BEFORE THE HONORABLE KAY IVEY

GOVERNOR OF THE STATE OF ALABAMA

In re:

Robert Bryant Melson,

Petitioner.

APPLICATION FOR COMMUTATION OF SENTENCE

REQUEST FOR HEARING

AND

REQUEST FOR COMPLIANCE WITH

ALABAMA CONSTITUTION

In re:
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Petitioner.

APPLICATION FOR COMMUTATION OF SENTENCE
REQUEST FOR HEARING

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Introduction

"A system that takes life must first give justice."[1]

On June 8, 2017, the State plans to execute Robert Melson, a former small-time drug dealer whose death sentence rests on a pair of shoes that were a size and a half too small for him, two pebbles, a seed, and the self-serving statement of an intellectually impaired and emotionally disturbed teenager who has since recanted.

Mr. Melson, an indigent man who has maintained his innocence from the start, did not have the benefit of effective lawyers at trial and was abandoned by the well-meaning but inexperienced lawyer whose post-conviction investigation might have saved his life. Arrested for being in the wrong place at the wrong time and for having skin the same color as the alleged shooter's, he has never had the chance to air evidence of his innocence in court. As Mr. Melson tells you in his letter, he has felt neither seen nor heard and truly "defen[s]eless" since his April 15, 1994 arrest.[2]

The extraordinary circumstances of his case warrant the extraordinary remedy of clemency. In a criminal justice system as demonstrably broken as Alabama's, we can't ever know beyond a reasonable doubt who is innocent and who is guilty. We should not kill anyone in light of persistent systemic uncertainties about the fairness of a process that exists to protect us all. Governor, before you sanction Mr. Melson's execution in the name of all Alabamians, we first respectfully ask you to consider extending clemency, especially given that he was wrongfully convicted and had no meaningful appeal, despite his innocence.

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[1] John J. Curtin, Jr., Former President of the American Bar Association.
[2] Ex. 1, Mr. Melson's May 17 Clemency Letter.

First, There Was a Tragic Crime . . .

On April 15, 1994, between 11:30 p.m. and midnight,[3] two men with bandanas over "half or more"[4] of their faces[5] entered an East Gadsden Popeye's Chicken restaurant as its employees were cleaning and preparing to leave. The assailants, "a Mexican" and an armed black man,[6] first herded employees into the restaurant office where they stole money from the safe.[7] Then, they forced the employees into the store's dark, walk-in freezer.[8] Minutes later, the freezer door re-opened and the black robber began shooting.[9] When the shots stopped, three employees — Tamika Collins, Darrell Collier, and Nathanial Baker — were dead. And a fourth employee, Bryant Archer, was gravely wounded but survived.[10]

Figure 1 Gadsden Popeye's Exterior

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[3] (R. 1124).
[4] (R. 1175).
[5] (R. 1166).
[6] (R. 1167-68).
[7] (R. 1167).
[8] (R. 1163).
[9] (R. 1168).
[10] (R. 1169, 1171).

Mr. Archer lost consciousness for a time.[11] But he was eventually able to crawl from the freezer to the office and call 911.[12] Mr. Archer told the dispatcher that he recognized "the Mexican" as Cuhuatemoc "Tempo" Peraita, a former Popeye's employee who had recently been fired or quit and who wore a distinctive shaved hairstyle.[13] In addition, Mr. Archer describe the black Monte Carlo car that Mr. Peraita owned.[14] Mr. Archer said that he had never seen the black robber before and did not immediately identify him.[15]

Police officers were dispatched to Popeye's shortly before 12:30 a.m., on April 16, 1994.[16] At 12:36 a.m.,[17] the Gadsden police issued a "be on the lookout" (BOLO) bulletin with descriptions of Mr. Peraita, Mr. Peraita's car, and a black male suspect.[18] Rainbow City, Alabama police officer Terry Graham received the bulletin from the Gadsden police department.[19] Mr. Graham recognized the description of the car in the bulletin as one that he knew in Rainbow City.[20] When Mr. Graham and two other officers went to the residence where Mr. Graham thought the car was, they saw a Monte Carlo which appeared to match the description in the BOLO.[21] Mr. Graham stopped the car as it left the residence.[22]

At 1:20 a.m.,[23] police arrested Robert Melson because he was a black man and because he was the unfortunate occupant of Mr. Peraita's car, miles away and an hour and twenty minutes after the Popeye's murders. [24] He was only there because Mr. Peraita picked him up from Green Pastures, an East Gadsden neighborhood where

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[11] (R. 1169).
[12] (R. 1169).
[13] (R. 1164).
[14] (R. 1178, 1227).
[15] (R. 1166).
[16] (R. 1221-1222).
[17] (R. 1243).
[18] (R. 1214).
[19] (R. 1237).
[20] (R. 1238).
[21] (R. 1239).
[22] (R. 1240).
[23] (R. 1243).
[24] (R. 1242).

Mr. Melson had been dealing drugs. Mr. Melson accepted a ride from Mr. Peraita, not knowing what Mr. Peraita and his accomplice had done.[25]

Detectives later brought photographs of suspects to the hospital where Mr. Archer was being treated for his injuries. Although he was too heavily medicated at first to make an identification, Mr. Archer did identify Peraita a second time after being shown a photograph.[26] But Mr. Archer was unable to identify the black male suspect from a photo array.[27] To this day, Mr. Archer doesn't know who shot him.

Figure 2 Mr. Peraita's arrest

Then, There Was A Hasty Investigation And Equally Hurried Rush To Judgment.

During police interrogation, Robert Melson, a 22 year old, small-time drug dealer, admitted to selling drugs that night. According to report that the police wrote up, Mr. Melson also first said that he had been with Mr. Peraita throughout the night until

[25] Ex. 2, Mr. Melson's Statement to Police.
[26] (R. 1170).
[27] *Id.*

their arrest.[28] But, because he was not a murderer, he consistently denied participating in the Popeye's robbery/homicide,[29]even after police told him that Mr. Peraita had already confessed.[30]

Mr. Melson eventually told police he had not been with Mr. Peraita from about 11:40 p.m. to 1:00 a.m. when the robbery and murder occurred.[31] Though his interrogators disbelieved, threatened, and harangued him, Mr. Melson refused to confess to murders he hadn't committed.

But police interrogators turned their attentions to Mr. Peraita, and whatever quixotic hopes Mr. Melson had of persuading police of his innocence disappeared.

Police managed to induce then 17-year old, intellectually impaired and emotionally disturbed,[32] Mr. Peraita to confess and to falsely inculpate Mr. Melson, by convincing Mr. Peraita that doing so was his best chance to avoid getting the death penalty. And Mr. Peraita soon told police what they wanted to hear - that while he'd been present during the Popeye's robbery, Mr. Melson, the black man, had done all the shooting. That's precisely what police wrote in transcribing Mr. Peraita's statement — "Robert did it."

Mr. Peraita's youth and profound mental impairments made him a less-than-credible witness.[33] And his lawyers would later

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[28] (R. 1154-57).
[29] (R. 1515).
[30] (R. 1502).
[31] Ex. 2, Mr. Melson's Statement to Police.
[32] According to his pre-sentence report, Mr. Peraita had been abused and shuttled in and out of institutions and foster care for much of his life. *See* Peraita's Pre-sentence Report, Ex. 3. He also had a rather long prior criminal history spanning multiple states. Mr. Peraita's Rule 32 petition elaborates on his long history of mental health problems. It alleged that he had been an addict since age 11, that he had a history of suicide attempts, that he had a history of "psychosis and hearing voices," and that he is "borderline mentally retarded." Peraita's Rule 32 Petition, Ex. 4, ¶¶ 209-212.
[33] Peraita Trial Tr. at R. 1742 (Mr. Peraita's trial counsel, arguing that his statement should be suppressed because "we've got some evidence [showing] that this fellow's about five years behind, mentally and emotionally"); *See also*

argue that, as a minor, he hadn't knowingly, intelligently, or voluntary waived his *Miranda* rights.[34] As courts have recognized, intellectually disabled defendants are "vulnerable to coercion."[35] At his trial, Mr. Peraita's elder sister confirmed that her brother possessed such vulnerabilities, agreeing that he was slow to learn, easily led, and eager to please authority figures.[36] As a result of these limitations, intellectually disabled defendants, like Mr. Peraita, are prone to giving involuntary and demonstrably false confessions, "may be less able to give meaningful assistance to their counsel and are typically poor witnesses[.]"[37]

In addition to intellectual impairments, Mr. Peraita had several significant mental health problems which also rendered his confession suspect. As a defense expert would testify after his second capital murder conviction,[38] Mr. Peraita suffers from multiple persistent psychological and psychiatric conditions, including childhood onset post-traumatic stress disorder continuing into adulthood related to sexual and physical abuse, psychotic thinking patterns linked to that early abuse, and depressive disorder.[39]

Id. at 1761-62 (Mr. Peraita's mother, Loretta Mancuso, testifying that he didn't attend school for "about three years" and that he was mentally "about four or five years" behind other kids his age).

[34] Peraita Trial Tr. at 1736.

[35] Brandon L. Garrett, *The Substance of False Confessions*, 62 Stan. L. Rev. 1051, 1064 (2010) ("Mentally disabled individuals and juveniles are both groups long known to be vulnerable to coercion and suggestion.").

[36] Peraita Trial Tr. at 1765-66 (Testimony of Victoria Beskeen); *See also Id.* at R. 1970-71 (Mr. Peraita's mother testifying that he had been in special education classes, that his schools socially promoted him, and that "[h]e's a follower").

[37] *Atkins v. Virginia*, 536 U.S. 304, 320–21 (2002).

[38] Mr. Peraita was convicted of capital murder a second time after killing Qunicy Lewis, a fellow inmate, at Holman Prison in 1999.

[39] *See* Ex. 5, Peraita's Post-hearing Reply Br., *Peraita v. Alabama*, No. CC-00-293.60, Doc. 91 (Circuit Court of Escambia County filed Jan. 31, 2017).

Date APRIL 16, 1994 Page No. 1.

STATEMENT OF: CUHUATEMOC PERAITA 380 WEST GRAND AVENUE RAINBOW, CITY ALABAMA

WE BOUGHT THE GUN ON EAST BROAD STREET I BOUGHT IT FOR $120.00 I BOUGHT IT FRIDAY MORNING ABOUT 2:00 A.M. I BOUGHT IT FROM BISCUIT. I BOUGHT THE GUN TO JACK PEOPLE WITH TO STEAL FROM THEM FROM POPEYE'S BECAUSE I KNEW WHAT THEY HAD. TONIGHT WE BOUGHT SOME GRASS FROM SOMEONE ON EAST BROAD STREET DOWN BY BISHOP'S I DIDN'T KNOW THE GUY WE BOUGHT THE GRASS FROM. THEN WE RODE AROUND SMOKING THE GRASS WAITING FOR POPEYE'S TO CLOSE. WE PARKED IN THE NEIGHBORHOOD BEHIND POPEYE'S AND WALKED THROUGH THE WOODS WE WENT IN THROUGH THE BACK DOOR I KNEW THE BACK DOOR WAS UNLOCKED BECAUSE I WORKED THERE. WHEN I CAME AROUND THE CORNOR I HAD THE GUN IN MY HAND I THEN MADE EVERYBODY GO INTO THE STORAGE ROOM. I POINTED THE GUN AT TAMIKA THE GIRL I LIKED AND TOLD THEM THIS AIN'T NO JOKE. NATE APPROCHED ME AND I SAID GET BACK AND ROBERT CAME AROUND THE CORNOR AND TOOK THE GUN FROM ME. THEN HE POINTED THE GUN AT THEM AND THEN HE THREW THE BAG AT THEM AND TOLD THE MANAGER TO FILL IT UP. THEN ROBERT MADE EVERYBODY GET INTO THE REFRIGERATOR. THEN ROBERT DID IT 'YOY KNOW WHAT HAPPENED. THEN WE LEFT AND I DROVE FOR ABOUT A BLOCK, AND THEN ROBERT SAID LET ME DRIVE. WE CAME OUT OF THE NEIGHBEOHOOD AN WENT ACROSS THE BROAD STREET BRIDGE AND I THREW THE GUN OUT. THE MONEY IS AT MY HOUSE IN RAINBOW CITY IN MY CLOSIT. WE CHANGED OUR CLOTHS AND LEFT THEM THERE AT MY HOUSE ALSO THIS STATEMENT WAS TYPED FOR ME BY LT. BOHANNON AS I TOLD IT TO HIM.

Figure 3 Peraita's Statement, as written by police

It didn't matter to police that Robert hadn't actually done "it." Having arrested Mr. Peraita with a black man and having coerced Mr. Peraita's confession, the authorities were satisfied that they'd captured the correct black man. Although neither his criminal history, nor his drug dealing, nor his black skin, nor his mere presence in Mr. Peraita's car made Mr. Melson guilty of capital murder, the police decided that he was guilty at 1:20 a.m. on April

16, 1994, and acted consistently with that belief throughout their brief investigation.[40] Police looked for no one else.

To shore up the case, though, authorities continued to gin up physical evidence. For instance, during the interrogation, unspecified police officers forcibly removed Mr. Melson's shoes from his feet.[41] Five days later, a police evidence technician belatedly discovered, photographed, and cast footprints in a rainy drainage ditch behind Popeye's restaurant, which they later said matched Mr. Melson's shoes.[42]

If the shoe prints from the drainage ditch matched, a fact which no defense expert has ever had the opportunity to challenge, it's certain that no other physical evidence linked Mr. Melson to this crime. None of the fingerprints found in the investigation matched Mr. Melson's.[43] None of Mr. Melson's fingerprints were found in the restaurant.[44] No blood or any other material from the Popeye's scene was found on Mr. Melson, on the clothes that he allegedly wore during the robbery, or on the shoes that the police seized from him.[45]

Instead, most of the evidence damningly implicated Mr. Peraita:

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[40] "Once a suspect confesses, police often close the investigation, deem the case solved, and overlook exculpatory information— even if the confession is internally inconsistent, contradicted by external evidence, or the product of coercive interrogation." *Why Confessions Trump Innocence*," by Saul M. Kassin, American Psychologist, Vol. 67, No. 6, pp. 431– 445 (citing Drizin & Leo, 2004; Leo & Ofshe, 1998); Hon. Alex Kozinski, *Criminal Law 2.0*, 44 Geo. L.J. Ann. Rev. Crim. Proc. III (2015) ("Police investigators have vast discretion about what leads to pursue, which witnesses to interview, what forensic tests to conduct and countless other aspects of the investigation. Police also have a unique opportunity to manufacture or destroy evidence, influence witnesses, extract confessions and otherwise direct the investigation so as to stack the deck against people they believe should be convicted.").

[41] (R. 1389; 1391-1392).
[42] (R. 1349, 1351).
[43] (R. 1421).
[44] (R. 1419).
[45] (R. 1405; 1775-1776).

