

THIS IS A CAPITAL CASE- NO EXECUTION DATE SET

No. _____

**IN THE
SUPREME COURT OF THE UNITED STATES**

XAVIER BROWN, *Petitioner*,

v.

STATE OF MISSISSIPPI, *Respondent*

APPENDIX

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Appendix A

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June 4, 2026

This is to advise you that the Mississippi Supreme Court rendered the following decision on the 4th day of June, 2026.

Supreme Court Case # 2017-DR-01373-SCT
Trial Court Case # 99K-909P

Xavier Brown v. State of Mississippi

The motion for rehearing filed by the petitioner is denied.

*** NOTICE TO CHANCERY/CIRCUIT/COUNTY COURT CLERKS ***

If an original of any exhibit other than photos was sent to the Supreme Court Clerk and should now be returned to you, please advise this office in writing immediately.

Please note: Pursuant to MRAP 45(c), amended effective July, 1, 2010, copies of opinions will not be mailed. Any opinion rendered may be found by visiting the Court's website at: <https://courts.ms.gov>, and selecting the appropriate date the opinion was rendered under the category "Decisions."



**MANDATE
SUPREME COURT OF MISSISSIPPI**

To the Lamar County Circuit Court - GREETINGS:

In proceedings held in the Courtroom, Carroll Gartin Justice Building, in the City of Jackson, Mississippi, the Supreme Court of Mississippi entered a judgment as follows:

Xavier Brown v. State of Mississippi
Supreme Court Case # 2017-DR-01373-SCT
Trial Court Case #99K-909P

Thursday, 5th day of February, 2026

Petition for Post-Conviction Relief to Establish Actual Innocence and Constitutional Violations filed by counsel for Xavier Brown is denied. King, P.J., for the Court. To Deny: All Justices. Order entered 1/29/26.

Thursday, 4th day of June, 2026

The motion for rehearing filed by the petitioner is denied.

YOU ARE COMMANDED, that execution and further proceedings as may be appropriate forthwith be had consistent with this judgment and the Constitution and Laws of the State of Mississippi.

I, D. Jeremy Whitmire, Clerk of the Supreme Court of Mississippi and the Court of Appeals of the State of Mississippi, certify that the above judgment is a true and correct copy of the original which is authorized by law to be filed and is actually on file in my office under my custody and control.

Witness my signature and the Court's seal on June 11, 2026, A.D.

A handwritten signature in cursive script, reading "D. Whitmire", is written over a horizontal line.

CLERK

Appendix B

Serial: 260384

IN THE SUPREME COURT OF MISSISSIPPI

No. 2017-DR-01373-SCT

XAVIER BROWN

Petitioner

v.

STATE OF MISSISSIPPI

Respondent

EN BANC ORDER

Before the Court, en banc, is the successive Petition for Post-Conviction Relief to Establish Actual Innocence and Constitutional Violations filed by counsel for Xavier Brown. Also before the Court is the State's Response in Opposition to Successive Petition for Post-Conviction Relief, to which Brown filed a reply.

Brown was convicted of capital murder and sentenced to death. This Court affirmed Brown's conviction and sentence. ***Brown v. State (Brown I)***, 890 So. 2d 901 (Miss. 2004). Now before the Court is Brown's successive petition for post-conviction collateral relief. Leave to proceed should be granted only if Brown's petition, exhibits, and the prior record show that his claims are not procedurally barred and that they "present a substantial showing of the denial of a state or federal right[.]" Miss. Code Ann. § 99-39-27(5) (Rev. 2020); *see also Ronk v. State*, 267 So. 3d 1239, 1247 (Miss. 2019). "Direct appeal [is] the principal means of reviewing all criminal convictions and sentences" Miss. Code Ann. § 99-39-3(2) (Rev. 2020). Review at this stage, with certain exceptions, is limited to issues that could not or should not have been reviewed at trial and in the direct appeal. *Id.*; ***Brown v. State***, 798 So. 2d 481, 491 (Miss. 2001).

Brown must overcome several procedural or substantive bars. First, the mandate in Brown's direct appeal issued on November 12, 2004. Brown's successive petition was filed on September 17, 2024. This filing is subject to the one-year time bar. Miss. Code Ann. § 99-39-5(2)(b) (Rev. 2020); *see also Brown v. State*, 306 So. 3d 719, 729 (Miss.

2020); **Jordan v. State**, 213 So. 3d 40, 42 (Miss. 2016); **Havard v. State**, 86 So. 3d 896, 899 (Miss.

2012). The failure to raise post-conviction claims within the one-year period results in a waiver of potential relief unless the petitioner meets an exception to the time bar. M.R.A.P. 22(c)(5); **Jordan**, 213 So. 3d at 42. Additionally, Brown admits that on March 31, 2017, the federal court granted him a stay of his federal habeas corpus proceedings, allowing him to proceed here on his unexhausted claims, which he did not file in this Court until September 17, 2024. Unless Brown can show that he meets an exception, the petition is barred as untimely.

Second, as mentioned above, Brown has filed a previous petition for post-conviction collateral relief. The claims raised in that petition were ultimately denied. **Brown v. State (Brown II)**, 948 So. 2d 405, 417 (Miss. 2006). The petition now before the Court is subject to the successive-writ bar set out in Mississippi Code Section 99-39-27(9) (Rev. 2020). “Absent an applicable exception, a successive motion for post-conviction relief is procedurally barred.” **Brown**, 306 So. 3d at 729. Unless Brown meets an exception to the successive-writ bar, his claims are precluded at this point.

Third, Mississippi Code Section 99-39-21(2)(Rev. 2020) provides that “[t]he litigation of a factual issue at trial and on direct appeal of a specific state or federal legal theory or theories shall constitute a waiver of all other state or federal legal theories which could have been raised under said factual issue. . . .” Reframing an issue that has previously been considered and rejected is not allowed. See **Foster v. State**, 687 So. 2d 1124, 1136 (Miss. 1996); **Wiley v. State**, 517 So. 2d 1373, 1377 (Miss. 1987).

Finally, Brown is prohibited from reraising claims that have been addressed in prior proceedings. “The doctrine of res judicata shall apply to all issues, both factual and legal, decided at trial and on direct appeal.” Miss. Code Ann. § 99-39-21(3) (Rev. 2020). “Res judicata also extends to those claims that could have been raised in prior proceedings but were not.” **Ambrose v. State**, 323 So. 3d 482, 493 (Miss. 2021) (internal

quotation marks omitted) (quoting **Brown**, 306 So. 3d at 730).

Brown first presents new claims that his trial attorneys were ineffective at the culpability and penalty phases of his trial. We find that these issues are barred because as they could have been raised in his first PCR. They are barred by waiver. § 99-39-21(2). And to the extent Brown’s claims attempt to reargue claims made in his first PCR, they are barred by res judicata. Miss. Code Ann. § 99-39-21(3) (Rev. 2020). Further, when deciding Brown’s first petition for post-conviction relief, the Court held that “[b]ased upon the facts of this case and the information presented in the trial record, defense counsel’s assistance was reasonable considering all of the circumstances.” **Brown II**, 948 So. 2d at 412-13.

Brown’s new claims of ineffective assistance of counsel are brought to the Court in this successive PCR under the assertion that post-conviction counsel was ineffective for failing to raise them in Brown’s first PCR. As an exception to the time-bar and successive writ bar, Brown relies on **Grayson v. State**, 118 So. 3d 118, 126 (Miss. 2013), which held that a death-penalty petitioner’s meritorious claim of ineffective assistance of post-conviction counsel is excepted from the statutory bars. But **Grayson** was overturned by this Court before the filing of Brown’s successive petition. See **Carr v. State**, 410 So. 3d 1062 (Miss. 2025).¹ Brown’s claims are both successive writ and time barred because **Grayson** no longer provides an exception for ineffective-assistance-of-post-conviction-counsel claims in death-penalty cases.

One of the exceptions to the time bar and the successive-writ bar is newly discovered evidence. But such evidence must not have been “reasonably discoverable at the time of trial” and it must be “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. § 99-39-5(2)(a)(i) (Rev. 2020); *see also* Miss.

¹ Presiding Justice King objected to the order with a separate written statement.

Code Ann. § 99-39-27(9). Brown claims to have newly discovered evidence, but none of the purported newly discovered evidence was undiscoverable at the time of trial. And to the extent Brown asserts that counsel was ineffective for failing to discover or present it, the issue is waived. Miss. Code Ann. § 99-39-21(1) (Rev. 2020).

Brown also asserts that he is entitled to post-conviction relief due to numerous violations of his right to confront witnesses against him. The Confrontation Clause confers a right to confront “those who ‘bear testimony’” against the defendant. *Connors v. State*, 92 So. 3d 676, 683 (Miss. 2012) (internal quotation marks omitted) (quoting *Crawford v. Washington*, 541 U.S. 36, 51 (2004)). At trial and on direct appeal, Brown asserted a Confrontation Clause violation as to one witness. In his successive petition, for the first time, Brown makes the same assertion against three additional witnesses for the prosecution, and he made no contemporaneous objections as to these additional witnesses at trial. We find these claims to have been waived because they were capable of be raised before now.

One of the exceptions to the time bar and the successive-writ bar are those cases in which a petitioner can demonstrate “that there has been an intervening decision of the Supreme Court of either the State of Mississippi or the United States that would have actually adversely affected the outcome of his conviction or sentence” §§ 99-39-5(2)(a)(i), -27(9). Brown now asserts that *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 313 (2009), *Bullcoming v. New Mexico*, 564 U.S. 647 (2011), and *Smith v. Arizona*, 602 U.S. 779 (2024), are all “intervening decisions which give rise to new claims that support relief for Brown” such that his Confrontation Clause claims are excepted from the waiver and successive-writ bars. We find that all of theses cases are pronouncements of the continued adherence to *Crawford*, 541 U.S. 36.

Further, the Supreme Court of the United States handed down its decision in *Crawford*, overruling *Ohio v. Roberts*, 448 U.S. 56 (1980), before briefing concluded in Brown’s direct appeal. Brown was aware of *Crawford*; he raised the issue in his reply

brief on direct appeal and in his petition for writ of certiorari in the Supreme Court. He did not raise it in his first petition for post-conviction relief. Brown has failed to overcome the procedural bars.

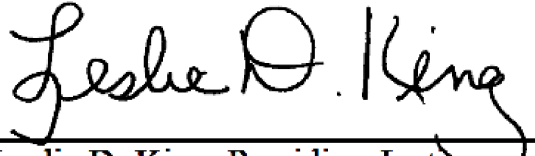
After a complete review of Brown's successive petition, we find that each claim is barred. Notwithstanding the bars, we find that the claims are also without merit.

IT IS, THEREFORE, ORDERED that the successive Petition for Post-Conviction Relief to Establish Actual Innocence and Constitutional Violations is denied.

SO ORDERED.

TO DENY: ALL JUSTICES.

DIGITAL SIGNATURE
Order#: 260384
Sig Serial: 100011696
Org: SC
Date: 01/29/2026



Leslie D. King, Presiding Justice

Appendix C

**IN THE SUPREME COURT OF MISSISSIPPI
NO. 2017-DR-01373-SCT**

XAVIER BROWN

Petitioner

v.

STATE OF MISSISSIPPI

Respondent

**PETITION FOR POST-CONVICTION RELIEF TO
ESTABLISH ACTUAL INNOCENCE AND
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INTRODUCTION

Xavier Brown did not kill Felicia Newell and certainly did not enter a murder-for-hire scheme to murder her. He was convicted only because trial counsel failed to take the obvious steps that any reasonable lawyer would have done.

1. Consider that unbiased, disinterested witnesses gave a description of the shooter that did not match Xavier Brown. James Bigler and Gemma Anderson described the shooter as “medium build” or weighing around 185 pounds. See Exhibit 1 (statement of Susan Petrush); Exhibit 2 (statement of Gemma Anderson). Mr. Brown weighed 260 pounds at the time of his arrest. Exhibit 3 (Custody Report). Trial counsel did not alert the jury to those discrepancies.

2. Consider that other aspects of Bigler’s description shows that Brown was not the shooter. Bigler was not asked on the stand whether he recognized Brown as the shooter. He did, however, rule out the victim’s ex-husband Anthony Sims. According to a coroner’s report, Sims was 5 feet, 10 inches tall and weighed 190 pounds. Exhibit 4 (Anthony Sims coroner report). Bigler described the shooter as having a narrower head and more refined features than Sims. T. 337. As the photos on the next page show, Brown did not come close to matching Bigler’s description of the shooter.

PHOTO OF ANTHONY SIMS:**PHOTO OF XAVIER BROWN:**

3. Consider records from the Mississippi Department of Corrections. They show conclusively that Xavier Brown could not have participated in a telephone conversation describing a murder-for-hire scheme because he was still serving a sentence of a completely unrelated charge. Moreover, scientific analysis of the recordings confirms that Brown was not a participant in the call. Remarkably, trial counsel stipulated to the admission of that recording, despite the State having no way to tie it to their client, but they failed to point out that Brown could not have been part of the call.

4. Consider that key witnesses known to the defense could have rebutted the testimony of incentivized witnesses who implicated Mr. Brown in the shooting, but trial counsel did not even speak to them.

Trial counsel expended no more effort for the penalty phase. They hardly spoke to anyone in Brown's family or uncovered readily available evidence of neglect and abuse Brown suffered, which led to post-traumatic stress disorder and a debilitating drug addiction.

Ordinarily, deficiencies with trial counsel's performance are taken up in PCR proceedings, but again appointed counsel failed Xavier Brown. For his initial PCR, Brown was represented by Robert M. Ryan, the former director of the Mississippi Office of Capital Post-Conviction Counsel. He assigned staff attorney Louwlynn Vanzetta Williams to assist him. Ryan raised only a generic challenge to trial counsel's guilt phase representation but did not cite *Strickland v. Washington*, 466 U.S. 668 (1984) or identify any of the obvious

shortfalls in the representation. Instead, he simply asserted, contrary to the record, that Brown suffered a virtual abdication of counsel.

Ryan's legal performance is familiar to the Court. He has signed an affidavit admitting to doing virtually no work on behalf of multiple clients. This Court expressly found his performance to have been deficient for clients such as Blayde Grayson, Alan Walker, and Thong Le. *Grayson v. State*, 118 So. 3d 118 (Miss. 2013); *Walker v. State*, 131 So. 3d 562 (Miss. 2013); *Thong Le v. State*, No. 2013-DR-00327-SCT, En Banc Order (Miss. Jan. 29, 2016). In Howard Goodin's case, Ryan's performance was so bad that this Court took the unprecedented step of ordering a second evidentiary hearing because it determined that its mandate had not been fulfilled at the hearing. The Court noted only that it was ordering a new hearing through no fault of the trial judge. *Goodin v. State*, No. 2007-CA-00972-SCT (Aug. 27, 2009) (en banc) (attached as Exhibit 62). But it left no doubt where fault lay.

For Brown, Ryan performed about as expected. He haphazardly assigned counsel to the case, allowed only a minimal amount of time for investigation, failed to consult with any experts, pushed to have record-based claims raised though he knew nothing about Brown's case, acted increasingly paranoid and erratic, and "made decisions that were not based on any

discernable interest of the client.” Ex. 61 (affidavit of Louwlynn Vanzetta Williams).

RELEVANT PROCEDURAL HISTORY AND CASE BACKGROUND

Felicia Newell Sims was shot to death in the parking lot of her Hattiesburg, Mississippi apartment complex on February 26, 1998. Initially, the prime suspect in Ms. Sims’s homicide was her ex-husband, Anthony Sims. Ms. Sims was expected to testify against her ex-husband in March 1998 on a concealed weapons charge. Two days after Ms. Sims’s murder, Anthony Sims was found dead in a motel room. The State concluded that Mr. Sims committed suicide due to a prescription drug overdose, and their investigation into Ms. Sims’s death stalled.

About two months before Ms. Sims was killed, Mr. Sims and an unidentified male left Ms. Sims a threatening voicemail message. Mr. Sims told Ms. Sims “There’s a contract out on you.” The unidentified male caller whispers statements to Mr. Sims, who then repeated them to Ms. Sims.

Months later, a man named Donald Crosby told one of Ms. Sims’s friends that “Tony”¹ Brown killed Ms. Sims. According to Mr. Crosby, Anthony Sims

¹ Many family and friends refer to Xavier Brown as “Tony.” To be consistent with witness statements and/or accounts, Xavier Brown is thus occasionally referred to as Tony in this Petition.

hired Brown to kill his ex-wife, and then committed suicide to avoid paying his debt to Brown.

Then, on June 10, 1999, a new witness came forward with information about Ms. Sims's death. Corey Johnson was the father of Brown's nephew and engaged to Brown's sister, Lorelei. Johnson informed the police that he had ridden with Brown from Laurel to Hattiesburg, that he saw Brown shoot Sims with a nine-millimeter pistol, and that Brown had threatened his life if he told anyone what he had seen.

Based on the information that Crosby and Johnson provided, the State indicted Brown for capital murder and for accepting money to kill Sims. Brown's Lamar County trial began on June 18, 2002, and the jury returned a guilty verdict two days later and then sentenced him to death.

The Lamar County Circuit Court denied Brown's post-trial motions. Brown filed his direct appeal in the Mississippi Supreme Court on September 8, 2003, and this Court upheld his conviction and death sentence on September 2, 2004. This Court then denied Brown's rehearing motion on November 4, 2004. *Brown v. State*, 890 So. 2d 901 (Miss. 2004).

Brown then filed his Motion for Leave to Proceed in the Trial Court with a Petition for Post-Conviction Relief on November 14, 2005. This Court did not grant an evidentiary hearing on any of the claims that Brown asserted in his

post-conviction petition and denied his request for relief on November 9, 2006. *Brown v. State*, 948 So. 2d 405 (Miss. 2006). Brown's rehearing motion was denied on February 22, 2007, and this Court issued its mandate on March 1, 2007.

Brown then sought relief in federal district court. His Petition for a Writ of Habeas Corpus was filed in the federal district court for the Southern District of Mississippi on February 25, 2007. In federal proceedings, Brown's counsel uncovered a wealth of evidence relevant to the question of his culpability for the charged offense and punishment. Initial post-conviction counsel did not undertake this investigation, and the issues raised in federal court were substantially different from the scant allegations raised in the initial attempt to obtain post-conviction relief. Recognizing that Brown was essentially raising new claims of trial counsel's ineffectiveness that had not been raised previously, the federal district court stayed those proceedings to allow him to exhaust those claims in state court. Mem. Op. and Order, *Brown v. Epps*, No. 2007-cv-49-HTW (Doc. 55) (S.D. Miss. Mar. 31, 2017).

Brown was appointed counsel to represent him in post-conviction proceedings. He also filed a motion for discovery and for permission to have experts evaluate him. This Court denied the motion on May 2, 2019, finding

that pre-petition discovery was not available for prisoners intending to file a second PCR petition.

Following preventive measures taken during the COVID pandemic and following a change in policy Office of the Attorney General about experts having access to prisoners for forensic evaluations via Department of Corrections' policy, Brown resumed preparations for his successor.

**BROWN'S CLAIMS ARE PROCEDURALLY AND STATUTORILY
ALIVE AND MERITORIOUS.²**

Despite concerns that the Court may have about Brown filing a second PCR petition, there are no bars to this Court's review. *First*, Brown's initial petition was an anomaly; this Court found even claims challenging trial counsel's performance to be barred because they could have been raised at trial or on appeal. *Brown v. State*, 948 So. 2d 405 (Miss. 2006). One of Brown's trial attorneys also represented him on direct appeal, and those claims relied on evidence beyond the trial record. Given the peculiar way in which the Court treated the initial petition, it is as though Brown has never had any meaningful opportunity to seek relief in state court. This Court should rectify

² In this section, Brown addresses the procedural viability of his ineffective assistance claims. He is also raising a claim arising under the Confrontation Clause. Because that claim relies on intervening decisions, he will address the arguments for considering the merits of that claim in that section.

its own mistake and address Brown's claims under law that was well-settled both before and after Brown filed his initial petition.

Second, there is no time-bar for these claims. This Court has squarely held that the Legislature did not provide a statute of limitations for successive petitions in capital cases. To retroactively apply a time-bar when this Court has reviewed the merits raised in other successive petitions would violate Brown's right to due process.

Third, this Court should revisit its holding in *Ronk v. State*, 2024 Miss. LEXIS 6 (Miss. Jan. 11, 2024), suggesting that the successor-bar is a substantive rule that can only be addressed by the Legislature. The successor-bar has *always* been treated as a procedural rule. A decision arbitrarily redefining what has been understood to be procedural to frustrate the vindication of federal constitutional rights is a clear violation of due process.

Fourth, even if there is a constitutionally applicable successor-bar, it is not available here because this petition should not be considered "successive" because this represents Brown's first opportunity to raise claims predicated on a violation of his right to the effective assistance of initial PCR counsel.

Fifth, this Court began recognizing and vindicating the right to the effective assistance of initial PCR counsel to remedy the consequences it created when it hired Robert Ryan to be the director of the Office of Capital

Post-Conviction Counsel. As in so many cases, Ryan's level of performance did not come close to being objectively reasonable. As in so many cases, he conducted almost no investigation though PCR litigation requires the development of facts beyond the trial record. This Court should find the performance of initial PCR counsel deficient and reach the merits of his claims.

Sixth, even if the Court reaffirms its decision in *Ronk*, it should not apply it retroactively to this case.

Seventh, as this Court has recognized elsewhere, it has the authority to reach the merits of claims raising questions of actual innocence.

Finally, the Court may also reach these claims by relying on exceptions for newly discovered evidence.

A. During the Initial PCR, the Court Procedurally Barred Many Claims that Could Not Have Been Statutorily Barred Under Current Caselaw Because Brown's Trial Counsel Was Also Appellate Counsel.

Brown was convicted of capital murder only because trial counsel failed to take the obvious steps that any reasonable lawyer would have done. At trial, Brown was represented by Scott Schwartz and Thomas Schwartz. On direct appeal, Scott Schwartz continued to represent Brown. Even though Brown was saddled with the same trial and direct appeal counsel, this Court previously ruled that Brown somehow should have raised his ineffectiveness claims prior

to his initial post-conviction proceeding. For example, when addressing Brown's claims concerning the ineffectiveness of trial counsel (also appellate counsel), the Court held:

- ¶ 14: "However, Brown failed to raise this issue at trial or on direct appeal."
- ¶ 21: "We find that the legal foundation for Brown's claim of ineffectiveness is not newly discovered evidence which could not have been discovered with reasonable diligence at the time of Brown's trial or direct appeal."

Brown v. State, 948 So. 2d 405, 408, 411 (Miss. 2006).

This Court had long held that attorneys representing someone on direct appeal cannot later raise a challenge to their own performance. *Read v. State*, 430 So.2d 832, 837 (Miss. 1983). And following Brown's initial petition, this Court has reaffirmed:

When a criminal defendant is represented on appeal by counsel who actively participated in the defendant's defense at trial, a charge that the defendant was provided ineffective assistance of counsel runs counter to both intentions. First and foremost, as this Court stated in *Read*, "it is absurd to fantasize that [a] lawyer might effectively litigate the issue of his own ineffectiveness." *Read*, 430 So.2d at 838. Second, were this Court to entertain such a claim, and thereafter deny it on the merits, under the doctrines of collateral estoppel and res judicata the criminal defendant would be precluded from re-raising the issue(s) or the claim in a post-conviction proceeding. And third, apart from the procedural and substantive reasons, this type of claim, as the Court of Appeals aptly noted, leaves questions.

Thus, a self-ineffectiveness claim is absolutely inappropriate and must not be permitted. In the event a reviewing court finds itself presented with such a claim, it should not address and rule upon the matter during a direct appeal, no matter how clearly the record indicates baselessness. The only means by which a reviewing court adequately can ensure that a criminal defendant represented on appeal by his or her trial counsel has the opportunity at least to fully raise an ineffectiveness claim is via a post-conviction proceeding.

Archer v. State, 986 So. 2d 951, 956 (Miss. 2008).

Brown could not “in practical reality” have raised this claim at trial or on direct appeal because the same counsel represented him in both proceedings. The Legislature, in fact, could have drafted § 99-39-3(2) with Brown in mind: “[T]he purpose of this article is to provide prisoners with a procedure, limited in nature, to review [claims] *which in practical reality could not be or should not have been raised at trial or on direct appeal.*” (emphasis added). Because it is now manifestly clear that Brown’s claims were not statutorily barred in his initial post-conviction proceedings, this proceeding is the first opportunity for the Court to consider the true measure of the ineffectiveness that plagued Brown’s trial.

B. Unlike the Time Limitation Bar at Issue in *Howell v. State*, the Court Should Hold That the Successive Writ Bar is a Procedural Rule for the Judiciary.

This Court has long observed its constitutional mandate to ensure that appointment of counsel is not an “empty formality.” *McKenzie v. State*, 233 Miss.

216, 219, 101 So. 2d 651, 653 (1958). In *Ronk*, a majority of the Court “partially overruled” *Grayson* because of a misguided notion that it lacked authority to provide “exceptions” to “substantive, constitutional” enactments of the legislature. *Ronk v. State*, 2024 WL 131639, at *5 (Miss. Jan. 11, 2024) (citing *Howell v. State*, 358 So. 3d 613 (Miss. 2023)). The bar against successive petitions, however, is unlike the statute of limitations at issue in *Howell*.

There are key statutory differences between the PCR Act’s time bar and the statute’s other bars. One primary difference is the differing *placement* of the bars in the statute. Section 99-39-5 contains the statute’s time bar, and that section *also contains* the statute’s substantive grounds for collateral relief. In contrast, the statute’s other bars are placed elsewhere and are not included with substantive grounds for relief. Take the successive writ bar at issue in *Ronk*; it is in Section 99-39-27(9). Thus, the PCR Act itself treats the bar in *Howell* (time bar) and the remaining statutory bars in fundamentally different ways. *See, e.g., Williams v. Duckett*, 991 So. 2d 1165, 1181-82 (Miss. 2008) (explaining that careful statutory construction requires consideration of the language, context—including constitutional provisions at issue, and overall statutory purpose).

Statutes of limitations are also necessarily an element in all legal actions; the successor bar is unique to the PCR context. Moreover, neither this

Court nor the State has *ever* indicated that the successor bar is anything but a procedural rule, unlike the statute of limitations, which the Court now regards as substantive. Indeed, in *Howell*, the Court relied almost completely on the prior decision in *Cole v. State*, 608 So. 2d 1313 (Miss. 1992). *Cole* did not address whether the PCR Act’s time limitations are procedural or substantive. *Cole* did, however, note that “time boundaries is a legislative prerogative.” *Id.* at 1317-1318. At the same time, this Court reaffirmed in *Howell*, that “[t]he Legislature has no Constitutional authority to enact rules of procedure.” 358 So. 3d at 615 (citing *Newell v. State*, 308 So. 2d 71, 78 (Miss. 1975)),

Moreover, this Court has always explained that the successive writ bar is procedural. *See, e.g., Jackson v. State*, 67 So. 3d 725, 731 (Miss. 2011) (labeling the successive writ bar as procedural). In fact, in a decision handed down yesterday (September 16, 2024), the Court returned to describing rules regarding successive petitions as “procedural.” En Banc Opinion, *Manning v. State*, No. 2023-DR-01076-SCT at 2 (filed Sept. 16, 2024). Given this context, *Howell*’s time bar may be treated as substantive while the successive writ bar may and should be treated as procedural.

This Court has the constitutional duty to safeguard constitutional rights imperiled in proceedings before it. It also has the duty to interpret the PCR statute in a way that effectuates the legislative intent to provide “prisoners with

a procedure, limited in nature, to review those objections, defenses, claims, questions, issues or errors which in practical reality could not be or should not have been raised at trial or on direct appeal.” Miss. Code Ann. § 99-39-3(2).

Further, because the Court has recognized PCR proceedings as part of the direct appeal process in capital cases, the state cannot deprive him of that right without implicating his due process rights. *Evitts v. Lucey*, 469 U.S. 387 (1985) (“[I]f a State has created appellate courts as ‘an integral part of the . . . system for finally adjudicating the guilt or innocence of a defendant,’ *Griffin v. Illinois*, 351 U.S., at 18, the procedures used in deciding appeals must comport with the demands of the Due Process and Equal Protection Clauses of the Constitution.”).³ Arbitrarily and without notice calling something “substantive” when it has always been treated as a “procedural issue,” will also violate Brown’s right to due process of law. *See NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 457-58 (1958) “Novelty in procedural requirements cannot be permitted to thwart review in this Court applied for by those who, in justified reliance upon prior decisions, seek vindication in state courts of their federal constitutional

³ This Court has long understood that its decision in *Jackson* implicated the right to due process of law. In *State v. Blendon*, 748 So. 2d 77, 89 n.1 (Miss. 1999), this Court held that *Jackson* was “necessary to accord due process in accordance with the Constitution of the State of Mississippi and the Constitution of the United States.

rights.”); *Barr v. Columbia*, 378 U.S. 146, 149 (1964) (“state procedural requirements which are not strictly or regularly followed cannot deprive us of the right to review.”).

C. Brown’s Petition Cannot be Time Barred Because There is No Time Bar for Second in Time Petitions in the PCR Act.

The PCR Act does not impose a limitations period upon the filing of a “second or successive” application. Mississippi Code § 99-39-27(9) provides as follows:

The dismissal or denial of an application under this section is a final judgment and shall be a bar to a second or successive application under this article. Excepted from this prohibition is an application filed under Section 99-19-57(2), raising the issue of the offender's supervening mental illness before the execution of a sentence of death. A dismissal or denial of an application relating to mental illness under Section 99-19-57(2) shall be res judicata on the issue and shall likewise bar any second or successive applications on the issue. Likewise excepted from this prohibition are those cases in which the prisoner can demonstrate either that there has been an intervening decision of the Supreme Court of either the State of Mississippi or the United States that would have actually adversely affected the outcome of his conviction or sentence or that he has evidence, not reasonably discoverable at the time of trial, that is of such nature that it would be practically conclusive that, if it had been introduced at trial, it would have caused a different result in the conviction or sentence. Likewise exempted are those cases in which the prisoner claims that his sentence has expired or his probation, parole or conditional release has been unlawfully revoked.

Id. “Noticeably absent from this statute is a time limitation in which to file a second or successive application if such application meets one of the statutory exceptions.” *Bell v. State*, 66 So. 3d 90, 91-93 (Miss. 2011).

In *Bell*, the initial petition for post-conviction relief was filed on December 20, 2001. *Id.* After the petition was filed, *Atkins v. Virginia*, 536 U.S. 304 (2002) was decided. The initial petition for post-conviction relief was denied in 2004. *Id.* Eight years after *Atkins* was decided, and six years after the initial petition was denied, Fredrick Bell brought a second-in-time petition alleging he was intellectually disabled and categorically excluded from a death sentence under *Atkins*. Bell’s petition was not time barred, and the Court granted an evidentiary hearing on Bell’s intellectual disability.

The Court has routinely held successor petitions not to be time barred because there is no such time limitation in the PCR Act. *See, e.g., Grayson v. State*, 118 So. 3d 118, 147 (Miss. 2013) (“Grayson is hereby granted leave to proceed in the circuit court with a motion for access.”); *Walker v. State*, 131 So. 3d 562, 564 (Miss. 2013) (“Alan Dale Walker’s Motion for Leave to File Successive Petition for Post–Conviction Relief should be, and it is hereby, granted.”); *Thong Le v. State*, No. 2013-DR-00327-SCT, En Banc Order (Miss. Jan. 29, 2016) (“Le has made a substantial showing that his right to effective assistance of counsel was violated such that he should be granted leave to file

a petition for post-conviction relief on this claim.”); *Brown v. State*, 306 So. 3d 719, 734 (Miss. 2020) (procedural bars, including time-bar, are inapplicable for claims related to ineffective assistance of PCR counsel); *Powers v. State*, 371 So. 3d 629, 642-43 (¶ 12) (Miss. 2023) (same).

Additionally, under *Howell v. State*, the PCR Act’s statute of limitations constitutes legislatively enacted substantive law. 358 So. 3d 613, 615 (Miss. 2023). *Howell* thus shows that the creation and imposition of a limitations bar in the post-conviction context is solely for the Legislature. As a result, Brown’s petition cannot be time barred because there is no time limitation for second or successor petitions in the PCR Act. As noted in the previous subsection, the Court cannot arbitrarily impose bars that have not been consistently applied without violating Petitioner’s right to due process.

D. Brown’s Ineffective Assistance of Counsel Claim is “Second in Time” but not a “Successive Writ.”

Simply because a petition is second in time does not mean it is automatically a successive writ barred by the PCR Act. While Brown’s petition is second in time, it is not a successive writ because his ineffective assistance of counsel claim was unripe at the time his initial petition for post-conviction relief was filed.

The PCR Act does not define a “second or successive” petition. *See* Miss. Code Ann. § 99-39-27(9). Guidance can be found from the federal bar against second or successive federal habeas corpus petitions. The federal statute is substantially similar to the bar found in the PCR Act. *See* 28 U.S.C. A. §2244(b)(2)⁴ and Miss. Code Ann. §99-39-27(9). Like the PCR Act, the federal statute does not have a definition for what is “second or successive.” In interpreting the federal statute, the United States Supreme Court has held that the phrase “second or successive” is not self-defining but that its meaning must be considered in context and taken from case law. *See Slack v. McDaniel*, 529 U.S. 473, 486 (2000); *Panetti v. Quarterman*, 551 U.S. 930 (2007); *Magwood v. Patterson*, 561 U.S. 320 (2010). “[A]lthough the Congress did not define the phrase ‘second or successive,’ as used to modify ‘habeas corpus application under section 2254,’ §§2244(b)(1)-(2), it is well settled that the phrase does not simply refer to all §2254 applications filed second or successive

⁴ 28 U.S.C.A. §2244(b)(2) states that “[a] claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless--

(A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(B)(i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and

(ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.”

in time.” *Magwood v. Paterson*, 561 U.S. 320, 331-32 (2010)(citing *Panetti*, 551 U.S. at 944).

There are several instances where the United States Supreme Court has found second in time petitions are not barred as “second or successive” under section 2254. For example, the United States Supreme Court has held that a petition challenging competency to be executed is not a “second or successive” petition even though the petitioner had filed a federal petition because it was unripe, and to apply the strictures of §2244 would deny them a meaningful opportunity to challenge their competency to be executed. *Panetti*, 551 U.S. at 945. Similarly, a death-sentenced inmate was allowed to challenge his sentence in a second federal habeas petition finding at “it is well settled that the phrase does not refer to all §2254 applications filed second or successive in time.” *Magwood*, 561 U.S. at 332.

Mississippi law recognizes the concept that there are ineffective assistance of counsel claims that may be raised at different points in time. Ineffective assistance of counsel claims are usually not capable of determination at trial and/or on direct appeal and are more appropriate in post-conviction proceedings. *See Archer v. State*, 986 So. 2d 951 (Miss. 2008); *Lynch v. State*, 951 So. 2d 549 (Miss. 2007); *Dunn v. State*, 693 So. 2d 1333,

1339-40 (Miss. 1997); *Read v. State*, 430 So. 2d 832, 838 (Miss. 1983); *Smith v. State*, 434 So. 2d 212 (Miss. 1983). Ineffective counsel cannot raise the issue of their own ineffectiveness and these claims must be brought later by different counsel. *See Lynch v. State*, 951 So. 2d 549, 552 (Miss. 2007). “It is totally unrealistic to expect that the lawyer charged with ineffectiveness will raise and preserve the issue in the trial court. Even if he raised the issue, it is absurd to fantasize that this lawyer might effectively or ethically litigate the issue of his own ineffectiveness.” *Id.*

These considerations are also borne out in the Rules of Appellate Procedure. MRAP 22(b) provides that “**issues which may be raised in post-conviction proceedings may also be raised on direct appeal** if such issues are based on facts fully apparent from the record.”(emphasis added).

Mississippi also has a framework for allowing second in time petitions for post-conviction relief where the defendant pled guilty to capital murder. Since they do not have the benefit of direct appeal, these individuals file their motions for post-conviction relief as an original civil action in the trial court. *See* Miss. Code Ann. §99-39-7 (“The motion under this article shall be filed as an original civil action in the trial court, except in cases in which the petitioner's conviction and sentence have been appealed to the Supreme Court of Mississippi and there affirmed or the appeal dismissed...”) The successive

writ bar **only** pertains to applications to the Mississippi Supreme Court for leave to proceed in the trial Court:

- (1) The application for leave to proceed in the trial court filed with the Supreme Court under Section 99-39-7 shall name the State of Mississippi as the respondent.

- (9) The dismissal or denial of an application under this section is a final judgment and shall be a bar to a second or successive application under this article.

Miss. Code Ann. §99-39-27(1) and (9).

The bar kicks in when the Supreme Court dismisses or denies an application for leave to proceed in the trial court. Miss. Code Ann. §99-39-27(1) and (9). No such bar is found in Miss. Code Ann. §99-39-7. Since defendants who enter a plea of guilty rather than being found guilty may file their initial motion for post-conviction relief at the trial court, they are entitled to file a second application for leave to proceed with the Supreme Court without implicating the bar. *See, e.g., Loden v. State*, 43 So. 3d 365, 369 (Miss. 2010) (noting that it was addressing Loden’s “second Petition for Post-Conviction Relief” without deeming it “successive”); *Garcia v. State*, 356 So. 3d 101, 110 (Miss. 2023) (denying relief in PCR challenge to sentence but noting that an appeal of an earlier filed petition was pending).

A second in time petition does not automatically run afoul of the statutory bar on successive petitions. Brown's claim for the ineffectiveness of his trial and post-conviction counsel did not arise until current post-conviction counsel discovered his ineffective assistance of counsel claim after they completed their investigation (which should have been done by trial counsel as Brown was held without bond after his arrest and unable to help his counsel investigate his claim). Accordingly, his second in time motion is not a successive petition and the bar does not apply.

