NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

KENNETH TRAYLOR,
Petitioner,

v.

STATE OF MISSISSIPPI,
Respondent-Appellee

ON PETITION FOR WRIT OF CERTIORARI
TO THE MISSISSIPPI SUPREME COURT

PETITION OF WRIT OF CERTIORARI

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QUESTIONS FOR REVIEW

I. **The Petitioner's Substantive Claim Should Be Heard on the Merits, as the Claim Could Not Have Been Raised in an Earlier Proceedings.**

II. **The Petitioner Is in Possession of Newly Discovered Evidence Tending to Prove His Actual Innocence, Meaning That Further Incarceration Would Be a Continued Violation of the Petitioner's Fifth and Fourteenth Amendments Right to Due Process of Law.**

III. **Prior Counsel was Ineffective for Failing to Adequately Investigate the Alibi Defense. Likewise, counsel pro se was ineffective on appeal and in the first post conviction pleading.1**

IV. **The Petitioner Is Entitled to an Evidentiary Hearing on These Matters.**

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the justices of this Court may evaluate possible disqualifications or recusal.

Kenneth Traylor, *Petitioner*

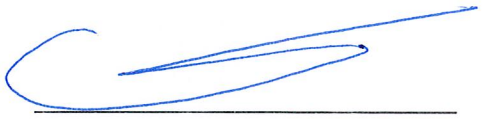
Cynthia A. Stewart, *Attorney for Mr. Traylor*

John Weddle, *Lee County District Attorney*

Jim Hood, *Attorney General*

Judge Paul Funderburk, *Circuit Court Judge, Lee County, Mississippi.*

SO CERTIFIED, this the 12th day of July, 2019.



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COMES NOW the Petitioner, by and through counsel, and files this his Petition for Writ of Certiorari, from a ruling of the Mississippi Supreme Court on an Order denying an application for leave to file a Motion for Post-Conviction Relief and in support thereof sets forth the following:

That an Amended application for leave to file a Motion for Post-Conviction Relief was filed on or about March 13, 2019.

On or about April 16, 2019, the Mississippi Supreme Court issued an Order denying Appellant's Amended application for leave to file a Motion for Post-Conviction Relief. (APPENDIX A)

On or about April 16, 2004, Kenneth Traylor was indicted for 3 counts of kidnapping, Aggravated Assault, Burglary, Burglary, Attempted Auto Theft, 2 Counts of Assault with a Deadly Weapon and Assault. (APPENDIX B) On or about June 8, 2005, Kenneth Traylor proceeded to trial. The Jury returned a guilty verdict. Mr. Traylor was sentenced in the Circuit Court of Lee County, Mississippi, on June 8, 2005, Mr. Traylor was sentenced to six life sentences with 120 year enhancement due

to his classification as an habitual offender. (APPENDIX C) Mr. Traylor filed a direct appeal with the Mississippi Supreme Court. (APPENDIX D) A mandate was issued on January 26, 2006 dismissing the appeal for failure to pay appeal costs. (APPENDIX E and F) All Affidavits (APPENDIX G)

The Petitioner further moves this Court to order an evidentiary hearing in order to resolve these issues. In support thereof, Petitioner states the following:

1. The events giving rise to this matter allegedly occurred on February 12, 2004. On that date, it is alleged that the Petitioner and co-defendant, Genarro Shumpert, engaged in the kidnapping of Tommy Malone, Debbie Malone, and Jamie Malone. Tommy Malone was struck with a pellet pistol causing numerous lacerations about the face and head, a skull fracture, and a fractured nose. Two firearms and some jewelry were taken from Malone residence as well as a Ford Explorer. The Explorer, along with the Malones' clothing was taken after brandishing the stolen firearms. Debbie Malone was also assaulted. None of the Malones were able to identify their assailants. (Transcript at 60, 90, 109-110). It was only through the testimony of Shumpert that the Petitioner was identified as an assailant herein. (Transcript at 204-205).

