IN THE SUPREME COURT OF MISSISSIPPI

No. _____

MICHELLE BYROM *Petitioner*

v.

STATE OF MISSISSIPPI *Respondent*

MICHELLE BYROM' S MOTION FOR LEAVE TO FILE SUCCESSIVE PETITION FOR POST-CONVICTION RELIEF

THIS IS A DEATH PENALTY CASE

Circuit Court of Tishomingo County Case No. CR 99-065
Direct Appeal Miss. Supreme Court Case No. 2001-DP-00529-SCT
First Miss. Supreme Court Post-Conviction Case No. 2003-DP-02503-SCT

Michelle Byrom, Petitioner

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INTRODUCTION

Petitioner, Michelle Byrom ("Byrom"), seeks leave to file a successive petition for post-conviction relief, and an evidentiary hearing on the new claims asserted. This case involves constitutional violations that call into question whether Byrom actually committed the "murder-for-hire" for which she was sentenced to death, as well as the appropriateness and reliability of her death sentence under the facts and circumstances presented in this case.

Byrom was convicted of capital murder and sentenced to death for hiring Joey Gillis ("Gillis") to murder her husband, Edward Byrom, Sr., for "pecuniary gain." At this point, even the prosecution does not now believe that Gillis was the triggerman who killed Edward Byrom, Sr. At Byrom's trial, the prosecutor argued that Gillis was in jail and awaiting trial on the murder-for-hire charge. However, after Byrom's trial, Gillis was allowed to plead guilty to charges of "accessory after the fact" and conspiracy to commit murder after it was disclosed that Byrom's son, Edward Byron, Jr. ("Junior") had confessed to the State's forensic psychologist ath

he had killed his father. As a result, the alleged shooter, Gillis, served a relatively short sentence and was released from prison on parole in 2009. Successive PC Ex. No. 23, MDOC record. Gillis has now provided an affidavit stating that he did not murder Edward Byrom, Sr. Junior entered a plea agreement with the state and testified at his mother's trial and he was released from prison on parole in 2013. Successive PC Ex. No. 24, MDOC record.

Petitioner now has new evidence to challenge her conviction in the form of an affidavit from the State's court-appointed forensic psychologist, Dr. Criss Lott, who has stated that Byrom's son, Edward Junior, confessed to killing his father with no help from Gillis, and for his own reasons. Successive PCR, Ex. No. 1. The confessions were made by Junior to Dr. Lott prior to Petitioner's trial, but this information was never disclosed to Petitioner or her attorneys. Junior was the key state prosecution witness against Byrom at her trial, and he cooperated with the State and testified against his mother pursuant to his plea agreement which allowed him to avoid the death penalty. Junior testified that Gillis was hired by his mother to murder his father, but we now know that this was false testimony.

In 2006, when the undersigned was investigating Byrom's case for federal habeas proceedings, Dr. Lott refused to discuss his evaluation of Junior because of specific instructions Dr. Lott had received from the trial court judge who told him not to talk about the case or disclose his files without a court order authorizing such disclosures. Successive PCR, Ex. No. 3 (¶¶ 4-24), Affidavit of David Calder. However, on February 3, 2014, Dr. Lott provided an affidavit stating that during Edward Byrom Jr.'s court-ordered psychological evaluation, Junior told Dr. Lott that he had been physically and emotionally abused by his father, Edward Byrom Sr., and that Junior shot his father for his own reasons. Successive PCR Ex. No. 1 (¶¶ 5-7). Dr. Lott testified that during Joey Gillis's psychological evaluation, Gillis told him that he did not

shoot Edward Byrom Sr. Because the versions of the crimes related by Junior and Gillis during their independent psychological evaluations were so similar factually, Dr. Lott believed that both men were telling the truth. Successive PCR, Ex. No. 1 (¶¶5-7).

Dr. Lott has also testified that he disclosed this information to the trial judge prior to Petitioner's trial. Initially, this was by way of a hypothetical question asking what he should do if, during the course of a forensic evaluation for mental competency and sanity, he received specific information about the facts and details of a crime. Successive PCR, Ex. No. 1 (¶ 9). After being instructed by the trial judge to be specific, Dr. Lott "told him about Edward Byrom Jr. 's confession to me that he had killed his father." Id. Both the prosecution and the trial judge failed to disclose to Petitioner or her attorneys that Junior told the State's witness, Dr. Lott, that it was Junior, not Gillis, who had shot his father.

At some point after Byrom's trial, Dr. Lott also told Gillis's trial attorneys about Junior's confession, and as a result, the State dropped the capital murder charge against Gillis and allowed him to plea to a lesser offense because the prosecutors were convinced that they could not convict Gills of murdering Edward Byrom, Sr. because of Junior's confession. Successive PCR, Ex. No. 2. This information was not disclosed to Byrom's defense counsel prior to or during her capital trial, in violation of her right to due process of law. Although the factual predicate concerning Junior's confession was arguably discoverable at some point after Byrom's trial based on the prosecutor's public statements, the claim was not raised during Byrom's initial state post-conviction proceedings. As a result, Petitioner received ineffective assistance of counsel in her initial post-conviction proceedings, and these claim should not be deemed procedurally barred.

In addition, Petitioner's trial attorneys, Terry Wood and Sunny Phillips, have now admitted by way of affidavits that they convinced Byrom to waive her right to be sentenced by a jury by assuring her that her conviction would be reversed on appeal due to the "errors" that the trial judge had committed in her trial. This erroneous legal advice could not realistically be deemed legitimate "strategy" by any reasonable criminal defense lawyer, and constituted ineffective assistance of counsel at trial and on direct appeal for which post-conviction relief is warranted.

Finally, at Byrom's trial, she received ineffective assistance of counsel because her attorneys intentionally withheld from discovery two letters that Junior had written confessing to the murder. As discovery sanction, the trial court precluded defense counsel from impeaching the key prosecution witness – Junior, – with his letters which provided a detailed description of how and why he – not the alleged triggerman, Gillis, – had actually murdered his father for his own reasons. Although this Court upheld the exclusion sanction on direct review, three Mississippi Supreme Court Justices[1] dissented, and would have reversed Byrom's conviction and death sentence due to the erroneous exclusion of Junior's letters confessing to the murder. *Byrom v. State*, 863 So.2d 836, 884-85 (2003) (Pittman, C.J., dissenting; joined by McRae, P.J., and Graves, J.)("*Byrom I*"). Byrom asks this Court to revisit this claim in light of its decision on a materially indistinguishable issue in *Ross v. State,* 954 So.2d 968, 997-1000 (Miss. 2007), which was decided after Byrom was denied post-conviction relief. Because of this intervening decision, this claim should not be deemed procedurally barred pursuant to Miss. Code Ann. §§ 99-39-5(2) and 99-39-27(9) (West 2013).

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[1] A fourth justice, Justice Diaz, also voted to overturn the conviction and sentence and prepared a dissent, but was not permitted to participate because he took a leave of absence after he cast his vote. *Byrom I,* 863 So.2d at 885-86. His prepared dissent was adopted by Justice McRae. *Id.* at 889.

Byrom's claims include allegations of the ineffective assistance of trial counsel at both the guilt and sentencing phases of this case. At the guilt phase, trial counsel committed a discovery violation that rendered them unable to impeach Junior with a letter he had written providing a detailed confession to the murder, and failed to present evidence in support of their theory that Byrom had confessed to this crime only in an effort to protect her son. This claim was not raised in post-conviction proceedings.

At sentencing, after inexplicably advising Byrom to waive her right to a jury, counsel did not present a single witness in Byrom's behalf, claiming they wanted to "save" the evidence for a retrial, which they assured Byrom would occur. In fact there were numerous witnesses who could have explained that Byrom had suffered a lifetime of physical, sexual and emotional abuse – first at the hands of her stepfather, and later had the hands of her husband and expert testimony that could have explained the traumatic effects of such abuse. As a result, the prosecution was able to successfully argue that Byrom had never been abused, and the trial judge refused to consider these powerful mitigating circumstances and sentenced Byrom to death.

Trial counsel's performance at sentencing was so egregious that one Mississippi Supreme Court justice would have reversed on this claim, *sua sponte*, on *direct review*. *See Byrom I,* at 893 (McRae, J. dissenting). Although Byrom did raise this claim in the initial post-conviction petition, post-conviction counsel did so after only the most cursory investigation, presenting inadequate evidence and virtually no argument in support, and the claim was denied without even an evidentiary hearing. Nevertheless, three justices dissented and would have vacated Byrom's death sentence on this ground. *Byrom v. State*, 927 So.2d 709, 730-33 (2006) (Dickinson, J., dissenting; joined by Graves, J. and Cobb, P.J.) ("*Byrom II*"). As Justice Dickinson described it, "I have attempted to conjure up in my imagination a more egregious case

of ineffective assistance of counsel during the sentencing phase of a capital case. I cannot." *Id.* at 732. Byrom re-raises this claim in this petition, submitting evidence and argument that could have and should have been presented during the first post-conviction proceeding and seeks an evidentiary hearing on this claim.

This Court has recognized a right to the effective assistance of post-conviction counsel in death penalty cases, and that a violation of that right will constitute sufficient grounds to authorize a second post-conviction petition presenting claims and/or evidence that was not submitted in the first. *See, e.g., Grayson v. State*, 118 So. 3d 118, 126 (Miss. 2013). Byrom's post-conviction counsel was ineffective for failing to adequately investigate, plead and/or present evidence in support of the claims presented herein, and for failing to make appropriate motions for (or otherwise procure) necessary investigative and expert assistance. Post-conviction counsel's failure to provide competent representation is a violation of Byrom's rights under the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, and Article 3, Sections 14, 25, and 26 of the Mississippi Constitution, and provides grounds for raising these claims in this successive petition.

After setting out the procedural history of the case and a summary of the key facts, Byrom discusses below each ground for relief and the supporting evidence. Finally, Byrom explains that these grounds for relief are not procedurally barred due to the ineffectiveness of prior post-conviction counsel or the availability of an intervening decision. Specifically, the claims asserted are based on violations of Byrom's fundamental rights, which are not subject to the procedural bars of the Mississippi Uniform Post-Conviction Collateral Relief Act, such as the prohibition in Miss. Code Ann. § 99–39–23(6) (West 2013) against "successive writs" *Rowland v. State*, 42 So.3d 503, 508 (¶ 16) (Miss.2010) ("Errors affecting fundamental constitutional

rights are excepted from the procedural bars of the [Uniform Post–Conviction Collateral Relief Act]").

PROCEDURAL HISTORY

On October 21, 1999, in Tishomingo County, Michelle Byrom (Byrom), her son Edward Byrom, Jr. (Junior), and Joey Gillis, were indicted for the capital murder of Byrom's husband, Edward Byrom, Sr. (Byrom, Sr.). CP 101.[2] Although the defendants were indicted in separate cases, the trial court issued an omnibus order that consolidated all three cases for pretrial preparations.[3] The State alleged that Byrom hired Gillis to kill Byrom, Sr., and that Junior purportedly assisted Gillis in both procuring and disposing of the weapon used.

Byrom was tried first, and she was represented by Terry Lynne Wood and Sunny Phillips. On November 17, 2000, a jury found Byrom guilty of capital murder based because she hired Gillis to commit the murder. Vol. 16, TR 993. Byrom's conviction was based primarily on the testimony of her son, Junior, who entered a plea agreement with the State so that he could avoid the death penalty. After being assured by her attorneys that the trial court has committed sufficient errors so that she would be assured a reversal of her conviction on appeal and a new

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[2] "CP" refers to the first nine volumes of the trial record, which consists of the clerk's papers and are consecutively paged; "Vol. __, TR. __" refers to trial transcript which is contained in Vols. 10-16 of the trial record; "State Tr. Ex." or "Def. Tr. Ex." refers to the exhibits introduced at trial; "PC Ex." refers to exhibits filed in the initial State post-conviction proceedings; "ECF [doc#]" refers to the record for the U.S. District Court for the Northern District of Mississippi, documents electronically filed and available on PACER. "Succ. PC Ex." refers to the exhibits attached to this Petition.

[3] The individual cases in the Circuit Court of Tishomingo County, Mississippi were: Michelle Byrom, Case No. 99-065, Edward Byrom, Jr. Case No. 99-066, and Joey Gillis, Case No. 99-067.

trial, Byrom waived her right to a jury at sentencing, and failed to present any witnesses in mitigation. *Id.* at 1001-02. The trial court judge sentenced Byrom to death. *Id.* at 1024.

On November 15, 2000 just prior to Byrom's trial, Junior entered a plea agreement in which the State agreed to drop his capital murder charge, and allow Junior to plead guilty to conspiracy to commit capital murder, and "accessory before the fact" to grand larceny and burglary with intent to commit assault (for a total sentence of 30 years), in exchange for his testimony against his mother and Gillis. State's Initial PC Ex. 30. On June 21, 2001, Junior entered guilty pleas to conspiracy and accessory before the fact and was sentenced in accordance with his plea agreement. Initial PC Ex. 10. **Junior served a relatively short prison sentence and he was released from prison on parole in 2013.** Successive PC Ex. No. 24, MDOC record.

On March 15, 2001, Gillis, the alleged "trigger-man" whom Byrom purportedly promised to pay for the murder of her husband, pled guilty to "accessory after the fact" to capital murder and conspiracy to commit capital murder, and he received a sentence of 15 years. Initial PC Ex. 11. **Gillis was subsequently paroled in 2009.** Successive PC Exhibit No. 23, MDOC record.

Byrom's convictions and death sentence were upheld on direct review to the Mississippi Supreme Court on October 16, 2003. *Byrom v. State*, 863 So.2d 836 (Miss. 2003) (*"Byrom I"*). Byrom was represented on direct review by her trial attorney, Terry Lynn Wood.

On February 7, 2005, Byrom filed a petition for post-conviction relief in the Mississippi Supreme Court, which was denied without an evidentiary hearing on January 19, 2006. *Byrom v. State*, 927 So.2d 709 (Miss. 2006) (*"Byrom II"*). Byrom was represented by Robert Ryan and Louwlynn V. Williams of the Office of Capital Post-Conviction Counsel.[4]

[4] Ms. Williams is now the head of the Office of Capital Post-Conviction Counsel.

On September 8, 2006, Byrom filed a Petition for Writ of Habeas Corpus in the Northern District of Mississippi. The district court denied the petition on July 5, 2011, (amended on August 22, 2011), *Byrom v. Epps*, 817 F. Supp. 2d 868 (N.D. Miss. 2011)("*Byrom III*"), and Byrom's Motion to Alter or Amend Judgment on August 29, 2011. However, the District Court did grant a "certificate of appealability" on her claims that: (1) evidence was improperly suppressed; (2) her statements were taken in violation of her privilege against self-incrimination; (3) the trial court failed to consider all mitigating evidence; (4) her waiver of jury sentencing was invalid; and (5) counsel was ineffective in failing to investigate and present all available mitigating evidence. *Byrom v. Epps*, 817 F.Supp.2d 868, 917 (N.D. Miss. 2011).

The Fifth Circuit's unpublished decision affirming the denial of habeas relief can be located at *Byrom v. Epps*, 518 Fed.Appx. 243 (5th Cir. Mar 28, 2013)("*Byrom IV*"). On May 23, 2013, the Fifth Circuit Court of Appeals denied Petitioner's request for rehearing *en banc*.

Byrom filed a Petition for Writ of Certiorari in the Supreme Court of the United States on August 22, 2013 (No. 13-5998), which is pending at the time of this Petition.

Byrom has been represented in federal habeas proceedings by David L. Calder, and Alan M. Freedman. Based on information discovered in the course of the federal proceedings, these attorneys have filed this Petition and a contemporaneous Motion to be appointed as Byrom's counsel in this case, because the Office of Capital Post-Conviction Counsel would have a conflict of interest, since ineffective assistance of post-conviction counsel is one of the claims raised.

FACTUAL SUMMARY

Byrom was convicted of capital murder and sentenced to death for hiring Joey Gillis to murder her husband, for "pecuniary gain." The relevant facts and procedural history associated with these issues are summarized below.

A. Statements.

On June 4, 1999, while Byrom was hospitalized with pneumonia, physical ailments related to Munchausen Syndrome, some of which were caused by her intentional ingestion of rat poison, and other psychological and physical problems. While she was in the hospital, Byrom's husband, Edward Byrom, Sr. was shot to death in his home with his own gun. After the shooting, Byrom's son, Junior, visited his mother at the hospital, returned home, and called 911. The Sheriff took Junior in for questioning. *Byrom I,* 863 So.2d at 845.

The tapes of the police interviews with Junior on June 4 and June 5 were lost or destroyed by law enforcement officials. Vol. 15, TR 865. At trial Junior testified that he had not incriminated his mother prior to his June 7th statement to police, and he alleged that he did not do so until after the police told him she had already confessed to the crime. Vol. 14, TR. 680, 687.

The police interrogated Byrom regarding her husband's murder on June 4, 5, 6 and 7, the first three taking place while Byrom was hospitalized and being administered a variety of medications. TR. Ex. 3. On June 4, police told Byrom that Junior had already told them she had hired someone to kill Byrom, Sr. Vol. 3, TR. 338-39. After being warned three times that if she didn't name someone, her son would "take the rap," Vol. 3, TR. 338, 339, 340, Byrom said she that she spoke with Gillis about killing her husband. Vol. 3, TR. 340. Byrom initially denied offering Gillis any payment or that she intended to use life insurance proceeds to pay him. Vol.

3, TR. 342-43. The next morning, police interviewed Byrom again, securing statements that she intended to pay Gillis from insurance proceeds. Vol. 3, TR. 348.

Byrom was interviewed regarding the same facts by one or more of the same individuals again on June 6 and 7. Vol. 3, TR. 352-368; Vol. 3, TR. 369-385. She was reminded that she was confessing in order to take the blame away from her son, Vol. 3, TR. 365, 366, and that the prosecutor was aware of her prior statements. Vol. 3, TR. 369-70. The June 4 and 5th statements were suppressed because the police failed to provide valid *Miranda* warnings; the June 6th and 7th statements were ruled admissible. Vol. 11, TR. 278.

Defense counsel argued that Byrom claimed she had hired Gillis in an effort to exculpate her son, not because it was the truth. Vol. 16, TR. 963-66.

