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

JOHN BROWN
Petitioner,

v.

WENDY KELLEY,
Director,
Arkansas Department of Correction
Respondent,

PETITION FOR A WRIT FOR HABEAS CORPUS UNDER 28 U.S.C. § 2254

John Brown is serving life imprisonment for a crime he did not commit. In 2015, Reginald Early admitted in an affidavit and confirmed in sworn testimony in 2016 that he alone committed the aggravated robbery and murder for which Brown and his co-defendants were convicted. Additional evidence recently uncovered also reveals the unreliable and manufactured nature of testimony used to convict Brown, including a false confession and previously undisclosed informants. Brown now seeks federal habeas relief.

Although the majority of claims asserted by Brown are newly discovered within the past year, this Court has the power to review the merits of Brown's Petition if he can supplement his constitutional claims with a colorable showing of actual innocence. *Schlup v. Delo,* 513 U.S. 298 (1995). Because the new evidence establishes a reasonable probability that no reasonable, fully-informed juror would find Brown guilty, this Court should review the merits of the constitutional claims set forth below and issue the writ of habeas corpus.

INTRODUCTION

John Brown was convicted following a jury trial in August 1992 of the murder and aggravated robbery of Myrtle Holmes. It took two trials to convict Brown and his co-defendants, Tina Jimerson and Reginald Early. A fourth co-defendant, Charlie Vaughn, had previously pled guilty.[1] In April of 1992, the State of Arkansas failed to persuade a twelve-person Dallas County jury that John Brown had committed the crime. The jury deliberated for approximately five days, ultimately splitting six-to-six on Brown's guilt, and the circuit court declared a mistrial.

Four months later, the State tried again, once more prosecuting Brown and his co-defendants together, but this time omitting critical DNA evidence that excluded Brown and Vaughn as contributors to DNA collected from the victim's vaginal swabs. Early was included as a potential contributor. Despite the fact that the inclusion of the DNA evidence significantly harmed Early and significantly helped Jimerson and Brown, Jimerson and Early were represented by the same attorney at trial.

Instead, the State's sole direct evidence in the second trial remained the conflicted testimony of alleged accomplice Charlie Vaughn. On March 25, 1991, Vaughn entered a guilty plea in which he admitted a major role in the murder and implicated Brown, Jimerson, and Early; a transcript of the plea was read into the record, however, on the witness stand, Vaughn recanted. He denied any involvement in the murder and denied that he even knew Brown.

To substantiate a relationship between Vaughn and the co-defendants and bolster their only link to the crime, prosecutors presented witnesses, none of whom observed the crime, yet

[1] Charlie Vaughn's confession is unreliable and inconsistent with the evidence in this case. He recanted his confession at every court proceeding following his guilty plea. Moreover, new evidence reveals the confession was the product of a previously undisclosed informant who played on Vaughn's fear of police and the death penalty, *See* Statement of Facts: Charlie Vaughn's "Confession" and Claim I, Part B, *infra*.

each of whom offered anecdotes claiming Brown and the co-defendants hung-out together shortly before and after the murder.

This time, the jury returned a guilty verdict, and the judge sentenced Brown to life in prison. The Arkansas Supreme Court affirmed the conviction, declining to visit the merits of Brown's two appellate arguments because trial counsel failed to preserve the first issue (that the trial court erred in denying his motion for a directed verdict that Vaughn's testimony was not corroborated) and failed to file a timely motion in the second (that the trial court erred in not granting his motion to dismiss because of procedural delay in filing charges). *Brown v. State*, 869 S.W.2d 9, 10 (Ark. 1994). Brown, an indigent defendant with no funds for counsel, did not seek further post-conviction relief.

In December 2015, Reginald Early, Brown's co-defendant, confessed in grisly detail to robbing, raping, and murdering Ms. Holmes alone. This confession, preserved in an attached affidavit as Exhibit 1, proves Brown's actual innocence. It also emphasizes that, contrary to the testimony of State witnesses, Early did not know Brown and did not spend time with him. Early's confession is corroborated by physical and forensic evidence and other witness testimony. Early testified under oath to the substance of his affidavit at a federal habeas hearing for Tina Jimerson in June 2016. Further, investigation following Early's confession also reveals that significant evidence used against Brown was manufactured and confirms what he has said all along—he did not commit this crime and he was not friends with Early or Vaughn. Brown now seeks a hearing to substantiate his petition for federal habeas relief.

STATEMENT OF FACTS[2]

THE CRIME

On the morning of September 22, 1988, 78-year-old Myrtle Holmes was found sexually assaulted and brutally murdered in her home in Fordyce, Arkansas. *Brown v. State*, 869 S.W.2d 9, 10 (Ark. 1994). Upon discovering Ms. Holmes was not in her house that morning, two relatives called the Fordyce Police Department. (TT2[3]:148-49). Officer Ronnie Poole was the first member of law enforcement on the scene. (TT2:149). The home was ransacked and in complete disarray (TT2:149). Blood was everywhere: blood-stained the sheet and furniture; blood splashed the walls and carpet; blood smeared the walls. (TT2:185-86). Drawers were pulled out and items dumped on the floor. (TT2:149). A broken knife blade lay between the bloodstained couch and coffee table. (TT2:185-86). In the master bedroom, the head of the bed was covered in blood. (TT2:149). A broken pot lay on the floor. (TT2:186). In the kitchen, the utensil drawer stood open with a knife on the counter above it. (TT2:150). Another knife was found on the bedroom floor. (TT2:185). A blood-drag trail led from the master bedroom, through the kitchen and utility room, and out onto the carport to Ms. Holmes' car. (TT2:149-50).

Ms. Holmes' body was found in the trunk of her car (TT2:186). She had various apparent injuries and her throat had been cut. In addition, Ms. Holmes had been raped and DNA was collected from vaginal swabs taken from her body. (TT1:153-54). The police found no signs of forced entry into her home on any of the windows or doors. (TT2:158-59).

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[2] Significant portions of the Statement of Facts are adopted from Petitioner Tina Jimerson's Post-Hearing Brief in the related case, *Jimerson v. Kelley*, 5:15CV00208 BSM-JTK.

[3] References to the transcripts will include the transcript abbreviation and page number (TT:pp). References to the mistrial in this case will be cited as "TT1" and refer to *State v. Brown*, No. CR90-17 (April 21-24 & 27, 1992). References to the second trial that resulted in a conviction are cited as "TT2"and refer to *State v. Brown*, No. CR90-17 (August 17-19, 1992). References to Tina Jimerson's federal habeas evidentiary hearing are made as "JHT" and refer to *Jimerson v. Kelley*, No. 5:15-cv-00208-BSM-JTK (June 16, 2016).

Over the next two years, investigators pursued leads and suspects with little success. During that time, the DNA from Ms. Holmes' vaginal swabs was compared to DNA samples from three apparent suspects: John Brown, Charlie Vaughn, and Reginald Early. (TT1:61-62; Ex.11, Testimony of Dr. Robin Cotton). Brown and Vaughn were excluded as contributors; Early was not. (Ex. 11 at TT1:521-3, 524; JHT:71, 61-62, 63). Nevertheless, on March 16, 1990, the State charged not only Early, but also Vaughn and Brown with capital murder. Brown and Early were arrested that day and denied guilt. However, Vaughn—a former special education student with little schooling who could not read or write—pleaded guilty to murder in the first degree. As part of a negotiated plea deal that ensured he would not receive the death penalty, Vaughn implicated Brown, Early, and Jimerson. (TT2:513; Ex. 5, Vaughn Plea Transcript at 3,4,6,7).

MICHAEL JOE EARLEY JOINS THE INVESTIGATION

"I'm looking for someone to pay for a crime." – Michael Joe Earley (TT2:397)

Vaughn became a suspect when contract investigator and former law enforcement officer Michael Joe Earley[4] provided Vaughn's name to police. According to Earley, he launched his investigation to appease neighbors and friends who "ask[ed] me to get involved . . ." (TT2:390). At trial, Investigator Earley would testify that he began his investigation after the police investigation "had come to an end" (JHT:182), yet he worked hand-in-hand with law enforcement throughout, entering the crime scene to draw a crime scene diagram at Sherriff Lee Hornaday's request (JHT:187), and providing information directly to chief investigator Jerry Bradshaw of the Arkansas State Police. (JHT:182-83,194; TT2:401). In exchange, Earley received $5,000 for closing the case. (JHT:196).

[4] Michael Joe Earley and Reginald Early are not related.

Earley's role was pivotal: every piece of information presented at trial originated from Earley's interactions and he was a key witness at trial. Earley testified that he "was looking for someone to pay for a crime." (TT2:397). Years after the investigation began, just two weeks before trial, he gave a formal statement to police for the first time stating that he saw Early in the vicinity of Ms. Holmes' house on the day of the murder. (TT2:395-96). Yet, despite his role in the investigation and discovery of evidence, he testified that he did not know who killed Ms. Holmes. (TT2:402). It was Earley's informant, Taura Bryant that provided the initial lead implicating Vaughn. (TT2:449; JHT:185-86).

CHARLIE VAUGHN'S "CONFESSION"

"I'm not trying to put words in your mouth. I'm just trying to find out what happened."
– The Court (Ex. 5 at 10-11)

The entirety of events that led Vaughn to confess was unclear at the time of trial. What was known, however, was that Vaughn only every claimed he participated in the murder of Ms. Holmes on two consecutive days. Otherwise, Vaughn denied any involvement in the murders of Ms. Holmes, both before and after his guilty plea.

Over a year after the crime, Earley told police that his own informant, Taura Bryant, reported Vaughn committed the crime. (TT2:449, 452-461). Bryant had previously operated as an informant for Earley when he worked in law enforcement in Fordyce (JHT:183); he had since left the police department for unknown reasons (JHT:181). On February 24 and April 19, 1989, investigators interviewed Vaughn; both times he denied any knowledge of the crime. (Ex. 6, Relevant Arkansas State Police Reports). Four months later, on August 7, 1989, and another six months later on February 2, 1990, police tried to interview Vaughn again, but he refused to answer any questions. (Ex. 6). On April 30, 1990, Vaughn was arrested on a no-bail warrant and refused to give a statement. (Ex 6). On July 5, 1990, over a year and a half after investigators

began hounding Vaughn with no success, Vaughn had a friend write a letter to an attorney for him stating that he could not afford a lawyer, and that he had no knowledge of the crimes for which he had been arrested. (TT2:546-549). Then, abruptly, on March 24, 1991, Vaughn made a statement to police investigators at the Dallas County Jail. (Ex. 6). Although records indicate the statement was recorded, no recording was ever produced in court or to the defense. No information was given to the defense indicating what prompted Vaughn's new willingness to talk.

The next day, Vaughn entered a plea of guilty in court and confessed to participating in the crimes. He named Brown and Early as co-perpetrators in the rape and murder of Myrtle Holmes, and alleged that Tina Jimerson had driven the men to Holmes' house. (Ex. 5 at 9). Initially, Vaughn stated that "Teen" and "John" picked him up to commit the robbery. (Ex. 5 at 7). He did not mention Early's name. Only after the judge asked, "Teen, John Brown and Reginald?," did Vaughn respond "Yes, sir" and proceed to make allegations against Early as well. (Ex. 5 at 7). Specifically, Vaughn claimed that Jimerson stayed in the car while he, Brown, and Early went into the victim's home. (Ex. 5 at 9). Vaughn alleged that Brown entered through the window and opened the door for Early and Vaughn. (Ex. 5 at 8). When prompted by the judge, Vaughn stated that he, Early, and Brown went through the house and found money, though Vaughn did not state where. (Ex. 5 at 10). Then, according to Vaughn, Brown beat Ms. Holmes; Vaughn first alleged the weapon was a pipe, then changed it to a skillet. (Ex. 5 at 10-11).

THE COURT: What did he beat her on the head with?

DEFENDANT: with a pipe.

THE COURT: A pipe?

DEFENDANT: Bottom of skillet.

THE COURT: Skillet? Some kind of pan? Is that what you

DEFENDANT: Yeah.

THE COURT: A--

DEFENDANT: It just -- was a skillet, sir.

THE COURT: I'm not trying to put words in your mouth. I'm just trying to find out what happened.

(*Id.*).

Vaughn claimed that each of the men raped Ms. Holmes, and that at some point Brown removed Ms. Holmes' oxygen mask. (Ex. 5 at 12). Finally, according to Vaughn, Brown stabbed Ms. Holmes to death and Vaughn and Brown put Ms. Holmes' body in the trunk of her car. (*Id.*).

None of the defendants knew Ms. Holmes, and she did not know them. Nonetheless, according to Vaughn, they had gone looking for Ms. Holmes' house on the night of the murder. (Ex. 5 at 7). When the judge pressed him on this unusual claim and asked how Ms. Holmes was targeted, Vaughn changed his story and said that was just "the house they stopped at." (Ex. 5 at 9).

Before accepting Vaughn's guilty plea, the judge asked Vaughn to acknowledge that he gave a statement to the police, to which Vaughn responded, "Yes, sir. I have." (Ex. 5 at 15). The judge then asked whether Vaughn told the police anything different from his testimony, and it appears Vaughn became confused:

THE COURT: Is what you told the police different?

DEFENDANT: Well, it's a little story.

THE COURT: Can you tell me basically what the differences are? It's hard to tell sometimes the same story.

DEFENDANT: Yes, sir.

THE COURT: More than once with everything being exactly the same in detail, but do you know right offhand what the differences might be?

DEFENDANT: No, sir. Not quite.

THE COURT: Is there any doubt in your mind that you and John Brown and Reginald Early went to the home of Myrtle Holmes with the intent to rob the resident of that house?

DEFENDANT: Yes, sir.

THE COURT: Any doubt in your mind? That's what you did say?

DEFENDANT: That's what we supposed to have went and did was rob.

(Ex. 5 at 15-16).

On January 28, 1991, shortly before Vaughn made these statements at his guilty plea hearing, his attorney had filed a plea of not guilty by reason of mental disease or defect, and a request for a mental examination. (Ex. 5 at 2-3). The trial court granted that request, and on February 21, 1991, the court ordered Vaughn to be evaluated. (*Id.*). Vaughn was apparently evaluated by Dr. Peal (Ex. 5 at 3), but the results of that examination were never presented in court. Despite the missing results, despite Vaughn's claim he had told "a little story," and despite Vaughn's confusion about his supposed role in the crimes, the court accepted Vaughn's plea and sentenced him to life in prison. (Ex. 5 at 16-17).

BROWN'S ARREST AND CONVICTION

"*I was falsely accused of a crime I didn't do. I was convicted of it."*

– John Brown (JHT:151).

Early, Brown, and Jimerson went to trial in August 1992, following an earlier mistrial. *Brown v. State*, 869 S.W.2d 9, 10 (Ark. 1994). The only direct evidence of Brown's alleged guilt was the statement Vaughn made at his guilty plea hearing. (Ex. 4, Testimony of Charles Vaughn at Brown's trial). While Vaughn testified at trial, he recanted the statement he gave previously. Instead, Vaughn testified that he was not involved in robbing, raping, or murdering Ms. Holmes.

(Ex. 4 at TT2:511). He did not know what had happened at Ms. Holmes's house. (*Id.*) He only mentioned Brown, Jimerson, and Early at his plea hearing because he was told to do so. (Ex. 4 at TT2:636-37). Vaughn further testified that he was forced to plead guilty, that at his guilty plea hearing he said what he was told to say, and that he had been threatened with the death penalty prior to entering his plea. (Ex. 4 at TT2:534-38, 542-43, 546). He testified the he confessed only at the insistence of his attorney. (Ex. 4 at TT2:537). "Man, like I told you, man, the lawyer was putting words in my mouth, man. I didn't know nothing about -- I don't know nothing about this murder, man." (Ex. 4 at TT2:542).