- Before the crime, Mr. Peraita talked about needing money and about robbing Popeye's where he – not Mr. Melson – had worked.[46]
- Police found $2,000 stolen from Popeye's in Mr. Peraita's house.[47]
- The murder weapon, a .45 caliber handgun, belonged to Mr. Peraita.[48]
- Police found Mr. Peraita's fingerprints on a gun cartridge case in the Monte Carlo.[49]
- The Department of Forensic Sciences found appreciable amounts of soil on Mr. Peraita's shoes, but not on Mr. Melson's.
- Police collected bullets and shell casings from the crime scene and Mr. Peraita's black Monte Carlo.[50]
- In the crime's aftermath, it was Mr. Peraita's brother, Edmundo Peraita, who attempted to dispose of the murder weapon by throwing it into the Coosa River, and it was Edmundo who later assisted police in recovering the murder weapon.[51]

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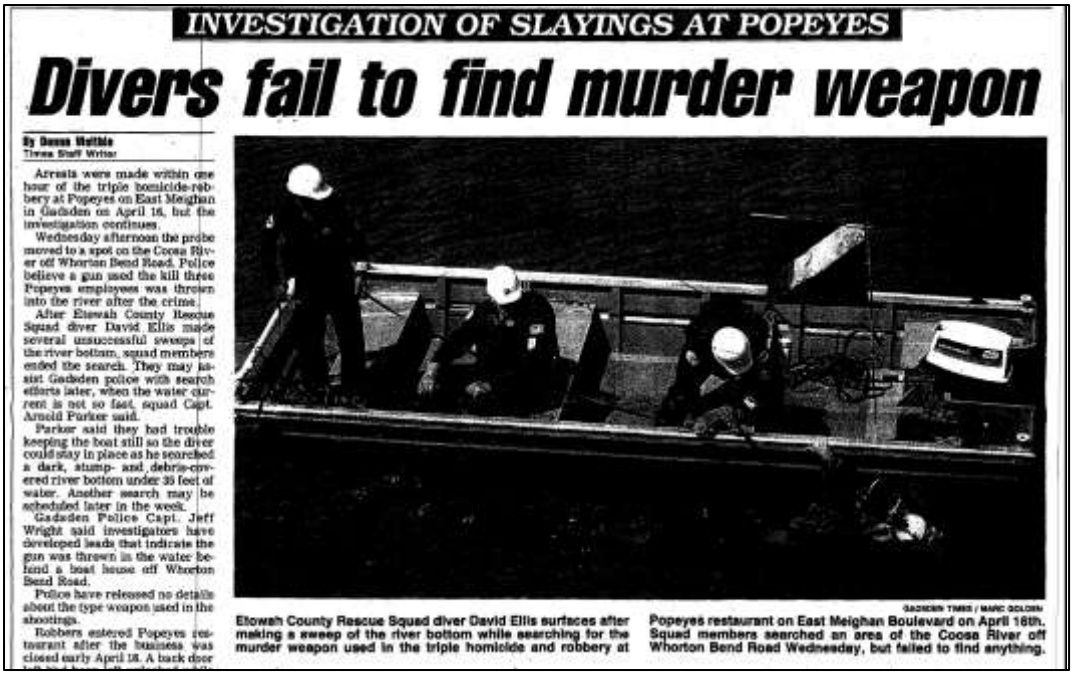
[46] (R. 1146).
[47] (R. 1437).
[48] (R. 1147).
[49] (R. 1420).
[50] (R. 1355-1358).
[51] (R. 1835, 1851).



INVESTIGATION OF SLAYINGS AT POPEYES

Divers fail to find murder weapon

By Donna Matthis
Times Staff Writer

Arrests were made within one hour of the triple homicide-robbery at Popeyes on East Meighan in Gadsden on April 16, but the investigation continues.

Wednesday afternoon the probe moved to a spot on the Coosa River off Whorton Bend Road. Police believe a gun used the kill three Popeyes employees was thrown into the river after the crime.

After Etowah County Rescue Squad diver David Ellis made several unsuccessful sweeps of the river bottom, squad members ended the search. They may assist Gadsden police with search efforts later, when the water current is not so fast, squad Capt. Arnold Parker said.

Parker said they had trouble keeping the boat still so the diver could stay in place as he searched a dark, stump- and debris-covered river bottom under 35 feet of water. Another search may be scheduled later in the week.

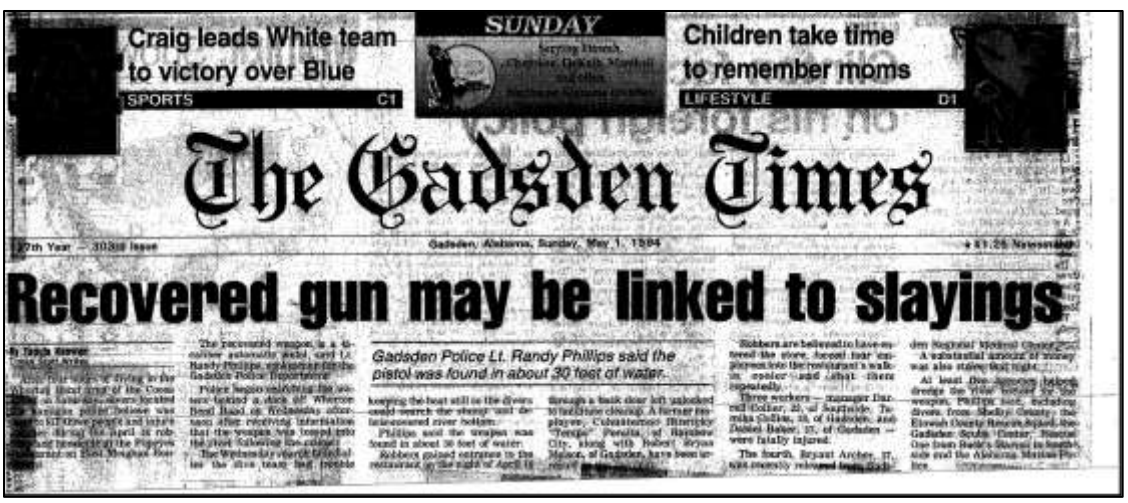
Gadsden Police Capt. Jeff Wright said investigators have developed leads that indicate the gun was thrown in the water behind a boat house off Whorton Bend Road.

Police have released no details about the type weapon used in the shootings.

Robbers entered Popeyes restaurant after the business was closed early April 18. A back door

GADSDEN TIMES / MARC GOLDEN

Etowah County Rescue Squad diver David Ellis surfaces after making a sweep of the river bottom while searching for the murder weapon used in the triple homicide and robbery at Popeyes restaurant on East Meighan Boulevard on April 16th. Squad members searched an area of the Coosa River off Whorton Bend Road Wednesday, but failed to find anything.



Craig leads White team to victory over Blue
SPORTS C1

SUNDAY

Children take time to remember moms
LIFESTYLE D1

The Gadsden Times

Gadsden, Alabama, Sunday, May 1, 1994

Recovered gun may be linked to slayings

Gadsden Police Lt. Randy Phillips said the pistol was found in about 30 feet of water.

So, having tidied up these loose ends, the hasty investigation finished as quickly as it began. Case closed.

Next, There Was A Political Sideshow.

Because this crime happened in 1994, during a gubernatorial election season, it was highly politicized. To Mr. Melson's obvious detriment, candidates Ann Bedsole, Winton Blount, Jim Folson, and Paul Hubbert, repeatedly exploited the Popeye's murders in the

media to promote their "tough on crime" platforms. As the Associated Press reported, "[t]he story proved irresistible for candidates desperate to make a mark in two crowded primary races."[52] Among other things, these campaign ads highlighted that Mr. Melson was a convicted felon and said that his early release from prison caused the murders. "A television commercial for Blount said two GOP rivals had backed a 1989 law that allowed Melson to be released early from prison last September after serving just two years of a 7-year sentence for property crimes."[53] "Hubbert's campaign ran a radio spot that blamed Folsom for overseeing the early release of 2,000 criminals under that law, including Melson."[54] None of these pejorative jibes, which Governor Fob James termed a "disgrace," would have been admissible at trial, but they poisoned the jury pool anyway.

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The Gadsden Times, Friday, April 22, 1994—B3

Hubbert calls for tougher sentences

Associated Press

BIRMINGHAM — Democratic gubernatorial candidate Paul Hubbert, continuing his push to make crime a key issue, said the fatal shootings at a Gadsden restaurant demonstrated the need for tougher sentences.

Three people died last weekend during a holdup at the fast-food restaurant. One of the suspects had been paroled in September after serving two years of a seven-year sentence.

Hubbert is proposing a "Truth in Sentencing" law which would require criminals to serve their entire sentence with no chance of parole.

"We've heard a lot this year about a three strikes and you're out policy," he said Thursday, referring to laws which require three-time violent offenders to serve life without parole. "Victims don't get three strikes. No one deserves the right to commit three rapes or murders."

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[52] Jessica Saunders, *Town Objects to Political Ads on Slayings*, http://www.apnewsarchive.com/1994/Town-Objects-to-Political-Ads-on-Slayings/id-24fdf78097b5e4031e4f96c33a45875e.
[53] *Id.*
[54] *Id.*

Owner of restaurant upset over Blount ad

By Donna Malble
Times Staff Writer

Malcolm Lindy thought the politicization of the slaying of three employees and wounding of a fourth in one of his Gadsden restaurants was supposed to be over.

Then he saw Republican gubernatorial candidate Winton Blount's political advertisements again during the weekend that draw on the April 16 robbery-murder at Popeyes Chicken and Biscuits on East Meighan Boulevard.

At Lindy's request, Popeyes' public relations firm in Atlanta contacted the campaigns of three gubernatorial candidates — Blount and Gov. Jim Folsom and Paul Hubbert, both Democrats — who aired television ads mentioning the Popeyes incident, beginning less than a week after the slaying shocked Gadsden. The candidates agreed Thursday to pull playing the ads in the Gadsden area.

Lindy said he thought all the ads would be pulled, and was bothered when he saw the Blount ad on a Huntsville television station during the weekend.

Lindy knew that some station is carried by cable systems in the Gadsden area and could be viewed by the families of the victims as well as potential jurors in future trials for the two men arrested.

"The ads are very difficult on our employees," as well as the families already trying to cope with the loss of loved ones, Lindy said.

"We just feel the ads are insensitive to the families of the victims," he said.

Blount's ad criticized candidates Ann Bedsole and Fob James, claiming Mrs. Bedsole voted for a "good time" law during the James' administration. The

Please see Popeyes, A5

LOCAL/STATE

Candidates strike out with ads on crime

Associated Press

MOBILE, Ala. — Candidates in Alabama's gubernatorial race are all in the same ballpark, batting against crime. But some say their anti-crime ads have struck out.

Republican Winton Blount's TV ad that made visual reference to a triple-slaying in Gadsden was singled out as being "insensitive" and "causing hardships" for the victims and the city, said Ellen Hartman, a spokeswoman for an Atlanta ad firm that represents the fast-food restaurant where the killings occurred April 16.

Hubbert's TV ads have shown him riding around crime-stricken neighborhoods. "Our television ad never mentioned the Gadsden situation at all," said Hubbert spokesman Joe Perkins. "I think they were calling all candidates."

But Perkins said the Gadsden case was mentioned in a Hubbert radio ad that was withdrawn after being broadcast about a week. After four weeks on crime, the Hubbert campaign is moving to other issues, Perkins said.

One Folsom ad shows chalk outlines of victims at a crime scene. Last week, a Folsom ad airing in the Gadsden-Anniston area referred to the Gadsden slayings.

Robert Bryant Melson, 22, of Gadsden, one of two suspects charged in the killings, had been released from prison Sept. 21 1993, before completing a seven-year burglary and theft sentence that began in May 1991.

Since his sentence was less than 15 years, he was eligible for early release under the state's good behavior law, prison system spokeswoman Debbie Herbert sai

Campaigning Wednesday in Mobile, Blount kept the heat on hi GOP opponents on crime and pun ishment. But an attorney outsid the gubernatorial fray says cand dates should understand that th good behavior law passed in 198 can't be called liberal.

Tom Sorrells, who helped writ the law, said it actually replaced 1976 law that permitted cuttin sentences by half when the inmat reported to prison.

Candidates withdraw ads

Associated Press

MONTGOMERY — Three gubernatorial candidates agreed Thursday to stop running campaign advertisements in the Gadsden area that deal with the slayings of three fast-food restaurant workers.

Campaign representatives for Gov. Jim Folsom, Democratic rival Paul Hubbert and Republican Winton Blount all agreed to withdraw their ads in the Gadsden area, said Ellen Hartman, a public relations representative for Popeyes Famous Fried Chicken.

Three employees at the Popeyes restaurant on East Meighan Boulevard in Gadsden were herded into a walk-in cooler and shot to death April 16 in a robbery. A fourth employee survived four gunshot wounds and provided key information in the arrest of two suspects.

The slayings have cropped up in three different ad campaigns aimed at showing each candidate's tough stance on crime. But the radio and television ads are painful for the restaurant's remaining staff and friends and family of the victims, assistant manager Avis Thornton said Thursday.

Please see Ads, A12

Opponents' crime ads a 'disgrace,' says James

By Andy Powell
Times Staff Writer

Former Gov. Fob James said Thursday it is a "disgrace" that three gubernatorial candidates ran advertisements about a triple murder in Gadsden because the commercials could jeopardize the case, do not take into account the families' feelings and are inaccurate.

James, a Republican candidate for governor, called on Winton Blount III, a Republican, and Gov. Jim Folsom Jr. and Paul Hubbert, both Democrats, to quit running the ads. Spokesmen for the three candidates announced later in the day that they would stop running the ads in the Gadsden area.

At a press conference in Gadsden prior to speaking at a rally Thursday night, James specifically mentioned an ad run by Blount that criticized James and state Sen. Ann Bedsole, R-Mobile, who also is seeking the Republican nomination for governor.

The ad criticized James and Sen. Bedsole for legislation passed in 1980 during James' term of office that, Blount said,

And to make matters evenworse, some media reporting inaccurately recited that "Bryant Archer, who survived four gunshot wounds, said co-defendant Robert Melson fired the shots . . . ."[55]

Although Mr. Melson's lawyers tried to get the trial moved to a different, less obviously biased venue,[56] those efforts failed. Thus, in the lead up to trial, media attention ensured that a notorious crime now had an even more notorious, media-indicted, villain. His name was Robert Melson. It was unsurprising, then, that the lawyers labored to select a fair and impartial jury in Gadsden.