B. Physical evidence.

Junior knew where his father's gun was hidden in the home. Only Junior had gunpowder residue on his palms after the murder; Gillis did not have any gunpowder residue on his person. Vol. 15, TR. 886-889, 891; TR 888. Junior led police to the murder weapon. Vol. 13, TR. 572-75. Junior led police to t-shirt that belonged to Junior that had been thrown into the woods near the Byrom home. Vol. 15, TR. 757. Although the t-shirt belonged to Junior, he claimed he had loaned it to Gillis to wear during the murder. Vol. 14, TR. 626.

C. Junior's testimony and the exclusion of his confession.

Pursuant to his plea agreement, Vol. 14, TR. 611-12, Junior testified at Byrom's trial that Joey Gillis shot Byrom, Sr. pursuant to a monetary agreement with Byrom, and that his own role was limited to procuring his father's gun and disposing of the evidence. Vol. 14, TR. 613-32.

Through Junior, the State also admitted three letters Byrom had written to Junior while they were in jail, wherein she had urged Junior to blame Gillis for the murder. St. Tr. Ex. 33, 34, 35.

The defense wanted to impeach Junior's testimony with two letters he wrote to his mother. In the first letter, he admitted general responsibility for his father's death, and described how he felt about his father's abuse and how his life had been spiraling downward in the months prior to the murder. Def. Tr. Ex 72/PC Ex. 15. In the second, Junior clearly stated that he had personally shot and killed his father, giving a detailed description of his conduct and emotions before, during and after the shooting. He explained that Gillis's role was limited to helping dispose of the gun, and that the "conspiracy thing, for money" story he had given the police was "BS." Def. Tr. Ex. 87/PC Ex. 15A.

The State objected to the introduction of the letters into evidence because defense counsel had not disclosed the letters in discovery. Vol. 14, TR. 714-15. **The State insisted they would not have made a deal with Junior or put him on the stand to testify against Byrom if they had seen these letters.** Vol. 14, TR. 737. Defense counsel insisted that under Mississippi law, he was not required to disclose impeachment evidence before trial, and these letters were offered to impeach the testimony that Junior offered against his mother. Vol. 14, TR. 720-21, 731, 742-43. The trial court recessed overnight, allowing the state time to review the letters and confer with Junior. Vol. 14, TR. 716; 718-19.

The next morning, **the trial court excluded the letters**, and the judge instructed defense counsel that he was **"not permitted to pick it up and otherwise handle it and make the jury aware that it even exists."** Vol. 14, TR. 730-32. The court specifically directed that defense counsel was *not* permitted to "read each line of the letter and ask [Junior] if he wrote that." Vol.

14, TR. 733, 734, 745. That is, counsel was permitted to generally ask Junior to admit or deny making statements similar to those he wrote in the letters, but was not allowed to impeach Junior with the letters if he denied making any of the statements he had written in the letters. Vol. 14, TR. 732.

Although Junior admitted to making a general statement claiming responsibility for his father's death, TR. 740, he denied making the statements he wrote in the letter which described, in detail, how and why he (not Gillis) had murdered his father. Vol. 14, TR. 747-48. The defense presented no evidence. The jury convicted Byrom of capital murder. Vol. 16, TR. 993.

D. Sentencing.

Because Byrom's trial attorneys were absolutely certain that Byrom's conviction would be overturned on appeal due to the trial court's exclusion of Junior's confession letters, and because trial counsel wanted to avoid disclosing the mitigation evidence to the prosecution so they could "save" any mitigation evidence for the retrial, and possibly cause the trial judge to be recused on the re-trial due to a conflict, Byrom's attorneys advised her to waive her right to a jury sentencing, and they presented no witnesses on her behalf in the sentencing phase. Vol. 16, TR. 1001-06. Instead of offering this evidence, trial counsel determined that it was better "strategy" not to present witnesses in mitigation so that the state would be unaware of the mitigation testimony to be offered at the retrial, which the attorneys advised Byrom would certainly occur. Initial PC Pet. Ex. 6, Affidavit of Terry Wood; Initial PC Pet. Ex. 7, Affidavit of Sunny Phillips; Pet. Ex. 15; Successive PC Ex. 9, Affidavit of Terry Wood and Ex. 10, affidavit of Sunny Phillips; and Successive PC Ex. 21, Transcript of Oral Argument on Direct Appeal.

Trial Counsel discussed his justification for the waiver of jury sentencing at oral argument on direct appeal where he clearly revealed the alleged "strategy" behind his decision:

BY A MEMBER OF THE COURT: One other thing, why did you choose - - I know this is strategy, but **why did you choose to let the Judge sentence Byrom rather than the jury?**

BY MR. WOOD: Well, Your Honor, we had some witnesses present that we had contemplated using only in the sentencing phase, **but we made a strategy decision at that time to just let the Judge sentence her, and to - - BECAUSE WE FELT LIKE THERE HAD BEEN ENOUGH ERRORS IN THE TRIAL OF THE CASE THAT WE HAD A POTENTIAL FOR RETRYING THE CASE, AND WE DID NOT WANT TO GO AHEAD AND PUT THE WITNESSES ON AT THAT TIME.**

Successive PC Ex. 21, Transcript of Oral Argument, TR. at 25 (emphasis added). See also Initial PC Pet. Ex. 6, Aff. of Terry Wood; Initial PC Pet. Ex. 7, Aff. of Sunny Phillips; Pet. Ex. 15 Trial counsel also indicated that he thought it could constitute "reversible error" if the trial court allowed Byrom to waive sentencing by a jury, since the Mississippi capital murder statutes provide the right to jury sentencing.

Thus, even if this Court assumes *arguendo* that it may be an appropriate trial strategy under certain circumstances to waive sentencing by a jury in some cases, in this case, the reasons expressed by the trial attorneys for recommending that Petitioner forego the presentation of live testimony on the issue of mitigation, and waive sentencing by the jury are so inadequate that it cannot be deemed competent legal advice or representation. Under these circumstances, Petitioner submits that she received ineffective assistance of counsel at trial, because she could not have knowingly and intelligently waived her right to jury sentencing based on the erroneous legal advice that she was assured a retrial.

The state introduced the report of its court-appointed psychiatrist, Dr. Criss Lott, who had evaluated Byrom, Junior and Gillis prior to trial. Vol. 16, TR. 1005; TR. Ex. 88. Instead of calling any witnesses to testify in Byrom's behalf, defense counsel presented only a summary of Byrom's medical records, and the report of defense psychiatrist, Dr. Keith Caruso. Vol. 16, TR. 1006-07; Def. Tr. Ex. 89, 90. Numerous witnesses were available to testify on behalf of Byrom,

including Dr. Caruso, but trial counsel did not want to disclose the substance of any of the witness testimony to the prosecution, so that the testimony would be fresh during the retrial which counsel assured Petitioner would occur.

The reports of Drs. Caruso and Lott summarized Byrom's own account of the physical, emotional and sexual abuse she suffered as a child, and later at the hands of Byrom, Sr. TR. Ex. 88, 90. However, neither doctor had been provided with corroborating information from Byrom's family. *Id.* Dr. Caruso's report also summarized his diagnostic impressions – that Byrom suffered from borderline personality disorder, depression, alcohol dependence, and Munchausen syndrome, which caused her to deliberately make herself sick, for example, by ingesting rat poison – and he listed several statutory and non-statutory mitigating factors which he found present in this case. TR. Ex. 90.

Trial counsel argued that Byrom and her son had both endured abuse at the hands of Edward Byrom, Sr., that Byrom had suffered a "horrific childhood," and that Byrom's conduct was the desperate act of an emotionally disturbed woman afraid to leave her husband. Vol. 16, TR. 1013-16.

The State countered that, "This was nothing but a calculated, cold-blooded act in order to gain monetary gain ...." Vol. 16, TR. 1011; see also TR. 1009, 1012. According to the State, Byrom created her own emotional problems, and manipulated the doctors to gain sympathy, and not because of any legitimate illness. Vol. 16, TR. 1019-20. In support of this theory, the State focused on the fact that the only evidence that Byrom suffered any abuse came from Byrom herself, and was completely uncorroborated:

> It is very important to take notice that their reports have no corroboration whatsoever. And as you are quite aware, no doctor can testify within a medical reasonable certainty from evidence they have deduced strictly from their patient, particularly psychologists. None of the doctors were able to corroborate the information she has given them. So,

> therefore, the allegations she puts forth, particularly her factual portions, have no bearing. That's what their results are based upon, yes. But having no corroborating evidence, it can be taken with a grain of salt at best.

Vol. 16, TR. 1020.

Indeed, the prosecution insisted that Byrom's husband was hardworking man who provided for his family and tried to raise his son well; it was Michelle Byrom who was the bad wife and the bad mother. Vol. 16, TR. 1011-12. The prosecution repeatedly insisted, if the abuse was really so bad, Byrom certainly had "every opportunity" to leave. Vol. 16, TR. 1010; see also TR. 1020-22.

After a brief recess at the conclusion of argument, the trial court judge stated that he would consider as mitigating Byrom's lack of any prior criminal record, and that she was acting "while under the influence of some extreme mental or emotional disturbance," but noted that "these factors are the only factors suggested which would appear and bear consideration by the court." Vol. 16, TR. 1024. Finding the sole aggravating factor – that Byrom committed the offense for pecuniary gain – outweighed the only mitigating factors the court was willing to consider, the court sentenced Byrom to death. Vol. 16, TR. 1024-25.

E. Junior's other confession & Gillis's plea to a reduced charge

After the trial, Gillis pled guilty to conspiracy and accessory after the fact to capital murder, with a sentence of 15 years. PC Ex. 11. The prosecutor told the press Junior had made "another conflicting statement to his psychologist," and that such conflicting statements "could have 'seriously compromised' [Junior's] future testimony against Gillis." Successive PC Ex 2. This information was confirmed by Gillis' trial attorney, Thomas Comer, in a letter to the prosecutor dated March 21, 2001. Successive PC Ex. No. 22. In that letter, Mr. Comer indicated that he intended to call Dr. Lott as a witness to testify about the "prior inconsistent statement"

that Junior had made that he had killed his father and that Gillis had only helped him hide the gun. Id. Mr. Comer also intended to examine Dr. Lott as an expert witness "... in profiling our client as not being a "hitman" and also using Dr. Lott in mitigation testimony, if necessary." Id.

F. Direct Review.

Byrom's conviction and death sentence were upheld on direct review. The Mississippi Supreme Court rejected Byrom's claim that counsel had been improperly precluded from impeaching Junior with his letters confessing to the murder. *Byrom I,* 863 So.2d at 868-71.

Byrom's trial counsel served as appellate counsel. Appellate counsel admitted at oral argument that, after trial, he had learned from Gillis' counsel that Junior confessed to Dr. Lott that Junior, not Gillis, had shot Byrom, Sr., and that this "raised *Brady* issues," Dir. App. Br. of Appellant at 9, 16, but he did not raise a claim under *Brady v. Maryland,* 373 U.S. 83 (1963), or ask for any remedy based on the failure to disclose this information. *Byrom I,* 863 So.2d at 852, 869, 894.

G. State and federal post-conviction proceedings.

During state post-conviction proceedings, Byrom's post-conviction counsel did not raise any claim associated with the failure to disclose Junior's confession to Dr. Lott.

Post-conviction counsel did allege counsel ineffective for failing to present witnesses at the penalty phase. They attached affidavits from several of Byrom's family members, who were willing to describe instances of abuse Byrom suffered at the hands of her stepfather and husband. **These individuals indicated that trial counsel did not interview any of them about Byrom's background – not even her mother.** PC Ex. 14, 15, 16, 17, 18. In spite of not being interviewed, Byrom's siblings and niece traveled to Iuka for the trial and were ready and willing

to testify in Byrom's behalf. They were told by trial counsel that they should not attend the trial, and were later dismissed, without explanation, and without ever being called. *Id.*

This claim was raised in post-conviction proceedings; this Court denied relief, without an evidentiary hearing. *Byrom II*, 927 So.2d at 720. Byrom raised this claim again before the federal district court, submitting declarations from the same family members, defense counsel and defense psychiatrist, Dr. Caruso, and asked for an evidentiary hearing.

Although the district court was willing to assume trial counsel's performance was deficient, it denied the claim. *Byrom III*, 817 F.Supp.2d 868, 916 (N.D. Miss 2011). The district court explained: "The Court assumes, without deciding, that counsel's failure to call readily available witnesses at the sentencing phase of a capital murder trial in order to preserve the testimony for a hypothetical retrial is an unreasonable strategic decision. See, e.g., Moore v. Johnson, 194 F.3d 586, 615 (5th Cir.1999)(holding that courts defer to strategic decisions intended to yield benefit or avoid harm where that decision is based on sound legal reasoning)."

Byrom also claimed her right to the effective assistance of counsel at the guilt phase was violated due to trial counsel's failure to discover Junior's confession letters to the state prior to trial. The district court found this claim was defaulted as it was not raised in state post-conviction proceedings. Byrom III, 817 F.Supp.2d at 888.

And, Byrom raised, for the first time, a claim that the failure to disclose Junior's confession to Dr. Lott violated her rights under *Brady v. Maryland,* 373 U.S. 83 (1963). She alleged that there was sufficient evidence of her innocence to meet the standard in *Schlup v. Delo*, 513 U.S. 298 (1995), to overcome any default. Although Dr. Lott had previously confirmed the confession to Gillis's counsel verbally, he advised habeas counsel that the trial judge had ordered him not to discuss the matter with habeas counsel. Byrom requested the

district court order discovery related to her *Brady* claim. The district court denied Byrom's requests for discovery, *Byrom v. Epps*, 2008 U.S. Dist. LEXIS 58975 (N.D. Miss. July 23, 2008) and *Byrom v. Epps,* 2010 U.S. Dist. LEXIS 102448 (N.D. Miss. Sept. 14, 2010), and denied the petition, but granted a certificate of appealability on numerous issues. *Byrom III*, 817 F. Supp. 2d 868, 917 (N.D. Miss. 2011).

Byrom appealed all of these issues in the Fifth Circuit. After Byrom's opening brief was filed, the Supreme Court of the United States decided *Martinez v. Ryan*, 132 S.Ct. 1309 (2012), and she further alleged that post-conviction counsel's ineffectiveness constituted an alternative cause for overcoming any procedural default. The Fifth Circuit denied relief on all claims, and ignored her *Martinez* argument. *Byrom IV*, 518 Fed.Appx. 243 (5th Cir. 2013).

On August 20, 2013, Petitioner filed for certiorari with the United States Supreme Court. Case No. 13-5998, and that Petition was pending at the time the instant Petition was prepared.

CLAIMS FOR RELIEF

CLAIM I: Byrom's right to due process of law was violated when the prosecution and the trial court failed to disclose material exculpatory and impeachment evidence.

Byrom's due process rights were violated by the prosecution and the trial court's failure to disclose exculpatory evidence that would have impeached key prosecution witness Edward Byrom, Jr. ("Junior"), **which indicates that the "murder for hire" did not occur.**

At Byrom's trial in November 2000, the State's theory of the murder-for-hire charge was that Byrom hired Joey Gillis to kill Edward Byrom, Sr. However, during Edward Junior's psychological evaluation that was performed by Dr. Criss Lott under court order in July 2000, Junior confessed to murdering Edward Byrom, Sr. for his own reason, and not as a part of any murder-for-hire scheme. Successive PC Ex. No. 1, Affidavit of Dr. Criss Lott. Dr. Lott initially

refused to discuss Junior's confession with the undersigned in the course of the federal habeas investigation, based on instructions he had received from the trial judge not to discuss the matter. Successive PC Ex. No. 3, Affidavit of David Calder.

Apparently, Dr. Lott initially informed the attorneys for Gillis about Junior's confession as they were preparing for Gillis's trial, when Dr. Lott expressed surprise that the capital murder charges against Gillis were still pending, in view of Junior's confession. This was confirmed in by Gillis' trial attorney, Thomas Comer, in a letter to the prosecutor dated March 21, 2001. Successive PC Ex. No. 22. In that letter, Mr. Comer indicated that he intended to call Dr. Lott as a witness in Gillis's trial to testify about the "prior inconsistent statement" that Junior had made to Dr, Lott that he had killed his father and that Gillis had only helped him hide the gun. Id. Mr. Comer also intended to examine Dr. Lott as an expert witness "... in profiling [Gillis] as not being a "hitman" and also using Dr. Lott in mitigation testimony, if necessary." Id.

The State ultimately dismissed the capital murder charge against Gillis based on Junior's confession. Successive PC Ex. No. 2, Newspaper Articles (with quotes from State Prosecutor justifying Gillis's sentence for "accessory after the fact"). However, even though Junior was the key witness against his mother at trial, this exculpatory and impeachment information was not disclosed to Byrom's counsel, in violation of the rules clearly established in *Brady v. Maryland*, 373 U.S. 83, 87 (1963) and *Giglio v. United States*, 405 U.S. 150, 154 (1972). Because the confession Edward Junior made to the State's psychologist was inconsistent with other statements he made at Byrom's trial, this information was critical to Byrom's defense to impeach Junior's credibility. Failure to disclose this information violated Byrom's fundamental rights, as the suppression of evidence favorable to an accused violates due process, where the

evidence is material either to guilt or to punishment, irrespective of the good faith of the prosecution.

Junior's confession to Dr. Lott in the course of his competency evaluation also constituted impeachment evidence under *Brady* and *Giglio*, and it is well-settled that impeachment material, including prior inconsistent statements must be produced to the defendant. *See, e.g., United States v. Bagley*, 473 U.S. 667, 676 (1985) (Brady's disclosure requirement encompasses impeachment evidence as well as exculpatory evidence); *Giglio v. United States*, 405 U.S. 150, 154 (1972). Because Junior's confession to Dr. Lott was inconsistent with the testimony he offered at Byrom's trial when he was called as the State's key witness, it was critical to Byrom's defense to impeach Junior's credibility. Junior testified against his mother to fulfill his own plea bargain that allowed him to avoid the death penalty.

A. EVIDENCE CONCERING DR. LOTT'S EVALUATION.

At an "omnibus hearing" on June 22, 2000 for all three defendants, Byrom, Junior and Gillis, the court ordered that Dr. Criss Lott would be appointed to initially evaluate all three co-defendants – Michelle Byrom, Junior and Joey Gillis, for competency. C.P. 103-104, Omnibus Hearing TR. 3-4 (June 22, 2000).

