IN THE UNITED STATES DISTRICT COURT

for the

EASTERN DISTRICT OF ARKANSAS

PINE BLUFF DIVISION

JOHN BROWN

Petitioner,

CASE NO. 5:16CV00381 BRW-JJV

v.

WENDY KELLEY,

Director,

Arkansas Department of Correction

Respondent,

PETITIONER'S REPLY TO STATE'S RESPONSE TO PETITIONER'S PETITION FOR WRIT OF HABEAS CORPUS

Respondent does not address the merits of John Brown's constitutional claims, Response at 20-21, and instead argues that Mr. Brown's claims are procedurally barred by default and the statute of limitations. *Id.* at 4, 9. However, by Respondent's own reasoning, an evidentiary hearing is necessary to resolve the factual issues underlying Respondent's arguments. Indeed, Respondent agrees with Mr. Brown on one key factor: that Reginald Early was at the crime scene and the perpetrator of this crime. *Id.* at 18. The State and Mr. Brown dispute the evidence regarding Mr. Brown's innocence or guilt. Although Respondent asserts that Early's recantation is unreliable, Respondent fails to address significant new evidence regarding suppressed evidence that the State used informant Ronnie Prescott to secure a false confession from Charlie Vaughn,

Petition at 21-27, and new evidence that witnesses Lee and Kenny Parsons, Ellis Tidwell, and Taura Bryant gave false testimony at trial, Petition 27-34. Because this evidence goes to the heart of Mr. Brown's actual innocence claim and the *Schlup* innocence gateway, this Court should, at a minimum, grant an evidentiary hearing to resolve this factual issue. Mr. Brown's claims arise out of the same factual predicate warranting review and in which this Court granted a hearing in *Jimerson v. Kelley*, 5:15CV00208 BSM-JTK.

I. MR. BROWN FILED WITHIN THE STATUTE OF LIMITATIONS.

Respondent inexplicably argues that Mr. Brown's claims do not satisfy 28 U.S.C. § 2244(d)(1)(D) because while Mr. Brown raised his claim within one year of Reginald Early *signing* his affidavit confessing to the crime, Mr. Brown could have, Respondent argues, learned of this confession earlier through due diligence. Response at 6-7. It is unclear what Respondent believes Mr. Brown could have done to diligently discover such a confession before the December 21, 2015 date (of signature, and not disclosure) because prior to that date *it did not exist.*

Indeed, the State itself makes clear that prior to that date, Early had instead testified under oath that he was innocent and had not participated in the crime. Response at 17, 16. Instead, as explained in Brown's petition, Early only confessed to his crime when he learned that new DNA testing was being performed that would reveal the true perpetrator. Petition at 20. At Tina Jimerson's evidentiary hearing (on this same evidence and issue), Early testified that he told his attorney from the Innocence Project the truth because he found out that the Innocence Project had filed a motion on his behalf for DNA testing and that they would be paying for the testing. *Id.* Early further testified that he did not initially want to come forward with the information that he raped and murdered Ms. Holmes. *Id.* He ultimately decided to do so only after his attorney told

him that his admission "could help people." *Id.* Early thus signed an affidavit on December 21, 2015, stating the details to which he testified at the evidentiary hearing. *Id.* With Early's permission, his attorney subsequently sent a copy of the affidavit to Mr. Brown's counsel. It was not until the evidentiary hearing of Tina Jimerson, another of Mr. Brown's co-defendants, on June 15, 2016, that Early testified under oath for the first time about his crimes against Ms. Holmes. Early admitted at that time that none of his co-defendants had participated in the murder.