Five State's witnesses testified to seeing Brown in the days surrounding the crimes: Lee Parsons, Kenny Parsons, Taura Bryant, Ellis Tidwell, and Patsy Harris, but none placed Brown at the scene. Lee Parsons testified that once while Brown was living with him, Brown came to the house with Jimerson, Early, and Vaughn. (TT2:410-13). According to Lee, Brown looked like he was in a hurry, and wearing clothes that appeared to have blood stains on them. (TT2:413). Brown changed clothes and left. (TT2:414). On cross-examination, Lee testified that he did not remember the day that Brown came to his house, (TT2:419), and that he later washed Brown's bloody clothes and wore them. (TT2:415). Lee did not come forward with this account until March 27, 1991, three years after the crime and after his brother Kenny made a statement to police. (TT2:421-22).

Kenny Parsons, Lee's brother, testified that the night before he learned about the murder of Ms. Holmes, Brown, Early, Jimerson, and Vaughn pulled up to his home in a car that Jimerson was driving. (TT2:409,423,425). According to Kenny, Brown had blood all over him, and Brown said he had been in a fight. (TT2:426). Kenny stated that Brown then changed his clothes, and the two walked uptown together. (TT2:426-27). Kenny was a trustee at the city jail

when he first came forward with this information, again nearly three years after the fact and on the exact day Jimerson was arrested. (TT2:432).

Taura Bryant testified that the night before the murder, she saw Brown, Early, and Jimerson in the front yard of Levi Grandy's home between 4:30pm and 5:30pm. (TT2:441-42). According to Bryant, the three individuals left and then came back around 9:00pm or 9:30pm, only to leave again fifteen minutes later. (TT2:442-43). Around 10:30pm, Brown, Early, and Jimerson were back yet again, and Vaughn came down the street. (TT2:443). All four individuals then left between 11:00pm and 11:15pm. (TT2:444). Each time Bryant saw the four, they were apparently in a different car. (TT2:442-44). Bryant further testified that she saw Early, Brown, Jimerson, and Vaughn again the next evening at Piggot's house. (TT2:444-45). Bryant heard Vaughn say that he had robbed Ms. Holmes, that she "was big as a ocean" and "he could fit a light pole up her." (TT2:446,448). Bryant heard Jimerson crying and saying "shut up." (*Id*.). Bryant testified further that Brown had a red stain on his knee. (TT2:449-50). She admitted on cross-examination that she had previously testified that Early, not Brown, had blood on his clothes. (TT2:450).

Ellis Tidwell testified that Brown and Vaughn visited his home on the night of the murder. Vaughn arrived seeking an advance for work he had performed for Tidwell. (TT2:327). Tidwell claimed Vaughn introduced Brown, and that the two looked "wild-eyed." (TT2:338).

Patsy Harris testified that she saw Brown on the morning of September 22, 1992, in the courthouse where she worked as a Municipal Court Clerk. (TT2:434-35). Harris stated that Brown appeared in court that day to testify in a case, *John Brown v. Sonny Tidwell*. (TT2:437). Brown had his shirt unbuttoned and Harris observed Brown had a "scar or a wound on the right side of his chest." (TT2:436). Harris did not know how he got the scar, but she did know he had been stabbed by Sonny Tidwell, sometime prior to the court date. (TT2:437).

Lastly, Investigator Michael Joe Earley testified that on the night of the murder, he saw Reginald Early near Ms. Holmes' home. (TT2:378-85, 387-88). Notably, despite the value of such information, Earley did not give a formal statement to police until just days before the trial (TT2:395-96) and was not called to testify during Brown's first trial (TT2:380).

Jimerson testified in her own defense and maintained her complete innocence of the crimes; she swore that she had not driven the men to or from the crime scene and that she was home on the night Ms. Holmes was killed. (TT2:585, 580-603). Her father's testimony corroborated her account of her whereabouts. (TT2:569, 567-80). Jimerson also testified that in 1991, investigators offered a bribe if she would lie and falsely incriminate Brown and Early. (TT2:582).

Early testified at trial that on the day of the murder, he had spent the day drinking with an individual named "Pig." (TT2:606-607, 618). Early drank until the liquor store closed, and then ended up lying outside on a corner until around 3:00 a.m., when he went home. (TT2:619-20). He denied having anything to do with the Holmes murder. (TT2:605,623-625).

Brown did not testify at trial, but maintained his plea of not guilty. Despite the lack of direct evidence of his guilt, Brown was convicted of first degree murder and aggravated robbery, and sentenced to life in prison. At sentencing, he maintained his innocence. (TT2:740). Early and Jimerson were also found guilty and received life sentences.

ACTUAL INNOCENCE

John Brown, throughout state court proceedings, had the misfortune of being represented by ineffective and corrupt counsel who did virtually no investigation on his behalf. Consequently, he went to trial without a reasonable, independent investigation into his innocence. As a result, some of Brown's most compelling claims for relief have never before been presented in state

court, whether at trial or in post-conviction proceedings. Additional claims are based upon new evidence, not previously available, and are properly before this Court. In spite of the failure to raise some of the claims and evidence presented herein, this Court can reach the merits of any claim if it finds that Brown can supplement his constitutional claims with a colorable showing of actual innocence. *Schlup v. Delo*, 513 U.S. 298 (1995).

While a prisoner's failure to litigate a constitutional claim in state court may disentitle him to federal review, *Wainwright v. Sykes*, 433 U.S. 72 (1977), the defense of procedural default is neither jurisdictional nor absolute. A state prisoner is entitled to federal habeas corpus relief on constitutional error if he can demonstrate cause for the procedural default and prejudice from the asserted constitutional error. *Murray v. Carrier*, 477 U.S. 478 (1986). Even if a prisoner cannot satisfy the cause-and-prejudice exception to the procedural bar rule, "the principles of comity and finality that inform the concepts of cause and prejudice 'must yield to the imperative of correcting a fundamental, unjust incarceration.'" *House v. Bell*, 126 U.S. 2064, 2077 (2006), quoting *Murray v. Carrier*, *supra*, at 495. Thus, notwithstanding any procedural default the prisoner or his counsel may have committed in state court, he is nevertheless entitled to federal habeas corpus review of his constitutional claims if he can produce "new reliable evidence . . . that was not presented at trial," *Schlup v. Delo*, 513 U.S. at 324, establishing that "it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt," *Id*., at 327. The Supreme Court has emphasized:

> *Schlup* makes plain that the habeas court must consider "all the evidence," old and new, incriminating and exculpatory, without regard to whether it would necessarily be admitted under "rules of admissibility that would govern at trial."

House v. Bell, *supra*, at 2077, quoting *Schlup v. Delo*, 513 U.S. at 327. The Court reasoned that "because a *Schlup* claim involves evidence the jury did not have before it, the inquiry requires

the federal court to assess how reasonable jurors would react to the overall, newly supplemented record. If the new evidence so requires, this may include consideration of the 'credibility' of the witnesses presented at trial." *House v. Bell, supra* at 2078, quoting *Schlup v. Delo, supra,* at 330.

CLAIM I:
NEW EVIDENCE, INCLUDING REGINALD EARLY'S CORROBORATED STATEMENT ADMITTING HE WAS THE SOLE PERPETRATOR OF THE MURDER OF MYRTLE HOLMES, CONFIRMS JOHN BROWN'S ACTUAL INNOCENCE.

If this Court is satisfied that there is ample evidence that Brown is innocent, this Court could decide he is entitled to habeas corpus relief even if he received a fair trial. *See Herrera v. Collins*, 506 U.S. 390 (1993) (Justices Blackmun, Stevens, and Souter stating they would have remanded the case for a hearing on whether Herrera could "show that he is probably innocent." (*Id.* at 442); Justice White ruling that he would grant relief in such cases if the prisoner's evidence shows that "no rational trier of fact could [find] proof of guilt beyond a reasonable doubt." (*Id.* at 429); Justices O'Connor and Kennedy concluding, "the Court has no reason to pass on, and appropriately reserves, the question whether federal courts may entertain convincing claims of actual innocence. That difficult question remains open." (*Id.* at 419)).

Although Brown's court-appointed trial counsel failed to investigate and present important evidence and constitutional claims in state court, the likelihood of his innocence nevertheless warrants federal habeas corpus review of his petition. Before discussing his individual constitutional claims for relief, Brown will discuss the evidence now available that supports his colorable claim of actual innocence.

A. REGINALD EARLY'S CONFESSION

"*Charlie Vaughn was not at this crime. I'm telling you that as a fact. How do I know? I can only tell you that under attorney-client privilege. But never the less [sic] Charlie Vaughn Tina Jimerson And [sic] John Brown Jr. are innocent.*"

– Reginald Early (Ex. 2 at JHT:67-68)

In December 2015, Reginald Early confessed that he alone murdered Ms. Holmes. The confession came on the heels of proposed new DNA testing, which Brown and Jimerson hoped would help clear their names. Armed with the knowledge that new DNA technology could definitively identify him, rather than simply include him as a potential contributor, Early stepped forward and admitted the truth: he alone committed the crime. While represented by counsel, Early signed an affidavit, confessing, "I am solely responsible for the events that led to the convictions of Mr. Brown, Mr. Jimerson, and Mr. Vaughn. I committed these crimes alone. Mr. Brown, Mr. Vaughn and Ms. Jimerson are innocent of the murder and rape of Myrtle Holmes." (Ex. 1, Affidavit of Reginald Early at 6). Further, he acknowledged that he "never knew John Brown. Never met him at all," (Ex. 1 at 5). and that he was not friends with Vaughn or Jimerson. (Ex. 1 at 6).

In a June 15, 2016 evidentiary hearing before this Court, Reginald Early stood by his confession and the information in his affidavit. Under oath, Early offered additional details that only the perpetrator would know. (Ex. 2, Testimony of Reginald Early at JHT:38-52). As he did at trial, Early testified that on September 21, 1988, he drank from daytime until the liquor store closed. (Ex. 2 at JHT:38-39). He was drinking with an individual named Clarence Pope, also known as "Pig." (Ex. 2 at JHT:39-40). After the liquor store closed, Early separated from Pope and walked towards his cousin Shannon Manning's house. (Ex. 2 at JHT:40). Early testified that as he was walking to his cousin's house, he saw Ms. Holmes' house and decided to rob her to get back at her for calling the police on him earlier that year. (Ex. 2 at JHT: 40-41; Ex. 1 at 2). At the

age of seventeen, Early already had a history of burglarizing various locations in Fordyce, including the local pool hall, the courthouse, an auto shop, and the law firm of the prosecutors in his murder case. (Ex. 2 at JHT:37-38, 42). It would not have been unusual for an inebriated Early to decide to rob Ms. Holmes' residence.

Early's detailed and unsolicited confession is compelling and should be credited for a number of reasons. First, the physical evidence is consistent with Early's affidavit and hearing testimony. At the hearing, Early testified that he entered Ms. Holmes' house through the carport door, which was open. (Ex. 2 at JHT:41; Ex. 1 at 2). He described in detail both the home, and the robbery that led to the death of Ms. Holmes. Specifically, he testified that Ms. Holmes was asleep when he entered the home, but that he woke her up to ask whether she had any money. (Ex. 2 at JHT:44-45; Ex. 1 at 2). He described how he tackled Ms. Holmes as she tried to run away from him, and how that made him angry. (Ex. 2 at JHT:46; Ex. 1 at 3). After he found money in the dresser, Ms. Holmes hit him with a pot, so he slammed her to the floor, hit her several times, and raped her. (Ex. 2 at JHT:47-48; Ex. 1 at 3-4). Early continued to search the home for money, but Ms. Holmes tried to get away again through the living room, so he went to the kitchen and grabbed several knives. (Ex. 2 at JHT:50-51; Ex. 1 at 4). Early ripped the phone cord from the wall at some point during their struggle, (Ex. 2 at JHT:53), and he also pulled a thin, curtain-like piece of fabric off a mirror in the bedroom, wrapped Ms. Holmes' legs with it, and pushed her under the bed. (Ex. 2 at JHT:48; Ex.1 at 3). He cut Ms. Holmes 'throat and as she screamed, he stabbed her in the back with a knife, which broke, and then continued to stab her with a second knife. (Ex. 2 at JHT: 51-52; Ex. 1 at 4). Finally, he located Ms. Holmes' car keys, dragged her body out to the carport through the living room, bedroom, and kitchen, placed her in the trunk,

and wiped his prints off the car and the surfaces in Ms. Holmes' home. (Ex. 2 at JHT:53-55; Ex. 1 at 5).

The murder scene confirms Early's account. As Chief of Police Ronnie Poole recounted in his trial testimony, the Holmes residence was a gruesome scene, with blood from the kitchen to the utility room leading to the carport, and a broken knife blade on the floor in the living room. (TT2:149-150). Drawers had been pulled out and the bedroom "appeared to have been ransacked." (TT2:149; Ex. 6). There were trails of blood on the floor; in the kitchen, a utensil drawer had been pulled out and a knife sat on the counter above it. (TT2:150; Ex. 6). Company Commander Jerry Bradshaw confirmed that the scene included a blood-soaked sheet on the couch, a knife with a broken handle, and other blood stains. (TT2:185). He also mentioned that was a pot on the bed and two other pots on the bedroom floor. (TT2:186; Ex. 6). Officer Mike Hall testified that there was no sign of forced entry into the home and the doors to the house appeared to be unlocked. (TT2:299-300). These specific descriptions suggest that there was likely a struggle between Ms. Holmes and her killer, just as Early explained in his affidavit and hearing testimony. Similarly, police reports discuss a crumpled rug and leaned-over chair in the living room, "indicating it may have been knocked in that position and also on the cushion are several what appear to be bloodstains." (Ex. 6; Ex. 1 at 4).

Additionally, Early spoke about a broken knife, just like the one found in the home, recovered near the coffee table in the living room. (Ex. 6; Ex. 1 at 3). Early said that Ms. Holmes fell onto the couch at one point and started bleeding, consistent with bloodstains on the couch and the sheet covering it. (Ex. 6; Ex. 1 at). Even Early's comment about the phone cord matches the physical evidence: "Lying in the middle of the floor directly in front of you as you come in the door into the living room is a long black telephone cord. This cord is stretched out and

doubled. The room is in somewhat disarray indicated a possible struggle in this room . . . In front of [the bedroom] door is a T.V. set, on top of which is a telephone. This telephone has been torn loose from the wall and the cord has been what appears to be cut. This could possibly be the telephone that was disabled and the cord which is lying in the living room." (Ex. 6). Poole testified at trial that Ms. Holmes' brother had tried to use the phone in the home on the morning she was discovered dead, but it wouldn't work. (TT2:173).

Moreover, Early got another detail right; State's Exhibit 16 at trial was a photo showing blood on the floor and doorway between the bedroom and living room, (TT2:203-204), and present in State's Exhibit 15 is also a thin, green, arguably curtain-like piece of fabric on the floor of the bedroom. (TT2:203). The fabric, which Early stated he used to tie Ms. Holmes' legs, was not mentioned at trial and it is something only the killer would know. (Ex. 1 at 3).