Byrom's attorney objected to the same "psychiatrist examining and reporting for each defendant." C.P. 106, Omnibus Hearing TR. 7. However, the trial judge stated on the record that he had engaged in an *ex parte* communication with Dr. Lott, who indicated that there were no ethical concerns at all. C.P. 106-107, Omnibus Hearing, TR. 7-8. This is not consistent with what Dr. Lott told Petitioner's counsel when he was first contacted during the investigation relating to federal habeas proceedings, as Dr. Lott indicated that he called the trial court judge and told performing contemporaneous forensic evaluations of three capital murder co-defendants presented "an ethical dilemma" for Dr. Lott. Successive PC Ex. No. 3, affidavit of David Calder, ¶

6. However, Dr. Lott said that his request that he not to be required to evaluate all three of the co-defendants was denied by the trial court judge.

The trial court determined that although the reports concerning Dr. Lott's evaluations for each defendant would ultimately be discoverable, those reports would initially be made available only to the defendant and the trial court, who would review the reports *in camera*. C.P. 107-08, Omnibus Hearing, TR. 8-9.

Dr. Lott evaluated Junior on July 22, 2000. Successive PC Ex 4 & 5 (Scheduling Orders in Criminal Case No. CR 99-065 (June 30, 2000 & July 20, 2000). In a subsequent pretrial hearing in Petitioner's case on August 11, 2000, the trial court indicated that the psychological evaluations of all three co-defendants had been completed by Dr. Lott and received by the court. Vol. 10, TR. 5. The court stated: "Dr. Lott has provided me with a report. I have provided the defendant's attorneys with a copy of that report. The State does not have the report at this time. It will be kept by me as confidential until such time as I deem it appropriate that the State be provided with that information." Vol. 10, TR. 6.

Another status conference was conducted on September 5, 2000, and after confirming that her attorneys had received a copy of Dr. Lott's report concerning Byrom, the trial court addressed the State's demand for the production of Dr. Lott's report. Vol. 10, TR. 23-24. Petitioner's attorney objected to the production on several grounds, but those were all denied by the trial judge, who stated: "I'm going to order that a copy of Dr. Lott's report - - I don't know the date of that. **It is, I think, in the court file, or I believe we sealed copies of that** - - a copy of that report be afforded to the State and further that if you intend to - - I'm going to let that State look at that and see if they want any further evaluation." Vol. 10, TR. 25 (emphasis added).

Petitioner's counsel then stated that he had "been informed today that Edward Byrom, Jr. will be entering a plea of guilty ...." Vol. 10, TR. 26. The trial court inquired as to when Edward

Junior's case was scheduled for trial, and the State indicated it was set for October 23, 2000. Vol. 10, TR. 27. **The State also advised the court that Edward Junior would be testifying against his co-defendants as part of his plea agreement.** Vol. 10, TR. 27. The trial court then continued Byrom's trial to October 23, 2000, and left Edward Junior's case as a back-up setting on that same date.

As a pretrial hearing on October 18, 2000, the trial court ordered that Dr. Lott's report regarding Byrom be provided to the State, and it was clear that the State considered Dr. Lott to be a witness for the prosecution (for sentencing) in Byrom's case. Vol. 10, TR. 32, 51-62. After her trial, Byrom learned that Junior had told the State's psychologist, Dr. Criss Lott, that, contrary to the story he told at Byrom's trial, *he* had murdered his father for his own reasons. *Byrom v. State*, 863 So.2d 836, 848 (2003). Significantly, in his recent affidavit, Dr. Lott stated that although he did not indicate in Junior's psychiatric evaluation that Junior had confessed that he shot his father, Dr. Lott contacted the trial judge directly after examining the three co-defendants, and asked him what Dr. Lott should do in the hypothetical situation where he had received specific information about the facts and details of a crime during the course of forensic evaluations for mental competency and sanity. Successive PC Ex. No. 1, Affidavit of Dr. Lott, ¶¶ 8 & 9. The trial judge told Dr. Lott that he should tell him specifically what he knew, and therefore, Dr. Lott disclosed to the trial judge that Junior had confessed that he had killed his father. Id. Dr. Lott had explained to the undersigned in 2009 that he was prohibited from discussing these matters or disclosing the information revealed in the evaluations. Successive PC Ex. No. 3, Affidavit of David L. Calder (¶¶ 22-24) (January 9, 2014).

In Byrom's brief on direct appeal, trial counsel alleged that a few months after Byrom was sentenced, Dr. Lott divulged to Gillis' attorneys that Junior had confessed to him that he

shot Edward, Sr. but this Court held that this information was not included in the record. *Byrom*, 863 So.2d at 852 & n.8 (¶ 30); Appellant's Br. at 16. In fact, a few months after Byrom's sentencing, while discussing Gillis' guilty plea, prosecutor Arch Bullard told a local newspaper that Junior had made "another conflicting statement to his psychologist," and that such conflicting statements **"could have 'seriously compromised' [Junior's] future testimony against Gillis."** Successive PC Ex. No. 2 (Amy Sims, *Third Defendant Sentenced in Iuka Murder-For-Hire Case,* The Daily Corinthian, March 22, 2001, at 1A).

Junior's confession letter and his confession to Dr. Lott could not be considered merely cumulative of his other statements where he generally acknowledged responsibility for his father's death. **The District Attorney clearly recognized the persuasive force of the confession to Dr. Lott by allowing Gillis to plead guilty to an accessory after the fact charge.** In regard to the letters, the prosecutor had stated at Byrom's trial: **"If this evidence [the confession letters] had been in our possession, it very well may have been that we would not have cut a deal with this individual [Junior], much less put him on the stand in this case."** Vol. 14, TR. 726-27.

It is undisputed that the prosecutor was convinced that based on Junior's confession to Dr. Lott, and the fact that his letters to Byrom would be admissible in Gillis's trial, there was no likelihood of obtaining a capital murder conviction against Gillis as the "triggerman" in regard to Edward Sr.'s death. Successive PC Ex. 2. **Therefore, Gillis was allowed to plead guilty to "conspiracy and accessory-after-the-fact."** As a result, Gillis, whom Byrom was wrongfully convicted of hiring to commit the murder, has already served a relatively short sentence, and he was released from prison on parole in 2009. Successive PC

Exhibit No. 23. It is clear now that not even the prosecutor believes that Gillis was hired as the "triggerman" by Byrom.

Junior's confession to Dr. Lott in the course of his competency evaluation constituted exculpatory and impeachment evidence under *Brady* and *Giglio*, and it is well-settled that such material, including prior inconsistent statements must be produced to the defendant. *See, e.g., United States v. Bagley,* 473 U.S. 667, 676 (1985) (*Brady's* disclosure requirement encompasses impeachment evidence as well as exculpatory evidence); *Giglio v. United States*, 405 U.S. 150, 154 (1972). Because the confession Edward Junior made to the psychologist was inconsistent with other statements he made after the competency evaluation and at trial, it was critical to Byrom's defense to impeach Junior's credibility.

Under the circumstances presented in this case, Junior's confessions, both in the letters that were excluded by the trial court and in his statements to Dr. Lott, were critical to the defense because Junior's testimony was a major component of the State's case against Byrom. Therefore, confronting and impeaching the credibility of this cooperating co-defendant was crucial to Byrom's defense. In addition, even though Junior made other prior inconsistent statements, the timing and circumstances of the letters and his confession to Dr. Lott were important, as both came well before Junior's plea agreement with the State, which was finalized the day before he took the stand to testify against Byrom. Vol. 14, TR. 726.

Notwithstanding the information about Gillis's plea bargain, state post-conviction counsel did not raise any claim regarding this issue, nor did they request discovery. In the federal habeas proceedings, Byrom's counsel raised this claim for the first time, and attempted to investigate the matter. Joey Gillis's attorneys, Thomas Comer and John Farrell, advised undersigned counsel that, in the course of preparing for Gillis's trial, they contacted Dr. Lott for

a telephone interview. When they explained to Dr. Lott that they were preparing for Gillis's capital murder trial, Dr. Lott expressed surprise that the State was still prosecuting Gillis for capital murder, since Edward Byrom, Jr. had confessed to murdering his father. Successive PC Ex. No. 3 (Affidavit of David Calder, ¶¶ 25-33). Based on Dr. Lott's verbal disclosure to Gillis's attorney, they gave the prosecutor notice that he would be called as a witness to testify concerning Junior's confession. See Successive PC Ex. No. 22, Letter from Gillis Attorney Comer.

In an effort to investigate the allegations concerning Edward Byrom Jr's confession to Dr. Criss Lott, the undersigned initially contacted Dr. Lott directly to discuss this matter. Dr. Lott stated that he remembered this case because it placed him in an uncomfortable ethical dilemma, because he had been appointed to evaluate three co-defendants in the same case. Dr. Lott stated that he called the trial court judge after his appointment and told him that this presented "an ethical dilemma," but Dr. Lott's request not to evaluate all three of the co-defendants was denied by the trial court judge. Successive PC Ex. 3, ¶ 6.

Dr. Lott said that he was employed at the Mississippi State Mental Hospital at the time he performed these evaluations. He also said that it was his recollection that Michelle Byrom had already been tried and convicted at the time he evaluated Edward Junior and Joseph Gillis. However, based on the court orders entered in the three parallel cases, the undersigned knew that all three co-defendants were evaluated by Dr. Lott at about the same time, prior to Michelle Byrom's trial.

The undersigned explained to Dr. Lott that the District Attorney who prosecuted these three cases had disclosed in a local newspaper article the fact that Edward Byrom, Jr. had confessed to Dr. Lott that Junior had murdered his father, and this new information could

possibly constitute new evidence that might require a new hearing for Michelle Byrom. Dr. Lott said that the disclosure of Edward Byrom Jr.'s confession to murdering his father also caused Dr. Lott additional ethical concerns, because he did not feel that the statements that a person such as Edward Junior made to him in the course of a psychological evaluation should be used against him. Id.

The undersigned asked Dr. Lott if he would send the information he had concerning Edward Byrom, Jr., and he said that he would send his evaluation and report. On July 14, 2006, the undersigned sent Dr. Lott a letter explaining the nature of the inquiry, and included a copy of the newspaper article published March 16, 2001, in which the District Attorney stated that Gillis was offered a plea agreement because of "conflicting statements" made by Edward Byrom, Jr., including a statement that he had made "to his psychologist" which indicated that Junior was the "shooter," and not Joey Gillis.

The undersigned asked for Dr. Lott's assistance in documenting what statements were made by Michelle Byrom, Edward Byrom Jr., and Joey Gillis in the course of the evaluations that he performed, when these statements were made, and what information or admissions were revealed in those statements, and when the reports were disclosed to the court and to the attorneys representing the parties in each of these cases. Id.

Subsequently, the undersigned did not receive any information from Dr. Lott, but he agreed to a meeting at his office in Jackson, Mississippi on September 7, 2006. However, at that meeting, Dr. Lott explained that he had called the state trial court judge to be sure that he was free to discuss these matters. Dr. Lott said that the trial judge instructed him not to discuss this case with anyone unless an order was entered giving specific approval for such an interview. Based on these instructions, Dr. Lott said he could not share his files concerning any of these

defendants, and he could not disclose when the interviews were conducted, or when any information was submitted to the trial court. Successive PC Ex. No. 3, ¶¶ 4-24.[5]

Although Byrom sought discovery to pursue this claim in the federal habeas proceedings, the district court denied that request and ultimately held that the claim had been procedurally defaulted because it had not been presented to the state court. *Byrom III*, 817 F. Supp. 2d 868 (N.D. Miss. 2011), *aff'd Byrom v. Epps*, 518 Fed.Appx. 243 (5th Cir. Miss. Mar. 28, 2013).

B. BYROM HAS SET FORTH A VIABLE *BRADY/GIGLIO* CLAIM.

Byrom has set forth a *prima facie* case that the prosecution withheld material, exculpatory and impeachment evidence in violation of her right to due process of law under *Brady v. Maryland*, 373 U.S. 83 (1963), and thus is entitled to the discovery she seeks to support the claim. A prosecutor's suppression of evidence favorable to the accused violates due process where the evidence is material to either guilt or punishment. *Brady*, 373 U.S. at 87. Such evidence is material "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *United States v. Bagley*, 473 U.S. 667, 682 (1985). *See also Kyles v. Whitley*, 514 U.S. 419, 433-434 (1995).

The duty to disclose includes impeachment evidence as well as exculpatory evidence, *United States v. Bagley*, 473 U.S. 667 (1985), and encompasses "any favorable evidence known to others acting on the government's behalf in the case. . . .," even if unknown to the prosecutors. *Kyles*, 514 U.S. at 437.

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[5] This instruction would appear to violate the spirit of Uniform Circuit and County Court Rule 9.04(D) which provides: "Except as is otherwise provided or in cases where the witness would be forced to reveal self-incriminating evidence, neither the attorney for the parties nor other prosecution or defense personnel shall advise persons having relevant material or information, except the accused, to refrain from discussing the case with the opposing attorneys or showing the opposing attorneys any relevant material, nor shall they otherwise impede the opposing attorney's investigation of the case."

Here, the State failed to disclose evidence that Junior confessed to Dr. Criss Lott that he murdered his father. Such evidence is clearly exculpatory. Dr. Lott was appointed to evaluate Junior prior to Byrom's trial and the prosecution was clearly aware, or should have been aware, of such evidence at the time of Byrom's trial. It is apparent from the record that the trial court was provided with Dr. Lott's report by August 11, 2000. We know that the state was apparently entitled to receive a copy of the reports at some point because, as described above, the trial court stated that the reports would eventually be discoverable by the state. We also know that the trial court was willing to order the report be given to the State, as he did so (over objection) in *Byrom. Byrom I*, 863 So.2d at 850-51 (discussing why the trial court did not err in ordering the disclosure of psychologists' reports to the state prior to trial).

Finally, we know that Junior and the state reached a plea agreement *before* Junior testified at Byrom's trial. In fact, a few months after Byrom's sentencing, while discussing Gillis' guilty plea, prosecutor Arch Bullard told a local newspaper that Junior had made "another conflicting statement to his psychologist," and that such conflicting statements "could have 'seriously compromised' [Junior's] future testimony against Gillis." Successive PC Ex. 2 (Amy Sims, *Third Defendant Sentenced in Iuka Murder-For-Hire Case,* The Daily Corinthian, March 22, 2001, at 1A). Thus, at some point the State became aware Junior had made such a statement to Dr. Lott. The only way to know when the prosecutor learned of this statement is to ask - - that is, to allow the discovery Byrom is seeking.

Obviously, if the prosecution had this information prior to Junior's testimony, they were obliged to disclose it under *Brady.* Even if the prosecution did not receive this information until after Byrom's trial had concluded, it was still required to provide this evidence to Byrom's counsel, who could have used it, for example, to support a motion for a new trial. **Finally, Dr.**

Lott, by his own admission, was employed by the State of Mississippi at the time of his evaluation and, according to the prosecution, was acting as a witness for the prosecution in Byrom's case. The duty to disclose exculpatory information encompasses "any favorable evidence known to others acting on the government's behalf in the case. . . .," even if unknown to the prosecutors, *Kyles*, 514 U.S. at 437, and Byrom's due process rights were violated regardless of whether the prosecutor actually possessed information about Junior's confession to Dr. Lott.

Furthermore, it appears that at least the trial judge knew of Junior's confession to Lott prior to Byrom's trial. Successive PC Ex. No. 1. The trial court is also obliged to reveal exculpatory evidence in its possession, even when that evidence is in the form of confidential records that may be otherwise undiscoverable. *See Pennsylvania v. Ritchie*, 480 U.S. 39, 60 (1987) ("Moreover, the duty to disclose is ongoing; information that may be deemed immaterial upon original examination may become important as the proceedings progress, and the court would be obligated to release information material to the fairness of the trial."); *Gardner v. Florida*, 430 U.S. 349, 360-61 (1977)(due process violated when trial court sentenced defendant based on "confidential" information in pre-sentence report that had not been disclosed to defense counsel).

The withheld evidence is clearly exculpatory. Not only would it have severely undermined Junior's credibility in general, but it directly refuted the State's theory Edward Byrom, Sr. was killed pursuant to a murder-for-hire scheme instigated by Michelle Byrom. Accordingly, both the prosecution and/or the trial court were obliged to disclose this evidence to Byrom. *See Brady, supra.*

There is also a reasonable probability that Byrom would not have been convicted of capital murder (murder for hire) and/or sentenced to death had this evidence been presented at trial. Junior's testimony was the linchpin of the State's case that Byrom had hired Gillis to kill Edward, Sr. because Junior testified in detail not only about the alleged hiring, but also how he assisted Gillis in disposing of the weapon and of Junior's own shirt that Gillis allegedly borrowed. The prosecution told the press that they decided not to pursue a capital murder conviction against Gillis precisely because Edward, Jr.'s inconsistent statements, **primarily the one made to his psychologist**, so undermined his credibility. Successive PC Ex. No. 2.

Although Junior made similar admissions in letters he wrote to his mother prior to trial, because defense counsel was prohibited from confronting Junior with the actual letters, and Junior denied much of their contents, this evidence may have been discredited by the jury at Byrom's trial. *See* Claim II, *infra*. Had the jury heard that Junior had told the State's psychologist that he had acted alone, this, combined with evidence of Edward, Jr.'s extremely volatile relationship with his father, the argument they'd had the night before and the fact that it was Edward, Jr. -- not Gillis -- who had gunshot residue on his hand, the jury would have been far less likely to believe Junior's version of the events provided during his testimony. In fact, the State would likely not have offered Junior a plea bargain. In objecting to the introduction of the letters into evidence because defense counsel had not disclosed the letters in discovery, the **State insisted they would not have made a deal with Junior or put him on the stand to testify against Byrom if they had seen these letters.** Vol. 14, TR. 714-15 & 737. Under these circumstances, there is a reasonable probability that the jury would have concluded that Edward, Jr., not Gillis, had committed the murder, and that the alleged solicitation between Michelle and

Gillis had either not occurred or, at a minimum, had been unproductive and had nothing to do with Junior's murder of his father.