2. Newly discovered evidence has been obtained in the form of an affidavit from Christopher Perkins. Perkins now states that his identification of the Petitioner as an assailant was given under pressure from law enforcement officials. (Perkins Affidavit, (APPENDIX G) Perkins states that he was told that his children would be taken away if he did not cooperate and give the

testimony that the Detective Donna Franks was wanting him to give. He was provided with a prefilled statement to sign. (Perkins Affidavit) In actuality, Mr. Perkins, did not hear Mr. Traylor say anything regarding a crime that occurred on February 12, 20014. In fact, Mr. Perkins never saw Mr. Traylor on the day of the incident that occurred on February 12, 2004.

3. Newly discovered evidence has been obtained in the form of an affidavit from Tomika Brown. Brown now states that that her identification of the Petitioner as an assailant was given under pressure from law enforcement officials. (Brown Affidavit, APPENDIX G) She was told that she would be charged with Accessory after the Fact and her children would be taken by DHS if she did not sign a pre-filled statement that Detective Donna Franks provided. (Brown Affidavit) Ms. Brown never saw Mr. Traylor on the day of the incident that occurred on February 12, 2004. At trial, Ms. Brown testified that she heard Mr. Shumpert, the co-defendant, and another man, identified as Mr. Shumpert's brother-in-law, discuss robbing the Malones. (Brown Affidavit)

4. Newly discovered evidence has been obtained in the form of an affidavit from Genarro Shumpert, (APPENDIX G) Shumpert now states that his identification of the Petitioner as an assailant was given under pressure from law enforcement officials. (Shumpert Affidavit) Shumpert was promised a twenty-year term of incarceration, as opposed to the threatened six life sentences should he fail to implicate the petitioner. (Shumpert Affidavit). In actuality, the Petitioner only loaned his girlfriend's car to Shumpert and

Shumpert's brother-in-law, the actual assailants, without knowledge that Shumpert was planning to commit the crimes at issue. (Shumpert Affidavit). Shumpert's recantation is in accord with the Petitioner's continued insistence on his innocence in this matter (Traylor Affidavit).

5. Newly discovered witnesses have come forward. Latonya Henley, Surwanda Walton, and Juana Sykes have provided affidavits giving rise to a previously unasserted alibi defense (APPENDIX G) The inability or unwillingness of prior counsel to discover and present these witnesses materially prejudiced the Petitioner. Furthermore, it constituted ineffective assistance of counsel. If the evidence was "reasonably discoverable" upon due diligence of counsel, then the failure of the trial counsel to discover the false testimony constitutes ineffective assistance of counsel. *Wilson v State*, 256 So. 3d 25, 2018 Miss. App. Petition for Certiorari was denied. The newly discovered witnesses have personal knowledge of the Petitioner's whereabouts during the timeframe when the crimes were committed. These witnesses further corroborate Genarro Shumpart's statement that the Petitioner is actually innocent. The Petitioner is entitled to a new trial based upon the new alibi witnesses (in addition to Mr. Shumpert's recantation).

6. As a result of these facts, the Petitioner was indicted on April 16, 2004, by the Grand Jury of Lee County, Mississippi. The Petitioner was charged with: kidnapping, (Counts One, Two, and Three); aggravated assault (Count Four); breaking and entering/burglary (Count Five); attempting to steal vehicle (Count

Six); assault with a deadly weapon (Counts Seven and Nine); and assault (Count Eight). The indictment also listed two prior convictions. The Petitioner entered a not guilty plea to these charges.

7. On June 6, 2005, the Petitioner proceeded to a jury trial in the Circuit Court for Lee County, Mississippi before the Honorable Pail S. Funderburk. Following the presentation of the government's case, and again at the conclusion of presentation of all evidence, defense counsel moved for a directed verdict. The motion for directed verdict was denied. (Transcript at 223-227, 285). The main thrust of defense counsel's argument was that no credible evidence was presented that the Petitioner was even at the crime scene. (Transcript at 223). The jury returned a guilty verdict on all counts.

8. On June 8, 2005, the Petitioner was sentenced to six life sentences with a 120-year enhancement based on the Petitioner's classification as a habitual offender. Judgment was entered on June 8, 2005. After sentencing, defense counsel withdrew without filing a notice of appeal.