Respondent makes no argument as to what, if any, action Mr. Brown could have taken as an indigent defendant to discover a confession that did not yet exist. And case law does not require him to do so. Mr. Brown filed his petition within the time allotted by 28 U.S.C. § 2244(d)(1)(D), which begins running from the later of the date on which the judgment became final or "the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence." *Id*. The statute of limitations prescribed for an application of habeas corpus must be applied on a claim-by-claim basis. *Munchinski v. Wilson*, 694 F.3d 308, 327 (3d Cir. 2012). And "the factual predicate of a petitioner's claims constitutes the vital facts underlying those claims." *Earl v. Fabian*, 556 F.3d 717, 725 (8th Cir. 2009) (quoting *McAleese v. Brennan*, 483 F.3d 206, 214 (3d Cir. 2007). Here, Mr. Brown asserts a *Schlup* innocence gateway claim and due process violation based on a freestanding claim of actual innocence based upon newly discovered evidence. *cf. House v. Bell*, 547 U.S. 518, 554 (2006). The factual predicate of this claim is Early's affidavit, executed on December 21, 2015, in which he admitted for the first time that he alone raped and murdered Myrtle Holmes and that Mr. Brown had absolutely no involvement in the crime. It was impossible for Mr. Brown to have any information prior to December 21, 2015 as, even with the utmost diligence, the confession *did not exist.* The due diligence element of § 2254(d)(1)(D) "does not require 'the maximum feasible

diligence' but only 'due, or reasonable diligence.'" *Starns v. Andrews*, 524 F.3d 612, 618 (5th Cir. 2008) (quoting *Moore v. Knight*, 368 F.3d 936, 940 (7th Cir. 2004)). It certainly does not require foreseeing the future.

Tellingly, Early testified at Tina Jimerson's hearing that he had declined to disclose his guilt to anyone until he spoke privately with his attorney from the Innocence Project in November of 2015. Up until the moment of his admission, Early had assured his legal team that the crime scene DNA they were about to test was not his. (H.T. at 58-59). It was not until after the filing of a motion for post-conviction DNA testing and conversations with his counsel that Early finally made a full confession. The fact that Early had finally admitted he committed this crime alone was known only to Early and his counsel until December 21, 2015, when Early signed a sworn affidavit. (H.T. 59-63). Thus, under these facts, the only possible due diligence Mr. Brown could have done was to get a law degree, represent Early to secure DNA testing, and advise him of the consequences of DNA testing. This was impossible and it is no surprise that Mr. Brown did not learn of this fact until it actually came to exist in 2015.

In fact, Mr. Brown was shocked when he learned of Early's affidavit in early 2016. Mr. Brown has known all along that he is innocent, but because he was not present at the crime, he had no way of knowing who actually committed it. Before receiving Early's affidavit, Mr. Brown believed that all of his other co-defendants were innocent as well. Mr. Brown did not wait to discover "every possible scrap of evidence that might… support [his] claim", Response at 6: Early's affidavit is the earliest basis for his actual innocence claim and before December 2015, Mr. Brown had absolutely no reason to think that Early would suddenly confess after 25 years. To the extent that Mr. Brown was able to develop additional evidence, this Court would only hear it

if it were presented in the same petition as the new evidence. To argue that Mr. Brown should have filed immediately mischaracterizes the requirements of federal habeas review.

Further, it is unfair to suggest that Mr. Brown made no efforts to advance his innocence while sitting behind bars for a quarter of a century. *Id.* at 6. Brown has been without counsel since his direct appeal, with no resources, financial or otherwise, with which to attempt the costly and exhaustive process of establishing his innocence. To suggest otherwise is absurd and downplays the type of evidence necessary to file a cognizable federal habeas petition. Prior to December 2015, through no fault of his own, Mr. Brown had no basis on which to file a petition in this Court. He could not have known Early's secret or forced him to come forward with the truth as Brown was fully without counsel until 2015.

In short, the unrebutted evidence presented in Early's affidavit and at Tina Jimerson's June 2016 evidentiary hearing demonstrates that Mr. Brown did not know of Early's guilt until he received a copy of his sworn statement in December of 2015. He could not have learned of Early's admission any earlier because Early had never made such an admission before that date. The one-year statute of limitations for filing a claim based on Early's affidavit began, at the earliest, on December 21, 2015—the date the affidavit was executed. *See Williams v. Hobbs*, 2011 U.S. Dist. LEXIS 101243, 2011 WL 3962076 (E.D. Ark. May 23, 2011) (finding that where the factual predicate of the habeas petitioner's actual innocence claim was an affidavit from the co-defendant recanting his earlier testimony, the statute of limitations began running on the date the co-defendant executed his affidavit). Mr. Brown filed his petition within one year of that date. He has exercised due diligence in bringing this new evidence and his actual innocence claim before this Court.

