IN THE CIRCUIT COURT FOR MONTGOMERY COUNTY
STATE OF MISSISSIPPI

CURTIS GIOVANNI FLOWERS,
Petitioner,

v. **Case Number _____**

STATE OF MISSISSIPPI,
Respondent.

Supreme Court No. 1015-DR-00591-SCT
Montgomery County No. 2003-0071-CR

PETITION FOR POST-CONVICTION RELIEF

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COMES NOW, CURTIS GIOVANNI FLOWERS, Petitioner, and asks this Court, pursuant to the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution; Article 3, §§ 14, 26, and 28 of the Mississippi Constitution; as well as other laws set forth below, to grant post-conviction relief in his case.

INTRODUCTION

After six trials and four appeals over a nearly twenty-year period, one might assume that the prosecutions of Curtis Flowers had run its factual course. Nothing could be further from the truth. After many months of investigation—that took the undersigned from Mississippi to Massachusetts, and points in between, and that included an exhaustive review of the District Attorney's pattern and practice of selecting jurors for capital prosecutions—what emerges is a completely different, and much more accurate, portrait of a case whose tortured history is unparalleled.

Curtis Flowers is innocent of the Tardy Furniture Store murders. Newly discovered evidence demonstrates that the State succeeded in convicting Mr. Flowers—on its sixth try, no less—largely through prosecutorial misconduct, including false testimony by key law enforcement witnesses, suppression of material evidence, egregious racial discrimination in jury selection, and reliance on false and discredited forensic evidence. Mr. Flowers was entitled to have his guilt or innocence adjudicated on the basis of reliable evidence and truthful testimony. The State of Mississippi violated that right, in repeated and shocking ways.

The State's case against Mr. Flowers was weak to begin with. No physical evidence ever connected Mr. Flowers to the crime. Investigators recovered no DNA, fingerprints, or other crime scene evidence that could be linked to Mr. Flowers. What little evidence they did collect—seven projectiles fired from a never-recovered .380 gun; several live rounds found on

the floor indicating that the gun jammed during the murders; and a bloody partial shoeprint from a Fila Grant Hill shoe that was never recovered—did not connect Mr. Flowers to the crimes. It was only with the testimony of numerous witnesses, each of whom claimed to have seen Mr. Flowers in various places around town on the morning of July 16, 1996, that the State was able to prop up its case. But there were two key problems with this testimony. First, most of these eyewitnesses did not come forward until weeks after the crimes, after the State had publicly focused on Mr. Flowers and had offered a $30,000 reward for information. When these witnesses did finally present themselves to law enforcement, they gave hopelessly conflicting stories of when they saw Mr. Flowers, where, and what he was wearing. And second, testimony from eyewitnesses pointed at least as strongly to another perpetrator, Doyle Simpson, whose gun the State claimed was the murder weapon. One of Mr. Simpson's own family members saw him driving toward Tardy's on the morning of July 16, when Mr. Simpson was supposedly at work, and Simpson's car was seen outside of Tardy Furniture shortly before the murders. In sum, the evidence against Mr. Flowers was extremely thin.

Since Mr. Flowers' sixth trial and appeal, a cache of new evidence has come to light that not only topples the State's tenuous case against Mr. Flowers, but also reveals the lengths to which the State was willing to go to secure a conviction. Specifically, we now know that the perpetrators of a string of robbery-murders nearly identical to the Tardy murders traveled to Mississippi at the time of the Tardy murders, wearing Fila shoes and wielding a .380 handgun that tended to jam, and returned to their home state of Alabama with cash they didn't have before they left.

More troubling are the lengths to which the State went to hide this evidence. New evidence proves that the State of Mississippi considered and pursued these individuals as

suspects. But the prosecution not only hid all traces of its investigation of these alternative suspects from the defense; they also presented demonstrably false testimony from multiple law enforcement witnesses to cover up that investigation. Lieutenant Wayne Miller and Investigator Jack Matthews testified, repeatedly and emphatically, that the State of Mississippi investigated no other suspects. And other members of the prosecution team, including District Attorney Doug Evans and Investigator John Johnson, likewise made on-the-record representations to the Court that the State never considered any suspect other than Curtis Flowers. We now know this was false. Of course, we don't know that these other suspects committed the Tardy murders. But we do know that the jury was not presented with that plausible alternative explanation. To the contrary, the jury was told by State witnesses that Mr. Flowers was the only suspect ever considered.

This false testimony and suppression of critical evidences warrants a new trial on its own. But there is more. Since Mr. Flowers' trial, new evidence has come to light showing that the prosecution's star witness, Patricia Sullivan-Odom—the only witness whose testimony purported to link Mr. Flowers to the crime scene—was under a 13-count federal tax fraud indictment at the time she gave her testimony. The prosecution knew (or should have known) this information, but suppressed it. And multiple sources of new evidence confirm that two other key prosecution witnesses—Odell Hallmon and Clemmie Flemming, who, respectively, gave damning testimony that Mr. Flowers had confessed to the murders and that Mr. Flowers had been spotted sprinting away from Tardy Furniture shortly after the murders—fabricated their testimony.

As for the forensic evidence adduced at Mr. Flowers' trials, new evidence reveals that the "scientific" ballistics and shoeprint evidence the State relied upon was unreliable junk science

that never should have been presented to the jury. Contrary to the State's experts' contentions, there was no scientifically valid basis to claim that the projectiles recovered from the crime scene were fired from Doyle Simpson's gun, nor was it possible to claim that the bloody shoeprint found at the scene was made by a size 10 1/2 shoe.

Other errors infected Mr. Flowers' trial, too. As he had done in Mr. Flowers' prior trials, District Attorney Evans exercised peremptory strikes on the basis of race in violation of Mr. Flowers' equal protection rights. The trial record itself is replete with evidence proving this. But to the extent the State's motivation for its exercise of peremptory challenges was a close question, new evidence adduced since Mr. Flowers' trial resolves it. Specifically, a newly conducted statistical analysis of Mr. Evans' peremptory strikes across all capital cases he has tried for which data were available—13, in total—reveals that he is ***eight times*** more likely to strike a black qualified venire member than a white qualified venire member. In the prosecution of Curtis Flowers, Mr. Evans' discriminatory strikes were even more aggressive. In those trials, Mr. Evans was ***more than 20 times*** more likely to strike black qualified venire members than white qualified venire members. This is not the product of happenstance.

New evidence also demonstrates that the special venire assembled for Mr. Flowers' sixth trial was tainted in other ways. Specifically, several venire members have disclosed that venire members spoke with victims' family members at the courthouse during the *voir dire* process; that venire members openly discussed the case during that process, sharing sentiments such as "why we up here, he guilty"; and that certain white venire members made abhorrently racist comments, causing several black venire members to "self strike" off of the jury.

Further, evidence unearthed since Mr. Flowers' sixth trial and appeal demonstrates that he is intellectually disabled. This evidence, which was never presented at trial, is critical not

only because it renders him ineligible for the death penalty, but also because it casts further doubt on the State's theory of the crime. It is hard to imagine a highly-efficient, execution-style quadruple homicide like the Tardy murders being committed by any single individual, but it is utterly implausible to think that someone like Mr. Flowers—who has a tested IQ of 72, was highly accident prone throughout his childhood and young adult life, and struggled to complete complex tasks—could have done it.

If all these egregious instances of State misconduct and other errors were not enough to stack the deck against Mr. Flowers beyond repair, he also received seriously deficient assistance of counsel. Among their many errors, trial counsel failed to present evidence of Mr. Flowers' intellectual disability and other readily available mitigation evidence, evidence that would have discredited the prosecution's highly influential ballistics and shoeprint evidence, evidence that a rusty .380 was found buried undernaeath a house near Tardy's in 2001 but never tested or disclosed by the State to defense counsel, and other available evidence that would have discredited key prosecution witnesses.

* * * * *

The State's case against Mr. Flowers rested on weak foundations. To the extent it was sufficient to support a conviction—a dubious proposition—there is no question it would have buckled under the weight of the new evidence that has come to light since Mr. Flowers' trial and appeal. Each of those new pieces of evidence independently establishes that, if introduced at a new trial, the outcome of this case would be different. Viewed in combination, the effect is staggering.

PROCEDURAL HISTORY

In 1997, a Montgomery County Grand Jury returned four indictments against Petitioner, each bearing a separate charge number and each charging him with a separate count of capital murder relating to the murder of four people at the Tardy Furniture Store in Winona on the morning of July 16, 1996—Bertha Tardy (Montgomery County Case No. 7447), Robert Golden (Case No. 7448), Carmen Rigby (Case No. 7449), and Derrick Stewart (Case No. 7450).

Having separated the murder into four indictments, the State selected the Bertha Tardy indictment, Case No. 7447 (*Flowers I*), for the first trial. Petitioner pled not guilty and was represented at trial by John M. Gilmore and Billy J. Gilmore. He was tried by a jury, found guilty, and sentenced to death on October 17, 1997. Petitioner appealed his conviction and sentence in *Flowers I.* He was represented by James Craig and Keith Ball.

While that appeal was pending, the State proceeded to trial again, this time on the Derrick Stewart indictment, Case No. 7450 (*Flowers II*). At this second trial, Petitioner was represented by different defense counsel, Chokwe Lumumba and Harvey Freelon. On March 31, 1999, Petitioner was convicted and sentenced to death.

On December 21, 2000, the Mississippi Supreme Court reversed Petitioner's conviction and sentence in *Flowers I* on the basis of prosecutorial misconduct relating to, *inter alia*, introduction of evidence concerning other separately indicted crimes, arguing facts not in evidence, improper cross-examination of Petitioner, and improper comment by the trial court. *Flowers v. State*, 773 So. 2d 309 (Miss. 2001).

Petitioner appealed his conviction and sentence in *Flowers II*. He was represented on appeal by James Craig and Keith Ball. On April 3, 2003, the Mississippi Supreme Court reversed Petitioner's conviction and sentence in *Flowers II* on the basis of the same kinds of

prosecutorial misconduct as occurred in *Flowers I*, including introduction of evidence concerning other separately indicted crimes, improper attempts to impeach witnesses without a factual basis to do so, and gross misstatements of the evidence by the prosecution during closing argument. *Flowers v. State*, 842 So. 2d 531 (Miss. 2003).

Both *Flowers I* and *Flowers II* were remanded to the Montgomery County Circuit Court for further proceedings not inconsistent with the Mississippi Supreme Court decisions. On remand, the State abandoned its effort to charge and try the four murders separately. The prosecution against Petitioner was renumbered as Montgomery County Circuit Court Case No. 2003-0071-CR, and all subsequent trials dealt with all four charged capital murders. Petitioner was again tried by a jury and, on February 11, 2004, was convicted of four counts of capital murder and sentenced to death (*Flowers III*). Petitioner was represented at trial by Ray Charles Carter and André De Gruy.

Once again, Petitioner appealed his convictions and sentences, this time represented by David Voisin and André De Gruy. On February 1, 2007, the Mississippi Supreme Court again reversed Petitioner's convictions and sentences on the basis of egregious prosecutorial misconduct, including overt racial discrimination by the prosecution in its exercise of peremptory challenges, and remanded to the Montgomery County Circuit Court for a new trial. *Flowers v. State*, 947 So. 2d 910, 939 (Miss. 2007).

Petitioner was tried a fourth time in November 2007 (*Flowers IV*). He was again represented by Ray Charles Carter and André De Gruy. At this fourth trial, the State elected not to seek the death penalty. That trial ended in a mistrial when the jury was unable to reach a verdict. The State of Mississippi then tried Petitioner a fifth time in September 2008 (*Flowers V*). This time, the State reverted to seeking the death penalty. Petitioner was represented by

Ray Charles Carter, André De Gruy, and Alison Steiner. Again, the jury was unable to reach a verdict on guilt or innocence, and Petitioner's fifth trial ended in a mistrial.

Undeterred, the State pressed forward, trying Petitioner for a sixth time in June 2010 (*Flowers VI*). Petitioner was represented by Ray Charles Carter, André De Gruy, and Alison Steiner. On June 19, 2010, the jury found Petitioner guilty of four counts of capital murder and sentenced him to death. Petitioner appealed his convictions and sentences. On appeal, he was represented by Sheri Lynn Johnson, Keir M. Weyble, and Alison Steiner. A divided panel of the Mississippi Supreme Court affirmed his convictions and sentences on November 13, 2014, and denied rehearing on March 26, 2015. *Flowers v. State*, 158 So. 3d 1009 (Miss. 2014), *reh'g denied* (Mar. 26, 2015). Three justices dissented. Justice Dickinson filed a dissenting opinion with which Justices King and Kitchens joined. Justice King filed a dissenting opinion with which Justices Dickinson and Kitchens joined.

On June 23, 2015, Petitioner filed a petition for certiorari with the United States Supreme Court, seeking review of his convictions and sentences. *See Flowers v. State*, No. 14-10486 (*petition for cert. filed* June 23, 2015). The State filed its brief in opposition on September 11, and Petitioner filed his reply on September 28. That petition remains pending.

On April 2, 2015, the Mississippi Supreme Court remanded the matter to the Circuit Court of Montgomery County for the appointment of post-conviction counsel. Thereafter, on May 22, the Office of Capital Post-Conviction Counsel ("OCPCC") filed a Notice of Selection of Counsel, pursuant to Mississippi Code § 99-39-117, informing the Court that W. Tucker Carrington and William McIntosh, attorneys at the Mississippi Innocence Project, had agreed to serve as *pro bono* counsel to Petitioner. The State did not object, and on June 24, the Circuit Court determined that Mr. Carrington and Mr. McIntosh were qualified *pro bono*

counsel and approved of their representation of Petitioner. On August 25, the Mississippi Supreme Court admitted Jonathan Abram, Benjamin Lewis, and Kathryn Ali *pro hac vice* to represent Flowers, again without objection by the State.

Months later, on October 20, 2015, the State filed a motion challenging the qualifications of all five of Petitioner's post-conviction counsel—W. Tucker Carrington, William McIntosh, Jonathan Abram, Benjamin Lewis, and Kathryn Ali—under Rule 22 of the Mississippi Rules of Appellate Procedure.[1] At a January 29, 2016 hearing before the Circuit Court for Montgomery County, Judge Loper found that Mr. Carrington, Director of the Mississippi Innocence Project and lead counsel on Petitioner's case, was "[e]minently qualified to represent Mr. Flowers;" that the other attorneys who are part of Petitioner's post-conviction team could work under Mr. Carrington's supervision; and that Petitioner was constitutionally entitled to his counsel of choice (here, Messrs. Carrington, McIntosh, Abram, and Lewis, and Ms. Ali). *See* Hr'g Tr. 19-22, *Flowers v. State*, No. 2015-DR-005910-SCT (Miss. Cir. Jan. 29,

[1] As noted, the State did not object to the OCPCC's Notice of Selection of Counsel, which stated, correctly, that "Mr. Carrington will serve as lead counsel for Flowers, and he is in all respects qualified pursuant to Mississippi Rule of Appellate Procedure 22 to serve as lead counsel in this case." Notice of Selection of Counsel at *1-2, *Flowers v. State*, No. 2015-DR-005910-SCT (Miss. May 22, 2015). Nor did the State object to or appeal the Circuit Court's June 24 determination that "Mr. Carrington and Mr. McIntosh are qualified private counsel," or its "approv[al] of their representation of Mr. Flowers on a *pro bono* basis." Order on Finding of Indigency and Appointment of Counsel, *Flowers v. State*, No. 2015-DR-005910-SCT (Miss. June 24, 2015). And when Messrs. Abram and Lewis and Ms. Ali sought admission *pro hac vice* to represent Petitioner, the State again stayed silent. It was not until months had gone by and Petitioner's post-conviction legal team had devoted more than 3,000 hours and expended more than $1.2 million in attorneys' fees (excluding tens of thousands more dollars in investigative costs and other expenses) in preparing Petitioner's claims for post-conviction relief that the State decided it was necessary to assess the qualifications of Petitioner's counsel. And at the time the State filed its disqualification motion, Petitioner's Motion for Leave to Proceed in the Trial Court with a Petition for Post-Conviction Relief was due in just a few short weeks. Although Petitioner ultimately received an extension to file that Motion, the State's Disqualification Motion was a transparent attempt to unconstitutionally strip Petitioner of his chosen counsel, with whom he had developed a relationship of trust and confidence.

2016) (hereinafter "Jan. 2016 Hr'g Tr."). On March 7, 2016, David Voisin entered an appearance on Mr. Flowers' behalf.[2]

PRESERVATION OF ISSUES

Mississippi Code § 99-39-21(6) requires Petitioner to allege in his Petition such facts as are necessary to demonstrate that his claims are not procedurally barred under that section. These claims are not barred, for the reasons explained below.

"Post-conviction proceedings are for the purpose of bringing to the trial court's attention facts not known at the time of judgment." *Williams v. State*, 669 So. 2d 44, 52 (Miss. 1996) (quoting *Smith v. State*, 477 So. 2d 191, 195 (Miss. 1985)); *see also* Miss. Code. § 99-39-5. Post-conviction proceedings have long been considered the appropriate vehicle for addressing "issues or errors which in practical reality could not be or should not have been raised at trial or on direct appeal." Miss. Code § 99-39-3(2); *see also Brown v. State*, 798 So. 2d 481, 491 (Miss. 2001). And the post-conviction relief statute authorizes courts to consider evidence that was not reasonably available at the time of trial. Miss. Code § 99-39-5. Nearly all of Petitioner's claims are based upon facts not known at the time of trial and thus not present in the record, or upon facts which could not have been raised on direct appeal due to the impossibility at the time of supplementing the record to include additional facts not known at the time of trial.

As explained in Petitioner's discussion of his specific claims below, claims alleging the presentation of false or misleading evidence, or the suppression of material exculpatory and impeachment evidence, could not have been discovered prior to post-conviction proceedings. Petitioner uncovered these grounds only as a result of investigation efforts conducted after

[2] Mr. Voisin entered his appearance after an unexpected personal matter arose for Mr. Carrington, requiring participation of additional Mississippi counsel.

Petitioner's conviction was affirmed on appeal. *See Kyles v. Whitley*, 514 U.S. 419 (1995); *Guerra v. Johnson*, 90 F.3d 1075 (5th Cir. 1996); *Manning v. State,* 884 So. 2d 717 (Miss. 2004) (remanding for post-conviction hearing on multiple allegations of state misconduct); *Malone v. State*, 486 So. 2d 367, 369 (Miss. 1986).

Petitioner's claim under *Atkins v. Virginia*, 536 U.S. 304 (2002), similarly is properly raised on post-conviction review because the facts supporting the claim were not discovered until after Petitioner's trial and appeal and because the Uniform Post-Conviction Collateral Relief Act allows Mississippi courts to grant relief where, as here, "the sentence exceeds the maximum authorized by law." Miss. Code §§ 99-39-5(1)(c) and (d).

Likewise, Petitioner's claims that trial counsel were ineffective rely on facts unavailable at the time of direct appeal. Post-conviction proceedings therefore are the proper vehicle for such claims. *See Brown v. State*, 749 So. 2d 82 (Miss. 1999); *Davis v. State*, 743 So. 2d 326 (Miss. 1999).

Where, as here, the Petitioner is under a sentence of death, the Mississippi Supreme Court's statutory responsibility requires it to go beyond the specific points raised on direct appeal and determine whether the death sentence is imposed under influence of "passion, prejudice or any other arbitrary factor." Miss. Code § 99-19-105(3)(a). The claims in this Petition relate to such arbitrary factors, including egregious prosecutorial misconduct and the consideration of unlawful and improper evidence, which improperly contributed to Petitioner's convictions and death sentences. Because the Court must go beyond the specific points raised on direct appeal to fulfill this responsibility, it may not refuse to review a claim simply because of any procedural defect associated with direct appeal.

Moreover, the Mississippi Supreme Court has a venerable tradition of applying less stringent procedural rules in death penalty cases to ensure the interests of justice and in an "awareness of the uniqueness and finality of the death penalty." *Williams v. State*, 445 So. 2d 798, 810 (Miss. 1984); *see also Randall v. State*, 806 So. 2d 185 (Miss. 2001); *Conerly v. State*, 760 So. 2d 737, 740 (Miss. 2000) ("This Court has recognized an exception to procedural bars where a fundamental constitutional right is involved.") (quoting *Matson v. State*, 750 So. 2d 1234, 1237 (Miss. 1999)); *Rowland v. State*, 42 So. 3d 503 (Miss. 2010); *Gilliard v. State*, 614 So. 2d 370, 375 (Miss. 1992) ("This Court has looked beyond a procedural bar in instances where the error was of constitutional dimensions."); *Smith v. State*, 477 So. 2d 191 (Miss. 1985); *Cole v. State*, 666 So. 2d 767, 782 (Miss. 1995); *Pinkney v. State*, 602 So. 2d 1177 (Miss. 1992); *Clemons v. State*, 593 So. 2d 1004, 1005 (Miss. 1992). And, critically, the Mississippi Supreme Court has held that procedural bars will not prevent consideration of issues on the merits "where the errors at trial affect fundamental rights." *Gallion v. State*, 469 So. 2d 1247, 1249 (Miss. 1985) (citing *Brooks v. State*, 46 So. 2d 97 (Miss. 1950)). The claims raised in this Petition implicate "fundamental rights"—most particularly, the right not to be convicted and sentenced to death except in accordance with legal and constitutional principles. *See Furman v. Georgia*, 408 U.S. 238 (1972). Thus, even if the Court believes that some of Petitioner's claims might have been brought sooner—and they could not have been—failure to consider these claims would result in a fundamental miscarriage of justice and would violate Petitioner's constitutional rights. *See Smith v. Murray*, 477 U.S. 527, 538 (1986); *Murray v. Carrier*, 477 U.S. 478, 496 (1986); *Sawyer v. Whitley*, 505 U.S. 333, 352 (1992).

STANDARD OF REVIEW

The Mississippi Supreme Court's well-established standard for review of capital convictions and sentences is "one of 'heightened scrutiny' under which all *bona fide* doubts are resolved in favor of the accused." *Flowers I*, 773 So. 2d at 317 (internal cites omitted); *see also Chamberlin v. State*, 989 So. 2d 320, 330 ¶ 22 (Miss. 2008) ("The thoroughness and intensity of review are heightened in cases in which the death penalty has been imposed."); *Randall*, 806 So. 2d at 200 ("[T]he rule in this State is clear: death is different. In capital cases, all *bona fide* doubts are resolved in favor of the defendant"). Thus, "what may be harmless error in a case with less at stake becomes reversible error when the penalty is death." *Flowers I*, 773 So. 2d at 31 (internal cites omitted).

FACTUAL BACKGROUND

Sometime before 9:30 a.m. on July 16, 1996, some person or persons entered Tardy Furniture Store in Winona, Mississippi, shot and killed three employees and the store's owner, and stole approximately $389 in cash from the register. Tr. 1834-35[3], 2659; State Trial Ex. S-127 at 8 (Prior Testimony of Sam Jones (Nov. 29, 2007)), *Flowers VI* (hereinafter "SJ Tr."). The shots were precise: three victims were shot once in the head, and the fourth victim was shot twice in the head, although either shot would have been fatal. Tr. 2013, 2021, 2023. The victims were found in the store, where they had been killed. Three of the victims—Derrick Stewart, Carmen Rigby, and Robert Golden—were found roughly in a triangle, separated from each other by as many as five feet, while the fourth victim, Bertha Tardy, was found more than fifteen feet away from the others. *See* Trial Ex. S-39, S-40, S-51 (Sketch of Crime Scene and

[3] Unless otherwise noted all "Tr." citations refer to the trial transcript of *Flowers VI (State v. Flowers*, No. 2003-0071-CR (Miss. Cir. 2010)).

Key Measurements of Melissa Schoene), *Flowers VI*. There was no evidence that any of the victims had been restrained at any time during the robbery or murders. Thus, either a single perpetrator managed to kill four unrestrained victims with precision shots despite their separation by moderate to substantial distances, or the Tardy murders were not the work of a lone gunman.

No physical evidence connected Petitioner to the crime. Investigators recovered no DNA, fingerprints, or other scientific or trace evidence that could be linked to Mr. Flowers, and they found no bloody clothing or other materials that even arguably connected him to the crime scene. The scant physical evidence recovered from the scene also could not tie Petitioner to the crime: some bullets fired from a never-recovered .380 caliber handgun; several live rounds found on the floor indicating that the gun repeatedly jammed during the murders; and a bloody, partial shoeprint made by a never-found Fila Grant Hill athletic shoe.

Nor did the prosecution have any evidence supporting a plausible motive for this horrific crime. The State posited that Curtis Flowers—a 26-year old gospel singer with no criminal record and an IQ of 72—was driven to commit a quadruple murder because he was angry over having been let go from a minimum wage job at a furniture store where he worked for a total of three and a half days. Tr. 2494-95. Even if that far-fetched theory could have been considered a motive, there was no evidence supporting it. The evidence at trial was that, while working on July 3, 1996, Mr. Flowers accidentally dropped and damaged several batteries after failing to secure them to a truck. Tr. 2495. He reported the damage to store owner Bertha Tardy, who told him he might "have to pay for them out of [his] check" if they could not otherwise be replaced. *Id.* But despite the battery incident, Bertha Tardy graciously loaned Mr. Flowers thirty dollars before he left work that day. Tr. 2496-97. The store was closed for the July 4 holiday and, as he had done in other jobs, Mr. Flowers failed to show up for work during the next

three business days. Tr. 2496. When he called the store the following week to ask whether he should come in, Bertha Tardy informed him that he no longer had a job, and that most of his paycheck for the few days he had worked "was pretty much covered up with them batteries . . . That was it." *Id.*

Absent from the trial record is any evidence or testimony from even a single witness that Mr. Flowers ever expressed anger at Tardy Furniture, its owner, or other employees of the store. Nor was there any evidence that Mr. Flowers was upset or disappointed by Bertha Tardy's reasonable decision to let him go after he failed to show up for work several days in a row. The record was likewise devoid of any evidence that Mr. Flowers had any history of violence, mental health problems, or criminal record of any kind. Thus, the uncontroverted evidence at trial was that Curtis Flowers was a man who had spent his entire life as a law-abiding, stable, non-violent citizen, and who reacted to the loss of his short-term job in a manner consistent with that history.

To make its case against Curtis Flowers at trial, the State relied on five categories of evidence: (1) testimony that a .380 caliber gun was stolen from Doyle Simpson's car at the Angelica Factory parking lot on the morning of the crime; (2) a shoebox found at Petitioner's girlfriend's home; (3) a single particle of gunshot residue found on Petitioner's hand after he had ridden in a police car and spent time in a police station; (4) inconsistent testimony from eyewitnesses, most of whom did not come forward until months after the murders, after the State publicized a $30,000 reward for information; and (5) testimony of a jailhouse informant and self-confessed perjurer that, despite the fact that Mr. Flowers has maintained his innocence throughout six prosecutions and turned down repeated plea offers for a life sentence, Petitioner confessed to him.

1. Doyle Simpson's .380

Among the State's most crucial theories was its claim that the murders were committed with a gun stolen from Doyle Simpson's car. On the morning of the murders, Doyle Simpson reported that his .380 handgun had been stolen from the glove compartment of his car while parked outside Angelica Garment Factory, where he worked. The State claimed at trial that this was the murder weapon. But the evidence revealed at least three critical defects in this theory.

First, Mr. Simpson did not notice that the gun was missing until around 11:00 a.m. *See* Tr. 2334-35. And his testimony—at all six of Petitioner's trials—suggested that the gun did not go missing until at least 10:25 a.m.[4] Mr. Simpson testified that he went out to his car at "about 9:15" to get his breakfast and again at "about ten-something. Ten - - about 10:25" to let his windows down, and did not notice anything unusual about his car at either time. Tr. 2333-35. It was not until he went back out to his car a third time, after 10:25 a.m. at "something-to-11," that he noticed signs of a break-in. Tr. 2334-36. Thus, one of the few consistent facets of Doyle Simpson's testimony across the six trials was that his gun likely was not stolen until nearly an hour after the Tardy murders occurred.[5]

Second, the State never recovered the gun, so they could not perform forensic analysis comparing bullets found at the scene with bullets shot from a subject gun in a controlled test environment. Instead, they visited Mr. Simpson's mother's house and dug several bullets out of a fencepost that Mr. Simpson used for target practice. *See* Tr. 2520. The State presented these

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[4] *See also Flowers V* Tr. 404; *Flowers IV* Tr. 393*; Flowers III* Tr. 1337-38; *Flowers II* Tr. 1810; *Flowers I* Tr. 657-58.

[5] Sam Jones testified that he first discovered the crime scene at "between 9:15 and 9:30." SJ Tr. 6-7. And the 911 call in which the Tardy murders were first reported to law enforcement occurred at 10:21 a.m. *See* Ex. 1 (Winona Police Dep't Radio Log (July 16, 1996)); *see also* Tr. 1834. Chief Johnny Hargrove was at the crime scene by 10:22. *See id.*; Tr. 1834-35.

fencepost bullets to its own ballistics analyst, Steve Byrd, who compared them to bullets recovered at the crime scene and reported that it was not possible to conclude that the two sets of bullets were fired from the same gun. Dissatisfied with its own ballistics expert, the State went shopping for another, ultimately hiring David Balash. Mr. Balash opined that, unlike the State's expert, he could match the bullets using toolmark examination evidence. *See* Tr. 2133-48—a methodology that has been discredited and abandoned by the Federal Bureau of Investigation, Department of Justice, and many experts in the field.

Third, the State offered no evidence that Petitioner knew that Mr. Simpson kept his gun in his car. The evidence at trial was all to the contrary. Mr. Simpson testified that he did not usually keep his gun in the glove compartment, and that "there was no way that [Mr. Flowers] would have known that gun was in the car that particular morning." Tr. 2358. In the face of this testimony from the owner of the gun, the State relied on the testimony of a bystander, Katherine Snow, who said that she had seen Mr. Flowers leaning up against Mr. Simpson's car at approximately 7:15 a.m. on the morning of the murders. Tr. at 2221-22. But even though Ms. Snow claimed that she was certain Mr. Flowers was the person she saw, and "figured it was [Mr. Flowers]" who committed the Tardy murders, she did not tell her co-workers or the police that she had seen him until a month after the crime, and several weeks after a $30,000 reward for information—a sum roughly double the annual per capita income of Montgomery County[6]—had

[6] *See* United States Census Bureau, *Quick Facts: Montgomery County, MS,* http://www.census.gov/quickfacts/table/INC110214/28097,00 (last visited Mar. 15, 2016); *see also* United States Census Bureau: *Per Capita Income by County*, https://www.census.gov/hhes/www/income/data/historical/county/county3.html (last visited Mar.15, 2016) (listing the per capita income of Montgomery County in 1989 as $7,660).

been widely publicized. Tr. at 2224-25, 2235; C.P. 2237 (CD).[7] And based on the facts reported by Mr. Simpson, the gun could not have been stolen at 7:15 a.m., when Ms. Snow says she saw Mr. Flowers, because it was still there when he went to his car three hours later.

Undeterred by the timing of the supposed theft (after 10:25 a.m.) or the thin ballistics match evidence, the State pressed ahead with its theory at trial that Petitioner had walked across town to Mr. Simpson's car to steal a gun he did not know was there, and then used it to commit the Tardy murders sometime before 9:30 a.m., when the gun was still in Mr. Simpson's car.

2. The Bloody Partial Shoeprint

The State also relied heavily on a bloody partial shoeprint found at the scene of the crime, which was later determined to have been made by a Fila Grant Hill shoe. With respect to this evidence, the State's theory at trial was simple: the shoeprint found at the scene was made by the killer; Mr. Flowers could have made the shoeprint; and, therefore, Mr. Flowers must have been the killer. However, as with the State's ballistics theory, there were several gaps in the evidence. First, there was ample time between when the murders were first discovered and when law enforcement arrived at the scene for someone other than the killer to leave the shoeprint. Sam Jones, who first discovered the crime scene, testified that he arrived at the crime scene "between 9:15 and 9:30," SJ Tr. 8, and did not see the shoeprint at that time, *id.* 22-24, 34. Law enforcement did not arrive on the scene and see the bloody shoeprint until at least fifty minutes later. *See* Tr. 1834-35 (Chief Hargrove testifying that he arrived on the scene at "10:20-something"). Given that Tardy Furniture was located in a busy downtown area, and

[7] The clerk's papers are cited by page number as "C.P." and were made a part of the trial record in *Flowers v. State*, No. 2010-DP-01348-SCT (Miss. July 1, 2013). *See* C.P. 2237 CD in folder name: "Photos from Envelopes #2,3,4 and B & W shoeprint."

that the relevant gap was during Tardy's normal business hours, it is well within the realm of possibility that a person other than the killer could have entered the store and left the bloody shoeprint.

