardson, also known as "Miami." Richardson, who had not been approached by Manning's lawyers previously, acknowledged that he shared a cell with Manning but that Manning, who is known as "Fly," "never talked to me about any crime, why he was in jail, or any gun." Ex. 2, ¶ 4. Richardson added that "[a]ll we did was play cards. I never talk to anyone about their case, my case, or why anyone is in jail. I don't do that stuff." *Id.* Richardson made this point to law enforcement in 1993. When asked about Manning, Richardson told them that "Fly and me never talked about any crime, why he was in jail, or any gun. I also told the officers that if someone was saying fly talked to me about a crime, why he was in jail, or a gun, it was a complete lie." Ex. 2, ¶ 5.

Richardson confirmed that Parker concocted the story about Manning discussing the crime. Manning made no incriminating admissions to Parker. Like Jordan, Parker made up that account. Also, like Jordan, Parker's willingness to testify falsely was demonstrated in earlier proceedings. In earlier proceedings, Manning introduced a wealth of other evidence demonstrating that just about everything else that Parker mentioned in his trial testimony was false.

According to Parker, he came to the jail in Starkville because he was on the run from charges in Texas and decided to turn himself in. T. 1117. There, he

supposedly overheard Manning mention that he sold the gun that he used to commit the crime on the street. T. 1120; *see also* Ex. 8.

Parker testified that at one point he had a burglary charge lodged against him. T. 1116. However, he added that he "had written the governor of Texas and the sheriff asking them to drop all charges against me and they did." Parker denied receiving any consideration for his testimony and reiterated that the charges against him in Texas had been dropped. T. 1121, 1126. Parker also tried to minimize the seriousness of the Texas charges, stating that if the charges had not been dropped, he would only have had to serve "approximately six weeks in a drug rehab." T. 1132.

Frank Parker portrayed himself almost as an unintended, but unfortunate, victim of the great efforts to convict Manning. According to Parker, he faced minor charges in Texas, did the right thing by turning himself in, had the charges dropped, but had to remain incarcerated far from home to do the right thing. This pitiful portrait, however, was false.

Parker, a long-time thief, often stole from his own family. He lived with his aunt and uncle, but his uncle had to padlock the doors within the house to prevent Parker from stealing valuables. Ex. 18 (affidavit of Chester Blanchard, Parker's uncle). Around March 11, 1993, while his aunt and uncle were out of town, Parker cleaned out their house and pawned their valuables. *Id.* He even stole the telephone, which forced them to go next door to notify the police. *See also* Ex. 19 (Offense Report listing property stolen); Ex. 20 (Declaration of Complaint signed by Chester

Blanchard); Ex. 21 (statement of Carolyn L. Blanchard and Stacey L. Blanchard); Ex. 22 (Investigation Bureau Supplementary/Follow Up Report).

The Bexar County Sheriff's Department learned that Parker was in custody in Mississippi on May 14, 1993. Parker's uncle, Chester Blanchard, recalled receiving a call from a sheriff's department in Mississippi at around 2:00 a.m. stating that Parker was in custody and was going to be a witness in a murder trial. Ex. 18 (affidavit of Chester Blanchard). During that conversation, Blanchard informed the authorities in Mississippi about the charges he had pressed against his nephew. *Id*.

In August, when Parker said that the charges were supposedly dropped, a Texas grand jury indicted him for theft. Ex. 23 (True Bill of Indictment, *Parker v. State*, No. 93-CR-5281, filed August 11, 1993). He faced a sentence of two to ten years, and not, as he claimed at trial, merely a few weeks in a drug rehab center. Ex. 24. Parker also testified that charges against him in Frio County had been dropped; however, he never faced charges in that county. Ex. 25 (note from Frio County Clerk of Court).

When Parker finally returned to Texas, he pled guilty to theft. The trial judge was initially going to reject the plea bargain. The prosecution then explained to the judge that Parker's incarceration and testimony factored into the plea bargain. After hearing this, the judge accepted the plea bargain and sentenced Parker to three years' probation. Successor Ex. 27 (Transcript, Plea of Guilt and Sentencing, *State v. Parker*, No. 93-CR-5281, 144th Judicial District, dated April 10, 1995).

This rampant lying was characteristic of Frank Parker. As his uncle

explained,

> I have known Frank since he was very young, and he lived in my house for more than ten years. In my opinion, Frank has a reputation for dishonesty. I would not take his word for anything. I have no idea about whether the defendant in Mississippi is guilty or innocent, but I would not let anything that Frank said have any bearing at all on any case.

Ex. 18 (affidavit of Chester Blanchard).

The State was plainly aware of the true story about Parker's criminal history. The sheriff's department spoke to Parker's uncle and knew about the nature of the charges facing Parker. Ex. 18. More significantly, Parker made it clear in correspondence addressed to the District Attorney and the trial judge that he faced theft charges. PCR Exhibits 19, 20 (letter from Frank Parker to District Attorney Forrest Allgood, dated March 24, 1994, and a letter addressed to Forrest Allgood and Judge Lee Howard, with an envelope postmarked March 25, 1994). This correspondence also shows that Parker was hoping to get some of the reward money available for those willing to help the State. Like Jordan and Hathorn, Parker hoped to turn the State's determination to build a case against Manning to his own advantage.

3. Newly available evidence from Paula Hathorn further undermines the reliability of her trial testimony.

Paula Hathorn has provided new information admitting that a key part of her trial testimony was false and providing additional details about the assistance she received from law enforcement for her cooperation. At trial, she stated that she saw Manning on December 9 but did not see him again until December 14, when she saw

him with a number of items that were supposedly stolen. Now she admits she saw Manning the day after Steve Moore's death. Ex. 3, ¶ 14. Steve Moore was a mutual friend who shot himself and his girlfriend hours before Steckler and Miller were killed. If Hathorn had testified to this at trial, she would have corroborated defense testimony that Manning went home the night of Moore's death and he was picked up the next morning from his house by Lindell Grayer. T. 1413.

Hathorn's new statement also provides additional details about what law enforcement expected her to do as well as the rewards she received for her efforts. The sheriff recorded her conversations with Manning hoping that he would admit his involvement. Ex. 3, ¶ 5. He allowed her to visit Manning at night at the jail, again hoping Manning would say something inculpatory. *Id.,* ¶ 6. Before trial, the sheriff rehearsed Hathorn's testimony with her. *Id.,* ¶ 7.

Hathorn was amply rewarded for her efforts. Hathorn had a number of bad check charges pending against her. When the sheriff began to pressure her to try to get Manning to confess, he told her "not to worry about going to jail for these charges." Ex. 3, ¶ 4. She later received $17,500 after her trial testimony. *Id.* ¶ 9. Even before trial, the sheriff or a deputy gave her cash, helped with bills, paid for some furniture, or bought her meals. *Id.*

In prior proceedings, Manning produced unrebutted evidence of the preferential treatment Hathorn received in exchange for her cooperation. Both Hathorn and the sheriff denied that she received assistance on the charges she was facing in exchange for her testimony against Manning. T. 690, 838-39. That, however,

was not true. In an affidavit filed in Manning's initial post-conviction petition, Hathorn acknowledged:

> . . . [A]fter I testified against Willie, my charges were passed to the file, and I have not served any time. I was worried about this before I was approached by Sheriff Bryan, but *he told me not to worry about going to jail*.

Ex. 31 (emphasis added). She had much to worry about:

> When I was approached to help Sheriff Bryan, I had about thirteen bad check charges in Oktibbeha County. I also had about twenty bad check charges in Lowndes County. There were also bad check charges in Macon, Clay, and Jackson Counties. Altogether, I owed more than $10,000 in fraudulent checks and court fees.

Id. Hathorn understood that she could probably have gotten as much as eight to ten years for her pending charges.[18]

Because of the assurances from the sheriff, Hathorn agreed to waive her right to counsel and plead guilty to charges in Justice Court in Oktibbeha County. Ex. 31. At her plea, she received only the lightest slap on the wrist. On one charge, she received a $100 fine, and five days in jail, suspended for two years on good behavior. On a second charge, she was sentenced to pay a $300 fine, spend thirty days in jail, suspended for two years good behavior, and pay restitution and court costs. Ex. 32 PCR Exhibit 30 (Oktibbeha County Justice Court file, *Hathorn v. State*, sentences imposed September 28, 1993).

Besides favorable treatment on her pending charges, Hathorn was well-compensated for her efforts. Although the sheriff testified that he would recommend

[18] Hathorn's court files in Case No. 12-183 and 12-184 are attached as Ex. 33 and 34. A summary of her bad check charges from 1989-1994 is compiled in Ex. 35.

that Hathorn receive a reward, he did not disclose the magnitude of the reward: $17,500. Ex. 3, 31. Furthermore, it was never disclosed that the sheriff held out the hope for a reward when he first approached Hathorn to make a case against Manning. Ex. 31.

Additionally, Manning discovered in earlier proceedings that the sheriff had secretly recorded telephone conversations between Hathorn and Manning. Those recordings conclusively show that Hathorn was acting as a state agent, was willing to – and actually did – say whatever the sheriff asked her to say, and was testifying at trial inconsistently with the statements on the tapes.

The sheriff arranged for Manning's calls from jail to Hathorn to be recorded. The sheriff provided Hathorn with a number of questions to ask Manning in the hope of getting him to incriminate himself. Two microcassettes in the custody of the Sheriff's Department contained a number of these conversations, and the sheriff had arranged for the transcription of at least one of these conversations. PCR T. 27-28; Ex. 36 and 37.

In the transcript prepared by the sheriff's department, Hathorn covered most, if not all, of the topics that the sheriff wanted her to cover. She failed to elicit an incriminating statement from Manning, and made several statements contradicting her trial testimony or the testimony of Sheriff Bryan.

Regarding the bullets in the tree, Hathorn was emphatic about not knowing anything when discussing the matter on the telephone with Manning. In the

suppressed recordings, Hathorn also ventured her own opinion of the evidence: "I said [to the sheriff] I know Fly [Manning] didn't do that." Ex. 37.

The secret recordings captured other statements inconsistent with Hathorn's trial testimony. At trial, Hathorn testified that she saw Manning with a CD player on December 14. T. 678. On tape, however, Hathorn said that she told law enforcement that she did not know about a CD player. Ex. 37, pp. 3, 11. At trial, there was some discussion as to whether Hathorn ever saw Manning with a class ring. T. 711. In the undisclosed telephone conversations, however, Hathorn denied any knowledge of a class ring. Ex. 37, p. 4.

A discussion about the leather jacket proved no more incriminating; in fact, it demonstrated that law enforcement believed that Manning bought the jacket, not that he had stolen it. Ex. 37, p. 1. When Manning denied having any of the items that he allegedly stole, Hathorn did not contradict him. *Id.*, p. 4.

Hathorn also did not dispute Manning's contention that he was at the 2500 Club the night of the students' death and that he came home after being at the club. *Id.*, pp. 11-12.[19] At trial Hathorn testified that Manning was gone from December 9 until December 14; however, she now confirms that he really was home on the morning of December 11. Ex. 3.

On the secret recordings, Hathorn declared several times that she was being threatened with prosecution. Ex. 37, pp. 2, 8, 10. The handwritten section of the transcript references additional coercion applied to Hathorn. *Id.* (handwritten

[19] At trial, Lindell Grayer testified that he picked Manning up the next morning at Manning's house. T. 1413.

section). Later, Hathorn returned to the threats of prosecution: "Well, Dolph [the sheriff] told me that I would be accessory after the fact of murder that I could get 10 yrs what's that." *Id*. In another conversation, which was not transcribed until after the evidentiary hearing, Hathorn confided to Manning that the Sheriff accused her of participating in a cover-up, specifically hiding the murder weapon.[20]

4. New scientific developments show the bankruptcy of the State's forensic evidence.

At Manning's trial, an FBI firearms examiner testified that bullets taken from a tree in Manning's yard were fired by the same gun used to kill the victims, "to the exclusion of every other firearm – every other barrel, in the world .... It's like fingerprints are to you." T. 1092 (testimony of John Lewoczko). As this Court put it, that ballistics testimony from a firearms examiner was "damning" evidence. *Manning v. State*, 726 So. 2d 1152, 1168 (Miss. 1998), *overruled by Weatherspoon v. State*, 732 So. 2d 158 (Miss. 1999). The "damning" ballistics testimony was also absolutely crucial to the State's case, and it has been used by every judge of the evidence, including this Court, to provide the definitive link between Manning and this crime.