Second, the DNA evidence available at the time of trial corroborates this new evidence from Early. The medical examiner found "human sperm in the vagina" of Ms. Holmes. (TT1:154). Upon testing that sperm, both Brown and Vaughn were excluded as contributors. (TT1:500-507). Early could not be excluded as a contributor to the male DNA found on the vaginal swabs taken from Ms. Holmes.[5] (TT1:500-507). Thus, the DNA is consistent with Early acting as the sole perpetrator of the sexual assault of Ms. Holmes. Similarly, the State presented the testimony of a serologist at the first trial, who examined blood found on twenty-two items from the crime scene. He could find no blood from either Vaughn or Brown. (TT1:200-202).

Third, testimony from witnesses during both the mistrial and the second trial fit with Early's confession that he acted alone and with his description of the crime. Informant Darrell Jenkins testified that Early confessed to him that he had committed the murder. (TT2:464-487).

[5] The DNA evidence was not presented at the second trial resulting in the conviction of Brown, Jimerson, and Early.

Jenkins and Early were close friends, and the two regularly played dice together. (TT2:467-68). While shooting dice in the mill quarters one night, Early admitted his role in the murder to Jenkins. (TT2:467).

According to Jenkins, Early entered Ms. Holmes' home and "hit [Holmes] across the head with a pot and pans and stabbed her" (TT2:468). He added that the murder occurred in Ms. Holmes' bedroom and that she required "some type of oxygen machine." (*Id.*). At the time of trial, Early had also confessed to Jenkins that he stole Ms. Holmes' cash and tried to steal her car, but that the car wouldn't start. (TT2:469). Notably, Early never mentioned the presence or cooperation of Brown or anyone else to Jenkins. (TT2:479-480). These facts relayed by Jenkins mirror the facts asserted in Early's 2015 affidavit and in his 2016 hearing testimony.

Additionally, the testimony of witness Jackie Hubbard also corroborates Early's confession. During the mistrial, Hubbard testified that she and Early share a son. (TT1:426-27). Hubbard explained that Early got mad at Hubbard in May of 1989 and threatened her life, telling her he would kill her like he killed Ms. Holmes: "I'll do to you like that lady over on the Southside." (TT1:430-31). This testimony from Hubbard matches up with Early's confession, as Ms. Holmes lived on the south side of town.

Finally, Early's reasons for not coming forward previously are credible. At the hearing, Early explained how he came to confess to committing the rape and murder. He had never told anyone about his participation in those crimes until November 2015, when he told his counsel. (Ex. 2 at JHT:57). Early testified that he had contemplated pleading guilty prior to trial, but that once he found out the names of his co-defendants, he changed his mind. (Ex. 2 at JHT:65). He did not even know all of them, and he knew for certain none of them was present for the crime

because he committed it alone. (*Id.*). So, instead of confessing, Early decided to take his chances at trial. (*Id.*). If the others were actually innocent, perhaps Early could be found innocent, too.

The first person Early told that he raped and murdered Ms. Holmes was his attorney from the Innocence Project in November 2015. (Ex. 2 at JHT:57-58). Early testified that he had intended to tell someone about committing the murder for over fifteen years, but he was waiting for legal representation. (Ex. 2 at JHT:57-58, 66). He stated that he wrote to various legal organizations over the years after his conviction, and he always noted in his correspondence that he knew something he would "only tell if [he] was being represented by counsel." (Ex. 2 at JHT:66-67). Early made such a note in correspondence he sent to the Innocence Project requesting representation on behalf of Charlie Vaughn on January 3, 2005. (Ex. 2 at JHT:67). In that letter, Early signed a case authorization form on behalf of Vaughn, and added a note stating that "Charlie Vaughn was not at this crime. I'm telling you that as a fact. How do I know? I can only tell you that under attorney-client privilege. But never the less [sic] Charlie Vaughn Tina Jimerson And [sic] John Brown Jr. are innocent." (JHT:67-68). Early ultimately started working with the Innocence Project years later, around 2012. Even then, Early did not state what it was that he knew about the Holmes murder; he waited until 2015 to admit his guilt.

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. (Ex. 2 at JHT:59-60). Early further testified that he did not initially want to come forward with the information that he raped and murdered Ms. Holmes. (Ex. 2 at JHT:64). He ultimately decided to do so only after his attorney told him that his admission "could help people." (Ex. 2 at JHT:62-63). Early thus signed an affidavit on December 21, 2015, stating the details to which he testified at the evidentiary hearing. (Ex. 1).

Notably, while Early has maintained that he was innocent of the crimes for which he was convicted, in truth, although he committed the crime, he was. Early was convicted as an accomplice to robbery and murder (Ex. 2 at JHT:71,79), but he was not an accomplice: He was the sole perpetrator of the crimes against Ms. Holmes. (Ex. 2 at JHT:79). No one else participated in those crimes.

Early also testified that at the time of the murder he knew "of" Jimerson, that he knew Vaughn from seeing him in town, and that he did not know Brown at all. (Ex. 2 at JHT:36-37). He was not friends with any of his co-defendants. (Ex. 2 at JHT:36). In fact, Early noted in his affidavit that he "cares nothing for [his codefendants]." (Ex. 1 at 6). The State presented no evidence at the hearing suggesting Early has anything to gain by taking full responsibility for the crimes.

Early's recantation did not occur until December 21, 2015. As a result, it was not presented at trial. Brown now timely petitions the court to vacate his conviction on the basis of this new evidence. Had a jury heard Early's corroborated confession that he alone committed the crime, Brown would not have been convicted.

B. UNDISCLOSED INFORMANT RONNIE PRESCOTT'S RECENT TESTIMONY EXPLAINS CHARLIE VAUGHN'S FALSE CONFESSION.

"*And I got him all the information he needed, and probably more."*

-Ronnie Prescott, (Ex. 7, JHT: 20)

In considering the strength of Early's confession, the Court must also review the incredible weakness of Vaughn's incriminatory statements. Vaughn's plea was the only direct evidence linking Brown to the crime. However, it is clear that Vaughn's admission cannot be considered truthful or reliable. As discussed above, Vaughn recanted his confession at trial and testified that he had nothing to do with the robbery, rape, and murder of Myrtle Holmes. (Ex. 4 at

TT2:503-511). He did not know Early, Jimerson, or Brown and he was not with any of them on September 21, 1988. (Ex. 4 at TT2:505,508). More importantly, newly discovered evidence reveals that Vaughn's confession was obtained through an informant previously undisclosed to the defense; As became evident during Jimerson's June 2016 hearing, previously undisclosed informant Ronnie Prescott was promised leniency on pending drug charges if he could obtain a confession regarding the Holmes murder from Charlie Vaughn. (Ex. 7, Testimony of Ronnie Prescott at Jimerson Hearing at JHT:10-11,33; JHT:99). His conversations with Vaughn were recorded, but never turned over to the defense. Requests for copies of these recordings has indicated that they were improperly destroyed.

At Jimerson's hearing, Prescott testified that he was released from the Texas Department of Corrections in March 1991, three years after the murder. (Ex. 7 at JHT:8-9). Donny Ford, the Sheriff of Dallas County, and Ronnie Poole, an Arkansas drug task force officer, picked up Prescott from Huntsville and drove him to Fordyce to face drug charges in Dallas County. (Ex. 7 at JHT:9; JHT:173-74). On the drive, which they made in a single day, Ford told Prescott that if he would help obtain information about a murder case, his pending drug case would be "dissolved." (Ex. 7 at JHT:10-11; JHT:99). Ford described the crime as a brutal murder of an elderly person by younger people who had broken into the home. (Ex. 7 at JHT:10,33). Prescott agreed to the proposal. Specifically, he agreed to use a pocket tape recorder to record a "young black guy" in the jail cell where Ford later placed him. (Ex. 7 at JHT:11).

At the Jimerson's evidentiary hearing, Prescott testified that after he arrived at the Dallas County jail, Ford supplied him with a tape recorder and a cassette, which he hid in a zippered pocket of his jumpsuit. (Ex. 7 at JHT:11-13). Ford instructed Prescott to try to get the target inmate to talk about the crime, then locked Prescott in the cell with the inmate. (Ex. 7 at JHT:12-

13). That inmate was Charlie Vaughn. Vaughn had already been cleared by DNA evidence and denied any involvement. But with the crime still unsolved after nearly three years, police were desperate.

Prescott believed it was in his interest to get Vaughn to talk about the crime so that Prescott's pending case would go away. (Ex. 7 at JHT:12). He recorded three or four conversations with Vaughn over a period of two or three days. (Ex. 7 at JHT:29). At one point, Prescott suggested that he and Ford stage an argument to enhance Prescott's credibility with Vaughn. (Ex. 7 at JHT:14). Prescott recorded additional conversations after that. (*Id*.). At the end of the process described above, Prescott gave Ford the recorder, and Ford played a portion of the tape. (JHT:15). Prescott's wife picked him up later that evening or the next day. (Ex. 7 at JHT:15-16).

A subsequently obtained handwritten statement bearing Prescott's signature, dated March 24, 1991, and co-signed by Ronnie Poole and ASP Lieutenant Jerry Bradshaw, who is now deceased corroborates Prescott's account.[6] (Ex. 8, Handwritten Statement Signed By Ronnie Prescott.) The statement was written in the first-person for Prescott, and states that he was picked up by the Dallas County Sheriff on Friday, March 22, 1991, his last day in the Texas Department of Corrections. (*Id.*) The sheriff returned Prescott to Arkansas and placed him in the Dallas County jail late that afternoon. (*Id*.)

The statement described how Prescott encountered Vaughn and asked what he was "in for"; Vaughn told Prescott "bits and pieces" and said he thought he might get the death penalty. (*Id.*) According to the statement, the conversations between Prescott and Vaughn continued the next day—Saturday, March 23—and Vaughn "appeared convinced that he

[6] The handwritten statement was not disclosed until January 7, 2015, when it was provided to Tina Jimerson's counsel.

could trust me after the sheriff and I had some words" (*Id.*) The remainder of the handwritten statement purported to be a description of what Vaughn said about the murder. (*Id.*) Nowhere did the statement reference Prescott taping conversations with Vaughn with a recorder he received from Ford—a fact undisputed at Jimerson's hearing.

Prescott did not recall signing this statement before leaving the jail, but he identified his signature on the last page; nothing else written on that exhibit was in his handwriting. (Ex. 7 at JTH:16-17.) Prescott added that in 1991 he would not have been able to read that statement because he was not well educated—and he can barely make out the writing even today. (Ex. 7 at JTH:27.) Because Prescott's recording of Vaughn no longer exists, we will never know precisely what Vaughn said during those conversations. Nonetheless, the handwritten statement was written by someone other than Prescott and deceptively hid the fact that a recording was made.

At the evidentiary hearing, Prescott testified that the drug charges pending against him were dismissed because he helped the Dallas County sheriff with the murder case. (JHT:18, 20). This testimony was also verified by independent evidence admitted at the evidentiary hearing, including Prescott's testimony at the trial of Bill Keeling. Keeling's trial took place in the Dallas County Circuit Court on August 15, 1991, just months after the recordings. The trial was before Judge Graves, the same judge who presided over Vaughn's guilty plea and Brown's trial. (JHT:18; Ex. 8). The prosecutor in the case against Keeling was Thirteenth Judicial District Deputy Prosecuting Attorney David Butler. (Ex. 8 at 1; JHT:87). Butler was also Ronnie Poole's supervisor, and Poole kept Butler apprised of his investigation relating to Prescott. (JHT:174).

Prior to Prescott's testimony at the Keeling trial, Judge Graves inquired about Prescott's veracity. Butler said he was convinced Prescott would tell the truth, and if he did not, perjury

charges would likely be filed; Prescott's attorney concurred in this assessment. Butler also said that the drug charges against Prescott had been nolle prossed. Prescott testified at the Keeling trial as follows:

> When the sheriff and Mr. Ronnie Poole came to the penitentiary in Texas to pick me up and extradite me back to the state of Arkansas, he, the sheriff, Donny Ford, asked me if I could assist him in a brutal murder that had happened a few years back by some gentleman [sic] of an elderly lady, and I told him if I could, I would in exchange for helping me with this. . . . And I got him all the information he needed, and probably more.

(Ex. 7 at JHT:20). Butler made no effort to correct this testimony, as would have been his ethical obligation had Prescott been lying. Prescott was never charged with perjury and the drug charges were never refiled. (Ex. 7 at JHT:21).

Brown's counsel did not find out about Prescott or his testimony in Keeling's trial until Jimerson's evidentiary hearing in June 2016. This evidence would have played a key role in undermining Charlie Vaughn's confession. Prior to the recorded conversations Vaughn had with Prescott, when he was interviewed by investigators from the Arkansas State Police on at least six occasions over the course of 18 months, Vaughn had denied any knowledge of the crime. (Ex. 6). It was only after Prescott's recorded conversations were turned over to Sheriff Ford that Vaughn made an incriminatory statement to investigators at the Dallas County Jail and entered a guilty plea in court. (Ex. 8; Ex. 6; Ex. 5). Though Prescott's memory of the substance of his conversations with Vaughn was not entirely complete, he "could have said" something like "you could get the death penalty for that" in order to convince Vaughn to keep talking. (Ex. 7 at JHT:33). This was corroborated by what Sheriff Ford told private investigator Gregory Stimis that Prescott discussed with death penalty with Vaughn. (JHT:106). Vaughn testified at both trials that the only reason he took a plea was because he wanted to avoid the death penalty. (TT1:640-643; Ex. 4 at TT2:551-3).

Moreover, Vaughn's clear mental impairments also weaken the veracity of his confession and his testimony at his plea hearing. At trial, Vaughn testified that he could not read or write (Ex. 4 at TT2:537-538; 548); he quit school in the 9th grade and was in special education classes. (Ex. 3, Testimony of Charles Vaughn at Jimerson Evidentiary Hearing at JHT:161-162; TT1:602, 609; Ex. 4 at TT2:504, 537-538, 548, 551). During his testimony at Jimerson's hearing, his severely limited mental capacity was unquestionable. Vaughn could not understand why he was still serving time for the Holmes murder, even though he was sentenced to life. (Ex. 3 at JHT:160). He repeatedly asserted that he believed he had overdone his time. (*See* Ex. 3 at JHT:157-158). He could not answer simple questions; he could not even give the name of the victim. (Ex. 3 at JHT:158). Although Vaughn claimed that he could read, when he was asked to read a document while on the stand, he could not do so. (Ex. 3 at JHT: 161-62). Vaughn's mental state made him especially vulnerable to threats of the death penalty if he would not cooperate with the State.[7] (*See* Ex. 4 at TT2:551, 552, 554).

The physical evidence and the details of the crime do not match up to Vaughn's version of events. Vaughn testified during his plea hearing that Brown entered the home through a window, but there was no evidence of tampering with the windows at Ms. Holmes' residence. (TT2:296, 687). Since Ms. Holmes' doors were never locked (TT2:320), Early's explanation that he walked through an open door is much more likely. Vaughn said that Jimerson waited in the car while the other three went inside the residence, but he did not specify where the car was during the crime. (Ex. 5 at 9, 14). None of Ms. Holmes' neighbors mentioned seeing a car outside her home on the night she was murdered. Thus, Early's assertion that he arrived to Ms.

[7] It is clear that Vaughn was terrified of the police. When they approached him asking for a blood sample, Vaughn threatened to kill himself and told law enforcement that he'd have them shoot him before he went back to court. (Ex. 6). In another interview with law enforcement, he began screaming and protesting and was consequently subdued. (Ex. 6).

Holmes' house on foot is a much more likely scenario. (Ex. 1). Vaughn said they found money inside the home, but he did not specify where. Early was able to tell the Court exactly where he discovered the cash and how much he found. (Ex. 2 at JHT:45, 47; Ex. 1). During his plea, Vaughn initially said Brown beat Ms. Holmes with a pipe, but was then corrected by the judge and said it was a skillet. (Ex. 5 at 10). And finally, the DNA evidence directly contradicts Vaughn's assertion that he, Brown, and Early all sexually assaulted Ms. Holmes. (TT1:523,524,527; Ex. 5 at 11).