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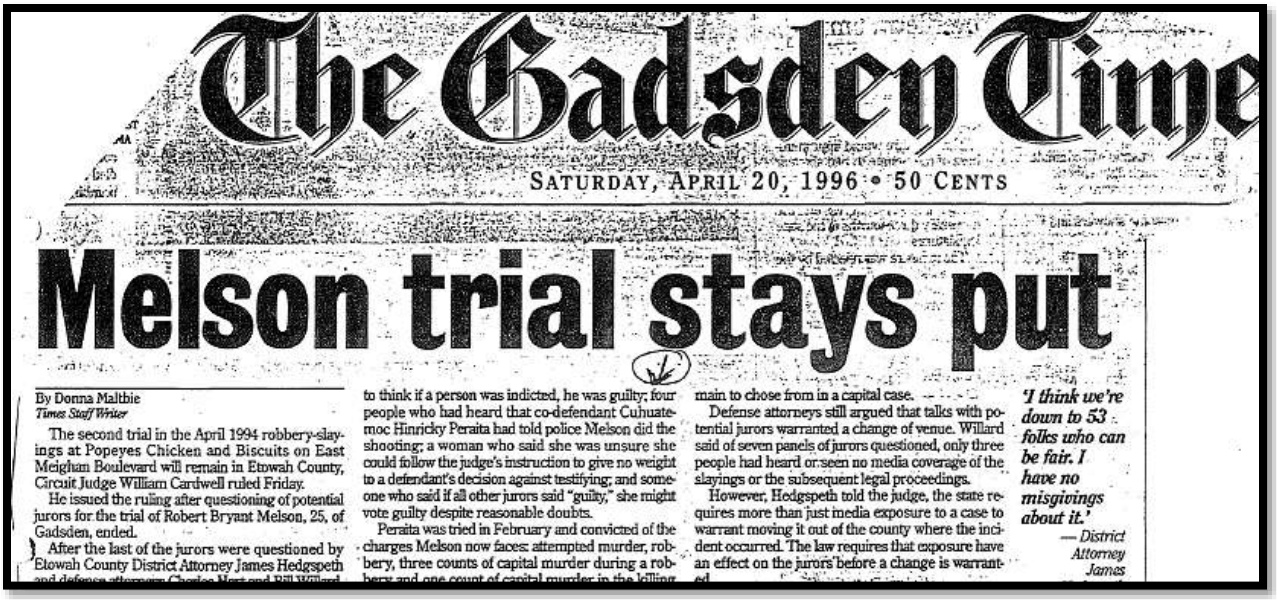
[55] (R. 133).
[56] (R. 131, 192, 241-43).



The Gadsden Times

SATURDAY, APRIL 20, 1996 • 50 CENTS

Melson trial stays put

By Donna Malthie
Times Staff Writer

The second trial in the April 1994 robbery-slayings at Popeyes Chicken and Biscuits on East Meighan Boulevard will remain in Etowah County, Circuit Judge William Cardwell ruled Friday.

He issued the ruling after questioning of potential jurors for the trial of Robert Bryant Melson, 25, of Gadsden, ended.

After the last of the jurors were questioned by Etowah County District Attorney James Hedgspeth

to think if a person was indicted, he was guilty; four people who had heard that co-defendant Cuhuatemoc Hinricky Peraita had told police Melson did the shooting; a woman who said she was unsure she could follow the judge's instruction to give no weight to a defendant's decision against testifying; and someone who said if all other jurors said "guilty," she might vote guilty despite reasonable doubts.

Peraita was tried in February and convicted of the charges Melson now faces: attempted murder, robbery, three counts of capital murder during a robbery and one count of capital murder in the killing

main to chose from in a capital case.

Defense attorneys still argued that talks with potential jurors warranted a change of venue. Willard said of seven panels of jurors questioned, only three people had heard or seen no media coverage of the slayings or the subsequent legal proceedings.

However, Hedgspeth told the judge, the state requires more than just media exposure to a case to warrant moving it out of the county where the incident occurred. The law requires that exposure have an effect on the jurors before a change is warranted.

'I think we're down to 53 folks who can be fair. I have no misgivings about it.'
— District Attorney James

In 1996, Gadsden was a small city of about 41,000 residents.[57] When the potential jurors were questioned, all but a handful of the approximately 150 venirepersons had heard about the crime.[58] Many of the venirepersons were convinced of Mr. Melson's guilt before the first witness was called, because they personally knew the victims, their families, Mr. Melson, or because of their exposure to the media.[59]

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[57] *See* U.S. Census Bureau data https://www.google.com/publicdata/explore?ds=kf7tgg1uo9ude_&met_y=population&idim=place:0128696&hl=en&dl=en.

[58] (R. 1 079).

[59] (R. 272,282,293,309,315,344,361,378,386,390,395,398,401, 412,454,633,635,637,875,894).

At Trial, the Prosecution Relies Heavily On Two Pebbles And A Seed To Convict Mr. Melson.

SATURDAY, MARCH 16, 1996

The Associated Press

Cuhuatemoc Peraita shows no reaction as he is sentenced to life in prison for murder.

Mr. Peraita, who was convicted and sentenced to life without parole by Judge Roy Moore for this capital murder in March,[60] did not testify at Mr. Melson's April 1996 trial. And, as a result, the prosecutor could not use his confession to convict Mr. Melson.

Instead, the state relied heavily on the only physical evidence available to them – shoeprints. Five days after seizing the shoes from his feet,[61] police claimed to have recovered casts of Mr. Melson's shoeprints from a muddy, rain-filled drainage ditch behind Popeye's.

Figure 4 State's Ex. 91

[60] *See* Ex. 6, Peraita Sentencing Order.
[61] (R. 1679-80).

Absent Mr. Peraita's confession, the case against Mr. Melson was weak. So, from the trial's opening statement, the prosecutor argued that "notwithstanding Mr. Melson's assertion that he hadn't been around there [at Popeye's] that night . . . the prints that were found were a part of or came from the shoes that Mr. Melson had on."[62] Thus, the prosecution's theory of the case was that, even absent any positive identification of the black male suspect, the shoeprints conclusively established his complicity in the murders. A prosecution expert testified that two pebbles and a seed were imbedded in the cast and in the imprint in the same areas, establishing a match.[63] More specifically, John Case, a trace evidence expert with the Alabama Department of Forensic Sciences, testified: "to find by chance another shoe that would be the same size, the same brand, and have the same degree of wear or lack of wear and also have those inclusions in the same spot on the same shoe and on the cast would be very remote such as to make it impractical to consider another shoe."[64] The defense called no expert witness of its own to challenge this conclusion. Instead, they chose to spend $66.59 on a footwear impression treatise which did them absolutely no good. Having looked for nothing else, defense counsel offered nothing more.

Figure 5 State's Ex. 18

[62] (R. 1131-32).
[63] (R. 1637).
[64] *Id.*

The Prosecution Also Focuses on Discrediting Mr. Melson's Alibi Evidence.

Having asserted his innocence to the police and to his lawyers to no avail, while he was locked up prior to trial, Mr. Melson attempted to mount a defense by enlisting friends and others to help establish an alibi. At trial, Mr. Melson's slapdash self-help strategy failed for essentially two reasons:

First, the strategy failed because the prosecution successfully attacked the credibility of each alibi witness, thwarting Mr. Melson's attempts to prove he was not at Popeye's with Mr. Peraita. For instance, Melissa Patterson testified about the letters that Mr. Melson sent to her after his arrest. Specifically, the letters asked Ms. Patterson to establish that she had seen Mr. Melson at a shot house called "Frankie's" around the time of the murders and that she had seen him leave in a black car.[65] The prosecution introduced this testimony to suggest that Mr. Melson directed Ms. Patterson to lie about his lack of involvement in the crime.[66] On direct examination, Ms. Patterson agreed that she had not seen Mr. Melson at Frankie's (or at all) for two months before the crime – testimony she would later recant.[67]

A defense witness, Tyrone Porter, testified that as he was riding around with a friend on the evening of the crime, he saw Mr. Melson near Frankie's on Harlem Avenue between 11:30 p.m. and midnight.[68] Mr. Melson was walking up the street alone when Mr. Porter saw him.[69] During the trial, the prosecutor assailed Mr. Porter's testimony as false by eliciting that he was not wearing a watch that night; by painting Mr. Melson's protestations of his own innocence to police and his attempts to present an alibi defense as false; and by pointing out that Mr. Porter did not volunteer his statement to police.[70]

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[65] (R. 1539).
[66] (R. 1539-40).
[67] (R. 1544).
[68] (R. 1726, 1730).
[69] (R. 1727).
[70] (R. 1727-1735).

Mr. Melson's strategy also foundered because the prosecutor reminded jurors over and over again about his first statement to police that had alleged his presence with Mr. Peraita for the whole evening on April 15. In this first statement dated April 16, 1994, which Mr. Melson refused to sign, Mr. Melson allegedly said that he was with Mr. Peraita all night on April 15, 1994.[71] In a second, April 18, 1994 statement, Mr. Melson said that Cuhuatemoc Peraita had dropped him off in the Green Pastures neighborhood of East Gadsden at about 11:50 p.m. and had picked him up again at about 1:00 a.m.[72] The prosecutor argued that only Mr. Melson's first statement was true and his subsequent recantation of that statement was a lie.[73]

In the end, the prosecutor's pointed closing argument repeatedly framed Mr. Melson's protestations of innocence as a tangled web of lies.[74] Predictably, absent solid proof of innocence, the jury found Mr. Melson guilty and he was sentenced to death.

On judgment day, before Judge William Cardwell announced the sentence, Mr. Melson expressed sympathy for the victims' families, but also proclaimed his innocence saying, "I hate to die for something I ain't done ...."[75] The Judge was not swayed. Finding that Mr. Melson had fired the fatal shots and that the aggravating circumstances outweighed the mitigating, Judge Cardwell condemned Mr. Melson to death.[76]

Despite overwhelming evidence that Mr. Peraita committed the murders and only the self-serving statement of Mr. Peraita and the police's late-breaking shoeprint "evidence" to suggest Mr. Melson was guilty, Mr. Peraita escaped the death penalty because he convinced Judge Roy Moore and the grieving Gadsden community from which both juries were drawn that "Robert did it."

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[71] (R. 1154-57).
[72] (R. 1526.)
[73] (R. 1788-89).
[74] (R. 1806, 1808, 1810-11).
[75] (R. 2195).
[76] (Clerk's Record at 484).

Judgment day

Melson

Gunman who killed three in the robbery of Popeye's restaurant sentenced to the electric chair by Judge William Cardwell.

'We ask the court to give him the same consideration he gave this victims(). That's only right. That's only fair. That's only just.'

— District Attorney Jerry Hodgepeth

A smiling Robert Melson is led by sheriff's deputies down a hook chairwell Thursday at the Etowah County Courthouse en route to his sentencing hearing. Judge William Cardwell followed the jury's recommendation, sentencing Melson to death by electrocution for killing three people during the robbery of Popeye's Chicken and Biscuits in 1994.

Long

Nell Ray Long gets two 30-year terms for killing her police officer husband and his 35-year-old mistress in 1995.

Hyde

Marshall County jury recommends life without parole for Matthew Hyde in the murder of detective Andy Whitten.

The Case Unravels: Mr. Peraita's Recanted Confession and Other Substantial Evidence Gathered Since Trial Prove Mr. Melson's Innocence.

Since trial in 1996, several prosecution witnesses have contradicted their testimony or admitted their trial testimony was false. Additionally, new witnesses[77] have come forward to support Mr. Melson's innocence claim.

- In 2002, Mr. Peraita signed two hand-written, self-authored, notarized statements which recanted his false inculpatory statements about Mr. Melson. In them, he admitted that Mr. Melson was not with him during the Popeye's murder. He

[77] For the most part, this exculpatory evidence was uncovered by Federal Defender staff during federal habeas proceedings.

also admitted that he lied in his April 16, 1994 statement because he had been using drugs and because police had threatened him.[78]

- Mr. Peraita has since given two spontaneous, notarized, statements indicating that he was threatened into implicating Robert, that he refused to testify against Robert because doing so would have been a lie, and asserting that Robert was not his accomplice. They are transcribted here, and copies are attached to this petition.

November 30, 2001 Statement of Cuhuatemoc Peraita

I *Cuhuatemoc Peraita am making this statement under my own free will on this month of November 2001.*
Concerning to April 15 early 16 of 1994:

I drop Robert Mellson off at a serivcs station in the pastour. Then I went to Popeyes to robb it with some one else. After we did the robbing I drop him off, and went to pick Robert up at the shot house, also known as Frakies. Robert and I drove to my house so I could change cloths. He did not know anything about what I did at Popeyes. Then I let Robert drive to pick up my brother at his job. The police pick us up. I was high. I told the police that, they scared me into say Robert help me rob Popeyes. He did not!

I Cuhuatemoc Peraita make this statement of my own free will.
s./ Cuhuatemoc Peraita

December 6, 2002 Statement of Cuhuatemoc Peraita

The reason I Cuhuatemoc Peraita did not testify in Robert B. Melson's murder trial, is the DA Jame Hedgspath wanted me to tell a lie! He wanted me to say Robert accompanied me to Popeye's! He was not with me that night at Popeye's. That is the truth!
s./ Cuhuatemoc Peraita

[78] *See* Ex. 7, Peraita's Recantation Affs.

- Melissa Patterson King gave testimony known by the D.A. to be false. She testified falsely that she did not see Robert Melson on April 15, 1994, and had not seen him for several weeks.[79] She now admits that she saw Mr. Melson at about 11:00 p.m. or 11:30 p.m. on the night of April 15, 1994.[80]

- Laura Laverty omitted from her trial testimony key pieces of information known to the D.A. but not to defense counsel. She failed to disclose that Cuhuatemoc Peraita's brother, Edmundo Peraita, told her that he had found the murder weapon concealed in a floor vent of the house he shared with his brother within days of Cuhuatemoc Peraita's arrest.[81] Ms. Laverty failed to disclose that Edmundo Peraita told her that he had disposed of the weapon. Ms. Laverty omitted that the prosecutor threatened her into testifying against Mr. Melson.[82]

- A new witness, Joyce Watson, told police that Robert Melson did not commit the crime and that she had burned the bloody clothes of her boyfriend, the likely culprit, but defense counsel never learned of her existence or her testimony.[83]

- Two other new witnesses, Vanessa Watson and Lashunda Davis, also confirm Joyce Watson's account of what happened on the night of the murders.[84]

Juror interviews prove that the absence of this exculpatory evidence resulted in Mr. Melson's conviction, as juror Phillip Morgan's affidavit shows. Evidence which weighed heavily in Mr. Morgan's determination of Mr. Melson's guilt included the testimony

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[79] (R. 1538).
[80] Ex. 8, (Patterson Aff. ¶4).
[81] Ex. 9, (E. Peraita Aff ¶ 7).
[82] Ex. 9, (E. Peraita Aff ¶8).
[83] Ex. 10, (Joyce Watson Aff.).
[84] Ex. 11 & 12, (Affs. Of Vanessa Watson and Lashunda Davis).

of Ms. Patterson King and Mr. Archer, which he found credible.[85] Because it was unsubstantiated by other evidence and discredited by Ms. Patterson King, Mr. Morgan disbelieved the testimony of defense witness Tyrone Porter regarding Mr. Melson's alibi.[86] However, having been presented with new reliable evidence of Mr. Melson's actual innocence, Mr. Morgan stated:

> If I had known these facts at the time of trial, I would have followed the court's jury instructions regarding consideration of evidence. However, based on this new evidence, along with the evidence presented at trial, I would not have found Mr. Melson guilty beyond a reasonable doubt. Without a complete story about the evidence, I do not feel that, as a reasonable juror, I could have rendered a fair judgment in Mr. Melson's case.[87]

Governor, your predecessor was on record saying, "Ultimately a jury makes a decision to impose the death sentence and my duty is to carry out that sentence barring a case of extraordinary circumstances."[88]Mr. Melson's case presents such an extraordinary circumstance where you are uniquely positioned to do justice.

