IN THE SUPREME COURT OF MISSISSIPPI
Mississippi Supreme Court Case No. 2014-DR-00808-SCT
Harrison County Circuit Court No. B2402-08-201

JASON LEE KELLER, Petitioner,

v.

STATE OF MISSISSIPPI, Respondent.

MOTION FOR LEAVE TO PROCEED IN THE TRIAL COURT WITH A PETITION FOR POST-CONVICTION RELIEF

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COMES NOW the Petitioner, Jason Lee Keller, and files this his Motion for Leave to Proceed in the Trial Court with a Petition for Post-Conviction Relief and asks this Court, pursuant to the First, Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, Article 3, §§ 13, 14, 26, 28, 31 and 32 of the Mississippi Constitution, Miss. Code Ann. § 99-39-1 et seq., and other law set forth below, to order that post-conviction relief be granted in this case. Mr. Keller has attached his proposed petition as Exhibit *.*. The relevant procedural background and grounds for the Petition are provided below.

Introduction

Jason Lee Keller, the Petitioner in this matter, has been denied his fundamental constitutional rights. Mr. Keller's trial counsel failed to render constitutionally sufficient assistance within the meaning of the Sixth Amendment by, first and foremost, failing to conduct a reasonable investigation of sentencing phase issues in the case, including the identification, development, and presentation of mitigating evidence, and the rebuttal of evidence the State presented in support of statutory aggravating circumstances. As a result, jurors were unable to consider reasonably available mitigating evidence and testimony, and did not have the benefit of

considering evidence rebutting the State's aggravating evidence and argument in support of a death sentence. Mr. Keller's trial counsel conducted virtually no mitigation investigation, failing even to speak directly with most of his immediate family (aside from his mother and father, Mr. Keller has one half-brother and seven half-sisters). Counsel failed to make a reasonable investigation of records relating to Mr. Keller and his family that would have included valuable mitigating information about a history of cognitive deficiencies, potential mental health issues, and prolonged struggles with substance abuse and addiction.

A psychologist was ordered by the trial court to evaluate Mr. Keller for competency and sanity at the time of the crime. The same psychologist later conducted intelligence testing on Mr. Keller. This psychologist made clear that she was not conducting an investigation or evaluation of potential mitigating evidence. In fact, the psychologist specifically recommended to trial counsel that "if this case goes forth as a capital case, a mitigation study regarding this man's psychological functioning is recommended." No such mitigation study was conducted, despite trial counsel being specifically advised that this psychologist was not providing this service. These failures occurred despite widespread and accepted practices in the capital defense community, as well as Supreme Court precedent, assigning counsel responsibility for making a reasonably complete investigation of all relevant issues.

The failure to make a reasonably complete investigation deprived jurors of extensive and powerful evidence mitigating against a death sentence and rebutting the State's evidence in aggravation. Jurors were deprived of testimony from dozens of witnesses, including family members, friends, and teachers, who were willing to share their experiences and observations of Mr. Keller, as well as their knowledge about his history, character, and background, and his family history. Records corroborated these accounts, and provided additional mitigating

information, all of which would have been discovered in a reasonably complete investigation. Post-conviction counsel anticipates supplementing this petition with the reports of experts who can provide further commentary and explanation about Mr. Keller's lifelong struggles with drug addiction, potential mental health issues, and deficiencies in his cognitive functioning. Had the jury been provided with this information, there is "a reasonable probability that at least one juror would have struck a different balance" and voted in favor of a life sentence. *Wiggins v. Smith*, 539 U.S. 510, 537 (2003); *Davis v. State*, 87 So. 3d 465, 474 (Miss. 2012).

This failure to investigate compounded other unprofessional errors committed by trial counsel, including the failure to prevent the State from presenting to the jurors inadmissible evidence about Mr. Keller's prior convictions for nonviolent crimes. The existence of these nonviolent convictions was specifically relied upon by the State during the sentencing phase in its argument as to why jurors should sentence Mr. Keller to death. *Keller v. State*, 138 So. 3d 817, 864 (Miss. 2014). Although failing to prevent the admission of this evidence is, in and of itself, constitutional error that undermines confidence in the outcome of this proceeding, counsel's failure to investigate left the jurors with no understanding of the connection between Mr. Keller's prior criminal history and his lifelong struggles with substance abuse and addiction.

Trial counsel also allowed the State to enter evidence of armed robbery charges against Mr. Keller that had not yet resulted in a final conviction. Indeed, there is still no final conviction resulting from these charges, as a motion for a new trial is pending before the trial court, and Mr. Keller's time in which to appeal has not yet begun to run. The jurors should not have been permitted to consider armed robbery charges that had yet to result in a final, valid conviction as aggravating evidence against Mr. Keller. This was a primary focus of the State's sentencing phase case against Mr. Keller.

The failure to object to the above inadmissible evidence entered during sentencing further harmed Mr. Keller when his trial counsel permitted the state to make impermissible arguments without objection. Indeed, the State specifically highlighted certain evidence, such as the armed robbery charges and the prior nonviolent convictions, in its rebuttal closing argument. The prosecutor also made a number of other impermissible arguments in closing, including explicit appeals to his position of authority as a district attorney and agent of the government. Trial counsel failed to object to any of these impermissible arguments.

Further, trial counsel failed to rebut or challenge the State's medical examiner, who presented testimony on a number of issues used in the State's sentencing phase case that were outside the bounds of permissible expert testimony. Specifically, the medical examiner testified about whether Hat Thi Nguyen was standing when she was shot, what order the shots were fired, and the relative positions of Mr. Keller and Ms. Nguyen at the time of the shooting. The medical examiner's statements on these issues fell outside the bounds of permissible expert testimony, but drew no objection or rebuttal from defense counsel, prejudicing Mr. Keller as a result.

Mr. Keller was sentenced to death by a jury facing several problems of constitutional significance. First, a venire member was unconstitutionally struck for cause in violation of *Witherspoon v. Illinois*, 391 U.S. 510 (1968). Trial counsel failed to object to this invalid motion to strike, and appellate counsel failed to appeal the issue, despite raising other *Witherspoon* claims. Second, counsel failed to ensure that jurors gave effect to mitigating evidence, by permitting confusion in the court's instructions (subsequently exacerbated by inaccurate statements of law in the prosecutor's argument) without clarifying jurors' understanding of the role of mitigating evidence. Third, one of the seated jurors in Mr. Keller's trial failed to disclose that his sister worked for the Harrison County District Attorney's office at the time of trial.

Given the constitutional errors pervading Mr. Keller's trial, including trial counsel's failure to investigate, the introduction of impermissible evidence, and the problems with his jury, this Court should find that Mr. Keller's conviction and/or sentence is invalid under both Mississippi law and the United States Constitution. Mr. Keller requests that this Court set aside his sentence of death. Alternatively, if this Court determines further proceedings should be conducted before a decision on the validity of Mr. Keller's death sentence is rendered, Mr. Keller requests leave to proceed in the trial court on the issues specified herein.

Preliminary Statement

Mr. Keller's motion remains incomplete. A number of issues remain outstanding, including outstanding discovery requests, retrieval of records for Mr. Keller and his family members, and completion of evaluations and reports of experts concerning Mr. Keller's mental health. The Supreme Court has suggested, in terms of federal habeas petitions, that prisoners should file protective petitions in order to avoid having a statute of limitations run. *See Pace v. DiGuglielmo*, 544 U.S. 408, 416 (2005). Mr. Keller has sought to file such a protective filing here as well, and anticipates supplementing or amending the petition for the reasons set out below.

Discovery requests remain outstanding in this case. For example, pursuant to M.R.A.P. 22(c)(4)(ii), Mr. Keller has been seeking complete files of law enforcement and prosecutorial agencies related to a number of prior convictions used against Mr. Keller in his capital murder prosecution, including an armed robbery charge, two convictions for burglary of a dwelling, a conviction for burglary of a business, and a conviction for grand larceny. Mr. Keller first sought to obtain these files in an October 13, 2014, letter to the Harrison County District Attorney (HCDA). Ex. 139 [Oct. 13, 2014 Smith letter to HCDA]. At trial, the District Attorney argued

that the evidence presented to jurors showed that Mr. Keller had "other felony convictions" and, counting all of those convictions, the capital charge was Keller's sixth felony conviction. Tr. 667–68; *see also Keller v. State*, 138 So. 2d 817, 864 (Miss. 2014). The District Attorney told jurors that they should find that a person with six felony convictions was not a person "that deserves to live the rest of his life in prison," but was "a man that deserves the ultimate sentence of the death penalty." *Id.* Despite making these arguments at trial based on the prior convictions, the District Attorney's response to the October 13, 2014 discovery request called the cases regarding the prior convictions "unrelated criminal matters." Ex. 140 [Oct. 16, 2014 HCDA letter to Smith]. The Biloxi Police Department referred requests for discovery to the Harrison County District Attorney, leaving Mr. Keller with no discovery.

After the Harrison County District Attorney's Office refused to provide files related to these cases, Mr. Keller sought discovery through a series of motions in the Harrison County Circuit Court. Mr. Keller did not receive discovery from law enforcement agencies involved in investigating the capital crime or his armed robbery charge until May 12, 2015. The circuit court refused to order mandatory discovery of the complete files of law enforcement agencies involved in the prior felonies used by the prosecutors as aggravating evidence in the capital case. In an order entered on May 20, 2015, the Harrison County Circuit Court noted it would review the Harrison County District Attorney files related to a number of these files *in camera* before deciding whether to produce them to post-conviction counsel. On May 22, 2015, the circuit court provided 12 pages from these files it found were related to Mr. Keller's stated purpose for discovery. Ex. 141 [Order May 22, 2015]. Mr. Keller's efforts to obtain "complete files" of these cases pursuant to Rule 22 is the subject of a writ of mandamus currently pending before this Court.

Further, retrieval of records for Mr. Keller and his family members is ongoing, as are efforts to complete evaluations and reports by experts concerning Mr. Keller's cognitive functioning and mental health. An order granting access to a necessary expert was signed by the Harrison County Circuit Court on June 5, 2015. Ex. 151 [Agreed Order Allowing Access]. Given the pending nature of the discovery requests, mental health expert consultations, and outstanding record requests, Mr. Keller is unable to completely and fully detail all bases for claims in this motion. Nevertheless, Mr. Keller files this petition to ensure he does not miss any filing deadlines relevant to his claim. *See* Miss. Code § 99-39-5(2). Mr. Keller respectfully requests this Court to accept the current Motion, and to grant him reasonable time to supplement and/or amend the petition after the outstanding discovery requests are finalized, Mr. Keller's mental health experts have had sufficient time to conduct their evaluations and finalize reports, and post-conviction counsel has received the records which remain outstanding. *See* Miss. R. Civ. P. 15(a) (party may amend pleading "as a matter of course" at any time before responsive pleading served or if no responsive pleading is required, "within thirty days after it is served").

Statutorily Required Information and Procedural History

Mr. Keller's Motion for Post-Conviction Relief is filed pursuant to Mississippi Code § 99-39-27. He asks this Court to reverse his conviction and death sentence pursuant to Mississippi Code § 99-39-27(7)(a). If this Court is not inclined to grant immediate relief with regard to any claim, Mr. Keller respectfully requests that this Court allow further proceedings before the Harrison County Circuit Court or other appropriate tribunal, pursuant to Mississippi Code § 99-39-27(7)(b), so that Mr. Keller may have the opportunity to develop and present additional evidence in support of his claims.

Mr. Keller was charged in the June 21, 2007 shooting death of Ms. Hat Thi Nguyen, in Biloxi, Mississippi. "[A]ttempting suicide" when apprehended, Mr. Keller pretended to point a gun "at the police to induce them to shoot him." *Keller*, 138 So. 3d at 830. Police shot him in the chest and he was taken into custody later that night.

Mr. Keller was indicted as a nonhabitual offender on March 31, 2008, and the indictment was amended on June 6, 2008, charging Mr. Keller as a habitual offender. An Order appointing counsel for Mr. Keller in this matter was entered June 11, 2008, shortly after the indictment was amended. He was represented at trial by Harrison County Public Defender Glenn Rishel and his Deputy, Lisa Collums.

Jury selection commenced in the Harrison County Circuit Court on October 5, 2009, and concluded the next morning, on October 6, 2009. The guilt/innocence phase of the trial began immediately thereafter, and jurors returned a verdict of guilty of capital murder at about 11:00 a.m. on October 7, 2009, after 30 minutes of deliberation.

The penalty phase of the trial began on the afternoon of October 7, 2009. The State requested that jurors sentence Mr. Keller to death based on evidence relating to four aggravating circumstances:

1. Whether the defendant was previously convicted of a felony involving the use or threat of violence to the person. Miss. Code § 99-19-101(5)(b).
2. Whether the capital offense was committed while the defendant was engaged in the commission of, or attempt to commit a Robbery. Miss. Code § 99-19-101(5)(d).
3. Whether the capital offense was committed for the purpose of avoiding or preventing a lawful arrest. Miss. Code § 99-19-101(5)(e).
4. Whether the capital offense was especially heinous, atrocious or cruel. Miss. Code § 99-19-101(5)(g).

Jurors refused to find that the offense was especially heinous, atrocious or cruel, but found the other aggravating circumstances and returned a sentence of death on the afternoon of October 8, 2009.

After a motion for new trial was denied on February 17, 2010, and a notice of appeal filed on March 9, 2010, trial counsel was allowed to withdraw from further representation. Mr. Keller was represented on appeal and in certiorari proceedings by Alison Steiner of the Mississippi Office of Capital Defense Counsel. Mr. Keller timely filed a direct appeal. After oral argument on appeal, this Court remanded the case to the circuit court to conduct a supplemental evidentiary hearing to determine whether any of Mr. Keller's statements were coerced and, if so, whether information gained in a coerced statement assisted law enforcement in gathering information from Mr. Keller in a statement that was not coerced. *Keller*, 138 So. 3d at 831.

After a hearing on the matter, the circuit court found that none of the statements were coerced. This Court subsequently denied Mr. Keller's appeal on February 6, 2014. *Keller*, 138 So. 3d at 817. Rehearing was denied June 6, 2014.

A Petition for Writ of Certiorari was denied by the Supreme Court of the United States on February 23, 2015. *Keller v. Mississippi*, 135 S. Ct. 1397 (2015). On or about June 24, 2014, the Mississippi Supreme Court ordered the Mississippi Office of the Capital Post-Conviction Counsel to represent Mr. Keller during his post-conviction proceedings upon a finding of indigence. On July 28, 2014, the Circuit Court of Harrison County found Mr. Keller to be indigent and appointed the Office as Mr. Keller's post-conviction counsel.

All Claims are Properly Preserved

Claims presented herein satisfy requirements of the Mississippi Uniform Post-Conviction Collateral Relief Act. *See* Miss. Code § 99-39-21. Grounds for post-conviction relief set out

herein are each based on errors affecting Mr. Keller's fundamental constitutional rights under the First, Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and corresponding provisions of the Mississippi Constitution. These include claims that were unavailable to Mr. Keller either due to conflict with counsel or because these claims were based on evidence not known to trial counsel or the trial court through reasonably diligent efforts and absent from the record on appeal to this Court. *See Carr v. State*, 873 So. 2d 991, 997 (Miss. 2004) (citing *Williams v. State*, 669 So. 2d 44, 52 (Miss. 1996)); *see also* Miss. Code § 99-39-3(2) (providing that post-conviction proceedings may address objections, claims, and errors that could not have been reviewed at trial or on direct appeal); Miss. Code § 99-39-5(1)(e) (providing that prisoners may seek post-conviction relief where material facts, not previously presented, require vacation of conviction or sentence). Mr. Keller's claims of ineffective assistance of counsel, presentation of false and misleading evidence, and juror bias were unable to be raised during trial or direct appeal. A new trial (or new sentencing hearing) is warranted where, as here, newly discovered evidence is likely to produce a different result, the new evidence could not reasonably have been discovered prior to trial, and the new evidence is not merely cumulative or impeaching. *See Carr*, 873 So. 2d at 997 (citing *Ormond v. State*, 599 So. 2d 951, 962 (Miss. 1992)).

Moreover, as this Court recognizes, "'[e]rrors affecting fundamental constitutional rights may be excepted from procedural bars that would otherwise prohibit their consideration.'" *Smith v. State*, 922 So. 2d 43, 46 (Miss. 2006) (quoting *Luckett v. State*, 582 So. 2d 428, 430 (Miss. 1991)); *see also Gilliard v. State*, 614 So. 2d 370, 376 (Miss. 1992) (holding that the bar of res judicata is inapplicable where constitutional rights are implicated); *Smith v. State*, 477 So. 2d 191, 195 (Miss. 1985) (finding that errors affecting fundamental rights, though not raised during

direct appeal, may be raised for the first time during post-conviction proceedings). Thus, even if any of Mr. Keller's claims were subject to a procedural bar—which they are not—this Court should ignore such bar where, as here, Mr. Keller's fundamental constitutional rights are implicated.

Standard of Review

Review for a capital conviction and sentence of execution demands heightened scrutiny from the Court and requires all doubts to be resolved in favor of the accused. *See, e.g.*, *Wilson v. State*, 81 So. 3d 1067, 1074 (Miss. 2012) (quoting *Chamberlin v. State*, 55 So. 3d 1046, 1049–1050 (Miss. 2010)); *Flowers v. State*, 773 So. 2d 309, 317 (Miss. 2000) ("'[W]hat may be harmless error in a case with less at stake becomes reversible error when the penalty is death.'" (quoting *Porter v. State*, 732 So. 2d 899, 902 (Miss. 1999)). Thus, the Court must accept all well-pleaded allegations as true and draw all reasonable inferences in Mr. Keller's favor. *See Simon v. State*, 857 So. 2d 668, 678 (Miss. 2003). Unless it can be established beyond a reasonable doubt that Mr. Keller cannot prove any set of facts entitling him to relief, this Court must grant an evidentiary hearing at which he may develop and proffer evidence supporting his claims. *Sanders v. State*, 846 So. 2d 203, 234 (Miss. Ct. App. 2002); *see also Billiott v. State*, 515 So. 2d 1234, 1237 (Miss. 1987) (petitioner is entitled to an evidentiary hearing where his petition meets the pleading requirements in Miss. Code Ann. § 99-39-9 and presents a live claim evidencing a denial of a state or federal right). Mr. Keller's petition satisfies these requirements, and he is entitled to post-conviction relief or provision of an evidentiary hearing.

Grounds for Relief

I. INEFFECTIVE ASSISTANCE OF COUNSEL

A. Trial Counsel Failed to Object to the State's Introduction of Inadmissible Evidence about Mr. Keller's Prior Convictions for Nonviolent Crimes and Other Bad Acts For Jurors' Consideration in the Penalty Phase

Although the trial court granted defense counsel's motion to prohibit the State from introducing or mentioning evidence of Mr. Keller's "prior bad conduct" or "any misdemeanor and/or felony convictions," Ex. 52 [Order, No. B2402-08-201 (Oct. 5, 2009)], defense counsel failed to object when the prosecution introduced evidence of four prior felony convictions, Tr. 519 (introducing State's Exhibit 21, a habitual offender indictment for Cause No. B2401-07-604, attached to this Motion as Ex. 53 [Armed Robbery Indictment]), and also failed to object when the State argued that jurors should rely on these convictions for nonviolent felonies as aggravating evidence when determining whether to sentence Mr. Keller to death. Making matters worse, defense counsel highlighted the convictions for jurors during cross-examination, Tr. 520, and then sat silent while the prosecution used the convictions in closing argument to urge jurors to sentence Mr. Keller to death. Tr. 667–68. As a result of defense counsel's unreasonable performance, jurors were improperly allowed to consider prejudicial evidence that was irrelevant to the statutory aggravating circumstances, in violation of Constitutional guarantees and protections.

As this Court noted, the State admitted into evidence the indictment and sentencing order for Mr. Keller's armed robbery charges "in support of the first aggravating circumstance." *Keller*, 138 So. 3d at 863. "The indictment for the bank robbery . . . also included information concerning four prior felony convictions for crimes that were not 'prior violent felonies.'" *Id.* The Court recognized that trial counsel made "no specific objection to [these nonviolent prior felonies] being admitted into evidence." *Id.* The Court further noted that the State argued that jurors should consider Mr. Keller's convictions for nonviolent felonies as aggravating evidence in favor of a death sentence because they show that Keller "hasn't learned his lesson," and that a

person like Mr. Keller with six felony convictions does not deserve to live the rest of his life in prison but, instead, "deserves the ultimate punishment of the death penalty." 138 So. 3d at 864.[1]

Mississippi law limits the evidence jurors may consider when determining whether to impose a capital sentence to evidence related to specific aggravating circumstances listed in Miss. Code §§ 99-19-101(5)(a) through (f). *Walker v. State*, 740 So. 2d 873, 886 (Miss. 1999); *Jackson v. State*, 672 So. 2d 468, 487 (Miss. 1996); *Balfour v. State*, 598 So. 2d 731, 748 (Miss. 1992) (trial court erred when it allowed the prosecutor to explore the non-statutory aggravator of the appellant's propensity for future crimes); *Stringer v. State*, 500 So. 2d 928, 941 (Miss. 1986) (misdemeanor convictions were inadmissible because they were not relevant to an aggravating circumstance). In *Balfour*, for example, this Court noted that "propensity to commit future crimes *either is, or is not*, one of the eight enumerated factors. Clearly, it is not." 498 So. 2d at 748 (noting that some jurisdictions, such as Idaho and Texas, allow future dangerousness as an aggravator, but Mississippi does not).

In *Edwards v. State*, the Court explained that the "statutory mandate of § 99-19-101(5) can be no clearer" in limiting aggravating circumstances to "the eight factors enumerated in Miss. Code Ann. § 99-19-101(5)." 737 So. 2d 275, 290 (Miss. 1999) (citing *Lester v. State*, 692 So. 2d 755, 800 Miss. 1997)). Under the statute, "only felony convictions involving the use or threat of violence are admissible," and admission of evidence or argument regarding other crimes is error as a matter of law. *Id*.

[1] On appeal, the State argued that Mr. Keller's complaints about the improper admission of the nonviolent prior felonies were barred because trial counsel did not object. 138 So. 3d at 864. Mr. Keller claimed that counsel was ineffective for failing to object, and the Court ruled that "a claim of ineffective assistance of counsel is best reserved for subsequent post-conviction-relief proceedings." *Id.*

Jurors' reliance on evidence relevant to statutory aggravating circumstances is critical because it "narrow[s] the class of persons eligible for the death penalty" in Mississippi as required by the Eighth and Fourteenth Amendments. *Zant v. Stephens*, 462 U.S. 862, 877 (1983). When jurors are permitted to consider evidence that is unrelated to the statutory aggravating factors, arbitrariness is impermissibly injected into the jurors' weighing processes. *See Brown v. Sanders*, 546 U.S. 212, 220–21 (2006) (due process requires reversal of a death sentence where aggravating evidence irrelevant to the aggravating circumstances that were properly before the jury was considered by jurors in arriving at sentence); *Lewis v. Jeffers*, 497 U.S. 764, 776 (1990) (Eighth Amendment requires that "aggravating circumstances must be construed to permit the sentencer to make a principled distinction between those who deserve the death penalty and those who do not"). Non-statutory aggravating evidence may "so infect[] the balancing process . . . that it is constitutionally impermissible to let the sentence stand." *Wainwright v. Goode*, 464 U.S. 78, 86 (1983) (quoting *Barclay v. Florida*, 463 U.S. 939, 956 (1983)).

The State requested that jurors sentence Mr. Keller to death based on evidence relating to four aggravating circumstances:

1. Whether the defendant was previously convicted of a felony involving the use or threat of violence to the person. Miss. Code § 99-19-101(5)(b).
2. Whether the capital offense was committed while the defendant was engaged in the commission of, or attempt to commit a Robbery. Miss. Code § 99-19-101(5)(d).
3. Whether the capital offense was committed for the purpose of avoiding or preventing a lawful arrest. Miss. Code § 99-19-101(5)(e).
4. Whether the capital offense was especially heinous, atrocious or cruel. Miss. Code § 99-19-101(5)(g).[2]

See, e.g., Tr. 653–55. Defense counsel successfully moved the trial court to prohibit the State from introducing or mentioning evidence of Mr. Keller's "prior bad conduct" or "any misdemeanor and/or felony convictions" at the guilt phase of Mr. Keller's trial. Ex. 52 [Order,

[2] Jurors rejected this aggravating circumstance entirely.

No. B2402-08-201 (Oct. 5, 2009)]; Ex. 51 [Motion in Limine Regarding Prior Criminal Convictions, (Jul. 23, 2009) (based on M.R.E 609)]. In the same Order, the trial court prohibited witnesses for the State from mentioning Mr. Keller's "prior bad conduct" or "other evidence regarding any uncharged criminal actions" Keller may be alleged to have committed. Ex. 52 [Order, No. B2402-08-201 (Oct. 5, 2009)] (addressing Mr. Keller's Motion in Limine (404b)). Thus, for example, evidence supporting aggravating circumstance #1 (conviction of felony involving use or threat of violence) was limited to Mr. Keller's December 2007 conviction for armed bank robbery.

The State called Harrison County Circuit Court Clerk Gayle Parker to introduce Exhibits S-21, Ex. 53 [Armed Robbery Indictment], and S-22, Ex. 54 [Armed Robbery Final Judgment 2nd Day], the indictment and conviction order for the armed robbery as evidence in support of aggravating circumstance #1. Tr. at 515–20. This evidence included information about four prior felony convictions. The four crimes were one count of burglary (Cause No. B2402-98-00338), one count of grand larceny (Cause No. B2402-98-00648), and two counts of burglary of a dwelling (both under Cause No. B2401-2000-751). Ex. 53 [Armed Robbery Indictment]. These crimes indisputably did not involve the use or threat of violence to the person and were not properly considered "prior violent felonies," within the ambit of Miss. Code Ann. § 99-19-101(5)(b). *See Gillett v. State*, 56 So. 3d 469, 506 (Miss. 2010) (state's introduction of Kansas escape conviction did not support aggravator, because there was no evidence all Kansas convictions on this charged involved element of violence); *Hansen v. State*, 592 So. 2d 114, 145 (Miss. 1991) (finding that four grand theft, four burglary, and two escape convictions were not felonies "involving the use or threat of violence to the person"). Although defense counsel had made a general objection to the admission of "other crimes" evidence, Ex. 50 [Motion In Limine

(404b), Jul. 23, 2009], they made no objection to admission of State's Ex. 21, including the introduction of the other four indisputably nonviolent felonies that should not have been presented to or considered by jurors. Tr. 519. Moreover, even though the prosecution did not highlight the prior convictions during direct examination of the court clerk, defense counsel drew jurors' attention to them. Tr. 520.

The prosecutor took full advantage of the admission of this improper evidence. With the evidence fully available for jurors to review and consider during deliberations, the prosecutor waited until his rebuttal closing argument, when Mr. Keller would have no opportunity to respond, to focus jurors' attention on these prior convictions. He argued they established an escalating pattern of misconduct and justified sentencing Mr. Keller to death:

> [Jason Keller] hasn't learned his lesson. . . . The crimes that are in the sentence order show[] that Mr. Keller, *as pointed out by counsel opposite*, has other felony convictions. The armed [bank] robbery conviction was his fifth felony conviction, his fifth. Yesterday you handed down number six. Six felony convictions, and is that a man that deserves to live the rest of his life in prison? That's a man that deserves the ultimate sentence of the death penalty.

Tr. 667–68 (emphasis added). The prosecutor went on—without objection by defense counsel or correction by the trial court—to tell jurors that, because Mr. Keller already was sentenced to life in prison and was "already not getting out," a sentence less than death would, in fact, be no sentence for Keller. He claimed that Mr. Keller "needs to be punished for what he did to Ms. Hat," and that, because of his life sentence for armed robbery, "[t]he only punishment that is warranted in this case is the death penalty," and the death penalty is "the only punishment." Tr. 668. Jurors' review and consideration of this improper and inadmissible evidence, at the prosecutor's insistence, undermines confidence in their sentencing decisions.

Trial counsel unreasonably failed to prevent jurors from considering as aggravating evidence inadmissible and improper evidence of previous nonviolent convictions when

determining whether to sentence Mr. Keller to death. The State exploited counsel's unreasonable performance and urged jurors to rely on these prior nonviolent convictions as evidence that Mr. Keller had not "learned his lesson" and, therefore, did not "deserve[]" a life sentence, and a death sentence was required. The admission of these nonviolent prior convictions served no reasonable trial strategy, and these convictions were not even contextualized by defense counsel at sentencing within a larger mitigation narrative that would have allowed the jury to understand them. *See* Claim I.C, *infra*. The prosecution's argument that Mr. Keller's prior nonviolent convictions should be considered as aggravating evidence in favor of a death penalty was among the final words the jurors heard before retiring to deliberate, and it would be unreasonable to think they forgot this when reaching their sentencing decisions. The prosecution's introduction of this inadmissible and improper evidence and argument, and trial counsel's failure to object to either—despite clear case law and a favorable pre-trial ruling—undermines confidence in the jurors' decisions. This Court should grant Mr. Keller's motion and vacate his death sentence.

B. Trial Counsel Unreasonably Failed to Prevent Jurors From Considering, as a Previous Conviction Within the Meaning of the Statutory Aggravator, a Felony Charge for Criminal Conduct (Armed Robbery) That Was Not (and is Not) Yet a Final, Valid Conviction

Trial counsel unreasonably failed to object to the admission of evidence and argument relating to Mr. Keller's armed robbery charges as a previous conviction sufficient to establish the statutory aggravating circumstance alleged by the State that Keller "was previously convicted of another capital offense or of a felony involving the use or threat of violence to the person." Miss. Code §99-19-101(5)(b). In fact, there was a motion for new trial still pending in the armed robbery case at the time of Mr. Keller's capital trial. Because the trial court in the armed robbery case had yet to rule on the motion for new trial, and Mr. Keller had not yet had an opportunity to appeal the verdict in that case, the judgment was not final and not appropriate for the State to use

to satisfy the statutory requirements of a previous conviction. As a result of counsel's failure to object, jurors were allowed to consider aggravating evidence and argument in support of a death sentence that would have been otherwise inadmissible. Ex. 53 [State's Ex. 21 in the capital trial]; *see also* Tr. 507, 515–20, 653–54, 666–68.

The admission of evidence and argument relating to the armed robbery also led to the admission of and reference to multiple nonviolent felonies—burglary and grand larceny offenses from March 1999 and two counts of burglary of a dwelling from August 2001—that were improperly considered by jurors in making their sentencing decisions. *See supra* Claim I.A.

The prosecutor told jurors that they should consider these prior convictions as evidence proving that Mr. Keller "deserve[d] the ultimate sentence of the death penalty," and that the death penalty was "the only punishment" available for jurors to give Mr. Keller. Tr. 668. This argument, which focused on Mr. Keller's numerous prior crimes, was itself objectionable. *See* Claim I.D *infra*. Additionally, the improper admission and consideration by jurors of evidence of Mr. Keller's armed robbery charge undermines confidence in their decisions regarding Mr. Keller's sentence. The Court should grant the motion and vacate Mr. Keller's death sentence.

The State urged jurors to sentence Mr. Keller to death based in part on the aggravating circumstance that Mr. Keller "was previously convicted of another capital offense or of a felony involving the use or threat of violence to the person." Miss. Code § 99-19-101(5)(b). In support of this aggravating circumstance, the State presented evidence of Mr. Keller's non-final December 2007 conviction for armed robbery. Tr. 518–19.[3]

[3] The armed robbery charge was tried in the First Judicial District of Harrison Court as Case No. B2401-07-604. It appears to have been investigated primarily by the Harrison County Sheriff's Office and the Gulfport Police Department. *See supra* Claim I.A.

Mississippi law, however, prevents the State from presenting and jurors from considering aggravating circumstances that do not fit into the factors enumerated by statute. *Balfour v. State*, 598 So. 2d 731, 747–48 (Miss. 1992) ("'[T]he state is limited to offering evidence that is relevant to one of the aggravating circumstances included in § 99–19–101.'" (quoting *Stringer v. State*, 500 So. 2d 928, 941 (Miss. 1986); also citing *Coleman v. State*, 378 So. 2d 640, 648 (Miss. 1979))). This Court has found that this statutory restriction "can be no clearer." *Balfour*, 598 So. 2d at 748 ("[a]ggravating circumstances *shall be limited* to the following" enumerated factors (citing Miss. Code Ann. § 99-19-101(5)). Strict adherence to this mandate is why Mississippi does not allow propensity for future dangerousness as an aggravating factor, *Balfour*, 598 So. 2d at 747–48, as some other jurisdictions do.

The relevant statutory aggravating factor relied on by the State here required the prosecution to prove that Mr. Keller was "previously *convicted* of another capital offense or of a felony involving the use or threat of violence to the person." Miss. Code Ann. § 99-19-101(5)(b) (emphasis added). Importantly, there was no final conviction of Mr. Keller on the charge of armed robbery at the time of his capital murder trial, and his trial counsel should have objected to the introduction of evidence suggesting there was.

The State charged Mr. Keller with robbing the Hancock Bank with a handgun on January 30, 2007. On December 5, 2007, jurors assembled in the Harrison County Circuit Court found him guilty as charged, and he was sentenced. Ex. 54 [Armed Robbery Final Judgment 2nd Day]. However, a timely Motion for a New Trial was filed on December 14, 2007. Ex. 55 [Motion for New Trial]; *see also* Miss. Uniform Rules of Circuit and County Court Practice R. 10.05. The Motion for New Trial had not been resolved at the time of Mr. Keller's capital trial and currently is pending before the circuit court. It has never been addressed or ruled on by any court. As a

result, no final conviction has been entered regarding Mr. Keller's armed robbery charges, nor has he had an opportunity to file a notice of appeal or pursue appeal of this conviction and contest any violations of Mississippi or federal law occurring at trial. *See, e.g.*, *Jordan v. McKenna*, 573 So. 2d 1371, 1374 (Miss. 1990) (criminal conviction determined to be a valid and final judgment after conviction and sentence affirmed on appeal); *Mississippi Bar v. Hull*, 118 So. 3d 544, 544–45 (Miss. 2012) (criminal conviction is considered final for purposes of disciplining attorneys under Rule 6(d) after appeal is concluded or the time for an appeal expires). Mississippi affords a criminal defendant an appeal as a matter of right. Miss. Code Ann. § 99-35-101 ("Any person convicted of an offense in a circuit court may appeal to the Supreme Court."). Trial counsel raised no objection to jurors' consideration of this evidence in making decisions about whether Mr. Keller should receive a death sentence. Trial counsel's failure to object to the introduction of a conviction that was not yet final is particularly unreasonable because Mr. Keller's lawyer for the armed robbery case also represented Mr. Keller in the capital case.

The United States Supreme Court has held "[s]tate convictions are final 'for purposes of retroactivity analysis when the availability of direct appeal to the state courts has been exhausted and the time for filing a petition for a writ of certiorari has elapsed or a timely filed petition has been denied.'" *Beard v. Banks*, 542 U.S. 406, 411 (2004) (quoting *Caspari v. Bohlen*, 510 U.S. 383, 390 (1994)). This Court has acknowledged this holding, and has used this formulation of finality in determining the retroactivity of its own holdings. *See McCain v. State*, 81 So. 3d 1055 (Miss. 2012) (noting that defendant's case was not yet final, although appeal had already been denied, while motion for rehearing by Mississippi Court of Appeals and writ of certiorari to the Mississippi Supreme Court remained pending); *see also Lampley v. State*, 308 So. 2d 87, 89

(Miss. 1975) (determining that criminal defendant could not get benefit of an amended statute because the "judgment of the trial court became final as of the date when the petition for rehearing was denied by the Supreme Court of Mississippi."); *cf. Puckett v. State*, 834 So. 2d 676, 677–78 (Miss. 2002) ("In a death penalty context, a conviction is final only when the mandatory state appellate review is complete, *i.e.*, when this Court's mandate on appeal issues.").

The length of time Mr. Keller's Motion for New Trial has been pending does not render it moot or make the conviction final, and he may file a timely notice of appeal up until 30 days after resolution of the motion. *See, e.g.*, *McIntosh v. State*, 749 So. 2d 1235, 1237–38 (Miss. Ct. App. 1999) (finding appeal timely from a motion for new trial that was pending in the circuit court for "more than five years" before the court entered an order resolving the motion);[4] *see also* Miss. Code § 9-3-9 (appellate jurisdiction not acquired "until after final judgment in the court below"); M.R.A.P. 4(a).

Because Mr. Keller's Motion for New Trial on his armed robbery charge is still pending in the circuit court, there is no final conviction against him relating to the Hancock Bank robbery; without a final conviction, Mr. Keller has not yet had the opportunity to litigate his motion for new trial or to seek appellate review. M.R.A.P. 4(e)[5]; *see also First Nat'l Bank of*

[4] Further, the circuit court does not lose jurisdiction solely by virtue of the court term ending. *Presley v. State*, 792 So. 2d 950, 953–54 (Miss. 2001) (citing Miss. Code Ann. § 11-1-16). Provided the motion is pending before the end of the term in which the sentence was imposed, the circuit court retains jurisdiction to rule on the motion. *See Carr v. State*, 881 So. 2d 261, 264 (Miss. Ct. App. 2003) (holding circuit court had no jurisdiction over post-conviction motion not filed until after the court term in which sentencing occurred had ended). Circuit courts do not lose jurisdiction simply due to the passage of time.

[5] M.R.A.P. Rule 4(e) reads in pertinent part:

> If a defendant makes a timely motion . . . for a new trial under [Uniform Rules of Circuit and County Court Practice] Rule 10.05, the time for appeal for all parties

Vicksburg v. Cutrer, 190 So. 2d 883, 886 (Miss. 1966) (holding that prematurely filed appeal was cured by court entering final judgment and disposing of pending post-trial motions).

The pendency of Mr. Keller's Motion for New Trial in the armed robbery case made it improper for the State to present that case, including the indictment and sentencing order, to jurors for consideration as aggravating evidence of a "conviction" in support of a death sentence. Telling capital sentencing jurors that another jury's determination of guilt can be considered a "previous conviction," without telling them: a.) that the order had not become a final judgment; b.) that a motion for new trial challenging the conviction was pending and had not been addressed by any court; and c.) that there had been no appellate review of proceedings in which guilt was determined, violates Constitutional protections under the Sixth, Eighth, and Fourteenth Amendments. Jurors would reasonably presume that a "previous conviction" meant that the defendant had received all of the rights and process to which he is entitled, and that he either elected not to appeal before the final judgment of conviction or that his appeal was denied. It was unreasonable, misleading, and prejudicial to Mr. Keller to have jurors mistakenly rely on these presumptions when the truth is that the purported "conviction" was something less than a final judgment of conviction.

Mississippi's requirement that a "previous conviction" necessitates a final judgment regarding a defendant's alleged criminal behavior is consistent with Eighth Amendment and Due

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> shall run from the entry of the order denying such motion. Notwithstanding anything in this rule to the contrary, in criminal cases the 30 day period shall run from the date of the denial of any motion contemplated by this subparagraph, or from the date of imposition of sentence, whichever occurs later. A notice of appeal filed after the court announces a decision sentence, or order but before it disposes of any of the above motions, is ineffective until the date of the entry of the order disposing of the last such motion outstanding, or until the date of the entry of the judgment of conviction, whichever is later. Notwithstanding the provisions of Appellate Rule 3(c), a valid notice of appeal is effective to appeal from an order disposing of any of the above motions.

Process guarantees under the Mississippi and United States Constitutions. The Supreme Court of the United States has held, for example, that the use of an erroneous conviction in the capital sentencing phase can be prejudicial, because it may be "'decisive' in the 'choice between a life sentence and a death sentence.'" *Johnson v. Mississippi*, 486 U.S. 578, 586 (1988) (quoting *Gardner v. Florida*, 430 U.S. 349, 359 (1977) (plurality opinion)).[6]

Mississippi law required the State to use only prior final convictions for felonies involving the use or threat of violence to the person as aggravating evidence in favor of a death sentence. Miss. Code §99-19-101(5)(b). Contrary to fundamental Due Process, the State failed to comply with this statutory requirement and presented instead a conviction that was not yet final. *Cf. Wolff v. McDonnell*, 418 U.S. 539, 557–58 (1974) (finding a liberty interest protected by the federal Due Process Clause "even when the liberty itself is a statutory creation of the State," and noting the "touchstone of due process is protection of the individual against arbitrary action of government"); *see also Hicks v. Oklahoma*, 447 U.S. 343, 346 (1980). The failure to observe statutory restrictions for narrowing application of the death penalty also violates Eighth Amendment protections against arbitrary imposition of a capital sentence. *See Zant v. Stephens*, 462 U.S. 862, 878 (1983) ("Our cases indicate, then, that statutory aggravating circumstances play a constitutionally necessary function at the stage of legislative definition: they circumscribe the class of persons eligible for the death penalty.")