Vaughn's vague and confused confession, which he soon recanted, cannot be more persuasive or reliable evidence than the detailed and accurate admissions of Reginald Early.

C. NEW EVIDENCE REVEALS THAT SEVERAL STATE WITNESSES GAVE FALSE TESTIMONY AT TRIAL.

Following Tina Jimerson's evidentiary hearing, undersigned counsel undertook additional investigation into the facts presented at trial. This investigation revealed that at least two of the State's witnesses have subsequently recanted their testimony. In addition to the Parsons' recantations, the Midwest Innocence Project's investigation also uncovered a number of witnesses never before interviewed by defense counsel, who undermine the State's case and support Brown's claim of innocence, including Ellis Tidwell, Shannon Manning, Corniece Grandy, Jesse Grandy, Terrie Childs, Donnie Mason, and Patsy Harris.

i. Lee and Kenny Parsons falsely testified that they saw Brown in bloody clothes on the night of the crime.

If jury had heard about Early's confession and the full scope of the unreliability of Charlie Vaughn's story of the crime, they would likely have acquitted both Brown and Jimerson. But, in addition to Early's admission and Vaughn's recantation of his confession, there is even more new evidence of Brown's innocence, much of which stems from the breakdown of

evidence pieced together by Michael Joe Earley over years. Darrell Jenkins, a State witness and long-time informant of Investigator Earley, (JHT:183; TT2:479), told law enforcement on June 20, 1989, that on the night of the murder, Brown had gone to Kenny and Lee Parsons' home to change out of his bloody clothes after leaving Ms. Holmes' residence.[8] (Ex. 6). Yet, Kenny and Lee Parsons did not corroborate Jenkins's story until two years later in 1991, when Kenny was serving as jail trustee in Fordyce. (TT2:155,174,432). Kenny did not make a statement until the very day that Jimerson was arrested, March 26, 1991.[9] (TT2:155; Ex. 6). Lee was contacted by Sheriff Ford and gave a statement several days later on March 27, 1991. (TT2:155; Ex. 6). Both brothers then testified at trial that Brown lived with them in the weeks leading up to the Holmes murder and that he came to their house with the other three co-defendants and changed clothes on September 21, 1988. (TT2:408-409,411-413,424-426).

However, in recent interviews, the brothers have separately recanted that testimony. Lee Parsons did not remember exactly what he said during Brown's trial, but recalled that he was asked to testify because he had "apparently seen" Brown, Jimerson, Early, and Vaughn together at his house on the night of the Holmes murder. (Ex. 13, Rachel Price Declaration re Lee Parsons at 1). He might have been at the jail at the time he was asked to testify. (*Id.*). Lee was clear: He did not actually see Brown or his co-defendants at his home at any time, including the evening of the crime. (*Id.*). Brown did not live with the Parsons brothers and never kept or changed clothes there. (*Id.*). Lee did not see Brown in bloody clothes and he did not wash or wear Brown's clothes. (*Id.*). Kenny Parsons was heavily into drugs at the time of the Holmes murder and did not have a permanent residence. (Ex. 12, Micah Moore Declaration re Kenny Parsons at 1).

[8] Jenkins did not testify to this at trial.

[9] When asked if anyone came to his house on the night of the murder in 1988, Kenny Parsons initially gave police the following names: "A: Charlie Vaughn, Shawn Brown, and a Reggie Maroo. Q: Okay, was there anybody else with them? A: Ah, Gerald Jimerson." (Ex. 6).

Kenny and his brother did not live together and did not spend much time together. (*Id.*). Like his brother, Kenny could not remember what he said at Brown's trial and or who asked him to testify. And like his brother, he was also unambiguous in that he had never seen Brown, Jimerson, Early, and Vaughn together and had not seen the four of them at his house on the night Ms. Holmes was murdered. (*Id.*). Kenny did not live with Brown, did not see Brown with blood on his clothes, and has never worn any of Brown's clothes.[10] (*Id.*). In short, each brother separately told Midwest Innocence Project student investigators that their trial testimony was false.

Lee's and Kenny's recantations further strip away the evidence used to convict Brown, support Early's assertion that he committed this crime alone, and showcase the manipulative tactics of the police. The brothers "came forward" with their stories about the night of the murder over two years after the crime, when Kenny was a jail trustee, and only days after Vaughn's guilty plea.

ii. Ellis Tidwell gave false testimony that Brown introduced himself to Tidwell on the night of the murder.

Not only did Kenny and Lee Parsons testify untruthfully at trial, but new evidence also suggests that Ellis Tidwell, another State's witness and life-long friend of Michael Joe Earley, also testified falsely. In 1988, Charlie Vaughn was an employee of Ellis Tidwell. (TT2:326, 507). On the stand at trial, Tidwell stated on the night of the Holmes murder, Vaughn and Brown came by his house around midnight, looking "wild-eyed." (TT2:327-28). Vaughn wanted money. (TT2:327). Tidwell told the jury that he'd never met the man accompanying Vaughn before, but that Vaughn introduced his friend as John Brown. (TT2:328, 338).

[10] When Kenny Parsons was approached in November of 2016 about his willingness to sign a sworn declaration, his wife indicated that Kenny was afraid of the police and reluctant to get involved in this matter. (Ex. 12).

Yet, during an interview in August of 2016, Tidwell shared that he knew Vaughn's friend was John Brown because Investigator Earley showed him a photo line-up at the police station and he was able to identify Brown. (Ex. 14, Micah Moore Declaration re Ellis Tidwell at 1). Additionally, Tidwell now claims that he saw both Brown and Early with Vaughn that evening and he also picked Early out of that same photo array.[11] (*Id.*). Tidwell is close friends with Donny Ford and Ronnie Poole, as well as Investigator Earley—all of whom did crucial investigative work in the Holmes murder case. (*Id.*). He had also known Ms. Holmes his whole life. (TT2:324-325). The State never disclosed anything about this line-up, *see* Claim IV, *infra*, which is a much less reliable form of identification than Vaughn introducing whoever may have been with him on September 21, 1988 by name.

Even at the time of trial, it was evident that Tidwell had likely been heavily influenced by law enforcement to give "helpful" information. Because of a request by Sheriff Donny Ford, Tidwell had been released from the Arkansas Department of Corrections on a 20 year sentence in order to come to the Dallas County Sheriff's Department and act as a trustee.[12] (TT2:323-324, 333). Tidwell was sentenced in April of 1989 and was released to Dallas County under "Act 309" in August of 1991. (TT2:324,341-342). It was not under after Tidwell arrived back in Dallas County that he gave a police statement implicating Brown. (TT2:330,334,343-344; Ex.6). Tidwell maintained that he casually mentioned to Poole that he had spoken about the murder with Michael Joe Earley in December of 1988 and he wondered if Earley ever passed on this information to Poole. (Ex. 6). Despite claiming he spoke to Earley years before, there are no

[11] Tidwell was told by Earley that Jimerson had driven Brown, Early, and Vaughn to Ms. Holmes's residence and that they were responsible for the murder. Tidwell also indicated that Donny Ford or Ronnie Poole may have been present when he participated in the photo array. (Ex. 14).

[12] Tidwell admitted on cross-examination that as a trustee, he was able to receive furloughs from Sheriff Ford. (TT2:333).

statements from Tidwell in the police file other than his November 1991 interview with police. (*Id.*). At the time of trial, he was still working as a trustee, fixing the county's police vehicles. (TT2:323, 344).

iii. Patsy Harris Has Recently Revealed Important Contextual Information Regarding Her Trial Testimony.

State's witness Patsy Harris was working as a Fordyce Municipal Court Clerk at the time Ms. Holmes was murdered. (TT2:434). The morning after Ms. Holmes' death, September 22, 1988, Harris saw Brown in municipal court (TT2:435; Ex. 6) and testified that Brown's shirt was open, revealing a wound that had not yet healed across his chest. (TT2:436). The State hoped the jury would conclude that this wound was the result of Brown's attack on Ms. Holmes the previous night.

This was an unfair inference, as Harris has now given a more particular description of Brown's wound: She has referred to what she saw as "small scratches", "about one or two fingers wide", white and unhealed, not fresh or bloody. (Ex. 15, Rachel Price Declaration re Pat Harris). This is unremarkable, as Brown was in court that morning because of an incident months before where Sonny Tidwell, another Fordyce resident, had stabbed Brown in the chest. (TT2:437; Ex. 6). Harris also added that she first mentioned seeing Brown on September 22, 1988, when prosecutor Tom Wynne came into the courthouse looking for documents related to Brown. (*Id.*). Harris told Wynne about what she witnessed and Wynne insisted that she testify against Brown at trial. (*Id.*). She did not want any part in testifying, but she was not asked to participate—"she was told." (*Id.*). Even the judge she worked for told Harris it was "her duty because she worked for the court." (*Id.*). Harris regrets her testimony and she believes the wrong people have been punished for the murder of Myrtle Holmes. (*Id.*).

iv. New Evidence Challenges Taura Bryant's Testimony.

With Early's confession, Vaughn's recantation and reiteration of his innocence, the Parsons brothers' recantations, the false testimony of Ellis Tidwell, and the new information from Patsy Harris, the only remaining evidence against Brown is the testimony of informant Taura Bryant, who is now deceased.

Bryant testified at trial that all four co-defendants attended a party at Levi Grandy's on the night of the murder and the next night. (TT2:442). Bryant was key to the State's case in that she placed Brown, Jimerson, Early, and Vaughn together near the time of the crime. (TT2:442-443). She also claimed she heard the defendants make self-incriminating statements and that she saw Brown with blood on his clothes. (TT2:447-448). But Bryant's statement to police and later trial testimony all stemmed from her relationship with Investigator Michael Joe Earley. Earley had used Bryant as an informant in the past. (JHT:183-184). In fact, the first reported interview with Bryant is an undated conversation between her and Earley where Earley only refers to her as "Sam", an alias.[13] (Ex. 6; TT2:449). Bryant also knew the victim, Ms. Holmes, because they both lived on the south side of Fordyce. (TT2:440).

There are inconsistencies in Bryant's testimony and her story changed and changed again over time. (TT2:451). In fact, Bryant herself admitted that the statement she gave police was "immensely different" from her court testimony. (TT2:455). Bryant first told police that she saw

[13] This interview is rampant with incredibly leading questions from Investigator Earley. For example, when discussing the location of Levi Grandy's home: "Q: Okay, on First Street? A: Uh huh. Q: Go across the railroad, turn left at the next street? A: Uh huh. Q: Go around the curve and about the second brick house on the left, isn't it? A: Yes. Q: That's Levi Grandy's." (Ex. 6). And then towards the end of the interview, "Q: …Again, I'm still concerned about Charlie Vaughn's knowledge into this thing. He definitely knows what went down there. A: He has to know". (*Id.* at 142). After Bryant tells Earley that Vaughn allegedly made a comment about being able to "fit a light pole" into Ms. Holmes: "Q: Well, if he knew that, he had to be there. A: That's what I was figuring." (*Id.*).

a blood stain on Early's torn shirt. (TT1:72; Ex. 6). But at the second trial, she claimed that she saw blood on Brown's pants instead. (TT2:449-450,458,461). On cross, she changed her story again and reverted back to having seen blood on Early's clothes. (TT2:461). In her first interview with Earley as "Sam", she first stated that all she heard was Brown and his co-defendants discussing "a secret" plan (TT2:452-453; Ex. 6). There was no mention by the four of any specific victim or crime. (TT2:452). Yet, on the stand, she claimed that she suddenly remembered the defendants talking about robbing and murdering "the old woman." (TT2:452).

Bryant also equivocated and changed other important details. She told police that she saw Brown and Early together on a Tuesday evening; but at trial she asserted she saw them on a Wednesday night. (TT2:459). Although never presented to the jury, in a closed court session, Bryant's testimony was challenged by two additional defense witnesses, Stephanie Rogers and Mary Chambers. They both would have testified that they overheard Bryant shout to Sheriff Donny Ford before her trial testimony, "What am I supposed to say? I don't know what I'm supposed to say, I don't even know why I'm here." (TT2:649-650, 652, 654-656).

If the case against Brown were retried today, Bryant's testimony could also be challenged by the recently obtained statements of several witnesses, particularly Corniece and Jessie Grandy. Corniece Grandy, Levi's daughter, has stated that it would have been "unusual" for Brown to have been at one of her father's parties because Brown was not a friend or associate of anyone in their family. (Ex. 17, Corniece Grandy Declaration). She never saw Brown, Jimerson, Early, and Vaughn together. (*Id.*). Corniece does not know Taura Bryant and has no idea why Bryant would have been at one of their house parties. Corniece has sworn that she's "certain that no one ever confessed their involvement regarding the Holmes murder at one of my father's parties or at our house". (*Id.*). Jessie Grandy, Levi's son and Corniece's brother, attended his

father's gatherings and knew the people who were there. (Ex. 18, Jessie Grandy Declaration). Brown was never at Levi's get-togethers. (*Id*.).

D. A REASONABLE JUROR, LOOKING AT THE NEW AND OLD EVIDENCE, WOULD FIND BROWN ACTUALLY INNOCENT.

This Court, applying any rigorous test that balances the newly discovered evidence against the existing evidence, should conclude that Brown has met his burden to prove actual innocence. If this case were to be retried, the jury would hear a detailed, corroborated confession from Reginald Early, stating that he acted alone and that Brown, Jimerson, and Vaughn had nothing to do with the murder of Myrtle Holmes. The jury would hear about the incredibility of Vaughn's confession, the recantations of the Parsons brothers, the false testimony of Ellis Tidwell, and the truth about what Patsy Harris witnessed. In short, the jury would have no choice but to reach the inescapable conclusion that Reginald Early robbed, raped, and murdered Ms. Holmes alone. No credible evidence remains to suggest Brown played any role in the murder.

For all these reasons, this Court should vacate Brown's conviction.

CLAIM II.
BROWN'S RIGHT TO DUE PROCESS WAS VIOLATED WHEN THE STATE CONCEALED EVIDENCE THAT IT EMPLOYED AN INCENTIVIZED INFORMANT TO ELICIT CHARLIE VAUGHN'S FALSE CONFESSION.

Ronnie Prescott played a central role in securing Vaughn's confession—the only evidence linking the co-defendants to Ms. Holmes' murder. And he undertook that role in exchange for leniency from the State. Yet, Prescott's role and incentive in ensuring that Vaughn made incriminating statements was never disclosed to the defense. This violated Mr. Brown's right to due process pursuant to *Brady v. Maryland*, 373 U.S. 83 (1963).

Due process obligates the government "to disclose evidence that is favorable to the accused and material to either guilt or punishment." *U.S. v. Barraza Cazares*, 465 F.3d 327, 334

(8th Cir. 2006). That "duty encompasses impeachment evidence as well as exculpatory evidence." *Id.*, citing *United States v. Bagley*, 473 U.S. 667, 676 (1985). It does not matter whether the evidence was requested by Brown, the State was still obligated to disclose it. *Strickler v. Greene*, 527 U.S. 263, 280-81 (1999) ("[T]he duty to disclose such evidence is applicable even though there has been no request by the accused."), citing *United States v. Agurs*, 427 U.S. 97, 107 (1976).

Here, the evidence that Prescott created the confession from Vaughn was material and demanded disclosure. Evidence is material "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Bagley*, 473 U.S. at 682; *see also Kyles v. Whitley*, 514 U.S. 419, 433-434, 131 L. Ed. 2d 490, 115 S. Ct. 1555 (1995).