As it turns out, the FBI admits its forensic evidence was false. In 2013, the Department of Justice stated in a letter to the parties in this case that the trial testimony of the FBI firearms was "error" because "[t]he science regarding firearms examinations does not permit examiner testimony that a specific gun fired a specific bullet to the exclusion of all other guns in the world." Ex. 44, DOJ Firearms Letter

[20] Although sheriff testified that Hathorn was merely "role playing" by repeating what he wrote down for her to say, PCR T. 85, there are no notes asking her to mention that she was being accused of hiding the murder weapon.

pp. 1-2; *see also* Ex. 46, DOJ Hair Analysis Letters (DOJ also conceding that the analysis identifying the hairs found in Miller's car to be from a Black person was invalid).

After receiving the DOJ letters, Manning obtained and presented to this Court affidavits from experts providing a scientific explanation of the admissions contained the letters. *See, e.g.,* Ex. 4, Aff. of Tobin (Tobin's 2013 Affidavit is attached as Ex. A to his 2023 Affidavit). As to the firearms identification evidence, Manning's expert explains that, "[t]he letter from the U.S. Department of Justice dated May 6, 2013, the first 'crack in the dam' at the time, recognized that the extreme probabilistic statement 'to the exclusion of all other guns in the world' is patently unacceptable." Ex. 4, Aff. of Tobin p. 3.

Since 2013, there has been an even more drastic sea change. In his 2023 Affidavit, William Tobin describes the new studies and research showing firearm identification and toolmark analysis to be an inherently unreliable form of forensic science. As his Affidavit states, "[t]here has been very significant and revelatory new research, effecting a paradigm shift, adopted by the scientific community revealing that there is *no* demonstrable basis with scientific, empirical, or even heuristic foundational validity underlying the opinions of the forensic firearms identification expert at Manning's trial, nor supporting claims presented to the *Manning* jury." Ex. 4, 2023 Aff. of Tobin p. 4 (emphasis in original).

The developments since the 2013 DOJ letter are "a direct result of the mainstream scientific community's *rejection of claims that bullets can be matched to*

guns with any scientifically, empirically, or even heuristically acceptable degree of certainty using the methods employed by the analysis in Manning's case." *Id.* at p. 3 (emphasis added).[21]

For example, a recent research Report of the Ames National Laboratory dated October 10, 2020 "exposes rates of error and indicia of reliability for firearms identification methodology that was used in *Manning* that are egregiously unacceptable, even for what are called 'gun-recovered' cases; the *Manning* matter is known as a 'no-gun-recovered' case, which is so problematic that some crime labs do not allow examiners to individualize cartridge cases or bullets to specific guns in 'no-gun-recovered' cases." Ex. 4, Aff. of Tobin p. 5.

Following severe criticism of the discipline by the 2008 and 2009 National Academies of Science reports, the Association of Firearm and Toolmark Examiners (AFTE), the trade association of firearm toolmark examiners, performed a number of so-called 'validation studies' in an attempt to validate the practice and establish that reliable error rates existed. *Id.* at 5. The 2016 President's Council of Advisors on Science and Technology (PCAST) Report, and its subsequent addendum, dismissed all but one of those validation studies as seriously flawed. *Id.* at 5-6.

[21] Tobin was employed by the FBI for twenty-seven years, first as a special agent and then as a forensic metallurgist. He has experience as a forensic metallurgist/materials scientist with the FBI Laboratory in Washington, D.C. From 1986 until his retirement in 1998, he was personally responsible for virtually all forensic metallurgical examinations requested of the FBI by all local, state, federal (including military), and foreign agencies. Tobin has been qualified as an expert in 302 courts in 46 states/jurisdictions (including D.C. and Puerto Rico) and in testimonies before U.S. Senate Subcommittees on the Judiciary and Court Oversight. He also has testified in firearms/toolmarks identification matters over 58 times throughout the United States.

But even that one study "failed to show that examiners could reliably reach the correct result because, among other things, it artificially deflated the error rate by counting every answer of 'inconclusive' (i.e., 'I don't know') as a correct response, among many other flaws. *Id*. at p. 6; *see also, e.g.*, *U.S. v. Tibbs*, No. 2016-CF1-19431, 2019 WL 4359486, at *1 (D.C. Super. Sep. 05, 2019). As Tobin further explains:

> Additionally, the study was not double-blind nor even blind. Recruitment for the study involved a self-selected respondent pool (typically only the most confident examiners sign up for a study), and notwithstanding, had a high survivorship bias (approximately 23.2% dropout rate). When respondents know they are being tested, the rate of invoking "inconclusive" (33.7% in the Ames I Study) skyrockets because examiners know they are not counted as incorrect responses. That practice is analogous to students being allowed to choose to answer only questions they're most confident in answering on tests.

Ex. 4, Aff. of Tobin p. 6.

The National Academy of Sciences (NAS) and the President's Council of Advisors on Science and Technology (PCAST), and the findings of the very recent Ames-FBI Report, indicate that, in *Manning*, "the jury and court would have been better served with a coin toss to assess firearm source attribution." *Id.* at 7. These new scientific studies and developments since the 2013 DOJ *Manning* letters and Manning's subsequent post-conviction proceedings in 2013 further show the complete bankruptcy of the state's forensic evidence in Manning's trial.

5. <u>New evidence shows the lengths to which law enforcement went to create informants</u>.

Newly available evidence also reveals the extent to which law enforcement went to create a case against Manning by leaning on individuals susceptible to pressure. For instance, Samuel Paige was awaiting trial in the Oktibbeha County

jail in 1993, when he was escorted to the sheriff's office where he met the sheriff and "a white guy in a suit." Ex. 38, ¶ 3. They asked him to make a statement about Manning. When Paige asked if there was a quid pro quo, he was told "they would help me with the judge and give me a sentence reduction." *Id.* Paige wrote out a statement about what he supposedly heard Manning say, but he now admits that he "was lying and saying anything to get out of jail. I never heard Fly on the phone." *Id.* ¶ 4. Later, when Paige was transferred from Parchman to Oktibbeha County and told he was expected to testify against Manning, he refused. *Id.* ¶ 6.

Robert Ware had a similar experience. While awaiting trial in Oktibbeha County, he was called to Sheriff Bryan's office. The sheriff offered assistance with Ware's case if he would help the sheriff build a case against Manning. Ex. 39, ¶ 3. According to Ware, Manning only said that he was innocent. *Id.* ¶ 4.

Eugene Davis was also asked to give a statement about how Manning supposedly explained how he disposed of the murder weapon. Davis has provided a sworn statement that any statement attributed to him is false: "I never made any statement to anyone about Willie Manning having a .380 or any other gun or selling a .380 or any other gun. I have no knowledge of Willie Manning ever having a gun or selling a gun." Ex. 40, ¶ 5.

6. Newly discovered evidence would have undermined the State's theory of the case.

Newly available evidence also undermines the State's timeline about the course of the night's tragic events. According to the sheriff's speculations, Miller and Steckler were seen at the fraternity around 12:50 a.m. and were shortly thereafter

kidnapped from the parking lot. Nathaniel Morris and Tina Cockrell, however, provide information suggesting a different course of events and a different timeline. They lived in the same trailer park that Miller lived in. Some time between midnight and 1:00 a.m., they heard a white male yelling, followed by gunshots. Nathaniel recalled the male yelling, "that ain't right. You know this mother fucking shit ain't right." Ex. 41, ¶¶ 4-5. Tina, who was a daughter of Jesse Oden, an experienced deputy with the Oktibbeha County Sheriff's Office, lived near Miller. After midnight on December 11, 1992, she, like Nathaniel, heard a white male raising his voice. Tina, though, recalls the male saying something like "I can't believe what you did." She then heard two gunshots. Ex. 42, ¶¶ 6-7. Tina mentioned this to her father, who passed the information to the sheriff, who dismissed what she had to say. *Id.* ¶ 9. Tina does not know Manning, but her father later told her that he thought Manning was innocent. *Id.*, ¶ 4.

At trial, Melanie Brown provided testimony more in line with a time frame provided by Morris and Cockrell. Brown, who lived at the Old Mayhew Apartments, noticed a small white car, which turned out to be Miller's, when she returned home around 1:00 a.m. on December 11. T. 1360.

Another weakness with its case is that the State never accounted for how Manning managed to cover so much ground, while supposedly carrying around various stolen goods on a cold night. He had no car. Rickey Johnson, who was at the 2500 Club the night of the murders, recalls seeing Manning there around 11:30 pm or midnight. Manning asked Johnson for a ride home. Ex. 45, ¶ 4. Johnson turned

Manning down because he did not want to take his car down the dirt road on which Manning lived. *Id.* Manning was thus ready to go home, not break into cars, and he had no way to get to the fraternity house.

7. Newly discovered evidence undermines the attempts to link Manning to a leather jacket taken from John Wise.

Manning has also obtained newly available statements casting further doubt on the State's evidence regarding alleged links between items taken either from John Wise's car or from Miller and Steckler.

For instance, the State tried to somehow forge a link between a leather jacket taken from Wise and a leather jacket that had been in Manning's position. As Dexter Campbell recalls, on the night Miller and Steckler were killed, he saw Manning wearing a brown bomber jacket. Manning told Campbell he was going to the 2500 Club. Ex. 43.

8. Evidence developed in Manning's other capital case revealed the State's practice of relying on witnesses with every reason to testify falsely.

Manning had also been convicted of two other capital murders in Starkville, but this Court granted post-conviction relief and the prosecution later dropped all charges. *Manning v. State,* 158 So. 3d 302 (Miss. 2015). There, the state failed to disclose information that would have proved that its key witness lied. Kevin Lucious testified that he saw Manning enter the victims' apartment from the apartment where he supposedly lived. In fact, Lucious did not live there at the time of the murders, he moved in to the apartment about two weeks after the murders, and notes in the possession of the police would have proved he was lying.

Why did Lucious lie? At the evidentiary hearing in that case, Lucious explained that he was facing murder charges in Missouri when he gave the statement, and he was also afraid that the police were going to charge his girlfriend. Ex. 44 ,at pp. 53-54, 56, 73 (testimony of Lucious from PCR evidentiary hearing). As in the case for the students, law enforcement elicited false testimony from someone who had nothing to lose and everything to gain from cooperating.

Testimony from Likeesha Jones, Lucious' girlfriend at the time also shows a consistent pattern of law enforcement's approach to the investigation. Jones testified that the sheriff at times threatened her with arrest or offered her money to testify against Manning. Jones refused. Ex. 45, at pp. 88-89 (testimony of Likeesha Jones at PCR evidentiary hearing)

In both cases in which Manning was convicted, law enforcement could not quickly solve the murders. The sheriff applied pressure and offered incentives to people in desperate situations. Similar to Lucious in the other case, Jordan faced indictment as a habitual offender and Hathorn faced numerous bad check charges. They both seized the opportunity to help themselves regardless of the consequences.

GROUNDS FOR RELIEF

A. The State Violated Petitioner's Right to Due Process in Violation of Rights Guaranteed by the Fourteenth Amendment When It Failed to Disclose Material, Exculpatory Information.

The State violates a defendant's right to due process if it withholds evidence that is favorable to the defense and material to the defendant's guilt or punishment. *Brady v. Maryland,* 373 U.S. 83 (1963); *see also Manning v. State,* 158 So. 3d 302, 305

(¶ 8) (Miss. 2015). This includes evidence of impeachment. *Smith v. Cain*, 565 U.S. 73, 76 (2012); *Napue v. Illinois,* 360 U.S. 264, 269 (1959) ("The principle that a State may not knowingly use false evidence, including false testimony, to obtain a tainted conviction, implicit in any concept of ordered liberty, does not cease to apply merely because the false testimony goes only to the credibility of the witness."); *Floyd v. Vannoy*, 894 F.3d 143, 163 (5th Cir. 2018) ("[E]vidence impeaching a prosecution witness is favorable *Brady* evidence.").

Impeachment evidence includes deals or arrangements made with state agents for favorable treatment with other charges. "[W]here a key witness has received consideration or potential favors in exchange for testimony and lies about those favors, the trial is not fair." *Tassin v. Cain,* 517 F.3d 770, 778 (5th Cir. 2008).

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

The prosecution must disclose favorable material evidence in the possession of police whether the prosecutor knows about the evidence or not. "[T]he individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police." *Id.* at 437. Favorable

material evidence must be disclosed "even though there has been no request by the accused." *Strickler v. Greene*, 527 U.S. 263, 280 (1999).

Evidence is "material" within the meaning of *Brady* when there is "a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different." *Smith*, 563 U.S. at 75. The accused is not required to prove that the undisclosed evidence, more likely than not, would have led to an acquittal. *Kyles*, 514 U.S. at 433. Undisclosed evidence is material if it "could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *Id*. at 435. A determination of materiality must be based on the *cumulative* effect of the undisclosed evidence. *Id.* at 436 (materiality of undisclosed evidence must be "considered collectively, not item by item").