II. MR. BROWN'S INNOCENCE OVERCOMES ANY PROCEDURAL DEFAULT.

Respondent similarly argues that Mr. Brown's constitutional claims are procedurally defaulted. Response at 9-15. As Respondent notes, however, a petitioner's failure to present to the state court the factual and legal grounds of his claim will be excused if the petitioner can show either (1) cause and prejudice or (2) a fundamental miscarriage of justice. Response at 11; *see also Maples v. Thomas*, 565 U.S. ____, 132 S. Ct. 912, 922 (2012); *Murray v. Carrier*, 477 U.S. 478, 495-496, 515 (1986). Notably, the State does not differentiate the claims which arise under cause and prejudice from the factual predicate that makes up Mr. Brown's innocence gateway claims and instead inappropriately conflates the two in discussing Mr. Brown's actual innocence. *See* Response at 12. Here, new evidence demonstrates that Mr. Brown is innocent of the crime for which he was convicted, and thus failure to excuse procedural default would amount to a fundamental miscarriage of justice.

Mr. Brown has demonstrated new evidence in the form of Early's confession, Petition at 15-21, the suppressed evidence that the State used informant Ronnie Prescott to secure a false confession from Charlie Vaughn, Petition at 21-27, and new evidence that witnesses Lee and Kenny Parsons, Ellis Tidwell, and Taura Bryant gave false testimony at trial, Petition 27-34. Notably, the State addresses only Early's confession, and fails to even mention the significant other new evidence that exists.

A petitioner may overcome procedural default by demonstrating that alleged constitutional violations probably resulted in the conviction of an actually innocent person. *Schlup v. Delo*, 513 U.S. 298, 320-22 (1995); *Carrier*, 477 U.S. at 496. This well-founded "concern about the injustice that results from the conviction of an innocence person has long been at the core of our

criminal justice system." *Schlup*, 513 U.S. at 325. "[A]ctual innocence, if proved, serves as a gateway through which a petitioner may pass whether the impediment is a procedural bar, as it was in *Schlup* and *House*, or… expiration of the statute of limitations." *McQuiggin v. Perkins*, ___ U.S. ___, 133 S. Ct. 1924 (2013).

To show fundamental miscarriage of justice, the petitioner must demonstrate that in light of new evidence, "it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt." *Schlup*, 513 U.S. at 3267. Put another way, the new facts presented by the petitioner must raise sufficient doubt about the petitioner's guilt "to undermine confident in the result of the trial." *Id.* At 317. Because the inquiry focuses on actual innocence, the reviewing court may consider *all* relevant evidence, including evidence that was excluded or unavailable at trial. *Id.* at 327-328. And to refute Mr. Brown's claim, the State must also consider all relevant evidence presented. Yet, it did not.

The confession of Reginald Early casts grave doubt on the primary evidence used to convict Mr. Brown at trial. When newly discovered evidence implicates another suspect, as it does here, that evidence is sufficient to undermine confidence in the petitioner's conviction. *See House v. Bell*, 547 U.S. 518, 548-554 (2006) (holding that evidence pointing to an alternate suspect reinforced doubts as to petitioner's guilt and, coupled with challenges to other evidence and petitioner's lack of motive, satisfied the *Schlup* gateway standard); *Munchinski v. Wilson*, 694 F.3d 307, 338 (3d Cir. 2012) (finding that evidence implicating other suspects was reliable such that it satisfied the *Schlup* standard). Had the jury heard Early's account of events, particularly when combined with evidence that Charlie Vaughn's confession was coerced and other State witness testimony false, it would have found Mr. Brown not guilty. No reasonable juror would

have convicted Mr. Brown had this evidence, which was corroborated by physical evidence and DNA testing done prior to trial, been presented at his trial.