E. Brown Was Denied His Right to the Effective Assistance of Initial PCR Counsel

This Court hired Robert M. Ryan to serve as director of the OCPCC when it had the authority to hire. It was not long before the magnitude of the mistake of hiring him became apparent. As he admitted in a sworn statement, he filed number post-conviction petitions without carefully reviewing the record and conducting a minimal investigation. Exhibit 58 (affidavit of Robert M. Ryan). Even a cursory glance at some of this Court's opinions denying cursory, incomplete, and skeletal petitions filed by Ryan highlight the gross deficiency of his performance:

For example:

- ***Knox v. State***, 901 So. 2d 1257, 1265-66 (Miss. 2005): "The State answers by first stating that the affidavits of the

[MOCPPC] staff contain hearsay, and when Mildred Knox purports to convey what other people have stated, they contain double hearsay . . . The State points out that Knox has supplied little or nothing as to what an effective attorney performing a proper investigation would or should have found in the way of mitigating testimony. The State argues that the accusation that trial counsel failed to properly investigate is merely an unfounded allegation. We agree with the State.”

- ***Grayson v. State***, 879 So. 2d 1008, 1016-17 (Miss. 2004): “Grayson additionally argues that counsel was ineffective in failing to perform an adequate investigation . . . Grayson has failed to present any information regarding the extent of the investigation actually conducted by counsel, or what, if anything, an “adequate” investigation would have revealed.”
- ***Simmons v. State***, 869 So. 2d 995, 1003 (Miss. 2004): “Simmons offers no evidence now which supports his claim that his trial counsel should have investigated more thoroughly, or in certain areas . . . Simmons offers nothing in support from mental health experts who can now say what an investigation of Simmons or his family background would have shown, or what such experts would be willing to testify to. Simmons offers nothing from his trial attorney on how much time he spent preparing from the sentencing phase and why he did not feel the need to offer more or different evidence on mitigation.”

The gross ineptitude of Ryan’s egregious performance was highlighted in Howard Goodin’s case. In *Goodin v. State*, 856 So. 2d 267, 284-85 (Miss. 2003), this Court had granted Goodin leave to file a post-conviction petition on the issues of intellectual disability, ineffective assistance of counsel on the issue of mental illness, and ineffective assistance of counsel on the issue of competency. At the evidentiary hearing in Circuit Court, Ryan called one lay witness on

behalf of Goodin and rested. The trial court then entered a directed verdict against Goodin since all of the claims remanded for hearing required expert testimony under *Chase v. State*, 873 So. 2d 1013 (Miss. 2003).

Goodin's case was appealed after Ryan left the Office and Glenn Swartzfager was named director. Goodin then filed a motion to have the case remanded to the trial court for another hearing because the first hearing did not comply with this Court's mandate. This Court agreed, finding that "through no fault of the trial court, this Court's mandate in Goodin has not been carried out. Thus, in the interest of justice, we vacate the judgment dismissing Goodin's petition for post-conviction relief and remand this case for a full evidentiary hearing and ruling on the aforementioned issues." *Goodin v. State*, No. 2007-CA-00972-SCT (Aug. 27, 2009) (en banc) (attached as Exhibit 62).

Although it did not elaborate, this Court did not rely on whether Goodin suffered a deprivation of his right to effective PCR counsel; instead, it presumably acted based on its broad powers to ensure the integrity of the judicial system and to ensure that it works in accordance with principles of fundamental fairness. *See, e.g., McKenzie v. State*, 101 So. 2d 651, 653 (Miss.

1958) (state courts have obligation to enforce mandates of statutes and the state constitution).⁵

The order in Goodin corrected an injustice in that case, but the deeper problem persisted. Defects in post-conviction representation were so bad that a number of death row prisoners filed suit in chancery court to seek declaratory and injunctive relief. This Court held that the chancery court lacked jurisdiction to grant the requested relief. Nevertheless, it indicated that prisoners could file successive petitions for post-conviction relief. *See Knox v. State*, 75 So. 3d 1030 (Miss. 2011). The Court then elaborated on the appropriate remedy in *Grayson v. State*, 118 So. 3d 118, 126, 146 (Miss. 2013), holding that ineffective assistance of state post-conviction counsel can provide an exception to procedural default and finding that “[t]he denial of an opportunity to present a properly supported motion seeking post-conviction collateral relief is, in effect, the denial of meaningful access to the courts.”⁶ *Grayson v. State*, 118 So.3d 118, 146 (Miss. 2013); *see also id.* at 126 (“because

⁵ *See also Chase v. State*, 873 So. 2d 1013, 1019 (Miss. 2004) (declining to dismiss a post-conviction petition “due to errors by his counsel”).

⁶ An ineffective state process can render state post-conviction counsel ineffective. *See, e.g., Daniels v. Woodford*, 428 F.3d 1181, 1205–06 (9th Cir. 2005) (finding counsel deficient where it was a “lack of time and funding—and not strategic choice—that hampered [defense counsel’s] representation and ability to present mitigating evidence.”).

this Court has recognized that PCR proceedings are a critical stage of the death-penalty appeal process at the state level, today we make clear that PCR petitioners who are under a sentence of death do have a right to the effective assistance of PCR counsel.”).

In *Grayson*, the Court had little trouble in finding that Ryan’s performance fell below an objective standard of reasonableness, observing he conducted little independent investigation or seek expert assistance and filed a PCR petition that was similar to the direct appeal brief. *Grayson*, 118 So. 3d at 128. In *Walker v. State*, 131 So. 3d 562 (Miss. 2013).

In *Le v. State*, 2016 Miss. LEXIS 546 (Miss. Jan. 29, 2016), this Court remanded another case in which Ryan had been the initial attorney for an evidentiary hearing. Ryan handled Le’s case around the time he represented Brown.

The magnitude of Ryan’s failure in Brown’s case will be more apparent in the discussion of the substantive claims discussed below. Nevertheless, it should have been apparent that there were many avenues to explore to challenge the results of both the culpability and penalty phases.

In state court proceedings, Brown raised the following challenge to trial counsel’s performance at the culpability phase:

2. Failure to Present a Defense in the Guilt-Innocence Phase of the Trial:

39. The petitioner would respectfully submit that his trial counsel failed to present an adequate and sufficient defense which would pass muster under the Sixth Amendment to the United States Constitution and the corresponding portions of the Mississippi Constitution. During the guilt-innocence phase of the trial the defense did not call a single witness, nor did Brown testify. “If the decision to stand trial has been made, counsel must hold the prosecution to its heavy burden of proof beyond a reasonable doubt.” *United States v. Cronin*, 466 U.S. 648, [656, n.19] (1984). “If counsel entirely fails to subject the prosecution’s case to meaningful adversarial testing, then there has been a denial of Sixth Amendment rights that makes the adversary process itself presumptively unreliable.” *Id.* [at 659].⁷

40. The petitioner asserts that counsel’s failure to present a defense was representative of deficient performance. Brown was denied the effective assistance of counsel during the guilt phase due to trial counsel’s failure to provide a meaningful defense to the allegation contained in the indictment.

Petition for Post-Conviction Relief, No. 2004-DR-01772-SCT at 19 (filed Nov. 14, 2005) (relevant portion attached as Exhibit 59).

The two paragraphs quoted above *is the entirety of* the challenge to trial counsel’s guilt phase performance. Prior post-conviction counsel did not make allege any specific errors on the part of trial counsel or present any affidavits or other records to support the allegations even though Mississippi law

⁷ In the state court petition, prior counsel cited page 667 of *Cronin*, but the quoted portions are not found there.

requires a post-conviction petitioner to attached documentary support for the allegations. Miss. Code Ann. § 99-39-9(1)(e).

Cronic is clearly reserved to situations in which trial counsel “entirely fails” to challenge the State’s case. In this instance, trial counsel cross-examined the State’s witnesses and filed a handful of motions. Because trial counsel did not entirely fail to represent Brown, *Cronic* is inapplicable. See *Cone v. Bell*, 535 U.S. 685, 696-97 (2002). Instead, prior post-conviction counsel should have identified specific errors of trial counsel and pursued relief under *Strickland v. Washington*. *Cronic*, 466 U.S. at 666 & n.41.

The challenge to trial counsel’s performance is qualitatively different than it was in the initial petition. Rather than a generic statement about counsel, Brown has presented a wealth of affidavits challenging the veracity of the State’s witnesses, expert reports about a tape recording used to establish an element of the offense, and other records and exhibits.

The difference between the state and federal court challenges to trial counsel’s penalty phase performance was nearly as stark. After several pages of largely boilerplate review of the *Strickland* standard, state post-conviction counsel made the following assertion:

36. In view of the above authorities cited, the petitioner states that his trial counsel had a duty to investigate and present mitigating evidence. Trial counsel was neglectful in that they failed to do so and as a result, the court never had an opportunity to consider evidence that Brown was a good student while he was enrolled at school, that he earned his GED, entered the military and received an honorable discharge. *See Exhibits 8, 9, 16, 17.*

Brown v. State, Pet. For Post-Conviction Relief, No. 2004-DR-01772-SCT at 18 (filed Nov. 14, 2005) (relevant portion attached as Ex. 60). Exhibit 8 of the state court filing was Petitioner's school records, Exhibit 9 was a few pages of his military records, Exhibit 16 was a brief affidavit from Louise Arrington, Brown's grandmother, and Exhibit 17 was a brief affidavit from Brenda Bonner, Brown's ex-wife. These affidavits focus almost exclusively on facts related to the conviction and their belief that Brown is not guilty. The only reference to mitigation in Ms. Arrington's affidavit is in paragraph 11, in which she states that "I believe that Xavier's trial attorneys failed to present any mitigation testimony for his defense." Nothing in Ms. Arrington's affidavit suggests what that mitigating evidence should have included. Ms. Bonner's affidavit, which is attached to this pleading as Exhibit 29, does not refer to mitigating evidence at all.

In contrast to the negligent presentation in the initial petition, Brown here has attached two expert reports based on an evaluation of the trauma he experienced in childhood as well as his drug addiction.

Louwlynn Vanzetta Williams, who was the staff attorney assigned to Brown's case has provided an affidavit detailing the deficiencies in the representation caused in large part by Ryan's mismanagement and ineptitude. Ex. 60. She recalled that she was "given neither the time nor the resources to do more than cursory investigation and preparation of his petition." *Id.* In fact, she was unable to turn her attention to the case until two weeks before the state court petition was due, and virtually no work had been done on the case by anyone else in her office. *Id.*

The shortage of investigative resources was compounded Ryan's decision to assign Tomeka Harris, the primary investigator, to the position as fiscal administrator. *Id.*, ¶ 5. This reassignment left Harris with virtually no time to investigate. *Id.*, ¶ 12.

Williams recalls that she effectively had only two weeks to work on the case. During that time, she reviewed the record and interviewed three witnesses but had no time to interview Brown's trial attorneys, conduct discovery, or confer with any mental health expert. *Id.*, ¶ 8. She recognizes that there were many other witnesses who had to be interviewed. *Id.*

The challenges of working on Brown’s case were compounded by the uninformed and idiosyncratic decisions of Robert Ryan, the director of Williams’ office. Ryan, who was not at all familiar with Brown’s case, insisted on having the final say on the issues to be raised. According to Williams, Ryan favored record-based claims that had already been litigated on direct appeal or broad, systemic claims, rather than extra-record claims required by the post-conviction statute. *Id.*, ¶ 9. As Williams points out:

Of the nine claims ultimately included, 6 were either record-based direct appeal claims or generic systemic challenges. The 3 fact-specific claims were: a spare actual innocence claim, a proportionality claim, and an ineffectiveness claim. The ineffectiveness claim contained virtually no information related to Mr. Brown’s case. The final petition was not a result of my reasoned strategic judgment; it was what I was able to cobble together in two weeks along with what Mr. Ryan wished to include. I specifically recall that I disagreed with Mr. Ryan about the substance of Mr. Brown’s petition and believed that his decision to focus on generic claims without investigation was simply wrong for clients.

Id. ¶ 9.

Williams added that Ryan’s erratic tenure led to other problems for Brown’s state court representation. As Williams recalls, Ryan “appeared to be deteriorating mentally under the pressure. He began doing less and less work and behaving more and more erratically.” *Id.* at ¶ 11. Williams describes the work Ryan did as “tangential to our cases” and notes that he “became

increasingly paranoid that staff members were speaking behind his back or conspiring against him.” *Id.* He also “constantly shuffled case assignments for the staff and made decisions that were not based on any discernable interest of the client.” *Id.*, ¶ 12.

Williams had the opportunity to review the briefing submitted in federal court, which largely parallels what is contained herein, and attests “that it includes the type of evidence I would have developed and issues I would have presented, had I been given the time and resources.” *Id.*, ¶ 10. She emphasizes that “[t]here was no strategic reasons for the minimal investigation competed,” that the petition she filed was “inadequate,” and that she hopes Brown is “given an opportunity to file a second state post-conviction petition.” *Id.* Based on Williams’ affidavit and a comparison of what was filed in state and federal court, it is apparent that Brown did not receive effective representation in his prior effort to seek collateral relief in state court.

F. *Ronk* Does Not Apply Retroactively to Brown’s Claim.

This Court’s decision in *Ronk* was handed down long after Brown’s trial and his initial motion for post-conviction relief. Applying *Ronk* retroactively would violate both his due process rights and his right to effective counsel. This Court has been clear that “due process requires adequate post-conviction remedies.” *Petition of Broom*, 168 So. 2d 44, 46 (Miss. 1964).

Additionally, *Ronk* should not be applied retroactively based on Mississippi law. “The general rule is that decisions of the Mississippi Supreme Court are presumed to have retroactive effect.” *Morgan v. State*, 703 So. 2d 832, 839 (Miss. 1997). “Only where retroactive enforcement would cause serious disruption of the administration of justice and where the prior rule was not infected by a serious absence of fundamental fairness will decisions of our supreme court not be retroactively applied.” *Graves v. State*, 761 So. 2d 950, 953-54 (Miss. Ct. App. 2000) citing *Morgan*, 703 So. 2d at 839. It is fundamentally unfair to apply *Ronk* retroactively to bar Brown’s claims when he has uncovered evidence which proves his innocence.

“Traditionally, [the Mississippi Supreme Court] applies the law as it exists at the time of appellate review.” *Gibson v. Bell*, 312 So. 3d 318, 324 (Miss. 2020) citing *Mid-S. Retina, LLC v. Conner*, 72 So. 3d 1048, 1052 (Miss. 2011)(internal quotation marks omitted). “[N]ewly enunciated rules of law are applied retroactively to cases that are pending trial or that are on appeal, and not final at the time of the enunciation.” *Id.* citing *Thompson v. City of Vicksburg*, 813 So. 2d 717, 721 (Miss. 2002). Evidence of Brown’s innocence should have been brought by his ineffective counsel at the time of his trial and would not have been statutorily barred. This Court should not apply *Ronk* retroactively to Brown’s claims.

G. The Statutory Bars Would be Unconstitutional as Applied to this Egregious Case, Especially Because it Raises Actual Innocence Issues.

The statutory bars do not apply to Brown's post-conviction claims because he is innocent. Mississippi Courts have historically overturned convictions of innocent people exercising their authority to remedy grievous judicial wrongs. *See State v. Bass*, 4 So. 3d 353, 357 (Miss. Ct. App.); *In re Clyde Kennard*, No. 2006-M-00053 (Feb. 17, 2006). This Court has recognized that "[r]ules are made to secure justice, not defeat it" and "[a]ll courts have the inherent power to correct and make their judgments speak the truth." *Gill v. State*, 962 So. 2d 552, 554 (Miss. 2007) (internal citations and quotations omitted.)

Recently, this Court has acknowledged that there are circumstances where the statutory bars are unconstitutional as applied:

We acknowledge that other arguments may be used to attack the constitutionality of the statutory bars, either as applied to particular cases or on their face, and we have no intent to address their validity one way or the other here. We further recognize that, in specific cases, other arguments or doctrines, e.g., equitable tolling, might be available to afford relief from the statute of limitations.

Howell v. State, 358 So. 3d 613, 616 (Miss. 2023).

The Mississippi Supreme Court also recently reaffirmed that actual innocence claims may survive *Howell* and constitute an exception to the

statutory time bar in *Hathorne v. State*, 376 So. 3d 1209, 1211-12 (Miss. 2023). Hathorne appealed an order of the trial court denying his motion for post-conviction collateral relief from an indictment that was defective because it failed to charge a crime. *Id.* at 1211. The Court of Appeals affirmed the judgment finding that a defective indictment was not an enumerated exception to the statutory bars of the UPCCRA. *Id.* The Supreme Court reversed the Court of Appeals finding the claim was not statutorily barred, reversed the conviction and sentence and rendered a judgment dismissing the indictment. *Id.* at 1210-11. The Court declined to address whether actual innocence claims survive Howell and constitute an exception to the statutory time bar because Hathorne’s claim was not time barred. *Id.* at 1211-12. Following longstanding precedent, the Mississippi Supreme Court held that Hathorne’s challenge to the substantive sufficiency of his indictment cannot be waived:

To hold otherwise in this case would preclude relief from a person, who we have determined was never charged with a crime, serving twenty years in prison, day-for-day. Granting relief in this extraordinary case is the only just outcome—to keep Hathorne in prison under no legal requirement would certainly constitute “cruel or unusual punishment” and an “excessive fine[],” which is expressly prohibited under our Constitution. Miss. Const. art. 3, § 28.

Id. at 1215.

This Court should apply the same inherent power to correct the wrong in this case and hold that would be unconstitutional to bar Brown's actual innocence claims. *See In re Clyde Kennard*, No. 2006-M-00053 (Feb. 17, 2006).

H. Innocence Claims Fall within the PCR Act's Interest of Justice Statutory Exception.

The UPCCRA allows any person sentenced by a court of record of the State of Mississippi to move to vacate, set aside, or correct the judgment or sentence if the person claims "that there exists evidence of material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice." Miss. Code Ann. §99-39-5(e). Brown's claims fall within the interest of justice statutory exception and his claims are not barred. Indeed, it is "the quintessential miscarriage of justice" to convict a man with a showing of innocence. *Schlup v. Delo*, 513 U.S. 298, 324 (1995).

I. The Statutory Bars Do Not Apply as this is Newly Discovered Evidence.

Additionally, and alternatively, Brown's claim is excepted from the statutory bars as it is newly discovered evidence. *See generally* Miss. Code Ann. §99-39-5(2)(a)(i); §99-39-21(3); §99-39-23(6); §99-39-27(9).

To overcome the statutory bars under the newly discovered evidence exception, Brown must show that (1) the evidence was "discovered after the

trial; (2) [it] could not by due diligence have been discovered before trial; (3) [it is] material to the issue and not merely cumulative or impeaching; and (4) [it] would probably produce a different result or verdict in the new trial.” *Powers v. State*, 371 So. 3d 629, 687 (Miss. 2023)(internal citations omitted).

A multitude of evidence in Brown’s case was discovered after the trial, including the opinion of a forensic linguist expert that Brown was not likely speaking on the audio recording heard at trial. Brown’s trial counsel obtained funds for obtaining an expert to determine whether voice identification would be possible on the voice recording. C.P. 279-289; Ex. 17, 18. Unfortunately the retained expert wrote that the tape recording was not of sufficient quality to conduct voice identification analysis. Ex. 19. Because the retained expert was unable to perform the voice identification analysis, Brown was unable to obtain the needed expert opinion.

For the first time, current post-conviction counsel was able to locate a forensic linguist expert, Ana Flavia Zuim, Ph.D., who reviewed seven voicemails and compared them with three voice recordings of Brown.⁸ *See* Ex. 24. Dr. Zuim states in her report that Brown is not likely one of the speakers on the voicemail. *Id.*

⁸ Due to objections by the Attorney General’s Office, current post-conviction counsel was unable to retain experts to evaluate Brown in person until after the June/July, 2021.

An expert opinion that Brown was not on the voicemail would not have been cumulative or impeaching. Along with evidence that Brown was incarcerated at the time the alleged contract was made, this would have destroyed the prosecution's theory of the case, and likely resulted in an acquittal.

Brown's trial counsel failed to interview several critical witnesses. For the first time, current post-conviction interviewed James and Susan Bigler and Darwin Brown and obtained crucial information for Brown's defense as explained in this motion. Brown was unable to interview these witnesses before trial as he was incarcerated. As stated above, his trial counsel could not have discovered their own ineffectiveness and realized they needed to interview the witnesses. Darwin Brown and the Biglers' testimony is material as it would discredit Donald Crosby and Corey Johnson and be key to a successful motion to suppress the alleged confession.

GROUNDS FOR RELIEF

GROUND I: Brown Was Denied The Effective Assistance Of Counsel Guaranteed By The Sixth And Fourteenth Amendment At The Culpability Phase Of His Trial

A. Overview of this Ground for Relief.

Felicia Newell was shot by an unknown assailant on February 26, 1998, as she parked her car after returning from work. The police suspected her ex-husband, Anthony Sims, aka Tariq Bey, because Sims had previously threatened to kill her. After Sims was found dead from an apparent suicide the next day in a motel room, the police had few, if any, leads to pursue. Over a year later, however, Donald Crosby and Corey Johnson gave statements to law enforcement implicating Xavier “Tony” Brown. Crosby stated that Brown confessed to him, and Johnson claimed that he was with Brown at the time of the shooting. Crosby mentioned that Darwin Brown, Petitioner’s brother, and Ricky McLaurin were present for the confession, and Johnson went so far as to state that Darwin urged him to come forward to tell law enforcement what he knew about the murder.

At trial the State’s case went largely unopposed. Defense counsel did little aside from bringing out a couple of inconsistent statements that Johnson made. Counsel could easily and should have done so much more. For instance,

counsel could have easily shown that the description of the shooter given by unbiased witnesses did not match Xavier Brown. Despite having an investigator, defense counsel did not interview either Darwin Brown or Ricky McLaurin, even though both would have denied the statements made by Crosby and Johnson. Ex. 27 (declaration of Darwin Brown); Ex. 32 (declaration of Ricky McLaurin). Counsel also:

- failed to challenge the admissibility of tape recordings that could not be linked to their client,
- failed to point out other inconsistencies in the testimony of the State's witnesses,
- failed to point out obvious lies in Johnson's testimony,
- failed to establish the connection between Johnson and Sims,
- failed to establish that any contract for the killing of Felicia Newell could not have included Xavier Brown because he was in prison on other charges at the time the contract was made and that the problems between Sims and Newell began long before Xavier Brown returned to Laurel,
- failed to investigate Sims's history of violence towards his ex-wife, or
- failed to develop evidence regarding the car used by the shooter.

Under these circumstances, where the State's case went unchallenged, it is no wonder that the jury found Xavier Brown guilty.

The Sixth Amendment to the United States Constitution guarantees the right to *effective* assistance of counsel. *See Strickland v. Washington*, 466 U.S.

668, 686 (1984). To establish ineffectiveness, a petitioner must show that (a) counsel's performance was so deficient that counsel was not functioning as the counsel guaranteed by the Sixth Amendment and (b) there is a reasonable probability that but for counsel's unprofessional errors, the result of the proceeding would have been different. *See Strickland*, 466 U.S. at 687, 694. A reasonable probability is a probability that is sufficient to undermine confidence in the outcome. *Id.* at 694. Had counsel performed some elementary investigation and provided a zealous defense, there is more than a reasonable probability that the result would have been different, and thus Xavier Brown's defense counsel were constitutionally deficient.

Brown first reviews the testimony about the shooting and the State's case against him. Brown then sets forth the controlling legal principles and analyzes what constitutionally effective trial would have done and how an adequate performance would reasonably likely have affected the verdict.

B. Trial Proceedings and State's Theory of the Case.

1. The Murder.

James Bigler was at home in the early evening of February 26, 1998. His then-girlfriend was preparing dinner when he heard a gunshot. T. 327.¹ He jumped to the patio window of his apartment overlooking Westover Drive and noticed a black man of medium build wearing jeans, a dark sweatshirt, a dark cap, and white gloves walking quickly westward. T. 330. James noticed that this man had something in his hand which he placed in his pants pocket. T. 329, 331. James saw this individual get into the passenger side of a Blue Cutlass, which was backed into a parking place. T. 330. James did not get a good look at the driver except that he did notice that the driver, too, was wearing white gloves. T. 340. After this car sped away, James ran to the parking lot, noticed a car with the driver's door open about ten spaces away from where the other car was parked, and saw a woman slumped over in the front seat. T. 330, 331.

Susan Bigler was preparing dinner for James and herself when she, too, heard the gunshot. T. 346-47. She did not observe as much as James did, but

¹Page references to the trial transcript will be cited as "T." References to the Clerk's Papers will be "C.P." References to exhibits introduced at Petitioner's trial will be "Trial Ex." Exhibits introduced in connection with this petition will be "Ex."

what she described was more or less consistent with what James noticed. Susan saw a black man running westward on Westover Drive. She also saw that the man wore jeans, probably dark, a baseball cap, and a dark colored shirt. T. 348.

The police arrived and identified the victim as Felicia Newell. A 9 mm casing was found near the crime scene. T. 359. The medical examiner concluded that Felicia died of a single gunshot wound to her back. T. 458. Law enforcement did not recover the bullet that struck Felicia, and they found no prints or other forensic evidence that would assist in locating the shooter. T. 388.

2. The Ex-Husband

The police learned that Felicia had a turbulent relationship with her ex-husband, Anthony Sims, aka Tariq Bey. T. 384. Several months earlier, Anthony had chased Felicia with a gun. T. 598. He was arrested and charged with being a felon in possession of a firearm. He was scheduled for trial, and Felicia was to be the key witness against him. T. 565. She had also filed a claim of harassment. T. 565. The police learned that Anthony owned a late Cutlass Sierra, which was white over blue. T. 365.

Law enforcement also discovered that Anthony had been making threats to kill his ex-wife. They found threatening messages on her home answering

machine and on her voice mail where she worked at Sunbeam Oster. The recordings on the home answering machine, which was introduced at trial as Trial Exhibit 12, are difficult to discern. However, the messages recorded on the voice mail and introduced at trial as Trial Exhibit 11, are much easier to make out. There were several messages on the office voice mail recorded between November 24 and 29, 1997. Several of the messages were determined to have been left by Anthony; however, there were others left by an unknown person who threatened Felicia with reprisals by a gang. On the last message, which was dated November 29, it sounds as though the unknown person told Felicia that a contract had been placed on her. T. 384; 573; Trial Exhibit 11.

The next day, Anthony was found dead in a motel room in Laurel. T. 393. The coroner determined that he died of a drug overdose. T. 464. The police learned that around 9 a.m. on the date that Felicia was killed, Anthony went to an ATM machine. T. 402-03. Photographs of Anthony at the ATM machine were introduced as Trial Exhibit 6; *see also* Ex. 5. In addition, a photograph of Anthony lying dead in the motel room was introduced as Trial Exhibit 7; *see also* Ex. 7. He appeared to be wearing the same clothes that he wore the day before at the ATM machine. The police found a little over \$1100 cash in Anthony's motel room, and he had over \$300 in his bank account. T. 399, 403.

Those photographs of Anthony were shown to the Biglers, who testified that the man they saw in the parking lot was not wearing the clothes that Anthony was wearing. T. 335, 348. Furthermore, James Bigler testified that the shooter had finer features than Anthony had and that the individual in the motel room had a broader nose than the man in the parking lot had. T. 337. On cross-examination, James elaborated a bit on the comparison between Anthony and the man in the parking lot. According to James, the face of the man he saw outside of his apartment was thinner and not as pudgy as the photograph of Anthony that he was shown and that the man's nose was not as wide as Anthony's. T. 342. Susan, likewise, testified that the man in the photo (Anthony) looked larger and his facial features seemed larger than the man she saw running in the parking lot. T. 348, 351.

According to the medical examiner, Anthony was 32 years old, stood 5' 10", and weighed 190 pounds. T. 461.

3. The Alleged Confession.

The police concluded that Anthony Sims was involved in the murder of his ex-wife, but law enforcement had no leads to determine conclusively who shot Felicia. However, in 1999, Donald Crosby, who is a three-time convicted felon whose crime of choice involves inherent dishonesty, T. 426, informed the police that Tony Brown confessed to him. T. 422. According to Donald, he was

in business with Tony's brother Darwin. On one particular day, Tony mentioned to Donald that he had "killed a bitch but he did it so smooth that the person he was with didn't even know he had did it." T. 420. Donald added that Tony said that Anthony Sims killed himself because Sims owed him money for the killing. T. 421. According to Donald, Darwin and Ricky McLaurin were present when Tony supposedly confessed. T. 449. According to Donald, he and Darwin said that Tony talked too much. T. 420, 424. Donald's story, however, was problematic because he alleged that Tony supposedly said that the victim was shot with a .22 caliber. T. 422.

Donald did not come forward with this tale at first because "it really had nothing to do with me." T. 423. Later, however, Donald had a change of heart supposedly after talking to Roderick Ball, who came to the detail shop. As Donald told the story, Roderick Ball had a picture of Felicia Newell, who was his ex-fiancee. After hearing Roderick talk about Felicia, Donald told Roderick what he allegedly heard from Tony. Later, Donald was approached by Mark Berry of the Hattiesburg Police Department. T. 428.

Donald asked the police for \$400 in order to get out of town because he felt threatened. T. 447. Donald also claimed to still be friends with Darwin. T. 448. Donald added that Ricky McLaurin was in jail in New Jersey, and

Darwin is overweight, has a heart condition, requires oxygen, and is confined to a wheelchair. T. 450.

4. The Allegedly Unwitting Accomplice.

The prosecution next called Corey Demont Johnson, its most important witness. Corey began by testifying that he worked at Sanderson Farms, where he claimed to have been employed for four years. T. 478, 516. Corey was involved with Tony's sister, Lorelei, and they had two children. T. 478. According to Corey, on the day of the murder, he was walking down Magnolia Street in Laurel to visit Darwin when Tony pulled up next to him. Corey asked where he was going, and Tony replied that he was "just going riding." T. 480. "And I got in the car with him, and we end up just riding and we rode down here to Hattiesburg." *Id.* On cross-examination, Corey testified that Tony asked him to take a ride. T. 516; *see also* Trial Exhibit 20 (attached here as Ex. 8). At trial, Corey testified that Tony drove straight to the Interstate and that he rode close to another automobile. T. 518. Although Corey claimed that he did not know whether Tony was following the car, Corey stated that the car that Tony was close to was Felicia Newell's Chrysler. T. 518. According to Corey, therefore, Tony out of the blue essentially asked him to become a witness to a capital murder, and Tony just happened to locate and fall in behind Newell as they drove on the interstate.

Corey then testified that when they arrived in Hattiesburg, Tony drove to an apartment complex and backed into a parking space. T. 481. Corey noted that the car was a Pontiac Parisienne that was dark blue on top and light blue on the bottom. T. 481. Before Tony exited the car, Corey observed him pulling a paper bag from beneath his seat. Corey denied that he saw a gun at that time. T. 482; 519 (on cross-examination, states that he did not see a gun until Tony returned to the car). He then saw Tony pull on a pair of black gloves. T. 482, 531. When Tony got out of the car, he took the paper bag with him. T. 482.

Corey recalled that Tony “walked, back to my right on down a little bit,” and added that he “couldn’t see because all the cars was in the apartment complex.” T. 482. On cross-examination, Corey added that Tony left his sight. T. 532. Corey heard “something like a firecracker” and then Tony walked up to the passenger side door of the car, pointed a gun at Corey, and told him to drive. T. 482-83. Corey did not see Tony shoot anyone. T. 532. Before pulling the gun on Corey, Tony was holding it behind his back. T. 533. Tony raised the gun when he walked to the passenger side of the car where Corey was sitting. T. 533. Corey jumped over to drive when he saw the gun. T. 483. On cross-examination, Corey mentioned that Felicia’s car was parked about ten spaces away. T. 520. He also stated that he saw Felicia slumped over in her

car after being shot. As he testified, “I saw that part. I mean, you could see through the glasses of the cars from the side. You could see through the glasses of the cars how she slumped over the seat to the side.” T. 537.

Corey then drove back to Darwin’s house in Laurel. After Tony got out of the car, Corey walked back down the street. T. 483. When Tony dropped him off, he warned Corey not to say anything. T. 484. Corey recalled that Tony wore a long-sleeve black shirt, black pants, “had on some shades for a minute” and also “had some kind of little black hat.” T. 483. Corey also testified that Tony had a “little narrow gun. Looked like an old 9 mm.” T. 491.

Corey did not come forward to speak to law enforcement until June 20, 1999. He explained that he went to the police after Darwin “told me to come in.” T. 485. On redirect examination, Corey added that Darwin told him to go to the police to tell them who committed the crime. T. 559.

Corey also testified that he knew Anthony Sims but was not friends with him. T. 484. Corey also stated that he did not know Felicia. T. 491.

On cross-examination, the defense underscored several statements that Corey gave to the police that were inconsistent with his trial testimony. For instance, Corey told the police that Tony pulled out a gun and put it in a paper bag. T. 535. Trial Exhibit 21 (attached here as Ex. 9). However, during direct

examination, Corey testified that he did not see a gun before Tony left the car. T. 482.

Corey also told the police that after the shooting, Tony drove the car to a nearby Kmart and then made Corey drive back to Laurel. T. 536; Trial Exhibit 21; Ex. 9. In contrast, Corey testified before the jury that Tony told him to drive when he returned to the car after shooting Felicia. T. 483.

During direct examination, Corey testified that after returning to Laurel, he left Tony at Darwin's house and then walked away. T. 484. That was not what he initially told the police, however. Instead, he told the police that he went to Darwin's house and told Darwin that "Tony murdered this girl down in Hattiesburg." T. 545. Corey explained the discrepancy by stating that Tony scared him by pulling a gun on him. T. 545.

5. The Trial Judge Acknowledged the Weak Evidence Supporting the Capital Murder Charge.

The aspect of the case that elevated it from simple murder to capital murder was the assertion that the killing was done by a "person who has been offered or has received anything of value for committing the murder." Miss. Code Ann. § 97-3-19(2)(d). *See also* C.P. 12. At the conclusion of the State's case-in-chief, defense counsel moved for a direct verdict because the record was "absolutely devoid of any evidence of there being any contract for killing . . .

There has been no proof as to who would have hired him. There is no proof as to whether or not money was promised, where money changed hands. And at the very least, the capital portion of the indictment should be stricken.” T. 612. The state retorted that the tape recordings indicated that there was a contract on Felicia’s life. T. 613. Defense counsel replied that he did not make out the word “contract” on the tapes and that the State failed to prove there was a contract, i.e., “an offer and acceptance and there’s got to be a meeting of the minds and there’s got to be two identifiable parties.” T. 615. The trial judge acknowledged that it was a close question, but found that the word “contract” was on the tape. T. 617-18. The trial judge concluded: “It’s certainly not the strongest case anybody has ever seen, but I think it’s one that the jury should rule on, and I overrule the motion for directed verdict.” T. 620.

6. Closing Arguments

In its initial closing, the prosecution played the recording that mentioned the “contract”: “There’s a contract out on Felicia Newell. Those are some of the truest works that have been spoke in the form of one of the types that you’re going to hear.” T. 635.

For its part, the defense pointed out a few weaknesses with the State’s case: there was no proof that Sims knew their client or that they communicated in any way about a contract; Donald Crosby lacked credibility as shown by his

multiple convictions for embezzlement; and there were inconsistencies between Corey Johnson's trial testimony, his statements to law enforcement, and the testimony of James Bigler.

In its final argument, the prosecutor emphasized Johnson's testimony, highlighting Johnson's statement that he heard the gunshot and "saw the woman slumped." T. 656.

In a sense, that last comment sums up this case: Johnson was obviously lying. He could not have seen the victim slumped in her car if he was sitting in the driver's seat. Trial counsel, however, did not manage to point out what should have been obvious.

7. Post-trial Proceedings

At trial, the State took pains to make Corey Johnson appear to be credible, gainfully employed, tax-paying citizen; the State asked him about his employment status, and Corey responded that he had been working at Sanderson Farms for four years. T. 478. Corey Johnson lied. At the hearing on a Motion to Set Aside Verdict and for a New Trial Based on Newly Discovered Evidence (C.P. 540), defense counsel presented evidence that Johnson fabricated testimony about his employment status.

Johnson admitted that he was not employed at Sanderson Farms at the time of trial, but stated that he had been working at Sanderson Farms up until

Brown's trial and that he was fired just prior to the trial. Supp. T. 10. According to Johnson, "I was employed until this trial came up. I just ended up losing my job, and I got fired." Supp. T. 10. Johnson explained that he was fired because of the trial: "when I had to come down here for this trial, I got fired." Supp. T. 10. Johnson contradicted himself, however, denied that he was lying and declared that "I was currently employed at that time." Supp. T. 11. Shortly after making this statement, Johnson again testified under oath that he was employed at Sanderson Farms until the day before Brown's trial began. Supp. T. 11. After defense counsel told him that the jury was empaneled for the trial on June 17, 2002, Johnson testified that he would have been employed up until June 16, 2002. Supp. T. 12.

Defense counsel presented Johnson's records from Sanderson Farms to prove conclusively that he was lying. According to records from Sanderson Farms, Johnson "was employed from April 4th, 1995 through April 1, 1996." Supp. T. 12; Supp. Trial Exhibit 2. As defense counsel pointed out, there was nothing about Johnson being employed in 2002. Supp. T. 12. Before Johnson was finished testifying, he changed his story yet again. This time, he denied that he was fired because he was subpoenaed to be a witness. Instead, he claimed to have been fired for missing days because his daughter was sick. Supp. T. 13. Defense counsel then asked Johnson about whether he and Brown

had problems about his sister. Johnson denied any problems and also denied that he beat up his sister. Supp. T. 15. As indicated previously, Johnson was not likely being truthful about that, either.