Second, even if the shoeprint was left by the perpetrator, shoeprints are not fingerprints. Anyone could have been wearing Fila Grant Hill shoes that day. They were hugely popular in the 1990s. *See* Tr. 2620. And the closest investigators ever came to linking Mr. Flowers to shoes that might have made the shoeprint was their seizure of an empty shoe box labeled "MS Grant Hill No. 2 mid FILA, red, navy and blue, size ten and a half," from the home of Petitioner's girlfriend, Connie Moore. Tr. 2106. The State enlisted an expert to testify that the bloody shoeprint at the scene of the crime was "consistent" with a size 10 1/2, and then seized on this expert testimony to state, definitively, to the jury during closing argument that the partial shoeprint was made by a size 10 1/2 Fila shoe. Tr. 3196 ("They could tell what size it was. It was size 10 1/2. So you have got a special kind of shoe of a certain size.").

Third, Connie Moore testified that the shoes had belonged to her son, not Mr. Flowers. Tr. 2856. That was borne out by the State's own investigators, who lifted several latent prints "of value" from the shoebox, none of which matched Curtis Flowers. Tr. 2696. And of the five witnesses who allegedly saw Petitioner on the morning of the Tardy murders and described his clothing, only one—Patricia Sullivan-Odom[8], who we now know had a substantial incentive to falsify her testimony[9]—suggested that Petitioner was wearing a pair of Fila shoes. Tr. 2046.

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[8] Ms. Odom is referred to by different last names "Patricia Sullivan Odom" in *Flowers VI* and "Patricia Hallmon Sullivan" in *Flowers III*.

[9] Patricia Sullivan-Odom was under indictment for tax fraud at the time of *Flowers VI* and received favorable treatment for her cooperation. *See* Ground B, Section C, *infra*.

Finally, new expert evidence discovered since Mr. Flowers' trial reveals that the shoeprint impressions from the crime scene could have been made by a shoe anywhere from a size 8 1/2 to 11. *See* Ex. 2 (Alicia Wilcox Aff. (Mar. 16, 2016)) ¶ 5. So the State's claim that "they could tell what size it was," and that the print was made by a size 10 ½ shoe was not just unsupported by its own witness's testimony, it was false.

3. The Gunshot Residue Particle

The State also emphasized the collection of a single particle of gunshot residue found on Petitioner's right hand several hours after the murders. Tr. 2615. But police did not swab Petitioner's hands for residue immediately upon taking him into custody. Instead, they waited until after they had placed him in a police car, driven him to a police station, and held him there for some period of time. Even the State, therefore, conceded that the evidence was probative only of whether Mr. Flowers "was in the presence or the environment of gunshot residue"—like a police car or a police station. Tr. 2273. Indeed, even the State's own expert agreed that Petitioner could easily have picked up the single particle of gunshot residue during his ride in a police car or his time in the police station earlier in the afternoon. Tr. 2630-32.

4. Eyewitness Identifications

The State produced six witnesses who allegedly saw Mr. Flowers near Doyle Simpson's car and/or moving toward Tardy's on the morning of the crime. But the testimony of these witnesses was wildly inconsistent, both in terms of what they saw and when they saw it. In chronological order of events, the six witnesses testified as follows:

> **James Edward Kennedy** claimed he saw Petitioner walking past his home at 635 South Applegate, Tr. 2288, towards the Angelica Clothing Factory at "7:15 that morning," Tr. 2289-90, wearing "white pants and a black sweater," Tr. at 2293.

Katherine Snow claimed that she saw Petitioner at exactly the same time approximately six blocks away in the Angelica parking lot "leaning up against Doyle Simpson's car," Tr. 2221-22, while wearing "[b]lack jeans [and a] white shirt," Tr. 2238.

Edward Lee McChristian[10] claimed he saw Petitioner "[g]oing north" on Academy Street—away from Angelica and toward Connie Moore's house—"[b]etween 7:30 and 8:00," Tr. 2301-02; he did not describe Petitioner's clothing.

Patricia Sullivan-Odom claimed that she saw Petitioner arriving at Connie Moore's house, some twelve blocks away from Mr. McChristian's house, at 7:30, and that he was wearing "some black . . . wind suit pants, and . . . a white shirt[,] . . . [a]nd the pants . . . unzipped at the leg." Tr. at 2044-46. She also claimed to see Petitioner leave Moore's house at "like 7:50 or 7:51," Tr. 2055, and gave no indication that he had changed clothes in the meantime.

Mary Jeannette Flemming[11] claimed she saw Petitioner walking toward downtown Winona at "five after nine," Tr. 2312, over an hour since he reportedly left Moore's house, and that he was wearing "brown pants . . . a white shirt and a . . . gray jacket." Tr. 2313; *see also id.* ("I never said black pants. He had brown pants on."); *id.* ("His pants was not black."); Tr. 2314 ("His pants was brown.").

Beneva Henry[12] testified at Petitioner' previous trial that she saw Petitioner walking down the street in the direction of downtown Winona "between around 9:00 and 9:30 in the morning," BH Tr. 1319; *see also id.* 1320, and wearing "some shorts" that "were white," *id.* at 1322, and no hat, *id.* at 1324.

These accounts cannot be reconciled. They require Mr. Flowers to be on Academy Street and in the Angelica parking lot—six blocks away—at the same time. They also require

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[10] Mr. McChristian first spoke to investigators when he was picked up by police on August 16, 1996. He was "nervous when the police had picked [him] up," and they explained to him "that they wanted to know if [he] had seen Curtis Flowers." Tr. 2304.

[11] Mary Jeannette Flemming did not speak with investigators until February 1997—approximately seven months after the crime. She was picked up without warning by police, and specifically asked to recall whether she had seen Mr. Flowers on July 16, 1996. At the time of this interview, Ms. Flemming was well aware of the $30,000 reward. Tr. 2317-18.

[12] Beneva Henry was an elderly woman who did not speak to investigators until September 3, 1996, when she was asked specifically whether she had seen Curtis Flowers more than six weeks earlier on the morning of July 16. Mrs. Henry had passed away by Petitioner's sixth trial. Her testimony from an earlier

Petitioner to be near Mr. McChristian's house and at Ms. Moore's house—twelve blocks away—at around 7:30. They suggest it took Petitioner fifteen minutes to travel from the Angelica Factory and Ms. Moore's house, as Ms. Snow and Ms. Sullivan-Odom combine to claim, but over seventy-four minutes to travel roughly the same distance between Ms. Moore's house and where Ms. Flemming and Ms. Henry say they saw him at around 9:00. Moreover, each witness who described Petitioner reported him wearing different clothing. The closest any two descriptions come to one another is Katherine Snow describing a white shirt and black jeans, and Patricia Sullivan-Odom describing a white shirt and black wind pants. But wind pants—which Sullivan-Odom said were "unzipped at the leg"—are visibly distinguishable from men's jeans. These inconsistencies are fatal to the witnesses' credibility. Indeed, the only unifying feature of their testimony is that not one of those witnesses came forward until after a substantial cash reward for information had been widely published, by which time it had become well known that Curtis Flowers was the person in whom law enforcement was interested.

Setting aside the hopelessly conflicting stories of sightings around town, the State offered two witnesses who placed Petitioner at the Tardy Furniture Store on the morning of July 16, but these were among the State's least credible and reliable eyewitnesses. First, the prosecution offered the testimony of Porky Collins, who testified that while running errands that morning, he saw two black men standing near a dirty, brown or tan-colored car "somewhere around a little bit before 10:00 to a few minutes after 10:00."[13] PC Tr. 1601, 1610, 1639. He noticed these men

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trial was read to the jury. *See* Tr. 2640; Trial Ex. S-128 at 8 (Prior Testimony of Beneva Henry (Feb. 7, 2004)) (hereinafter "BH Tr.")

[13] By the time of Petitioner's sixth trial, Porky Collins was deceased. His testimony from a prior proceeding was read into the record. *See* Tr. 2395; Trial Ex. S-115 (Prior Testimony of Porky Collins (Mar. 24-25, 1999)) (hereinafter "PC Tr.").

because he "thought they was fixing to fight." *Id*. 1606. Mr. Collins only caught a "brief glimpse" of one of the men, *id*. 1640, 1649, and at the time was on "a lot of medication" that affected his memory, *id*. 1613. Nevertheless, the State waited six weeks before presenting Mr. Collins with photo arrays to attempt to identify the men he had seen. Tr. 3014, 3017. In the first array, which did not include Petitioner, Mr. Collins identified Doyle Simpson as the person he had seen. Tr. 3031. That would not do, so the State showed Mr. Collins a second array, this one without Mr. Simpson but with Petitioner. This time, Mr. Collins pointed out Petitioner and said, "I believe that's him, it looks like him." Tr. 3032. Law enforcement followed up by suggestively asking "Do you know Curtis Flowers?" Tr. 3032. From that prompting, Mr. Collins' prior identification of Mr. Simpson and equivocal identification of Petitioner turned into certainty that Curtis Flowers was the man he had seen. But that certainty was fleeting: Mr. Collins again had difficulty identifying Mr. Flowers during the first trial. *See Flowers I* Tr. 435. Mr. Collins' "brief glimpse" of the two men and his poor memory, coupled with the State's undue influence during the presentation of the photo array, renders Mr. Collins' identification of Mr. Flowers entirely unreliable.[14]

Finally, the State called Clemmie Flemming to testify that she saw Petitioner fleeing the scene of the crime shortly after 10:00 a.m. Like the State's other witnesses, however, there were significant defects in Ms. Flemming's testimony. As an initial matter, Ms. Flemming waited nine months after the crime—until after Curtis Flowers had already been charged with the murders and the $30,000 reward for information had been widely publicized—to offer herself as

[14] Flowers proffered expert testimony to explain how, based on the expert's extensive criminal-justice experience and training, the photo lineup presented to Porky Collins was unduly suggestive, but the trial court erroneously excluded that testimony from trial. *See* Tr. 3122-23. The trial court also erroneously excluded

a witness to law enforcement. Tr. 2374. When she did finally come forward, she gave an utterly implausible reason for claiming she had been outside Tardy Furniture. She said that a man named Roy Harris drove her to the store "a little after 10:00" so she could pay her overdue furniture bill. Tr. 2367-68. When they reached the store, however, she suddenly changed her mind and decided to go home. Tr. 2368. Moreover, several members of Ms. Flemming's own family testified that she was lying. Mary Ella, her sister, testified that she and Clemmie were together from 7:30 a.m. until 3:00 p.m. on the day of the crime, and were nowhere near the furniture store around 10:00 a.m. *See* Tr. 2845-46. Latarsha Blissett, her cousin, testified that Ms. Flemming had admitted to manufacturing her story to avoid paying for her furniture, and that she was afraid to come clean for fear of going to jail or losing her kids. Tr. 2819. And since Mr. Flowers' trial, two other witnesses—including Roy Harris, the man Ms. Flemming supposedly was with on the morning of July 16—have confirmed in sworn affidavits that Ms. Flemming's testimony was fabricated. *See* Ex. 3 (Roy Harris Aff. (Mar. 9, 2016)) ¶¶ 3-4; *see also* Ex. 4 (Frederick Woods Aff. (Mar. 9, 2016)) ¶ 3.

5. The Jailhouse Informant

Odell Hallmon testified for the prosecution that he was incarcerated with Mr. Flowers, and that Mr. Flowers admitted to him that he killed the people at Tardy Furniture. Tr. 2415-16. Mr. Flowers has steadfastly maintained his innocence for two decades, throughout a gauntlet of six trials, and has declined several plea offers that would have spared his life. It is therefore inconceivable that he would suddenly decide to confess to a random fellow prisoner. But even

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expert testimony from an experienced psychologist explaining the factors that are relevant to the jury's assessment of Mr. Collins' eyewitness account and photo-lineup identification. *See* Tr. 300-05.

putting that aside, there were many reasons why Odell Hallmon's testimony was untrustworthy, and more have come to light since Mr. Flowers' trial.

In Petitioner's second trial, Mr. Hallmon testified that his sister, key State witness Patricia Sullivan-Odom, had manufactured her testimony that she had seen Petitioner on the morning of the crime in an effort to obtain reward money. *See, e.g., Flowers II* Tr. 2571-73. Later, however, Mr. Hallmon claimed that this testimony was a lie. Tr. 2417-18. He explained that he had agreed to commit perjury and accused his own sister of lying because Mr. Flowers had promised him thousands of dollars and was supplying him with cigarettes. Tr. 2417-18, 2420, 2424, 2456-57. He explained that he had decided to come clean because his family "turned against [him]." Tr. 2419. But Mr. Hallmon later switched to another explanation for why he had changed his testimony: he had been diagnosed with HIV, Tr. 2473, and therefore needed to "get [him]self right with God" in the little time he had left. Tr. 2428.

GROUNDS FOR RELIEF WITH SUPPORTING FACTS

GROUND A

NEW EVIDENCE RELATING TO POTENTIAL THIRD-PARTY PERPETRATORS, THE FORENSIC "SCIENCE" THE STATE RELIED ON AT TRIAL, AND FALSE TESTIMONY BY A KEY STATE WITNESS REQUIRES THAT PETITIONER'S CONVICTIONS AND SENTENCES BE VACATED IN THE INTEREST OF JUSTICE.

The prosecution's theory that Curtis Flowers single-handedly killed four people execution-style, in broad daylight, and in a very short window of time, was based entirely on circumstantial physical evidence, dubious eyewitness testimony about Petitioner's whereabouts on the morning of the crime, and a jailhouse informant's incredible claim that Petitioner confessed to the crime after years of steadfastly maintaining his innocence. This was the same

thin evidence that led to two prior mistrials because the jury could not agree on a verdict.[15] And it was constitutionally insufficient to support "a verdict worthy of confidence." *Kyles*, 514 U.S. at 434; *cf. id.* at 455 (Stevens, J., concurring) ("[T]he fact that the jury was unable to reach a verdict at the conclusion of the first trial provides strong reason to believe the significant errors that occurred at the second trial were prejudicial."). Further, newly discovered evidence now calls much of the State's evidence presented at trial into question.

Since the Mississippi Supreme Court affirmed Petitioner's convictions and sentences on appeal, substantial new and material evidence has come to light:

- We now know that the perpetrators of nearly identical robbery-murders in Alabama traveled to Mississippi at the time of the Tardy murders, wearing Fila shoes and wielding a .380 handgun that tended to jam, and returned to Alabama with cash they didn't have before they left.

- We know that the State pursued these individuals as suspects but hid those efforts from the defense, even going so far as testifying falsely under oath to cover up their investigation of the Alabama suspects.

- New forensic evidence shows that the State's ballistics expert relied on a wholly discredited methodology to conclude that bullets recovered from Tardy Furniture Store were fired from Doyle Simpson's gun.

- New forensic evidence also demonstrates that the State's shoeprint expert's testimony that the bloody partial shoeprint found at Tardy's was made by a size 10 1/2 Fila shoe was inaccurate and misleading.

- New evidence also confirms that the State's jailhouse informant, Odell Hallmon, lied on the stand—once again—when he testified that Petitioner confessed to the Tardy murders.

[15] Although Petitioner was convicted based on this evidence in his first three trials, the Mississippi Supreme Court found that those convictions were tainted by prosecutorial misconduct. *See Flowers I*, 773 So. 2d at 321; *Flowers II*, 842 So. 2d at 538; and *Flowers III*, 947 So. 2d at 937. They are therefore unreliable measures of the sufficiency of the evidence in this case.

- And we know that another key witness, Patricia Sullivan-Odom, was under indictment for tax fraud when she testified, and was subsequently given favorable treatment for her unwavering cooperation throughout the six *Flowers* trials.

Each of these new sources of evidence independently establishes a reasonable probability that, if introduced at a new trial, the outcome of this case will be different. Taken in combination, the effect is staggering. Mr. Flowers deserves to have all of the relevant evidence heard in court. The interests of justice require that the Court vacate Petitioner's convictions and death sentences and grant him a new trial.

Legal Principles

Mississippi law requires the grant of post-conviction relief when "there exists evidence of material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice." Miss. Code Ann. § 99-39-5(1)(e). Mississippi courts have interpreted this provision to require:

> (1) that the new evidence was discovered since the trial, (2) that when using due diligence the evidence could not be discovered prior to trial, (3) that the evidence is material to the issue and that it is not merely cumulative or impeaching, and (4) that the evidence will probably produce a different result or verdict in the new trial.

Williams v. State, 754 So. 2d 591, 593 (Miss. Ct. App. 2000) (citing *Smith v. State*, 492 So. 2d 260, 263 (Miss. 1986)). These procedural requirements are relaxed in death-penalty cases, where "[t]here is no margin for error." *Smith*, 492 So. 2d at 265; *see also Brewer v. State*, 819 So. 2d 1169, 1172 (Miss. 2002). To vacate a death-penalty conviction based on new evidence "there must only be a reasonable probability that a different result will be reached." *Smith*, 492 So. 2d at 265. Moreover, courts are obligated to remand for an evidentiary hearing to determine if the newly discovered evidence warrants a new trial, even when there was other evidence sufficient to convict the defendant. *Brewer*, 819 So. 2d at 1174 ("While there may appear to be

sufficient evidence to convict Brewer notwithstanding this new DNA evidence, the fact that this is a death penalty case justifies the need to revisit this matter in light of these test results").

The State's burden of proof informs whether new evidence is reasonably likely to produce a different result. A jury may find a criminal defendant guilty only if the State proves its case beyond any reasonable doubt. *In re Winship*, 397 U.S. 358, 364 (1970). When the State's theory relies on circumstantial evidence, for example, "it must be such as to exclude every other reasonable hypothesis than that the contention of the state is true." *Hester v. State*, 463 So. 2d 1087, 1093 (Miss. 1985) (quoting *Westbrook v. State*, 32 So. 2d 251, 252 (Miss. 1947)). Thus, if in light of newly discovered evidence, "[t]he web of circumstances established by the [S]tate does not exclude the reasonable hypothesis that a third party, not [the defendant], was [the] assailant," *Hester*, 463 So. 2d at 1094, the Court can only conclude that a reasonable jury would find the defendant not guilty in a new trial.

A. New Evidence About Alternative Suspects Requires That Mr. Flowers' Convictions And Sentences Be Reversed.

1. The State's Evidence Does Not Exclude The Reasonable Hypothesis That Experienced Killers From Alabama Committed The Tardy Murders.

On July 25, 1996, nine days after the Tardy murders, Marcus Presley and LaSamuel Gamble entered a pawn shop in Shelby County, Alabama—just three hours away from Winona—cleaned out the cash register, and killed the two store clerks on duty with precision gunshots to their heads.[16] They used a .380 caliber handgun. That gun jammed repeatedly, requiring Presley, the shooter, to manually clear the gun on several occasions. *See* Ex. 5 (Trial Tr. 1148, 1198-99, 1201, 1386, 1883-84, *State v. Gamble*, Nos. CC-96-813, 814 (Ala. Cir.

[16] A third man, Steven McKenzie, was present during the robbery-murder but never entered the store. He drove the getaway car.

1997)) (hereinafter "Gamble Tr."); *see also* Ex. 6 (Trial Tr. 1140-41, *State v. Pressley*, Nos. CC-96-815, 816 (Ala. Cir. 1997)) (hereinafter "Presley Tr."). Gamble wore Fila athletic shoes during the robbery. *See* Ex. 5 (Gamble Tr.) 1955.

That robbery-murder was part of a string of similar crimes by Presley and Gamble during the late spring and summer of 1996, several of which involved similar, execution-style murders and/or shootings. Their *modus operandi* in each was largely the same: they entered a store in broad daylight; forced the employees to the floor at gunpoint; shot the employees using a .380, often killing them; and then stole cash and other portable goods. *See* Ex. 7 (Chart of Alabama Suspects' Criminal History). Their attempts to elude authorities also had a common theme: shortly after each murder, they traveled to Boston to lay low, where both Presley and Gamble had family. *See* Ex. 6 (Presley Tr.) 1575-77. Relevant here, within a few days of robbing Curt's Package Store in Birmingham on June 30, 1996, Presley and Gamble escaped to Boston on a Greyhound bus. Ex. 8 (Marcus Presley Aff. (Nov. 16, 2015)) ¶¶ 5-6. They stayed for about one week, and returned to the Birmingham area on or around July 10 or July 11, 1996. *Id.* This time, they brought with them Steven McKenzie. *Id.*

New evidence places Gamble and McKenzie in Mississippi on the day of the Tardy murders, July 16, 1996. According to Marcus Presley's sworn affidavit, sometime between July 10 and July 17, 1996, Gamble and McKenzie traveled to Mississippi to visit Gamble's family and to buy drugs that they planned to resell.[17] *Id* ¶ 7. They drove a Buick or a Cadillac, and

[17] Although Presley reports that it was Gamble and McKenzie who travelled to Mississippi, it is equally, if not more plausible, that Presley himself was on the trip. Presley has a history of telling authorities true events, but removing himself from culpability. After his arrest for the pawn-shop murders in Alabama, for example, Presley conceded that the murder-robbery occurred, but insisted that Gamble was the shooter and that he was a mere bystander. *See* Ex. 6 (Presley Tr.) 1129-30. He stuck to this story until he was shown a surveillance video tape that clearly showed he was the shooter. *See id.*

were carrying two guns—a .380 and a .357. *Id.* ¶ 9. When they came back to Alabama, Gamble had cash on him that he did not have before going to Mississippi. *Id.* ¶ 10. On or around July 17th, the day after the Tardy murders, Presley, Gamble, and McKenzie returned to Boston, where they stayed for several days, before again returning to Alabama on or around July 22 or July 23.[18] *Id.* ¶ 13. Presley and Gamble then committed the pawn-shop robbery on July 25 using the same tried and tested method that they had employed for months.

a. The evidence implicating third-party perpetrators is material and would likely change the outcome at trial.

This evidence creates a "reasonable probability that a different result will be reached," *Smith*, 492 So. 2d at 265, if introduced at a new trial. The facts of the Alabama suspects' crimes are eerily similar to those of the Tardy murders. And the evidence provides for opportunity: Presley attests that Gamble and McKenzie were in Mississippi at the time the Tardy murders occurred.[19] *See* Ex. 8 (Presley Aff.) ¶¶ 7-8. And we know that these individuals were capable of committing execution-style multiple homicides, which solves one of the central weaknesses of the State's "lone gunman" theory against Mr. Flowers. The theory that the Alabama suspects committed the crime is also consistent with Porky Collins' claim that he saw *two* men, not just one, in front of Tardy Furniture on the morning of the crime. The circumstantial evidence that the State relied on to convict Petitioner "does not exclude the

[18] Presley's account of the timeline is not only consistent with Presley and Gamble's *modus operandi—i.e.*, committing a robbery-shooting and then immediately fleeing to Boston to lay low—but also borne out by independent facts, which show that Presley was arrested in Boston on July 18 on a marijuana charge.

[19] As discussed in note 17, *supra*, it is equally likely that Presley was present on the Mississippi trip, in place of, or in addition to, Steven McKenzie.

reasonable hypothesis that a third party, not [Petitioner], was [the] assailant," *Hester*, 463 So. 2d at 1094, and this new evidence thus creates reasonable doubt.[20]

b. *The State of Mississippi investigated the Alabama suspects and their connection to the Tardy murders.*

The State of Mississippi apparently agreed that these similarities were too striking to ignore; Mississippi investigators seriously pursued Presley and Gamble as suspects. On August 6, 1996, weeks after Mississippi law enforcement supposedly had zeroed in on Curtis Flowers to the exclusion of other suspects, they sent a copy of the Fila shoeprint impression recovered from the crime scene at Tardy Furniture to Detective Tim Murray of the Boston Police Department. *See* Ex. 9 (Ms. Crime Lab., Microanalysis Section, Case Activity (Aug. 6, 1996)). Detective Murray was the lead investigator in Boston working to locate the Alabama suspects during the manhunt that ensued after the pawn-shop murders. Then, once it became known that Presley and Gamble had fled to Norfolk, Virginia, where they ultimately were arrested and taken into custody, Mississippi law enforcement contacted Virginia authorities for information about their whereabouts and potential connection to the Tardy murders.

Specifically, on August 9 or 10, 1996, Lieutenant Horace Wayne Miller of the Mississippi Highway Patrol, who was actively following the efforts to locate and apprehend Gamble and Presley as he was investigating the Tardy murders, contacted Detective David Goldberg of the Norfolk Police Department as soon as he learned that Presley and Gamble had been apprehended.

[20] Gamble and McKenzie used a .380 with a tendency to jam, just the sort of gun used at the Tardy Furniture Store. The only circumstance that is unexplained by the Gamble and McKenzie theory is the theft of Doyle Simpson's gun on the morning of the crime. But as discussed *supra* at 16-18, that theft occurred after the murders, the State's own expert testified that bullets allegedly from that gun could not be matched to those found at the scene, and the State's alternative hired expert based his testimony on a methodology that the scientific community has rejected as unreliable. The supposed theft of Doyle Simpson's gun, therefore, does not exclude the Alabama suspects as the perpetrators of the Tardy murders.

He asked Detective Goldberg to question Presley and Gamble about the Tardy murders. *See* Ex. 10 (David Mark Goldberg Aff. (Jan. 20, 2016)) ¶ 6. Not only did he ask that Presley and Gamble be questioned about their possible involvement, Lieutenant Miller also requested that Detective Goldberg send Mississippi law enforcement a photograph of Marcus Presley. *Id.* ¶ 7. He did, and Mississippi authorities included that photograph in one of the photo arrays shown to Porky Collins on August 24, 1996. *See* Tr. 3014, 3017; Ex. 11 (State's Color Photo Lineup and Side-by-Side Comparison); *see also* Ex. 8 (Presley Aff.) ¶ 22; Ex. 12 (Dr. Guodong Guo Aff. (Jan. 25, 2016)) ¶ 5. Finally, when interviewing Roxanne Ballard, the daughter of victim Bertha Tardy, Mississippi law enforcement showed her pictures of jewelry seized from Presley and Gamble, who had been selling stolen jewelry in Boston, *see* Ex. 6 (Presley Tr.) 1577-78, and asked if she recognized it as having belonged to her mother or having come from the furniture store. *See* Ex. 13 (Peter G. Skidmore Aff. (Mar. 11, 2016)) ¶ 7.

The State suppressed this information, at every single opportunity and in response to every single request by Mr. Flowers' counsel and the court, in violation of *Brady v. Maryland*, 373 U.S. 83 (1963). *See* Ground B, *infra*. If the fact of that investigation, and the information it yielded, were disclosed to a jury, there is more than a reasonable probability that the result of Mr. Flowers' trial would be different. Indeed, the prosecution's evidence at trial was entirely insufficient to exclude the reasonable hypothesis that the Alabama suspects committed the Tardy murders. *See Hester*, 463 So. 2d at 1094.

c. The evidence implicating third-party perpetrators is new and could not have been discovered through reasonable diligence prior to trial.

Mr. Flowers did not learn of this evidence until after his trial and appeal, and is presenting this evidence for the first time in this Petition. Indeed, as discussed *infra* at Ground

B, Section B, notwithstanding its *Brady* obligation to disclose material information, the State actively concealed evidence regarding its investigation into the Alabama suspects and consistently and falsely represented that Mr. Flowers was the only suspect ever investigated:

> The Court: Now, and I—I'll say—Has the State got any exculpatory evidence —
> Mr. Evans: No, sir.
> The Court: — at all, or have you ever had any that has not been provided?
> Mr. Evans: We have never had any evidence that showed anything other than this defendant's guilt.

Tr. 442.

> The Court: Do I have the State's assurance that everything you have had in your possession from an investigative standpoint in this case has been provided?
> Mr. Evans: Yes, sir. Everything.
> The Court: Well, as far as I'm concerned, I think that is sufficient.

Tr. 439. And investigator John Johnson testified under oath: "I'm not familiar with another suspect," Tr. 383, and that Curtis Flowers "was the only one that was an initial suspect." Tr. 2935.

The State made these false representations in the face of explicit and repeated requests by the defense for information regarding alternative suspects. *See*, *e.g.*, Tr. 463 (renewing motion for information on other suspects submitted in *Flowers IV*); Notice of Renewal and Adoption of Mots. from the Previous Five Trials at 3, *Flowers VI* (Miss. Cir. Apr. 9, 2010)); Request for 9.04 Disc. and for Suppl. of Disc. Furnished to Date, *Flowers VI* (Miss. Cir. Mar. 23, 2010); Tr. 333-34 (oral motion for information on other suspects in *Flowers V*); Mot. to Produce Info. on Other Suspects, *Flowers IV* (Miss. Cir. Oct. 1, 2007)); Mot. for Disc. of *Brady* Material, *Flowers II* (July 16, 1998)).[21] And the State went so far as to present false testimony at trial from two

[21] During an April 10, 2010 pre-trial discovery hearing, District Attorney Evans repeatedly represented that the State had turned over any and all information:

law enforcement witnesses—Jack Matthews and Wayne Miller—to further cover their tracks. *See* Trial Tr. 2579 (Jack Matthews denying that he had heard about crimes involving "[Presley] . . . and Gamble"); Tr. 2579 ("Q. And did you discover any similarly committed criminal acts to the one that occurred down there at Tardy's? A. No. We didn't run across anything."); Tr. 3014, 3016-17 (Wayne Miller testifying that the only "persons of interest" were Curtis Flowers and Doyle Simpson).

The State has continued to represent that no such information exists. At a January 29, 2016 discovery hearing before the Montgomery County Circuit Court, the Court asked District Attorney Evans: "Does the State possess any information on any other suspects . . .?" Mr. Evans responded "No, sir." Jan. 2016 Hr'g Tr. 48-49. When questioned further regarding whether any law enforcement agencies might have such information, Mr. Evans was adamant that this "extend[s] to all law enforcement agencies." *Id.* at 49. The Court asked again, "So we've got assurance from the State of Mississippi that there was no record[] of anything dealing with other perpetrators of anything of that nature; is that correct?" Doug Evans and Assistant Attorney General Brad Smith each assured the Court, "Yes, sir." *Id.* As the evidence in this Petition makes clear, these statements were untrue.

> The Court: I will say this, Mr. Evans. The last thing I am going to have happen is this case come back to this court again from the Supreme Court because of some discovery issue . . .
>
> Mr. Evans: We have told every defense attorney that has been involved . . . ***There is no more discovery.*** This case has been tried so many times it's pitiful already with the same evidence. And the evidence is clear.

Tr. 358-359 (emphasis added). Upon further requests for information by defense counsel, Mr. Evans repeated: "Your Honor, this is at the point of being ridiculous. We have let them come through our office. I know defense attorneys have been in there at least three times going through everything that is there. They have been in the trials every time. Everything that is there was sent in discovery." Tr. 438.

The State's denials that any other suspects were investigated had the intended effect. Although Mr. Flowers' trial counsel were vaguely aware of media reports from 1996 that Presley and Gamble had committed a pawn-shop robbery and killed two clerks, defense counsel were not aware of their other similar crimes, or of any further details linking those crimes with the Tardy murders. *See* Ex. 14 (Alison Steiner Aff. (Mar. 4, 2016)) ¶¶ 12-13; Ex. 15 (Ray Charles Carter Aff. (Mar. 15, 2016)) ¶ 11. The State did not disclose and defense counsel did not know at the time of Petitioner's trial, for example, that the Alabama perpetrators used a .380, that their gun jammed just as the one used in the Tardy murders did; that many of the Alabama robberies were committed in broad daylight; that Gamble wore Fila Grant Hill shoes at the time; or that either Gamble and McKenzie, or Gamble and Presley, were in Mississippi on July 16, 1996. Nor were defense counsel aware that the State had pursued Presley and Gamble as suspects. *See id.*

Defense counsel could not have discovered this evidence using reasonable diligence, and no reasonable attorney would have expended scarce resources on a detailed investigation for the simple reason that the prosecution repeatedly represented that there were no other suspects and that it had no exculpatory evidence that had not already been turned over. *See Manning v. State*, 158 So. 3d 302, 306 ¶ 10 (Miss. 2015) (the likelihood of trial counsel being able to obtain this information through diligent investigation many years after the fact "defies computation of even a minimal degree of success"). The defense is entitled to rely on "the prosecution's representation that it had fully disclosed all relevant information its file contained." *Banks v. Dretke*, 540 U.S. 668, 693 (2004); *see also id.* at 695-96 (defendant is not obligated to "scavenge for hints of undisclosed *Brady* material"); *Bracy v. Gramley*, 520 U.S. 899, 909 (1997) ("Ordinarily, we presume that public officials have 'properly discharged their official duties.'") (quoting *United States v. Armstrong*, 517 U.S. 456, 464 (1966)); *Barnes v. Thompson*, 58 F.3d

971, 984 (4th Cir. 1996) (Murnaghan, J., concurring) ("[A] reasonable defendant would not have looked into the matter any further once the prosecuting attorney represented that the Commonwealth did not possess exculpatory evidence."). Petitioner should not be denied his right to a fair trial because his counsel reasonably chose not to waste scarce resource on leads the State represented were irrelevant or did not exist.