Because Byrom has set forth specific allegations to support a colorable *Brady* claim, and because the discovery she seeks is necessary to prove her allegations, Byrom request this Court remand this claim to the trial court for an evidentiary hearing with directions to allow Byrom to pursue the discovery she seeks.

C. THIS CLAIM IS NOT PROCEDURALLY BARRED.

Petitioner respectfully submits that the undisputed facts in this case clearly indicate that this claim is not procedurally barred. Miss. Code Ann. § 99-39-21(6) (West 2013)(petitioner must show that successive petition is not procedurally barred).

In regard to the *Brady/Giglio* claims based on the affidavit recently obtained from Dr. Lott, these issues are not barred for 2 reasons: (1) Under Miss. Code Ann. §§ 99-39-5(2) and 99-39-27(9) (West 2013), these facts were previously unavailable to counsel for Michelle Byrom, as Dr. Lott refused to disclose this information by way of affidavit; and in the alternative, (2) Petitioner received ineffective assistance of counsel on direct appeal as well as ineffective assistance of prior post-conviction counsel because this information was not pursued.

At this point, it is not clear to the undersigned counsel exactly when Dr. Lott's knowledge about Junior's confession was actually disclosed to the prosecutor or the trial judge. What appears clear is that given Dr. Lott's prior reluctance to provide an affidavit, based on his specific instructions from the trial court that he was prohibited from discussing this matter or releasing his files, it appears that neither prior trial counsel not prior post-conviction counsel could have obtained an affidavit from Dr. Lott on this issue. However, if this Court assumes *arguendo* that this information was reasonably available to prior state post-conviction counsel,

then Petitioner respectfully submits that she received ineffective assistance of counsel in regard to her first state post-conviction Petition because counsel failed to pursue this information.

On information and belief, Petitioner respectfully submits that when the trial judge sentenced her to death, he knew that Junior had confessed to the crime during his examination by Dr. Lott. This confession to the State's agent occurred after Junior was provided with Miranda warnings, and after he had an opportunity to consult with his court-appointed attorneys. The confession to Dr. Lott cannot be considered merely cumulative of Junior's other statements, as the Court previously ruled concerning the pre-trial confession letters that were excluded from evidence due to a discovery violation by Petitioner's trial attorneys. *See, e.g., Keller v. State*, ___ So.3d ___, 2014 WL 465676 (¶ 35) (Miss. 2014)("A *Brady* violation occurs where the record shows the existence of evidence that: (1) is favorable to the accused or impeaching of a state's witness, (2) was suppressed either willfully or inadvertently by the prosecution, and (3) is material to the accused's defense.") Significantly, in *Keller*, this Court re-affirmed its long-standing position that "[T]his Court applies heightened scrutiny to capital-murder convictions where a sentence of death has been imposed. ... **We repeatedly have ruled that '[w]hat may be harmless error in a case with less at stake [may become] reversible error when the penalty is death."** *Keller*, 2014 WL 465676 (¶ 15) (citations omitted).

A Brady violation can occur even if evidence is withheld "in good faith" or without the State's knowledge. *Bridgeman v. State*, 58 So.3d 1208, 1216 (¶ 36) (Miss. App. 2010)(duty of disclosure extends to both exculpatory and impeachment evidence). In *Little v. State*, 736 So.2d 486, 489 (¶ 11) (Miss. App. 1999), the Court found a *Brady* violation in an embezzlement case because the State failed to procure and produce the cash receipts journal kept by the alleged victim (and presumably the State's star witness against the defendant), which contained

exculpatory evidence showing that the bulk of the allegedly embezzled funds had actually been deposited into the alleged victim's own bank account. **The Court explained that even if the State did not know that the journal existed,** a *Brady* violation occurred because the State's witness (the victim) knew about the journal which contained the exculpatory information. The Court concluded that the State had a duty to investigate all evidence regarding the alleged offense, and **"[w]hether or not the State knew of the existence of the documents is immaterial ..."** *Little v. State*, 736 So.2d at 489 (¶¶ 13-14).

Likewise, in the case at bar, the State's star witness, Edward Junior, knew that he had confessed to Dr. Lott that he had murdered his father for his own reasons, but he testified that Michelle Byrom had hired Gillis to commit the murder, so that Junior could avoid the death penalty under his plea agreement with the State. Even if the Court assumes arguendo that the State failed to discover Junior's confession to Dr. Lott, that is immaterial, as it cannot be disputed that this fact now undermines the reliability of Michelle Byrom's conviction and death sentence and presents the inescapable conclusion that had this evidence been disclosed to the defense, a reasonable probability exists that the outcome of the proceedings would have been different.

In the case *In re: J.E.*, 726 So.2d 547, 552 (¶ 19) (Miss. 1998) this Court held that a criminal defendant's rights under Brady had been violated because certain Youth Court records concerning prior allegations by the victim had been sealed and were not available to the defendant at trial. This fact raised the "reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different," which was "sufficient to undermine confidence in the outcome." Therefore, the Court remanded the case

for in camera inspection by the trial court and disclosure of the records "relevant to [the] defense at trial." Id. at 553 (¶¶ 23-24).

Numerous courts have held that *Brady* violations occur if the trial court does not disclose exculpatory or impeachment information that it has seen. For example, courts have found that if a trial court conducts an *in camera* review of documents or information, it has an obligation to disclose any material evidence that comes to light. In *Commonwealth v. Santiago*, 591 A.2d 1095, 1114 (Pa. Super. Ct. 1991), the court held that "where a trial court is in the sole possession of materially exculpatory evidence, it must disclose that evidence to the defense." There, the defendant was charged and convicted of first-degree murder, and appealed his life sentence on the basis of a due process violation. *Id.* at 1097, 1108. At issue on appeal was the trial court's "decision to conduct pre-trial closure interviews with potential trial witnesses *in camera*, outside the presence of both defense counsel and the prosecution." *Id.* at 1108-09. The court found that the *in camera* testimony of one of the witnesses was "utterly contradictory to that offered at trial," and that the witness's trial testimony had an "obvious deleterious effect" on the defense. *Id.* at 1119-21. Thus, the appellate court held that by denying defense counsel an opportunity to use the *in camera* testimony to impeach this witness, the trial court "undermine[d] [the court's] confidence in the verdict." *Id.* at 1121. Ultimately, the appellate court held that while the trial court's duty to disclose such evidence "is quite limited in practical effect," such a duty does arise when a judge has "exclusive knowledge of such evidence." *Id.* at 1114. *See also US v. Cuthbertson*, 511 F. Supp. 375, 382 (D.N.J. 1981) ("it is almost inconceivable that a court, possessing exculpatory information, must remain silent when the prosecution possessing identical information would be compelled to speak"), *rev'd on other grounds*, 651 F.2d 189 (3d Cir. 1981), *cert. denied sub nom, Cuthbertson v. CBS, Inc.*, 454 U.S. 1056 (1981).

Similarly, in *State v. Calloway*, 718 So. 2d 559, 562-64 (La. Ct. App. 1998), the appellate court held that the state *and* the trial court violated *Brady* in failing to turn over statements from two witnesses. Throughout the proceedings, defense counsel twice requested discovery of witness statements, and the trial court subsequently reviewed these statements *in camera*. *Id.* at 562. After each review, the trial court determined that the statements did not contain material evidence to which the defense was entitled. *Id.* However, on appeal, the court found that there were clear inconsistencies in the witnesses' statements, specifically regarding the chain of events leading up to the crime and the identification of the alleged perpetrator. *Id.* at 563-64. These inconsistencies were "material directly to guilt or innocence and to credibility or impeachment of the witnesses." *Id.* at 564. Therefore, the court held that the "state and the trial court committed reversible error in not turning over the statements of these two witnesses to defendant" *Id.*

A similar result was reached in *State v. Johnson*, 599 S.E.2d 599, 602 (N.C. Ct. App. 2004), where the court held that records from the Department of Social Services (DSS), including medical information and case file documents, should have been provided to the defendant, who was convicted of first-degree statutory sexual offense. There, the trial court had conducted an *in camera* review of the DSS record, but disclosed only portions of the record to the defendant, withholding information "favorable and material" to the defendant's case. *Id.* In particular, the withheld evidence provided an "alternative explanation" for the victim's abuse, mainly that someone other than the accused could have inflicted the abuse on the victim. *Id.* at 603. This created, in the court's opinion, a "reasonable probability" that the "result of the proceeding would have been different" had the evidence been disclosed to the defense. *Id.* (quoting *US v. Bagley*, 473 U.S. 667, 682 (1985)). The trial court's refusal to provide this evidence to the defendant was "prejudicial error" that required reversal of the defendant's

conviction and the granting of a new trial. *Id.* These cases are directly applicable to the case at bar, because Dr. Lott has now testified that he told the trial judge about Junior's confession to the murder. Successive PCR, Ex. No. 1.

The standards for evaluating whether suppressed evidence was "material" to the defense, must be considered in light of the entire record. *U.S. v. Agurs*, 427 U.S. 97, 112 (1976). The "touchstone of materiality is a 'reasonable probability' of a different result," which is "shown when the government's evidentiary suppression 'undermines confidence in the outcome of the trial.'" *Kyles v. Whitley,* 514 U.S. 419, 434 (1995). To determine whether confidence in the verdict is undermined by the suppression, we must necessarily evaluate the strength or weakness of the State's other evidence of guilt. *Kyles*, 514 U.S. at 451-53; *see also, Strickler v. Greene,* 527 U.S. 263, 293 (1999).

Courts have frequently found suppressed evidence that undermined a key prosecution witness's uncorroborated testimony on essential elements of the government's case to be material. *Tassin v. Cain*, 517 F.3d 770, 780-81 (5th Cir.2008)(suppressed evidence showing key prosecution witness had motive to lie was material); *U.S. v. Sipe*, 388 F.3d 471, 480, 488-90, 491-92 (5th Cir.2004)(suppressed evidence permitting impeachment of prosecution's key witnesses was material); *U.S. v. Fisher*, 106 F.3d 622, 634-35 (5th Cir.1997)(holding that suppressed impeachment evidence "tending to discredit" government's key witness was material), *abrogated on other grounds by Ohler v. United States*, 529 U.S. 753, 755 (2000).

In Byrom's case, there can be no dispute that Junior's confession to the State's expert witness, after Junior had been provided with Miranda warnings and consulted with his attorney, constituted evidence that was material to her defense.

In regard to the statutory procedural bar against "successive" petitions for post-conviction relief, the Mississippi Uniform Post Conviction Collateral Relief Act specifically provides exceptions, stating in relevant part:

> Likewise **excepted from this prohibition are those cases in which the prisoner can demonstrate either that there has been an intervening decision of the Supreme Court of either the State of Mississippi or the United States that would have actually adversely affected the outcome of his conviction or sentence** or that he has evidence, not reasonably discoverable at the time of trial, that is of such nature that it would be practically conclusive that, if it had been introduced at trial, it would have caused a different result in the conviction or sentence. ...

Miss. Code Ann. § 99-39-27(9) (West 2013)(emphasis added). In the case at bar, it cannot be disputed that Junior's confession to Dr. Lott was made prior to Petitioner's trial, Junior was evaluated by Dr. Lott on July 22, 2000. Successive PC Ex 4 & 5 (Scheduling Orders in Criminal Case No. CR 99-065 (June 30, 2000 & July 20, 2000). This information was not provided to Byrom's attorneys and was not reasonably discoverable by them prior to her trial. Therefore, Petitioner respectfully submits that this constitutes new evidence which is an exception to the usual procedural bar for successive petitions under Miss. Code Ann. § 99-39-27(9).

Finally, Petitioner respectfully submits that the failure to disclose Junior's confession to Dr. Lott, which was made early on in these proceedings after Junior had been Mirandized and consulted with his court-appointed attorneys, demonstrates a constitutional violation that was recognized under *Schlup v. Delo*, 513 U.S. 298, 326–27 (1995) based on claims of "actual innocence." *See also, Herrera v. Collins,* 506 U.S. 390, 404 (1993)(proof of actual innocence may justify successive writs for collateral relief); *Murray v. Carrier*, 477 U.S. 478, 496 (1986) ("in an extraordinary case, where a constitutional violation has probably resulted in the

conviction of one who is actually innocent, a federal habeas court may grant the writ even in the absence of a showing of cause for the procedural default").

Dr. Lott's affidavit establishes a prima facie case of actual innocence. Thus, even if the prosecutor did not know of Junior's confession to Dr. Lott at the time of Byrom's trial, the judge (and sentencer) sat on the most compelling evidence in the case.

CLAIM II. This Court's prior decision concerning the exclusion of Junior's letters, wherein he confessed that he, not Gillis, murdered his father, as a discovery sanction, should be revisited in light of this Court's decision in *Ross v. State*, 954 So.2d 968 (Miss. 2007).

At trial, Petitioner's attorneys elected to withhold from discovery two letters that Junior had written to his mother in which he provided a detailed confession as to why he killed his father. The trial court excluded the letters from evidence because of the discovery violation, because the trial court repeatedly warned defendant's attorney that any information, including "impeachment evidence," was subject to the reciprocal discovery rule, and any such information that was not disclosed would be objectionable at trial. TR. 37-40. This Court's decision on direct appeal concluded that defense counsel's actions were unreasonable, as the decision to withhold Junior's confession letters was contrary to clearly established Mississippi law. *Byrom v. State*, 863 So.2d 836, 869 (¶ 111) (Miss. 2003)("... defense must produce that evidence it intends to use substantively at trial ... [and] these letters were substantive evidence and should have been disclosed to the State").

On its face, these facts present a prima facie claim for ineffective assistance of trial counsel, because defense counsel's alleged "strategy" constituted erroneous legal advice that was not grounded in the applicable law and fell below any objective standard of reasonable representation that should be expected of any criminal defense attorney. *See, e.g., Kimmelman v.*

Morrison, 477 U.S. 365, 381-85 (1986). In *Kimmelman*, the defense attorney failed to conduct any pretrial discovery which would have revealed information about an illegal search and seizure, and about the state's expert witness. This inaction was based on **defense counsel's "mistaken beliefs** that the State was obliged to take the initiative and turn over all of its inculpatory evidence to the defense ...." Id. at 385 (emphasis added). As a result of the failure to conduct discovery, the attorney also failed to file a motion to suppress the evidence that had been seized illegally, and it was introduced at trial. The Court explained that in order to establish a claim of ineffective assistance under those circumstances, the defendant must establish both incompetence on the part of the attorney and prejudice to the defendant. Id. at 381. The Court rejected the state's argument that defense counsel's vigorous cross-examination of the state's expert witness at trial somehow cured the failure to request pre-trial discovery, and the Court concluded that even though the attorney performed adequately at trial, the glaring discovery error established his incompetence because he failed to comply with the prevailing standards of practice. Id. at 385. Therefore, the Court held that the defendant was entitled to an evidentiary hearing on the issue of whether he has suffered prejudice as a result of his attorney's deficient performance, because even though the evidence that was not excluded was not as important as other aspects of the case (such as the victim's testimony), "... it may well have tipped the balance" in regard to the guilty verdict. Id. at 390-91.

In the case at bar, the State's key witness against Byrom was her son, Edward Byrom, Jr., who, pursuant to a plea agreement in which the State agreed to drop the charges of murder and capital murder, agreed to testify against his mother. Vol. 14, TR. 611-12. Junior testified that Joey Gillis shot and killed Byrom, Sr. pursuant to a monetary agreement with Michelle Byrom, and that his own role was limited to procuring his father's gun for Gillis, and helping Gillis

dispose of the gun and other evidence after the fact. Vol. 14, TR. 613-32. During cross-examination, the defense wanted to impeach Junior's testimony with two letters he wrote to his mother: in the first, he generally told his mother that he was responsible for his father's murder, and described how he felt about how his father had treated him and how his life had been spiraling downward in months prior to the murder. Def. TR. Ex 72. In the second letter, Junior gave a very detailed description of the shooting and his conduct before and after. He clearly stated that he had personally shot and killed his father, and that Gillis's role was limited to accompanying Junior while he disposed of the gun after the murder, and that the "conspiracy thing, for money" story he had given the police was "BS." Def. TR. Ex 87.

The State objected to the letters because defense counsel had not provided them in discovery. Vol. 14, TR. 714-15. The State claimed it was prejudiced because, **"If this evidence had been in our possession, it very well may have been that we would not have cut a deal with this individual, much less put him on the stand in this case."** Vol. 14, TR. 737 (emphasis added). This representation by the State highlights the significance of these letters for Petitioner's defense. Defense counsel vociferously argued that under the Mississippi rules and relevant case law, he was not required to provide these letters to the state, because they were to be used for impeachment. Vol. 14, TR. 720-21, 731, 742-43. The trial court recessed overnight, allowing the state time to review the letters and confer with Junior about them. Vol. 14, TR. 716; 718-19. In spite of this, the next morning, court excluded the letters, and precluded defense counsel from referring to the letters in any way: defense counsel was "not permitted to pick it up and otherwise handle it and make the jury aware that it even exists." Vol. 14, TR. 730-32. **The court specifically directed that defense counsel was NOT permitted to "read each line**

of the letter and ask [Junior] if he wrote that." Vol. 14, TR 733, 734, 745.[6] That is, counsel was permitted to generally ask Junior to admit or deny making the statements he wrote in the letters, but not allowed to impeach Junior with the letter itself if he denied having made any of the statements he wrote in the letter. Vol. 14, TR 732. Defense counsel was prohibited from even intimating to the jury that a letter even existed.

Deny he did. Although Junior admitted to making a general statement claiming responsibility for his father death, Vol. 14, TR. 740, he denied making the statements he wrote describing, in detail, that it was he, not Gillis, who had shot and killed his father. Vol. 14, TR. 747-48. Of course nearly everyone in the courtroom knew that Junior was not telling the whole truth when he denied making these statements, except the folks who mattered most – the jury. Taken out of context, and in light of his story on direct that he had helped Gillis kill his father, Junior's initial admission amounted to very little: the jury could have very reasonably believed that all he had meant was that he felt responsible for his father's death, and/or "may have seen them as a result of the cross-examination skills of Byrom's counsel rather than as truthful statements of past admissions." *Byrom I*, 863 So. 2d at 898 (McRae, P.J., dissenting). In sum, the jury was deprived of information that was unquestionably crucial to accurately assessing Junior's credibility and, ultimately Byrom's guilt. The application of the exclusion sanction in this case was unwarranted and unreasonable, and deprived Byrom of her right to confrontation under the Sixth and Fourteenth Amendments of the Constitution of the United States.