9. A motion for new trial was filed with the trial court on June 27, 2005. It was argued that: (1) the evidence was insufficient to support the jury's verdict; (2) the court erred in denying a motion to compel certain evidence; (3) the court erred in denying the Petitioner's motion to appoint an expert; (4) the court erred in denying the Petitioner's motion to quash the venire; (5) the court erred in ordering the Petitioner shackled during trial; (6) the court erred in denying the Petitioner's challenges for cause; (7) the court erred in permitting the State's

witnesses to testify in narrative form; (8) the court erred in denying the Petitioner's objection to admission of photographs showing the Petitioner handcuffed and without a shirt; (9) the court erred in denying a motion for mistrial; (10) the court erred in admitting hearsay testimony from Chris Perkins and Tamika Brown; (11) the court erred in failing to grant the Petitioner's motion for directed verdict; and (12) the court erred in permitting the State's proposed jury instructions and denied the Petitioner's instructions, specifically S-4 and S-10. The motion was denied on July 12, 2005.

10. A notice of appeal was filed *pro se* (case number 2005-TS-01327-COA). The appeal was dismissed by the Court of Appeals on January 26, 2006 for failure to pay costs.

11. On March 14, 2006, the Petitioner filed a *pro se* petition for Writ of Habeas Corpus pursuant to 28 U.S.C. §2254 in the United States District Court for the Northern District of Mississippi, Eastern Division, Cause No. 1:06-cv-00072. Therein, the Petitioner argued that he was denied his right to due process of law when he was denied the right to file a direct appeal. The petition was denied without prejudice on June 17, 2006, as the Petitioner failed to exhaust his remedies in state court.

12. On February12, 2007, the Petitioner filed a *pro se* post-conviction motion pursuant to Miss. Code §99-39-7 with the trial court. The Petitioner argued that: (1) the trial court erred in denying the Petitioner an appointment of counsel to file his direct appeal *in forma pauperis* after retained counsel

withdrew, without having permitted the jury to determine whether said enhancement had proved beyond a reasonable doubt. The motion was denied on January 4, 2008.

13. The petitioner filed a successive pleading for Post Conviction on March 13, 2017. The petition was denied on October 27, 2017.

14. The Petitioner filed a Petition for Rehearing on November 9, 2017 and it was denied on December 13, 2017.

15. The Petitioner has taken no further legal action in this case.

16. The Petitioner submits that his detention is unlawful, and argues that:

I. The Petitioner's substantive claim should be heard on the merits, as the claim could not have been raised in an earlier proceeding.

II. The Petitioner is in possession of newly discovered evidence tending to prove actual innocence, meaning that further incarceration would be a continued violation of the Petitioner's Fifth and Fourteenth Amendment rights to due process of law.

III. The Petitioner was not afforded effective counsel in violation of his Sixth Amendment rights.

IV. The Petitioner is entitled to an evidentiary hearing on these matters.

17. The Petitioner is currently incarcerated in Parchman, Mississippi. The Petitioner's inmate registration number is: r7322.

LAW AND ARGUMENT

In order to succeed in a post-conviction motion under Mississippi law, a petitioner must show that the adjudication of a claim in a Mississippi court resulted in a conviction or sentence that was obtained in violation of the Constitution or laws of the United States. Miss. Code §99-39-1, *et seq.* The Constitution, as the framework from which all federal and state law springs, must not be violated as applied to the Petitioner.

I. The Petitioner's Substantive Claim Should Be Heard on the Merits, as the Claim Could Not Have Been Raised in an Earlier Proceedings.

The purpose of a post-conviction proceeding is to bring to trial court's attention material facts not known at the time of judgment. *Foster v. State* 687 So.2d 1124 (Miss. 1996), cert. denied, 521 U.S. 1108, 117 S.Ct 2488 (1997). Other issues, which were either presented through direct appeal or at trial, may be procedurally barred in a motion for post-conviction relief. The Petitioner submits that the substantive claims raised herein are based upon newly discovered evidence, and could not have been raised at an earlier time. The newly discovered evidence, in the form of a witness statement and affidavit, could not have been coerced or obtained at an earlier date, as the Petitioner is but an incarcerated individual who had to wait for the conscience of the witness to bear fruit.