Scientific Evidence Was Materially Flawed Too.

Shoeprint evidence is unreliable and lacks empirical support because, unlike DNA evidence, it has not been scientifically validated. "With the exception of nuclear DNA analysis . . . no forensic method has been rigorously shown to have the capacity to consistently, and with a high degree of certainty, demonstrate a connection between evidence and a specific individual or source."[89]

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[85] Ex. 13, (P. Morgan Aff. ¶ 4).
[86] (P. Morgan Aff. ¶ 4).
[87] *Id.* at ¶ 5.
[88]Charles J. Dean, *Governors almost never stop executions*, http://www.al.com/news/indEx.ssf/2016/01/governors_and_executions_they.html.
[89] Committee On Identifying The Needs Of The Forensic Sciences Community, Strengthening Forensic Science In The United States: A Path Forward, National Research Council at 6 (2009), available at https://www.ncjrs.gov/pdffiles1/nij/grants/228091.pdf.

The shoe print evidence in the ditch was not evidence of Mr. Melson's guilt.[90] Even so, Alabama courts found that shoe print evidence, along with Mr. Melson's initial statement, were sufficient evidence to uphold his capital murder conviction.[91] But as we now know, there are several problems with Mr. Case's methods and his conclusions about shoeprint evidence. As shown below, the shoeprint evidence was so unreliable and unscientific that it never should have been relied upon to convict Mr. Melson. Today, no credible expert would have testified as Mr. Case did because:

- It had rained throughout the week after the murders, and a rainfall monitor reported at trial that 1.81 inches of rainfall fell between April 15 and April 18 in the area.[92] **One wonders, then, how police collected a useable print in nearly two inches of standing water.**
- As the 2009 National Academy of Sciences (NAS) report shows, pattern "[i]dentifications are largely subjective and are based on the examiner's experience and on the number of individual, identifying characteristics in common with a known standard."[93] **Mr. Case had testified in between 5-10 shoeprint cases in over 28 years working as an expert**.[94]
- As the NAS report said, "Following analysis of the impression, an identification is determined or ruled out according to the number of individual characteristics the evidence has in common with the suspected source. But there is no defined threshold that must be surpassed, nor

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[90] "[M]ere presence at the scene of the crime is not enough to support a conviction." *Ex parte Smiley*, 655 So.2d 1091, 1095 (Ala.1995).
[91] *Melson v. State*, 775 So.2d 857, 896 (Ala. Crim. App. 1999) aff'd sub nom. *Ex parte Melson*, 775 So.2d 904 (Ala. 2000).
[92] (R. 1380).
[93] Committee On Identifying The Needs Of The Forensic Sciences Community, Strengthening Forensic Science In The United States: A Path Forward, National Research Council 154-55 (2009), *available at* https://www.ncjrs.gov/pdffiles1/nij/grants/228091.pdf.
[94] (R. 1651).

are there any studies that associate the number of matching characteristics with the probability that the impressions were made by a common source."[95] **Mr. Case relied on two pebbles and a seed.**

- "At the least, class characteristics can be identified, and with sufficiently distinctive patterns of wear, one might hope for specific individualization. However, there is no consensus regarding the number of individual characteristics needed to make a positive identification, and the committee is not aware of any data about the variability of class or individual characteristics or about the validity or reliability of the method. Without such population studies, it is impossible to assess the number of characteristics that must match in order to have any particular degree of confidence about the source of the impression."[96] **Again, Mr. Case's positive identification relied on two pebbles and a seed.**
- "Experts in impression evidence will argue that they accumulate a sense of those probabilities through experience, which may be true. However, it is difficult to avoid biases in experience-based judgments, especially in the absence of a feedback mechanism to correct an erroneous judgment."[97] **Mr. Case knew who the suspects were when he examined the evidence.**
- "Forensic scientists also can be affected by this cognitive bias if, for example, they are asked to compare two particular hairs, shoeprints, fingerprints—one from the crime scene and one from a suspect—rather than comparing the crime scene exemplar with a pool of counterparts." [98] **Again, knowing that the shoes belonged to Mr. Peraita and Mr. Melson, Mr. Case examined shoeprints and**

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[95] *Id.* at 147.
[96] *Id.* at 149.
[97] *Id.*
[98] *Id.* at 123.

determined, consistent with the prosecutor's theory, that the prints belonged to Mr. Peraita and Mr. Melson.

The September 2016 President's Council of Advisors on Science and Technology (PCAST)[99] report confirms the NAS report's suspicions about the invalidity of shoeprint analysis as a scientific discipline:

> PCAST finds that there are no appropriate black-box studies to support the foundational validity of footwear analysis to associate shoeprints with particular shoes based on specific identifying marks. Such associations are unsupported by any meaningful evidence or estimates of their accuracy and thus are not scientifically valid.[100]

"[S]ubstantive information and testimony based on faulty forensic science analyses may have contributed to wrongful convictions of innocent people. This fact has demonstrated the potential danger of giving undue weight to evidence and testimony derived from imperfect testing and analysis."[101] As United States Supreme Court Justice Antonin Scalia wrote in response to the NAS report, "[f]orensic evidence is not uniquely immune from the risk of manipulation . . . . A forensic analyst responding to a request from a law enforcement official may feel pressure—or have an incentive—to alter the evidence in a manner favorable to the prosecution."[102]

Given these important concerns about the reliability, accuracy and validity of forensic evidence in capital cases, some states have also begun to question whether such evidence should be entitled to dispositive or even persuasive deference. The April 25, 2017 *Report*

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[99] On September 20, 2016, PCAST released a Report to the President on *Forensic Science in Criminal Courts: Ensuring Scientific Validity of Feature-Comparison Methods.*

[100] *Id.* at 13; 117. *See* Yaron Shor & Sarena Weisner, A Survey on the Conclusions Drawn on the Same Footwear Marks Obtained in Actual Cases by Several Experts Throughout the World, 44 J. Forensic Sci. 380, 383 (1999) (finding a wide range of variability in criteria experts use to draw conclusions in shoe print cases).

[101] NAS Report, *supra*, at 4.

[102] *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 318 (2009).

of the Oklahoma Death Penalty Review Commission is a good example. The all-volunteer, bipartisan commission was led by three co-chairs, former Governor Brad Henry, retired Court of Criminal Appeals Judge Reta Strubhar, and former U.S. Magistrate Judge Andy Lester. Its first recommendation was to impose forensic evidence reforms.[103] Its fifth recommendation was for that state to "provide an avenue for post-conviction relief based on changing science that casts doubt on either the accuracy of an inmate's conviction or the evidence used to obtain a sentence of death."[104]

As Senator Dick Brewbaker said last year in sponsoring legislation for the creation of an Innocence Inquiry Commission in Alabama, which would be separate from the appeals process, "The bill is necessary to insure the integrity of our death penalty statute[.]"[105] Had it passed, it would have allowed death row inmates to present new forensic evidence proving actual innocence. Although Senator Brewbaker favors the death penalty, he went on to say that "society has the obligation if it is going to impose such penalties to make sure, absolutely sure, that it is being imposed on people are in fact guilty."[106]

For years, the State of Alabama strenuously resisted Mr. Melson's efforts to obtain access to the shoes, which, it alleged, conclusively prove he is guilty.[107] As a result, re-testing the shoe evidence hasn't been possible. Although we believe that Mr. Melson is innocent, Alabama's broken system has ensured that he has

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[103] *The Report of the Oklahoma Death Penalty Review Commission* at ix, http://okdeathpenaltyreview.org/the-report/.
[104] *Id.*
[105] Kent Faulk, *Change: Alabama Innocence Inquiry Commission would now review only death row cases,* Al.com, http://www.al.com/news/birmingham/indEx.ssf/2016/02/change_alabama_innocence_inqui.html.
[106] Bill Britt, *Brewbaker Sponsor's[sic] Historic Innocence Commission*, Alabama Political Reporter, http://www.alreporter.com/2016/02/18/brewbaker-sponsors-historic-innocence-commission/.
[107] *Melson v. Allen*, No. 06-14047-P (11th Cir. Aug. 24, 2007), Exhibits to oral argument.

never had a full and fair opportunity to prove that he is. Governor, that's all the more reason that you should grant clemency.

Appellate Counsel Tried (And Failed) To Secure Reversal of The Conviction Based On Issues Which Focused On The Shoes.

Direct appeal counsel argued to Alabama state courts that the shoe evidence introduced against Mr. Melson should have been suppressed as illegally obtained.[108] Counsel also argued that, in violation of Mr. Melson's Sixth Amendment right to confront witnesses against him, the district attorney solicited from a police witness that Mr. Peraita was the source of the information that led to the police taking Mr. Melson's shoes, but Mr. Peraita did not testify at Mr. Melson's trial. Neither of those issues managed to persuade the state courts and they declined to grant relief.

After Losing On Direct Appeal, Mr. Melson's State Post-Conviction Litigation Was Derailed by Attorney Abandonment.

As the American Bar Association has recognized, "[t]he importance of state post-conviction proceedings to the fair administration of justice in capital cases cannot be overstated."[109] But "[n]early alone among the States, Alabama does not guarantee representation to indigent capital defendants in postconviction proceedings."[110] And, contrary to what the State has argued, death row inmates "**are** **not** almost uniformly represented by qualified counsel in preparation for and during post-conviction proceedings"

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[108] *Melson v. State*, 775 So. 2d 857, 894 (Ala. Crim. App. 1999), *aff'd sub nom. Ex parte Melson*, 775 So. 2d 904 (Ala. 2000).

[109] Evaluating Fairness And Accuracy In State Death Penalty Systems: The Alabama Death Penalty Assessment Report (June 2006), available at: http://www.americanbar.org/content/dam/aba/migrated/moratorium/assessmentproject/alabama/report.authcheckdam.pdf.

[110] *Maples v. Thomas*, 565 U.S. 266, 272 (2012) (citing ABA Report 111–112, 158–160; Justices Brief 33); *see also id.* at 273 ("The State has elected, instead, 'to rely on the efforts of typically well-funded [out-of-state] volunteers.'" (quoting State's Brief in Opposition in *Barbour v. Allen,* O.T.2006, No. 06–10605, p. 23)).

or "by law firms and public-interest groups whose human and financial resources far outstrip the State's."[111]

Like scores of other death row inmates, following a series of losses on direct appeal, Mr. Melson had no attorney willing to help him file a Rule 32 petition. After spending some months trying to recruit a lawyer for Mr. Melson, the Equal Justice Initiative finally found one.

But this volunteer lawyer, Ingrid DeFranco, had only been licensed as an attorney for two years when she agreed to take Mr. Melson's case. She practiced law in Colorado, and she wasn't licensed in Alabama.[112] Unsurprisingly, she had no experience litigating a Rule 32 case. "Alabama's system of postconviction review in capital cases is exceedingly complex and rife with pitfalls - even attorneys and judges often must struggle to understand and comply with its procedures."[113] But Ms. DeFranco wanted to help and agreed to become involved only because she understood that "Alabama was very short of attorneys for post-conviction."[114]

Figure 6 Ingrid DeFranco

While Ms. DeFranco was undoubtedly well-intentioned, like many lawyers unfamiliar with Alabama's peculiarly unforgiving post-conviction process, she was soon very lost. And, although there are

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[111] Brief of Appellee at 5, *Christopher Barbour, et al., Plaintiffs-Appellants, v. Michael HALEY, et al., Defendants-Appellees.*, 2006 WL 4541663 (11th Cir. May 24, 2006).
[112] *Melson v. Allen*, No. 4:04-cv-03422-VEH-HGD, Doc. 82 at 31-32, 42 (N.D. Ala. filed Oct. 26, 2011) (hereinafter Equitable Tolling Hrg. Tr.).
[113] Brief of Amici Curiae Alabama Appellate Court Justices and Bar Presidents in Support of Petitioner, *Maples v. Thomas*, 2011 WL 2132709 (U.S. May 25, 2011).
[114] Ex. 14, Equitable Tolling Hrg. Tr. at 31.

rules that dictate what to file and where to file Rule 32 pleadings, Ms. DeFranco did not consult them. What she did instead not only deprived Mr. Melson of any opportunity to pursue his claims during Rule 32, but it also eventually cost him any chance to present innocence claims to federal courts.

Mr. Melson's Rule 32 petition was due to be filed in circuit court on or before March 6, 2001. Ms. DeFranco alleged several claims about trial counsel's failure to investigate Mr. Melson's case and their failure to retain a pattern impression expert to challenge the state's only physical evidence against him. Among other things, Mr. Melson's Rule 32 petition alleged:

> Because of counsel's failure to investigate the case, the State's proffer of shoes allegedly belonging to Mr. Melson, which were one and one-half sizes too small for his feet, and which constituted the sole physical evidence against him, was not adequately challenged and Mr. Melson was wrongfully convicted of capital murder.[115]

Elsewhere, Ms. DeFranco proffered Mr. Peraita's recantation of his confession in support of his innocence.[116] Although Ms. DeFranco filed the petition on March 4, before its due date, the petition was not verified, and thus, was not in the form prescribed by Alabama's procedural rules. An improperly filed Rule 32 petition does not toll the relevant statute of limitations. So, by the time Ms. DeFranco repaired that first mistake, Mr. Melson's federal statute of limitations ran out.

Mr. Melson's Rule 32 counsel went on to make other mistakes which compounded the first. When the judge denied Mr. Melson's Rule 32 petition on October 17, Ms. DeFranco prepared an appeal and sent documents and instructions necessary to perfect that appeal to local counsel, Ms. Loretta Collins. Ms. Collins, a relatively

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[115] Ex. 15, Rule 32 Petition at ¶11.
[116] Rule 32 Record at 158.

inexperienced attorney with no prior capital experience,[117] inexplicably filed the appeal at the Alabama Court of Criminal Appeals, when the procedural rules explicitly said that the appeal should have been filed in the Circuit Court of Etowah County.[118] By the time the CCA returned the appeal paperwork to Etowah County days later, it was too late and the court dismissed the appeal as untimely.

Figure 7 Loretta Collins

While she was tasked with helping to represent Mr. Melson, Ms. Collins was apparently distracted, as she struggled to manage problems related to her serial professional malpractice. During and after her work on Mr. Melson's case, Ms. Collins was the subject of multiple client complaints to the Alabama State Bar.[119] In one of them, based on events that occurred 2003 (while Mr. Melson's Rule 32 appeal was pending), Ms. Collins received a public reprimand for liquidating a client's investment accounts and deducting an unearned $50,000 fee.[120] "In its report and order entered after the disciplinary hearing, the Alabama [State Bar] found that Collins acted with a '[d]ishonest or selfish motive' and that she refused to 'acknowledge [the] wrongful nature of [her] conduct.'"[121] Unfortunately, she brought the same cavalier attitude to her work on Mr. Melson's death penalty case.