Prescott's involvement was the key to Vaughn's plea. Before Prescott, Vaughn denied any involvement in the murder, and as soon as Prescott was once again removed from the picture, Vaughn again denied involvement. In short, Prescott played the critical role in producing Vaughn's confession, and thus a critical role in the conviction of Brown and Jimerson.

At Jimerson's federal habeas evidentiary hearing, Prescott testified that he was given a tape recorder, clothed in a jail jumpsuit, and placed in a cell with Charlie Vaughn. (Ex. 7 at JHT:10-16). He discussed the death penalty with Vaughn (Ex. 7 at JHT:33; JHT:106; TT2:546), ultimately leading Vaughn to give a false statement implicating himself, Brown, Jimerson, and Early. This was noteworthy because at trial, Vaughn recanted his admission and testified that he had falsely confessed out of fear of getting the death penalty. (Ex. 3 at JTH: 158-160; Ex. 4 at JHT:511, 538-39, 546).

The State did not disclose any information regarding Prescott's involvement to the defense. (JHT:113-116). The tapes were not only suppressed, they were destroyed. (JHT:105-106). Brown only became aware of the existence of Prescott and the recording tapes from Jimerson's initial Petition for Habeas Corpus which was filed on June 30, 2015. Brown's defense counsel filed a Motion To Compel Law Enforcement Officials To Turn Over And Advise Prosecuting Attorney Of All Information Acquired During The Course Of Investigation and an additional Motion for Discovery on November 14, 1991. (Ex. 9, Discovery Motions). The Court granted the motion on November 15, 1991. (*Id.*). Nothing regarding Prescott was turned over following the Order. Additionally, the State's earlier Response to Jimerson's Motion to Discovery did not include any information on Prescott. (Ex.10, Discovery Answer).

Because the State suppressed the evidence in question and neither Brown nor his trial attorneys knew about it, Brown was unable to raise the issue in his direct appeal. No exercise of due diligence on Brown's part could have revealed the existence of the informant or the circumstances of the recording at the time of trial or appeal.

At Jimerson's evidentiary hearing, Ford admitted that he gave the tape recorder to Prescott and asked Prescott to record any statements he got from Vaughn. (JHT:82-83). Ford testified that he took the recorder from Prescott and was sure he listened to the recording, but claimed not to know what happened to the tape and emphasized that it was not used for trial. (JHT:83-85, 91). Ford telephoned then-Prosecuting Attorney Tom Wynne and told him about the recording, stating they did not need the recording because Vaughn was willing to take a plea. (JHT:85). Wynne advised Ford that they could not use the recording at trial. (JHT:86). Ford never gave the recording to Wynne and never discussed the recording with Jimerson's defense. (JHT:86-87).

Ronnie Poole similarly testified at the evidentiary hearing that Wynne told him and Ford that the tape had no evidentiary value. (JHT:170). Also, like Ford, Poole said he did not know what had happened to the tape. (*Id*.) Wynne did not testify at Jimerson's evidentiary hearing, and the State offered no evidence to rebut Ford's and Poole's testimony that Wynne knew about the recording.

"When the 'reliability of a given witness may well be determinative of guilt or innocence,' nondisclosure of evidence affecting credibility falls within the general [*Brady*] rule." *Giglio v. United States,* 405 U.S. 150, 154 (1972) (quoting *Napue*, 360 U.S. at 269). Beyond any doubt, the newly revealed evidence undermines the reliability of Vaughn's confession, and without his statement the case could not have gone to the jury. In fact, a previous jury did not find the evidence was sufficiently credible to support a conviction of the Brown—even with Vaughn's plea. Had the jury heard this additional evidence explaining why Vaughn falsely confessed, it would have credited Vaughn's true and honest recantation.

Further, impeachment evidence is material if the witness is "the *only* evidence linking [the defendant] to the crime." *Smith v. Cain,* 565 U.S. 73, 76 (2006). As in *Smith,* Vaughn is the *only* witness at trial who directly implicated Brown in the crime. *See also Wearry v. Cain,* 136 S. Ct. 1002, 1006 (2016). "[I]f the verdict is already of questionable validity, additional evidence of relatively minor importance might be sufficient to create a reasonable doubt." *United States* v. *Agurs,* 427 U. S. 97, 113 (1976); *see also Strickland v. Washington,* 466 U.S. 668, 696 (1984) ("a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support").

For these reasons, the State's suppression of Prescott's recordings of his conversations of Vaughn violated Brown's right to Due Process and his conviction must be vacated.

CLAIM III.
THE STATE'S BAD-FAITH FAILURE TO PRESERVE EVIDENCE VIOLATED BROWN'S RIGHT TO DUE PROCESS PURSUANT TO *ARIZONA V. YOUNGBLOOD*, 488 U.S. 51 (1988).

As stated above, Vaughn's statement was the sole direct evidence provided to link Brown with Ms. Holmes' murder. Yet not only was the secret recording of the Prescott's jailhouse conversations with Vaughn suppressed, investigators also destroyed the recordings in bad faith. Former Dallas County Sheriff Donny Ford has revealed that the recording of the conversations between the informant and Vaughn no longer exists. (JHT:105-106). Such destruction/loss of the tapes occurred despite conversations between law enforcement and the prosecution about the substance of the tapes. (JHT:84-87, 170, 176-177). This destruction, done in bad faith, violates Brown's right to Due Process under *Arizona v. Youngblood*, 488 U.S. 51 (1988).

The recording of the jailhouse discussions between Vaughn and the informant was potentially exculpatory. Vaughn's statement to the informant was the first direct accusation by anyone that Brown was involved in the offense. Based on the recollections of Donny Ford, the informant was on a mission to obtain a confession from Vaughn and discussed the death penalty with Vaughn; this could have corroborated Vaughn's later recantation.

Because Prescott was briefed ahead of time about facts of the homicide, it is possible that the recording would have demonstrated that the informant provided some of these details to Vaughn during their jailhouse conversations—such as information about Brown. (*See* Ex. 7 at JHT:26).

In addition, the tape could have revealed that the informant used coercive tactics to elicit Vaughn's confession. The informant recalled that he sensed that Vaughn was afraid during their conversations about the case. Donny Ford acknowledged that Prescott talked about the death penalty and other potential punishments with Vaughn. (*See* Ex. 7 at JHT: 33; JHT:117).

The State had knowledge that this evidence could be important; Donny Ford called to discuss it with Prosecutor Wynne. Wynne should have realized the importance of such a recording to the defense and not only preserved it, but turned it over. Indeed, the very collection of the evidence was unconstitutional; because Vaughn had been charged with murder and had retained counsel at the time police sent an undercover informant to extract a confession from him, the use of this informant violated Vaughn's Sixth Amendment right to counsel. (JHT: 90, 91). Donny Ford was apparently aware of this, stating that he believed the tape could not be used at trial because the informant had been acting as an agent for the police. (*See* JHT:85,106).

Moreover, not only did law enforcement officials suppress and destroy the tape, they also took steps to conceal the facts that Prescott had purposefully elicited a confession from Vaughn and recorded their conversations. Although also not disclosed to defense counsel before trial, then-Fordyce Police Chief Ronnie Poole drafted a hand-written statement that was signed by Prescott, describing Vaughn's confession and misleadingly suggesting that that it was Vaughn's idea to discuss the murder with Prescott and entirely omitting the fact that Prescott was working with the police and had recorded the conversations. (*See* Ex. 8). Further, the official memorandum in the Arkansas State Police file regarding Prescott not only omits those same facts, but indeed entirely fails to mention the substance of what Prescott told police. (*See* Ex. 6). Similarly, at the conclusion of Vaughn's guilty plea hearing, the judge asked the attorneys and law enforcement agents in the courtroom about any other statements Vaughn may have made, and none of them mentioned the recorded jailhouse conversations with Prescott. (*See* Ex. *5*). None of this information about the agreement with the informant or the recorded jailhouse conversations was disclosed to Brown's counsel. (*See* JHT:116,113-114).

Because Brown only recently became aware of these facts, they have not previously been presented to a court. Brown learned of this information in June 2016, when counsel was retained and represented him at Tina Jimerson's hearing. Brown is an indigent prisoner, with no funding for investigators or attorneys. After waiting for years for assistance, the Midwest Innocence Project agreed to represent Brown in 2016. It was only at this time that Brown and his counsel learned the facts uncovered by Jimerson's defense team. This was not due to the lack of due diligence on Brown's part—without access to investigators, there was no way he could have uncovered the information. Thus, Brown's claim is timely filed. The one-year limitation period for filing a § 2244 petition begins running on the later of the date on which the state court 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." 28 U.S.C. § 2244(d)(1)(D). The due diligence element of § 2244(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)). "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, the factual predicate of Brown's claims are those facts proven at Jimerson's June 15, 2016 federal habeas hearing. To the extent that this Court finds that Brown is procedurally barred, this Court can reach the merits of this claim because Brown has made a colorable showing of actual innocence. *Schlup v. Delo*, 513 U.S. 298 (1995); *see* Claim 1, *supra*.

Thus, because the State failed to preserve exculpatory evidence in violation of *Arizona v. Youngblood*, 488 U.S. 51 (1988), this Court should vacate Brown's conviction.

CLAIM IV.
BROWN'S RIGHT TO DUE PROCESS WAS VIOLATED WHEN THE STATE FAILED TO DISCLOSE ADDITIONAL INTERVIEWS OF ELLIS TIDWELL AND KENNY PARSONS AND INCENTIVES THEY RECEIVED IN EXCHANGE FOR THEIR TESTIMONY.

At trial, the State relied on testimony of Ellis Tidwell, Kenny Parsons, and Lee Parsons to bolster the theory that Brown, Vaughn, Jimerson, and Early were associated together. Ellis Tidwell testified that Vaughn came to his house with Brown on the night of the crime. (TT2:327-28). The Parsons testified that Brown stayed with them (TT2:409-410,424), that they had seen Brown with Vaughn, Jimerson, and Early (TT2:413, 425), and that they had seen Brown with blood on his clothes around the time of the crime. (TT2:413,426). These incriminating statements were preserved in recorded police interviews. However, at trial, Tidwell and Kenny Parsons each testified that they were interviewed by police on additional occasions prior to their recorded statements. (TT2:334, 431-32). No records of these interviews were disclosed to the defense. Nor are they available in the police file.

The State had a duty to disclose these interviews to defense counsel. Defense counsel was precluded from impeaching these witnesses with any of their early statements to law enforcement because the interviews weren't turned over. The State has a "duty" to disclose "impeachment evidence." *Strickler v. Greene*, 527 U.S. 263, 280 (1999), citing *United States v. Bagley*, 473 U.S. 667, 676 (1985). To comply with *Brady*, the State must "learn of any favorable evidence known to the others acting on the government's behalf in this case, including the police." *Kyles v. Whitley*, 514 U.S. 419, 437 (1995).

Recent investigation reveals that significant impeachment evidence would have been contained within those interviews. At trial, Tidwell testified that Vaughn and Brown visited Tidwell's home on the night of the murder and that Vaughn introduced Tidwell to Brown: "That

was the first time I had seen John Brown and was introduced to John Brown." (TT2:327-28, 338). This statement was false. Tidwell now reports that he learned the name and identity of Brown after a photo-array shown to him by Michael Joe Earley. (Ex. 14.) Information regarding Tidwell's earlier interaction with Earley would have undermined Tidwell's testimony that he knew Brown because Vaughn introduced them.

In assessing the materiality of evidence, this Court must consider how a competent defense lawyer would have used the evidence in defense of the client. *See, e.g., Kyles v. Whitley,* 514 U.S. 419, 442-451 (1995) (noting in considerable detail how the defense could have used undisclosed exculpatory evidence to "attacked the investigation as shoddy," *id.* at 442, n. 13, to "fuel[ ]a withering cross-examination" of an alleged eye-witness, *id.* at 443, to "severely undermine" identification testimony," *id.* at 444, to "undercut" the prosecution's theory of guilt, *id.* at 445, to attack "the thoroughness and even the good faith of the investigation," *id.,* to infer the "possible guilt" of a police informant, *id.* at 446, or to raise "possibilities that incriminating evidence had been planted," i*d.*). Here, information about Michael Joe Earley's additional involvement would not only have undercut the reliability of Tidwell's testimony, it also would have undermined the veracity of Michael Joe Earley's testimony; Earley was not just an interested citizen, he worked directly for the police in creating false evidence against the defendants. It also would have provided defense counsel with a solid and likely theory of defense—that Brown and his co-defendants did not commit this crime, but rather were set up by an over-eager and under-employed former investigator.

Similarly, the State did not disclose how the Parsons came to testify and any additional incentives they received for giving false testimony. Both Parsons have recanted their original testimony (Ex. 12; Ex. 13), and have suggested that there were additional incentives for their

testimony. Kenny Parsons has revealed that he struggled with mental illness at the time (Ex. 12); he set himself on fire shortly after testifying during a suicide attempt. (*Id.*.) He felt it was worth noting that he was at a very low point during that time (*Id.*). Kenny sought help afterwards and attended rehab; he's now been drug free for over 20 years. (*Id.*).

Lee Parsons remembers that he was asked to testify because he had "apparently seen" Brown, Vaughn, Jimerson, and Early together at his house the night of Ms. Holmes' murder. (Ex. 13). He didn't remember who asked him to testify, but he thought he might have been in the jail at the time they asked him. (*Id.*). Lee Parsons recalled that his brother Kenny was involved in a lot of criminal activity and interacted with the police often. (*Id.*).

Evidence regarding Lee's and Kenny's conversations with police could have directly refuted the testimony of the Parsons, which on its face appeared to be neutral, reliable testimony. Those documents could have revealed that Kenny struggled with mental illness and explained their previous relationships with key law enforcement officers, as well as possible incentives they received in exchange for testifying as Kenny was in jail at the time he came forward. Taken in conjunction with the other suppressed evidence, this information was material; evidence qualifies as material when there is "'any reasonable likelihood'" it could have "'affected the judgment of the jury.'" *Giglio*, *supra*, at 154 (quoting *Napue* v. *Illinois*, 360 U. S. 264, 271 (1959)). In considering *Brady* claims, a court must "evaluate the tendency and force of the undisclosed evidence item by item... and evaluate its *cumulative effect* for purposes of materiality separately and at the end of the discussion." *Kyles v. Whitley*, 514 U.S. 419, 436, n. 10 (1995) (emphasis added). Here, the cumulative effect of the number of witnesses offered incentives for their testimony or whose testimony was tainted by information planted by investigators—

contract or otherwise—would have caused the jury to question the credibility of the State's witnesses.

Defense counsel was never provided any information regarding this initial police contact. Although trial testimony revealed that at least one additional interview had occurred, it was not until recently that Brown discovered its content. To the extent that this Court finds that counsel did not exercise due diligence in the discovery of this information, it should find counsel ineffective for failing to investigate and pursue this issue. *See* Claim VI.F, *infra*.

In short, the testimony of Tidwell and the Parsons was critical to bolstering the questionable testimony of Vaughn; without it, a jury may have found Vaughn's testimony incredible. As a result, the suppression of earlier interviews containing impeachment evidence violated Brown's right to Due Process, requiring Brown's conviction be vacated.

CLAIM V.
BROWN'S FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS OF LAW WAS VIOLATED WHEN THE PROSECUTION FAILED TO CORRECT FALSE EVIDENCE WHEN IT APPEARED IN THE RECORD.