The prosecution relied heavily on Mr. Keller's purported previous conviction for armed robbery, along with improper and inadmissible information of other unrelated, nonviolent convictions, to support its primary argument that Mr. Keller must be put to death because the

[6] As in *Johnson*, the prosecutor did not introduce evidence of Mr. Keller's behavior relating to the armed robbery beyond information in documents establishing that Mr. Keller was indicted and found guilty of the charges (and information of additional previous convictions). *See supra* Claim I.A.

evidence introduced of his prior convictions showed that he had not "learned his lesson." Tr. 667. Additionally, the prosecutor argued that, because Mr. Keller was "already serving life without parole" for armed robbery, and was "already not getting out," imposing another life sentence would be equivalent to imposing no sentence at all. Tr. 668. Therefore, "the only punishment" warranted was the death penalty. *Id. See also supra* Claim I.A.

Trial counsel unreasonably failed to object to the use of the indictment and order as insufficient to establish that Mr. Keller was previously convicted of armed robbery for consideration as an aggravating circumstance pursuant to Miss. Code § 99-19-101(5)(b). As a result of defense counsel's failure, jurors considered erroneous evidence of a prior conviction as aggravating evidence in support of a death sentence, even though the order of conviction was not yet final in the circuit court, let alone the appellate courts. The inclusion of this evidence undermines confidence in jurors' consideration and weighing of evidence in aggravation and mitigation, and in their decisions to sentence Mr. Keller to death. The fact that jurors were encouraged to sentence Mr. Keller to death on the basis of a charge which had not yet resulted in a final, valid conviction—indeed, for which the period to file an appeal as of right under Mississippi law had not even begun to run—creates a reasonable probability that, had trial counsel not performed deficiently, the outcome of the proceeding would have been different. This Court should grant the motion and vacate Mr. Keller's death sentence.

C. Trial Counsel was Ineffective for Failing to Investigate and Discover Significant Mitigating Evidence about Mr. Keller

Trial counsel failed to make a reasonable investigation of mitigating evidence and failed to provide jurors with extensive and accurate evidence in favor of imposing a sentence less than

death on Mr. Keller (Jason).[7] This evidence was necessary to provide an accurate understanding of Jason's history, character, and background, as well as his behavior and limitations. Counsel did not conduct adequate mitigation interviews with any witnesses, and did not even contact the vast majority of family, friends, and others familiar with Jason's history, character, or background. Dr. Beverly Smallwood, Ph.D., the psychologist appointed to assess whether Jason was sane at the time the crime was committed and whether he was competent to stand trial, Ex. 77 at 000160 [Feb. 10, 2009 Order for Psychiatric Evaluation], expressly advised counsel, "if this case goes forth as a capital case, a mitigation study regarding this man's psychological functioning is recommended." Ex. 78 at 10–11 [Smallwood Psychological Evaluation]. No subsequent investigation or study was made of Jason's life history or family background, and no such mitigation study was ever conducted. Without a reasonable investigation, counsel was forced to rely on superficial testimony of witnesses, one of whom counsel first met in the hall outside the courtroom just before he took the witness stand, Ex. 5 ¶11 [Jerry Jr.], and another who confided on the witness stand that she could not recall any interaction she had with Jason, Tr. 541. This course of action was based on an unreasonably incomplete investigation and not the result of a fully informed decision. *Wiggins v. Smith*, 539 U.S. 510, 532 (2003) (noting "'strategic choices made after less than complete investigation are reasonable' only to the extent that 'reasonable professional judgments support the limitations on investigation'") (quoting *Strickland v. Washington*, 466 U.S. 668, 690–91 (1984)).

As a result, Jason's capital sentencing jurors were denied accurate and extensive evidence that would have provided an understanding of Jason's history and family background and the context of his behavior, and would have provided jurors bases for making a balanced estimation

[7] To avoid confusion in referring to various members of Mr. Keller's family, the claim will refer herein to family members by their first names.

of Jason's character and culpability. These are essential and fundamental components of a fair consideration of sentencing in a capital case. *See, e.g., Devin Bennett v. State*, 990 So. 2d 155, 158–59 (Miss. 2008) (citing *Moore v. Johnson*, 194 F.3d 586, 612 (5th Cir. 1999) ("Mitigation evidence concerning a particular defendant's character or background plays a *constitutionally important* role in producing an individualized sentencing determination that the death penalty is appropriate in a given case." (emphasis in *Bennett*)). The failure to provide this information to jurors in Jason's case undermines confidence in jurors' sentencing decisions, made without this critical evidence and understanding.

The failure to provide jurors with an accurate and balanced understanding of Jason's history, background, and character allowed the State to tell jurors that Jason's "only problem . . . [was] that he likes to take drugs," Tr. 656, and that the reason he killed Ms. Nguyen was "because he wanted to see what it felt like to kill another human being," Tr. 667. Because jurors were forced to rely on such inaccurate and imbalanced evidence and argument, confidence is undermined in their sentencing decisions. Based on evidence and argument herein, the motion should be granted and Jason's death sentence vacated.

1. Trial counsel fell below an objective standard of reasonableness by not investigating and presenting abundant evidence of Mr. Galloway's social history

a. Jeraldine Keller

Jason Lee Keller was born in July, 1979. Ex. 79 [Jason's Birth Certificate]. His mother, Jeraldine Keller, called the events leading to his birth the biggest mistake of her life. Ex. 18 ¶19 [Jeraldine].

Jeraldine had been married to Edward Keller ("Eddie"), and the couple had two daughters. Ex. 127 [1978 Divorce Record]. Jeraldine and Eddie moved with their daughters to

live next to Jerry Bankester Sr. ("Jerry Sr.") and his wife, Shirley Bankester. Eddie and Jerry Sr. were close friends, Ex. 37 ¶29 [Delores]; Ex. 17 ¶23 [Eddie], and the families spent a great deal of time together. Ex. 4 ¶5 [Edna]; Ex. 17 ¶15 [Eddie]; Ex. 3 ¶5 [Doris]; Ex. 21 ¶¶4, 5 [Pearl]; Ex. 27 ¶7 [Lydia]; Ex. 8 ¶33 [Nancy]; Ex. 1 ¶4 [Pam]; Ex. 21 ¶¶4–5 [Pearl]. Shirley's brother, Charles, was married to Jeraldine's sister, Delores. Ex. 37 ¶¶ 22, 27 [Delores]; Ex. 18 ¶17 [Jeraldine]. The three couples spent time together frequently—going out to barrooms on the weekends or staying home and playing cards. Ex. 37 ¶27 [Delores]; Ex. 17 ¶19 [Eddie].

After the Kellers moved next door to the Bankesters, Jerry Sr. and Jeraldine developed feelings for each other. Ex. 37 ¶30 [Delores]; Ex. 17 ¶22 [Eddie]. When Jeraldine's oldest daughter, Pam, caught them kissing in the kitchen, others in the family found out about the affair. Ex. 1 ¶5 [Pam]. Once Jeraldine revealed the affair to Eddie, they separated and later divorced. Ex. 127 [1978 Divorce Record]. The affair caused hurt, awkwardness, and a rift between the families—Eddie and Jerry Sr. have never reconciled, and cannot even be in the same room together. Ex. 3 ¶4 [Doris]; Ex. 37 ¶29 [Delores]; Ex. 18 ¶19 [Jeraldine]; Ex. 17 ¶¶22, 23 [Eddie].

After Jeraldine and Eddie separated, Jason was born at Howard Memorial Hospital in Biloxi.[8] Ex. 79 [Jason's Birth Certificate]. Jeraldine brought Jason home to 401 Maple Street in Biloxi. Ex. 79 [Jason's Birth Certificate].

Jason's family has longstanding and significant ties to the Biloxi area. Both of his parents grew up on the Gulf Coast, and were part of large families living and working in the area. Jason's father's family included Laz Quave, a former mayor of Biloxi. Ex. 8 ¶7 [Nancy] (Jason's paternal great-grandmother's brother). Jason's mother's sister, Doris Deno, was the long-time

[8] Although Jerry Sr. was Jason's father, Eddie was listed as Jason's father on his birth certificate. Ex. 79 [Jason's Birth Certificate]. Eddie and Jeraldine were already separated by the time Jason was conceived, *see* Ex. 127 [1978 Divorce Record], and there has never been any dispute that Jerry Sr. is Jason's father.

proprietor of a much-loved hot tamale stand in D'Iberville. After she passed away, the community named the street where "Doris's Hot Tamales" still stands after her, Ex. 18 ¶11 [Jeraldine]. Eddie Keller, Jason's stepfather, served as a member of the National Guard forces that dealt with the terrible aftermath of Hurricane Camille on the Gulf Coast. Ex. 17 ¶¶8-10 [Eddie].

b. Jerry Banster, Sr.

Jason's father, Jerry Sr., was born in Pensacola, Florida, Ex. 96 [National Personnel Records Center (NPRC) Records], and his family moved to the Biloxi area when he was a small child. His parents worked in the fishing industry. Ex. 6 ¶2 [Jerry Sr.]. His father, Bueron Bankester, worked for the city of Biloxi and also worked on the fishing boats, and his mother, Doris Holland Bankester, worked as a shrimp picker. Ex. 8 ¶¶8–9 [Nancy]; Ex. 6 ¶2 [Jerry Sr.]. The family "had enough to eat," but "didn't have many extras." Ex. 8 ¶14 [Nancy].

Jerry Sr. had one older sister, Peggy, and two younger sisters, Nancy and Susie. Ex. 8 ¶2 [Nancy]. Peggy, the oldest, married Archie LeBatard in May 1957 at the age of 19. Ex. 143 [Peggy Marriage License]. Ex. 8 ¶4 [Nancy]. Nancy was first married to William Allen Westall at the age of 17, in July 1964. Ex. 144 [Nancy Marriage License – Westall]. Nancy's second husband was Garry Kendall, who she married in February 1980. Ex. 145 [Nancy Marriage License – Kendall]. Garry Kendall was an alcoholic, who was physically abusive to Nancy and her children. Ex. 8 ¶17 [Nancy]. Susie also married young, marrying Richard Puglise when she was only 18 years old, in March 1967. Ex. 147 [Susie Marriage License].

Jerry Sr. got his first job in a shrimping factory when he was fourteen years old. Ex. 6 ¶6 [Jerry Sr.]. He was always a hard worker throughout his life, and often worked overtime. Ex. 31 ¶¶16, 19 [Rick Sr.]; Ex. 142 [Jerry Sr. SSA records].

After struggling in school, including having to repeat the seventh grade, Jerry Sr. quit in the tenth grade and joined the U.S. Army. Ex. 6 ¶7 [Jerry Sr.]; Ex. 90 [Jerry Sr. Biloxi High School Records]. Jerry's father told him that he had to either stay in school or join the Army. Ex. 6 ¶7 [Jerry Sr.]. Jerry Sr. served three years, two months, and one day in the Army. Ex. 6 ¶8 [Jerry Sr.]; Ex. 96 at 3 [National Personnel Records Center]. Dropping out of school was not rare in the Bankester family; none of Jerry's siblings graduated from high school. Ex. 8 ¶12 [Nancy]. Jerry Sr. received an honorable discharge in 1963, and returned home to the Biloxi area. Ex. 96 [National Personnel Records Center]; Ex. 6 ¶10 [Jerry Sr.].

One night, not long after his discharge from the military and return to Mississippi, Jerry Sr. went out drinking with some friends of his from the Army and was involved in a serious car accident. Ex. 6 ¶18 [Jerry Sr.]. Jerry Sr. was driving the car at the time of the accident, and described, "I guess I leaned against something and the door opened unexpectedly and I fell out of the car entirely. Although I only broke my finger, the car crashed." Ex. 6 ¶18 [Jerry Sr.]. Two of his friends who were in the car were more seriously injured and were taken to the emergency room at a local hospital. Ex. 6 ¶19 [Jerry Sr.]. One of the men broke his ribs. The man was told not to move, but "he tried to push himself up with his hands to assist [the orderlies with moving him]. One of his broken ribs punctured his heart and he died." Ex. 6 ¶19 [Jerry Sr.]. Jerry Sr. considered himself responsible for his friend's death. Ex. 6 ¶20 [Jerry Sr.].

When Jerry Sr. returned to Biloxi after his military service, he met Shirley Ann Walston at the neighborhood bar and they married about three months later. Ex. 6 ¶11 [Jerry Sr.]. They were married for about sixteen years. Ex. 6 ¶13 [Jerry Sr.]; Ex. 83 [marriage record]; Ex. 84 [Jerry Sr. and Shirley Divorce decree].

When Jerry Sr. and Shirley married, Shirley had a daughter, Audrey, from an earlier marriage. Ex. 6 ¶14 [Jerry Sr.]; Ex. 18 ¶18 [Jeraldine]; Ex. 86 [marriage record]. Jerry Sr. and Shirley had four children together: Doris, Dorthy, Jerry Jr., and Edna Mae (Jason's paternal half-siblings). Ex. 84 [Jerry Sr. and Shirley Divorce].

c. Shirley Bankster

Shirley came from a large family, and had thirteen siblings. Ex. 6 ¶11 [Jerry Sr.]. Her family was from Arkansas, but had moved and scattered after her father died because there was no money and no way to earn money in the remote part of Arkansas where they lived. Ex. 37 ¶21 [Delores]. Some of the older children were sent to Catholic schools, while the younger ones were given to other families to be raised. Ex. 37 ¶21 [Delores]. Shirley and some of her siblings ended up in the Biloxi area. Her older brother, Charles Walston, married Jeraldine's older sister, Delores. Ex. 37 ¶22 [Delores]; Ex. 82 [Delores and Charles Marriage]. Delores and Charles's marriage later broke up, and Delores married Warren Walston ("Corky"), the younger brother of Charles and Shirley. Ex. 37 ¶24 [Delores]; Ex. 108 [Charles and Delores Divorce]; Ex. 85 [Delores and Corky Marriage].

Shirley was a mean woman. Ex. 6 ¶14 [Jerry Sr.]; Ex. 38 ¶2 [John Wayne]; Ex. 31 ¶20 [Rick Sr.]; Ex. 37 ¶28 [Delores]; *cf.* Ex. 27 ¶8 [Lydia O'Brien] ("Shirley was always kind of strange and weird—so much so that I even noticed as a little kid."). She hit Jason's siblings "with a switch, coat hanger, broomstick, flyswatter, or belt—whatever was nearby. Sometimes it was too much, like it was more than [they] deserved." Ex. 4 ¶17 [Edna]. If one of the kids did something that made Shirley mad, "she would just take it out on whoever was around. . . . [Y]ou just never knew what she was going to do." Ex. 31 ¶20 [Rick Sr.]. Shirley was a crazy woman—it was "almost like she had two different personalities;" she seemed to have a friend-type

relationship with her children and did not seem to care what they did, but was also very strict about making the kids do the housework and chores. Ex. 21 ¶6 [Pearl]. Shirley did not take care of the house or the children, which left the children, particularly Audrey—the children's older half-sister—to raise each other and take care of the house. Ex. 8 ¶23 [Nancy]; Ex. 18 ¶18 [Jeraldine]; Ex. 17 ¶16 [Eddie]. Audrey ran away from home when she was very young, and, even after she was found by the police, she refused to return to Shirley and Jerry Sr.'s home. Ex. 18 ¶18 [Jeraldine]. Shirley would keep a refrigerator in her bedroom and padlock the door so that her children would not be able to eat anything besides bread and eggs. Ex. 39 ¶17 [Billy]. *See also* Ex. 36 ¶9 [David]. Reba[9] Cross, a childhood friend of Edna Mae's from Tennessee who later married Jerry Jr., recalled that the high school counselor brought her in and asked her if she would be friends with Edna Mae, because Edna Mae "didn't have any friends . . . [and] did not take care of herself at all . . . Edna Mae just didn't care about herself or how she looked. The other kids at school teased her because of this." Ex. 9 ¶4 [Rebia]. When Reba went to Edna Mae's house, where Edna Mae lived with Shirley and her fourth husband, Jay James, Reba "had never seen any of the other kids I knew so unsupervised." Ex. 9 ¶6 [Rebia].

Shirley was a drinker, and she "liked to party, and often was not around the house looking after her kids." Ex. 22 ¶9 [Thomas].

> When I first started partying with Shirley, she still lived in the same broken down old house next to the abandoned trailer park. The house wasn't that livable, but they lived there anyway. There were roaches and the house was old and run down. It would have taken a lot of work to fix the house up. . . . The house was in bad enough shape that I once fell through the floor in one of the rooms.

Ex. 22 ¶7 [Thomas]. There was not enough money for a nicer place or food, "but they managed to buy alcohol and pot all the time." Ex. 22 ¶11 [Thomas]. A friend observed, "It seemed like

[9] Reba's first name is legally "Rebia," due to a misspelling on her birth certificate, but she has always used the name "Reba."

there was never enough food in that house. I would bring leftover food from the KFC by whenever I could, and would give the kids some of my paycheck every week to help out on groceries, since they didn't have enough to eat[.]" Ex. 22 ¶10 [Thomas].

d. Siblings

From the time they were young, Jason's half-sisters and half-brother had reputations as being "rowdy." Ex. 17 ¶17 [Eddie]. Although they were often kept close to home, when they did go out they got into things and created a mess, leaving things "looking like a tornado hit." Ex. 17 ¶15 [Eddie]. Shirley and Doris were both known to have "sticky fingers," meaning that "[t]hey liked to steal things." Ex. 8 ¶29 [Nancy]. They stole things from relatives' homes—"[w]henever they came over, small things like watches would disappear." Ex. 8 ¶29 [Nancy].

Jason's paternal siblings struggled in school. Jerry Jr. was retained in sixth grade, conditionally passed in seventh grade, and had to go to summer school after being retained in eighth grade. Ex. 91 [Jerry Jr. D'Iberville High School records]. He then dropped out in ninth grade.[10] Ex. 91 [Jerry Jr. D'Iberville High School records]. Doris also repeated a grade. Ex. 93 [Doris D'Iberville High School records]. She did finally graduate, ranked 138th in a class of 142 students. Ex. 93 [Doris D'Iberville High School records]. Her records also showed multiple school transfers and withdrawals. Ex. 93 [Doris D'Iberville High School records].

Many of Jason's siblings had issues with violence, criminal behavior, and drug use that continued into their adult lives. A family friend observed, "a Bankester family reunion is one you have to have 911 on speed dial for, because at a certain point, someone will get way too messed up and start swinging at someone else. The Bankesters, they knew how to get down and dirty." Ex. 22 ¶28 [Thomas].

[10] Jerry Jr.'s son, Wayney, is illiterate. Ex. 114 [Jerry Bankester III 2013 DUI Charge].

i. Jerry Bankster, Jr.

According to family members and friends who know him, Jerry Jr. has struggled with alcoholism for many years, *see infra*, and has had a number of charges and a history of violent behavior. He was both physically and emotionally abusive to his ex-wife and also has faced more recent domestic violence charges. Ex. 9 ¶11a [Rebia]; *see also* Ex. 9 ¶12a [Rebia]. Ex. 98 [2007 Jerry Jr. Domestic Violence Charges]; Ex. 113 [2008 Jerry Jr. Domestic Violence Charges]. Jerry Jr.'s cousin, Billy Westall, described Jerry Jr. as acting like a different person when he was drinking—"[h]e would be violent and was always trying to fight me." Ex. 39 ¶8 [Billy]; *see also* Ex. 9 ¶¶17, 15a [Rebia]. Once, when he was drunk and wanted to fight, Jerry Jr. grabbed a sword off the wall; another time, he used a crowbar. Ex. 39 ¶8 [Billy]. Jerry Jr. was abusive to his wife, Reba. When she tried to escape and return home to Tennessee from Mississippi, he would threaten to kill himself if she left. Ex. 9 ¶¶17–18, 32 [Rebia]. On one occasion, he showed up at Reba's house with a loaded shotgun and threatened to kill himself after she asked for a divorce. Ex. 9 ¶34 [Rebia]. Shortly after that, Jerry Jr. attempted to kidnap the couple's son and take him back to Mississippi without telling Reba. Ex. 9 ¶35 [Rebia]. After Jerry Jr. threatened to kill Reba and attempted to abduct their son, she was so scared that she went into hiding for over a year. Ex. 9 ¶36a [Rebia].

ii. Doris Bankster

Jason's half-sister Doris has also struggled with drug addiction, *see infra*, and repeatedly has been a victim of domestic violence, Ex. 23 ¶¶5, 16 [Carla]. Doris was evicted from her trailer park because she was involved in so many domestic violence incidents. Ex. 23 ¶5 [Carla]. She got beat up by men and women she was living with, including her son Jonathan: "She'd stay with a female friend until she did something the woman didn't like and an argument or fight would

start. Sometimes the women would have their kids beat up Doris." Ex. 23 ¶16 [Carla]. Ex. 100 [Records] Doris also stole to support her drug habit. *See* Ex. 23 ¶10 [Carla]; Ex. 22 ¶¶25, 26 [Thomas].

iii. Edna Bankster

Edna, the closest sibling in age to Jason, also has a long history of drug addiction and self-medication to deal with the issues she has faced in her life. *See infra*. Edna became guilty and depressed, "and went somewhere dark for a while" after the accidental death of her infant daughter. Ex. 4 ¶¶13-14 [Edna]. Edna has described her drug use as a form of "self-medication" for depression. Ex. 4 ¶25c [Edna].

iv. Dorthy Bankster

Dorthy, Jason's only paternal half-sibling without a well-documented history of addiction, had a reputation for being "mean." Ex. 37 ¶26 [Delores]. *See also* Ex. 4 ¶8 [Edna]. According to family members, after Dorthy and Gary Walston (her first cousin and boyfriend of several years) separated, they learned that Dorthy punished Gary's young son by "hold[ing] Little Gary's head under the water for long periods of time in the bathtub." Ex. 37 ¶26 [Delores]; *see also* Ex. 35 ¶11 [Cassie] (Dorthy targeted Little Gary and treated him badly). Because of the mistreatment, the child was afraid of her. Ex. 37 ¶26 [Delores].

e. Maternal Family Social History

Jason's mother, Jeraldine, came from a large family and also grew up in the Biloxi area. She spent her childhood in a house on Bowen Street. Jeraldine was the youngest of Mary Bosarge Nelson and Miral Nelson's five daughters: Evelyn Rose ("Rose"), Doris, Millie, Delores, and Jeraldine. Her mother, Mary, also had two sons from a prior marriage, Walter and Milton Ware, who lived in the home on Bowen Street. Ex. 37 ¶4 [Delores].

Jeraldine's family lived next door to her double first cousins—Mary's sister, Edna Bosarge, had married Miral's brother, Vander Dale Nelson. Edna and Vander Dale Sr. had five children: Vander Dale Jr., Miral, Addie, Barbara, and June. Ex. 37 ¶7 [Delores]. Edna Bosarge was previously married to Harvey Hughes but divorced him before she married Vander Dale. She had three children from her marriage to Harvey Hughes: Harvey L., Tommy, and Jimmy. Tommy and Jimmy also lived with their mother on Bowen Street. Ex. 15 ¶ [Harvey]. Jeraldine's paternal grandparents lived in a house that backed up to the house where Jeraldine's parents lived on Bowen Street. Ex. 15 ¶10 [Harvey]; Ex. 37 ¶8 [Delores].

The family "didn't have much." Ex. 18 ¶7 [Jeraldine]. Jeraldine's parents "always struggled for money. There was never enough." Ex. 15 ¶22 [Harvey L.]. According to a cousin who visited the area frequently during the time Jeraldine lived there, the area where Jason's mother and her sisters grew up "was a slum. The city dump was right at the end of the street where they lived. Between the shrimp factories on one side and the dump at the end of the row, that area of town smelled terrible." Ex. 15 ¶13 [Harvey L.]. The houses where Jeraldine and her family lived and next-door where her double first cousins lived were crowded and dirty. Ex. 15 ¶13 [Harvey L.]; Ex. 26 ¶5 [June]. Jeraldine's house did not have a bathroom inside—they used an outhouse and took baths in a big metal tub they filled up, unless their grandmother allowed them to use the bathtub at her house. Ex. 37 ¶8 [Delores].

During Jeraldine's childhood, Mary cleaned houses and Miral was on disability from the time the girls were young. Ex. 37 ¶12 [Delores]; Ex. 18 ¶7 [Jeraldine]. Jeraldine and her sisters were often unsupervised. Delores, the next youngest to Jeraldine, had a series of bad accidents as a child. When she was four or five years old, she got run over by a car while she was crossing the street. Ex. 37 ¶12 [Delores]. She was in the hospital for several months and had to get a metal

plate in her head. Ex. 37 ¶12 [Delores]. When she was six or seven years old, Delores "was trying to hang out with [her] older sisters" and "someone threw the gas and it got on the top half of [her] body." Ex. 37 ¶13 [Delores]. Delores "just went up in flames. . . . The whole top half of [her] body was on fire." Ex. 37 ¶13 [Delores]. She had "huge blisters all over" and was "burned real bad on the top half of [her] body." Ex. 37 ¶13 [Delores].

Jeraldine has smoked ever since her early teens. Ex. 37 ¶14 [Delores]. She and her sister Delores would take cigarettes from their mother and go out to smoke. Ex. 37 ¶14 [Delores]. When they couldn't get cigarettes, they'd pick "bamboo," light it up, and smoke it like cigarettes. Ex. 37 ¶14 [Delores].

Schooling was a struggle for Jason's maternal family. Miral, Jason's maternal grandfather, "could write his name;" Mary, Jason's maternal grandmother, could read. Ex. 37 ¶10 [Delores]. Delores, Jason's maternal aunt, had only gone through fifth grade, and Jeraldine, Jason's mother, had just started seventh grade when she dropped out of school. Ex. 37 ¶10 [Delores]. Jeraldine had the same kind of trouble in school that Jason later had—she was not able to "comprehend." Ex. 18 ¶32 [Jeraldine]. Jason's aunt Delores recalled that she fell "real behind in school," and "was in third grade when she was ten years old." Ex. 37 ¶10 [Delores].

Jeraldine and her sisters "got pulled into the street scene and drugs and alcohol when they were young." Ex. 15 ¶24 [Harvey L.]. The area they lived in was a bad area, and it was hard to avoid the drugs. "That area was so bad, all you had to do was walk out the door and you could get whatever [drugs] you wanted." Ex. 15 ¶24 [Harvey L.].

Jeraldine had trouble getting along with the other kids in the neighborhood. According to her sister Delores, Jeraldine, "was a real scrappy fighter, and she was mean. I didn't like to fight,

and didn't do it unless I had to. Jeri, though, got into fights all the time, and once she started in on someone, she just wouldn't stop." Ex. 37 ¶15 [Delores].

Millie, Jason's maternal aunt, also was a fighter and a "wild one." Ex. 37 ¶16 [Delores]. *See also* Ex. 15 ¶25 [Harvey L.] (Mille was "real happy-go-lucky and kind of a weird one," who "used a lot of drugs, and was always looking for a good time."). She worked at a barroom called the Clover Club, and got a tattoo of a clover on her arm. Ex. 37 ¶16 [Delores]. Delores recalled one night when Millie—who had a little boy out of wedlock—was working at the bar. A woman customer commented to Millie about the boy: "'Why don't you get a bar of soap and wash up that little bastard.' Millie jumped across the bar to get to the lady and fight her." Ex. 37 ¶16 [Delores]. Mille also struggled with drug addiction. *See infra*. There were a lot of fighters in the family. Jeraldine's cousin, Harvey L., remembered his uncles and brothers and sisters all being fighters. His uncles would "just get sent to jail for a night or two and be out. But, they'd drink a lot and then fight a lot—that is just how our family has always been." Ex. 15 ¶30 [Harvey L.].

Jason's mother and aunts left school and began having children and getting married at young ages. Rose left home young, and Doris married young as well. Ex. 37 ¶¶18-19 [Delores]; Ex. 18 ¶10 [Jeraldine]. Millie had a son, Allen Wayne, out of wedlock who Jason's grandparents helped to raise. Ex. 37 ¶16 [Delores]. Millie would leave Allen with her parents and "would go out and do her thing, often staying out all night." Ex. 18 ¶9 [Jeraldine]. Delores met Charles Walston (Shirley Bankester's brother) when she was at a barroom with her sisters and her Aunt Edna. Ex. 37 ¶20 [Delores]. Charles and Delores married and had six children: Gary, John Wayne, Sebrina, David, Kim, and Walter. Ex. 37 ¶22 [Delores]; Ex. 82 [Delores and Charles Marriage]. Delores later had a relationship with and married Charles's brother, Corky, who had

fathered her youngest daughter, Rachel. Ex. 37 ¶24 [Delores]; Ex. 85 [Delores and Corky Marriage].

Jeraldine had her first child, Pam, right after she turned eighteen years old. Pam's father, Danny Cochran, was much older, and a big drinker and fighter. Ex. 15 ¶28 [Harvey L.]; Ex. 1 ¶2 [Pam]. Jeraldine and Danny were not together long. Ex. 15 ¶28 [Harvey L.].

Jeraldine married Eddie Keller in January of 1969. Ex. 17 ¶12 [Eddie]; Ex. 80 [Jeraldine and Eddie Marriage, 1969]. Jeraldine and Eddie's relationship was back-and-forth, and they argued and separated many times. Ex. 18 ¶16 [Jeraldine]; Ex. 17 ¶¶20, 21 [Eddie]. Jeraldine was hotheaded. Ex. 17 ¶21 [Eddie]. When Jason and his half-sisters were young, Eddie "could never tell what would set [Jeraldine] off. [He'd] come home from work and say something, and she'd just go off[.]" Ex. 17 ¶21 [Eddie]. Eddie and Jeraldine argued a lot. Ex. 17 ¶20 [Eddie]. While Eddie preferred to stay home, Jeraldine wanted to go out and have fun. Ex. 17 ¶20 [Eddie]. When Jeraldine went out at night without Eddie, Eddie "always tried to make [her] come home by 12 am;" Jeraldine thought this was "ridiculous," and the two would argue over "how controlling he tried to be." Ex. 18 ¶16 [Jeraldine].

Jeraldine was very particular about her home. As she described it: "I had a few rules in my home. You were not allowed to tear up the house, you had to pick up toys and clean up after yourself, and if you messed something up, you cleaned it up. If the kids broke the rules, they got whoopings with a belt." Ex. 18 ¶35 [Jeraldine]. Jeraldine was "obsessive about being clean," and cleaned the house each day before she went to work, and again after she returned home from work. Ex. 17 ¶18 [Eddie]. On the weekends, Jeraldine woke the kids up so she could make their beds. Ex. 27 ¶8 [Lydia].

The kids, particularly Jason and his younger half-sister, Christina, were often left unsupervised. According to Christina, the two "got into so many situations, I know I am lucky to be alive." Ex. 19 ¶¶3–5 [Christina]; *see also infra*. Their favorite activity was to climb on top of the roof and jump off onto a trampoline. Christina noted that she "got a lot of cuts, scrapes, and broken bones when I was coming up, and still have a lot of the scars. Jason did, too." Ex. 19 ¶3 [Christina].

Like Jason, *see infra*, Christina struggled in school. She "struggled to sit still and understand things." Ex. 19 ¶8 [Christina]. She was not promoted after sixth grade. Ex. 92 [Christina Biloxi High School Records]. Christina eventually dropped out of Biloxi High so she would not be forced to repeat her senior year of high school. Ex. 19 ¶18 [Christina].

When their kids were young, Jeraldine and Eddie moved frequently. Ex. 17 ¶14 [Eddie]; Ex. 18 ¶17 [Jeraldine]; Ex. 1 ¶4 [Pam]. Some of the moves were due to Jeraldine's back-and-forth romantic relationships, but other times Jeraldine "just want[ed] to move." Ex. 17 ¶14 [Eddie]. One of these moves brought Jeraldine and Eddie to the house in North Biloxi where Jerry and Shirley Bankester were their neighbors. Ex. 18 ¶17 [Jeraldine]. At that point, Jeraldine and Jerry made the connection that would lead to their affair and ultimately to Jason's birth. Ex. 18 ¶19 [Jeraldine].

After Jason was born, Jeraldine's back-and-forth relationships with Eddie and Jerry Sr. continued. Ex. 18 ¶¶16, 20–23 [Jeraldine]; Ex. 27 ¶¶9–10 [Lydia] ("My mom and dad always seemed to have a back-and-forth relationship. My dad would move in, and then he'd move out. They used to argue with each other and yell a lot when they were romantically involved."); Ex. 1 ¶10 [Pam]. Jeraldine and Eddie later had another daughter, Christina, who was born in 1983 and was almost five years younger than Jason. Ex. 19 ¶2 [Christina]. Several years after Christina

was born, Jeraldine and Eddie got back together and were remarried, Ex. 81 [Jeraldine and Eddie Marriage, 1991], although the second marriage did not last long. Ex. 18 ¶23 [Jeraldine]. Jeraldine had met Duane ("Rocky") Mountain before she and Eddie remarried, and had developed romantic feelings for him. Ex. 1 ¶13 [Pam]. After Jeraldine and Eddie divorced for the second time, Jeraldine began a relationship with Rocky. Ex. 1 ¶¶13–14 [Pam].

2. A reliable investigation into Petitioner's life history would have uncovered extensive evidence of substance abuse

Jason's family has an extensive history of substance abuse problems. Alcohol and drug use and addiction are prevalent in Jason's father's family.[11] *See* Ex. 22 ¶27 [Thomas] (noting that most of the Bankesters struggled with alcohol and drugs and "just couldn't control the addiction. They would just keep doing whatever they could get their hands on. . . . There was no moderation and they would just get really inebriated, to the point that they could not control themselves."); Ex. 4 ¶¶17–19 [Edna] ("A lot of people in my family have struggled with drugs and addiction. . . . All of us smoked pot—always have, always will—but that wasn't the same as the harder drugs. The harder drugs were what really created problems in our lives."); Ex. 9 ¶¶27–28 [Rebia] (noting she believes "the alcoholism that I saw in Jerry [Jr.] runs deep in the Bankester family"). Alcohol played a large role in family get-togethers: "The Bankester family would throw huge crawfish boils for special occasions. They would all get together and cook Cajun food and get totally drunk." Ex. 9 ¶31 [Rebia].

According to friends and family members, Jason's father is an alcoholic. Ex. 23 ¶¶25–27 [Carla]; Ex. 30 ¶36 [Jeff]; Ex. 31 ¶29 [Rick Sr.]; Ex. 4 ¶21 [Edna]. Thomas Lassere, a long-time

[11] In addition, two of Jerry Sr.'s sisters married alcoholics. Ex. 8 ¶¶16–17 [Nancy]; *see also* Ex. 39 ¶5 [Billy].

family friend of the Bankesters, described Jerry Sr. as "a hell of a drinker when he was younger." Ex. 22 ¶16 [Thomas]. He "would keep a bottle under the seat in the truck, and whenever he'd come to get the kids, he'd hop out of the truck and reach back and grab it and take a swig." Ex. 22 ¶16 [Thomas]. *See also* Ex. 36 ¶8 [David]; Ex. 23 ¶ 25 [Carla]. "It was not uncommon for [Jerry Sr.] to come home and drink a fifth of liquor, take a nap, wake up and then drink another fifth. That was just the way he was." Ex. 39 ¶9 [Billy]. *See also* Ex. 31 ¶17 [Rick Sr.]; Ex. 8 ¶32 [Nancy].

Jerry Sr. regularly went out to bars. Ex. 37 ¶18 [Delores]; Ex. 17 ¶19 [Eddie]. He often drank so much that he could not drive home. Delores described, "Jerry [Sr.] was a bad alcoholic. I remember he'd frequently go out and get so drunk that he'd have to have little Jason sit on his lap to drive home—this was when Jason was a young kid. Jason would look so funny looking out over the big steering wheel." Ex. 37 ¶35 [Delores]. Billy Westall, Jason's cousin, recalled:

> There were many times that Uncle Jerry and I would leave together, but I would choose to walk home because I did not want to get in the car with Uncle Jerry. When he got real drunk, he usually let me drive, but occasionally he would still insist on driving, so I would walk home.
>
> One day Uncle Jerry had been drinking and we were out driving in his truck. Something happened with the gearshift and Uncle Jerry just kept working it back and forth until finally the entire gearshift just broke off in his hand. Uncle Jerry was so upset that he grabbed the whole gearshift (which was more than a foot long) and tried to throw it out the window. He had not realized, though, that the window was completely rolled up. The gearshift broke the glass. After this, Uncle Jerry just drove to a junk shop where he knew the guys who worked there. We exchanged trucks with another one in the lot, and drove that home.

Ex. 39 ¶¶10–11 [Billy].

Jerry Sr. drank freely around his children. Edna, the closest sibling in age to Jason, remembered that, "Daddy was mostly a drinker. He liked beer and Canadian Mist, mostly. I don't know what Canadian Mist is exactly, just some kind of liquor. I used to mix his drinks with it." Ex. 4 ¶25b [Edna]. Jerry Jr. described that Jason "saw our parents and their friends drinking.

We all did when we were growing up." Ex. 5 ¶10 [Jerry Jr.]. *See also* Ex. 37 ¶35 [Delores] (sometimes Jerry Sr. got so drunk when Jason was a kid that Jason would have to drive him home); Ex. 40 ¶9 [Chris] ("Jerry was always bloodshot and smelling like beer—I can smell it now.").

Jerry Sr. "eventually quit drinking for good as a result of the Crohn's Disease. If [he] drank alcohol, it neutralized the medication [he] was taking to help control Crohn's, and [he] ended up in the hospital." Ex. 6 ¶29 [Jerry Sr.]. *See also* Ex. 4 ¶25b [Edna]; Ex. 39 ¶12 [Billy]; Ex. 22 ¶17 [Thomas]; Ex. 23 ¶25 [Carla]. Quitting was not easy for Jerry Sr., though. A family friend recalled:

> I remember going out with Jerry Jr. to visit Mr. Jerry one time after I moved back to Mississippi. Jerry Jr. and I were drinking beers and Mr. Jerry reached for one. Jerry Jr. smacked his hand away and told him, "No, you can't have one of those." Even though Mr. Jerry knew it was bad for him and he couldn't really handle it, he still had the urge.

Ex. 22 ¶17 [Thomas]. "When the doctors first told him he needed to stop drinking, he didn't want to and tried to resist. In the end he had to stop because it was too painful for him to continue." Ex. 39 ¶12 [Billy].

Much of Jason's father's family, including Jerry Sr., also smoked marijuana. Ex. 30 ¶¶3, 33 [Jeff]; Ex. 4 ¶25a [Edna]. As Jason's sister, Edna, explained, "Smoking weed was never a big deal in my family. Everyone did it—my mom, dad, brothers, sisters, cousins—really just everyone. I learned to smoke weed from my mom." Ex. 4 ¶25a [Edna]. A childhood friend of Jason's described that Jerry Sr. "would pick up weed and roll joints for us to smoke with him," and that "Jason's older brother and sisters also smoked weed with him." Ex. 7 ¶9 [Trisha].

Shirley Bankester—Jerry Sr.'s ex-wife and the mother of Doris, Dorthy, Jerry Jr., and Edna Mae—used a lot of drugs and alcohol as well. Ex. 38 ¶2 [John Wayne] (Shirley "drank a

lot of alcohol."). Gin was Shirley's beverage of choice. Ex. 8 ¶24 [Nancy]. "After Shirley was divorced from Jerry Sr. and moved out of their shared house, she really began hitting the drugs. She was heavy into dope. She continued to smoke it in Tennessee and throughout the rest of her life." Ex. 8 ¶34 [Nancy]; *see also* Ex. 8 ¶24 [Nancy]; Ex. 4 ¶25a [Edna]; Ex. 22 ¶12 [Thomas].