There is more than a reasonable probability that this suppressed evidence would lead to a different result in a new trial. And, as described in detail below, additional new evidence has come to light and new witnesses have come forward that undermine every other key element of the State's case against Mr. Flowers. This new evidence confirms, for example, that Odell Hallmon and Clemmie Flemming testified falsely against Petitioner. *See* Grounds A, C, G, *infra*. It shows that the State Crime Lab's ballistics expert, Steve Byrd, was right in concluding that no ballistics match was possible, and that the expert the State hired in his place provided false and unreliable "junk science" that never should have been presented to the jury. The same was true of the State's shoeprint-related "expert" evidence. *See* Ground A, *infra*. New evidence establishes that Patricia Sullivan-Odom's testimony was tainted by a 13-count federal tax fraud indictment that was hanging over her head at the time of trial and not disclosed to defense counsel. *See* Ground B, *infra*. There is a reasonable probability that any one of these new pieces of evidence—let alone all of them in combination—would lead to a different outcome at a new trial. Mr. Flowers had a right to present all of this evidence to the jury. That right was violated. The interests of justice thus require that this Court vacate Mr. Flowers' convictions and death sentences and grant him a new trial.

B. Newly Discovered, Sound Forensic Evidence Shows That The State Relied On Discredited Ballistics Evidence And Inaccurate Shoeprint Evidence In Violation Of Mr. Flowers' Due Process Rights.

1. New Evidence Demonstrates That The State's Ballistics Evidence Was Unsound And Unreliable.

One of the most critical components of the State's case against Mr. Flowers was its claim that he had stolen a .380 gun from Doyle Simpson's car and used it to commit the murders. But because the murder weapon was never recovered, the State needed a creative evidentiary link to prove this theory. On the day of the murders, the State recovered five cartridge casings and five bullet fragments from the scene of the crime.[22] After Doyle Simpson announced, hours after the murders, that a .380 handgun had been stolen from his car on the morning of the murders, State investigators went to Doyle Simpson's mother's house in search of bullets that had been fired from Simpson's gun, in the hopes they could match those bullet fragments to those found at the crime scene. Those investigators successfully pried two slugs out of a fencepost in Simpson's mother's yard, which they had out-of-state ballistics examiner David Balash analyze—an expert the prosecution hired after becoming dissatisfied with the Mississippi Crime Laboratory's initial inconclusive findings.

Mr. Balash testified that he used firearm toolmark examination to examine the cartridge casings and the two sets of bullets—seven recovered from the scene of the crime and two pried from Doyle Simpson's fencepost. *See* Ex. 16 (Chart of Ballistics Admitted at Trial and Corresponding Testimony of Mr. Balash). And according to Mr. Balash, he was able to conclude with 100 percent certainty that three bullets found at the crime scene and the two

[22] Approximately one month after the murders, State investigators returned to the scene of the crime, which had long since been cleaned up, and recovered two new bullet fragments; one from inside a mattress and the other near the loveseat at the store. Tr. 2522-26.

fragments found at Doyle Simpson's house were fired from the same gun. Tr. 2133-48.

As a verifiable forensic scientific fact, this claim was unreliable, untrustworthy, and unscientific. New evidence supplied by the Federal Bureau of Investigations ("FBI"), Department of Justice ("DOJ"), and independent experts thoroughly discredits the toolmark analysis upon which Mr. Balash relied and the conclusions he reached using it. The admission of Mr. Balash's testimony at trial violated Mr. Flowers' due process rights and demands that he be granted a new trial.

a. New Findings Issued by the FBI and DOJ After Mr. Flowers' Trial are Newly-Discovered Evidence Requiring Reversal of Flowers' Conviction.

In May 2013—three years after Mr. Flowers' sixth trial—the FBI and DOJ each publicly made a shared, critical finding: "[t]he science regarding firearms examinations ***does not permit examiner testimony that a specific gun fired a specific bullet to the exclusion of all others***." Ex. 17 (Ex. E and F to Suppl. to Mot. to Stay Execution, *Manning v. State*, No. 2013-CR-00491, (Miss. May 7, 2013)) (hereinafter "*Manning* Ex. E and F"). (emphasis added). As the FBI explained, "claims of infallibility or impossibility of error are not supported by scientific standards." *Id.*

These letters were stunning admissions from the nation's law enforcement officials, and they have had a dramatic effect in Mississippi. In *Manning v. State*, 112 So. 3d 1082 (2013), Willie Manning was found guilty of capital murder and sentenced to death based primarily on the testimony of a forensic expert who claimed that microscopic hair analysis and toolmark analysis tied Manning to the crime scene. On May 6, 2013, one day before Manning's execution date, the FBI and DOJ released the above-described letters challenging their own expert's testimony

regarding the ballistics analysis he conducted.[23] *See* Ex. 17 (*Manning* Ex. E and F). After those issues—and only those two issues—were briefed by the parties, the Mississippi Supreme Court stayed Manning's execution.

The ballistics evidence discredited in the *Manning* case is identical to what the State presented in Mr. Flowers' case. Mr. Balash testified that he conducted scientific testing of the ballistics evidence recovered from the crime scene and reached, in his opinion, the certain conclusion that at least three of those recovered bullets and bullet fragments were fired from Doyle Simpson's never-recovered gun. Tr. 2134-39. He also testified that five cartridge casings found at the scene of the crime were fired "in one weapon, and one weapon alone," Tr. 2133, and that he was "100 percent absolutely certain" of this conclusion. *Id.* As he explained to the jury, "There is no margin – if I identify them as coming from the gun, that's an absolute identification, 100 percent." *Id.* When asked about the bullet recovered from the mattress and the two bullets recovered from Doyle Simpson's house, Mr. Balash went on to state, again with 100 percent certainty, that "all three [bullets] were fired from the same weapon." Tr. 2139. He then concluded, again "with 100 percent assurance," that two other bullet fragments recovered from the scene of the crime were fired from the same weapon that fired the bullet recovered from the mattress and the slugs recovered from Doyle Simpson's house. Tr. 2142-49. Mr. Balash was unable to identify any support for these findings, save his own "opinion." Tr. 2154-55. When asked whether he needed to find a certain number of similarities between two bullets to find a "match," he was unable to point to any established standard operating procedures (SOP) or any other protocols for that matter. Tr. 2161. Instead he testified that those determinations are

[23] On May 2 and May, 2013, the FBI and DOJ submitted letters retracting scientific claims regarding microscopic hair analysis.

"individual to the examiner," *id.*, relying on his own subjective beliefs and making his testimony even more unreliable. *See also* Ex. 18 (Professor Clifford Spiegelman Aff. (Mar. 12, 2016)) ¶ 4 ("The absence of . . . SOPs is the main defect of toolmark analysis in general, and of this case.").

Even in the best of circumstances—for example, if the gun had been recovered and subsequently tested in the crime lab—Mr. Balash's analysis and testimony would have been impermissibly unreliable. *See* Ex. 19 (Professor William Tobin Aff. (Mar. 16, 2016)) ¶ 30. But these were not the best of circumstances. No gun was recovered, and the slugs tested to find a "match" were dug out of a fencepost by inexperienced investigators using inadequate tools. Indeed, State investigator Jack Matthews removed the slugs with a penknife, Tr. 2520-21, likely spoiling the slugs and making the supposed "match" even more unreliable.

In the end, Mr. Balash's absolute conclusions turned out to be absolutely wrong, or at least absolutely unknowable. This is exactly the sort of testimony the FBI and the DOJ warned against in *Manning*. *See Manning*, 112 So. 3d at 1082 (staying execution where FBI rejected expert's testimony that all bullets came from one weapon to the exclusion of all others in the world). Mr. Balash's conclusions were not supported by scientific standards and never should have been presented to the jury.

Indeed, since 2008, the National Academy of Science has published several reports discrediting toolmark examination "science," on the basis of its unreliability. *See e.g.*, Daniel L. Cork et al., *Ballistic Imaging* 3, Nat'l Research Council of the Nat'l Archives (Nat'l Academies Press ed., 2008) ("The validity of the fundamental assumptions of uniqueness and reproducibility of firearms-related toolmarks has not yet been fully demonstrated."). And many industry experts have in recent years abandoned and discredited toolmark analysis. For example, ballistics expert William Tobin states the following about firearm toolmark analysis:

> There are numerous reasons why firearm identification pattern-matching practice cannot be considered a science, to include that it has no falsifiable hypothesis (premise), no scientifically acceptable protocol articulating parameters of detection, no rules of application of such parameters, is missing the critical cornerstones of repeatability, reproducibility, and falsifiability, of the true scientific method and, thus, is a virtually 100% subjective practice once the possible sample pool is narrowed by class characteristic elimination (*e.g.*, caliber, number of lands and grooves, direction of twist, *etc.*). There is no science that allows for 100% subjectivity or a non-falsifiable hypothesis.

Ex. 19 (Tobin Aff.) ¶ 4. Indeed, not only was Mr. Balash's "100 percent certain" conclusion that all five bullets were fired from the same weapon based on junk science, but it also impermissibly implied a zero percent chance of error. Ex. 18 (Spiegelman Aff.) ¶ 7 ("Currently the error rate for toolmark examinations is unknown. Statements of zero or near-zero error rates claimed by toolmark examiners are not scientifically defensible."). Mr. Balash's conclusions were based on the flawed assumption that two or more guns can never produce similar results. Ex. 19 (Tobin Aff.) ¶ 11. This was wrong, for two reasons. First, to reach a near zero error rate conclusion, the examiner would have to test a large enough sample of bullets—no less than several thousand—which did not occur here. Ex. 18 (Spiegelman Aff.) ¶ 6. And second, numerous studies have confirmed that bullets fired from different weapons can share "virtually indistinguishable" characteristics. Ex. 19 (Tobin Aff.) ¶ 30.

Due to the inherent unreliability of ballistics analysis like that Mr. Balash relied on and testified to, courts across the country have moved away from relying on ballistics evidence to support convictions. Specifically, trial courts are increasingly refusing to accept testimony that different bullets were fired from the same weapon to the exclusion of all others. *See, e.g.*, *United States v. Diaz*, No. 05-167 WHA, 2007 WL 485967 at *35-36 (N.D. Cal. Feb 12, 2007) ("[T]he evidence before this Court does not support the theory that firearms examiners can conclude that a bullet or casing was fired by a particular firearm to the exclusion of all others in

the world."); *United States v. Monteiro*, 407 F. Supp. 2d 351 (D. Mass. 2006) (finding "there is no reliable . . . scientific methodology which will currently permit the expert to testify that [a casing and a particular firearm are] a 'match' to an absolute certainty"); *United States v. Chaz Glynn*., 578 F. Supp. 2d 567 (S.D.N.Y. 2008) (finding that testimony that a bullet matched a particular gun to a reasonable degree of scientific certainty would seriously mislead the jury as to the nature of the expertise involved).

Likewise, state and federal appellate courts across the country have stayed executions or granted new evidentiary hearings on the basis of unreliable ballistics evidence. *See, e.g., Smith v. State*, 23 So. 3d 1277, 1278 (Fla. Dist. Ct. App. 2010) (reversing denial of post-conviction relief because based on new evidence discrediting ballistics analysis relied on by the state at trial); *Zamarippa v. State*, 100 So. 3d 746, 747 (Fla. Dist. Ct. App. 2012) (determining that National Academy of Sciences comparative bullet lead analysis ("CBLA") report may qualify as newly discovered evidence, and granting evidentiary hearing); *State v. Behn*, 868 A.2d 329, 343 (N.J. Super. Ct. App. Div. 2005) (finding defendant was entitled to new trial based on newly-discovered CBLA evidence).

Although the reliability of the toolmark examination analysis that Mr. Balash used to reach his "100 percent match" conclusion had been the subject of increasing scrutiny and criticism in the years prior to Mr. Flowers' trial, the *Manning* FBI and DOJ letters marked the first time in Mississippi that the FBI and DOJ directly intervened in a pending case to question the reliability of expert testimony in this area. In other words, while the reliability of Mr. Balash's testimony was suspect even at the time of Mr. Flowers' trial, nothing so definitive as the FBI's and DOJ's all-out abandonment of this forensic evidence was yet available. And although Petitioner's appeal was filed a month after the issuance of the *Manning* letters, Mr.

Flowers was limited to the trial record and therefore could not have presented this evidence at the direct appeal stage. *See* M.R.A.P. 10(a) (limiting the record on appeal to "designated papers and exhibits filed in the trial court, the transcript of proceedings, if any, and in all cases a certified copy of the docket entries."). The letters thus qualify as newly discovered evidence, and this claim is properly reviewed at the post-conviction stage. *See In re personal Restraint of Trapp*, No. 65393-8-I, 2011 WL 5966266, *5 (Wash. Ct. App. Nov. 28, 2011) ("[A] report generally calling CBLA evidence into question may have been published in 2004, [but, here] the extent of the FBI's 'misleading' testimony . . . only became apparent after [trial]."); *see generally Crawford v. State*, 867 So. 2d 196, 202 (Miss. 2003) ("Petitioner will also defeat procedural bar if he can demonstrate that he has evidence, not reasonably discoverable at the time of trial" that " [if] introduced at trial would have [probably] caused a different result.").

b. The New FBI and DOJ Evidence is Material.

This new evidence is material; had it been known at the time of trial, it "probably [would have] produce[d] a different result or verdict." *Brewer*, 819 So. 2d at 1172. Mr. Balash's testimony that the bullets found at the crime scene and those found at Doyle Simpson's house came from the same gun to the exclusion of all others was a central part of the State's case against Petitioner. The importance of Mr. Balash's testimony comes into clear focus when reviewing the State's opening arguments, during which the State took great pains to link Mr. Flowers to Doyle Simpson's gun. Tr. 1819. First, the State used Mr. Flowers' relationship with Mr. Simpson to link him to the alleged murder weapon. *Id.* (stating that Mr. Flowers knew of the gun in Doyle Simpson's car because he was related to him). Then, the State used the bullets found at Mr. Simpson's house as evidence that Simpson's gun was the murder weapon. *Id.* ("We'll show you that projectiles were dug out of the post [at Doyle Simpson's house], and it

was determined that that ***was definitely the murder weapon***.") (emphasis added). The State's opening statements were underscored by its closing argument, where the State reiterated, in no uncertain terms, that the victims were all killed "by one gun." Tr. 3186; 3197-98 (stating that Mr. Balash said "one gun" and that "[a]bsolutely, we know what gun."); Tr. 3199 ("So the gun at the crime scene, the gun that killed Miss Tardy is the gun that shot the bullets in the post at Doyle's house."); Tr. 3200 ("Mr. Balash . . . was able to make a positive identification of that to the mattress bullet and the post bullets."). Each of these statements was misleading; science does not support such claims. But the jury was not privy to any information regarding the unreliability of Mr. Balash's testimony; to the contrary, the jury was left with the distinct and unrebutted impression that Doyle Simpson's gun was the murder weapon, end of story.

Mr. Balash's unreliable testimony was made all the more damaging by the fact that jurors often place undue weight on forensic testimony because they have unrealistic expectations of the capabilities of forensic science and often erroneously presume that forensic scientific evidence is neutral and objective. In light of these factors, it is unsurprising that exaggerated and/or unsupported claims made by forensic experts are a leading cause of wrongful convictions. *See Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 319 (2009) ("Serious deficiencies have been found in the forensic evidence used in criminal trials . . . One study of cases in which exonerating evidence resulted in the overturning of criminal convictions concluded that invalid forensic testimony contributed to the convictions in 60% of the cases.") (citing Brandon L. Garrett & Peter J. Neufeld, *Invalid Forensic Science Testimony and Wrongful Convictions*, 95 Va. L. Rev. 1, 14 (2009)); *see also Hinton v. Alabama*, 134 S. Ct. 1081, 1089 (2014) (cautioning against "the threat to fair criminal trials posed by the potential for incompetent or fraudulent prosecution forensic experts").

The Mississippi Supreme Court, too, has warned that jurors are predisposed to give undue weight to expert testimony. In *Edmonds v. State*, the Court reversed the petitioner's conviction upon finding that a forensic expert's testimony unduly influenced the jury. 955 So. 2d 787, 792 (Miss. 2007). In that case, the doctor who conducted the autopsy of the victim testified that the gun wound demonstrated that two people were holding the gun when the shot in question was fired. *Id*. The Court found that such testimony should not have been admitted because it was speculative and not based on scientific methods and procedures. *Id*. The Court thus reversed the conviction, finding that the petitioner's "substantial rights were affected by [the expert's] conclusory and improper testimony." *Id*. at 791. The Court explained that improper expert witness testimony is especially harmful because of lay jurors' reliance on such testimony:

> Juries are often in awe of expert witnesses because, when the expert witness is qualified by the court, they hear impressive lists of honors, education and experience. An expert witness has more experience and knowledge in a certain area than the average person. Therefore, juries usually place greater weight on the testimony of an expert witness than that of a lay witness.

Id. Other courts have reached similar conclusions. *See, e.g.*, *United States. v. Frazier*, 387 F.3d 1244, 1263 (11th Cir. 2004) (upholding exclusion of forensic expert testimony and cautioning that courts must take steps to ensure that expert evidence does not "mislead or confuse" jurors since "expert testimony may be assigned talismanic significance"); *United States v. Addison*, 498 F.2d 741, 744 (D.C. Cir. 1974) (expert scientific evidence may "assume a posture of mythic infallibility in the eyes of a jury of laymen").

The problem of jurors over-emphasizing the importance and accuracy of expert forensic testimony is made even more troubling by the fact that cross-examination is generally ineffective at correcting jurors' misperception of the value of expert testimony. *See* Dawn McQuiston-Surrett and Michael J. Saks, *Communicating Opinion Evidence in the Forensic*

Identification Sciences: Accuracy and Impact, 59 Hastings L.J. 1159, 1167-69 (May 2008) ("Whether or not jurors were informed about the limitations of microscopic hair examination on cross-examination or by the judge had little measurable or meaningful impact on their judgments about the likelihood that the defendant was the source of the crime-scene hair or their perceived understanding of the expert's testimony.").

Mr. Balash's testimony is precisely the sort that other experts and courts have found to be too unreliable to fairly support a conviction. And it is precisely the sort of forensic expert testimony that has contributed to a startling number of wrongful convictions—including this one. This Court should vacate Mr. Flowers' conviction based on the newly-discovered *Manning* letters. *See Brewer*, 819 So. 2d at 1172 ("While there may appear to be sufficient evidence to convict Brewer notwithstanding this new DNA evidence, the fact that this is a death penalty case justifies the need to revisit this matter in light of these test results.").

2. <u>New Evidence Demonstrates That The State's Shoeprint Expert's Testimony Was Unsound And Misleading.</u>

In addition to the ballistics evidence described above, the State placed an emphasis on its claim that a bloody partial shoeprint impression left at the scene of the crime was made by a size 10 1/2 Fila Grant Hill shoe—the same size shoe Mr. Flowers allegedly wore. The sum total of the shoeprint-related evidence in the case was the partial shoeprint found at the crime scene and an empty Fila Grant Hill shoe box, size 10 ½, from the home of Mr. Flowers' girlfriend, Connie Moore. At trial, the State relied upon its trace examination expert, Joe Andrews, to claim that the shoeprint left at the crime scene was made by a size 10 1/2 shoe. However, Mr. Andrews' testimony was misleading. New testimony and evidence from footwear impression expert Alicia Wilcox reveals that the shoeprint impression from the crime scene could have been made

by a wide range of shoe sizes—anywhere from a size 8 1/2 to 11. Ex. 2 (Wilcox Aff.) ¶ 5. The admission of Mr. Andrews' unsound and misleading testimony violated Mr. Flowers' due process rights and demands that he be granted a new trial.

In conducting the analysis about which he testified, Mr. Andrews contacted Fila and asked for a set of 10 1/2 outsoles that would have been consistent with the Grant Hill shoes that would originally have been packaged in the shoebox retrieved from Connie Moore's home. Tr. 2601. This was a substantial error. What Mr. Andrews should have done was request a series of sizes from Fila with which to conduct his analysis. That is the only way to ensure a thorough and accurate forensic comparison of the partial footwear impressions. Ex. 2 (Wilcox Aff.) ¶ 6. ("In cases where a suspect's shoe is not recovered, the footwear examiner should request a series of sizes from the manufacture for comparison to the crime scene impression."). Mr. Andrews limited the scope of his forensic comparison by only requesting size 10 1/2 outsoles from Fila, instead of a range of outsoles for comparison purposes. *Id.* As a result, his testimony was narrowly focused in a way that was misleading to the jury.

Indeed, without conducting the necessary comparison of a range of sizes, for Mr. Andrews to say that the footwear impression from the scene of the crime is consistent a size 10 1/2 Fila Grant Hill is inaccurate and unduly prejudicial against Mr. Flowers. This is especially troubling given jurors' propensity to assign significant weight to expert testimony. *See United States v. Frazier*, 387 F.3d 1244, 1263 (11th Cir. 2004) ("[E]xpert testimony may be assigned talismanic significance in the eyes of lay jurors, and, therefore, the district courts must take care to weigh the value of such evidence against its potential to mislead or confuse."); *United States v. Hines*, 55 F. Supp. 2d 62, 64 (D. Mass. 1999) ("[A] certain patina attaches to an expert's testimony unlike any other witness; this is 'science,' a professional's judgment, the jury may

think, and give more credence to the testimony than it may deserve.").

Mr. Andrews' improperly narrow analysis, disregarding the material fact that a wide range of sizes could have made the shoe print impression found at the crime scene, was too unreliable to fairly support a conviction.

C. New Evidence Confirms That Jailhouse Snitch Odell Hallmon Testified Falsely.

New sworn statements from two witnesses confirm that jailhouse snitch and admitted perjurer Odell Hallmon testified falsely against Mr. Flowers at trial. The prosecution put Mr. Hallmon on the stand to claim that Mr. Flowers confessed to him and that he enlisted Mr. Hallmon, with whom he had no preexisting relationship, to testify falsely on his behalf. This was nothing new. Mr. Hallmon was the third jailhouse snitch the State used in its prosecution of Mr. Flowers. It presented similar testimony at earlier trials from Frederick Veal and Maurice Hawkins, each of whom claimed to have heard Mr. Flowers confess at different times. *See Flowers I*, 773 So. 2d at 314. Both witnesses, however, subsequently recanted, admitting that their testimony was false and that they had been pressured to testify falsely by the prosecution team, who had helped them fabricate Petitioner's supposed confession(s). *See* Ex. 20 (Frederick Veal Aff. (March 14, 2016)) ¶¶ 6-12, 15-18; Ex. 21 (Maurice Bernard Hawkins Aff (Nov. 24, 2015)) ¶¶ 3-4. The prosecution thus had no choice but to find a new snitch, and they found their man in Odell Hallmon. But new evidence now shows that, just like Mr. Veal and Mr. Hawkins before him, Mr. Hallmon fabricated his story. And because Mr. Hallmon was the only witness at Petitioner's trial to testify that Petitioner had confessed to the murders, his testimony was highly material.

This evidence did not come to light until after Mr. Flowers' trial, and could not have been discovered by prior counsel. Mr. Hallmon did not recant his testimony until 2012, two years

after Mr. Flowers' trial. *See* Ex. 22 (Charles R. Crawford Aff. (Mar. 8, 2016)) ¶¶ 4, 9; *see also* Ex. 23 (Clyde Smith Aff. (Mar. 2, 2016)) ¶¶ 2, 4. Nor could counsel have raised this new evidence on direct appeal, as they were limited to the record below. *Givens v. State*, 967 So. 2d 1, 6 (Miss. 2007).

1. New Evidence Confirms That Mr. Hallmon Perjured Himself At Trial (Again).

Odell Hallmon's testimony was short and simple: Mr. Hallmon claimed that he had been incarcerated with Flowers and that during this time, Mr. Flowers "admitted [to Hallmon] that he killed the people at Tardy Furniture." Tr. 2415-16. It also was false. New evidence proves that Mr. Hallmon lied under oath. On April 23, 2012, Charles R. Crawford, a prisoner on death row at the Mississippi State Penitentiary, was sitting in his cell watching television when he heard a loud argument. *See* Ex. 22 (Crawford Aff.) ¶ 4. He walked to the door of his cell, where he saw and heard Mr. Hallmon arguing with Clyde Smith, another prisoner. *Id.* ¶ 5; *see also* Ex. 23 (Smith Aff.) ¶ 3. During the argument, Mr. Hallmon originally denied he was a "snitch," averring instead that he had testified favorably for Mr. Flowers. Ex. 22 (Crawford Aff.) ¶ 6; Ex. 23 (Smith Aff.) ¶ 3. Later, however, Mr. Hallmon admitted he testified against Flowers, and that his testimony was false. Ex. 22 (Crawford Aff.) ¶ 8; Ex. 23 (Smith Aff.) ¶¶ 3, 4. Mr. Hallmon bragged, "[t]hat dude never said anything to me about 'doing' those people. The dude fucked me over, so I fucked over him, and now he's going to get what he deserved." Ex. 22 (Crawford Aff.) ¶ 9. According to Mr. Hallmon, he and Mr. Flowers had made some sort of financial deal, and Mr. Hallmon did not get paid what Mr. Flowers supposedly promised to pay him. Ex. 22 (Crawford Aff.) ¶ 9; Ex. 23 (Smith Aff.) ¶ 4.

To be sure, prior to his April 2012 recantation, other evidence strongly suggested that Mr. Hallmon had perjured himself. Mr. Hallmon was arguably the least trustworthy witness ever to

testify in the six trials of Curtis Flowers. He began his reign as a star *Flowers* witness by testifying for the defense in *Flowers II* (later overturned on account of prosecutorial misconduct). At that trial, Mr. Hallmon rebutted the story told by his sister—key State witness Patricia Sullivan-Odom—that she had seen Mr. Flowers on the morning of the murders. Mr. Hallmon testified that he told her there was a cash reward for information about the person who committed the Tardy Furniture murders. *Flowers II* Tr. 2572. Ms. Sullivan-Odom asked Mr. Hallmon how to get that money, and he told her the police wanted to charge Curtis with the murders, so she should "tell them you know who did it and get the money." *Id.* Mr. Hallmon explained that he passed this along to his sister because he wanted to use some of the reward money himself to pay a fine, so he would not be sent back to prison. *Id.* After his parole was revoked, Mr. Hallmon went back to jail where he saw Curtis. *Flowers II* Tr. 2574-75. His "conscience kept eating [him] up," so he got Mr. Flowers' attorney's address and wrote him a letter saying: "I had my sister to lie on the stand." *Flowers II* Tr. 2575, 2587. At the same time, Mr. Hallmon wrote another letter expressing his emotional turmoil, this one to Mr. Flowers' mother. Tr. 2442. Mr. Hallmon wrote, "I know apologizing is not going to help, but I had to give it a try." Tr. 2444. Mr. Hallmon went on to explain that he was trying to get out of jail, and that his sister was "lying for money." Tr. 2445. He told Ms. Flowers, "My family might turn against . . . me for what I'm doing but I don't care. And she [his sister] know herself what we was trying to do . . . so anything I can do to help in a matter, I'll do it." *Id.*

Later, however, Odell Hallmon switched sides, insisting that his earlier testimony that his sister was a liar was itself a lie he had delivered under oath because Mr. Flowers asked him to. Tr. 2416. To explain this shift, Mr. Hallmon supplied a host of explanations that only further underscore his untrustworthiness. First, Mr. Hallmon said he decided to "lie on" his sister

because Flowers "was the only one . . . keeping [him] supplied with cigarettes." Tr. 2418, Tr. 2420-21. When he was unable to hold that story together on cross-examination, Mr. Hallmon quickly added a second incredible reason for his initial supposedly perjured testimony: Mr. Flowers (who had been in prison since 1997 and was drawing $119 in unemployment benefits prior to his arrest) had "promised [him] thousands of dollars, too." Tr. 2420-21, Tr. 2424, Tr. 2456-57.

The reasons Mr. Hallmon offered to explain his change of heart were equally numerous and implausible. Mr. Hallmon first testified that he came clean about having lied in *Flowers II* because his sister was not speaking to him and his mother wanted him to do something about it. Tr. 2417, 2419, 2450, 2471. Worried this was not convincing enough, Mr. Hallmon offered another uncorroborated whopper, professing that he was facing a "medical crisis" and so was trying to "get [himself] right with God." Tr. 2428; *see also* Tr. 2460 ("Man, that why I'm up here now because my conscience is eating at me."). "Well," Mr. Hallmon explained, "I've been diagnosed with HIV. And I know my life ain't far from coming so I just want to clear my conscience, get all this out of the way."[24] Tr. 2473. That much of Mr. Hallmon's testimony was focused on explaining away previous lies he had told while under oath, *see, e.g*, *Flowers II* Tr. 2571-75; *Flowers III* Tr. 1659-65; *Flowers IV* Tr. 418-33; Tr. 2415-2421, 2423-31, 2441-65, is itself telling.

In addition to Mr. Hallmon's history of changing stories and admitted perjury *in this prosecution*, there was further evidence of his propensity for mistruths. Although Mr. Hallmon

[24] As of July 2015, thirteen years after Mr. Hallmon allegedly received his diagnosis, Tr. 2461, he is still alive and continues to weigh north of 300 pounds. *See* Ex. 24 (MDOC Discharge Certificate (July 10, 2015)) (listing Hallmon's weight as 315 pounds). If his health were deteriorating as he claimed, the pace of his decline was, and continues to be, miraculously slow.

repeatedly claimed that Mr. Flowers had written him several letters relating to his requests that Hallmon lie on his behalf, Tr. 2418, 2459-60, no such letter was ever introduced at trial or disclosed to the defense (so, presumably, the State was not in possession of any such letters). Nor could Mr. Hallmon remember what cells he and Mr. Flowers supposedly were in at the time Flowers made his alleged confession. Tr. 2416-17, 2425. Moreover, the State administered a polygraph examination to Mr. Hallmon, *see* Tr. 2432; *Flowers III* Tr. 1666, but never turned over the results of that examination to defense or post-conviction counsel, despite express requests for this information. *See* Second Mot. to Compel Produc. of Mandatory Post-Conviction Disc. at 3, *Flowers v. State,* Case No. 2015-DR-00591 (Miss. Cir. (Jan. 15, 2016)) (hereinafter "Second Mot. to Compel"); *see also* Ex. A to Second Mot. to Compel (Letter from W. Tucker Carrington, Miss. Innocence Project, to Doug Evans, Dist. Attorney (Jan. 11, 2016)).

Mr. Hallmon's deplorable prison conduct prior to Flowers' trial—conduct of which the State was surely aware—further undercuts his credibility and demonstrates his propensity for untruthfulness. *See* Ex. 25 (MDOC Incident Report: Odell Hallmon, Jr. (Feb. 11, 2016)). Hallmon has been cited repeatedly for forgery and providing false information to corrections officers and staff (1998, 1998, 2007), *id.* at 2, 3, 6; and has been caught more than 20 times for possession of contraband, including two shanks (2008, 2009), *id.* at 5, 10; a razor (2007), *id.* at 6; a spear (2007), *id.* at 7; and a multitude of cell phones and illegal drugs, *id.* at 10-14. When asked about these documented incidents under oath, Hallmon denied them. *See, e.g.*, Tr. 2469 ("Yeah, I was charged with [illegal possession of a cell phone] . . . [B]ut it wasn't mine."); *id.* 2469-70 ("Q. Now, wasn't you caught with some other stuff you wasn't supposed to have? A.

Just a charger.[25] Q. No drugs? A. No, I wasn't caught with no drugs."). And when he began to worry that his repeated disavowals of verifiable disciplinary incidents might not seem credible, he added another, even less credible explanation—the reason he would have tested positive for drugs is that he was taking medication (provided by the Mississippi Department of Corrections, no doubt) that contained marijuana. Tr. 2470-71. The prosecution put him on the witness stand anyway.