In analyzing whether the withholding of information constitutes a *Brady* violation, the court must evaluate the importance of the suppressed information in its totality and in the light of the evidence that was presented to the jury at trial. *Kyles*, 514 U.S. at 436. Therefore, even where a witness has already been impeached at trial, additional impeachment evidence that the prosecution fails to disclose may be prejudicial. *See Wearry v. Cain*, 577 U.S. 385, 389 (2016) (reversing conviction where a prosecution's witness whose "credibility, already impugned [at trial] by his many inconsistent stories, would have been further diminished had the jury learned" additional information that undermined his veracity).

Manning will review the undisclosed information from several individuals who have provided information that was not reasonably available previously. He will also point out the materiality of the undisclosed information.

1. <u>Failure to disclose exculpatory evidence from Earl Jordan</u>.

The State failed to disclose the arrangement it made with Earl Jordan to indict him on lesser charges in exchange for his assistance. Realizing he could be indicted as a habitual offender, Jordan began offering assistance to law enforcement with efforts to find someone to arrest for the murders of Miller and Steckler. Jordan initially gave a statement implicating two other individuals, Johnny Lowery and Anthony Reed. When they were eliminated as suspects, Jordan then claimed to have overheard Manning confess to the crime.

The sheriff understood the leverage he had over Jordan. As Jordan put it, "The sheriff said he knew I could be charged as a habitual offender and that time was running out." Ex. 1, ¶ 5. Jordan also explained that the sheriff "had a way of making it clear that he would help me out if I helped him with Manning." *Id.* The sheriff met with Jordan "four or five times" going over how "he [the sheriff] thought Willie had done the murder, and I changed some words to the way the sheriff said he thought it happened." *Id.,* ¶ 6.

The State did not disclose its deal or arrangement with Jordan that it would indict him on lesser charges in exchange for his cooperation. In fact, Jordan denied he had a deal, and the prosecutor argued to the jury that Jordan had nothing to gain and much to lose for testifying against Manning. T. 1542.

The State violates the *Brady* rule when it fails to disclose any deal it made with a key witness at trial. *Giglio v. United States,* 405 U.S. 150 (1972); *LaCaze v. Warden*, 645 F.3d 728 (5th Cir. 2011). It is not necessary for there to be a formal contract between the State and a witness. Indeed, "[a] promise is unnecessary." *Tassin*, 517 F.3d at 778. "Where, as here, the witness's credibility 'was ... an important issue in the case ... evidence of any understanding or agreement as to a future prosecution would be relevant to his credibility and the jury was entitled to know it." *Id.* (quoting *Giglio,* 405 U.S. at 154-55).

In *Tassin*, Robert Tassin was convicted of capital murder in part based on the testimony of his wife Georgina. Before the jury, Georgina testified that she did not know if her testimony would affect her sentence, and that no promises related to her testimony had been made. 517 F.3d at 773. The prosecutor suggested that Georgina had no reason to lie since she faced up to a 99-year sentence. *Id.* Later, Tassin learned that his wife expected to receive only a 10-year sentence. The state court, however, found that there had not been an arrangement reached between Georgina and the prosecution.

The Fifth Circuit found the state court adjudication involved an unreasonable application of *Giglio, Napue,* and *Brady*. *Id*. at 776-79. There is no requirement that there be a firm promise or binding contract. *Id.* at 778 (citing *United States v. Bagley*, 473 U.S. 667, 683 (1985) (opinion of Blackmun, J., joined by O'Connor, J.). Instead, the key point is "the extent to which the testimony misled the jury, not whether the promise was indeed a promise. *Id.* at 778.

For Earl Jordan, the question is not whether he reached an effective agreement with the sheriff; rather, it was whether he "might have believed that [the state] was in a position to implement ... any promise of consideration." *Napue*, 360 U.S. at 270. The sheriff unmistakably conveyed to Jordan that he could receive a benefit by providing assistance. The sheriff reminded Jordan that he could be charged as a habitual offender "and that time was running out." Ex. 1, ¶ 5.

At trial, the prosecution did not correct the false impression from Jordan's testimony that he merely hoped to be treated favorably for his testimony. Compounding the error, the prosecutor emphatically denied Jordan was receiving *any* gain for his testimony against Manning. *See Napue*, 360 U.S. at 270 (noting the significance of the prosecuting attorney attesting to the lack of a promise and the failure to correct the misimpression created by the witness's testimony).

The materiality of the failure to disclose the true nature of Jordan's arrangement with the state was material. The prosecution had no evidence of a kidnapping. There were no eyewitnesses and no forensic evidence linked Manning to the crime. Even if Steckler and Miller stumbled upon a car burglary, there is little reason to believe that the perpetrator would gather stolen goods; corral his victims into a tiny car; force them to a deserted location; dispose of the car back near one of the victim's home; and then walk a great distance with an armful of stolen loot from the earlier car burglary. The testimony about stolen goods was equivocal. The State *needed* the testimony of Earl Jordan, and it *needed* the jury to find Jordan credible. As the prosecutor argued, the "only issue" is "who are you going to believe." T. 1529.

Yet what the jury needed and deserved to hear to accurately gauge Jordan's credibility was the truth about the incentives Jordan had and the deal made with the sheriff.

In an earlier decision in Manning's case addressing different claims regarding the impeachment of Jordan (and Frank Parker), this Court found no error because "Jordan was thoroughly cross-examined and that there was other evidence before the jury that Jordan was hoping for a favorable deal in exchange for his testimony. *Manning v. State,* 929 So. 2d 885, 902 (¶ 48) (Miss. 2006). As *Giglio*, *Napue,* and *Tassin* make clear, Jordan's "hope" about receiving a favorable deal did not sufficiently inform the jury about the true benefit Jordan was to receive.

Additionally, this Court finding of harmless error because of earlier cross-examination at trial is at odds with *Brady*—as was made clear in *Wearry v. Cain*, 577 U.S. 385 (2016). There, the Court addressed the materiality of the nondisclosure of statements by a key witness whose credibility had already been damaged at trial. Rather than finding additional impeachment evidence immaterial, the Court stressed that the undisclosed evidence would have further impugned the witness's credibility. *Id.* at 393.

Here, defense counsel brought out reasons to question Jordan's credibility. The new evidence of his undisclosed deal undermines his credibility even further. Had the jury heard this new evidence, there is a reasonable probability of a different result.

2. <u>The State Failed to Disclose Exculpatory Information From Henry Richardson</u>.

In addition to Jordan, the State leaned on Frank Parker, another informant, to cobble together a semblance of a case against Manning. Parker supposedly overheard a conversation between Manning and Henry "Miami" Richardson about how Manning disposed of the murder weapon. That conversation, however, did not take place. Henry Richardson told law enforcement officers that "Fly [Manning's nickname] and me never talked about any crime, why he was in jail, or any gun. I also told the officers that if someone was saying Fly talked to me about a crime, why he was in jail, or a gun, it was a complete lie." Ex. 2. Richardson's emphatic denial to law enforcement was never disclosed to Manning's counsel.

The failure to disclose Richardson's statement violated *Brady's* disclosure rule. The statement was exculpatory. Indeed, it would have provided powerful rebuttal evidence to Parker's dubious tale of an open conversation about disposing a murder weapon. It was also material. Along with Jordan, Parker provided the only direct link between Manning and the murders. There is at least a reasonable probability that evidence that Parker was lying about what he heard would have affected the verdict. This is especially true if testimony from Richardson is considered in conjunction with the wealth of other evidence about Parker's ability to testify truthfully about any aspect of his past or criminal behavior.

3. Additional Undisclosed Exculpatory Evidence From Paula Hathorn.

In earlier proceedings, Manning presented documentary evidence to support Hathorn's 2001 affidavit that she received consideration for her testimony. *See generally* Ex. 31-35. More recently, Hathorn has provided additional exculpatory details that were not previously disclosed. As Manning noted previously, Hathorn related additional details about the favorable treatment she received from law enforcement.

Additionally, she provided information contrary to her trial testimony. At trial, she testified that she did not see Manning for several days after the shooting. In fact, she saw him that day. Ex. 3, ¶ 14. Had she testified truthfully on this score, she would have actually corroborated the defense testimony that Manning was at home the morning of the shootings. This new evidence, especially when considered in connection with evidence presented in earlier proceedings and in light of a correct understanding of applying *Brady's* materiality element, would have created at least a reasonable probability of a different result. *See Kyles v. Whitley, supra; Wearry, supra.*

4. Suppression of Other Evidence of the Lengths to Which the State Went to Entice Potential Informants Also Violated *Brady*.

The sheriff entered undisclosed deals with Hathorn and Jordan. Other evidence would have highlighted that law enforcement's approach to this case consisted largely of playing "let's make a deal." Both Samuel Paige and Robert Ware have provided sworn statements that the sheriff offered to help them with pending

charges if they assisted him in building a case against Manning. Ex. 36, 37. According to Ware, the sheriff told him that he [the sheriff] "could help lighten my sentence if I would help him with the case against Manning." Ex. 37, ¶ 3. Paige wrote out a statement because he wanted a deal. Ex. 36, ¶ 5. However, at trial, Paige refused to testify at Manning's trial. *See generally id.*

5. <u>The Cumulative Effect of the Suppressed Evidence Is Material</u>.

This Court must consider the cumulative effect of the suppressed evidence and not consider each item of evidence in isolation. *Kyles*, 514 U.S. at 441; *Wearry*, 577 U.S. at 394. As it stands, "the State's trial evidence resembles a house of cards," that depended on the jury accepting the credibility of the State's informants. *Wearry*, 577 U.S. at 392. The picture the jury received would have been much different.

Jurors would have gotten the complete picture of Jordan's reliance on the sheriff's undisclosed promises, and the prosecutor would not have been able to falsely claim Jordan had no expectation of any gain. Similarly, the jury would have heard testimony further undermining Parker's and Hathorn's credibility and heard damning evidence about how the State sought to build a case against Manning by holding out the promise of preferential treatment. When this new evidence is taken together with evidence presented in earlier proceedings, there is virtually nothing left to the State's case. Under these circumstances, Manning easily satisfies his burden of showing a reasonable probability of a different result had this evidence been disclosed.

B. Petitioner is Entitled to Post-Conviction Relief Based on Newly Discovered Evidence, Including the Recantation of a Key Witness.

The Court may grant post-conviction relief in connection with a successive petition for post-conviction relief if the prisoner "has evidence, not reasonably discoverable at the time of trial, which is of such nature that it would be practically conclusive that had such been introduced at trial it would have caused a different result in the conviction or sentence." Miss. Code Ann. § 99-39-27(9). Newly discovered evidence can overcome time bar and bars against successive petitions. *Bass v. State,* 4 So. 3d 353, 357-58 (Miss. App. 2008). Manning has presented information which was not reasonably discoverable, including a recantation from the most important witness for the State.

"[T]he presentation of affidavits in which key witnesses recanted their testimony require[s] that an evidentiary hearing be held." *Hardiman v. State,* 789 So. 2d 814, 816 (Miss. App. 2001) (discussing *Tobias v. State,* 505 So. 2d 1014, 1015 (Miss. 1987)); *see also Manning v. State,* 884 So. 2d 717, 723 (Miss. 2004) ("When an important witness to a crime recanted his testimony and offered a reason for having given false testimony at trial, the defendant/petitioner is entitled to an evidentiary hearing to determine whether the witness lied at trial or on his affidavit."); *Woods v. State*, 141 So. 3d 14, 16-17 (Miss. App. 2014) ("Recanted testimony is . . . adequate to a entitle a petitioner to an evidentiary hearing.").

The newly discovered evidence strikes at the very core of the State's case. Given the lack of physical evidence or eyewitnesses, the law enforcement chose to rely

on heavily incentivized witnesses, who felt pressure to cooperate in exchange for leniency, even if it meant giving false testimony. Earl Jordan lied because he faced indictment as a habitual offender and could not be blind to the fact that he would be a suspect in the murders since he had committed crimes on the Mississippi State campus. Jordan now admits he lied. Ex. 1. Without his testimony, the State has no direct evidence of Manning's involvement.

Manning also has newly available information from Henry Richardson, who makes clear that Frank Parker lied when he claimed to have overheard Manning discuss getting rid of a weapon.

On top of this, additional new evidence from Paula Hathorn further undermines the reliability of her trial testimony.

At trial, the prosecutor stressed that the *only* real issue was determining the credibility of witnesses. Now, it is clear that the testimony of the dubious witnesses presented by the State lacked credibility.

Newly discovered evidence helps explain how the State came to depend on such shaky witnesses. Because the crime was not solved quickly, the State actively solicited help from those with much to gain from cooperating with law enforcement. Samuel Paige and Robert Ware describe how the sheriff sought their help, offering favorable treatment on pending charges. Ex. 38, 39.

Evidence from Manning's other capital murder case revealed the same pattern. Law enforcement leaned on Kevin Lucious, which gave him an incentive to testify falsely against Manning. The sheriff tried similar tactics with Likeesha Jones, but

she rebuked the sheriff. Lucious recanted, and documents supported his recantation. *Manning v. State,* 158 So. 3d 302 (Miss. 2015).