On direct appeal, this Court acknowledged the obvious: Johnson perjured himself. *Brown v. State*, 890 So. 2d 901, 916 (¶ 52) (Miss. 2004). However, the Court found the perjury harmless since it pertained to a collateral matter, *id.* (¶ 55). Even so, Johnson’s propensity to lie even about matters that may seem relatively insignificant must be factored into the overall evidentiary picture when the Court assesses the prejudice from counsel’s deficient performance—especially since the evidence that counsel should have gathered would have given jurors even more compelling reasons to question his credibility.

C. Trial Counsel’s Trial Preparation and Strategy.

Trial counsel believed that there was little evidence that Tony even knew Anthony Sims, much less entered into a murder-for-hire scheme with him. T. 643. Counsel thus felt that the trial court should have granted a directed verdict. Furthermore, they intended to cross-examine Corey and pick out inconsistent statements made at trial that were different from his statements to the police. Counsel also pointed out variances between Corey’s testimony and the testimony of other witnesses. For instance, James Bigler reported

seeing the driver and shooter wearing white gloves, but Corey stated that Tony wore black gloves. T. 645. Trial counsel wanted to emphasize that the Biglers never identified Tony as the shooter: “And the police never show the Biglers a picture of Corey . . . The Biglers didn’t identify Xavier Brown.” T. 647. Counsel was able to make this point in summation because the State did not even ask the Biglers to make an in-court identification of the defendant. Finally, counsel derided Corey’s testimony as ridiculous and asked the jury to apply common sense: “Does it make sense for there to be a contract killing, a contract to kill for money as the State wants you to believe, and that somebody is going to take a witness with them? Does that make sense? Of course not.” T. 650.

Counsel, however, must do more than reach for low-hanging fruit. They have a duty to probe for other weaknesses in the State’s case and conduct their own independent investigation into the veracity of witnesses rather than simply rely on cross-examination.

Besides failing to carry out their own trial strategy, defense counsel also failed to conduct more than a cursory investigation into the facts of the case. The trial judge granted defense counsel’s motion to retain investigator Deron Nored and authorized the defense to expend up to \$2,500 for his services to conduct an investigation into the facts and circumstances of the offense. C.P. 28-30; 70-71; Ex, 10, 11 (motion for funds for expert and order granting

funding). However, trial counsel did not arrange for him to talk to key witnesses, including, but not limited to, Darwin Brown and Ricky McLaurin. Ex. 12 (invoice of investigator). Counsel's failure was significant because Darwin could have rebutted key aspects of the testimony of Corey Johnson and Donald Crosby. Moreover, the investigator's total bill came to only \$938.50, or only about 38% of the amount authorized by the trial judge. Moreover, as indicated on the invoice, the investigator spent only 20.5 hours for investigation and spent 15.5 hours for transcribing. Ex. 12.

D. Trial Counsel's Performance was Constitutionally Deficient.

To establish whether he received ineffective assistance of counsel, Petitioner must show that trial counsel's performance was deficient, that is, it "fell below an objective standard of reasonableness." *Strickland v. Washington*, 466 U.S. 668, 688 (1984). In assessing whether counsels' conduct was reasonable under the *Strickland* standard, this Court may rely on the American Bar Association ("ABA") Standards for Criminal Justice, as well as the ABA Guidelines For the Appointment and Performance of Counsel in Death Penalty Cases ("Guidelines"). These standards and guidelines are "well-defined norms" for the conduct of counsel appointed in capital cases. *Wiggins v. Smith*, 539 U.S. 510, 524 (2003); *Rompilla v. Beard*, 545 U.S. 374, 387 (2005); *Smith v. Dretke*, 417 F.3d 438, 441 (5th Cir. 2005) ("The Supreme Court

instructs courts to look at the ‘norms of practice as reflected in the American Bar Association Standards’ and to consider ‘all circumstances’ of a case”) (quoting *Strickland*, 466 U.S. at 688). Under Guideline 10.7 “counsel at every stage ha[s] an obligation to conduct thorough and independent investigation relating to issues of both guilt and penalty.” See ABA Guidelines 10.7A. Counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. See *Hamblin v. Mitchell*, 354 F.3d 482 (6th Cir. 2003).

A reviewing court may generally defer only to counsel’s strategic decisions made after full investigation. As the Supreme Court explained:

[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.

Strickland, 466 U.S. at 690-91; see also *Williams v. Taylor*, 529 U.S. 362, 396 (2000) (counsel’s failure to discover and present voluminous mitigating evidence at sentencing could not be justified as a tactical decision to focus on the defendant’s voluntary confessions because counsel had not “fulfill[ed] their obligation to conduct a thorough investigation of the defendant’s background”);

Ramonez v. Berghuis, 490 F.3d 482, 488 (6th Cir. 2007) (“A purportedly strategic decision is not objectively reasonable when the attorney has failed to investigate his options and make a reasonable choice between them”) (quoting *Towns v. Smith*, 395 F.3d 251, 258 (6th Cir. 2005)).

“[A] lawyer who fails adequately to investigate, and to introduce into evidence, evidence that demonstrates his client’s factual innocence, or that raises sufficient doubt as to that question to undermine confidence in the verdict, renders deficient performance.” *Riley v. Payne*, 352 F.3d 1313, 1318 (9th Cir. 2003) (quoting *Avila v. Galaza*, 297 F.3d 911, 919 (9th Cir. 2002)).

This Court has spelled out counsel’s duties, especially with regarding for preparing to contest guilt:

“At a minimum, counsel has a duty to interview potential witnesses and to make *independent* investigation of the facts and circumstances of the case.” *Payton v. State*, 708 So. 2d 559 (Miss. 1998) (citing *Ferguson v. State*, 507 So. 2d 94, 96 (1987) (emphasis in original)). The decision not to interview witnesses, particularly your own, cannot be considered an effective strategic choice. When counsel makes choices of which witnesses to use or not to use, those choices must be based on counsel's proper investigation. Counsel's minimum duty is to interview potential witnesses and make an independent investigation of the facts and circumstances of the case. *State v. Tokman*, 564 So. 2d 1339, 1342; *Ferguson*, 507 So. 2d 94.

Johns v. State, 926 So.2d 188, 196 (¶ 38) (Miss. 2006).

As demonstrated below, counsel failed to interview several obviously crucial witnesses, failed to point out inconsistencies in the testimony of the prosecutor's witnesses and did not point out discrepancies between the testimony of a key witness and the crime scene evidence. In addition, trial counsel failed to develop the history of the Sims-Newell marriage or establish that Petitioner could not have entered into a contract with Sims to kill his wife. Finally, counsel did not even point out that Xavier Brown did not match the physical description of the assailant.

1. Xavier Brown did not Meet the Physical Description Given By Eyewitnesses.

In her statement to the police, Susan Bigler recalled that the shooter was about 5'10"-5'11" tall and medium build. Ex. 1. Consistent with the description, Gemma Anderson, a resident of the apartment complex, informed the police that she, too, saw the shooter return to his car and the shooter was about 5'9" tall and weighed about 185 pounds. Ex. 2. Gemma Anderson, like James Bigler, reported that the man she saw running wore a dark sweat shirt and white gloves. *Id.* Arcella Trimble, who also gave a statement to the police, recalled "a man wearing a hooded sweatshirt running to a blue car." She added that "the man was not a big man. He was average size." Ex. 13. Moreover, the Biglers were shown a photograph of Anthony Sims, and the Biglers contrasted the shooter to Sims and described the shooter as having more refined

features. James Bigler also described Sims as having a broader nose and a wider face than the shooter. T. 337, 342. There is no indication that trial counsel interviewed Gemma Anderson or Arcella Trimble.

Official governments records conclusively demonstrate that Xavier Brown does not come close to matching the physical description of the shooter. When he was incarcerated in 1993, he was listed as being only 5'8" tall but weighing 245 pounds. Ex. 14. On a jail booking master file, he was listed as being 5'8" and weighing 260 pounds. Ex. 15. Finally, when he was arrested on June 14, 1999, he was listed as being 5'8" and weighing 260 pounds. Ex. 3. Thus, he was hardly of medium build. Third, his features would not be considered to be "refined."

Defense counsel could have also pointed out that Brown did not wear long sleeve shirts. After he was released from prison on unrelated charges, his grandmother bought him short-sleeved shirts, a brown leather jacket, and blue jeans. Ex. 16 (declaration of Louise Arrington); Xavier only wore short sleeve shirts because his arms were big, and he wanted to show off his tattoos. Ex. 16.

As the medical examiner stated, Anthony Sims was 5' 10", and weighed 190 pounds. T. 461; Ex. 4. If the Biglers ruled out Anthony and suggested that the shooter appeared somehow more "refined," then it is hard to imagine that someone who was shorter (5'8") and heavier (260 pounds) would be consistent

with the person described by the Biglers. Put another way, the Biglers effectively ruled out Brown as the shooter, but counsel did not raise this obvious point.

Defense counsel could have done far more than point out that the Biglers were never asked to provide an in-court identification of Xavier; rather, defense counsel could have demonstrated that the descriptions given by unbiased and neutral eyewitnesses excluded him as being the shooter.

2. Trial counsel stipulated to the admissibility of a tape recording mentioning a murder-for-hire contract when they could have objected and prevented its admission.

Trial counsel *stipulated* to the admissibility of recordings that purport to be answering machine messages. T. 298. They were introduced at trial as Trial Exhibits 11 and 12. Even more improbably, they, and not the prosecutors, first played Trial Exhibit 11 to the jury. One of these recordings contains two, probably male, voices. At some point during that recording, the word “contract” is uttered. It seems fairly certain that one of those voices was Anthony Sims, the ex-husband of Felicia Newell Sims. The identity of the other voice was never established.

In order for an item to be admitted into evidence at a trial there must be “evidence sufficient to support a finding that the item is what the proponent claims it is.” M.R.E. 901 (a). The material item upon which the recording was

imprinted was properly authenticated. However, the underlying recording was not authenticated. No one testified that the second voice on that recording belonged to Xavier Brown. In fact, the State had no witnesses listed who were proposed to testify to that fact.

“An opinion identifying a person’s voice” is a necessary prerequisite to authenticating an audio recording. M.R.E. 901 (b) (5). A recording must be identified sufficiently as containing “all of the sounds and statements incident” to the matter being recorded. *Doby v. State*, 557 So.2d 553, 541 (Miss. 1990). Furthermore, someone must be able to testify that the recording accurately reflects the events that were recorded. *Conway v. State*, 915 So.2d 521, 526 (Miss. Ct. App. 2005). With no opinion testimony describing whose voice it was, and with no one testifying that it contained the sounds and statements incident to the threat, the recording was incapable of being authenticated. *See also White v. State*, 755 So. 2d 1148, 1152 (Miss. App. 1999) (tape erroneously admitted due to lack of authentication, including testimony about the identity of parties on a recording).

The recording was the key element stressed by the trial judge when overruling the motion for a direct verdict and emphasized by the prosecutor in his closing argument. T. 635. Other than the recording, there was no evidence from which the State could argue that Anthony Sims paid or offered anything

of value to Xavier Brown (or anyone else) to have Felicia Newell Sims murdered. There is no evidence that connects Anthony Sims to Xavier Brown, and the recording simply invited the jury to speculate that the mysterious, unidentified voice belonged to Xavier. Had trial counsel not stipulated to the admissibility of that recording, it would not have been admissible. The trial court would have excluded the recording, and there would have been no evidence from which a jury could even consider that the death of Felicia Newell Sims was a contract killing. Thus, even if the jury believed Xavier pulled the trigger on the fatal gunshot, without this recording, he could only have been convicted of murder and the maximum sentence to which he would have been exposed was life in prison. Trial counsel's stipulating to the admissibility of the recording clearly prejudiced Xavier Brown. *See Chester v. Vannoy*, 2018 U.S. Dist. LEXIS 99219 (E.D. La. June 11, 2018) (counsel ineffective for stipulating to, rather than challenging, key evidence)

3. Even if the recordings were admissible, trial counsel failed to show conclusively that Xavier Brown was incapable of entering into the contract-murder scheme described on the voice-mail and Sims had been talking about killing his ex-wife long before Xavier Brown came into the picture.

Even if the recordings were going to be admitted into evidence, defense counsel should have blunted their effect of that evidence because the recordings contain the best evidence that Anthony Sims may have entered into

a contract to have his ex-wife killed. With simple preparation, counsel could have shown conclusively that their client could not have made the recordings and that Sims was conspiring with a third person, who was never identified, to kill his ex-wife.

On Trial Ex. 11, there was another voice, but it was not known whose voice it was. This unknown person made reference to the alleged contract. Defense counsel requested that the trial judge order the tape to be sent to an expert for purposes of determining whether voice identification would be possible. C.P. 279-288; Ex. 17. The trial judge granted the motion. C.P. 289; Ex. 18. The expert retained by the defense wrote that the tape recording was not of sufficient quality to conduct voice identification analysis. Ex. 19. Even though those efforts did not work out, defense counsel had two obvious alternatives.

First, they could have called any number of people who can have testified with certainty that it was not Xavier's voice on the recording. *See, e.g.*, Ex. 20 (affidavit of ex-wife Brenda Bonner); Ex. 21 (affidavit of aunt Marilyn Hasberry); Ex. 22 (affidavit of daughter Yolanda Bonner).

Second, they could have proved that Xavier was in no position to be on a call with Anthony Sims. At the time of the call that mentioned the contract, November 29, 1997, Xavier was incarcerated on an unrelated manslaughter

charge. He was not released until December 27, 1997, or about a month after the alleged contract would have been made. Ex. 23 (Detainer Sheet from Xavier Brown's Department of Corrections Records).

Defense counsel obviously aimed to show the lack of a connection between their client and Anthony Sims to demonstrate that there was no contract between the two. If counsel had used the records from the Department of Corrections, they could have established that Xavier would not have been the person with whom Anthony Sims may have contracted.

Finally, the defense could have also sought alternative expert assistance. Recently, using well-known techniques, Dr. Ana Floria Zuim was able to compare the recordings introduced at trial and compare them to an exemplar obtained from Xavier. Even accounting for Xavier being older now than he was at the time the message was left on Felicia Newell's answering machine, Dr. Zuim was able to conclusively exclude Xavier as being the unknown call. Ex. 24 (affidavit, report, and CV of Dr. Zuim).

4. Corey Johnson Lied About Seeing the Victim Slumped Over in Her Car.

Corey Johnson told the police and testified at trial that he saw the victim slumped over in her car after she was shot. Corey's false testimony is easy to detect. According to Corey himself, and as described by James Bigler, the victim's car was about ten parking spaces away from the shooter's car. The

shooting occurred on February 26, 1998, around 6:00 p.m. Thus, it would have been dark. As the newspaper reported that day, sunset was 5:56 p.m. Ex. 25. As Corey indicated at the outset of his testimony, T. 482, and as confirmed in Trial Ex. 3, (attached here as Ex. 26), there were a number of cars parked between the victim's car and the shooter's car, including at least one SUV. Third, the parking lot slopes downward from where the shooter was parked going to where the victim was parked. Finally, the shooter's car was backed into its parking spot; consequently, Corey would have been looking over his shoulder. *See Apartment Complex Photos, Exs. 1 and 2 to Trial Tr.*

These factors make it physically impossible for Corey to have seen Felicia Newell after she was shot if he was sitting in a car parked ten spaces away. Even though trial counsel had information available to establish that Corey was not being truthful about this point, they failed to do so. Likewise, counsel could have bolstered this point by having someone describe the crime scene or by asking the court to allow the jury view the scene.

5. Counsel Failed to Detail the Extent of Anthony Sims' Murderous Intent.

The prosecutor touched briefly on the tension between Sims and Felicia Newell, in particular the threatening telephone calls. This cursory review hardly touched on Sims' intense desire to harm his ex-wife. Their problems

began at least several months before the shooting. On July 8, 1997, Felicia filed a Complaint for Divorce charging Anthony with “habitual cruel and inhuman treatment.” Ex. 33. She asked the Chancery Court Judge to order Sims to restrain from harassing her. *Id.* The Chancellor signed the Final Order of Divorce on September 17, 1997. Ex. 34.

Felicia’s concerns about her safety were justified. On October 26, 1997, Sims chased her into a store with a gun. Ramona Killings, a clerk at the store, told the police that a woman ran into the store looking for some place to hide. Ex. 35. Ramona remembers Felicia Newell’s hair was messed up and her eyeliner was running. Ex. 36 (Declaration of Ramona Killings). Lisa Smith, another employee, heard Felicia cry that her husband was trying to kill her. Ex. 37. A man soon came into the store with a gun looking for the woman. Ramona describes him as looking “psycho and crazy” and very angry. Ex. 36. Ramona recalls Sims holding a gun and screaming “where the bitch at.” Ramona and Lisa hid in a small room in the store until Sims left. Ex. 35, 36. Shortly thereafter, law enforcement apprehended Sims and charged him with being a felon in possession of a firearm, reckless driving, and stalking. Ex. 38.

A few days later, Felicia sought a Protective Order. Ex. 39. Felicia complained that Anthony “physically assaulted her and that she is in immediate and present danger of abuse” *Id.* The Chancery Court granted

Felicia's request. Ex. 40. Anthony disregarded the court order and began making the threatening calls discussed previously.

Vonetta Page, who knew Anthony and Felicia, describes Anthony as "being in love with her to an extreme." Ex. 41. Anthony struck Vonetta as being obsessive about Felicia. Anthony also told Vonetta that he would kill himself before he would ever go back to jail. Ex. 41.

6. Corey Johnson Knew Anthony Sims.

One of the key points that defense counsel attempted to stress was the lack of any connection between Anthony Sims and their client. T. 643. As noted above, defense counsel failed to point out that any contract into which Anthony Sims entered was arranged before Tony was released from prison on other charges, and that Anthony Sims had made his arrangement with someone else. Corey Johnson testified that he knew Anthony but was not friends with him. T. 540. Trial counsel did not investigate whether there had been a connection between Corey and Anthony Sims. As Darwin Brown indicates, Corey and Anthony were friends. Ex. 27. According to Darwin, Corey came to his house with Anthony before the shooting. Corey was interested in purchasing a dog from Darwin. In addition, Corey allowed Anthony's brother to stay with him. Ex. 27. Darwin's declaration thus

highlights yet another reason to question the veracity of Corey Johnson's testimony.

Michael Page, who lived next door to Darwin Brown, corroborates the relationship between Anthony and Corey. Michael, who was a friend of Corey's brother, remembers an occasion when Corey and Anthony came together for a visit. Ex. 42.

Anthony's brother, Bobby, confirms the relationship between Corey and members of his family. He states that his family has known Corey for a long time. Ex. 43.

7. Counsel did not Investigate the Car Used by the Shooter(s).

Photographs of Anthony Sims' car were introduced at trial as Trial Ex. 19B, 19C, 19E, and 19F. Those photographs were attached to Trial Exhibits 19A and 19D, which were photographs of a light blue, older American sedan. These trial photographs are attached here as Ex. 44. James Bigler recalls being shown photographs of Anthony Sims' dark blue car shortly after the shooting. Ex. 45. Ex. 2. He was not, however, shown the car photographed in Trial Exhibits 19A and 19D. *Id.* More recently, Bigler was asked to review the photographs of the cars. He repeated that he did not see the dark blue car at the time of the shooting. However, he recognized the light blue car. Bigler is a car enthusiast and recalls details about cars. Ex. 45.

Bobby Sims, Anthony's brother, also recognized the light blue car as belonging to his cousin James. Ex. 43.

Counsel was on notice as to the owner of the light blue car. On the copy provided to them in discovery, James Harris' name was written on the bottom. Ex. 46. When the exhibit was introduced at trial, James' name was blacked out, but counsel were at least on notice about the ownership of the car and both could and should have focused their investigation on that point. Determining ownership of the car at the crime scene would have been critical. The State went to great lengths to devise a theory, however far-fetched, to have Anthony away from the crime scene. According to the State, Anthony kept his distance from Xavier Brown because Anthony could not afford to pay Xavier for the shooting and was afraid of him. T. 639. To support this theory, the State relied on James Bigler's statement that he did not see Anthony Sims' car. Furthermore, to support the theory that Xavier Brown was hired to kill Felicia, the State had Corey testify that he did not recognize the car that Xavier was driving. T. 481.

The State's theory, however, is substantially undermined if a car of a relative of Anthony was observed at the crime scene. Corey's statement that he did not recognize the car is dubious if it belonged to a relative of his friend, Anthony. Furthermore, Corey or anyone else that Anthony knew could have

used the car, or Anthony himself could have been in the car at the time of the shooting. It also makes it unlikely that Anthony hired someone to kill his wife, for it is unlikely that someone hired to commit the killing would have used a car belonging to a relative of the person who hired him.

8. Failure to Uncover Crosby's Lies and Criminal Conduct.

Donald Crosby testified that Darwin Brown was present when Tony allegedly confessed to him. According to Crosby, Tony confessed to the murder and then both he and Darwin discussed how Tony talked too much. At trial, the prosecution elicited testimony and insinuated that it did not call Darwin only because he had serious medical problems. T. 450; 656. The defense did not call him, either. In fact, there is no indication that the defense ever spoke to Darwin. Ex. 12 and 27. The natural inference that the jury drew from this was that Darwin was indeed a witness to his own brother's confession; otherwise, the defense would have called him as a witness. Crosby also claimed that Ricky McLaurin was present at the time of the confession. The State did not call McLaurin to corroborate Crosby's testimony. According to the State, McLaurin was in prison in New Jersey. T. 656. As with Darwin, there is no indication that defense counsel interviewed McLaurin. Ex. 12 and 32.

Darwin and Ricky McLaurin would have refuted Donald's testimony that Tony ever "confessed" to Felicia's murder. According to Darwin, the so-called

confession did not take place. Darwin states that Tony never said anything about being involved in such a crime. Ex. 27. Darwin would have also contradicted Donald's testimony that he and Darwin discussed how Tony talked too much. According to Darwin, that conversation did not take place, either. Ex. 27.

McLaurin likewise declares that he "never heard any such talk [about the murder] and [he] never heard Donald Crosby tell Tony that he talked too much although [he, McLaurin] was in the shop every day." Ex. 32. According to McLaurin, he "was not around any conversation between Crosby and Tony Brown where the killing came up." Ex. 32

At trial, Donald also mentioned that he was in business with Darwin, and the State argued that Tony would have confessed to Donald, Darwin, and Ricky. However, according to Darwin, Donald was not being truthful. Darwin declares around the time of the murder, he operated the Magic Touch Detail Shop and rented the space from a man who owned an alternator shop next to the detail shop. Ex. 27. Darwin was in business with Ricky McLaurin, who ran the business for him. Donald stayed in the shop and worked for Darwin, but Donald was not Darwin's business partner. Ex. 27. Darwin even states that he stopped associating with Donald because he stole from him and even burglarized the shop. Donald was a drug user. Ex. 27. Moreover, Darwin

explains that Donald and his brother did not like each other. Donald understood that Darwin intended for Tony to become more involved in the business, which meant that Tony would be around more often. Exhibit 27. Furthermore, as Xavier states in the affidavit that he provided in post-conviction proceedings, Donald went to the police with the story of the alleged confession after Petitioner provided information to the police that Donald may have been involved in an unrelated murder. This state post-conviction affidavit is attached hereto as Ex. 28.

McLaurin corroborates Darwin's testimony. McLaurin states that Crosby was not in business with them. McLaurin and Darwin allowed Crosby to live in the shop because he was homeless. They let him go because they suspected Crosby of burglarizing the shop. As McLaurin recalls, they became convinced when Crosby suddenly had enough money to buy a Jeep shortly after the burglary. Ex. 32. McLaurin also acknowledged that though he was friends with Darwin, he was not personally close to Tony. Ex. 32.

Bobby Sims also knew Crosby and states that Crosby is a known "crack-head" and "can pretty much guarantee that Don was using drugs at the time of Felicia's murder." Ex. 43.

9. Failure to Develop Additional Evidence to Impeach Crosby and Johnson.

Additional investigation would have also revealed additional problems with Corey Johnson's credibility. Though Corey testified that he had not been convicted, he was nonetheless involved in criminal activity. As Darwin states, Corey was from a violent family and also used and sold drugs. Ex. 27 and 29 (affidavit of Brenda Bonner).

Corey also testified that he went to the police station because Darwin told him to do so. T. 485. According to Corey, Darwin told him "that y'all were here doing an investigation about a murder in Hattiesburg, and he told me to come down here and tell the investigators who did it." T. 559. That testimony was also false. According to Darwin, after he went to the police station to be questioned about the murder, he was with his sister Lorelei and Corey and mentioned that the police were interested in a murder. Ex. 27. As Darwin states, he told Corey that the police asked questions about Tony but he told the police that he did not know anything about the murder. Darwin showed Corey the card of the detective who questioned him, and gave it to Corey when Corey asked for it. Ex. 27.

Det. Mark Berry testified that Darwin appeared to be frightened. T. 577, 579. Darwin, however, disputes that he feared his brother. According to

Darwin, he heard from his sister that the police wanted to talk to him. He went to the police station with Ricky McLaurin but was not in the room with Ricky during the questioning. The police asked him about the murder, but he told them that he did not know anything about it. Ex. 27. He told the police that he had to leave to go open the shop and then go to a doctor's appointment. Darwin also states that he was not afraid of his brother. Although he and Tony may have had disagreements, he did not fear Tony. As Darwin notes, he and Tony had their last significant fight when he was sixteen. He describes the fight as being over something "stupid": Tony was wearing his cap and would not give it back. The next day, however, Tony hugged him and they reconciled. Ex. 27. Darwin named his son, Antonio, after his brother, and to this day, Darwin remains close to him. He has even sent Tony a Father's Day card because Tony was in some ways like a father to him. Ex. 27; Ex. 30.

McLaurin also denies being frightened of Tony. According to McLaurin, if he was afraid of anyone, it was the police after he was threatened with having to serve "100 years for conspiracy." Ex. 32.

Darwin and other members of Tony's family could have also provided an explanation for why Corey would have testified against Tony. Darwin recalls that his brother and Corey had an altercation. Darwin does not know exactly what the dispute was about, but he also knew that Corey was cheating on his

sister. Ex. 27. 14. Tony's grandmother believes that Corey had hit Lorelei. Ex. 16 and 31. Tony's mother, Ora Smith, stated that it was not unusual for Corey and Lorelei to fight and that she had to call the police once when Corey hit Lorelei when she was pregnant. Ex. 47 (affidavit of Ora Lee Smith).

Darwin does not recall anyone connected with his brother's defense team talking to him before trial, but he would have been willing to testify if they had asked him to do so. Ex. 27. Because Darwin was not called by the defense, the prosecutor had free rein to ask the jury to infer from Darwin's absence the truthfulness of Donald's and Corey's testimony. Thus, after recounting Donald Crosby's testimony, the prosecutor pointed out that Darwin was present when the confession was allegedly made. T. 653. The prosecutor continued: "One thing most criminals have in common is they brag . . . And somebody he told about it was his brother and two people he thought were his friends of his." T. 654. The prosecutor made it seem like Darwin would have been available as a witness for the State were it not for his medical condition. T. 656 ("You've heard them say Darwin Brown has serious health problems. On oxygen."). However, Darwin would have been available to testify for the defense. Habeas Ex. 27.

Likewise, defense counsel failed to contact McLaurin to interview him about the case. McLaurin recalls someone asking him about Tony, but

“[w]hoever it was, they did not ask me if what Donald Crosby had told the police and testified to at trial was true. I would have told them it wasn’t.” Ex. 32.

Besides failing to conduct a thorough investigation, counsel also failed to follow through adequately with their strategy of cross-examining the State’s witnesses regarding prior inconsistent statements. At trial, Corey testified that he could not see where Tony was going after Tony left the car in the parking lot. In his statement to the police, however, Corey stated that he saw Tony head to the driver’s side of a Chrysler. Ex. 9 (Trial Ex. 21). For the same reason Corey could not have seen the victim slumped over in her car, he could not have seen the make of the car from his vantage point if he remained in the passenger seat and supposedly had no idea what Tony’s plan was when they arrived at the apartment complex.

Defense counsel pointed to certain discrepancies between the testimony of the Biglers and Corey Johnson. Corey testified that when they arrived in the parking lot, he sat in the passenger seat until Tony returned from shooting the victim, pointed a gun at him, and ordered him to drive. The Biglers did not notice anything like that happen. Instead, from James Bigler’s testimony, the driver with white gloves was already sitting behind the wheel when the shooter returned. Bigler reaffirmed his trial testimony that the second person was

already sitting behind the steering wheel and that he did not observe any interaction between the driver and the person who walked to the passenger side of the car. Ex. 45.

Defense counsel could have also called Arcella Trimble to provide corroboration for James Bigler and to discredit Corey. According to her statement to the police, Arcella Trimble stated that she saw someone jump into the car, which then took off with another person driving. She thought that the car had been backed into the parking space in order to leave quickly. Ex. 2 and 13.

E. Cumulative Prejudicial Effect of Trial Counsel's Failures

The specific instances of counsel's deficient performance were each prejudicial, but the taken together, they leave no doubt about the unreliability of the trial. Without the testimony of Donald Crosby and Corey Johnson, the State had no case against Xavier Brown. No prints, fibers, DNA, or weapon linked Xavier to the crime. There were also no eyewitnesses who could identify Xavier. Only Donald Crosby and Corey Johnson said anything about Xavier's alleged involvement. Their testimony was easily impeachable, however. Both mentioned Darwin Brown in their statements to the police, and Crosby also claimed that Ricky McLaurin heard a supposed "confession." *See, e.g., McClellan v. Rapelje*, 703 F.3d 344 (6th Cir. 2013) (counsel grossly deficient for

failing to interview witnesses); *Anderson v. Johnson*, 338 F.3d 382 (5th Cir. 2003) (same).

Counsel had an elementary duty to interview Darwin, Ricky McLaurin, and other witnesses to determine whether there was any merit to the statements that Corey and Donald had given or to find other grounds for challenging their credibility. Likewise, counsel could have also strengthened their case if they had used the information available to them. With reasonably effective representation, defense counsel could have shown:

- Tony did not match the description of the shooter;
- Tony did not own the type of clothing worn by the shooter;
- Tony could not have been on the call mentioning a “contract”;
- Donald Crosby was not close to either Darwin or Tony Brown;
- Crosby was a thief and a drug user in addition to being an embezzler;
- Corey had a heated argument with Tony;
- Corey had a criminal background, including using and selling drugs;
- Corey knew Anthony Sims;
- A car belonging to Sims’ cousin was at the crime scene, and the Biglers were never shown a photograph of that car;

- Anthony Sims had been threatening Felicia for a number of months before the shooting; he also stated that he would kill himself before going back to jail;
- Tony did not “confess” to Donald Crosby;
- Darwin never told Corey to go to the police about the murder;
- Darwin and Ricky McLaurin were not afraid of Xavier Brown;
- Corey lied when he said he saw the victim slumped over in her car;
- Corey’s testimony deviated in material respects from his statements to the police;
- Corey’s testimony was at odds with the statements of disinterested eyewitnesses.

On top of this, the jury already knew that Corey inexplicably gave other contrasting accounts of the shooting. In one version, he said he saw Tony put the gun into a paper bag; in another version, he said he did not see the gun until Tony returned. In one version, he stated that Tony drove from the parking lot, but he changed during trial. He also told the police that he went to Darwin on the day of the shooting, but he disavowed that during trial as well. Corey claimed to be afraid of Tony, but his alleged fear does not explain why he would have told a radically different versions of the event sixteen months after the fact when he was with the police. His decision to go to the police was obviously not spontaneous, and there is no other reasonable

explanation for the differing accounts other than he forgot the lie he originally told and then had to alter his story to fit the eyewitness testimony of the Biglers and statements of other eyewitnesses.

In addition, Corey's account already differed from the version given by the Biglers. The eyewitnesses to the event did not see the shooter brandish a gun; instead, they only saw at most something in his hand. No one reported seeing the second person slide over to drive, as Corey insisted occurred. All who noticed stated that the shooter and driver wore white gloves, not black gloves like Corey said. Without mounting any significant investigation to the testimony of Crosby and Johnson, counsel had little basis for challenging their credibility. *See Ramonez v. Berghuis*, 490 F.3d 482, 490-91 (6th Cir. 2007) (counsel's failure to interview witnesses was prejudicial because the jury heard no evidence contradicting state's witness).

Finally, in considering prejudice, the Court must also account for the totality of the record, including the post-trial discovery that Johnson cavalierly perjured himself repeatedly, thereby providing additional proof that he was anything but a credible witness.

There is a reasonable likelihood that each factor taken alone would have resulted in a different outcome. In fact, the failure to interview or call Darwin Brown or Ricky McLaurin was particularly damaging given the State's

insinuation that they would support the testimony of Crosby and Corey Johnson. Prejudice is likely to result “when counsel fails to call a witness who is central to establishing the defense’s theory-of-the-case, and the jury is thereby allowed to draw a negative inference from that witness’s absence.” *Harrison v. Quarterman*, 496 F.3d 419, 427 (5th Cir. 2007) When the cumulative effect of counsel’s deficiencies are considered, there is at least a reasonable probability that the result would have been different. *Goodman v. Bertrand*, 467 F.3d 1022, 1030 (7th Cir. 2006) (“the cumulative effect of trial counsel’s errors sufficiently undermines our confidence in the outcome of the proceeding”). For these reasons, Petitioner is entitled to post-conviction relief.

GROUND II: Brown Was Denied His Right to the Effective Assistance of Counsel Guaranteed by the Sixth and Fourteenth Amendments Because He Received the Ineffective Assistance of Trial Counsel at the Penalty Phase of His Trial.

A. Summary of Applicable Legal Principles.

When addressing a challenge to trial counsel’s performance, a reviewing court must consider 1) whether counsel’s performance was deficient; and 2) whether Petitioner suffered prejudice as a result. *See Strickland v. Washington*, 466 U.S. 668 (1984); *Wiggins v. Smith*, 539 U.S. 510 (2003). To show deficient performance, Petitioner must demonstrate that “counsel’s representation fell below an objective standard of reasonableness.” *Davis v.*

State, 87 So.3d 465, 469 (¶ 20) (Miss. 2012); *see also Strickland*, 466 U.S. at 687.

In a capital case, counsel has an “obligation to conduct a thorough investigation of the defendant’s background.” *Porter v. McCollum*, 558 U.S. 30, 39 (2009) (citing *Williams v. Taylor*, 529 U.S. 362, 396 (2000)); *see also Wiggins*, 539 U.S. at 522 (quoting ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases, Section 11.4.1 (1989)); *Sonnier v. Quarterman*, 476 F.3d 349, 358 (5th Cir. 2007) (trial attorneys’ performance deficient where they “did not talk to Sonnier’s family and acquaintances at the length or in the depth required for these purposes”). While “counsel is not required to exhaust every conceivable avenue of investigation, he or she must at least conduct sufficient investigation to make an informed evaluation about potential defenses.” *Ross v. State*, 954 So. 2d 968, 1005 (Miss. 20007); *see also State v. Tokman*, 564 F.2d 1339, 1343 (Miss. 1990). “[T]here is no strategy involved in neglecting to investigate and failing to ask questions of potential witnesses.” *Davis*, 87 So. 3d 465, 471 (¶ 28) (Miss. 2012).

In a capital sentencing context, a “reliable adversarial testing process generally requires that counsel present to the sentencing jury evidence of the character and record of the individual offender and the circumstances of the particular offense.” *Eddings v. Oklahoma*, 455 U.S. 104, 111-112 (1982);

Fulgham v. State, 46 So. 3d 315, 336 (Miss. 2010). There are few limits on the scope on mitigating evidence, which encompasses any information about the defendant which might induce a juror to vote for a life sentence. *See, e.g., Tennard v. Dretke*, 542 U.S. 274, 284-85 (2004). In particular, counsel should be alert to red flags, such as poverty, dysfunctional families, or substance abuse, found in records or arising from an investigation. *See Porter*, 558 U.S. at 40 (counsel ineffective for ignoring “pertinent avenues for investigation of which he should have been aware”); *see also Harries v. Bell*, 417 F.3d 631 (6th Cir. 2005). As this has found, counsel is deficient if he fails to investigate evidence of his client’s abusive childhood. *Davis*, 87 So. 3d at 471 (¶ 29).

In death penalty cases, the duty of counsel to present mitigating evidence is well established. See ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (ABA Guidelines) 10.7A (Feb. 2003). Mitigating evidence concerning a particular defendant’s character or background plays a constitutionally important role in producing an individualized sentencing determination that the death penalty is appropriate in a given case. *Moore v. Johnson*, 194 F.3d 586, (5th Cir. 1998) (citing *Woodson v. North Carolina*, 428 U.S. 280 (1976)). Evidence about the accused’s background is particularly relevant in a death penalty case “because of the belief, long held by this society, that defendants who commit criminal acts that

are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse.” *Id.* (citing *Penry v. Lynaugh*, 492 U.S. 302 (1989)). For this reason, defense counsel must conduct a broad investigation into the defendant’s history: indeed, an investigation that begins at conception. *See* ABA Guidelines 10.7 cmt.

Investigations into mitigating evidence should comprise efforts to discover all reasonably available mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor. *See Wiggins*, at 524 (quoting ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases, Section 11.4.1 (1989)).

Counsel is also required to consider presenting evidence of, *inter alia*, medical history, educational history, employment and training history, family and social history, prior adult and juvenile correctional experience and religious and cultural influences. (ABA Standards for criminal Justice 4-4.1 cmt. at 4-55). Under Guideline 10-7, “counsel at every stage ha[s] an obligation to conduct a thorough and independent investigation relating to issues of both guilt and penalty.” *See* ABA Guidelines 10.7A. This is in conjunction with counsel’s duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. *See*

Smith v. Quarterman, 471 F.2d 565, 570 (5th Cir. 2006) (citing with approval the ABA Guidelines regarding the investigation of mitigating evidence); *Hamblin v. Mitchell*, 354 F.3d 482 (6th Cir. 2003). This duty requires “extensive and generally unparalleled investigation into personal and family history” given that the sentencer in a capital case must consider “anything in the life of a defendant which might militate against the appropriateness of the death penalty.” ABA Guidelines 10.7 cmt. *Sonnier v. Quarterman*, 476 F.3d 349, 358 (5th Cir. 2007) (trial attorney’s performance deficient where they “did not talk to Sonnier’s family and acquaintances at the length or in the depth required for these purposes”); *Roberts v. Dretke*, 356 F.3d 632 (5th Cir. 2004).