It is the duty of the prosecutor to seek justice, and not merely to convict. *United States v. Berger*, 295 U.S. 78 (1932). The due process clause of the 14th Amendment protects criminal defendants from the prosecution use of false evidence:

> As long ago as *Mooney v. Holohan*, 294 U.S. 103, 112 (1935), this Court made clear that deliberate deception of a court and jurors by the presentation of known false evidence is incompatible with "rudimentary demands of justice." This was reaffirmed in *Pyle v. Kansas*, 317 U.S. 213 (1942).

Giglio v. United States, 405 U.S. 150, 153-154 (1972). Here, the prosecutor not only had a duty to refrain from the use of testimony which he knew or should have known to be false, he also had an affirmative obligation to advise the trial court that Ellis Tidwell did not recognize Brown until after shown a photo array and being told his name by Michael Joe Early. "In *Napue v. Illinois*,

360 U.S. 264 (1959), we said, 'the same result obtains when the State, although not soliciting false evidence, allows it to go uncorrected when it appears.'" *Giglio*, 405 U.S. at 154. Instead of complying with his constitutional duty, the prosecutor sat silently by and took advantage of the windfall that came his way by reason of Tidwell's false and misleading testimony. The evidence and testimony supporting Brown's claim is set forth in further detail in Claims 1-3 above and is incorporated herein by reference.

Under *Napue* and *Giglio*, Brown is entitled to habeas corpus relief if the false or misleading evidence could have affected the deliberations of the jury:

> It is of no consequence that the falsehood bore upon the witness' credibility rather than directly upon defendant's guilt. A lie is a lie, no matter what its subject, and, if it is in any way relevant to the case, the district attorney has the responsibility and duty to correct what he knows to be false and elicit the truth. . . . That the district attorney's silence was not the result of guile or a desire to prejudice matters little, for its impact was the same, preventing, as it did, a trial that could in any real sense be termed fair.

Napue, 360 U.S. at 270. That standard is unquestionably met in this case, where the prosecution's case was built entirely on the unreliable testimony of Vaughn that is otherwise uncorroborated by physical evidence. Indeed, the DNA evidence in this case excluded Brown. *See* Claim VI.A, *infra.* Thus, Tidwell testimony served as an objective corroboration Vaughn's plea.

To the extent that this claim is procedurally barred, Brown has met both the actual innocence and cause and prejudice standard, *see* Claims I and III, *supra*, and this Court may review this claim. Because the State allowed false testimony to go uncorrected in violation of Brown's right to Due Process, Brown's conviction must be vacated.

CLAIM VI.
TRIAL COUNSEL WAS INEFFECTIVE IN VIOLATION OF BROWN'S SIXTH AND FOURTEENTH AMENDMENT RIGHT TO COUNSEL.

No physical evidence linked Brown to the homicide of Myrtle Holmes. In fact, the forensic evidence at the scene pointed only to Early, as his DNA could not be excluded as the source of semen on a vaginal swab taken from Ms. Holmes. (TT1:524). Instead, the State's case rested on the recanted confession of Charlie Vaughn, an illiterate and intellectually challenged man threatened with the death penalty by prosecutors who later recanted at two separate trials, and the unreliable testimony of informants who were brought into the fold by Michael Joe Earley. A reasonable investigation and competent performance by Brown's counsel would have produced substantial information and evidence to cast doubt upon the State's key evidence.

The Sixth Amendment to the United States Constitution entitles Brown to assistance counsel at trial. *U.S. Const. amend. IV*. To prove that he received ineffective assistance, Brown must show: (1) counsel performed deficiently; and (2) this deficient performance prejudiced his defense. *Strickland v. Washington*, 466 U.S. 668 (1984).

To satisfy the first prong of deficient performance, Brown "must show that counsel's representation fell below an objective standard of reasonableness." *Id*. at 688. Objective reasonableness of counsel's representation, in turn, is measured against prevailing professional norms. *Id*. The context and fact-specific circumstances of each case should guide any deficient-performance inquiry. *Wiggins v. Smith*, 539 U.S. 510, 522 (2003). A failure of trail counsel to conduct a reasonable investigation constitutes a breach of duty. *Strickland v. Washington*, 466 U.S. 668 (1984). The duty of investigation specifically includes potential witnesses or evidence as to which counsel has actual notice. *Wiggins*, 539 U.S. at 523. The failure of counsel to investigate is not a matter of trial strategy; it is simply inept performance. *Chambers v. Armontrout*, 907 F.2d 825, 828 (8th Cir.) (en banc), cert. denied, 111 S.Ct. 369 (1990);

Hawkman v. Parratt, 661 F.2d 1161, 1168 (8th Cir. 1981) ("[O]rdinarily a reasonably competent attorney will conduct an in-depth investigation of the case which includes an independent interviewing of the witnesses."). Such a failure violates counsel's "essential duty to make an adequate factual investigation [which can] only be viewed as an abdication – not an exercise – of this professional judgment." *McQueen v. Swenson*, 498 F.2d 207, 216 (8th Cir. 1996).

The duty to investigate specifically embraces matters that would impeach a key state's witness, including prior inconsistent statements of the witness, *Nixon v. Newsome*, 888 F.2d 112 (11th Cir. 1989), or with the testimony of others who would contradict the witness' testimony. *Hadley v. Groose*, 97 F.3d 1131 (8th Cir. 1996). The United States Supreme Court has recognized that "some errors will have had a pervasive effect on the inferences to be drawn from the evidence, altering the entire evidentiary picture. . ." Strickland, 466 U.S. at 695-696. The Eighth Circuit has found that failure to impeach a critical witness can have such an effect. *Driscoll v. Delo*, 71 F.3d 701, 711 (8th Cir. 1995). In *Driscoll*, for example, the court found that trial counsel's failure to impeach a witness who was the only witness to corroborate an allegedly coerced admission from the defendant constituted ineffectiveness. *Id.*

To satisfy the second prong, prejudice, Brown "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 695. In short, and as explained below, Brown's counsel—attorneys William Murphy[14] and Robert Jeffrey—provided constitutionally ineffective

[14] Not only did Murphy provide Brown with constitutionally deficient counsel, he also lost his license to practice law because of his participation in illegal activity. In 1998, the Arkansas Supreme Court permanently barred lead counsel Murphy from practicing law in Arkansas. *In re Murphy*, 982 S.W.2d 199 (Ark. 1998). This expulsion stemmed, in part, from a federal indictment that alleged a drug conspiracy between Murphy and a local prosecutor. Murphy

assistance. The State's case included weak direct and circumstantial evidence: Vaughn's vague and inconsistent statements and the incredible testimony of incentivized informants. Counsel performed deficiently by failing to challenge their testimony and failing to pursue any investigation to uncover the truth behind Investigator Earley's manipulation of facts and witnesses. These deficiencies are not mere trifles. Independently and collectively, they prejudiced Brown. Because he received ineffective assistance of counsel, Brown should receive a new trial.

A. DEFENSE COUNSEL WAS INEFFECTIVE FOR FAILING TO PRESENT DNA EVIDENCE EXCLUDING BROWN AS MS. HOLMES' RAPIST.

During the course of the police investigation, DNA testing was performed on a vaginal swab taken from Ms. Holmes. This test excluded both Brown and Vaughn as contributors, despite Vaughn's assertion during his plea hearing that Early, Vaughn, and Brown each had sex with Ms. Holmes. (Ex. 5 at 11). The State presented this DNA evidence at the first trial, which ended in a hung jury. But counsel failed to present this exculpatory DNA evidence at the second trial, resulting in the conviction of Brown.

As part of the investigation, Officer Mike Hall gathered several items of evidence from the crime scene, including the victim's dentures, blue housecoat, "nightie", blood-stained pillows and sheets, pots and pans, the broken knife blade and handle, and the blood-soaked towel found in Ms. Holmes's car, and sent them to the Arkansas State Crime Lab (ASCL). (TT1:128-144). Gerald Curtis, an investigator for the ASCL's medical examiner's office, took vaginal swabs

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admitted to coercing his wife, Sandra, into lying before a federal grand jury and pled guilty to suborning perjury. He was initially charged with racketeering, two counts of conspiracy to commit extortion, bank fraud, another count of suborning perjury, and one count of conspiracy to influence or prevent grand jury testimony. Ex. 21, Linda Friedlieb, *Lawyer persuaded wife to lie*, ARKANSAS DEMOCRAT-GAZETTE (Dec. 31, 1997); *see also* Ex. 22, Linda Friedlieb, *Ex-prosecutor faces 11 charges*, ARKANSAS DEMOCRAT-GAZETTE (April 12, 1997).

from Ms. Holmes' body at the scene. These swabs were also sent to ASCL, where they tested positive for sperm and were released to serology. During the autopsy of Ms. Holmes, Dr. Fahmy A. Malak found "liquid fluid" in the victim's vagina; he took a sample and spread it on a slide. (TT1:153). Upon examining the slides, he confirmed the presence of plentiful spermatoa, which he determined to be proof of ejaculation."[15] (TT1:154).

On August 7, 1989, Investigator Butch Godwin and Chief Poole requested a court order to take a sample of Charlie Vaughn's blood for DNA testing. In an August 8, 1989 letter from Chief Poole to the Cellmark Diagnostics lab, he pleaded, "it is my hope that [Charlie Vaughn's] DNA Banding Pattern will match the DNA Banding Pattern taken from the vaginal swabs from Myrtle Holmes." (Ex. 6). But, Poole did not receive his wish: Results from August 24, 1989 revealed that "[t]he DNA banding pattern obtained from the blood of Charlie Vaughn did not match the DNA banding pattern obtained from the previously analyzed vaginal swabs from Myrtle Holmes." (Ex. 6).

On January 30, 1990, investigators approached Early about the Holmes murder and took a sample of his blood for DNA testing. (Ex. 6). Early had long been the object of the Fordyce Police Department attention due to his criminal history.[16] On March 9, 1990, Early's blood allegedly proved a "perfect [DNA] match" to biological evidence recovered from the crime scene. (Ex. 6). Early was soon thereafter arrested by the police.

[15] The DNA testing performed by Cellmark Diagnostics was concerning the vaginal swabs, not the slides.

[16] The Fordyce Police quickly focused on Early as a suspect in the Holmes murder as a result of a burglary charge a year prior to the murder. *See Arkansas v. Early*, Dallas County Circuit Court, information for arrest on two counts: (1) breaking and entering the home of Charlie Burks and stealing $205 and (2) breaking and entering the business of Wynne, Wynne & Wynne Law LLC and taking a .22 caliber automatic pistol, a .32 caliber revolver, and approximately $20 in cash.

At the mistrial, in April of 1992, pathologist Fahmy Malak testified that he found "human sperm in the vagina" of Ms. Holmes, meaning there was sexual contact. (TT1:154). Robin Cotton, Deputy Director at Cellmark Diagnostics, explained that testing performed by the ASCL excluded both Brown and Vaughn as contributors to the sperm. (TT1:500-507,523,527). Early could not be positively identified from the sample, but he also could not be excluded[17]. (TT1:500-507; 524-526).

Counsel failed to present this exculpatory forensic evidence at the second trial. In Vaughn's plea transcript, read to the jury in full and relied on by the State as the central piece of evidence, Vaughn claimed that he, Brown, and Early all raped Ms. Holmes. Yet, the DNA evidence available at trial did not support this story and would have been immensely powerful to the jury, as evidenced by the hung jury doing the first trial. There was substantial overlap between the first and second trials with three exceptions: (1) the State dropped its rape charge; (2) the State included a new star witness, Michael Joe Earley, who had been working "privately" to solve the case and sharing information with the Fordyce Police Department, and (3) the DNA evidence was missing.[18] Indeed, even the timeline of the DNA evidence is persuasive—police knew that Vaughn and Brown were excluded as contributors on August 8, 1989, long before Brown's arrest or Vaughn's plea. Had the jury at Brown's second trial heard that he had been

[17] In light of the early form of DNA testing used to analyze the victim's vaginal swabs, Cotton could not include Early as a source of the semen on the tested swab. (TT1:532) ("Q: Okay. The swab that you claim that was his semen, you're—really, you're not saying that's his semen. You're saying he can't be excluded, is that right? A: That's exactly right. Q: Okay. So, just because he can't be excluded doesn't mean it's his sample, does it? A: Essentially, that's correct . . . [t]hat's right . . . . Q: Just because he can't be excluded, that doesn't mean that he's the person either, does it? A: No.").

[18] The State chose not to call Dr. Fahmy Malak, the medical examiner, swapping his testimony for that of the coroner, Charles Teppenpaw. Teppenpaw was not allowed to touch Holmes's body at the crime scene and was unable to determine the cause of her death. (TT2:308-309). He was an "embalmer" who had not been to medical school. (TT2:307).

excluded as a perpetrator of the rape of Myrtle Holmes, further weakening the confession of Vaughn, there is a reasonable probability that they would have acquitted Brown, as six jurors voted not to convict Brown during the first trial. (TT1:897).

B. DEFENSE COUNSEL WAS INEFFECTIVE FOR FAILING TO CHALLENGE CHARLIE VAUGHN'S ACCOMPLICE TESTIMONY BY DEMONSTRATING HIS LIMITED MENTAL CAPACITY.

The State's case primarily relied upon the testimony of Charlie Vaughn, who agreed to testify against Brown and his co-defendants as a part of a plea agreement that spared Vaughn the death penalty. (Ex. 4 at TT2:504,547,722). When the State called Vaughn to testify, he recanted his confession, and, almost immediately, the court declared Vaughn a hostile witness (Ex. 4 at TT2:509), and his plea hearing transcript was read to the jury. (Ex. 4 at TT2:514). Vaughn's plea was vague and lacked many specific details. The State, in its closing, characterized Vaughn's statement as "a co-defendant who sat up here and told you in detail what he did and what they did." (Ex. 4 at TT2:721).

Vaughn recanted this plea and its accompanying confession at both trials.[19] This recantation had two major themes. First, Vaughn denied having any involvement in the murder or knowing the victim. (Ex. 4 at TT2:511). He confessed only at the insistence of his attorney, and because he was scared of being sentenced to death if he did not confess and plead. (Ex. 4 at TT2:537, 542, 551, 552, 554). Second, Vaughn denied knowing Brown or the other co-defendants. (Ex. 4 at TT2:506, 540-541).

The United States Supreme Court has also long expressed skepticism about accomplice testimony. Accomplice testimony "ought to be received with suspicion, and with the very greatest care and caution, and ought not to be passed upon by the jury under the same rules

[19] Vaughn stood by his recantation at Jimerson's evidentiary hearing. (*See* Ex. 3 at JHT:157-158,160-161).

governing other and apparently credible witnesses." *Crawford v. United States*, 212 U.S. 183, 204 (1909). The Arkansas Supreme Court has expressed a similar skepticism about accomplice testimony. *Foster v. State*, 290 Ark. 495 (1986) (holding that "[t]he instinct for survival renders the testimony of an accomplice less than completely credible."). Given the devastating impact of Vaughn's plea transcript and the central role it played in the investigation and prosecution of this case, Brown's trial counsel had a constitutional duty to ensure that the jury understood both the specific inconsistencies of Vaughn's confession with the evidence and the general unreliability of accomplice testimony.