Other newly discovered evidence, though not as dramatic, also weakens other aspects of the State's case. Eugene Davis denied giving a statement about seeing Manning with a .380 or any other gun. Ex. 40. As discussed earlier, Nathaniel Morris and Tina Cockrell heard a man screaming followed by what sounded like gun shots near Miller's trailer at a time inconsistent with the State's theory of the case. Ex. 41, 42. Dexter Campbell provided a statement about Manning having a brown leather jacket even before he went to the 2500 Club on December 10. This information would have undercut the link between Manning and the jacket taken from John Wise.

Rickey Johnson also recalls Manning asking for a ride home from the 2500 Club, which showed that Manning was looking for a way home and not planning a burglary, and that Manning had no vehicle. Ex. 45. The State had no explanation for how Manning made it from the 2500 Club to the fraternity parking lot and then from the Old Mayhew Apartments to his home outside of town.

C. Newly Discovered and Developed Forensic Firearms Identification Evidence Requires a New Trial, and the Use of Scientifically Invalid Testimony Rendered Manning's Trial Fundamentally Unfair in Violation of Due Process.

The advent of DNA testing has led to greater scrutiny of the scientific basis of many of the traditional forensic analyses. Disciplines previously considered infallible "science" are being revealed, even—as in this case—by their proponents, to be significantly less scientific than previously espoused, or simply not "science" at all. *See e.g.*, National Research Council of the National Academies, *Strengthening*

Forensic Science in the United States: A Path Forward (2009). The U.S. Supreme Court has repeatedly recognized the centrality of forensic testimony in criminal cases against a defendant. For example, in *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009), the Court cited concerns about the reliability of forensics, exaggerated testimony and the number of forensic matches that have led to wrongful convictions.[22]

Here, there has been an affirmative retreat by the mainstream scientific community from claims that a bullet can be matched to a specific gun with any scientifically acceptable degree of certainty. "[S]everal landmark studies have conclusively established that the forensic practice of firearms identification is not only without foundational validity, it is so egregiously flawed that the three key indicia of reliability (accuracy, repeatability and reproducibility) are patently (and shockingly) unacceptable for forensic utility as evidence of guilt." Ex. 4, Tobin Aff. p. 2.

1. Firearms Identification Generally.

Firearms Identification Theory. Forensic firearms analysis, or ballistic matching, falls under a category of forensics called toolmark identification, which itself falls under a broader category called pattern matching. In pattern matching specialties, analysts typically look at a piece of forensic evidence taken from a crime scene and compare it to another piece of evidence linked to a suspect.

[22] "One commentator asserts that "[t]he legal community now concedes, with varying degrees of urgency, that our system produces erroneous convictions based on discredited forensics." Metzger, *Cheating the Constitution*, 59 Vand. L. Rev. 475, 491(2006). One study of cases in which exonerating evidence resulted in the overturning of criminal convictions concluded that invalid forensic testimony contributed to the convictions in 60% of the cases. Garrett & Neufeld, *Invalid Forensic Science Testimony and Wrongful Convictions*, 95 Va. L. Rev. 1, 14 (2009)."

Technically, bitemark analysis is also a form of toolmark analysis (the teeth are the "tool"). Generally speaking, pattern matching forensics has a dubious history. Perhaps the most notorious example is the Mississippi dentist Michael West. *See generally Howard v. State*, 300 So. 3d 1011 (Miss. 2020) (citing a study by the National Academy of Sciences Report reporting the lack of scientific basis for bite-mark evidence and research concluding that even board-certified forensic dentists could not reliably identify a human bite mark on human skin, much less compare and accurately match an alleged bite mark to the teeth of a single individual to the exclusion of all others).

Firearm identification is a type of toolmark identification that attempts to determine "whether a bullet, cartridge case or other ammunition component or fragment can be traced to a particular suspect weapon." *Fleming v. State*, 194 Md. App. 76, 100–01 (2010). A toolmark is generated when a hard object (tool) comes into contact with a relatively softer object. *Id.*

Manufacturing a firearm involves cutting, drilling, grinding, hand-filing, and sometimes hand-polishing, all of which leaves marks on a firearm's components. *U.S. v. Monteiro*, 407 F. Supp. 2d 351, 359 (D. Mass. 2006). When the firearm is fired, "the various components of the ammunition come into contact with the firearm at very high pressures," transferring markings from the firearm to the ammunition, *i.e.* the bullet and the cartridge case. *Id.* at 359-60 (citation omitted). Firearms examiners use a technique they believe allows them to discern those markings, which are

purportedly unique to each firearm. Examiners call these markings "individual characteristics."

The technique relies on three categories of characteristics:

Class Characteristics. Examiners first look for "class characteristics," which "are defined as 'family resemblances which will be present in all weapons of the same make and model.'" *Id.* at 360 (citation omitted). Class characteristics are things like a bullet's weight and caliber, the number and width of the lands and grooves in the barrel of a gun, and the direction of the rifling in the barrel. *U.S. v. Willock*, 696 F. Supp. 2d 536, 558 (2010).[23]

Subclass Characteristics. Between class characteristics and individual ones are "subclass characteristics," which "appear on a smaller subset of a particular make and model of a firearm." *Monteiro*, 407 F. Supp. 2d at 360. Those characteristics may be found "on a group of guns within a certain make or model, such as those manufactured at a particular time and place." *Id.*

While an individual characteristic results from an imperfection in the manufacturing process that affects only one firearm, a subclass characteristic results from an imperfection that affects multiple firearms manufactured at the same time. The ability to distinguish purported individual characteristics from subclass characteristics is part of the controversy concerning the reliability of firearms identification. *See, e.g., New York v. Ross*, 129 N.Y.S.3d 629, 641 (Sup. Ct.

[23] A gun's inner barrel places "rifling" on a bullet, *i.e.* depressed "land impressions" and raised "groove impressions."

2019) (discussing "the potential for subclass characteristics to mimic individual characteristics").

Individual Characteristics. Examiners also look for the "individual characteristics," which are "theoretically unique to each firearm." *Fleming*, 194 Md. App. at 103. These markings are "random imperfections," produced during the manufacturing process or caused by accidental discharge, purportedly producing a unique signature for that firearm. *Monteiro*, 407 F. Supp. 2d at 360-61. "[B]ut it is likewise true that each element of a firearm's signature may be found in the signatures of other firearms." *Id.* (internal quotation marks omitted) (citation omitted). Moreover, "individual characteristics of toolmarks change somewhat over time due to wear and tear." *Id.*

Using the firearms/toolmark identification "technique," a firearms examiner tries to determine whether a particular firearm was the source of particular fired ammunition. The examiner "will test fire the weapon using the same type of ammunition as that recovered in the case." *Id.* Once the weapon is test-fired, the examiner uses "a split-screen microscope to simultaneously compare the toolmarks on the crime scene evidence against the toolmarks produced by a test round fired by the subject firearm. Crucially, this is acknowledged to be a subjective determination." *Fleming*, 194 Md. App. at 104 (citations omitted).

The examiner exercises subjective judgment in determining "which marks are unique to the weapon in question, and which are not." *U.S. v. Green*, 405 F. Supp. 2d 104, 107 (D. Mass. 2005). There are *no* specific protocols for making that

determination—*nor* are there any objective criteria. *Id.* at 114. Distinguishing class characteristics from subclass characteristics or individual characteristics is difficult. *See id.* at 107.

The AFTE Examiners' Subjective Methodology. The main methodology used by firearms examiners is the Association of Firearm and Tool Mark Examiners ("AFTE") "Theory of Identification" (the "AFTE Theory"). *See* Committee for the Advancement of the Science of Firearm & Toolmark Identification, Theory of Identification as it Relates to Toolmarks: Revised, 43 AFTE J. 287 (2011). Examiners employing the AFTE Theory follow a two-step process. At step one, the examiner evaluates class characteristics of the unknown and known samples. *See* AFTE, Summary of the Examination Method, *available at* https://afte.org/resources/swggun-ark/summary-of-the-examination-method (last visited Sept. 25, 2023), archived at https://perma.cc/4D8W-UDW9.

If the class characteristics do not match—i.e., if the samples have different numbers of lands and grooves or a different twist direction—the firearm that produced the known sample is excluded as the source of the unknown sample. *Id.* If the class characteristics match, the second step involves "a comparative examination ... utilizing a comparison microscope." *Id.* At that step, the examiner engages in "pattern matching" "to determine: 1) if any marks present are subclass characteristics and/or individual characteristics, and 2) the level of correspondence of any individual characteristics." *Id.*

Based on that "pattern matching," the examiner makes a determination in accordance with the "AFTE Range of Conclusions," which presents the following options:

i. "Identification" occurs when there is "[a]greement of a combination of individual characteristics and all discernible class characteristics where the extent of agreement exceeds that which can occur in the comparison of toolmarks made by different tools and is consistent with the agreement demonstrated by toolmarks known to have been produced by the same tool."

ii. There are three categories of "Inconclusive," all of which require full agreement of "all discernible class characteristics": (a) when there is "[s]ome agreement of individual characteristics ... but insufficient for an identification"; (b) when there is neither "agreement [n]or disagreement of individual characteristics"; and (c) when there is "disagreement of individual characteristics, but insufficient for an elimination."

iii. "Elimination" occurs when there is "[s]ignificant disagreement of discernible class characteristics and/or individual characteristics." AFTE, Range of Conclusions, *available at* https://afte.org/about-us/what-is-afte/afte-range-of-conclusions (last visited September 25, 2023), archived at https://perma.cc/WKF5-M6HD.

According to the AFTE, a positive "Identification" can be made when there is "sufficient agreement" between "two or more sets of surface contour patterns" on samples. *See* AFTE, *AFTE Theory of Identification as It Relates to Toolmarks*,

available at https://afte.org/about-us/what-is-afte/afte-theory-of-identification (last accessed September 29, 2023), archived at https://perma.cc/E397-U8KM. "[S]ufficient agreement," in turn: (1) occurs when the level of agreement "exceeds the best agreement demonstrated between toolmarks known to have been produced by different tools and is consistent with agreement demonstrated by toolmarks known to have been produced by the same tool"; and (2) means that "the agreement of individual characteristics is of a quantity and quality that the likelihood another tool could have made the mark is so remote as to be considered a practical impossibility." *Id.*

The AFTE fully acknowledges that "the interpretation of individualization/identification is subjective in nature[.]" *Id.* Indeed, the AFTE Theory provides no objective criteria to determine what constitutes the "best agreement demonstrated" between toolmarks produced by different tools or what rises to the level of "quantity and quality" of agreement demonstrating a "practical impossibility" of a different tool having made the same mark.

As discussed more below, scientific developments now fully recognize that firearm identification and toolmark analysis, including the AFTE Theory, "is clearly *not a scientific theory*[.] … Rather, it is *a claim* that examiners applying a subjective approach can accurately individualize the origin of a toolmark." PCAST Report at 60 (emphasis added); Exhibit C to Tobin's Affidavit.[24]

[24] Also *available at* https://obamawhitehouse.archives.gov/sites/default/files/microsites/ostp/PCAST/pcast_forensic_science_report_final.pdf (last visited September 29, 2023).

2. The Scientific Community's Retreat From The Firearms Identification Presented In Manning's Case.

The first prominent use of firearms identification in the United States is attributed to examinations made in the aftermath of the 1906 race-related incident in Brownsville, Texas, known as the "Brownsville Affair." There, Army personnel purportedly matched 39 out of 45 cartridge cases to two types of rifles "through the use of only magnified photographs of firing pin impressions[.]" Kathryn E. Carso, *Amending the Illinois Postconviction Statute to Include Ballistics Testing*, 56 DePaul L. Rev. 695, 700 n.43 (2007). For many years thereafter, firearms identification was accepted by law enforcement organizations and courts without significant challenge.

The advent of *Daubert*,[25] work exposing the unreliability of other previously accepted forensic techniques (such as comparative bullet lead analysis[26] or bitemark analysis[27]), and recent reports undermining and crippling the foundations underlying firearms identification have led to necessary levels of skepticism. As Tobin's Affidavit explains:

> Historically, the discipline of firearms/toolmarks analysis has been practiced by crime lab firearms examiners who assumed, but never really questioned, that the characteristics (striations and impressions)

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[25] *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993).

[26] Comparative bullet lead analysis was initially widely accepted within the scientific and legal community, and admitted successfully in criminal prosecutions nationwide, yet its validity was subsequently undermined and such evidence is now inadmissible. *See Chesson v. Montgomery Mut. Ins. Co.*, 434 Md. 346, 358-59, 75 A.3d 932 (2013) (stating that, despite the expert's "use of th[e] technique for thirty years," comparative bullet lead analysis evidence was inadmissible because its "general and underlying assumption ... was no longer generally accepted by the relevant scientific community"); *Clemons v. State*, 392 Md. 339, 364-72, 896 A.2d 1059 (2006) (comprehensively discussing comparative bullet lead analysis); *Sissoko v. State*, 236 Md. App. 676, 721-27, 182 A.3d 874 (2018).