Defense counsel finding any suggestion of mental health issues must select an appropriate expert and “present those experts with information relevant to the conclusion of the experts.” *Caro v. Calderon*, 165 F.3d 1223, 1226 (9th Cir. 1996); *see also Williams v. Stirling*, 914 F.3d 302, 313 (4th Cir. 2019); *Wallace v. Stewart*, 184 F.3d 1112, 1116 (9th Cir. 1999) (counsel have an affirmative duty to provide mental health experts with information needed to develop an accurate profile of the defendant’s mental health). Failure to select experts appropriate for the issues involved or failing to furnish the experts with all relevant information may be deficient performance. *Doss v. State*, 19 So. 3d 690, 707 (¶ 29-30) (Miss. 2009) (counsel deficient for not

uncovering evidence of family issues, psychological and organic disorders); *Wilson v. Sirmons*, 536 F.3d 1064, 1089 (10th Cir. 2008) (An attorney has a responsibility to investigate and bring to the attention of mental health experts who are examining his client, facts the experts do not request and must at a minimum exercise supervisory authority over the expert.).

A petitioner challenging trial counsel's performance must also show prejudice, i.e., that there is a reasonable probability that but for counsel's unprofessional errors, the result of the proceeding would have been different. *See Strickland*, 466 U.S. at 694. A reasonable probability is a probability that is sufficient to undermine confidence in the outcome. *Id.* at 694; *see also Doss v. State*, 19 So.3d 690, 708 (Miss. 2009).

Because, under Mississippi statutory law, the jury must be unanimous in order to return a death sentence, the prejudice question becomes: "Is this additional mitigating evidence so compelling that there is a reasonable probability at least one juror could reasonably have determined that, because of [Petitioner's] reduced moral culpability, death was not an appropriate sentence?" *Neal v. Puckett*, 286 F.3d 230, 242 (5th Cir. 2002) (en banc), citing Miss. Code Ann. § 99-19-103.

Considering the case law cited above and the ABA Guidelines pertaining what is required in the "unparalleled mitigation investigation" demanded in a

capital case, Brown's attorneys failed in their duty to provide him with constitutionally effective counsel.

B. The penalty phase as it was presented

1. The fortuitous discovery of the only witness who was called

Because they performed only the most cursory of investigations and failed to consult any mental health experts despite readily available signals of problems, trial counsel were prepared only to present one witness, whom they stumbled upon. They only learned of Deputy Hamler at the beginning of Brown's trial when he was serving as a bailiff. Counsel admitted in his closing argument that he did not know that Deputy Hamler might be a witness until after the state's voir dire. T. 742 (referencing the district attorneys remarks).

No matter when defense counsel decided to call Deputy Hamler as a mitigation witness, the trial record shows that trial counsel subpoenaed no witnesses in the culpability or the penalty phase of Brown's trial, thus indicating that counsel failed to make even the most rudimentary efforts to guarantee that favorable witnesses would appear. C.P. 1-557.

Deputy Hamler's direct testimony takes up only two-and-one-quarter pages of the trial transcript. T. 689-691. It established that he was a long-time deputy for the Lamar County Sheriff's Office and that he worked in the county jail when Brown was awaiting trial there. Hamler described an

incident where he was struggling with a large, strong inmate who was fighting several officers and who had sprayed them with their own pepper spray. T. 690-691. Deputy Hamler related that he was abandoned by his fellow officers, fighting this man by himself, until Brown was let out of his cell and helped “me subdue the man.” T. 691.

On cross-examination, the prosecutor was able to convey to the jury that Brown had been transferred to other facilities, and incarcerated in the Stone County and Jones County jails. In a parting shot, the prosecutor also elicited from Deputy Hamler that Brown had also been in the Forrest County jail. T. 692. Thus, the effect of the mitigation testimony no doubt diminished in the jurors’s minds by questions on how many jails Brown had served time in and for what offenses, and was he in some way a troublemaker.

2. Only three and a half pages of closing argument was devoted to mitigation, and counsel downplayed their only witness.

Deputy Hamler’s testimony that Brown had rescued him when he was set upon by inmates in the county jail was helpful, but was unlikely to overcome the state’s case for death on its own. Further diminishing the impact of the testimony of this solitary mitigation witness, trial counsel downplayed the incident as mitigation, mentioning it in only three sentences in his three-and-one-half page closing. T. 740-744.

3. The two witnesses who were there, but not properly prepared or called

Great effort was made by the trial judge and defense counsel to make it clear that the choice to not call Louise Arrington and Brenda Bonner as witnesses was made by Brown, absolving trial counsel of any responsibility for the decision. Even so, this does not explain why that was his choice or why these were the only two witnesses at the courthouse, to what degree these witnesses were prepared, or why other witnesses could not be called to testify. T. 673-675, 687-688. Trial counsel cannot retroactively abdicate their duty to carry out this investigation. By no stretch of the imagination can this be considered as a “waiver” since Brown had no effective choice in the matter.

The invoice provided by the investigator hired in this case, Deron Nored, shows that he had a single meeting on June 4, 2001, more than a year before trial, with Mrs. Arrington and his total time spent focused on what she could bring to the case was three hours, when at least one hour of travel time is subtracted from the total three hours. The same invoice shows no contact with Brenda Bonner. Ex. 12 (Hunter Investigations invoice itemizing Deron Nored’s work). Trial counsel did not gather enough of the information available on Brown’s life history to make constitutionally defensible choices on what mitigation evidence to present. This is understandable because only \$105.00

was expended in the search.⁹ Critically, trial counsel did not even exhaust the funding granted by the trial court. Nored's bill for the totality of his work -- fact investigation, mitigation work, mileage and transcription services — was only \$938.00. This left an unexhausted balance of more than \$1500.00 that could have been put to work seeking out the witnesses and information discovered in preparation for these proceedings. Nothing in the record indicates that trial counsel gathered enough information on Brown's life history to make a constitutionally supportable decision to call or not call witnesses.

C. The penalty phase defense as it should have been presented

There were a number of family members or some individuals outside the family that that trial counsel either did not discover, or discovered and did not utilize, thus abdicating their duty to present the jury with a fully developed history of Brown's birth, childhood and adult life, and the development of his character. Similar, counsel failed to obtain or make use of a number of records that could have provided evidence in mitigation. Finally, an elementary investigation would have uncovered a number of red flags indicating the need for expert assistance to explain the effects of a lifelong exposure to trauma,

⁹ Nored's hourly rate of \$35.00 multiplied by the three hours spent on mitigation investigation.

violence, and drug dependence. Here, Brown greatly benefited from the assistance of psychologist Seyi Amosu, Ph.D., and social worker, Alena Aguilar, LMSW, who primarily assessed Brown's childhood, family, and exposure to trauma, and Dr. Susan Skolly, a clinical toxicologist who evaluated him with regard to his drug dependence, which began in his early teen years.

Dr. Amosu and Ms. Aguilar interviewed Xavier Brown, some of his family members, and reviewed available records to determine his exposure to traumatic experiences and assess the consequences of those experiences. Ex. 48. They observed that he "comes from a large family characterized by dysfunction across generations." Ex. 48 at 3. Xavier's mother, Ora Smith, met his father, Tyrone Brown, when she was young. She gave birth to Xavier when she was only 18 years old. Ex. 48 at 3. According to Xavier's grandmother, Ora had convulsions and seizures while pregnant and had to be rushed to the hospital. She gave birth prematurely. Ex. 16; *see also* Ex. 22 (declaration of Beola Drummer).

Tyrone was never employed during their brief marriage and was considered a "moocher." *Id.* Maternal aunts Beola Drummer and Marilyn Hasberry recall Tyrone having a bad temper, who was referred to as "the devil" by their father. *Id.* The family also learned that Tyrone had violent tendencies and engaged in criminal behavior.

Tyron abandoned his family around the time of Xavier's birth. *Id.* When Xavier was three years old, Ora sought a divorce on the ground of abandonment, which was granted by the Chancery Court of Jones County. Ex. 49 and 50. Because Tyrone had simply disappeared, Ora had to put notices in the newspaper. Ex. 21.

Although Xavier had a large extended family, he was not part of a cohesive family unit. Ex. 48 at 4. According to Marilyn, Ora left Xavier when he was only six months old and did not return until he was a year old. Ex. 21. After Tyrone left, Ora had another son Darwin. Marilyn recalls that Ora did not care for the boys, and their hair was nasty and their clothes dirty. Ex. 21.

Because of the chaotic situation, Ora's mother Louise began caring for the boys. At the same time, Louise had a large family of her own; as a result, Xavier was cared for by three of his maternal aunts, including Marilyn, who was the oldest but only in 5th grade. Ex. 48 at 3.

Ora eventually married Leroy Smith, and four additional children: Allison, Lorelei, Erron, and Deidre. Ex. 48 at 4.

Ora was known for a "temperamental and argumentative personality," and was called "Barb," short for "barbwire" *Id.* Xavier recalls his mother being hospitalized for a nervous breakdown when he was young. She was kicking and screaming while her brothers attempted to restrain her and take her to a

hospital. Ex. 48 at 4.

She frequently screamed at Xavier and his siblings and physically disciplined him in extreme ways. She hit Darwin with a broom, breaking his jaw. Ex. 48 at 4. *See also* Ex. 27. Darwin also recalls heated arguments between his mother and stepfather, especially when they drank. They even hit each other. Ex. 27.¹⁰

Substance abuse, primarily alcohol, was significant factor in the family, affecting Xavier's great-grandfather, mother, stepfather, and several maternal aunts and uncles. Ex. 48 at 5. Beola describes the family as "full of functional alcoholics." Ex. 48 at 5. Heavy drinking was "highly normalized," with Xavier's mother, stepfather, and others drinking about two fifths of whiskey most evenings. If whiskey was unavailable, someone would walk great distances even to purchase mouthwash to drink. Ex. 48 at 5. Violence often accompanied the alcohol abuse. It was so prevalent that Xavier sought refuge at the home of Louise Arrington ("Mama Lou"), his maternal grandmother.

One particular traumatic event stands out. When Xavier was 13 years-old, Leroy came home intoxicated and beat Ora so badly she dropped Erron,

¹⁰ Other violent incidents involving Ora also stand out. Xavier remembered an incident in which his mother attacked a bride and groom at a wedding over a parking dispute. Ex. 48 at 4.

who has cerebral palsy. To protect his mother and siblings, Xavier grabbed a knife from the kitchen. He was crushed, however, when his mother defended her husband and kicked Xavier out of the house. Ex. 48 at 5. This was an incident that led him to move in with his grandmother. *Id.* Although he was able to move to his grandmother's house, Xavier felt that this incident with his mother "destroyed me." Ex. 48 at 8. He described his mother's actions "as the most significant betrayal of his life." Ex. 48 at 8.¹¹

Given the trauma, prevalence of alcohol, and acute sense of betrayal, Xavier's life began spiraling downward. He had begun sneaking beers when he was still in middle school. Ex. 48 at 6. Nevertheless, after witnessing the debilitating effects of alcohol, he never became a heavy drinker. Instead, in early adolescence, he began using marijuana regularly at the home of the grandmother of a friend, who allowed the preteens to smoke and drink in her house. Ex. 48 at 6. At this time, Xavier first got high on a codeine-based cough syrup. After downing about half of a bottle, he felt "like he was superman." Ex. 48 at 6. As he began middle school, Xavier began recreationally abusing cough syrup, primarily Robitussin DM, and soon developed a substance

¹¹ A similar event happened to Xavier's daughter, Yolanda. During her senior year of high school, Leroy tried to molest her. When she told Ora about what happened, Ora threw her out of the house. Ex. 48 at 5.

dependence problem. Ex. 48 at 6.

His grandmother did not realize Xavier was abusing cough syrup even after he moved in with her. She eventually found empty bottles in his room. Even after he told her that he used the syrup to get high, she did not intervene to try to stop him. Ex. 48 at 6. Xavier's aunt Marilyn also learned of his dependence on cough syrup. She recalled him "drinking cough syrup by the bucket to get a cheap high." Ex. 48 at 6. She reported that his use was so extreme that he frequently lost control of his bowels and soil himself. Ex. 48 at 6. One of his teachers eventually contacted his mother about his body odor. Ex. 48 at 6.

Other people close to Xavier corroborate his increasing dependence on cough syrup. His aunt Beola compared his consumption of cough syrup to the way alcoholics drink alcohol. Ex. 53 at 4 (affidavit/report of Dr. Susan Skolly). An ex-girlfriend, Patricia Hatten recalled Xavier drinking up to three 12-16 ounce bottles either every day or every other day. Ex. 53 at 4. Hatten observed that Robitussin¹² changed his personality, making him paranoid and agitated."

¹² Dr. Skolly explains that Dextromethorphan (DXM), a primary ingredient in over-the-counter medications such as Robitussin DM, is a safe medication for cough suppression. Ex. 53 at 8. However, large doses block N-methyl-D-aspartate (NMDA) receptors in the brain, producing anesthetic and dissociative effects similar to those of phencyclidine (PCP) and ketamine. Ex. 53 at 8. Abuse of the drug may produce effects ranging from mild euphoria to intense hallucinations and paranoia, leading to impulsive violent behaviors, including confrontation, assault, or suicide. Ex. 53 at 9. It can also result in psychosis or seizures and

Ex. 53 at 4.

Xavier believes that drinking cough syrup helped him focus because his mind was “always racing.” It also made him feel “powerful,” “confident,” “boosted,” and “invincible.” Ex. 53 at 5. At times, however, it made him feel paranoid and agitated, and it also triggered hallucinations. Ex. 53 at 5.

Cut adrift from his family, primarily his mother, Xavier found a sense of belonging with a gang, which he characterized as “a new family” or as “having a family that I never really had.” Ex. 48 at 8, 9. As he later realized, however, this is when other problems in his life began. For instance, his school performance deteriorated. Through middle school, he was an excellent student. He was regarded as highly intelligent, with several family members referring to him as a “genius.” Ex. 48 at 8. Around 7th grade, however, his grades began to slip. Ex. 48 at 8. By 9th grade, he received Ds and Fs and began facing disciplinary action and described himself as highly reactive. Ex. 48 at 8; *see also* Ex. 52 (school records).¹³

After a football injury, he quit school in 10th grade. Ex. 48 at 9. His aunt Marilyn also noted that he was easily agitated and impulsive. As he

even mimic symptoms of mental illness, such as bipolar disorder or schizophrenia. Ex. 53 at 9. Chronic use may also result in addiction. Ex. 53 at 9.

¹³ The precipitous decline in school performance should have been a red flag for any attorney in a capital case.

described it, “I had no one to direct me and show me what I needed to be doing with all that energy.” Ex. 48 at 8. Unfortunately, his involvement in the gang led to frequent exposure to violence, including fights and shootouts. Ex. 48 at 9. As Dr. Amosu notes, “this environment compounded the trauma he experiences within his family and contributed to lifelong trauma symptoms of anxiety, hypervigilance, and nightmares.” Ex. 48 at 9.

If anything, Xavier’s mother exacerbated his problems. He was known to be protective of his family, but his mother exploited this by sending him to school to beat up someone who had been bullying one of his siblings. Ex. 48 at 9.

Xavier found an opportunity for advancement in the army. It provided him with necessary structure, and he advanced as a surveyor. Ex. 48 at 6-7. He was promoted from PV1 to SP4 due to his demonstrated “patriotism, valor, fidelity, and professional excellence” and due to his “demonstrated leadership potential for professional competence and dedicated service to the U.S. Army.” Ex. 48 at 7; Ex. 54 (excerpts from military records). Tragically, he was involved in the shooting death of Nathaniel Todd Samuels. As noted below, Brown had felt threatened but did not intend to shoot Samule. After the shooting, Brown immediately turned himself in and ultimately pled guilty to manslaughter and was thus discharged from the army. Ex. 48 at 7; Ex. 54 (excerpts from military

records). Xavier reported that he was “high as hell” on Robitussin. Ex. 48 at 7.

The consequences of Xavier’s early life, in particular his addiction and dependence on cough syrup and exposure to violence and a lack of structure, continued to plague him and undermine efforts to adapt to life outside of prison. He married Brenda Bonner, which became the “most significant relationship” he had in his life. Ex. 48 at 7. Nevertheless, he repeated the cycle of domestic violence he witnessed. Ex. 48 at 7. When he was released from prison for manslaughter, he again used Robitussin DM heavily. By age 33, he was drinking 16 ounces at a time. Ex. 48 at 9. As Dr. Amosu noted, “[p]sychologically, the use of substances to cope decreased his ability to practice and develop more adaptive coping mechanisms.” Ex. 48 at 10.

Besides a chronic drug dependence, Dr. Amosu found that “[g]iven Mr. Brown’s myriads of traumas – neglect, abuse, and loss – during his formative years, it follows that he would struggle with impulsivity, aggression and short-sighted decision-making.” Ex. 48 at 10. He did better in more structured environments, such as the military and incarceration. Ex. 48 at 11.

One of the most pronounced consequences of Xavier’s life is recurrence of symptoms of Post-traumatic Stress Disorder (PTSD), “including but not limited to difficulty sleeping, rumination, anxiety, and being highly reactive to

stress and perceived threats (i.e., hypervigilance).” Ex. 48 at 11. He attributes these symptoms to the violence he witnessed from gang involvement. Ex. 48 at 11. He also continues to have nightmares about a train accident he witnessed when he was about three years old. Fifteen train cars carrying liquefied petroleum derailed and exploded, killing two and injuring many more. Ex. 48 at 4. His nightmares are so severe that he broke his toe kicking the wall in his sleep. Ex. 48 at 11.¹⁴ They continued until he was prescribed Abilify, which decreased their severity and frequency. Ex. 48 at 11.

Dr. Amosu and Ms. Aguilar sum up their conclusions:

It is these evaluators’ opinion that Mr. Brown meets the criteria for Post Traumatic Stress Disorder and suffers from active symptoms of PTSD. It is important to note, Mr. Brown’s trauma spans over a series of events and multiple exposures dating back to childhood rather than a singular traumatic event. The lack of parental supervision, exposure to violence, and his substance usage had a direct impact on Mr. Brown’s functioning beginning in his early childhood continuing into adulthood. This type of prolonged trauma, arising from childhood experiences known as Complex Post Traumatic Stress Disorder (CPTSD) is a more accurate description of Mr. Brown’s condition.

Ex. 48 at 12.

Dr. Skolly adds that Xavier suffers from the negative effects consistent with substance abuse beginning in his teen years. Ex. 53 at 12. She explains

¹⁴ Dr. Skolly also learned of Xavier’s history of chronic night terrors, which are “episodes of screaming or crying, intense fear, and sometimes waving arms and legs when not fully awake.” Ex. 53 at 7.

that high doses of dextromethorphan produce a range of effects “including restlessness, visual and auditory disturbances, altered consciousness, dissociative effects, delusions, and paranoia.” Ex. 53 at 12. Large doses also have physiologic effects, such as imbalance, sweating, high blood pressure, and seizures. She concludes to a reasonable degree of scientific certainty that up through the time of his arrest, “the acute and chronic use of cough syrup affected Brown’s cognitive abilities and perceptual functioning.” Ex. 53 at 12.

D. Trial counsel also failed to counter the State’s case in aggravation

Trial counsel undoubtedly knew that the prosecutor was going to introduce Brown’s prior conviction for manslaughter as a statutory aggravating circumstance. Trial Exhibit 24; T. 685. However, they took no steps to mitigate the effect of the evidence or even to prevent the state from presenting this conviction in a manner that would allow the jury to consider manslaughter to be “another capital offense.” C.P. 453, T. 736.

As to the facts of Brown’s manslaughter conviction, trial counsel could have softened the effects of the conviction on the jury by explaining the circumstances through Officer Buckley’s police report which showed that Brown turned himself in. “Xavier Antino [*sic*] Brown flagged me down and stated that he wanted to give himself up that he had just shot a dude down on S. Magnolia St.” Ex. 55 (report of Officer Buckley, May 22, 1986). John Lorenzo

Ramsey, who was with Xavier at the time of the shooting, confirmed that he “told us to take him to the Police Station so he could turn himself in.” Ex. 56 (statement of John Lorenzo Ramsey, May 22, 1986). In his own statement to the police, Brown explained that the intended victim had earlier threatened him and that he knew that the person who had threatened him carried a gun. Ex. 57 (statement of Xavier A. Brown, May 22, 1986).

Trial counsel failed to ameliorate the effect of this aggravating circumstance by showing that he felt threatened but then after the shooting he turned himself in to the police. Evidence of the facts of the aggravator were also readily available right in the courtroom, in fact, in the hands of the state, in the pen-pak submitted as State’s Trial Exhibit 25 for ID, where Brown explained that his life was threatened and he responded then turned himself in, supporting the statements made at his arrest. No effort was made to explain the facts of the prior crime or to limit its effect on the jury.

In addition, trial counsel could have integrated other mitigating aspects of his life to help jurors to understand that event. Xavier was brought up in an environment of violence and turned to a gang to offer him a semblance of family and belonging. On top of that, he was abusing cough syrup, which triggered paranoia and impulsive reactions.

E. Trial counsel's penalty phase performance fell below professional standards and was prejudicial.

Trial counsel have a duty to conduct a thorough investigation into a client's life and prepare to present to the jurors compelling mitigating circumstances that could convince at least one of them to vote for a life sentence. Similarly, counsel have the elementary duty to prepare to meet the case that the State will present in aggravation of punishment, especially if doing so may blunt the force of the State's case. Trial counsel for Brown did not fulfill either of these duties.

As discussed in Subsection A, courts find counsel to be ineffective when they make no systematic effort to acquaint themselves with their clients. See *Williams v. Taylor*, 529 U.S. 362 (2000) (counsel began preparing for the penalty phase a week before trial and called just three witnesses; counsel failed to uncover abuse and neglect in family); *see also Lewis v. Dretke*, 355 F.3d 364 (5th Cir. 2003) (counsel ineffective for not presenting evidence of abusive background); *Haliym v. Mitchell*, 492 F.3d 680 (6th Cir. 2006); *Hamblin v. Mitchell*, 354 F.3d 482, 487 (6th Cir. 2007); *Anderson v. Sirmons*, 476 F.3d 1131 (10th Cir. 2007); *Outten v. Kearney*, 464 F.3d 401 (3rd Cir. 2006).

In *Lewis*, *supra*, the Fifth Circuit determined that trial counsel's investigation and presentation of evidence of childhood abuse was deficient.

Trial counsel presented only “conclusional testimony” from the petitioner’s grandmother and failed even to talk to a number of witnesses who could have provided more detailed testimony. *Lewis*, 355 F.3d at 368-369. In Brown’s case, the investigation was even more deficient, as none of the available witnesses were called who could have described the abuse in his early upbringing as well as other deficits in his development.

In *Haliym, supra*, defense counsel presented only three witnesses, and the defendant’s unsworn statement. One of the witnesses was the petitioner’s former employer. Trial counsel also called his client’s grandmother and a mental health expert who met with the petitioner on one occasion. 492 F.3d at 708. In later proceedings, post-conviction counsel presented evidence of abuse. Again, not even this degree of investigation was conducted by Brown’s counsel. They discovered and called no witnesses to support the mitigation later developed by other counsel. The *Haliym* court found that counsel performed deficiently due to the failure to find ample evidence that the petitioner grew up in a troubled home, repeating its prior holdings that evidence of a family history of abuse is considered an important mitigating factor (*Id.* at. 713), and cited the ABA Guidelines commentary which emphasized that a minimally adequate mitigation investigation should include members of the client=s immediate and extended family, medical history, family and social history, and

exposure to violence. *Id.* at 717.

Hamblin v. Mitchell, supra, also shares distressing similarities with Brown's case. Counsel gave himself only six days to prepare for the penalty phase and did not seek any advice or expert assistance. 354 F.3d at 490. Counsel never spoke to any of the defendant's brothers and sisters and never examined school records, medical records or records of mental health counseling.

The same deficiencies are present in Brown's case, and the *Hamblin* court found that if defense counsel had conducted an investigation, they would have discovered a large body of mitigating evidence, including the fact that Hamblin grew up in an environment of poverty and neglect, that he had a violent family life and a father that was physically abusive to his mother, that he had a poor education, that his father was arrested several times for public intoxication and neglect, that his mother abandoned her children, leaving Hamblin and his siblings to survive on their own, and that Hamblin had a juvenile record. Further, Hamblin showed signs of a mental disorder, resulting from either his family situation or a severe blow to the head at age eight. The *Hamblin* court found that the "total lack of preparation, investigation and understanding of sentencing caused counsel's deficient performance and extreme prejudice to Hamblin" *Id.* at 493. The *Hamblin* court

held:

Our confidence in the outcome of Hamblin's trial has been undermined by counsel's failure to include the details of Hamblin's background during their penalty phase presentation. In our view, had the available evidence been presented about Hamblin's mental history and abusive childhood at least one juror would have voted against the death penalty.

Hamblin, 354 F.3d at 493.

Trial counsel in Brown's case neglected to discover, develop and present mitigation in much the same way as trial counsel in *Hamblin*. The similarity of the mitigation evidence kept from Brown's jury is striking, from his mother's problem pregnancy to his premature birth to his abandonment by his parents, to his abuse at the hands of his mother and step-father, to his un-treated head injury and his self-destructive behavior as a child as well as his Robitussin abuse beginning when he was a young adult and continuing to the time of the crime charged. Family members and friends who were witnesses to all of these incidents and behaviors were available to Brown's counsel had they sought them.

In *Anderson v. Sirmons*, 476 F.3d 1131 (10th Cir. 2007), Anderson was convicted of three counts of murder. Anderson's allegation was that trial counsel "wholly failed to investigate potential mitigation evidence, instead

focusing almost exclusively on the guilt phase of the trial.” *Id.* at 1142.¹⁵ The court found that the record supported Anderson’s assertions. *Id.* at 1143. Anderson’s counsel retained a mitigation phase investigator who conducted just 23 hours of substantive mitigation work in the month prior to Anderson’s trial. This was found to be deficient. Brown’s counsel did not seek specific mitigation assistance, opting only to hire a former police officer to investigate both phases of the trial. His invoice for work on the case shows only three-and-one-half hours identifiable as mitigation work, as part of 20.5 total hours of work on the entire case. Ex. 12 (Hunter Investigations Invoice, Deron Nored work). Additionally, this investigator had no particular skills in seeking out and interpreting potentially mitigating evidence. Even with an investigator, trial counsel made no effort to find the readily available evidence of Brown’s traumatic journey to his trial, which began in his mother’s womb, continued with his premature birth, and followed him through childhood, adolescence and adulthood in the form of abuse, neglect and addiction. As in Anderson’s case, Brown’s trial counsel “did not undertake a strategic decision in this case to omit the mitigation evidence identified above; counsel simply did not

¹⁵ In Brown’s case, although trial counsel seemed also to focus on winning the case at the culpability phase, constitutionally adequate efforts were not made in preparation for that phase, either. *See* Ground I.

investigate and therefore did not know such evidence was available.” *Id.* at 1145.

There was no justification for trial counsel’s failure to seek mitigation evidence. *See Neal v. Puckett*, 286 F.3d 230, 236 (5th Cir. 2000) (“We consider it indisputable that, in the context of a capital sentencing proceeding, defense counsel has the obligation to conduct a ‘reasonable substantial, independent investigation’ into potential mitigating circumstances.”). Brown’s counsel could not have made any constitutionally valid strategic decisions on what mitigation evidence to present and what not to present, without first having gathered and reviewed all the evidence that was readily available to them. As held in *Neal*, “perhaps the most troubling aspect of these affidavits is that they indicate that counsel never contacted any of the other people who have provided the additional testimony we now have before us, and which would have added to and developed the skeletal evidence before the jury.” 286 F.3d at 240.

Despite the “well-defined norms” for capital counsel, Brown’s counsel failed to seek out the family members and friends who would have provided a strong mitigation case in favor of a life sentence. This was the result of inattention and not supported by reasonable professional judgment. *See United States v. Grauy*, 878 F.2d 702 710 (3d Cir. 1989) (“[C]ounsel can hardly

be said to have made a strategic choice against pursuing a certain line of investigation when s/he had not yet obtained the facts on which such a decision could be made.”); *see also Poindexter v. Mitchell*, 454 F.3d 564, 578 (6th Cir. 2006) (“The record reflects that Poindexter’s counsel failed to conduct virtually any investigation, let alone sufficient investigation to make any strategic choices possible”); *Dickerson v. Bagley*, 453 F.3d 690, 695 (6th Cir. 2006) (“a partial, but ultimately incomplete, mitigation investigation does not satisfy *Strickland*’s requirements”).

Besides failing to conduct even a minimally competent investigation, trial counsel failed to rebut or explain the State’s case in aggravation. They knew that the state would introduce Brown’s prior violent felony of manslaughter as an aggravator to induce the jury to sentence him to death and thus were required to fully investigate the facts of the prior conviction and present those facts to the jury to counter the prosecution’s punch. *Rompilla v. Beard*, 545 U.S. 374 (2005) (trial counsel deficient and their performance prejudicial “in failing to examine the court file on [petitioner’s] prior rape and assault conviction.” As in *Rompilla*, Brown’s prior aggravating conviction involved a killing and therefore was similar to the charge for which he was being tried. And although the jury was not informed by the state’s exhibit which supported the aggravator how the killing occurred, it followed the

language of the trial court's Sentencing Instruction 13 (C.P. 453) and found that Brown had been "previously convicted of another Capitol [*sic*] offense or of a felony involving the use or threat of violence to the person." C.P. 481.

Further similarities exist in *Rompilla* and Brown's case. Trial counsel in both cases relied on the residual doubt in the penalty phase in trying to convince the jury spare Brown's life. Under these circumstances, it was ineffective to the point of reversible error for Rompilla's counsel to fail to attack the aggravator that was similar to the crime he was being tried for. Brown's counsel should have done the same to lessen the impact of his similar crime of violence.

In *Rompilla*, family members testified that they believed Rompilla to be innocent and a good man, seeking the benefit of residual doubt. Brown's counsel, in his closing argument -- which spans little more than three pages of the transcript -- offered to the jurors "that the conclusion [they reached] was incorrect, that the imposition of the death penalty would be a compound." T. 741. Counsel added that there was no better time "to re-examine your decision than now" by looking at the statement of Corey Johnson from the guilt phase of the trial. T. 743. However, "[w]ithout making efforts to learn the details and rebut the relevance of the earlier crime, a convincing argument for residual doubt was certainly beyond any hope." *Rompilla* 545 U.S. at 385. Finally, the

Rompilla Court stated that “[i]t flouts prudence to deny that a defense lawyer should try to look at a file he knows the prosecution will cull for aggravating evidence” in finding that the state court was objectively unreasonable in excusing Rompilla’s attorneys from looking at the file.

F. Petitioner Was Prejudiced by Counsel’s Deficient Performance.

After establishing counsel’s deficient performance, 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. *Strickland*, 466 U.S. at 694. A reasonable probability is a probability that is sufficient to undermine confidence in the outcome. *Id.* at 694. In *Lockett v. Anderson*, 230 F.3d 695 (5th Cir. 2000), the Fifth Circuit noted that under Mississippi law, a death sentence requires unanimity. *Id.* at 716 (citing Miss. Code Ann. § 99-19-103). “If we can conclude that a juror could have reasonably concluded that the death penalty was not an appropriate penalty in this case based on the mitigating evidence, prejudice will have been established.” *Id.* See also *Wiggins v. Smith*, 539 U.S. 510, 537 (“Had the jury been able to place petitioner’s excruciating life history on the mitigating side of the scale, there is a reasonable probability that at least one juror would have struck a different balance”); *Davis v. State*, 87 So. 3d 465, 474 (¶ 29) (Miss. 2012) (same).

When the jury is deprived of mitigation evidence “relevant to the defendant’s character, background, or the circumstances surrounding the crime,” a reversal as to sentencing is warranted “since the jury was prevented from considering all relevant mitigating evidence.” *Fulgham v. State*, 46 So. 3d 315, 336-37 (¶ 67) (Miss. 2010). *Strickland* made it clear that a petitioner does *not* have to prove that the outcome would have been different, *id.* at 693-94, because “[t]he result of a proceeding can be rendered unreliable, and hence the proceeding itself unfair, even if the errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome.” *Id.* at 694. As this Court held in *Ross*, the failure to investigate a defendant’s psychological problems “substantially undermines our faith in [the defendant’s] sentence, and therefore constitutes ineffective assistance of counsel for the sentencing phase of the trial.” *Ross v. State*, 954 So. 2d 968, 1006 (Miss. 2007).

In *Williams v. Taylor*, 529 U.S. 362 (2000), the Court stressed that while the evidence adduced at trial “may not have overcome” the prosecution’s evidence of aggravating factors, “the graphic description of [the defendant’s] childhood, filled with abuse and privation, or the reality that he was ‘borderline mentally retarded,’ might well have influenced the jury’s appraisal of his moral culpability.” *Id.* at 398. The Court concluded: “Mitigating evidence unrelated to [aggravating factors] may alter the jury’s selection of penalty, even if it does not undermine or rebut the prosecution’s death-eligibility case. The Virginia

Supreme Court . . . failed to accord appropriate weight to the body of mitigation evidence available to trial counsel.” *Id.*

Brown’s jury was not presented with evidence of his abuse and neglect at the hands of his parents and step-father, or other aspects of his lifelong exposure to violence leading to Complex Post Traumatic Disorder, or of his addiction to cough syrup. Had counsel conducted a timely and thorough investigation, they would have uncovered the evidence presented herein and could have fully informed the jury of the trauma of Brown’s life and the chaos and deprivation of his formative years. A thorough investigation into the one incident that trial counsel did present as mitigation would have also given more weight to Deputy Hamler’s testimony. Law enforcement reports of the incident and other witnesses could have been presented to the jury to paint a more detailed and compelling picture of this display of Brown’s good character and why it justified sparing his life.

Evidence of a traumatic childhood has long been recognized as mitigating, and reviewing courts have found prejudice even in light of graphic crimes or crimes involving multiple victims. For instance, in *Williams, supra*, the Commonwealth of Virginia presented two experts regarding Williams’s likelihood of being a future danger and evidence of several other violent felonies he committed before and after the capital murder. 529 U.S. at 368. Similar to this case, the defense only presented brief testimony about some of

their client's good characteristics. *Id.* at 369. In collateral proceedings, however, Williams's new counsel provided evidence of abuse, mistreatment, and neglect during early childhood as well as evidence of cognitive limitations. *Id.* at 370-71.

In finding prejudice, the Supreme Court stressed that while the evidence adduced at trial "may not have overcome" the prosecution's evidence of aggravating factors, "the graphic description of [the defendant's] childhood, filled with abuse and privation, or the reality that he was 'borderline mentally retarded,' might well have influenced the jury's appraisal of his moral culpability." *Id.* at 398.

Similarly, in *Rompilla v. Beard*, 545 U.S. 374 (2005), the defendant was convicted of a heinous offense, and two of the aggravating circumstances included that the murder was committed by torture and that the defendant had a significant history of prior violent convictions. *Id.* at 378. The defense presented brief testimony from five witnesses, primarily that they still believed the defendant to be innocent and that they believed him to be a good man. *Id.* Had Rompilla's attorneys performed an adequate investigation, they would have found evidence of his childhood and mental health very different from what they had seen. *Id.* at 390-91. Available records showed that Rompilla grew up with violently alcoholic parents and later became an alcoholic, which was a factor in his prior offenses. *Id.* at 391-93. Based on the newly developed

mitigating evidence, the Supreme Court reversed Rompilla’s death sentence. *See also Sears v. Upton*, 561 U.S. 945, 948-49 (2010) (prejudice found in light of evidence of abusive parents, behavior problems, sexual assault, deficits in mentality and impulse control, head injuries and substance abuse). Other reviewing courts have found prejudice from a violation of the right to the effective assistance of counsel, even when the facts of the case were highly aggravated. *See, e.g., Williams v. Stirling, supra* (had counsel presented evidence of Fetal Alcohol Syndrome because such information would have explained cause and effect to the jury, giving them a better understanding of what led the petitioner to commit the crime, which involved holding his girlfriend hostage and shooting her when she tried to escape); *Haliym v. Mitchell*, 492 F.3d 680 (6th Cir. 2007) (prejudice found despite fact that the petitioner was involved in the stabbing death of two people); *Hamblin v. Mitchell*, 354 F3d 482 (6th Cir. 2003) (despite a crime in which the defendant inflicted blunt force trauma on the victim and shot a park ranger in the leg, prejudice found because trial counsel failed to present evidence of difficult childhood and violent surroundings as well as mental health conditions); *Mason v. Mitchell*, 543 F.3d 766, 769 (6th Cir. 2008) (prejudice found even though the petitioner raped a woman and beat her to death using “a blood-stained board with protruding nails”). In fact, in *Davis v. State*, the Mississippi Supreme Court granted post-conviction relief due to trial counsel’s

failure to present evidence of a traumatic and chaotic family background. 87 So. 3d 465 (Miss. 2012).

