**IN THE UNITED STATES DISTRICT COURT**
**EASTERN DISTRICT OF ARKANSAS**
**PINE BLUFF DIVISION**

**JOHN BROWN, JR.** **PETITIONER**

**V.** **CASE NO. 5:16CV00381 BRW-JJV**

**WENDY KELLEY, Director,**
**Arkansas Department of Correction** **RESPONDENT**

## RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS

Comes now the respondent, Wendy Kelley, Director, Arkansas Department of Correction, by and through counsel, Leslie Rutledge, Attorney General, and Kent G. Holt, Assistant Attorney General, and for her response, states:

## I. Introduction

Petitioner Brown is in the custody of the Arkansas Department of Correction serving a sentence of life imprisonment for his 1992 aggravated robbery and first-degree murder convictions in Dallas County Circuit Court.[1] *See* Trial Record ("TR") vol. II at 469 (Resp.'s Ex. 3, vol. I-IV). He petitions the Court for habeas

[1] This Dallas County Circuit Court ordered these sentences to be served consecutively with Brown's 1989 Nevada conviction for manslaughter. *State of Nevada v. John L. Brown*, Case No. 89C089504.

corpus relief under 28 USC § 2254. The petition should be denied because it is untimely, or alternatively, because its claims are inexcusably procedurally defaulted, or otherwise without merit.

## II. Facts and Procedural History

On September 22, 1988, Myrtle Holmes was found brutally murdered; her beaten and stabbed body dumped in the trunk of her own car. *Brown v. State*, 315 Ark. 466, 468, 869 S.W.2d 9, 10 (1994). Charlie Vaughn, John Brown, Jr., and Reginald Early were each charged with her capital murder on March 16, 1991, in Dallas County Circuit Court. *Id*. On March 25, 1991, Vaughn pleaded guilty to first-degree murder and was sentenced to life in prison. *Id*. Vaughn's guilty plea implicated a fourth co-defendant, Tina Jimerson. *Id*. Jimerson was charged with capital murder as an accomplice on March 27, 1991. *Id*. Jimerson, Brown, and Early were tried together. *Id*. Part of the evidence adduced at trial was testimony regarding RFLP-DNA typing that was obtained through the collection of a vaginal swab. The sperm fraction banding pattern produced from the testing as compared to banding patterns produced by blood samples of John Brown, Charlie Vaughn, and Reginald Early excluded Brown and Vaughn as contributors. (Resp.'s Ex. 5, at 557-561)[2]

[2] DNA testing through the RFLP method was one of the earliest forms of DNA testing utilized in a forensic setting. The circuit court observed that the testimony regarding the process and the results that was rendered "was confusing." (Resp. Ex. 5, at 547)

The jury trial ended in a mistrial, and the felony informations were subsequently amended to charge each of the three co-defendants with first-degree murder and aggravated robbery. *Id*. All three co-defendants were found guilty by a jury on both charges and each sentenced to life in prison on both charges. *Id*. A judgment was entered on August 19, 1992. *See* Resp.'s Ex. 1.

Brown raised the following two points in his direct appeal to the Supreme Court of Arkansas: (1) the trial court erred in not granting his motion for directed verdict based upon the lack of accomplice corroboration; and, (2) the trial court erred in not granting his motion to dismiss based upon prosecutorial delay. The appellate briefs have been ordered and will be submitted under separate cover as Respondent's Exhibit 3. The Supreme Court of Arkansas affirmed Brown's convictions and sentences on January 10, 1994. *Brown*, 315 Ark. 466, 869 S.W.2d 9 (1994). A copy of the opinion is attached as Respondent's Exhibit 4. Brown did not pursue post-conviction relief in state court.

Respondent admits that Brown is in her custody pursuant to Brown's convictions and sentences in Dallas County Circuit Court, Case Number CR 1990-17. Respondent also admits that Brown has no unexhausted, non-futile state remedies available to him. Respondent denies, however, that Brown is entitled to an evidentiary hearing or any habeas corpus relief in this action.