[27] *See Howard v. State*, 300 So. 3d 1011 (Miss. 2020).

> that they use for comparisons and to "identify" a specific firearm are unique and belong only to that firearm. Not only are they *assuming* the existence of uniqueness, but also they are *assuming* that firearm examiners have the ability to discern that uniqueness ("discernible uniqueness") in casework. Over the past two decades, the legal and scientific communities have challenged the assumptions inherent within the discipline and found them to be unfounded. As of the date of this Affidavit, the two required premises of uniqueness and discernible uniqueness have never been established to exist.

Ex. 4, Tobin Aff. at 2-3 (emphasis in original).

Prior to the 2013 DOJ *Manning* letters, qualified experts had started becoming critical of the discipline of firearms/toolmark analysis. These include studies and statements from the National Research Council in 2008 and the National Academies of Science in 2009. In 2008, the National Research Council of the National Academies of Science published a report concerning the feasibility of developing a national database of ballistic images to aid in criminal investigations. National Research Council of the National Academy of Sciences, Committee to Assess the Feasibility, Accuracy, and Technical Capability of a National Ballistics Database, *Ballistic Imaging* 1-2 (2008).[28] In the report, the committee identified challenges that complicate firearms identifications, and ultimately determined that the creation of a national ballistic image database was not advisable at the time. *Id.* at 4-5.

Then, in 2009, the NRC published a report in which it addressed "pressing issues" within several forensic science disciplines, including firearms identification. National Research Council, National Academy of Sciences, *Strengthening Forensic*

[28] *Available at* https://nap.nationalacademies.org/read/12162/chapter/1 (last visited Sept. 25, 2023), archived at https://perma.cc/X6NG-BNVN;

Science in the United States: A Path Forward 2-5 (2009) (the "2009 NRC Report").[29] The NRC observed that advances in DNA evidence had revealed flaws in other forensic science disciplines that "may have contributed to wrongful convictions of innocent people," *id.* at 4, and pointed especially to the relative "dearth of peer-reviewed, published studies establishing the scientific bases and validity of many forensic methods," *id.* at 8.

With respect to firearms identification specifically, the NRC criticized the firearms identification field as lacking specificity in its protocols; producing results that are not shown to be accurate, repeatable, and reproducible; lacking databases and imaging that could improve the method; having deficiencies in proficiency training; and requiring examiners to offer opinions based on their own experiences without articulated standards. *Id.* at 6, 63-64, 155. In particular, the lack of knowledge "about the variabilities among individual tools and guns" means that there is an inability of examiners "to specify how many points of similarity are necessary for a given level of confidence in the result." *Id.* at 154.

After the 2008 and 2009 reports, and since the 2013 DOJ *Manning* letters, "there has been very significant and revelatory new research, effecting a paradigm shift, adopted by the scientific community revealing that there is *no* demonstrable basis with scientific, empirical, or even heuristic foundational validity underlying the

[29] *Available at* https://www.ojp.gov/pdffiles1/nij/grants/228091.pdf (last visited Sept. 25, 2023), archived at https://perma.cc/RLT6-49C3. The lead NRC "Committee" behind the report was the "Committee on Identifying the Needs of the Forensic Science Community." The committee was co-chaired by Judge Harry T. Edwards of the United States Court of Appeals for the District of Columbia Circuit and included members from a variety of distinguished academic and scientific programs.

opinions of the forensic firearms identification expert at Manning's trial, nor supporting claims presented to the *Manning* jury." Ex. 4, Tobin Aff. p. 4 (emphasis in original).

3. The Scientific Community's Further Retreat From The Firearms Identification Presented In Manning's Case: The 2016 PCAST Report and the 2020 AMES II Study and Report.

Since Manning's conviction and even his prior post-conviction proceedings, significant newly discovered evidence has developed related to firearms identification and toolmark analysis as a disciple. This new evidence and scientific development renders the type of firearms identification used in Manning's case as grossly unreliable and subjective speculation.

2016 PCAST Report. The first landmark study after the 2013 DOJ Manning letters was published in September 2016. It is "a report by one of the two most respected authoritative voices of the relevant scientific community, the President's Council of Advisors on Science and Technology (PCAST)."[30] *Id.* Among its myriad findings was that firearms/toolmarks identification forensic practice is without foundational validity. *Id.* In the same Report, the DOJ indicates that counsel and

[30] The PCAST Report provides the following description of PCAST's role:

The President's Council of Advisors on Science and Technology (PCAST) is an advisory group of the Nation's leading scientists and engineers, appointed by the President to augment the science and technology advice available to him from inside the White House and from cabinet departments and other Federal agencies. PCAST is consulted about, and often makes policy recommendations concerning, the full range of issues where understandings from the domains of science, technology, and innovation bear potentially on the policy choices before the President. PCAST Report at iv.

Members of PCAST included scholars and senior executives at institutions and firms including Harvard University; the University of Texas at Austin, Honeywell; Princeton University; the University of Maryland; the University of Michigan; the University of California, Berkeley; United Technologies Corporation; Washington University of St. Louis; Alphabet, Inc.; Northwestern University; and the University of California, San Diego. *Id.* at v-vi. PCAST also consulted with "Senior Advisors" including eight federal appellate and trial court judges, as well as law school and university professors. *Id.* at viii-ix.

examiners should not offer testimony in any forensic practice without foundational validity.[31]

First, the PCAST Report states that firearms identification and the AFTE Theory of Identification "is clearly not a scientific theory[.]... Rather, it is a claim that examiners applying a subjective approach can accurately individualize the origin of a toolmark." PCAST Report at 60. More importantly, the PCAST Report labels the method as "circular":

> It declares that an examiner may state that two toolmarks have a "common origin" when their features are in "sufficient agreement." It then defines "sufficient agreement" as occurring when the examiner considers it a "practical impossibility" that the toolmarks have different origins.

Id.

In other words, the theory to individualize the origin of a toolmark *never* explains what it purports to explain: how to determine when an examiner should find a match.

Second, the PCAST Report criticizes the AFTE Theory of Identification's reliance on "an examiner's training and experience." "In effect," the study explained, "positive identification depends on the examiner being positive about the identification":

> "Experience" is an inadequate foundation for drawing judgments about whether two sets of features could have been produced by (or found on) different sources. Even if examiners could recall in sufficient detail all the patterns or sets of features that they have seen, they would have no way of knowing accurately in which cases two patterns actually came from different sources, because the correct answers are rarely known in casework…. "Training" is an even weaker foundation. The mere fact that

[31] PCAST Report at page 141.

> an individual has been trained in a method does not mean that the method itself is scientifically valid nor that the individual is capable of producing reliable answers when applying the method.

Id. at 60-61.

A major issue with the theory's reliance on training and experience is further made clear when one considers that the theory claims to allow certainty in an identification. The theory does not state that the likelihood of an examiner making a correct identification changes with training and experience. Rather, it states that the standard for finding an absolute match changes with training and experience.

So, while an examiner with a high standard (purportedly derived from his training and experience) and one with a low standard (also derived from his training and experience) logically will have space for disagreement as to any particular set of evidence, the AFTE Theory of firearms identification nonetheless allows *both* examiners to be fully certain that they have the correct answer.

Third, the PCAST Report criticizes the firearm identification method's failure to report in court the reliability of the method applied, *i.e.*, the error rate. Without error rates, any identification is meaningless:

> As a rationale, it is sometimes argued that it is impossible to measure error rates perfectly or that it is impossible to know the error rate in the specific case at hand. This notion is contrary to the fundamental principle of scientific validity in metrology—namely, that the claim that two objects have been compared and found to have the same property (length, weight, or fingerprint pattern) is meaningless without quantitative information about the reliability of the comparison process.

PCAST Report at 62.

Fourth, the PCAST Report provides an extensive review of the research literature—concluding that the empirical evidence does not support the scientific validity of the practice of toolmark analysis:

> Although firearms analysis has been used for many decades, only relatively recently has its validity been subjected to meaningful empirical testing. Over the past 15 years, the field has undertaken a number of studies that have sought to estimate the accuracy of examiners' conclusions. While the results demonstrate that examiners can under some circumstances identify the source of fired ammunition, many of the studies were not appropriate for assessing scientific validity and estimating the reliability because they employed artificial designs that differ in important ways from the problems faced in casework.

PCAST Report at 106.

Empirical evidence is the sine qua non of foundational validity: "neither experience, nor judgment, nor good professional practices (such as certification programs and accreditation programs, standardized protocols, proficiency testing, and codes of ethics) can substitute for actual evidence of foundational validity and reliability." *Id.* at 6. The PCAST Report "that firearms analysis currently falls short of the criteria for foundational validity." *Id.* at 112, 150.

2020 Ames II Study and Report. Since the 2016 PCAST Report, subsequent research has similarly failed to establish the reliability of firearms identification and toolmark analysis. The second new landmark study is a recent research Report of the Ames National Laboratory (known as "Ames II") dated October 10, 2020. Ex. 4, Tobin Aff. p. 5. The Ames II Report exposes rates of error and indicia of reliability for firearms identification methodology that was used in *Manning* "that are egregiously unacceptable, even for what are called 'gun-recovered' cases; the *Manning* matter is

known as a 'no-gun-recovered' case, which is so problematic that some crime labs do not allow examiners to individualize cartridge cases or bullets to specific guns in 'no-gun-recovered' cases." Ex. 4, Tobin Aff. p. 5.

"[T]he error rate for comparing bullets in the Ames II study 'was as much as a whopping 53%.'" *Id*. at 11-12 (internal citation omitted). In other words, more often than not, an examiner *got the wrong answer*.

"For comparing cartridge cases, the error rate was 'as a similarly eye-popping 44%.'" *Id*. (internal citation omitted). *Id.*

Thus, in the Ames II study, "a controlled black-box study where ground truth is known, examiners *are worse than flipping a coin in making bullet comparisons* and only slightly better than flipping a coin in making cartridge case comparisons." *Id.* (emphasis added).

The data for repeatability and reproducibility are equally disturbing. Calculations for repeatability reveal the following:

- ~ **21%** of the time, same examiner would disagree with prior opinion for 'matches',
- ~ **35.3%** of the time, same examiner would disagree with prior opinion for non-matches
- ~ **50%** of the time disagreement (same examiner) if grouped with 'Inconclusive C' ("leaning toward elimination").

As for reproducibility, the calculations are:

- ~ **36.4%** of the time different examiners would disagree on 'matches',
- A stunning **59.7%** would disagree on 'non-matches'.

Id.; *see also* David L. Faigman, Nicholas Scurich, Thomas D. Albright, *The Field of*

Firearms Forensics Is Flawed (May 25, 2022) (Discussing the Ames II study and noting that "[t]he same examiner looking at the same bullets a second time reached the same conclusion only two thirds of the time. Different examiners looking at the same bullets reached the same conclusion less than one third of the time. So much for getting a second opinion!").[32]

Worse, "as bad as the data are, actual error rates are likely worse than the data on repeatability would imply. It is noted that a respondent could have scored poorly (0%, incorrect response) in the first phase of the study, then poorly (0%, incorrect response) in the second phase or subsequent, thus scoring highly in the *reliability* indicator of 'repeatability'; the examiner was reliable, just reliably wrong." Ex. 4, Tobin Aff. p. 12.

Worse still, a final complication to any examination is the presence of subclass characteristics. "Subclass carryover is the term used to denote characteristics that appear on bullets and cartridge cases from the manufacturing process and belonging to a potentially very large number of firearms in the same production lot, at a minimum. They are not "individual" in nature as described by Lewoczko in his *Manning* trial testimony." Ex. 4, Tobin Aff. p. 13-14. Subclass characteristics can look like individual characteristics but are not in fact unique to one gun. *Id.*

If subclass characteristics are present, an examiner may erroneously find "sufficient agreement" (i.e., a match) if he relies on subclass characteristics. And "there exists no known method by which a forensic examiner can discern or

[32] *Available at* https://www.scientificamerican.com/article/the-field-of-firearms-forensics-is-flawed/ (last visited September 29, 2023).

differentiate between subclass characteristics (from manufacturing) from purportedly 'individual' characteristics." *Id.* at 13 (citing PCAST Report).

Because the number of virtually identical firearms distributed in the region of a crime is never known by litigants, "jurors have no information by which to interpret the meaning of a claimed 'match'. Smith & Wesson makes approximately 2,000 9mm S&W semi-automatic pistols *per day*; they are boxed, palleted, and shipped to distributors and retail outlets as such." *Id.*

To illustrate this point, in the two following photos, two samples are displayed side-by-side in split-screen images (delineated by a dark vertical line in the center of each photograph).