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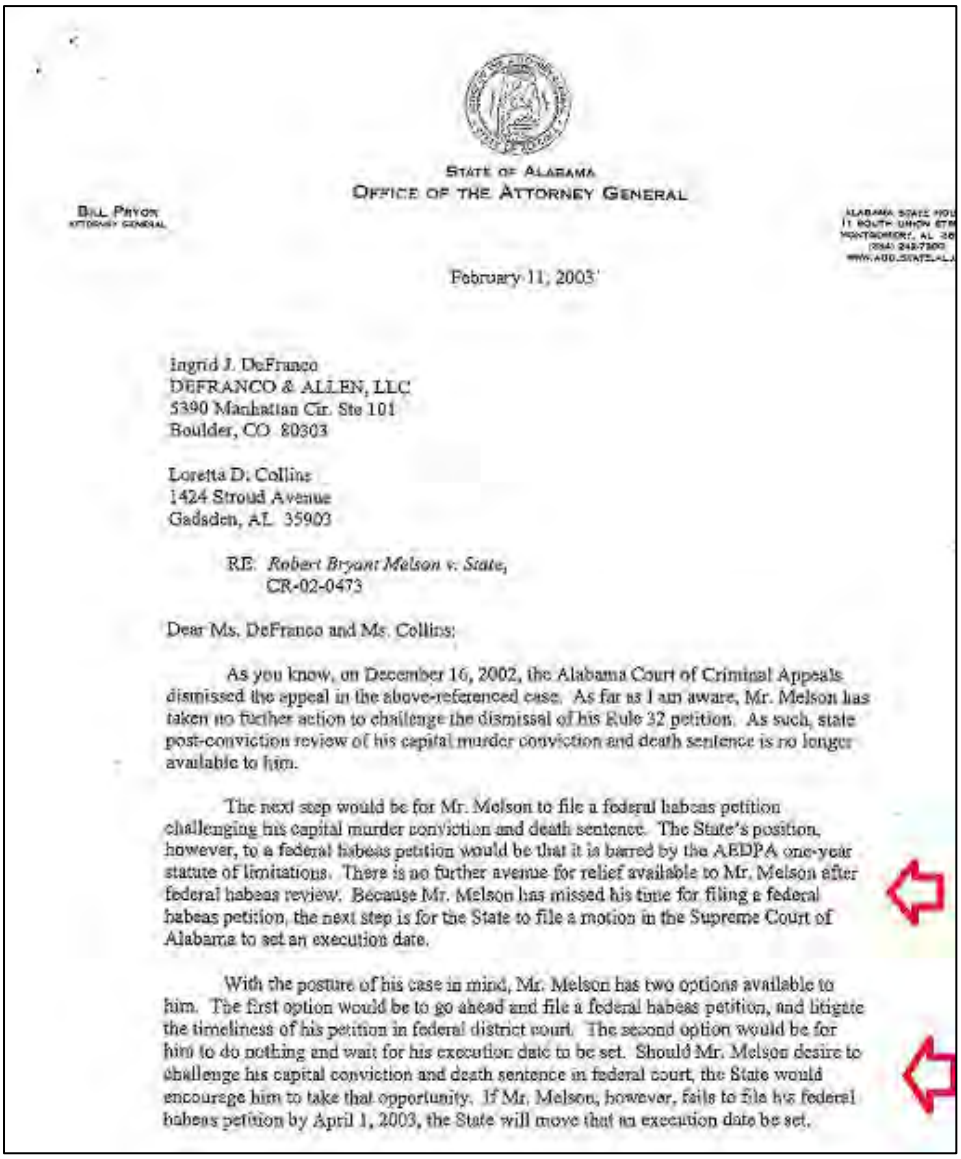
[117] Equitable Tolling Hrg. Tr. at 98-100 (Ms. Collins later testified that she became licensed to practice to law in Alabama in September 2000. Two years later, when she agreed to become Ms. DeFranco's local counsel, she had done limited criminal work but had no Rule 32 experience and no criminal appellate experience.).
[118] Equitable Tolling Hrg. Tr. at 109-110 (L. Collins Testimony).
[119] *In re Collins*, 288 Neb. 519, 521, 849 N.W.2d 131, 133 (2014) ("[B]etween September 29, 2000, and March 22, 2013, five disciplinary complaints were filed against her in Alabama."); *See also* Ex. 16 and 17, L. Collins' Public and Private Reprimands by the Alabama State Bar.
[120] *Id.* at 134.
[121] *Id.*

Neither Ms. DeFranco nor Ms. Collins bothered to tell Mr. Melson that his appeal had been dismissed. Instead, Mr. Melson first learned that his Rule 32 petition had been denied when the Attorney General's Office sent him a copy of a letter it had also sent to his counsel, which warned that an execution date might be set if he failed to file a (by then untimely) federal habeas petition.[122]



STATE OF ALABAMA
OFFICE OF THE ATTORNEY GENERAL

BILL PRYOR
ATTORNEY GENERAL

February 11, 2003

Ingrid J. DeFranco
DEFRANCO & ALLEN, LLC
5390 Manhattan Cir. Ste 101
Boulder, CO 80303

Loretta D. Collins
1424 Stroud Avenue
Gadsden, AL 35903

RE: *Robert Bryant Melson v. State*,
CR-02-0473

Dear Ms. DeFranco and Ms. Collins:

As you know, on December 16, 2002, the Alabama Court of Criminal Appeals dismissed the appeal in the above-referenced case. As far as I am aware, Mr. Melson has taken no further action to challenge the dismissal of his Rule 32 petition. As such, state post-conviction review of his capital murder conviction and death sentence is no longer available to him.

The next step would be for Mr. Melson to file a federal habeas petition challenging his capital murder conviction and death sentence. The State's position, however, to a federal habeas petition would be that it is barred by the AEDPA one-year statute of limitations. There is no further avenue for relief available to Mr. Melson after federal habeas review. Because Mr. Melson has missed his time for filing a federal habeas petition, the next step is for the State to file a motion in the Supreme Court of Alabama to set an execution date.

With the posture of his case in mind, Mr. Melson has two options available to him. The first option would be to go ahead and file a federal habeas petition, and litigate the timeliness of his petition in federal district court. The second option would be for him to do nothing and wait for his execution date to be set. Should Mr. Melson desire to challenge his capital conviction and death sentence in federal court, the State would encourage him to take that opportunity. If Mr. Melson, however, fails to file his federal habeas petition by April 1, 2003, the State will move that an execution date be set.

Figure 8 Letter to Mr. Melson's Counsel

To absolutely no avail, Ms. DeFranco spent the next few years litigating whether Mr. Melson should have the right to pursue an

[122] Ex. 18, Attorney General's February 11, 2003 Letter.

out-of-time appeal, despite these mistakes. Alabama courts rejected each argument she offered, including that her own ineffective assistance of counsel should excuse Mr. Melson's untimely appeal.[123] As a result, all of Mr. Melson's post-conviction claims respecting errors at his trial remained unheard and un-redressed by Alabama's courts. No Alabama court cared to hear that Robert Melson was innocent because his post-conviction counsel couldn't manage to timely file his pleadings.

When he got the State's letter, Mr. Melson wrote to Ms. DeFranco on February 18, 2003[124], expressing bewildered disbelief about his lost opportunity for post-conviction review. He asked his lawyer "how on earth did I lose my [R]ule 32"?

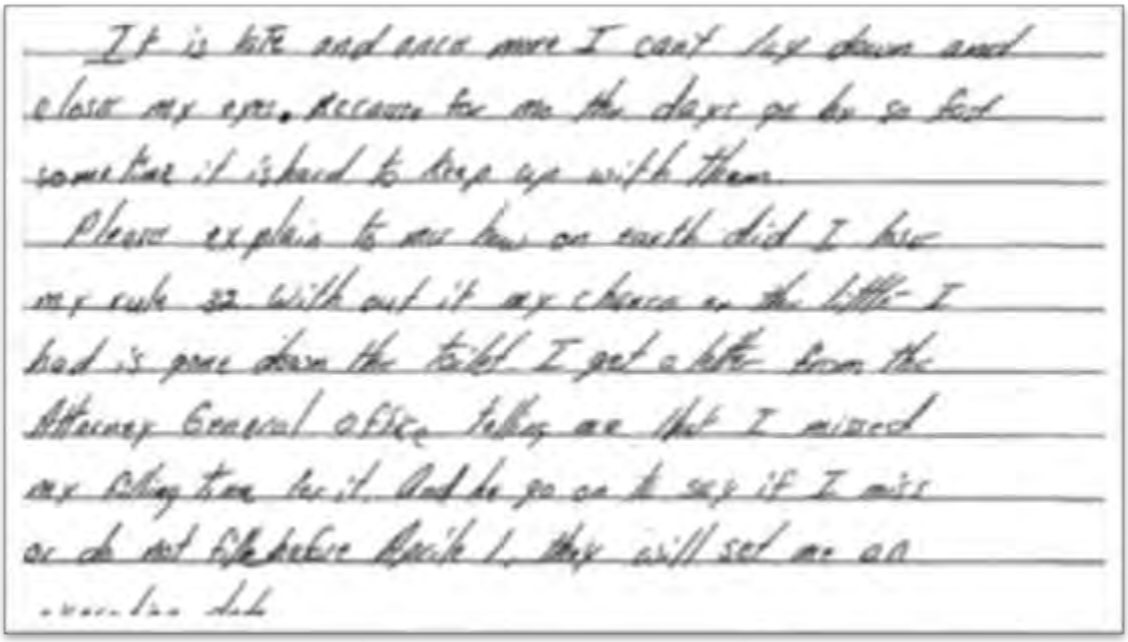

It is late and once more I can't lay down and
close my eyes. Because for me the days go by so fast
sometime it is hard to keep up with them.
Please explain to me how on earth did I lose
my rule 32 with out it my chance on the little I
had is gone down the toilet I get a letter from the
Attorney General office telling me that I missed
my filling time for it. And he go on to say if I miss
or do not file before April 1, they will set me an

Figure 9, Mr. Melson's February 18, 2003 letter to Ms. DeFranco

[123] The Alabama Supreme Court has since reversed the then-controlling law, holding that Rule 32 petitions may be used to attain out-of-time appeals. That decision did not come in time to cure Robert's case.
[124] Ex 19, Mr. Melson's February 18, 2003 letter.

Governor, Mr. Melson wants you to know that he has been afraid every day for the last 23 years that the State will execute him for crimes he didn't commit.[125]

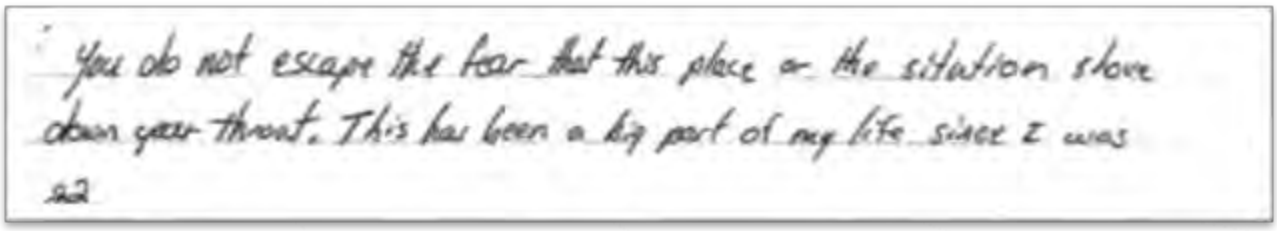

You do not escape the fear that this place or the situation stare down your throat. This has been a big part of my life since I was
22

Figure 10 Mr. Melson's May 17, 2017 Letter to the Governor

Rule 32 counsel's mistakes magnified these fears a hundredfold.

As Ms. DeFranco recently said in an affidavit, she regrets that her grievous errors have deprived Mr. Melson of post-conviction review and have hastened his execution.[126] Unfortunately, her sincere contrition was cold comfort to Mr. Melson and has changed nothing about the precarious state of his capital appeals. But she fervently hopes that you grant clemency to remedy this injustice.[127]

Because Of Counsel's State Court Mistakes, No Federal Court Would Review Mr. Melson's Claims Either

With new counsel from the Federal Defender's Office, Mr. Melson eventually filed a federal habeas petition on December 13, 2004, just three days after the Alabama Supreme Court declined to hear his belated appeal. Among other things, the petition alleged that Mr. Melson was innocent of the crime for which he was convicted and sentenced to death.[128]

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[125] Ex. 1, Mr. Melson's May 17 Clemency Letter.
[126] Ex. 20, I. DeFranco Aff. at ¶ 22.
[127] *Id.*
[128] *See Melson v. Campbell*, No. 4:04-cv-03422-VEH-HGD, Doc. 1 at 35-36 (N.D. Ala. filed Dec. 13, 2004).

However, the Attorney General's Office predictably argued that the federal petition should be dismissed as untimely because of Ms. DeFranco's filing errors. More specifically, the State argued first that "Melson did not properly file a verified Rule 32 petition until March 25, 2002, more than a year (384 days) after his conviction became final and the one-year limitations period of § 2244(d) began to run."[129] Second, the State argued Mr. Melson "did not file his notice of appeal until December 2, 2002, and did so improperly by filing it with the Alabama Court of Criminal Appeals."[130] The District Court agreed with these arguments and dismissed Mr. Melson's federal petition. In doing so, the Court found that despite Mr. Melson's alleged innocence, facts underpinning those claims — including Mr. Peraita's recanted confession — were untimely and procedurally defaulted.[131]

At the time that the District Court issued its opinion, the law laid the errors of Mr. Melson's Rule 32 lawyers firmly at Mr. Melson's doorstep. Although he's not a lawyer or a fortuneteller, then-existing law said that he was at fault and responsible for not managing his own Rule 32 litigation and for not predicting (and somehow mitigating) the professional incompetence of his lawyers.

But, while his case was pending on appeal to the United States Supreme Court, another case, *Holland v. Florida*, 560 U.S. 631 (2010), changed the law. *Holland* established that the federal statute of limitations for death penalty cases could be equitably tolled if an inmate shows "(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way" and prevented timely filing.[132] Thus, *Holland* caused Mr. Melson's case to be remanded to the lower court for an evidentiary hearing to determine whether he was entitled to have the federal

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[129] *Melson v. Campbell*, No. 4:04-cv-03422-VEH-HGD, Doc. 13 at 4 (N.D. Ala. filed Feb. 14, 2004).
[130] *Id.* at 5.
[131] *Melson v. Campbell*, No. 4:04-cv-03422-VEH-HGD, Doc. 27 at 33 (N.D. Ala. filed Sept. 28, 2005).
[132] *Holland v. Florida*, 560 U.S. 631, 649 (2010).

statute of limitations equitably tolled and his habeas claims finally heard.