## III. The Petition

On December 21, 2016, Brown, through counsel, filed the present petition for a writ of habeas corpus. In the petition, he alleges six principal claims: (1) a free-standing claim of actual innocence; (2) a violation of due process rights under *Brady v. Maryland*, 373 U.S. 83 (1963); (3) a violation of due process rights under *Arizona v. Youngblood*, 488 U.S. 51 (1988); (4) a violation of due process from failure to disclose additional interviews and/or incentives that witnesses Ellis Tidwell and Kenny Parsons received in exchange for testifying; (5) a violation of due process when the prosecutor failed to correct false evidence, and, (6) multiple discrete claims of ineffective assistance of counsel. Based on the reasons set forth below, Brown is not entitled to relief.

## IV. Reasons Why Relief Should Be Denied

As will be demonstrated below, the petition is time barred under 28 U.S.C. § 2244(d)(1). Alternatively, relief should be denied because the petitioner's claims are procedurally defaulted, and/or fail on the merits. Petitioner's request for a writ of habeas corpus should be denied and dismissed with prejudice.

### A. Statute of Limitations

Brown's petition should be dismissed as time-barred under 28 U.S.C. § 2244(d)(1). Title 28 U.S.C. § 2244(d)(1) provides a one-year period of limitation on an application for a writ of habeas corpus by a person in custody pursuant to the

judgment of a state court. The limitation period begins to run on "the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review[,]" 28 U.S.C. § 2244(d)(1)(A), or, in some cases, "the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence." 28 U.S.C. § 2244(d)(1)(D). The limitation period is tolled, however, while properly-filed applications for state post-conviction relief or other collateral review with respect to the pertinent judgment or claim are pending. 28 U.S.C. § 2244(d)(2). Petitioners whose convictions became final before April 24, 1996 – the effective date of the Antiterrorism and Effective Death Penalty Act (AEDPA) – are given one year from that date, or until April 24, 1997, to file a federal habeas petition. *E.g.*, *Baker v. Norris*, 321 F.3d 769, 771 (8th Cir. 2003).

Brown's convictions became final before AEDPA's effective date. Thus, he had one year from the effective date, or until April 24, 1997, to file his petition. The one-year period was not tolled by any properly-filed petitions for post-conviction relief in state court. Because Brown waited over 20 years after AEDPA's effective date to file his petition, the petition is clearly barred under § 2244(d)(1)(A).

Section 2244(d)(1)(D) is also of no help to Brown. Brown asserts that Reginald Early's "recantation did not occur until December 21, 2015" and further

claims that his petition, filed a year to the date of Early's signed affidavit, is timely. However, Brown has not demonstrated that, through the exercise of due diligence, he could not have discovered these facts earlier. *See, e.g., Ford v. Gonzalez*, 683 F.3d 1230, 1235 (9th Cir. 2012) (the limitation period under § 2244(d)(1)(D) starts to run when the factual predicate could have been discovered through due diligence, not when it actually was discovered).

The Supreme Court of Arkansas affirmed Brown's convictions and sentences over 21 years ago. Significantly, Brown has done nothing to pursue his claims independently from the statement of Reginald Early that was formalized on December 21, 2015. While Brown presumably sees this 2015 date as dispositive, the pertinent issue is not when Brown personally discovered what he must consider is the factual predicate for his claim; the question is when the factual predicate of his claim could have been discovered with due diligence. *See Earl v. Fabian*, 556 F.3d 717, 726 (8th Cir. 2009) (noting diligence with respect to discovering the factual predicate of a habeas claim does not extend to the discovery of "every possible scrap of evidence that might . . . support [a petitioner's] claim") (quoting *Flanagan v. Johnson*, 154 F.3d 196, 199 (5th Cir. 1998)). *Cf. also Johnson v. Dretke*, 442 F.3d 901, 909-11 (5th Cir. 2006) (discussing various cases that establish mere lack of knowledge of, for example, *Brady* material is insufficient to satisfy diligence requirement of § 2244(b)(2)(B)(i) and that a petitioner must show

that through investigation he would have been unable to discover the factual predicate sooner than he did). Brown's petition, however, makes no attempt to explain what he was doing in the intervening 20 years to diligently pursue his claims.