FIGURE 1: TOOLMARKS ON TWO RUGER BOLTS

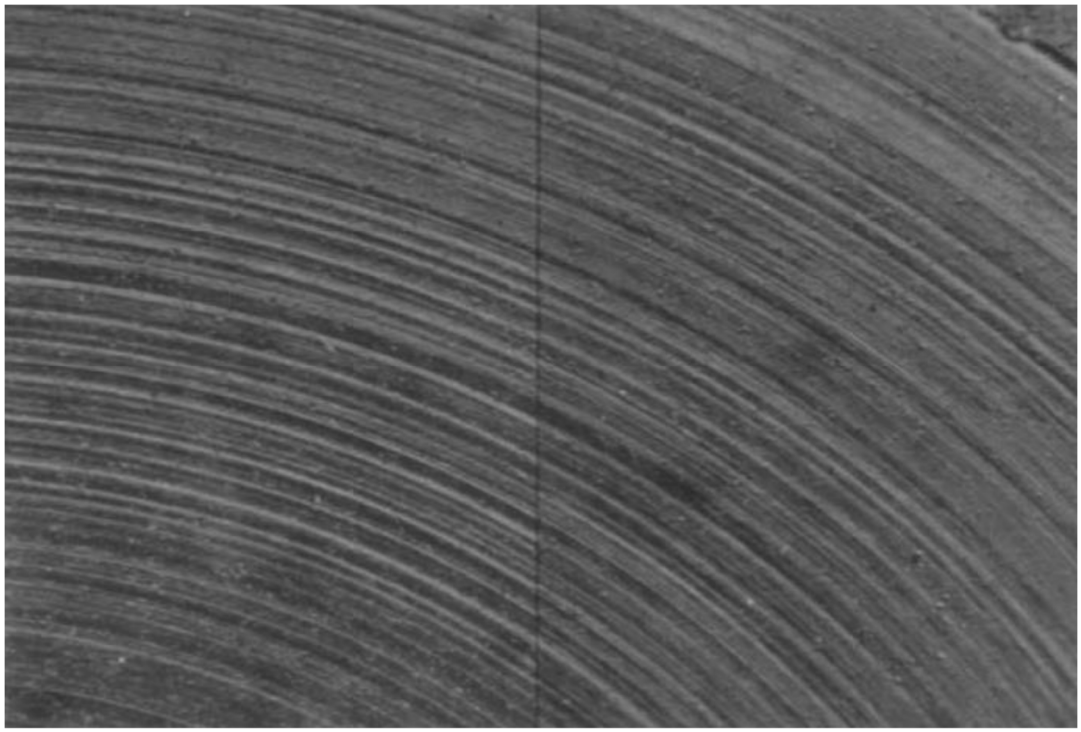
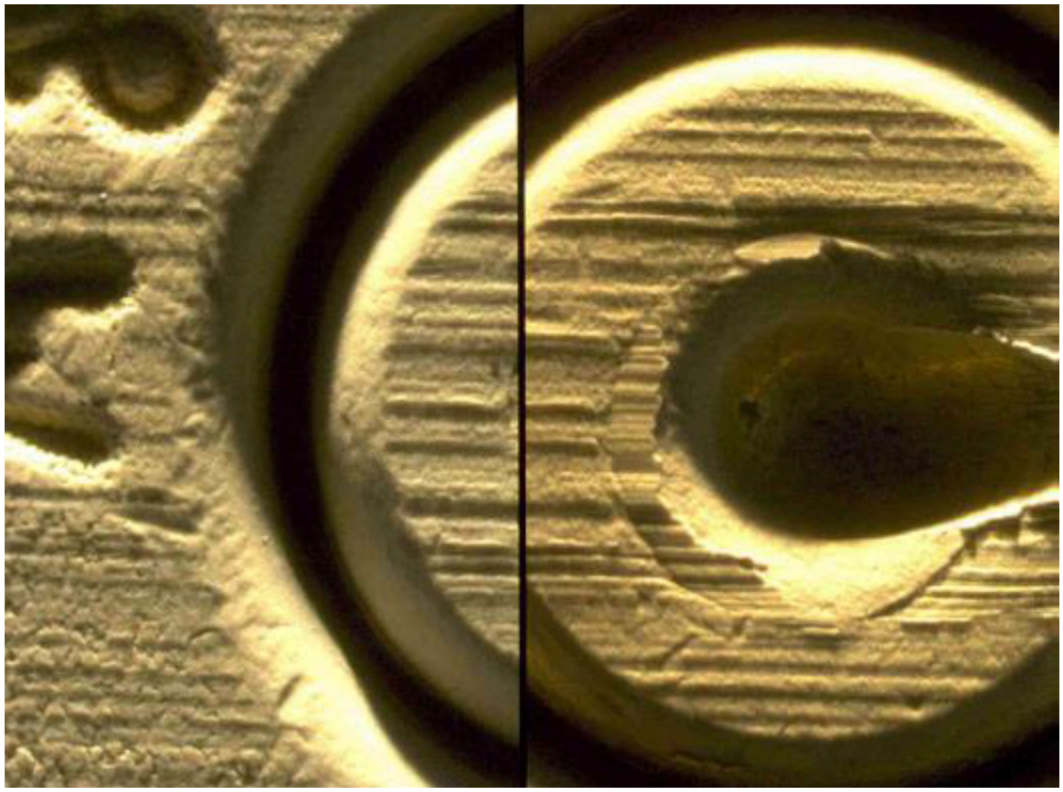


FIGURE 2: COMPARISON OF BREECH FACE MARKS ON TWO PISTOLS[33]



Each of the samples in Figures 1 and 2 was fired in/from *a completely different firearm*. "They are virtually indistinguishable and quite likely to have been subject to misattribution in case work where no other firearms from the same production lot were available for comparison." Ex. 4, Tobin Aff. p. 14-15.

Lest there be any doubt as to the lack of foundational validity of firearms identification and toolmark analysis, it is equally troublesome that the 2020 Ames II study was not blinded—respondents knew they were being tested:

> Prior studies have demonstrated that when respondents know they are being tested, use of the opinion 'inconclusive' dramatically increases for various reasons. This, in essence, allows a respondent to pick and choose which questions he/she feels most confident in answering. As one of the

[33] Breech Face: "The area around the firing pin, which is against the head of the cartridge or shotshell during firing." *See* Tenn. Admin. Office of the Courts, Firearms Handout, *available at*: https://www.tncourts.gov/sites/default/files/docs/firearmshandout_1.pdf (last visited Sept. 27, 2023).

> two most cited scholars at the intersection of science and the law points out, such allowance is tantamount to permitting law students taking the 200-question MBE to avoid answering any of the questions they find to be too difficult, too ambiguous, or too "inconclusive," then calculating percentage correct only on the basis of the questions they did answer, or worse, including those questions not answered as correct responses. In his own words, "An examinee who gets to choose which questions to answer is likely to do very well indeed on the test. Such a testing protocol, of course, would be absurd. It is similarly absurd as a research design."

Id.[34]

Also, the Ames II study is associated with a high survivorship bias (32.4% dropouts in the 1st phase alone), "surprisingly high given that the respondent pool was self-selected, meaning that only examiners most confident in their abilities volunteered as respondents." *Id.* at pp. 6, 11, 13. The high dropout rate of 32.4% for the first phase rose to 68.8% for the study as a whole. *Id*. So, only approximately 31% of the initial respondents completed the study. *Id.*

The principal reason cited by the dropouts was ostensibly the fact that they were overloaded in their normal workload. *Id*. Thus, "quite likely that the rates of error and poor repeatability and reproducibility rates would be even worse (1) for the general population of examiners, and (2) that those dropping out of the study could well be those most likely to make errors in the crush of heavy workloads, if indeed the rationale for dropping out is as represented."

In light of the newly discovered evidence – including scientific developments and all that has been discovered about the field of firearms identification and

[34] Citing David L. Faigman, Chancellor & Dean and John F. Digardi Distinguished Professor of Law at UC-Hastings, Professor of Medicine in the Dept. of Psychiatry at UC-San Francisco, and leading scholar on the subject of the use of scientific research in legal decision making.

toolmark analysis – Manning's conviction is indefensible.

4. The change in the scientific community's view and understanding of firearms identification and toolmark analysis is newly discovered evidence requiring post-conviction relief.

In recently addressing bitemark analysis (also a form of pattern analysis), the Mississippi Supreme Court had to grapple with the scientific community's view and understanding of a forensic field related to toolmark analysis. *See Howard v. State*, 300 So. 3d 1011 (Miss. 2020). There, the Court concluded that evidence of a change in the scientific understanding and acceptance of the reliability of individualizations in bitemark analysis was newly discovered evidence not available at time of Howard's capital murder trial. Thus, post-conviction relief was required.

Post-conviction relief is similarly required here. A petitioner is entitled to a new trial based on newly discovered evidence where, as here, he can demonstrate: (1) that the new evidence was discovered since the trial; (2) that, even when using due diligence, the petitioner could not have discovered the new evidence prior to trial; (3) that the evidence is material to the issue and that it is not merely cumulative or impeaching; and (4) that the evidence would probably produce a different result or verdict in a new trial. *See Ormond v. State*, 599 So. 2d 951, 962 (Miss. 1992); *accord Sonnenburg v. State*, 830 So.2d 678, 681 (Miss. Ct. App. 2002).

As in *Howard*, here there is indisputably a change in the scientific understanding and acceptance of the reliability of individualizations in firearms identification and toolmark analysis that is newly discovered evidence not available at the time of Manning's capital murder trial. Such scientific development evidence

also would have (more than) probably produced a different result or induced a different verdict. *See Howard*, 300 So. 3d at 1016 (defining the issue before the Court).

A comparison of the evidence in *Howard* and that demonstrated here tells the Court all it needs to know to grant post-conviction relief.

***Howard* evidence relied on to grant post-conviction relief because of scientific developments on the inherent unreliability of bitemark evidence.**	**Evidence presented here to grant post-conviction relief because of the scientific developments on the inherent unreliability of the firearms identification.**
When Dr. West testified in 2000, his testimony was consistent with the American Board of Forensic Odontology (ABFO) guidelines.	When the firearms examiner testified at Manning's trial his testimony was consistent with the FBI guidelines.
Later, the ABFO changed its guidelines as a result of dramatic change in the scientific understanding and acceptance of the reliability of individualizations in bite-mark analysis.	Later, the scientific community and the FBI changed its guidelines – and sent letters to this Court and the parties – as a result of dramatic change in the scientific understanding and acceptance of the reliability of individualizations in firearms identification analysis.
Changes to guidelines were prompted by wrongful convictions.	Changes in the scientific community and FBI guidelines for conclusions reached and testified to were prompted by wrongful convictions (among other developments). *See infra.*
➢ A study published in 2009 by the National Academy of Sciences Report reported the lack of scientific basis for bite-mark evidence, including the ability to accurately match an alleged bitemark to the teeth of a single individual to the exclusion of all others.	➢ In 2008, the National Research Council of the National Academies of Science published a report that identified challenges that complicate firearms identifications. ➢ In 2009, the NRC published a report in which it addressed "pressing issues" within the disciple of firearms identification. ➢ In 2013, DOJ letters admitting the testimony in Manning's case by the FBI was false: "The science regarding firearms examinations does not permit examiner testimony that a specific gun fired a specific bullet to the exclusion of all other guns in the world."

	➢ In 2016, the President's Council of Advisors on Science and Technology (PCAST), one of the two most respected authoritative voices of the relevant scientific community, issued a Report. Among its myriad findings was that firearms identification forensic practice is without foundational validity. ➢ Since the 2016 PCAST Report, subsequent research has similarly failed to establish the reliability of firearms identification and toolmark analysis. The second new landmark study is a recent research Report of the Ames National Laboratory (known as "Ames II") dated October 10, 2020. The Ames II Report exposes rates of error and indicia of reliability for firearms identification methodology that was used in *Manning* "that are egregiously unacceptable." *See* Tobin Aff., *supra*.
While Dr. West testified it was not impossible to compute a margin of error for his methods, a growing body of scientific research suggests that the error rate may be quite high.	Scientific research suggests that the error rate for comparing bullets in the Ames II study was 53%. *See supra*. In other words, more often than not, an examiner got the wrong answer. For comparing cartridge cases, the error rate was 44%. *Id*. Error rate calculations for repeatability and reproducibility are also high. *See supra*.
Dr. West, or any other forensic dentist, would not be able to offer the individualization testimony Dr. West gave at Howard's trial.	The FBI firearms examiner, or any other firearms examiner, would not be able to offer the individualization testimony the FBI examiner gave at Manning's trial.
The present scientific understanding of the invalidity of identification through bite-mark comparison is a new, material fact that constitutes newly discovered evidence.	The present scientific understanding of the invalidity of identification through firearms identification comparison is a new, material fact that constitutes newly discovered evidence.
The bitemark evidence was important evidence for the state at trial.	As this Court has noted, the firearms identification evidence was "damning" evidence against Manning.
The inadmissibility of Dr. West's testimony plus other newly discovered evidence shows that a jury would not have found Howard guilty beyond all reasonable doubt.	The inadmissibility of the firearms identification testimony plus other newly discovered evidence shows that a jury would not have found Manning guilty beyond all reasonable doubt.