Ms. DeFranco and Ms. Collins both testified at the hearing and admitted that they'd failed Mr. Melson during Rule 32 in several critical ways:

- Ms. DeFranco failed to properly file his petition because she failed to even read the applicable statute.
- She failed to obtain *pro hac vice* status as she had promised.
- Counsel failed to inform Mr. Melson of essential facts leading to the improper filing of his petition.
- Ms. Collins chose to file the notice of appeal in the Court of Criminal Appeals. And she made that filing in such a way as to ensure that, even if the Court accepted the filing, the notice would be late.
- Both attorneys then failed to tell Mr. Melson that his Rule 32 petition had been dismissed and that he would have to appeal.[133]

At the end of the day, though, Mr. Melson lost again. He lost because, even with lawyers who kept him perpetually in the dark, the federal courts still found that he'd not done enough on his own to ensure that his federal petition was timely filed.

The inequities in that decision are many but are neatly summed up in Judge Rosemary Barkett's opinion in a similar case:

> Making death row inmates wholly responsible for a lawyer's negligence does not ensure that lawyers will timely assert their clients' claims. Death row clients have little ability to hold their lawyers accountable for their negligence. And a policy of punishing death row inmates for such mistakes does not improve the timeliness of lawyers' actions. While civil litigants can seek relief for a lawyer's mistake through a malpractice lawsuit, there is no remedy for a death row inmate. When a

[133] *Melson v. Comm'r, Alabama Dep't of Corr.*, 713 F.3d 1086, 1088 (11th Cir. 2013).

lawyer's negligence forecloses consideration of the entirety of the death row inmate's federal claims, the result is the imposition of the death penalty without federal review.[134]

Mr. Melson's Upbringing Helps To Explain His Uncounseled Statements And Why He Was So Blindly Loyal And Naïve To The Risk Of Being Convicted Of A Crime He Had Not Committed.

Figure 11 Robert, age 13

Robert's parents were impaired people, who were incapable of protecting their children.

Parents are a child's first protectors. At least that's the way it should be. But Robert Bryant Melson was not as fortunate as many children are. Instead of having a stable family to protect him from the world's dangers, he was born into, and throughout his childhood lived within, the chaos of a horribly dysfunctional home.

On June 5, 1971, Robert was born in Gadsden, Alabama to Robert Brown Melson and Geraldine Smith Melson. Robert has an elder sister, Tamarla Melson (born in 1970), and a younger brother Arthur Melson (born in 1973), who were also born of that union.

Robert Brown Melson, a Vietnam veteran, developed mental illness and a chronic addiction to alcohol upon his return from the war.[135] These daily battles that Robert Brown Melson fought and lost to his twin demons–mental illness and alcoholism–victimized not only him but everyone who loved him.[136]

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[134] *Hutchinson v. Florida*, 677 F.3d 1097, 1110 (11th Cir. 2012).

[135] (R. 2049, 2064); Ex 21, Cynthia Melton Lee Aff. at ¶ 5; Ex 22, Aff. of Mark Smith at ¶ 7.

[136] Ex. 23, Tamarla Melson Aff. at ¶ 4.

His children and wife were frequently the targets of Robert Brown Melson's abuse and neglect. Robert Brown Melson worked for a time at Republic Steel. While they lived together as a family, beginning in 1970, Robert Brown Melson squandered the family's meager resources on alcohol, which left no money to feed his wife and children. Robert Brown Melson's criminal record reflects multiple arrests for alcohol-related crimes, including nine arrests for public intoxication and two arrests for driving under the influence of alcohol or controlled substances.[137] He frequently beat Mr. Melson's mother, on one occasion because she dared to feed their children at her mother's house.[138] Geraldine Melson separated from her husband in April 1974, when Robert was toddler.[139]

Robert Brown Melson continued to torment and traumatize the family he abandoned.

Despite their physical separation, the Melsons' relationship remained a volatile, toxic saga to which their children were first-person witnesses. Social services records document early and consistent involvement with the Melson family. On February 14, 1975, Geraldine Melson called her case worker to report that she and her children, ages five, four, and two, were hungry and out of food.

On March 5, 1975, during an unannounced visit with the Melson family, a social worker reported that Robert Brown Melson had hit Tamarla in the mouth with a fist, causing her lip to bleed. Although the social worker found no proof to support the allegation, Robert Brown Melson had counter-reported that his wife was on drugs and not taking care of the children. These records document that Mrs. Melson and the children were dependent on welfare benefits.

Even though he was physically absent from the house, Robert Brown Melson remained, for a time, a malevolent influence in his

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[137] Ex. 24, Robert Brown Melson's Gadsden Arrest History.
[138] (R. 2026).
[139] (R. 2024, 2049, 2064).

family's life. On March 10, 1975, during a court-ordered home study with a social worker, Geraldine Melson reported that her husband had, again, been physically abusive to her and the children during a visit. On another occasion, Robert's grandmother, Laura Mae Smith, saw Robert's father slap Geraldine. Laura Mae eventually made him leave after threatening him with a gun.

Robert's father apparently left the family for good that day. After divorcing him, Geraldine sought to form a new family in a new home, with Alvin St. George, Sr. Geraldine Melson had her youngest child, Alvin St. George, Jr., (a.k.a. "Julio") with Alvin St. George, Sr., in December 1975.

Robert's mother, an addict, invites a new abuser into her family.

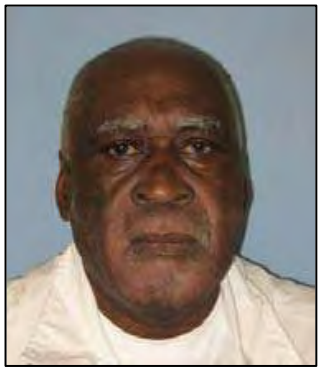

Figure 12 Figure 13 Alvin St. George, Sr.'s, Ala. DOC photo

Unfortunately, little changed for Geraldine's children because Alvin St. George, a drug dealer and bootlegger, only introduced a new sort of violent chaos into their lives. Robert's mother and step-father not only openly conducted an illegal drug business in the house where they were raising four children, but also used drugs themselves.[140] Alvin sold "T's and blues," marijuana, and home brew. As a young boy, Robert often saw his home populated by intoxicated drug addicts, including his own mother, who injected drugs in Robert's presence. Robert was seven or eight years old the first time he saw his mother using drugs. Cookie, a friend of his parents who frequented the Melson home, fed Robert and his siblings illegal drugs. Robert recalls being intoxicated as young as age eight.

The fact that Mr. St. George was a rather accomplished criminal also made him an unsuitable parent and role model.

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[140] Ex. 23, Tamarla Melson Aff. at ¶ 5 ("My mother was a drug addict. My mother was an IV drug user and would shoot up 'T's and blues'. My mother used to shoot up in the bathroom, and she was always going to the bathroom. A man would come over with the pills, which were wrapped in foil and one of the pills was blue in color."); Ex. 25, Jerry Black Aff. at ¶ 4.

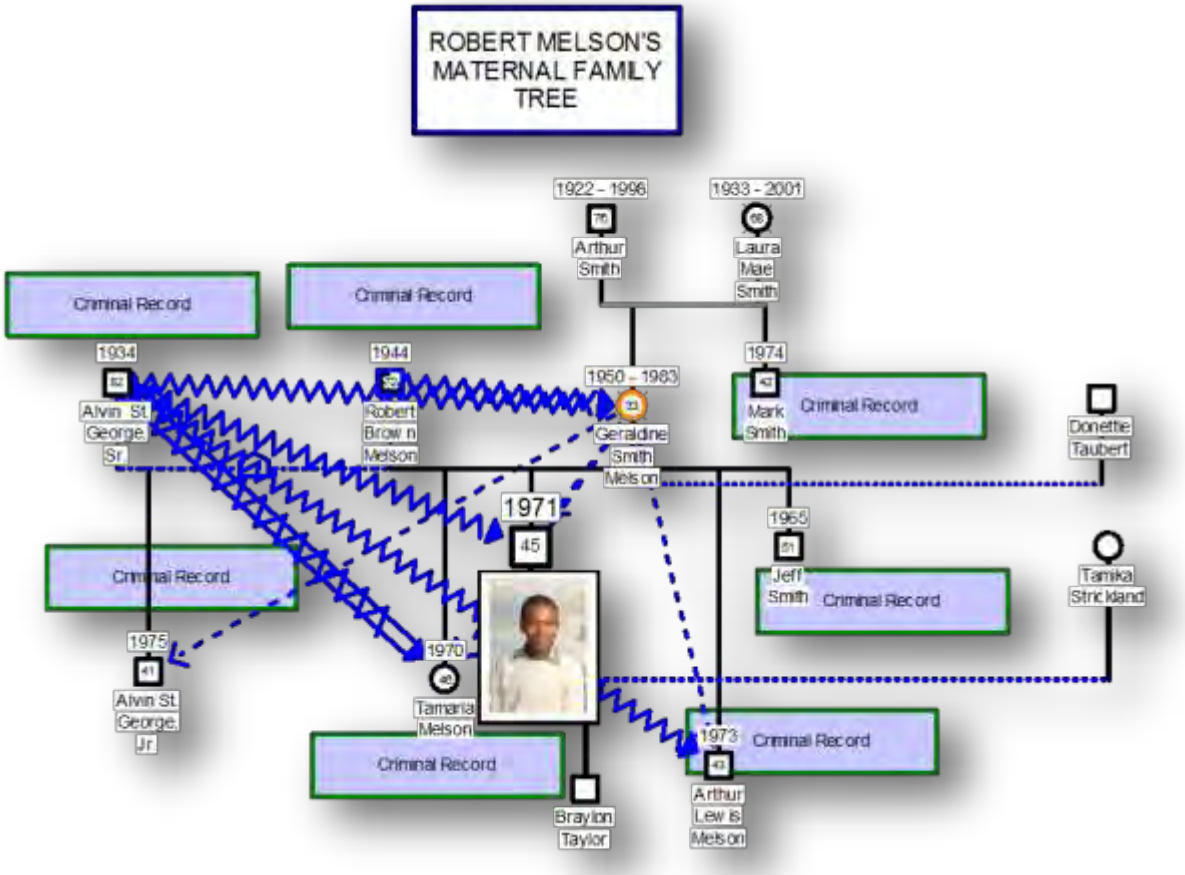
Between 1982 and 1992, Gadsden police arrested him for buying and receiving stolen property, public intoxication, marijuana possession, and simple assault. Later, he was sentenced to 20 years in state prison for drug distribution.

Robert hated weekends because of the knock-down drag-out fighting between his mother and step-father. When he could, he escaped to the homes of friends who let him stay the night.[141] Once, Alvin St. George pushed Geraldine out of a moving car and she spent a week in the hospital.[142] Another time, Geraldine told her daughter Tamarla to lock the door so Alvin could not get in the house. After breaking a window to get in, Alvin attacked Geraldine with a sledge hammer.[143] Jerry Black, a neighbor, once saw Alvin hit Geraldine in the face until her eyes were swollen shut.[144]

Alvin abused Geraldine's children, too. He used belts or switches to beat Robert and Arthur "on the average a couple of times a week."[145] When Alvin and his cronies began to attempt to sexually molest 12-year-old Tamarla,[146] she eventually went to live with her grandmother, leaving Robert and Arthur behind. In this house, the Melson boys remained isolated by the violence meted out between its four walls and often lived there alone and without proper clothing, "electricity, running water, or even food to eat."[147]

Figure 13 Robert & Arthur Melson with cousins Tim and Tawana

[141] Jerry Black Aff. at ¶ 5.
[142] Tamarla Melson Aff. at ¶ 6.
[143] *Id.*
[144] Jerry Black Aff. at ¶ 5.
[145] Tamarla Melson Aff. at ¶ 7; Jerry Black Aff. at ¶ 6.
[146] *Id.*
[147] Ex. 25, Jerry Black Aff. at ¶ 3.



Emotional Relationships

- 4 Physical Abuse
- 1 Sexual Abuse
- 4 Neglect (abuse)

Family Relationships

- 1
- 1 Marriage
- 1 Legal cohabitation
- 2 Casual relationship or dating (short-term)

- 12
- 1 Alcoholism, Serious physical or mental problems with alcohol or drug abuse
- 1 Drug Abuse

As this genogram shows, Robert Bryant Melson's maternal family, a primary influence during his formative years, was rife with negative role models who were abusers, addicts, and criminals.

Local boy owes life to strangers

BY GEORGE BUTLER
Times Staff Writer

A five-year-old Gadsden boy, rescued from a burning home, owes his life to two strangers who snatched him from a smoke-filled bedroom and the Gadsden Fire Medics who revived him after he was overcome by smoke.

The boy is Arthur Lewis Nelson, stepson of Alvin L. St. George, 100 Springdale Court in Oakleigh Estates. The boy was reported in good condition today at Holy Name of Jesus Hospital.

Firemen were called to the burning home at 12:08 a.m. Monday after a neighbor, Lewis Rhodes, saw the fire from his home down the street and heard some children scream.

After calling the fire department, Rhodes ran to the scene and saw flames coming out of the windows. Three small children ran out the front door and one yelled that their brother was in the house.

The three children were unharmed and were picked up by a neighbor.

A passerby, Sheldon Shack, 18, of Attalla, was driving by and saw the fire. He stopped to help.

He and Rhodes went to a side window and saw the small boy lying on a bed in a smoke-filled room. The bed was near the window but they were unable to enter the room because of flames.

Slack broke the window, reached in and, assisted by Rhodes, pulled the boy to safety through the window. In doing so, Slack cut his hands and was later treated at a local hospital and released.

Fire trucks and the fire medics arrived about that time. The fire medics revived the boy while firemen were bringing the flames under control.

Deputy Fire Chief Ray Stafford said one side of the house was fully involved when firemen arrived but the blaze was extinguished within a few minutes.

The boy was rushed to the hospital for treatment of smoke inhalation. He reportedly suffered no burns.

Fire Inspector Lee Reynolds said the fire, which started in a bedroom, is under investigation. Major damage was reported to the home.

Schools merge in Tuscaloosa

TUSCALOOSA, Ala. (AP) — The Tuscaloosa School Board has chosen Central High School as the new name for Tuscaloosa High and Druid High, which have been paired under federal court desegregation orders.

The school's colors will be red and white, and a mascot will be chosen later.

Superintendent Thomas Ingram said today that Tuscaloosa High Principal Eddie Thomas will become coordinator of the board's human resources project, while Druid Principal Charles Killough will be principal of Central High.

The Melson kids nearly burn to death in a fire.

Geraldine and Alvin Sr. often left the young children alone to fend for themselves.[148] They sometimes disappeared for days at a time. On May 28, 1979, seven-year old Robert and his three siblings (Tamarla, Arthur, and Alvin, Jr.) had been left home alone at 10:30 p.m. by their parents, who had gone to a nightclub in Cherokee County. Geraldine and Alvin left eight-year-old Tammy in charge of her younger siblings. When fire erupted at midnight, neighbors reported seeing three children running from the house and heard that a fourth child, five year old Arthur, remained inside hiding in a closet. The other children could hear him crying out but could not see him through the smoke. After leading Tammy and Alvin, Jr. to safety, Robert tried to get Arthur out of the burning house.[149] Sheldon Shack, a passer-by, eventually rescued Arthur,[150] who was treated at the hospital for smoke inhalation and burns on his head and ears.[151] Social services responded to the emergency room

[148] Ex. 26, Arthur Melson Aff. at ¶ 4.
[149] *Id.*
[150] Ex. 27, Sheldon Shack Aff. at ¶¶ 5-7.
[151] Arthur Melson Aff. at ¶ 4.