Furthermore, Brown is not entitled to any equitable tolling of the one-year limitation period. And for good reason – nothing prevented him from filing his federal habeas petition on time. "[E]quitable tolling affords the otherwise time-barred petitioner an exceedingly narrow window of relief[,]" *Jihad v. Hvass*, 267 F.3d 803, 805 (8th Cir. 2001), and it "is proper only when extraordinary circumstances beyond a prisoner's control make it impossible to file a petition on time[,]" *Kruetzer v. Bowersox*, 231 F.3d 460, 463 (8th Cir. 2000), or "when the State prevents the prisoner from taking more timely action." *Beery v. Ault*, 312 F.3d 948, 951 (8th Cir. 2003), *cert. denied*, 539 U.S. 933 (2003). "[A] petitioner is entitled to equitable tolling only if he shows (1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way and prevented timely filing." *Holland v. Florida*, 560 U.S. 631, 649 (2010) (internal quotations omitted). Brown failed to pursue his rights diligently, as he waited until December 21, 2016, to file his federal habeas petition – over 21 years after the Supreme Court of Arkansas affirmed his convictions and sentences. *See Nelson v. Norris*, 618 F.3d 886, 893 (8th Cir. 2010) (holding Nelson was not diligent in

pursuing his rights by waiting until nine months after the Arkansas Supreme Court denied rehearing to file his federal habeas petition). Brown has not shown that some extraordinary circumstance stood in his way to prevent a timely filing. Therefore, he is not entitled to equitable tolling. Because he filed his petition after the one-year limitation period had expired, and because he is not entitled to equitable tolling, this Court should dismiss his petition as time-barred under § 2244(d)(1).

The Supreme Court has held that a showing of actual innocence under *Schlup v. Delo*, 513 U.S. 298 (1995), may excuse noncompliance with the statute of limitations. *McQuiggin v. Perkins*, 133 S.Ct. 1924 (2013). Under *Schlup*, the petitioner may show that he is actually innocent by providing "new, reliable evidence—whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence—that was not presented at trial." *Schlup*, 513 U.S. at 324. The *Schlup* standard is demanding. *McQuiggin* at 1936. "Few petitions are within the narrow class of cases implicating a fundamental miscarriage of justice." *Weeks v. Bowersox*, 119 F.3d 1342, 1351 (8th Cir. 1997). Further, "a federal habeas court faced with an actual innocence gateway claim, should count unjustifiable delay on a habeas petitioner's part, not as an absolute barrier to relief, but as a factor in determining whether actual innocence has been reliably shown." *McQuiggen*, 133 S.Ct. at 1924, 1927. "[U]ntimeliness, although

not an unyielding ground for dismissal of a petition, does bear on the credibility of evidence proffered to show actual innocence." *Id.*

Brown's "new" evidence – Reginald Early's 2015 affidavit and hearsay declarations made by third parties almost 30 years after the fact – fail to meet the *Schlup* standard. Regarding Early's affidavit, recantations by co-defendants are inherently unreliable. *See Dobbert v. Wainwright*, 468 U.S. 1231, 1233-34 (1984). "Recantation testimony is properly viewed with great suspicion. It upsets society's interest in the finality of convictions [and] is very often unreliable and given for suspect motives[.]" *Id*.; *see also United States v. Vong*, No. 97-147 MJD/AJB, 2001 WL 1640134, at *1 (D. Minn. Oct. 30, 2001) aff'd, 39 F. App'x 466 (8th Cir. 2002) (An alleged recantation of testimony from a material witness should be viewed with disfavor). In *Hall v. Lockhart*, 806 F.2d 165 (8th Cir. 1987), as here, the co-defendants were serving life sentences "and thus may have nothing to lose by perjuring themselves." 806 F.2d at 168.

The skepticism attached to the type of evidence Brown has presented in his petition is well deserved, as will be demonstrated in the response to Claim I of his petition, where he asserts a freestanding claim of actual innocence.