Firearms identification based on the subjective "pattern matching" method has led to wrongful convictions across the country.[35] Misidentifications have resulted in wrongful arrests[36] and crime lab audits.[37] Indeed, a government crime lab in Washington D.C. recently lost its accreditation as a result of multiple firearms misidentifications.[38]

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[35] For example, Patrick Pursley spent 23 years in prison for a murder that he did not commit after a gun was misidentified as the source of bullets and casings from the scene. *People v. Pursley*, 2018 IL App (2d) 170227-U; National Registry of Exonerations, Patrick Pursley,

See https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=5487.

As another example, Anthony Ray Hinton spent nearly 30 years on death row for a murder that he did not commit based on a misidentification. *Hinton v. Alabama*, 571 US 263 (2014); National Registry of Exonerations, Anthony Ray Hinton,

https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=4669. *See also* Brandon Garrett, Siggers' Firearms Exoneration, Duke Law Forensic Forum (Oct 23, 2018) (wrongful conviction of Darrell Siggers); Craig Cooley & Gabriel Oberfield, *Symposium: Daubert, Innocence, and the Future of Forensic Science: Increasing Forensic Evidence's Reliability and Minimizing Wrongful Convictions: Applying Daubert Isn't the Only Problem*, 43 TULSA L REV 285, 33738 (2007) (wrongful conviction of Charles Stielow).

[36] Rickey Ross, a Los Angeles County Sheriff's Deputy, was wrongfully arrested for several murders after examiners misidentified his gun as the source of the bullets recovered at the scene of each murder. *See* Cooley, *supra* n. 32 at 338-39. As another example, Leslie Merritt was arrested and wrongfully incarcerated for seven months based on a misidentification before charges were dismissed. *See Merritt v. Arizona*, 425 F. Supp. 3d 1201, 1208, 1214 (D. Ariz. 2019).

[37] For instance, at the request of the Detroit Police Department Chief and the Wayne County Prosecutor's Office, a team from the Michigan State Police Forensic Science Division conducted an audit of the DPD's firearms unit, including a random reanalysis of 250 real-world cases and an additional 33 cases that were known to have been prosecuted. The results of the audit were striking (enough to shutter the unit): in ten percent (29) of the 283 cases reanalyzed, firearms examiners from the DPD's firearms unit had committed serious errors (defined as false identifications or false exclusions). *See* Michigan State Police Forensic Science Division, *Audit of the Detroit Police Department Forensic Services Laboratory Firearms Unit* (2008), *available at*:

http://www.sado.org/content/pub/10559_MSP-DCL-Audit.pdf; *see also* Nick Bunkley, Detroit Police Lab is Closed After Audit Finds Serious Errors in Many Cases, NY TIMES (Sept 25, 2008), https://www.nytimes.com/2008/09/26/us/26detroit.html.

[38] The D.C. Department of Forensic Sciences lost its accreditation in 2021 after a casework review triggered by a failed proficiency test by a firearms examiner launched an odyssey of multiple audits. *See* Spencer S. Hsu & Keith L. Alexander, Forensic Errors Trigger Reviews of D.C. Crime Lab *Ballistics Unit, Prosecutors Say*, WASHINGTON POST (Mar 24, 2017); Jack Moore, *Sweeping Report Urges DC to Review Every Case Handled by Firearms, Fingerprint Units at Troubled Crime Lab*, WTOP NEWS (Dec 14, 2021); Jack Moore, Officials Now Expect DC Crime Lab to Remain Sidelined Until Next *Spring*, WTOP NEWS (Mar 31, 2022).

Thus, for good reason, cases across the country have already begun to reshape how firearms identification evidence is received in criminal cases.[39] *See, e.g., Abruquah v. State*, 483 Md. 637, 648, 296 A.3d 961, No. 10, Sept. Term, 2022 (filed June 20, 2023) (holding that a firearms examiner could not "offer an unqualified opinion that the crime scene bullets were fired from" a specific gun and could only say that "patterns and markings on bullets are consistent or inconsistent with those on bullets fired from a particular firearm").

Indeed, since the 2013 DOJ *Manning* letters, courts across the country have taken essentially four tracks when either admitting under limited circumstances or excluding altogether firearms identification evidence: (1) limit the language that experts can use when testifying to their conclusions; (2) limit conclusions to class characteristics only; (3) rule that evidence concerning the proficiency of firearms experts is relevant to the preliminary question: whether to qualify the expert; and (4) examining the as-applied question whether the method was reliably used in the particular case.

The following chart demonstrates the body of precedent in light of newly discovered scientific developments:

[39] Yet another misattribution occurred in *Williams v. Quarterman*, where a firearms/toolmarks examiner testified *to an absolute certainty* that a bullet was fired from a certain .25 caliber pistol. It was eventually determined to have been fired from a .22 caliber pistol not owned by the defendant. *Williams v. Quarterman*, 551 F.3d 352, 355 (5th Cir. 2008).

CASE	LIMITATION ON TESTIMONY FIREARMS IDENTIFICATION TESTIMONY
Abruquah v. State, 483 Md. 637, 648, 296 A.3d 961, No. 10, Sept. Term, 2022 (filed June 20, 2023)	Firearms examiner could not "offer an unqualified opinion that the crime scene bullets were fired from" a specific gun and could only say that "patterns and markings on bullets are consistent or inconsistent with those on bullets fired from a particular firearm").
U.S. v. Felix, No. CR 2020-0002, 2022 WL 17250458 (D.V.I. Nov. 28, 2022)	Testimony may offer only conclusions regarding class characteristics and whether individual toolmarkings were "consistent"
U.S. v. Stevenson, No. CR-21-275-RAW, 2022 WL 4368466 (E.D. Okla. Sept. 21, 2022)	Limiting expert to "reasonable degree of ballistic certainty"
Winfield v. Riley, 2021 WL 1795554 (E. D. La. 2021)	Limiting expert to "more likely than not" conclusion
U.S. v. Adams, 444 F. Supp. 3d 1248 (Ore. 2020)	No methods of conclusions relating to whether casings "matched" may be admitted
People v. Ross, 129 N.Y.S.3d 629 (Supreme Court, Bronx Counrt, NY) (slip op.)	"Qualitative opinions" can only be offered on the significance of "class characteristics"
U.S. v. Hunt, 464 F.Supp.3d 1252 (W.D. Ok. 2020)	Permitting "reasonable degree of ballistic certainty"
State v. Raynor, 2020 WL 8255199 (Conn. 2020)	Permitting "more likely than not" testimony
U.S. v. Harris, 2020 WL 6488714 (D.D.C. 2020)	Instructed expert to abide by DOJ limitations, including not using terms like "match"
Williams v. United States, 210 A.3d 734 (D.C. 2019)	Finding error to permit expert to testify that there was not "any doubt" in conclusion
State v. Gibbs, 2019 WL 6709058 (Del. Sup. Ct. 2019)	May not testify to a "match" with any degree of certainty, and may not testify to a "reasonable degree" or "practical impossibility"
U.S. v. Tibbs, 2019 WL 4359486 (D.C. Super. 2019)	Limiting testimony to "the recovered firearm cannot be excluded as the source of the cartridge casing found on the scene of the alleged shooting."

U.S. v. Davis, 2019 WL 4306971 (W.D. Va. 2019)	Preventing testimony to any form of "a match"
U.S. v. Shipp, 422 F.Supp.3d 762 (E.D.N.Y. 2019)	Preventing testimony "to any degree of certainty"
U.S. v. Medley, 17 CR 242 (D.Md. April 24, 2018)	Permitting "consistent with" but no opinion fired by same gun
State v. Terrell, 2019 WL 2093108 (Conn. 2019)	Prohibiting testimony regarding likelihood so remote as to be practical impossibility
U.S. v. Simmons, 2018 WL 1882827 (E.D. Va. 2018)	Limiting to "a reasonable degree of ballistic ... certainty"
U.S. v. White, 2018 WL 4565140 (S.D.N.Y. 2018)	Holding that expert may not provide any degree of certainty, unless pressed on cross-examination, and may then present "personal belief"
State v. Jaquwan Burton, Superior Court, No. CR140150831 (New Haven, CT February 1, 2017) (oral decision)	Permitting "consistent with" but no opinion that it was fired by same gun
Missouri v. Goodwin-Bey, No. 1531-CR00555-01 (Cir. Ct. Green County, Mo., Dec. 16, 2016)	Limiting to "the recovered firearm cannot be excluded as the source of the cartridge casing found on the scene of the alleged shooting."
Gardner v. United States, 140 A.3d 1172 (D.C. 2016)	Error to admit "unqualified" testimony with "100% certainty"
U.S. v. Cazares, 788 F.3d 956 (9th Cir. 2015)	Limiting to "reasonable degree of scientific certainty"
U.S. v. Black, 2015 WL 13660442 (D. Minn. 2015)	Limiting to "reasonable degree of ballistics certainty" and barring "certain" or "100%" conclusions
U.S. v. Ashburn, 88 F.Supp.3d 239 (E.D.N.Y. 2015)	Limiting to "reasonable degree of ballistics certainty" and precluding "certain" and "100%" sure statements
U.S. v. McCluskey, 2013 WL 12335325 (D. N.M. 2013)	Limiting testimony to "practical certainty" or "practical impossibility"

5. The use of this scientifically invalid testimony rendered Manning's trial fundamentally unfair in violation of due process.

"[T]he Due Process Clause guarantees the fundamental elements of fairness in a criminal trial." *Spencer v. Texas,* 385 U.S. 554, 563-64 (1967). This right requires that a defendant be given "a fair opportunity to defend against the State's accusations." *Chambers v. Mississippi,* 410 U.S. 284, 294 (1973). Such an opportunity is entirely denied when "convictions are predicated on what new scientific evidence has proven to be fundamentally unreliable expert testimony ..." *Han Tak Lee v. Glunt,* 667 F.3d 397,403 (3d Cir. 2012). In other words, a defendant and his counsel simply cannot have subjected the initial scientific testimony to "the crucible of meaningful adversarial testing," *United States v. Cronic,* 466 U.S. 648,656 (1984), when scientific understanding about the value of that evidence does not change until years or decades after a conviction is obtained.

At the time of Manning's trial—and, indeed, for many years afterwards—firearms identification and toolmark comparison evidence had not yet been exposed to serious scientific scrutiny. As a result, courts and litigants alike accepted the claimed abilities of firearms examiners to boldly declare that bullets taken from a tree in Manning's yard were fired by the same gun used to kill the victims, "to the exclusion of every other firearm – every other barrel, in the world .... It's like fingerprints are to you." T. 1092 (testimony of John Lewoczko).

Because the scientific understanding had not yet changed at the time of Manning's trial, the prosecution's evidence could not be subjected to "the crucible of

meaningful adversarial testing," *Cronic,* 466 U.S. at 656, that would be possible today.

The risk of fundamental unfairness is also especially acute under these circumstances. As an initial matter, jurors are unlikely to be positioned to independently evaluate expert evidence, and are thus likely to place a high level of faith in such evidence.[40] That can only be more so where, here, the court, the prosecutor, and defense counsel were all operating under the same false assumption, i.e., that, at the least, firearms identification and toolmark analysis evidence is generally valid and reliable. The jury's integral role as fact-finder is unavoidably impaired under these circumstances, "call[ing] into question the ultimate 'integrity of the fact-finding process,'" *Chambers,* 410 U.S. at 295 (quoting *Berger v. California,* 393 U.S. 314,315 (1969)).