Respondent claims that Early's affidavit and hearing testimony reveal that his confession is "implausible," Response at 16-17, and asserts that Early is a "liar." *Id*. at 16. Respondent argues that Early's testimony that he did not know John Brown and was not friends with Charlie Vaughn or Tina Jimerson cannot be true; as evidence of this, they point *only* to a police interview with Early's cousin, Shannon Manning, who allegedly told law enforcement officers that Early "ran with" Vaughn and Brown and that Brown and Early were together at the mill quarters sometime after the Holmes murder. *Id.* at 18. But this statement from Shannon Manning does absolutely nothing to undercut the reliability of Early's affidavit and hearing testimony, since Shannon Manning has signed a declaration indicating that the notes regarding his police interview were falsified, Ex. 20 at 1, a fact Respondent conveniently overlooks. *See* Petition at 61-62. Manning confirms that the four co-defendants were not friends, stating "I have never seen the four of them together and my understanding has always been that they were not friends. It has never made sense to my why these four people were charged together for a crime." *Id.*

As to Respondent's other argument, it is simply not inconsistent for Early to state that he "took care" not to get blood on him and for the crime scene to contain blood. Response at 18-19. Respondent maintains that Vaughn's account of the crime is "much more in line with the physical evidence" than Early's because Vaughn explained at his plea colloquy that Holmes hit the perpetrator with a pot, which aligns with a crime scene photograph featuring a sauce pan with a broken handle. Response at 19-20. But Early testified to a similar interaction, with much more detail: "Ms. Holmes has a table in her bedroom that looked like a dining room table and it had a

bunch of pots and pans on it. She grabbed one of the empty pots on the table and started to swing it at me with all her might and started to fight me with the pot." Ex. 1 at 3.

Early's participation in the rape and murder of Myrtle Holmes on September 21, 1988 is undisputed. Respondent does not argue otherwise. The only question, then, is whether Early acted alone or in concert with others. Mr. Brown, Tina Jimerson, and Charlie Vaughn all categorically deny participation in the crime and they have each consistently proclaimed their innocence. Now, Early has sworn in an affidavit and testified in court that he was the sole participant in the crimes for which Mr. Brown was convicted. To the extent that the State wishes to characterize Early as a liar, Response at 16, it has yet to prove that it is this confession, implicating himself, and not his original testimony that is a lie. Contrary to the State's contention that Early had nothing to lose by admitting the truth about the murder of Ms. Holmes, Response at 9, Early lost an entire legal team equipped with funds to pay for DNA and to fight for his innocence on his behalf at no cost to him. Considering Early originally maintained his innocence, it is not difficult to see which statement is the "lie."

Further, Respondent fails to address the State's own misconduct when it suppressed critical evidence that the confession of Charlie Vaughn had been procured by informant Ronnie Prescott. Charlie Vaughn was the key to the case—his was the initial statement bringing the defendants together. This statement was compounded by testimony from the Parsons, Ellis Tidwell, and Taura Bryant now known to be false. Nowhere does Respondent address these critical new developments that further support Mr. Brown's innocence.

For all these reasons, Mr. Brown meets the *Schlup* innocence gateway claim and overcomes any procedural bar. *Schlup v. Delo*, 513 U.S. 298 (1995). Further, Mr. Brown presents the exceedingly rare case that meets the standard for a freestanding claim of actual

innocence. *See Dist. Atty's Office for the Third Jud. Dist. v. Osborne*, 557 U.S. 52, 71-72 (2009); *In re Davis*, 557 U.S. 952, 952 (2009) (recognizing that in the proper case, a freestanding claim of innocence would be recognized in the habeas context). Thus, independently of whether Mr. Brown may pass through the *Schlup* gateway, he is entitled to habeas relief. *See Herrera v. Collins*, 506 U.S. 390, 405 (1993) (constitutional due process protections extend beyond the death penalty to wrongful incarceration); *United States v. United States Coin & Currency*, 401 U.S. 715, 726 (1971) (Brennan J. concurring) ("[T]he government has no legitimate interest in punishment those innocent of wrongdoing…").