This issue was raised on direct review. The Mississippi Supreme Court held that under U.R.C.C.C. 9.04(C)(1), defense counsel was obliged to discover the letters to the state prior to

[6] Defense counsel nevertheless did refer to a letter in his first question regarding its contents, Vol. 14, TR. 740, but thereafter the state's objection was sustained and counsel was precluded from mentioning the letters again. Vol. 14, TR 745.

trial even though they were used for impeachment, because they supported Byrom's general defense that Junior not Gillis committed the murder. The Court further held that exclusion was proper because: (1) defense counsel's failure to turn over the letters constituted a "willful" discovery violation committed to gain a "tactical advantage"; and (2) in any event, Byrom was not harmed because counsel was permitted to ask Junior about the letters' contents. *Byrom I,* 863 So.2d at 868-71. Although the Court acknowledged the "*Box* guidelines," codified in URCCC 9.04(I) should have, but did not, dictate the trial court's conduct here, *id.* at 870-71,the Court's primary concerned appears to be that there be no more "trial by ambush" in Mississippi. *Id.* at 870.

Five years later, in *Ross v. State,* 954 So.2d 968 (Miss. 2007), this Court considered a materially indistinguishable claim, but resolved the matter in a manner that is irreconcilable with the Court's prior holding in *Byrom*. Defendant Ross was accused of murdering a man named Yancy in his home during the course of a robbery. Ross was homeless, but sometimes stayed with his half-sister, Margaret Jones, who lived in a trailer with her boyfriend, her son and her nephew. Police found proceeds from the robbery – a television and VCR - in Jones's son's room. Jones told the police, and later testified, that Ross had come to her home that night, that she had seen Ross with Yancy's wallet, which he burned in a grill at her house, and that Ross had confessed to committing the murder. *Id.* at 983-84. In a recorded interview with a defense investigator, Jones had made statements inconsistent with her testimony. Specifically, her account of when Ross purportedly came and left her trailer that evening, whether Ross had shown her Yancy's wallet inside or outside, and the materials Ross used to start the fire to burn the wallet, differed from her testimony. *Id.* However, when the defense attempted to impeach

Jones with her inconsistent statements, this evidence was excluded because it was not discovered to the prosecution prior to trial. *Id.* at 999-1001.

Consistent with *Byrom*, this Court held that the defense was required to discover Jones' statement to the state prior to trial because, although it was used for impeachment, "a crucial element of Ross' defense was undermining Jones' credibility." *Ross,* 954 So.2d at 999. **The rest of the Court's analysis, however, is irreconcilable with the analysis in *Byrom*.**

First, unlike in *Byrom*, the *Ross* court concluded that defense counsel's failure to disclose the statement was not a "deliberate[] attempt to ambush the state with new evidence," because there was nothing in the record to suggest that, and because the "State cannot claim that the introduction of the state caught it unaware, *since the statement was given by its own witness*." *Id.* at 1000 (emphasis supplied). In *Byrom,* the Court found that defense counsel's conduct was a "willful" attempt to gain a tactical advantage, even though the letters in question were not only provided by the State's own witness (Junior), but it was evident from the record that the State was well aware that correspondence between Junior and his mother was taking place while they were both incarcerated, as they had intercepted at least some of these letters and introduced them against Byrom at trial. Moreover, not only is there no evidence that defense counsel's conduct was a willful violation of the discovery rules – the record actually refutes such a finding.

The discovery provision counsel violated requires the disclosure of "Names and addresses of all ***witnesses in chief which the defendant may offer at trial***, together with a copy of the contents of any statement, written, recorded or otherwise preserved of each such witness and the substance of any oral statements made by any such witness." U.R.C.C.C. 9.04(C)(1) (*emphasis supplied*). As Junior was a *State's* witness, and unquestionably *not* a "witness[] in chief which the defendant may offer at trial," defense contended that this rule did not apply to

Junior's letters. Defense counsel explained:

> We carefully deliberated about this document [the letter]. And the reason it was not discovered is that it was intended to be used, not in our case in chief as the rules say as far as discovery documents, it was to be used to impeach and attack the testimony of this witness. ***And we reread, we studied the rule.*** And our opportunity to use this evidence was only going to be on impeachment of this witness. And that's why it was not discovered.

TR 715 (emphasis supplied). Neither of the cases cited by this Court in analyzing this situation clearly refuted defense counsel's interpretation of the rule. In both cases, the undiscovered evidence at issue was not impeachment evidence, but evidence to support the defendant's case-in-chief. *Coates v. State*, 495 So. 2d 464, 466 (Miss. 1986)(withheld letters were "much more than" mere impeachment, but supported affirmative "defense of consent") and *De La Beckwith v. State*, 707 So. 2d 547, 573 (Miss. 1997)(failure to disclose identity and location of defense witness).

While the Court ultimately concluded that "the *Coates* rationale remains directly on point" because the undiscovered letters were consistent with the defense "theory" that Byrom was innocent, and Junior, not Gillis, killed Byrom Sr,, *Byrom I*, 868 So.2d at 869, this extension was not necessarily evident prior to this Court's decision in *Byrom*, particularly when one considers, as defense counsel reasonably did, Miss. R. Evid. 613(a) which reads, "In examining a witness concerning a prior statement made by him, whether written or not, the statement need not be shown nor its contents disclosed to him at that time, but on request the same shall be shown or disclosed to opposing counsel," and Mississippi precedent which interpreted this provision as requiring disclosure of a prior statement used for impeachment only at the time of cross-examination and when requested. Vol. 14, TR. 720-21, 731, 742-43. Defense counsel cited *Jones v. State*, 710 So. 2d 870, 873 (Miss. 1998) wherein the court held that pursuant to Rule 613(a), the prosecution would have been required to hand over a written statement used to

impeach a witness at the time of the cross-examination had defense counsel made a timely objection:

> The court – Mississippi Supreme Court in this case, Jones v. State, 710 So.2d 870, was dealing with a matter where the State had not disclosed some statement of witness they intended to use only for impeachment. And the defense objected because, apparently, even during the course of the testimony of the witness, the State would not give or provide a copy to defense counsel. And the court here very clearly enunciates that this is not a discovery issue, you are permitted to impeach a witness, and you do not have to provide those things you are going to impeach a witness with until you go to impeach them.
>
> And we followed exactly this procedure here. I realize that I was cut off before I could actually try to impeach this gentleman with it. But they very clearly talk about that. And they say, "Clearly the defense should have been allowed to review the statement used to impeach as provided by Mississippi Rules o Evidence 613(a)." They don't buy the defendant's argument in that case, which it's reversed of what it is today, that the State had to give the statement to them in advance of the impeachment. That's what 613(a) provides. And it's not a discovery issue if it's being used for impeachment.
>
> Your Honor is probably well aware that the defense was running a risk here. The risk was that Edward Byrom, Jr. would not testify. And I admit, we would not have been able to use this in our case in chief under our discovery rules under that scenario. However, we were and are permitted under the rule and the rules of evidence and this case to use that piece of evidence not discovered to impeach the witness.

Vol. 14, TR. 720-21.

According to this Court, Rule 613(a) was adopted in recognition of "what is but common sense, that if counsel is to test effectively the credibility and testimony of an opposing witness, he must be allowed to ask him about prior statements and to do so without the witness having the crutch of the prior statement to 'refresh' his memory." *Williams v. State*, 595 So.2d 1299, 1307-08 (Miss. 1992). Read in conjunction with the limiting language in Rule 9.04(C)(1), it was hardly unreasonable for defense counsel to conclude that he was not required to turn over letters written by the State's own witness before trial.

Counsel did not flagrantly disregard the rules and lie about it, as was the case in *Taylor v. Illinois*, 484 U.S. 400, 404-05, 417 & n.22 (1988); at worst, he misinterpreted a rule that even the

trial court in this case acknowledged was unclear. Vol. 14, TR. 732 ("I think it's time for the Supreme Court of this state to decide what the law is."). As Justice McRae observed in his dissent:

> The conclusion of Byrom's counsel that they were not required to disclose these letters was plausible, considering the wording of the various rules and precedent, and the fact that they intended to use them only for impeachment. This is not a situation where the discovery abuse was wanton or deceitful. Defense counsel apparently had an honest belief that withholding the letters from the State was allowed under the rules and case law of this State.

Byrom I, 863 So.2d 897-98. Moreover, there is nothing to indicate counsel's conduct was motivated by an attempt to prevent the truth from coming out – to the contrary, he appears to have been concerned that if *Junior* knew he was going to be impeached with his letters it would give *Junior* time to fabricate an explanation. Vol. 14, TR. 718-19. To the extent this constitutes a tactical advantage, it is a tactical advantage he reasonably believed he was *entitled* to seek, given the purpose of Rule 613(a), because it is one that enhances, but does not obfuscate, the truth finding process.

Considering the foregoing circumstances, defense counsel's conduct in *Byrom* was no more willful than it was in *Ross,* and cannot justify the different result in these cases.

The *Ross* Court's other basis for overturning the application of the discovery sanction was its determination that Ross was prejudiced by the exclusion: "While Ross was allowed to impeach Jones with her prior statement on cross-examination, the exclusion of that statement from evidence did prejudice Ross," because Jones' testimony was the "only direct evidence linking Ross to the crime," her credibility was "crucial," and the "severity of the crime charged." 954 So.2d at 1001. Of all of these reasons applied equally to the omitted letters in Byrom's case.

In this case, the trial court not only excluded the letters, but also precluded defense counsel from referring to the letters in any way: defense counsel was "not permitted to pick it up and otherwise handle it and make the jury aware that it even exists." Vol 14, TR. 730-32. That is, counsel was permitted to ask Junior to admit or deny making the statements he wrote in the letters, but not allowed to impeach Junior with the letter if he denied having made any of the statements he wrote in the letter. Vol. 14, TR 732. Although Junior admitted to making a general statement claiming responsibility for his father death, Vol. 14, TR. 740, he denied making the statements he wrote describing, in detail, that it was he, not Gillis, who had shot and killed his father. Vol. 14, TR. 747-48.

In the excluded letters to his mother, Junior provided, *inter alia,* a very detailed, step-by-step of account of how and why he – not Gillis – shot his father, how he felt before, during and after:

> . . .My father comes in, doesn't say a word, but goes to his room. I tell Joey to go on out town, and I'll find him later. I sit in my room for a good 1 ½ - 2 hours, and dad comes in my room, and goes off on me, calling me bastard, no good, mistake and telling me I'm inconsiderate, and just care about myself, and he slaps me, then goes back in his room. **As I sat on my bed, tears of rage flowing, remembering my childhood, my anger kept building and building, and I went to my car, got the 9mm, and walked to his room, peeked in, and he was asleep. I walked about 2 steps in the door, and screamed, and shut my eyes, when I heard him move, I started firing. When I opened my eyes again, I freaked! I grabbed what casing I saw, and threw them in the bushes, grabbed the gun, and went to town. I saw Joey, told him to hide the gun, and he said he's take it to his spot, which I knew from when I'd sell him stuff, and went and told mom, that dad was dead, and before her teary eyes could let loose, I ran out of the hospital, and headed for the house.** I was so confused. My mind was going 1 million different ways at once, I saw bones, so I stopped, he asked if I wanted to go burn one, so I said sure, then headed strait [sic] to my house to see if he might still be alive, and I also was thinking if I had a witness there when I found him, it would be better, so I did, he was dead, and I called 911, then my mother, and before I could hang up with her, I heard sirens. . . .

Def. Tr. Ex. 87 (emphasis supplied).

When questioned generally about this, Junior denied making these statements:

Q. And do you then remember saying that you laid there and you got mad and you went and you went out to your car and got a 9-millimeter pistol and you walked to your dad's room? Is this ringing a bell?

A. **No sir.**

***

Q. Do you ever recall telling anyone that you went to that door, opened it up, peeked in, and saw your dad asleep? Do you ever remember telling anybody that?

A. **No, sir.**

Q. Do you ever remember telling anybody that you then took two steps, screamed, and when you heard movement, you began firing? Do you ever remember telling anybody that?

A. **No, sir.**

Q. Did you ever make that statement to your mother?

A. **Not that I recall.**

Q. Do you remember telling also that you left and you went to town and you found Joey Gillis and you told him to go hide the gun in the spot you and he had out on some county road near his house? Do you ever remember telling anybody that?

A. **No sir.**

Vol. 14, TR. 747-750. **Each and every one of those "no sirs" was a lie, and defense counsel was unable to let the jury know that because counsel was not permitted to use Junior's letter that proved it was a lie.**

Of course everyone in the courtroom knew that Junior was not telling the whole truth when he denied making these statements, except the folks who mattered most – the jury. Taken

out of context, and in light of his story on direct examination that he had helped Gillis kill his father, Junior's initial admission amounted to very little: the jury could have very reasonably believed that all he had meant was that he felt responsible for his father's death, and/or they jury "may have seen them as a result of the cross-examination skills of Byrom's counsel rather than as truthful statements of past admissions." *Byrom v. State*, 863 So. 2d 836, 898 (Miss. 2003)(McRae, P.J., dissenting).

In sum, the jury was deprived of information that was unquestionably crucial to accurately assessing Junior's credibility and, ultimately Byrom's guilt, which is certainly not harmless given that Junior was the only witness to testify as to Byrom's and Gillis's conduct in the murder for hire scheme.

Exclusion of the letters also permitted Junior to offer explanations for the admissions he did make – explanations that would have looked quite implausible had the jury been apprised of the actual letters. Junior claimed he wrote letters because he was "on the downside of a rollercoaster" and "depressed," and that he was "ready to take the rap for everything to free my mother and Joey" and that he had hoped that the letter would be intercepted by the State. Vol. 15, TR. 754. Yet, Junior testified initially that he was not even aware that any of the correspondence was being intercepted while he was incarcerated, and he did not learn of the interceptions until after the state discovered that information to his attorney. Vol 14, TR. 750. He admitted that the "scheme" was to "get y'all out of this" Vol. 15, TR. 753, – and it is clear from Byrom's letters that the "scheme" was to blame Gillis in attempt to exculpate herself *and Junior*– yet, Junior *letters* don't conform to any such scheme at all – instead they provide a detailed confession that inculpates himself and exonerates Gillis. App. 35-36. Junior told the jury that he wrote the letters because was depressed, but in the letters the jury never saw he

explained, in great detail, how this downward spiral began long before this crime, that his father's treatment of him was the primary cause of this depression and it was this depression that ultimately led him to kill his father. App. 36. And everything that Junior writes describes in these letters –including the fact that it was he, and not Gillis, who fired it – in consistent with the physical evidence. The jury had no way to assess its credibility without being aware of the letters themselves and their entire contents.

The exclusion of these letters unquestionably misled the jury as to the facts and deprived the jury of information necessary to assess the reliability of critical testimony from the State's key witness. This error was certainly not harmless, and resulted in a fundamental miscarriage of justice. *Ben v. State*, 95 So.3d 1236, 1249-50 (¶¶ 36-39) (Miss. 2012). In *Ross,* this Court admonished:

> We must never forget, however, that the trial for life or liberty is not a game and that **discovery rules, like other rules of procedure, are not an end in and of themselves but a means to the end that we dare call justice.** To that end, **we administer our discovery rules with a strong bias in a favor of the court and the jury receiving and considering all relevant and otherwise admissible evidence.**

954 So.2d at 1000 (*citation omitted; emphasis added*).

In *Taylor,* it was the defense attorney's violation of the discovery rule, and not the sanction imposed, that threatened the integrity of the truth-finding process:

> Regardless of whether prejudice to the prosecution could have been avoided in this particular case, it is plain that the case fits into the category of willful misconduct in which the severest sanction is appropriate. After all, the court, as well as the prosecutor, has a vital interest ***in protecting the trial process from the pollution of perjured testimony.*** . . .The pretrial conduct revealed by the record in this case gives rise to a sufficiently strong inference that "***witnesses are being found that really weren't there,"*** to justify the sanction of preclusion.

Id. at 417 (emphasis supplied). In *Byrom*, not only did the discovery violation not prejudice the prosecution, but the imposition of the *sanction* severely prejudiced Byrom in her attempt to

impeach the testimony of the State's star witness, Junior, and polluted the trial with uncorrected perjured testimony.

What we have in this case is the opposite of what occurred in *Taylor*: the discovery violation did not impede the truth finding process at all – it was corrected, by an overnight continuance that allowed the prosecution to consult with Junior about the letters. However, unlike in *Taylor,* imposition of the sanction unquestionably impeded the truth finding process. Junior lied under oath. He was asked if he made the forgoing statements, he said he did not. The letter proves that he did. And he lied under oath about what was the most critical issue in this case –whether or not Gillis shot Edward Byrom, Sr. as part of a murder for hire scheme instigated by Michelle Byrom. Even things Junior did admit to saying, he attempted to explain away.

The exclusion of Junior's letters deprived Byrom of "[o]ne of the most legitimate and valuable weapons in cross-examining counsel's arsenal[,] the prior inconsistent statement." *Williams v. State,* 595 So.2d 1299, 1308 (1992). Without being able to confront Junior with the letters themselves – their *entire* contents and the context in which they were written -- there was no way the jury could reliably assess Junior's credibility.

B. THIS CLAIM IS NOT PROCEDURALLY BARRED.

In regard to this claim for ineffective assistance of counsel based on the failure to produce Junior's confession letters at trial, this claim was not presented on direct appeal by Petitioner's trial attorneys, or in the first state post-conviction proceedings. This resulted in this claim being procedurally barred from consideration by the federal courts that considered Petitioner's request for federal habeas relief. The District Court refused to consider this claim because Byrom "has never presented a State court with the argument that trial counsel performed

ineffectively in failing to properly follow the rules." *Byrom III*, 817 F.Supp.2d at 888. The Fifth Circuit affirmed that decision. *Byrom IV*, 518 Fed.Appx. at 251-52. Petitioner respectfully submits that the only reason this claim, which was readily discernable from this Court's decision in the direct appeal, was not presented in the previous state post-conviction petition is due to the ineffectiveness of the former state post-conviction counsel.