What's more, the risk of undue prejudice is especially high in the case of the type of individualizations in firearms identification and toolmark analysis. Here, for example, the evidence that bullets taken from a tree in Manning's yard were fired by the same gun used to kill the victims, "to the exclusion of every other firearm – every

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[40] *See, e.g.*, Keith A. Findley, *Innocents at Risk: Adversary Imbalance, Forensic Science, and the Search for Truth,* 38 SETON HALL L. REV. 893, 948 (2008) ("[R]esearch indicates that jurors often do not understand the fundamentals of scientific evidence, and lack the 'ability to reason about statistical, probabilistic, and methodological issues effectively.'" (citation omitted)); Mark A. Godsey & Marie Alou, *She Blinded Me with Science: Wrongful Convictions and the "Reverse CS! Effect,"* 17 TEX. WESLEYAN L. REV. 481,495 (2011) ("It is clear to me that jurors in this country often accept state forensic testimony as if each prosecution expert witness is the NASA scientist who first put man on the moon."); Tom R. Tyler, *Viewing CS! and the Threshold of Guilt: Managing Truth and Justice in Reality and Fiction,* 115 YALE L. J. I 050, I 068 (2006) ("There is widespread evidence indicating that people already overestimate the probative value of scientific evidence."); Richard H. Underwood, *Evaluating Scientific and Forensic Evidence,* 24 AM. J. TRIAL ADVOC. 149, 166 (2000) ("Given their lack of scientific sophistication and innumeracy, jurors are likely to overestimate the significance of [expert testimony].").

other barrel, in the world," appears to be certain evidence of guilt. *See Ege v. Yukins,* 485 F.3d 364, 376-78 (6th Cir. 2007) (noting the highly prejudicial nature of positive bite mark identifications and affirming grant of habeas relief on due process grounds); *accord Brown v. O'Dea,* 227 F.3d 642,645 (6th Cir. 2000) ("[T]he admission of prejudicial evidence constitutes a denial of fundamental fairness" when the evidence is "'material in the sense of a crucial, critical highly significant factor.'") (quoting *Leverett v. Spears,* 877 F.2d 921,925 (11th Cir. 1989)).

The State unquestionably used the presence of bullets in a tree behind Manning's house that could have only come from the gun used to kill the victims, "to the exclusion of all other firearms" to convict Manning. It was, as this Court said, "damning" evidence. *Manning*, 726 So. 2d at 1168. There can be no argument this testimony was not material.

Due process does not permit a conviction obtained by scientific evidence, later learned to be unvalidated and unreliable, to stand. Here, the admission of such evidence violated Manning's right to due process, and he is thus entitled to a new trial. *Ege,* 485 F.3d at 375 (the "improper admission of certain evidence injurious to the defendant" violates due process when it "deprive[s] a defendant of her right to a fair trial" (emphasis omitted)).

D. This Court Should Grant Post-Conviction Relief Based on the Cumulative Effect of the Evidence Undermining the Reliability of Manning's Conviction.

Even if any of the new evidence, taken in isolation, is insufficient for the grant of post-conviction relief, a consideration of the aggregate effect of the totality of the

evidence completely changes the evidentiary landscape. *See Thorson v. State,* 994 So. 2d 707, 721 (Miss. 2007). Similarly, when reviewing claims regarding the failure to disclose exculpatory evidence, the Court must not view each item in isolation; rather, it must assess the cumulative effect of the errors. *Wearry v. Cain*, 577 U.S. 385, 394 (2016).

At this point, there is no need to belabor the obvious. There is no reason to have confidence in the result of Manning's trial. The prosecutor emphasized that the case turned on the credibility of the State's witnesses, and now it is apparent that the most important witnesses lied. Other newly discovered evidence further exposes the overall weakness of a theory based solely on an unproven link between a car burglary and the murders.

The weak forensic evidence – hairs and ballistics comparisons – have no strength. The FBI repudiated the conclusions about the hair evidence reached by its analyst in 2013, and now scientific advances have shown the testimony about the bullet comparison to lack any scientific validity. The only reasonable conclusion to draw is that Manning is entitled to post-conviction relief.

THE CLAIMS RAISED IN THIS PETITION ARE NOT STATUTORILY BARRED.

Under Miss. Code Ann. § 99-39-21(6), "the burden is upon the prisoner to allege in his motion such facts as are necessary to demonstrate that his claims are not statutorily barred under this section." *See, e.g., Jackson v. State,* 860 So. 2d 653, 661 (Miss. 2003). Although this is a successive petition, Manning can overcome statutory barriers if he can demonstrate cause for not raising a claim sooner. "Cause" is

"limited to those cases where the legal foundation upon which the claim for relief is based could not have been discovered with reasonable diligence at the time of trial or direct appeal." Miss. Code Ann. § 99-39-21(4).

A petitioner may also overcome the successor bar if there has been an intervening decision of the Supreme Court of either the State of Mississippi or the United States which would have actually adversely affected the outcome of his conviction or sentence. *See, e.g., Chase v. State*, 873 So. 2d 1013 (Miss. 2003) (applying new decision barring the execution of the intellectually disabled). In addition, a petitioner may proceed with a successive petition if "he has evidence, not reasonably discoverable at the time of trial, which is of such nature that it would be practically conclusive that had such been introduced at trial it would have caused a different result in the conviction or sentence." Miss. Code Ann. § 99-39-27(9); *see also Howard v. State*, 300 So. 3d 1011 (Miss. 2020); *Bass v. State,* 4 So. 3d 353, 357-58 (Miss. App. 2008).

A. The State's Failure to Disclose Exculpatory Information Constitutes Cause.

A petitioner cannot be at fault for failing to raise a claim if the State fails to disclose it. *See Strickler v. Greene*, 527 U.S. 263, 283 (1999) (state's non-disclosure of information provides cause to overcome procedural default); *Banks v. Dretke*, 540 U.S. 668, 692-93 (2004). Despite having an obligation to disclose exculpatory material, the State did not disclose the arrangement it had with Earl Jordan, its conversations with Henry Richardson denying Manning made incriminating statements in his

presence, or information from Hathorn about the favorable treatment she received, both financially and with pending charges.

Moreover, Manning diligently sought the material. He previously approached Earl Jordan, but Jordan refused because he was afraid of the sheriff. Ex. 1, ¶ 7. In 2013, Jordan would not sign an affidavit recanting his testimony though he did admit to an investigator that he lied. At that time, the Court declined to consider his recantation because "Manning fails to present competent evidence Earl Jordan has recanted his trial testimony." *Manning v. State,* 2013 Miss. LEXIS 186, *6 (Miss. April 25, 2013). Although counsel spoke to Hathorn previously, she only now disclosed the additional information contained in her more recent affidavit. Ex. 3. Moreover, as discussed below, Manning was unable to locate Richardson previously.

Although Manning exercised diligence in trying to obtain the key details from those witnesses, it was not incumbent upon him to track down the witnesses, hoping they would talk to him and disclose what they had previously told law enforcement. Instead, the Constitution clearly places the burden on the State to disclose all exculpatory material. Providing constitutionally required exculpatory information is not a game of hide-and-seek. *Banks,* 540 U.S. at 696 ("A rule thus declaring 'prosecutor may hide, defendant must seek,' is not tenable in a system constitutionally bound to accord defendants due process."). Because the State failed to fulfill its obligations under *Brady* and failed to disclose key information, Petitioner has shown cause for not raising these issues earlier. For the reasons discussed in the

ground for relief addressing *Brady,* the suppressed information is material, and this Court should grant post-conviction relief.

B. Other Facts Were Not Previously Available.

This Court has previously found that scientific advances discrediting certain types of forensic evidence may constitute newly available evidence. In *Howard v. State,* 300 So. 3d 1011 (Miss. 2020), this Court found that developments regarding bite mark analysis were new evidence and relied on those new findings to grant post-conviction relief. As discussed in greater detail in Ground C, advances in the field of firearms/toolmark identification shows that there is no reliable way to compare two different bullets to determine whether they were fired from the same gun. In 2013, Manning presented evidence based on a limited critique of the comparison of the bullets at issue based largely on the grossly overstated level of confidence on the part of the FBI examiner. New scientific studies have shown that this field of comparison is not reliable at all. As in *Howard,* the jury should never have heard the discredited science, and no conviction that relies on that discredited analysis should stand.

Other facts developed in connection with this successive petition could not have been developed when the initial post-conviction petition was filed due to a lack of time and resources. The newly created Office of Capital Post-Conviction Counsel opened its doors in November 2000. Initially, the Office did not learn of its appointment in Manning's case involving the students until March 2001 because the office was not served with the appointment order. *See* Ex. 5. David Voisin was a staff attorney assigned to represent Manning.

Because Manning had two separate capital cases requiring extensive investigation and because of the overall workload of the OCPC, the director at the time, C. Jackson Williams, entered into a contract with Robert S. Mink to serve as co-counsel. Shortly after the OCPC began representing Manning, the State filed a notice of non-compliance with Rule 22, asserting that Mink was unqualified to represent Manning even though Voisin, who was qualified, served as lead counsel. The trial court ultimately agreed with the State and removed Mink. *See* Ex. 6.

As a result, Voisin represented Manning in both cases, as well as numerous others, and could not devote nearly enough time to Manning's case. During this period, he also had to litigate issues regarding funding, discovery, and access to Manning's files held by the Department of Human Services. There was only one investigator with the OCPC at the time. Details about the overall workload and shortage of resources in 2001 are contained in affidavits of David Voisin and C. Jackson Williams, attached as Ex. 47 and 48. Despite exercising diligence, counsel could not hope to locate and interview all individuals who may have critical information to offer, especially after the State made the situation immeasurably worse when it had an attorney removed from the case.

Manning never had a chance to have competent counsel have adequate time and resources to conduct a thorough and reliable investigation. The first two attorneys appointed to his case did nothing but move to withdraw. Ex. 5. The circuit court's delay in making a timely appointment of qualified counsel cost Manning his chance for federal habeas corpus review. *Manning v. Epps,* 688 F.3d 177 (5th Cir.

2012). When OCPC was appointed, it had inadequate staffing and resources to manage its caseload. When it sought to contract with competent counsel who could provide meaningful assistance, the State interceded to have the attorney removed. Under the cynical guise of having a conscientious lawyer removed, the State ensured that Manning would be unable to undertake a complete investigation. Under these circumstances, the State cannot now blame Manning and complain that he has been less than diligent in trying to develop all relevant facts.

C. Evidence Developed in Manning's Other Case Did Not Become Available Until After the Initial Petition In This Case Was Adjudicated.

Other facts were not fully developed until Manning was granted an evidentiary hearing in his case involving the two elderly women in Starkville. At that hearing, Manning was able to produce testimony from Kelvin Lucious and Likeesha Jones about law enforcement's method of applying a mixture of carrots and sticks to induce a fraught witness to provide statements that the prosecution will find beneficial.

Other bad acts by a party are relevant and admissible to show "motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident." Rule 404(b)(2). Under similar circumstances in which it struggled to solve an infamous double murder, law enforcement offered inducements to and threatened individuals susceptible to pressure. Those individuals like Lucious, in one case, and Jordan, Parker, and Hathorn in this case, helped themselves even though it resulted in false evidence used to convict an innocent man.

Flowers v. Mississippi, 139 S. Ct. 2228 (2019) may also shed light on these circumstances even though the underlying legal issue, the racially discriminatory exercise of peremptory strikes, is not at issue here. There, a powerful indicator of wrongfulness on the part of the prosecutor was that he took the same unconstitutional action against the same defendant in earlier proceedings. An earlier pattern of misconduct supported an inference that current action was also indicative of misconduct.

The similar pattern is apparent here. Unable to identify a perpetrator with eyewitnesses or reliable forensics, the State turned to desperate informants with a lengthy history of criminal activity or dishonesty somehow expecting them to be truthful.

CONCLUSION

For the foregoing reasons, Manning requests that this Court grant post-conviction relief. At a minimum, under well-settled precedent, this Court should remand for a hearing regarding the new evidence, in particular Earl Jordan's recantation. *Tobias v. State,* 505 So. 2d 1014, 1015 (Miss. 1987)); *see also Manning v. State,* 884 So. 2d 717, 723 (Miss. 2004). Similarly, Manning is at least entitled to a hearing regarding scientific advances in the field of ballistics comparisons.

Respectfully submitted, this the 29th day of September 2023.

/s/ Krissy C. Nobile
Krissy C. Nobile, MSB #103577
MISS. OFFICE OF CAPITAL POST-CONVICTION COUNSEL
239 North Lamar Street, Suite 404
Jackson, MS 39201
Telephone: 601.359.5733
knobile@pcc.state.ms.us

David P. Voisin, MSB #100210
P.O. Box 804
Hammond, LA 70404
(601) 949-9486
david@dvoisinlaw.com

Robert S. Mink, Sr., MSB #9002
5760 I-55 North, Suite 300
Jackson, Mississippi 39211
(601) 351-5519
robmink@holcombgroup.com

Counsel for Petitioner Willie Jerome Manning

CERTIFICATE OF SERVICE

I, the undersigned attorney, do hereby certify that I have on this day caused the foregoing to be filed using the MEC system, which sent notice to all counsel of record, including:

Mary Helen Wall
Ashley Sulser
Office of the Attorney General
P.O. Box. 220
Jackson, MS 39205

It has also been sent via U.S. Mail to: Mr. Willie Manning

Dated: September 29, 2023

/s/ Krissy C. Nobile
Krissy C. Nobile

Counsel for Petitioner Willie Jerome Manning