Doris Bankester, who is Jason's oldest paternal sibling, has acknowledged she went through "some very difficult years abusing drugs, including being a crack user." Ex. 3 ¶9 [Doris]. During this time, she "was in such a sorry state that [she] wasn't allowed even to be around [her] grandchildren." Ex. 3 ¶10 [Doris]. A family friend recalled that when she met the Bankester family in 1995, Doris was using a lot of drugs. Ex. 23 ¶4 [Carla]; *see also* Ex. 8 ¶30 [Nancy]; Ex. 35 ¶21 [Cassie]; *see also* Ex. 99 [2014-08-20 Justice Ct. Doris Bankester]. Doris "smoked crack, used cocaine, and did heroin. . . . [I]f you can name it, Doris was doing it during that time." Ex. 23 ¶10 [Carla]; *see also* Ex. 31 ¶28 [Rick Sr.] (Doris "got into harder drugs like meth and crack too"); Ex. 4 ¶18 [Edna]. Jeffrey Puglise, a cousin of Doris and Jason, "smoked crack with [Doris] many times, and she was a big needle junkie for a long time" and he also "saw her do a lot of heroin." Ex. 30 ¶34 [Jeff].

A friend, Carla Lawson, had to take over caring for Doris's daughter, Jennifer, due to Doris's drug use. Ex. 23 ¶¶4–7 [Carla]. Carla became increasingly concerned that Doris was not taking care of her children, because Doris "was off partying and doing drugs, and it was really just Jonathan and Jennifer [her children] alone in the trailer." Ex. 23 ¶7 [Carla]. One day when Carla went by the trailer:

> Jennifer was there, but neither Doris nor Jonathan was around. There was no food at all in the house, and the electricity had been cut off. I decided enough was enough at that point, and took Jennifer with me. Jennifer has lived with me since then, and I raised her like my own daughter. Doris never said anything to me about taking her daughter, except thanks for looking out for her.

Ex. 23 ¶8 [Carla]. Doris's drug use ultimately led to her committing various property crimes to support her drug habit. *See supra.* Doris finally was able to turn her life around, and has "been clean for the past years through a 12-step program and [her] heavy reliance on religion." Ex. 3 ¶9 [Doris]. *See also* Ex. 23 ¶18 [Carla].

Jason's older half-brother, Jerry Jr., is also an alcoholic, and was a marijuana user. "Jerry Jr. learned how to drink alcohol from his father. He's told me he started drinking at age nine or ten, and he still drinks today." Ex. 23 ¶27 [Carla]; *see also* Ex. 5 ¶10 [Jerry Jr.]; Ex. 17 ¶18 [Eddie]. Jerry Jr. told his ex-wife, Reba, that he had snuck beer from his grandfather since he was a little kid. Ex. 9 ¶29 [Rebia]. Thomas Lassere, a family friend, recalled:

> Jerry Jr. learned how to drink from Mr. Jerry. He drove Mr. Jerry around to the bars when he was 14, before he even had a license. Jerry Jr. told me that he started drinking too during this time. By the time I came back to Mississippi in 1996, Jerry Jr. was a full-fledged alcoholic. He still is. He mostly drinks beer and whiskey.

Ex. 22 ¶19 [Thomas]. Jerry Jr.'s drinking continued into adulthood. Ex. 9 ¶27 [Rebia]; Ex. 31 ¶29 [Rick Sr.]. Reba, Jerry's ex-wife, described liquor as "'the monster,' because when Jerry drank liquor, that is what he turned into." Ex. 9 ¶14 [Rebia]. When he was drinking, Jerry Jr. became violent, mean, and abusive. Ex. 9 ¶17 [Rebia]; *see also* Ex. 22 ¶¶20-23 [Thomas]. A friend observed:

> One time, when Jerry Jr. was living with Carla and me, he went after his daughter Ciara and I had to step between them. I could hear them screaming at each other from my room. Eventually, I got up and came outside. Jerry Jr. was getting ready to start wailing [sic] on Ciara, and he was the kind of drunk where when he started wailing [sic] on her he wasn't going to stop. I had seen this happen before. Normally, Jerry Jr. was pretty good with kids, but as they got older, he got meaner to them. Jennifer, Doris's daughter, used to call Jerry Jr. "Scary Jerry."

Ex. 22 ¶23 [Thomas]. Now, Jerry Jr. is not allowed to drive due to his substance abuse. Ex. 22 ¶19 [Thomas]. *See also* Ex. 97 [2014-08-20 Justice Ct. Jerry Bankester Jr.].

Jerry Jr. also smoked marijuana and experimented with other drugs. He described that, "I knew that Jason tried drugs off and on as he was growing up. I did too, and it was pretty much the same for everyone I knew. I am sure he saw my friends and my sisters' friends drinking or using some kinds of drugs when he was growing up." Ex. 5 ¶10 [Jerry Jr.]. *See also* Ex. 4 ¶25a [Edna]. Jerry Jr. and his sisters smoked weed with Jason and his friends. Ex. 7 ¶9 [Trisha]. *Cf.* Ex. 29 ¶8c [Harley] (Jason's friend remembered being in high school and selling weed to someone in Jason's family—he thought it was Jason's older brother).

Edna is the paternal half-sister closest in age to Jason. She has also struggled with drug addiction, and used marijuana and crack. Edna said she "learned to smoke weed from [her] mom." Ex. 4 ¶25a [Edna]. The father of one of her children was a crack dealer, and she previously smoked crack "for quite a long time." Ex. 4 ¶17 [Edna]. Edna quit smoking crack in 1995 when she was pregnant with her youngest son, but she continued to struggle with her addictions for many years. Ex. 4 ¶17 [Edna]; *see also* Ex. 115 [2011 Drug Paraphernalia Charge].

Edna characterized most of her drug use and struggles with addiction as failed attempts at self-medication. She "struggled with depression," particularly following the death of her infant daughter, the molestation of another daughter at the hands of the child's father, and almost losing her oldest son after he was hit by a drunk driver at the age of 12. Ex. 4 ¶¶13-16, 25c [Edna]. She observed that she did not think she was the only person in the family to engage in self-medication with illicit drugs. She noted, "Doris self-medicated too, I think. She had a miscarriage, and was depressed after that, like most women are." Ex. 4 ¶25e [Edna]. Edna also noted that she saw many of the same characteristics of depression in Jason right before the crime, leading him to self-medicate with illicit drugs. Ex. 4 ¶¶25f, 25g [Edna].

The pattern of struggles with drug addiction runs throughout Jason's paternal family. Doris's children, Jason's nephew and niece, both developed drug problems. Doris's son Jonathan, "struggles with his own addiction problems, mostly with crack." Ex. 23 ¶11 [Carla]; Ex. 117 [Jonathan Bankester 2012 Possession]; Ex. 118 [Jonathan Bankester 2013 Possession]; Ex. 119 [Jonathan Bankester 2015 DUI]. Jonathan was indicted for possessing more than 30 grams of marijuana in April 2013. Ex. 118 [Jonathan Bankester 2013 Possession]. "Jennifer too has had her struggles with drugs. During her senior year of high school, Jennifer and her husband were caught with meth," which they both were using at the time. Ex. 23 ¶11 [Carla]; Ex. 116 [Jennifer Bankester 2005 Possession]. *See also* Ex. 31 ¶34 [Rick Sr.]; Ex. 35 ¶21 [Cassie]. Jerry Jr.'s daughter, Ciara, also has had drug problems, Ex. 23 ¶24 [Carla], and although Jerry Jr. has not had contact with his son since Wayney's childhood, Ex. 9 ¶37 [Rebia], Wayney also has had issues with drugs and alcohol requiring rehab, Ex. 9 ¶30 [Rebia]; Ex. 114 [Jerry Bankester III 2013 DUI Charge].

Jason's cousin, Jeff Puglise, also has struggled with drug addiction. *See, e.g.*, Ex. 110 [Puglise 2007 DUI]; Ex. 111 [Puglise 2008 Disorderly Conduct]; Ex. 112 Puglise 2009 [Disturbing Family Peace]. He started smoking meth when he was 12 or 13 years old. Ex. 30 ¶27 [Jeff]. He used crack, too, although he preferred meth because the cycle of going up and coming down from crack was hard. Ex. 30 ¶¶28–31 [Jeff]. As Jeff described, he and Jason "did whatever was available." Ex. 30 ¶28 [Jeff]. Jason's cousin, Billy Westall, has dealt with alcohol addiction, and Billy's mother and Jason's paternal aunt, Nancy Carroll, also drank a lot. Ex. 9 ¶30 [Rebia]. *See also* Ex. 126 [William Westall 1995 DUI] Billy's son, Bachus Westall, also has a history of drug addiction. Ex. 9 ¶30 [Rebia]; Ex. 122 [Bachus Westall 2012 Drug Charge]; Ex. 123 [Sally

Westall 2013 Protection Order]; Ex. 124 [Bachus Westall 2014 Domestic Abuse Charge]; Ex. 125 [Bachus Westall 2015 Public Intoxication Charge].

Drug and alcohol use and addiction have also plagued Jason's maternal family. Jason's maternal aunt, Millie, had a "really bad problem" with drugs. Ex. 37 ¶17 [Delores]; *see also* Ex. 15 ¶25 [Harvey]. Finally, to get Millie off drugs, her husband "took her to Florida and locked her up and wouldn't let her out until she came down off of the drugs." Ex. 37 ¶17 [Delores]. As an older cousin noted, Jason's mother and aunts "got pulled into the street scene and drugs and alcohol when they were young. That area where they were living was such a bad area, and there wasn't anything else to do in Biloxi, that it was hard to avoid all of the drugs. That area was so bad, all you had to do was walk out the door and you could get whatever you wanted." Ex. 15 ¶24 [Harvey]. One of Jason's maternal half-sisters noted, "We had been around marijuana growing up, because my aunts and their families smoked it." Ex. 27 ¶25 [Lydia]; *see also* Ex. 18 ¶39 [Jeraldine] ("People in the family used marijuana, but that isn't any different than cigarettes, really."); Ex. 121 [Gary Walston 2008 DUI]; Ex. 1 ¶40 [Pam]. Jason's cousin, Wayne, has struggled with an addiction to crack cocaine "that has caused him a lot of problems." Ex. 36 ¶8 [David]; *see also* Ex. 35 ¶21 [Cassie].

Heavy alcohol use also was common in Jason's mother's family. Jeraldine's uncle, Tom Bosarge (who the family called "Uncle Purdy"), was an alcoholic. Ex. 37 ¶5 [Delores]. Jason's uncle Walter (Jeraldine's half-brother) was reported to be a frequent drinker. Ex. 37 ¶4 [Delores] ("Walter was a huge momma's boy and lived at home with our mom until he passed away. He worked on the shrimp boats, and whatever money he made, he'd bring home to Momma. She'd take it, and give him a little to spend on himself—he'd then go to the bar."). One of Jeraldine's cousins described that his uncles and siblings would "drink a lot and then fight a lot—that is just

how our family has always been." Ex. 15 ¶30 [Harvey]; *see also* Ex. 148 [Sebrina Merrill License Suspension].

Many of Jeraldine's cousins also had significant struggles with drugs and addiction. Ex. 37 ¶7 [Delores]. One of her double first cousins, Barbara Summerlin, died of an overdose; she had overdosed before, but the last time no one found her until it was too late to help. Ex. 15 ¶21 [Harvey]; *see also* Ex. 37 ¶7 [Delores]. Another of Jeraldine's double first cousins, June Nelson, referenced what she called "the family's cycle of drug abuse;" June herself used crack for about 30 years. Ex. 26 ¶6 [June]. Issues related to drug use also led to numerous incarcerations. At least three of Jeraldine's cousins were incarcerated for offenses related to drugs. Ex. 15 ¶16 [Harvey]; Ex. 26 ¶7 [June].

Jason's older half-sister, Pam Adams, has two children—Jason's niece and nephew—who have been addicted to drugs. Ex. 1 ¶¶33, 35 [Pam]. Jason's niece Ashley has used meth and heroin. Ex. 1 ¶36 [Pam]. His nephew Little Russell "struggled with drugs—mostly Xanax—for awhile." Ex. 1 ¶33 [Pam]. *See also* Ex. 2 ¶4 [Russell Jr.]; Ex. 35 ¶22 [Cassie]. Little Russell described how he would use Xanax for many days in a row, because the "comedown was terrible—like a hangover that you'd get from drinking alcohol, only much worse. We'd have to either use more or find other drugs to make us feel better." Ex. 2 ¶9 [Russell Jr.]. Both Ashley and Little Russell stole to support their drug habits. Ex. 1 ¶¶32, 38 [Pam]. Jason's cousin Cassie also used hard drugs, including cocaine. Ex. 35 ¶23 [Cassie]; *see also* Ex. 35 ¶¶14–22 [Cassie] (describing drug abuse among the younger generations of Jason's mother's family).

Jason's nephew, Shawn (the son of Jason's older sister Pearl), committed suicide. Ex. 37 ¶37 [Delores]; *see also* Ex. 18 ¶34 [Jeraldine]. Shawn grew up with Jason and Jason's younger sister, Christina. Ex. 19 ¶13 [Christina]. Shawn was using pills, and family describe that he killed

himself because of his problems with drugs. Ex. 35 ¶15 [Cassie]; Ex. 19 ¶13 [Christina]; *see, e.g.*, Ex. 120 [Shawn Keller 2011 Robbery/Assault]. Two grandsons of Jason's Aunt Delores also killed themselves when they were in their late teens or early twenties. Ex. 37 ¶37 [Delores]. Jason's cousin Gary "started using meth, and the meth messed with his head. He started hearing voices. My grandma remembers seeing him sitting on the couch, talking to the voices in his head. It was finally too much for Gary, and he took his life to end it." Ex. 35 ¶17 [Cassie]. The suicides of these young men made one cousin "think there must be something hereditary." Ex. 35 ¶14 [Cassie].

As one of Delores's granddaughters observed, "[p]retty much my whole family has smoked weed, but it's the hard drugs that have caused the most harm." Ex. 35 ¶19 [Cassie]. "The boys in our family get into more trouble—breaking into houses, stealing, abusing hard drugs. . . . Us girls have drinking bones so we get into trouble that's less serious." Ex. 35 ¶26 [Cassie]. She described that, in her family, many

> lives and the lives of those around them have been very disrupted and harmed by the influence of drugs. . . . Some have been unable to be responsible for the most basic parts of their lives, and their most basic responsibilities—like keeping a job, paying bills, having a place to live, and caring for children and other family members. In many instances, others in the family have had to step in and take over these responsibilities, and hope people can get free of their addictions or reckless lifestyles before people are hurt even more seriously.

Ex. 35 ¶19 [Cassie]. She also noted that sometimes family members can avoid the cycle—Billy, the son of Jason's paternal half-sister Dorthy, had started to get drawn in to the cycle of drugs and alcohol when he was younger. *See* Ex. 149 [Billy 2004 minor alcohol/DUI]. However, Billy "was able to get away from his family, stay off drugs, and he's taking his boards to become a chiropractor. . . . Billy is a good example of how different things can be if you get away from drugs and bad influences." Ex. 35 ¶27 [Cassie].

a. Jason's Family Life

This is the family life into which Jason was born. For the first part of his life, Jason lived with his mother, Jeraldine, and his maternal half-sisters, Pam, Pearl, Lydia, and Christina. Ex. 1 ¶8 [Pam]; Ex. 6 ¶28 [Jerry Sr.]; Ex. 21 ¶9 [Pearl]. Depending on which man Jeraldine was with at the time, Eddie or Jerry Sr. also lived with the family.

The family moved a lot. Ex. 17 ¶14 [Eddie]. For a brief period following Jason's birth, Jeraldine and her children lived with Jerry Sr. Ex. 6 ¶¶13, 28 [Jerry Sr.]; Ex. 1 ¶6 [Pam]; Ex. 3 ¶5 [Doris]; Ex. 18 ¶21 [Jeraldine]. But Jeraldine's relationships with Jerry Sr. and Eddie were off-and-on. After she and Jerry Sr. split up, Jeraldine again resumed living with Eddie. Ex. 17 ¶25 [Eddie]. Jeraldine and Eddie separated again before Jeraldine had their youngest daughter, Christina, but got back together when Christina was a small child. Ex. 17 ¶25 [Eddie]. Eddie and Jeraldine later remarried in June 1991. Ex. 81 [Jeraldine and Eddie Marriage, 1991]; Ex. 126 [William Westall 1995 DUI Charge]. Eddie thought of Jason as a son, and Jason referred to him as "Daddy Eddie." Ex. 17 ¶3 [Eddie]; Ex. 18 ¶22 [Jeraldine].

Jason's half-sister Pam recalled that the family's "house was in an area that people today might call the projects. It was across the street from a housing complex where lots of low-income people were living." Ex. 1 ¶8 [Pam]. Nancy Hunter, Jason's fifth grade teacher, recalled that Jason and other students at Gorenflo Elementary school were "from an area of town known as 'the Point,' and came from low socioeconomic backgrounds. Many of them were in the free and reduced-lunch program." Ex. 16 ¶6 [Nancy Hunter]. *See also* Ex. 24 ¶3 [Sandra Meaut] (Jason's third grade teacher). During this time, Jeraldine worked as a housekeeper, Ex. 18 ¶7 [Jeraldine], and Eddie worked construction, Ex. 17 ¶7 [Eddie]. At least one of Jason's teachers noted that

"Jason was unkempt—he was often not well-groomed and his clothes and shoes were too big for him." Ex. 24 ¶4 [Sandra Meaut].

Several family members recalled that Jeraldine was particularly strict and orderly in maintaining her household. Jeraldine "was always very obsessive about being clean and spent a lot of time cleaning up the house each day, before and after work." Ex. 17 ¶18 [Eddie]. "My mom has always been immaculate—she used to wake us up on weekends so she could make up our beds." Ex. 27 ¶8 [Lydia]. Jeraldine recalled, "I had a few rules in my home. You were not allowed to tear up the house, you had to pick up toys and clean up after yourself, and if you messed something up, you cleaned it up. If the kids broke the rules, they got whoopings with a belt." Ex. 18 ¶35 [Jeraldine].

Jeraldine also could be a harsh disciplinarian. Jason's childhood friend, Chris Whittle, recalled, "one time, Jason and I were swinging Christina over the pool, and I let her go. Jeri tore both of us up—we had to take off our clothes and then she switched us—beat us until it really hurt." Ex. 40 ¶6 [Chris]. Eddie described that "[e]very day when I got home from work, Jerri would say she just didn't know what to do with that boy [Jason]. He got in a lot of trouble—Jerri would whip him or make his [sic] go to his room." Ex. 17 ¶ [Eddie]. Some of Jason's siblings recalled times when Jason was not treated as harshly as the older girls were when they were growing up. For example, Jason's half-sister Pearl said that her "parents had pretty strict rules with the three older girls, . . . [h]owever, when Jason was born (and then later after Christina was born), my mother just didn't really discipline him like she did us when we were growing up." Ex. 21 ¶9 [Pearl]. It was like Jeraldine and Eddie "just couldn't be bothered to do anything about it," Ex. 27 ¶17 [Lydia], and were "just tired," Ex. 21 ¶9 [Pearl].

b. Jason's Childhood

Jason was described almost universally as a "hyper" child. Ex. 1 ¶9 [Pam]; Ex. 18 ¶¶25, 30 [Jeraldine]; Ex. 31 ¶24 [Rick Sr.]; Ex. 5 ¶5 [Jerry Jr.]; Ex. 6 ¶30 [Jerry Sr.]; Ex. 17 ¶26 [Eddie]; Ex. 19 ¶3 [Christina]; Ex. 20 ¶16 [Charles]; Ex. 37 ¶32 [Delores]; Ex. 41 ¶7 [Jerome]; Ex. 27 ¶11 [Lydia]; Ex. 36 ¶4 [David]; Ex. 38 at 3 [John Wayne]; Ex. 40 ¶4 [Chris]. When Jason was a child, "[h]e was always getting in trouble for misbehaving and not sitting still." Ex. 4 ¶10 [Edna]. If he was forced to be inside, "[Jason] was running around too, but like he was bouncing off the walls." Ex. 5 ¶5 [Jerry Jr.]; *see also* Ex. 5 ¶11a [Jerry Jr.] ("When Jason was a kid, he couldn't shut up and slow down."). As Jason's childhood friend, Mike Diamond, recalled:

> Jason was definitely hyper when he was a kid. He was like, candy-hyper, sugar-hyper. Like he couldn't sit still and always wanted to run around. He couldn't even sit still long enough to play a video game. You'd be playing, and all of a sudden he'd pause it and jump up and run out of the room to go grab candy or a drink or just go do whatever popped into his head. He never could focus.

Ex. 11 ¶9 [Mike].

Jason's hyperactivity frequently got him into trouble. As Jeraldine noted, "[Jason] often helped himself when he wanted something, instead of asking for it, as he should have done." Ex. 18 ¶ [Jeraldine]. Lydia remembered several instances of this:

> Another time, Jason was at the grocery store and my mom caught him running down the aisle on top of the produce. She grabbed him to make him leave, and while they were standing in line, he goosed this old woman who was standing in line in front of them—stuck his hand right up her skirt and goosed her. He was about three or four years old.
>
> Another time, when Jason was about four, my mom wanted to have a family picture taken. We were all getting ready to go, and Jason went and cut off his hair in front—straight across, like a square. My mom was so angry. That was one of the times I'd seen her get the maddest with Jason.

Ex. 27 ¶¶13–15 [Lydia].

Jason was often left without necessary supervision. A cousin remembered that, "when [Jason] was about 2 or 3 years old he would walk around with cigarettes in his mouth and

drinking sips of beer." Ex. 39 ¶16 [Billy]. Jason's older sister recalled, "Jason would walk down the street flipping people off—even though he was just a little kid—younger than school age. I guess he learned it from the Bankester side of the family, because none of us Keller girls would ever have dared to do that. My mother would have whooped me for that!" Ex. 27 ¶13 [Lydia].

When Jason was about five or six years old, he accidently set himself on fire, severely burning his leg. "Jason was left outside and unsupervised and managed to get gasoline spilled on himself and accidentally set his leg on fire. Apparently, he was trying to imitate people starting the outdoor grill." Ex. 17 ¶32 [Eddie]. Jeraldine was the one who discovered him:

> I remember hearing a banging on the back door. When I went to the door, Jason was standing there and he was a blackish color (I realized it was from the smut from the fire). He was hitting on the door and making a sound that was kind of a cross between crying and groaning—like he was hurt too bad to cry out loud. I think he was in shock. I looked down and the skin was just blistering off his legs. I got him inside in the tub and filled it with ice, and called an ambulance. I remember calling Jerry and heading to the hospital. Jason was in awful pain.

Ex. 18 ¶26 [Jeraldine]. *See also* Ex. 27 ¶12 [Lydia] ("Jason was outside, and somehow got ahold of matches. He ended up setting himself on fire and burning himself very badly on the leg. No one was watching him at the time, so I don't think anyone saw it happen, but I do remember my mom screaming when she found Jason.").

The treatments for the burn were extremely painful. Jeraldine recounted:

> The worst were the treatments he had to have at the hospital after that, when they peeled the dead skin off of his legs. Jason would scream and scream from the pain. The treatments seemed like they were about once a week, and I know he had to get at least three treatments. I used to take him. At home, I had to clean his legs with Betadine solution and wipe them down a few times a day. He'd cry when I did it, and as soon as the gauze came off and the air hit his skin, he'd start yelling. It took a long while to heal—maybe five or six weeks. For years, he could not walk quite right—it was like the skin tightened up when it healed and he walked with a slight limp. I think he may still have a limp from that.

Ex. 18 ¶27 [Jeraldine]. *See also* Ex. 17 ¶32 [Eddie]. Jason could not move around normally for some time after the burns. "Jason had to wear bandages on his legs for a long time, and because of the burns he couldn't walk—while he was bandaged up, my mom or dad had to pick him up and carry him around the house." Ex. 27 ¶12 [Lydia]. *See also* Ex. 17 ¶32 [Eddie]. Jason has had nightmares about this event since he was a child, about eight to ten times per year, and when he has these nightmares he "wakes up with his heart beating very fast and breathing hard." Ex. 78 at 6 [Dr. Smallwood's Report].

The treatments Jason would have received for his burns are "exceptionally painful, particularly for a small child," Ex. 42 ¶5 [Dr. Dimick], and lasted for months following the burn. Jason's burns required daily dressing changes and cleaning to prevent infection. *Id*. at ¶5. The cleanings are "similar to washing your hands or face with a soap and a cloth," however, "[b]ecause the nerve endings in the burned area are exposed, they are directly traumatized during this cleansing process," causing the patient "very severe pain." *Id*. About four to six weeks after the burn, Jason then had to endure skin grafting. Skin grafting would produce "what are effectively new second-degree burns at the donor sites," which would "heal in about two weeks, but are very painful until they heal completely." *Id*. at ¶6. The painful daily dressing changes would have continued until the burns, skin grafts, and donor sites all healed. *Id*. Even after healing, it was painful to move his scarred legs. Accredited burn centers recognize that mental health treatment is an important part of recovery for both burn patients and their families because the trauma from both the burn itself and the treatments "can often have lasting effects on a child's psyche." *Id*. at ¶7. Neither Jason nor his family received any kind of mental health assistance following Jason's injury.

Jason also had many other accidents as a child. Jason's childhood friend, Charles Kemp observed, "Jason was tough as a kid. He was the kid who would always do the thing that no one else wanted to do or was scared to do. If the ball got stuck in a tree and no one else wanted to climb the tree, Jason climbed it." Ex. 20 ¶11 [Charles]. Jason "showed the same kind of recklessness [while playing sports] as in other things: he would sacrifice his body diving for a ball without a second thought." Ex. 20 ¶13 [Charles]. When playing football, Jason "was always willing to go full speed into things and tackle whoever had the ball." Ex. 20 ¶14 [Charles]. Charles recalled "[Jason] running into things, sometimes hard. Jason would just jump up and brush himself off and say, 'Let's go!' It may have given him a scar or two, but he didn't stop." Ex. 20 ¶15 [Charles].

Jason's mother described that, "when [Jason] was about 6 years old, and should have known better, I caught him sticking a screwdriver into an electric socket. There was a buzz, and the whole screwdriver turned black." Ex. 18 ¶28 [Jeraldine]. Jason's little sister Christina recalled, "one time after he left to go live with his dad, [Jason] fell off a Go Kart and scraped up his whole side—there was gravel all up and down his side, and he had to go to the doctor to get fixed up." Ex. 19 ¶3 [Christina].

Jason struggled with school. "Jason started school when he was 6 years old. He went into first grade, but had to repeat the grade." Ex. 18 ¶29 [Jeraldine]; Ex. 88 [Jason School Transcript]; *see also* Ex. 20 ¶3 [Charles]. Jason's mother described that Jason's problems resulted from, "a learning disability, an inability to comprehend, which meant he could not apply what he learned. I remember having the same kind of struggles when I was in school." Ex. 18 ¶33 [Jeraldine]. *See also* Ex. 31 ¶33 [Rick Sr.] ("Jason wasn't really very smart."); Ex. 21 ¶10 [Pearl] ("[Jason] was always slower than the other kids."); Ex. 38 at 3 [John Wayne]; Ex. 20 ¶23 [Charles]. Sandra

Meaut, one of Jason's third grade teachers, remembered that Jason sometimes had to sit near her desk for extra help: "Jason struggled in school and was restless, which made it difficult to get him to focus. He needed to sit near my desk with me so that I could help him one-on-one when he needed it." Ex. 24 ¶4 [Sandra Meaut]. Jason's fifth grade teacher noted that Jason had "academic struggles in school. After reviewing his transcript, I can say that his overall performance in fifth grade was well below average for our students. Although he failed three subjects, Jason was not retained because he passed one of the two major subjects—arithmetic." Ex. 16 ¶4 [Nancy Hunter]. Ms. Hunter noted:

> Gorenflo [Elementary School] had three levels for math. Students were placed into a math class based on their standardized test scores and teacher recommendations. When placing students, Gorenflo did not compare the students' test scores to the national scores. Instead, they placed students in the appropriate level by comparing student's scores to their peers at Gorenflo. Jason was placed in the lowest level math class, which I taught.

Ex. 16 ¶5 [Nancy Hunter].

Jason's school transcripts show he was enrolled in special education classes. Ex. 88 [Jason School Transcript]. One of his special education teachers, Nancy Sherman, described the special education program in the local schools:

> For my SPED classes, grading was not different from my other classrooms, but the content I taught was different. Other science teachers may have been teaching about another science subject, but I taught more practical things: I taught about the human body, organs, and sex education. I once had a nurse come to class to talk about birth control. I taught reading, English, Math, job skills, and life skills. These life skills included things like how to purchase a car, count money, balance a checkbook, and write a check. I often took my students to a restaurant so that they would know how to behave at a restaurant.
>
> The aim of the SPED classes was to prepare students for getting a job and living independently after they graduated from school. Therefore, a lot of the content I taught was very practical and geared towards making sure that the students would know how to handle everyday tasks.

Ex. 46 ¶¶6–7 [Nancy Sherman]. "SPED students do not often fail a class because the teacher adjusts what he/she is doing to meet the particular needs of each student." Ex. 46 ¶14 [Nancy Sherman]. Additionally, "SPED teachers generally do not give SPED students homework because the students may misunderstand the work when they leave the classroom setting." Ex. 46 ¶14 [Nancy Sherman]. She also commented on the process of enrolling a student in special education.

> When a student has failed two subjects, SPED teachers work with regular teachers to come up with interventions for the student. If their grades do not improve soon, then the permission of the parents is sought to test the students. The school district usually tests the students and has a psychologist or psychiatrist handle particular testing. To place students in special education, teachers also must fill out a checklist and submit the student's work samples. The student is also observed in the classroom setting. Then the parents and school district have an Individualized Education Plan (IEP) meeting to determine what is best for the student. The IEP includes the student's present level of performance, general goals and objectives to meet, and goals for all subjects. The IEP is revisited each year, or upon the teacher's or parent's request.

Ex. 46 ¶12 [Nancy Sherman].

Teachers did not remember Jason's parents being involved in his education. "I sent out letters to all my students' parents about coming in for conferences with me, but I never met with Jason's parents. Most of the other students' parents came in after I sent out letters." Ex. 24 ¶6 [Sandra Meaut]; *see also* Ex. 16 ¶8 [Nancy Hunter]; Ex. 46 ¶8[Nancy Sherman] ("I don't recall ever speaking with Jason's parents, though I would meet with most of the parents of the kids I taught.").

Neither of Jason's parents graduated from high school. Ex. 18 ¶8 [Jeraldine], Ex. 6 ¶7 [Jerry Sr.]; Ex. 90 [Jerry Sr. Biloxi High School Records]. Jason's maternal aunt Delores remembered that, "Jason really struggled with school. He'd come home in the afternoons and I'd try to get him to sit down and do his homework—I feel badly, but because I barely went to

school myself, I couldn't really help him. He'd sit there, getting frustrated and struggling, and then finally just quit and go out to play." Ex. 37 ¶33 [Delores].

As a child, Jason was diagnosed with attention deficit hyperactivity disorder (ADHD), and was prescribed Ritalin for his condition. Ex. 6 ¶30 [Jerry Sr.]; *see also* Ex. 18 ¶31 [Jeraldine]; Ex. 17 ¶26 [Eddie]; Ex. 19 ¶7 [Christina]; Ex. 27 ¶16 [Lydia]; Ex. 41 ¶7 [Jerome]; Ex. 21 ¶10 [Pearl]; Ex. 40 ¶4 [Chris]. Initially, the prescription seemed to help Jason's behavior and ability to focus. Ex. 17 ¶26 [Eddie] ("You could tell if [Jason] wasn't on the medicine.") "[I]f he skipped a day, he was into everything. For example, if we went to the grocery store, he'd be standing up in the cart grabbing at things, so we'd always have to be careful to walk right down the center of the aisle to try to keep him from reaching." Ex. 17 ¶27 [Eddie]. "From what I could tell, the medicine helped him in school." Ex. 18 ¶3 [Jeraldine]; *see also* Ex. 27 ¶16 [Lydia]; Ex. 38 at 3 [John Wayne]. Despite the medication, however, Jason's symptoms were not totally resolved. Ex. 6 ¶30 [Jerry Sr.]. According to Jason's mother, doctors felt that they had to keep increasing Jason's dose of Ritalin, Ex. 18 ¶32 [Jeraldine], demonstrating that he continued to display symptoms while on the medication.

One of Jason's maternal cousins, David Walston, noted that "[s]everal other kids in our family have had a hyperactive condition and had to take medication to control it." Ex. 36 ¶5 [David]. Jason's half-sister Christina commented, "Even though I was never diagnosed with ADHD or anything, I had a lot of trouble, too, and really struggled to sit still and understand things." Ex. 19 ¶8 [Christina]. Her oldest son also has ADHD and ADD. Ex. 19 ¶7 [Christina]; *see also* Ex. 17 ¶26 [Eddie]. Jason's half-sister Pearl also has a son with ADD. Ex. 21 ¶10 [Pearl]. Eddie described Jason's mother, Jeraldine, as "kind of hyper, too—always moving around and having to be doing something." Ex. 17 ¶21 [Eddie].

Jason stopped living with his mother, Jeraldine, and began living with his father, Jerry Sr., when he was about 11 years old. Ex. 18 ¶37 [Jeraldine]; Ex. 26 ¶4 [June]; Ex. 1 ¶12 [Pam]; Ex. 41 ¶4 [Jerome]. It was Jeraldine's decision. Ex. 6 ¶32 [Jerry Sr.]; Ex. 17 ¶33 [Eddie]. Jason's half-sister Pearl thought that he went to live with Jerry Sr. because their "mom was parenting on her own and Jason was becoming a little too much for her to handle." Ex. 21 ¶13 [Pearl]. His maternal cousin Cassie Walston is about ten years younger than Jason, but remembers being around him growing up. She observed, "[l]ooking back, it must have been a big change for Jason when he moved from my Aunt Jeri's to my Uncle Jerry's house. Jason's sisters on the Keller side—who I consider my aunts—are very different from the Bankesters. The Keller women are much more put-together." Ex. 35 ¶9 [Cassie].

Jerry Sr. began having serious health problems around the time Jason moved in with him. Around this time, he first began experiencing symptoms of anklyosing spondylitis ("AS").

> In 1988, I began having problems with soreness in my neck. I was working on a bridge in Pascagoula at the time. I woke up one morning and my neck was stiff and achy. I thought I slept on it wrong. I assumed it was nothing, but it never went away. I couldn't get relief and it kept getting worse. In 1992, I went to see doctors in New Orleans who performed X-rays and conducted other tests. It was the same year that I was diagnosed with ankylosing spondylitis, and I discovered that my vertebrae were fusing together.

Ex. 6 ¶21 [Jerry Sr.]. AS is a form of arthritis that, over time, has caused Jerry Sr.'s vertebrae to become fused together. Ex. 6 ¶22 [Jerry Sr.]. This creates many complications, including a forward-stooped posture that has caused Jerry Sr. "to have to adjust [his] body to a reclining position just to look someone [he is] talking with in the eye." Ex. 6 ¶23 [Jerry Sr.].[12]

[12] Ankylosing spondylitis (pronounced ank-kih-low-sing spon-dill-eye-tiss), or AS, is a form of arthritis that primarily affects the spine, although other joints can become involved. It causes inflammation of the spinal joints (vertebrae) that can lead to severe, chronic pain and discomfort. In the most advanced cases (but not in all cases), this inflammation can lead to new bone formation on the spine, causing the spine to fuse in a fixed, immobile position, sometimes

Jerry Sr. was also first diagnosed with Crohn's Disease around this time.[13] "In 1992, I also was diagnosed with Crohn's Disease, an inflammatory bowel disease that is associated with inflammation of the lining of the digestive tract, which can lead to flare-ups. I have had to be frequently hospitalized for my Crohn's since the late 1980s, sometimes several times a year." Ex. 6 ¶25 [Jerry Sr.]. Ex. 137 [Records].

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creating a forward-stooped posture. This forward curvature of the spine is called kyphosis. It is difficult to diagnose, especially in its early stages, and often is misdiagnosed.

Genetics play a key role in determining who might get AS. Risk factors for AS include having a family member with AS or testing positive for a particular gene called HLA-B27. More than 95% of Caucasians with AS have this genetic marker. AS also is more common in males. Age of onset is typically 40 years old or older. In the early stages of AS, the pain and stiffness often start in the lower back. Over time, pain and stiffness may move up the spine and into the neck. Patients with active disease experience greater levels of pain, swelling, and discomfort and may experience morning stiffness.

One of the most common complications of AS, uveitis can cause rapid-onset eye pain, sensitivity to light and blurred vision, sometimes requiring eye implants. Some people experience a thinning of their bones and weakened vertebrae may crumble, increasing the severity of the stooped posture. AS can cause the aorta to enlarge to the point that it distorts the shape of the aortic valve in the heart, which impairs its function.

There is no known cure for AS. Treatments and medications are available to reduce symptoms and manage the pain. *See generally About Spondylitis*, SPONDYLITIS ASSOCIATION OF AMERICA, http://www.spondylitis.org/about/as_sym.aspx (last visited May 26, 2015); *Ankylosing Spondylitis Symptoms*, MAYO CLINIC, http://www.mayoclinic.org/diseases-conditions/ankylosing-spondylitis/basics/symptoms/con-20019766 (last visited May 26, 2015).

[13] Crohn's disease causes inflammation of the lining of particular areas of the digestive tract, which can lead to abdominal pain, severe diarrhea, fatigue, weight loss and malnutrition. The inflammation caused by Crohn's disease often spreads deep into the layers of affected bowel tissue, and can be both painful and debilitating, and sometimes may lead to life-threatening complications. *Crohn's Disease*, MAYO CLINIC, http://www.mayoclinic.org/diseases-conditions/crohns-disease/basics/definition /con-20032061 (last visited May 26, 2015). A person is at higher risk for the disease if he has a close relative, such as a parent, sibling or child, with the disease. As many as one in five people with Crohn's disease has a family member with the disease. *Crohn's Disease Risk Factors*, MAYO CLINIC, http://www.mayoclinic.org/diseases-conditions/crohns-disease/basics/risk-factors/con-20032061 (last visited May 26, 2015). Jerry Sr.'s father, Bueron, also suffered from stomach problems. *See* Ex. 8 ¶20 [Nancy]; Ex. 96 [Jerry Sr.'s NPRC records]. There is no known cure for Crohn's disease.

Jerry Sr.'s poor health was evident to family members. Jason's maternal aunt Delores Walston recalled that "Jerry had a lot of health problems around that time and was not in good health. He used to have to go to the hospital sometimes and one of us would have to take him. He'd walk around bent over—you could tell he was real sick. There was something wrong with his stomach, too." Ex. 37 ¶34 [Delores]. Jeraldine observed, "Jerry has a lot of health problems—they seemed to be getting worse around the time Jason went to live with him. He has problems with his stomach, and a disease that keeps him from moving his neck from side to side." Ex. 18 ¶37 [Jeraldine]; s*ee also* Ex. 19 ¶11 [Christina]. "[P]retty quickly after Jason moved in, Jerry got pretty sick. I think he was increasingly disabled by his back problems as Jason got older. His health problems really prevented him from keeping up with Jason or disciplining him at all." Ex. 21 ¶14 [Pearl]. According to Trisha Cannette (née Kennedy), a girlfriend who spent time with Jason and Jerry Sr. when Jason lived with his father, "Jerry seemed a lot older than other parents, and it was noticeable that he had really bad health problems. He used to walk around kind of bent over, and couldn't really move his head from side to side. He also had problems with his stomach." Ex. 7 ¶6 [Trisha]. Scott Forehand, a friend of Jason's who also spent time with Jason and Jerry Sr. when Jason lived with his father, remembered Jason's dad "was real sick at the time." Ex. 12 ¶8 [Scott]; *see also* Ex. 35 ¶8 [Cassie].