Brown's counsel did not ask Vaughn a single question[20] and utterly failed to challenge this accomplice testimony in any meaningful way. First, as the Arkansas Supreme Court noted on Brown's direct appeal, trial counsel "did not make an argument about accomplice corroboration, did not ask the trial court to declare Vaughn an accomplice, and did not ask the trial court to charge the jury about the necessity of accomplice corroboration." *Brown v. State*, 315 Ark. 466 (1994). Even more importantly, trial counsel failed to present any evidence that supported Vaughn's in-court recantation and weakened the State's reliance on his plea testimony. Vaughn's testimony at both trials and at the June 2016 evidentiary hearing demonstrated his illiteracy and limited mental capacity; he did not go past the ninth grade in school and was in special education classes. (Ex. 3 at JHT:161-162;TT1:602,609; Ex. 4 at TT2:504,537-538,548,551). At the evidentiary hearing, Vaughn claimed he could read, but could not read any portion of a document when he was asked to do so by Jimerson's counsel. (JHT:161 -162). Further, it was clear that Vaughn did not even comprehend that he had been sentenced to life and any remaining doubt about his credibility was extinguished. (Ex. 5 at 16-17).

[20] Brown's counsel did not cross-examine Vaughn. Early's and Jimerson's counsel, William Howard, Jr., did conduct a cross-examination. (Ex. 4 at TT2:546-553,554).

> A: No, I pleaded guilty. That's what I'm saying, I had overdo—I overdid—I overdo my time…
> …
> Q: Okay. But when you pleaded guilty, did you know that you were pleading guilty to a life sentence?
> A: I did, but I really didn't know. But what I'm saying now, I'm on what's going on now. You know what I'm saying? At the time, I was real young then.

(Ex. 3 at JHT:157,158). Vaughn continued to explain that he "knew" he would not serve a life sentence because of his guilty plea and that he thought he'd "probably do about 28 years."[21] (Ex. 3 at JHT:160). The entirety of Vaughn's testimony at the evidentiary hearing demonstrated that his mental capacity was severely limited as many of his answers were unintelligible and he could not answer simple questions, like the name of the victim. (*See* Ex. 3 at JHT:156-162).

Since defense counsel did not ask Vaughn a single question at either trial, (TT1:644-645; Ex. 4 at TT2:553), it is evident that they made no effort to demonstrate to the jury that Vaughn's mental state would have made it highly unlikely that Vaughn could have given a coherent confession to the police or understand the statement that he signed. Counsel's failure to even attempt to adequately point out to the jury the inconsistencies and unreliability of Vaughn's plea and accomplice testimony constitutes deficient performance and entitles Brown to relief as it was prejudicial to Brown.

C. DEFENSE COUNSEL WAS INEFFECTIVE FOR FAILING TO PURSUE AN ACCOMPLICE TESTIMONY ARGUMENT AND JURY INSTRUCTION.

In addition, counsel failed to pursue an argument and jury instruction about Vaughn's accomplice testimony. Arkansas law prohibits a conviction based upon poorly corroborated

[21] Vaughn's confusion about the length of his sentence was likely only exacerbated by Judge Grave's assertion to Vaughn that his sentence would likely be reduced: "Now at this time, I am going to go ahead and give you credit for the five months, the five months credit on a life sentence means nothing. But at some point in time, I'm sure that some governor somewhere down the road will reduce the sentence or commute it to a term of years." (Ex. 5 at 17).

accomplice testimony. *See* generally A.C.A. § 16-89-111 (e)(1)(A). Arkansas case law outlines the procedures reasonable counsel must follow when challenging accomplice testimony. For example, counsel has a duty to object to such testimony as soon as counsel learns about accomplice testimony. *Cook v. State*, 77 Ark. App. 20, 34, 73 S.W.3d 1 (2002). The parties may dispute whether the witness qualifies as an accomplice, whether such testimony is corroborated, and whether the corroboration is sufficient to make the accomplice testimony credible. *Maynard v. State*, 21 Ark. App. 20, 23, 727 S.W.2d 858 (1987). These disputes are questions of facts, reserved for resolution by the jury. *Bush v. State*, 374 Ark. 506, 288 S.W.3d 658 (2008).

Further, the courts have held that when accomplice testimony is involved, the corroborating evidence must be "substantial." *Gardner v. State*, 364 Ark. 506, 512-13, 221 S.W.3d 339 (2006). Substantial evidence is evidence that supports a conviction with sufficient force that it will, with reasonable certainty and precision, compel a conclusion one way or the other. *Hallman v. State*, 288 Ark. 454, 455-56 (1986). Corroborating evidence is not substantial if the evidence raises only a suspicion of defendant's complicity. *Pollard v. State*, 264 Ark. 753, 756, 574 S.W.2d 656 (1978). This question of substantiality is, too, reserved for the jury. *Id.*

The record is clear. Brown's trial counsel did not ask Vaughn a single question on cross-examination and did not pursue an argument and jury instruction about accomplice testimony. He did not ask the jury to decide whether Vaughn qualified as an accomplice, whether Vaughn's plea statement was corroborated, and did not ask whether the corroboration was sufficient and substantial. Arkansas courts have held that failure to give such an instruction, if requested, is reversible error. *Brook v. State*, 2014 Ark. Ct. App. 84 (2014). Therefore, failure to request such an instruction, in cases such as this, must also constitute deficient performance.

The United States Supreme Court has long recognized the "devastating" impact of accomplice testimony. *Bruton v. United States*, 391 U.S. 123, 136 (1968); *Lee v. Illinois*, 476 U.S. 530, 542 (1986); *see also, United States v. Iron Thunder*, 714 F.2d 765, 771 (8th Cir. 1983). Therefore, a thorough and effective cross-examination and confrontation of an accomplice like Vaughn was paramount. Counsel did nothing to mitigate the harm of this devastating—and untruthful—accomplice testimony, and for this, counsel was deficient.

D. DEFENSE COUNSEL WAS INEFFECTIVE FOR FAILING TO INVESTIGATE AND PRESENT EVIDENCE THAT BROWN DID NOT KNOW EARLY OR VAUGHN AND THAT THE FOUR CO-DEFENDANTS DID NOT SPEND TIME TOGETHER.

The State's theory at trial rested not only on the reliability of Vaughn, but on the idea that all four co-defendants knew each other and hung out together before and after the crime. During his plea, Vaughn stated that "Teen" (Tina Jimerson), Brown, and Early picked him up and "[t]hey wanted to do a robbery." (Ex. 5 at 7). The State then presented other witnesses who also testified to seeing the co-defendants together: (1) Taura Bryant, an informant of Investigator Earley whose story changed several times, testified that on the night before the murder, she saw Brown, Early, and Jimerson together at a party at Levi Grandy's home (*see* Ex. 6; TT2:442-44; JHT:183); (2) Lee Parsons claimed that Brown had been living with him and Brown came to their house with Jimerson, Early, and Vaughn. (TT2:408-409,412-413); (3) Kenny Parsons, Lee's brother, testified that the night before he learned of the Holmes murder, Brown, Jimerson, Early, and Vaughn pulled up to his home in a car driven by Jimerson. (TT2:424-425); (4) Ellis Tidwell, Vaughn's former employer, said that on the night before the murder, Vaughn and Brown had showed up at his house looking "wild-eyed." (TT2:327-328).

The jury received two conflicting narratives from Vaughn. Vaughn's plea implicated Brown and his co-defendants. But in court, Vaughn testified that he did not only that he had

nothing to do with rape and murder of Myrtle Holmes, but also that he not know Brown, Jimerson, or Early. As the jury was left to choose which narrative to believe, trial counsel had a duty to present evidence that would have aided and persuaded the jury in making that choice.

As discussed above, trial counsel could have persuaded the jury to discredit Vaughn's testimony by presenting contrary forensic evidence excluding Brown and Vaughn as perpetrators of the rape of Ms. Holmes and by exposing Vaughn's vulnerable mental state. Additionally, counsel could have presented evidence that Brown and Vaughn did not know each other and that the four co-defendants were not friends in order to discredit Vaughn's confession and the other witnesses who testified to seeing the co-defendants together.

At the retrial, Vaughn testified that in 1988, he did not know John Brown, Tina Jimerson, or Reginald Early. (TT2:505-507,509). Vaughn also stated that he was not with Brown, Jimerson, or Early on or around September 21, 1988. (TT2:508-509). Both Jimerson and Early also denied that the four were friends on the stand. (TT2:585-586,587,592; TT2:612-614). Other witnesses would have bolstered Vaughn, Jimerson, and Early's trial testimony had counsel investigated and presented pertinent evidence.

In a signed declaration, Donnie Mason, a former Fordyce resident and past friend of Brown and Jimerson, indicated that he had never seen Brown or Jimerson with Early or Vaughn. (Ex. 19, Donnie Mason Declaration). "I do not understand why these four people who have committed a crime together." (*Id*.) He was never contacted by a defense attorney or investigator prior to the Holmes murder trial. (*Id*.). Shannon Manning, a cousin of Early, knew of Brown, Vaughn, and Jimerson and it never made sense to him why the four of them were charged together for this crime. (Ex. 20, Shannon Manning Declaration). Corniece Grandy, the daughter of Levi Grandy, was friends with Jimerson and that she knew of Brown, Early, and Vaughn. (Ex.

17, Corniece Grandy Declaration). In her own signed declaration, she continued: "I have never seen the four of them together. My understanding was that they were not friends with each other. John Brown sometimes hung out with Tina Jimerson, but to my knowledge, did not associate with Charlie Vaughn or Reginald Early. Likewise, to my knowledge, Reginald Early did not associate with Charlie Vaughn." (*Id*.). Corniece also never spoke to anyone from the defense team before Brown's trial. Had counsel spoken to either of the Parsons brothers before trial, he may have discovered that they also had information about the relationship (or lack thereof) between Brown and his co-defendants. There were already clear weaknesses in the trial testimony of Lee and Kenny. *See* Claim I.C, *supra* (incorporated by reference). If counsel had looked further into the Parsons connection to this case, they could have learned not only that Lee had not seen Brown, Jimerson, Early, and Vaughn at his house, but he had never actually the four of them together. (Ex. 13). Kenny Parsons reiterated that he did not know Brown, Jimerson, Early, and Vaughn to be friends. (Ex. 12). Lastly, Terry Childs, a former girlfriend of Brown, would have solidified that these co-defendants did not hang out. Childs was "shocked when she heard that they had been charged together for the murder…" (Ex. 16, Rachel Price Declaration re Terry Childs).

Defense counsel had a duty to investigate on Brown's behalf and had access to these witnesses at the time of trial. Donnie Mason was a friend of Browns, Shannon Manning was a cousin of Early's and was interviewed by police, the Parsons were State witnesses, and Terry Childs was Brown's ex-girlfriend. Had counsel sought out any of these witnesses and asked about the truth regarding the relationships between the co-defendants, he would have been supplied with ample evidence to prove that Brown was not friends with Vaughn or Early and that he never spent time with them. This evidence would have bolstered Vaughn's trial testimony and

the testimony of both Jimerson and Early—who also testified that the four co-defendants were not friends. Counsel's failure to investigate and present this information constitutes deficient performance and was obviously prejudicial to Brown, as it would have undermined the credibility of Vaughn's confession and the other important State witnesses and fractured the foundation of the State's theory.

E. DEFENSE COUNSEL WAS INEFFECTIVE FOR FAILING TO INVESTIGATE AND PRESENT EVIDENCE THAT POLICE BROWN DID NOT ATTEND A PARTY AT LEVI GRANDY'S HOME ON THE NIGHT OF THE MURDER.

Informant Taura Bryant testified at trial that all four co-defendants attended a party at Levi Grandy's home on the night of the murder and the night following Ms. Holmes's death.[22] (TT2:442-444). Bryant seems to be the first person to place Brown with the other actors and to implicate him in the crime. (Ex. 6); *see also* Statement of Facts and Claim I.C (incorporated by reference). According to Bryant, the co-defendants made self-incriminating statements, (TT2:446), and Brown had a possible blood-stain on his knee.[23] (TT2:447-448).

Bryant knew Ms. Holmes because they both lived on the south side of Fordyce. (TT2:440). During Jimerson's 2016 evidentiary hearing, Investigator Earley testified that he was familiar with Bryant because she had worked as an informant for him in the past. (JHT:183-184). Defense counsel could have drawn out Bryant's relationship with the victim and with Earley on

[22] *See also* Ex. 6, which is a transcript of an undated interview with Investigator Michael Jo Earley and a witness referred to only as "Sam", some sort of alias for Taura Bryant. (TT2:449).

[23] On cross-examination, Bryant admitted that she had previously testified that it was Early, and not Brown, who had blood on his clothes. (TT2:449-450, 458, 461; Ex. 6). Bryant also expressed confusion about the day she allegedly heard the defendants discussing the murder. (TT2:449-450). She finally confessed that her testimony at the first trial was "immensely different" than the statement she initially gave to Investigator Earley. (TT2:445). In a closed court session, Bryant's testimony was also challenged by two defense witnesses, Stephanie Rogers and Mary Chambers, both of whom testified that they overheard Bryant shout to Sheriff Donny Ford, "What am I supposed to say? I don't know what I'm supposed to say, I don't even know why I'm here." (TT2:649-650, 652, 654-656). The testimony of Rogers and Chambers was never heard by the jury.

the stand. He asked no questions about Bryant's interactions with law enforcement leading up to the trial or whether she was receiving any sort of incentive for testifying.

Moreover, Corniece Grandy, the daughter of Levi Grandy, signed a sworn statement in November 2016, stating that while her father frequently had gatherings at their home, she had never seen Brown, Jimerson, Early, and Vaughn together, let alone at her father's house. (Ex. 17). It would have been "unusual" for Brown to have been at one of Levi's parties because he was not a friend or associate of anyone in their family. (*Id*.) Further, Corniece had never heard of Taura Bryant and did not know why Bryant would have been at one of their house parties. (*Id*.) Jessie Grandy, Levi's son and Corniece's brother, attended his father's gatherings and knew the people who were there. (Ex. 18). Jessie affirmed that Brown had never been at any of Levi's get-togethers. (*Id.*) Neither Corniece nor Jessie were contacted by a defense attorney or investigator prior to the Holmes murder trial. (Ex. 17; Ex. 18).

Defense counsel had a duty to investigate Bryant's statement, as she was the key State's witness who placed the four co-defendants together before and after the murder. If they had interviewed Levi Grandy's family members, they would have learned that Brown never attended a party at Levi's, especially not with the other co-defendants. Counsel also could have bolstered Vaughn's recantation had he presented this evidence to the jury, as Vaughn testified that he did not know Taura Bryant, (TT2:507-508), was not with Bryant on September 21 or 22, 1988, (TT2:510), did not know Levi Grandy, (TT2:508), had never been to Grandy's home, (*id*.), and was not at Grandy's on September 21 or 22, 1988 (TT2:510). On a larger scale, counsel could have impeached Bryant's credibility and undermined the police investigation as a whole if they had inquired as to her past relationship with Investigator Earley and her motives behind coming forward with alleged information about Ms. Holmes' murder. Defense counsel's failure to

effectively investigate or cross-examine Bryant prejudiced Brown, as the jury likely would have reached a different outcome had they known about the evidence refuting Bryant's testimony and exposing her past history with Investigator Earley.

F. DEFENSE COUNSEL WAS ALSO INEFFECTIVE IN FAILING TO INVESTIGATE AND PRESENT EVIDENCE THAT FORDYCE POLICE FALSIFIED A POLICE REPORT AND WERE INTRICATELY CONNECTED TO WITNESS ELLIS TIDWELL.

After two years of investigation, the police working to solve the Holmes murder had reached a series of dead ends. In fact, in a January 22, 1990 letter from Fordyce Police Chief Stage to Judge Graves, Stage wrote:

> Fordyce Police Department did not have an experienced investigator capable of handling all phases of a homicide investigation such as the Holmes murder. It was quite obvious that the police department was totally dependent on the Arkansas State Police for expertise in this case. To correct this situation, I have hired an experienced investigator… although the investigation has focused on three individuals as the persons who probably committed the murder of Mrs. Holmes, there is at this time insufficient evidence to charge anyone or to ask for a Grand Jury hearing.