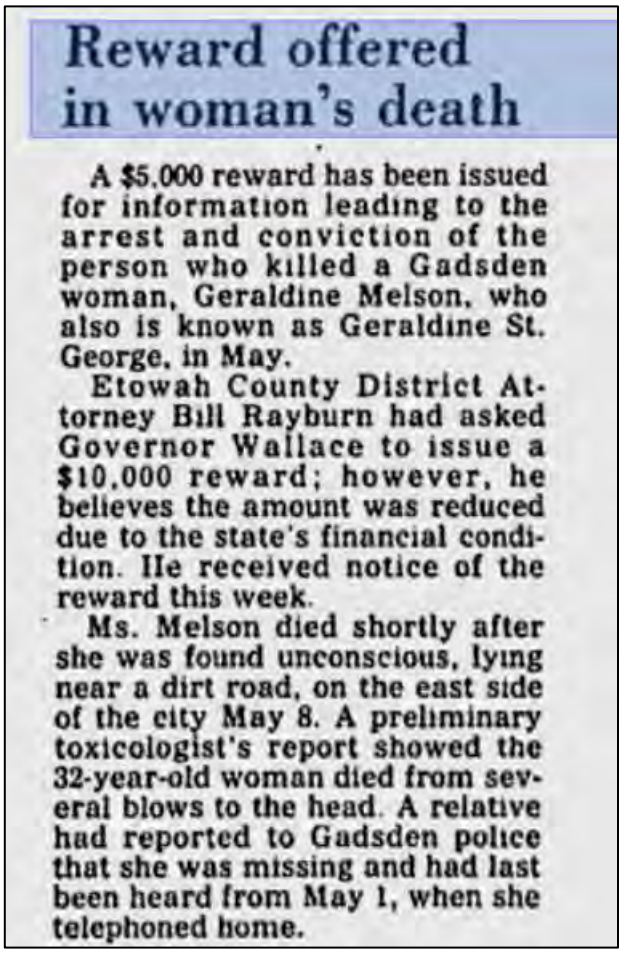
to care for the children, until their parents could be found and held to account for neglect.

Social services records show that by May 1980, the Melson children had been remanded into the care and custody of their elderly maternal grandparents, Laura and Arthur Smith. Mr. and Mrs. Smith also lived in Gadsden, just across the street from Geraldine and Alvin, Sr. Although Mr. Melson's grandparents loved him, they were elderly and ill-equipped to handle one traumatized child, much less three. As the State has argued elsewhere, "Studies show that 'child abuse and neglect have pervasive and *long-lasting effects* on children, their families, and the society.'"[152]

Figure 14 Robert's maternal grandparents, Arthur and Laura Mae Smith

[152] Brief of Texas, Alabama, et al., as Amici Curiae Supporting Appellee, *Kennedy v. Louisiana*, 2008 WL 782550, at *23-26 (filed March 19, 2008) (emphasis added).

Robert's mother is murdered.



Reward offered in woman's death

A $5,000 reward has been issued for information leading to the arrest and conviction of the person who killed a Gadsden woman, Geraldine Melson, who also is known as Geraldine St. George, in May.

Etowah County District Attorney Bill Rayburn had asked Governor Wallace to issue a $10,000 reward; however, he believes the amount was reduced due to the state's financial condition. He received notice of the reward this week.

Ms. Melson died shortly after she was found unconscious, lying near a dirt road, on the east side of the city May 8. A preliminary toxicologist's report showed the 32-year-old woman died from several blows to the head. A relative had reported to Gadsden police that she was missing and had last been heard from May 1, when she telephoned home.

Figure 15 The Gadsden Times, June 1, 1983

On May 8, 1983, when Robert was 12 years old, his already precarious situation became even more untenable. His mother was found brutally beaten in the front yard of an abandoned house on Albany Road in Gadsden. By the time she was found, Mrs. Melson had been missing for seven days. She had last spoken to her family on May 1, when she called to tell her mother that she was in Guntersville but planned to return home. Geraldine had told Mrs. Smith that she was "running from her husband" — an abusive Alvin St. George. When police responded to the scene on May 8, Geraldine had been lying in front of the Albany Road house exposed to the elements and incapacitated for two days. She was alive but unconscious when police found her and maggots already had infested her wounds.[153] Geraldine Melson never regained consciousness and died at the hospital shortly after she was found. An autopsy confirmed that Mrs. Melson had been beaten to death with a blunt instrument.[154] Although authorities ruled her death a homicide, Geraldine's murder was never solved.

[153] Ex. 28 (Police Incident Report documenting Geraldine Melson's murder).
[154] Ex. 29 (Alabama Department of Forensic Sciences Autopsy for Mrs. Melson).

Robert was raised in East Gadsden, one of the most crime-ridden areas of the city.

It's no wonder that Geraldine Melson's murderer was never brought to justice. East Gadsden, the area where she lived, raised her children, and later died, had long been known as one of the most crime-plagued areas of the city. By 1985, according to the *The*

CRIME IN GADSDEN

The number of reported crimes in the city's 10 sectors*

VIOLENT CRIMES

AUGUST 1, 1984 THRU JULY 31, 1985

SECTOR	1	2	3	4	5	6	7	8	9	10
AREA	DOWNTOWN BUSINESS	TUSCA-LOOSA	NORTH GADSDEN	EAST GADSDEN NORTH	EAST GADSDEN SOUTH	RAINBOW DRIVE & DOWNTOWN RESIDENTIAL	MOUNTAIN	WEST GADSDEN	ALA CITY	SOUTH GADSDEN
HOMICIDE	1	4	1	2	0	2	1	0	1	0
ROBBERY	7	5	2	6	1	4	1	6	5	2
RAPE	2	4	2	5	3	5	2	3	2	1
ASSAULT (ALL TYPES)	29	76	24	73	21	77	31	53	40	25
TOTALS	30	89	29	86	25	88	35	62	48	28

PROPERTY CRIME

AUGUST 1, 1984 THRU JULY 31, 1985

SECTOR	1	2	3	4	5	6	7	8	9	10
AREA	DOWNTOWN BUSINESS	TUSCA-LOOSA	NORTH GADSDEN	EAST GADSDEN NORTH	EAST GADSDEN SOUTH	RAINBOW DRIVE & DOWNTOWN RESIDENTIAL	MOUNTAIN	WEST GADSDEN	ALA CITY	SOUTH GADSDEN
LARCENY	104	97	54	210	61	170	23	114	142	68
BURGLARY	50	80	38	148	57	108	45	82	74	37
STOLEN VEHICLES	13	16	5	22	3	16	2	24	15	3
TOTALS	167	193	97	380	121	294	70	220	231	108

*These statistics, which were provided by the Gadsden Police Department's Computer Crime Analysis Unit, represent the number of crimes reported in the different areas of the city. These sectors were drawn up by Lt. E. R. Bowen to provide crime data for Gadsden police. These figures do not represent the number of actual crimes in specific areas or the number of crimes prosecuted.

Gadsden Times, the city had the "eighth highest murder rate per capita in the nation."[155]

In Gadsden, Robert attended under-performing, racially segregated schools.

Like many places in the South, Gadsden began desegregating its public schools in the early 1960s under federal court supervision. However, it wasn't until August 2005 that Gadsden schools finally achieved unitary status. To get there, it took Gadsden's school district 42 years and several tries to demonstrate that it had eliminated all traces of intentional segregation in six areas, called the "Green factors": 1) student assignment, 2) faculty assignment, 3) staff assignment, 4) transportation, 5) extracurricular activities, and 6) facilities.[156] And in the 1990s, a study found that Gadsden was still the second most racially segregated city in Alabama.[157]

During Robert's school enrollment, Gadsden's schools consistently lagged behind other schools districts on standardized achievement tests.

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[155] Chip Alford, *Crime: police concentrate on city's 'hot spots'*, The Gadsden Times (Sept. 1, 1985), https://news.google.com/newspapers?nid=1891&dat=19850901&id=crwfAAAAIBAJ&sjid=g9cEAAAAIBAJ&pg=5239,58330&hl=en.

[156] *Green v. New Kent County School Board*, 391 U.S. 430 (1968).

[157] Bernice L. Guity, *A Community Divided?*, The Gadsden Times (Feb. 4, 1997) https://news.google.com/newspapers?nid=1891&dat=19970204&id=VL0fAAAAIBAJ&sjid=LdgEAAAAIBAJ&pg=2576,371442&hl=en.

STANDARD ACHIEVEMENT TEST SCORES

Some skills to get closer look in Gadsden schools

By Marcella R. Elliott
Staff Writer

Gadsden city school students have shown definite improvements during the past five years they've taken the Stanford Achievement Test, school officials said. But there are still some areas — and specifically, some grade levels — that have not improved as much as they should have, the officials added.

The Stanford Achievement Test was given in April to students in Alabama public schools as well as in other state systems. The 1989 test was the fifth and final year this test will be administered in Alabama, according to the State Department of Education. The 1990 test will be a different form of the Stanford test, with most changes in the interpretation of test results.

Fred Taylor, superintendent of Gadsden City Schools, said at last week's local board meeting he and other system officials will be taking a close, hard look at scores that have appeared to remain consistently low since the Stanford test was first administered in 1985. Spencer Thomas, vice president of the Gadsden City Board of Education, raised concern over the low scores.

"There seem to be some skills consistently below even the state average," Thomas said. He asked if there was a correlation between these scores and the dropout rate.

Taylor said achievement scores did not reflect the dropout rate, but actually were consistently better in relation to the dropout rate.

"There definitely are some specific skills that need closer attention," Taylor said. "I don't know what the reason is at this point, but we are going to look at individual classes and teachers where the scores are not going up in those areas where they should be. We're going to have to address this more than we have in the past, and the only way is to get to the bare facts."

Helen McAlpine, director of counseling, presented this year's Stanford Achievement Test results to the board. Compared to results from 1985, when the test was first administered in Alabama, Gadsden's scores have improved — even if some of the improvements have only inched up slowly.

According to the system's 1989 test results, the lowest scores — in the 30s — were in vocabulary for grades 4, 5, 7, 8 and 10. Reading and math scores also were low — in the 40s. These scores are reflected in the complete battery total, which is an average of scores in all subject areas tested.

National average is 50, but the numbers are not interpreted as scores for other tests. Stanford scores are interpreted as the percentage of students tested who scored higher than the majority of students taking the test nationwide. For example; a score of 59 means that 59 percent of the students taking the test in that subject area scored higher than the national average.

Taylor and Mrs. McAlpine warned that the Stanford test scores should not be used to compare schools to other schools or school systems to other school systems.

Please see Tests, A5

Gadsden City Schools 1989

Stanford Achievement Test Results *

Subject	Grades 1	2	4	5	7	8	10
Reading	50	45	43	40	42	48	53
Vocabulary	53	49	35	36	38	39	39
Spelling	59	59	54	45	51	54	52
Math	51	58	48	46	54	54	54
Language	–	–	50	46	51	55	55
Battery total	51	52	46	42	48	50	50

* National individual percentiles
– Not tested
Note: National average is 50

Staff Graphic by Mike Turner

Figure 16 June 16, 1986, The Gadsden Times

Abused and neglected children can suffer cognitive delays which cause them to get low grades and perform poorly on standardized tests.[158] Predictably, as an elementary school student, Robert struggled to cope with his caregivers' maltreatment. And within these failing schools, Robert achieved failing scores and repeated two elementary grades before eventually being socially promoted.[159]

[158] National Research Council, *Understanding Child Abuse and Neglect*, 212 (1993) (citations omitted).
[159] *See* Ex. 30, Robert Melson's Gadsden City School Records.

Robert and his siblings find, then lose, a new stable home.

After their mother's death, Mayo Melson, Robert's paternal uncle, took custody of Robert, Tamarla, and Arthur.[160] By then, Robert had already failed the first and third grades. With Mayo Melson finally providing the children a caring and structured home, the children improved their grades and attended church and Sunday school regularly.[161]

Uncle Mayo was an authority figure, one of few in Robert's tumultuous life. This change also proved to be temporary, however. Although he was just a boy, adults in his life allowed Robert and his siblings to choose where they would live. After only a year with Mayo, the Melson children wanted to return to live with their elderly grandmother where there was much love but too few rules. While Mayo Melson lamented that decision, feeling that the children needed a strong influence to help reverse some of the damage that their early hardships had caused, he let them go. Though Robert's early life was spent living in a horrifically traumatic environment, as a young teenager, he worked especially hard to overcome his rough beginnings. He was good a student, a good athlete,[162] and a Christian, who was actively involved in his church.

Figure 17 Robert and Arthur Melson with Mayo Melson

[160] *See* Ex. 31, Juvenile Court Records.
[161] Ex. 32, Timothy Melson Aff. at ¶ 6; Ex. 33; Tawana Melson Aff. at ¶ 4.
[162] Ex. 34, Steven Abel Aff. at ¶ 2.

Shirley Latham, a youth director at the church Mr. Melson attended, remembered him as a sensitive, loving child who sought direction.[163] Ms. Latham said that the young Mr. Melson "was always like yearning for affection, yearning for learning, everything. He was just eager."[164] The husband of one of Robert's teachers was so impressed by his good manners that he recommended Robert for a job doing yard work for one of his friends.[165] Mr. Melson's football coach remembered that Mr. Melson was well-behaved and worked hard to have an opportunity to play football even though he was small in stature. At trial, each sentencing witness remembered Robert as a boy and a teenager who craved attachment with adults who could provide the stability that he lacked in his home.

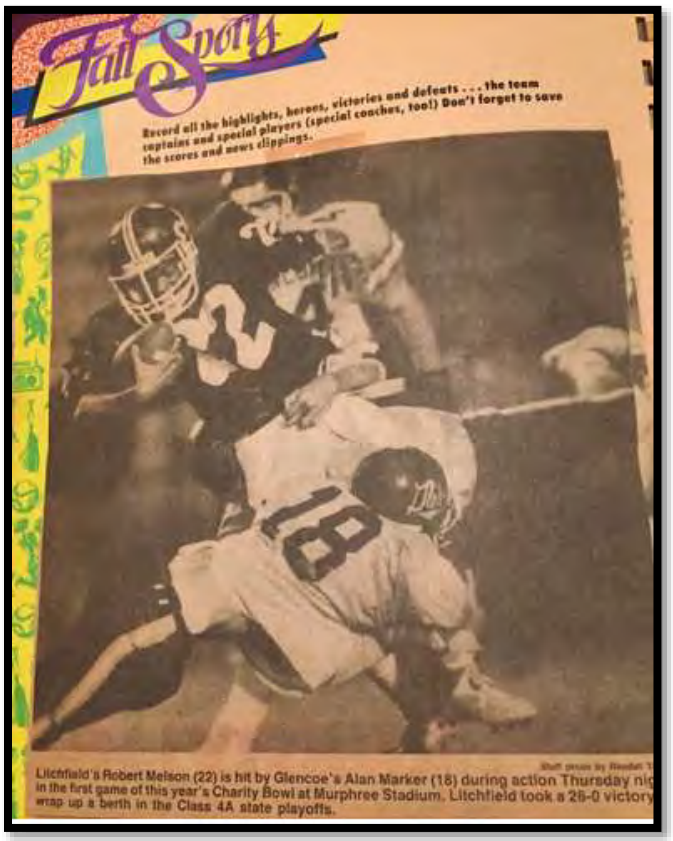

Figure 18 Robert Melson playing high school football

[163] (R. 2062).
[164] (R. 2066).
[165] (R. 2043).