The Petitioner recognizes that Mississippi has a three-year time limitation on filing for post-conviction relief. Petitions for post-conviction relief filed after the expiration of the three-year period are time barred unless the prisoner's

claim falls within one of the statutory exceptions. *Bevill v Mississippi*, 669 So.2d 14, 18 (Miss. 1996). One such exception exists for newly discovered evidence that was not reasonably discoverable at trial, "which is of such a nature that is would be practically conclusive that had it been introduced at trial it would have caused a different result in the conviction or sentence." Miss. Code §99-39-5(2).

This petition is properly before the Court as the issues presented have not previously been raised at trial or on appeal, and are based on newly discovered evidence tending to prove the Petitioner's actual innocence. The Petitioner seeks to vacate and set aside his conviction and sentence based on newly discovered evidence tending to prove his actual innocence. As such, the Petitioner submits that this matter must be decided upon the merits of the Petitioner's substantive claim.

II. The Petitioner Is in Possession of Newly Discovered Evidence Tending to Prove His Actual Innocence, Meaning That Further Incarceration Would Be a Continued Violation of the Petitioner's Fifth and Fourteenth Amendments Right to Due Process of Law.

"[E]rrors affecting fundamental constitutional rights are excepted from the procedural laws of the [Uniform Post-Conviction Act]. *Rowland v. State*, 42 So.3d. 503,506 (Miss. 2000). This requires "some basis of the truth of the claim." *Cummings v. State*, 130 So.3d 129, 131 (Miss. Ct. App. 2013) That basis is set forth in the issues below.

Likewise, the United States Supreme Court has held that "actual innocence.... Serves as a gateway through which a petitioner may pass" (in a federal habeas corpus

action) *McQuiggin v. Perkins*, 133 S.Ct. 1924 (2013). See also *Schulp v. Delo*, 513 U.S. 298 (1995); *House v. Bell*, 547 U.S. 518 (2006).

The issues presented by Mr. Traylor meet the requirement for consideration outside the time limits. At trial, the defendant enjoys a due process right to the presumption of innocence. The burden is on the state to prove all elements of the charge beyond a reasonable doubt. *Cochran v. United States*, 157 U.S. 286, 299 (1895). It is the obligation of the State to prove that the defendant did not act in self-defense.

The Mississippi Supreme Court has held that it is the State's burden to prove self-defense, and, if a reasonable doubt of his guilt arises from the evidence, he must be acquitted. *Ambroser v. State*, 133 So.3d 386, 791 (Miss 2013) (quoting *Heidel v. State*, 587 So.2d 835, 843 (Miss. 1991)).

The Petitioner is now in possession of newly discovered evidence tending to prove his actual innocence, requiring vacatur of his convictions and sentence to avoid a violation of the Petitioner's right to due process of law. The Fifth Amendment to the United States Constitution states that "[n]o person... shall be deprived of life, liberty, or property, without due process of law." U.S. Const., Amend. V. The Fifth Amendment is applicable to Mississippi via operation of the Fourteenth Amendment to the United States Constitution. U.S. Cons., Amend. XIV; see also *Lemon v. Mississippi Transp. Comm'n*, 35 So. 2d 1013 (Miss. 1999).

In evaluating due process claims, this court inquires whether the practice "offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Snyder v. Massachusetts*, 291 U.S. 97, 105,

54 S.Ct. 330, 332, 78 L.Ed. 674 (1934). As stated by Justice Frankfurter, due process:

> embodies a system of rights based on moral principles so deeply imbedded in the traditions and feelings of our people as to be whole history. Due process is that which comports with the deepest notions of what is fair and right and just.

Solesbee v. Balkcom, 339 U.S. 9, 16, 70 S Ct. 457, 461, 94 L. Ed. 604 (1950).