When Jason first moved in with Jerry Sr., they were living in the same trailer as Jason's half-sister Doris and her children. Eventually, Jason and his father moved into a trailer next door to Doris. Ex. 6 ¶33 [Jerry Sr.]. Before he was disabled, Jerry Sr. worked as a mechanic and construction worker and, occasionally, as a roustabout and/or cafeteria worker on an oil rig. Ex. 6 ¶¶16–17 [Jerry Sr.]. Jason's childhood friend Harley Poole noted:

> Jason was poor growing up and didn't have the nice things that other kids had. I remember one year when all the kids came back to school to start the 6th or 7th grade, everyone had new shoes and clothes. Jason was wearing beat up old "bobos" (cheap, no-name shoes) that were falling apart. I had more than one pair of good shoes, so I put my new Fila shoes in Jason's locker.

Ex. 29 ¶3 [Harley].

After Jason moved in with his father, he was often left to fend for himself. "Jason was on his own when he lived there—he was basically unsupervised." Ex. 19 ¶11 [Christina]. A friend of Jason's who frequently visited the trailer where Jason lived with his father at the time said, "I'm not exactly sure who Jason lived with at the trailer park, but his parents were never around. I didn't really ever see an adult there with Jason whenever I went over there. Jason was just usually there by himself. He mostly cooked for himself and took care of himself, as far as I could see." Ex. 14 ¶6 [Ricky]. One of Jason's friends at the time remembered, "We didn't have any supervision [at Jason's dad's house]—that is why I liked going over there so much. Jerry was always bloodshot and smelling like beer." Ex. 40 ¶9 [Chris]. According to another friend of Jason's at the time, Chad Spiers, "[Jason's] dad was old and didn't care much what we did. We could get into whatever we wanted there. . . . His dad didn't mind what we did, as long as we stayed out of his hair." Ex. 33 ¶3 [Chad]. Trisha recalled:

> Jason's home life was completely different from my own. I had a really strict mother who wouldn't let me go anywhere, and had rules that we were expected to follow. Jason lived with his dad, Jerry. Jerry was completely different from my mom, which is why I wanted to hang out with Jason. At Jerry's house, Jason (and the kids hanging out with him) could do whatever he wanted—Jerry did not really seem to notice or care what Jason got up to.

Ex. 7 ¶5 [Trisha]. "People knew to go to Jason's, and there were often a lot of kids around. They didn't really go to hang out with Jason. They wanted a place where they could get away with skipping school and smoking weed." Ex. 7 ¶8 [Trisha]. In fact, Jason's father sometimes "would pick up weed and roll joints for us to smoke with him." Ex. 7 ¶9 [Trisha].

About the time Jason moved in with Jerry Sr., Jeraldine remarried Eddie Keller. Ex. 81 [Jeraldine and Eddie Marriage Record, 1991]. Not long after they were remarried, the two divorced again. Ex. 109 [Jeraldine and Eddie Divorce Record, 1992]. Around the same time, Jeraldine became involved with a man named Duane "Rocky" Mountain. Ex. 18 ¶¶23–24 [Jeraldine]; Ex. 1 ¶14 [Pam]. They lived together for about ten years. Ex. 1 ¶14 [Pam]. When Jeraldine moved in with Rocky Mountain, it caused another dramatic shift in Jason's relationship with his mother. Jason's girlfriend at the time, Trisha, described:

> Jason's mom wasn't very involved in what was going on in his life. She was dating a guy named Rocky Mountain at the time I knew Jason. Rocky Mountain didn't like Jason, and Rocky wanted nothing to do with him. If Jason needed money, he could go to his mom and ask for some, but that was the extent of their relationship then.

Ex. 7 ¶11 [Trisha]. According to Jason's half-sister Pam:

> Rocky came from a military background and was more strict than my mother had been with her children. Rocky had definite expectations about how children were supposed to behave. I did not see him be physically abusive or especially angry, but his rules and discipline caused a difficult adjustment for Christina and for Jason when he was around. For example, it was Rocky's rule that once you left the dinner table, you could not return. When Jason was visiting it was hard for him to follow rules like this; he had always been a jumpy kid and was used to being allowed to get up and down throughout dinner. Rocky imposed his expectations of behavior on momma's children and it caused tension and created arguments between them. These kinds of tensions were always in the background.

Ex. 1 ¶16 [Pam]; Ex. 19 ¶ [Christina]; *see also* Ex. 18 ¶24 [Jeraldine] ("Rocky was very strict with the kids."). Christina, who lived with Jeraldine and Rocky during their relationship, observed that, "Rocky was a bad alcoholic. He drank beer all day long. In fact, he had a separate refrigerator in the garage just for his beer and his tea." Ex. 19 ¶16 [Christina]. A friend of Jason's in prison recalled that Jason had told him he "had a real hard time getting along with one of his mother's boyfriend's [sic]." Ex. 25 ¶11 [Vince].

Around the time Jason moved to live with his dad, he also stopped taking Ritalin. As his mother recalled, as "Jason got older, the doses got stronger." Ex. 18 ¶31 [Jeraldine]. The school had recommended it in the first place, and Jason "only took it during the school year—I thought since it was to help him sit still and behave in school, he didn't need to take it when he was out of school." Ex. 18 ¶32 [Jeraldine]. Eventually, "I decided to take him off the Ritalin after I realized the dose kept getting higher and higher—by the time he got off, he was prescribed something like three times the dose he started with. It was also expensive, so that was another reason it made sense for him to stop taking it." Ex. 18 ¶32 [Jeraldine].

Jason soon started to get into more trouble. Friends recalled that he was "hyper." Ex. 14 ¶4 [Ricky].

> You could tell some days that he was more hyper than others. I think he tried real hard to keep it under wraps around people he didn't know very well, but he just couldn't do it sometimes, and he'd be moving around a lot, talking really fast, and constantly switching topics. I don't recall seeing him take medication then.

Ex. 14 ¶4 [Ricky]. "Jason was all over the place; he could never sit still. Sometimes when I'd go over and hang out, he would randomly leave with friends and go somewhere, maybe score some dope. I would just sit around in his room until they got back." Ex. 7 ¶12 [Trisha].

Jason's struggles to fit in from a young age were noted by the other children. Harley Poole, who Jason met when they both were students at D'Iberville Middle School, remembered:

> Jason had some difficulty with school. I think he may have even been in special education classes in the sixth or seventh grade. I think Jason was also held back a year. I don't think that Jason did homework at home, and he usually didn't bring his homework back to school, although he did sometimes do it on the bus on the way to school. When Jason would have to read in front of the class he was slow and stumbling and other students laughed at him.
>
> * * *
>
> Jason was an outcast who struggled to fit in at school and I think he was frustrated with the way he was treated, although he tried to act like it didn't bother him.

> Jason was a bit of a loner. He didn't attend parties or dances and he didn't participate in extracurricular activities. I never knew Jason to have any girlfriends. I think Jason had low self-esteem. He was not excited to come to school or excited to go home.
>
> * * *
>
> Jason got picked on a lot. I remember him coming to school with a new pair of knock-off Reebok pumps. He was so proud of those shoes, because they were actually new and clean. Because they were knock-offs, one of the pumps went flat during school. All the kids made fun of him for that. He was so ashamed of it. He just seemed like he always had a cloud over his head. Things never worked out for him.
>
> Jason wanted to fit in, wanted to be a leader, but he just couldn't manage it. I remember one time, he gleaked on me (spit on me). He was proud of it, like he thought I was going to find it funny. I didn't think it was funny. I slapped him for it. We made up after that, but that was Jason—trying to be funny and f**king it up. I think that's why he was such an outcast.

Ex. 29 ¶¶4, 6, 8a, 8b [Harley].

Jason's childhood friend Charles Kemp explained, "It was not that Jason had a problem with anyone. Jason got along with everyone. But not everyone got along with Jason." Ex. 20 ¶17 [Charles]. Charles and his cousin Gilron Cannon, who were close with Jason at the time, "were the only friends of Jason that I knew about when we were kids." Ex. 20 ¶18 [Charles]. Describing Jason as "the underdog," Charles noted, "[t]he other kids picked on him a lot at school. They really ragged on Jason." Ex. 20 ¶18 [Charles]. "Mostly, the kids picked on Jason about his personal appearance, about being dirty. His two nicknames in school were 'Snotty Nose Jason' and 'Pigpen,' like the character on Charlie Brown." Ex. 20 ¶19 [Charles].

Mike Diamond, who knew Jason when they both were children, recalled that Jason "was the only white kid in the group of kids we hung out with. We used to tease him about it, pointing out that he was the only white kid. He would tell us, 'Nah, I'm not white, I'm a black kid in a white body!' I think he just wanted to fit in with us." Ex. 11 ¶11 [Mike].

Reba Cross, who was married for a time to Jason's half-brother, Jerry Jr., recalled Jason's trouble fitting in and need to be accepted:

> While I was living there, Jason had some trouble with bullies. They would pick on him because he was heavyset. . . . I do know that Jason got teased and bullied a lot while he was in school. I could see sadness in his eyes all the time. He wanted positive reinforcement and love so badly. I did not see him get a lot of this and whenever anyone would offer it, he would eat it up. I tried to love on him as much as I could because I knew that it made him feel better. He loved having me there, and I can remember him crying and crying when I told him I was leaving.

Ex. 9 ¶¶24–25 [Rebia].

When Jason moved to live with Jerry Sr., Jason was exposed to an environment dominated by drugs and people who abused drugs. According to Jason's half-sister Edna:

> Smoking weed was never a big deal in my family. Everyone did it—my mom, dad, brothers, sisters, cousins—really just everyone. I learned to smoke weed from my mom. I didn't find out my daddy smoked it until later. Still, Jason was around it when he was a kid.

Ex. 4 ¶25a [Edna]. His half-brother Jerry Jr. is "sure [Jason] saw my friends and my sisters' friends drinking or using some kinds of drugs when he was growing up. He saw our parents and their friends drinking. We all did when we were growing up." Ex. 5 ¶10 [Jerry Jr.]. Jason's maternal cousin David Walston also recalled, "Jason looked up to his older brother, Jerry Jr., and was around enough to see us smoking some weed and drinking." Ex. 36 ¶10 [David]. *See also* Ex. 31 ¶34 [Rick Sr.]. As Jason's maternal half-sister Pearl stated:

> Jason's more serious issues with drugs began after he moved in with Jerry. Doris and Jerry Jr. have serious drug problems, and I think they were the ones who first exposed Jason to that lifestyle. I recently found out that Edna Mae also had a serious problem with drugs as well. . . . The older kids would use Jason to do things and would get him into trouble. I believe that this was Jason's introduction to stealing and also his introduction to drug use. Drugs became a big part of Jason's life. I think it also contributed that the neighborhood where Jerry and Jason were living, on Reece Rd., had a lot of drugs.

Ex. 21 ¶16 [Pearl]. "It was easy to get [crack] then—crack dealers were just hanging out on the streets. You just went to Division and Main to get what you wanted." Ex. 33 ¶4 [Chad]. Numerous members of Jason's family, including most of his paternal siblings, suffered from extensive substance abuse problems. *See supra*.

Jason's childhood friends were aware that Jason had already experimented with marijuana when he was still living with his mom. Jason's friend Chris recalled, "Jason was still living on Fayard Street with his mom when we started smoking weed together. We were about 10 years old then. We'd take roaches from family members, or go on Main Street and get a $10 or $20 sack of weed. It was probably every day that we'd do that." Ex. 40 ¶7 [Chris]. As a young teenager, shortly after he moved in with his father, Jason continued smoking marijuana several times a week consistently. Ex. 3 ¶7 [Doris].

Jason's step-father Eddie "first saw the signs of [Jason using drugs] after Jerri sent Jason to live with Jerry. . . . He started having trouble getting along with people. He was skipping school." Ex. 17 ¶35 [Eddie]. By the time Jason was living with his father, it was also common knowledge among his childhood friends that Jason was smoking marijuana regularly. Jerome Williamson knew Jason from the time the two were in first grade together until they were about 16 years old. Jerome described:

> We started smoking pot together when we were young, maybe 10 or 12 years old. We first started sneaking pot that was stashed in a Monopoly game. Nobody cared so long as we weren't causing any trouble or breaking anything or whatever. Jason and my brother Donny and I would all take it sometimes and smoke together.
>
> Jason smoked as much pot as I did, and I smoked a lot back then. We probably smoked every day for a while there, and at least a couple times a week after we got started.

Ex. 41 ¶¶12–13 [Jerome]; *see also* Ex. 19 ¶12 [Christina]. Jason's girlfriend at the time, Trisha, noted, "We also smoked weed. Jason's dad would join us, too—he would pick up weed and roll joints for us to smoke with him. Jason's older brother and sisters also smoked weed with him." Ex. 7 ¶9 [Trisha]. Harley Poole said, "I remember Jason smoking weed at school . . . . Sometimes he and I would smoke weed by the river, or out in the country." Ex. 29 ¶7 [Harley]. Chad Spiers and Jason also smoked weed together. Ex. 33 ¶3 [Chad].

Jason quickly got involved in heavier drugs. According to his half-sister Edna, "I remember Jason using drugs when he was a teenager too. He would tell me about dropping acid with his girlfriend Trisha." Ex. 4 ¶25d [Edna]. Chad Spiers admitted, "I started smoking crack, and Jason started smoking crack with me. . . . When Jason started smoking crack, he got hooked. That happened to me, too. We tried heroin and LSD, but Jason got hooked on crack." Ex. 33 ¶5 [Chad]. Scott Forehand knew Jason mostly through his ex-wife, Cherie Forehand, with whom Jason used drugs at the time. Ex. 12 ¶2 [Scott]. Scott described:

> He and Cherie would go off during the day and do drugs together. They did much harder drugs than anyone else I was hanging around. I would smoke some pot with them sometimes, but when I was at work during the day, they would go off and take my truck and go find drugs with it. I think they smoked meth and crack, and other hard stuff.

Ex. 12 ¶3 [Scott]. Cherie recalled that, when she first started hanging out with Jason and Chad Spiers, they all smoked pot together. Ex. 32 ¶5 [Cherie]. Then, she "learned that they were doing cocaine, and had been doing it pretty regularly for a while. It was soon after this that we all started to smoke crack together." Ex. 32 ¶5 [Cherie].

Jason's uncle Richard Puglise Sr. noticed Jason was using drugs:

> I know Jason started off smoking pot, but later got into harder drugs, like crack and meth. Soon after this happened, when he would come around high, I told him that he couldn't come around like that anymore. He would come in, and he

> couldn't walk straight and he had these big, bulgy eyes whenever he was high. I'm a medic, so I could tell. I knew all the signs.

Ex. 31 ¶26 [Rick Sr.].

Around this same time, Jason stopped going to school. Ex. 88 [Jason School Transcript]. Jason's girlfriend Trisha "met Jason Keller through friends when we were 15 years old, and we started seeing each other. . . . I went to D'Iberville High School, but by the time Jason and I met, he had already dropped out of school." Ex. 7 ¶3 [Trisha]; *see also* Ex. 31 ¶36 [Rick Sr.]. This was not uncommon in Jason's paternal and maternal families. *See supra*; Ex. 6 ¶7 [Jerry Sr.]; Ex. 18 ¶8 [Jeraldine]; Ex. 90 [Jerry Sr. Biloxi High School Records]; *see also* Ex. 37 ¶10 [Delores]; Ex. 15 ¶27 [Harvey]; Ex. 19 ¶18 [Christina]; Ex. 8 ¶12 [Nancy]; Ex. 35 ¶25 [Cassie]; Ex. 87 [Reba Jenkins and Jerry Jr. Divorce]; Ex. 91 [Jerry Jr. D'Iberville HS Records] (indicating Jerry Jr. dropped out after ninth grade).

c. Jason's Teenage Years

After dropping out of school, Jason worked intermittently, but had trouble holding a job because of his drug abuse. "After he dropped out of school, he was working at different places, and I'd hear from his bosses how good of a worker he was. But after a year or two, I guess he started doing harder drugs, and he kept getting fired." Ex. 31 ¶25 [Rick Sr.]. "[T]hey'd make him piss in a cup and he'd get fired. The drugs were really what kept him from working." Ex. 31 ¶24 [Rick Sr.]. Jason's stepfather Eddie remembered:

> At some point before Jason went to prison, he worked at Tindal with me, doing construction. He was a good worker during the week, but it seemed like he was probably getting the drugs on the weekends. On Mondays, he'd always be dragging like he didn't get enough sleep, and he'd lay his head down on the table and nap during lunch.

Ex. 17 ¶37 [Eddie].

Jason's relationships with his friends and family also became strained as a result of his drug abuse.

> As he got to be older, Jason started getting into harder drugs, specifically crack, and he started using crack on a regular basis. It became too much for me. I didn't want to go down that path, and I didn't want to associate with those people. I stopped hanging out with them, and by the time I was 20 and had my first kid, I had totally cut ties with Jason.

Ex. 7 ¶15 [Trisha]. Jason's family members noted that he would not come around them if he had been using drugs, so they often would not see him for long periods of time. Ex. 18 ¶38 [Jeraldine]. Jerry Sr. recalled, "[w]hen he started using the harder drugs, I could tell because he would just head out and be gone for several days." Ex. 6 ¶35 [Jerry Sr.]. Jason's friend from childhood, Chris Whittle, noted that, by the time they were about fifteen years old, "Jason was wide-open. He was using drugs all the time. He was smoking dope (crack) and meth. . . . I remember being mad at him because I wanted to go to the batting cages like we used to, and all he wanted to do was smoke dope." Ex. 40 ¶10 [Chris].

As the grip of Jason's addiction tightened, Jason started looking for ways to support his need for drugs. Cherie Forehand confided, "Once we started smoking crack together, that became our primary activity. We looked for crack, we smoked crack, then we planned how to get more crack." Ex. 32 ¶6 [Cherie]. "Often, whatever we thought up as a way to get more crack wasn't legal. Chad was the first of us three to get in legal trouble and get locked up." Ex. 32 ¶7 [Cherie]. Chad Spiers admitted, "We started stealing in order to support our drug habit." Ex. 33 ¶7 [Chad]. Chad was locked up by the time he was 17. Ex. 33 ¶8 [Chad]. "Most of the trouble that I know Jason got into was because he was hooked on drugs. We were all doing lots of drugs back then, and stealing things to support our drug habit just seemed like the only option." Ex. 32 ¶11 [Cherie]. "When Jason started doing crack, that's all he could think about—getting his next

high. I saw him smoke crack often—every day, multiple times a day. When he wasn't smoking crack, he was looking to get more." Ex. 33 ¶11 [Chad].

d. Jason's Adulthood

Jason started getting into trouble with the law. *See* Ex. 5 [Jerry Jr.] ¶6 ("I remember when he got a little older, Jason seemed to get in trouble pretty often, including getting in trouble with the law. As I recall, Jason missed a lot of important occasions because he was locked up, like his 21st birthday."). *See also* Ex. 19 ¶14 [Christina]. Jason's charges were "mostly breaking into cars and houses or stealing things that he would sell to get money for drugs." Ex. 7 ¶16 [Trisha]. Jason also stole money from his family members. Ex. 6 ¶36 [Jerry Sr.]; Ex. 17 ¶36 [Eddie]; *see also* Ex. 21 ¶16 [Pearl].

One of Jason's early convictions was for burglary of a Super Video store, where his friend Cherie Forehand worked. Cherie, who was involved in the burglary explained:

> While Chad was locked up, Jason and I continued to hang out together and it was during this time that we robbed the video store where I worked. We were hanging out trying to figure out how to get money to buy drugs when we decided to rob the video store where I was working because I was the only one closing that night. Instead of stealing money out of the cash register, we stole videos and games and then pawned them in order to get money to buy crack. We sold games and videos several times over the course of the night. We would sell enough to buy some crack, but then we would smoke it all and want some more. We had to pawn videos and games several times that night in order to keep buying the crack. As the night drew to an end, I realized we needed to do something to cover our tracks. At that point, Jason was uninterested in helping me and just wanted to go home—this made me mad. In the end, I decided to leave the door unlocked so it would look like I just forgot to lock it and that was how someone got in the store to steal stuff. This plan didn't work. I later learned that the workers at the fast food restaurant next door watched us go in and out all night long.

Ex. 32 ¶8 [Cherie]. *See also* Ex. 33 ¶9 [Chad]. Jason was indicted (Cause No. B2402-98-00338) on July 23, 1998 (the crime had occurred on April 7, 1998), *see* Ex. 59 [Indictment – Burglary of a Business], and pled guilty on May 10, 1999. Ex. 129 [Jason Keller Petition to Enter Plea of

Guilty to Burglary of a Business]. As discussed *infra*, had trial counsel performed an adequate investigation they would have been able to contextualize this prior conviction, which was entered into evidence and used against Jason at his capital sentencing, within Jason's larger struggles with his drug addiction.

Jason's addiction put him in dangerous situations, but he was unable to quit using drugs. Childhood friend Chris Whittle recalled:

> I ran into [Jason] at Oberts Trailer Park, a total crack spot. We were about seventeen years old then. I was selling dope, and gave him $250 worth of dope to sell. That was about a quarter of an ounce. He should have come back with $750, but he only had about $70. Something like this happened a couple times, when he came back way short on money. Finally, I jumped on him—I was mad, and smashed his crack pipe on the ground. He started to cry and said he was sorry. He said that stuff had a hold on him, and he had been using instead of selling it. He said he wanted to get off of it, but he couldn't on his own. It was a lot of dope for him to be using a quarter ounce in one day.

Ex. 40 ¶11 [Chris].

Eventually, Jason was convicted of multiple crimes, and was sentenced to seven years in prison. Jason was already serving a sentence of probation for the burglary of the video store and grand larceny conviction for the theft of an acquaintance's truck. Ex. 150 [Post-Release Supervision Order–Burglary and Grand Larceny]. Jason was convicted for the grand larceny on March 10, 1999, in Cause No. B2402-98-00643. Ex. 106 [2007-07-16 Indictment (State's Ex. 21 in capital trial)]. The charge was related to the theft of a 1998 Mitsubishi Mighty Max truck from Herman C. Bellais, III on October 14, 1997. Ex. 60 [Indictment of Jason Lee Keller for Grand Larceny]. Jason stole the truck with Chad Spiers, and noted as part of a guilty plea that they "went for a ride then we abandoned the truck." Ex. 61 [Keller Petition to Enter Plea of Guilty to Charges of Grand Larceny]. Harrison County Sheriff's Department records included an interview police officers conducted with Cherie Forehand about this crime; Cherie noted that Jason

originally broke into the truck to steal a CD player, and upon finding the keys in the truck, drove it around for a while before leaving it in a parking lot. Ex. 128 [Interview with Cherie re Grand Larceny of Truck]. When the police asked Cherie who Jason sold the CD player to, Cherie said, "I never asked, I didn't want to know, I know Jason smokes crack, so he probably got rid of it somewhere like that." Ex. 128 at 4 [Interview with Cherie re Grand Larceny of Truck].

Jason was incarcerated in state prison after being charged with two counts of burglary of a dwelling. The indictment charged Jason with burglarizing two houses on February 20, 2000. Ex. 106 [Indictment–Burglary of a Dwelling]. These houses were on the same street, Early Wynn Drive, where Jason was living at the time. Ex. 62 [Booking Form–Burglary] (giving address as 18335 Early Wynn Drive, Saucier). Jason pled guilty on August 27, 2001 to both counts of burglary. Ex. 63 [Guilty Plea–Burglary of a Dwelling]. Investigative reports noted that Jason told police "that he again is hooked on crack and is currently on probation thru MDOC for burglary." Ex. 130 at 1 [Investigative Report]. Other police investigative reports said Keller "has been smoking Crack [sic] since he has been 17 years old and was trying to get money for the habit." Ex. 130 at 5 [Investigative Report].

Jason explained the burglaries at the plea colloquy on these charges:

> Defendant Keller: Well, yes, sir. Both of them was my friends; we were all neighbors. And, you know, we used to barbecue all the time, and, you know, I used to go over to their house every day, each one of them. And like I said, I was on drugs; they was on drugs, you know. We was doing drugs together.
>
> They left—we was over there one day, they had left, so I went home. And after they left, I went back to their house and got some more drugs, you know, they had possessed, and took a couple of other things I shouldn't have touched. And that's where it all started out in both cases, sir.
>
> The Court: Both of these houses, you went over there and stole drugs from them?

Defendant Keller: Yes, sir.

Ex. 154 at 11–12 [2001 Plea Hearing]. Jason's attorney noted, "he also requested—that was his request really, to go to alcohol and drug treatment. Even though he thinks he's got it licked, he wants to make sure and go." Ex. 154 at 9–10 [2001 Plea Hearing].

On August 27, 2001, Jason was sentenced to four years for each of the burglary of a dwelling charges, to be served concurrently. Ex. 131 [Sentencing Order–Burglary of a Dwelling]. These sentences were to be served consecutively with the suspended sentences he received for the earlier burglary of a business and grand larceny charges. Ex. 131 [Sentencing Order–Burglary of a Dwelling].

Jason began his incarceration at the Central Mississippi Correctional Facility on September 27, 2001. Ex. 74 at 11 [MDOC Offender Data Sheet]. He was housed at multiple facilities while in the custody of the Mississippi Department of Corrections (MDOC). Vince Montgomery met Jason while the two were incarcerated at the Delta Correctional Facility in Greenwood, Mississippi. Ex. 25 ¶3 [Vince]; Ex. 74 at 53 [June 24, 2005 Rule Violation Report]. Vince recalled that Jason "got along with everyone and inmates and staff all liked him. . . . And he never did anything to provoke or irritate other inmates or staff." Ex. 25 ¶5 [Vince]. The two first met at inmate counseling sessions addressing drug and alcohol abuse that were offered at the facility. Ex. 25 ¶4 [Vince].

Jason's need for drugs continued in the Delta facility. "When I knew Jason, his major drug was marijuana. At the time, that was pretty much the only drug you could get in prison." Ex. 25 ¶6 [Vince]. Jason "got and smoked marijuana at every chance he could. He had a steady source of money on his account, so people always were willing to sell him pot, or trade for commissary, and even front him pot because they knew through experience that he was good for

his debts." Ex. 25 ¶6 [Vince]. Jason "kept smoking pot all the time I knew him and would smoke every chance he got," Ex. 25 ¶7 [Vince], and "[i]t was like smoking pot became the most important thing to him." Ex. 25 ¶8 [Vince]. "Unlike most inmates, Jason would buy canteen then trade it to others for pot." Ex. 25 ¶8 [Vince]. "Jason was still hungry because he often would ask me or another guy we hung with, Larry Holloway, for noodles to eat as meals when he was hungry but had no food. Jason chose drugs over food even when he was hungry and needed food." Ex. 25 ¶8 [Vince]. MDOC records show that Jason tested "positive for the use of cannabinoids" on September 13, 2003. Ex. 74 at 49 [September 2, 2003 Rule Violation Report]. He again tested positive on June 24, 2005, and refused a drug test on July 14, 2005. Ex. 74 at 45 [June 24, 2005 Rule Violation Report]; Ex. 74 at 46 [July 14, 2005 Rule Violation Report].

Jason was released from prison in November 2005, less than three months after Hurricane Katrina hit the Gulf Coast of Mississippi. Ex. 74 at 150–52 [2005 Release]; *see also* Ex. 17 ¶38 [Eddie]: Ex. 18 ¶43 [Jeraldine]. Jason's sister, Lydia remembered, "Jason got out of prison right after Katrina and right before Thanksgiving. We were all hoping that he'd get out in time for our family to have Thanksgiving together, and he got out a few days before." Ex. 27 ¶29 [Lydia].

Following his release from prison, Jason made an effort to assimilate to life outside of prison and to stay off drugs. He began working, and started dating a woman named Wanda Harper. Wanda was already well into her pregnancy with her son, R.H., when Jason first met her. Jason's cousin Jeff Puglise explained, "When Jason first met Wanda and they started dating, she was seven months pregnant with someone else's child. That didn't matter to Jason. He liked her, and he loved her son, R.H., like R.H. was his own." Ex. 30 ¶11 [Jeff]; *see also* Ex. 32 ¶10 [Cherie]; Ex. 18 ¶42 [Jeraldine]; Ex. 19 ¶21 [Christina]. Jason, Wanda, and R.H. lived with Jerry

Sr. for a while, and Jerry Sr. recalled, "We all were doing well together until drugs started to work their way back into Jason's life." Ex. 6 ¶34 [Jerry Sr.].

At first, Jason was doing very well. Jason's half-sister Pearl recalled, "When Jason first got out of prison, he was doing okay. He had moved in with Jerry Sr. and was living with his girlfriend and her son. He seemed to want to get his life together." Ex. 21 ¶19 [Pearl]. Jason's R.H.paternal aunt Nancy Carroll recalled, "At first, he was always smiling and happy and loved to joke around with me." Ex. 8 ¶37 [Nancy]. Jason's half-sister Lydia remembered:

> [Jason] seemed like he'd really matured, and he was working real hard to do the right thing and stay straight. My husband and I saw that he was trying, and my husband got Jason a job where he worked. We also loaned him money to buy a car—only about a thousand dollars or so, but we wanted him to be able to get around because his girlfriend, Wanda, was about to have a baby and Jason really wanted to be a good dad.

Ex. 27 ¶29 [Lydia]. *See also* Ex. 17 ¶41 [Eddie]. He was also spending time with the rest of the family. His half-sister Christina described:

> When Jason first got out of prison in 2005, Jason would come over and spend time with us. When Jason came over to hang out with us, we would sit around and watch movies together. My sons Jaden and Devin were much younger then and loved the movie *Ice Age*. I can remember Jason coming by and watching *Ice Age* with us again and again. He and I would make jokes about the squirrel and the other stuff in the movie that was above the kid's heads. It was fun to spend time with Jason like that.

Ex. 19 ¶20 [Christina]. Jason's younger cousin Cassie Walston recalled, "We hung out and spent a lot of time together. There wasn't much to do out there so the two of us would play the card game UNO, and eat snacks. It meant so much to me that [Jason] was willing to spend so much time with me." Ex. 35 ¶12 [Cassie].

Jason was also trying to work. His half-sister Edna recalled, "When [Jason] first got out of prison, he had a job and he was working." Ex. 4 ¶25f [Edna]. *See also* Ex. 95 [Brinker

International Records] (employed at Chili's Restaurant as a dishwasher from December 10, 2005 to January 15, 2006).

Despite his efforts to build a productive life for himself, Wanda, and R.H., Jason's addiction overtook him not long after he was released from prison. According to his half-sister Pearl, "I believe it was after [Jason's nephew Jonathan and brother Jerry Jr.] arrived that Jason was drawn back into drugs and back into a life of crime to support his drug use." Ex. 21 ¶19 [Pearl]. Cousin Jeff Puglise revealed that others close to Jason also facilitated his addiction by providing harder drugs: "My ex-wife's father, Earl Phelps, who also was Wanda's uncle, got Jason back into drugs [crack] after he got out of prison." Ex. 30 ¶10 [Jeff]. Jeff explained:

> Uncle Earl was the one who got both Jason (after he got out of prison) and me into crack. Before that, I had used meth a lot, but hadn't really smoked much crack. I know Jason used crack before he went to prison, but after he got out, Uncle Earl was the one who got him started using it again.

Ex. 30 ¶26 [Jeff]. "Jason's normal way of using was to binge use for a couple of days, and then lay off for a few days and go work, and then go back to using again." Ex. 30 ¶24 [Jeff].

Jason's half-sister Edna noted, "When Jason got out of prison after Katrina, he wasn't out for very long before he got back on drugs. Jason was using a lot of drugs—basically whatever he could find: crack, heroin, pills, Xanax, pot, etc." Ex. 4 ¶22 [Edna]. Jason's cousin Jeff recalled that the two main drugs used in the area were meth and crack, and that most users only used one or the other. Ex. 30 ¶28 [Jeff]. But, he observed that, "[i]t never mattered to me and Jason, though: we just did whatever was available. I think Jason preferred crack, but he smoked meth with me whenever it was around and that was what we had." Ex. 30 ¶28 [Jeff].

The physical toll of the drug use quickly became apparent to others. According to cousin David Walston, "I remember seeing Jason when he just got out of prison in 2005. He looked

healthy and strong. When I saw him a few months later, he looked terrible, thin, with dark bags under his eyes." Ex. 36 ¶7 [David].

Jason's drug use made it difficult for him to hold a job. Jason's brother-in-law Michael O'Brien got Jason a job at SouthEastern Erectors. According to Michael, "[Jason] wasn't there long before he left. He was a good worker, but someone caught him using drugs at work." Ex. 28 ¶4 [Michael]; *See also* Ex. 94 [SouthEastern Erectors Records] (Jason applied for a job at SouthEastern Erectors on October 2, 2006, and was employed there from October 3, 2006 to November 21, 2006). After Jason lost the job at SouthEastern Erectors, his cousin Jeff got him a job working at a landfill:

> Jason worked with me for a good long time, probably six months or a year. He started using drugs again, though, and as he got heavier and heavier into drugs, he started missing work.
>
> One day, Jason showed up way too messed up to work. He came to work, but went straight up to our boss Greg Kenny, and said, "I can't do this. I can't work today. I need to get help. I need to get into rehab or something." I could tell by the way he looked and acted that he was pretty bad off. He was really edgy, and he just couldn't sit still or quit moving. He was way too amped up, and it seemed clear to me that he had been smoking crack right before he showed up at work. The boss told him to go home. He never came back to work after that.

Ex. 30 ¶¶7–8 [Jeff].

Jason's addictive behavior also caused problems with Wanda. As Jason's drug use was worsening, "[h]e and Wanda were fighting a lot. They kept splitting up and getting back together, and Jason was really upset about that." Ex. 30 ¶12 [Jeff]. "I used to hear them fighting sometimes (usually about the drugs Jason was using), and Wanda would kick him out and not let him see [R.H.], which really upset Jason." Ex. 30 ¶12 [Jeff]. "Wanda knew Jason was doing a lot of drugs. Jason used to have to come hide out at my house to do drugs, because Wanda didn't want him doing them." Ex. 30 ¶19 [Jeff]. Eventually, the arguing between Wanda and Jason "got

bad enough that Jason couldn't even go off and hang out with Wanda's Uncle Earl, because Wanda knew what Uncle Earl was up to, and knew Jason would be smoking crack with him." Ex. 30 ¶19 [Jeff]. Jerry Sr. also noted that "Jason's drugs use made his money problems much worse, and led to arguments between Wanda, Jason, and me." Ex. 6 ¶34 [Jerry Sr.]. According to Edna, Jason "wrecked Wanda's car into a tree at some point because he was high. Wanda was very angry with him, but she couldn't or didn't want to say anything about it because she was using drugs at the time too." Ex. 4 ¶22 [Edna].

Jason's other relationships became strained, as well. His half-sister Christina said:

> Soon after Jason got out of prison, however, I noticed a big change in him. When I would go to wherever he was staying, he used to come out and talk with me. Then, it started being that if I wanted to talk with him, I'd have to go in the room wherever he was staying, and he'd just be sitting in there with the lights off. . . . [S]ome time after [R.H.] was born, Jason just became secluded and had a lot less interaction with me and the rest of my family.

Ex. 19 ¶21 [Christina]. Once Jason started using drugs, whenever "he did come around, he was always trying to borrow money. Lydia was the last person in the family to cut him off and stop lending him money." Ex. 19 ¶22 [Christina]; *see also* Ex. 17 ¶43 [Eddie].

Jason's half-sister Pearl described Jason stealing from his family to support his drug addiction:

> When Jason started getting into hard drugs, he started taking things from me and my family to support his drug habit. He would sell the things he stole at a pawnshop for way less than I had paid for them. I would not want to support his drug habit, but I almost wish that he had just come to me to ask for the money—then I would have been out only $5 or $10, or whatever he needed at the time.

Ex. 21 ¶20 [Pearl]. His half-sister Edna recalled similar thefts. "During this time, things started to turn up missing around the house. He took my dad's ATM card around this time, and took $400 out of the account. Also, Jason stole power tools from around the house and pawned them for money to buy drugs." Ex. 4 ¶23 [Edna]; *see also* Ex. 28 ¶7 [Michael].

Because Jason's family and close friends were all dealing with the aftermath of Hurricane Katrina, they were less able to provide help. Jason "got out prison at the worst possible time. I remember, because it was right after Katrina." Ex. 31 ¶38 [Rick Sr.]. Much of the time, there were large numbers of people crowded into small trailers. Edna recalled many of the family members living in Jerry Sr.'s trailer after Jason was released from prison:

> [My son] Jamie's bed was in the living room, one of my girls had a bedroom, my dad had one of the other bedrooms, and Jason, Wanda, and [R.H.] slept in the third bedroom. My sister Dorthy and her kids were there for some of the time, but eventually she got a camper and parked it outside the trailer, and Dorthy and her kids stayed in that. Jerry Jr. and his daughter Ciara were around and staying with us sometimes, too.

Ex. 4 ¶16 [Edna]. The Keller family experienced similar problems. "That time was very overwhelming, because so many of the family just came home to nothing after the storm." Ex. 17 ¶40 [Eddie]. "For a few weeks, my brother, Jerri, Pam, Pam's husband, and Pam's two kids all lived in my two-bedroom apartment." Ex. 17 ¶40 [Eddie]. Pearl explained: "Because so many of us were homeless and displaced, at one point after we returned I had 18 people living in my house." Ex. 21 ¶17 [Pearl]. It also was hard to find work because there were not a lot of available jobs post-Katrina. *See* Ex. 31 ¶43 [Rick Sr.]. Eddie remembered that it was hard because Jason needed money, but "[a]fter Katrina, a lot of the family just didn't have money to give." Ex. 17 ¶43 [Eddie]. Even the family members who had money struggled: "things were so bad that even though we had money, there was no way to spend it and get supplies and things we needed. We had to drive all the way to Alabama to do laundry." Ex. 35 ¶13 [Cassie].

Jason eventually ended up without a place to live. Jeraldine noted:

> After he got out, Jason would stay with me sometimes and then stay with his dad sometimes. At the time, Jerry [Sr.] was living up on Moran Road, which is out in the country. Eventually, though, Jerry couldn't keep up the trailer so he moved in with Dorthy, his daughter. About this time, I had to move out of the FEMA trailer I got after Katrina. It had been parked in Pearl's yard, and Pearl had decided to

> sell the house and they were getting it ready to put on the market. I moved in with one of my daughters and her family.
>
> Neither of the girls had a place for Jason at their houses. He was just kind of bouncing around, staying where he could find a place. Jason was struggling a lot, and was basically homeless. He stayed at Lydia's place for a few nights after that, but he couldn't really stay there because there wasn't room. Dorthy would not let him stay at her place—I think because she knew he was using a lot of drugs.

Ex. 18 ¶¶44–45 [Jeraldine]. Jerry Sr. was hospitalized multiple times shortly after Jason's release and ultimately had large sections of his colon removed due to complications with his Crohn's disease. Ex. 137 at 16, 72 [Records].

The people around Jason noticed as his drug use worsened. Carla Lawson, a longtime Bankester family friend, noticed that, although Jason would not smoke crack at her house, he would sometimes come by afterward:

> Jason did come by the house high sometimes. I have been around people who are high on crack a lot in my life, because my husband smoked crack for a long time. I could tell when Jason was high, because he was very fidgety and nervous. He just couldn't sit still. He would talk really, really fast, and keep getting up to look around and look out the windows. He was always looking out the windows to see if someone was coming for him. He was incredibly paranoid. In my experience, this is what happens to most people who smoke a lot of crack.

Ex. 23 ¶22 [Carla]. Jason's cousin Jeff noticed that Jason would "smoke it all day, and get maybe an hour or two of restless sleep a day, before starting the cycle all over again. This would go on for days and days, and sometimes weeks." Ex. 30 ¶30 [Jeff]. Jason's half-sister Edna recalled that Jason "went on binges, where he would be gone for a few days, and then he'd come home and sleep for a long time. He would lay around without motivation to do anything and talk to anyone. Then, at some point, he would go back out again." Ex. 4 ¶23 [Edna].