**B. Procedurally defaulted claims; *Martinez* and *Trevino*.**

Pleading in the alternative, all of Brown's constitutional claims are barred by the doctrine of procedural default. Federal habeas relief is not available to resolve

procedurally defaulted claims which are "contentions of federal law which were not resolved on the merits in the state proceeding due to [a federal habeas petitioner's] failure to raise them as required by state procedure." *Wainwright v. Sykes*, 433 U.S. 72, 87 (1977). The doctrine of procedural default bars review of petitioner's claims which were not raised in the highest state court, therefore claims II-VI that follow his initial free-standing claim of actual innocence (Claim I), are procedurally defaulted. The state courts should have the first opportunity to review federal constitutional issues and to correct federal constitutional errors made by the state's trail courts. *See Coleman v. Thompson*, 501 U.S. 722 (1991); *Engle v. Isaac*, 456 U.S. 107, 128-29 (1982); *Maynard v. Lockhard*, 981 F.2d 981, 985 (8th Cir. 1992). This is because a federal habeas petitioner must show that he "has exhausted the remedies available in the courts of the State" as a precondition to seeking relief under the federal habeas statute. 28 U.S.C. § 2254(b)(1)(A). To meet this requirement, "state prisoners must give the state courts one full opportunity to resolve any constitutional issues by one complete round of the State's established appellate review process." *O'Sullivan v. Boerckel*, 526 U.S. 838, 845 (1999). A federal habeas petitioner is thus required to fairly present the substance of his federal claims, including, the facts and legal theory, in accordance with state procedure and through the highest state court. Failure to do so will result in procedural default.

In general, a federal habeas court may not consider the merits of procedurally-defaulted claims, which are "contentions of federal law which were not resolved on them merits in the state proceeding due to [the petitioner's] failure to raise them as required by state procedure." *Wainwright v. Sykes*, 433 U.S. at 87. An exception to the doctrine is that a procedurally defaulted claim may be considered on the merits if the petition alleges facts sufficient to demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice. *E.g.*, *id.*; *see also, e.g. Coleman*, 501 U.S. at 750. The latter is limited almost exclusively to a showing of actual innocence. *McCleskey v. Zant*, 499 U.S. 467, 495 (1991).

Brown offers no cause for why he has waited 21 years since his state conviction to raise all of his claims for the first time in federal court; instead, he appears to rely on a recent affidavit from a co-defendant to support the miscarriage-of-justice exception to excuse his procedural default. Although Brown uses the words "actual innocence" as his first ground, he has failed to make a showing of actual innocence.

To demonstrate cause, a petitioner must show some impediment, external to the defense, prevented him from presenting or developing the factual or legal basis of a claim. *Murray v. Carrier*, 477 U.S. 478, 488-89 (1986). "A showing of cause

requires more than a mere proffer of an excuse." *Lundgren v. Mitchell*, 440 F.3d 754, 763 (6th Cir. 2006). Cause must be something "that cannot fairly be attributed to [the petitioner]." *Coleman*, 501 U.S. at 753. If no cause has been established, the prejudice element need not be addressed. *McClesky*, 499 U.S. at 502. Additionally, "habeas petitioners cannot rely on conclusory assertions of cause and prejudice to overcome procedural default; they must present affirmative evidence or argument as to the precise cause and prejudice produced." *Lundgren*, 440 F.3d at 764.

Brown's first ground for relief is a freestanding claim of actual innocence. Assuming arguendo that the claim is cognizable here, *but see Herrera v. Collins*, 506 U.S. 390, 397 (1993), the petitioner has not presented this as a freestanding claim in the highest state court. As demonstrated above in the discussion about equitable tolling, the petition fails to demonstrate any cause external to Brown that prevented him from fairly presenting his claims to the state court in a timely manner. Similarly, the petitioner has not come forward with any reliable new evidence that could support an argument that he is actually innocent of capital murder, so the miscarriage-of-justice exception does not apply. *Carrier*, 477 U.S. at 478, *Schlup*, 512 U.S. at 327; *Amrine*, 238 F.3d at 1029. The failure to satisfy this standard bars all of Browns claims, including his free-standing assertion of innocence.