The Due Process Clause will be validated upon actions that "violate those fundamental conceptions of justice which lie at the base of our civil and political institutions and which define the community's sense of fair play and decency." *United States v. Lovasco*, 431 U.S. 783, 790, 97 S.Ct. 2044, 2049, 52 L.Ed.2d 752 (1977). The Supreme Court has "defined the category of infractions that violate 'fundamental fairness' very narrowly." *Dowling*, 493 U.S. at 352-53, 110 S.Ct at 674. The "primary guide in determining whether the principle in question is fundamental is, of course, historical practice." *Montana v. Egalhoff*, 518 U.S. 37, 41-44, 116 S.Ct. 2013, 2017, 135 L.Ed.2d 361 (1996).

During the years surrounding the founding of this country, and proceeding to the present day, the idea that one cannot be convicted upon evidence that does not rise to a level beyond a reasonable doubt has become enmeshed in the American judiciary. "[O]ur common-law heritage, our Constitution, and our experience in applying that Constitution have committed us irrevocably to the position that the criminal trial has one well-defined purpose--to provide a fair and reliable determination of guilt." *Estes v. Texas*, 381 U.S. 532, 565, 85 S.Ct. 1628, 1644 14 L.Ed.2d 543 (1965) (Warren, C.J., with whom Dougles and Goldberg, JJ., joined, concurring).

Due process rights, such as the need to prove elements of a crime beyond

reasonable doubt, protect against errors in fact finding. In *Cage v. Louisiana*, 498 U.S. 39, 40 (1990), the Supreme Court stated that the "reasonable doubt standard 'plays a vital role in the American scheme of criminal procedure. Among other things, it is prime instrument for reducing the risk of convictions resting on factual error" Further, as noted in *In re Winship*, 397 U.S. 358, 364 (1970), "a society that values the good name and freedom of every individual should not condemn a man for commission of a crime when there is reasonable doubt about his guilt." *Winship* itself makes clear that the requirement of proof beyond a reasonable doubt is grounded upon accuracy concerns:

> The requirement of proof beyond a reasonable doubt has this vital role in our criminal procedure for cogent reasons. The accused during a criminal prosecution has at stake interest in immense importance, both because of the possibility that he may lose his liberty upon conviction and because of the certainly that he would be stigmatized by the conviction.

Id. at 364

> The 'demand for a higher degree of persuasion in criminal cases Was recurrently expressed from ancient times, [thought] its crystallization into the formula "bond a reasonable doubt' seems to have occurred as late as 1798. It is now accepted... as the measure of persuasion by which the prosecution must convince the trier of all the essential elements of guilt.

Id. at 361 (quoting C. McCormick, Evidence §321, pp. 681-82 (1954)).

In the instant case, newly discovered evidence going to actual innocence, has been obtained in the form of an affidavit from Genarro Shumpert, an admitted assailant in this case. Shumpert now states that his identification of the Petitioner as an assailant was given under pressure from law enforcement officials. Shumpert was

promised a twenty year term of incarceration was opposed to the threatened six life sentences if he would implicate the Petitioner. (APPENDIX G). In actuality, the Petitioner only loaned his girlfriend's car to Shumpert and Shumpert's brother-in-law, the actual assailants herein, without knowledge that Shumpert was using planning to commit the crimes at issue. (Shumpert Affidavit). Shumpert's recantation accords with the Petitioner's continued insistence on his innocence in this matter. (APPENDIX G) As the Petitioner as not charged with conspiracy, aiding and abetting, or being an accessory, the fact that was not present at the crime scenes absolved the Petitioner of wrong doing.

In *Smith v. State*, 492 So.2d 260, 264-65 (Miss. 1986), the Mississippi judiciary stated that a defendant is entitled to a new trial on the grounds that testimony used by the State was perjured only where:

> (1) the prisoner clearly proves his allegations concerning perjured testimony;
>
> (2) the perjury, if newly discovered, was discovered since trial and could not have been discovered before trial by the exercise of due diligence;
>
> (3) the impeaching; and
>
> (4) the perjured testimony was such that there is substantial probability that a different result will be reached if a new trial is had without it.