Once drugs cost Jason his job at the landfill, he "didn't have any money, which meant that he couldn't put gas in his car, he couldn't buy food, and he couldn't buy drugs." Ex. 30 ¶13 [Jeff]. Jeff recalled, "He had a ride for a while, until his car broke down and he couldn't afford to

get it fixed. Then, he didn't have a way to go look for work, and he didn't have any hope of getting a job." Ex. 30 ¶13 [Jeff]. Jason's half-sisters saw Jason's despair and downward spiral. "After that, things got worse for him, after he lost his job. He needed help, because he just got worse and worse off into drugs." Ex. 4 ¶25f [Edna]; *see also* Ex. 19 ¶24 [Christina]. Jason reached out to his cousin David Walston for help. "Before the Hancock Bank robbery, Jason came to me to ask for a job. Jason pleaded that he really needed to get off the drugs he was using—crack and cocaine—and get a job to take care of his responsibilities. But he didn't know how he could do it without a job." Ex. 36 ¶6 [David].

Without a source of income, Jason continued to steal money and items he could pawn in order to support his addiction. He entered the Hancock Bank in Gulfport, Mississippi, on January 30, 2007, with an unloaded BB gun, wearing a baseball cap, and looking "like he had not shaved in [] days" Ex. 76 at 112 [Bank Robbery Tr.]; *Id.* at 124. Jason was apprehended by Gulfport Police Officer David Wilder within minutes of the robbery, just as Jason arrived at the car he had parked nearby the bank. Ex. 76 at 125–40 [Bank Robbery Tr.]. He admitted his actions, and explained to arresting officers that he had used a BB gun, Ex. 76 at 167 [Bank Robbery Tr.], and thrown it in the pond adjacent to the bank, Ex. 76 at 143 [Bank Robbery Tr.]. Law enforcement officers claimed they were unable to locate the BB gun because the pond was muddy. Ex. 76 [Bank Robbery Tr.].[14]

The State indicted Jason under the theory that he used a handgun to commit this crime. Prosecutors put on testimony from a customer at the bank who claimed to have special knowledge of weapons due to his military and law enforcement service, and who claimed Jason used a 9-millimeter, semi-automatic handgun to rob the bank. Ex. 76 at 120–21 [Bank Robbery

[14] Police investigation files do not include a report from the officer who was purported to have attempted to locate the BB gun in the pond.

Tr.]; *id*. 198, 201. David Brown testified generally that, based on his military and sheriff's department experience and his visual observations of the gun, Jason had a 9-millimeter. Ex. 76 at 120–21 [Bank Robbery Tr.]. Brown did not indicate whether he heard any clicking. No other witness for the state testified that Jason in fact had a 9-millimeter handgun. The State relied heavily on this testimony. Ex. 76 at 198, 201 [Bank Robbery Tr.].

In fact, Jason committed this robbery with an unloaded BB gun and not a 9-millimeter handgun. Witnesses at the bank noted that Jason was repeatedly "clicking" the BB gun. Dennis Ladner, one of the bank tellers involved in the case, described Jason as "clicking [the gun], like he was clicking the throttle[.]" Ex. 76 at 98 [Bank Robbery Tr.] Similarly, Bridget Tindel described the intruder as "standing there clicking a gun and waving it in the air. . . . he had the gun in the air, and he was just clicking something on the gun. I don't know if it was the back part of the gun or something, you know, but he was clicking some part of the gun." Ex. 76 at 110–11 [Bank Robbery Tr.].

The existence of this clicking is significant and establishes that the weapon was not, in fact, a 9-millimeter because "it is not possible that such a weapon would make a repetitive clicking noise as described in witness testimony. The only circumstance under which a 9-millimeter semi-automatic handgun would "click" would be right after the gun had fired a round, and it would click once or twice at most." Ex. 48 ¶7 [Alfred Brown]. It is, however, "possible for a BB gun to make a clicking sound. An empty BB gun could make a clicking sound even without discharging a BB pellet." Ex. 48 ¶8 [Alfred Brown].

Police records discuss Jason's mental state and the extent of his addiction at the time of the bank robbery. Captain Ron Pullen, who was the investigating officer on the case, noted "Keller stated that he had a crack cocaine problem and had used drugs earlier that day." Ex. 64 at

5–6 [HCSD Investigation Report (Armed Robbery)]. Capt. Pullen noted this more than once in his notes. Ex. 66 [HCSD JLK Personal History Form and HCSD Affidavit]. Jason even demonstrated how aware he was of the severity of his crack addiction in statements he made to Capt. Pullen, and noted how it drove him to do things he would not otherwise have done. In the course of an interview with Capt. Pullen and Investigator Joey Tracy, Jason asked Capt. Pullen whether he had called Jason's father. Ex. 65 [HCSD Narrative Report]. When Capt. Pullen indicated he had indeed contacted Jerry Sr., notes show that "Keller at this point became emotional and started to cry and stated, 'how did he sound when he found out what I had done'? Keller further said 'I hurt my family when I do stupid sh*t I do.'" Ex. 65 [HCSD Narrative Report].

Jason's father and his half-sister Lydia bailed Jason out of jail after the bank robbery. Lydia explained, "When Jason got locked up for the bank robbery, I helped his father bail him out because I really thought Jason could make it and I wanted him to have a chance." Ex. 27 ¶30 [Lydia].

After he was bailed out of jail, however, Jason's downward spiral continued. Jason essentially became homeless, sporadically crashing with a relative or friend:

> Jason and I were together almost every day in the weeks leading up to the convenience store shooting. Jason had actually been staying with me some of the time up in Saucier, Mississippi, during that time. Jason was bouncing around between different people's houses at that time, and wasn't really living much of anywhere. He never actually moved in with me in Saucier. He would just come and stay for a day or two on the couch, and then head off somewhere else.

Ex. 30 ¶6 [Jeff].

Jeff recalled that Jason "just felt hopeless, and would tell me he was going to give up." Ex. 30 ¶13 [Jeff]. "Eventually, he did give up, and he became really depressed. He was doing drugs whenever he could, and just getting worse and worse." Ex. 30 ¶14 [Jeff]. Jeff described

Jason as "[u]sually . . . a very upbeat guy" who was "outgoing and friendly" and "very cool and good-hearted." Ex. 30 ¶16 [Jeff]. "He was just always joking around." Ex. 30 ¶16 [Jeff]. Shortly before the shooting, however, Jason "got depressed." Ex. 30 ¶17 [Jeff]. "He stopped joking around or messing about with you. He just got very quiet and wasn't outgoing at all. He was really withdrawn." Ex. 30 ¶17 [Jeff]. Jason was still around, "but when you asked him what was up, he would just say, 'nothing,' or 'not much.' Then he'd just sit there and be quiet." Ex. 30 ¶17 [Jeff]. Many family members noticed the dramatic change in personality and behavior. *See* Ex. 6 ¶34 [Jerry Sr.] ("Jason was acting differently. He was more depressed and quiet, and he became more irritable."); Ex. 4 ¶25g [Edna] ("[Jason] was more quiet than usual, and quit coming around so much. When he did come around, he was withdrawn. He wouldn't talk or joke as much as he used to."); Ex. 17 ¶ 42 [Eddie]; Ex. 8 ¶ 39 [Nancy] ("As time went on, I noted that he became more withdrawn and depressed."). Jason's childhood friend, Chris Whittle, noted that Jason "used to be very affectionate—I'd get embarrassed because he'd come up and hug me in the middle of the grocery store. By the time of his bank robbery charge, I'd see him and he'd act like he didn't even know me." Ex. 40 ¶13 [Chris].

Jason's half-sister Christina had a vivid memory of the difference drugs made in Jason:

> Jason on drugs and Jason off drugs were like night and day. I only ever saw him when he was actually high on hard drugs one time. (I had seen him high on marijuana other times, but it was not the same as Jason using hard drugs.) That one time, Jason came over to my apartment and was pale as a sheet. He then just rolled himself up into a ball in the corner of my apartment. He was sweating and shaking and rocking himself back and forth. He was crying and kept yelling, "Help me, help me." I wanted to help him, and kept asking him, "Jason, what do you need? How can I help you?" Jason could not respond to me because he was so out of it. Jason was clearly paranoid and hallucinating and it seemed like he was hearing voices. I know that he had not slept in a long time and it seemed to me like he had not slept in a month. This incident scared me and I eventually ran out of the house crying. Afterwards, I told him that I didn't want him to come around me when he was like that anymore.

Ex. 19 ¶25 [Christina]. Lydia recalled, "The day that everything happened, Jason came by and left a note on my door saying he was sorry. He said he loved me, thanked me for my help and said goodbye." Ex. 27 ¶32 [Lydia].

Jason sought out drug treatment, and even asked his family for help. His mother, Jeraldine, remembered:

> Jason really wanted to stop using drugs, but he couldn't stop on his own. One day when I was at work, Jason came to talk with me. He told me he was having problems with drugs, and he wanted help stopping. I didn't know what to do or who to ask, so I told my daughter. She found a place in Mobile, Alabama, and we checked it out but couldn't afford it.

Ex. 18 ¶46a [Jeraldine]; *see also* Ex. 19 ¶26 [Christina]; Ex. 37 ¶36 [Delores]. Jason's half-sister Edna, who had struggled for years with her own addiction to drugs, observed, "My dad and his mom didn't seem like they knew how bad everything was or how to help him." Ex. 4 ¶25f [Edna]. Ultimately, Jason was never able to get the treatment he needed.

Jason's cousin Jeff recalled, "In the last few days before the shooting happened, I was smoking a lot of crack and I know that Jason was smoking more than I was." Ex. 30 ¶22 [Jeff]. "I know he was sleep-deprived during this time. . . . He had bloodshot eyes every time I saw him there at the end, and he had huge black bags under his eyes." Ex. 30 ¶15 [Jeff]. Jason stayed with his half-sister Pam's son, Little Russell, prior to the shooting:

> I saw Jason the day before the shooting. . . . I was the last person I know to have seen Jason before the shooting. We were doing drugs that day. We took a lot of Xanax. Around that time, I was with Jason when he was taking a lot of Xanbars (Xanax pills that come in bar form and have a higher dose of the drug in them) and smoking pot. He also used crack.
>
> We gave Jason a ride to Haney's Pawn Shop, where he said he wanted to pawn something. The key to the gun case at Haney's was left in the lock. No one was around, and Jason just unlocked the case and grabbed a gun out of it. It was a tiny gun, about the size of a pocketknife, which folded out like a pocketknife and had a clip on the side of it to clip it to your pocket. There were no bullets, just the gun.

> After that, one of my friends that we were with that day gave Jason a bag of bullets for the gun. Jason didn't steal any bullets from the pawn shop, and if he hadn't been given the bullets, he just wouldn't have had any. Jason wanted to pawn the gun somewhere else to get more money.
>
> After he stole the gun and pawned the stuff he had, we went riding around some more, and he did more drugs. We eventually left Jason off. I still had a bag of his clothes that I was supposed to bring to my grandma's house later.

Ex. 2 ¶¶4–7 [Russell Jr.].

After being let off by Little Russell and his friends, Jason made his way to a Waffle House in D'Iberville, where he ran into his old acquaintance Scott Forehand. Jason had been smoking crack persistently through that day and the days before. Scott worked at the Waffle House and remembered this encounter with Jason quite well:

> After Jason and Trisha broke up, I didn't see Jason for quite a few years. It was maybe ten years or so since I'd really seen him. All of a sudden, though, he showed up one night at the Waffle House I was working at. This was on Third Avenue in D'Iberville, right across the bridge. This was the night before he robbed the convenience store and shot that woman. I remember this, because after he left, I talked with a bunch of my co-workers about how messed up he'd seemed, and then the very next day, I saw his picture all over the news.
>
> Jason looked really bad that night. I could tell as soon as I saw him walking in that he was on something. He was just totally blitzed out of his mind, and was clearly in a really bad place. He was all glassy and buggy-eyed, and looked totally strung out.
>
> He came in and sat down in the smoking section of the Waffle House. He was dirty and disheveled. He looked like he'd been on a bender for days or weeks, and hadn't showered or changed his clothes. I think he had shorts and a tank top on, though I don't quite remember. I'm not really sure he even had shoes on, he was that bad off.
>
> Jason sat in the Waffle House for an hour or an hour and a half. I think this was around 11:00 PM or so that he came in. After he'd been sitting there for about an hour, I figured out that he didn't have any money, which was why he hadn't ordered anything. I fed him—just some eggs and hashbrowns and stuff that I could comp without anybody noticing. A little bit after that, he just up and left. He didn't say bye. He didn't say thanks. I just turned around and he was gone. The other people there said he had just split without saying anything.

> When I say Jason "sat" there, that's maybe a little misleading. He was at the booth, but he kept just getting up and going to the bathroom, and pacing around and going back to the bathroom and sitting back down. He may have been doing drugs in the bathroom. It wouldn't have surprised me with the way he was acting. He couldn't sit in one spot though, and was just jumping up and down and moving all the time. Jason seemed extremely anxious. He couldn't sit still and he kept looking over his shoulder.
>
> * * *
>
> Like I said, Jason was always hyper when I knew him. The night that I saw him at the Waffle House was something else entirely, though. He was totally off and couldn't hold still at all. This was way worse than I'd ever seen him.

Ex. 12 ¶¶9–15 [Scott].

Next, Jason made his way to another crack house in Biloxi, where he ran into another relative of his, June Nelson. June recalled the encounter:

> I saw Jason the night before the woman got shot, though I didn't realize that was what happened until much later when I saw him on the news. He had come to the house of a friend of mine looking for dope (crack), and wanting to smoke dope. He had been smoking crack. He seemed sad that night. Something seemed like it was wrong with him. I could [see] the scaredness in his eyes, like something serious was wrong. He was real quiet, and I asked him what was wrong and told him I loved him. When a fight broke out, some guy grabbed Jason and just pulled him out of there.

Ex. 26 ¶9 [June].

After leaving the crack house in the early morning hours of June 21, 2007, Jason walked to Biloxi Regional Medical Center, arriving there at around dawn that morning. He spent approximately an hour or two in the waiting room of the Intensive Care Unit (ICU). Around 7:00 a.m., he called his father and mother from a phone in the waiting room of the ICU. Tr. 535; Ex. 18 ¶46a [Jeraldine]. Jason then walked to Tindal, where his stepfather Eddie worked, and took Eddie's Dodge truck from the parking lot. *See* Ex. 17 ¶¶44–45 [Eddie]. Stressed, delirious, and high on cocaine, Jason began driving to a pawn shop to sell a gun he had stolen the day before, when he crashed his stepfather's truck into a curb, Tr. 560. Abandoning the truck, he began

walking down Popps Ferry Road toward his stepfather Eddie's trailer, where Eddie had a second truck (which Jason later took). *See* Ex. 17 ¶¶ 44–46.

Shortly before reaching his stepfather's trailer, Jason stopped into the Food Mart, owned by Ms. Nguyen, to buy cigarettes. Tr. 561–62. As Jason recounted at trial, "I stopped to get two packs of cigarettes. I went to my pocket to get my money, instead, I mean, money and a handgun. The handgun is what I touched, and for some reason it came out instead of the money." Tr. 562. Jason panicked when Ms. Nguyen turned back around, saw the gun, and started screaming. Tr. 562 ("I pulled the handgun out to rob her. She turned around and seen the gun and started screaming and I started firing."); Tr. 565 ("I had been up three or four days, I was delirious, I was scared, I didn't know what was going on."). When asked why he shot Ms. Nguyen, Jason could only reply, "I don't know. As I said, I was not in my right mind at the time." Tr. 576. "She screamed and I screamed, she went hysterical, I got scared. . . . She was hysterical before [I shot her], that was the action of pulling the trigger." Tr. 576.

The Mississippi Supreme Court made fact findings on appeal that support Jason's account of a panicked shooting, and that he was in a depressed and suicidal state. The Supreme Court found that Jason "stopp[ed] by Hat's store for cigarettes." *Keller*, 138 So. 3d at 830. This finding rejects the State's allegation that Jason had been walking past other stores that were less promising candidates to rob, and "stopped at Hat Nguyen's store because she was alone and [he] had the opportunity to take advantage of the situation[.]" Tr. 561–62. As Jason admitted, he first decided to rob Ms. Nguyen spontaneously and after he was inside the store. Tr. 562.

The Court also found that Ms. Nguyen "told [Keller] she would give him all the money in the store, so they returned inside the store." *Keller*, 138 So. 3d at 830. This finding supports Jason's claim that the shooting was part of a panic. The police found that the cash register was

untouched, closed and locked, and with "the proper amount of money in the till." Ex. 75 at 3, 5 [Manna Narrative]. This undisputed evidence is not consistent with the State's calculated robbery theory—and does not make sense—that Jason would kill Ms. Nguyen before she opened the cash register as she had just promised to give him all the money in the store.

The Court also confirmed Jason's suicidal behavior at the time of his apprehension, finding, "[w]hen he exited the vehicle, Keller, attempting suicide, pointed a metal object that resembled a shotgun barrel at the police to induce them to shoot him." 138 So. 3d at 830.

Police reports also rebut the State's case that Jason had a calculated plan to rob and murder Ms. Nguyen. Biloxi Police Investigator Mike Manna processed the crime scene at the Food Mart on June 21, 2007. His June 23, 2007, Narrative Form provides several pieces of evidence from the scene rebutting the argument that the crime was a cold and calculated robbery/murder. Ex. 75 [Manna Narrative]. For example, the cash register at the Food Mart was untouched, "closed and locked." Ex. 75 at 3, 5 [Manna Narrative]. There were no fingerprints on it or the counter area and there was no evidence the cash register was opened or that an attempt was made to open it. Ex. 75 at 3 [Manna Narrative]. Investigator Manna's search of the area behind the counter recovered a purse under a pile of papers that had more than $1,300 in cash and jewelry inside. When Manna looked around the interior of the store, he found another purse "in plain view" in an adjacent room. This purse had $1,019 inside and also had jewelry. These findings support Jason's account of a panicked, spur-of-the-moment robbery and shooting. He did not break into the cash register, the logical target of the armed robbery of a convenience store. He did not force Ms. Nguyen to open the cash register. He did not even look around the store, where thousands of dollars in cash was within easy reach. Instead, he grabbed cash and rolled change he happened to see sitting near the cash register and fled immediately.

Had trial counsel performed a reasonable, independent investigation into the circumstances leading up to the shooting, a much different picture could have been presented to the jurors. The prosecution told the jurors that "drugs didn't have anything to do with this," maintaining Jason was "sober as all get-out." Tr. 667. The jurors heard that Jason committed this crime because he "wants to be a man," and "wanted to see what it felt like to kill another human being." Tr. 667. Instead, as explained below, Jason's trial counsel could have presented jurors with a more accurate picture of his state of mind at the time of the shooting, and would have been able to provide statements from numerous other witnesses corroborating Jason's own account of his mental state at the time.

Trial counsel failed to make a reasonable investigation of mitigating evidence and failed to provide jurors with extensive and accurate evidence in favor of imposing a sentence less than death on Jason. Without a reasonable investigation, counsel was forced to rely on superficial testimony of witnesses, one of whom counsel had not talked to before the trial, Ex. 5 ¶11 [Jerry Jr. affidavit], and another who confided that she could not recall any interaction she had with Jason, Tr. 541. A psychologist testified that Jason was not insane at the time of the crime and was competent to stand trial. She had never been asked to perform a mitigation evaluation; in fact, she specifically recommended to counsel that, "if this case goes forth as a capital case, a mitigation study regarding this man's psychological functioning is recommended." Ex. 78 at 177–78 [Smallwood Psychological Evaluation]. Jurors also heard testimony that Keller had not been a "troublemaker" at the local detention center while awaiting trial for capital murder. Tr. 545. Counsel's course of action was based on an unreasonably inadequate investigation, and not the result of a fully informed decision.

No substantive mitigation or social history interview was conducted with any witness, including family members, friends, and others familiar with Jason's history and background. For example, Jason's half-sister Christina noted that a "lady spoke with me one time and a lawyer called me on the telephone," but that "[n]o one ever asked me if I could testify at Jason's trial." Ex. 19 ¶28 [Christina]. Jason's mother, Jeraldine, noted that she "hardly had any contact with Jason's lawyers before his trial." Ex. 18 ¶47 [Jeraldine]. When she did talk to trial counsel, "[t]hey didn't really ask about [Jason's] personal life." Ex. 18 ¶47 [Jeraldine]. Though willing to testify, his mother said that trial counsel "never asked me many questions or told me that I could testify for Jason at his trial." Ex. 18 ¶47 [Jeraldine]. Other family members were not contacted by trial counsel at all. Ex. 1 ¶43 [Pam]; Ex. 2 ¶10 [Russell Jr.]; Ex. 3 ¶12 [Doris]; Ex. 4 ¶26 [Edna]; Ex. 15 ¶31 [Harvey L.]; Ex. 17 ¶48 [Eddie]; Ex. 21 ¶23 [Pearl]; Ex. 26 ¶12 [June]; Ex. 27 ¶34 [Lydia]; Ex. 28 ¶12 [Michael]; Ex. 30 ¶38 [Jeff]; Ex. 31 ¶45 [Rick Sr.]; Ex. 35 ¶29 [Cassie]; Ex. 36 ¶11 [David]; Ex. 37 ¶38 [Delores]; Ex. 38 at 5 [John Wayne]; Ex. 39 ¶19 [Billy]. Nor did trial counsel speak to any of Jason's friends or others with relevant knowledge. Ex. 7 ¶17 [Trisha]; Ex. 9 ¶39 [Reba]; Ex. 11 ¶12 [Mike D.]; Ex. 12 ¶16 [Scott]; Ex. 14 ¶9 [Ricky]; Ex. 16 ¶9 [Nancy Hunter]; Ex. 20 ¶27 [Charles]; Ex. 22 ¶35 [Thomas]; Ex. 23 ¶29 [Carla]; Ex. 24 ¶7 [Sandra Meaut]; Ex. 25 ¶15 [Vince]; Ex. 29 ¶8 [Harley]; Ex. 32 ¶12 [Cherie]; Ex. 33 ¶13 [Chad]; Ex. 40 ¶15 [Chris]; Ex. 41 ¶16 [Jerome].

Neither of the two witnesses who testified at trial and were familiar with Jason's history—his father, Jerry Sr., and his half-brother, Jerry Jr.—was spoken to about mitigating evidence. Jerry Jr. had never previously spoken with trial counsel. He explained, "Jason's trial attorneys did not talk to me before the trial or prepare me to testify, and I did not actually know that I was going to be asked to testify that day. I was surprised and had not really thought about

what I could say." Ex. 5 ¶11 [Jerry Jr.]. He said this was "the first time I had ever testified like that." Ex. 5 ¶11 [Jerry Jr.].

As a result, Jerry Jr. testified that he believed Jason was "[a]bout 27" when he "started having problems. . . . with drugs." Tr. 526. But Jason, who was born in July 1979, was 27 years old at the time of the capital crime. Explaining his testimony about Jason's drug use, Jerry Jr. clarified:

> I knew that Jason tried drugs off and on as he was growing up. . . . I wasn't sure when Jason developed a serious drug problem. At trial when the lawyer asked me that, I didn't know what to say. I thought Jason got into legal problems due to his drug use when he was older and that that might make his drug problem serious, but I knew he started using harder drugs, even crack, sooner than that. I was around Jason when he started using some of the harder drugs, but was not around him much when he got more seriously into those drugs. When he was doing those harder drugs, he would just disappear for days.

Ex. 5 ¶10 [Jerry Jr.]. Had trial counsel tried to speak to Jerry Jr. ahead of time, he would have been willing to speak with them and make this clarification. Ex. 5 ¶12 [Jerry Jr.]. But counsel failed to do this.

Trial counsel only spoke with Jerry Sr. at the courthouse, and no one else ever came to talk to him. Ex. 6 ¶40 [Jerry Sr.]. Trial counsel spoke to Jerry Sr. "for a few minutes at the courthouse before the trial started, but that's all I recall them preparing me to testify. I did not know really what to expect before I testified and I didn't know what kinds of things I should talk about." Ex. 6 ¶40 [Jerry Sr.]. Jerry Sr.'s testimony was that Jason had lived with him since the age of 12, and "was a good person, a good boy, went to school and was always respectful," and got along with people. Tr. 529–30. The State successfully objected to Jerry Sr.'s attempt to testify that people told him Jason was on drugs, and Jerry Sr. was precluded from testifying about Jason's drug use and addiction.

Two staff members from the Harrison County Adult Detention Center testified that Jason had not been a "troublemaker" while awaiting trial, Tr. 545, though one did not recall ever interacting with Jason, Tr. 541–43. A psychologist, Beverly Smallwood, Ph.D., was appointed to assess whether Jason was insane at the time of the crime and whether he was competent to stand trial. Tr. 585; Ex. 77 [Order for Psychiatric Evaluation]. She testified that Jason was forthcoming in her interview, reported having a drug problem for many years, and used cocaine all night and the day before the crime. Tr. 589–90. She testified generally that drug addicts "make hurtful decisions toward their families," and added that she was not surprised that Jason was compliant when free of drugs. Tr. 591. She also noted that she scored Jason's full-scale IQ at 85, indicating that about 82% of the population scored higher than Jason. Tr. 598.

The minimal evidence presented was not the product of a "complete investigation," or of a reasonable decision that more "particular investigations [were] unnecessary." *Strickland v. Washington*, 466 U.S. 668, 691 (1984). The Mississippi Supreme Court has fully embraced and expanded the duty of capital defense counsel, holding that "strategic choices made after less than complete investigation will not pass muster as an excuse when a full investigation would have revealed a large body of mitigating evidence." *Ross v. State*, 954 So. 2d 968, 1006 (Miss. 2007) (quoting *Dickerson v. Bagley*, 453 F.3d 690, 696–97 (6th Cir. 2006)). "It is not reasonable to refuse to investigate when the investigator does not know the relevant facts the investigation will uncover." *Id.* A crucial duty of defense counsel in a capital case is to conduct a thorough and wide-ranging mitigation investigation, particularly given the importance of providing the jury with corroborating evidence where it exists, including records, in addition to the testimony of witnesses and other evidence. *See* ABA Standards for the Appointment and Performance of Defense Counsel in Death Penalty Cases, *reprinted in* 31 HOFSTRA LAW REVIEW 913, 1024–25

(2003). The United States Supreme Court has "rejected any suggestion that a decision to focus" on a reasonable strategy in a case can be justified "when 'counsel did not fulfill their obligation to conduct a through investigation of the defendant's background.'" *Sears v. Upton*, 561 U.S. 945, 954 (2010) (quoting *T. Williams v. Taylor*, 529 U.S. 362, 396 (2000)).

Capital trial counsel must ensure that an adequate, prompt, ongoing, and independent mitigation investigation is conducted, involving multiple, in-person interviews with the client and other witnesses who are familiar with the client's background and family history. Ex. 34 ¶¶ 3, 14 [Stetler]; Ex. 10 ¶6 [de Gruy]. Unlike insanity and competency, which are both strictly defined by statute, mitigation may encompass the client's entire life history and any other disabilities. Ex. 34 ¶28 [Stetler]. A thorough mitigation investigation should review every aspect of the client's life from birth to present. Ex. 34 ¶15[Stetler]; *see also* Ex. 10 ¶7 [de Gruy]. Capital trial counsel must establish a rapport with the client and his family over time, because the first interview typically results in superficial or incomplete responses. Ex. 34 ¶25 [Stetler]. A proper investigation frequently reveals mitigating facts, including details about the client's childhood traumas and the substance abuse problems of both the client and his family. Ex. 10 ¶7 [de Gruy]. The development of such information is essential to formulating a mitigation case at trial because, for example, a finding of substance abuse would necessitate further interviews and record review. Ex. 10 ¶7 [de Gruy].

A thorough mitigation investigation is also required to make an informed decision about which experts to retain, and these experts will, in turn, depend on information in the client's social history when making reliable evaluations. Ex. 34 ¶¶3, 14 [Stetler]; Ex. 10 ¶18 [de Gruy]. Great diligence is required in reviewing documentation about the client and his family, with such review often disclosing collateral documentation that also needs to be pursued. Ex. 34 ¶24

[Stetler]. Reliable mental health evaluations require historical data from sources independent of the client, thus mental health experts should normally be retained after the social history investigation. Ex. 34 ¶¶32–33 [Stetler].

At the time of Jason's trial, it was standard practice for capital defense attorneys to obtain funds from the court for a mitigation investigator, because it is absolutely essential to have an investigator interview the client and potential mitigation witnesses, as well as collect records pertaining to a client's social history. Ex. 44 ¶¶8, 9 [Simons]. Failure to request funding for a mitigation specialist fell below the standard of care at the time of Jason Keller's trial. Ex. 44 ¶9 [Simons]. Even if the court had not approved funds for a mitigation investigator, trial counsel had a duty to investigate and present mitigating evidence and could have turned to the Office of Capital Defense Counsel for assistance. Ex. 44 ¶12 [Simons].

Although the federal and state constitutional obligations and expectations that the professional standard of care will be met are sufficient to put counsel fully on notice of the obligations of capital defense counsel, trial counsel in this case also had the express recommendation of Dr. Smallwood that a mitigation investigation and evaluation should be completed if Jason's case were to "go[] forth as a capital case." Ex. 78 at 8–9 [Smallwood Psychological Evaluation]. At the conclusion of her report to trial counsel, Dr. Smallwood confirmed that her review was sufficient to determine that Jason was neither insane at the time of the crime nor incompetent to stand trial. She advised, however, "[I]f this case goes forth as a capital case, a mitigation study regarding this man's psychological functioning is recommended." Ex. 78 at 8–9 [Smallwood Psychological Evaluation]. Dr. Smallwood's report clearly indicated that she had made neither the mitigation investigation nor the study she recommended for a capital case. Indeed, the documents she reviewed came only from the court

file and police investigation of the crime. Ex. 78 at 2–3 [Smallwood Psychological Evaluation]. She included information from her one interview with Jason, but Dr. Smallwood interviewed no other witnesses and did not indicate she reviewed any other document or evidence.[15]

Trial counsel's investigation in this case fell well below prevailing professional norms at the time of Jason's trial. *Strickland*, 466 U.S. at 688. Had counsel performed a reasonable investigation, they would have discovered significant mitigating evidence, including evidence that Jason suffered from cognitive deficits from the time of his childhood that significantly impacted his functioning, and that—due to these deficits and biological and environmental factors present since before his birth—Jason was particularly vulnerable to developing the drug addiction that would further impair his functioning. Ex. 155 ¶¶19–20, 23, 30–45 [Dr. Woods]. The interaction between Jason's cognitive deficits, Neurodevelopmental Disorder, and trauma disorder, in addition to his drug use, greatly affected his functioning at the time of the shooting. Ex. 155 ¶¶ 34–39, 45, 57–58 [Dr. Woods].

A reasonable investigation, including the type of mitigation study recommended by Dr. Smallwood, would have revealed that Jason demonstrated cognitive dysfunction "consistent with a developmental disorder." Ex. 152 ¶108 [Dr. Watson]. Ex. 155 ¶10–11 [Dr. Woods]. Jason's impairments are neurodevelopmental, which means they are cognitive deficits that likely originated during his mother's pregnancy. Ex. 155 ¶¶11, 41 [Dr. Woods]. For example, Jason's brain impairments—childhood behavioral and academic failures, dysmorphology (bone development), and other signs of midline development disruption are consistent with a

[15] In addition, Mr. Keller's counsel attended conferences in 2008 providing explicit instruction on the ABA Guidelines, how to conduct an adequate mitigation investigation, and mental health issues, among other topics. Ex. 10 ¶¶12–13 [de Gruy].

Neurodevelopmental Disorder resulting from maternal alcohol consumption. Ex. 155 ¶¶11, 41 [Dr. Woods]; *see also* Ex. 155 ¶15 [Dr. Woods].

Jason's overall brain functioning is impaired. Jason's struggles from early childhood demonstrate that his brain was impaired long before he began using illegal drugs. Ex. 155 ¶43 [Dr. Woods]. Jason's deficits are evident in a number of areas that would have affected his functioning from early in his life. For example, neuropsychological findings "support the presence of deficits in learning generally" and indicate "a non-verbal learning disability, which would affect his capacity for social cognition." Ex. 152 ¶111 [Dr. Watson]; Ex. 155 ¶¶ 13, 42–43, 57 [Dr. Woods]. Counsel could have presented this evidence to jurors, along with evidence of Jason's struggles to learn and keep up from the time he was a child. He was held back in the first grade. Ex. 18 ¶29 [Jeraldine]; Ex. 88 [School Transcript]. Teachers noted his academic struggles, which are reflected in his school transcript. See Ex. 26 ¶4–5 [Nancy Hunter]; Ex. 88 [School Transcript]. Jason's mother described him as having, "an inability to comprehend," Ex. 18 ¶33 [Jeraldine], and his aunt described that Jason would get so frustrated while trying to do his homework that he would eventually just give up, Ex. 37 ¶33 [Delores]. This evidence would have helped jurors understand the impact of Jason's FSIQ of 85, meaning that he was "on the cusp of the Mildly Impaired range" of intellectual disability, and that about 85% of people have intellectual functioning that is superior to Jason's. Ex. 152 at 27 [Dr. Watson]; Ex. 155 ¶¶ 40, 45, 57–58 [Dr. Woods].

In addition, Jason's "brain deficits and dysfunction further undermine his ability to utilize the IQ potential he has. This is confirmed in neuropsychological testing." Ex. 155 ¶40 [Dr. Woods]. The primary neuropsychological summary measure done on Jason also placed his performance in the "Mildly Impaired range." Ex. 152 ¶114 [Dr. Watson]; Ex. 155 ¶34 [Dr.

Woods]. Jason's testing showed that he "had difficulty attending to [] information," "may have difficulty understanding and following new instructions," and "[i]n situations where there are high demands on his concentration, he may have more problems functioning and have difficulty thinking things through before acting." Ex. 152 ¶116 [Dr. Watson]; Ex. 155 ¶¶35–39 [Dr. Woods]. Results of testing also showed Jason "can be easily over-whelmed by too much verbal information being presented at one time and he is slower in processing auditory information." Ex. 152 ¶117 [Dr. Watson]. Jason also demonstrated signs of "lateralized dysfunction of the right hemisphere." Ex. 152 ¶118 [Dr. Watson]. Jason's limitations in executive functioning made "clear that he has difficulty with mental flexibility, particularly under time pressure, and in novel circumstances," and that he has "difficulty shifting from one set to another rapidly when confronted with a novel circumstance," and "difficulties in integrating multiple components of an interaction, including identifying emotion through facial expression and body language, and understanding the changes in meaning that can be discerned through voice tonality." Ex. 152 ¶119 [Dr. Watson]; Ex. 155 ¶¶37–39 [Dr. Woods]. The impairments demonstrated by Jason on his neuropsychological testing were particularly significant because they affected his executive functioning, including his "ability to problem solve, learn from past mistakes, inhibit responses, shift attention, multitask, and generate information." Ex. 155 ¶37 [Dr. Woods].

Jurors also did not hear that Jason was diagnosed at an early age with Attention Deficit and Hyperactivity Disorder (ADHD),[16] a finding consistent with his neuropsychological testing,

[16] Eventually, doctors prescribed a chemical treatment using Ritalin. Some family members and friends observed that the Ritalin seemed to help control Jason's hyperactivity. Ex. 6 ¶30 [Jerry Sr.]; Ex. 18 ¶31 [Jeraldine]; Ex. 17 ¶26 [Eddie]; Ex. 19 ¶7 [Christina]; Ex. 27 ¶16 [Lydia]; Ex. 41 ¶7 [Jerome]; Ex. 21 ¶10 [Pearl]; Ex. 40 ¶4 [Chris]. However, doctors kept increasing Jason's dosages of the chemical in an attempt to find a dose that would address his symptoms, Ex. 18 ¶32 [Jeraldine], and other members of the family were uncertain that it actually improved Jason's behavior, *see* Ex. 6 ¶30 [Jerry Sr.]. The fact that doctors kept increasing Jason's dose of Ritalin

Ex. 152 ¶120 [Dr. Watson]; Ex. 155 ¶29 [Dr. Woods]. Many of those close to Jason noticed Jason's difficulty focusing and sitting still in school. *See, e.g.*, Ex. 18 ¶25 [Jeraldine]; *see also* Ex. 31 ¶24 [Richard Sr.]; Ex. 5 ¶5 [Jerry Jr.]; Ex. 6 ¶30 [Jerry Sr.]; Ex. 18 ¶30 [Jeraldine]; Ex. 17 ¶26 [Eddie]; Ex. 19 ¶3 [Christina]; Ex. 20 ¶16 [Charles]; Ex. 37 ¶32 [Delores]; Ex. 41 ¶7 [Jerome]; Ex. 27 ¶11 [Lydia]; Ex. 36 ¶4 [David]; Ex. 38 ¶3 [John Wayne]; Ex. 40 ¶4 [Chris]. Had counsel performed a reasonable investigation, jurors would have heard about these symptoms, and that ADHD is associated with significant deficits in major life functions, and symptoms "produce an adverse impact on the ability of adults to function satisfactorily in the vast majority of major life activities important to adult adjustment." Ex. 152 ¶109 [Dr. Watson] (internal quotations and citation omitted).

Jurors never heard the significant evidence regarding Jason's cognitive impairments, and the symptoms which also ran throughout his family. Ex. 155 ¶¶30–33 [Dr. Woods]. A multi-generational history would have demonstrated the severity of these impairments, and that forces beyond his control altered Jason's behavior and development. *See, e.g.*, App. G, Corina U. Greven et al., *More Than Just IQ School Achievement Is Predicted by Self-Perceived Abilities—But for Genetic Rather Than Environmental Reasons* 20(6) PSYCHOL. SCI. 753, 759 (Jun 2009) (hereinafter "Greven et al.") (identifying substantial genetic overlap among IQ, self-perceived abilities, and achievement, indicating a common set of genes affect all three in children).

A proper investigation of records and interviews with family members and friends also would have demonstrated a family pattern showing evidence of the types of impairments Jason suffered from. Ex. 155 ¶¶16–23, 26, 29, 30–33 [Dr. Woods]. For example, multiple members of Jason's family have had academic problems. Ex. 92 [Christina School Records]; Ex. 90 [Jerry Sr.

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indicates that he continued to maintain a level of symptomatology even after he was prescribed Ritalin.

School Records]; Ex. 91 [Jerry Jr. School Records]; Ex. 93 [Doris School Records]; Ex. 18 ¶33 [Jeraldine]; Ex. 37 ¶10 [Delores]; Ex. 19 ¶8 [Christina]. Many were forced to repeat one or more grades, failed numerous classes, and did not complete high school, or even junior high school. *See* Ex. 92 [Christina School Records]; Ex. 90 [Jerry Sr. School Records]; Ex. 91 [Jerry Jr. School Records]; Ex. 93 [Doris School Records]; Ex. 18 ¶8 [Jeraldine] (Jason's mother quit school three weeks into the seventh grade); Ex. 37 ¶10 [Delores]; Ex. 35 ¶25 [Cassie]. Jason's mother described her own difficulty to "comprehend," Ex. 18 ¶33 [Jeraldine], and his younger sister, Christina, had trouble "understand[ing] things," Ex. 19 ¶8 [Christina]. One of Jason's maternal cousins, David Walston, noted "[s]everal other kids in our family have had a hyperactive condition and had to take medication to control it." Ex. 36 ¶5 [David]. Jason's mother, Jeraldine, was also described as "kind of hyper, too—always moving around and having to be doing something." Ex. 17 ¶21 [Eddie]. *See also* Ex. 19 ¶¶7, 8 [Christina]; Ex. 17 ¶26 [Eddie].