Similarly, in *Anderson v. Sirmons*, 476 F.3d 1131, 1146 (10th Cir. 2007), the Tenth Circuit found prejudice found despite convictions on three counts of “callous and brutal” first degree murder and despite the fact that prosecution introduced evidence that while awaiting trial, the petitioner obtained illegal drugs and a knife. The court recognized that the prosecutor had been able to capitalize on the overall weakness in the mitigation case at trial: “relying on the exceedingly limited nature of trial counsel’s case in mitigation, the prosecution was able to argue convincingly to the jury that there was nothing in the case to diminish [the petitioner’s] moral culpability for the murders.” *Id.* at 1147. The mitigation evidence that was not presented at trial, however, could have helped explain the petitioner’s predispositions. *Id.* The Tenth Circuit’s conclusions apply equally well to this case:

[T]he absence of this readily available mitigation evidence left the jury with no explanation for the murders other than the prosecution’s assertion Anderson was ‘evil.’ Although the case against Anderson was strong and the murders in this case were horrific, court have not hesitated to grant relief in similar circumstances where the absence of available mitigation evidence left the jury with a ‘pitifully incomplete’ picture of the defendant. Had the jury been presented a complete picture of Anderson’s background and history, there is a reasonable probability at least one juror would have struck a different balance between the mitigating and aggravating factors.

Id. at 1148 (cites omitted).

In *Jells v. Mitchell*, 538 F.3d 478 (6th Cir. 2008), the defendant beat a woman to death with a transmission belt as her four-year old son watched and had blood spattered on him. The boy watched as his mother's killer dragged her body into a junkyard. *Id.* at 514 (Batchelder, dissenting). As in Walker's case, the defense presented favorable evidence from Jells's family about his love for his family and strong work ethic. *Id.* at 489. The court found defense counsel's performance deficient because he waited far too late to begin preparing for the penalty phase and did not secure investigative assistance for the penalty phase. *Id.* at 497. Despite the horrendous facts, the Sixth Circuit found prejudice due to trial counsel's failure to uncover and present evidence of academic difficulties, aggressive behavior in school, and abusive and unstable home environment. *Id.* at 500.

Jurors who sentenced Brown to death knew almost nothing about his except the prosecution's case at the guilt phase and his prior conviction for manslaughter. With a reasonable effort, however, trial counsel could have easily unearthed a wealth of mitigating evidence that would have dramatically changed the sentencing profile, and there is at least a reasonable probability that one of the jurors would have opted for a life sentence.

GROUND III: Brown Is Entitled To Post-Conviction Relief Due To Numerous Violations Of His Rights to Confront Witnesses Against Him.

A. Ground for Relief

Post-conviction collateral relief is available to an inmate who can demonstrate that his “conviction or [] sentence was imposed in violation of the Constitution of the United States or the Constitution or laws of Mississippi[.]” Miss. Code Ann. § 99-39-5(a). Mark Berry, Danny Rigel, and Steven Hayne each testified about forensic scientific testing in a manner that violated the Confrontation Clause of the United States Constitution. This testimony also violated the right to confront witnesses as enumerated in the Miss. Const. art. 3 § 26 (1890). At a minimum, Xavier Brown is entitled to a hearing in the trial court on this claim.

B. Confrontation of forensic scientific witnesses.

1. The Law

The Confrontation Clause provides that, “[i]n all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him.” U.S. Const. amend VI. The Mississippi Constitution recognizes a similar right. Miss. Const. art. 3 § 26 (1890). Brown’s case became final on direct appeal and subsequent post-conviction relief was originally denied on November 9, 2006 (rehearing denied on February 22, 2007). Since then, the United States Supreme Court issued ground-breaking opinions about how

forensic scientific testimony must be treated under the Confrontation Clause. *See Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009); *Bullcoming v. New Mexico*, 564 U.S. 657 (2011); *Williams v. Illinois*, 567 U.S. 50 (2012); *Smith v. Arizona*, 602 U.S. ---, 144 S.Ct. 1785 (2024). The Mississippi Supreme Court recently followed the precedent of *Melendez-Diaz* and *Bullcoming*, adopting the same analysis. *See Connors v. State*, 92 So. 3d 676 (Miss. 2012); *Burdette v. State*, 110 So. 3d 296 (Miss. 2013).

These cases constitute intervening opinions that would have changed the outcome of the trial for Brown; thus, they allow Brown to hurdle the successive-writ bar even if it was applicable here (discussed more below). In particular, two broad categories of forensic scientific testimony would have been the subject of successful Confrontation Clause objections at the trial: (i) testimony about the cause of death of the main suspect, Anthony Sims; and (ii) testimony about scientific testing conducted on firearms or firearm projectiles. Current case law would bar the introduction of those subjects, eviscerating the case made by the State to exclude the main suspect.

In *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009), a laboratory analyst produced an affidavit finding that certain substances she tested were illegal to possess under Massachusetts law. The Supreme Court found that the affidavit was a core piece of testimonial evidence, and the relevant Massachusetts statute authorized its production for the sole purpose of

describing the results of the scientific testing. *Id.* at 310-311. Thus, Melendez-Diaz had the right to cross-examine the analyst who produced the affidavit and the forensic scientific opinions it contained.

Melendez-Diaz laid bare the false idea that laboratory analysts are not witnesses in the Sixth Amendment sense. Although they do not provide directly accusatory testimony against a particular criminal defendant, laboratory analysts provide evidence of a fact necessary to a criminal conviction (in that situation, that the substance was an illegal substance); thus, their testimony must be confronted to satisfy the Constitution. *Id.* at 313. Calling it neutral scientific testimony does not exempt it from confrontation, either. *Id.* at 317. This labelling would result in a gradual receding back toward the reliability standards that had been discarded. *Id.*

After *Melendez-Diaz*, the Supreme Court held that a surrogate forensic analyst cannot testify to the results produced by a testing analyst unless the surrogate signed a certification regarding those results or participated in some meaningful way in the testing. *Bullcoming v. New Mexico*, 564 U.S. 647 (2011). An analyst tested Bullcoming's blood to determine its alcohol content. *Id.* at 651. The analyst signed a certification detailing the results of that testing. *Id.* That certificate was introduced into evidence in the criminal prosecution through the testimony of a different analyst. *Id.* The second analyst had not signed the certificate, nor had he participated meaningfully in the testing. *Id.*

Bullcoming's right to confront his witnesses was thus violated when the unavailability of the testing analyst was not proven and when he did not have an opportunity to cross-examine the testing analyst. *Id.* at 652.

Just like *Melendez-Diaz*, *Bullcoming* rejected out-of-hand the position that laboratory analysts are not witnesses for confrontation purposes because they are somehow not accusatorial. *Id.* at 664. Likewise, the fact that the certifications were unsworn was not a crucial fact. *Id.* It was the nature of the testimony that required the testimony to be subjected to confrontation and not its form.

Mississippi appellate courts recognized this progression of Confrontation Clause jurisprudence. In one case, James Connors was convicted of two counts of murder and two counts of possession of a firearm by a felon. *Connors v. State*, 92 So. 3d 676 (Miss. 2012). The prosecution introduced two Mississippi Crime Laboratory reports into evidence during the testimony of an investigator from the sheriff's department. *Id.* at 682. One of those reports reflected opinions regarding whether shell casings were fired through a shotgun, all of which were found at the crime scene. *Id.* The other report reflected opinions regarding a toxicological analysis of Connors' blood. *Id.* Neither of the authors of these reports was called to testify. *Id.*

Because Connors had not objected at trial, he argued on appeal that the introduction of those two reports was plain error, violating his right to confront

those two witnesses. *Id.* Plain error is the doctrine that some trial errors are so grave that appellate courts will consider a claim—even if it were not properly preserved in the lower court. If the error affects a fundamental, substantive right, Mississippi appellate courts will consider that claim even if it were not properly preserved. *Id.* (citations omitted). Plain error is one that “resulted in a manifest miscarriage of justice or seriously affect[s] the fairness, integrity or public reputation of judicial proceedings.” *Id.* (citations omitted) (internal quotation marks omitted).

Conners explicitly recognized that the right to confront a witness is fundamental and substantive and reviewed the claim under plain error. The admission of the two laboratory reports, without allowing *Conners* to confront the analysts who produced them, was plain error, in violation of his confrontation rights. *Id.*

The *Conners* Court followed the analytical procedure laid out in *Melendez-Diaz* and in *Bullcoming*. It noted that both tests were performed at the request of the investigating agency and the results of those forensic tests were produced to be used in a prosecution. *Conners*, 92 So. 3d at 683-684. Because the ballistics and toxicology reports were “[p]lainly ... testimonial in nature[,]” *Conners* had the right to confront the analysts who produced them. *Id.* There was no showing that the two analysts were unavailable to testify, *Conners* had no prior opportunity to cross-examine them. *Id.* Thus, the

introduction of those reports, under these circumstances, violated the Confrontation Clause.

A similar issue arose in a subsequent case. Derrick Burdette was found guilty of manslaughter and raised a Confrontation Clause claim in a direct appeal. *Burdette v. State*, 110 So. 3d 296 (Miss. 2013). Burdette had shot his victim with a nine-millimeter handgun, which was recovered by law enforcement from a relative of Burdette. *Id.* at 298-299. However, .380 shell casings were found at the crime scene. *Id.* A law enforcement investigator testified that he contacted the manufacturer of the handgun who told him that .380 cartridges could be fired through their nine-millimeter handgun. *Id.* at 300. No one from the manufacturer testified at trial. *Id.* The investigator further testified that the Mississippi Crime Laboratory had tested the shell casings, as well as bullets that had been recovered. *Id.* He conveyed to the jury that the laboratory results showed all shell casings and four bullets were fired through the nine-millimeter handgun. *Id.* No one from the laboratory testified to these findings. *Id.*

Once again, the defendant had not raised a Confrontation Clause objection at trial. He instead raised it on appeal as plain error. *Id.* at 303. The *Burdette* Court noted that “surrogate testimony was presented by a police officer with no apparent relation to the Mississippi Crime Laboratory or to [that] particular report.” *Id.* at 304. The analysts were not shown to be

unavailable nor had Burdette had an opportunity to cross-examine them previously. Therefore, “[t]he admission of the document without live testimony from an individual involved in the analysis constituted a violation of the Confrontation Clause.” *Id.*

Under the *Melendez-Diaz* and *Bullcoming* regimes, the Mississippi Supreme Court twice found Confrontation Clause violations when Mississippi Crime Laboratory reports were admitted into evidence against criminal defendants. Twice those violations were identified as violating fundamental, substantive rights of those defendants. Twice, those errors were identified as plain error. Unfortunately for those two defendants, however, those errors were deemed harmless. *Connors v. State*, 92 So.3d 676, 684-685 (Miss. 2012); *Burdette v. State*, 110 So.3d 296, 304-305 (Miss. 2013).

Connors was found in a locked residence with two decedents who had died from shotgun wounds. *Connors*, 92 So.3d at 685. Connors had gunshot residue on his hands, and a shotgun was found on the kitchen table in the residence. *Id.* His version of events was not plausible under the circumstances; thus, the two forensic reports did not prejudice him in the face of such overwhelming evidence. *Id.* Burdette, meanwhile, had testified that he shot the decedent in his case in self-defense. Because Burdette did not contest that he fired the handgun, the laboratory testing of that handgun did nothing to prejudice him. *Burdette*, 110 So.3d at 304-305. Therefore, despite findings of

plain error in the violations of their respective Confrontation Clause rights, the convictions were upheld against Conners and Burdette.

The latest Confrontation Clause development came in a recent United State Supreme Court case. *Smith v. Arizona*, 602 U.S. ---, 144 S. Ct. 1785 (2024). Smith was prosecuted for possession of illegal drugs. *Id.* at 1795. The substances in dispute were presented by law enforcement officials to a crime laboratory in Arizona where they were tested. *Id.* The analyst prepared a report of her findings. At Smith's trial, another analyst testified about that report. *Id.* The new witness had not participated in the original testing in any way; he merely testified about his own "independent" opinion about the substances. *Id.* at 1795-1796. He based his opinion entirely on the original report. *Id.* The issue was whether restyling the original report as the basis for opinion testimony from an expert who did not participate in the testing violated the right to confront witnesses. *Id.* at 1791.

Smith held that "[i]f an expert for the prosecution conveys an out-of-court statement in support of his opinion, and the statement supports that opinion only if true, then the statement has been offered for the truth of what it asserts." *Id.* at 1798. When an expert conveys the results of another, non-testifying, expert under the guise of support for his own opinions, the jury is left with two options. Either it believes the opinion of the non-testifying expert, or it does not. In both situations, the jury makes a judgment about the truth

value of the out-of-court assertions to evaluate the testifying witness. *Id.* When this situation arises, “ ... the defendant has no opportunity to challenge the veracity of the out-of-court assertions that are doing much of the work.” *Id.* at 1799.

Smith reiterated that the introduction of testimonial hearsay requires confrontation. Thus, the analyst who prepares a report must testify at a criminal trial. That said, testimonial hearsay may be admitted if the analyst is shown to be unavailable and if the criminal defendant had a prior opportunity to cross-examine the analyst. Forensic scientific evidence is not excluded from these general rules. In *Smith*, though, the Court confined its analysis to whether the out-of-court statements of the testing analyst were hearsay (i.e., offered to prove their truth). It left open the question whether those statements were testimonial.¹⁶

Smith expressly abandoned the earlier treatment of this same type of evidence. In a 4-1-4 opinion, the Court had allowed opinions of non-testifying analysts to be conveyed to juries when they were the basis for the independent opinion of a testifying expert. *Williams v. Illinois*, 567 U.S. 50 (2012). The *Williams* Court had “sown confusion” among lower courts, and its plurality opinion was overruled. *Smith*, 144 S. Ct. at 1794 (citation omitted). Someone

¹⁶ The Mississippi Supreme Court has already answered this question regarding, though. Ballistics and toxicology reports from the Mississippi Crime Laboratory are “[p]lainly ... testimonial in nature.” *Conners v. State*, 92 So.3d 676, 684 (Miss. 2012).

who does not participate in testing may indeed have relevant and useful information for the prosecution.

However, admitting out-of-court statements of testing analysts through such a witness prevents a defendant from cross-examining the testing analyst about “what she did and how she did it and whether her results should be trusted.” *Id.* at 1800. Under that scenario, a defendant has no opportunity to reveal lies, deviation from appropriate testing protocols, or lack of qualifications of the testing analyst. *Id. Williams*, and its “basis” analysis was abrogated in favor of a straight-forward “testimonial hearsay” approach. *Id.* at 1797-1798 (2024).

Smith nicely summarizes the current state of law regarding the introduction of forensic scientific evidence:

A State may not introduce the testimonial out-of-court statements of a forensic analyst at trial, unless she is unavailable and the defendant has had a prior chance to cross-examine her. See *Crawford*; *Melendez-Diaz*. Neither may the State introduce those statements through a surrogate analyst who did not participate in their creation. See *Bullcoming*. And nothing changes if the surrogate ... presents the out-of-court statements as the basis for his expert opinion. Those statements, as we have explained, come into evidence for their truth—because only if true can they provide a reason to credit the substitute expert. So a defendant has the right to cross-examine the person who made them.

Id. at 1802 (internal citations shortened). None of this was understood to be the law at the time of Brown’s trial.

2. The Facts

In Brown's trial, Danny Rigel, Mark Berry, and Steven Hayne each testified to forensic scientific opinions in a manner that violated the Confrontation Clause. Rigel testified that he recovered a spent nine-millimeter shell casing in the parking lot where Felicia Newell Sims had been murdered. T. 376-387. He sent it to the crime lab for testing. T. 378. He was asked whether the crime lab identified a gun that fired the shell casing, and he responded, "[n]ot to my knowledge." T. 378. He was asked the same question later and responded, "[n]ot that I know of." T. 380. Brown's trial counsel compounded the problem by having Rigel reiterate the same answer again. T. 378.

Mark Berry testified that the shell casing recovered from the crime scene was sent to the crime laboratory along with a shell casing recovered from a vehicle owned by Anthony Sims. T. 571. Berry affirmatively testified that those casings were tested and determined not to be fired from the same gun. T. 571. He reiterated this finding on re-direct. T. 606-607. He was specifically asked by the prosecutor whether the two shell casings were fired from the same gun. T. 606-607. He responded, "[i]n a report from the crime laboratory dated September 23, 1999, (sic) says that the cartridge cases in exhibits 1 and 2 bear no significant similarities in class or individual characteristics with those produced by the gun." T. 607.

Steven Hayne conducted an autopsy on Anthony Sims. T. 462. During the course of that autopsy, he drew fluids and submitted them to the state crime lab, which forwarded them to the National Medical Services Laboratory. T. 463. This was in aid of a toxicological analysis, from which the cause of death was determined. T. 463. Hayne testified that he received a report from both the National Medical Services Laboratory and the state crime laboratory. T. 463-464. Hayne determined that Sims succumbed to a drug overdose due to a prescription drug, Restoril. T. 464. In fact, he noted a specific measurement of 4,500 nanograms per milliliter. T. 464. The Mississippi Crime Laboratory report revealed Benzodiazepine, Restoril, and Serax in Sims' blood as well as Xanax in his urine. T. 465.

There is no evidence that Rigel, Berry, or Hayne participated in the testing of those items. In the case of Rigel and Berry, it is clear the testing to which they referred in their testimony was conducted by the Mississippi Crime Laboratory (now known as the Mississippi Forensics Laboratory). On the other hand, Hayne sent samples to a national laboratory. There is no evidence that any of these witnesses participated in, conducted, or even observed the testing that provided results to which they testified. There is likewise no evidence that they were involved in any meaningful way in the production of the report upon which they testified. There is no evidence that any of the analysts who

performed these tests were unavailable to testify. There is no evidence that Brown had a prior opportunity to cross-examine any of those analysts.

Anthony Sims was clearly and appropriately the main suspect in the death of Felicia Newell Sims. He was identified as a suspect in the police report produced by the first police officer on the scene. T. 364. There were also at least two apparent motives for his wanting Felicia Newell Sims to be dead. First, he was an enraged ex-spouse. T. 364. Second, Felicia was scheduled to be a witness in a criminal prosecution against him within days of her death. T. 565-566; T. 598. Also, although he was a resident of Laurel, he was in Hattiesburg within a few hours of Felicia's death. T. 399-400; T. 403. He was clearly the natural suspect, but he could not be prosecuted because he was dead.

The State could not establish any connection between Xavier Brown and Anthony Sims. For example, Corey Johnson testified that he did not know if Brown and Anthony Sims knew each other. T. 484-485. But, to prosecute Xavier Brown successfully they needed to exclude Anthony Sims as being present at the time of the shooting. Thus, it was imperative for the prosecution to establish there was no forensic connection between the crime scene and Anthony Sims.

But the prosecution had a problem with that. The shell casing found at the crime scene and the shell casing found in Anthony Sims' vehicle were the same caliber. The testimony of Rigel and Berry was vital to establishing that

there was no connection between Sims and the gun used to murder Felicia Newell Sims. Despite the evident necessity for such testimony, the State introduced the analysts' conclusions through witnesses who had no knowledge about the analysis that was conducted. Those officers could not testify to any lies or deviations from established protocols or lack of qualifications of the testing analysts.

The forensic scientific testimony related to firearms and spent shell casings was filtered through the unqualified testimony of two law enforcement officers who had no basis of knowledge about how those conclusions were formed. A direct application of *Conners* and *Burdette* shows that this testimony was plain error, at a minimum. *Melendez-Diaz*, *Bullcoming*, and *Smith* are intervening United States Supreme Court cases that would prohibit the introduction of this testimony outright. Brown's rights to confront the firearm experts used against him were violated.

Further, the State advanced a theory that Sims committed suicide because he could not pay the hitman he had hired. The State advanced this theory despite the facts that he had \$368.82 amount in a bank account and \$1,1138.03 in his wallet at the time of his death. T. 398-399; T. 403. To establish suicide as Sims' cause of death, the testimony of Steven Hayne was critical. He was the only person who testified to Sims' cause of death. But he did not base his opinion on his own testing or observations; rather, he based

his opinion on a piece of paper generated by a testing laboratory. In fact, he testified to an oddly specific result generated by the testing of some other, unidentified analyst. None of the analysts who actually performed the toxicological testing testified at Xavier Brown's trial. Applying the rules found in *Melendez-Diaz*, *Bullcoming*, *Conners*, *Burdette*, and especially *Smith*, the testimony from Hayne was inadmissible, unfronted testimonial hearsay. Brown's rights to confront the toxicologist expert used against him were violated.

C. The Unfronted Forensic Scientific Testimony Altered the Outcome of the Trial.

Without this testimony, here is what the case against Xavier Brown looked like. Corey Johnson testified that Xavier Brown basically asked him to be a witness to a murder. T. 480-482; T. 550. Corey suggested that he did not participate himself in the crime, and he did not know in advance that the crime was going to occur. T. 516-517; T. 531. Corey was such a threat as a witness that Brown supposedly had to threaten him with a gun to keep silent, even though Brown could have just not had Corey accompany him. T. 482-484; T. 533; T. 555. This is the same Corey Johnson who was later confronted with his own words about his stable and long-lasting employment that was found to be

a lie. T. 477-478; Supp. T. 8-16.¹⁷ He bolstered his own character for veracity by lying and then proceeded to tell an implausible story that implicated Brown.

Without testimony from Rigel and Berry, there was no forensic evidence to exclude Sims as the shooter. He had motive to kill his ex-wife. He was in Hattiesburg on the day of her murder, as evidenced by his ATM receipt and accompanying video. T. 403. His vehicle had a shell casing that was the same size as the shell casing found at the crime scene where his wife was murdered. T. 607-608. He made ominous phone calls to Felicia's place of employment. T. 566; T. 572-573; T. 599.

Given the importance of this testimony, the State cannot show that it was harmless. *Delaware v. Van Arsdall*, 475 U.S. 673 (1986); *Earl v. State*, 672 So.2d 1240, 1243 (Miss. 1996). “[T]he focus of the prejudice inquiry in determining whether the confrontation right has been violated must be on the particular witness, not on the outcome of the entire trial.” *Van Arsdall*, 475 U.S. at 680. The factors to consider are “the importance of the witness’ testimony in the prosecution’s case, whether the testimony was cumulative, the presence of evidence corroborating or contradicting the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the

¹⁷ Supp. T. is the citation used to reference the transcript of the supplemental hearing held on Xavier’s Motion for Judgment Notwithstanding the Verdict or for New Trial.

overall strength of the prosecution's case." *Earl*, 672 So.2d at 1244 (quoting *Van Arsdall*, 475 U.S. at 684).

Without the testimony of Corey Johnson, Sims would have been the strongest suspect. No evidence connected Brown to Sims. As such, there would have been reasonable doubt as to the guilt of Xavier Brown in this case. Clearly, the introduction of that forensic scientific evidence, not subject to cross-examination, altered the course of the trial. Without it, reasonable doubt existed as to Brown's guilt, and he would have been acquitted.

In a similar vein, without the testimony from Hayne about Sims' cause of death, the outcome of the trial would have been different. The cause of death was established as an overdose on a drug that was prescribed to Anthony Sims. This strongly suggested suicide. Also, there was testimony that Sims killed himself to avoid paying his debt to a hitman. T. 420-421. That testimony amounted to no more than speculation, but it went unchallenged by trial counsel. Without evidence of an overdose, there would have been no inference of suicide. Without the inference of suicide, there would have been no suggestion of the need to avoid paying a hitman. Thus, there would have been nothing to support a finding beyond a reasonable doubt that money or offers of money were involved in the death of Felicia Newell Sims.¹⁸ Even so, Hayne

¹⁸ Brown recognizes that there is an audio-recording that appears to contain the word, "contract." T. 573. However, there is no evidence that connects Brown to that recording or its production. Further, Brown disputes that the word on that recording is "contract." He also

was allowed to testify to matters he read from a piece of paper, in violation of the Confrontation Clause, to establish the cause of death. This cause of death bolstered the unsubstantiated idea that Anthony Sims paid or offered something of value to someone to kill his ex-wife. It clearly altered the outcome of the trial and sentencing.

Indeed, without evidence of Sims' cause of death, there would have been reasonable doubt as to the element that elevated the crime from murder to capital murder. Anthony Sims was the person who had a clear motive to kill his own ex-wife. To the extent that there is any evidence that he engaged in a murder-for-hire scheme with anyone, it is with the unknown person caught on tape, not with Brown. Without this evidence, the State failed to rule out Anthony Sims as the murderer of his own ex-wife. And Brown clearly would have been acquitted of capital murder without the testimony from Hayne. It is, in fact, likely that he would have been acquitted of all crimes without that testimony. The outcome of the trial would have been vastly different had the testimony from Hayne about Sim's cause of death been excluded.

denies having uttered that word or participating in any telephone call of this nature. On its own, even if the recording were accepted by a jury, it is not proof beyond a reasonable doubt, standing alone, to establish the element of receiving money or an offer of something of value.

D. Brown's Confrontation Clause Claims Are Alive Procedurally and Statutorily.

Brown's Confrontation Clause claims are not statutorily barred. Brown recognizes that this petition is being filed more than two decades after the conclusion of the conviction and sentence that he is challenging. Brown also acknowledges that he has previously filed a petition for post-conviction collateral relief in this Court, which was denied. In many cases, there would be statutory bars to his seeking relief. Here, though, there is intervening case law decided after his initial PCR proceedings "that would have actually adversely affected the outcome of [Brown's] conviction or sentence." Miss. Code Ann. § 99-39-27(9). If this intervening case law existed at the time of trial, it is unlikely that Brown would have been convicted of any crime and unlikely that he would have been sentenced to death. Thus, the successive-writ bar does not apply to deny relief under this claim; Brown has not waived this issue; and the claims are not *res judicata* barred.

Brown distinguishes between lay witnesses and forensic scientific testimony to analyze properly the potential applications of any statutory bars.

1. The claim about confronting forensic scientific witnesses is not barred.

Melendez-Diaz created the rule that forensic scientific evidence was subject to the right of confrontation. *Connors* and *Burdette* flowed from the precedent that *Melendez-Diaz* established. *Bullcoming* narrowed that rule to

allow testimony of surrogate analysts so long as they participated meaningfully in the creation of the report or in the testing itself. Finally, *Smith* created a rule that allowed confrontation of analysts who performed testing upon which a subsequent expert formed an independent opinion.

These are all intervening decisions which give rise to new claims that support relief for Brown. And each case was decided after the conclusion of direct appeal and initial post-conviction litigation involving Brown and his capital murder conviction and death sentence. Claims regarding all unfronted forensic scientific evidence survive the application of any statutory bar.

2. The claim about confronting witnesses who produced toxicological reports is not barred.

Importantly, *Smith* is also independently intervening case law because it overruled *Williams*. Under the *Williams* regime, Confrontation was not required for underlying testing if a subsequent witness used that testing as the basis for his own opinion. *Smith* reversed course on that subject and created a new rule that all forensic scientific evidence was subject to the Confrontation Clause, even if it merely forms the basis for the opinion of another witness. *Smith* is the strongest example of intervening case law.

At a minimum, the testimony of Steven Hayne is clearly unconstitutional, as it embodied the unfronted testimony of a toxicological

laboratory analyst. Thus, even standing alone, *Smith* is intervening law on this subject. After *Smith*, Brown has a new rule to support a new claim that the testimony of Steven Hayne should not have been allowed on the cause of death of Anthony Sims. Because *Smith* intervenes on the Hayne testimony, it independently exempts this claim from the time and successive-writ bars. Even if the lay testimony and the forensic scientific testimony of Rigel and Berry are somehow not able to overcome statutory bars, *Smith* mandates that the testimony of Steven Hayne gives rise to a viable claim for violation of Xavier Brown's rights to confrontation. *Smith* changed the course of law as it had existed under *Williams*; therefore, it is clearly intervening in a manner that allows a challenge to the testimony of Hayne to surmount any statutory bar.

To be sure, Brown's direct appeal counsel claimed that his confrontation rights were violated. Briefing was closed, however, before *Crawford v. Washinton* was decided. While *Crawford* was decided before the mandate on direct appeal, and thus should have applied fully, this Court did not address *Crawford* or the Confrontation Clause on direct appeal. Instead, the Court only analyzed Brown's claims under the rules of evidence.

Later, during Brown's initial petition for post-conviction relief handled by Bob Ryan, Brown could not use *Crawford* as the basis to raise a Confrontation Clause claim. This is so because any such claim would have

defied Mississippi caselaw at the time. For example, in *Gray v. State*, a capital defendant raised a Confrontation Clause claim against the admission of DNA testimony. 887 So. 2d 158, 172-173 (Miss. 2004). Gray challenged the testimony of a DNA analyst who had supervised the work of another analyst. *Id.* The Mississippi Supreme Court ruled that there was not a Confrontation Clause violation when a DNA analyst testifies under these circumstances.

Gray proceeded into federal court on this same claim, using *Crawford* as the basis. The federal court rejected Gray’s claims under *Crawford*, reasoning that an expert who testifies to the “laboratory reports, raw data and materials used to formulate expert opinions” is not barred by *Crawford*, which dealt with non-expert, unfronted testimonial hearsay. *Gray v. Epps*, 2008 WL 4793796 (5th Cir. 2008) (not officially reported). Based on this precedent, prior post-conviction counsel could not have relied on *Crawford* under this Court’s precedents—let alone foreseen that *Crawford* would be extended as it was ultimately.

Instead, *Melendez-Diaz* and *Bullcoming* changed the law on this subject—especially in Mississippi where *Crawford* was interpreted incorrectly. They are thus intervening decisions under Mississippi’s PCR Act. The plain, unambiguous language of § 99-39-27(9) defines an intervening decision justifying consideration of a successive PCR claim as a United States or Mississippi Supreme Court opinion “that would have actually adversely

affected the outcome of his conviction or sentence.” The proper analysis, therefore, is to analyze the substance of an intervening decision to determine whether its application would have changed the outcome of the petitioner’s case. *See, e.g., Gilliard v. State*, 614 So.2d 370, 374-75 (Miss. 1992) (determining that an intervening decision would have actually adversely affected Gilliard’s sentence because the Court could not determine beyond a reasonable doubt that the HAC aggravator limiting instruction in the intervening case would not have altered the jury’s verdict if it had been applied to the facts of Gilliard’s case).

The intervening decisions in *Melendez-Diaz* and *Bullcoming* are similar to intervening decisions in *Maynard v. Cartwright*, 486 U.S. 356 (1988) and *Clemons v. Mississippi*, 494 U.S. 738 (1990). While *Clemons* did not apply retroactively under the federal habeas standard, it was intervening under Mississippi’s standard because it corrected the Mississippi Supreme Court. *See, e.g., Gilliard*, 614 So. 2d at 375 (“This Court now concludes that the *Maynard/Clemons* cases would, as a matter of state law, be intervening decisions which would except the application of the successive writ bar of the Uniform Post-Conviction Relief Act and Mississippi Supreme Court Rule 22.”); *Nixon v. State*, 641 So. 2d 751, 755 n.7 (Miss. 1994) (“The intervening decision in *Gilliard* was *Clemons v. Mississippi*, 494 U.S. 738, 110 S.Ct. 1441, 108 L.Ed.2d 725 (1990) ... However, the Supreme Court’s decision did not announce

a new decision in *Clemons* for purposes of the *Teague* test; rather, it ‘follow[ed], *a fortiori*,’ from its previous decision in *Godfrey v. Georgia*, 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1990). Respect for finality of judgments had to yield to the necessity of correcting a decision erroneous at the time it was made[.]”).

Smith is also independently intervening case law under the PCR Act because it overruled *Williams v. Illinois*. Under the *Williams* regime, Confrontation was not required for underlying testing if a subsequent witness used that testing as the basis for his own opinion. *Smith* reversed course on that subject and created a new rule that all forensic scientific evidence was subject to the Confrontation Clause, even if it merely forms the basis for the opinion of another witness. *Smith* is the paradigmatic example of intervening case law.

Under *Smith*, the testimony of Steven Hayne is clearly unconstitutional, as it embodied the unfronted testimony of a toxicological laboratory analyst. Thus, even standing alone, *Smith* is intervening law on this subject that actually adversely impacts Brown’s conviction and sentence.

* * *

Because Xavier Brown’s conviction and sentence rest on unfronted testimony prohibited by the United States and Mississippi Constitutions, he is entitled to post-conviction relief. His conviction and sentence are supported largely by unconstitutional, unfronted testimonial hearsay. This

testimonial hearsay altered the outcome of the trial. Brown's conviction and the death sentence should be vacated. Alternatively, Brown should be allowed to present these claims to the trial court.

Ground IV: This Court Should Grant Post-Conviction Relief Based on the Cumulative Effect of the Evidence Undermining the Reliability of Brown's Conviction and Death Sentence

Even if any of the above claims and 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).

"The cumulative error doctrine stems from the doctrine of harmless error, codified under Mississippi Rule of Civil Procedure 61." *Ross v. State*, 954 So. 2d 968, 1018 (Miss. 2007). This doctrine provides appellate courts with discretion to determine whether an error, not otherwise reversible on its own, requires reversal when combined with other such errors "because of the resulting cumulative prejudicial effect." *Moffett v. State*, 49 So. 3d 1073, 1116 (Miss. 2010) (quoting *Byrom v. State*, 863 So. 2d 836, 847 (Miss. 2003). "The question ... is whether the cumulative effect of all errors committed during the trial deprived the defendant of a fundamentally fair and impartial trial." *Id.*

The U.S. Supreme Court has found that a reviewing court may consider the cumulative effect of constitutional errors. *See Chambers v. Mississippi*, 410

U.S. 284, 288 (1973) (viewing denial of right of confrontation in conjunction with claim concerning right to call witnesses); *see also id.* at 290, n.3 (“His claim, the substance of which we accept in this opinion, rests on the cumulative effect of those rulings in frustrating his efforts to develop an exculpatory defense”); *Taylor v. Kentucky*, 436 U.S. 478, 487, n.15 (1978) (“the cumulative effect of the potentially damaging circumstances of this case violated the due process guarantee of fundamental fairness”). Further, a reviewing court must also consider the cumulative effect of counsel’s deficient performance. *See Williams v. Taylor*, 529 U.S. 362 (2000); *Moore v. Johnson*, 194 F.3d 586 (5th Cir. 1999); *Henry v. Scully*, 78 F.3d 51 (2d Cir. 1996); *Harris ex rel. Ramseyer v. Wood*, 64 F.3d 1432 (9th Cir. 1995).

Furthermore, the assessment of the cumulative effect of errors must include the perjured testimony of Corey Johnson. On direct appeal, this Court recognized that Johnson committed perjury but found that his false testimony was harmless because it dealt with a collateral matter. *Brown v. State*, 890 So. 3d 901, 916 (¶¶ 52-55) (Miss. 2004). Even if the perjured testimony, standing alone, was insufficient to warrant reversal, it only adds to the overwhelming picture that Brown was convicted on the basis of the most dubious testimony.

Here, Brown’s constitutional rights to a fair trial were violated because “there is a reasonable probability that the verdict might have been different

had the trial been properly conducted.” *Kirkpatrick v. Blackburn*, 777 F.2d 272, 278-79 (5th Cir.1985). Brown was convicted only because trial counsel failed to take the obvious steps that any reasonable lawyer would have done. The only reasonable conclusion to draw is that Brown is entitled to post-conviction relief.

CONCLUSION

For the foregoing reasons, Xavier Brown requests that this Court grant post-conviction relief. At a minimum, under well-settled precedent, this Court should remand for an evidentiary hearing.

Respectfully submitted, this the 17th day of September 2024.

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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:

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It has also been sent via U.S. Mail to: Mr. Xavier Brown

Dated: September 17, 2024

/s/ Krissy C. Nobile
Krissy C. Nobile

Counsel for Petitioner Xavier Brown

IN THE SUPREME COURT OF MISSISSIPPI
No. 2017-DR-01373-SCT

XAVIER BROWN
Petitioner

v.

STATE OF MISSISSIPPI
Respondent

**RESPONSE IN OPPOSITION TO SUCCESSIVE PETITION
FOR POST-CONVICTION RELIEF**

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INTRODUCTION

Xavier Brown sits on death row after being lawfully convicted of capital murder for the 1998 murder-for-hire of Felicia Newell. Finally—more than seven years after the federal district court stayed Brown’s federal habeas case so that he could pursue alleged unexhausted state-law claims in this Court, and over six years after he was appointed counsel—Brown filed his successive PCR petition on September 17, 2024 (“Successive PCR”). This is Brown’s second specious attempt at PCR. He raises four claims, all of which are barred by the Uniform Post-Conviction Collateral Relief Act (“UPCCRA”) and/or fail to substantially show the denial of any right. So, Brown’s Successive PCR must be dismissed or denied under Mississippi Code Annotated section 99-39-27(5).

STATEMENT OF THE CASE

I. Relevant Facts

In 1998, Brown murdered Felicia Newell after being hired by her ex-husband, Anthony Sims (a/k/a Tariq Bey). *Brown v. State*, 890 So. 2d 901, 907 (Miss. 2004) (“*Brown I*”). Felicia was found shot to death by a nine-millimeter pistol while sitting in her car in the parking lot of her apartment complex. *Id.*

Sims had a history of threatening violence against Felicia, both during their marriage and after they divorced. *See id.*; Tr. 364, 564–67, 572–74. Before Felicia’s murder, Sims was charged with being a felon in possession of a weapon, and Felicia was set to be the prime witness at his upcoming trial. Tr. 661; *Brown v. State*, 948 So. 2d 405, 407 (Miss. 2006) (“*Brown II*”). Sims left Felicia a threatening voicemail before her murder, telling her “[t]here’s a contract out on you.” *Id.* Another individual’s voice was heard on the voicemail whispering statements to Sims. Tr. 385–87, 572–74.

Corey Johnson, who was engaged to Brown’s sister, was a witness to Felicia’s murder. *Brown I*, 890 So. 2d at 907. Johnson said Brown threatened to kill him if he told anyone what he saw. *Id.* At trial, Johnson testified that while he was walking to Brown’s brother’s house, Brown drove up and asked if he wanted to go for a ride. Tr. 480–83. The pair drove to Hattiesburg, and Brown parked in the parking lot of Felicia’s apartment building—about ten parking spaces away from Felicia’s car. Tr. 481–82, 519–20. According to Johnson, Brown was wearing “a long-sleeve black shirt and some black pants, and he had on some shades for a minute.” Tr. 483. While Felicia was sitting inside of her car, Brown put

on gloves and pulled a brown paper bag out from under the seat. Tr. 482, 519. Brown then got out of the car and walked to Felicia's car. Tr. 482, 519–520, 531. Johnson did not see Brown shoot Felicia, but he heard a gunshot and then Brown returned to the car. Tr. 482–83, 533–34. Johnson saw Felicia's body “kind of slumped over the console to the passenger's side of the car.” Tr. 556. When Brown returned to the car, he pointed a 9mm pistol at Johnson and told him to drive back to Laurel. Tr. 483, 491, 533, 539. When they arrived back in Laurel, Brown told Johnson that if he “said anything about anything that happened down there in Hattiesburg, that he was going to kill [him].” Tr. 484.