Id.

In the instant matter, there can be little doubt that Shumpert's affidavit fulfills the above mentioned four requirements. Shumpert admits that his trial testimony was false. The affidavit could not have been obtained earlier, as the Petitioner could not coerce the truth form Shumpert. The testimony was material to the trial, as Shumpert provided the only testimony linking the Petitioner to the crimes at issue. No other witness identified the Petitioner as participating in the crimes at issue. Without Shumpert's testimony, the Petitioner would not have been found guilty of the charged crimes. As such, the Petitioner submits that he is innocent of the crimes at issue.

As the Petitioner's due process rights were and continue to be violated upon being convicted and incarcerated for a crime for which he is innocent, the Petitioner submits that this Court must vacate his conviction and subsequent sentence, and set this matter for re-hearings consistent with the findings of this Court and the constitutional principle of fair play and substantial justice.

III. Prior Counsel was Ineffective for Failing to Adequately Investigate the Alibi Defense. Likewise, counsel pro se was ineffective on appeal and in the first post conviction pleading.1

The Defendant had a viable alibi defense that prior counsel failed to adequately investigate. Prior counsel knew that the Defendant had attended a party on the

1 Mr. Traylor's right to effective assistance of counsel extended to appeal and his first post-conviction proceeding. *Martinez v Ryan*, 132 S.Ct. 1309(2012). He concedes his ineffectiveness in proceeding pro se. See Cause No. 2005-TS-01327-COA and 2007-M-01502.

night the crimes were committed. The Defendant, had a full and fair investigation been conducted, would have been able to demonstrate at trial the following:

A. That the police officer investigating the crime coerced incorrect statements from Juanita Sykes.;

B. That Latonya Henley could affirmatively verify the Defendant's presence at a party during the time in which the crime occurred. his testimony that would contradict the circumstantial evidence presented by the prosecution; and

C. That the discovery of others in attendance at the party who would have conclusively verified the Defendant's presence would have given greater weight to the Defendant's Alibi Defense.

The lack of investigation into the Defendant's whereabouts was a material absence in

diligence that, but for the inaction of counsel, would have uncovered a viable, credible, and salient defense, upon which a jury may have found the Defendant not guilty. The prejudice upon the Defendant by counsel's failure to conduct an adequate investigation to a salient defense is demonstrable. The Defendant was precluded, by his own counsel, from presenting evidence that would have otherwise been weighed against the prosecution's evidence.

The absence of the exercise of diligence in the investigation of Alibi, was tantamount to proceeding pro se where the Defendant remained incarcerated pending trial and was rendered incapable of conducting an investigation on his own. The Constitution gives criminal Defendants a right to counsel. The courts have expanded

the Sixth Amendment to mean the right to *effective* counsel (emphasis added). See generally *Strickland v. Washington*, 466 U.S. 668 (1984). Courts have long recognized that in order to render constitutionally adequate effective assistance of counsel, an attorney must provide "an intelligent and knowledgeable defense on behalf of his client. *Caraway v. Beto*, 421 F.2d 636, 637 (5th Cir. 1979).

In order to prevail, a defendant must show both that counsel's representation fell below an objective standard of reasonableness and that there exists a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668, 688, 694, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). In other words, a defendant must demonstrate both seriously-deficient performance on the part of his counsel and prejudice resulting therefrom, i.e., the defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668 (1984).

A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Strickland v. Washington*, 466 U.S. 668, 690-694 (1984); *Davis v. State*, 743 So.2d 326 (1999). The *Strickland* Court elucidated this test further: "When a defendant challenges a conviction, the question is whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt." *Id.*, 466 U.S. at 695. To prevail on a claim of ineffective assistance of counsel, a criminal defendant must show that his attorney's performance fell below an objective standard of reasonableness and that he was

prejudiced thereby. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). With respect to the first Strickland prong, there exists a strong presumption that counsel's conduct falls within the wide range of professionally reasonable assistance. *Id.* at 689. In order to establish prejudice, petitioner "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694.