A reasonable investigation also would have revealed evidence that Jason suffered from bouts of depression. Medical records show that physicians from the Mississippi Department of Corrections prescribed various anti-depressants for Jason, including amitryptiline (Elavil), trazodone, quetiapine (Seroquel)[17], carbamazepine, and mirtazapine. Ex. 104 at 10, 11, 14, 44, 45, 54, 61, 62, 71 [Records]. Records from the Mississippi Department of Corrections note that Jason had a "history of depression," and had been taking Elavil daily. Ex. 104 at 14–16 [Records]; *see also* Ex. 104 at 60 [Records] (indicating Jason showed "signs of depression" and has a "psychiatric history"). Reports of friends and family members who observed Jason at

[17] Quetiapine has been noted as "effective in reducing psychiatric symptoms" of bipolar disorder. *See* United States National Library of Medicine, *Quetiapine*, MEDLINEPLUS, http://www.nlm.nih.gov/medlineplus/druginfo/meds/a698019.html#why (last accessed June 4, 2015).

various points in his life, particularly after his release from prison following Hurricane Katrina, also described behaviors characteristic of someone suffering from depression. *See, e.g.*, Ex. 30 ¶¶13–14, 16–17 [Jeff] ("He stopped joking around or messing about with you. He just got very quiet and wasn't outgoing at all."); Ex. 6 ¶34 [Jerry Sr.] ("He was more depressed and quiet, and he became more irritable"); Ex. 4 ¶25g [Edna] ("When he did come around, he was withdrawn. He wouldn't talk or joke as much as he used to."); Ex. 17 ¶42 [Eddie] ("He used to be kind of a jokester, but he stopped and seemed unhappy and sad."); Ex. 8 ¶39 [Nancy]. The neuropsychologist evaluating Jason post-trial found Jason showed signs of "an affective disorder, specifically depression, but alternative disorders should not be ruled out." Ex. 152 at 28 [Dr. Watson]. Investigation also would have uncovered reports of similar evidence of depression in other immediate family members. *See, e.g.*, Ex. 4 ¶¶25c, 25e–f [Edna]; Ex. 21 ¶18 [Pearl]; Ex. 1 ¶28 [Pam]; *see also* Ex. 137 at 5, 63, 145, 370, 805 [Records]; Ex. 138 at 396, 407, 420 [Records]; Ex. 123 [Westall Protection Order]. These reports are important because depression disorders often have hereditary components. *See, e.g.*, DSM IV-TR at 373 ("Major Depressive Disorder is 1.5–3 times more common among first-degree biological relatives of persons with this disorder than among the general population."); App. J, Tuula Kieseppa, M.D., et al., *High Concordance of Bipolar I Disorder in a Nationwide Sample of Twins*, 161 AM J. PSYCHIATRY 10, 1820 (Oct. 2004).

Jason has both personal and family histories consistent with mood disorders, such as bipolar disorder and depressive disorder. Ex. 155 ¶26 [Dr. Woods]. Family history shows intergenerational symptoms of "depression, mood lability, substance abuse, impaired social relations, suicidality, [and] impulsivity." Ex. 155 ¶26 [Dr. Woods]. The chemical dependency, violence, and sexual inappropriateness demonstrated throughout Jason's family are consistent

with familial mood disorders—both depression and bipolar disorder. Ex. 155 ¶12 [Dr. Woods]. Substance abuse and bipolar disorder are frequently comorbid; appearing together, they "create greater problems in a person's life than one of the disorders alone." Ex. 155 ¶20 [Dr. Woods]. Jason also has a history of mood and anxiety symptoms, which, combined with his drug use beginning early in life, is consistent with bipolar disorder. Ex. 155 ¶23 [Dr. Woods]. Jason also displayed difficulty learning, poor academic functioning, impaired social relationships, distractibility, and irritability. Ex. 155 ¶28 [Dr. Woods]. Although Jason was diagnosed with ADHD as a child, many of his symptoms could be evidence of a mood disorder.[18] Ex. 155 ¶29 [Dr. Woods].

Had trial counsel performed a reasonable investigation, jurors also would have heard about the severe and traumatic third-degree burn injuries Jason sustained as a child when he set himself on fire, and the subsequent painful medical treatments he had to endure. These events had a sustained impact, altering his emotional, cognitive, and biological functioning. Since the injury, and into adulthood, Mr. Keller has exhibited evidence of significant trauma, including sustained distress, distressing memories and dreams, dissociative reactions, and psychological or physiological distress at cues associated with the event. He avoid stimuli associated with the event, as well as external reminders. These experiences are consistent with the criteria for Post traumatic Stress Disorder, chronic, severe. Ex. 155 ¶46 [Dr. Woods]. Not only did this change Jason's response to stressful situations, but it also made him more vulnerable to drug use and addiction. *See, e.g.*, Ex. 42 ¶7 [Dr. Dimick]. *See also* App. D, Carla Kmett Danielson, Ph.D., et al., *Trauma-Related Risk Factors for Substance Abuse Among Male Versus Female Young*

[18] Evaluating Neuropsychiatrist, Dr. George Woods, opined that his preliminary review indicates that Jason's case warrants further medical examination before making a final conclusion. Ex. 155 ¶59 [Dr. Woods].

Adults, 34(4) ADDICT BEHAV. 395, 398 (Apr 2009) (hereinafter "Danielson et al.") (finding that specific traumatic events increase the risk of substance abuse disorder in males). Trauma disorders are associated with increased rates of other mental disorders, including Major Depressive Disorder, Substance-Related Disorders, Generalized Anxiety Disorder, and Bipolar Disorder. *See* DSM-IV-TR 465.

As described in detail *supra*, Jason was in a serious accident when he was about five or six years old, and set himself on fire while he was unsupervised and playing with gasoline and a lighter. Jason suffered third-degree burns on his lower leg. The burns were so severe that Jason was required to submit to months of painful medical treatments, including numerous skin grafts, to replace the skin that was burned away and to keep Jason free from dangerous infections. *See* Ex. 27 ¶12 [Lydia]; Ex. 18 ¶27 [Jeraldine]; Ex. 42 ¶5 [Dr. Dimick]. For a time, the burns and treatment made Jason unable to walk. After the accident, Jason avoided lighters and matches and "didn't want to be anywhere near a fire." Ex. 17 ¶32 [Eddie]. He has had recurring nightmares related to fire and being burned since he was a small child. The smell of the burn cream that was used on his leg during treatment still creates a strong emotional reaction for Jason, another indication of the long-lasting effect of the injury and sustained trauma he suffers from as a result of the accident, injury, and treatments.[19]

Jason received no therapy or counseling as a child to deal with the trauma he was undergoing. "This is significant, because such traumas can often have lasting effects on a child's psyche." Ex. 42 ¶7 [Dr. Dimick]; Ex. 155 ¶¶50–51 [Dr. Woods] (childhood burns were among

[19] Notably, Dr. Dimick assumed Jason would have been taken to a medical facility for the daily dressing changes to his burn. Ex. 42 ¶5 [Dr. Dimick]. He noted such facilities sometimes give narcotics to take the edge off the exceptional pain. Ex. 42 ¶5 [Dr. Dimick]. Jason's daily wound cleanings and dressing changes, however, were done at home by his mother. Ex. 18 ¶27 [Jeraldine].

the first types of trauma identified as leading to traumatic stress reactions in adults). These descriptions of Jason's reaction to the medical trauma he experienced as a young child include recurrent distressing dreams, and reaction to cues that symbolize an aspect of the traumatic event. *See* DSM-IV-TR 464, 468; *see also* Ex. 152 ¶120 [Dr. Watson].

Had counsel completed a reasonable investigation, jurors would have heard that a complex picture of impairments limited Jason's functioning.[20] *See* Ex. 152 ¶120 [Dr. Watson]; Ex. 155 ¶¶10–14, 52–58 [Dr. Woods]. These impairments, consistent with a developmental disorder, Ex. 152 ¶108 [Dr. Watson], were present from the time of Jason's childhood, and not only affected Jason's functioning throughout his life, they increased his vulnerability to issues such as drug addiction, Ex. 152 ¶110 [Dr. Watson] ("ADHD is also associated with co-morbid conditions[,]" including substance abuse and depressive disorder.) (internal citations omitted); Ex. 155 ¶¶19–20, 23 [Dr. Woods]. *See also, e.g.*, App. E, Deborah Deas, MD, M.P.H. et al., *Comorbid Psychiatric Factors Contributing to Adolescent Alcohol and Other Drug Use*, 26:2 ALCOHOL, RESEARCH & HEALTH 116 (2002) (hereinafter "Deas et al.") (correlating attention deficient hyperactivity disorder (ADHD) and low cognitive functioning with increased substance use); *id.* at 118; App. A, Ron B. Aviram, PhD et al., *Psychotherapy of Adults with Comorbid Attention-Deficit/Hyperactivity Disorder and Psychoactive Substance Use Disorder*, 10:3 J.

[20] Numerous other mental health diagnoses, such as major depressive disorder and anxiety disorder, *see* DSM IV-TR at 375–76, 388–92, and forms of organic brain dysfunction, include some of the symptoms Jason suffered. *See, e.g.*, App. E, Deas et al. at 117–18 (correlating depression and anxiety with higher substance abuse rates, especially in teens and young adults displaying symptoms of suicidal thoughts and ideations). These types of impairments, particularly when combined with substance abuse, can make individuals act more rashly and impulsively. *See* App. A, Aviram et al. at 180 ("[T]he combination of psychoactive substance abuse disorder and ADHD likely exacerbates impulsivity."). *See also* App. F, Harriet de Wit, *Impulsivity as a determinant and consequence of drug use: a review of underlying processes*, 14(1) ADDICT. BIOL. 22, 31 (Jan 2009) ("Impulsive behavior is closely linked to drug use, both as a determinant and as a consequence.").

PSYCHOTHERAPY PRACT RES. 179 (2001) (hereinafter "Aviram et al.") (noting strong correlation between ADHD and increased risk for substance abuse); *id.* at 179, 180. Substance use "is often a component of the presentation of symptoms of mental disorders. . . . Substance-Related Disorders are also commonly comorbid with . . . many mental disorders." DSM-IV-TR 204.

Jason's impairments, present from childhood, combined with his family history and background to make him particularly vulnerable to developing an addiction to drugs. A reasonable investigation by trial counsel would have revealed that Jason was born into a family with widespread and longstanding struggles with substance abuse. A family history of drug abuse increases the risk that other family members will abuse substances. App. C, Laura Jean Bierut, et al., *Familial Transmission of Substance Dependence: Alcohol, Marijuana, Cocaine, and Habitual Smoking*, 55 ARCH. GEN. PSYCHIATRY 982, 988 (1998) (hereafter "Bierut") ("[A]lcohol and substance dependence frequently . . . aggregate within families."); *see also id.* at 987. This is due, at least in part, to genetic factors. App. L, Soo Hyun Rhee, PhD, et al., *Genetic and Environmental Influences on Substance Initiation, Use, and Problem Use in Adolescents*, 60 ARCH. GEN. PSYCHIATRY 1256, 1256 (2003) (hereafter "Rhee"); *see also* App. I, Kenneth Kendler, MD, et al., *Illicit Psychoactive Substance Use, Heavy Use, Abuse, and Dependence in a US Population-Based Sample of Male Twins*, 57 ARCH. GEN. PSYCHIATRY 261, 261 (2000) (hereafter "Kendler"); App. B, David Ball, *Addiction science and its genetics*, 103 ADDICTION 360, 365 (2007); App. K, Kathleen R. Merikangas, PhD, et al., *Familial Transmission of Substance Use Disorders*, 55 ARCH. GEN. PSYCHIATRY 973, 977 (1998) (hereinafter "Merikangas et al.") (finding that family history of drug abuse is one of the highest risk factors for subsequent development of drug abuse); Ex. 155 ¶¶21–23, 29 [Dr. Woods].

Had trial counsel made a reasonable investigation of Jason's history, jurors would have heard evidence that substance abuse plagued Jason's paternal family for generations. They would have heard about Jason's father's heavy drinking and problems that resulted from that drinking, including the death of Jerry Sr.'s army friend. They would have heard that at least three of Jason's four paternal half-siblings have struggled with addiction to drugs and alcohol. Ex. 3 ¶¶9–10 [Doris]; Ex. 23 ¶4–8, 10, 27 [Carla]; Ex. 8 ¶30 [Nancy]; Ex. 35 ¶21 [Cassie]; Ex. 30 ¶34 [Jeff]; Ex. 31 ¶28 [Richard]; Ex. 4 ¶18 [Edna]; Ex. 5 ¶10 [Jerry Jr.]; Ex. 22 ¶¶12, 19–23 [Thomas]; Ex. 9 ¶¶7–8, 12–14, 17, 29 [Rebia]; Ex. 4 ¶¶17, 19, 25a [Edna]; Ex. 7 ¶9 [Trisha]; Ex. 29 ¶8c [Harley]. They would have heard that multiple nieces, nephews, and cousins of Jason also have a history of abuse of alcohol and illegal drugs. Ex. 23 ¶¶11, 24 [Carla]; Ex. 31 ¶34 [Richard]; Ex. 35 ¶21 [Cassie]; Ex. 9 ¶30, [Rebia]; Ex. 30 ¶¶27–31 [Jeff]. A reasonable investigation also would have shown that addiction to alcohol and other drugs also has been prevalent in Jason's maternal family. His maternal aunt, Ex. 37 ¶ 17 [Delores]; niece and nephews, Ex. 1 ¶¶32–36, 38 [Pam]; Ex. 2 ¶¶4, 9 [Russell Jr.]; Ex. 35 ¶¶14–23[Cassie]; and multiple cousins, Ex. 36 ¶8 [David]; Ex. 15 ¶¶16, 21 [Harvey]; Ex. 26 ¶6 [June], suffered from debilitating drug addiction. In addition, alcohol abuse was common among the older generations of Jason's maternal relatives. *See* Ex. 15 ¶¶ 6, 16, 17, 20, 21, 30 [Harvey], Ex. 37 ¶¶4, 5, 7 [Delores].

In addition to providing extensive evidence of a genetic or hereditary component to Jason's struggles with drug addiction, a reasonable investigation also would have allowed jurors to learn that Jason grew up in an environment that exposed him to substance abuse, corresponding criminal behavior, and other erratic conduct by those who raised and influenced him. From an early age, Jason witnessed people drinking and smoking marijuana. Ex. 5 ¶10

[Jerry Jr.] ("I knew that Jason tried drugs off and on as he was growing up. I did too, and it was pretty much the same for everyone I knew. I am sure he saw my friends and my sisters' friends drinking or using some kinds of drugs when he was growing up. He saw our parents and their friends drinking."); *see also* Ex. 4 ¶25a [Edna] ("Smoking weed was never a big deal in my family. Everyone did it—my mom, dad, brothers, sisters, cousins—really just everyone."); Ex. 18 ¶39 [Jeraldine] ("People in the family used marijuana, but that isn't any different than cigarettes, really."). Even as a very small child, Jason had learned to emulate the behaviors he saw around him. An older cousin recalled Jason at two or three years old, "walk[ing] around with cigarettes in his mouth and drinking sips of beer." Ex. 39 ¶16 [William]. A relative recalled, "[Jerry Sr. would] frequently go out and get so drunk that he'd have to have little Jason sit on his lap to drive home—this was when Jason was a young kid." Ex. 37 ¶35 [Delores]. Further, Jason's family members, particularly his sister Doris, were known to steal, even from family members, and modeled this behavior for him from a young age. *See* Ex. 8 ¶29 [Nancy] ("Shirley and Doris both had what I call 'sticky fingers.'"); Ex. 22 ¶¶25–27 [Thomas] ("They [the Bankesters] would just keep doing whatever [drugs] they could get their hands on, and when they couldn't get their hands on stuff anymore, they'd start stealing to get it.").

Most of Jason's life was spent in poor neighborhoods on the Gulf Coast, surrounded by poverty and drugs. Friends noted the prevalence of street drugs. Ex. 33 ¶4 [Chad] ("[Crack] was easy to get then—crack dealers were just hanging out on the streets. You just went to Division and Main to get what you wanted.") *See also* Ex. 31 ¶34 [Richard] ("At the same time, he was around a hell of a crowd at Wood Ridge trailer park."). Some drugs, such as marijuana, were used almost ubiquitously and Jason would have been widely exposed to them as he was growing up. *See, e.g.*, Ex. 4 ¶25a [Edna]; Ex. 18 ¶39 [Jeraldine]; Ex. 5 ¶10 [Jerry Jr.]. By the time Jason

was around 11 years old, members of his peer and friend groups were already regularly using drugs, starting with marijuana. *See, e.g.,* Ex. 41 ¶¶11–13 [Jerome]; Ex. 29 ¶¶7, 8c [Harley]; Ex. 40 ¶7 [Chris]. It took little time for Jason to progress to other more powerful and addictive drugs, ultimately leading to the abuse of substances such as LSD and heroin at a young age. *See* Ex. 33 ¶5 [Chad]; Ex. 4 ¶25d [Edna].

The "family environment substantially influences the risk for use of marijuana or any illicit substance," because this environment "is important at the stage of substance initiation." App. I, Kendler, at 267–68. A combination of factors in a family's history—including genetics, modeling, parenting, conflict, and degree of bonding—affects children's drug use:

> Families affect children's drug use behaviors in a number of ways. Beyond the genetic transmission of a propensity to alcoholism in males, family modeling of drug using behavior and parental attitudes toward children's drug use are family influences related specifically to the risk of alcohol and other drug abuse. Poor parenting practices, high levels of conflict in the family, and a low degree of bonding between children and parents appear to increase risk for adolescent problem behaviors generally, including the abuse of alcohol and other drugs.

App. H, J. David Hawkins, et al., *Risk and Protective Factors For Alcohol and Other Drug Problems in Adolescence and Early Adulthood*, 112 PSYCH. BULLETIN 64, 82 (1992). *See also* Ex. 155 ¶52 [Dr. Woods]

Trial counsel unreasonably failed to conduct a reasonable investigation into the State's aggravating evidence, as well as evidence of Jason's history, background, and character including a multi-generational social history, and failed to present readily-available mitigating evidence to jurors, in violation of *Strickland*, 466 U.S. 668 (1984), and its progeny. *See, e.g.*, *Williams v. Taylor*, 529 U.S. 362 (2000); *Wiggins v. Smith*, 539 U.S. 510 (2003); *Rompilla v. Beard*, 545 U.S. 374 (2005); *Sears v. Upton*, 130 S. Ct. 3259 (2010) (per curiam); *Porter v.*

McCollum, 130 S. Ct. 447 (2009) (per curiam). This failure undermines confidence in jurors' sentencing decisions. *See Strickland*, 466 U.S. at 694.

Had trial counsel conducted the type of investigation required by prevailing standards, including speaking with family members, friends, and others familiar with Jason's history and background and collecting relevant records and documentary evidence, they would have been able to present jurors with significant evidence rebutting proffered aggravating evidence and mitigating in favor of a sentence less than death, by providing jurors with a more complete and accurate understanding of Jason's background and behavior. Counsel was on notice that Jason struggled with drug addiction throughout his life, had suffered trauma in early childhood, and that Jason had a hyperactivity disorder that required chemical treatment and had especially low intellectual functioning. *See supra*. Despite being aware of these and other red flags, counsel failed to make a reasonable investigation of Jason's history and background, or to investigate his multi-generational family history. This investigation was critical to understanding the psychological, psychiatric, biological, and environmental risk factors that shaped Jason's development. Counsel's failure to investigate and explain these risk factors prevented jurors from accurately understanding Jason's history and background, and its impact on his behavior, his crime, and his moral culpability. *See, e.g.*, Ex. 155 ¶¶26–28, 52, 54, 57, 58 [Dr. Woods].

Counsel's failure to investigate and present this evidence was prejudicial, because there is a "belief long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse." *Boyde v. California*, 494 U.S. 370, 382 (1990). Prejudice is compounded because Jason's brain dysfunction and drug addiction were at the root of each of the prior convictions the State entered as aggravating evidence against him, which counsel failed

to rebut or contextualize.[21] The evidence counsel failed to investigate and present would have provided jurors with the context of Mr. Keller's behavior leading to his prior convictions and his capital charge within his broader life story and family history, and the many influences and factors involved in that story. Had counsel properly investigated Jason's history and background, they would have discovered this type of information that would have influenced jurors' determinations about his culpability.

Investigation, including testing and review by experts and review of Jason's history and family background, would have revealed that Jason's functioning and behavior were determined by factors present since Jason's childhood and before. A comprehensive neuropsychological battery showed findings "most consistent with a developmental disorder." Ex. 152 ¶108 [Dr. Watson]. *See also* Ex. 155 ¶¶11, 41 [Dr. Woods]; Ex. 155 ¶44 [Dr. Woods] (abnormal brain function was likely affected by early exposure to significant trauma). This brain dysfunction affected Jason's behavior in a number of ways. Jason likely suffers from "multiple, interactive neuropsychiatric disorders," including Neurodevelopmental Disorder Associated with Fetal Alcohol. Ex. 155 ¶¶14–15 [Dr. Woods]. Jason showed "impaired executive functioning," which "diminishes Mr. Keller's his [sic] ability to effectively weigh circumstances, deliberate, understand context, and get the gestalt of a situation." Ex. 155 ¶35 [Dr. Woods]. As a post-trial expert noted, Mr. Keller's "overall brain functioning is impaired," and neuropsychological tests showed him as mildly to moderately impaired in four of the most sensitive indicators of brain dysfunction. Ex. 155 ¶34 [Dr. Woods]. "Studies show that, if even two of these indicators are positive, there is a high probability of brain dysfunction. It should be noted that 'impairment' on

[21] Though information regarding Jason's prior crimes was ultimately improperly admitted at the trial, *see supra*, trial counsel had a responsibility to perform a reasonable investigation of these prior convictions before the trial. *See Rompilla*, 545 U.S. at 389–90.

these measures, even 'mild impairment,' indicates substantial dysfunction in the brain." Ex. 155 ¶34 [Woods] (internal citation omitted).

Testing shows that Jason functions at "the Low Average range of intellectual abilities with a FSIQ of 85—at the 16th percentile rank and on the cusp of the Mildly Impaired range." Ex. 152 ¶114 [Dr. Watson]; Ex. 155 ¶40 [Dr. Woods]. This means "about four in every five person's intellectual functioning is superior to Mr. Keller's functioning." Ex. 155 ¶40 [Dr. Woods]. Because counsel did not complete the necessary investigation and consult with an expert to obtain a mitigation study, jurors did not hear that Jason's limitations meant that "[h]e generally has had difficulty acquiring information over time including understanding abstract elements of language. He also has somewhat limited capacity for 'on the spot' problem solving." Ex. 152 ¶114 [Dr. Watson]; Ex. 155 ¶¶37–39 [Dr. Woods]. Test findings also showed that these deficits "are long-standing in nature and were present during his childhood." Ex. 152 ¶75 [Dr. Watson]; Ex. 155 ¶¶11, 41, 43 [Dr. Woods]. Jason's brain deficits and dysfunction further undermined his ability to utilize the IQ potential he does have. Ex. 155 ¶40 [Dr. Woods].

Jurors did not hear about Jason's longstanding cognitive deficits, including impairment in attention—"[i]n situations where there are high demands on his concentration, he may have more problems functioning and have difficulty thinking things through before acting;" impairment in processing—"he can be easily over-whelmed by too much verbal information being presented at one time;" lateralized dysfunction of the right hemisphere; and impairment in executive functioning—"difficulty with mental flexibility . . . in novel circumstances," "difficulty shifting from one set to another when confronted with a novel circumstance," and "difficulties in integrating multiple components of an interaction, including identifying emotion through facial

expression and body language, and understanding the changes in meaning that can be discerned through voice tonality." Ex. 152 ¶119 [Dr. Watson]; Ex. 155 ¶¶37–39 [Dr. Woods].

Jason's executive functioning impairments would have had a significant effect on his basic functioning, and would have diminished his ability to effectively weigh circumstances, deliberate, or understand context. Ex. 155 ¶35 [Dr. Woods]. Evidence indicates impairment of the prefrontal region of Jason's brain critical for understanding emotion, which would have led to significant emotional dysfunction, including "frustration tolerance, lability, anxiety, and blunted affect," which would have imposed significant limitations on his real-world functionality. Ex. 155 ¶¶36–37 [Dr. Woods]. Dr. Watson's testing showed problems with task-switching behaviors. Ex. 155 ¶38 [Dr. Woods]. This means that his ability to think clearly or act rationally in fast-moving or rapidly changing circumstances is significantly impaired. Ex. 155 ¶38 [Dr. Woods]. When Jason found himself in new, novel, and stressful situations, he would be unable to think through his actions, because of his brain dysfunction. Ex. 155 ¶¶35–39 [Dr. Woods]; *see also* Ex. 155 ¶45 [Dr. Woods] (noting that these cognitive deficiencies would have been part of the cumulative deficiencies impeding Jason at the time of the shooting). Jason's brain dysfunction existed long before the time when he began to use illicit drugs, Ex. 155 ¶43, 57 [Dr. Woods], but were likely exacerbated by his use of drugs around the time of the shooting. Ex. 155 ¶57 [Dr. Woods].

Jurors also were left without an explanation of the factors that made Jason particularly vulnerable to developing a drug addiction—his pre-existing brain dysfunction and the biological significance of multi-generational substance abuse on Jason as a child, as well as the significance of being raised in an environment including widespread substance abuse. Had counsel pursued a minimally reasonable mitigation investigation, this information would have been readily

apparent, warranting further investigation into this evidence, consultation with an expert, and eventual presentation to the jury of this evidence in an appropriate form.

Instead, counsel failed to obtain or even seek an expert who was qualified to explain the significance of Jason's history and impairments to jurors. An expert could have explained that a confluence of risk factors placed Jason at an extraordinary risk of developing a substance abuse disorder, Ex. 155 ¶52 [Dr. Woods], and that once he developed this addiction, it had a profound influence on his behavior, Ex. 155 ¶¶55–57 [Dr. Woods]. A variety of emotional and cognitive disorders affected Jason, and "[e]ach of these disorders, his mood disorder, cognitive deficits, chemical dependency, and traumatic stress were at play at the time of his offense." Ex. 155 ¶54 [Dr. Woods]. The overall effect of these disorders would have been interactive and cumulative, Ex. 155 ¶45 [Dr. Woods], and would "call into question his ability to effectively conform his behavior to the law at the time of the offense," Ex. 155 ¶58 [Dr. Woods]. As a result of trial counsel's failure to reasonably investigate and present information about Jason's history, background, and character, jurors heard no evidence regarding the biological and environmental risk factors that affected Jason's development, his decision-making, and his moral culpability.

The evidence available through a reasonable investigation would have both rebutted the prosecutor's case in aggravation and mitigated Jason's culpability for the capital charge. One of the key arguments the prosecution made to jurors to convince them to sentence Jason to death was Jason's criminal history: "[S]ix felony convictions and is that a man that deserves to live the rest of his life in prison? That's a man that deserves the ultimate sentence of death." Tr. at 667–68. Had trial counsel adequately investigated Jason's history and background, counsel could have contextualized Jason's prior convictions, explaining the factors that limited his culpability, and caused him to commit the crimes to support his drug addiction. Each of the prior convictions

on which the prosecution relied in encouraging jurors to sentence Jason to death was the result of drug-seeking behavior. The earliest of Jason's convictions, a burglary of a video store, was done to get money to purchase crack. Ex. 32 ¶8 [Cherie]. Similarly, the grand larceny of a truck was committed to pawn the stereo for crack. Ex. 128 [Interview with Cherie Forehand]. Likewise, jurors would have learned that there was contemporaneous evidence that Jason burglarized the dwellings in his neighborhood on Early Wynn Drive because he needed money for crack. Ex. 130 [Inv. Report re Burglary of a Dwelling]; Ex. 154 at 9–12 [2001 Plea Hearing]. Similar evidence existed Jason's armed robbery charge also was directly related to Jason's crack use and his attempts to get more of the drug to quell the need caused by his addiction. *See* Ex. 64 at 5–6 [HCSD Investigation Report (Armed Robbery)]; Ex. 65 [HCSD Narrative Report]; Ex. 66 [HCSD JLK Personal History Form and HCSD Affidavit].

There was available evidence relating Jason's brain dysfunction and drug addiction to each of the violent and nonviolent convictions, as well as to other nonviolent criminal behavior like taking his stepfather's truck, which was introduced as aggravating evidence by the State. This evidence was necessary for jurors to have a fair and accurate understanding of the significance of the State's proffered evidence and argument, and for jurors to properly assess Jason's culpability and weigh the defense's mitigating evidence. The unreasonable omission of this evidence deprived jurors of evidence that Jason's criminal behavior was inextricably linked with his cognitive dysfunction and his struggles with drug addiction. Where a defendant's history of drug abuse has been improperly withheld from jurors, the United States Supreme Court has found the omission of this kind of evidence sufficient to remand to determine "whether there is a reasonable probability that the withheld evidence would have altered at least one juror's assessment of the appropriate penalty." *Cone v. Bell*, 556 U.S. 449, 453 (2009); *id.* at 475–76

(the omitted evidence "may have persuaded the jury that [the defendant] had a far more serious drug problem than the prosecution was prepared to acknowledge, and that [the defendant's] drug use played a mitigating, though not exculpating, role in the crimes he committed. . . . [and] may well have been material to the jury's assessment of the proper punishment.").

Without the evidence that could have been developed and presented after a reasonable investigation, the prosecutor was free to tell jurors deciding whether to sentence Jason to death that Jason was simply a person who "likes to take drugs." Tr. 656. According to the prosecutor, jurors should determine to put Jason to death because "Jason killed [Ms. Hat] because he wanted to see what it felt like to kill another human being. That's the type of human that you will be considering. Not Jason on drugs, drugs didn't have anything to do with this." Tr. 667. Had trial counsel reasonably investigated and presented the extensive evidence of Jason's personal and family history of substance abuse and addiction, his cognitive impairments, and other mitigating evidence, jurors would have had a far more complete and accurate understanding of the evidence needed to make appropriate decisions about whether to impose a death sentence.

In the absence of such information, jurors were left with the impression that there was no way to understand or explain Jason's behavior. In fact, Jason's own attorney never mentioned Jason's drug addiction in argument in the penalty phase and told jurors, "I can't explain what came over him." Tr. 662. The extremely limited testimony presented during the sentencing phase incorrectly conveyed the seriousness and extent of Jason's drug use and addiction, and the brain dysfunction present since Jason's childhood. Had counsel investigated Jason's history and background, she would have been able explain to jurors the factors that affected Jason's development and mitigated his behavior on the day Ms. Nguyen was shot. Ex. 155 ¶10–58 [Dr. Woods].

If trial counsel had investigated and presented information to jurors regarding Jason's brain dysfunction and drug addiction as a function of his background, there is a reasonable probability that at least one juror would have found that the mitigating evidence outweighed the aggravating evidence, or declined to choose a death sentence. *See Strickland*, 466 U.S. at 694. The evidence that trial counsel failed to investigate and present to jurors is precisely the type of evidence the Supreme Court of the United States has held could affect jurors' decisions regarding imposition of the death penalty. *See, e.g.*, *Bell*, 556 U.S. at 453; *id.* at 475–76 (evidence "may have persuaded the jury that [the defendant] had a far more serious drug problem than the prosecution was prepared to acknowledge, and that [the defendant's] drug use played a mitigating, though not exculpating, role in the crimes he committed. . . . [and] may well have been material to the jury's assessment of the proper punishment."); *Sears v. Upton*, 561 U.S. 945, 951 (2010) (finding cognitive deficiency evidence "might well have helped the jury understand Sears, and his horrendous acts"). *See also Penry v. Lynaugh*, 492 U.S. 302, 319 (1989) ("'[E]vidence about the defendant's background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background . . . may be less culpable than defendants who have no such excuse.'"). Jason requests that this Court set aside his sentence. In the alternative, Jason requests that this Court grant leave to proceed in the trial court with further proceedings to further develop this claim.

D. Counsel Unreasonably Failed to Object to Prosecutorial Misconduct in Closing Argument in the Penalty Phase

1. Trial Counsel Failed to Object to Prosecutorial Misconduct in Closing Argument in the Penalty Phase

The prosecutor's arguments to jurors in the penalty phase, including improperly referencing evidence not admitted at trial and invoking his position as the government's attorney,

violated Mr. Keller's Eighth Amendment and Due Process rights, and violated fundamental principles of fairness. Jurors relied on the prosecutor's improper argument when making their decisions about whether Mr. Keller should be sentenced to death. Although defense counsel has an obligation to make a contemporaneous objection to erroneous or improper argument by prosecutors, *Gray v. State*, 487 So. 2d 1304, 1312 (Miss. 1986), counsel for Mr. Keller unreasonably failed to object to damaging, improper arguments made by the prosecutor. As a result of counsel's failure to make necessary objections, confidence in jurors' sentencing decisions is undermined. *Strickland v. Washington*, 466 U.S. 668, 690–91, 694 (1984).[22]

The prosecutor impermissibly invoked his position as the State's attorney in order to urge jurors to sentence Mr. Keller to death. In his rebuttal closing argument, the prosecutor told jurors, "Death penalty cases are rare, they hardly come up because the facts and evidence don't justify it in most of the other cases that we deal with" but the facts in Mr. Keller's case "warrant[] the justification of the death penalty." Tr. 666. In *Holland v. State*, 705 So. 2d 307 (Miss. 1997), this Court found, "it is improper for a district attorney, in argument to the jury, to use his position or function as a basis for convicting or more severely sentencing a defendant." *Id*. at 347. *See also Brooks v. Kemp*, 762 F.2d 1383, 1410 (11th Cir. 1985), *vacated on unrelated grounds*, 478 U.S. 1016 (1986), *cert. denied*, 483 U.S. 1010 (1987)) (prosecutor's argument to

[22] Mississippi Rule of Appellate Procedure 22(b) requires ineffective assistance of counsel claims be raised on direct appeal if "such issues are based on facts fully apparent from the record" and "appellant is represented by counsel who did not represent the appellant at trial." M.R.A.P. 22(b). Appellate counsel in this case raised trial counsel's ineffectiveness for failing to object to only one of the prosecutor's improper arguments. *See* n. 23, *infra*. This Court has held that an exception exists to this procedural bar where there are "errors affecting fundamental constitutional rights." *Rowland v. State*, 42 So. 3d 503, 507 (Miss. 2010). *See also Grayson v. State*, 118 So. 3d 118, 125 (Miss. 2013). As argued herein, the prosecutor's repeated improper arguments and counsel's failure to object or seek a mistrial violated Mr. Keller's fundamental rights under the Sixth, Eighth, and Fourteenth Amendments. This Court should grant an exception to any procedural bars on this claim, based on the failures of appellate counsel.

jury that he had only sought death in rare instances "improperly implied to the jury that the prosecutor's office had already made the careful judgment that this case, above most other murder cases, warranted the death penalty"); *United States v. Garza*, 608 F.2d 659, 663 (5th Cir. 1979) ("It is particularly improper, even pernicious, for the prosecutor to seek to invoke his personal status as the government's attorney or the sanction of the government itself as a basis for conviction of a criminal defendant."); *Hall v. United States*, 419 F.2d 582, 587 (5th Cir. 1969) (prosecutor's statement that "we try to only prosecute the guilty" was "at the least, an effort to lead the jury to believe that the whole government establishment has already determined" the defendant's guilt).

The prosecutor's representation to jurors that this was one of the rare instances in which the facts and evidence caused him to determine that the death penalty was warranted undermined jurors' discretion in determining punishment "by implying that he, or another high authority, has already made the careful decision required." *Brooks*, 762 F.2d at 1410. This type of argument is particularly prejudicial because it "unfairly plays upon the jury's susceptibility to credit the prosecutor's viewpoint." *Id*. Further, these comments came in the prosecution's rebuttal closing arguments, when Mr. Keller had no further opportunity to respond, and courts have called specific attention to the problems inherent in such arguments. *See United States v. Manning*, 23 F.3d 570, 575 (1st Cir. 1994) (noting that prosecutor's improper closing was particularly problematic because it occurred during "the last words spoken to the jury by the trial attorneys"); *United States v. Johnson*, 713 F. Supp. 2d 595, 633 (E.D. La. 2010) (noting that prosecutor's improper rebuttal argument was "among the last words the jurors heard from counsel").Trial counsel's failure to object to the prosecutor's inappropriate and prejudicial argument, despite the well-established prohibition, undermines confidence in jurors' sentencing-phase decisions.

The prosecutor's argument also called upon jurors to trust and rely upon evidence that was not presented at trial, namely the prosecutor's assessments purportedly conducted "in most of the other cases that we deal with." Tr. 666. The prosecutor's argument allowed jurors to rely on his representation without providing Mr. Keller notice of the substance of this evidence and without giving him an opportunity to object. It also allowed jurors to consider the prosecutor's representation without allowing the trial court an opportunity to rule upon its admissibility for consideration by sentencing jurors. Evidence about other cases on which the Harrison County District Attorney worked was an irrelevant and constitutionally impermissible basis on which for jurors to base their sentencing decisions.

The prosecutor also made arguments that were unsupported by the evidence adduced at trial. For example, the prosecutor told jurors that Mr. Keller killed Ms. Nguyen because "he wanted to see what it felt like to kill another human being" and because he "want[ed] to be a man, go in one of those places and be a man." Tr. 667. There was no evidence in the record that supported the prosecutor's inflammatory arguments. In fact, this Court expressly found that Mr. Keller "stopp[ed] by Hat's store for cigarettes." *Keller*, 138 So. 3d at 830.

Attorneys are afforded wide discretion in arguing their case to jurors, but "there is a limit to the latitude to be allowed to counsel in addressing a jury." *Clemons v. State*, 320 So. 2d 368, 371 (Miss. 1975) (quoting *Cavanah v. State*, 56 Miss. 299 (1879)). Prosecutors are prohibited from making arguments that are "inflammatory, highly prejudicial, or reasonably calculated to unduly influence the jury." *Sheppard v. State*, 777 So. 2d 659, 661 (Miss. 2000). In *Flowers v. State*, this Court held:

> The prosecutor may comment upon any facts introduced into evidence, and he may draw whatever deductions and inferences that seem proper to him from the facts. Counsel cannot, however, state facts which are not in evidence, and which the court does not judicially know, in aid of his evidence. Neither can he appeal to

> the prejudices of men by injecting prejudices not contained in some source of evidence.

Flowers v. State, 842 So. 2d 531, 553–54 (Miss. 2003) (internal quotation marks and citations omitted). The prosecutor's arguments in the penalty phase closing were inflammatory and prejudicial, were not based on any evidence that had been presented to the jury, and were therefore improper. Trial counsel's failure to object allowed the prosecutor to emphasize a prejudicial argument regarding Mr. Keller's motive that was unsupported by any evidence before the court.

The prosecutor further urged jurors to sentence Mr. Keller to death because he "hasn't learned his lesson" and would continue to commit crimes. Tr. 667. Mississippi law clearly prohibits prosecutors from arguing aggravating circumstances that are not specifically enumerated in the statute. Miss. Code Ann. § 99-19-101(5); *Lester v. State*, 692 So. 2d 755, 800 (Miss. 1997); *Balfour v. State*, 598 So.2d 731, 748 (Miss. 1992); *Stringer v. State*, 500 So. 2d 928, 941 (Miss. 1986). The statutory factors do not include the defendant's failure to reform or the likelihood he will commit crimes in the future. Miss. Code Ann. § 99-19-101(5).

Trial counsel failed to object to the prosecutor's argument about non-statutory aggravating evidence. Trial counsel's failure to object to the prosecutor's argument that jurors impermissibly rely on Mr. Keller's general history and propensity to engage in criminal behavior was objectively unreasonable and Mr. Keller was prejudiced as a result. Had trial counsel objected, jurors would not have been able to consider the prosecutor's improper and prejudicial argument that Mr. Keller would likely continue to engage in criminal conduct and be a future danger to society. As a result of counsel's deficient performance and jurors' resultant reliance on non-statutory aggravating evidence, confidence in jurors' sentencing decisions is undermined.

Mississippi law requires that a prior conviction used as aggravation in a capital sentencing be limited to a prior capital offense or a "felony involving the use or threat of violence to the person." Miss. Code. Ann. § 99-19-101(5)(b). Jurors were presented with Mr. Keller's purported "conviction" for armed robbery. *But see supra* Claim I.B. Jurors also were presented with evidence that Mr. Keller was previously convicted of a single count of burglary of a business in violation of Miss. Code § 97-17-33, a single count of grand larceny in violation of Miss. Code § 97-17-41, and two counts of burglary of a dwelling in violation of Miss. Code § 97-17-23. *See* Exhibit 53 [Armed Robbery Indictment]. None of these convictions involved a finding that Mr. Keller engaged in "the use or threat of violence to the person." Miss. Code Ann. § 99-19-101(5)(b). *See Hansen v. State*, 592 So. 2d 114, 145 (Miss. 1991) (finding that grand theft, burglary, and escape do not constitute crimes involving the use or threat of violence to the person within the meaning of § 99-19-101(5)(b)); *cf. Brown v. State*, 102 So. 3d 1087 (Miss. 2012) (burglary of a dwelling does not qualify as a crime of violence under habitual offender statute unless there is proof of actual violence).[23] Despite the statute's clear requirement, the prosecutor explicitly argued that jurors should rely on Mr. Keller's prior convictions for nonviolent conduct in support of their decisions to sentence him to death:

> The crimes that are in the sentence order show that Mr. Keller, as pointed out by counsel opposite, has other felony convictions. The armed robbery conviction was his fifth felony conviction, his fifth. Yesterday you handed down number six. Six felony convictions, and is that a man that deserves to live the rest of his life in prison?