(Ex. 23, Letter to Judge Graves). Fordyce residents also began to voice growing concerns about the lack of progress in solving the crime. Desperate to solve this case, the police relied upon Investigator Michael Joe Earley to solve in the mystery of Holmes' murder. (TT2:377, 390-91; JHT:182-83). Earley led a corrupt investigation ending in the wrongful conviction of Brown. Not only was Earley a close friend and neighbor of Ms. Holmes, he also received a financial reward for solving her murder. (TT2:385-386, 390, 397; JHT:196). Investigator Earley also played the role of an important eyewitness, claiming to have seen Reginald Early and two other men near Ms. Holmes' house on the night of the murder. (TT2:387-388). But, as he admitted, Earley waited nearly four years until just two weeks before the second trial before he documented this vital information with police. (TT2:395-396).

Substantial evidence suggests that law enforcement, including Michael Earley, coerced and fabricated witness statements. Even Tina Jimerson, testifying in her own defense and claiming her innocence at trial, stated that in 1991, investigators offered her a bribe if she would lie and falsely incriminate John Brown and Reginald Early.[24] (TT2:582-583). Jimerson was told, "some nigger was gonna do some time for this crime." (TT2:583). As discussed further in Claim II, informant Ronnie Prescott was able to evade punishment for several drug-related charges in exchange for soliciting incriminating statements from Vaughn in the Dallas County jail. (Ex. 7 at 10-23).

If defense counsel had investigated, he would have discovered additional evidence of questionable police behavior. Shannon Manning was a high school student who moved from Fordyce to Oakland, California shortly after the Holmes murder. (Ex. 20). Manning is Early's cousin and was living in Fordyce with his mother, Nadine Manning, in 1988. Ms. Holmes' house was just down the street. (*Id*.) Police interviewed Manning about Ms. Holmes' death at school in California. Reports indicate that Manning shared damning details about Brown. He stated that Brown and Early had gotten into a fight in the mill quarters because one of them had said the other killed Ms. Holmes; Jimerson and Vaughn were also present when this altercation occurred. (Ex. 6). He apparently told officers that Early was friends with Brown and Vaughn and that Early and Brown were "prejudiced" against white people and would "hurt or kill a white person just because they had the opportunity." (*Id*.).

However, in a recent interview with Manning, he revealed the truth behind his interactions with law enforcement. Manning gave very little information to police because he did not know much about the murder, but he was told he was being "dishonest and uncooperative."

[24] Jimerson initially contacted the Fordyce Police Department in March of 1989 because she had been sexually assaulted. (TT2:583-584; JHT:130-131).

(Ex. 20). He ended up signing his name on a statement reflecting the small bits of information he knew. (*Id*.) Manning moved back to Fordyce a few years later. (*Id*.) Prior to trial, he was shown his alleged statement by Prosecutor Robin Wynne and it included things that Manning never told police. He complained about the fabrications in the report and was told he could not enter the courtroom. (*Id*.)

Not only did police fabricate the police statement of Shannon Manning, they also did not reveal that State's witness Ellis Tidwell was close friends with several key law enforcement officers. Tidwell, another of Donny Ford's jail trustees, claimed to have seen Brown and Vaughn together on the night of the murder. (TT2:327-328).

At trial, Tidwell admitted that Sheriff Ford requested that he be released from the Arkansas Department of Corrections on a 20 year sentence in order to come to the Dallas County Sheriff's Department and act as a trustee.[25] (TT2:323-324,333). It was not until after he came back to Dallas County as a trustee that he mentioned to Chief of Police Ronnie Poole that he had talked to Michael Joe Earley in December of 1988 about what happened the night of the murder. (TT2:330, 334, 343-344). He then shared his information with Poole. (TT2:330). Tidwell had also known Ms. Holmes his whole life. (TT2:325).

In a recent interview with Tidwell, it became clear that defense counsel could have uncovered additional impeachment evidence had they any investigation into Tidwell's connection to law enforcement. Counsel could have discovered Tidwell's life-long friendship with Michael Joe Earley, who questioned Tidwell about the murder on more than one occasion. (Ex. 14). Tidwell has also known Donny Ford and Ronnie Poole his whole life, and he even phoned Ford during his conversation with Midwest Innocence Project law student interns. (*Id*.;

[25] Tidwell was sentenced in April of 1989 to 20 years in the Arkansas Department of Corrections. He was released to Dallas County under "Act 309" in August of 1991. (TT2:341-342).

Id. at 2). An unrelated piece of evidence that may have served counsel well was that Tidwell considered Vaughn, his former employee, to have the "IQ of a 7-year old." (*Id*.) Lastly, Tidwell shared: "…he is still bitter about his prison sentence because no one tried to help him get out. He stated that the government aids black people, but not whites, and that this is unfair. He further expressed to us that Fordyce was a better town before black people, whom he called 'hoodlums,' came along and began 'causing trouble'."[26] (Ex.14).

Defense counsel had notice than Manning was interviewed by police prior to trial, yet they did no investigation into Manning or his alleged statements. (Ex. 20 at 2). If they had, they would have learned that the police falsified the report. Manning's testimony at trial could have been further evidence of a police investigation that was anything but credible. In addition, had counsel investigated Ellis Tidwell, they could have uncovered that Tidwell had close relationships with key law enforcement officers; this information would have undermined Tidwell's already shaky credibility for the jury. Counsel performed deficiently by failing to investigate and to present evidence of a flawed and corrupt police investigation. This failure prejudiced Brown; if counsel had investigated and presented such evidence, the jury likely would have had grave doubts about the integrity of the State's case and they would have viewed the many witnesses over whom Fordyce Police had leverage skeptically. This failure to investigate and present the flawed and corrupt investigation undermined confidence in jury verdict.

[26] Others witnesses mentioned their negative interactions and impressions of the Fordyce Police Department: Kenny Parsons indicated he, "believes the police in Fordyce are racist" and that "Ronnie Poole don't like niggers." (Ex. 12). Donnie Mason told MIP investigators, "I recall Michael Joe Earley as a racist police officer" and a "brash cop". (Ex. 19). Lee Parsons felt strongly about the Fordyce police force in that they "were racist and targeted black communities within the town." (Ex. 13). Finally, Shannon Manning stated, "My experiences in Fordyce have led me to believe that the police are racist." (Ex. 20). Brown, Jimerson, Vaughn and Early are all African American. Earley, Ford, and Poole are all white.

G. DEFENSE COUNSEL WAS INEFFECTIVE FOR FAILING TO INVESTIGATE AND ADEQUATELY CROSS-EXAMINE STATE'S WITNESS PATSY HARRIS.

Patsy Harris was working as a court clerk at Fordyce Municipal Court at the time of Holmes murder. (TT2:434). The morning after Ms. Holmes' death, September 22, 1988, Harris saw Brown in court. (TT2:435; Ex. 6). At trial, she testified that Brown's shirt was open, revealing a wound that had not yet healed across his chest. (TT2:436). The obvious implication the State was seeking was that the cut was fresh and was an artifact of Brown struggling with Ms. Holmes the night before. However, recently, Harris gave a more specific and accurate description of Brown's wounds: They were "small scratches." "about one or two fingers wide". (Ex. 15). The scratches were white and unhealed, not fresh or bleeding. (*Id*.). It makes sense that Brown would have had an unhealed scar on his chest, as he was in court that day because of a previous altercation with Sonny Tidwell. (TT2:437). Tidwell stabbed Brown in the chest and then Brown later beat Tidwell up in retaliation. (*Id*.; TT2:426; Ex. 15; Ex. 16).

This recent conversation with Harris also revealed additional, important details that counsel should have attempt to illicit from her on the witness stand. He could have uncovered this information had he done any investigation into the statement of Harris. Harris told Prosecutor Wynne that she recalled Brown had been in court the morning after the murder due to an incident with Sonny Tidwell. Sonny was Harris's neighbor at the time and she had encouraged him to show up for his court date; he did not. (*Id*.) After Harris told Wynne about Brown's appearance that day in court, Wynne insisted she would testify at the Holmes murder trial. Although Harris did not want to testify, the judge she worked for told her it was her duty and that she would be required to testify without a subpoena. (*Id*.) Harris was extremely upset that she was forced to testify and she regrets it; she does not believe that the right people were charged and punished for this murder. (*Id*.)

Brown's counsel had a duty to elicit testimony from Harris to clarify what the scars on Brown's chest actually looked like in order to prevent the jury from making an assumption that they came from Ms. Holmes. Counsel only asked Harris a few questions on cross-examination, mainly regarding how Brown was behaving on the morning after the murder. (TT2:437-438). Had he drawn out from Harris the exact nature of the scratches, the jury would not have been able to conclude that these were fresh wounds that Brown incurred on the night of the murder, but instead, that the wounds were from a stabbing that occurred weeks earlier. If counsel had interviewed Harris prior to trial, he also would have uncovered the circumstances behind her testimony and he could have presented that information to the jury as well. There is a reasonable likelihood that a juror who heard this evidence would have had reasonable doubt as to Brown's participation in the murder. Counsel's failure to interview Harris and to offer crucial evidence to the jury renders his performance inept, meaning Brown is entitled to a new trial.

H. THIS COURT MAY REVIEW COUNSEL'S INEFFECTIVENESS.

To the extent that these claims are procedurally defaulted as they were not previously raised, this Court may still reach those claims if Brown has made a colorable showing of actual innocence or cause and prejudice. *See Schlup*, supra; *Coleman v. Thompson*, 501 U.S. 722, 750 (1991); *see also, e.g, Collier v. Norris*, 485 F.3d 415, 425 (8th Cir. 2007) ("'[A] state prisoner who fails to satisfy state procedural requirements forfeits his right to present his federal claim through a federal habeas corpus petition, unless he can meet strict cause and prejudice or actual innocence standards.'") (quoting *Clemons v. Luebbers*, 381 F.3d 744, 750 (8th Cir. 2004)).

Brown has met the actual innocence standard. *See* Claim 1, *supra*. Alternatively, Brown can demonstrate cause and prejudice. To demonstrate cause, the petitioner must show that something external to the defense resulted in the procedural default. *Coleman v. Thompson*, 501

U.S. at 753 (citing *Murray v. Carrier*, 477 U.S. 478, 488 (1986) ("We think that the existence of cause for a procedural default must ordinarily turn on whether the prisoner can show that some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule."). To demonstrate prejudice, a petitioner must show a reasonable probability that, but for the alleged constitutional violations, the result of the proceeding would have been different. *See, e.g., Hunt v. Houston*, 563 F.3d 695, 704 (8th Cir. 2009) (citing *Easter v. Endell*, 27 F.3d 1343, 1347 (8th Cir. 1994)). The standard is the same where a petitioner seeks to overcome a "double procedural default," i.e., where no contemporaneous objection was made at trial such that, in addition to now having procedurally defaulted a federal habeas claim by failing to properly present it to the state courts, the petitioner was also procedurally barred from presenting the claim to the state court via direct appeal. *See United States v. Frady*, 456 U.S. 152, 167-168 (1982) ("[T]o obtain collateral relief based on trial errors to which no contemporaneous objection was made, a convicted defendant must show both (1) 'cause' excusing his double procedural default, and (2) 'actual prejudice' resulting from the errors of which he complains."); *see also Reed v. Farley*, 512 U.S. 339, 354-55 (1994) (citing *Frady*, 456 U.S. at 167-68) (collateral review of procedurally defaulted claims is subject to same "cause and actual prejudice" standard whether the claim is brought by a state prisoner under § 2254 or a federal prisoner under § 2255).

Ineffective assistance of counsel may be cause for a procedural default. *See Murray v. Carrier*, 477 U.S. 478, 488-89 (1986). The appropriate standard for establishing ineffective assistance of counsel sufficient to overcome a procedural default is deficiency and prejudice under *Strickland v. Washington*, 466 U.S. 668, 692-96 (1984).

At trial, Brown was represented by William Murphy and Robert Jeffrey. (TT2:1) Jeffrey also represented Brown on direct appeal. Because trial counsel could not find or raise their own

ineffectiveness, Brown was unable to present these claims on direct appeal. *See Bader v. State*, 344 Ark. 241, 249 (2001) (Arkansas contemporaneous-objection rule requires objection at the trial level in order to preserve an argument for appeal); ARK. R. APP. P. 1(a) (no right to appeal from a plea of guilty or nolo contendere). Thus, the inability to raise the issue demonstrates cause and prejudice sufficient to overcome procedural default of Brown's claims on direct appeal.

The Supreme Court has also held that ineffective assistance of post-conviction counsel may constitute cause for default on an ineffective assistance of trial counsel claim where that claim is properly raised for the first time in a state post-conviction proceeding. *See Martinez v. Ryan*, 566 U.S. 1, 132 S. Ct. 1309, 1318 (2012). Under the holding in *Martinez*, "[w]here, under state law, claims of ineffective assistance of trial counsel must be raised in an initial-review collateral proceeding, a procedural default will not bar a federal habeas court from hearing a substantial claim of ineffective assistance at trial if, in the initial-review collateral proceeding, there was no counsel or counsel in that proceeding was ineffective." *Id.*, 132 S. Ct. at 1320. Procedural default of Brown's claims for purposes of state post-conviction relief was also a result of ineffective assistance of counsel. Specifically, Brown qualifies as having had no counsel during initial review proceedings such that his failure to raise an ineffective assistance of counsel claim in state court collateral proceedings is excused under *Martinez*. It is well-settled that "[t]he Sixth Amendment guarantees a defendant the right to have counsel present at all 'critical' stages of the criminal proceedings." *Missouri v. Frye*, 132 S. Ct. 1399, 1405 (2012) (citing *Montejo v. Louisiana*, 556 U.S. 778, 786, (2009)).

At the time when Brown could have raised counsel's ineffectiveness in a Rule 37 petition, he was incarcerated and indigent with no right to counsel and no money to afford one. It was through no fault of his own that he could not investigate and discover the information recently

unearthed. Because Brown has demonstrated both actual innocence and cause and prejudice, this Court may reach his claims of ineffective assistance of counsel.

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All of these failures, independently and taken together, prejudiced Brown. Counsel did not conduct reasonable investigation and did not present the jury with key evidence that would have impeached the State's most crucial witness and undermined the State's theory of the crime. Counsel's performance was deficient at each step and if counsel had discovered and offered the evidence outlined above to the jury, there is a reasonable probability that the jury would have acquitted Brown.

CONCLUSION

WHEREFORE, for all of the foregoing reasons, Petitioner respectfully prays that this Court:

A. Enter its order Requiring Respondent to Answer John Brown's Petition for Writ of Habeas Corpus;

B. Allow counsel for Petitioner a reasonable time within which to respond to Respondent's Answer;

C. Expand the record to include the exhibits set forth in the appendix submitted herewith;

D. Conduct an evidentiary hearing on the allegations of John Brown's Petition, including his colorable claim of actual innocence; and

E. Grant the Writ of Habeas Corpus conditionally discharging John Brown from custody, and granting such further relief as the Court deems consistent with the ends of justice.

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**Admission Pro Hac Vice Pending*

CERTIFICATE OF SERVICE

I hereby certify that on December 21, 2016, I placed a file-marked copy of the foregoing petition in the United States Postal Service to:

Wendy Kelly
Director, Arkansas Department of Corrections
P.O. Box 8707
Pine Bluff, AR 71611-8707

Tricia J. Bushnell