Trial Counsel had an affirmative duty to investigate any salient defenses. See *Wiggins v. Warden*, 539 U.S. 510 (2003). The Defendant's trial counsel did not effectively investigate the Alibi Defense. The Defendant through a proper investigation was able to locate exculpatory witnesses. The Defendant should be afforded the opportunity to present these witnesses to a jury.

In this case, defense counsel committed several unprofessional errors and omissions that resulted in performance falling below an objective standard of reasonableness for the defense counsel at sentencing in a criminal case.

Defense counsel obligation includes a duty to investigate.

ABA Criminal Justice Standard 4 – 4.1 states:

> (a) Defense counsel should conduct a prompt investigation of the circumstances of the case and explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction. The investigation should include efforts to secure information in the possession of the prosecution and law enforcement authorities. The duty to investigate exists regardless of the accused admissions or statements to defense counsel of facts

> constituting guilt or the accused's stated desire to plead guilty.

Furthermore, BA Criminal Justice Standard 4 – 3.8(b) requires defense counsel to "explain development in the case to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

The Fifth Circuit also noted in *Brawner v. Epps* that the Sixth Amendment's objective standard of reasonableness" in light of prevailing professional norms" laid out in Strickland, 466 U.S. at 686, are to be understood as the ABA Guidelines. 439 Fed. Appx. 396, 402 (5th Cir. 2011). In fact quoting the Supreme Court in *Bobby v. Van Hook*, 130 S. Ct. 13, 17 (2009), the *Brawner* court noted that "[c]counsel's duty to investigate is not negated by the expressed desires of a client. ABA Guidelines Sec. 11.4.1 cmt." Id. The Fifth Circuit went on to explain that the "current" ABA Guidelines 'discusses the duty to investigate mitigating evidence in exhausting detail.'" *Brawner*, 439 Fed. Appx. At 402 n.1 (quoting *Bobby v. Van Hook*, 130 S. Ct. at 17). The Fifth Circuit also expressed, "we...consider the ABA's Guidelines and embracing the prevailing norms of the time even before the Supreme Court explicitly referenced them.' *Adams v. Quarteman*, 324 Fed. Appx. 340, 345 n.17 (5th Cir. 2009).

The Defendant has thus established that 1) trial counsel's performance was deficient; and 2) that said deficiency prejudiced the Defendant. The Defendant is therefore entitled to a hearing on the matter.

IV. The Petitioner Is Entitled to an Evidentiary Hearing on These Matters.

The Mississippi Supreme Court has held "a post-conviction collateral relief petition which meets basic requirements sufficient to mandate an evidentiary hearing unless it appears beyond a doubt that the Petitioner can prove no set of facts in support of his claim which would entitle him to relief." *Marshall v State,* 680 So. 2d 794, 794 (Miss. 1996).

In the instant case, Petitioner asserts that he in possession of newly discovered evidence tending to prove his actual innocence. Additionally, the assertion goes beyond a mere plea to re-examine the sufficiency of the evidence in that the Defendant has procured statements given under oath that the Defendant had a real, salient alibi defense that, but for a failure to investigate the same, would have presented at trial. Therefore, the Petitioner requests an evidentiary hearing to review the issues.

Where the Defendant has new evidence tending to prove actual innocence, the absence of an evidentiary hearing is tantamount to a per se deprivation of his Fifth and Fourteenth Amendment rights to Due Process. Whereupon the examination of the new and exculpatory evidence, the Court should properly find that the Defendant is entitled to a new trial.

Specifically, quoting the Supreme Court, in the context of a claim of failure to investigate, *Strickland* instructs that "counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Strickland*, 104 s. Ct. at 2066. The Fifth Circuit has explained that an evidentiary hearing should be granted

because of trial counsel's failure to present mitigating evidence. See *Loyd v. Smith*, 899 F.2d 1416, 1425 (5th Cir. 1990) (the case was vacated and remanded when the appellate court found that the district court mostly ignored "explicit and implicit finds of fact [] supported by the record." The parallels strongly militating for an evidentiary hearing abound.