Although there were many reasons not to trust Odell Hallmon's testimony, it was not until several years after trial, when Mr. Hallmon recanted his testimony, admitting that he had fabricated the story of Mr. Flowers' supposed confession, that Mr. Flowers could prove that Mr. Hallmon had testified falsely.

2. This Evidence Is Material.

There is no doubt that Mr. Hallmon's testimony was material. Mr. Flowers has maintained his innocence from the start and on that basis has refused plea deals that would have spared him from the death penalty. Aside from admitted perjury from the State's other two jailhouse snitches at prior trials, Mr. Hallmon is the only witness ever to assert that Mr. Flowers confessed to the murders. This testimony plainly would impact the judgment of any reasonable juror. "A confession is like no other evidence. Indeed, 'the defendant's own confession is probably the most probative and damaging evidence that can be admitted against him . . . Certainly, confessions have profound impact on the jury . . . ." *Arizona v. Fulminante*, 499 U.S. 279, 296 (1991); *see also Skilling v. United States*, 561 U.S. 358, 383 (2010) ("The defendant's own confession is probably the most probative and damaging evidence that can be admitted

[25] Why Mr. Hallmon would have a cell phone charger in his possession when, according to the sworn testimony he gave just a few moments earlier, he did not have a cell phone, is puzzling.

against him.") (quotation marks and alteration omitted); *Boyer v. Houtzdale*, 620 F. App'x 118, 127 (3d Cir. 2015) ("As [many] courts have recognized, a defendant's confession is uniquely damaging."). Indeed, empirical studies have repeatedly demonstrated the uniquely powerful nature of confession evidence. *See, e.g.*, Saul M. Kassin, *On the Psychology of Confessions: Does Innocence Put Innocents at Risk?*, *Am. Psychologist*, at 215, 222 (Apr. 2005) (confessions "tend to overwhelm . . . exculpatory evidence"); Saul M. Kassin & Katherine Neumann, *On the Power of Confession Evidence: An Experimental Test of the Fundamental Difference Hypothesis*, 21 Law & Hum. Behav. 469, 476, 479, 481 (1997) (finding that confessions are more prejudicial than other powerful forms of evidence, such as eyewitness identifications and character testimony); Eugene R. Milhizer, *Confessions After Connelly: An Evidentiary Solution for Excluding Unreliable Confessions*, 81 Temp. L. Rev. 1, 5-8 (2008) (collecting sources and noting that, "[v]irtually every scholar who has addressed the subject agrees that confession evidence is singularly potent in achieving a guilty verdict").

If, at a new trial, the State was forced to proceed without the benefit of Mr. Hallmon's testimony and, thus, without any evidence of Mr. Flowers' supposed confession, that would "probably produce a different result or verdict," and the interests of justice therefore demand that Mr. Flowers receive a new trial. *See Williams*, 754 So. 2d at 593.

GROUND B

THE STATE'S SUPPRESSION OF MATERIAL EXCULPATORY AND IMPEACHMENT EVIDENCE VIOLATED THE SIXTH AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION AND MISSISSIPPI LAW.

The prosecutor in a criminal case:

> is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern

> at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. [26]

Berger v. United States, 295 U.S. 78, 88 (1935); *see also United States v. Mauskar*, 557 F.3d 219, 232 (5th Cir. 2009) ("The duty of a prosecutor, as the representative of the sovereign in a criminal case, is not that it shall win a case but that justice shall be done.") (quotation marks omitted) (citing *Dickson v. Quarterman*, 462 F.3d 470, 479 (5th Cir.2006)); *State v. Storey*, 901 S.W.2d 886, 901 (Mo. 1995) ("[T]he prosecutor has a duty to serve justice, not merely to win the case."). Thus, although a district attorney "may prosecute with earnestness and vigor," it "is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one." *Berger*, 295 U.S. at 88.

Accordingly, the Supreme Court has long held that a defendant's due process rights are violated when the government withholds exculpatory or impeachment evidence that is material to either the defendant's guilt or punishment, *see Brady*, 373 U.S. 83, or uses false evidence to secure a conviction or sentence, *see Giglio v. United States*, 405 U.S. 150 (1972); *Napue v. Illinois*, 360 U.S. 264 (1959). *See also Wearry v. Cain*, No. 14-10008, __ S. Ct. __, 2016 WL 854158 (Mar. 7, 2016). Newly discovered evidence makes clear that both types of misconduct infected Petitioner's trial.

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[26] That the prosecution eschewed its duty to seek justice in favor of a win-at-all-costs mentality is demonstrated not only by the egregious suppression of evidence and other prosecutorial misconduct that Mr. Flowers has unearthed since his trial, but also by the very fact that the State has tried Mr. Flowers six times for the same crimes. As Mr. Flowers argued prior to his sixth trial and on appeal, forcing him to endure six prior trials, three appellate reversals, and two hung juries violated the Double Jeopardy Clause of the Fifth Amendment, the Due Process Clause of the Fourteenth Amendment, and an analogous provision of the Mississippi Constitution. The prerogative of the government to try and re-try criminal defendants is not unlimited, and Mr. Flowers' right to fundamental fairness outweighs the State's right to pursue a conviction at all costs. *See, e.g.*, *Preston v. Blackledge*, 332 F. Supp. 681, 687-88 (E.D.N.C. 1971) ("[T]o try the petitioners five times . . . exceeds the limitations on the right to retry an accused subsequently set forth by our Supreme Court."); *State v. Moriwake*, 65 Haw. 47, 54 n.12 (1982) ("we cannot believe that an infinite number of retrials . . . are consistent with double jeopardy principles.").

Suppression of material evidence by the State violates due process "irrespective of the good faith or bad faith of the prosecution." *Brady*, 373 U.S. at 87. Thus, *Brady* imposes a strict obligation upon the State to provide the defense with all exculpatory material, including impeachment evidence. And the State has a corresponding duty to "investigate all evidence regarding a crime" and not simply "those items which appear to support the case against a defendant." *Little v. State*, 736 So. 2d 486, 489 (Miss. Ct. App. 1999). A *Brady* violation may occur, therefore, "[w]hether or not the State knew of" suppressed evidence, if the State's ignorance stemmed from its failure to investigate. *Id.* The State's obligation under *Brady* also extends to information in the hands of law enforcement and others assisting in the prosecution, even where that information is unknown to the prosecutor himself. *See, e.g.*, *Kyles*, 514 U.S. at 437 ("[T]he individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police."); *Manning v. State*, 158 So. 3d at 306 ¶ 10 (granting post-conviction relief based on failure to disclose materials in possession of police); *United States v. Antone*, 603 F.2d 566, 569 (5th Cir. 1979); *United States v. Brooks*, 966 F.2d 1500, 1503 (D.C. Cir. 1992) (finding *Brady* violation for failure to disclose homicide files in the possession of the D.C. police); *United States ex rel. Smith v. Fairman*, 769 F.2d 386, 391 (7th Cir. 1985) (state's failure to produce police ballistics report unknown to prosecutors but in police files violated *Brady* because "the withheld evidence [was] under the control of a state instrumentality closely aligned with the prosecution, such as the police"); *Carey v. Duckworth*, 738 F.2d 875, 878–79 (7th Cir. 1984) ("[A] prosecutor's office cannot get around *Brady* by keeping itself in ignorance, or compartmentalizing information about different aspects of a case."); *Barbee v. Warden, Maryland Penitentiary*, 331 F.2d 842, 846 (4th Cir. 1964) (failure to disclose police ballistics and fingerprint tests violated *Brady* because "[t]he police are

also part of the prosecution, and the taint on the trial is no less if they, rather than the State's Attorney, were guilty of the nondisclosure"); *United States v. Boyd*, 833 F. Supp. 1277, 1353 (N.D. Ill. 1993) *aff'd*, 55 F.3d 239 (7th Cir. 1995) (it is "clear that the 'prosecution' includes police officers, federal agents and other investigatory personnel who participated in the investigation and prosecution of the case"). In short, *Brady*'s mandate is clear: "[T]he individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police," *Kyles*, 514 U.S. at 437, and to turn any exculpatory and impeachment information over to the defense.

State prosecutors have an affirmative duty to disclose regardless of whether the defense submits a specific request, a general request, or no request at all for *Brady* material. *United States v. Agurs*, 427 U.S. 97, 107 (1976); *see also Smith v. State*, 500 So. 2d 973, 979 (Miss. 1986) (a prosecutor has a duty to disclose under *Brady* "regardless of the nature of [the defendant's] request"); *Malone v. State*, 486 So. 2d 367, 369 (Miss. 1986) (state had a duty to disclose its plea agreement with a key witness even though the defense did not specifically request information regarding a plea agreement). Mississippi courts further recognize that "as a matter of good practice and sound judgment," prosecuting attorneys should err on the side of disclosure and permit defense attorneys to make their own determination "whether or not the material is useful in the defense of the case." *Hentz v. State*, 489 So. 2d 1386, 1388 (Miss. 1986). The prosecutor "should resolve doubtful questions in favor of disclosure," *Smith*, 500 So. 2d at 979, and this Court must consider "the cumulative effect of all such evidence suppressed by the government," *Kyles*, 514 U.S. at 421. *See also Wearry*, __ S. Ct. __, 2016 WL 854158, at *4 (reversing denial of post-conviction relief in part because of "the state postconviction court['s] improper[] evaluat[ion] . . . of each piece of evidence in isolation rather

than cumulatively"). These obligations are at their apex in capital cases, where "all doubts" must be "resolved in favor of the accused." *Hollie v. State*, 174 So. 3d 824, 829 (Miss. 2015) (quoting *Bennett v State*, 933 So. 2d 930, 939 (Miss. 2006)).

The governing principles that emerge from *Brady, Napue, Giglio*, and their progeny are simple: (i) the prosecution must affirmatively disclose to the defense all favorable evidence and (ii) the prosecution must not knowingly advance or fail to correct false testimony in its pursuit of a conviction. The State of Mississippi violated both of these basic tenets of fairness in its prosecution of Mr. Flowers when it suppressed material exculpatory evidence of alternative suspects and material impeachment evidence that one of its star witnesses was facing a federal fraud indictment.

A. The State's Suppression Of Material Exculpatory Evidence Of Alternative Suspects Violated Mr. Flowers' Due Process Rights.

New evidence reveals that the State suppressed its investigation of three suspects from Alabama who committed a series of murder-robberies similar to the Tardy murders during the late spring and summer of 1996. Relatedly, new evidence shows the State failed to disclose that Mississippi authorities included a mug shot of one of these Alabama suspects in the photo array shown to key eyewitness Porky Collins. The State should have turned all of this information over to defense counsel. This is not a gray area. Had the State disclosed that it pursued these alternative suspects, Petitioner could have properly investigated these leads and uncovered the details of their crime spree. And had this information been introduced at trial, there is a reasonable probability it would have changed the result. This evidence therefore was material, and the State should have disclosed it. *See Kyles*, 514 U.S. at 433.

Petitioner could not have been expected to discover this evidence on his own through reasonable diligence. Mr. Flowers had no way of knowing who the state secretly investigated. And, in the face of sworn testimony by a State law enforcement witness that the pictures included in the photo array shown to Mr. Collins were simply "fillers," Tr. 3014-15, 3016-17, Mr. Flowers had no reason to know or suspect that the array actually included a photograph of an alternative suspect. A reasonable defendant would not waste resources on potential third-party perpetrators who, according to the State's repeated affirmative representations, were never considered in the State's investigation. Because the State's suppression of this evidence deprived Mr. Flowers of material exculpatory evidence in violation of *Brady*, this Court must vacate Mr. Flowers' convictions and grant him a new trial.

1. The Prosecution Suppressed Exculpatory Evidence Of Alternative Suspects.

Petitioner has discovered that, contrary to its representations regarding full disclosure, the State of Mississippi actively investigated three men from Alabama—Marcus Presley, LaSamuel Gamble, and Steven McKenzie—who in July and August of 1996 were wanted for murders markedly similar to the Tardy Murders. Specifically, in early- to mid-August 1996, weeks after the Tardy murders:

- Mississippi investigators contacted officials in Boston, Massachusetts and Norfolk, Virginia about Presley and Gamble, who were on the run and ultimately apprehended in those jurisdictions. *See* Ex. 9 (MS Crime Lab., Microanalysis Section, Case Activity) (showing transfer of information from Mississippi Crime Lab to Boston authorities); Ex. 10 (Goldberg Aff.) ¶ 6.

- On August 6, 1996, the Mississippi Crime Lab sent a copy of the Fila shoeprint recovered from Tardy Furniture to Tim Murray of the Boston Police Department—the lead investigator in Boston helping to direct the multi-agency manhunt for Presley and Gamble following the pawn shop murders. *See* Ex. 9 (MS Crime Lab., Microanalysis Section, Case Activity).

- On or about August 9th or 10th, 1996, Lieutenant Horace Wayne Miller of the Mississippi Highway Patrol requested and received a photograph of Marcus Presley from Detective David Goldberg in Norfolk. *See* Ex. 10(Goldberg Aff.) ¶ 6. Lieutenant Miller included this photo of Presley in the photo array shown to Porky Collins on August 24, 1996. *See* Ex. 11 (State's Color Photo Lineup and Side-by-Side Comparison); Ex. 8 (Presley Aff.) ¶ 22; Ex. 12 (Guo Aff.) ¶ 5 (concluding to a reasonable degree of scientific certainty that Presley's mug shot was used in the photo arrays).

- In mid-August, 1996, when interviewing Roxanne Ballard, the daughter of victim Bertha Tardy, Mississippi investigators showed Ms. Ballard photographs of jewelry recovered from investigations of Presley, Gamble, and McKenzie and asked if she recognized it. *See* Ex. 13 (Skidmore Aff.) ¶ 6.

These actions demonstrate not only that the State of Mississippi strongly suspected Presley, Gamble, and McKenzie of committing the Tardy murders, but that they acted on these suspicions and actively investigated the Alabama suspects' potential involvement in those murders.

The State failed to disclose any of this information. The discovery file disclosed by the State does not contain even a single reference to Marcus Presley, LaSamuel Gamble, or Steven McKenzie.[27] Even worse, the prosecution suppressed this evidence in the face of Petitioner's specific and repeated requests for the information, which put the prosecution "on notice of its value." *United States v. Bagley*, 473 U.S. 667, 683-84 (1985). Mr. Flowers first requested information on alternative suspects in a motion filed prior to his second trial. *See* Mot. for Disc. of *Brady* Material, *Flowers II* (July 16, 1998)). Mr. Flowers also requested information on alternative suspects prior to his fourth trial. *See* Mot. to Produce Info. on Other Suspects, *Flowers IV* (Miss. Cir. Oct. 1, 2007)). The State never produced information responsive to

[27] The sole trace of this investigation in the State's discovery file is a single notation on the Mississippi Crime Lab Microanalysis Section Case Activity document, attached hereto as Ex. 9, dated August 6, 1996 and reading: "Sent photocopy of footwear impression to Jack Matthews with MHP-CIB and to Tim Murray with Boston Police Dept." *Id.* But without knowing the connection of the Boston Police Department to the investigation and manhunt relating to the Alabama suspects, or that Tim Murray was leading that effort, this single reference, buried in a lengthy discovery file, was meaningless.

these requests. Mr. Flowers later renewed a motion for discovery regarding alternative suspects in *Flowers V*, which the Court granted. *See* Tr. 333 (reporting transcript of pre-trial proceedings in *Flowers V*). The State again produced nothing, maintaining instead that Mr. Flowers was the only suspect from the very beginning and that the State had no information on other suspects. Tr. 333-34 ("As far as I know, [Petitioner] was the key suspect from the beginning. And everything that I'm aware of pointed to him."). Finally, prior to his most recent trial, Mr. Flowers again renewed his request for information on alternative suspects. Tr. 463; Request for 9.04 Disc. and for Suppl. of Disc. Furnished to Date, *Flowers VI* (Miss. Cir. Mar. 23, 2010). And again, the prosecution disclosed nothing and represented to the Court that "[it] has never had any evidence that showed anything other than this defendant's guilt." Tr. 442. *See also* Tr. 358-59 ("There is no more discovery."); Tr. 383 (John Johnson testifying under oath: "I'm not familiar with another suspect"); Tr. 2935 (John Johnson testifying that Curtis Flowers "was the only one that was an initial suspect"); Tr. 439 (The Court: "Do I have the State's assurance that everything you have had in your possession from an investigative standpoint in this case has been provided?" // Mr. Evans: "Yes, sir. Everything.").

More troubling still, the State went further than just suppressing this information; the prosecution presented several law enforcement witnesses at trial who testified falsely that no such information existed. Specifically, as discussed *infra* at Ground C, lead investigator Jack Matthews denied any knowledge of crimes similar in time and circumstances to the Tardy murders and denied any familiarity with Marcus Presley or LaSamuel Gamble. Tr. 2579. Likewise, when Lieutenant Wayne Miller was asked whether any "persons of interest" were included in the photo arrays shown to Porky Collins, he testified that the only persons of interest were Doyle Simpson and Curtis Flowers—failing to mention that he had also included a photo of

third-party suspect Marcus Presley in that array. Tr. 3014-15, 3016-17. He repeatedly referred to the other photographs as "just filler pictures" of people with "the same race, similar complexion, things of that nature," *id*., which were taken randomly from a collection of mug shots, Tr. 474; *see also* Tr. at 485, 3016. That testimony was blatantly false: Lieutenant Miller himself requested the photo of Presley from Detective Goldberg in Norfolk, and he himself included that photo in the array shown to Mr. Collins. The State's flagrant suppression of evidence in response to specific inquiries violated Mr. Flowers' due process rights. *Agurs*, 427 U.S. at 106; *see also Banks*, 540 U.S. at 694 (prosecution's presentation of false testimony supports finding of *Brady* violation).[28]

2. The Suppressed Evidence Of Alternative Suspects Undermines Confidence In The Outcome Of The Trial.

The prosecution's failure to disclose alternative suspects is material, and therefore must be disclosed, when there is "some plausible nexus linking the other suspect to the crime." *Kiley v. United States*, 260 F. Supp. 2d 248, 273 (D. Mass. 2003); *Crawford v. Cain*, No. Civ. A. 04-0748, 2006 WL 1968872, at *19 (E.D. La. July 11, 2006), *aff'd*, 248 F. App'x 500 (5th Cir. 2007). To determine materiality, courts do not consider only the precise evidence that was suppressed by the State; instead, a *Brady* claim may be predicated on other evidence that the defense failed to uncover as a result of the State's suppression. *See Bagley*, 473 U.S. at 682-83 (recognizing *Brady* violation when the suppressed evidence causes the defendant to "abandon

[28] Although the knowledge of investigators is imputed to the prosecution by law for *Brady* purposes, *see Kyles*, 514 U.S. at 436, in this case there is no doubt the prosecution itself knew of the investigation into the Alabama suspects. District Attorney Evans recently represented at a discovery hearing that "there was nothing that went on [in the Flowers case] that I didn't personally handle," Jan. 29, 2016 Hr'g Tr. 33, and that every agency working on the case "compiled one file at our office with everything that everybody worked on. Everything that was involved with any agency, police department, sheriff's department, MDI, crime lab, all of

lines of independent investigation, defenses, or trial strategies that [he] otherwise would have pursued" and that would have yielded admissible evidence that undermines confidence in the outcome of the trial); *see also Maynard v. Virgin Islands*, 392 Fed. App'x. 105, 115, 118-19 (3rd Cir. 2010).

Here, materiality is self-evident. The evidence relating to the Alabama suspects' crime spree matches the physical evidence recovered from Tardy Furniture to a tee. Slugs from a .380 handgun, live rounds showing the gun tended to jam, and a Fila shoeprint are more consistent with the theory that the Alabama murderers committed the Tardy murders than that Curtis Flowers did. First, Gamble himself admitted that he wore Fila shoes in July 1996, Ex. 5 (Gamble Tr.) 1955, while the State was left to rely on an empty shoebox and testimony from a tainted witness, Patricia Sullivan-Odom, to establish that Mr. Flowers wore Filas. Second, the execution-style shooting of the Tardy victims is far more plausible with multiple, experienced assailants than just a single perpetrator with no criminal record or history of violence. Third, the Tardy murders matched the method that Presley and Gamble previously employed in Alabama: entering a store in broad daylight and shooting the clerks execution-style during the course of a simple robbery. And fourth, the Alabama suspects theory is more consistent with Porky Collins' testimony that he saw *two men* arguing in front of Tardy Furniture shortly before the crime was committed. Moroever, new evidence reveals that members of the Alabama suspects were in Mississippi on July 16, carrying a .380 handgun, on the day of the Tardy murders. *See* Ex. 8 (Presley Aff.) ¶¶ 7-9. Had this evidence been introduced, the prosecution could not have proven Petitioner's guilt beyond a reasonable doubt, because it could not have

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it was in our file," *id*. 58-59. Jack Matthews' trial testimony confirms that the investigation "funneled . . . through the D.A.'s office." Tr. 2577.

conclusively excluded the entirely reasonable hypothesis that the Alabama suspects committed the crime. This evidence therefore casts doubt on the prosecution's theory and is sufficient to "undermine confidence in the outcome of the trial." *Kyles*, 514 U.S. at 434.

Whether or not the State had knowledge of all the details of the Alabama suspects' crimes described above—and there is good reason to believe it did—is inapposite. What matters is that the prosecution prevented this information from coming to light. By affirmatively representing that the State never investigated alternative suspects, the prosecution steered the defense away from conducting its own investigation into those suspects. When potential *Brady* material is requested, prosecuting attorneys are obligated to err on the side of disclosure, so that they may allow ***the defendant*** to determine "whether or not the material is useful in the defense of the case." *Hentz*, 489 So. 2d at 1388; *see also Kyles*, 514 U.S. at 437. In light of this obligation, a reasonable defendant would have taken the State at its word—that there were no alternative suspects—and would not have wasted precious time and resources in advance of trial digging up information on Presley, Gamble, and McKenzie. *See Banks*, 540 U.S. at 695-96 (defendant is not obligated to "scavenge for hints of undisclosed *Brady* material"); *Strickler v. Greene*, 527 U.S. 263, 283-84 (1999). "Ordinarily, we presume that public officials have properly discharged their official duties." *Bracy*, 520 U.S. at 909. That is exactly what Petitioner did here.

Had the State turned over evidence relating to its investigation of the Alabama suspects, Mr. Flowers would have discovered the striking similarity between their crime spree and the Tardy murders. Additionally, Petitioner's counsel could have interviewed Presley, Gamble, and

McKenzie, all of whom were incarcerated in Alabama in 2010 (and remain so today).[29] And had defense counsel done that, Presley likely would have told them exactly what he has now divulged in a sworn statement: that Gamble and McKenzie were in Mississippi at the time of the Tardy murders, that they were carrying a .380 handgun, that Gamble was wearing Fila shoes, and that they returned with cash they did not have when they left. *See* Ex. 8 (Presley Aff.) ¶¶ 7, 9-10; *see also* Ex. 5 (Gamble Tr.) 1955. Indeed, Presley had no more incentive to keep quiet in the months leading up to the *Flowers VI* trial than he does now.

Moreover, the details of the Alabama suspects' crimes were material by themselves, but all the more so because of the State's investigation into them as alternative suspects. State investigators do not waste scarce resources in a time-sensitive murder investigation on dead leads. In a case in which officials abandoned after the first day their investigation into Doyle Simpson, the owner of the alleged murder weapon, the connection between the Alabama suspects and the Tardy murders must have been substantial indeed. A reasonable juror could infer that there was enough information to believe that the Alabama suspects, and not Petitioner, may have committed the Tardy murders. This alone would have been sufficient to create reasonable doubt about whether Petitioner committed the Tardy murders.

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[29] Presley and Gamble were both tried, convicted, and sentenced to death in 1997. *See Ex Parte Pressley*, 770 So. 2d 143 (Ala. 2000); *Gamble v. State*, 791 So. 2d 409 (Ala. Crim. App. 2000). However, Presley's sentence was commuted to life in 2005 pursuant to the Supreme Court's decision in *Roper v. Simmons*, 543 U.S. 551 (2005)) (holding the death penalty unconstitutional for offenders who were under the age of 18 when their crimes were committed). Gamble's death sentence was commuted shortly thereafter when the district attorney who prosecuted his case advocated for the commutation on the basis that it would be unfair to execute Gamble when Presley, who was the shooter in the pawn shop murders, would be spared from execution. *See* Brenda Goodman, *Prosecutor Who Opposed a Death Sentence is Rebuked*, NY Times (Sept. 15, 2007), http://www.nytimes.com/2007/09/15/us/15penalty.html?_r=0. Steven McKenzie was sentenced to 25 years in prison for his role in the pawn shop murders. *See Incarceration Details: Steve McKenzie,* Ala. Dep't. of Corr., http://www.doc.state.al.us/InmateHistory.aspx (last visited Mar. 14, 2016).

Finally, the State's use of Presley's photo in the photo array shown to Porky Collins was material evidence, independent of the suppressed details of the Alabama suspects' crimes. With this information, defense counsel could have impeached Lieutenant Miller, a key State witness, by illuminating his false testimony that no other "persons of interest" were used in the photo array. Tr. 3014-17. This impeachment evidence would have not only undermined Miller's credibility as a witness, but also his integrity as a primary investigator in the case. The jury would have been left with the impression that the State conducted a dishonest, or at least incompetent, investigation.

Because of the State's misconduct, Mr. Flowers was precluded from developing these compelling lines of defense. Had this evidence been introduced, there is a "reasonable probability" that the outcome of his trial would have been different.

3. The Defense Could Not Have Obtained The Suppressed Evidence With Reasonable Diligence.

Defense counsel could not have uncovered the suppressed Alabama-related evidence through reasonable diligence. As explained above, Petitioner was entitled to rely on the prosecution's representation that it did not investigate any alternative suspects. *See Banks*, 540 U.S. at 671 ("[The defendant] cannot be faulted for relying on [the state's] misrepresentation."); *Bagley*, 473 U.S. at 682-83. Further, because the State's investigation was not discoverable through reasonable diligence, neither were the details regarding the Alabama murder-robberies that Petitioner would have uncovered if he knew of that investigation. No reasonable defendant would go looking exactly where the state swears that there is nothing to see. Defendants must

be able to rely on the State's representations to determine where to spend their finite resources preparing for trial.[30]

The prosecution's suppression of its investigation into alternative suspects requires this Court to vacate Petitioner's conviction and grant him a new trial.

B. The State's Suppression Of Material Impeachment Evidence Relating To Patricia Sullivan-Odom's Pending Tax Fraud Indictment Violated *Brady* And Flowers' Due Process Rights.

The State's *Brady* obligations extend to all forms of exculpatory evidence, including impeachment evidence favorable to the accused. "When the 'reliability of a given witness may well be determinative of guilt or innocence,' non-disclosure of evidence affecting credibility," especially evidence of any understanding or agreement as to a future prosecution, violates due process. *Giglio*, 405 U.S. at 154-55 (quoting *Napue*, 360 U.S. at 269). And where, as here, defense counsel specifically requests certain evidence—here, the complete and up to date criminal records of all state witnesses—the prosecution is "on notice of its value" and it is reasonable for "defense to assume from the nondisclosure that the evidence does not exist, and to make pretrial and trial decisions on the basis of this assumption." *Bagley*, 473 U.S. at 682-83. Patricia Sullivan-Odom's federal tax fraud indictment fits squarely within the parameters of what the Supreme Court has defined to be *Brady* material, and the State violated Petitioner's due process rights by suppressing it.

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[30] If the Court disagrees, and finds that defense counsel reasonably should have done more, defense counsel's failure to investigate alternative suspects would constitute ineffective assistance of counsel. *See* Ground G, *infra*.

1. The State Suppressed Evidence Of Ms. Sullivan-Odom's Indictment.

On February 17, 2010, a federal grand jury indicted Patricia Sullivan-Odom on sixteen counts of tax fraud for preparing "16 false tax returns for seven individuals from tax years 2004 through 2007," amounting to $652,345.00 in falsely claimed items.[31] The sixth *Flowers* trial began soon after, on June 16, 2010. The State never disclosed the indictment, and defense counsel did not learn of it until several months after trial, sometime after October 1, 2010, when a jury found Ms. Sullivan-Odom guilty of eight counts of federal tax fraud. Ex. 14 (Steiner Aff.) ¶ 14; Ex. 15 (Carter Aff.) ¶ 14 .

The prosecution team knew about Ms. Sullivan-Odom's indictment prior to trial. On April 15, 2010, two months before Mr. Flowers' sixth trial began, Mark K. Horan entered his appearance as Sullivan-Odom's defense counsel in connection with her federal charges. Ex. 27 (Entry of Appearance Upon Substitution, *United States v. Patricia Ann Sullivan*, Case No. 3:10-cr-00017 (S.D. Miss. Apr. 15, 2010)). Mr. Horan was no stranger to the *Flowers* case. As a former member of District Attorney Evans' office, Mr. Horan prosecuted Mr. Flowers in his first and second trials, and even examined Patricia Sullivan-Odom as a witness during *Flowers I*. Thus, he was intimately familiar both with Petitioner's case and with the crucial importance of Ms. Sullivan-Odom's testimony to the State's case against Petitioner. That Mr. Horan appreciated the importance of Ms. Sullivan-Odom's testimony to the prosecution of Petitioner is evidenced by the fact that, at Ms. Sullivan-Odom's sentencing hearing in January 2011, he described himself as part of the Flowers prosecution team and highlighted Ms. Sullivan-Odom's testimony in Petitioner's sixth trial as a reason why she should receive a reduced sentence:

[31] Ex. 26 (Press Release, *Jackson Woman Charged With Preparing False Federal Tax Returns*, U.S. Dep't of Justice (Mar. 5, 2010)).

> Your Honor, I feel compelled to say something on behalf of Patricia. When I was in the DA's office and this Flowers murder case—the murder occurred in Winona. I was an assistant district attorney. The first person that came forward on behalf of the state or gave any information that led to the eventual conviction of Mr. Flowers was this lady right here. First time I saw her was in October of 1997 at a time when it was a very volatile situation in Montgomery county area involving this case. And she came to us when I was working in the DA's office at great peril to herself, and she did that, and she consistently testified on six separate occasions three times for me when I was an assistant district attorney. She has been ridiculed by certain members of the community up there for doing that, but she held fast, Your Honor, and she did something that I think warrants some consideration from this court in her assistance to the state of Mississippi, not only during the course of the trial but during the course of the investigation, Your Honor.

Hr'g Tr. 55-56, *United States v. Patricia Sullivan*, No. 3:10-cr-00017 (S.D. Miss. Jan. 5, 2011)), ECF No. 76-1. Further, Patricia Sullivan-Odom's plea for a lesser sentence was further supported by a personal letter from the prosecutor who tried *Flowers VI*, District Attorney Evans.[32]

District Attorney Evans has stated that he had no knowledge of Ms. Sullivan-Odom's indictment at the time of Petitioner's trial, and that he only learned about the indictment "sometime after the June 18, 2010 conviction of Curtis Flowers." Ex. A (Aff. of Doug Evans) to Resp. to Mot. for Remand and Leave to File Suppl. Mot for New Trial, *Flowers VI* (May 25, 2012). But even if that were true—an unlikely proposition in light of Mr. Evans' close ties to Ms. Sullivan-Odom's defense attorney—that does not shield the State from liability under *Brady*. To the contrary, Mr. Evans' duty to disclose is not limited "by his knowledge," *Gibbs v. Johnson*, 154 F.3d 253, 256 (5th Cir. 1998), but rather includes all information "known ***or available to*** the

[32] District Attorney Evans' letter was filed under seal with Ms. Sullivan-Odom's presentence investigation report. Petitioner moved the federal court for production of the letters submitted on Sullivan-Odom's behalf in connection with her sentencing. Although the Government did not oppose the request, the district court entered an order denying it on April 11, 2012. *See* Ex. 28 (Op. and Order, *United*

prosecutor,"[33] *United States v. Koetting*, 74 F.3d 1238 (5th Cir. 1995) (emphasis added) (quoting *United States v. Auten*, 632 F.2d 478, 481 (5th Cir.1980)); *see also East v. Scott*, 55 F.3d 996, 1003 (5th Cir. 1995) (recognizing the "prosecutor's duty to investigate a witness' criminal history"); *Williams v. Whitley*, 940 F.2d 132, 133 (5th Cir. 1991) ("[T]he prosecution is deemed to have knowledge of information readily available to it and the failure to provide that information when requested is a violation of the *Brady* rule.").