With regard to Claim VI, in *Martinez v. Ryan,* 566 U.S. 1 (2012), the Supreme Court held that, in limited circumstances, lack of counsel or ineffective assistance of post-conviction counsel in an initial-review collateral proceeding can be used as cause to excuse the default of claims of trial-counsel ineffectiveness. *Martinez,* 566 U.S. at 17; *see also Trevino v. Thaler*, 133 S. Ct. 1911, 1921 (2013). To reach that holding the Court reasoned:

> These rules [for when a prisoner may establish cause to excuse a procedural default] reflect an equitable judgement that only where a prisoner is impeded or obstructed in complying with the State's established procedures will a federal habeas court excuse the prisoner form the usual sanction of default. Allowing a federal habeas court to hear a claim of ineffective assistance of trial counsel when an attorney's errors caused a procedural default in an initial-review collateral proceeding acknowledges, as an equitable matter, that the initial review collateral proceeding, if undertaken without counsel or with ineffective counsel, may not have been sufficient to ensure that proper consideration was given to a substantial claim. From this it follows that, when a State requires a prisoner to raise an ineffective-assistance-of-trial-counsel claim in a collateral proceeding, a prisoner may establish cause for a default of an ineffective-assistance claim in two circumstances. The first is where the state courts did not appoint counsel in the initial-review collateral proceeding for a claim of ineffective assistance at trail. The second is where appointed counsel in the initial-review collateral proceeding, where the claim should have been raised, was ineffective under the standards of *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). To overcome the default, a prisoner must also demonstrate that the underlying ineffective-assistance-of-trial-counsel claim is a substantial one, which is to say that the prisoner must demonstrate that the claim has some merit.

*Martinez*, 566 U.S. at 9. As noted above, the Court reaffirmed that there is no constitutional right to post-conviction counsel to file an initial-review collateral proceeding. *Coleman v. Thompson*, 501 U.S. 722 (1991). For that reason, a prisoner cannot seek refuge in *Martinez* if, as here, he did not effectively initiate a collateral-review proceeding. *Martinez* simply does not apply in cases where no initial-review collateral proceeding was properly initiated, for in such cases, there can be no conduct of counsel in the proceeding to consider as cause for default. *See, e.g.*, *Jones v. Penn. Bd. of Probation and Parole*, 492 Fed.Appx. 242, 246-247 (3rd Cir. 2012), *cert. denied*, ___ U.S. ___, 133 S.Ct. 1316 (Feb. 19, 2013); *Castillo v. Ryan*, 2013 WL 3282547, at *5 (U.S.D.C. Ariz. June 28, 2013); *Uptegrove v. Villmer*, No. 12-0456-CV, 2012 WL 3637707 at n. 2 (W.D. Mo. Aug. 22, 2012); *Trust v. Larkins*, No. 4:09-CV-1101, 2012 WL 4479088, at *8 (E.D. Mo. July 20, 2012), *report and recommendation adopted by*, 2012 WL 4480719 (E.D. Mo. Sept. 28, 2012); *Anderson v. Koster*, No. 11-1227-CV, 2012 WL 1898781, at *9 (W.D. Mo. May 23, 2012); *Bland v. Hobbs*, No. 5:11-CV-286, 2012 WL 2389904, n. 5 (E.D. Ark. June 12, 2012), *proposed findings and recommendations adopted by*, 2012 WL 2874118 (E.D. Ark. July 13, 2012). "The Supreme Court was adamant that its holding in *Martinez* created a 'limited' and 'narrow' exception to the rule established in *Coleman* [*v. Thompson*, 501 U.S. 722 (1991)]." *Jones v. Penn. Bd.*, 492 Fed. Appx. at 246, citing *Martinez*, 132 S.Ct. at

1315, 1319. "Were it otherwise, the *Martinez* rule could potentially apply to any defendant who failed to petition for state collateral review." *Id*. at 247. Consequently, because Petitioner did not effectively initiate a Rule 37 proceeding, he cannot rely on *Martinez* to show cause for his default. His ineffective-assistance-of-counsel claims thus remain barred from review and relief should be denied. Moreover, Martinez, does not concern itself with attorney errors in other kinds of proceedings and it does not operate to excuse defaulted claims of trial error such as those contained in Brown's Claims I-V. *See Dansby v. Hobbs*, 766 F.3d 809, 832-34 (8th Cir. 2014)(refusing to extend *Martinez* to claims of trial error) *cert. denied sub nom*, *Dansby v. Kelley*, 136 S.Ct. 297 (2015).