Petitioner respectfully submits that this claim is not procedurally barred, because Miss. Code Ann. §§ 99-39-5(2) and 99-39-27(9) authorize this Court to grant post-conviction relief in light of new case law, such as *Ross, supra.* At a minimum, Petitioner respectfully submits that even though the uncontradicted facts clearly establish that her trial attorneys violation of the reciprocal discovery rule demonstrated incompetence because they did not know the applicable Mississippi law that governed this situation, the discovery violation was not "wilfull" in the sense that it was not with any intent to deceive the trial court. Therefore, Petitioner was denied the effective assistance of competent counsel, and she should at a minimum be afforded an evidentiary hearing to establish that she suffered prejudice as a result of that incompetence. *Kimmelman*, *supra*, 477 U.S. at 381-85.

For the foregoing reasons, Petitioner respectfully submits that this Court should re-evaluated Byrom's claim in light of the recent contrary decision in *Ross.* Here, as in *Ross,* the exclusion sanction was improperly applied and this prejudiced Byrom because her right to confrontation was violated. Therefore, her conviction should be reversed.

CLAIM III: Byrom's trial counsel were ineffective for causing Junior's confession letters to be excluded due to their discovery violation, and for failing to investigate and/or present relevant evidence in Byrom's behalf at the guilt phase of her trial, and for failing to raise these issues in the first post-conviction petition.

Two pieces of evidence were crucial to the State's case against Byrom: Junior's testimony, and Byrom's own confession through which she sought to protect her son. Significantly, the police initially interrogated Junior about the murder, but this interview was "lost" by the State. According to Junior, he had not told the police a murder for hire story or implicated his mother at that point. Vol. 14, TR. 680, 687; Vol. 15, TR. 674-77, 865; Def. Tr. Ex. 70.

Defense counsel's theory that Junior was lying about the murder for hire scheme, and that he, not Gillis, actually shot his father, and that Byrom's confession was lying in her confession in an effort to protect her son. Nevertheless, defense counsel failed to discover Junior's confession letters to the state, notwithstanding the trial court's order that he do so, thereby causing this critical evidence to be excluded. Further, notwithstanding the importance of undermining the reliability of Byrom's confession, counsel failed to present readily available evidence on that point. Because these errors, individually or cumulatively, "fell below an objective standard of reasonableness," *Strickland v. Washington*, 466 U.S. 668, 688 (1984), and because "there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt," *Strickland*, 466 U.S. at 691, Byrom's conviction should be reversed.

A. Byrom's counsel were ineffective for failing to produce Junior's confession letters to the State in discovery when the trial court ordered, prior to trial, that he do so.

The issue of the discoverability of Junior's confession letters was initially raised by Byrom's attorney in response to the State's demand for discovery. The trial court repeatedly

admonished the attorneys that if all parties did not produce all materials to the opposing side during discovery, the evidence would not be admissible at trial. CP 111.

Later, at the pre-trial hearing on September 15, 2000, Byrom's counsel attempted to argue his theory that "impeachment" evidence need not be produced by the Defendant in discovery. Vol. 10, TR. 39-40. It is clear he was referring to Junior's letters: "If they [the prosecutors] put son [Edward Junior] on and he testifies in a certain way, we may try to impeach him with asking him certain things. But if he testifies the other way, we won't even touch it. You know what I am saying? It's only for impeachment." Vol. 10, TR. 39. The trial court responded: "Well, provide production Counsel. ... In any event, I know of nothing that protects [impeachment] information of that sort as not being discoverable. So the defendant will be required to make full disclosure, or else, at trial, it's objectionable." Vol. 10, TR. 39 & 40.

Thus, Byrom's lawyer unquestionably believed these letters constituted valuable impeachment evidence against Junior and wanted to use these letters for that purpose, but was unable to do so because of his misinterpretation of the governing discovery rules. In no sense, can that failure be attributed to a strategic choice. The decision made by Byrom's trial counsel not to provide the letters to the State - - in spite of being specifically ordered to do so -- was based on counsel's belief that impeachment evidence was not discoverable -- a belief that, according to the trial court and the Mississippi Supreme Court in this case was erroneous.

Errors caused by counsel's ignorance of the law are errors that run afoul of the objective standard of reasonableness. *See Kimmelman v. Morrison*, 477 U.S. 365, 385 (1986) (rejecting argument that counsel's errors were strategic choices because they were based on ignorance of the law). Even if counsel believed the trial court's ruling was wrong, the trial court's clear and direct order to disclose or face exclusion of critical impeachment evidence, in a capital murder

trial, would lead any reasonably competent lawyer to err on the side of caution and disclose the evidence. *See Noble v. Kelly*, 89 F. Supp. 2d 443, 462-463 (S.D.N.Y. 2000) (in spite of counsel 's good faith belief that rule did not require disclosure of witnesses under the circumstances, counsel's performance was deficient because reasonably competent lawyer would have erred on the side of caution and filed notice). Counsel's failure to do so here was "outside the wide range of professionally competent assistance." *Strickland*, 466 U.S. at 690. *See, e.g., Clinkscale v. Carter*, 375 F.3d 430, 444-45 (6th Cir. 2004) (trial counsel ineffective for failing to comply with rule requiring notice of alibi witnesses resulting in exclusion of witnesses).

Moreover, as described in Claim II, *supra*, the consequences of counsel's failure to disclose the letters was unquestionably prejudicial to Byrom. As a result, the letters were excluded from evidence and counsel was not permitted to refer to them or apprise the jury of their existence. Junior was a critical witness who provided direct evidence of Byrom's participating in her husband's murder. Although Byrom's confession was admitted, in light of the tactics used to procure it, the jury could have plausibly believe that Byrom's story was crafted to protect her son. There was no physical evidence linking Byrom or Gillis to the crime, and Gillis never admitted to the murder for hire scheme. It was Junior who procured the gun from his father. It was Junior who led police to the murder weapon. Junior, not Gillis had gunpowder residue on his hands. Under these circumstances, Junior's credibility was a crucial issue before the jury. The exclusion of these letters, as described above, deprived the jury of evidence necessary to reliably make that determination. There is a reasonable probability that, had the jury been apprised of the letters and their contents, they would not have convicted Byrom of capital murder.

B. Trial counsel were ineffective for failing to present evidence concerning the circumstances of Byrom's confession that would have cast doubt on its reliability.

Aside from Junior's testimony, the only evidence linking Byrom to any alleged murder for hire scheme was her own confession. Although trial counsel's theory was that Byrom was confessing to protect Junior, they failed to present evidence that would have supported this theory at trial.

It is well established that, even if this confession was voluntary and admissible, a defendant is entitled to present evidence concerning the circumstances of the interrogation and confession that may cast doubt on its reliability. *E.g., Crane v. Kentucky*, 476 U.S 683, 688 (1986). Here, there was ample evidence to question the reliability of Byrom's confession, yet counsel failed to present it.

In his confession letter, Junior states that after he murdered his father he went to hospital and told his mother what he had done. Tr. Def. Ex 87. The police interrogated Junior and, although this interview was "lost," according to Junior, he had not told the police a murder for hire story or implicated his mother at this point. Vol. 14, TR. 680, 687; Vol. 15, TR. 674-77, 865; Def. Tr. Ex. 70. Byrom's first interrogation took place between 10:47 p.m and 11:15 p.m. on June 4, while she was in her hospital bed, being medicated for double pneumonia. She suffered from Munchausen Syndrome and had been intentionally ingesting rat poison. Vol. 11, TR. 226. She was also being administered sleeping pills (Restoril), muscle relaxers (Darvacet) and pain medication (Talwin). Vol. 11, TR. 226; Vol. 3, TR. 346. According to her testimony at the suppression hearing, she could recall little about the interrogations. Vol. 11, TR. 225-27.

Sheriff David Smith and Deputy Donnie Edmondson conducted the June 4 interrogation. Vol 3, TR. 338. **No valid Miranda warnings were given.** Vol 3, R 338; TR. 278 (ruling).

Sheriff Smith began by telling Byrom that her son had already given a statement in which he told police that Byrom had hired someone to kill his father, and that person was responsible for the shooting. Vol. 3, TR. 338. The Sheriff told Byrom that *she* was putting herself and Edward in danger, unless she identified the person she hired to kill Edward, Sr., because that person would try to harm them. Vol. 3, TR. 339. Three times the Sheriff warned that if Byrom did not name a person she procured to kill her husband, her son would take the rap. Vol. 3, TR. 338 ("Don't let him be out there by himself on this."); Vol. 3, TR. 339 ("And I can tell you, you are trying to leave him out there by himself.") It was only after the third such admonishment that Byrom told the story blaming Joey Gillis for the murder. Vol. 3, TR. 340. Immediately thereafter, Byrom said, "I talked to Joey, that was all," and she began making incriminating statements. Vol. 3, TR. 340. **Trial counsel failed to present any of this evidence.**

Trial counsel also failed to adequately investigate or present evidence concerning the effect that the numerous medications would have had on the reliability of Byrom's confession. During federal habeas proceedings, Dr. Anthony J. Verlangieri, a Pharmacologist and Toxicologist, reviewed Byrom's hospital records concerning the medications she was administered at the time of her initial interrogation. Successive PC Ex. 8 (Affidavit of Dr. Anthony J. Verlangieri). Dr. Verlangieri observed that Byrom's "pharmacological condition," was such that there is "a reasonable probability that the statements Ms. Byrom made were unreliable, and her decision-making ability would have been markedly impaired." *Id.* at pg. 6.

Trial counsel also failed to present evidence concerning the initial interrogation, which showed that Byrom confessed only after the police repeatedly urged her to do so to protect her son. *See* Saul M. Kassin et al., *Police-Induced Confessions: Risk Factors and*

Recommendations, 34 L. & Hum. Behav. 3, 14 (2010) (research indicates that "a desire to protect the actual perpetrator," is "the most prevalent reason for false admissions").

But for the forgoing omissions, there is a reasonable probability that the jury could have found Byrom's confession incredible given the circumstances under which it was obtained, and the compelling motive she had to falsely confess – to protect her son.

C. PREVIOUS POST-CONVICTION COUNSEL FAILED TO RAISE CERTAIN ISSUES RELATED TO INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL.

Although previous post-conviction counsel raised some issues relating to ineffective assistance of trial counsel in the initial Petition, they failed to raise any issues of deficient performance based on the exclusion of the Junior's confession letters, or challenges to the introduction of Petitioner's confessions based on circumstances that undermined their reliability, including the medications that had been administered to Petitioner at the time she made the statements. *See Byrom v. State*, 927 So.2d 709 (Miss. 2006) (none of these claims were asserted). This Court found in its opinion on direct appeal that Petitioner's trial counsel violated discovery rules which justified the exclusion of Junior's confession letters. Post-conviction counsel clearly knew or should have known about this claim. There can be no reason for failing to raise it in the original post-conviction petition, other than ineffective assistance of counsel in the post-conviction proceedings.

D. THIS CLAIM IS NOT PROCEDURALLY BARRED.

In regard to this claim for ineffective assistance of counsel based on the failure to produce Junior's confession letters at trial, this claim was not presented on direct appeal by Petitioner's trial attorneys, or in the first state post-conviction proceedings. *Byrom v. State*, 927 So.2d 709 (Miss. 2006). This resulted in this claim being procedurally barred from consideration

by the federal courts in the federal habeas proceedings. The District Court refused to consider this claim because Byrom "has never presented a State court with the argument that trial counsel performed ineffectively in failing to properly follow the rules." *Byrom III*, 817 F.Supp.2d at 888. The Fifth Circuit affirmed that decision. *Byrom IV*, 518 Fed.Appx. at 251-52. Thus, the claims which Petitioner now seeks to assert were deemed "unexhausted" by the federal courts, because they had never been presented to the state courts for consideration, due to the shortcomings of previous state post-conviction counsel.

In regard to the IAC claims based on issues relating to failure to develop mitigation evidence and incompetent conduct that resulted in the exclusion of Junior's confession letters, these claims are distinctly different from the ICA claims that this Court considered under the first Petition in *Byrom II*. Petitioner respectfully submits that the only reason these readily apparent claims were not presented in the previous state post-conviction petition is due to the ineffectiveness of the former state post-conviction counsel. *See, e.g., Grayson v. State*, 118 So. 3d 118, 126 (Miss. 2013); *Knox v. State,* 75 So. 3d 1030, (Miss. 2011). *See also Alan Dale Walker v. State,* ___ *So.3d* ___, 2013 WL 6916330, No. 2012-DR-00102-SCT (Dec. 12, 2013)(remanding for evidentiary hearing on claim that prior post-conviction counsel was ineffective for failing to raise claim of ineffective assistance of trial counsel); *Benny Joe Stevens v. State*, No. 2011-DR-00637-SCT (May 5, 2011) (Order stating the Mississippi Supreme Court has recognized death-sentenced inmates have a federal right to effective assistance of counsel in post-conviction proceedings since *Jackson v. State*, 732 So. 2d 187 (Miss. 1999)); See CLAIM V below.

The claim for ineffective assistance of trial counsel based on violation of established discover rule was obvious from this Court's opinion in the direct appeal, *Byrom I.* Post-

conviction counsel were on clear notice of this claim, and have had no reasonable basis for failing to raise it. At a minimum Petitioner should be entitled to an evidentiary hearing on these issues.

E. PETITIONER SHOULD BE GRANTED AN EVIDENTIARY HEARING.

For the foregoing reasons, trial counsel were ineffective in their representation of Byrom at the guilt phase of the trial. Accordingly, Byrom's conviction and death sentence should be vacated and this case remanded for a new trial. In the alternative, Byrom respectfully submits that she has at a minimum demonstrated that this issue should be remanded for an evidentiary hearing on this claim.

CLAIM IV: Trial counsel were ineffective for failing to investigate and present available mitigating evidence at sentencing.

In this case, Byrom's trial counsel failed to present a single witness to testify in Byrom's behalf at the penalty phase of her capital trial. Although trial had in their possession a report from defense psychiatrist Dr. Keith Caruso summarizing Byrom's account of horrific physical, emotional and sexual abuse at the hands of her stepfather and, later, her husband, trial counsel made no attempt to independently investigate these allegations, even though Byrom's family members, including several of her siblings, were available and willing to testify in Byrom's behalf. Although Dr. Caruso had diagnosed Byrom with significant mental disorders - - major depression, borderline personality disorder, alcohol dependence and Munchausen Syndrome - - and was present and fully prepared to testify as to the nature of these disorders, their relationship with the years of abuse she had suffered and the crime that occurred --- trial counsel did not even call Dr. Caruso to testify. Instead, counsel advised Byrom to waive a jury sentencing and submitted only Dr. Caruso's written report and summary of her medical history to the trial court.

Counsel's explanation for these "tactics"– that they wanted to "save" any witness testimony for the retrial after Byrom's conviction was reversed on appeal. Trial counsel determined that it was better strategy not to present witnesses in mitigation so that the state would be unaware of the mitigation testimony to be offered at the retrial, which they were certain would occur. Initial PCR Ex. 6, Affidavit of Terry Wood; Ex. 7, Affidavit of Sunny Phillips; Pet. Ex. 15). **This explanation is not only dumbfounding it was incompetent legal advice and/or strategy.** Indeed, Justice Dickinson lamented in his dissent:

> I have attempted to conjure up in my imagination a more egregious case of ineffective assistance of counsel during the sentencing phase of a capital case. I cannot.

Byrom II, 927 So.2d at 732.

Had counsel presented readily available evidence from Byrom's family describing the years of abuse she suffered and its observable effects, and permitted Dr. Caruso to testify and actually explain his diagnostic impressions and the impact of Bryom's abuse, and mental disturbances, on her behavior before and at the time of the offense, there is a reasonable probability Byrom would not have been sentenced to death.

A. The Strickland Standard.

The Supreme Court established the legal principles governing ineffective assistance claims in *Strickland*, 466 U.S. 668. Such claim has two components: a performance prong, and a prejudice prong. *Strickland*, 466 U.S. at 687. To establish deficiency, Byrom must show her "counsel's representation fell below an objective standard of reasonableness." 466 U.S. at 688. To establish prejudice, she "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.,* at 694.

Applying this standard to counsel's performance at the penalty phase of a capital trial, the Supreme Court has made clear that the investigation and presentation of some mitigating evidence is not sufficient to meet the constitutional standard, if counsel fails to investigate reasonably available sources or neglects to present mitigating evidence without a strong strategic reason. *E.g., Sears v. Upton*,130 S. Ct. 3259, 3265-66 (2010). *See also Bond v. Beard,* 539 F.3d 256, 291 (3d Cir. 2008)("*Strickland* permits relief where, as here, trial counsel presented some mitigation evidence but could have introduced evidence that was upgraded dramatically in quality and quantity.")*; Walbey v. Quarterman*, 2009 U.S. APP. LEXIS 942 (5th Cir. 2008) (fuller details of history, character and background lead to penalty phase relief under *Strickland*); *Williams v. Allen*, 542 F.3d 1326 (11th Cir. 2008) (counsel's failure to follow "red flags" lead to a mitigation presentation that was vastly different than what it could have been); *Gray v. Banker*, 529 F.3d 220 (4th Cir. 2008)(counsel ineffective for failing to investigate numerous "red flags" contained in defendant's records that indicated defendant was mentally ill, even though the jury had found 13 mitigating factors from evidence presented at trial); *Dickerson v. Bagley*, 453 F.3d 690, 695-97 (6th Cir. 2006) (counsel was ineffective, despite having presented eight witnesses at sentencing, for failing to discover and introduce evidence that the defendant had a low I.Q. and a borderline personality disorder, was taunted at school, and was referred to as "the moron" by his mother); *Harries v. Bell,* 417 F.3d 631, 638 (6th Cir. 2005) (counsel deficient at sentencing for failing to fully investigate the defendant's family history and mental health, despite having conducted at least six interviews).