In another case, the Fifth Circuit Court of Appeals concluded that the evidentiary hearing was necessary when trial counsel misrepresented material facts, withheld information and exerted pressure on defendant to induce a guilty plea. See *Friedman v. U.S.*, 588 F.2d 1010 (5th Cir. 1979) (contested fact issues cannot be resolved on the basis so conflicting affidavits). The Fifth Circuit holds that when material facts are in dispute, an evidentiary hearing is necessary.

The Friedman court advanced a tow-step inquire detailing when a petitioner would be entitled to an evidentiary hearing; (1) does that record in the case, as supplemented by the Trial Judge's "personal knowledge or recollection," conclusively negate the factual predicates asserted in support of the motion for post-conviction relief? (2) Would the petitioner be entitled to post-conviction relief as a legal matter if those factual allegations which are not conclusively refuted by the record and mattes within the Trial Judge's personal knowledge or recollection are in fact true? If the answer to the first inquiry is an negative one and the answer to the second inquiry an affirmative one, the court requires evidentiary hearing on those factual allegations which, if found to be true, would entitle petitioner to post-conviction relief. *Friedman*, 588 F.2d at

1015 (footnote omitted). The Fifth Circuit went on to explain that "a district court abuses its discretion by denying an evidentiary hearing if the motion sets forth specific, controverted issues of facts that are not conclusively negated by the record and that, if proven at the hearing, would entitle petitioner to relief." *U.S. v. Kayode*, 2014 U.S. ap. LEXIS 24338 (5th Cir. Dec. 23, 2014) (citing *Mack v. Smith*, 659 F.2d 23, 25 (5th Cir. 1981)) " [W]here [the petitioner] would be entitle to post-conviction relief if his factual allegations were proven true, Sec 2255 requires an evidentiary hearing on those allegations.") (citing *Friedman*, 588 F.2d 1010). *Kayode* also quotes its sister circuit. "[A] petitioner need only allege-not prove – reasonably specific, non-conclusory facts that, if true, would entitle him to relief." *Winthrop-Redin v. U.S.*, 767 f.3d 1201, 1216 (11th Cir. 2014).

The Fifth Circuit reaffirms its longheld tenant which categorically states that "[c]ontested fact issues in Sec. 2255 case must be decided on the basis of evidentiary hearing." *Reagor v. U.S.*, 488 f.2d 515, 517 (5th cir. 1973) (emphasis added). "As the Supreme Court has explained, even if the Government contends that the petitioner's allegations are 'improbably and unbelievable,' if the petitioner makes specific and detailed assertions in his motion and affidavit that create contested issue of fact that, if true, entitle him to relief, an evidentiary hearing is warranted." Kayode, LEXIS 24338 (quoting *Machibroda v. U.S.*, 368 U.S. 487, 494 (1962); see also *Blackledge v. Allison*, 431 U.S. 63, 75 (1977) (explaining that "[i]n administering the writ of habeas corpus and it Sec. 2255

counterpart, the federal courts cannot fairly adopt a per se rule excluding all possibility that a defendant's representations at the time his guilty pleas was accepted were so much the product of such factors as misunderstanding, duress, or misrepresentation by others as to make the guilty plea a constitutionally inadequate basis for imprisonment," and remanding because the "record of the plea hearing did not, in view of the allegations made, conclusively shoe that the prisoner (was) entitled to no relief") "footnote and internal citations omitted). Petitioner Traylor has properly presented specific facts that, if true would entitle him to relief under 28 U.S. C Sec. 2255. He therefore respectfully requests an evidentiary hearing to resolve these matters of fact.

"[E]rrors affecting fundamental constitutional rights are excepted from the procedural laws of the [Uniform Post-Conviction Act]. *Rowland v. State*, 42 So.3d. 503,506 (Miss. 2000). This requires "some basis of the truth of the claim." *Cummings v. State*, 130 So.3d 129, 131 (Miss. Ct. App. 2013).

For the above and ongoing reasons, the Petitioner should be granted Certiorari.

This the 12th day of July, 2019.

Respectfully submitted,

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