Two eyewitnesses—James and Susan Bigler—corroborated Johnson's testimony in several ways. James confirmed that the person who shot Felicia parked about ten parking spaces away from Felicia's car. Tr. 329–31. The Biglers reported “hearing a gunshot and seeing a black male, wearing gloves, walking away from [Felicia's] vehicle.” *Brown II*, 948 So. 2d at 406. James said that the “man had something concealed in his right hand and got into the passenger side of what appeared to be a Blue Cutlass.” *Id.* The driver of the vehicle was also wearing gloves. *Id.* Both James and Susan affirmatively stated that Sims was not the man

they saw walking away from Felicia's vehicle after the shooting. Tr. 337, 349.

Two days after Felicia was murdered, police found Sims dead of a prescription drug overdose in his hotel room. *Brown I*, 890 So. 2d at 907. They did not find a weapon or any other evidence connecting Sims to Felicia's murder either in his hotel room or in his vehicle. Tr. 398, 400–04.

Later, Donald Crosby told Felicia's friend that it was Brown—not Sims—who murdered Felicia. *Brown I*, 890 So. 2d at 907. Crosby testified at trial and, according to him, Brown told him that Sims paid him to murder Felicia, and that Sims committed suicide to avoid paying Brown additional money he owed. *Id.*; Tr. 421, 449. Crosby's testimony that Sims paid Brown to kill Felicia is consistent with the voicemail Sims left Felicia telling her there was a "contract" out on her. Tr. 385–87, 572–74. Brown told Crosby that he killed Felicia "so smooth that the person he was with [Johnson] didn't even know he had did it." Tr. 420. Crosby said that Brown bragged about killing Felicia, telling him that when he got back in the car with Johnson, he "didn't believe I had killed the bitch." Tr. 449.

II. Procedural History

Brown was convicted of capital murder and sentenced to death. *Brown I*, 890 So. 2d at 907. This Court affirmed Brown’s conviction and sentence in *Brown I*.

In *Brown I*, the Court

1. rejected Brown’s argument that he was deprived of a fair trial because too many members of the jury pool had ties to law enforcement and one juror had a friend whose daughter was murdered, *Id.* at 908–09;
2. affirmed the trial court’s holding that a juror who wished to be excused was not qualified to sit on the jury, *Id.* at 909–910;
3. held that the trial court did not err by refusing to give a cautionary instruction that Corey Johnson was an accomplice to the murder when there was no evidence that he was an accomplice, *Id.* at 910–11;
4. held that the trial court did not abuse its discretion by refusing to issue a limiting instruction after Johnson testified that Brown threatened to kill him if he said anything about him murdering Felicia, *Id.* at 912–13;
5. rejected Brown’s claim that the trial court improperly allowed hearsay testimony, *Id.* at 913–15;
6. rejected Brown’s argument that the trial court improperly allowed an investigator to give an incompetent expert opinion, *Id.* at 915–16;
7. held that Johnson’s perjured testimony regarding his place of employment did not warrant a new trial, *Id.* at 916–17;

8. held that Brown's conviction was supported by the evidence, *Id.* at 917;
9. rejected Brown's argument that the indictment failed to indict a death penalty eligible offense, *Id.* at 918;
10. held that it was not error to allow the State to use pecuniary gain to elevate the crime to capital murder as an aggravating factor, *Id.* at 918;
11. held that it was not error to allow the jury to consider Brown's prior manslaughter conviction as an aggravating factor, *Id.* at 918–19;
12. held the trial court did not err by excluding Brown's two jury instructions on aggravation and mitigation, *Id.* at 919–920;
13. held that the trial court did not err in instructing the jury it could not consider "mere sympathy," *Id.* at 920;
14. held that the trial court did not err by refusing to instruct the jury that aggravating instructions must outweigh the mitigating circumstances beyond a reasonable doubt, *Id.* at 921;
15. held that the trial court did not err by refusing to instruct the jury that there were three sentencing options available, *Id.* at 922;
16. held that there was no cumulative error because there were no errors in the trial court, *Id.*; and
17. held that Brown's death sentence was proportional, *Id.*

The Court denied rehearing, and the United States Supreme Court denied certiorari review. *Brown v. Mississippi*, 544 U.S. 981 (2005).

The Court likewise rejected all Brown's PCR claims in *Brown II*.

The Court held that

1. Brown's IATC claims were procedurally barred, but he nonetheless was not denied effective assistance of counsel during the guilt or penalty phase of his trial, *Brown II*, 948 So. 2d at 407–413;
2. Brown's claims that he was denied adequate notice of the specific offenses he had to defend against was procedurally barred, *Id.* at 414;
3. Brown's "death row phenomenon" claim was not cognizable, *Id.*;
4. Brown's proportionality claim was procedurally barred, *Id.* at 415;
5. Brown's actual innocence claim was procedurally barred, *Id.* at 415–16;
6. Brown's claim regarding perjured testimony was barred, *Id.* at 416;
7. Brown's claim regarding the State's alleged failure to preserve evidence was barred, *Id.*; and
8. Brown's cumulative effect claim was barred and alternatively without merit. *Id.* at 416–17.

The Court denied rehearing and the United States Supreme Court denied certiorari review. *Brown v. Mississippi*, 552 U.S. 848 (2007).

On July 25, 2007, Brown filed a habeas petition in the United States District Court for the Southern District of Mississippi. *Brown v. Epps*,

2:07-cv-00049-HTW (Doc. 10). On March 31, 2017—eight years after the case was fully briefed—the district court stayed the habeas case so that Brown could return to this Court to exhaust ineffective assistance claims under *Grayson v. State*, 118 So. 3d 118 (Miss. 2013), *overruled by Ronk v. State*, 391 So. 3d 785 (Miss. 2024). *Brown v. Epps*, 2:07-cv-00049-HTW (Doc. 55 at 5–10).

Finally—more than seven years after his habeas case was stayed and more than six years after he was appointed counsel—Brown filed the Successive PCR on September 17, 2024. In it, Brown argues that (1) he received ineffective assistance of counsel during the guilt phase of his trial, Succ. PCR at 40–79; (2) he received ineffective assistance of counsel during the penalty phase of his trial, Succ. PCR at 83–112; (3) he was denied the right to confront witnesses against him, Succ. PCR at 119–138; and (4) the cumulative effect of these errors undermined his conviction and sentence, Succ. PCR at 143.

SUMMARY OF THE ARGUMENT

In the Successive PCR, Brown merely asserts obviously barred claims. No exception offers him relief from the bars. And as Chief Justice Randolph has noted, failing to dismiss time and successive-writ barred

PCR motions “only encourage[s] death penalty litigators to file an endless number of pleadings.” *Bell v. State*, 66 So. 3d 90, 102 (Miss. 2011) (Randolph, J., concurring in part and dissenting in part). To that end, this Court has, in recent months, denied barred petitions under the UPCCRA without reaching the merits. *See, e.g.*, Order, *Jordan v. State*, No. 2022-DR-01243-SCT (Miss. Oct. 1, 2024); Order, *Smith v. State*, No. 2019-DR-01492-SCT (Miss. Feb. 4, 2025). The Court should do the same here and expressly hold that all of Brown’s claims are barred and decline to alternatively reach the merits of the Successive PCR. If the Court does alternatively reach the merits of Brown’s Confrontation Clause claims, however, Brown’s claims lack merit, and his Successive PCR should be dismissed or denied.

STANDARD OF REVIEW

Direct review is “the principal means of reviewing all criminal convictions and sentences.” Miss. Code Ann. § 99-39-3(2); *Moffett v. State*, 351 So. 3d 936, 942 (Miss. 2022). It is the “main event” in Mississippi’s appellate review process—not collateral review. *Brown v. State*, 798 So. 2d 481, 491 (Miss. 2001). Collateral review is limited to claims that could not have been or should not have been raised at trial or on direct review.

Prisoners often attempt to relitigate claims or resurrect others that have been waived. Collateral review is not a proxy for direct review. *See Cole v. State*, 666 So. 2d 767, 773 (Miss. 1995) (citing *Smith v. State*, 434 So. 2d 212, 215, n. 2 (Miss. 1983)). And as this Court said forty years ago, “[t]he fair and orderly administration of justice dictates that a person accused of a crime be afforded the opportunity to present his claims before a fair and impartial tribunal[,]” not “that he be given multiple opportunities to ‘take a bite at the apple.’” *Smith*, 434 So. 2d at 220. To that end, the UPCCRA prevents petitioners from taking multiple bites at the apple by limiting the scope of collateral review in four ways.

First, the UPCCRA uses a pleading standard that helps courts weed out claims that are not proper for post-conviction relief. The UPCCRA’s pleading standard is a heightened one that requires a “far more substantial and detailed threshold showing ...” than “a plaintiff in a civil action or ... the prosecution in a criminal indictment” to obtain leave. *See Ronk v. State*, 267 So. 3d 1239, 1247 (Miss. 2019) (citing *Neal v. State*, 525 So. 2d 1279, 1280-81 (Miss. 1987)). Under that standard, a prisoner may obtain relief “only if the application, motion, exhibits, and prior record show that [his] claims are [(1)] not procedurally barred and [(2)] that they ‘present a

substantial showing of the denial of a state or federal right.” *Id.* (quoting Miss. Code. Ann. § 99-39-27(5)).

Second, the UPCCRA limits collateral review with two statutory bars—thoroughly discussed below—that apply to PCR pleadings: the time and successive-writ bars. Prisoners under sentence of death have a one-year limitations period, which begins to run on the date the direct appeal mandate issues, for filing a PCR application in this Court. *See* Miss. Code Ann. §§ 99-39-5(2)(b), 99-39-7; *Puckett v. State*, 834 So. 2d 676, 677 (Miss. 2002). Additionally, prisoners may file only one PCR pleading. *See Brown v. State*, 255 So. 3d 141, 144 (Miss. 2017) (citing Miss. Code Ann. § 99-39-27(9); *Russell v. State*, 819 So. 2d 1177, 1178 (Miss. 2001)); *see also* Miss. Code Ann. § 99-39-23(6). The UPCCRA prohibits prisoners from filing second or successive PCR pleadings—save for limited exceptions. *See id.*

Third, the UPCCRA uses two statutory bars which, as thoroughly discussed below, limit collateral review to just those claims that could not have been or should not have been raised at trial or on direct review—section 99-39-21’s (1) waiver bar and (2) different theories bar. The UPCCRA’s waiver bar precludes review of claims that could have or should

have been raised at trial or during direct review. Miss. Code Ann. § 99-39-21(1); *Ronk*, 267 So. 3d at 1289–90. Its different theories bar prohibits collateral review of claims that are based on a factual issue that was litigated at trial or on direct appeal under one legal theory, from being relitigated in a collateral proceeding under a different legal theory that could have been raised on the same facts. *Id.* at § 99-39-21(2); *see, e.g., Jordan v. State*, 912 So. 2d 800 (2003); *Smith v. State*, 877 So. 2d 369, 379 (Miss. 2004). The waiver and different theories bars may be excused but only upon a showing and a finding of good cause *and* actual prejudice. *Id.* at § 99-39-21(4)-(6); *Ambrose v. State*, 323 So. 3d 482, 493 (Miss. 2021) (citing *Ronk*, 267 So. 3d at 1288).

Finally, the UPCCRA’s res judicata bar, section 99-39-21(3), prohibits collateral review of claims that were adjudicated or “that could have been raised in prior proceedings but were not[.]” *Ambrose*, 323 So. 3d at 493 (quoting *Brown v. State*, 306 So. 3d 719, 730 (Miss. 2020), *then* citing *Ronk*, 267 So. 3d at 1288). The only exceptions to the UPCCRA’s bars are those listed in the statute, *See Howell v. State*, 358 So. 3d 613–16 (Miss. 2023); *Ronk v. State*, 391 So. 3d 785, 794—and the statute does not contain an exception to the res judicata bar. This Court has held that

section 99-39-21’s exceptions to the waiver bar do not apply to the res judicata bar. *See Powers v. State*, 371 So. 3d 629, 688 (Miss. 2023) (citing *Walker v. State*, 863 So. 2d 1, 27 (Miss. 2003)).

BARS¹

I. All Brown’s claims are statutorily barred.

“Leave is granted only if the application, motion, exhibits, and prior record show [(1)] that the claims *are not procedurally barred* and [(2)] that they ‘present a substantial showing of the denial of a state or federal right.’” *Ronk*, 267 So. 3d at 1247 (emphasis added) (quoting Miss. Code Ann. § 99-39-27(5)). Brown must first show that all four of his claims are procedurally alive. *Powers v. State*, 371 So. 3d 629, 640 (Miss. 2023) (citing Miss. Code Ann. § 99-39-21(6)). That he cannot do. Each of Brown’s claims is time-barred, successive writ-barred, waiver-barred, and/or res judicata-barred. And no exception saves his claims.

¹ Brown argues that all his claims are “procedurally alive and meritorious,” Succ. PCR at 8–39, but he miscomprehends the UPCCRA by conflating claims under the UPCCRA and exceptions to the UPCCRA’s bars. All his claims are barred under the UPCCRA. The only potential “exception” he argues for his barred IATC claims is *Grayson v. State*, 118 So. 3d 118 (Miss. 2013)—which is no longer an exception at all, *Ronk v. State*, 391 So. 3d 785 (Miss. 2024).

A. Time Bar

Brown’s claims are untimely under the UPCCRA’s statute of limitations. Miss. Code Ann. § 99-39-5(2); *see Havard v. State*, 86 So. 3d 896, 899 (Miss. 2012). Capital petitioners’ PCR motions are subject to a one-year time bar. Miss. Code Ann. § 99-39-5(2)(b). “Failing to file a post-conviction claim within the time period amounts to a waiver of relief unless the claim presented meets an exception to the time bar.” *Jordan v. State*, 213 So. 3d 40, 42 (Miss. 2016) (citing M.R.A.P. 22(c)(5)(i)).

This Court has repeatedly held that time-barred claims must fall into one of the enumerated exceptions to be considered on the merits. *See, e.g., Patterson v. State*, 594 So. 2d 606, 608 (Miss. 1992). And the UPCCRA’s limitations period is a legislative enactment that prevents abuse in our judicial system, promotes the fair and equal administration of justice, gives effect to a legislative enactment, and conserves judicial resources. *See Bell*, 66 So. 3d at 102 (Randolph J., concurring in part). Enforcing the limitations period satisfies the Fourteenth Amendment’s Due Process Clause. *See id.* at 101.

Assuming section 99-39-5(2) applies to successive PCRs—as the State argues below that it does—the Successive PCR was filed nineteen

years too late and is therefore time-barred. Direct review proceedings from Brown's capital murder conviction ended, and this Court's decision affirming that conviction and his resulting death sentence became final, when the mandate issued on November 12, 2004. *See Puckett*, 834 So. 2d at 677. Brown filed his Successive PCR on September 17, 2024—nearly nineteen years after time expired. His claims are therefore barred, and he has not shown that any exception applies.

B. Successive Writ Bar

Brown's claims are also subject to the UPCCRA's successive-writ bar. Miss. Code Ann. § 99-39-27(9). Section 99-39-27(9) states that "[t]he dismissal or denial of an application under this section is a final judgment and shall be a bar to a second or successive application under this article." *Moffett*, 351 So. 3d at 942 (quoting Miss. Code Ann. § 99-39-27(9)). Failing to enforce the successive-writ and time bars effectively amends the UPCCRA to permit unlimited filings for an infinite amount of time. *See Bell*, 66 So. 3d at 102 (Randolph J., concurring in part).

This Court denied Brown's first PCR petition. *Brown II*, 948 So. 2d at 417. His current PCR petition is therefore successive and, absent an applicable exception, is barred as a successive writ. *Jordan*, 213 So. 3d at

42 (quotation omitted). As explained below, Brown has not shown that his claims are excepted from the successive-writ bar, so they are barred.

C. Waiver Bar

There are two ways claims can be waived. *See Powers*, 371 So. 3d at 642. First, claims that could have or should have been raised at trial or during direct review are barred. Miss. Code Ann. § 99-39-21(1). Second, the different theories bar prohibits collateral review of claims that are based on a factual issue that was litigated at trial or on direct appeal under one legal theory from being relitigated in a collateral proceeding under a different legal theory that could have been raised on the same facts. Miss. Code Ann. § 99-39-21(2); *see, e.g., Jordan*, 912 So. 2d at 809; *Smith*, 877 So. 2d at 379. The waiver and different legal theories bars may be excused but only upon a showing and a finding of good cause *and* actual prejudice. *Id.* at § 99-39-21(4)-(6); *Ambrose*, 323 So. 3d at 493 (citing *Ronk*, 267 So. 3d at 1288).

All of Brown's claims could have been raised at trial, on direct appeal, or during his initial PCR. *See* Miss. Code Ann. § 99-39-21(1). And any factual issue that Brown has litigated to support a legal claim cannot now be used to argue a different legal claim. *See* Miss. Code Ann. § 99-

39-21(2). Brown has not shown, or even tried to show, cause and actual prejudice, so his claims are barred under sections 99-39-21(1) & (2). *Thorson v. State*, 994 So. 2d 707, 720 (Miss. 2007).

D. Res Judicata Bar

The UPCCRA's res judicata bar prohibits collateral review of claims that were adjudicated or “that could have been raised in prior proceedings but were not[.]” *Ambrose*, 323 So. 3d at 493 (quoting *Brown*, 306 So. 3d at 730, then citing *Ronk*, 267 So. 3d at 1288). The res judicata bar “shall apply to all issues, both factual and legal,” that have been decided. Miss. Code Ann. § 99-39-21(3). Although the statute refers to claims that have been decided “at trial and on direct appeal,” this Court has held that the statutory res judicata bar applies to claims that were decided on direct appeal even if they were not decided at trial and “to claims that were considered and rejected in prior post-conviction proceedings.” *Powers*, 371 So. 3d at 660. “Rephrasing direct appeal issues for post-conviction purposes will not defeat the procedural bar of res judicata.” *Brown*, 306 So. 3d at 729. And the UPCCRA's res judicata bar “extends to ... claims that could have been raised in prior proceedings but were not.” *Powers*, 371 So. 3d at 672.

All of Brown’s claims either were or could have been raised in prior proceedings and are therefore res judicata barred.

II. *Howell and Ronk*

In 2010, this Court created a “fundamental rights” exception to the UPCCRA bars. *Rowland v. State*, 42 So. 3d 503, 507 (Miss. 2010). In 2013, the Court expanded *Rowland* and created an additional exception for claims that were not previously raised because of the ineffective assistance of post-conviction counsel. *Grayson*, 118 So. 3d at 126. After *Grayson*, successive PCR petitioners could raise statutorily barred claims under the judicially crafted exception for ineffective assistance of PCR counsel. *See id.*

But in 2023, this Court overruled *Rowland v. State*, 42 So. 3d 503 (Miss. 2010), *Rowland v. State*, 98 So. 3d 1032 (Miss. 2012), “and any other case in which, and to the extent that, we have held that the fundamental-rights exception [to the statutory bars] can apply to the substantive, constitutional bars codified by the Legislature in the [UPCCRA.]” *Howell v. State*, 358 So. 3d 613, 615 (Miss. 2023). The Court held that the UPCCRA’s bars are substantive and “cannot be judicially amended or ignored.” *Id.* at 615–16. *Howell* therefore “supports that no

judicially crafted exception—even for fundamental rights—applies to the UPCCRA’s substantive, constitutional bars....” *Id.* at 616.

In light of its decision in *Howell*, this Court overruled *Grayson* “to the extent it crafted an exception for ineffective-assistance-of-post-conviction-counsel claims in death-penalty cases.” *Ronk*, 391 So. 3d at 794. “To hold otherwise would be to ‘amend or ignore constitutionally sound law enacted by the Legislature,’ which we cannot do.” *Id.* (quoting *Howell*, 358 So. 3d at 616).

So, the ineffective assistance of PCR counsel is no longer an exception to the UPCCRA bars discussed above. And this Court no longer recognizes a fundamental rights exception. All of Brown’s claims are statutorily barred. And neither *Rowland* nor *Grayson* offer him relief from the bars.

III. All Brown’s pled “exceptions” to the UPCCRA’s statutory bars fail.

Brown makes several odd, misplaced, and/or erroneous arguments in support of his claim that the Successive PCR is not barred by the UPCCRA. The Court can dispel these quickly.

First, the legislature did not set out a time limitation for filing a successive PCR petition, Succ. PCR at 16–18, because prisoners are not

entitled to file successive PCR petitions at all. In fact, prisoners are “entitled to file only one petition for post-conviction, subject to limited exceptions.” *Brown v. State*, 255 So. 3d 141, 144 (Miss. 2017) (first citing Miss. Code Ann. §§ 99-39-23, 99-39-27(9) (Rev. 2015); then citing *Russell v. State*, 819 So. 2d 1177, 1178 (Miss. 2001)). Assuming section 99-39-5(2) applies to barred successive PCRs, the Successive PCR was filed nineteen years too late and is time-barred.

And Brown cannot rely on *Bell*. Succ. PCR at 17. *Bell* did not hold that the UPCCRA’s time bar does not apply to successive PCR motions. Instead, it said that “[n]oticeably absent from [section 99-39-27(9)] is a time limitation in which to file a second or successive application *if such application meets one of the statutory exceptions*.” *Bell*, 66 So. 3d at 93. *Bell* met the “intervening decision” exception with an *Atkins*² claim. Brown does not meet that exception. Or any other. So, his claim is successive writ-barred, regardless of whether there is a time limitation for filing successive writ-barred PCR motions. Anyway, the Court’s recent orders belie Brown’s claim that there is no limitations period for filing successive PCR motions. *See Jordan v. State*, 396 So. 3d 1157, 1158

² *Atkins v. Virginia*, 536 U.S. 304 (2002) (holding that the Eighth Amendment bars execution of the intellectually disabled).

(Miss. 2024) (finding Jordan’s fourth PCR motion was “subject to the one-year limitations period for capital cases” and was “barred as a successive writ”); *Manning v. State*, No. 2023-DR-01076-SCT, 2024 WL 4235459, at *1 (Miss. Sept. 16, 2024) (finding UPCCRA’s time, successive writ, and res judicata bars applicable to petitioner’s third PCR motion); Order, *Powers v. State*, No. 2023-DR-00895-SCT (Miss. Sept. 11, 2024) (holding that capital petitioner’s fourth PCR motion was “time and successive-writ barred”).

Second, Brown’s convoluted argument that the successive writ bar is a procedural bar while the time bar is not, lacks foundation. Succ. PCR at 12–16. In *Ronk* itself—the case in which this Court abrogated *Grayson*—the Court held that Ronk’s claims were successive writ- and time-barred because *Grayson* no longer provided an exception. *Ronk*, 391 So. 3d at 794.

Third, Brown’s claim that the Successive PCR is “second in time” but not “a successive writ” is nonsensical. Succ. PCR at 18–23. At the outset, that Brown’s first PCR was an “anomaly” according to him does not mean his Successive PCR is not in fact successive. Brown’s argument is based on his assertion that “his ineffective assistance of counsel claim

was unripe at the time his initial petition for post-conviction was relief was filed.” Succ. PCR at 18. That’s wrong. His first PCR counsel could have—and did—assert IATC claims relating to both the guilt and penalty phases of his trial. *See Brown II*, 948 So. 2d at 407–413. And because this Court no longer recognizes the *Grayson* exception to the bars, Brown’s argument fails. *See* Succ. PCR at 22–23. Besides that, even if Brown’s claims are not successive writ barred, they are all still time barred, waiver barred, and/or res judicata barred.

Fourth, Brown’s claim that the UPCCRA’s bars should not apply to the Successive PCR because he is “actually innocent” stems from a misunderstanding of the UPCCRA and its bars. Succ. PCR at 35–37. Even so, Brown does not raise an actual innocence claim—he only raised IATC claims and Confrontation Clause claims. That said, this Court recognized post-*Howell* that “the post-conviction relief act does not provide an exception to the procedural bars for claims of actual innocence.” *Powers v. State*, 371 So. 3d 629, 649 (Miss. 2023) (citing *Howard v. State*, 945 So. 2d 326, 369 (Miss. 2006) (recognizing actual innocence as an exception to procedurally defaulted *federal habeas* claims but not UPCCRA-barred claims)). So even if Brown had raised an actual

innocence claim, that claim would still not be excepted from the UPCCRA's bars simply by virtue of being an actual innocence claim—he must still meet one of the enumerated exceptions.

Fifth, Brown's contention that his "innocence claims" "fall within the interest of justice statutory exception and his claims are not barred" rests on a misapprehension of the UPCCRA. Succ. PCR at 37. Again, he did not raise an actual innocence claim. And what he calls the "interest of justice exception" is actually a ground for relief under section 99-39-5(1)(e). A claim for relief under that section, when raised in an untimely and successive PCR motion like Brown's, must still meet one of the UPCCRA's enumerated exceptions to the bars. Because Brown fails to meet any exception, his claims are barred.

Sixth, Brown's argument that *Ronk* should not apply to him retroactively fails—namely because *Ronk* was decided *before* the Successive PCR was filed. Succ. PCR at 33–35. *Ronk* overruled *Grayson* "to the extent it crafted an exception for ineffective-assistance-of-post-conviction-counsel claims in death-penalty cases." *Ronk*, 391 So. 3d at 794. *Ronk* was decided in January 2024—eight months *before* Brown filed his Successive PCR.

Another death row petitioner's (Anthony Carr) first PCR motion was filed twenty-three years before *Ronk* overruled *Grayson*. Yet the Mississippi Supreme Court just made clear that it would not hear Carr's barred claims based on *Ronk*'s holding. Order, *Carr v. State*, No. 2023-DR-00503-SCT (Miss. Jan. 16, 2025). So, no retroactivity problem exists. Anyway, *Ronk* did not create some new rule that warrants a retroactivity discussion. It simply overruled bad law and restored the legislatively enacted UPCCRA by acknowledging that the only exceptions to the UPCCRA's statutory bars are those found in the statute. *See Ronk*, 391 So. 3d at 794.

Finally, Brown fails to satisfy the newly discovered evidence exception to the statutory bars. Brown makes a confusing argument that his "claim" is excepted from the bars based on "newly discovered evidence." Succ. PCR at 37–39. His alleged "newly discovered evidence" is a report from a linguistic expert concluding that it was likely not Brown's voice on recordings played at trial. Succ. PCR at 37–39, Ex. 24. He does not identify which "claim" the newly discovered evidence exception allegedly applies to. Instead, Brown merely argues that his "claim is excepted from the statutory bars as it is newly discovered

evidence.” Succ. PCR at 37. He seemingly argued this as a standalone claim (a claim that does not exist) rather than tied it to a barred claim.

In any event, under the newly discovered evidence exception to the UPCCRA’s bars, Brown must “prove that the new evidence has been discovered since the close of trial and that it could not have been discovered through due diligence before the trial began.” *Havard v. State*, 312 So. 3d 326, 337 (Miss. 2020) (quotation omitted). He must also prove that the new evidence “is of such a 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.” *Powers*, 371 So. 3d at 659 (quoting § 99-39-5(2)(a)(i)). Brown can prove neither. Not only *could* he have obtained a linguistic expert before trial, he *did* obtain a qualified linguistic expert—Tom Owen. CP 279–286, 289; Succ. PCR Ex. 19. That the linguistic expert he previously retained did not provide the conclusion he wanted does not entitle him to relief. And even if the linguistic expert he retained over twenty years ago had provided the subject testimony at trial, a different result would not have been *practically conclusive* given the substantial evidence of Brown’s guilt presented at trial. *See Brown I*, 890 So. 2d at 917.

All four of Brown's claims are barred, and none of the exceptions saves his barred claims.

A. Brown's ineffective assistance claims are barred.

Brown's IATC claims necessarily rely on *Grayson's* abrogated exception for the ineffective assistance of PCR counsel in death penalty cases. *Ronk*, 391 So. 3d at 794. According to Brown, his first PCR counsel was ineffective for not raising his IATC claims, so his IATC claims are excepted from the UPCCRA's bars. Succ. PCR at 23–33. But Brown's discussion about PCR counsel's alleged incompetence is futile post-*Ronk*. Succ. PCR 28–35. The UPCCRA bars Brown's claims under the time bar, successive writ bar, res judicata bar, and the waiver bar. And *Grayson* is no longer an exception that saves his IATC claims from any of those bars.

Brown cannot rely on initial PCR counsel's alleged constitutionally ineffective assistance to overcome the UPCCRA's bars. And because *Grayson* is the only exception Brown articulates for why his IATC claims are not barred, Succ. PCR at 8–40, his IATC claims are barred.

B. Brown's Confrontation Clause claims are barred.

Brown argues that *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009), *Bullcoming v. New Mexico*, 564 U.S. 647 (2011), and *Smith v.*

Arizona, 602 U.S. 779 (2024) are all “intervening decisions which give rise to new claims that support relief for Brown” such that his Confrontation Clause claims are excepted from the waiver and successive-writ bars. Succ. PCR at 138. Not so. None of these cases treads new ground. Instead, each case represents the United States Supreme Court’s continued adherence to *Crawford v. Washington*, 541 U.S. 36 (2004). As such, none of these cases is an intervening decision that excepts Brown’s claims from the waiver and successive-writ bars under section 99-39-27(9).

As this court has held, an “intervening decision” is one that “announced a new rule of law, not an application of existing law.” *Powers*, 371 So. 3d at 689 (citing *Jackson v. State*, 860 So. 2d 653, 663 (Miss. 2003)). These post-*Crawford* cases just apply *Crawford* to the specific facts of each case—so they are not intervening decisions. In other words, *Melendez-Diaz*, *Bullcoming*, and *Smith* uphold *Crawford*’s requirement that the testimonial statements of an out-of-court witness are inadmissible unless (1) the witness is unavailable and (2) the defendant had a prior opportunity to cross-examine the witness. See *King v. State*, 23 So. 3d 1067, 1071 (Miss. 2007).

The “intervening decision” exception to the waiver and successive-writ bars applies if the petitioner can prove “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.” Miss. Code Ann. §§ 99-39-5(2)(a)(1), 99-39-27(9). The “intervening decision” exception applies only if the decision creates a new rule, recognizes a new right, or announces a sudden reversal of law pertinent to this issue. *Carr v. State*, 178 So. 3d 320, 322 (Miss. 2015); *See Powers*, 371 So. 3d at 689. A decision that recognizes, applies, or reaffirms existing law—like *Melendez-Diaz*, *Bullcoming*, and *Smith*—is not an intervening decision. *Id.*; *King*, 23 So. 3d at 1071–72.

In *Crawford*, the United States Supreme Court overruled *Ohio v. Roberts*, 448 U.S. 56 (1980), which held that an unavailable witness’s out-of-court statement could be admitted at trial if the statement bore “adequate indicia of reliability.” *Crawford*, 541 U.S. at 40. Instead, the *Crawford* Court held that the “testimonial statements” of out-of-court witnesses are prohibited *unless* (1) the out-of-court witness is unavailable

and (2) the defendant had a prior opportunity to cross-examine the out-of-court witness. *Id.* at 68.

Applying *Crawford*, the *Melendez-Diaz* Court held that a lab analyst's affidavit was a testimonial statement subject to *Crawford*'s requirement that to be admissible, (1) the authoring lab analyst must be unavailable and (2) the defendant had a prior opportunity to cross-examine the analyst about the affidavit. *Melendez-Diaz*, 557 U.S. at 311. The Court therefore declined to create an exception to *Crawford* for forensic evidence. *See id.*

The *Bullcoming* Court held that, under *Crawford*, the prosecution could not introduce a laboratory report containing testimonial statements "made in order to prove a fact at a criminal trial, through the in-court testimony of an analyst who did not sign the certification or personally perform or observe the performance of the test reported in the certification." *Bullcoming*, 564 U.S. at 657. Put differently, a surrogate lab analyst could not testify about a certification written by an out-of-court analyst unless he performed the test or observed the performance of the test. *Id.*

Finally, in *Smith*, the Court resolved confusion it created through its plurality opinion in *Williams v. Illinois*, 567 U.S. 50 (2012), about whether the Confrontation Clause is implicated when an expert relies on an absent analyst's statements to explain how he or she arrived at his or her own independent opinion. Applying *Crawford*, the *Smith* Court held that the Confrontation Clause was implicated where an expert conveyed an absent expert's opinion in support of his own opinion when the out-of-court statement only supports that independent opinion if true. *Smith*, 602 U.S. at 783.

Rather than creating a new rule, recognizing a new right, or announcing a sudden reversal of law pertinent to the issue, the United States Supreme Court only applied *Crawford* in its *Melendez-Diaz*, *Bullcoming*, and *Smith* decisions. So, none of these cases meets the "intervening decision" exception to the UPCCRA's time and successive-writ bars.

But even if this Court could find that *Melendez-Diaz*, *Bullcoming*, and *Smith* meet the UPCCRA's intervening decision exception, that exception only applies to the time and successive-writ bars. See *Powers*, 371 So. 3d at 689 (recognizing that the UPCCRA's intervening decision

exception applies to the time and successive writ bars but does not apply to the res judicata bar). Brown’s Confrontation Clause claims are also res judicata barred because, as explained below, he could have raised his claims in prior proceedings. And he neither argues nor meets any other statutory exception to the UPCCRA’s statutory bars.

As a side note, Brown’s reliance on *Connors v. State*, 92 So. 3d 676 (Miss. 2012) and *Burdette v. State*, 110 So. 3d 296 (Miss. 2013)—both direct review cases—is misplaced. Those cases do not address the “intervening decision” exception under the UPCCRA. Instead, *Connors* and *Burdette* just affirmed the well-established rule that “new” decisions apply retroactively when a prisoner’s case is not yet final when the decision is handed down. This Court noted in *Connors* that *Bullcoming* applied retroactively to Conner “*because Conner’s appeal was pending at the time of decision.*” *Id.* at 684 (emphasis added). Likewise, *Burdette* was decided *after Melendez-Diaz* and *Bullcoming*, so the Court applied those cases. *Burdette*, 110 So. 3d at 304. Unlike those appellants, Brown’s case was not pending on direct review when *Melendez-Diaz*, *Bullcoming*, or *Smith* were decided.

CLAIMS

As discussed above, each of Brown's claims is statutorily barred and no exception applies. This Court should therefore expressly hold that Brown's claims are barred and decline to reach the merits of his claims. As for Brown's Confrontation Clause claims, if the Court does alternatively address the merits, it should deny his claims because they are meritless.

I. Brown's IATC claims related to the guilt and penalty phases of his trial should be denied because the Court should no longer entertain barred IATC claims that rely on the abrogated *Grayson* exception.

Brown spills much ink arguing that his barred IATC claims have merit. Succ. PCR at 40–119. But the only excuse he gives for defaulting these IATC claims is one this Court no longer recognizes—the *Grayson* exception to the UPCCRA's bars. And this Court has recently suggested that it will no longer consider the merits of barred claims relying only on the abrogated *Grayson* exception. *See* Order, *Carr v. State*, No. 2023-DR-00503-SCT (Miss. Jan. 16, 2025) (ordering the State to move to lift the

*Rhines*³ stay in federal court because its *Ronk* decision abrogating the *Grayson* exception to the UPCCRA's bars became final).

The Court should deny Brown's IATC claims because he fails to meet section 99-39-27(5)'s first requirement—proving that his claims are procedurally alive. *See Corrothers v. State*, 255 So. 3d 99, 103 (Miss. 2017). State law therefore bars review of Brown's IATC claims.

As thoroughly discussed above, Brown's claims are barred under the UPCCRA. His IATC claims are time-barred, successive writ-barred, and waiver-barred. This Court denied his IATC claims in *Brown II*, 948 So. 2d at 407–413. The Court barred Brown's claims, but alternatively held that they lacked merit. *Id.* at 412–13. Though Brown's IATC claims were not the same as the IATC claims he raises in the Successive PCR, he could have and should have raised his claims in his first PCR. For that same reason, Brown's IATC claims are res judicata barred. *See Brown v. State*, 306 So. 3d 719, 730 (Miss. 2020). And there is no statutory exception to the res judicata bar.

Further, for the reasons outlined above, Brown fails to meet any exception to the UPCCRA's bars. The only exception he tries to argue for

³ *Rhines v. Weber*, 544 U.S. 269 (2005).

his IATC claims is PCR counsel's alleged constitutional ineffectiveness. *See* Succ. PCR at 23–33. But this Court no longer recognizes the *Grayson* exception to the UPCCRA's bars. *Ronk*, 391 So. 3d at 794. Post-*Ronk*, this Court has barred claims relying on the abrogated *Grayson* exception. *See, e.g., Hutto v. State*, 391 So. 3d 1192, 1195 (Miss. 2024). That PCR counsel was allegedly constitutionally ineffective for not raising these specific IATC claims in the first PCR is not an exception to the UPCCRA's bars post-*Ronk*.

And not only that, but this Court has begun ordering the State to move to lift the stay in federal habeas cases that were stayed to allow the petitioner to return to state court to exhaust claims where the petitioner's only pled exception to the bars was PCR counsel's alleged ineffectiveness under *Grayson*. *See Carr v. State*, No. 2023-DR-00503-SCT, Order (Jan. 16, 2025). The Court has therefore suggested that barred claims—where the only pled exception is the now-abrogated *Grayson* exception—should not be considered on the merits.