**C. <u>The Claims</u>**

***Claim I: Actual Innocence***

Brown's first claim argues that he is entitled to relief because he is actually innocent of the murder of Myrtle Holmes. The Supreme Court has not decided whether a persuasive demonstration of actual innocence after trial would render unconstitutional a conviction and sentence that is otherwise free of constitutional error. *See House v. Bell*, 547 U.S. 518, 554–55 (2006). The Court has established, however, that the threshold for any such claim, if it were recognized, would be "extraordinarily high." *Herrera v. Collins*, 506 U.S. 390, 417 (1993). The threshold, if it exists, would require "more convincing proof" than the "gateway"

standard that allows for consideration of otherwise defaulted constitutional claims upon a showing of actual innocence. *House*, 547 U.S. at 555; *see Schlup v. Delo*, 513 U.S. 298, 315, (1995). And it certainly would require more than the testimony of an admitted liar like Early. After all, Early has testified, under oath, both that he did not kill Myrtle Holmes and that he did kill Myrtle Holmes. Obviously, both cannot be true and Early is a liar. Thus, contrary to Brown's claim, on a freestanding claim of actual innocence, it is not sufficient that a petitioner shows even that it is "more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt." *Id*. at 327, 115 S.Ct. 851. The "extraordinarily high" threshold, if recognized, would be even higher. *House,* 547 U.S. at 555. *Dansby v. Hobbs*, 766 F.3d 809, 816 (8th Cir. 2014).

In any case, a review of Reginald Early's differing versions of events and the "new" evidence presented in Brown's petition – the 2015 affidavit of his codefendant Reginald Early and his testimony at the federal habeas evidentiary hearing of another co-defendant, Tina Jimerson,[3] – does not provide sufficient reliable new evidence to establish that he has otherwise satisfied the gateway standard for the consideration of his other constitutional claims. To the contrary, an examination of Reginald Early's trial testimony, his affidavit (Pet.'s Ex. 1), and

[3] Reginald Early testified in *Jimerson v. Kelley*, 5:15-cv-208 (E.D. Ark.), and Brown has appended a transcript of that testimony to his petition as Petitioner's Exhibit 2.

his testimony at Jimerson's evidentiary hearing (Pet.'s Ex. 2), reveal the implausibility, and, thus, the unreliability of his recantation.

First, unlike his testimony at the Jimerson hearing, Reginald Early took the stand in both his trials and denied that he had anything to do with the murder of Myrtle Holmes. He testified, that, on the night of Myrtle Holmes' murder, he had been roaming around town and drinking with different people in Fordyce before going to the house of his cousin, Shannon Manning. (Resp.'s Ex. 5, at 802-858, Resp.'s Ex. 3, at 1127-1154) While Early maintained that he had never seen Brown before being arrested and jailed on this charge, and only knew who Charlie Vaughn and Tina Jimerson were by sight, the State's case demonstrated otherwise. While it apparently did not seem an important fact during the trial of the case, in Early's cross-examination he also described a place called the "mill quarters" where he and a crowd of people would often go to drink and shoot dice. *Id*. at 847-850 and 1147.

In his affidavit, Early states that he "never knew John Brown. Never met him at all." And "None of these people are my friends. I don't care nothing for them." Pet.'s Ex. 1, at 5, 6. However, the investigative file compiled by the Arkansas State Police following the murder of Myrtle Holmes (Resp.'s Ex. 6), contains a report that details an interview with Shannon Cortez Manning (Early's cousin) that took place in Oakland, California, on March 5, 1990. *Id*. at 88-89. In the report,

Manning told investigators that Early never worked and he made his living by gambling. *Id*. He further stated that Early "ran with" two groups of people and one of those groups included Charlie Vaughn and John Brown. He also told interviewers that the day after Myrtle Holmes' body was discovered, Brown and Early were at the mill quarters together and got into a fight over the subject of Holmes' murder. *Id*. Manning also told investigators that Tina Jimerson was very upset by all this and told Early and Brown to "shut up and come on." *Id*. Although Manning was not called as a witness at trial, the statement itself seriously undercuts the reliability of the statements made by Early almost three decades after the fact and his attempt to obscure the fact that his co-defendants were also his cohorts. *House v. Bell*, 126 U.S. 2064, 2007 (2006)(quoting *Schlup v. Delo*, 513 U.S. 298, 327 (1995).