[23] On direct appeal, Mr. Keller argued that his counsel were ineffective for failing to object to both the evidence and the argument presented about his prior non-violent convictions. This Court deferred consideration of these claims, noting, "As previously stated, a claim of ineffective assistance of counsel is best preserved for subsequent post-conviction-relief proceedings." *Keller*, 138 So. 3d at 864.

Tr. 667–68.[24] Defense counsel did not object to the prosecutor's argument.

The prosecutor emphasized Mr. Keller's history of nonviolent criminal convictions and his failure to reform as reasons that jurors should sentence Mr. Keller to death. Because of counsel's failure to object to the prosecutor's impermissible arguments, jurors considered Mr. Keller's nonviolent criminal history without evidence to provide rebuttal or context to Mr. Keller's conduct. Had counsel objected, jurors would not have been permitted to consider Mr. Keller's prior non-violent convictions. Counsel's failure to object undermines confidence in decisions of jurors that were based on this impermissible evidence. *Wiggins*, 539 U.S. at 537.

Trial counsel failed to object to any of the prosecutor's improper statements—invoking the prosecutor's status as a government attorney, advising the jury to rely on his assertions of the rarity of death penalty cases prosecuted by the Harrison County District Attorney, speculating about possible motivations Mr. Keller had for which there was no evidence, and invoking non-statutory aggravating evidence—in his penalty phase closing argument. In each instance, trial counsel's failure to prevent jurors from relying on improper bases for determining whether to sentence Mr. Keller to death prejudiced Mr. Keller. This improper argument was particularly injurious to Mr. Keller, as these represented the final words to the jury before it was instructed to retire and consider whether Mr. Keller should be sentenced to death. The prejudicial effect is multiplied when the errors are considered cumulatively, and made even more severe when considered in combination with mitigating evidence that should have been presented to jurors had a reasonable investigation of sentencing phase issues been completed. *See supra* Claim I.C. *See also Porter v. McCollum*, 558 U.S. 30, 41 (2009) (*per curiam*); *Hall v. United States*, 419

[24] The "sentence order" referred to was State's Exhibit 21. Ex. 53 [Armed Robbery Indictment]. The convictions in the sentence order included a single count of burglary of a business in violation of Miss. Code § 97-17-33, a single count of grand larceny in violation of Miss. Code § 97-17-41, and two counts of burglary of a dwelling in violation of Miss. Code § 97-17-23.

F.2d 582, 588 (5th Cir. 1969) ("When zeal does outrun fairness and the prosecutor makes inappropriate statements there is a multiple effect which tends to tip the scales in favor of the government."). Counsel's failure to object to the prosecution's prejudicial arguments fell below an objective standard of reasonableness, and is sufficient to undermine confidence in the outcome of the proceeding. *Strickland*, 466 U.S. at 690–91, 694. Mr. Keller requests that his sentence be vacated, due to his trial counsel's unprofessional errors in failing to object to this obviously objectionable and prejudicial argument.

2. Appellate Counsel was Ineffective for Failing to Raise Trial Counsel's Failure on Direct Appeal

Mr. Keller maintains that trial counsel was ineffective for failing to object to prosecutorial misconduct during arguments, and that any procedural bar should be excused based on the failures of appellate counsel. *See Rowland*, 42 So. 3d at 507 ("Errors affecting fundamental constitutional rights are excepted from the procedural bars of the UPCCRA."). Should this Court find that Mr. Keller's claims concerning trial counsel's failure to object to prosecutorial misconduct are barred due to appellate counsel's failure to raise these claims on direct appeal, Mr. Keller separately alleges that appellate counsel was ineffective for failing to raise the claims detailed above.

Appellate counsel failed to raise the above claims regarding the prosecutor's impermissible and prejudicial statements in closing argument, despite the fact that the errors were apparent from the face of the record and counsel on appeal had not been counsel at trial. Miss. R. App. P. 22(b). These claims were non-frivolous, and as laid out above, provided numerous examples of prosecutorial misconduct during closing argument that was objectionable and prejudicial. *See Berger v. United States*, 295 U.S. 78, 88 (1935) ("[W]hile [the prosecutor] may strike hard blows, he is not at liberty to strike foul ones.").

Counsel's failure to raise the improper closing argument on appeal was not based on a strategic decision to raise other, more meritorious claims instead. *See, e.g.*, *Keller v. State*, 138 So. 3d 817, 873 (Miss. 2014) (dismissing claim about the duplicative use of robbery as an element of the crime and an aggravator and noting that this claim runs directly counter to Mississippi and Supreme Court precedent); *id*. at 874–75 (dismissing numerous non-meritorious claims about the invalidity of the Mississippi death penalty scheme, ultimately noting that some of the arguments had previously "been rejected squarely by the Court").

In contrast, the issue of the prosecutor's improper closing argument was well-supported by case law from this Court. *See supra*; *see also Bridgeforth v. State*, 498 So. 2d 796, 801 (Miss. 1986) ("An otherwise orderly and fair trial can be instantly destroyed by such unprepared intemperate argument."); *Ellis v. State*, 254 So. 2d 902, 904 (Miss. 1971) (overturning conviction and remanding for new trial where trial court sustained objection to prosecutor's improper closing argument but refused to grant a mistrial). Had appellate counsel brought this claim on appeal, there is a reasonable likelihood the appeal would have been successful, and Mr. Keller's sentence would have been vacated on direct appeal. Accordingly, Mr. Keller requests that his sentence be vacated and the case remanded for a new sentencing.

E. Trial Counsel's Failure to Rebut or Challenge Dr. McGarry's Improper Expert Testimony Was Unreasonable and Prejudicial

1. Mr. Keller Received Ineffective Assistance of Counsel when Counsel Failed to Rebut or Challenge Dr. McGarry's Improper Expert Testimony at Trial

Dr. Paul McGarry testified for the prosecution, without objection, as an expert in the field of forensic pathology. Tr. 433. The only evidence offered in support of his particular expertise was his years conducting autopsies. Tr. 431–33.

Dr. McGarry testified that Ms. Nguyen had four gunshot wounds inflicted by the gun the State alleged was a .22-caliber handgun, and described each gunshot wound. Tr. 434–49. During

the course of his testimony, however, Dr. McGarry testified to several things that were outside the scope of his expertise in forensic pathology and thus inadmissible under Mississippi Rule of Evidence ("M.R.E.") 702. Counsel's failure to object to any of Dr. McGarry's overreaching testimony fell below prevailing professional norms and Mr. Keller was prejudiced as a result of counsel's deficient performance.

Expert testimony is only admissible under M.R.E. 702 if it is "relevant and reliable." *Ross v. State*, 954 So. 2d 968, 996 (Miss. 2007). Under the rule, testimony is admissible if it is "(1) based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods; and (3) the witness has applied the principles and methods reliably to the facts of the case." M.R.E. 702. Mississippi operates under a modified *Daubert* standard that provides that expert testimony should be admitted pursuant to Rule 702 only if it meets a two-prong inquiry of relevance and reliability. *Mississippi Transp. Com'n v. McLemore*, 863 So. 2d 31, 35 (Miss. 2013). Expert testimony is relevant if it will "assist the trier of fact in understanding or determining a fact at issue." *Id*. Expert testimony is reliable if it is "based on methods and procedures of science," not "unsupported speculation." *Id*.

Dr. McGarry's testimony on three points failed to satisfy the requirements of Rule 702. First, Dr. McGarry testified to whether Ms. Nguyen would have been knocked down or able to remain upright after the non-fatal gunshots. In regard to the gunshot that did not penetrate Ms. Nguyen's skull (referred to by Dr. McGarry as wound A), the prosecution asked, "What would the power of the gunshot be to someone as Ms. Nguyen?" Tr. 437. Dr. McGarry testified, "It would be likely to knock her down but not to kill her. . . . She would probably be stunned and knocked down but still able to move[.]" *Id*. at 438. Dr. McGarry later reiterated that Ms. Nguyen "would be knocked down by the wound on the right side of the head." *Id*. at 447.

Second, Dr. McGarry provided speculative and unreliable testimony regarding the order in which the shots were fired. The prosecutor asked Dr. McGarry if, based on what he knew, he could determine the order in which the shots were fired. McGarry first responded that he did not "know for sure," but then testified, "if I put these four wounds together with whatever information is available I think I can make a judgment as to what order at least the first and the last were. The two in the middle I would not be as sure of." Tr. 446. Dr. McGarry was later asked if the victim would "become more disabled after each gunshot." Tr. 455. In response, Dr. McGarry stated:

> I would expect so. If they are in the order that I think they are the abdomen is minimally disabling. The gunshot wound that hits her head hard but doesn't go into her brain would be like a blow to the head, like getting punched or hit by a stick or something like that. She would still be able to what she needed to do in an emergency, possibly clearly thinking. The wound that goes in the left-side and actually goes in her brain, and this is certainly a more disabling wound but not fatal. She would still be able to move. None of her major brain parts that are necessary for movement are damaged there. So she would still be able to move around. . . .The final gunshot she can't do anything after that.

Tr. 455.

Third, the prosecution elicited testimony from Dr. McGarry regarding the relative positions of Mr. Keller and Ms. Nguyen. The prosecutor asked Dr. McGarry whether "based upon the angle" he could tell whether Ms. Nguyen "would be standing or sitting or laying." Tr. 447. Dr. McGarry first stated, "I can't tell. It depends on where the shooter was." *Id.* Despite clearly stating that he could not form an opinion based merely on the autopsy and without knowing where the shooter was, he nonetheless testified to jurors what he opined to be her "more likely" position. "She could be standing up, but that's unlikely. She would be more likely crouched down or down close to the floor and being shot down on." *Id.*

Counsel failed to object to any of Dr. McGarry's objectionable and inadmissible testimony. Both Rule 702 and this Court's precedent supported such an objection. Whether Ms.

Nguyen was knocked down by wound A was not something a medical examiner could determine from performing an autopsy. Ex. 49 ¶11 [Dr. Lauridson] ("[I]t is not possible to determine with certainty from the autopsy whether any of the shots, with the exception of the wound labeled B, would have knocked the victim down"). Though asked "[w]hat would the power of the gunshot be," Tr. 437, Dr. McGarry had no facts or data about the power or caliber of the gun used upon which to base his opinion, and offered none in his testimony. Whether the force of the shot would knock Ms. Nguyen down would also depend on many factors, in addition to the caliber of the firearm, that were outside Dr. McGarry's knowledge, including how she was positioned at the time of the shot, whether there were objects in her vicinity that could stop a fall, and her personal physical characteristics, such as her balance and coordination, as well as other environmental factors that could influence the velocity and trajectory of the shot. No facts or data about these things were incorporated into Dr. McGarry's testimony or within his knowledge. Even if Ms. Nguyen's body contained injuries indicative of a fall—and Dr. McGarry did not claim that Ms. Nguyen had such injuries—there would be no way to associate a purported fall with any particular shot. Dr. McGarry's testimony was not based on sufficient facts or data, was not the product of reliable principles and methods, and was not based on a reliable application of principles and methods to the facts of the case. It therefore satisfied none of the three requirements of Rule 702. It was objectively unreasonable for counsel not to object to this inadmissible and prejudicial testimony.

Similarly, the autopsy alone was insufficient to indicate the order of the wounds or whether Ms. Nguyen was standing or sitting or crouching when she was shot. Ex. 49 ¶¶9, 13 [Dr. Lauridson] ("It is also impossible to determine from the autopsy whether the victim was in a standing or crouching position when she was shot. . . . Dr. McGarry's testimony on this point

was purely speculative."). *See also* Tr. 446–47 (Dr. McGarry acknowledged that he could not "know for sure" and "[i]t depends on where the shooter was"). Dr. McGarry nonetheless proceeded to offer his opinion on both issues. Dr. McGarry's opinion was outside the scope of his expertise and was based solely on speculation rather than facts or data and was not the product of reliable principles and methods. Ex. 49 ¶8 [Dr. Lauridson] ("It is generally accepted that a forensic pathologist's testimony must be established within a reasonable degree of medical certainty. . . . Commentary or opinion that does not reach this level of certainty is not appropriate opinion testimony."); M.R.E. 702; *Goforth v. City of Ridgeland*, 603 So. 2d 323, 329 (Miss. 1992) ("[B]efore a qualified expert's opinion may be received, it must rise above mere speculation" (citing *Fowler v. State*, 566 So. 2d 1194 (Miss. 1990))). Testimony outside the scope of the witness's expertise is inadmissible. *Edmonds v. State*, 955 So. 2d 787, 792 (Miss. 2007) (holding that opinion offered by pathologist outside the scope of his expertise was inadmissible and required reversal of defendant's conviction); *Treasure Bay Corp. v. Ricard*, 967 So. 2d 1235, 1242 (Miss. 2007) (holding that because evidence was insufficient to allow expert using reliable principles and methods within his expertise to form the opinion given, such opinion was insufficient to support summary judgment ruling in trial court). "'[O]nly opinions formed by medical experts upon the basis of credible evidence in the cases and which can be stated with reasonable medical certainty have probative value.'" *Catchings v. State*, 684 So. 2d 591, 596 (Miss. 1996) (quoting *Magnolia Hospital v. Moore*, 320 So. 2d 793, 799 (Miss. 1975)). Furthermore, there was no basis for any of Dr. McGarry's objectionable testimony in the autopsy report that was disclosed to defense counsel prior to trial. *See* Ex. 56 [Autopsy Report]. Despite this clear precedent, trial counsel failed to object to any of Dr. McGarry's inadmissible and damaging testimony.

Trial counsel were further on notice at the time of trial for the potential of inadmissible and misleading testimony from Dr. McGarry because it was well known in the legal community at the time that Dr. McGarry had a reputation for providing unreliable and inadmissible testimony. *See* Ex. 43 [Robert Rudder]. In *Harrison v. State*, 635 So. 2d 894 (Miss. 1994), a capital defendant's convictions were overturned on the basis of Dr. McGarry's inadmissible testimony. Not only was this a published opinion with which counsel had a duty to be familiar, but it was a notorious capital murder case along the Gulf Coast. Ex. 44 [Ross Simons]. Furthermore, had counsel researched Dr. McGarry, they would have discovered numerous news articles regarding problems with Dr. McGarry's autopsies, going back years before Mr. Keller's trial. In 2007, local and national news outlets covered a story involving an autopsy performed by Dr. McGarry in December 2006 on Lee Demond Smith, who died while in custody at the Harrison County Jail. *See, e.g.*, Kathleen Koch, *Family Suspicious about Grandson's Jail Death*, ANDERSON COOPER 360 BLOG, http://goo.gl/EWD8q6 (July 24, 2007) (last visited May 22, 2015); Robin Fitzgerald, *TV Show, Autopsy Reports Prompt Probe*, THE SUN HERALD, July 26, 2007, at A1. Ex. 153. Although Dr. McGarry had concluded that Smith died of a blood clot in the lung, a subsequent autopsy revealed that Dr. McGarry had not even dissected Smith's lung. *Id*.

Counsel had a duty to be familiar with the relevant case law and with the rules of evidence that applied to an expert's testimony. Despite red flags in both the case law and the media, and the clear requirements of Rule 702, counsel unreasonably failed to object to any of Dr. McGarry's testimony that was outside of his area of expertise and not based on his autopsy of Ms. Nguyen. Counsel's failure fell below prevailing professional norms and was objectively unreasonable.

Counsel's unreasonable failure to object to Dr. McGarry's testimony prejudiced Mr. Keller. This Court has found, "Juries are often in awe of expert witnesses because, when the expert witness is qualified by the court, they hear impressive lists of honors, education and experience. An expert witness has more experience and knowledge in a certain area than the average person. Therefore, juries usually place greater weight on the testimony of an expert witness than that of a lay witness." *Edmonds v. State*, 955 So. 2d 787, 792 (Miss. 2007) (citations omitted). *See also United States v. Benson,* 941 F.2d 598, 604 (7th Cir. 1991) (noting that an expert's "stamp of approval" may "unduly influence the jury").

Additionally, Dr. McGarry's testimony was the most significant piece of evidence supplied by the prosecution in its effort to argue Mr. Keller killed Ms. Nguyen to avoid arrest, the third aggravating factor noticed against him. The prosecution argued:

> The third aggravating factor that we have is that the defendant did this and committed the killing with the intent to avoid arrest. And as you can draw reasonable inferences, and as you use your common sense and think about what's going on in this case, in January he's caught on a bank robbery. So this time, six months later, June of 2007, as he's walking around looking for the opportunity he finds Ms. Hat Nguyen. He could have robbed her, he could have gotten the money and he could have left. She ran out the store. He could have gotten the money and he could have left but he didn't. He brought her back into the store and got her down on her knees and executed her for the purpose of avoiding arrest. That, ladies and gentleman, is the third aggravating factor, and is another reason by itself that you can consider and return a verdict of death.

Tr. 654. When Mr. Keller took the stand, the prosecution questioned him directly about this, and he denied that he killed Ms. Nguyen to avoid arrest. Tr. 563. In the absence of testimony from Dr. McGarry that Mr. Keller shot Ms. Nguyen while she was kneeling or crouching, the prosecution would have been unable to argue that Mr. Keller brought Ms. Nguyen back into the store and "got her down on her knees executed her for the purpose of avoiding arrest." Tr. 654. Without this evidence, there is a reasonable probability jurors would not have found this

aggravating factor beyond a reasonable doubt, or would not have selected death as the appropriate sentence.

The prosecution emphasized McGarry's testimony in the penalty phase closing, telling jurors, "Maybe he enjoyed the thrill of bringing her back in the store and putting her on her knees." Tr. 661. McGarry's testimony was further highlighted in the prosecution's penalty phase rebuttal:

> Dr. McGarry testified as to the angle of the bullets. This would have been D, the one that goes in the left side into her brain into this angle, that she was being in a crouched or kneeling or on her knees position. She's already down there and he shoots her with this one at close range. Then she hits the floor and he shoots her with that one. Then he's going to come in here yesterday with that crap that he expounded out of his mouth and tell you oh, she's standing up. All right, well let's go with that. If she's standing up that means because Dr. McGarry said once you get shot in the head she's basically lifeless, she's down. So what does he do? I guess he's going to say he's holding her up with one hand and going to shoot her with the other. That's probably worse than shooting her while she's on the ground. Holding her up to kill her. Whatever way it was an unnecessary shot, it was an unnecessary death.

Tr. 669. The prosecutor later repeated to the jury that Mr. Keller shot Ms. Nguyen "again in the crouched down position." Tr. 670. The prosecution used Dr. McGarry's testimony to support their argument that Mr. Keller intended to kill Ms. Nguyen and that he did so in a domineering and calculated manner. But for this testimony, the prosecution would have had no basis to argue to jurors that Mr. Keller shot Ms. Nguyen while she was in a crouched and vulnerable position. There is a reasonable probability that but for counsel's unreasonable failure to object to Dr. McGarry's speculative and prejudicial testimony, at least one juror would have reached a different conclusion as to the presence of one or more aggravators, or as to sentence selection.

2. Mr. Keller Received Ineffective Assistance of Counsel when Counsel Failed to Rebut or Challenge Dr. McGarry's Improper Expert Testimony on Appeal

Counsel on appeal recognized the prejudicial impact of Dr. McGarry's improper testimony and raised the issue in the Supreme Court of Mississippi. Brief of Appellant at 115.

This Court found that they were under "no obligation to address" the issue because counsel on appeal "fail[ed] to cite any authority in support of the argument." *Keller*, 138 So. 3d at 860. This Court has repeatedly made clear that "it is the duty of an appellant to provide authority and support of an assignment [of error]." *Hoops v. State*, 681 So. 2d 521, 526 (Miss. 1996) (citing *Kelly v. State*, 553 So. 2d 517, 521 (Miss. 1989)); *Brown v. State*, 534 So. 2d 1019, 1023 (Miss. 1988); *Harris v. State*, 386 So. 2d 393 (Miss. 1980)). *See also Williams v. State*, 805 So. 2d 452, 487 (Miss. 2001); *Weaver v. State*, 713 So. 2d 860, 863 (Miss. 1997); *McCain v. State*, 625 So. 2d 774, 781 (Miss. 1993); *Hewlett v. State*, 607 So. 2d 1097, 1106 (Miss. 1992).

Counsel's failure to provide relevant authority to support an argument they raised on appeal was objectively unreasonable and fell below prevailing professional norms. *See Luchenburg v. Smith*, 79 F.3d 388, 392–93 (4th Cir. 1996) ("In these circumstances, counsel made no tactical 'choice,' unless a failure to become informed of the law affecting his client can be so considered. We refuse to endorse such a rule."); *State v. O'Neil*, 99 A.3d 814, 824 (N.J. 2014) ("If every person is presumed to know the law, no exception can be made for appellate counsel. Although informed "strategic choices" made by counsel will rarely be subject to challenge, no deference must be paid to a choice made in disregard of standing precedent." (citing *Strickland*, 466 U.S. at 690)).

Had counsel properly briefed the issue, there is a reasonable probability that the result of the proceeding would have been different. As discussed above, Dr. McGarry testified outside his area of expertise in forensic pathology, in violation of Mississippi and federal constitutional law. In declining to address the issue on direct appeal, this Court based its decision on trial counsel's failure to object at trial, and appellate counsel's failure to provide any relevant authority to support their argument that trial counsel was ineffective. But for appellate counsel's

unreasonable failure to provide any legal support for this claim, there is a reasonable probability that Mr. Keller would have been granted relief on appeal.

F. Trial Counsel Unreasonably Failed to Object When the Trial Court Struck Venireman Max Bell For Cause, In Violation of the Law as Stated in *Witherspoon v. Illinois*, Keller's Due Process Rights, and Keller's Sixth Amendment Right to Counsel

1. Keller was Deprived of Due Process by the For-Cause Strike Against Bell

The State successfully moved to strike venireman Max Bell for cause on the basis of his views on the death penalty. Tr. 308. In response to initial questioning by the trial court about whether Bell was able to follow instructions during the guilt phase knowing that there may be a sentencing phase that could require jurors to determine whether Mr. Keller should get a death sentence, Mr. Bell answered that he was "not sure how [he] would decide [the question of guilt] knowing" that the consequence of a guilty verdict could be the need to determine whether the death sentence should be applied. Tr. 190. Asked whether the possibility that he may have to decide whether to impose a death sentence would affect his ability to arrive at a fair and just verdict regarding guilt, Mr. Bell answered, "Again I can't say honestly whether it would or not." Tr. 190. The State and the trial court characterized Mr. Bell's testimony in a significantly different way when they asked to examine Mr. Bell further about his ability to decide the case based on the evidence. The State claimed that Mr. Bell "indicated that he would vote for life only[.]" Tr. 277. The trial court claimed that Mr. Bell said that he didn't "think he could do the guilt phase knowing that he had to do the penalty phase." Tr. 278. The trial court agreed that Bell could be questioned further at a later time. *Id.*

Upon further questioning by the State,[25] Mr. Bell stated the following:

[25] Mr. Bell also was questioned about problems he might have due to sequestration of jurors and confirmed that he "could put that aside. . . . [and] be a fair juror." Tr. 297

Mr. Bell: I believe that I could be a fair juror, but I made another answer. . . . if I voted for a guilty verdict may mean the death penalty, that would be a heavy burden, and I don't know how—I cannot honestly say that it wouldn't influence me as to how I would vote.

Mr. Lusk: So you're saying that it's possible that you would not even vote during what we would call the guilt phase to find the defendant either guilty or not guilty based upon the potential sentence of the death penalty that he could receive?

Mr. Bell: I'm saying that I don't really know how I would react. I know that's a vague answer, but I've never been in that position, and I don't know, Mr. Lusk, if I would react.

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Mr. Bell: It's not as though I have a problem with death penalties, it's just I don't how I would react if the burden were on my shoulders as far as if knowing that a guilty verdict might possibly lead to a death sentence of a man.

***

Mr. Lusk: So are you saying that if the—if after the aggravating factors were weighed and the mitigating factors were weighed that you could deliberate with your jurors to come up with a sentence for the defendant or do you feel that you would not be able to do that?

Mr. Bell: I feel like I could deliberate with the jurors and come to a conclusion depending on the evidence, of course, you know.

Mr. Lusk: Okay. So you would not automatically rule out the death penalty?

Mr. Bell: No, sir.

Mr. Lusk: You would use the balancing factor?

Mr. Bell: I would like to think that I would be balanced, let me phrase it that way.

Tr. 297–99. On examination by defense counsel, Bell agreed that the fact the death penalty was involved in the case "[m]ight influence," "would in all probability influence," and "would affect" his ability to find Mr. Keller guilty. Tr. 299–300.

This testimony falls short of establishing the "substantial impairment" needed to establish a "for-cause" reason to strike Bell. The standard for evaluating for-cause strikes based on opinion of the death penalty is whether the venireperson's "views [on the death penalty] would prevent or substantially impair the performance of his duties in accordance with his instructions or his oath." *Wainwright v. Witt*, 469 U.S. 412, 424 (1985); *Witherspoon v. Illinois*, 391 U.S. 510, 521 (1968) (state may not "[sweep] from the jury all who expressed conscientious or religious scruples against capital punishment"). "[N]either nervousness, emotional involvement, nor inability to deny or confirm any effect whatsoever is equivalent to an unwillingness or an inability on the part of the jurors to follow the court's instructions and obey their oaths, regardless of their feelings about the death penalty." *Adams v. Texas*, 448 U.S. 38, 50 (1980) (finding that excluding jurors who stated the death penalty would "have any effect at all on the jurors' performance of their duties" violated the Sixth and Fourteenth Amendments). *Compare Darden v. Wainwright*, 477 U.S. 168, 178 (1986) (juror properly excluded because he said he could not vote for death regardless of facts); *Wainwright v. Witt*, 469 U.S. 412, 415–16 (1985) (juror properly excluded because she said her personal beliefs about punishment would interfere with her ability to judge guilt or innocence); *Lockett v. Ohio*, 438 U.S. 586, 595–96 (1978) (jurors properly excluded where they said they were so opposed to death penalty they could not take oath to follow the law). The Fifth Circuit has particularly noted that a juror's statement that the "potential [imposition of the death] penalty would 'affect' her is insufficient to permit her disqualification." *Burns v. Estelle*, 592 F.2d 1297, 1301 (5th Cir. 1979), *aff'd en banc*, 626 F.2d 396 (5th Cir. 1980).

Bell unequivocally agreed he "would not automatically rule out the death penalty," and affirmatively stated he "could deliberate with the jurors and come to a conclusion depending on

the evidence, of course," and "would be balanced." Tr. 298–99. These statements show he would have been able to faithfully discharge his duties as a juror, and should not have been struck for cause. This was error, and invalidates Keller's death sentence. *See Gray v. Mississippi*, 481 U.S. 648, 668 (1987). The United States Supreme Court has found that error interfering with a defendant's right to be judged by impartial jurors is "so basic to a fair trial" that it "can never be treated as harmless error:

> Because the *Witherspoon-Witt* standard is rooted in the constitutional right to an impartial jury, *Wainwright v. Witt*, 469 U.S. at 416, and because the impartiality of the adjudicator goes to the very integrity of the legal system, the *Chapman* harmless-error analysis cannot apply. We have recognized that "some constitutional rights [are] so basic to a fair trial that their infraction can never be treated as harmless error." *Chapman v. California*, 386 U.S. at 23. The right to an impartial adjudicator, be it judge or jury, is such a right. *Id.* at 23 n. 8, citing, among other cases, *Tumey v. Ohio*, 273 U.S. 510 (1927) (impartial judge). As was stated in *Witherspoon*, a capital defendant's constitutional right not to be sentenced by a "tribunal organized to return a verdict of death" surely equates with a criminal defendant's right not to have his culpability determined by a "tribunal 'organized to convict.' " 391 U.S. at 521 (quoting *Fay v. New York*, 332 U.S. 261, 294 (1947).

Gray, 481 U.S. at 668 (parallel cites removed).

The erroneous striking of a potential juror who expresses uncertainty about the death penalty but is nonetheless still qualified to serve under *Witt* and *Witherspoon* is structural error and invalidates any subsequent death sentence imposed. *Gray*, 481 U.S. at 668; *Davis v. Georgia*, 429 U.S. 122 (1987) (per curiam). Keller's case suffers from just such an infirmity and this Court should grant this motion and vacate his death sentence.

2. Keller was Denied Effective Assistance of Counsel by Trial Counsel's Failure to Oppose the State's For-Cause Strike Against Bell

Strickland requires that trial counsel appropriately discharge her duties during voir dire. *See Virgil v. Dretke*, 446 F.3d 598, 610–11 (5th Cir. 2006); *Hughes v. United States*, 258 F.3d 453, 462 (6th Cir. 2001); *Johnson v. Armontrout*, 961 F.2d 748 (8th Cir. 1992). These duties

include protecting a defendant by preventing the State from impermissibly excluding jurors simply because they express concerns or hesitancy about the application of the death penalty. *See Witherspoon*, 391 U.S. at 521; *Witt*, 469 U.S. at 424. The State's impermissible exclusion of such jurors is *per se* prejudicial to the defendant. *Gray*, 481 U.S. at 668; *Davis*, 429 U.S. at 123. In light of this assumption of harm to the defendant, it is unreasonable for trial counsel not to object when a venire member is being impermissibly struck on the basis of his view on the death penalty.

Mr. Bell was impermissibly struck based on the State's allegations that his views on the death penalty would prevent or substantially impair his ability to deliberate fairly and base his decisions on the evidence presented. These allegations are rebutted by the record. *See supra*. Nonetheless, when the State moved to strike Mr. Bell for cause, defense counsel unreasonably failed to raise a proper objection to the strike. It is incumbent upon trial counsel to raise proper objections in order to protect the defendant's constitutional rights. *See Cox v. McNeil*, 638 F.3d 1356, 1362 (11th Cir. 2011) (noting Florida Supreme Court found trial counsel ineffective for failing to object to prosecutor's misstatements of law); *Anderson v. State*, 18 So. 3d 501, 517 (Fla. 2009) (same); *Kubat v. Thieret*, 867 F.2d 351, 370 (7th Cir. 1989) (trial counsel ineffective for failing to object to improper instructions); *see also Hughes v. United States*, 258 F.3d 453, 464 (6th Cir. 2001) (failure to object to biased juror was ineffective assistance of counsel); *Johnson v. Armontrout*, 961 F.2d 748, 755 (8th Cir. 1992).

Mr. Keller was prejudiced by trial counsel's failure to object. As noted above, the exclusion of individuals from the jury based on their general uncertainty about the death penalty, regardless of their indicated ability to follow the law, violates the defendant's constitutional right to an impartial jury that is "so basic to a fair trial that their infraction can never be treated as

harmless error." *Gray*, 481 U.S. at 668; *see also Witherspoon*, 391 U.S. at 521; *Witt*, 469 U.S. at 424; *Davis*, 429 U.S. at 123.

3. Keller was Denied Effective Assistance of Counsel When Appellate Counsel Failed to Appeal Bell's For-Cause Strike

A criminal defendant is entitled to receive competent counsel during his direct appeal, assuming the state provides appeals as of right. *See Evitts v. Lucey*, 469 U.S. 387, 396 (1985). Counsel is not required to "raise every nonfrivolous ground of appeal available," and where appellate counsel did file a merits brief, the defendant is generally required to show that "a particular nonfrivolous issue was clearly stronger than issues counsel did present." *Dorsey v. Stephens*, 720 F.3d 309, 320 (5th Cir. 2013) (quotations and citations omitted).

Keller's attorney raised the issue of jurors improperly struck under *Witherspoon* on direct appeal. Though the Mississippi Supreme Court opinion does not identify the jurors struck for cause by name, Keller's appeal brief shows they were Glenn Ellis and Ernestine Cherry. Brief of Appellant at 64–68. As the Mississippi Supreme Court noted:

> Juror E [Ellis] stated several times that he is Catholic and that the Catholic Church opposes the death penalty. When questioned by defense counsel as to whether he could impose the death penalty, Juror E responded: "[B]ased on my upbringing and based on my Catholic faith [there is a] 99.9 percent chance I don't believe that I could do it." Juror C [Cherry] stated multiple times that she did not think she could vote to impose the death penalty, that it would be "very, very difficult" for her to do, and that she could not think of a single circumstance in which she believed she could vote in favor of a death sentence.

Keller v. Mississippi, 138 So. 3d 817, 845–46 (Miss. 2014).

Compared to either of these individuals, Mr. Bell was a significantly better candidate for inclusion. Unlike Mr. Ellis, who stated he was 99.9% certain he would not be able to give a death penalty, or Ms. Cherry, who could think of no instance in which she might return the death penalty, Mr. Bell indicated that he "could deliberate with the jurors and come to a conclusion depending on the evidence, of course," would not automatically rule out the death penalty, and

"would be balanced." Tr. 298–99. Had appellate counsel either included Mr. Bell in this claim, or substituted Mr. Bell for either Mr. Ellis or Ms. Cherry, the claim would have gone from one of questionable value to a viable issue on which to appeal. Particularly, Mr. Bell was struck for cause despite his firm statements that he would faithfully and impartially discharge his duties. Neither Ms. Cherry nor Mr. Ellis gave any indication they could meaningfully consider returning a death penalty, and were therefore appropriately stricken for cause. Mr. Bell, however, should not have been, as discussed above.

Further, appellate counsel could have raised the strike on appeal, even though there was no contemporaneous objection to the striking of Mr. Bell.[26] While generally Mississippi requires a contemporaneous objection in order to preserve an issue for appeal, *see Walker v. State*, 913 So.2d 198, 238 (Miss. 2005), the Mississippi Supreme Court's heightened level of scrutiny for death penalty cases allows it to discretionarily rule on the merits of claims that would otherwise have been defaulted. *See, e.g.*, *Faraga v. State*, 514 So.2d 295, 303 (Miss. 1987) ("Although no objection was raised during the argument, under this Court's heightened level of scrutiny for death penalty cases, they will be reviewed."); *Hansen v. State*, 592 So.2d 114, 142 (Miss. 1991) (noting the "relax[ed] enforcement of our contemporaneous objection rule" in death penalty cases); *Culberson v. State*, 379 So.2d 499, 506 (Miss. 1979). This Court has previously considered procedurally barred appeals on issues such as improperly refused jury instructions, *see Culberson*, 379 So. 2d at 506, objectionable statements made by the prosecutor in closing, *see Faraga*, 514 So.2d at 303, erroneous jury instructions, *Toney v. State*, 298 So.2d 716, 720 (Miss. 1974), trial court decisions to compel further deliberation, *Scott v. State*, 878 So.2d 933,

[26] Notably, no contemporaneous *Witherspoon* objection was raised in voir dire to the striking of either Mr. Ellis or Ms. Cherry, and this Court "[o]ut of an abundance of caution" addressed the issue "notwithstanding any procedural bar that may apply." *Keller v. State*, 138 So. 3d 817, 845 (Miss. 2014).

988 (Miss. 2004) (evaluating decision under "plain error" standard), and objectionable statements made during voir dire by a venire member, *Ross v. State*, 954 So.2d 968, 988 (Miss. 2007) (evaluating for "plain error").

In this case, this Court noted that no contemporaneous *Witherspoon* objection was raised in voir dire to the striking of either Mr. Ellis or Ms. Cherry. *Keller v. State*, 138 So.3d 817, 845 (Miss. 2014). Nevertheless, "[o]ut of an abundance of caution, and because the defense objects to the removal of Jurors E [Ellis] and C [Cherry] from the venire, we will address the issue notwithstanding any procedural bar that may apply." *Id.* Had the erroneous for-cause strike of Mr. Bell been included in the direct appeal, this Court presumably would have extended the same discretionary review, especially considering the structural nature of the error involved in *Witherspoon* claims. *See Gray*, 481 U.S. at 668; *Witherspoon*, 391 U.S. at 521; *Witt*, 469 U.S. at 424; *Davis*, 429 U.S. at 123. As explained above, an appeal of this for-cause strike of Mr. Bell on *Witherspoon* grounds was far more likely to succeed than the claims brought about Mr. Ellis and Ms. Cherry, and could have been easily raised with those claims. As the State's impermissible exclusion of jurors on the basis of some hesitancy about the death penalty is *per se* prejudicial to the defendant, appellate counsel was deficient in failing to raise this argument on appeal, and the prejudice to Mr. Keller is to be assumed. *Gray*, 481 U.S. at 668; *Davis*, 429 U.S. at 123.

G. Counsel Failed to Reasonably Ensure That Jurors Gave Full Effect to Mitigating Evidence

Trial counsel unreasonably failed to ensure that, considering the context of this case and the totality of circumstances, jurors properly applied the instructions and fully considered all constitutionally relevant mitigating evidence. *Cf. Boyde v. California*, 494 U.S. 370 (1990). As a result, there is a reasonable likelihood that jurors misunderstood the instructions and verdict form in a way that unconstitutionally constrained their ability to give effect to mitigating evidence. *See*

Buchanan v. Angelone, 522 U.S. 269, 279 (1998); *see also Penry v. Lynaugh*, 492 U.S. 302 (1989). The Eighth and Fourteenth Amendments of the Constitution require "individualized consideration of mitigating factors" in capital cases. *Lockett v. Ohio*, 438 U.S. 586, 606 (1978). Jurors in capital sentencing proceedings must consider and give full effect to mitigating evidence of the defendant's character, family history and background, circumstances, and individual worth. *See, e.g.*, *Eddings v. Oklahoma*, 455 U.S. 104, 112–13 (1982). Circumstances at Mr. Keller's trial created confusion about jurors' constitutional duty to consider mitigating evidence and their option to sentence Keller to life imprisonment even if they found that aggravating evidence outweighed mitigating evidence. Trial counsel's failure to ensure that the jurors fulfilled this Constitutional requirement before imposing a death sentence and understood their sentencing options undermined confidence in their sentencing decisions.

Jurors in Mississippi are free to sentence a capital defendant to life imprisonment even though the jurors find that aggravating evidence outweighs mitigating evidence. Despite having this option, Mr. Keller's jurors were never directly instructed that they could sentence Keller to life if they found aggravating evidence outweighed mitigating evidence.[27] Cir. Ct. Harrison Cty, Sentencing Instruction 1, No. B-2402-2008-201. Instead the judge only directly instructed the jurors that they could sentence Mr. Keller to life if they found that the mitigating evidence outweighed the aggravating evidence. *Id.*

[27] The Harrison Co. Cir. Ct. instructed the jury: "If one or more . . . aggravating circumstances is found to exist beyond a reasonable doubt, then each of you must consider whether there are mitigating circumstances, which outweighs the aggravating circumstance(s)…If you individually find that one or more of the preceding elements of mitigation exists, then you must consider whether it outweigh(s) or overcome(s) the aggravating circumstance(s) you previously found. In the event that you find that the mitigating circumstance(s) do not outweigh or overcome the aggravating circumstance(s), you may impose the death sentence. Should you find that the mitigating circumstance(s) outweigh or overcome the aggravating circumstance(s), you shall not impose the death sentence." Harrison Co. Cir. Ct., Sentencing Instruction 1, No. B-2402-2008-201).