Indeed, all of the Melson children craved a loving, stable home. None got it. And, unsurprisingly,[166] none of them escaped unscathed from the traumas they experienced as abused and neglected children. As adults, Robert's siblings all have struggled with addiction and all have been incarcerated at various points in their lives.

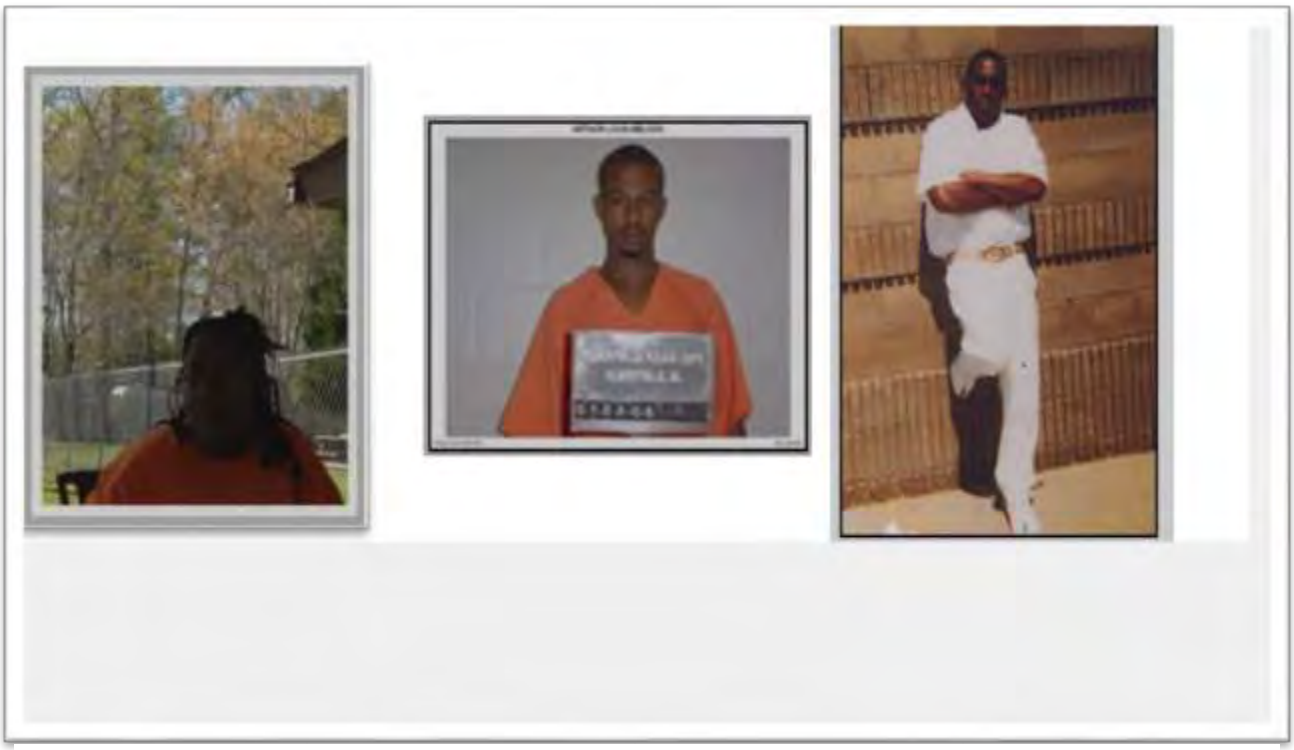

Figure 19 Tamarla, Arthur, and Julio

[166] According to the National Institute of Justice, "Being abused or neglected as a child increases the likelihood of arrest as a juvenile by 59 percent, as an adult by 28 percent, and for a violent crime by 30 percent according to one study that looked at more than 1,500 cases over time (the researchers matched 900 cases of substantiated child abuse with more than 650 cases of children who had not been abused)." *See* http://www.nij.gov/topics/crime/child-abuse/pages/impact-on-arrest-victimization.aspx#note2.

Robert goes to prison at 19 years old.

Robert Melson's Ala. DOC photo

Eventually and predictably, the accumulated traumas and bad influences in Robert's fraught environment won out against modest gains toward normalcy. Robert dropped out of Litchfield High School on January 17, 1991, in the 11th grade. Barely a man, he later ended up in prison for committing a series of non-violent property offenses.

To start, at 19 years old, Robert and another boy were arrested and later convicted for breaking into Coffey's Hunting and Fishing. Police reports reflect that on September 23, 1990 Mr. Melson broke into Coffey's Hunting and Fishing in East Gadsden. Police arrested him inside the store where he was hiding. Robert told the police that he had been drinking and using drugs at the time of the offense. To protect his brothers, Robert later took the blame for breaking into the same gun store for a second time. By May 1991, although Robert had no prior criminal record, the court denied youthful offender status and he was sentenced to seven years in the Alabama Department of Corrections. He served his time at Draper Correctional Facility, Frank Lee Youth Center, and Birmingham Work Release.

He was out of prison by September 1993. But, after his release, Robert remained barely literate and struggled to find work as a convicted felon. He began selling crack cocaine around East Gadsden's housing projects to support himself.

If Robert's record marks him as a criminal, he'd never been a violent one. Instead, folks who knew him then consistently describe him as kind, protective of his loved ones, passive and non-confrontational,[167] although he sold drugs to make his living.[168]

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[167] *See* Arthur Melson Aff. at ¶ 14.
[168] *See* Mark Smith Aff. at ¶ 12; Ex. 35, Tamika Strickland Aff. at ¶ 7; Jerry Black Aff. at ¶ 13; Steve Abel Aff. at ¶ 5; Timothy Melson Aff. at ¶ 13.

As he continued this rapid descent into poor decision-making, he became more involved in criminal activities and more well-known to local authorities as a trouble-maker. By 1994, he had racked up three felony convictions.[169] Little did he know it, but when the Popeye's murders were committed, Robert Melson, then a 22-year old man and no angel, was about "to reap the whirlwind."[170]

By the time of his arrest for this crime, Mr. Melson's mistrust of police was long-standing and deeply rooted.

As one commentator has recently said, "[y]ou just have to be poor in this country to be presumptively suspect; and to be poor and black is to be presumptively criminal."[171] Since they caught him with Mr. Peraita, an hour or so after the surviving victim had identified Mr. Peraita as a suspect in a robbery/homicide, police were relatively certain that Mr. Melson was the other suspect — "the black man." After his arrest, police wasted no time in confronting him with their truth — that he must have done it — and also prodded him with Mr. Peraita's confirmatory, self-serving confession — "Robert did it." Although he had nothing to do with the Popeye's crime and said so, Robert failed to tell the whole truth about what he knew, even in the interest of saving himself.

That behavior begs the question: so, why not? There are many reasons — some at tension with others — but most compelling were the terrible weight of his own 22-year history and its intersection

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[169] *See* Etowah County Circuit Court, CC-94-413.02 (Theft 2nd Degree; Mr. Melson stole cigarettes and beer from an Exxon station with Alvin St. George, his brother, and two other men); Etowah County Circuit Court, CC-94-413.01 (Burglary 3rd Degree; Mr. Melson participated in the burglary of the Exxon station with Alvin St. George, his brother, and two other men); Etowah County Circuit Court, CC-94-413.03 (Possession of Burglar Tools; Mr. Melson was arrested by Gadsden Police on a charge of Possession of Burglar Tools. His brother, Alvin St. George, and two other men were also charged).
[170] *Hosea* 8:7 (King James).
[171] Ellis Isquith, "*A 21st-century segregationist claim": Why Giuliani's race screed is so foolish — and dangerous* (Dec. 12, 2014) http://www.salon.com/2014/12/12/a_21st_century_segregationist_claim_why_giulianis_race_screed_is_so_foolish_and_dangerous/.

with the historically charged relationship between Gadsden police and his East Gadsden community.

For most of his life, Robert had fallen into a protector role in his family. As the eldest male child, he had honored a promise to his mother and had done what he could to protect his siblings from the dangers and violence all around them.[172] When police confronted Robert with evidence of what Mr. Peraita had done, he responded defensively and not cooperatively. He also reacted as he did because he got caught up in a riptide of fatalism about the value of his own life. In that distressed, myopic moment, Robert kept quiet because he figured his life and his freedom were somehow worth less than what he protected. So, Robert did not volunteer all that he knew about what happened on April 15. After that, the police refused to believe any subsequent statement.

Robert's persisting naïveté also played a role. Like many unwitting suspects, he believed telling the police he was innocent would make them less — not more — inclined to believe he was guilty.[173] He foolishly believed that offering up alibis[174] and saying he hadn't done it (without naming Mr. Peraita's accomplice) would prevent him from being convicted.

Robert did not tell the whole truth because of an overweening fear that he would not be believed and that he could not make himself understood by these police who already judged him guilty. He had no trust in the police. In his community and in his experience, police were more adversary than friend, and they had

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[172] *See* Arthur Melson Aff. at ¶ 15 ("When Robert and I were growing up, Robert was the one who looked after me. On the night that our house was on fire, Robert was the person who came to rescue me. Robert taught me to respect people. If Robert saw me disrespecting someone, he would tell me that I should treat that person with respect.").

[173] Kassin, Saul M., *Why Confessions Trump Innocence*, 67 Am. Psychol. 435 (2012)("[R]esearch shows that people are far more likely to believe a suspect's admissions of guilt than his or her denials.") .

[174] *Id.* at 433 (stating that innocent people are more inclined "to offer up alibis freely, without regard for the fact that police may view minor inaccuracies with suspicion").

been singularly unhelpful in resolving the problems he'd faced during his life. And he also knew that the Gadsden police interrogating him were among those who had a history of abusing their power and the people they had sworn to protect.

After all, as Robert knew well, historically and in years immediately preceding the Popeye's crime, these same Gadsden police had unlawfully arrested, beaten, shot and killed black citizens and not been held accountable. The mistrust between Gadsden police and its citizens was decades in the making. In the 1960s, Gadsden police used cattle prods to control civil rights marchers. In 1976, the police shot Robert's uncle Clifton Melson to death. Two years later, after the police shooting of another black man, 100 Ku Klux Klansmen marched through Gadsden's streets "in support of local law enforcement." In 1991, The Gadsden Times reported that four black citizens had died while in the custody of Gadsden police. As Spencer Thomas, a columnist for The Gadsden Times wrote in 1993, police brutality was "not an isolated occurrence in the All-American city" and these "repeated white police beatings of African-Americans . . . [seemingly had] everything to do with race."

Robert was an heir to this troubled history. Doubtless, there were members of the Gadsden police force who were not racially biased, but Robert had not encountered many of them before the Popeye's crime, and certainly not after.

So, when Robert told police from the outset that he wasn't guilty and they mocked and disbelieved him, they satisfied his already low expectations.

Robert expressed this perception during his sentencing, stating in relevant part that:

> I ain't done nothing. The only reason I'm here is due to the fact that I pissed [the police] off on the 16th and they told me they was going to go for me. [...] I still, you know, have great respect for the law. I have respect for it, but

> there are certain individuals behind the law that I feel ought not to be in the position that they are in.[175]

This too was a vital part of Robert's personal truth. Perhaps it was the specter of being sentenced to death that finally empowered him to tell it.

Conclusion

Conventional wisdom suggests that when a condemned inmate has reached this stage, there is substantial certainty about guilt, as the case has wended its way through multiple levels of judicial review. As we have shown you, however, this is a unique case which was subject to only a perfunctory, biased police investigation.

And because he has had a conventional post-conviction appeal, Mr. Melson has been denied the rigorous due process protections normally afforded death-sentenced inmates. As a result, although lingering doubts about Mr. Melson's guilt remain, all attempts to demonstrate his innocence have been foreclosed. "In a case such as this—where a life hangs in the balance—it is more important than ever that justice not only be done, but that justice also be seen to be done."[176]

On April 15, 1994, as his co-defendant has avowed repeatedly, Robert Melson committed no capital murder. Now, as an innocent man with no avenue for appeal remaining, executive clemency is Mr. Melson's last, best hope for relief. As the United States Supreme Court has recognized:

> Executive clemency has provided the "fail safe" in our criminal justice system. . . . It is an unalterable fact that our judicial system, like the human beings who administer it, is fallible. But history is replete with examples of wrongfully convicted persons who have been

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[175] (R. 2194-95).

[176] *Bacon v. Lee*, 225 F.3d 470, 495 (4th Cir. 2000) (King, J., dissenting).

pardoned in the wake of after-discovered evidence establishing their innocence.[177]

Granted, the courts reviewing this case, when they have elected do so, found nothing in the law to reverse the conviction or death sentence. But for the reasons we have stated here, Mr. Melson has lacked judicial recourse.

We do not ask you to make a legal judgment. Rather, in evaluating this petition, we acknowledge your tremendous power to "correct injustices that the ordinary criminal process seems unable or unwilling to consider."[178] "Executive clemency in capital cases is distinctive in that it is the only power that can *undo death*--the only power that can prevent death once it has been prescribed and, through appellate review, approved, even if erroneously, as a legally appropriate punishment."[179]

Governor, substantial evidence shows Mr. Melson did not commit this crime. At the very least, this evidence shows you cannot be certain that Mr. Melson is the guilty party. Please grant Mr. Melson clemency and commute his sentence to life without the possibility of parole.

Thank you for your time and consideration – for agreeing to hear and see Mr. Melson's entreaties to your compassion and for justice. We would appreciate an opportunity to make this presentation in person, so that if there is any additional information that you would find useful, we could quickly provide it.

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[177] *Herrera v. Collins*, 506 U.S. 390, 415 (1993).
[178] *Harbison v. Bell*, 566 U.S. 180, 206 n.10 (2009).
[179] Austin Sarat, *Memorializing Miscarriages of Justice: Clemency Petitions in the Killing State*, 42 Law & Soc'y Rev. 183 (2008); *see also Kansas v. Marsh*, 548 U.S. 163, 193 (2006) (Scalia, J., concurring) ("Reversal of an erroneous conviction on appeal or on habeas, or the pardoning of an innocent condemnee through executive clemency, demonstrates not the failure of the system but its success. Those devices are part and parcel of the multiple assurances that are applied before a death sentence is carried out.").

Respectfully,

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