Here, Ms. Sullivan-Odom's indictment was readily available to Mr. Evans through a routine update of Ms. Sullivan-Odom's criminal history. Defense counsel requested just that, though the prosecution's obligation to provide updated criminal histories existed even independent of this request. *Smith*, 500 So. 2d at 979 (recognizing prosecutor's *Brady* obligations "regardless of the nature of [the defendant's] request"). On March 23, 2010, in preparation for Petitioner's sixth trial, defense counsel filed a Request for 9.04 Discovery and for Supplementation of Discovery Furnished to Date. This motion requested that the prosecution confirm that it had provided the defense with all *Brady* materials. And this motion operated, at least in part, as a renewal of a prior motion for updated criminal histories that defense counsel

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States v. Patricia Sullivan, No. 3:10-cr-00017 (S.D. Miss. April 11, 2012)). To this day, Mr. Evans has not produced the letter to Petitioner or his counsel.

[33] Either Mr. Evans knew of the indictment or the information was readily available to him. That is all that is required to establish a Brady violation. But others on the prosecution team may very well have known about the indictment. Evans' previously submitted affidavit makes a critical, glaring omission: nowhere does he attest that other members of the prosecution team, including members of the District Attorney's Office for the Fifth District of Mississippi, the Winona County Police Department, and other members of the investigative team, were unaware of Sullivan-Odom's indictment prior to Petitioner's trial. The Court should not give Mr. Evans the benefit of the doubt on this issue. As discussed *supra*, Mr. Horan was intimately involved in Petitioner's earlier trials as a former member of Mr. Evans's District Attorney's Office. And Mr. Horan began representing Ms. Sullivan-Odom under questionable circumstances. Sullivan-Odom was found to be indigent at her March 5, 2010 arraignment, and the Federal Public Defender was appointed to represent her. *See* Ex. 29 (Order Appointing Counsel, *United States v. Sullivan*, No. 3:10cr17-WHB-LRA (S.D. Miss. Mar. 5, 2010)). Yet she somehow acquired the means to retain private counsel immediately thereafter. *See* Ex. 27 (Entry of Appearance Upon Substitution).

originally filed on October 1, 2007, in connection with Petitioner's fourth trial, and which had previously been renewed, and granted, in advance of Petitioner's fifth trial. *See* Mot. for Complete and Up to Date Criminal Histories of any Potential State's Witness, *Flowers IV* (Miss. Cir. (Oct. 1, 2007)). The 2007 motion for updated criminal histories specifically explained that Petitioner was entitled to the updated federal criminal histories because he had no other means of obtaining them: "the defendant is legally prohibited from access to the criminal histories of government witnesses located at the National Crime Information Center ("NCIC") data," Mot. for Complete and Up to Date Criminal Histories of any Potential State's Witness at 4, *Flowers IV*, a database which the Winona County Police check "daily at the station," according to testimony of Jack Matthews, Trial Tr. 2579.

District Attorney Evans made several on-the-record representations, on April 20, May 10, May 14, and June 1, 2010, that there was no new criminal history information to provide. *See* Tr. 333-35, 436-37; Report of Pretrial Disc. Conferences, *Flowers VI*; Hr'g Tr. S-98-99, *Flowers VI* (June 1, 2010). The NCIC database was readily available to Mr. Evans at the time he made those representations, as it was during Petitioner's previous trials. *See Williams v. Whitley*, 940 F.2d at 133 (charging the prosecution with knowledge of information readily available to it). In fact, the State provided defense counsel with an updated NCIC report for Ms. Sullivan-Odom prior to Petitioners' other trials, including *Flowers V*. Ex. 30 (NCIC Report at 9, *Flowers V* (Sept. 17, 2008)). Mr. Evans' failure to do the same prior to *Flowers VI* therefore amounted to an improper suppression of Ms. Sullivan-Odom's tax fraud indictment in direct contravention of *Brady*. The NCIC database would have revealed that Ms. Sullivan-Odom was indicted for federal tax fraud on February 17, 2010 and arraigned on March 5, 2010—months before Petitioner's sixth trial. *See* Ex. 15 (Carter Aff.) ¶¶ 14-17.

Mr. Evans's failure to run this updated criminal history—one specifically requested by defense counsel, no less—"does not change 'known' information into 'unknown' information within the context of the disclosure requirements." *Auten*, 632 F.2d at 481 (reversing conviction where government witness admitted one prior conviction during trial testimony, but evidence later showed that he had two others which government failed to learn of because it did not run records check); *see also Crivens v. Roth*, 172 F.3d 991, 996-97 (7th Cir. 1999) (finding state suppressed witness's criminal history when it "failed to respond adequately to [defendant's] request" for criminal history, including arrest records and rap sheets); *United States v. Perdomo*, 929 F.2d 967, 974 (3rd Cir. 1991) (reversing conviction on *Brady* grounds where prosecutor found no prior criminal records for witness in national database, but failed to check local records); *Martinez v. Wainwright*, 621 F.2d 184, 189 (5th Cir. 1980) (prosecution had duty to furnish a rap sheet of decedent to the defense even where document was in possession of medical examiner, not prosecutor). To the contrary, *Brady* violations "cover a multitude of prosecutorial sins involving breach of the 'broad obligation to disclose exculpatory evidence,' . . . 'includ[ing] both the failure to search for *Brady* material and the failure to produce it.'" *United States v. Andrews*, 532 F.3d 900, 905 (D.C. Cir. 2008) (citation omitted). Thus, "the government cannot shield itself from its *Brady* obligations by willful ignorance or failure to investigate." *United States v. Quinn*, 537 F. Supp. 2d 99, 110 (D.D.C. 2008).

2. Ms. Sullivan-Odom's Pending Tax Fraud Indictment Was Material.

Materiality does not require that a defendant demonstrate "that disclosure of the suppressed evidence would have resulted ultimately in the defendant's acquittal." *Kyles*, 514 U.S. at 434. Instead, the "touchstone of materiality is a 'reasonable probability' of a different result, and the adjective is important." *Id.* "A 'reasonable probability' of a different result is . . .

shown when the government's evidentiary suppression 'undermines confidence in the outcome of the trial.'" *Id.* (quoting *Bagley*, 473 U.S. at 678). Petitioner need only show, therefore, that there is a reasonable probably of a different result if the State had not suppressed Sullivan-Odom's tax fraud indictment. *Strickler*, 527 U.S. at 291. He easily clears that low bar.

The State's case would have fallen flat without Patricia Sullivan-Odom—the only witness to link Petitioner to physical evidence found at the crime scene. *See Smith v. Cain*, __ U.S. __, 132 S. Ct. 627, 630 (2012) (finding *Brady* violation when prosecution withheld evidence contradicting testimony of only eyewitness tying defendant to the crime); *Byrd v. Owen*, 272 Ga. 807, 811 (2000) (holding that suppression of impeachment evidence was material where witness's testimony was key to establishing location and motive in murder case). Without Ms. Sullivan-Odom's testimony, the State offered no evidence that Mr. Flowers was inside Tardy Furniture on the morning of July 16. Investigators found bloody shoeprints at the crime scene, which Mississippi State forensic scientist Joe Andrews testified matched a size 10 1/2 Fila Grant Hill tennis shoe. Tr. 2606-11. The State *never recovered* any Fila Grant Hill tennis shoes in Mr. Flowers' possession. Instead, the State found an empty Fila tennis shoe box in his girlfriend Connie Moore's home. Tr. 2104. And because none of the fingerprints lifted off of that box matched Petitioner's prints, and because Connie Moore testified that she purchased size 10 1/2 shoes for her son Marcus prior to the murders, Tr. 2855-56, the State lacked any credible explanation to connect Mr. Flowers, an empty shoe box, and a bloody shoeprint.[34] This is where

[34] No other witness testified to seeing Mr. Flowers wearing Fila shoes on the day of the Tardy murders. Elaine Gholston (erroneously referred to in the transcript as Elaine Goldstein) testified that she previously saw Mr. Flowers wearing Fila shoes "[p]robably a couple of months before [the murders], something like that." Tr. 2208. But Ms. Gholston's testimony was hardly credible. She could not remember whether she saw Mr.

Ms. Sullivan-Odom's testimony filled a critical gap. Six state witnesses testified that they saw Mr. Flowers on the day of the murders. Of those six, only three witnesses, including Sullivan-Odom, testified to the details of his clothing. And of those three, *only* Ms. Sullivan-Odom testified that Petitioner was wearing Fila Grant Hill shoes on July 16, 1996. Tr. 2046.

Ms. Sullivan-Odom's testimony also provided the prosecution with the timeline it needed to support its claim that Petitioner stole the purported murder weapon on the morning of the murders. Without this testimony, the prosecution could not have connected Mr. Flowers to the theft of Doyle Simpson's gun. Mr. Simpson's testimony suggested that his gun did not go missing until at least 10:25 a.m.—almost an hour after the murders occurred. Tr. 2333-35. The State therefore needed Ms. Sullivan-Odom's testimony to fill in this conspicuous hole in its theory of Petitioner's alleged whereabouts on the day of the murders. Ms. Sullivan-Odom testified that on July 16, 1996, she saw Petitioner return home around 7:30 a.m. and then leave soon after in the same direction, toward downtown. Trial Tr. 2047. The State used this testimony—conveniently ignoring Doyle Simpson's conflicting testimony—to suggest that Mr. Flowers returned home from Angelica around 7:30 a.m., having stolen Mr. Simpson's gun for later use in the murders. Ms. Sullivan-Odom's role as the lynchpin in the State's case is exemplified by the prosecution's repeated references to her testimony during closing arguments. Assistant District Attorney Hill pointed to Ms. Sullivan-Odom as a key witness providing details

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Flowers wearing the shoes on more than one occasion. *Id.* ("Mr. Evans: And did you see him on more than one occasion wearing those shoes? // Ms. Gholston: Not that I can remember."). Nor could she recall Mr. Flowers ever wearing any other kind of tennis shoe during the eight years she lived near him. Tr. 2210-11. And on the one occasion she could recall seeing Mr. Flowers wearing Fila shoes, she testified to seeing Mr. Flowers from across the street at an unknown time of day on an indeterminate day of the week, and could not recall *any* distinguishing characteristics about his clothing at that time. Tr. 2211-13.

about Petitioner's movements and whereabouts on the morning of the murders, testimony which provided the logistical framework for his supposed movements to and from Angelica's. Tr. 3189, 3191. Mr. Hill further emphasized that:

> There is one other thing important about what she saw. The defendant was wearing his Fila Grant Hill II tennis shoes. She knew him to have the shoes. She had seen them before. They were, you know, a kind of a special shoe.

Id. 3190. The State's case depended on this testimony—without it, nothing linked Petitioner to the crime scene. *Id*. 3196. Accordingly, the State's suppression of highly favorable impeachment evidence to attack her credibility "undermines confidence in the outcome of [Petitioner's] trial" in violation of *Brady*. *Bagley*, 473 U.S. at 678.

A successful attack on Ms. Sullivan-Odom's credibility would have shattered the foundational testimony propping up the State's flimsy case, and the suppressed indictment therefore was favorable to Petitioner. *See Giglio*, 405 U.S. at 154-55. It is "beyond genuine debate" that Ms. Sullivan-Odom's indictment "qualifies as evidence advantageous" to Petitioner with respect to its value in indicting her character for truthfulness. *Banks*, 540 U.S. at 691. The indictment also would have been admissible to show her bias and motivation to testify favorably for the prosecution in exchange for Mr. Evans' favorable recommendation at her eventual sentencing—a favorable recommendation we now know she received M.R.E. 616.

Had defense counsel known of Ms. Sullivan-Odom's tax fraud indictment, they would have altered their pretrial and trial strategies in a number of material ways. Ex. 15 (Carter Aff.) ¶ 17; *cf. Wood v. Bartholomew*, 516 U.S. 1, 7 (1995) (finding withheld evidence was not material because counsel would not have changed his trial strategy with access to the suppressed evidence). First, defense counsel could and would have inquired into Sullivan-Odom's conduct underlying the tax fraud indictment because it involved "lying, deceit or dishonesty" and was

therefore "probative of [Sullivan-Odom's] character for veracity." *Brent v. State*, 632 So. 2d 936, 944 (Miss. 1994); *see also* Ex. 15 (Carter Aff.) ¶ 17; M.R.E. 608(b); *United States v. Staples*, 410 F.3d 484, 489 (8th Cir. 2005) (noting that where a potential witness was under indictment in a fraud case, that impeachment based on the conduct underlying the indictment "would have diminished greatly the value of his testimony"); *Arnold v. McNeil*, 622 F. Supp. 2d 1294, 1319-21 (M.D. Fla. 2009) (finding evidence of ongoing, pre-indictment criminal activity to be material when it impeached an important prosecution witness); *United States v. Gordon*, 246 F.Supp. 522, 525 (D.D.C. 1965) (finding that evidence putting the witness's credibility in question may be enough to create a reasonable doubt as to the defendant's guilt). Without knowledge of Ms. Sullivan-Odom's indictment or her underlying tax fraud offenses, defense counsel were unable to question her about her dishonest acts or to demonstrate her character for untruthfulness.

Second, Mr. Evans's enthusiastic advocacy on Sullivan-Odom's behalf, urging the federal court to impose a reduced sentence based on her extraordinary cooperation in the prosecution of Curtis Petitioner, suggests Ms. Sullivan-Odom was incentivized to testify favorably for the prosecution in exchange for Mr. Evans's support. Defense counsel certainly would have been on notice of this possibility if the State had complied with its obligation and disclosed Ms. Sullivan-Odom's indictment. And defense counsel could have, and would have, investigated Sullivan-Odom's motivations for testifying and thereafter cross-examined Sullivan-Odom about those motivations. M.R.E. 616; Ex. 15 (Carter Aff.) ¶ 17.

Instead, defense counsel were left to attempt to impeach Patricia Sullivan-Odom on cross-examination by inquiring into prior inconsistent statements regarding the frequency with which Petitioner wore Fila shoes, Tr. 2066, and her knowledge of a $30,000 reward in exchange

for testimony, Tr. at 2067, 2069. But in the face of Ms. Sullivan-Odom's denial of these accusations, defense counsel was left without any effective impeachment evidence to call her credibility in to question.

3. Ms. Sullivan-Odom's Indictment Was Not Discoverable With Reasonable Diligence.

Defense counsel did not possess information regarding Ms. Sullivan-Odom's indictment, *see* Ex. 14 (Steiner Aff.) ¶ 14; Ex. 15 (Carter Aff.) ¶ 14, nor could they have obtained it through "reasonable diligence." *Manning v. State*, 158 So. 3d at 305. When the State represents, as it did here, that all *Brady* material was disclosed, defense counsel is not obligated to "scavenge for hints of undisclosed *Brady* material." *Banks*, 540 U.S. at 695-96. Defense counsel instead reasonably relied on District Attorney Evans' representations during the sixth trial that there were no updates to the State witnesses' criminal histories. Although the State's *Brady* obligations apply regardless of any request for exculpatory information, "the more specifically the defense requests certain evidence, thus putting the prosecutor on notice of its value, the more reasonable it is for the defense to assume from the nondisclosure that the evidence does not exist, and to make pretrial and trial decisions on the basis of this assumption." *Bagley*, 473 U.S. at 682-83. Petitioner's rights under *Brady* would be "thwarted if a prosecutor were free to ignore specific requests for material information obtainable by the prosecutor from a related governmental entity, though unobtainable by the defense." *Martinez*, 621 F.2d at 187. Defense counsel here did not have "any responsibility to be aware of the witness' criminal record," particularly because "the prosecution, not the defense, is equipped with the resources to accurately and comprehensively verify a witness' criminal background." *Perdomo*, 929 F.2d at 973.

4. This Claim Is Not Procedurally Barred.

This claim is properly raised on post-conviction review because an undeveloped record precluded defense counsel from raising it at trial or on direct appeal. M.R.A.P. 22(b); *see also* Miss. Code. Ann. § 99-39-3(2). Trial counsel did not even learn of Ms. Sullivan-Odom's federal tax fraud indictment until several months after Petitioner's sixth trial concluded. *See* Resp. in Opp'n to Mot. for Leave to Seek Disc., *Flowers v. State*, No. 2015-DR-00591-SCT (Miss. Cir. Oct. 20, 2015) (hereinafter "Resp. Opp'n") Ex. A, at App'x 4 (Aff. of Ray Charles Carter (July 11, 2015)). Petitioner's *Brady* claim related to that indictment was therefore not raised, or capable of being raised, at trial. *See Simon v. State*, 857 So. 2d 668, 679 (Miss. 2003) (rejecting State's argument that petitioner's *Brady* claim was procedurally barred where petitioner alleged he did not have knowledge of any suppressed evidence at the time of trial); *see also* Miss. Code Ann. § 99-39-21(1). There is no dispute on this issue—the State agrees that this *Brady* claim "[was] not presented to the trial court for review." Resp. Opp'n, Ex. B (Resp. to Mot. for Remand and Leave to File Suppl. Mot. for New Trial at 2, *Flowers v. State*, No. 2010-DP-01348-SCT (Miss. Cir. (May 25, 2012))).

And although Mr. Flowers filed a Motion for Remand and Leave to File Supplemental Motion for New Trial to "assert[] a violation of *Brady v. Maryland*, 373 U.S. 83 (1963)" related to Ms. Sullivan-Odom's indictment, Mr. Flowers did not seek an adjudication of that claim on the merits, nor did the court address them. Resp. Opp'n, Ex. A (Mot. for Remand and Leave to File Suppl. Mot. for New Trial, *Flowers v. State* at 1, No. 2010-DP-01348-SCT (Miss. Cir. (May 1, 2012))). In fact, Mr. Flowers' motion stated explicitly: "[Petitioner] is not seeking—and does not intend to seek—an adjudication of his *Brady v. Maryland* claim until he has been afforded an opportunity to complete development of the necessary facts." *Id.* at 13, n. 21. The

Supreme Court of Mississippi denied the motion without addressing the merits of this prospective, undeveloped *Brady* claim. *See* Resp. Opp'n, Ex. C (Order, *Flowers v. State* at 1, No. 2010-DP-01348-SCT (Miss. Cir. (June 20, 2012))).

Nor were the merits of this *Brady* claim considered on direct appeal. To the contrary, the Supreme Court of Mississippi denied Mr. Flowers' request to set aside its prior order in response to his Motion for Remand "[b]ecause the issue was not presented to the trial court" and it was "not proper on appeal." *Flowers v. State*, 158 So. 3d 1009, 1075 (Miss. 2014). No court, therefore, has yet reached the merits of Petitioner's *Brady* claim and he is entitled to raise it on post-conviction review. *See Bennett*, 990 So. 2d at 158.

GROUND C

THE STATE KNOWINGLY PRESENTED FALSE AND PERJURED TESTIMONY IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE FEDERAL CONSTITUTION AND MISSISSIPPI LAW.

The State may not knowingly advance or fail to correct false testimony in its pursuit of a conviction. *See e.g., Napue*, 360 U.S. at 269-71; *Giglio.*, 405 U.S. at 153-54. The U.S. Supreme Court first recognized this strict obligation in *Mooney v. Holohan*, 294 U.S. 103, 112 (1935), where it admonished the State for its "deliberate deception of court and jury by the presentation of testimony known to be perjured." Subsequent Supreme Court decisions sharpened *Mooney*'s holding, making clear that the State's presentation or failure to correct false or misleading evidence violates the due process clause of the Fourteenth Amendment. *See e.g., Alcorta v. Texas*, 355 U.S. 28, 31-32 (1957); *Pyle v. Kansas*, 317 U.S. 213, 216 (1942). To establish a due process violation based on the State's use of false or misleading evidence, a

petitioner must show that: (1) the evidence was false, (2) the State knew that the evidence was false, and (3) the evidence was material. *Giglio*, 405 U.S. at 153-154.

In *Napue v. Illinois*, the Supreme Court clarified two critical principles relating to the State's use of false testimony. First, the false testimony need not reach guilt or innocence to be material. 360 U.S. at 269. Instead, "a lie is a lie" and false testimony relating to a witness's credibility is equally damaging. *Id.* ("[T]he jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence . . . [and] it is upon such subtle factors . . . that a defendant's life or liberty may depend."). Second, the State violates due process whether it solicits the false testimony or allows the false testimony to go uncorrected when it occurs. *Id.*; *see also*, *Giglio*, 405 U.S. at 154 ("[W]hether the nondisclosure was a result of negligence or design, it is the responsibility of the prosecutor.").

Although the State's presentation of false testimony must be knowing to run afoul of *Napue*, this knowledge requirement is satisfied even when the State negligently solicits false testimony or allows false testimony to go uncorrected. *See Martinez*, 621 F.2d 184, 186-88 (5th Cir. 1980). It is not enough for the State to claim that it was a good faith mistake or oversight. *See Giglio*, 405 U.S. at 154. Moreover, the prosecuting attorney need not have actual knowledge of the falsity; knowledge of information in the investigation file is imputed to the prosecution. *See Agurs*, 427 U.S. at 110; *Giglio*, 405 U.S. at 154; *see also Smith v. State*, 492 So. 2d at 267 ("The fact that the prosecuting attorney who asked the question may not have actually known [that a witness' testimony was false] is immaterial since knowledge of the information in the police file is imputed to him."); *Box v. State*, 437 So. 2d 19, 25 n.4 (Miss. 1983) (Robertson, J., specially concurring) (what information is known or available to police officers is "deemed known by or available to the State").

With respect to materiality, the *Napue/Giglio* standard is lenient—the relevant question is whether there is "if 'the false testimony could . . . in ***any*** reasonable likelihood affected the judgment of the jury[.]'" *Giglio*, 405 U.S. at 154 (emphasis added) (quoting *Napue*, 360 U.S. at 270); *Kirkpatrick v. Whitley*, 992 F.2d 491, 497 (5th Cir. 1993) ("[I]f the prosecutor has knowingly used perjured testimony or false evidence, the [materiality] standard is considerably less onerous" than under *Brady*); *Dahl v. King*, No. 1:09CV298-HSO-JMR, 2011 WL 7637258, at *24 (S.D. Miss. Sept. 9, 2011) *R. & R. adopted*, No. 1:09-CV-298HSO-JMR, 2012 WL 1072201 (S.D. Miss. Mar. 29, 2012) ("Under *Giglio*, perjured evidence is material if 'in any reasonable likelihood [it could] have affected the judgment of the jury,' a lower threshold than in a *Brady* analysis.").

Here, Petitioner's trial was infected by the State's knowing presentation of false testimony from two law enforcement officers, Lieutenant Wayne Miller and investigator Jack Matthews. These claims are properly raised on post-conviction review because Mr. Flowers was precluded from raising them at trial or on direct appeal due to the State's withholding of critical evidence, which was discovered only after Petitioner's appeal was decided. M.R.A.P. 22(b); see also Miss. Code Ann. § 99-39-3(2). Trial counsel had no knowledge of these issues, and could not possibly have raised these issues at trial or on direct appeal. Therefore, Petitioner's *Napue*/*Giglio* claims are not procedurally barred and this Court must consider them.

A. The State's Knowing Presentation Of False Testimony From Lieutenant Wayne Miller And Investigator Jack Matthews About Alternative Suspects Violated Mr. Flowers' Due Process Rights.

Throughout the six prosecutions of Petitioner, the State was adamant and unwavering in its position that Curtis Flowers was the only suspect they ever investigated. We now know that this was untrue; the State pursued at least one set of alternative suspects. And not only did the

State fail to disclose this investigation to the defense in violation of *Brady*, but two State witnesses testified falsely to ensure that this investigation would remain hidden. New evidence makes clear that Petitioner was convicted on the basis of untruthful testimony. He is entitled to a new trial.

1. Lieutenant Wayne Miller's Testimony Was False.

Lieutenant Wayne Miller of the Mississippi Highway Patrol assembled both of the photo arrays presented to Porky Collins on August 24, 1996. Tr. 3021. Mr. Miller personally selected the photographs for the arrays. Tr. at 3013-14. At trial, Mr. Miller testified that, other than Doyle Simpson in the first array, and Curtis Flowers in the second array, no other "persons of interest" were included in the arrays, and all of the other photographs were "just filler pictures" from "various police departments" of people with "the same race, similar complexion, things of that nature." Tr. 3016-17, 3025.

This testimony was false. At least one of the photographs in the second array was not a "filler"—it was a photograph of Alabama suspect Marcus Presley. *See* Ex. 11 (State's Color Photo Lineup and Side-by-Side Comparison); Ex. 12 (Guo Aff.) ¶ 5; Ex. 8 (Presley Aff.) ¶ 22. Nor was that photograph chosen haphazardly from the "various police departments" to which Lieutenant Miller so casually referred in his testimony—departments that were so unimportant and forgettable that Mr. Miller simply neglected to note which ones had sent which photographs. Instead, the photograph of Marcus Presley that Lieutenant Miller included in the second array shown to Porky Collins was sent by Detective David Goldberg of the Norfolk Police Department ***at the specific request of Lieutenant Miller himself***, a request he made in connection with the State's investigation into the potential connection of the Alabama suspects to the Tardy murders.

2. Investigator Jack Matthew's Testimony Was False.

During his trial testimony, Jack Matthews, an investigator with the Mississippi Highway Patrol who was closely involved in the investigation of the Tardy murders, was asked if investigators explored whether any similar crimes had taken place around the time of the Tardy murders, and which might have been related. Mr. Matthews said no, they "didn't run across anything." Tr. 2579. More to the point, when asked—twice—whether he had heard about crimes committed by two gentlemen by the names of "Prestidge" and "Gamble," Matthews both times denied any such knowledge:

> Q. And did you discover any similarly committed criminal acts to the one that occurred down there at Tardy's?
> A. No. We didn't run across anything.
> Q. And how did you check into that? What did you do?
> A. Well, it was pretty much on the news in the area, and we didn't have anybody that had anything of this magnitude anywhere else around at that time.
> Q. And where did you check, Mr. Matthews?
> A. Well, we checked NCIC's information. We get that daily at the station.
> Q. And you didn't hear about some crimes taking place in Decatur, Mississippi involving – I think it might have been a gentleman by the name Prestidge, P-R-E-S-T-I-D-G-E and Gamble?
> A. ***I don't remember that, no.***
> Q. Did you hear about any similar crimes taking place in Alabama involving a guy by the name of Prestridge and Gamble?
> A. ***I did not.*** I don't remember at that time."

Tr.. 2579 (emphases added).

This testimony was false.[35] As discussed *supra*, Mississippi law enforcement actively pursued Presley and Gamble as suspects. They affirmatively reached out to law enforcement agencies in Alabama and Virginia (where Presley and Gamble were taken into custody) for

[35] Matthews' false testimony is not excused by the fact that in addition to referring to Gamble and murders in Alabama, trial counsel mispronounced and misspelled Presley's name and mentioned a crime in Decatur. The State had investigated the murders sufficiently that Matthews plainly knew or should have

information, and they sent evidence relating to the Tardy murders to authorities in Boston, where the manhunt for Presley and Gamble began.

That the prosecution knew Mr. Matthews' testimony was false but nonetheless failed to correct it is sufficient to establish a constitutional violation. *See Agurs*, 427 U.S. at 110; *Giglio*, 405 U.S. at 154; *Smith*, 492 So. 2d at 267 ("knowledge of the information in the police file is imputed to him."). But Jack Matthews knew it, too. He played a central role in the investigation of the Tardy murders, Tr. 2879, an investigation we now know included an exploration of Presley and Gamble as suspects. Indeed, Mr. Matthews played a vital role in every single step of the investigative process. Mr. Matthews interviewed numerous key witnesses, including Mr. Flowers on the day of the murders, Tr. 2482; Doyle Simpson, Tr. 2520; Porky Collins, Tr. 2553; Katherine Snow, Tr. 2569; Roxanne Ballard, Tr. 2563; and Clemmie Flemming, Tr. 2580, among others. Mr. Matthews also performed the gunshot residue test on Petitioner, Tr. 2478; searched the home of Connie Moore, where Petitioner was staying at the time of the murders, Tr. 2519; and pried slugs from Doyle Simpson's mother's fencepost. Tr. 2520. In light of his heavy involvement in the Tardy investigation, it defies belief that Mr. Matthews would not have been aware of the State's investigation of Presley and Gamble in July and August 1996.

3. The Prosecution Knew That Mr. Miller And Mr. Matthews Testified Falsely.

Here, there is no question the prosecution knew that Mr. Miller and Mr. Matthews testified falsely, especially given that all information about the investigation was, according to Matthews, "funneled all of our information through the D.A.'s office." Tr. 2577. And if there

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known to whom counsel was referring. Nor is there any doubt that the State knew, or at the very least should have known, that Matthews' testimony was false.

were any doubt on that score, recent on-the-record statements by District Attorney Evans put it to rest. At a January 29, 2016 hearing in this proceeding, Mr. Evans emphatically represented to the court: "As far as the Flowers case, there was nothing that went on that I didn't personally handle . . . there was nothing that went on in that case that I was not aware of." Jan. 2016 Hr'g Tr. 3. Mr. Evans further explained: "The way this case worked, every agency that was working on it, did different parts. They compiled one file at our office with everything that everybody worked on. ***Everything that was involved with any agency, police department, sheriff's department, MDI, crime lab, all of it was in our file***. ***So everything that they have would be in our file*** . . . ." Tr. at 58-59 (emphasis added).

There is additional evidence that the prosecution knew the details about the individuals pictured in the photo arrays shown to Porky Collins. In *Flowers II*, Lieutenant Miller insisted on the record that the police file included a record of the source of the photographs and who each individual was. *Flowers II* Tr. 873. Without prompting, District Attorney Evans added that "the originals at the Supreme Court have the names on the back of the original pictures." *Id.* 874. Thus, by Mr. Miller's and Mr. Evans' own admissions, even if Lieutenant Miller's contact with Detective Goldberg was never documented, Marcus Presley's name was.

4. <u>The False Testimony Was Material.</u>

These falsehoods were material. The *Napue/Giglio* materiality threshold is exceedingly low. It is met if there is *any reasonable likelihood* that the false testimony *could have impacted* the jury's judgment. *Giglio*, 405 U.S. at 154; *see Napue*, 360 U.S. at 271 (emphases added). The new evidence proving Mr. Miller's and Mr. Matthews' false testimony easily satisfies this standard.

If the jury had learned that, contrary to the State's repeated avowals and Mr. Miller's and Mr. Matthews' false testimony, Mr. Flowers was not the only suspect in the State's investigation of the Tardy murders, and that the State had investigated other suspects committing very similar murders nearby, there is no question that it could have impacted the jury's view of the case. As discussed in Ground A, the crimes committed by Presley and Gamble closely matched the facts of the Tardy murders, and Presley has now admitted in a sworn affidavit that Gamble and another co-defendant were in Mississippi during the time of the Tardy murders, carrying a .380 handgun and returning to Alabama with cash they did not have when they left. Ex. 8 (Presley Aff.) ¶¶ 7-10. The fact that Lieutenant Miller requested a photograph of Marcus Presley for use in the photo arrays shown to eyewitnesses would further have impressed upon the jury that the connection of Presley and Gamble to the Tardy murders was more than just a "hunch" on the part of Mississippi authorities. Had this evidence been presented, it would have "put the whole case in such a different light as to undermine confidence in the verdict." *Kyles*, 514 U.S. at 435. This conclusion is underscored by the fact that jurors—and especially death qualified jurors—tend to be "more trusting of prosecution witnesses (such as police officers)," *see* Craig Haney, *Death by Design* 110 (Ronald Roesch, ed., 1st ed. 2005), and thus tend to give the testimony of police officers more weight.

Moreover, courts routinely find *Napue/Giglio* violations in circumstances where the challenged testimony is based on an omission or where it is less clearly false than that at issue here. *See, e.g.*, *Jenkins v. Artuz*, 294 F.3d 284, 294 (2d Cir. 2002) (finding *Giglio* violation where testimony was "probably true" but "misleading"); *United States v. Sutton*, 542 F.2d 1239, 1243 (4th Cir. 1976) (finding due process violation where "the prosecution allowed a false impression to be created at trial when the truth would have directly impugned the veracity of its

key witness"); *United States v. Iverson*, 637 F.2d 799, 805 n.19 (D.C. Cir. 1980) (noting that "it makes no difference" for purposes of discerning a *Giglio* violation, "whether the testimony is technically perjurious or merely misleading"). Mr. Miller's and Mr. Matthews' false testimony were not minor oversights. Instead, these falsehoods were part of a deliberate scheme to suppress the State's investigation of the Alabama suspects and leave the impression that Mr. Flowers was their only suspect.