III. MR. BROWN'S CLAIMS THAT THE STATE SUPPRESSED EXCULPATORY EVIDENCE IN VIOLATION OF *BRADY V. MARYLAND,* AND DESTROYED THAT EVIDENCE IN BAD FAITH IN VIOLATION OF *YOUNGBLOOD V. ARIZONA,* SATISFY CAUSE AND PREJUDICE.

In its zeal to assert that Mr. Brown is procedurally barred, Respondent fails to address Mr. Brown's *Brady* and *Youngblood* claims, each of which satisfies the cause and prejudice exception. Cause exists when an obstacle over which a petitioner has no control impedes his efforts to comply with the state procedural rule. *Maples*, 132 S. Ct. at 922; *see also Strickler v. Greene*, 527 U.S. 263, 283 n.24 (1999) (cause exists when interference by officials makes compliance impracticable, or when the factual and legal bases for the claim are not available to the petitioner's counsel at the time of state proceedings). The State's suppression of relevant evidence in violation of *Brady v. Maryland* is cause for a petitioner's failure to comply with the state procedural rule. *Banks v. Dretke*, 540 U.S. 668, 691 (2004). It logically follows that the State's destruction of relevant evidence in violation of *Arizona v. Youngblood* is cause for a petitioner's failure to comply with the state procedural rule.

In *White v. Helling*, the petitioner had to establish cause and prejudice to bring new evidence into the record at the merits stage of a habeas proceeding. 194 F.3d 937, 943 (8th Cir. 1999). The petitioner uncovered previously undisclosed police notes and memoranda during the proceeding. *Id.* The District Court refused to hear the new evidence, but the Court of Appeals reversed, reasoning that petitioner had demonstrated cause because "the very point urged by petitioner [was] that the evidence in question, documents from police files, was not previously made available to him, though the prosecution had a duty, under *Brady v. Maryland*, to make the information available if it was exculpatory." *Id.* (internal citation omitted).

Here, as in *White*, the very point urged by Mr. Brown is that the State withheld evidence from him, in violation of *Brady v. Maryland*, and that it destroyed that evidence in bad faith, in violation of *Youngblood v. Arizona*. The State failed to inform Mr. Brown that a jailhouse informant obtained the State's only direct evidence of his guilt. This information and the recording of the conversations between the informant and Vaughn were withheld from trial counsel, and according to the law enforcement officer who arranged for the recording, the recording no longer exists. The State also withheld evidence of interviews with Ellis Tidwell and Kenny and Lee Parsons, which would have undermined their testimony at trial. Because the basis of Mr. Brown's claims is that the State suppressed and subsequently destroyed potentially exculpatory evidence in bad faith, Mr. Brown's claims satisfy cause.

Mr. Brown suffered actual prejudice as a result of the State's suppression and destruction of this exculpatory evidence. A petitioner suffers actual prejudice from a *Brady* violation sufficient to overcome procedural default when the evidence suppressed meets the *Brady* materiality standard. *Banks*, 540 U.S. at 698. Under *Brady*, suppressed evidence is material if a reasonable probability exists that its introduction would have led to a different outcome in the

case. *Id.* at 698-99. In other words, the evidence must undermine confidence in the original outcome at trial. *United States v. Bagley*, 473 U.S. 667, 682 (1985); *White*, 194 F.3d at 944. Logically, the same standard would apply to a *Youngblood* violation.

Here, the State failed to disclose to Mr. Brown crucial information about both the circumstances under which the State obtained Vaughn's confession, and the substance of the confession. First, the State failed to disclose that an informant played a key role in obtaining Vaughn's confession, including that the informant was briefed about the murder prior to speaking with Vaughn and that the informant was incentivized to induce Vaughn to confess. In fact, the State here concealed all information about the existence of the informant.