Nor did the verdict form provide an option where jurors could find that aggravating evidence outweighed mitigating evidence but still sentence Mr. Keller to life imprisonment. *Id.* It contained three options and the only one providing for a life sentence required jurors to be unanimous in selecting a life sentence. *Id.* The verdict form did not provide for jurors to find that aggravating evidence outweighed mitigating evidence.[28] *Id.*

Jurors' constitutional obligations to consider and give effect to mitigating evidence in all circumstances were not made clear during *voir dire*. The trial judge assured jurors that they would receive detailed instructions on how to weigh mitigating evidence and specified that the death penalty cannot be automatically imposed, but failed to state that, or describe how, jurors could give effect to mitigating evidence should they find that aggravating evidence outweighed mitigating evidence.[29]

The prosecutor's closing argument exploited this lack of clarity about the jurors' ability to consider mitigating evidence, and provided additional opportunity and motivation for trial counsel to intervene and make sure that jurors' duties were clear. The prosecutor told jurors that, "the only punishment that is warranted in this case is the death penalty. . . . I would ask that [the death penalty] be your only sentence that you return because that is the only sentence that Jason Keller deserves[.]" Tr. 668, 672. The prosecution made these comments in the rebuttal portion of

[28] The verdict form provided jurors with three sentencing options: (1) unanimous finding that sufficient aggravating circumstances existed to impose death, mitigating circumstances did not outweigh aggravating circumstances, and the defendant should suffer death; (2) unanimous finding that life imprisonment without parole should be imposed; (3) inability to unanimously agree on sentence, thus the Judge will sentence the defendant to life imprisonment without parole. Cir. Ct. Harrison Cty, Sentencing Instruction 1, No. B-2402-2008-201).

[29] During voir dire examination the judge said: "I will again give you detailed instructions of law on how to consider [mitigating] evidence and how to conduct the weighing of aggravating and mitigating circumstances that is required . . . [y]ou must remember that the death penalty cannot be automatically imposed for this crime[.]" Tr. 176.

closing argument and defense counsel failed to object before jurors began deliberations, thereby failing to clarify for jurors that they could consider mitigating evidence and were not obligated to impose a death sentence after the weighing process.

These confusing circumstances triggered trial counsel's duty to intervene. The Constitution requires that the trial court issue clear instruction focusing the jury's consideration of mitigating evidence. *Spivey v. Zant*, 661 F.2d 464 (5th Cir. 1981). The combined impact of voir dire, the verdict form, jury instructions, and the prosecutor's argument left jurors reasonably confused about the extent of their obligations to consider mitigating evidence and corresponding options to choose not to impose the death penalty, even after finding that aggravating circumstances outweighed mitigating circumstances. Sworn statements from jurors reveal that they believed they "didn't really have a choice," "had to follow the instructions and vote to give [Jason Keller] death," and that several jurors convinced another juror that he or she misunderstood the instructions thus "had to vote for death as well." Ex. 45 [Aguillard]; Ex. 13 [Dubose].

Trial counsel's failure to clarify this obligation and ensure jurors were properly instructed, particularly after the prosecutor's misleading closing argument, was unreasonable and undermines confidence in jurors' sentencing decisions. In assessing ineffective assistance of counsel claims, "prevailing norms of practice as reflected in American Bar Association standards . . . are guides to determining what is reasonable." *Wiggins v. Smith*, 539 U.S. 510, 522 (2003) (citing *Strickland v. Washington*, 466 U.S. 688-89 (1984)). Trial counsel had a duty to request jury instructions and verdict forms that ensure jurors will be able to give effect to all relevant mitigating evidence, to object to instructions or verdict forms that are unconstitutional or do not properly instruct jurors on the law, and to offer alternative instructions. *See Bigner v. State*, 822

So. 2d 342, 353 (Miss. Ct. App. 2002) (citing *Yarbrough v. State*, 529 So. 2d 659 (Miss. 1988)) (noting Mississippi Supreme Court has found failure to submit jury instructions to be evidence of ineffective assistance of counsel); Am. Bar Assoc., *The Defense Case Concerning Penalty*, ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (Feb. 2003). There is a reasonable likelihood that jurors in Mr. Keller's trial did not understand that they were constitutionally required to consider mitigating evidence even if they found evidence in aggravation outweighed evidence in mitigation. Trial counsel's failure to address this confusion was objectively unreasonable and created a reasonable likelihood that jurors misapplied the instructions, thus preventing their full consideration of constitutionally relevant evidence. *Cf. Boyde v. California*, 494 U.S. 370 (1990). Trial counsel's ineffective assistance undermined confidence in the jurors' sentencing decisions. This Court should vacate Mr. Keller's death sentence.

H. Cumulative Prejudice

Prejudice from Mr. Keller's claims of ineffective assistance of counsel must be considered cumulatively. *See Strickland v. Washington*, 466 U.S. 668, 690 (1984). *Strickland* requires the petitioner to demonstrate prejudice by showing "a reasonable probability that, but for counsel's unprofessional *errors*, the result of the proceeding would have been different." *Id.* at 694 (emphasis added). The Court's plural "errors" formulation is consistent throughout the opinion. *See, e.g., id.* (courts "making the determination whether the specified errors resulted in the required prejudice . . . presume . . . that the judge or jury acted according to law"); *id.* at 695 ("When a defendant challenges a conviction, the question is whether there is a reasonable probability that, absent the errors, the fact finder would have had a reasonable doubt respecting guilt."); *id.* at 696 ("a court making the prejudice inquiry must ask if the defendant has met the burden of showing that the decision reached would reasonably likely have been different absent

the errors"); *see also, e.g.*, *Rompilla v. Beard*, 545 U.S. 374, 390 (2005) (quoting "errors" language); *Wiggins*, 539 U.S. at 534 (same); *Williams v. Taylor*, 529 U.S. 362, 391 (2000) (same). Courts must evaluate "the entire post-conviction record, viewed as a whole." *Williams, T. v. Taylor*, 529 U.S. 362, 399 (2000).

This does not mean that a single act or omission can never be sufficient to establish prejudice. Clearly it can be. But *Strickland* makes clear that courts cannot mechanically limit the prejudice inquiry and perform *only* a claim-by-claim assessment. Thus, even if none of the aforementioned instances of ineffective assistance of counsel individually merits reversal, Mr. Keller's conviction and death sentence must be reversed because he suffered cumulative prejudice from counsel's omissions and errors. *See Strickland*, 466 U.S. at 694 (prejudice assessed from cumulative effect of counsel's errors); *see also Yarbrough v. State*, 529 So. 2d 659 (Miss. 1988).[30]

In this case, counsel's errors compounded one another throughout the trial. Counsel failed to object when potential juror Max Bell was impermissibly stricken for cause, *see supra* Claim I.F. Counsel then failed to object to any of Dr. McGarry's speculative and inadmissible testimony, including testimony regarding the order in which the shots were fired, whether the

[30] *See also Dugas v. Copland*, 428 F.3d 317, 335 (1st Cir. 2005) (same); *Lindstadt v. Keane*, 239 F.3d 191, 199, 203–04 (2d Cir. 2001) (same); *Berryman v. Morton*, 100 F.3d 1089, 1101–02 (3d Cir. 1996) (same); *Elmore v. Ozmint*, 661 F.3d 783, 868–71 (4th Cir. 2011) (same); *Richards v. Quarterman*, 566 F.3d 553, 571–72 (5th Cir. 2009) (same); *Stewart v. Wolfenbarger*, 468 F.3d 338, 361 (6th Cir. 2004) (same); *Goodman v. Bertrand*, 467 F.3d 1022, 1030 (7th Cir. 2006) (same); *Mak v. Blodgett*, 970 F.2d 614, 622 (9th Cir. 1992) (same); *Cargle v. Mullin*, 317 F.3d 1196, 1207–08 (10th Cir. 2003) (same); *Gordon v. United States*, 518 F.3d 1291, 1297–98 (11th Cir. 2008) (same); *In re Gay*, 968 P.2d 476, 509 (Cal. 1998); *People v. Cole*, 775 P.2d 551, 555 (Colo. 1989); *People v. Briones*, 816 N.E.2d 1120, 1127 (Ill. App. Ct. 2004); *Potter v. State*, 684 N.E.2d 1127, 1135 (Ind. 1997); *Cherry v. State*, 659 So. 2d 1069 (Fla. 1995); *Bowers v. State*, 578 A.2d 734, 744 (Md. 1990); *People v. Trait*, 139 A.2d 937, 939 (N.Y. App. Div. 1988); *State v. Gondor*, 860 N.E.2d 77, 90 (Ohio 2006); *State v. Charles*, 263 P.3d 469, 480 (Utah Ct. App. 2011); *Ex Parte Welborn*, 785 S.W.2d 391, 393 (Tex. Crim. App. 1990) (en banc).

non-fatal wounds would have caused the victim to fall, and whether the victim was likely in a standing or crouching position when the fatal shot was fired. The prosecution relied heavily on this evidence to support their argument that Mr. Keller shot Ms. Nguyen for purposes of avoiding arrest under Miss. Code § 99-19-101(5)(e). *See supra* Claim I.E. Counsel then allowed evidence of Mr. Keller's prior non-violent convictions to be presented to the jury, despite a motion to keep such evidence out having been granted, and then inexplicably elicited further testimony about the prior convictions on cross-examination. *See supra* Claim I.A. Counsel also failed to object to the introduction of a non-final conviction. *See supra* Claim I.B. The prosecutor took full advantage of counsel's error and highlighted Mr. Keller's history of felony convictions to jurors in his closing argument, without any objection from the defense. Nor did counsel object to any of the prosecutor's other impermissible arguments, including arguing to jurors that Jason's case was one of the rare instances where he sought death, making arguments that were unsupported by the evidence, and arguing that Mr. Keller should be sentenced to death based on non-statutory aggravators. *See supra* Claim I.D. Most importantly, counsel failed to conduct even a cursory investigation of the available mitigating evidence, preventing jurors from learning of Jason's history of cognitive impairments, childhood trauma, mental health struggles, and ensuing addiction to crack cocaine and other substances. *See supra* Claim I.C. Finally, counsel failed to ensure that jurors gave full effect to mitigating evidence. *See supra* Claim I.G. But for counsel's unprofessional errors, the balance of aggravating and mitigating evidence would have been drastically different. Available evidence would have rebutted the prosecution's case on several charged aggravating circumstances and would have added substantial mitigating evidence. As a result of counsel's unprofessional errors, confidence is undermined in jurors'

findings as to aggravating circumstances, whether mitigating evidence outweighed aggravating evidence, and their ultimate decisions to sentence Mr. Keller to death.

The United States Supreme Court has consistently applied a cumulative approach to its prejudice analysis in claims of ineffective assistance of counsel. *See Williams, T. v. Taylor*, 529 U.S. 362, 395–96 (2000) (identifying multiple categories of evidence omitted by trial counsel's deficient mitigation investigation as part of a single failure on the part of trial counsel); *Wiggins*, 539 U.S. at 534 ("In order for counsel's inadequate performance to constitute a Sixth Amendment violation, petitioner must show that counsel's *failures* prejudiced his defense." (emphasis added)); *Rompilla*, 545 U.S. at 391 (evaluating prejudice based on the evidence "taken as a whole"); *Porter v. McCollum*, 558 U.S. 30, 40–41 (2009) (prejudice is based on the totality of the available evidence).

A cumulative approach also is consistent with how courts evaluate evidence in other contexts. In the context of *Brady* claims, courts must assess the materiality of withheld evidence cumulatively. *Kyles v. Whitley*, 514 U.S. 419, 436–37 (1995). The *Brady* materiality standard is derived from the *Strickland* prejudice standard. *United States v. Bagley*, 473 U.S. 667, 694 (1985). In the context of harmless error review in criminal appeals, courts consider whether the combined impact of multiple errors amounts to a constitutional violation. *See, e.g.*, *Taylor v. Kentucky*, 436 U.S. 478, 487 n. 15 (1978) (finding that "the cumulative effect of the potentially damaging circumstances of this case violated the due process guarantee of fundamental fairness"); *Chambers v. Mississippi*, 410 U.S. 284, 302–03 (1973) (concluding exclusion of critical evidence, combined with state's refusal to permit petitioner to cross-examine resulted in a denial of due process."); *United States v. Munoz*, 150 F.3d 401, 418 (5th Cir. 2005) ("[A]n aggregation of non-reversible errors . . . can yield a denial of the constitutional right to a fair

trial[.]"); *United States v. Rahman*, 189 F.3d 88, 145 (2d Cir. 1999) (noting that "the effect of multiple errors in a single trial may cause such doubt on the fairness of the proceedings that a new trial is warranted, even if no single error requires reversal").

Considered cumulatively, trial counsel's errors in this case undermine confidence in jurors' penalty phase decisions.

II. NAPUE

A. The State Presented False and Misleading Evidence When Telling Jurors That Keller was Previously Convicted of Armed Robbery

All factual allegations and legal arguments set out in Claim I.B, *supra*, are incorporated by reference herein. At Keller's capital trial, the State—more particularly, the Office of the District Attorney for Harrison County—presented evidence of Keller's armed robbery charges and related argument as a previous conviction in order to prove the statutory aggravating circumstance that Keller "was previously convicted of another capital offense or of a felony involving the use or threat of violence to the person," Miss. Code § 99-19-101(5)(b). Tr. 507; 515–20; 653–54; 666–68. The State—also the Office of the District Attorney for Harrison County—prosecuted the armed robbery charges against Keller and was aware that a motion for new trial was pending in that case, Ex. 55 [Motion for New Trial], and, therefore, the conviction was not yet final. Despite this knowledge, the State presented the conviction without reservation or explanation and did not inform the trial court or jurors of the pending litigation in the armed robbery case.

A prosecutor violates the Fifth and Fourteenth Amendments by presenting or failing to correct evidence known to be false. *Giglio v. United States*, 405 U.S. 150, 153 (1972) ("[D]eliberate deception of a court and jurors by the presentation of known false evidence is incompatible with rudimentary demands of justice."); *Napue v. Illinois*, 360 U.S. 264, 269–70

(1959) ("district attorney has the responsibility to correct what he knows to be false and elicit the truth."); *Bosarge v. State*, 786 So. 2d 426, 438 (Miss. 2001); *Alcorta v. Texas*, 355 U.S. 28 (1957). The Constitution also forbids prosecutors from creating false impressions through the presentation or omission of evidence or by argument.

> To be sure, where it may be established that a conviction has been obtained through the use of false evidence or perjured testimony, the accused's rights secured by the due process clause of the Fourteenth Amendment of the Constitution of the United States are implicated. . . . *And this is so without regard to whether the prosecution has willfully procured the perjured testimony. Where such false evidence has in fact contributed to the conviction, the accused is entitled to relief therefrom.*

Pearson v. State, 428 So. 2d 1361, 1363 (Miss. 1983) (internal citation omitted). The omission of relevant testimony can be the functional equivalent of the presentation of false testimony. *Id.*; *see also United States v. Anderson*, 574 F.2d 1347, 1355 (5th Cir. 1978); *United States v. Barham*, 595 F.2d 231, 242 (5th Cir. 1979). Proof of prejudice or materiality under *Napue* requires only a showing that "there is any reasonable likelihood that the false testimony could have affected the judgment of the jury." *U.S. v. Agurs*, 427 U.S. 97, 103 (1976); *Napue*, 260 U.S. at 271; *Howard v. State*, 945 So. 2d 326, 370 (Miss. 2006).

Evidence and argument relating to the armed robbery "conviction" was the crux of the State's case in aggravation. Other than evidence relating to the armed robbery, the only other appropriate evidence the State relied on in support of a death sentence were the facts of the capital crime, Tr. 508, and brief victim impact testimony, Tr. 509–13. Moreover, through admission of evidence relating to the armed robbery, the State also was able to argue that jurors should consider multiple nonviolent crimes attributed to Mr. Keller when making their determinations whether Mr. Keller should be sentenced to death. Tr. 507; 653–54; 666–68. The

State insisted that evidence relating to the armed robbery case should affect jurors' sentencing determinations, and the record provides no basis for finding jurors did not follow this direction.

Because the State knowingly presented and failed to correct evidence against Keller that was false or misleading, and the evidence "may have had an effect" on jurors' decisions, it violated Mr. Keller's constitutional right to due process under the Fifth, Eighth, and Fourteenth Amendments and corresponding provisions of the Mississippi Constitution. *See Napue*, 360 U.S. at 272; *Agurs*, 427 U.S. at 103. The Court should grant the writ and vacate Keller's death sentence.

No objection was raised at the trial or on appeal to the admission of evidence relating to the armed robbery, Tr. 519, or related argument by the State, *see, e.g.*, Tr. 507; 653–54; 666–68. *See, e.g., Smith v. State*, 724 So. 2d 280, 302 (Miss. 1998) (a contemporaneous objection must be made to preserve an alleged point of error for appeal) (quoting *Davis v. State*, 660 So. 2d 1228, 1251 (Miss. 1995)). Mr. Keller maintains that trial counsel's failure to act in a constitutionally effective manner and exercise reasonable diligence with regard to this issue provides "cause" sufficient for this Court to grant relief from any waiver of this claim. Miss. Code § 99-39-21(1);[31] *see also* Claim I.B, *supra*, incorporated by reference herein. Because the admission of evidence and argument relating to the armed robbery charge was a central component of the State's case in aggravation and was considered as such by jurors when making their sentencing decisions, the erroneous admission of evidence and argument adversely affected the ultimate

[31] The Code subsection reads as follows:

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

outcome of Keller's sentence, and satisfies the requisite showing of "actual prejudice," Miss. Code § 99-39-21(5).

III. JUROR MISCONDUCT

A. Juror Misconduct Violated Mr. Keller's Rights to an Impartial Jury and to Due Process

Mr. Keller's rights to a fair trial by an impartial jury and to be tried based only on the evidence presented at trial were violated by the participation of a juror who concealed during voir dire that his sister was employed by the same district attorney's office that prosecuted the case against Mr. Keller. This juror misconduct violated rights protected by the Fifth, Sixth, Eighth, and Fourteenth Amendments of the U.S. Constitution and corresponding sections of the Mississippi Constitution, including Art. 3, Sec. 14, 26, 28, and 31.

Based on Mr. Keller's allegations and evidence in support, he believes that he has provided sufficient bases to entitle him to an evidentiary hearing under *McDonough Power Equipment v. Greenwood*, 464 U.S. 548 (1984), and *Odom v. State*, 355 So. 2d 1381 (Miss. 1978), to determine juror partiality.

The trial court asked the entire venire panel, including venire member Cory Aguillard, "[D]o any of you know or know of any of the attorneys or the accused in this case?" Tr. 141. Mr. Mr. Aguillard responded, "I've heard of the DA's [sic] thrown around in my house because my parents know him." Tr. 153. Mr. Aguillard was later seated as a juror in Keller's trial. Tr. 353.

Mr. Aguillard failed to disclose that his sister, Dixie Newman, was at that time employed by the Harrison County District Attorney's Office. Ex. 45 ¶4 [Aguillard]. Ms. Newman, a member of the Biloxi city council and a recent candidate for mayor in Biloxi, Mississippi, has publicly stated that she was employed by the Harrison County District Attorney's Office from 2008 to 2013. *See* Ex. 58 [Dixie Newman Facebook page]; Ex. 57 [Dixie Newman website]; *see*

also Ex. 45 ¶4 [Aguillard]. Other jurors disclosed connections to the district attorneys through family members and employment. For example, potential juror Cherry disclosed that Assistant District Attorney Lusk's mother worked for her husband in the Biloxi schools. Tr. 141. Venire member Shankland disclosed that she worked with Assistant District Attorney Geiss's sister. Tr. 143. Neither of these jurors was seated. Mr. Aguillard was present in the venire panel and heard both of these answers prior to providing his own answer to the court's question.

Mr. Keller alleges that Mr. Aguillard was not a fair and impartial juror, and that his concealment of his sister's employment with the District Attorney's Office was intentionally misleading. Mr. Keller maintains that Mr. Aguillard's lack of candor in revealing the extent of his family members' relationships with the District Attorney is evidence indicating his desire to serve on Mr. Keller's jury. Mr. Keller further maintains that Mr. Aguillard adjusted his answer because he was aware that full disclosure of his family members' relationships with the District Attorney's Office was likely to jeopardize his chances of being included on Mr. Keller's jury. In these circumstances, Mr. Aguillard's inclusion on Mr. Keller's capital jury introduced "the kind of unpredictable factor into the jury room that the doctrine of bias is meant to keep out," *Dyer v. Calderon*, 151 F.3d 970, 982 (9th Cir. 1998) (en banc), *cert. denied*, 525 U.S. 1033 (1998). Mr. Aguillard's failure to reveal his sister's position serving as a member of the District Attorney's Office's staff deprived Mr. Keller of an opportunity to conduct a meaningful voir dire and kept him unaware of this basis for making a peremptory strike or a for-cause challenge. *See Odom v. State*, 355 So. 2d 1381, 1383 (1978).

Under the test set forth by the by the Supreme Court of the United States in *McDonough Power Equipment v. Greenwood*, 464 U.S. 548 (1984), juror misconduct may be found where the juror's concealment on voir dire foreclosed counsel's ability to conduct an adequate voir dire. If

a juror failed to answer a material question honestly on voir dire, and a correct response would have provided a valid basis to challenge for cause, then relief is warranted. *Id*. at 556.[32] Many courts recognize that a juror's lack of truthfulness can be sufficient basis for relief even absent proof that the juror would have been excludable for cause. "[W]hen possible non-objectivity is secreted and compounded by the untruthfulness of a potential juror's answers on voir dire, the result is a deprivation of the defendant's right to a fair trial." *United States v. Bynum*, 643 F.2d 768, 771 (4th Cir. 1980). As one court explained:

> The individual who lies in order to improve his chances of serving has too much of a stake in the matter to be considered indifferent. Whether the desire to serve is motivated by an overactive sense of civic duty, by a desire to avenge past wrongs, by the hope of writing a memoir or by some other unknown motive, this excess of zeal introduces the kind of unpredictable factor into the jury room that the doctrine of bias is meant to keep out.

Dyer, 151 F.3d at 982.[33]

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[32] Four years prior to the Supreme Court's decision in *McDonough*, this Court held that where a prospective juror fails to respond to a question on voir dire, the court must "determine whether the question propounded to the juror was (1) relevant to the voir dire examination; (2) whether it was unambiguous; and (3) whether the juror had substantial knowledge of the information sought to be elicited." *Odom v. State*, 355 So. 2d 1381, 1383 (Miss. 1978). To obtain a new trial under the *McDonough* test a petitioner must "demonstrate that a juror failed to answer honestly a material question on voir dire, and then further show that a correct response would have provided a valid basis for a challenge for cause." *McDonough*, 464 U.S. at 556. To the extent that the *Odom* test imposes additional elements on petitioner to establish his federal constitutional claim, the *McDonough* test must apply in order to determine whether Mr. Keller's federal constitutional rights have been violated.

[33] *See also United States v. Rucker*, 557 F.2d 1046 (4th Cir. 1977) (voir dire that has effect of impairing defendant's ability to exercise intelligently his challenges is ground for reversal, irrespective of prejudice); *United States v. Brown*, 799 F.2d 134 (4th Cir. 1986) (same); *United States v. Colombo*, 869 F.2d 149, 151 (2d Cir. 1989) (intentional nondisclosure on voir dire "reflected an impermissible partiality" and "prevented [defendant] from intelligently exercising his peremptory and causal challenges"); *United States v. Perkins*, 748 F.2d 1519, 1531–33 (11th Cir. 1984) (juror's refusal to disclose, *inter alia*, that he knew defendant gives rise to presumption of actual bias); *McCoy v. Goldston*, 652 F.2d 654, 658 (6th Cir. 1981) (requiring presumption of bias where juror deliberately concealed information); *Burton v. Johnson*, 948 F.2d 1150, 1159 (10th Cir. 1991) (juror's failure to reveal that she was involved in abusive

Mr. Keller alleges that he will also be able to establish juror bias under the test established by this Court in *Odom v. State*, 355 So. 2d 1381 (Miss. 1978). Under the *Odom* test, the court must determine "whether the question propounded to the juror was (1) relevant to the voir dire examination; (2) whether it was unambiguous; and (3) whether the juror had substantial knowledge of the information sought to be elicited." *Id.* at 1383. The question whether venire members "knew or knew of" any of the attorneys or the defendant in the case was unambiguous and relevant. *See id.* at 1382 (question to venire whether they had close relative who worked for law enforcement was relevant); *Williams v. State*, 35 So. 3d 480, 490 (Miss. 2010) (question whether venire members were close personal friends or family members with witnesses was unambiguous and relevant). Upon information and belief, Juror Aguillard had personal knowledge that his sister worked for the Harrison County District Attorney at the time of Keller's trial.

The United States Supreme Court "has long held that the remedy for allegations of juror partiality is a hearing in which the defendant has the opportunity to prove actual bias." *Phillips*, 455 U.S. at 215. *See also McDonough*, 464 U.S. at 551–52 (criticizing appellate court for deciding a juror bias claim without remanding the matter to the district court for an evidentiary hearing); *M. Williams v. Taylor*, 529 U.S. 420, 441–42 (2000) (stating that juror's omission of accurate responses during voir dire "disclose[d] the need for an evidentiary hearing"); *Dennis v. United States*, 339 U.S. 162, 171–72 (1950) ("Preservation of the opportunity to prove actual bias is a guarantee of a defendant's right to an impartial jury."). A post-conviction hearing allows counsel to question the juror about his "memory, reasons for acting as he did, and his understanding of the consequences of his actions," and permits the court "to observe the juror's

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family situation where defendant was on trial for killing her abusive husband was itself evidence of bias and that defendant had been denied right to a fair trial).

demeanor under cross-examination and to evaluate his answers in light of the particular circumstances of the case." *Phillips*, 455 U.S. at 222 (O'Connor, J., concurring). This Court should grant Mr. Keller discovery and an evidentiary hearing at which to develop evidence to prove his allegations that Juror Aguillard provided an incomplete and misleading answer on a material question, and that he is entitled to relief under *McDonough Power Equipment v. Greenwood* and *Odom v. State*.

IV. MR. KELLER IS ENTITLED TO A DETERMINATION OF HIS ELIGIBILITY FOR A DEATH SENTENCE THAT IS CONSISTENT WITH THE SIXTH AMENDMENT AND THE SUPREME COURT'S HOLDING IN *RING V. ARIZONA*

Any assessment of prejudice resulting from violations as alleged by Mr. Keller herein must take into account all of the evidence, old and new, resulting from both claims of ineffective assistance of counsel and claims of prosecutorial misconduct. *See Williams, T.*, 529 U.S. at 399 (noting that courts must evaluate "the entire post-conviction record, viewed as a whole"); *see also Kyles*, 514 U.S. at 346–37 (prejudice for *Brady* claims assessed cumulatively); *Bagley*, 473 U.S. at 694 (noting that the *Brady* materiality standard and the *Strickland* prejudice standard are the same). As appropriate, the Court must assess prejudice for both the guilt and sentencing determinations made by jurors.

Mississippi's statutory scheme provides that, if one or more of the aggravating circumstances upon which a death sentence is imposed is found to be invalid, this Court "shall determine whether the remaining aggravating circumstances are outweighed by the mitigating circumstances[.]" Miss. Code Ann. §99-19-105(3)(d); *see also Gillett v. State*, 148 So. 3d 260, 266 (Miss. 2014) (noting that when reweighing "the Court takes the place of the sentencer and reaches its own independent conclusion"). Such a reweighing, however, would substitute the Court's finding for a finding that must be made by jurors before Mr. Keller could even be

considered eligible for a death sentence, in violation the Supreme Court's holding in *Ring v. Arizona*, 536 U.S. 584 (2002).

Mississippi law requires that, before jurors may select a sentence of death, they must first be unanimous in finding: (a) that the defendant killed, attempted or intended to kill, or knew lethal force would be employed; (b) the presence of at least one of the aggravating factors enumerated in §99-19-101(5); and (c) that the mitigating circumstances do not outweigh the aggravating circumstances. Miss. Code Ann. §99-19-101(3). A unanimous finding that each of these elements has been sufficiently proven does not require jurors to impose a death sentence; finding all three elements merely makes the defendant *eligible* for a death sentence. The three eligibility requirements enumerated in §99-19-101(3) are, therefore, necessary prerequisites that must be found in order to increase the maximum sentence a defendant may receive. *Ring*, 536 U.S. at 609. Without jurors finding that the mitigating evidence does not outweigh the aggravating evidence, the maximum sentence for which Mr. Keller would have been eligible is life imprisonment. *See id*. at 597, 599; Miss. Code. Ann. §99-19-101(3) (jurors "must unanimously find in writing" all three enumerated circumstances in order for a defendant to be eligible for a death sentence or life imprisonment without eligibility for parole).

Because Mississippi has made an increase in authorized punishment for defendants like Mr. Keller who are convicted of capital murder contingent on the findings of facts set out in §99-19-101(3), those facts must be found by a jury beyond a reasonable doubt. *Ring*, 536 U.S. at 602. It is contrary to the provisions of *Ring*, and the Sixth and Fourteenth Amendments for this Court to substitute its findings with regard to any of these eligibility factors for those of properly selected jurors by conducting the "reweighing" contemplated by Code §99-19-105(3)(d).

V. IN VIOLATION OF THE EIGHTH AMENDMENT PROHIBITION AGAINST CRUEL AND UNUSUAL PUNISHMENT, MR. KELLER'S DEATH SENTENCE IS UNCONSTITUTIONAL BECAUSE THE METHOD OF EXECUTION UNDULY RISKS SUBSTANTIAL HARM

The manner of execution for individuals sentenced to death in Mississippi is "by continuous intravenous administration of a lethal quantity of an ultra-short-acting barbiturate or other similar drug in combination with a chemical paralytic agent until death is pronounced by the county coroner where the execution takes place or by a licensed physician according to accepted standards of medical practice." Miss. Code Ann. §99-19-51. The method, as implemented by Mississippi, poses an unacceptable risk of significant pain and violates Mr. Keller's right be free from cruel and unusual punishment under the Eighth Amendment and Fourteenth Amendments of the United States Constitution and Article Three Section Twenty-Eight of the Mississippi Constitution. Failures to reveal details about the method execution violate his rights under the First Amendment of the United States Constitution and Article Three Section Thirteen of the Mississippi Constitution.

The lethal injection protocol promulgated by Mississippi Department of Corrections (MDOC) calls for the serial administration of three drugs to put a prisoner to death. Ex. 156 (MDOC Lethal Injection Protocol); Ex. 157 (Affidavit of Jim Norris). Pentobarbital is a short-acting barbiturate designed to render the prisoner unconscious and insensate. Vecuronium bromide is a neuromuscular blocking agent which paralyzes all of the prisoner's voluntary muscles, including the muscles used for respiration, but does not affect sensation, consciousness, cognition, or the ability to feel pain and suffocation. The third drug is potassium chloride which disrupts the electrical signals in the heart, paralyzes the cardiac muscle and kills the prisoner by cardiac arrest.

The drugs used in Mississippi's lethal injection protocol have known and documented risks. If vecuronium bromide is administered to a prisoner who is still conscious and able to feel pain, he will suffocate to death while experiencing the agonizing and conscious desire to inhale. Because he is completely paralyzed and unable to talk, move, or make facial expressions as a result of being paralyzed, his agony will be unknown and concealed to observers. If potassium chloride is administered before the prisoner is anesthetized, then he will experience excruciating pain. Mississippi's protocol provides no mechanism to assure that a sufficient dose of the short-acting barbiturate has been dosed adequately to prevent the prisoner from experiencing these horrendous complications.

A. Known Risks of the Lethal Injection Protocol

The availability of the necessary drugs for execution has also been seriously restricted. In July 2011, the only FDA-approved manufacturer of injectable pentobarbital sodium (Nembutal), Lundbeck, sold its interest in Nembutal and restricted the sell or transfer of the drug to states that do not have capital punishment. Mississippi's supply has since expired and it can no longer legally-obtain unexpired injectable pentobarbital for use in executions. *See* Ex. 157 (Affidavit of Jim Norris).

It appears that Mississippi is preparing to either compound its own execution drugs or send the powered form of pentobarbital to a compounding pharmacy. In an affidavit provided by the attorney for MDOC, Mr. Jim Norris testified that the pentobarbital sodium possessed by MDOC is in the powder form and will expire in May 2015[34]. *See* Ex. 157 (Affidavit of Jim Norris). Compounded drugs are not FDA-approved and have not been evaluated for effectiveness and safety. Until recently, the FDA did not regulate compounded drugs and

[34] Based on this information, the supply of pentobarbital sodium maintained by MDOC has expired.

compounding pharmacies, and still does not have regulatory authority over all compounding pharmacies. There is a significant risk that compounded drugs are manufactured with counterfeit or substandard ingredients purchased from a range of manufacturers that operate outside of the FDA supervision and regulation. This has led to individuals taking harmful, contaminated, counterfeit, sub-potent, and/or super potent-drugs.

MDOC's decision to use a new and experimental lethal injection protocol without adequate assurances that the pentobarbital is manufactured according to accepted pharmaceutical practices and with pure and potent ingredients presents an unacceptable risk that will result in the infliction of cruel and unusual punishment.

B. Unsuccessful Executions due to Untested Lethal Injection Mixtures

Prisoners in the United States have recently suffered excruciating pain during executions due to experimental procedures and drug mixtures.[35] These botched executions have

[35] There have been forty-six (46) well-known botched executions in the United States: August 10, 1982. Virginia. **Frank J. Coppola;** April 22, 1983. Alabama. **John Evans;** Sept. 2, 1983. Mississippi. J**immy Lee Gray;** December 12, 1984. Georgia. **Alpha Otis Stephens;** March 13, 1985. Texas. **Stephen Peter Morin;** October 16, 1985. Indiana. **William E. Vandiver;** August 20, 1986. Texas. **Randy Woolls;** June 24, 1987. Texas. **Elliot Rod Johnson;** December 13, 1988. Texas. **Raymond Landry;** May 24, 1989. Texas. **Stephen McCoy;** July 14, 1989. Alabama. **Horace Franklin Dunkins, Jr.;** May 4, 1990. Florida. J**esse Joseph Tafero;** September 12, 1990. Illinois. **Charles Walker;** October 17, 1990. Virginia. **Wilbert Lee Evans**; August 22, 1991. Virginia. **Derick Lynn Peterson;** January 24, 1992. Arkansas. **Rickey Ray Rector;** April 6, 1992. Arizona. **Donald Eugene Harding;** March 10, 1992. Oklahoma. **Robyn Lee Parks;** April 23, 1992. Texas. **Billy Wayne White;** May 7, 1992. Texas. **Justin Lee May;** May 10, 1994. Illinois. **John Wayne Gacy;** May 3, 1995. Missouri. **Emmitt Foster;** January 23, 1996. Virginia. **Richard Townes, Jr.;** July 18, 1996. Indiana. **Tommie J. Smith**; March 25, 1997. Florida. **Pedro Medina;** May 8, 1997. Oklahoma. **Scott Dawn Carpenter;** June 13, 1997. South Carolina. **Michael Eugene Elkins;** April 23, 1998. Texas. **Joseph Cannon;** August 26, 1998. Texas. **Genaro Ruiz Camacho;** October 5, 1998. Nevada. **Roderick Abeyta;** July 8, 1999. Florida. **Allen Lee Davis;** May 3, 2000. Arkansas. **Christina Marie Riggs;** June 8, 2000. Florida. **Bennie Demps;** December 7, 2000. Texas. **Claude Jones;** June 28, 2000. Missouri. **Bert Leroy Hunter;** November 7, 2001. Georgia. **Jose High;** May 2, 2006. Ohio. **Joseph L. Clark;** December 13, 2006. Florida. **Angel Diaz;** May 24, 2007. Ohio. **Christopher Newton;** June 26, 2007. Georgia. **John Hightower;** June 4, 2008. Georgia. **Curtis Osborne;** Sept. 15,

demonstrated an impermissible risk that lethal injection executions pose an interoperable risk of pain in violation of the prohibition against cruel and usual punishment. *Baze v. Rees*, 553 U.S. 35, 53 (2008). Mississippi appears to be headed down the same path by compounding Pentobarbital. Given the recent failures, the likelihood of a similar outcome is certain which will give rise to a procedure that is in direct violation of the mandates of the Eighth Amendment prohibition against cruel and unusual punishment.

In October 2012, in South Dakota, Eric Robert was executed using compounded pentobarbital. Witnesses reported that he appeared to clear his throat and gasp heavily, at which point his skin turned a blue-purplish hue. Mr. Robert opened his eyes, and they remained open until his death. *See* App. M, Dave Kolpack and Kristi Eaton, Eric Robert *Execution: South Dakota Executes Inmate Who Killed Prison Guard*, Huffington Post, Oct. 16, 2012, available at http://www.huffingtonpost.com/2012/10/16/eric-robert-execution_n_1969640.html. (Last visited June 11, 2015).

Michael Lee Wilson was executed in Oklahoma on January 9, 2014, using Oklahoma's three-drug lethal injection protocol, starting with compounded pentobarbital. Within twenty seconds of the administration of the pentobarbital, Mr. Wilson said, "I feel my whole body burning." *See* App. N, Rick Lyman, *Ohio Execution Using Untested Drug Cocktail Renews the Debate Over Lethal Injections*, N.Y. Times, Jan. 16, 2014., available at http://www.nytimes.com/2014/01/17/us/ohio-execution-using-untested-drug-cocktail-renews-the-debate-over-lethal-injections.html?_r=0. (Last visited June 11, 2015). Attorneys and experts had warned that pentobarbital is considered a controversial substitute for sodium thiopental

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2009. Ohio. **Romell Broom;** Sept. 27, 2010. Georgia. **Brandon Joseph Rhode;** Jan. 16, 2014. Ohio. **Dennis McGuire;** April 29, 2014. Oklahoma. **Clayton D. Lockett;** July 23, 2014. Arizona. **Joseph R. Wood.**

because its manufacture is often poorly regulated, and contaminated batches can cause excruciating pain prior to death.

The state of Arizona has announced a moratorium on future executions in order to review the lethal injection procedure following the botched execution of Joseph Wood on July 23, 2014, which took nearly two hours to complete. *See* App. O, DPIC, "Death Penalty in Flux", available at http://www.deathpenaltyinfo.org/death-penalty-flux (last visited June 11, 2015); *see also* App. P, Connor, "Arizona Execution of Joseph Wood Took Nearly Two Hours", available at http://www.nbcnews.com/storyline/lethal-injection/arizona-execution-joseph-wood-took-nearly-two-hours-n163086 (last visited June 11, 2015). The Wood execution came on the heels of another horribly botched execution in Ohio, that of Denis McGuire. These states have been receiving drug combinations from questionable and lightly regulated compounding pharmacies since manufacturers have halted the sale of them to prisons for executions. K. Outterson, "The Drug Quality and Security Act - Mind the Gaps," N. ENGL. J. MED. 97, 98-99 (2014).

The Eighth Amendment protects Mr. Keller from an execution that warrants an "unnecessary and wanton infliction of pain." *Gregg v. Georgia*, 428 U.S. 153, 173 (1976). The United States Supreme Court in *Baze v. Rees* held the Eighth Amendment prohibits lethal injection drugs that inflict unnecessary pain and suffering. *Baze v. Rees*, 553 U.S. 35, 53 (2008). The Court further held although it is impossible to determine whether an inmate will suffer unnecessary pain, "subjecting individuals to a risk of future harm" violates the Eighth Amendment. *Id.* at 49.

In light of the State of Mississippi's untested and changing protocols, Mr. Keller's sentence should be vacated and remanded for a new sentencing hearing.

Conclusion

WHEREFORE, for the foregoing reasons, Mr. Keller respectfully requests that this Court vacate his conviction and sentence in this case and order a new trial, or in the alternative, remand this cause to the trial court for an evidentiary hearing and the development and presentation of evidence in support of the claims of error raised herein.

Dated: June 12, 2015

Respectfully submitted,

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Certificate of Service

I, the undersigned attorney for the Petitioner, do hereby certify that I have on this day filed the foregoing Motion for Leave to Proceed in the Trial Court with a Petition For Post-Conviction Relief with the Clerk of the Court using the MEC system which sent notice to the following:

Honorable Jason Davis
Assistant Attorney General
Post Office Box 220
Jackson, MS 39205
jdavi@ago.state.ms.us

Additionally, Exhibits filed under seal were served via Hand Delivery to:

Honorable Jason Davis
Assistant Attorney General
500 High Street
Jackson, MS 39205

This the 12th day of June, 2015.

s/ Louwlynn Vanzetta Williams
Louwlynn Vanzetta Williams, MSB #99712
Certifying Attorney