Mr. Flowers was entitled to have his guilt or innocence adjudicated on the basis of truthful testimony. The prosecution's knowing presentation of false testimony—and from law enforcement agents, no less—rendered Mr. Flowers' trial fundamentally unfair in violation of the Due Process Clause, and mandates reversal of his convictions and sentences.

GROUND D

THE STATE EXERCISED PEREMPTORY CHALLENGES ON THE BASIS OF RACE IN VIOLATION OF THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT TO THE FEDERAL CONSTITUTION AND MISSISSIPPI LAW.

"For more than a century," the U.S. Supreme Court "consistently and repeatedly has reaffirmed that racial discrimination by the State in jury selection offends the Equal Protection Clause." *Georgia v. McCollum*, 505 U.S. 42, 49 (1992) (citing *Strauder v. West Virginia*, 100 U.S. 303 (1880)); *see also Batson v. Kentucky*, 476 U.S. 79, 89 (1986). The Mississippi Supreme Court, likewise, has repeatedly reaffirmed its unwillingness to tolerate racial discrimination in jury selection—including in the context of the prosecution of this Petitioner by this District Attorney. *See Flowers v. State*, 947 So. 2d 910, 935 (Miss. 2007) (hereafter, "*Flowers III*") (reversing and remanding for new trial upon finding "as strong a *prima facie* case of racial discrimination as we have ever seen in the context of a *Batson* challenge"); *see also,*

e.g., McGee v. State, 953 So. 2d 211 (Miss. 2007) (reversing and remanding for new trial based on *Batson* violation); *Thorson v. State*, 721 So. 2d 590 (Miss. 1998) (same); *Conerly v. State*, 544 So. 2d 1370 (Miss. 1989) (same).

Nevertheless, racial discrimination in jury selection persists, in Mississippi and elsewhere, not least because of the "practical difficulty of ferreting out discrimination in selections discretionary by nature[.]" *Miller-El v. Dretke*, 545 U.S. 231, 238 (2005) (hereafter "*Miller-El II*"); *see also id.* at 267 (Breyer, J., concurring) (lamenting the "practical problems of proof" in discerning *Batson* violations); *Flowers III*, 947 So. 2d at 937:

> [R]acially-motivated jury selection is still prevalent twenty years after *Batson* was handed down and . . . this case evinces an effort by the State to exclude African-Americans from jury service . . . Unfortunately, as this case has shown, Justice Marshall was correct in predicting that th[e] problem [of racially discriminatory use of peremptory challenges] would not subside" under the *Batson* formula) (citations omitted).

In this case, however, the Court confronts no such difficulty. New evidence demonstrates beyond any doubt the racial motivation behind the State's exercise of peremptory strikes at Mr. Flowers' trial.

First, the facts. During *voir dire* in Mr. Flowers' trial, the State managed to seat a jury of eleven whites and one African-American out of an original venire that was 42% African-American, in a county where 45% of the 2010 population was African-American.[36] Were there any serious question about the prosecutor's motivation in peremptorily striking all but one of the African-American venire members tendered for service, his systematic exclusion of African-Americans during jury selection throughout this case puts it swiftly to rest:

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[36] U.S. Census Bureau, *QuickFacts: Montgomery County, Mississippi*, http://www.census.gov/quickfacts/table/PST045215/28097 (last visited Mar. 14, 2016) (reporting that of 10,925 Montgomery County residents in 2010, 45.5% were African-American).

- In *Flowers I*, District Attorney Evans peremptorily struck all five African-American venire members tendered for service. The jury that convicted Mr. Flowers and sentenced him to death was all white.

- In *Flowers II*, District Attorney Evans peremptorily struck all five African-American venire members tendered for service. But for the fact that the trial court disallowed one of those strikes on *Batson* grounds, the jury that convicted Mr. Flowers and sentenced him to death would again have been all white. Instead, the jury was made up of eleven whites—and the lone African-American the State was prevented from removing.

- In *Flowers III*, District Attorney Evans exercised all fifteen available peremptory strikes (twelve strikes plus three alternate strikes) against African-American venire members. Although two African-Americans sat on the jury, they did so only because the State ran out of peremptory strikes. On direct appeal, the Mississippi Supreme Court reversed Mr. Flowers' conviction on the basis of two clear *Batson* violations and three more highly suspicious strikes. *Flowers III*, 947 So. 2d at 936.

- In *Flowers IV*, District Attorney Evans exercised all eleven available peremptory strikes against African-American venire members. Although five African-Americans sat on the jury, that was, again, only because the State ran out of peremptory strikes. *Flowers IV* resulted in a mistrial.

- In *Flowers V*, District Attorney Evans used four of the five peremptory strikes he exercised to strike African-American jurors. Three African-Americans served on the jury. After a mistrial, wherein the sole holdout was African-American, Judge Loper ordered the arrest of two of the African-American jury members for perjury.

- In *Flowers VI*, District Attorney Doug Evans accepted the first African-American venire person tendered for service, and then peremptorily struck the remaining five African-American panel members. The jury that convicted Curtis Flowers was made up of eleven whites and one African-American.

Put another way, across the six prosecutions of Curtis Flowers, the State accepted a grand total of four African-Americans for jury service. Every other African-American who made it onto a *Flowers* jury—and there were not many—did so either because the State ran out of peremptory strikes after using 100% of them to strike African-Americans, or because the trial court reversed a strike on *Batson* grounds. This track record is staggering. And it bears

directly on the Court's inquiry into the genuineness of the prosecution's stated reasons for its strikes of 83% of the African-American jurors tendered in *Flowers VI*. *Batson*, 476 U.S. at 96-97 ("all relevant circumstances" must be considered in determining whether a violation has occurred). As the Supreme Court noted in *Miller-El II*, "[i]f anything more is needed for an undeniable explanation of what was going on, history supplies it." 545 U.S. at 266.

New evidence confirms that history explains what was going on here, too. A newly conducted statistical analysis of Mr. Evans' exercise of peremptory strikes in capital cases since he assumed the role of District Attorney of Mississippi's Fifth District in 1992—evidence that was not and could not in practical reality have been presented previously[37]—reveals that he is eight times more likely to strike a black qualified venire member than a white qualified venire member. Ex. 33 (Barbara O'Brien Aff. (Mar. 16, 2016)) ¶ 9. His discriminatory strikes were even more aggressive in the Flowers trials. In those cases, Mr. Evans struck qualified African-American venire members at a rate ***more than 20 times*** the rate of his strikes of white qualified venire members. *Id.* ¶¶ 10-11. To say that "[h]appenstance is unlikely to produce this disparity," *Miller-El II*, 545 U.S. at 240-241 (internal quotation marks omitted), is a vast understatement.[38] The conclusions that necessarily follow from these data are two-fold: (1)

[37] At the direction of Mr. Flowers' post-conviction counsel, a team of five attorneys, four law clerks, and a paralegal spent, collectively, more than 575 hours collecting and organizing these data. Ex. 31 (Patricia A. Brannan Aff. (Mar. 1, 2016)) ¶¶ 6-8 (accounting for 464.9 hours spent on this project); Ex. 32 (William McIntosh Aff. (Mar. 10, 2016)) ¶ 12 (accounting for 112 additional hours spent on this project) This hours total does not include the dozens more hours spent by statisticians and other experts to analyze the data. *See generally* Ex. 33 (Barbara O'Brien Aff. (Mar. 16, 2016)); Ex. 34 (John J. Green & David May Aff. (Mar. 15, 2016)). In view of the tremendous expenditure of both manpower and financial resources associated with this undertaking, there is no way, in practical reality, that trial counsel could have adduced these data at the trial stage. *See* Ex. 35 (Andre De Gruy Aff. (Mar. 3, 2016)) ¶ 5 (attesting that trial counsel would not have had the resources to complete the jury strike analysis).

[38] The Mississippi Supreme Court already acknowledged as much following Mr. Flowers' third trial. There, "[a]t least 120 potential jurors indicated that they were of African-American descent, meaning that at least forty percent of the potential jury pool was African-American. This percentage closely tracks the racial

Evans is a willful and recalcitrant *Batson* violator and (2) he is at his most virulent when he is prosecuting Curtis Flowers.

The divided panel of the Mississippi Supreme Court that affirmed Mr. Flowers' conviction on appeal did not have the benefit of this newly discovered evidence. To be clear, Mr. Flowers maintains that it was error to affirm notwithstanding the ample evidence of racial discrimination in jury selection (among other things) before the Court at the time it decided his direct appeal. *Cf. Flowers VI*, 158 So. 3d at 1083 (King, J., dissenting) ("Despite the same errors occurring in today's case, the Majority, in a stark departure from this Court's previous *Flowers* opinions, finds that Flowers' conviction and death sentence should be affirmed . . . the errors in today's case resulted in Flowers being denied his right to a fair trial[.]"); *id.* at 119 ("While this repetition of prosecutorial misconduct is alarming, the Majority's approval of the same is even more startling."). But to the extent the State's motivation for its exercise of peremptory challenges was a close question, the new evidence adduced in this Petition tips the scales, mandating a finding that those challenges violated *Batson* and Mr. Flowers' right to be tried by a jury selected through fair and race-neutral means.

Legal Principles

Exercising peremptory strikes on the basis of race violates the Equal Protection Clause of the Fourteenth Amendment. *Batson*, 476 U.S. at 89. Where even a single juror is struck on the basis of race, structural constitutional error has occurred and the petitioner's conviction must

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demographics of Montgomery County, as defense counsel asserted that African-American citizens comprise forty-five percent of the county's population. The prosecutor exercised all fifteen of his peremptory strikes on African-Americans, and the lone African-American who ultimately sat on Mr. Flowers' jury was seated after the State ran out of peremptory challenges." *Flowers III*, 947 So. 2d at 936. On appeal, the Court noted that "though the sheer number of strikes exercised against a cognizable group of jurors is not itself dispositive . . . [s]uch a result cannot be considered 'happenstance.'" *Id.* at 935-36 (citing *Miller-El v. Cockrell*, 537 U.S. 322, 342 (2003)) (hereafter "*Miller El-I*").

be reversed. *Id.* at 100; *see also Dawson v. Delaware*, 503 U.S. 159 (1992) (Blackmun, J., concurring) (*Batson* violations are not subject to harmless-error analysis); *Flowers III*, 947 So. 2d at 939 ("Based on the State's *Batson* violation, we are required to reverse"); *Scott v. Hubert*, No. 13-30493, 2015 WL 4547719, at *1 (5th Cir. July 28, 2015) (discrimination on the basis of race in *voir dire* is a structural error that voids a conviction) (citing *Vasquez v. Hillery*, 474 U.S. 254, 261–64 (1986)).

In lodging a *Batson* claim, the party objecting to the peremptory strike must first make a *prima facie* showing that race was the reason for the exercise of the peremptory strike. *Flowers III*, 947 So. 2d at 917. Once a *prima facie* case of discrimination has been established, the burden shifts to the party who exercised the strike to articulate a race-neutral explanation for excluding that potential juror. *Id*. Finally, the trial court must determine whether the race neutral explanation "is merely a pretext for racial discrimination." *Id*.

Critically, Courts cannot take such explanations at face value. In determining whether facially neutral reasons are pretextual, "all of the circumstances that bear upon the issue of racial animosity must be consulted." *Snyder v. Louisiana*, 552 U.S. 472, 478 (2008) (citing *Miller-El II*, 545 U.S. at 239); *see also Batiste v. State*, 121 So. 3d 808, 848 (Miss. 2013) (courts must "consider all relevant circumstances" in assessing whether a *Batson* violation has occurred). Although the "sheer number of strikes exercised against a cognizable group of jurors is not itself dispositive . . . the relative strength of the *prima facie* case of purposeful discrimination will often influence" *Batson's* third inquiry. *Flowers III*, 947 So. 2d at 935 (citing *Sewell v. State*, 721 So. 2d 129, 136 (Miss. 1998)) (internal quotations omitted).

A history of racial discrimination by the prosecuting office is relevant in assessing whether discrimination occurred, *Miller-El II*, 545 U.S. at 263. So, too, are contrasting *voir*

dire questions posed respectively to black and nonblack venire members; "[t]he presence of unchallenged jurors of the opposite race who share the characteristic given as the basis for challenge"; "failure to *voir dire* as to the characteristic cited"; and lack of record support for the cited characteristic. *Flowers III*, 947 So. 2d at 917 (quoting *Manning v. State*, 765 So. 2d 516, 519 (Miss. 2000)). All of these factors are present here, in spades.

A. The Prosecution Violated Mr. Flowers' Equal Protection Rights When It Struck Prospective Jurors On The Basis of Race.

1. The Strength Of The *Prima Facie* Case.

Although, as noted above, statistics alone are insufficient to prove a *Batson* violation, "'the relative strength of the *prima facie* case of purposeful discrimination will often influence th[e *Batson*] inquiry,'" *Flowers III*, 947 So. 2d at 935 (citation omitted), and the statistics here are stunning. A jury pool that began with 42% African-American venire members was whittled down to 28% African-American venire members after strikes for cause, Tr. 1733, 1734, and only one African-American sat on the jury that convicted Curtis Flowers and sentenced him to death. To achieve that result, District Attorney Evans struck all but one of the African-Americans tendered for service. *See* Appendix A to Br. of Appellant, *Flowers VI* (Miss. July 1, 2013) (hereinafter "App. A").

The Mississippi Supreme Court split on the question of whether that violated *Batson*, demonstrating the question was close just based on the record at trial. *See Flowers VI*, 158 So. 3d at 1088 (King, J., dissenting on *Batson* grounds, joined by Kitchens, J. and Dickinson, P.J.). As the three dissenters recognized, the statistics surrounding the State's exercise of peremptory strikes against African-American jurors in *Flowers VI* "are too disparate to be explained away or categorized as mere happenstance." *Id*. at 1090. Instead, they "reveal a clear pattern of

disparate treatment between white and African-American venire members." *Id*. at 1089. Indeed, the statistics surrounding the State's exercise of peremptory strikes in *Flowers VI* are even more egregious than those the Supreme Court deemed "remarkable" in *Miller-El II* before reversing the petitioner's conviction on *Batson* grounds. 545 U.S. at 240-41.

In *Miller-El*, the overall venire pool began as 18% African-American (there were 20 African-Americans in a 108-person venire panel). Nine African-American venire members were excused for cause or by agreement; after for-cause challenges, 11 African-Americans remained in the qualified venire. The State then peremptorily struck 91% of the eligible African-American venire members. One African-American ultimately served on the jury that convicted Miller-El. *Miller-El II*, 545 U.S. at 240-41.

Here, the original venire was composed of 42% African-American jurors; after for-cause challenges, 28% remained. District Attorney Doug Evans then accepted the first African-American juror who survived for-cause challenges and struck the remaining five tendered for service—an 83% strike rate against African-American jurors. *See* App. A. One African-American sat on the jury that convicted Curtis Flowers and sentenced him to death. *Id*. *Flowers VI*, 158 So. 3d at 1089. To state the obvious, "[h]appenstance is unlikely to produce this disparity." *Miller-El II*, 545 U.S. at 240-41. The trial court acknowledged as much, finding a *prima facie* case of discrimination. *Flowers VI*, 158 So. 3d at 1047.

2. The Reasons Offered For The Strikes Were Pretext.

With respect to the determination of whether the reasons offered for challenged strikes are pretext, "[t]his Court has examined the number of strikes on a particular class, the ultimate ethnic or gender makeup of the jury, the nature of questions asked during *voir dire*, and the overall demeanor of the attorney." *Randall*, 716 So. 2d at 587 (citing *Coleman v. State*, 697 So.

2d 777, 786 (Miss. 1997)). In making this determination, courts must "consider all relevant circumstances." *Batiste*, 121 So. 3d at 848; *see also Batson*, 476 U.S. at 93, 96 ("In deciding if the defendant has carried his burden of persuasion, a court must undertake 'a sensitive inquiry into such circumstantial and direct evidence of intent as may be available'" and must "consider all relevant circumstances") (quoting *Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977)); *see also Manning*, 765 So. 2d at 519 (at *Batson* step three, Mississippi Courts consider five indicia of pretext:

> (1) disparate treatment, that is, the presence of unchallenged jurors of the opposite race who share the characteristic given as the basis for the challenge; (2) the failure to *voir dire* as to the characteristic cited; (3) the characteristic cited is unrelated to the facts of the case; (4) lack of record support for the stated reason; and (5) group-based traits.) (internal citations omitted).

Here, in addition to the strength of the *prima facie* case and other strong evidence of discriminatory intent, Mr. Flowers has uncovered powerful new evidence that makes clear that the State's exercise of peremptory strikes in this case was motivated by race, and that the supposedly race-neutral justifications offered to justify those strikes were pretext. Although statistics alone are insufficient to make out a *Batson* violation, they are the lens through which other evidence of discriminatory intent must be viewed. When viewed as a whole, the evidence now before the Court leaves no doubt that the State's exercise of peremptory strikes violated Mr. Flowers' constitutional rights.

a. The prosecution's history of racial discrimination in jury selection

District Attorney Evans has a demonstrated and uninterrupted track record of racial discrimination in jury selection—not just in the six prosecutions of Curtis Flowers, but also in every other capital case he has tried for which jury strike data were available.

During the summer of 2015, a team of ten (five attorneys, four law clerks, and a paralegal) spent, collectively, more than 575 hours attempting to collect peremptory strike data for every capital case Mr. Evans has tried in his now 24 years as District Attorney. Ex. 31 (Brannan Aff.) ¶ 8; Ex. 32 (McIntosh Aff.) ¶ 12. These efforts are explained in more detail in the affidavits of William McIntosh and Ashley Stancik, attached here to as Exhibits 32 and 36, but, briefly, Mr. Flowers' post-conviction team did the following:

- Identified all capital cases tried by District Attorney Evans, and the county in which each case originated and was tried. *See* Ex. 32 (McIntosh Aff.) ¶¶ 4-5.

- Traveled to five of the seven counties located in Mr. Evans' district to inspect court records relating to jury selection. To counsel's knowledge, Mr. Evans has never tried a capital case in Winston or Webster counties, so no records were obtained there. Where the relevant information was located in the court files, copies of relevant records were made. Information obtained included, among other things: (i) names, race, and gender of *voir dire* panel members; (ii) peremptory strikes exercised by the State; (iii) peremptory strikes exercised by defense counsel; (iv) names, race, and gender of tendered and struck jurors; and (v) names, race, and gender of seated jurors. *See* Ex. 32 (McIntosh Aff.) ¶ 6.

- Where the jury information described above was not available in the court clerk file, the post-conviction team traveled to Jackson to inspect records at the Mississippi Department of Archives and History and the Mississippi Supreme Court. *See* Ex. 32 (McIntosh Aff.) ¶¶ 7-8.

- Because race and gender information was not available for certain jurors, the post-conviction team undertook substantial additional efforts to obtain those data. These included, but were not limited to attempting to obtain the missing data: (a) from voter registration databases; (b) from DMV records; (c) from Office of Vital Statistics records; (d) from records housed at the Secretary of State's Office at the Elections Call Center of Mississippi; (e) from jury administration records; (f) by obtaining and/or purchasing it from political consultancies; (g) by reviewing census reports; and (h) by contacting trial, appeal, and post-conviction counsel for the defendants in the cases for which data were missing. *See* Ex. 32 (McIntosh Aff.) ¶ 10; Ex. 36 (Ashley Stancik Aff. (Mar. 7, 2016)) ¶¶ 4-9.

- Ultimately, Mr. Flowers' post-conviction team obtained complete data for 13 capital cases tried by Doug Evans, including four prosecutions of Curtis Flowers.[39] *See* Ex. 32 (McIntosh Aff.) ¶¶ 6, 9, 11.

- Once the universe of cases with complete data had been determined, post-conviction counsel worked with several experts to process the data. The steps those experts took to analyze the data are explained in detail in the Affidavit of Barbara O'Brien, attached hereto as Ex. 33, and the Affidavit of John Green and David May, attached hereto as Ex. 34.

In light of the staggering amount of resources—in terms of both manpower and cost—required to collect and analyze these data, this evidence could not, "in practical reality . . . have been raised at trial or on direct appeal," and therefore is properly before the Court at this stage of the proceedings.[40] *Foster v. State*, 687 So. 2d 1124, 1129 (Miss. 1996).

The results of the data analysis are nothing short of shocking. Two separate statistical analyses, each described in detail below, reveal that, across the 13 cases analyzed, Mr. Evans exercises peremptory challenges at a much higher rate against black venire members than against white venire members:

Strike-eligible venire member analysis: Professors Barbara O'Brien and Catherine Grosso undertook an analysis of Mr. Evans' peremptory strike rate of "strike-eligible"

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[39] These include the prosecutions of: Billy Joe Barnett, Lawrence Branch, Roderick Eskridge, Deondray Johnson, Barry Love, Terry Pitchford, Christopher Rosenthal, Bradford Staten, Krishun Williams and Derrick Willis (tried together as co-defendants), and the third, fourth, fifth, and sixth trials of Curtis Flowers. In addition to the first two capital prosecutions of Curtis Flowers, District Attorney Doug Evans tried six additional capital cases in which the post-conviction team was unable to obtain race information for venire members. These cases therefore were excluded from the statistical analysis. These cases include the prosecutions of: Frederick Bell, Anthony Doss, Christopher Fair, Markeith Fleming, William Joseph Holly, Edwin Hart Turner. A detailed explanation of the efforts undertaken to obtain the missing information for these cases is set forth in the affidavit of Ashley Stancik at ¶¶ 4-9. Notably, of the 77 venire panel members in the Barnett case, post-conviction counsel were unable to obtain race information for two jurors. Ex. 32 (McIntosh Aff.) ¶ 11.

[40] To the extent the Court determines that trial counsel could have adduced this evidence prior to trial—which they could not have, Ex. 35 (De Gruy Aff.) ¶ 5—Mr. Flowers submits their failure to do so was ineffective assistance of counsel.

jurors—*i.e.*, potential jurors who were not excused for cause or because enough jurors had been selected by the time the court reached them. *See* Ex. 33 (O'Brien Aff.) ¶¶ 4-6 (explaining methodology). Across all strike-eligible venire members in the study, District Attorney Evans struck 65.2% of eligible black venire members, compared to only 8.2% of eligible white venire members. In other words, Mr. Evans was, on average, nearly eight times more likely to strike a black qualified venire member than a white qualified venire member. Ex. 33 (O'Brien Aff.) ¶ 8 & Table 2. There is less than a one in one thousand chance that a disparity of this magnitude would occur if the jury selection process were race neutral. *Id.* This massive disparity persisted when the data were analyzed in the context of each trial included in the study. In each of those cases, Mr. Evans struck qualified black venire members at an average rate of 65.1%, but struck qualified white venire members at an average rate of 8.1%. *Id.* at ¶ 9 & Table 3. Thus, prosecutors struck qualified venire members who were black at more than eight times the rate they struck qualified white venire members. *Id.*

When the four *Flowers* trials in the study were analyzed separately, the disparities were even sharper. In those cases, Mr. Evans struck 72.9% of qualified black venire members, compared to just 3.2% of qualified white venire members. *Id.* at ¶ 10 & Table 4. Thus, Mr. Evans ***struck qualified venire members who were black at 20.4 times the rate he struck white qualified venire members***. *Id.* This pattern across the *Flowers* trials is consistent with the pattern evidenced in Mr. Flowers's most recent trial. *Id.* at ¶ 12 & Table 1. In that trial, Mr. Evans struck 71.4% of qualified venire members who were black, compared to 4.0% of qualified white venire members. In other words, Mr. Evans struck qualified venire members who were black at 17.9 times the rate he struck qualified white venire members. *Id.*

Full venire analysis: Separately, Professors John Green and David May undertook an analysis of the rate of peremptory strikes as compared to the full venire panel. *See* Ex. 34 (John J. Green & David May (Mar. 15, 2016)) ¶¶ 3-6 (describing methodology). Using cross-tabulation analysis, which is used for identifying if there is a pattern between categories on one variable and categories on a second variable, they determined that, across the 13 cases in the study, District Attorney Evans was more than five times as likely to strike a black venire member than a white venire member (3.8% of white venire members versus 19.9% of black venire members). *See id.* ¶¶ 8-9. Based on this preliminary analysis, Professors Green and May concluded that there was a "moderately strong" association between a potential juror's race and being struck by Mr. Evans. *Id.* ¶ 11. The probability of finding this association across the populations of potential jurors from 13 different cases if there was no association between race and being struck is less than 1 in 1,000. *Id.* ¶ 12.

Next, using logistic regression analysis, which is used to model the likelihood of a potential juror being struck by District Attorney Evans, Professors Green and May determined that, across the 13 cases analyzed, black venire members were more than six times (6.322) as likely to be peremptorily struck by Mr. Evans than white venire members. *Id.* ¶¶ 13-15. This finding remained true even when Professors Green and May controlled for the influence of any individual case factors that may have affected the analysis. *Id.* ¶¶ 19-22.

Finally, Professors Green and May conducted a layered cross tabulation to assess whether race was associated with being struck by District Attorney Evans. *Id.* ¶ 23. They ran this analysis separately for the non-*Flowers* and *Flowers* cases in the study. *Id.* Across the nine non-Flowers cases, African-American venire members were more than 3.9 times as likely to be peremptorily struck than white venire members. *Id.* ¶ 23(a). Across the four *Flowers* cases,

African-American venire members were nearly 16 times (15.769) as likely to be peremptorily struck as white venire members. *Id.* ¶ 23(b). From this analysis, Professors Green and May determined that in the non-Flowers cases there was a moderately strong association between the race of potential jurors and whether they were struck by Mr. Evans, and that in the Flowers cases, this association was strong. *Id.* ¶ 24.

Overall, on the basis of all methods of analysis they used, Professors Green and May determined that "black potential jurors had an increased likelihood of being struck by the DA relative to white potential jurors. We found this pattern consistently, even when controlling for individual court cases. Furthermore, the association between race and being struck was strongest (i.e. of the greatest magnitude) for the Flowers cases." *Id.* ¶ 25.

* * * * *

The obvious take-away from these data is that being African-American significantly increases a potential juror's likelihood of being peremptorily struck by Mr. Evans.[41] Ex. 34 (Green & May Aff.) ¶ 25; Ex. 33 (O'Brien Aff.) ¶ 8-12. And the association between race and being struck was even stronger for the *Flowers* trials than in non-*Flowers* trials. Ex. 34 (Green & May Aff.) ¶ 25; Ex.33 (O'Brien Aff.) ¶ 8-12.

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[41] In three non-*Flowers* cases, Mr. Evans succeeded in seating all-white juries notwithstanding that the population of the counties from which the respective juries were drawn were more than 40 percent African-American. *See* Deondray Johnson, trial ct. case # 2002-0067-CR and Billy Joe Barnett, trial ct. case # 9943 (tried in Attala County, which was 42% African-American in 2010, *see* U.S. Census Bureau, *QuickFacts; Attala County, Mississippi*, http://www.census.gov/quickfacts/table/PST045215/28007 (last visited Mar. 14, 2016)); Christopher Rosenthal, trial ct. case # 2000-133-CR (tried in Greanda County, which was 41.7% African-American in 2010, *see* United States Census Bureau, *QuickFacts; Grenada County, Mississippi*, http://www.census.gov/quickfacts/table/PST045215/28043 (last visited Mar. 14, 2016)). In a fourth case, Evans secured a jury of 11 whites and one African-American, notwithstanding that the venire after challenges for cause was 36 percent African-American. *See Pitchford v. State*, 45 So. 3d 216, 263 (Miss. 2010) (Graves, J., dissenting). Two justices of the Mississippi Supreme Court dissented from the denial of relief on Mr. Pitchford's *Batson* claim, finding that Evans used peremptory challenges "to exclude African-Americans from the jury." *Id.* at 261.

This new evidence supplies powerful confirmation that race was the reason only one African-American sat on the jury that convicted Mr. Flowers and sentenced him to death. That conclusion is underscored when the newly discovered data are viewed in tandem with Mr. Evans' demonstrated track record of excluding African-Americans from jury service in the *Flowers* prosecutions—peremptorily striking every African-American tendered for service in *Flowers I and II*, using all of his peremptory challenges to strike African-Americans in *Flowers III* and *IV*, and warning off future potential African-American jurors by prosecuting two African-American jurors for perjury after *Flowers V* ended in a mistrial.[42]

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[42] Mr. Flowers' capital conviction also violated his equal protection rights because the prosecutor acted with a discriminatory purpose in seeking the death penalty against him. *Cf. McCleskey v. Kemp*, 481 U.S. 279 (1987). Studies have repeatedly shown that "capital cases that involve [b]lack defendants, particularly when the victims are [w]hite . . . are especially prone to racially-biased outcomes." Mona Lynch & Craig Haney, *Looking Across the Empathic Divide: Racialized Decision Making on the Capital Jury*, 2011 Mich. St. L. Rev. 573, 586 (2011). For example, a 1985 study of Mississippi's capital punishment "essentially replicate[d]" the conclusions of the *McCleskey* study, including the finding that a defendant as 4.9 times more likely to receive a death sentence if the victim was white as opposed to black. *See* David C. Baldus, George Woodworth & Charles A. Pulaski, *Equal Justice and the Death Penalty: A Legal and Empirical Analysis* 258-60 (1990) (citing Richard Berk & Joseph Lowery, *Factors Affecting Death Penalty Decisions in Mississippi* 14-15 (June 1985; unpublished manuscript)). In 1990, the Government Accounting Office synthesized existing research on whether race of the defendant or the victim influences the likelihood that defendants will be sentenced to death, concluding that "[i]n 82 percent of the studies, race of victim was found to influence the likelihood of being charged with capital murder or receiving the death penalty." *See* United States Gen. Accounting Office, *Death Penalty Sentencing: Research Indicates Pattern of Racial Disparities* 5 (Feb. 1990), http://archive.gao.gov/t2pbat11/140845.pdf. More recent studies of capital punishment in Pennsylvania, Maryland, Missouri, Nebraska, and South Carolina have documented a similar pattern of racial disparities. Raymond Paternoster et al., *Justice by Geography and Race: The Administration of the Death Penalty in Maryland*, 1978-1999, 4 Margins: U. Md. L. J. of Race, Religion, Gender & Class 1 (2004); Katherine Barnes, David Sloss & Stephen Thaman, *Place Matters (Most): An Empirical Study of Prosecutorial Decision-Making in Death Eligible Cases*, 51 Ariz. L. Rev. 305 (2009); David C. Baldus et al., *Arbitrariness and Discrimination in the Administration of the Death Penalty: A Legal and Empirical Analysis of the Nebraska Experience (1973-1999*), 81 Neb. L. Rev. 486 (2002); Michael J. Songer & Isaac Unah, *The Effect of Race, Gender, and Location on Prosecutorial Decisions to Seek the Death Penalty in South Carolina*, 58 S.C. L. Rev. 161 (2006). And most recently, researchers presented a nationally-representative group of respondents with a triple murder trial scenario while varying the maximum penalty (death vs. life without parole) and the race of the defendant. Jack Glaser, Karin D. Martin & Kimberley B. Kahn, *Possibility of Death Sentence Has Divergent Effects on Verdicts for Black and White Defendants*, 39 Law & Hum. Behav. 539 (2015) https://gspp.berkeley.edu/assets/uploads/research/pdf/GlaserMartinKahn_LHB_in_press.pdf. "Respondents who were told life-without-parole was the maximum sentence were not significantly more likely to convict Black (67.7%) than White (66.7%) defendants. However, when death was the maximum sentence,

The Supreme Court made clear in *Miller-El II* that a history of systemic exclusion of minorities from jury service is evidence of a *Batson* violation. 545 U.S. at 263 ("There is a final body of evidence that confirms this conclusion. We know that for decades leading up to the time this case was tried prosecutors in the Dallas County office had followed a special policy of systemically excluding blacks from juries[.]"). In *Miller-El II*, the relevant history of systemic exclusion pertained to the prosecutor's *office*, and the Court found that to be powerful evidence of discrimination. *Id.* Here, the evidence is even more powerful because it demonstrates a history of systemic exclusion of African-Americans from jury service by the very prosecutor who tried the case at issue. The trial judge erred in "blindly accept[ing] any and every reason put forth by the State, especially [given that] here, the State continues to exercise challenge after challenge only upon members of a particular race." *Flowers III*, 947 So. 2d at 937.

b. Disparate questioning of African-American and white jurors

"[C]ontrasting *voir dire* questions posed respectively to black and nonblack panel members" are probative of purposeful discrimination, *Miller-El II*, 545 U.S. at 255, and here, the State's questioning of African-American and white jurors during *voir dire* was starkly different.