So, Brown's barred IATC claims should be denied because he failed to meet section 99-39-27(5)'s first requirement. These claims can no

longer be excepted under *Grayson*. And the Court need not reach the merits of these blatantly barred claims.

II. Brown’s Confrontation Clause claims should be denied because he failed to meet both requirements under section 99-39-27(5).

The Court should deny Brown’s Confrontation Clause claims because they do not meet either, much less both, requirements under section 99-39-27(5)—they (1) are not procedurally alive *and* (2) fail to substantially show the denial of a state or federal right. *Corrothers*, 255 So. 3d at 103. State law bars review of Brown’s Confrontation Clause claims. And not only that, but Brown’s claims do not substantially show a denial of his Sixth Amendment right to confront witnesses against him under *Crawford* and its progeny.

A. Brown’s Confrontation Clause claims are not procedurally alive.

Brown failed to meet section 99-39-27(5)’s first requirement—that his Confrontation Clause claims are procedurally alive.

As detailed above, these claims are successive writ- and time-barred. Further, his claims are waiver- and res judicata-barred because he could have and should have raised his Confrontation Clause claims in

prior proceedings. *See Ambrose*, 323 So. 3d at 493 (quoting *Brown*, 306 So. 3d at 730, *then* citing *Ronk*, 267 So. 3d at 1288).

Danny Riegel (Tr. 371–91), Steven Hayne (Tr. 453–73), and Mark Berry (Tr. 563–606) all testified at trial, and Brown could have and should have objected to their testimony on confrontation grounds then. By failing to object, he waived these claims. *See Rogers v. State*, 928 So. 2d 831, 838 (Miss. 2006). What’s more, *Crawford* was decided in March 2004—*before* Brown’s direct appeal was decided in September 2004. *Brown II*, 948 So. 2d at 901.

Brown also could have and should have raised his claims in his first PCR, which he filed after *Crawford* was decided. His claims are therefore res judicata barred.

And, for the reasons outlined above, Brown fails to meet any exception to the UPCCRA’s bars. Hoping to sidestep the bars, Brown argues that his Confrontation Clause claims are excepted under the “intervening decision” exception in section 99-39-27(9). According to him, *Melendez-Diaz*, *Bullcoming*, and *Smith* are all “intervening decisions” saving his claims from the UPCCRA’s bars. Succ. PCR at 138. But that is wrong. As detailed above, the United States Supreme Court did not

announce a new rule of law, recognize a new right, or suddenly reverse *Crawford*. *Melendez-Diaz*, *Bullcoming*, and *Smith* only apply and reaffirm *Crawford*. They represent the United States Supreme Court's continued application of *Crawford* to the specific facts of each case.

Because Brown's Confrontation Clause claims are barred and no exception applies, his claims are not "procedurally alive" under section 99-39-27(5). *Corrothers*, 255 So. 3d at 103. This Court should therefore deny Brown's claims under section 99-39-27(5).

B. Brown failed to substantially show the denial of his Sixth Amendment right to confront witnesses against him.

Even if the Court rejects binding precedent and decides that Brown's Confrontation Clause claims are excepted from the UPCCRA's bars based on the "intervening decision" exception, his claims should still be denied because they lack merit.

At the outset, Brown did not contemporaneously object to Officer Rigel's, Officer Berry's, or Dr. Hayne's testimony at trial. In fact, the record is devoid of any reference to an alleged violation of Brown's Sixth Amendment right to confront witnesses against him. He therefore waived this argument, and it is procedurally barred for that reason, in addition

to the reasons set forth above regarding the statutory bars. *See, e.g., Rogers v. State*, 928 So. 2d 831, 838 (Miss. 2006) (citing *Stockstill v. State*, 854 So. 2d 1017, 1023 (Miss. 2003) (holding that constitutional claims not raised at trial are barred from appellate review); *Contreras v. State*, 445 So. 2d 543, 544 (Miss. 1984) (same)). “Application of the contemporaneous objection rule is not diminished in a capital case.” *Rubenstein v. State*, 941 So. 2d 735, 751 (Miss. 2006) (citation omitted).

In any event, this Court has consistently applied *Crawford* and its progeny in assessing Confrontation Clause claims. The Sixth Amendment to the United States Constitution and Article 3, Section 26 of the Mississippi Constitution “guarantee a defendant in any criminal prosecution the right to confront and cross-examine witnesses against him or her.” *Galloway v. State*, 122 So. 3d 614, 636 (2013) (citations omitted). According to the United States Supreme Court, under the Confrontation Clause, “testimonial statements of witnesses absent from trial are admissible only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine the witness.” *Id.* (quoting *Crawford*, 541 U.S. at 36).

After *Crawford*, this Court has correctly analogized the facts of cases under review to those in *Melendez-Diaz* and *Bullcoming*. This Court has therefore held that “forensic laboratory reports created specifically to serve as evidence against the accused at trial are among the ‘core class of testimonial statements’ governed by the Confrontation Clause.” *Id.* (quoting *Grim v. State*, 102 So. 3d 1073, 1078 (Miss. 2012) (quoting *Melendez-Diaz*, 557 U.S. at 310)). And “the surrogate testimony of a lab analyst who did not sign the certification or perform or observe the test reported in the certification did not satisfy the Sixth Amendment right to confrontation.” *Grim*, 102 So. 3d at 1078 (quoting *Bullcoming*, 564 U.S. at 652) (internal quotations omitted). Most recently, the United States Supreme Court reaffirmed and applied *Crawford* in holding that the Confrontation Clause was violated when a testifying expert conveyed an absent expert’s opinion in support of his own opinion where the out-of-court statement only supported the expert’s opinion if true. *Smith*, 602 U.S. at 783.

Under *Crawford* and its progeny, neither Officer Rigel, Officer Berry, nor Dr. Hayne testified in violation of Brown’s Sixth Amendment right to confront witnesses against him. And should the Court find

otherwise, any error was harmless. *See Smith v. State*, 986 So. 2d 290, 300 (Miss. 2008) (applying the harmless error doctrine to Confrontation Clause claim).

1. None of Officer Rigel’s testimony implicated the Confrontation Clause.

Officer Rigel was the captain over the Hattiesburg Police Department detectives when he investigated Felicia’s murder. Tr. 372. He testified in depth about the crime scene and his discovery of evidence at the scene. Tr. 372–76. He collected a projectile and a shell casing at the crime scene. Tr. 375–76; Tr. Exs. 4, 9. According to Officer Rigel, he submitted the shell casing to the Mississippi Crime Lab, which “to [his] knowledge” was unable to identify the gun they were fired from. Tr. 378. When asked whether the Crime Lab determined whether the casing was fired from a specific weapon, he responded, “not that I know of” and “not that I’m aware of.” Tr. 380, 387.

Brown did not contemporaneously raise a Confrontation Clause objection to Officer Rigel’s testimony about his lack of knowledge of the crime lab’s ballistic testing at trial. He therefore waived this argument, and it is procedurally barred. *See, e.g., Rogers*, 928 So. 2d at 838 (citing *Stockstill*, 854 So. 2d at 1023 (holding that constitutional claims not

raised at trial are barred from appellate review); *Contreras*, 445 So. 2d at 544 (same).

Bars notwithstanding, it is elementary that the Confrontation Clause only applies to the “testimonial hearsay.” *Smith*, 602 U.S. at 784–86. And “in that two-word phrase there are two limits”: (1) the Confrontation Clause applies only to “testimonial statements” of “witnesses” who “bear testimony;” and (2) it “bars only the introduction of hearsay—meaning, out-of-court statements offered to prove the truth of the matter asserted.” *Id.* (internal quotations omitted).

First, the Confrontation Clause “bars the admission at trial of ‘testimonial statements’ of an absent witness unless she is ‘unavailable to testify, and the defendant has had a prior opportunity’ to cross-examine her.” *Id.* at 784 (quoting *Crawford*, 541 U.S. at 53–54). The United States Supreme Court has identified the “core class of testimonial statements” covered by the Confrontation Clause, which includes

ex-parte in-court testimony or its functional equivalent—that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially; extrajudicial statements...contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions; statements that were made under circumstances

which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.

Melendez-Diaz, 577 U.S. at 309–10 (quoting *Crawford*, 541 U.S. at 51–52). *Crawford* therefore applies to lab analysts and their reports. *Id.* at 311; *Bullcoming*, 564 U.S. at 652; *Smith*, 602 U.S. at 783.

Officer Danny Rigel’s testimony simply did not contain any “testimonial statements” made by an out-of-court witness. He did not testify that anyone at the Crime Lab *told* him the shell casing was not matched to a specific weapon or that he reviewed a report to that affect. In fact, he did not relay any testimonial statements at all. Instead, he merely stated that he had no knowledge of a match. Tr. 378, 380, 387. Because no testimonial statements were presented against Brown, the Confrontation Clause was not implicated.

Second, the Confrontation Clause only bars admission of hearsay. *Smith*, 602 U.S. at 785. “When a statement is admitted for a reason unrelated to its truth, we have held, the Clause’s role in protecting the right of cross-examination is not implicated.” *Id.* (quotation omitted). Here, Officer Rigel relayed no hearsay. He did not relay any declarant’s out-of-court statement, much less an out-of-court statement for the truth of the matter asserted. *See* M.R.E. 801(d)(a). Instead, he only said the

shell casing had not been matched to a specific weapon “to his knowledge.” In other words, he did not know. And he did not testify that his lack of knowledge stemmed from his reliance on any out-of-court statement.

Because Officer Rigel’s testimony contained no out-of-court statement at all, he conveyed no hearsay—much less testimonial hearsay. The Confrontation Clause was therefore not implicated.

2. Neither Officer Berry’s testimony nor Dr. Haynes’s testimony implicated the Confrontation Clause and, even if it did, any error was harmless given the overwhelming evidence of Brown’s guilt.

Brown argues that Officer Mark Berry and Dr. Steven Hayne testified in violation of his Confrontation Clause right. But neither witness’s testimony implicated the Confrontation Clause and, even if it did, any error was harmless because “it appears beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.” *Willis v. State*, 352 So. 3d 602, 614 (Miss. 2022).

i. Officer Berry’s Testimony

Officer Mark Berry was a detective for the Hattiesburg Police Department when Felicia was murdered. Tr. 563. He helped Officer Rigel

process the scene, collected evidence, spoke to witnesses, and investigated Felicia's murder. Tr. 563–82, 595–609. Officer Berry testified that detectives recovered a shell casing from Felicia's vehicle and a shell casing from Sims's vehicle. Tr. 571, 607. Those shell casings were sent to the crime lab for analysis, and, according to the crime lab report, those shell casings were not fired from the same gun. Tr. 571, 607. Officer Berry referenced the lab report, but it was not admitted into evidence at trial.

ii. Dr. Hayne's Testimony

Steven Timothy Hayne, M.D.—a medical examiner for the State of Mississippi at the time—testified about the autopsies he performed on Felicia and Sims. Tr. 453–71. Dr. Hayne testified that during Sims's autopsy, he collected fluids and submitted them to the state crime lab for analysis. Tr. 463. Some of those fluids were also submitted to the National Medical Services Laboratory “for quantitation of toxicology.” Tr. 463.

According to Dr. Hayne, he submitted the fluids for toxicology because he “did not find evidence of disease or injury that would produce death,” and he “felt very strongly that it was probably going to be a

toxicological death involving drugs or medications.” Tr. 463. Based on the toxicology report from the National Medical Services Laboratory, he determined that Sims died of a “Restoril drug overdose.” Tr. 464. The state crime lab’s testing revealed that Benzodiazepine, Restoril, Serax, and Valium were in Sims’s system when he died. Tr. 465. Neither the state crime lab’s report nor the National Medical Services Laboratory’s report was admitted into evidence at trial.

iii. Brown waived his Confrontation Clause claims by failing to contemporaneously object at trial.

Again, Brown failed to make contemporaneous Confrontation Clause objection to either Officer Berry’s testimony or Dr. Hayne’s testimony about the results of lab testing at trial. He therefore waived this argument, and it is procedurally barred. *See, e.g., Rogers*, 928 So. 2d at 838 (citing *Stockstill*, 854 So. 2d at 1023 (holding that constitutional claims not raised at trial are barred from appellate review); *Contreras*, 445 So. 2d at 544 (same)).

iv. The Confrontation Clause was not implicated and, even if it had been, any error was harmless.

Bars notwithstanding, Brown is not entitled to relief. The Confrontation Clause protects a defendant’s “right to be confronted with the witnesses *against* him....” *Crawford*, 541 U.S. at 54 (quotation omitted) (emphasis added). “It applies to witnesses *against* the accused—in other words, those who bear testimony.” *Id.* at 51 (quotation omitted) (emphasis added). In *Melendez-Diaz*, the United States Supreme Court emphasized that the “Sixth Amendment guarantees a defendant the right to be confronted with witnesses *against him*.” *Melendez-Diaz*, 557 U.S. at 313 (emphasis in original). The Court then held that the lab analyst who analyzed the substance seized from Melendez-Diaz and determined that it was cocaine was a witness *against* Melendez-Diaz because the lab report identifying the substance as cocaine was necessary for his conviction. *Id.* Citing *Melendez-Diaz*, this Court has held that a witness provides testimony against the defendant when the witness “provided one fact necessary for his conviction....” *Connors*, 92 So. 3d at 683.

The *Melendez-Diaz* Court noted that “there is not a third category of witnesses, helpful to the prosecution, but somehow immune from confrontation.” *Id.* at 314. But here there was no out-of-court witness who “bore testimony against” Brown at all. Neither the ballistic report Officer Berry referenced, nor the toxicology reports Dr. Hayne referenced, provided “*a fact necessary for [Brown’s] conviction.*” *Melendez-Diaz*, 557 U.S. at 313; *Conners*, 92 So. 3d at 683 (emphasis added). Instead, the lab report Officer Berry referenced compared a casing found in *Sims’s* vehicle to the casing found in Felicia’s vehicle. They were not fired from the same weapon. This neither inculcates nor exculpates Brown. This is especially so given Johnson’s, Crosby’s, and the Biglers’s testimony against Brown. *Brown I*, 890 So. 2d at 917. Likewise, Dr. Haynes testified about toxicology reports analyzing drugs found in *Sims’s* system—not Felicia’s. These toxicology reports were not testimonial statements against Brown. And Dr. Hayne’s testimony about *Sims’s* cause of death was unnecessary for Brown’s conviction.

But even if this Court finds that Brown’s right to confront witnesses against him was violated, any error in admitting Officer Berry’s testimony about the ballistic report and/or Dr. Hayne’s testimony about

the toxicology report was harmless. In accordance with *Chapman v. California*, 386 U.S. 18 (1967), this Court recognizes “that the admission of statements made by a non-testifying witness in violation of the Confrontation Clause can be harmless error.” *Smith v. State*, 986 So. 2d 290, 300 (Miss. 2008) (citations omitted). “An otherwise valid conviction should not be set aside if the reviewing court may confidently say, on the whole record, that the constitutional error was harmless beyond a reasonable doubt.” *Id.* (quoting *Delaware v. Van Arsdall*, 475 U.S. 673, 681 (1986) (internal quotations omitted)).

“The well-settled standard for determining whether a constitutional error is harmless is whether it appears beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.” *Willis v. State*, 352 So. 3d 602, 614 (Miss. 2022) (quotation omitted). “Harmless errors are those ‘which in the setting of a particular case are so unimportant and insignificant that they may, consistent with the Federal Constitution, be deemed harmless, not requiring the automatic reversal of the conviction.’” *Connors*, 92 So. 3d at 684 (quoting *Chapman*, 386 U.S. at 22). So, an error is harmless when

the State presents other overwhelming evidence of a defendant's guilt. *Id.*

In the *Willis* case, Willis shot his estranged girlfriend, Tamaneka Alexander, to death in front of her young daughter. *Willis*, 352 So. 3d at 606. Willis's friend, Martin, witnessed the murder. *Id.* at 606–07. During Captain Williams's first interview with Martin, Martin maintained that Willis and Alexander were involved in an altercation before the murder. *Id.* at 607. During a second interview with Martin, Martin stated that Willis shot Alexander. *Id.* The trial court denied Willis's request to play a recording of Captain Williams's testimony from the preliminary hearing to impeach his inconsistent testimony about Martin's second interview. *Id.* at 607–09.

On appeal, this Court held that a Confrontation Clause violation occurred when the trial court limited Willis's cross-examination of Captain Williams. *Id.* at 614. But it concluded that the error was harmless because even absent Captain Williams's testimony, "a reasonable juror could have concluded from the remaining evidence presented by the State, particularly [Alexander's daughter's] testimony, that Willis shot and killed Tamaneka Alexander without justification or

excuse.” *Id.* at 614–15. The Court noted the “devastating” evidence against Willis—Alexander’s daughter’s testimony, text messages between Willis and Alexander, and a ballistic expert’s testimony. *Id.* at 615. “Had the State rested after the testimony of [Alexander’s daughter] and its presentation of the text messages, a conviction would have been almost certain.” *Id.* And even though Captain Williams’s testimony helped the jury understand how the investigation unfolded, “his testimony was not indispensable to Willis’s conviction and was not nearly as important as that given by [Alexander’s daughter] and the text messages.” *Id.*

So is the case here. Absent Officer Berry’s testimony about the ballistic report and Dr. Hayne’s testimony about Sims’s toxicology report, Brown still would have been convicted of capital murder. Thus, even if the Court finds that Brown’s Confrontation Clause right was violated when Officer Berry testified about the ballistic report’s conclusion that the shell casings recovered from Sims’s and Felicia’s vehicles were fired from different guns and Dr. Hayne’s testimony that Sims died of a Restoril overdose, any error was harmless. Based on other evidence presented at trial—especially the testimony of three independent

witnesses—it “appears beyond a reasonable doubt that the alleged Confrontation Clause violation did not contribute to the verdict obtained.” *Id.* at 614.

At trial, the State presented overwhelming evidence of Brown’s guilt. On direct appeal, this Court determined that the State presented sufficient evidence of Brown’s guilt—not even including Officer Berry’s testimony or Dr. Hayne’s testimony in that assessment. *Brown I*, 890 So. 2d at 917. According to this Court, the State “produced three independent witnesses who testified against Brown”—Johnson, who offered eyewitness testimony because he was with Brown when he murdered Felicia; Donald Crosby, to whom Brown bragged that he killed Felicia and admitted that Sims hired him to kill Felicia; and James Bigler, who “pinpointed two males at the scene when Felicia was killed, corroborating Johnson’s story.” *Id.*

Brown makes much out of the fact that without Officer Berry’s testimony, “there was no forensic evidence to exclude Sims as the shooter,” Succ. PCR at 134, while ignoring the fact that Johnson and Crosby both testified that *Brown* was the shooter. Johnson witnessed the murder. *Brown I*, 890 So. 2d at 907. And Brown bragged to Crosby that

he murdered Felicia and said Sims paid him to do it. *Id.* What's more, James and Susan Bigler both testified that Sims was *not* the shooter. Tr. 337, 349. So, Officer Berry's testimony that the shell casing found in Sims's vehicle was fired from a different gun than the shell casing found in Felicia's vehicle did not contribute to the verdict—that Brown involved Johnson and Crosby sank his defense.

Brown similarly downplays Crosby's testimony as it relates to Sims hiring Brown to kill Felicia, claiming that “without the testimony from Hayne about Sims' cause of death, the outcome of the trial would have been different.” Succ. PCR at 135. That's false. Brown told Crosby that Sims hired him to kill Felicia—and that he committed suicide to avoid paying that debt. *Brown I*, 890 So. 2d at 907. Crosby's testimony was consistent with the voicemail Sims left Felicia telling her there was a “contract” out on her. Tr. 385–87, 572–74.

As was the case in *Willis*, the alleged Confrontation Clause errors here were harmless given that “a conviction would have been almost certain” absent Officer Berry's and Dr. Hayne's complained of testimony. *Willis*, 352 So. 3d at 615. Neither Officer Berry's nor Dr. Hayne's testimony “was ... indispensable to” Brown's conviction and “was not

nearly as important as that given by” Johnson, Crosby, and the Biglers. *Id.* The testimony of these three witnesses alone provided overwhelming proof of Brown’s guilt. So even absent Officer Berry’s testimony and Dr. Hayne’s testimony, Brown still would have been convicted. Any Confrontation Clause error was harmless. Brown is not entitled to relief.

III. No reversible error was committed, so there is no cumulative error.

Brown claims that even if this Court finds that his claims are “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.” Succ. PCR at 143. He argues, in essence, that this Court should reverse his conviction and sentence under the cumulative error doctrine. But each of his claims have been refuted by the substantial authority outlined above. “Where there is no reversible error in any part, ... there is no reversible error to the whole.” *Doss v. State*, 709 So. 2d 369, 401 (Miss. 1997) (quotation omitted). No error was committed, so there can be no cumulative error.

CONCLUSION

Both the UPCCRA and this Court's precedent are clear: PCR is only available to petitioners who show their claims are not statutorily barred and that their claims "present a substantial showing of the denial of a state or federal right." Miss. Code Ann. § 99-39-27(5); *Powers*, 371 So. 3d at 642. Brown makes neither showing, much less both, so he is not entitled to post-conviction relief. The Court should expressly bar Brown's claims because all are time-barred, successive writ-barred, waiver-barred, and/or res judicata-barred, and no exception applies. And Brown's Confrontation Claim claims alternatively lack merit. This Court should therefore dismiss or deny the Successive PCR.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Allison Kay Hartman, certify that I have electronically filed this document with the Clerk of the Court using the MEC system, which sent notification to all counsel of record.

THIS, the 13th day of February, 2025.

/s/ Allison Kay Hartman
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**IN THE SUPREME COURT OF MISSISSIPPI
NO. 2017-DR-01373-SCT**

XAVIER BROWN

Petitioner

v.

STATE OF MISSISSIPPI

Respondent

**REPLY IN SUPPORT OF PETITION
FOR POST-CONVICTION RELIEF**

ORAL ARGUMENT REQUESTED

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REQUEST FOR ORAL ARGUMENT

Xavier Brown has never had any meaningful opportunity to seek relief in state court. But his constitutional claims strike at the core of why we have a post-conviction process. Brown did not kill Felicia Newell and he certainly did not enter, and could not have entered, a murder-for-hire scheme to murder her. Oral argument will be beneficial to unbraiding the State's tortured reading of the PCR Act and showing why the Court has a duty to correct the repeated deprivation of Brown's constitutional rights.

Oral argument is also proper under MRAP 34(a), which provides: "Oral argument will be had in all death penalty cases." In Mississippi, capital post-conviction cases are "part[] of the death penalty appeal process." *Jackson v. State*, 732 So. 2d 187, 190 (Miss. 1999); *Puckett v. State*, 834 So. 2d 676, 678 (Miss. 2002) (same). Thus, capital post-conviction cases should properly fall within MRAP 34(a)'s grant of oral argument in "all death penalty cases."

INTRODUCTION

Because the State cannot address the merits of Xavier Brown’s claims, the State relies only on procedural hurdles and a misunderstanding of the PCR Act to imply this Court is powerless to correct constitutional errors. But this Court has and will correct an error when, as here, the Court is faced with manifest injustice. *See, e.g., Howell v. State*, 358 So. 3d 613, 616 (Miss. 2023); *Hathorne v. State*, 376 So. 3d 1209 (Miss. 2023) (refusing to apply the waiver bar in post-conviction); *Minor v. State*, 402 So. 3d 1272, 1281 (Miss. 2025).

The evidence presented in post-conviction shows that Brown did not kill Felicia Newell and certainly did not enter a murder-for-hire scheme to murder her. Below are a few key examples of evidence developed in post-conviction that the State ignores:

- According to four disinterested witnesses (James Bigler, Susan Bigler, Arcella Trimble, and Gemma Anderson), Brown did *not* meet the physical description of the shooter.
- A car belonging to Anthony Sims’ cousin was at the crime scene.
- Brown could not have participated in the phone call that mentions a “contract.” Brown was in prison serving a sentence on an unrelated charge at the time. Scientific analysis also confirms that Brown did not take part in the phone call.
- There is no connection between Brown and Sims. But both Darwin Brown and Bobby Sims confirm there was a connection between Sims and Corey Johnson.
- Corey Johnson lied repeatedly. He lied about seeing the victim slumped over in her car, and he lied on the stand about his employment. Corey’s testimony also deviated in material respects from his statements to the police, and his testimony was at odds with the statements of disinterested eyewitnesses. Corey also had a heated argument with Brown before going to the police.

- Donald Crosby is a convicted felon who lied on the stand and was engaged in criminal conduct.

The State also cannot dispute the merits of Brown's claims under the Confrontation Clause. Under recent case law from the U.S. Supreme Court, two categories of forensic scientific testimony would have been the subject of successful Confrontation Clause objections at Brown's trial: (i) testimony about the cause of death of the main suspect, Anthony Sims; and (ii) testimony about scientific testing conducted on firearms or firearm projectiles. The State's arguments to the contrary, *see* State Br. 50, 51, were expressly argued by the government in *Smith v. Arizona*, 602 U.S. 779 (2024) and rejected by the U.S. Supreme Court.

Taken together, the cumulative error—including ineffective assistance of counsel, improper and perjured testimony, and Confrontation Clause violations—deprived Brown of a fair trial. *See, e.g., Andrew v. White*, 145 S. Ct. 75, 78 (2025) (holding that when evidence is so duly prejudicial it renders the trial fundamentally unfair, the Due Process Clause provides a mechanism for relief). The prejudice from these compounded violations was overwhelming. Brown is entitled to post-conviction relief, including an evidentiary hearing.

REPLY ARGUMENT

I. The State Does Not Question that Xavier Brown Suffered a Substantial and Prejudicial Deprivation of His Constitutional Rights; It Simply Believes This Court is Powerless to Prevent a Miscarriage of Justice.

Under well-settled law, the failure of a party to deny allegations or raise a defense is considered an admission or a waiver of a defense. *See generally* Rule 8(d), MRCP (“Averments in a pleading to which a responsive pleading is required, other than those as to the amount of damages, are admitted when not denied in the responsive pleading.”). Nowhere does the State contest the factual allegations supporting the claims regarding the denial of the right to the effective assistance of counsel at both phases of Brown’s capital trial. In fact, it expressly limited its response to alleged statutory bars: “So, Brown’s barred IATC claims should be denied because he failed to meet section 99-39-27(5)’s first requirement.” Resp. at 40. Thus, according to the State, innocence and deprivation of constitutional rights are irrelevant.

Though not contesting the merits of the IATC claims, the State raises several procedural defenses. Brown anticipated these defenses in his successive petition and refers the Court to his discussion set forth there. In this reply, he focuses on specific points raised by the State and reinforces arguments raised earlier.

The State begins with an assertion that the successive petition fails to meet the statute of limitations. Resp. at 20. But as this Court has pointed out, there is no statute of limitations for successive petitions when a petitioner can satisfy an exception to the bar

against successive petitions. *See Bell v. State*, 66 So. 3d 90, 93 (¶ 6) (Miss. 2011). This Court also continues to recognize equitable tolling in post-conviction cases. *Howell v. State*, 358 So. 3d 613, 616 (Miss. 2023)

In *Puckett v. State*, 834 So. 2d 676, 677 (Miss. 2002), the Court granted equitable tolling because the actions of post-conviction counsel made it impossible for Puckett to file a petition within the one year allowed in capital cases. The Court noted that the Legislature had enacted a one-year statute of limitations for filing a post-conviction claim because it “[r]ecogniz[ed] that death eligible inmates are, under these statutes and under [*Jackson*], assured competent counsel” As the Court observed, “[a]n indigent inmate under a sentence of death is entirely dependent upon state-appointed counsel to pursue his post-conviction efforts” in holding that “[p]ursuant to this Court’s decision in [*Jackson*], Puckett was clearly entitled to appointed competent and conscientious counsel to assist him with his pursuit of post-conviction relief.” *Puckett*, 834 So. 2d at 678, 680.¹

As Brown explains, he did not receive anything close to “competent and conscientious counsel” in his first attempt to obtain post-conviction relief. Instead, the former director of the Office of Capital Post-Conviction Counsel, who was mentally deteriorating, did not expend resources on the case, had no direct involvement on the case but insisted that staff focus only on record-based issues, haphazardly assigned the office

¹ With respect to equitable tolling, the State nowhere challenges the impact of the COVID epidemic, changes in staffing, and personal problems that required Mr. Brown to seek new experts.

fiscal worker to lead the investigation, and did not assign a staff attorney to the case until two weeks before the petition was due. *See generally* Pet. at 23-33. Brown has presented a wealth of uncontested evidence that he was wrongly convicted but, at the time of the initial petition, counsel could muster only two paragraphs of boilerplate to challenge his conviction.

The State does not contest any of these allegations about the poor quality of Brown's representation; instead, it believes the Court should look the other way regardless of the consequences. As the Court made clear in *Howell*, the Court retains authority to draw on equitable considerations to correct a grave injustice.

The State also relies on the successor bar. In particular, it asserts that in *Ronk v. State*, 391 So. 3d 785 (Miss. 2024), the Court overruled an exception to the successor bar set forth in *Grayson v. State*, 118 So. 3d 118 (Miss. 2013). What the State cannot dispute, though, is that even after *Ronk*, there remains a *right* to effective post-conviction counsel; the only question is whether there is a remedy. As Brown pointed out, the Court could effectuate the right and respect the statutory limits if it recognizes that a challenge to the performance of initial PCR counsel is not ripe until after an initial petition is filed. The State derides this position as “nonsensical.” Resp. at 27. But this Court has taken such a purportedly “nonsensical” approach for claims involving competency to be executed and guilty pleas. It does not treat second-in-time petitions in those circumstances as “successive.” Pet. at 18-23. Likewise, in the federal system, the Supreme Court has embraced this approach in

recognition of the fact that some types of claims may not be ripe at the time an initial petition is filed and thus it would be unfair to hold a petitioner to heightened requirements for filing successive petitions.

The State also overlooks the fact that this Court has taken steps, even before *Grayson*, to ensure that the provision of post-conviction counsel was meaningful. In *Jackson v. State*, 732 So. 2d 187 (Miss. 1999), this Court observed that a death-sentenced prisoner was not learned in the law, was often handicapped by psychological or intellectual disabilities, and lacked the means to gather evidence to comply with the strict pleading requirements of the UPCCRA. The Court later recognized that a petitioner should not suffer because counsel failed to satisfy basic requirements. And as noted, the Court recognizes equitable tolling. *See Puckett, supra*. In *Chase v. State*, 873 So. 2d 1013, 1019 (Miss. 2004), the Court declined to dismiss a successive post-conviction petition “due to errors by his counsel.” And in *Goodin v. State*, the Court ordered a second evidentiary hearing due to a failure by Robert Ryan, the same attorney responsible for Mr. Brown’s petition. *See Pet.* at 24-26.

Similarly, in other cases before *Grayson*, the Court recognized its authority to assess the performance of initial post-conviction counsel. *See Stevens v. State*, No. 2011-DR-00637-SCT (order filed May 5, 2011) (“we have recognized the right [to effective PCR counsel] since 1999, in *Jackson v. State*, 732 So. 2d 187 (Miss 1999), and have granted claims of ineffective assistance of post-conviction counsel) (emphasis added); *Simmons v. State*, No.

2012-DR-00980-SCT (order filed June 20, 2012) (denying merits of claim on ineffective PCR counsel).

The State also overlooks the fact that on several occasions it has called on the courts of this State to effectuate the guarantee of adequate counsel, going so far as to ask to have attorneys removed even if a petitioner desired the attorney, if a court determined that those attorneys lacked the necessary qualifications. For instance, Bobby Wilcher, who had two separate post-conviction actions, was represented by Camille Henick Evans. Although the State did not oppose her appointment, it did move to have her removed from the case. Exhibit 64 (Affidavit of Camille Henick Evans). Evans had been representing Wilcher for approximately three years and had done substantial work on the case, without any compensation or litigation expenses being authorized by the trial court, despite the holding in *Jackson*. *Id.*

Even still, on April 13, 2001, the State filed a “Motion for Determination of Counsel’s Compliance with Competency Standards” under MRAP 22. Exhibit 65 (Mot. for Determination of Counsel’s Compliance with Competency Standards, *Wilcher v. State*, No. 99-cv-0045 (Cir. Ct. Scott Cty. (filed April 13, 2001))). Regardless of MRAP Rule 22, which became effective only after her appointment, Evans had been certified as qualified to represent Wilcher by the Public Defender Commission created by statute in 1998. Miss. Code Ann. § 25-32-37. Exhibit 66 (Response to Motion For Determination of Counsel’s Compliance with Competency Standards, *Wilcher v. State, supra*). When the trial court

held a hearing on the State's motion, the State, without notice to the Office, moved to dismiss Evans (rather than simply seeking the appointment of additional qualified counsel) and to appoint the Office. Exhibit 67 (Order, *Wilcher v. State, supra* (Cir. Ct. Scott Cty (filed April 26, 2001))). The trial court granted the motion, *id.*, and denied Wilcher's request for interlocutory appeal, Exhibit 68 (Order on Request for Interlocutory Appeal, *Wilcher v. State, supra* (filed May 3, 2001))).

Similarly, in two cases involving Willie Manning, the State filed a "Notice of Non-Compliance of Counsel with Competency Standards" under MRAP 22(d) and asked for one of Mr. Manning's lawyers to be removed from the case. Exhibit 69. The state asserted that Robert S. Mink was not qualified and should be "prevent[ed] . . . from further representing Mr. Manning in this post-conviction matter." Exhibit 69.

Mink responded on July 5, 2001, and informed the court that he had been contracted only as "junior counsel" to assist Voisin on the two Manning cases. Exhibit 70 (Response of Attorney Robert S. Mink (July 5, 2001))). With respect to his specific qualifications, Mink stated that the only provision of MRAP 22(d) that he did not meet was that he did not have three years' experience in "state criminal appeals," although he had the substantially equivalent experience in federal criminal appeals, state civil appeals, and civil and criminal trials in state and federal court. *Id.*

Following a hearing on this matter, the trial court declined to rule on the state's motion to disqualify Mink because the court found that it lacked authority to do so because

“Rule 22 reserves to the Supreme Court the power to make any decision regarding Mr. Mink’s continued representation of petitioner without meeting the qualifications set forth therein.” Exhibit 71 (Order, *Manning v. State*, No. 2001-0144-CV (Cir. Ct. Oktibbeha Cty) (Oct. 1, 2001). Manning’s counsel objected and included an affidavit from Mr. Manning expressing his desire for Mr. Mink to remain on his case. Exhibit 72 (Memorandum with Respect to Petitioner’s Legal Representation in Post-Conviction Proceedings, *Manning v. State*, No. 2000-DR-01078-SCT (Nov. 28, 2001)). After the matter had been pending for several months in the Supreme Court without a ruling, Mink withdrew. Exhibit 73 (Affidavit of David Voisin).

In the Kelvin Jordan case, the state also litigated to relieve attorney Keith Ball as local counsel for Stefanie McArdle, a qualified out-of-state counsel. Exhibit 74 (Response to Motion to Substitute Local Counsel, *Jordan v. State*, No. 1999-DR-1391-SCT (filed August 13, 2003)). Ball was relieved by the trial court on December 5, 2001, and the court ordered McArdle to find other “qualified” counsel as local counsel. *Id.*

More recently, in *Corrothers v. State*, the State sought to remove two attorneys who had been representing Mr. Corrothers due to their lack of qualifications. Exhibit 75, (Motion to Disqualify Counsel, *Corrothers v. State*, No. 2015-M-00975-SCT (filed July 24, 2015)). This Court granted the motion. Exhibit 76 (Order, *Corrothers v. State*, No. 2015-M-00975 (filed Sept. 10, 2015)).

The State places great weight on *Ronk* and *Howell* but those decisions recognize the Court's authority to correct injustices or ensure adequate representation, and there are numerous examples of court intervention, even at the instigation of the State, to ensure that the right to post-conviction counsel is not hollow.

What makes this Court's intervention more urgent in this case is that this Court was the entity responsible for selecting Robert Ryan as the director. In the case of Howard Goodin, the Court recognized the problem and took urgently needed action to ensure that Goodin received adequate representation. Pet. at 10, 24-26. There is no reasonable way to distinguish Goodin's case from Brown's case. Nor can there be any justification for acting as though it were powerless in this case when the Court intervened in the cases of Wilcher, Manning, Jordan, and Corrothers to force an attorney out so that the prisoner could receive adequate representation.²

While the State need not provide appeals as of right to criminal defendants seeking review of trial court errors, if the State chooses to provide a system for appeals, "the procedures used . . . must comport with the demands of the Due Process and Equal Protection Clauses of the Constitution." *Evitts v. Lucey*, 469 U.S. 387, 394 (1985). In *Jackson*, this Court recognized that post-conviction is part of the direct appeal process.

² Because individuals such as Wilcher and Manning were not permitted to have counsel who had been representing them, those attorneys cannot be said to have been their agents.

Thus, there should be a remedy for when a death-sentenced prisoner fails to receive even the most basic adequate representation.

The State also overlooks critical issues not addressed in *Ronk*—namely, the right of meaningful access to the courts. *Jackson*, 732 So. 2d at 191. The Court also observed that in *Jackson*, it was “compelled to take such steps as [was] necessary to accord due process in accordance with the Constitution of the State of Mississippi and the Constitution of the United States.” *State v. Blendon*, 748 So. 2d 77, 89 n.1 (Miss. 1999) (citing *Jackson*). Although the Legislature may enact certain substantive provisions, only the courts are responsible for ensuring fundamental fairness, due process, meaningful access, and effective counsel in the judicial process and have the necessary authority to fashion appropriate remedies, whether granting equitable tolling (*e.g.*, *Puckett*), removing counsel (*e.g.*, *Corrothers*), granting a second evidentiary hearing (*e.g.*, *Goodin*), overlooking deficiencies in pleading (*e.g.*, *Chase*), or granting a hearing on a claim not raised by initial PCR counsel. *Walker v. State*, 131 So. 3d 562 (Miss. 2013); *Le v. State*, 2016 Miss. LEXIS 546 (Miss. Jan. 29, 2016).