Furthermore, Early's most recent accounts, while bearing a remarkable recall of events that occurred in 1988, contain glaring inconsistencies that reflect on the reliability of his statements. Admittedly, Early would know a lot about the crime scene because he was there and participated in the robbery and murder of Myrtle Holmes. However, as the crime scene photos reveal, Myrtle Holmes suffered a massive loss of blood as well as blunt-force trauma to her head and upper torso. *See* Resp.'s Ex. 7 (crime scene photos) and Resp.'s Ex. 8 (Arkansas Medical Examiner Autopsy Report). Early stated in his affidavit that "I took care not to get

blood on me." Pet.'s Ex. 1 at 5. Early may very well have "taken care" not to get blood on him and his testimony at Tina Jimerson's evidentiary hearing attempted to explain how, in spite of copious amounts of blood left in different areas of Myrtle Holmes' house, he managed to do so. Of course, the simplest explanation is that Early did not act alone and as recounted in Charlie Vaughn's statement during his guilty plea colloquy, Vaughn and Brown put Myrtle Holmes' body in the trunk of her car, not Early. *See* Pet.'s Ex. 13. Otherwise, Early's version of events is fatally flawed. Early stated that Myrtle Holmes "wasn't dead" when he put he in the trunk of her car. *See* Pet.'s Ex. 2, at 54. While the crime scene photographs suggest that Myrtle Holmes' heart was, in fact, still pumping blood when she was placed in the trunk, Early's explanation is wholly incredible with regard to how he was able ***to not get blood on him***.

Furthermore, Charlie Vaughn's account also described the inside of Myrtle Holmes' house, including her oxygen tank and mask (ripped off by Brown), as well as Brown viciously beating her with a "skillet or pot." Vaughn's account of the carnage that took place is much more in line with the physical evidence than Early's account that Myrtle Holmes picked up a pot and hit him with it, but it "wasn't doing nothing to me." *See* Pet.'s Ex. 5, at 10-14; Resp.'s Ex. 3, at 751 (photograph of a sauce pan with a broken handle between the bed and blood-spattered wall); Pet.'s Ex. 2, at 48. Vaughn's statement is also corroborated by the

testimony at trial of the Parsons brothers, who described Brown as coming to their home on the night of the murder and changing out of a blue warmup suit that appeared to be covered in blood. *See* Resp.'s Ex. 3, at 928-936, 944-948.

In sum, Brown's petition, with the help of Reginald Early and the accretion of years, attempts to obscure the circumstances surrounding the murder of Myrtle Holmes and his involvement in it with his co-defendants. Brown's lack of diligence in pursuing this, or any of his other claims, speaks volumes as to both the legitimacy of his actual-innocence claim and Early's incredible and unsupported account of the circumstances surrounding Myrtle Holmes' murder. Respondent respectfully submits that the Court should find that Brown has failed to establish actual innocence as a gateway to considering the rest of his time-barred and procedurally defaulted claims.

***Claims II-VI.***

In Brown's Claims II-V, he raises various federal constitutional claims. The constitutional errors complained of are not grounds for tolling the limitations period or excusing procedural default, and, because Brown has not established cause or a gateway for their consideration, they are both untimely and procedurally defaulted.

Brown's Claim VI raises several discrete ineffective-assistance-of-counsel claims. Brown has not established any kind of cause or procedural gateway for the

consideration of these untimely claims, and, as explained in Point IV.B, *infra*, his failure to seek any postconviction relief in state court bars excusal of procedural default pursuant to the Supreme Court's holdings in *Martinez* and *Trevino*, *supra*.

## V. Conclusion

WHEREFORE, the petition should be denied and dismissed with prejudice, and, pursuant to 28 U.S.C. § 2254 and Rule 12 of the Rules governing Section 2254 Cases in the United States District Courts, a certificate of appealability should be denied. Respondent reserves the right to plead further on the merits of any claims the Court deems subject to merits review.

Respectfully submitted,

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**ATTORNEYS FOR RESPONDENT**

## CERTIFICATE OF SERVICE

I, Kent G. Holt, hereby certify that on April 10, 2017, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which shall send notification of such filing to:

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