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respondents presented with Black defendants were significantly more likely to convict (80.0%) than were those with White defendants (55.1%)." *Id.* at 1.

The conclusion to be drawn from this immense body of research is clear: the race of the defendant and the race of the victim has a material and substantial impact on capital charging and sentencing. Moreover, *McCleskey* was wrong the day it was decided, and the time for courts to revisit and overturn that decision is long overdue. *McCleskey*, a narrow 5-4 decision, is widely regarded as a stain on the Supreme Court's jurisprudence—the modern day *Dred Scott* or *Plessy v. Ferguson*. Justice Powell, who authored the *McCleskey* majority opinion, admitted just four years later that he wished he had voted the other way. *Justice Powell's New Wisdom*, NY Times (June 11, 1994). http://www.nytimes.com/1994/06/11/opinion/justice-powell-s-new-wisdom.html. And thirty years after *McCleskey* came down, race persists as a significant factor in determining whether a criminal defendant will be sentenced to die, in Mississippi and across the country. Black defendants accused of killing white victims, like Curtis Flowers, remain more likely to be put to death than their counterparts simply because they are black and/or because their victims are white. If equal protection is to mean anything, surely it should preclude a capital punishment system that treats defendants differently based on race.

Each of the five struck African-American jurors were asked 10 or more questions by the State during individual *voir dire*, whereas the average number of questions asked of white jurors was two, and no white juror was asked more than six questions. In fact, nine white jurors were asked no questions by the prosecution on individual *voir dire*, and 23 white jurors were asked no questions by the State other than generic inquiries related to bias and their understanding of a bifurcated trial. Perhaps most startling, the State tendered four white jurors—Larry Blaylock, Harold Waller, Marcus Fielder, and Bobby Lester—without having asked them a single *voir dire* question, notwithstanding the fact that each had volunteered that they had relationships with defense witnesses. In contrast, the State probed deeply into those relationships when questioning African-American jurors, *see, e.g.*, Tr. 1406-07 (inquiring one-by-one into each of the witnesses African-American venire member Diane Copper knew), and relied heavily upon such relationships in justifying strikes against African-American jurors.[43] This disparate questioning is strong evidence of pretext. *See Miller El-I*, 537 U.S at 344 ("[T]he use of disparate questioning is determined by race at the outset, it is likely a justification for a strike based on the resulting divergent views would be pretextual").

[43] The prosecution also engaged in a line of questioning with potential juror Copper wholly irrelevant to her ability to be a fair juror, and highly suggestive of "fishing" for a facially neutral pretext. During group *voir dire*, Copper had volunteered that she lived a couple of blocks from the Flowers residence, but stated that her house was not on the same street. Tr. 971. The State never asked other jurors about their proximity to the Flowers residence. But after Copper offered this information, the State prodded her with questions implying cause for concern that she was a "neighbor" of the Flowers family. Tr. 972, 974. Defense counsel objected to the use of such strong language when it appeared Copper was only indicating she lived in the general vicinity of the Flowers home, a seemingly insignificant trait considering the small size of the Winona community as a whole. When prodded by the State about whether the proximity of her residence would affect Copper's thinking, she responded "No. No it wouldn't be a problem." Tr. 972. Nonetheless, the next day, the State asked several more questions about Copper's residence. Tr. 1405.

c. Acceptance of white jurors sharing the proffered reason for the strike of African-American jurors

Were more needed to expose the State's true motivations in its exercise of peremptory challenges, a side-by-side comparison of African-American venire panelists struck by the State against white panelists whom the State accepted for service supplies it. "If a prosecutor's proffered reason for striking a black panelist applies just as well to an otherwise-similar nonblack who is permitted to serve, that is evidence tending to prove purposeful discrimination." *Miller-El II*, 545 U.S. at 241. Here, the plausibility of Evans' stated reason for several strikes is "severely undercut by [his] failure to object to other panel members who expressed views much like [the struck black jurors']." *Id.* at 248.

Most apparent here was that the State's treatment of jurors who knew defense witnesses varied markedly depending on the race of the juror. For example, as one of its claimed reasons for striking African-American venire panelist Carolyn Wright, the State asserted that she knew "almost every [d]efense witness in this case." Tr. 1763. But Wright had specifically and unequivocally stated that she could put aside her connections to all of the witnesses she knew. Tr. 1165; *see also* Tr. 782, 909, 923, 925, 934, 1028, 1075-76. Moreover, she also knew several prosecution witnesses, including Porky Collins and former sheriff Bill Thornburg. Tr. 906, 910. The State also cited relationships with "many [d]efense witnesses" as a reason justifying its strike of Dianne Copper. Tr. 1793-94. In truth, what Copper had said was that she previously worked with Mr. Flowers' father, Archie, Sr., at Wal-Mart, Tr. 770, 1406, but that being his former coworker would not affect her ability to fairly judge the case, Tr. 1408. Copper also stated she had previously worked with Mr. Flowers's sister at Shoe World, but that it was for less than a year and they had a "working relationship." Tr. 973. Moreover, Copper

reported a possible pro-prosecution bias: her husband had worked at Tardy Furniture. Tr. 1030. And Copper reported that she knew many prosecution witnesses, including: Odell Hallmon, Tr. 910, Clemmie Flemming, Tr. 906, Katherine Snow Tr. 906, Sheriff Bill Thornburg, *id.*, Patricia Hallmon Sullivan-Odom, Tr. 909.

By contrast, the State was not at all concerned with white jurors' relationships with defense witnesses. Pamela Chesteen, Harold Waller, and Bobby Lester were all tendered by the State despite each having reported relationships with defense witnesses.[44]

White juror Pamela Chesteen was tendered by the State despite having admitted she knew more than a dozen witnesses, including several members of Mr. Flowers' immediate family: Archie, Sr. (Flowers' father), Lola (Flowers' mother), and Archie, Jr. (Flowers' brother), Angela Jones, Connie Moore, Denise Kendle, Emmitt Simpson, Hazel Jones, Henry Stansberry, Kittery Jones, Latarsha Blissett, Liz Vanhorn, Nelson Forrest, and Rev. Jimmy Lewis Forrest. Tr. 792; 920-21, 923, 925, 928, 930-33; 935. When the judge asked whether she could set aside her relationships with Mr. Flowers' family, the best she could do was to say, "I will do my best." Tr.

[44] The State also cited connections to the defense as among its justifications for the strikes of Edith Burnside and Tashia Cunningham. In both cases, these reasons are also made suspect by the State's disinterest in white jurors' connections to the defense. The State's race-neutral reasons for striking Edith Burnside included her relationship with Curtis Flowers, whom Burnside said had been friends with her son *when they were children*. Tr. 768. During *voir dire*, she stated unequivocally on at least three occasions that the relationship would not affect her. Tr. 768; 975; 1027-28. Perhaps Evans did not believe her, though if so, the suspicion is raised that it was race that made him disbelieve her, given that he was so sanguine about white jurors' connections to the defense that he did even bother to *voir dire* them on the issue. Even more suspect are the actions taken by the State with respect to Cunningham. Evans cited Cunningham's relationship with Flowers' sister, Sherita Baskin, and her purported "lie[] under *voir dire*" in saying that she did not work physically close to Baskin at ADP. Tr. 1775-76. Cunningham testified that Baskin worked "at the front of the line, and I work at the end of the line," and characterized the relationship as "just a working relationship." Tr. 987. Cunningham was asked whether her relationship with Baskin would affect her and she said "no." Tr. 1297. As defense counsel noted in rebuttal, the State accepted similar assurances of neutrality from at least two white jurors, but it did not accept the truthfulness of Cunningham's testimony. Instead, it called Crystal Carpenter, a quality control clerk at ADP, to testify that Cunningham and Baskin worked "about nine or ten inches" apart, "side by side." Tr. 1328-29. On cross-examination, defense counsel asked Carpenter if

793. Notwithstanding these ties to defense witness or Chesteen's equivocal answer on bias, Evans tendered Chesteen as a juror—without asking her any questions about these relationships. Tr. 1169.

Likewise, the State tendered white juror Harold Waller despite his acknowledgement of relationships with 17 witnesses. Tr. 1204. Waller indicated he had known Derrick Stewart and knew Liz Vanhorn, Rev. Billy Little, Robert Merrit, Barry Eskridge, Bill Thornburg, Porky Collins, Jerry Bridges, Randy Keenum, Randy Stewart, John Johnson, Wayne Miller, James Taylor Williams, Dennis Woods, and Carmen Rigby. Tr. 862; 905-06; 910; 912; 913; 915; 916; 918; 920; 924; 932; 1042-43. The State declined to ask a single question, on any subject, of Harold Waller. Tr. 1204.

White juror Bobby Lester was also tendered by the State despite having admitted knowing over 25 witnesses in the case, including six defense witnesses: Emmitt Simpson, Hazel Jones, Latarsha Blissett, Liz Vanhorn, Nelson Forrest, and Rev. Jimmy Lewis Forrest. Tr. 921; 932; 928; 920; 931; 930. Despite these numerous connections, the State declined to ask a single question of Lester on individual *voir dire*. Tr. 1338.[45]

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she could obtain proof from "human resources" to substantiate her testimony, and she responded, "I will"; despite a second request by the defense, this evidence was never submitted. Tr. 1330, 1782.

[45] The disparate treatment of jurors who admitted they had not been completely truthful is also probative, albeit more complicated. Among the State's reasons for striking prospective African-American juror Flancie Jones was her untruthful questionnaire response that she was strongly against the death penalty, an inaccuracy revealed by her answer to the very next question on the questionnaire that she "could consider the death penalty." 1 Supp. C.P. 323b. She admitted her opposition to the death penalty in the questionnaire was a lie, stating "I guess I'd say anything to get off" being on the jury. Tr. 1364. While this lie provides a race neutral reason for the State to strike her, it also provides additional evidence of racial motivation. Prospective white juror Burrell Huggins was tendered by the State despite having lied on his questionnaire by denying that he had been summoned to serve on a jury previously. 1 Supp. C.P. 625. On individual *voir dire* Mr. Huggins was questioned about having been summoned for Flowers' 2008 trial, and after several questions, Mr. Huggins admitted he had been summoned, then apologized, stating he is a generally honest person. Tr. 1649; 1728. Evans struck Ms. Jones but not Mr. Huggins. While they lied about different things on their juror questionnaires, both lies are relevant to the proceedings, and "[a] *per se* rule that a defendant cannot win a

d. Lack of record support for the reason cited

That many of the reasons Evans cited for his strikes of African-American jurors are belied by the record is further proof that Evans' strikes of African-American jurors were racially motivated. Indeed, where the stated reason for the strike is unsupported or plainly contradicted by the record, the Mississippi Supreme Court has not hesitated to find a *Batson* violation. *See, e.g.*, *Hatfield v. State*, 161 So. 3d 125, 139 (Miss. 2015) (finding that juror was not asleep as counsel had claimed); *Flowers III*, 947 So. 2d at 925-26 (finding that prosecutor's reasons for strikes were blatantly contradicted by the record); *Conerly*, 544 So. 2d 1370, 1372-73 (finding that prosecutor's justification was pretext where prosecution explained that it struck juror based on her supposed inability to fill out a court form or disclose her age to the court but those explanations were directly contradicted by the record).

Here, the State mischaracterized the record with respect to several African-American jurors. Evans' statement that Carolyn Wright had relationships with "almost every [d]efense witness" in the case, Tr. 1763, for example, was a half-truth. Wright also knew a plethora of prosecution witnesses; in fact, Wright acknowledged she knew more prosecution witnesses (19) than defense witnesses (17).[46] The State also cited Wright's alleged relationship with Mr. Flowers' sister, Sherita Baskin, as one of its reasons for striking Wright. Tr. 1763. This was

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Batson claim unless there is an exactly identical white juror would leave *Batson* inoperable; potential jurors are not products of a set of cookie cutters." *Miller-El II*, 545 U.S. at 248, n.6.

[46] In total, Wright's relationships with witnesses numbered seventeen: Archie Flowers, Sr., Connie Moore, Cora Flowers Tyson, the Flowers family, Denise Kendle, Emmitt Simpson, Frances Hayes, Hazel Jones, Kittery Jones, Larry Smith, Liz Vanhorn, May Ella Fleming, Nelson Forrest, Patricia Flowers Tyson, Ray Charles Weems, Rev. Jimmy Lewis Forrest, and Stacey Wright. The full list of acquaintance relationships Wright had with prosecution witnesses totals nineteen, as follows: Bart Eskridge, Beneva Henry, Bennie Rigby, Chief Johnny Hargrove, Clemmie Fleming, Danny Joe Lott, Dennis Woods, Doyle Simpson, Elaine Gholston, James Taylor Williams, Jerry Dale Bridges, Jessie Sawyer, Kenny Townsend, May Jeanette Fleming, Porky Collins, Vera Latham, Vernon Peeples, Vincent Small, and unspecified members of law enforcement.

untrue. Nowhere in the record did Wright mention any relationship with Baskin at all. Tr. 1763.

Finally, the prosecution cited Wright's involvement in litigation with Tardy Furniture as one of its reasons for exercising a peremptory strike,[47] averring that Tardy Furniture "had to garnish her wages because of" the lawsuit, Tr. 1763. This, too, was inaccurate. Wright readily admitted Tardy Furniture had sued her and that she had paid it off, but the issue of garnished wages never came up. Tr. 965-67. Wright also testified she had nothing against the Tardy family and harbored no ill will. Tr. 1028. When the prosecution submitted "an abstract of justice court" from Wright's lawsuit with Tardy Furniture, defense counsel's question as to whether it contained "a garnishment order" went unanswered by the Court. Tr. 1770. Moreover, in addition to exaggerating the record, this reason reeks of pretext. Given that this trial was for a quadruple homicide—and only one of the victims was a Tardy—it blinks reality that the State would actually fear that a juror would be biased toward acquittal on the basis of prior litigation over an unpaid bill with Tardy Furniture.[48]

With respect to African-American venire member Flancie Jones, the State claimed that she "is related to the Defendant . . . [h]e would be her nephew." Tr. 1786. This was not true. Jones had testified that the "***court made me aware*** that he is my sister-in-law's sister's son," and said it would not affect nor influence her and she "could completely" set it aside. Tr. 754; 1363

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[47] When defense counsel asked the Court for time to investigate the prosecution's proffered race-neutral reasons for striking Wright, she was rebuffed as making "an absurd request." Tr. 1768. In light of this prosecutor's blatantly discriminatory conduct in *Flowers III*, 947 So. 2d at 935 (characterizing the evidence as presenting "as strong a *prima facie* case of racial discrimination as we have ever seen in the context of a *Batson* challenge"), this request was not absurd.

[48] The State also cited a lawsuit with Tardy Furniture as one of the reasons for its strike of African-American juror Edith Burnside. Here, too, the State embellished the facts. The State claimed that Burnside tried to deny that she was involved in litigation with Tardy Furniture by saying she had settled the case. In fact, Burnside had testified she had an account with Tardy, but never denied that she had been sued.

(emphasis added). In fact, before having been told of the relationship, she "didn't even know" about it. Tr. 989. And there is no significant relationship between Jones and Mr. Flowers: Jones' testimony was that Curtis Flowers was her "sister-in-law's sister's son." Tr. 754. If there is any name at all for such a distant relationship, it is certainly not "nephew." Such exaggeration is probative of pretext. *Cf. Flowers III*, 947 So. 2d at 923 (strike violated *Batson* where the State exaggerated the juror's working relationship with Flowers' sister)

Turning to prospective juror Dianne Copper, the prosecution claimed that one of the reasons for its strike was that "[s]he's stated that she leaned toward favoring his side of the case." Tr. 1794. This statement was not only misleading, but disingenuous, given the State's leading questions. When prodded by the State about whether her working relationships with Archie, Sr. and Cora "may cause [her] to lean toward the defendant in the case," she responded "[y]es, sir, it's possible," to which Evans responded, "Okay. Thank you, ma'am." Tr. 973. Notably, Copper volunteered a potentially significant relationship with the victim—a relationship that could favor the prosecution. Nevertheless, the prosecution declined to ask or infer that that relationship would cause her to "lean toward" the prosecution; instead of asking Copper if she was "close" with the Tardy family, or if she ever "visit[ed] with" the Tardys, Evans asked a leading question attempting to minimize her association with them. Moreover, Copper admitted numerous relationships with prosecution witnesses, including Chief Hargrove, Clemmie Fleming, Danny Joe Lott, Dennis Woods, Doyle Simpson, Jerry Dale Bridges, and Porky Collin—relationships that might just as well have led to bias toward the prosecution, but these

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After Burnside was asked for clarification on the question, she acknowledged that she had been sued. Tr. 963-64.

possibilities were not of interest to Evans because he was not attempting to assess her true feelings; instead, he was attempting to manufacture a reason to strike her.[49]

B. The State's Racially Discriminatory Exercise Of Peremptory Strikes Also Violated The Constitutional Rights Of The Excluded African-American Jurors.

"The harm from discriminatory jury selection extends beyond that inflicted on the defendant and the excluded juror to touch the entire community. Selection procedures that purposefully exclude black persons from juries undermine public confidence in the fairness of our system of justice." *Batson*, 476 U.S. at 87. Just as Mr. Flowers had a right to be tried by a jury selected by race-neutral means, the potential jurors, too, had a right to be free from discrimination.[50] *Powers*, 499 U.S. at 416; *see also Batson*, 476 U.S. at 87 ("Racial discrimination in selection of jurors harms not only the accused whose life or liberty they are summoned to try," it also "unconstitutionally discriminate[s] against the excluded juror"). That

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[49] The prosecutor's later inquiry of Ms. Copper followed the same pattern of leading questions:

> EVANS: And I think it was yesterday and my notes show that you said that the fact that you know all of these people could affect you and you think it could make you lean toward him because of your connections to all of these people. Is that correct?
> COPPER: It — it's possible.
> EVANS: Okay. That would be something that would be entering into your mind if you were on the jury, wouldn't it?
> COPPER: Yes, sir.
> EVANS: And it would make it to where you couldn't come in here and, just with an open mind, decide the case, wouldn't it?
> COPPER: Correct.
> EVANS: Okay. Nothing further, your Honor.

Tr. 1407. However, when then asked if she would follow the law and consider only the evidence presented in court, Ms. Copper said, "Yes sir. That's correct." Tr. 1409. And when asked by the trial court if she could find the defendant guilty, she said, "Yes, sir." When asked once again if she could "listen to the evidence" and base her "decision strictly on the evidence and no outside factors," she stated "[t]hat's correct." Tr. 1410.

[50] Mr. Flowers has standing to litigate this claim; "a defendant in a criminal case can raise the third-party equal protection claims of jurors excluded by the prosecution because of their race," in large part because "a juror dismissed because of race probably will leave the courtroom possessing little incentive to set in motion the arduous process needed to vindicate his own rights." *Powers v. Ohio*, 499 U.S. 400, 415 (1991).

right was violated. Indeed, it is hard to conceive of a scenario where the harm to the community from the State's discriminatory jury selection practices is more palpable, or runs more deeply, than this case.

That the State managed to seat all-white or nearly all-white juries in its prosecutions of Curtis Flowers is nothing short of extraordinary. The new evidence of Mr. Evans' track record with respect to peremptory strikes confirms his strikes in Mr. Flowers' sixth trial were discriminatory. But this case shows that discriminatory strikes are not the only way to eliminate African-Americans from a jury.

During Mr. Flowers' fifth trial, the prosecution brought forth evidence indicating that one of the African-American alternate jurors, Mary Annette Purnell, had failed to truthfully answer questions during *voir dire* concerning her relationship with Mr. Flowers. Ms. Purnell was removed from the jury, charged with perjury, and incarcerated. Before Mr. Flowers' sixth trial, Ms. Purnell was prosecuted for two counts of perjury, for which she faced a potential 40-year prison sentence. Ms. Purnell pled guilty in exchange for a lesser sentence of 10 years, of which she would serve 15 months.[51]

The State did not stop with Ms. Purnell. After a mistrial was declared due to the jury's inability to reach a verdict in *Flowers V*, African-American juror James Bibbs was also charged with perjury based on information provided by another juror that Mr. Bibbs had outside knowledge relevant to the case. There was no suggestion that Mr. Bibbs ever had contact with Mr. Flowers, any member of his family, or anyone connected to Mr. Flowers in any way. Nevertheless, Mr. Bibbs was charged and hauled off to jail straight away after the trial concluded,

[51] *See Perjured juror in murder trial pleads guilty*, The Mississippi Link (Nov. 17, 2009), http://themississippilink.com/2009/11/17/perjured-juror-in-murder-trial-pleads-guilty/.

on $20,000 bond. *Flowers V* Tr. 569-70 ("And Mr. Bibbs, you are free to go in handcuffs. And when you post $20,000 bond, you are free to be released at that time"). Mr. Evans then indicted Mr. Bibbs for perjury. Ultimately, the State of Mississippi dropped the charges against Mr. Bibbs once the Attorney General's Office took over the case in the wake of Mr. Evans' recusal from further involvement, conducted an independent review, and concluded that the charges should be dismissed.[52] But the damage had been done: African-Americans throughout Montgomery County learned the painful and unforgettable lesson that if they served on a *Flowers* jury, it would be at their peril.

Statements made after *Flowers V* indicated that the State viewed jury service by African-Americans in Montgomery County as problematic. During the Court's questioning of Mr. Bibbs regarding his supposed perjury, the Court encouraged District Attorney Evans to enlist the assistance of the Prosecutor's Association in lobbying the legislature to amend the laws of this State to allow prosecutors to move for change of venue. *Flowers V* Tr. 570 ("Mr. Evans, I would encourage you to get with the prosecutor's association, the attorney general of this state and others in an attempt to get some legislation passed to address this problem[.]"). The State enthusiastically heeded that call to action. On the heels of the Court's comments, the Mississippi legislature passed a bill that would draw the jury from a wider geographical area than the county where the crime was committed. Miss. SB 2069 (2009 Regular Session), http://billstatus.ls.state.ms.us/documents/2009/pdf/SB/2001-2099/SB2069PS.pdf. [53] Although

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[52] *Charges dismissed against perjured Flowers' Juror*, The Mississippi Link (Oct. 8, 2009), http://themississippilink.com/2009/10/08/charges-dismissed-against-perjured-flowers-juror./

[53] The bill was sponsored by Republican State Senator Lydia Chassaniol, a member of the Council of Conservative Citizens ("CCC"), who gave the keynote address at the CCC annual convention in 2009. *See* Ward Schafer, *Minister Blasts Mississippi Senator's Connections*, Jackson Free Press (July 10, 2009), http://www.jacksonfreepress.com/news/2009/jul/10/minister-blasts-mississippi-senators-connections/. The

the bill died in committee, it was representative of an overt effort to ensure that the jury in Mr. Flowers' sixth trial would be whiter.

The message to the African-American community that emerged from these combined State actions was clear, and it was resounding: you are not welcome. *See* Ex. 37 (Max Mayes Aff. (March 15, 2016)) ¶¶ 10-12, 14, 16-17, 19, 21. That message permeated the African-American community especially deeply in light of the painful history of race discrimination in Mississippi, and in Montgomery County in particular. *See Miller-El II*, 545 U.S. at 237-38 ("Defendants are harmed, of course, when racial discrimination in jury selection compromises the right of trial by impartial jury . . . but racial minorities are harmed more generally, for prosecutors drawing racial lines in picking juries establish state-sponsored group stereotypes rooted in, and reflective of, historic prejudice.") (internal quotation marks omitted). And the message had its intended effect; several African-American prospective jurors have reported that they and other black venire members were aware of what had happened to James Bibbs, were fearful that the same thing would happen to them if they served on the jury, and thus made every attempt to avoid serving on the *Flowers* jury. *See* Ex. 37 (Mayes Aff.) ¶¶ 10, 14, 16.

CCC's Statement of Principles includes the following: "***We also oppose all efforts to mix the races of mankind***, ***to promote non-white races over the European-American people*** through so-called 'affirmative action' and similar measures, to destroy or denigrate the European-American heritage, including the heritage of the Southern people, ***and to force the integration of the races.***" Samuel Francis, *CCC: Statement of Principles* ¶ 2, http://conservative-headlines.com/introduction/statement-of-principles/ (emphasis added). The Southern Poverty Law Center ("SPLC") has called CCC a "crudely white supremacist group" and has said of the organization: "The [CCC] is the modern reincarnation of the old White Citizens Councils, which were formed in the 1950s and 1960s to battle school desegregation in the South." SPLC, *Extremist Files: Council of Conservative Citizens*, https://www.splcenter.org/fighting-hate/extremist-files/group/council-conservative-citizens (last visited Mar. 15, 2016). District Attorney Doug Evans also has delivered an address at a CCC meeting in Greenwood, Mississippi in 1991. *See* Ex. 38 (*DA Candidate Addresses Webster Chapter*, Citizen Informer Vol. 22 (Late Summer 1991)).

These prospective jurors remain fearful of retaliation even now, six years after Mr. Flowers' trial. *See id.* ¶¶ 11-12, 17-21.

"Discrimination within the judicial system is most pernicious because it is 'a stimulant to that race prejudice which is an impediment to securing to [black citizens] that equal justice which the law aims to secure to all others." *Batson*, 476 U.S. at 87-88 (alteration in original) (citation omitted). The State's collective actions here—flagrant racial discrimination during jury selection, *see, e.g.*, *Flowers III*, 947 So. 2d at 935; prosecuting several of the very few African-American jurors who did manage to make it onto a *Flowers* jury; and pursuing legislative action that would, effectively, make it easier for the State to seat white juries going forward—not only violated Mr. Flowers' rights, but also violated the rights of the struck jurors and, more broadly, undermined public confidence in the fairness of the judicial system.

GROUND E

PETITIONER'S DEATH SENTENCE VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE FEDERAL CONSTITUTION BECAUSE HE IS INTELLECTUALLY DISABLED.

Mr. Flowers' death sentences must be vacated because he is intellectually disabled[54] and thus ineligible for the death penalty. *See Atkins v. Virginia*, 536 U.S. 304 (2002) (categorically exempting intellectually disabled persons from capital punishment); *Chase v. State*, 873 So. 2d 1013, 1016 (Miss. 2004) ("*Chase I*") ("*Atkins* exempts ***all*** [intellectually disabled] persons—even those who are minimally [intellectually disabled]—from execution") (emphasis in original).

[54] The terms "intellectually disabled" and "intellectual disability" have replaced the terms "mentally retarded" and "mental retardation" in the professional vernacular. The U.S. Supreme Court has recognized

Mr. Flowers' claim that he is intellectually disabled and therefore cannot be executed is properly before the Court because the facts underlying this claim were not discovered until after trial and appeal. Moreover, the Uniform Post-Conviction Collateral Relief Act allows Mississippi Courts to grant relief if "the statute under which the conviction and/or sentence was obtained is unconstitutional" or if "the sentence exceeds the maximum authorized by law." Miss. Code §§ 99-39-5(1)(c) and (d). Under well-settled law, illegal sentences, such as a death sentence for an intellectually disabled person, cannot be procedurally barred. *See, e.g.*, *Stevenson v. State*, 674 So. 2d 501, 505 (Miss. 1996) ("[A]n unenforceable sentence is nevertheless plain error and capable of being addressed."). And the Mississippi Supreme Court has specifically held that constitutional questions about the imposition of the death penalty will be reviewed even if the issue was not properly preserved before the trial court. *Holly v. State*, 671 So. 2d 32, 42 (Miss. 1996).

Mr. Flowers reserves the right to supplement this pleading because the State's actions precluded him from developing the necessary facts to fully develop his *Atkins* claim by the March 17, 2016 deadline to file his Motion for Leave to Proceed. Petitioner's counsel notified the State on December 22, 2015 that they intended to seek neuropsychological testing of Mr. Flowers, and requested the State's consent to allow experts into the prison to conduct their testing. On December 23, Assistant Attorney General Brad Smith responded that the State was unwilling to consent to Petitioner's request.[55] Mr. Smith provided no reason for this decision,

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this change. *See Hall v. Florida*, __ U.S. __, 134 S. Ct. 1986, 1990 (2014). This brief uses the term "intellectual disability," and substitutes that term where "mental retardation" was used by courts and others.

[55] This refusal flew in the face of the Mississippi Supreme Court's holding permitting post-conviction petitioners' access to experts provided that the access complies with Department of Corrections' regulations and as long as those rules or regulations do no violate due process. *Grayson v. State*, 118 So. 3d 118, 147 (Miss. 2013).

so on December 23, Petitioner's counsel asked Mr. Smith for the basis of the State's unwillingness to consent. Mr. Smith never responded. On January 6, 2016, Petitioner filed a Motion for Expert Access in the Montgomery County Circuit Court. Several weeks later, at a January 29 hearing before the Circuit Court, the State reversed course, stating for the first time that it had no objection to the expert access motion. Jan. 2016 Hr'g Tr. 59-60. On February 2, the Court granted Flowers' motion.

The State's refusal to allow Petitioner's experts access to conduct their tests was quite literally baseless, and caused a substantial delay in Petitioner's ability to complete the neuropsychological testing necessary to support his *Atkins* claim. Due to the State-caused delay, and the arduous process of getting Dr. Goff cleared with the prison, Dr. Goff was not able to evaluate Petitioner until February 26, 2016. Although the results of that evaluation and the other evidence cited herein are sufficient to support relief under *Atkins*, or at the very least to warrant an evidentiary hearing, Petitioner expressly reserves the right to supplement this claim.

A. Mr. Flowers Is Entitled To An Evidentiary Hearing To Prove That He Is Intellectually Disabled.

To obtain a hearing on an *Atkins* claim in Mississippi, a petitioner must:

> [A]ttach to the motion an affidavit from at least one [qualified] expert . . . who opines, to a reasonable degree of certainty, that: (1) the defendant has a combined Intelligence Quotient ("IQ") of 75 or below, and; (2) in the opinion of the expert there is a reasonable basis to believe that, upon further testing, the defendant will be found [intellectually disabled.]

Chase, 873 So. 2d at 1029. As shown below, Petitioner satisfies both criteria and thus is entitled to an evidentiary hearing on his intellectual disability claim.

Mississippi has adopted the 2010 standards promulgated by the American Association on Intellectual and Developmental Disabilities ("AAIDD") and the 2013 standards promulgated by

the American Psychiatric Association ("APA") for use in determining whether a petitioner is intellectually disabled. *Chase v. State*, 171 So. 3d 463, 471, 487-88 (Miss. 2015) ("*Chase II*"). The 2010 AAIDD standard defines intellectual disability as being "characterized by significant limitations in both intellectual functioning and in adaptive behavior as expressed in conceptual, social, and practical adaptive skills," which must have originated prior to age 18. Robert L. Schalock, et. al, *Intellectual Disability: Definition, Classification, and Systems of Support* 1 (11th ed. 2010). With respect to adaptive behavior, the AAIDD standard identifies three relevant domains:

> The conceptual skills domain includes 'language; reading and writing; and money, time, and number concepts.' . . . The social skills domain includes 'interpersonal skills, social responsibility, self-esteem, gullibility, naïveté (i.e., wariness), follows rules/obeys laws, avoids being victimized, and social problem solving.' The practical skills domain includes "activities of daily living (personal care), occupational skills, use of money, safety, health care, travel/transportation, schedules/routines, and use of the telephone.'

Chase II, 171 So. 3d at 469 (internal citations omitted). For a diagnosis of intellectual disability under the 2010 AAIDD standard, an individual must have significant deficits in one of these three adaptive functioning domains. *Id.*

The 2013 APA standard defines intellectual disability as "a disorder with onset during the developmental period that includes both intellectual and adaptive functioning deficits in conceptual, social, and practical domains." APA, *Diagnostic and Statistical Manual of Mental Disorders* 33 (5th ed. 2013). As under the AAIDD standard, an individual who presents significant limitations in one of the three domains listed below is properly considered intellectually disabled under the new APA standard:

> The ***conceptual (academic) domain*** involves competence in memory, language, reading, writing, math reasoning, acquisition of practical knowledge, problems solving, and judgment in novel situations, among others. The ***social domain***

> involves awareness of others' thoughts, feelings, and experiences; empathy; interpersonal communication skills; friendship abilities; and social judgment, among others. The ***practical domain*** involves learning and self-management across life settings, including personal care, job responsibilities, money management, recreation, self-management of behavior, and school and work task organization, among others.