Second, the State withheld fundamental details of Vaughn's confession from Mr. Brown, including that the informant discussed the death penalty with Vaughn. When Vaughn recanted his confession at Tina Jimerson's evidentiary hearing, he stated that he had confessed falsely because he feared he would receive the death penalty. This testimony would have been much more believable had the jury also heard Ronnie Prescott's account or heard the recording of the jailhouse conversations. Because the jury did not know about Prescott, it did not have sufficient information to make a determination about Vaughn's credibility. A jury cannot properly assess a witness's credibility if the jury is missing significant relevant information about that witness's testimony. *See Banks*, 540 U.S. at 702 ("one can hardly be confident that [defendant] received a fair trial, given the jury's ignorance of [the informant's] true role in the investigation," despite impeachment of the informant's testimony during trial proceedings). Had Mr. Brown been able to present the evidence about the interview between Vaughn and the informant, the jury would have evaluated the credibility of Vaughn's confession differently.

Vaughn's confession was the only evidence directly tying Mr. Brown to the murder. The jury would have been far less likely to convict Mr. Brown had the State disclosed that it obtained the confession through a jailhouse informant who talked about the death penalty with Vaughn and received favorable treatment in exchange for eliciting a confession from Vaughn. As a result, Mr. Brown suffered actual prejudice and his failure to present his claims in state court should be excused.

IV. THIS COURT IS AUTHORIZED BY STATUTE TO HOLD AN EVIDENTIARY HEARING ON MR. BROWN'S CLAIMS.

This Court has found that Mr. Brown's co-defendant Tina Jimerson was entitled to an evidentiary hearing on the same grounds. *See Jimerson v. Kelley*, 5:15CV00208 BSM-JTK. Mr. Brown is entitled to the same because he has met the threshold requirements for obtaining an evidentiary hearing in federal district court. Under 28 U.S.C. § 2254(e)(2), if the petitioner has failed to develop the factual basis of his claim in state court, it is nonetheless permissible for the federal district court to hold an evidentiary hearing if the petitioner can show: (1) that the claim relies on a factual predicate that could not have been previously discovered through the exercise of due diligence, and (2) that the facts underlying the claim 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.[1] Here, Mr. Brown has satisfied both prongs of the statute.

[1] According to the holding in *Cullen v. Pinholster*, 563 U.S. 170, 185 (2011), if a claim has been adjudicated on the merits in state court, the federal court is not authorized to take additional evidence in an evidentiary hearing. However, where there has been no adjudication in the state court, the *Pinholster* decision has no bearing on the district court's discretion to take new evidence under 28 U.S.C. § 2254(e)(2). *Id.* At 185-186.

CONCLUSION

WHEREFORE, Petitioner asks that the Court grant the following relief:

1. Issue a writ of habeas corpus ordering that John Brown be brought before the Court to be discharged from his unconstitutional confinement and relieved of his unconstitutional conviction and sentence;
2. Grant John Brown, upon request, the authority to obtain discovery and subpoenas for witnesses and documents necessary for an evidentiary hearing;
3. Order an evidentiary hearing on John Brown's claims; and
4. Grant such other relief as may be just and appropriate.

/s/ Tricia J. Bushnell
Tricia Bushnell
Missouri Bar #66818
Midwest Innocence Project
605 W. 47th Street, #222
Kansas City, MO 64112
(816) 221-2166 (phone)
(888) 446-3287 (facsimile)
tbushnell@themip.org

/s/ Erin Cassinelli
Erin Cassinelli
Arkansas Bar #2009118
Lassiter & Cassinelli
813 W 3rd St.
Little Rock, AR 72201
(501) 370-9300 (phone)
(501) 370-9306 (facsimile)
erin@lcarklaw.com

/s/ Rachel Wester
Rachel Wester*
Missouri Bar #67826
Midwest Innocence Project
605 W. 47th Street, #222
Kansas City, MO 64112
(816) 221-2166 (phone)
(888) 446-3287 (facsimile)
rwester@themip.org

ATTORNEYS FOR PETITIONER JOHN BROWN

CERTIFICATE OF SERVICE

I, Tricia Bushnell, hereby certify that on April 25, 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:

Kent G. Holt
Assistant Attorney General
323 Center Street, Suite 200
Little Rock, AR 72201
Kent.Holt@arkansasag.gov

/s/Tricia J. Bushnell
Tricia J. Bushnell