The State now takes *Ronk* to slam shut the courthouse door to a second petition regardless—even if, as here, it does not contest the merits. But that is not what *Ronk* says. *Ronk* can properly be understood to limit a petitioner to *one opportunity* to challenge the effectiveness of initial PCR counsel, which occurs only after the first PCR is denied. It thus

avoids the Court’s fear of a petitioner having unlimited opportunities to seek relief. *Ronk*, 391 So. 3d at 795.

Here, the uncontested evidence was that Ryan’s mental state was deteriorating, and thus he was in no position to provide adequate representation. At the same time, his arbitrary and ill-informed decisions made it impossible for members of the staff to provide the level of legal representation that the Court no doubt intended. Exhibit 60 (affidavit of Louwlynn Vanzetta Williams, attached to the petition filed Sept. 17, 2024). Under these limited circumstances, when the State does not question the merits of the claims raised, this Court should grant post-conviction relief. Given the Court’s prior efforts to ensure fairness and adequate representation in the past, a failure to do so now will violate Brown’s right to equal protection and due process of law.

II. The State Violated Brown’s Rights Under the Confrontation Clause, and the U.S. Supreme Court Already Rejected the Arguments Advanced by the State.

Xavier Brown’s claims under the Confrontation Clause are statutorily alive based on the PCR Act’s intervening law exception. After Brown’s initial post-conviction proceeding, the U.S. Supreme Court issued several decisions addressing the application of the Confrontation Clause to forensic-testing evidence. *See Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009); *Bullcoming v. New Mexico*, 564 U.S. 647 (2011); *Smith v. Arizona*, 602 U.S. 779 (2024). Most recently, in *Smith*, the Court held that if a witness recounts an absent expert’s statements—even if in support of their independent opinion, and those statements would only support their opinion if true, then those statements come into evidence for their

truth and are hearsay. This means that such basis evidence³ implicates the Confrontation Clause.

Here, Brown is entitled to the benefit of intervening Supreme Court case law. The State disagrees, but its protests prove too much. According to the State, an intervening decision cannot be one that “recognizes, applies, or reaffirms” existing law. State Br. 33-34. The primary problem with the State’s argument is that the decision in *Smith* was *not* existing law *in Mississippi* prior to 2024. Before *Smith*, Mississippi law ran directly contrary to *Smith*. Cf. *Galloway v. State*, 122 So. 3d 614, 637 (Miss. 2013).

Under current case law, two categories of forensic scientific testimony would have been the subject of successful Confrontation Clause objections at Brown’s trial: (i) testimony about the cause of death of the main suspect, Anthony Sims; and (ii) testimony about scientific testing conducted on firearms or firearm projectiles. The State’s argument to contrary—*viz.* that the Confrontation Clause was not violated here because the relevant forensic “report[s] [] w[ere] not admitted into evidence at trial,” *see* State Br. 50, 51—is illogical and was expressly argued by the government in *Smith* and rejected by the Supreme Court.

Brown’s Confrontation Clause claims are statutorily alive and warrant an evidentiary hearing.

³ Expert witnesses may base their testimony on hearsay in any number of ways. At issue in *Smith* is a specific form of “basis evidence” where a testifying witness relays an absent analyst’s work as the means of presenting that information to the jury. *See id.* at 1800-01; *see also Williams v. Illinois*, 567 U.S. 50, 123-24 (2012) (Kagan, J., dissenting).

A. The Supreme Court’s recent Confrontation Clause cases are intervening decisions because the cases fundamentally alter Mississippi’s application of federal law; the cases thus create new law in Mississippi.

The PCR Act allows a petitioner to overcome the successive writ bar and the time bar where they can demonstrate an intervening decision would have adversely affected the outcome of the petitioner’s conviction or sentence. *See* Miss. Code Ann. § 99-39-5(2)(a)(i); Miss. Code Ann. § 99-39-27(9). *Smith* is an intervening decision under the PCR Act, as it adversely affects the outcome of Brown’s conviction.

The State avers that *Smith* cannot be an intervening decision because it is not a “new rule.” State Br. 33. The point this argument misses is that a federal “new rule” and a Mississippi “intervening decision” are separate matters. On pages 33-34 of its brief, the State cites *Powers v. State* for the proposition an intervening decision cannot be one that “recognizes, applies, or reaffirms” existing law. The problem with the State’s argument is that, at the time it was decided, *Smith* was not existing law in Mississippi. Mississippi law, before *Smith*, held directly contrary to *Smith*. *Cf. Galloway v. State*, 122 So. 3d 614, 637 (Miss. 2013). *Smith* thus creates new law in Mississippi. *Cf. State v. Pogue*, No. CR-2024-0655, 2025 WL 452628, at *6-7 (Ala. Crim. App. Jan. 17, 2025) (explaining that *Smith* “abrogated” prior state law).

Indeed, the Mississippi Supreme Court has repeatedly applied the intervening decision exception in cases like this one. For example, in *Gilliard v. State*, 614 So. 2d 370 (Miss. 1992), this Court held that Gilliard could relitigate a previously rejected challenge

to the constitutionality of the “especially heinous, atrocious or cruel” aggravating factor jury instruction given in his capital sentencing because the Supreme Court’s intervening decisions in *Maynard v. Cartwright*, 486 U.S. 356 (1988), and *Clemons v. Mississippi*, 494 U.S. 738 (1990), established that the instruction was unconstitutionally vague unless accompanied by an appropriate limiting instruction. *Gilliard*, 614 So. 2d 373-74. *Maynard* and *Clemons* did not create a new constitutional rule but reiterated the Eighth Amendment rule of *Godfrey v. Georgia*, 446 U.S. 420 (1980). *Id.* at 374 (citing *Stringer v. Black*, 503 U.S. 222 (1992)). Thus, although *Clemons* may not have been a “new rule” under federal retroactivity decisions, it was an intervening decision showing that this Court’s prior decisions were wrongly decided. Accordingly, *Gilliard* “successfully hurdled the successive writ bar.” *Id.* at 375.

Since *Gilliard*, this Court has “consistently treated *Clemons* claims as exceptions to the procedural bar rule, under the intervening decision proviso of the statute.” *King v. State*, 656 So. 2d 1168, 1173 (Miss. 1995) (citing *Irving*, 618 So. 2d 58; *Gilliard*, 614 So. 2d 370; *Pinkney v. State*, 602 So. 2d 1177 (Miss. 1992); *Jones v. State*, 602 So. 2d 1170 (Miss. 1992); *Shell v. State*, 595 So. 2d 1323 (Miss. 1992); *Clemons v. State*, 593 So. 2d 1004 (Miss. 1992)); see generally *Nixon v. State*, 641 So. 2d 751, 755 n.7 (Miss. 1994) (in *Gilliard*, “respect for finality of judgments had to yield to the necessity of correcting a decision erroneous at the time it was made[.]”). As *Nixon* explains, the “newness” of a legal holding

always has been measured against the way *Mississippi courts* previously enforced the federal right.

Post-conviction petitioners, like Brown, also cannot “waive” a claim that previously was foreclosed by state law. The wording of the PCR Act proves this basic principle:

(1) Failure by a prisoner to raise objections, defenses, claims, questions, issues or errors either in fact or law ***which were capable of determination at trial and/or on direct appeal***, regardless of whether such are based on the laws and the Constitution of the state of Mississippi or of the United States, shall constitute a waiver thereof and shall be procedurally barred, but the court may upon a showing of cause and actual prejudice grant relief from the waiver.

(2) The ***litigation of a factual issue at trial and on direct appeal*** of a specific state or federal legal theory or theories shall constitute a waiver of all other state or federal legal theories which ***could have been raised*** under said factual issue; and any relief sought under this article upon said facts but upon different state or federal legal theories shall be procedurally barred absent a showing of cause and actual prejudice.

(3) The doctrine of res judicata shall apply to all issues, both factual and legal, ***decided at trial and on direct appeal***.

Miss. Code Ann. § 99-39-21 (emphasis added).

At the time of Brown’s trial and his initial post-conviction proceeding, Mississippi’s application of federal law foreclosed any successful challenges in this case under the Confrontation Clause. *Melendez-Diaz*, *Bullcoming*, and *Smith* were all decided after the conclusion of Brown’s trial, direct appeal, and initial post-conviction. As discussed, Mississippi also was not applying the Confrontation Clause consistent with those cases.

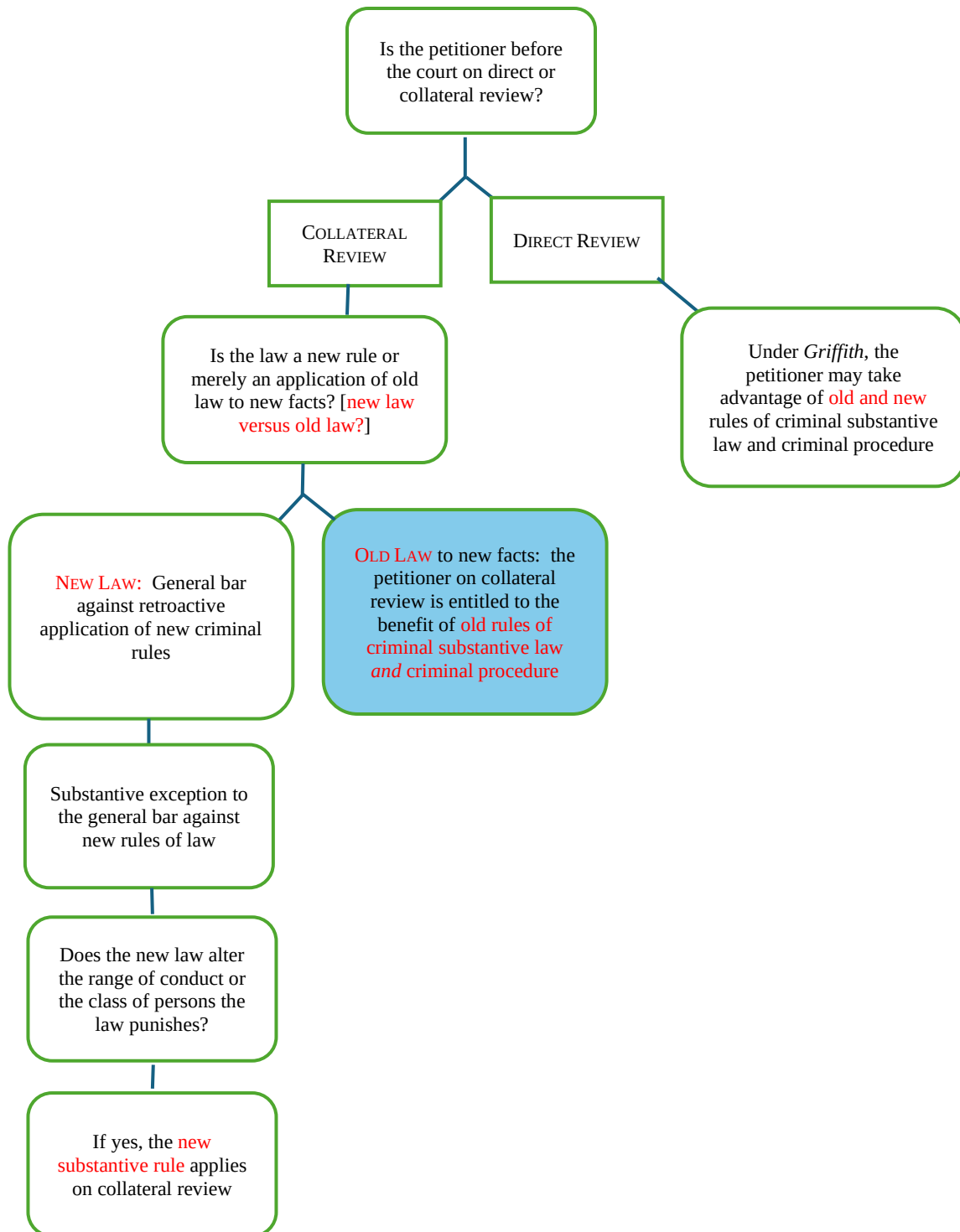
Brown thus did not waive any claims under the Confrontation Clause; you can't waive a claim you don't have.

Because intervening case law is not capable of determination at trial and/or on direct appeal, there is also no need to prove cause and actual prejudice to overcome the waiver bars. *See Irving v. State*, 618 So. 2d 58, 61-62 (Miss. 1992) (“The State, as mentioned above, also argues Irving is not entitled to rely on *Maynard* and *Clemons* as intervening authority, thus trapping Irving in the web of either Miss. Code Ann. § 99-39-21(2) or § 99-39-21(3). This Court, however, has already responded to this argument, holding *Maynard* and *Clemons* would have ‘actually adversely affected’ a petitioner’s sentence...”). Further, even if it was required, a determination that the intervening law actually adversely affects the petitioner’s conviction satisfies the cause and prejudice requirement.

B. Post-conviction petitioners are entitled to the benefit of settled federal constitutional law at any point during collateral review.

Under the PCR Act, Brown is entitled to the benefit of intervening Supreme Court case law. While the State’s brief does not mention *Teague v. Lane*, 489 U.S. 288 (1989), that decision also requires that Brown receive the benefit of settled federal constitutional law. Under *Teague* and *Yates v. Aiken*, 484 U.S. 211 (1988), a state post-conviction petitioner is entitled to the benefit of settled constitutional law – that is, “old law” – *at any point during collateral review*. That is, a petitioner is entitled to the benefit of *a decision* that is new *if the law the new decision applies is old*. In other words, on collateral review, state courts must apply the federal law they ought to have applied in the first place.

The chart below illustrates *Teague* and *Griffith v. Kentucky*, 489 U.S. 314 (1987).



Here, under *Teague* and *Yates*, this case falls into the blue highlighted portion in the chart. Brown is entitled to the benefit of the U.S. Supreme Court’s recent Confrontation Clause decisions. *Stringer v. Black*, 503 U.S. 222, 227 (1992); *Jan G. v. Comm’r of Correction*, No. CV18-4009648-S, 2023 WL 8431827, at *15 (Conn. Super. Ct. Nov. 20, 2023) (“If the rule is not new, then it applies retroactively to all.”).

Lest there be any doubt, the Supreme Court’s recent decision in *Cruz v. Arizona* 598 U.S. 17 (2023) also shows that petitioners are entitled to the benefit of settled federal constitutional law at any point during collateral review. In *Cruz*, the Arizona Supreme Court held that Cruz had not satisfied state rule 32.1(g) allowing defendants to file a successive petition if there had been “a significant change in the law.” *Id.* at 24–25. Cruz was convicted of murder and sentenced to death in 2005. He argued on direct appeal that the trial judge violated *Simmons v. South Carolina*, 512 U.S. 154 (1994), by refusing to let him tell the jury that a life sentence would be without parole.

The Arizona Supreme Court affirmed Cruz’s conviction, holding that *Simmons* did not apply to Arizona’s sentencing scheme. *Id.* at 21–22. The court continued to follow that holding until 2016 when the Supreme Court in *Lynch v. Arizona* held that *Simmons* did indeed apply in Arizona. *Lynch*, 578 U.S. 613, 614–16 (2016) (per curiam).

Cruz moved for postconviction relief under rule 32.1(g), arguing that *Lynch* constituted “a significant change in the law.” *Cruz*, 598 U.S. at 24. A “[s]traightforward” reading of Arizona precedent suggested that Cruz was correct. Even so, the Arizona

Supreme Court held that Cruz failed to satisfy rule 32.1(g)—reasoning that *Lynch* “was not a significant change in the law” because *Lynch* “relied on *Simmons*, and *Simmons* was clearly established at the time of Cruz’s trial despite the misapplication of that law by the Arizona courts.” *Id.* (cleaned up and citations omitted).

The U.S. Supreme Court vacated Arizona’s decision and held:

[The State’s] arguments miss the point. While *Lynch* did not change this Court’s interpretation of *Simmons*, it did change the operative (and mistaken) interpretation of *Simmons* by Arizona courts. *Lynch* thus changed the law in Arizona in the way that matters[.]”

....

Lynch should qualify because it overruled binding Arizona precedent, creating a clear break from the past in Arizona courts.

Cruz, 598 U.S. at 30-32; *id.* at 28 (condemning “the way in which [the Arizona Supreme Court’s holding] disregards the effect of *Lynch* on the law in Arizona”); *see also Yates, supra* (explaining that state courts cannot invoke state law as a basis for refusing to give effect to decisions applying settled federal law).

C. Mark Berry, Danny Rigel, and Steven Hayne each testified about forensic scientific testing in a manner that violated the Confrontation Clause.

1. The State’s argument that the Confrontation Clause applies only when a report is formally introduced into evidence is wrong and squarely rejected by *Smith v. Arizona*.

The State contends that there can be no Confrontation Clause violation here because the relevant forensic reports themselves were not formally introduced into

evidence. State Br. 50 (“Officer Berry referenced the lab report, but it was not admitted into evidence at trial.”); State Br. 51 (“Neither the state crime lab’s report nor the National Medical Services Laboratory’s report was admitted into evidence at trial.”). That is logically wrong, and this exact argument was already rejected by the U.S. Supreme Court.

Indeed, in *Smith v. Arizona*, the underlying forensic report at issue was *not offered into evidence*. *Smith*, 602 U.S. at 783. In *Smith*, the forensic scientist who created the report and notes (Elizabeth Rast) did not testify. And Rast’s report was not introduced into evidence. The substitute testifying witness (Gregory Longoni) instead referred to Rast’s report and notes and relayed some of the contents.

After trial, Smith moved for a judgment of acquittal, arguing that Longoni’s testimony violated his Sixth Amendment confrontation right under *Bullcoming*. The trial court in *Smith* distinguished *Bullcoming*, finding Longoni testified of his own opinion. Smith was convicted, and the Arizona Court of Appeals affirmed Smith’s conviction. *State v. Smith*, No. 1 CA-CR 21-0451, 2022 WL 2734269, at *1 (Ariz. Ct. App. July 14, 2022). It reasoned that “when an expert gives an independent opinion, the expert is the witness whom the defendant has the right to confront.” *Id.* at * 4. The court also distinguished *Bullcoming* and *Melendez-Diaz* on the same basis that the State tries to do so here—that those cases involved the formal admission of testimonial documents into evidence, whereas Rast’s work products in *Smith* were never entered or offered into evidence. *Id.* at *5.

The Supreme Court granted certiorari and, at the certiorari stage, the State of Mississippi participated as an Amicus Curiae. In its brief, Mississippi argued exactly what it tries to *reargue* here: that the Confrontation Clause only applies when the court “admit[s] the report of the original, non-testifying analyst.” *See* Smith State Amicus Br. pp. 18, 2 (arguing that “the State did not introduce Rast’s opinions, report, or notes into evidence”).⁴ The U.S. Supreme Court rejected those arguments; vacated the lower court decision; and remanded the case.

The Supreme Court held that if the absent analyst’s statements support the substitute witness’s opinion only if those statements are true, then they are hearsay – that is, they “come into evidence for their truth.” *Smith*, 602 U.S. at 783. And if those statements are also found to be testimonial, then their admission violates the Confrontation Clause. *Id.* It is thus immaterial here that the relevant forensic reports were not formally introduced into evidence. The essential question, rather, is whether the substance or context of the testimonial statement has been explicitly or implicitly communicated to the trier of fact.

A rule that made the Confrontation Clause inapplicable unless the exact statement were formally presented to the trier of fact would make no sense and would render the Clause a virtual nullity: A prosecutor could avoid the Clause simply by having the in-court

⁴ Available at [https://www.supremecourt.gov/DocketPDF/22/22-899/293938/20231220174107346 OkAz Amici%20Document%20December%2020%202023%20EFile.pdf](https://www.supremecourt.gov/DocketPDF/22/22-899/293938/20231220174107346%20OkAz%20Amici%20Document%20December%2020%202023%20EFile.pdf) (last visited Apr. 25, 2025).

witness offer a paraphrase or summary of the statement, or for that matter any other testimony from which the substance of the statement might be inferred. *Accord Douglas v. Alabama*, 380 U.S. 415, 419 (1965) (explaining that formal admission is not necessary for the Confrontation Clause to be invoked and that, under the circumstances, “the jury might improperly infer both that the statement had been made and that it was true”); *Davis v. Washington*, 547 U.S. 813, 826 (2006) (“[W]e do not think it conceivable that the protections of the Confrontation Clause can readily be evaded by having a note-taking policeman *recite* the unsworn hearsay testimony of the declarant[.]”) (emphasis in original). Based on settled case law, the State’s argument here may and should be dispensed with quickly.

2. The State’s argument that the witnesses here were not subject to confrontation because they are not “accusatory” witnesses was argued in and rejected by *Melendez-Diaz v. Massachusetts*.

The State is wrong in alleging that Berry, Rigel, and Hayne were not “accusatory” witnesses that testified “against” Brown. State Br. p. 52. In fact, the State’s contention is the exact one rejected by the Supreme Court in *Melendez-Diaz*.

In *Melendez-Diaz*, the state argued that the testifying witnesses “are not subject to confrontation because they are not ‘accusatory’ witnesses, in that they do not directly accuse petitioner of wrongdoing; rather, their testimony is inculpatory only when taken together with other evidence linking petition to the [crime].” *Melendez-Diaz*, 557 U.S. at

313. The Supreme Court held that his type of argument “finds no support in the text of the Sixth Amendment or our case law.” *Id.*

As in *Melendez-Diaz*, Berry, Rigel, and Hayne all three “provided testimony against [Brown], proving one fact necessary for his conviction,” *see id.*, —*viz.*, that the main suspect (Anthony Sims) was not present at the time of shooting. In other words, the testimony provided evidence that Sims didn’t do it; Brown did.

Sims was appropriately the main suspect in the death of Felicia Newell. He was identified as a suspect in the police report produced by the first police officer on the scene. T. 364. There were also at least two apparent motives for his wanting Felicia to be dead. First, he was an enraged ex-spouse. T. 364. Second, Felicia was scheduled to be a witness in a criminal prosecution against him within days of her death. T. 565-566; T. 598. Also, although Sims was a resident of Laurel, he was in Hattiesburg within a few hours of Felicia’s death. T. 399-400; T. 403. Sims was the natural suspect, but he could not be prosecuted because he was dead.

Nor could the State establish any connection between Brown and Sims. For example, Corey Johnson testified that he did not know if Brown and Sims knew each other. T. 484-485. But to prosecute Brown successfully, they needed to exclude Sims as being present at the time of the shooting. Thus, it was imperative for the prosecution to establish there was no forensic connection between the crime scene and Sims.

The forensic scientific testimony related to firearms and spent shell casings was filtered through the unqualified testimony of Rigel and Berry—neither of whom had any basis of knowledge about how those conclusions were formed. The State also advanced a theory that Sims committed suicide because he could not pay the hitman he had hired. The State advanced this theory despite the facts that he had \$368.82 amount in a bank account and \$1,138.03 in his wallet at the time of his death. T. 398-399, 403. To establish suicide as Sims' cause of death, the testimony of Hayne was critical.

This testimony violates the Confrontation Clause. In fact, as the Court recognized in *Melendez-Diaz*, “[i]t is often, indeed perhaps usually, the case that an adverse witness’s testimony, taken alone, will not suffice to convict.” *Melendez-Diaz*, 557 U.S. at 314. For example, in *Kirby v. United States*, 174 U.S. 47 (1899), the Supreme Court considered Kirby’s conviction for receiving stolen property, the evidence for which consisted, in part, of the records of conviction of three individuals who were found guilty of stealing the relevant property. *Id.* at 53. Though this evidence proved only that the property was stolen, and not that Kirby received it, the Supreme Court nevertheless ruled that admission of the records violated Kirby’s rights under the Confrontation Clause. *Id.* at 55. The same is true here.

3. The inquiry is not whether witnesses quote verbatim out-of-court statements; it is whether the out-of-court statements are implied or may be inferred.

“An out-of-court statement offered in evidence to prove the truth of the matter asserted is ‘hearsay’ whether the statement is quoted verbatim or conveyed only in substance; whether it is relayed explicitly or merely implied; and whether the declarant is identified or not.” *Young v. United States*, 63 A.3d 1033 (D.C. 2013); accord *United States v. Kizzee*, 877 F.3d 650, 658 (5th Cir. 2017) (testimony included hearsay where the “content of [the out-of-court declarant’s] statements could be readily inferred from the prosecutor’s questions and [the witness’s] testimony”); *United States v. Meises*, 645 F.3d 5, 22 n 25 (1st Cir. 2011) (explaining that a party may not sidestep the hearsay prohibition by implying the contents of an out-of-court statement rather than quoting it).⁵

Here, the State argues the exact argument that the Fifth Circuit rejected in *Kizzee*. In *Kizzee*, the argument was that “no statement made by Brown [the out-of-court witness] was ever introduced at trial, and Detective Schultz testified only as to his own observations ... The prosecutor justified his questioning of Schultz by arguing that ‘hearsay is an out-of-court statement. You are not going to hear this witness utter one single word that Carl Brown replied in response to any of the questions. It can’t possibly be hearsay.’” *Id.*

⁵ The Mississippi Supreme Court has held that ballistics and toxicology reports from the Mississippi Crime Laboratory are “[p]lainly ... testimonial in nature.” *Conners v. State*, 92 So. 3d 676, 684 (Miss. 2012).

The Fifth Circuit rejected the government’s argument, reasoning that out-of-court statements may be introduced “by implication,” and “a prosecutor’s questioning may introduce a testimonial statement by a nontestifying witness, thus implicating the Confrontation Clause.” *Kizzee*, 877 F.3d at 657; *id.* (explaining that “the content of [the officer’s] testimony implicitly revealed [the out-of-court] statements”). The same result should follow in this case.

United States v. Meises, 645 F.3d 5 (1st Cir. 2011) is also a good example. There, the prosecutor, recognizing that statements made by a cooperating arrestee to law enforcement agents were testimonial, did not ask a testifying agent what the arrestee said; instead, he secured the agent’s testimony that after the interview “the targets of [the] investigation change[d]” and that the accused was taken into federal detention. The Court of Appeals for the First Circuit saw through this ruse: “It makes no difference that the government took care not to introduce [the out-of-court witness’s] ‘actual statements.’ ... [A]ny other conclusion would permit the government to evade the limitations of the Sixth Amendment ... by weaving an unavailable declarant’s statements into another witness’s testimony by implication.” *Id.* at 12-13; *accord, e.g., Young v. United States*, 63 A.3d 1033, 1044 (D.C. 2013) (rejecting the government’s argument that the witness “did not quote any particular hearsay statements, mention any out-of-court declarants, or introduce a report” and holding it immaterial “whether the statement is quoted verbatim or conveyed only in substance [or] whether it is relayed explicitly or merely implied”).

Here, Rigel, Berry, and Hayne all three provided forensic evidence needed to exclude Anthony Sims as being present at the time of the shooting.

a. The firearms testimony by Danny Rigel and Mark Berry violated the Confrontation Clause.

To prosecute Xavier Brown successfully, the government needed to exclude Anthony Sims as being present at the time of the shooting. Thus, it was imperative for the prosecution to establish there was no forensic connection between the crime scene and Sims. But Anthony Sims had been indicted on a weapons charge, T. 597-598; had paperwork involving a nine-millimeter in his van, T. 381, 601; and a bullet casing also was located in his van, T. 601. Without testimony from Rigel and Berry, there was no forensic evidence to exclude Anthony Sims as the shooter.

Danny Rigel testified that he recovered a shell casing from the scene and sent that casing to the crime lab. T. 376-378. Immediately following this testimony, the following exchange occurred:

- Q: And did you send this to the crime lab?
 A: Yes, sir, I did.
 Q: And were -- do you know whether or not they were ever able to identify a gun that that shell casing was fired from?
 A. Not to my knowledge.
 ...
 Q: And the evidence that you took, you took into your possession. And I think that that shell casing -- you found out it was sent to the crime lab; is that correct?
 A. Yes, sir.
 Q. And while it had been fired, they were never able to determine a weapon it had been fired from; is. that correct?
 A. Not that I know of.

T. 378-380.

Rigel's testimony was vital to establish there was no connection between the gun used to murder Felicia Newell and any known gun possessed by Anthony Sims. Rigel was the "captain over detectives for HPD, and he was the one called to "process the scene" of the murder of Felicia. T. 372-373. He would thus have knowledge of a weapon identified as the one used in the murder. As in the *Kizzee* case discussed above, the out-of-court statements of the crime lab's expert in ballistics were introduced by Rigel "by implication," and the "prosecutor's questioning introduce[d] a testimonial statement by a [the] nontestifying [expert in ballistics]." *Kizzee*, 877 F.3d at 657.

Mark Berry's testimony was vital to establish that there was no connection between the gun used to murder Felicia and shell casings found in Anthony Sims' vehicle. Berry testified that the shell casing recovered from the crime scene was sent to the crime laboratory along with a shell casing recovered from a vehicle owned by Anthony Sims. T. 571. Berry *affirmatively* testified that those casings were tested and determined not to be fired from the same gun. T. 571, 606-607. He was specifically asked by the prosecutor whether the two shell casings were fired from the same gun. T. 606-607. He responded, "[i]n a report from the crime laboratory dated September 23, 1999, (sic) says that the cartridge cases in exhibits 1 and 2 bear no significant similarities in class or individual characteristics with those produced by the gun." T. 607.

Despite the State's evident necessity for such testimony, the State introduced the forensic analysts' conclusions through witnesses who knew nothing about the analysis that was conducted. Neither Rigel nor Berry could testify to any deviations from established protocols or lack of qualifications of the testing analysts. Thus, forensic scientific testimony related to firearms and spent shell casings was filtered only through the unqualified testimony of two law enforcement officers who had no basis of knowledge about how those conclusions were formed. Brown's rights to confront the firearm experts used against him were violated.

b. The forensic testimony by Steven Hayne violated the Confrontation Clause.

The State theory was that Anthony Sims committed suicide because he could not pay the "hitman" he hired. The State advanced this theory despite Sims having \$368.82 amount in a bank account and \$1,1138.03 in his wallet at the time of his death. T. 398-399, 403. To establish suicide as Sims' cause of death, the testimony of Steven Hayne was critical. And Hayne was the only person who testified to Sims' cause of death.

That said, Hayne did not base his opinion on his own testing or observations. Rather, Hayne based his opinion on a piece of paper generated by a testing laboratory—specifically, the National Medical Services Laboratory and the state crime lab. T. 463-464. (Q: "What was the purpose of sending those items for toxicology?" Hayne: "In that we did not find evidence of disease or injury that would produce death[.]"); (Hayne: "[I]t was in the toxicological analysis that the cause of death was determined.").

As discussed, the State's argument in its brief specifically as to Hayne's testimony is the same argument rejected in *Smith*. State Br. 51 ("Neither the state crime lab's report nor the National Medical Services Laboratory's report was admitted into evidence at trial."). The State's argument is inept, and Brown's rights to confront the forensic experts used against him were violated.

4. The State is wrong in arguing that the Confrontation Clause violations in this case are harmless.

Because the State relied extensively on forensic testimony (introduced unconstitutionally through Rigel, Berry, and Hayne) both "[i]n its case in chief and its closing argument," it cannot "conclusively show that the tainted evidence did not contribute" to Brown's conviction such that the Confrontation Clause error could be harmless beyond a reasonable doubt. *United States v. Jackson*, 636 F.3d 687, 697 (5th Cir. 2011) (citation omitted).

Without testimony from Rigel and Berry, there was no forensic evidence to exclude Sims as the shooter. Similarly, without the testimony from Hayne about Sims' cause of death, there would have been no inference of suicide. Without the inference of suicide, there would have been no suggestion of the need to avoid paying a hitman. Thus, there would have been nothing to support a finding beyond a reasonable doubt that money or offers of money were involved in the death of Felicia Newell. Given the importance of this testimony, such testimony was not harmless. *Delaware v. Van Arsdall*, 475 U.S. 673 (1986); *Earl v. State*, 672 So.2d 1240, 1243 (Miss. 1996).

Indeed, the U.S. Supreme Court has recognized the importance of cross-examining the original forensic analyst who performed the work. Cross-examination has long been recognized as “the greatest legal engine ever invented for the discovery of truth.” *California v. Green*, 399 U.S. 149, 158 (1970) (quoting 5 Wigmore § 1367). And the Court in *Crawford v. Washington*, 541 U.S. 36, 54 (2004) insisted upon cross-examination and rejected the notion of a judicial determination of reliability for absent witnesses. There is no forensic evidence exception to the rule. *See supra Bullcoming* and *Melendez-Diaz*.

“Expert evidence can be both powerful and quite misleading because of the difficulty in evaluating it.” J. Weinstein, *Rule 702 of the Federal Rules of Evidence Is Sound; It Should Not Be Amended*, 138 F.R.D. 631, 632 (1991). Indeed, the Supreme Court and many others have cautioned about the outsized influence of “scientific” evidence. *See, e.g., Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 595 (1993); *United States v. Frazier*, 387 F.3d 1244, 1263 (11th Cir. 2004) (“[E]xpert testimony may be assigned talismanic significance in the eyes of lay jurors.”).

But in scientific communities there has been a growing skepticism about the supposed infallibility of some forensic evidence, its handling in crime laboratories, and its interpretation in the courtroom. *See, e.g.,* Nat’l Research Council, *Strengthening Forensic Science In The United States: A Path Forward*, 4 (2009) (“NAS Report”);⁶ President’s

⁶ Available at <https://nap.nationalacademies.org/catalog/12589/strengthening-forensic-science-in-the-united-states-a-path-forward> (last visited Apr. 29, 2025).

Council Of Advisors On Sci. And Tech., Forensic Science In Criminal Courts: Ensuring Scientific Validity Of Feature-Comparison Methods 25 (2016) (“PCAST Report”);⁷ *Howard v. State*, 300 So. 3d 1011 (Miss. 2020) (citing the NAS Report for the lack of scientific basis for bite mark evidence); *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”).

Because forensic evidence may not always be reliable, the criminally accused must be afforded every constitutional guarantee to defend themselves against faulty or misleading forensics, and, at a minimum, that includes the right to cross-examine the analyst who conducted the testing. Confrontation is essential to permit the criminally accused the opportunity to test the state’s evidence through the adversarial method. Cross-examination can expose fraud, mistakes or incompetence, or judgment that consists of nothing more than the *ipse dixit* of the analyst. *General Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997). More broadly, cross-examination provides the jury with information necessary to assess the weight, if any, to give the forensic opinion, and a requirement of confrontation helps encourage scientific rigor as a general matter.

⁷ Available at https://obamawhitehouse.archives.gov/sites/default/files/microsites/ostp/PCAST/pcast_forensic_sciencereport_final.pdf (last visited Apr. 29, 2025).

All in all, the introduction of forensic evidence, not subject to cross-examination, altered the course of Xavier Brown’s trial. The fallibility and importance of forensic evidence in criminal prosecutions underscore the need for this Court to ensure a meaningful right to confrontation. “[T]he analysts who write reports introduced as evidence must be made available for confrontation even if they have the scientific acumen of Mme. Curie and the veracity of Mother Teresa.” *Bullcoming*, 564 U.S. at 661 (quoting *Melendez-Diaz*, 557 U.S. at 317) (internal quotation marks omitted).

III. The State cannot evade the cumulative errors that resulted in a fundamentally unfair trial in violation of the Due Process Clause.

Appearing to fall back on one sentence from this Court’s opinion on Brown’s direct appeal the State claims there is no cumulative error because “no error was committed.” *See* State Br. 59; State Br. 11-12 (“In *Brown I*, the Court...held that there was no cumulative error because there were no errors in the trial court”). Try as it might, the State cannot bypass the merits of Brown’s post-conviction petition by pointing out a conclusion this Court made in 2004—while Brown was represented by one of the same ineffective attorneys that represented him at trial.

As discussed, the State has not disputed that Brown suffered a substantial and prejudicial deprivation of his constitutional right to effective assistance of counsel at trial, on direct appeal, and in his first attempt to obtain post-conviction relief. *See* State Br. 40-41. And other than recycling arguments already rejected by the U.S. Supreme Court, it has

not tried to dispute Brown's rights were violated under the Confrontation Clause. *See* State's Br. 50-51.

Instead, the State cites *Doss v. State*, 709 So. 2d 369, 401 (Miss. 1997) for the proposition that “[w]here there is no reversible error in any part, ... there is no reversible error to the whole.” But this is not a complete statement of the law. For when “procedural failures render the individual errors not reversible, [these] failures do not preclude application of the cumulative-error doctrine.” *Minor v. State*, 402 So. 3d 1272, 1281 (Miss. 2025). Indeed, in *Minor*, this Court applied the cumulative-error doctrine to restore Minor's rights to a fair trial despite “procedural bars, the admission of inadmissible hearsay being harmless, Minor's objection...being sustained, the jury's being instructed that prosecutorial statements are not evidence, and the State's comments during closing arguments not being unjustly prejudicial.” *Id.* at 1281. If the fundamental fairness of a trial is destroyed, as it was here, the cumulative-error doctrine applies because it infringes on a defendant's rights under Due Process Clause of the Fourteenth Amendment. *Id.* at 1280.

The errors in Minor's case mirror those in Brown's case and should be given the same legal significance. In Minor's case, the government relied on impermissible hearsay testimony to secure a conviction. Similarly, in Brown's case, it is undisputed that the prosecution introduced unfronted hearsay testimony to obtain a conviction. The constitutional harm in the two cases is comparable. Thus, just as relief was granted to

Minor, it too should be afforded to Brown. Brown is, at a minimum, entitled to an evidentiary hearing.

Respectfully submitted, this the 5th day of May, 2025.

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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:

Ashley Sulser
LaDonna Holland
Allison Hartman
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It has also been sent via U.S. Mail to: Mr. Xavier Brown

Dated: May 5, 2025.

/s/ Krissy C. Nobile
Krissy C. Nobile

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