B. The sentencing hearing.

Prior to trial, Byrom retained psychiatrist Dr. Keith Caruso to assist in the development of mitigation evidence that could be offered at the sentencing phase in the event Byrom was

convicted.[7] Dr. Caruso evaluated Byrom and provided a report to counsel. His report described Byrom's extensive history of physical, emotional and sexual abuse as child, and a long history of sexual, emotional and physical abuse Byrom suffered from her husband, Edward Byrom, Sr. Successive PC Ex. 11, Attachments B & C (Report of Dr. Keith Caruso). *All* of this information was derived exclusively from his interview with Byrom. The attorneys provided Dr. Caruso with no information from collateral sources - - for example family members - - regarding Byrom's background. Successive PC Ex. No. 11 (Declaration of Dr. Keith Caruso, ¶ 12).

Dr. Caruso's report also summarized his diagnostic impressions – that Byrom suffered from borderline personality disorder, depression, alcohol dependence, and Factious Disorder (Munchausen syndrome), which caused her to deliberately made herself sick by, for example, by ingesting poison – and listed several statutory and non-statutory mitigating factors which he found present in this case. Successive PC Ex. No. 11, Attachment B (Report of Dr. Caruso).

Armed with the abundant information concerning Byrom's life history from Dr. Caruso's report, **trial counsel did . . . nothing.** Although Byrom had numerous siblings and other family members who could have corroborated Byrom's account of the extreme abuse she had suffered throughout her life, trial counsel did not interview any of them about Byrom's background – not even her mother. Successive PC Ex. No. 19 (Affidavit of Helen Marie Garnett)(sister); Successive PC Ex. No. 15 (Affidavit of Kenneth Dimitro) (brother); Successive PC Ex. No. 17 (Affidavit of Doranna Dimitro)(sister-in-law); Successive PC Ex. No. 14 Affidavit of Betty

[7] Dr. Caruso's impressive resume indicates that he has a member of The American Academy of Psychiatry and the Law (AAPL), which is dedicated to the highest standards of practice in Forensic Psychiatry, and that he specializes in "the interface of the professions of psychiatry and the law." This includes services he has provided as a consultant and expert in over 100 capital murder trials for both the defense and the prosecution in state courts in Mississippi, Tennessee, Alabama, Georgia, North Carolina, and Maryland; federal courts in Kentucky and Oklahoma; and military courts of the United States Army and the United States Navy. Successive PC Ex. 11 (Declaration of Dr. Keith Caruso, ¶ 2-4).

Postalwaite (mother); Successive PC Ex. No. 18 (Affidavit of Leighanne Bundy)(niece); Successive PC Ex. No. 16 (Affidavit of Louis Dimitro)(brother).

According to Dr. Caruso, trial counsel spent little time with him discussing the mitigation evidence that could be offered at the penalty phase of the trial. Successive PC Ex. No. 11 (Affidavit of Dr. Caruso, ¶ ¶ 11, 12).

At the sentencing hearing where Byrom's life literally hung in the balance, **Byrom's attorneys failed to call a single witnesses to testify in Byrom's behalf.** Counsel explained that this was because they believed that it would be good strategy not to disclose the mitigation testimony to the prosecution at that time, but rather, to keep the mitigation evidence in reserve, so it could be freshly presented at the re-trial, which trial counsel believed was certain to be granted. *Byrom* II, 927 So.2d at 720; Successive PC Exhibits 9 & 10 (Affidavits of Terry Wood and Sunny Phillips). Instead of calling witnesses to testify on Byrom's behalf, trial counsel advised Byrom to waive her right to a jury sentencing, and presented only a summary of Byrom's medical records by Dr. Kitchens, and a copy of Dr. Caruso's report.

This was not because witnesses were unavailable. In spite of not being interviewed by counsel, Byrom's siblings and niece traveled to Iuka for the trial and were ready and willing to testify in Byrom's behalf. They were told by trial counsel that they should not attend the trial, and were later dismissed, without explanation, and without ever being called. Successive PC Exhibits No. 16, 17, 18, 19.

Dr. Caruso was also present at the Tishomingo County Courthouse on November 18, 2000, which was the day that Petitioner was convicted of capital murder and her sentencing hearing began, and he was prepared to testify. Successive PC Ex. 11 (Declaration of Dr. Caruso, ¶ 14). It was Dr. Caruso's understanding that he was going to have the opportunity to testify in

this case, and he was never told that his report would be provided to the sentencer in lieu of his testimony. *Id.* at ¶ 8. Dr. Caruso was prepared to offer substantial mitigation evidence on behalf of Byrom because she had a host of psychological and physical conditions, as well as a traumatic personal history, which were relevant and persuasive information on the issue of whether the death penalty was appropriate in this case. *Id.* at ¶ 15. If her had been allowed to testify, Dr. Caruso would have fleshed out the history of the abuse Petitioner had suffered in her childhood and as an adult, and he would have explained the basis of his clinical diagnoses concerning Byrom's's psychiatric conditions and how they were relevant for mitigation purposes. *Id.* at ¶ 15.

Based on Dr. Caruso's report, trial counsel argued that Byrom and her son had endured violence and emotional abuse at the hands of Edward Byrom, Sr., that Byrom had suffered a "horrific childhood," and that Byrom's conduct was the desperate act of an emotionally disturbed woman afraid to leave her husband. Vol. 16, TR. 1013-16.

The State countered that, "This was nothing but a calculated, cold-blooded act in order to gain monetary gain ...." Vol. 16, TR. 1011; see also TR. 1009, 1012. According to the State, Byrom created her own emotional problems, and manipulated the doctors. Vol. 16, TR. 1019-20. Indeed, the prosecution insisted that Byrom's husband was A hardworking man who provided for his family and tried to raise his son well; it was Michelle Byrom who was the bad wife and the bad mother. Vol. 16, TR. 1011-12. The prosecution repeatedly insisted, if the abuse was really so bad, Byrom certainly had "every opportunity" to leave. Vol. 16, TR. 1010; *see also* TR. 1020-22.

In support of this theory, the State focused on the fact that the only evidence that Byrom suffered any abuse came from Byrom herself, and was completely uncorroborated:

> It is very important to take notice that their reports have no corroboration whatsoever. And as you are quite aware, no doctor can testify within a medical reasonable certainty from evidence they have deduced strictly from their patient, particularly psychologists. None of the doctors were able to corroborate the information she has given them. So, therefore, the allegations she puts forth, particularly her factual portions, have no bearing. That's what their results are based upon, yes. But having no corroborating evidence, it can be taken with a grain of salt at best.

Vol. 16, TR. 1020.

The State was correct. **There was no corroborating evidence, because trial counsel had not presented any, even though it was available. The trial court did not take this evidence "with a grain of salt" – he refused to consider it at all.** After a brief recess, the trial court stated that he would consider as mitigating Byrom's lack of any prior criminal record, and that she was acting "while under the influence of some extreme mental or emotional disturbance," but noted that "these factors are the only factors suggested which would appear and bear consideration by the court." Vol. 16, TR. 1024. Finding the sole aggravating factor – that Byrom committed the offense for pecuniary gain – outweighed the only mitigating factors the court was willing to consider, the court sentenced Byrom to death. Vol. 16, TR. 1024-25.

C. ***Deficient Performance***

Trial counsel's decision to rely solely on the doctors' written reports to present mitigation was unreasonable under prevailing professional norms. In assessing the reasonableness of an attorney's performance, the Supreme Court has looked to standards promulgated by the American Bar Association (ABA) as appropriate guides. *See Wiggins*, 539 U.S. at 524. The ABA standards pertaining to capital defense work in 1990 provided that a sentencing phase investigation "should comprise efforts to discover all reasonably available mitigating evidence." ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 11.4.1(C) (1989). As part of these efforts, counsel had a duty to collect information pertaining to

"family and social history (including physical, sexual or emotional abuse)," and to "*obtain names of collateral persons or sources to verify, corroborate, explain and expand upon [the] information obtained.*" *Id.*, 11.4.1(D)(emphasis supplied).

The information that trial counsel acquired through Dr. Caruso's report would have led a reasonable attorney to investigate further. *See Wiggins v. Smith*, 539 U.S. 510, 527 (2003). Trial counsel knew from Dr. Caruso's report that Byrom had experienced abuse as a child and later at the hands of her husband. As was true in *Wiggins*, "any reasonably competent attorney would have realized that pursuing these leads was necessary to making an informed choice among possible defenses, particularly given the apparent absence of any aggravating factors in petitioner's background." *Wiggins*, 539 U.S. at 525.

A reasonable investigation into the leads in this case should have included, at a minimum, interviewing other family members who could corroborate the evidence of abuse and speak to the resulting impact on Byrom. Yet, despite the availability of several of Bryom's family members, trial counsel relied exclusively on Dr. Caruso's interview with the Byrom documented in his written report. By choosing to rely entirely on Byrom's own account, trial counsel left the State free to argue that Byrom's own account was self-serving and should be discounted.

Trial counsel's failure to pursue and present this additional evidence cannot be characterized as the product of a reasonable strategic decision. The Mississippi Supreme Court characterized trial counsel's failure to call any witnesses at sentencing as "admittedly perplexing," and trial counsel's "generic" claim of "trial strategy" as "not helpful." *Byrom II*, 927 So.2d at 720. **Indeed, trial counsel's claim that they wanted save the mitigation witness for a retrial is beyond perplexing – it is absurd.** Even had counsel been correct in their belief that there was certain reversible error in this case, that does explain counsel's failure to prepare

for sentencing ***before the trial commenced*** (i.e., before they could have know about the alleged reversible error), or why Byrom could not have challenged her conviction while serving a life sentence.

Nor is there any legitimate explanation for counsel's conduct apparent from the record. Counsel uncovered nothing in their limited inquiry into Byrom's background to suggest that "further investigation would have been fruitless." *Wiggins*, 539 U.S. at 525. To the contrary, the many red flags described in Dr. Caruso's report would have a prompted a reasonable attorney to conduct additional investigation. Moreover, acquiring additional mitigating evidence would have been consistent with the penalty phase themes that counsel attempted to argue in Byrom's behalf. Given that counsel's sentencing case focused on establishing that Byrom had been the victim of significant abuse, they had every incentive to develop the strongest mitigation case possible. *Cf. id.* at 526. It thus is apparent that counsel's failure to expand their investigation and present actual testimony "resulted from inattention, not reasoned strategic judgment." *Id.* at 526.

It is well established that, "[i]n assessing the reasonableness of an attorney's investigation, . . . a court must consider not only the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further." *Wiggins*, 539 U.S. at 527. As discussed above, trial counsel abandoned their investigation at an unreasonable point, particularly in light of the information about Byrom's background revealed by Dr. Caruso's report, and made the absurd decision to forego the presentation of any witnesses on the theory there would be a retrial. This was deficient performance under *Strickland*. *See id.* at 527-28.

D. There is a reasonable probability that Byrom would not have been sentenced to death had counsel presented readily available mitigating evidence.

The inexplicably omitted testimony from Byrom's family and Dr. Caruso could have dramatically changed the evidentiary picture at sentencing. For example, Byrom's brothers, Louis and Kenneth, could have vividly described the severe emotional and physical abuse Byrom suffered at the hands of her step-father throughout her childhood. Kenneth and Louis not only witnessed the abuse, but also experienced the abuse first hand. They described Byrom's stepfather, Harold Postalwaite, as a controlling and abusive alcoholic who looked for any excuse to punish them. Harold, didn't just spank the children, he berated and demeaned them, calling them worthless, stupid, and lazy; he didn't just use a belt, he would beat them with his fists, or anything he could get his hands on. Louis recalled one time when he came home a few minutes late, Harold fired a gun over Louis's car to let him know he was angry. Harold's temper was a constant source of tension in the home. He and Byrom's mother would fight, usually about us kids, all the time. Louis saw Harold hit his mother and give her a black eye. Successive PC, Ex. No. 16 (Affidavit of Louis Dimitro, ¶¶ 20, 21); Ex. No. 15 (Affidavit of Kenneth Dimitro, ¶¶ 19, 20, 21); Ex. No. 12 (Affidavit of Louis Dimitro, ¶¶ 4, 5, 6); Ex. No. 13 (Affidavit of Kenneth Dimitro, ¶ ¶ 4, 5, 6, 7, 8).

Louis described Michelle as "happy-go-lucky" before their mother married Harold. Over the years living with him, he witnessed her becoming increasingly withdrawn. Shortly after she ran away from home when she was 15-years-old, Michelle confided to Louis that Harold had been sexually abusing her. Successive PC Ex. No. 12 (Affidavit of Louis Dimitro, ¶ 7); PC Ex. No. 8 (Affidavit of Louis Dimitro, ¶ 19).

This evidence would not only have corroborated Byrom's own account, but it provided a considerably more complete picture of the day to day experiences Byrom suffered as a child, and

evidence of the observable effects this had on her emotional well-being. Moreover, the fact that Byrom had told her brother that her step-father had sexually abused her shortly after the abuse occurred – and long before she was accused of any crime – corroborates her own account of the sexual abuse.

Byrom's family members were also able to describe Edward Byrom, Sr.'s demeanor toward his wife and his son, Byrom's reaction to it, and give accounts of Byrom's thwarted attempts to leave her husband. Both Louis and Kenneth note that Edward, Sr. reminded them of their step-father. He drank constantly and was disrespectful toward Michelle. Successive PC, Ex. No. 12 (Affidavit of Louis Dimitro, ¶ 8); Ex. No. 13 (Affidavit of Kenneth Dimitro, ¶ 10).

Byrom's niece, Leighanne Bundy, lived with the Byroms for a short time. She observed Edward Sr. physically assault Edward, Jr. She heard Edward Sr. and Byrom arguing constantly in the back room and could hear banging on the walls. She heard Edward Sr. threaten to hit Michelle Byrom. Successive PC Ex. No. 18 (Affidavit of Leighanne Bundy, ¶¶ 7, 8, 10, 16). Leighanne was afraid of Edward, Sr. herself, explaining that when he drank he became "unglued." *Id.* (Ex. No. 18, Affidavit of Leighanne Bundy, ¶ 17, 18). Byrom's mentally impaired sister, Helen, would have testified that Edward, Sr. sexually assaulted her once while she was staying in the Byrom home. Successive PC Ex. No. 19 (Affidavit of Helen Marie Garnett, ¶ 7).

Leighanne could have described a time when Byrom came to her home after being abused by Edward, Sr. with bruises on her face. Byrom and Edward, Jr. only stayed a few days before returning, fearing what Edward, Sr. would do if she left him. Successive PC Ex. No. 18 (Affidavit of Leighanne Bundy, ¶¶ 11, 14) Byrom's mother, Betty Postalwaite, could have testified that when Byrom came to her home after fighting with Edward, Sr., Edward, Sr. would

call and call until Byrom came home. Successive PC Ex. No. 14 (Affidavit of Betty Postalwaite, ¶ 9). Louis could have testified that Byrom and Edward, Jr. told him that Edward, Sr. was verbally and physically abusive toward them when he was drinking. During the two years before Edward, Sr. was killed, Byrom called Louis several times, very upset over Edward, Sr.'s behavior, and talked about leaving him. Successive PC Ex. No. 12 (Affidavit of Louis Dimitro, ¶ 9).

Finally, Dr. Caruso, had he been called to testify, would have been able to explain that Byrom's emotional and mental disorders were entirely consistent with someone who suffered a background of extreme abuse. Successive PC Ex. No. 11 (Declaration of Dr. Caruso, ¶ 7). He could have explained why someone who had come from such an abusive and turbulent background would be drawn to, and stay with, an abusive spouse. *Id.* at ¶ 18. He could have explained why it so difficult for women with a history like Byrom's to simply leave an abusive spouse. *Id.* at ¶¶ 19, 20, 21.

In *Sears v. Upton*,130 S. Ct. 3259 (2010), the Supreme Court admonished, "[w]e have never limited the prejudice inquiry under *Strickland* to cases in which there was only 'little or no mitigation evidence' presented," *id.* at 3265, and proceeded to identify cases where counsel had made a superficially reasonable mitigation presentation, but was nevertheless ineffective. *Id.* at 3265-66 (*citations omitted*). When assessing prejudice, courts are required "to evaluate the totality of the available mitigation evidence -- both that adduced at trial, and the evidence adduced in the habeas proceeding -- in reweighing it against the evidence in aggravation." *Williams v. Taylor*, 529 U.S. 362, 397-398 (2000). "That same standard applies--and will necessarily require a court to 'speculate' as to the effect of the new evidence--regardless of how

much or how little mitigation evidence was presented during the initial penalty phase." *Sears*, 130 S.Ct. at 3266-67.

Here, as in *Cone v. Bell*, 556 U.S. 449 (2009), the omitted testimony was necessary to establish the *existence* of this mitigating factor that was disputed by the prosecution. In *Cone*, this Court reviewed the lower courts' assessment of the materiality of suppressed evidence concerning defendant's drug abuse near the time of the offense. *Id.* at 472. This Court specifically criticized the lower court's determination that the evidence was cumulative to that presented through defendant's experts at the trial, noting that the prosecution had discredited expert testimony on this point on the ground that it was uncorroborated. *Id.* at 472 & n. 18. The Court explained, "[i]t is possible that the suppressed evidence, viewed cumulatively, may have persuaded the jury that Cone had a far more serious drug problem than the prosecution was prepared to acknowledge," and may have "rebutted the State's suggestion that Cone had manipulated his expert witnesses into falsely believing he was a drug addict when in fact he did not struggle with substance abuse." *Id.* at 475. Thus, the Court remanded to permit the lower court to "fully consider" the impact of the omitted evidence. *Id.*

Likewise here, it would be unreasonable to assume that just because Byrom told her expert she was abused and he included this in his report, the trial court necessarily considered this as mitigating evidence. The prosecutor specifically argued that Byrom's account of the domestic abuse she suffered should not be believed because it was uncorroborated, Vol. 16, TR 1020, and that Byrom had "manipulated" the experts. Vol. 16, TR. 1019-20. Moreover, the trial court's sentencing decision indicates he did not consider this evidence to be a mitigating factor in this case. Vol. 16, TR. 1024.

Unfortunately, a woman's claims of domestic abuse, particularly in this context, is precisely the kind of evidence that may be discounted as self-serving. The omitted evidence in this case – testimony from Byrom's family members, and Dr. Caruso – could have not only corrorborated Byrom's account of the abuse, but explained why Byrom "didn't just leave," as the prosecution repeatedly suggested she would have done had she really been abused. Vol. 16, TR. 1010, 1020-22.

It is also necessary to consider the weight of omitted testimony relative to the circumstances of this particular offense. *See, e.g, Porter v. McCollum*, 130 S.Ct. 447, 442-44 (2009)(state court unreasonably discounted weight of omitted mitigating evidence and thus unreasonably applied *Strickland's* prejudice prong). The Supreme Court has indicated that evidence that a defendant had suffered abuse is relevant to sentencing in virtually any capital case, regardless of the nature of the crime. *E.g., Wiggins v. Smith*, 539 U.S. 510, 535 (2003)(physical, sexual and psychological abuse defendant suffered in childhood is the "kind of troubled history we have declared relevant to assessing a defendant's moral culpability."). In this case, that abuse, and its long-term psychological effects, is directly relevant to this particular offense. Had defense counsel actually presented their expert, he could have explained the intense mental and emotional toll that abuse took on Byrom, which could have particular salience for a trier-of-fact evaluating why Byrom would have resorted to hiring someone to murder her husband instead of 'just leaving him,' as the prosecution repeatedly suggested she could have done. *See Porter*, 558 U.S. at 43 (unreasonable for state court to discount to evidence of defendants abusive childhood, "especially when that kind of history may have particular salience for a jury evaluating" defendant's relationship with victim).

Most significantly, the omitted evidence also rebuts, or at least lessens the weight of, the only alleged aggravating factor – that the offense was committed for pecuniary gain. *See Rompilla v. Beard,* 545 U.S. 374, 386-87 (2005)(defense counsel is obliged to investigate and present evidence that may rebut, or lessen the weight, of aggravating circumstances). The abuse evidence offered an alternative explanation for Byrom's behavior, casting doubt on the prosecution's insistence that Byrom was motivated solely by greed.

Had Byrom's counsel presented the foregoing testimony, the trial court would have no legitimate basis for refusing to consider Byrom's history of abuse at the hands of her stepfather and her husband as mitigating circumstances in this case. *See, e.g., Porter*, 130 S. Ct. at 455 ("It is unreasonable to discount to irrelevance the evidence of Porter's abusive childhood, especially when that kind of history may have particular salience for a jury evaluating Porter's behavior in his relationship with [the victim]"). Such evidence not only constituted a powerful addition to the mitigation side of the scale, but significantly weakened the only aggravating factor – that the offense was committed for pecuniary gain. Armed with testimony corroborating the abuse she suffered from Edward, Sr., and Dr. Caruso's testimony, Byrom could present a considerably more plausible argument that her conduct was a desperate attempt to escape an abusive relationship, and not a cold-hearted attempt to get rich, the State claimed.

Under these circumstances, there is certainly a reasonable probability that Byrom would not have been sentenced to death but for her counsel's failure to present any witnesses in her behalf. Accordingly, Byrom's death sentence should be vacated and this case remanded for a new sentencing. In the alternative, Byrom has at a minimum demonstrated that she should be entitled to an evidentiary hearing on this claim.

E. THESE CLAIMS ARE NOT PROCEDURALLY BARRED.

Petitioner respectfully adopts that arguments set forth in CLAIM V below to support her contention that the claims asserted in the proposed Successive Petition are not procedurally barred because she received ineffective assistance of counsel in her first State Post-Conviction proceedings. *See, e.g., Grayson v. State*, 118 So. 3d 118, 126 (Miss. 2013); *Knox v. State,* 75 So. 3d 1030, (Miss. 2011). *See also Alan Dale Walker v. State,* ___ *So.3d* ___, 2013 WL 6916330, No. 2012-DR-00102-SCT (Dec. 12, 2013)(remanding for evidentiary hearing on claim that prior post-conviction counsel was ineffective for failing to raise claim of ineffective assistance of trial counsel); *Benny Joe Stevens v. State*, No. 2011-DR-00637-SCT (May 5, 2011) (Order stating the Mississippi Supreme Court has recognized death-sentenced inmates have a federal right to effective assistance of counsel in post-conviction proceedings since *Jackson v. State*, 732 So. 2d 187 (Miss. 1999)).

CLAIM V: This successive petition is not barred because Byrom was denied the effective assistance of post-conviction counsel during her first attempt to obtain post-conviction relief.

When Byrom filed his first petition for post-conviction relief, her post-conviction attorney failed to raise Claims II and III, as well as Claim I, in the event that this Court concludes that the facts concerning Junior's confession to Dr. Lott do not constitute "newly available evidence." With respect to Claim IV, raised herein, Byrom's post-conviction counsel was ineffective for failing to adequately investigate, plead and/or present evidence in support of their claim of ineffective assistance of counsel at the penalty phase, and for failing to make appropriate motions for (or otherwise procure) necessary investigative and expert assistance. **Post-conviction counsel has recognized these deficiencies, but explained that they resulted**

from an overload of cases in conjunction with a lack of staff and adequate funding. Successive PC Ex. No. 20 (Affidavit of Louwlynn Williams). The bottom line, however, is that Byrom did not receive the minimally adequate post-conviction representation guaranteed by state and federal law, and thus she can show cause for not presenting these claims or facts in her earlier petition. As this Court recently held, challenges to the provision of post-conviction representation are cognizable in successive post-conviction proceedings. *See, e.g., Grayson v. State*, 118 So. 3d 118, 126 (Miss. 2013); *Knox v. State,* 75 So. 3d 1030, (Miss. 2011). *See also Alan Dale Walker v. State,* ___ *So.3d* ___, 2013 WL 6916330, No. 2012-DR-00102-SCT (Dec. 12, 2013)(remanding for evidentiary hearing on claim that prior post-conviction counsel was ineffective for failing to raise claim of ineffective assistance of trial counsel); *Benny Joe Stevens v. State*, No. 2011-DR-00637-SCT (May 5, 2011) (Order stating the Mississippi Supreme Court has recognized death-sentenced inmates have a federal right to effective assistance of counsel in post-conviction proceedings since *Jackson v. State*, 732 So. 2d 187 (Miss. 1999)). Before addressing the deficiencies with her post-conviction representation, Byrom summarizes the applicable law regarding post-conviction counsel.

A. Byrom has the right to the effective assistance of post-conviction counsel, due process and fundamental fairness in post-conviction proceedings, and meaningful access to the courts.

This Court first recognized the right to post-conviction counsel in *Jackson v. State,* 732 So. 2d 187 (Miss. 1999). There, this Court held:

> The reality is that post-conviction efforts, though collateral, have become an appendage, or part, of the death penalty appeal process at the state level. The importance of state post-conviction remedies is heightened by the requirement that, with few exceptions, state remedies must be exhausted before relief can be sought through federal habeas corpus. ... Certain issues must often be deferred until the post-conviction stage, such as the claim of ineffective assistance of counsel.

Id. at 190. Besides recognizing that post-conviction proceedings represent the first opportunity to raise extra-record claims, the Court elaborated on the need for legal representation in post-conviction proceedings:

> Applications for post-conviction relief often raise issues which require investigation, analysis and presentation of facts outside the appellate record. The inmate is confined, unable to investigate, and often without training in the law or the mental ability to comprehend the requirements of the [state post-conviction statute]. The inmate is in effect denied meaningful access to the courts by lack of funds for this state-provided remedy.

Id. at 190.

Motions for post-conviction relief must be filed complete with legal arguments and a "specific statement of facts" supported by "[a]ffidavits of the witnesses who will testify and copies of documents or records that will be offered." Miss. Code Ann. § 99-39-9(1)(e). As this Court has held:

> Notions of notice pleading have no place in post-conviction applications. . . . [W]e require of such applicants a far more substantial and detailed threshold showing, far in excess of that we deem necessary in the case of a plaintiff in a civil action or, for that matter, in the case of the prosecution in a criminal indictment.

Neal v. State, 525 So. 2d 1279, 1280 (Miss. 1987); *see also Bishop v. State*, 882 So. 2d 135, 155 n.10 (Miss. 2004) (hearsay affidavits "are not proper affidavits and the Court will not consider them"). Thus, all of the investigation (complete with signed, sworn affidavits from all relevant witnesses), evaluations of experts, and research must be completed prior to filing.

In Mississippi, capital post-conviction proceedings are part of the direct appeal process, and the assistance of counsel is indispensable to a meaningful opportunity to litigate grounds for relief relying on facts outside of the trial record. Failure to provide the effective assistance of counsel also violates the Eighth Amendment and the rights to due process and access to the

courts. *See, e.g., Evitts v. Lucey,* 469 U.S. 387, 396 (1985).[8] *See also Puckett v. State*, 834 So. 2d 676, 678, 680 (Miss. 2002) (holding that "[a]n indigent inmate under a sentence of death is entirely dependent upon state-appointed counsel to pursue his post-conviction efforts" and that "[p]ursuant to this Court's decision in [*Jackson*], Puckett was clearly entitled to appointed competent and conscientious counsel to assist him with his pursuit of post-conviction relief"); *State v. Blenden*, 748 So. 2d 77, 89 n.1 (Miss. 1999) (the holding in *Jackson* was "necessary to accord due process in accordance with the Constitution of the State of Mississippi and the Constitution of the United States").

To effectuate this right, the Mississippi legislature passed the Mississippi Capital Post-Conviction Counsel Act ("MCPCCA"), creating the Mississippi Office of Capital Post-Conviction Counsel "for the purpose of providing representation to indigent parties under sentences of death in post-conviction proceedings." Miss. Code Ann. § 99-39-105.

B. Byrom did not Receive Effective Post-conviction Representation.

Given the importance of qualified counsel to the post-conviction process, it should hardly require stating that "the guarantee of counsel 'cannot be satisfied by mere formal appointment.'" *Evitts v. Lucey,* 469 U.S. at 395 (quoting *Avery v. Alabama*, 308 U.S. 444, 446 (1940)). Instead, counsel must actively prepare a case on behalf of his or her client and assist the petitioner in

[8] The State may not fail to provide meaningful access to the courts in civil cases where an indigent party stands in jeopardy of forfeiting fundamental rights. *M.L.B. v. S.L.J.*, 519 U.S. 102, 110-13, 120-21 (1996) (holding that the state of Mississippi had to provide a free trial transcript to an indigent mother to enable her to appeal the loss of her parental rights). *See also Bounds v. Smith*, 430 U.S. 817, 823 (1977) (even for discretionary appeals, "States must 'assure the indigent defendant an adequate opportunity to present his claims fairly.'") (quoting *Ross v. Moffitt*, 417 U.S. 600, 616 (1974)). In addition, even if states are not required to grant the right to post-conviction counsel in the first place, once they do, the state-created entitlement may not be arbitrarily denied. *See, e.g., Hicks v. Oklahoma*, 447 U.S. 343, 346 (1980) (*citing Vitek v. Jones*, 445 U.S. 480, 488-489 (1980)).

navigating the "intricate rules that to a layperson would be hopelessly forbidding." *Id.* at 396.

At the time Byrom's post-conviction petition was being prepared, the Office of the Capital Post-Conviction Counsel was handling between 30 and 40 capital post-conviction cases. Successive PC Ex. 20 (Affidavit of Louwlynn V. Williams). Resources, in terms of both funding and staff were very limited. *Id.* There were only three attorneys available to handle these cases (one of whom was the Director, Robert Ryan), and only one investigator, Tomika Harris, who was also serving as the fiscal administrator, which limited the time she had available to conduct investigations. *Id.* There was no money available to hire investigators or experts to assist in the preparation of the petition. *Id.* Significantly, several of the claims which Byrom now seeks to assert, consistent with her claims of innocence, were so obvious that there could have been no strategic reason for not raising them in the original Petition.

Byrom was prejudiced by the failure of post-conviction counsel to provide minimally competent representation. Post-conviction counsel failed to raise Claims I, II or III, described above, at all. The factual predicate of Claim II, concerning the failure to disclose Junior's confession to Dr. Lott, was discoverable by Byrom's post-conviction counsel, as it was noted in both Byrom's direct appeal brief and at the oral argument on that appeal. Under these circumstances, Byrom's post-conviction counsel could have raised the claim and sought discovery, but failed to do so.

The factual predicate for claim III, ineffective assistance of counsel at the guilt phase of the trial, was discernable from a review of the trial record and direct appeal opinion, the suppression hearing, Michelle Byrom's hospital records, and the transcripts of Byrom's statements to the police. Nevertheless, post-conviction counsel did not allege trial counsel's ineffectiveness at the guilt phase of these proceedings.

Post-conviction counsel's failure to raise these claims in prior proceedings may certainly constitute ineffective assistance of counsel under the *Strickland* standard. *See, e.g., Dretke v. Haley*, 541 U.S. 386, 394 (2004)(trial counsel's failure to object to the insufficiency of the evidence, defaulting the claim for appeal, was cause to excuse the default and constituted an independent claim of ineffective assistance of counsel); *Edwards v. Carpenter*, 529 U.S. 446, 451 (2000) (in certain circumstances "counsel's ineffectiveness in failing properly to preserve the claim for review in state court" constitutes cause and prejudice to overcome default).

Although post-conviction counsel did raise a claim of challenging trial counsel's performance at sentencing, post-conviction counsel failed to secure the assistance of Dr. Caruso, the defense expert at trial, who would have testified regarding his concern with trial counsel's lack of preparation for the penalty of the trial, and described the testimony he could have provided had he been called as a witness at sentencing. Successive PC Ex. No. 11. Although post-conviction counsel did obtain affidavits from some of Byrom's family members, as the State has vociferously argued throughout the state and federal post-conviction proceedings, these affidavits are replete with hearsay and irrelevant information, and appear to have been very hastily prepared.

In light of the prejudice stemming from post-conviction counsel's performance described above, this Court should grant post-conviction relief or remand for an evidentiary hearing.

CONCLUSION

Michelle Byrom was convicted and sentenced to death for hiring Joey Gillis to kill Edward Byrom, Sr. During her trial, where the principal witness against her was her son, the confession letters written by Edward Junior cast such strong doubt on that theory that the

prosecutor stated: "If this evidence [the confession letters] had been in our possession, it very well may have been that we would not have cut a deal with this individual [Junior], much less put him on the stand in this case." Vol. 14, TR. 726-27. Furthermore, after Junior's confession to Dr. Lott was publicized, the prosecutor was convinced that there was no likelihood of obtaining a capital murder conviction against the alleged triggerman, Joey Gillis. A few months after Byrom's sentencing, while discussing Gillis' guilty plea, prosecutor Arch Bullard told a local newspaper that Edward Junior had made "another conflicting statement to his psychologist," and that such conflicting statements "could have 'seriously compromised' [Junior's] future testimony against Gillis." Successive PC Ex. No. 2 (Amy Sims, *Third Defendant Sentenced in Iuka Murder-For-Hire Case,* The Daily Corinthian, March 22, 2001, at 1A).

Therefore, Gillis was allowed to plead guilty to charges of conspiracy and accessory-after-the-fact. As a result, Gillis served a short prison term and was released from prison in 2009. Successive PC Ex. No. 23. In addition, Edward Junior has already served his sentence under his plea bargain, and he was released from prison on parole in 2013. Successive PC Exhibit No. 24. It is clear now that not even the prosecutor believes that Gillis was hired as the "triggerman" in this case, and the undersigned respectfully submits that Michelle Byrom was wrongfully convicted of hiring Gillis to commit the murder.

RELIEF REQUESTED

Under these circumstances, the undersigned respectfully submits that discovery is needed in this case so that the evidence concerning Edward Byrom Jr.'s confession to Dr. Criss Lott can be fully explored. Specifically, Byrom is seeking to:

1. Serve a subpoena duces tecum on the State's psychologist, Dr. Chris Lott, to produce all files and statements concerning his work with Edward Byrom, Jr., including but not limited to the confession statements of Edward Byrom, Jr., that he killed his father, Edward Byrom, Sr., on his own and that his mother did not hire him to kill his father;

2. Serve a subpoena duces tecum on prosecutors, Arch Bullard, and all other prosecutors associated with this case, to produce the full and complete files in this case to discover these prosecutors' knowledge and/or possession of the statements of Edward Byrom, Jr. that he killed Edward Byrom, Sr.;

3. Depose W. Criss Lott, Ph.D., concerning the admissions Junior made during his court-ordered evaluation and Dr. Lott's communications regarding this matter with the trial court, the prosecution, and any other party.

4. Depose the Honorable Thomas J. Gardner, III, the trial judge in this case, concerning his communications with Dr. Lott and any other communications concerning Junior's confessions with any other party.

5. Depose the prosecutors in this case, Arch Bullard, and all other prosecutors associated with this case, because they were aware of Edward Byrom Jr.'s statement to Dr. Lott that he alone killed Edward Byrom, Sr., and that Michelle Byrom did not kill Edward Byrom, Sr.; and,

6. Depose Edward Byrom, Jr. concerning his statements to Dr. Lott that he alone killed Edward Byrom, Sr.;

7. Depose Joey Gillis concerning the fact that he was only involved in this case after the fact, and that he was not hired by Michelle Byrom to murder Edward Byrom, Sr.; and

8. Conduct any additional discovery that is reasonably related to these claims.

WHEREFORE PREMISES CONSIDERED, for the foregoing reasons, the undersigned

respectfully requests that this Court grant Byrom post-conviction relief. Alternatively, this Court is requested to grant Byrom leave to file a successive petition for post-conviction relief, and remand this case to the Circuit Court for appropriate discovery and an evidentiary hearing on the claims asserted. By way of a contemporaneously filed motion, Petitioner also requests appointment of counsel other than the Mississippi Office of Capital Post-Conviction Counsel, which has a conflict of interest in this case in view of the claim concerning ineffective assistance of post-conviction counsel, and an appropriation of funds necessary to secure expert and investigatory assistance in this matter.

RESPECTFULLY SUBMITTED, this the 20th day of February, 2014.

MICHELLE BYROM, Petitioner

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CERTIFICATE OF SERVICE

I, David L. Calder, do hereby certify that I have this day transmitted a true and correct copy of the foregoing Petition which is to be hand-delivered to the following:

Honorable Marvin L. White, Jr.
Assistant Attorney General
Walter Sillers Building
550 High Street, Suite 1200
Jackson, Mississippi 39201

SO CERTIFIED, this the 20th day of February, 2014.

David L. Calder
David L. Calder, MSB #7686