Id. at 37-38.

As the *Chase II* Court noted, "[t]he new AAIDD and APA definitions are similar and require the same basic three elements of intellectual disability as the earlier definitions: significantly subaverage intellectual functioning, significant deficits in adapative behavior, and manifestation before age 18." 171 So. 3d at 470.

1. Expert Opinion That Petitioner's IQ Is 75 Or Below.

On February 26, 2016 John R. Goff, Ph.D., administered the Wechsler Adult Intelligence Scale-Fourth Edition (WAIS-IV) to Mr. Flowers and obtained a Full Scale score of 75. Ex. 39 (John R. Goff, Ph.D. Aff. (March 16, 2016)) ¶ 9. This score falls squarely within the acknowledged range for demonstrating sub-average intellectual functioning. *See Brumfield v. Cain*, __ U.S. __, 135 S. Ct. 2269, 2278 (2015) ("Brumfield's reported IQ test result of 75 was squarely in the range of potential intellectual disability"); *Hall*, 134 S. Ct. at 1999; *Atkins*, 536 U.S. at 309 n. 5; *Chase*, 171 So. 3d at 468. Moreover, when adjusted to account for the Flynn Effect,[56] Mr. Flowers' Full Scale IQ score is 72. Ex. 39 (Goff Aff.) ¶ 12.

Dr. Goff also administered two validity tests—the Victoria Symptom Validity Test ("VSVT") and the 21-item memory test—to Mr. Flowers in conjunction with his administration

[56] The Flynn Effect, or Flynn Correction, documents the phenomena by which IQ scores have increased over time, from one generation to the next. For the Wechsler (WISC and WAIS) and the Stanford–Binet IQ tests, the best rule of thumb is that Full Scale IQ gains have been proceeding at a rate of 0.30 points per year since 1947. This means that for every year that passes since an IQ test was "normed," obsolescence inflates

of the WAIS-IV on February 26, 2016. *Id.* ¶¶ 8, 10. Those tests verified Dr. Goff's clinical impression that Mr. Flowers put forth a genuine effort on the WAIS-IV and that he is not malingering his symptoms of intellectual disability. *Id.* ¶ 10.

Mr. Flowers' IQ score of 72 recorded on February 26, 2016 is consistent with other indicia of his low IQ. As part of a psychological evaluation undertaken by the Mississippi Department of Corrections in April 2004, Mr. Flowers was administered the General Ability Measurement for Adults ("GAMA"). Ex. 40 (MDOC Psychol. Eval. Initial Screening (Apr. 29, 2004)). Dr. Fred J. Klopfer, who administered the test, rated Mr. Flowers' "Intelligence Range" as "Below Average"—two deviations below "Average."[57] *Id.*

These evaluations are consistent with measures of Mr. Flowers' IQ during his developmental years. In 1978 (age 7) and 1979 (age 8), Mr. Flowers was administered the Short Form Test of Academic Aptitude ("SFTAA"), and received scores of 76 and 77, respectively. Ex. 41 (C. Flowers School Records). Applying the Flynn effect, Mr. Flowers' score of 76 is adjusted to 74 and his score of 77 is adjusted to 75. Ex. 39 (Goff Aff.) ¶ 12.

Based on all of the information described above, Dr. Goff concluded to a reasonable degree of certainty that Mr. Flowers has a combined IQ of 75 or below. Ex. 39 (Goff Aff.) ¶¶ 9, 12, 16; *Chase I*, 873 So. 2d at 1029.

2. Expert Opinion Confirms There Is A Reasonable Basis To Believe That, Upon Further Testing, Petitioner Will Be Found Intellectually Disabled.

Dr. Goff has opined that "there is ample evidence that Mr. Flowers meets the criteria for a

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the score by 0.30 points. The Flynn Effect is considered to be an acceptable and necessary procedure to ensure correctness of IQ test scores. Ex. 39 (Goff Aff.) ¶ 12.

[57] The possible outcomes on the examination include: "Very Superior," "Superior," "High Average," "Average," "Low Average," "Below Average," and "Well below Average." Ex.40 (MDOC Pscyhol. Eval. Initial Screening).

diagnosis of intellectual disability," and that there is a reasonable basis to believe that further testing will confirm that Mr. Flowers is intellectually disabled. Ex. 39 (Goff Aff.) ¶ 16. This conclusion is based on, *inter alia*: (i) a review of Mr. Flowers' school records and prior achievement testing records; (ii) a review of Mr. Flowers' employment records; (iii) and interviews of family members, friends, and teachers who knew Mr. Flowers during his developmental period. *Id.* ¶ 5.

Mr. Flowers' academic record was very poor throughout his childhood and adolescence, and provides substantial support for a finding of intellectual disability. As a first grader, he received "D" grades in Arithmetic, Reading, Spelling, and Writing, and a "C" in Language. Ex. 41 (C. Flowers School Records). Although his grades showed slight improvement at times during his elementary school years, his overall academic record was very poor. *Id.* In fact, his performance was so poor that he was placed into several remedial classes in elementary school. *Id.*; *see also* Ex. 39 (Goff Aff.) ¶ 13.

Mr. Flowers' academic struggles only worsened when he reached junior high. In the eighth grade, Mr. Flowers failed Math and Social Studies, and barely passed English and Science. Ex. 41 (C. Flowers School Records). These numerous failing grades required him to repeat eighth grade. *Id.* During his second year of eighth grade and in ninth grade, Mr. Flowers was again placed in a remedial reading class. *Id.*; *see also* Ex. 39 (Goff Aff.) ¶ 13.

These trends continued throughout high school. At Winona High School, classes were divided into four levels. Ex. 39 (Goff Aff.) ¶ 14. Levels 1 and 2 were for students on track to attend college. *Id.* Level 3 was for "average" students, and Level 4 was for the worst-performing students, who generally were heading toward vocational education. *Id.* Mr. Flowers was in Level 4, and was shifted into vocational classes for a large number of class

credits in high school. *Id.* ¶ 14; Ex. 41 (C. Flowers School Records). His grades hovered mostly in the barely-passing range throughout high school, and he failed Math in tenth grade and U.S. History in eleventh grade. Ex. 41 (C. Flowers School Records).

One of Mr. Flowers' teachers, Ms. Annie Bennett, who taught him Science in eighth grade and "Family Living" in eleventh grade, has confirmed that Mr. Flowers struggled terribly in school, even with basic and vocation-oriented lessons. Ex. 39 (Goff Aff.) ¶ 15. The Family Living course was a vocational course focused on "basic living skills," such as making a grocery list or hands-on activities like cooking, cleaning a stove, cleaning the kitchen, dusting, giving a baby a bottle, making a bed, sewing a button or snap on a shirt. *Id.* Virtually all students got an "A" or "B" in the class, as long as they showed up and tried. *Id.*. Mr. Flowers did show up and try, so the fact that he received a barely-passing grade indicates that he did very poorly at all the exercises and assignments. *Id.*

Although Mr. Flowers graduated from high school, he did so last in his class (88/88). Ex. 41 (C. Flowers School Records). Interviews with Mr. Flowers' teachers confirm that many students were passed through from grade level to grade level to ensure that they graduated, even if they were not actually able to perform at the minimum levels expected of them, a well-documented practice known as "social promotion." Ex. 39 (Goff Aff.) ¶ 15.

In addition to his abysmal academic record, Dr. Goff relied on numerous other indicators to conclude that there is ample evidence that Mr. Flowers meets the criteria for a diagnosis of intellectual disability, *id.* ¶ 16, including:

- Mr. Flowers' teachers and others who knew him in an academic setting viewed him as slow to react, and as having slow reasoning powers. *Id.* ¶ 14.

- Mr. Flowers was slow to learn to ride a bicycle, preferring instead to push it around. *Id.* ¶ 15.

- He also couldn't shoot a gun—family members were scared to go hunting with him because of that lack of skill in that area. *Id.*

- Mr. Flowers never paid bills, handled rent money, or conducted other basic household or financial issues. *Id.*

- Mr. Flowers was "accident prone," and sustained several serious medical injuries throughout his childhood and early adulthood as a result. *Id.*

- Mr. Flowers rarely held a steady job and never held a job requiring skills beyond manual labor. At the job he did hold for a notable length of time, he was supervised by his older brother. *Id.*

* * * * *

Based on all of the information described above, Dr. Goff has opined, to a reasonable degree of certainty, that Mr. Flowers has an IQ of 75 or below and that there is a reasonable basis to believe that, upon further testing, Mr. Flowers will be found intellectually disabled. *Id.* ¶ 16. Mr. Flowers is therefore entitled to a hearing to prove that he is intellectually disabled. *Chase I,* 873 So. 2d at 1029.

GROUND F

THE VENIRE'S ACTIONS DURING *VOIR DIRE* DEPRIVED MR. FLOWERS OF HIS RIGHT TO AN IMPARTIAL JURY UNDER THE SIXTH AND FOURTEENTH AMENDMENTS AND VIOLATED MISSISSIPPI LAWS.

Mr. Flowers' right to a fair trial was further compromised by certain prospective jurors' inappropriate conduct—among themselves and with the public—during the *voir dire p*rocess. This inappropriate conduct also contravened Mississippi's Uniform Rules of Circuit and County Court Practice and a standing directive from this Court. Mr. Flowers' convictions and sentences should be vacated on the basis of each of these violations.

A. The Venire's Actions Deprived Mr. Flowers Of His Constitutional Right To An Impartial Jury And Violated State Law.

New evidence confirms that members of the venire at Mr. Flowers' sixth trial undermined Mr. Flowers' opportunity to receive the impartial jury guaranteed to him under the Sixth and Fourteenth Amendments, in addition to violating this Court's rules of procedure. Specifically, while *voir dire* was underway, several members of the venire had improper contact with a trial witness and members of the victims' families. In other instances, venire members' racially-charged comments drove a prospective juror to tears and may have motivated black members of the venire to "self-strike" off of the jury. No jury drawn under such circumstances could fairly be considered impartial or compliant with the Court's procedural safeguards.

1. Constitutional Violations Of Flowers' Right To An Impartial Jury.

The Sixth Amendment right to jury trial[58] "guarantees to the criminally accused a fair trial by a panel of impartial, indifferent jurors. The failure to accord an accused a fair hearing violates even the minimal standards of due process." *Groppi v. Wisconsin*, 400 U.S. 505, 509 (1971) (internal quotation marks and citation omitted). In order to be considered "impartial," a jury must be protected against both external influences and internal bias. *See Irvin v. Dowd*, 366 U.S. 717, 722 (1961).

Well-settled precedent forbids jury contact with external influences "tending to disturb the [jury's] exercise of deliberate and unbiased judgment." *Mattox v. United States*, 146 U.S. 140, 149-50 (1892); *see also Hickson v. State*, 707 So. 2d 536, 544 (Miss. 1997) ("[I]t is absolutely imperative that the jury be unbiased, impartial, and not swayed by the consideration of

[58] The Sixth Amendment right to jury trial is binding on the states through the Fourteenth Amendment's due process clause. *See Duncan v. Louisiana*, 391 U.S. 145, 158-59 (1968).

improper, inadmissible information."). To safeguard defendants' rights, trial courts must consider the prejudicial effect of any external contact with the tendency to influence the verdict, whether or not it directly concerns the matter pending before the jury. *See Mattox*, 146 U.S. at 150-51.

In Mississippi, a trial court confronted with credible allegations of external jury influence must at least inquire whether good cause exists to believe there was "an improper outside influence or extraneous prejudicial information" presented to the jury. *Roach v. State*, 116 So. 3d 126, 132 (Miss. 2013) (citations omitted). If so, the court is to conduct a post-trial hearing to determine whether it was "reasonably possible" that the verdict was thereby altered.[59] *Id.*; *see also United States v. Sylvester*, 143 F.3d 923, 932 (5th Cir. 1998); *Tarango v. McDaniel*, No. 13-17071, 2016 WL 828121 *8 (9th Cir. Mar. 3, 2016) ("Once a defendant shows an external occurrence having a tendency toward prejudice, federal law clearly requires a trial court to investigate the harmlessness or actual prejudice of the occurrence.").

In addition, an "impartial" jury must be free from unfair bias. Although claims of jury impartiality focus not on unselected venire members but "on the jurors who ultimately sat," *Ross v. Oklahoma*, 487 U.S. 81, 86 (1988), the Mississippi Supreme Court has explained that the right to an impartial jury trial contemplates both the absence of individually prejudiced jurors and "the right to be tried in an atmosphere in which public opinion is not saturated with bias and hatred and prejudice against the defendant," *Seals v. State*, 44 So. 2d 61, 67 (Miss. 1950). Jurors should not "have to overcome that atmosphere, nor the later silent condemnation of their fellow

[59] Similar steps are appropriate in instances of alleged improper influence upon venire pools. For example, in *Commonwealth v. Clemente*, 893 N.E.2d 19, 44-45 (Mass. 2008), the Massachusetts Supreme Judicial Court explained that the trial court judge "conducted a proper inquiry" where venire members who

citizens if they acquit the accused." *Id.*

The facts show that the venire at Mr. Flowers' trial was not adequately protected against either external influences or an internal atmosphere of bias. The special venire pool drawn for Mr. Flowers' sixth trial included six hundred individuals from Montgomery County. Tr. 353, 1749-55. Portions of individual *voir dire* were conducted with all jurors present. *See generally* Tr. 955-1093. Other portions were conducted on an individual basis, outside the presence of other jurors. During those periods, members of the venire were asked to stay in a hallway outside the courtroom and instructed that they should not discuss the case. Judge Loper explicitly asked prospective jurors to keep their number cards with them in the hallway in order to "let everybody know you are a juror. And they are not to speak to you." *Id.* at 1093-94; 1375-77. Multiple venire members now have reported that the venire divided along racial lines in the hallway, Ex. 42 (Willie Richard Robinson Aff. (Mar. 9, 2016)) ¶ 3; Ex. 37 (Mayes Aff.) ¶ 7, and that prospective jurors acted in a manner entirely inconsistent with the preservation of an independent and impartial jury. According to one venire member, the husband of one of the victims, Bennie Rigby, passed through the courthouse hallway and conversed with several prospective jurors. Ex. 37 (Mayes Aff.)) ¶ 8; *see also id.* (attesting that other victims' family members also spoke with prospective jurors in the courthouse hallway during the *voir dire* process).

And in addition to this improper outside influence, the jury pool was rife with bias. According to several venire members, prospective jurors discussed the case openly during the *voir dire* process, Ex. 37 (Mayes Aff.) ¶¶ 9, 14, notwithstanding Judge Loper's instruction to the

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participated in or overheard an inappropriate conversation regarding the case were not seated as jurors, and those seated submitted declarations of impartiality.

venire that they "can't talk about the case with anyone or among yourselves." Tr. at 1094; *see also id.* at 1377 (confirmation of Judge Loper that the venire members had "been told they can't talk about the case"). Some, mostly white prospective jurors, made comments such as "why we up here, he guilty." Ex. 37 (Mayes Aff.) ¶ 9. In other words, many members of the venire "already had their minds made up." *Id.* ¶ 15. And according to another prospective juror, many white venire members loudly made abhorrently racist comments toward African-Americans, such as "they need to give them all guns and let them shoot themselves in the head." *Id.* ¶ 14. These comments drove a white female venire member to tears. *Id.* This prospective juror also believes that many black venire members deliberately removed themselves from the jury pool following these comments. *Id.* ¶ 16.

This demonstrated lack of impartiality among venire members implicates the "minimal standards of due process" owed to Mr. Flowers under the Sixth and Fourteenth Amendments. *Groppi*, 400 U.S. at 509. It is difficult to imagine a stronger outside influence on prospective jurors than contact with a victim's family. *See State v. Roman*, 817 A.2d 100, 106 (Conn. 2003) (finding that trial court had abused its "wide latitude in fashioning the proper response to allegations of juror bias" where it failed to make "any meaningful inquiry into a specific and facially credible claim" that a juror had spoken with the victim's family). Meanwhile, the venire's courthouse hallway discussions plainly reflect an atmosphere in which public opinion is unacceptably "saturated with bias and hatred and prejudice against the defendant." *Seals*, 44 So. 2d at 67.

These circumstances deprived Mr. Flowers of his constitutional right to an impartial jury and counsel in favor of a new trial. At the very least, consistent with *Roach*, 116 So. 3d at 132, further evidentiary inquiry is appropriate as to the venire's external influences.

2. Violations Of The Court's Procedural Rules And Oral Directive.

The venire members' open discussion of Mr. Flowers' case and interactions with victims' family members during *voir dire* also violated this Court's own procedural rules and standing directives to the jury pool. These violations of state law provide an additional reason to vacate Mr. Flowers' convictions and sentences. Miss. Code Ann. § 99-39-5(1)(a).[60]

Mississippi Uniform Rule of Circuit and County Court Practice ("Rule") 3.06 provides that "[j]urors are not permitted to mix and mingle with the attorneys, parties, witnesses and spectators in the courtroom, corridors, or restrooms in the courthouse. The court must instruct jurors that they are to avoid all contacts with the attorneys, parties, witnesses or spectators." Rule 3.06 has been cited by the Mississippi Supreme Court as applicable to the venire as well as the impaneled jury. *See Thomas*, 818 So. at 346-47 (upholding the trial court's denial of a motion for mistrial, where a victim's relative had been "fellowshipping" with potential jurors but the attesting witnesses did not hear what was discussed, and *voir dire* questioning suggested that the discussions did not relate to the case). Consistent with Rule 3.06, Judge Loper explicitly instructed the venire to keep their number cards with them in the hallway in order to "let everybody know you are a juror. And they are not to speak to you." Trial Tr. at 1093-94, 1375-77.

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[60] The Supreme Court of Mississippi has considered a Rule 3.06 violation as a cognizable basis for a mistrial. *See Thomas v. State*, 818 So. 2d 335, 346-47 (Miss. 2002) (carefully reviewing a mistrial motion related to venire contacts with a victim's relative and cautioning that the defendant's claim should "not to be taken lightly"). So, too, should a serious Rule 3.06 violation create a cognizable claim for post-conviction relief under Miss. Code Ann. § 99-39-5(1)(a). A violation of state trial rules may taint a conviction no less than its disagreement with state substantive law. And where, as here, evidence of a Rule 3.06 violation is not discovered until a defendant already has been convicted and sentenced to death, post-conviction proceedings should be capable of affording him relief. *See Batiste v. State*, No. 2013-DR-01624-SCT, 2016 WL 274947 * 1 (Miss. Jan. 21, 2016) (evidence of improper jury communications with bailiffs during trial reflected "precisely [the] sort of 'evidence of material facts, not previously presented and heard,' which is contemplated by the Mississippi Uniform Post-Conviction Collateral Relief Act").

Notwithstanding these clear instructions, venire members spoke with Bennie Rigby and others related to the victims. Ex. 37 (Mayes Aff.) ¶ 8. This was so even though Bennie Rigby was listed as a witness for the prosecution, Tr. at 1530, and a substantial number of prospective jurors had confirmed in open court during *voir dire* that they knew Mr. Rigby personally, *see id.* at 819-24, 826-27, 829, 831, 915.

The Mississippi Supreme Court has cautioned that contact between venire members and victims' families are "not to be taken lightly." *Thomas*, 818 So. 2d at 347. The Court's concern should be amplified where, as here, a victim's family member is listed as a trial witness, and there was no confirmation during *voir dire* that any discussions he may have had with prospective jurors excluded reference to the case. *Cf. id*. at 346 (declining to grant a new trial where, unlike here, questioning during *voir dire* showed that prospective jurors' discussions with a victim's family member were not "dealing with any of this [case]"). In fact, the prospective jurors in this case made no mention of their discussions with Bennie Rigby and other members of the victims' families during *voir dire*. Their silence denied trial counsel the opportunity to raise a prompt challenge to these interactions and casts serious doubt on the impartiality of the jury's verdict. *See United States v. Pridgeon*, 462 F.2d 1094, 1095 (5th Cir. 1972) (affirming mistrial requested by prosecution where juror spoke to defendant's witness and family, noting that the trial judge had "no way of ascertaining the true content of conversations that took place in violation of his express order" and that the juror "may have developed some subtle emotional inclination toward the defendant from her conversations with the defense witnesses and the defendant's relatives"); *Quinones v. Commonwealth*, 547 S.E.2d 524, 529 (Va. Ct. App. 2001) (reversing on other grounds and noting that the trial court also erred in refusing to investigate allegations that a juror communicated with a trial witness, which "called into question the

integrity of the trial").

All of these facts, which have been confirmed and amplified by new evidence from post-trial interviews with venire members, create substantial uncertainty regarding the impartiality of the jury that convicted Mr. Flowers and sentenced him to death. Nothing in the *voir dire* record allays that concern. Nor were counsel aware of the venire's out-of-court contacts with external influences during *voir dire*.

Mr. Flowers' convictions and sentences should be vacated under Miss. Code Ann. § 99-39-5(1)(a) in response to this critical violation of Mississippi's rules of practice. *See Batiste*, 2016 WL 274947 at * 4 (granting defendant leave to file a motion for post-conviction relief and explaining that he was "entitle[d] . . . to a hearing to enable the circuit court to ascertain what communications were had between bailiffs and/or other persons and the jury and to determine, insofar as is possible, what impact, if any, those communications had on [his] conviction and sentence").

GROUND G

PETITIONER WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL GUARANTEED BY THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE FEDERAL CONSTITUTION AND ANALOGOUS PROVISIONS OF THE MISSISSIPPI CONSTITUTION.

The Sixth Amendment to the United States Constitution guarantees the right to effective assistance of counsel. *See Strickland v. Washington*, 466 U.S. 668, 686 (1984). To establish that trial counsel was ineffective, a petitioner must satisfy a two-part test. First, he must demonstrate that counsel's performance was deficient by "showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.* at 687. Second, the petitioner must show that counsel's deficient

performance prejudiced his defense; *i.e.*, that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Id*. at 694. A reasonable probability is a probability that is sufficient to undermine confidence in the outcome. *Id.*

The Mississippi Supreme Court has admonished that, "at a minimum, counsel has a duty to interview potential witnesses and to make independent investigation of the facts and circumstances of the case." *See, e.g.*, *Ferguson v. State,* 507 So. 2d 94, 96 (Miss. 1987) (internal citations and emphasis omitted). In other words, "[w]hile counsel is not required to exhaust every conceivable avenue of investigation, he or she must at least conduct sufficient investigation to make an informed evaluation about potential defenses." *Davis v. State*, 980 So. 2d 951, 954 (Miss. Ct. App. 2007) (citing *Ross v. State,* 954 So. 2d 968, 1005 (Miss. 2007)). That did not happen here. Defense counsel failed to satisfy even these minimal obligations.

Specifically, Mr. Flowers' trial counsel were ineffective in the following critical respects:

First, trial counsel failed to investigate and present evidence of Mr. Flowers' intellectual disability, *see* Ground E, which may have impacted the jury's verdict not only with respect to sentencing, but also with respect to the guilt-or-innocence phase of trial.

Second, in the alternative to the grounds for relief concerning new and material evidence, counsel failed to retain experts to rebut two of the State's most damning pieces of evidence against Mr. Flowers: (i) the State's ballistics expert's testimony that he had concluded with 100% certainty that the bullets found at the scene of the crime were fired from Doyle Simpson's gun, and (ii) a second State expert's testimony that the bloody shoeprint found at Tardy Furniture was consistent with a size 10 1/2 Fila Grant Hill athletic shoe. Both of these conclusions were

suspect. But without an expert to explain why, trial counsel left themselves powerless to rebut this critical evidence.

Third, in the alternative to the grounds for relief concerning the State's failure to disclose its investigation of third party suspects and its presentation of false testimony regarding the same, *see supra* Grounds B and C, Petitioner submits that trial counsel failed to investigate alternative suspects, when doing so would have allowed them to present a more compelling defense theory than that which they presented at trial.

Fourth, notwithstanding that at the time of his sixth trial Mr. Flowers had spent many years on Mississippi's death row with a spotless disciplinary record, trial counsel failed to fully investigate or present this powerful evidence of Mr. Flowers' personal qualities and lack of future dangerousness.

Fifth, defense counsel failed to object to the State's improper closing argument, resulting in application of a harsher standard on appeal.

Sixth, trial counsel failed to adequately investigate or present evidence relating to a .380 gun found that was found near Tardy Furniture several years after the murders.

Seventh, in the alternative to the grounds for relief concerning new evidence, *see supra* Ground F, trial counsel failed to seek sequestration of the venire or a mistrial on the basis of improper venire conduct.

Eighth, trial counsel failed to present admissible evidence that would have rebutted the eyewitness testimony of a key State witness.

Finally, trial counsel failed to adequately pursue DNA testing prior to trial.

These claims are properly before the Court; ineffective assistance of counsel claims are generally more appropriate for review at the post-conviction stage than on direct appeal.

See, e.g., *Sandlin v. State*, 156 So. 3d 813, 819 (Miss. 2013); *Gowdy v. State*, 56 So. 3d 540, 543 (Miss. 2010); *Wilcher v. State*, 863 So. 2d 776, 825 (Miss. 2003); *see also Shinn v. State*, 174 So. 3d 961, 965 (Miss. Ct. App. 2015) ("It is unusual for this Court to consider a claim of ineffective assistance of counsel when the claim is made on direct appeal[.]") (internal quotation marks omitted).

A. Mr. Flowers Was Denied His Right To The Effective Assistance Of Counsel Due To Trial Counsel's Failure To Develop And Present Evidence That He Is Intellectually Disabled.

At trial, defense counsel did not present any evidence of Mr. Flowers' intellectual disability despite the fact that this evidence was readily available to them. As described in Claim E, *supra*, Mr. Flowers has a tested IQ of 72, and myriad sources of evidence—including developmental-stage IQ scores, school records, medical records, employment records, an evaluation by an MDOC psychologist, and interviews with family, friends, and teachers who knew Mr. Flowers during his childhood and adolescence—confirm that Mr. Flowers is intellectually disabled.

Trial counsel's failure to present this compelling evidence to the jury denied Mr. Flowers his right to the effective assistance of counsel, in three distinct ways. First, had trial counsel presented evidence of Mr. Flowers' intellectual disability prior to trial, there is a reasonable probability that the Court would have found Mr. Flowers to be intellectually disabled. This would not only have taken the death penalty off the table, but it also would have meant that the State would not have had the benefit of trying Mr. Flowers before a death-qualified—and thus, more conviction prone—jury. Second, if trial counsel did not succeed in using evidence of Mr. Flowers' intellectual disability to preclude the State from seeking the death penalty, they could have used it to present a powerful mitigation case during Mr. Flowers' sentencing phase. Even

if the jury would not have found evidence sufficient to conclude that Mr. Flowers is intellectually disabled and thus *ineligible* for the death penalty, there is a reasonable probability that at least one juror would have voted for a life sentence in light of his limited intellectual functioning. Third, trial counsel could have presented evidence of Mr. Flowers' intellectual disability during the guilt-or-innocence phase of trial, which may have led the jury to reach a different verdict altogether.

1. <u>There Is A Reasonable Probability That, Had Defense Counsel Introduced Evidence Of Mr. Flowers' Intellectual Disability Prior to Trial, The Court Would Have Found Him To Be Intellectually Disabled And The State Would Have Been Precluded From Seeking The Death Penalty.</u>

Had defense counsel adequately investigated Mr. Flowers' intellectual disability, they could have presented this evidence to the Court for a pre-trial determination of Mr. Flowers' eligibility for the death penalty. *See, e.g.*, *Baxter v. State*, 177 So. 3d 394, 398 (Miss. 2015), *reh'g denied* (Nov. 12, 2015) (noting that, prior to trial, the trial court found defendant ineligible for the death penalty, so his trial proceeded non-capitally). In light of the substantial evidence that post-conviction counsel have now adduced on this question, there is a reasonable probability that the Court would have found Mr. Flowers to be intellectually disabled and thus categorically ineligible for the death penalty. *See* Ground E, *supra*.

It is difficult to imagine an error more prejudicial than trial counsel's failure to take this critical step. Had Mr. Flowers been deemed exempt from the death penalty prior to trial, he would have had the obvious and enormous benefit of not facing the possibility of a capital sentence. But a finding of intellectual disability also would have stripped the State of the opportunity to seek a death qualified jury. The significance of this cannot be over-stated. Research has repeatedly and consistently shown that death qualification stacks the deck against

defendants by producing juries that are especially prone to convict. *See, e.g.*, James R. P. Ogloff & Sonia R. Chopra, *Stuck in the Dark Ages: Supreme Court Decision Making and Legal Developments*, 10 Psychol. Pub. Pol'y & L. 379, 394 (2004) ("A recent meta-analysis involving 14 articles, and a total of 20 studies involving different experimental methods, reached the conclusion that that death-qualified jurors are more conviction-prone than excludables."); Adam M. Clark, *An Investigation of Death Qualification as a Violation of the Rights of Jurors*, 24 Buff. Pub. Int. L.J. 1, 29 (2005-2006) ("Among its various objections to the death penalty, the [American Psychological Association] includes the fact that psychological studies have shown that death-qualified juries are more conviction prone.").

This is because, for one, death-qualified jurors tend to have more punitive attitudes about criminal justice than those excluded through death qualification. *See* Brooke Butler & Gary Moran, *The Impact of Death Qualification, Belief in a Just World, Legal Authoritarianism, and Locus of Control on Venirepersons' Evaluations of Aggravating and Mitigating Circumstances in Capital Trials*, 25 Behav. Sci. & Law 57, 66 (2007); Robert Fitzgerald & Phoebe C. Ellsworth, *Due Process vs. Crime Control: Death Qualification and Jury Attitudes*, 8 J.L. & Hum. Behav. 31, 45 (1984). Moreover, the death qualification process itself biases the jury against the defendant. *See* Craig Haney, *On the Selection of Capital Juries: The Biasing Effects of the Death-Qualification Process*, 8 J.L. & Hum. Behav. 121, 129 (1984) ("By requiring the attorneys and judge to dwell on penalty at the very start of the trial, the death-qualification process implies a belief in the guilt of the defendant on the part of these major trial participants."); Assoc. J. John Paul Stevens, *Address to the American Bar Association Thurgood Marshall Awards Dinner* (Aug. 6, 2005), http://www.supremecourtus.gov/publicinfo/speeches/sp_08-06-05.html (noting that death qualification "creates an atmosphere in which jurors are likely to assume that their primary

task is to determine the penalty for a presumptively guilty defendant").

These biasing effects are exacerbated for African-American defendants like Curtis Flowers. African-Americans oppose the death penalty at significantly higher rates than whites. *See* Pew Research Ctr., *Shrinking Majority of Americans Support Death Penalty* (Mar. 28, 2014), http://www.pewforum.org/2014/03/28/shrinking-majority-of-americans-support-death-penalty/; Frank Newport, *In U.S., 64% Support Death Penalty in Cases of Murder*, GALLUP (Nov. 8, 2010), http://www.gallup.com/poll/144284/support-death-penalty-cases-murder.aspx; The result, of course, is that African-Americans are excluded from jury service on death qualification grounds at far higher rates than whites. That was true in Mr. Flowers' case—16 African-American members of the venire were excluded on the basis of their opposition to capital punishment, compared to only four white venire members.[61] App. A.

The creation of a whiter jury through the death qualification process is extremely consequential in cases where the accused is African-American. *See, e.g.*, Mona Lynch & Craig Haney, *Capital Jury Deliberation: Effects on Death Sentencing, Comprehension, and Discrimination*, 33 Law & Hum. Behav. 481, 490 (2009) (in experimental study, finding that concentration of white men on any given jury contributed to significantly higher rates of death sentencing in scenarios with a black defendant); William J. Bowers, Benjamin D. Steiner & Marla Sandys., *Death sentencing in Black and White: An empirical analysis of jurors' race and jury racial composition*, 3 U. of Pa. J. Const. L. 171 (Feb. 2001) (archival study of 340 capital trials finding that the greater the proportion of whites to black jurors, the more likely a black

[61] Moreover, black jurors who express reservations about capital punishment are subject to exclusion through peremptory strikes even if they do not meet the *Witherspoon*/*Witt* criteria. Those reservations are easily spun into purportedly race-neutral explanations for strikes, further reducing the available pool of black jurors likely to actually serve on capital juries and providing cover against potential *Batson* claims.

defendant was to be sentenced to death, particularly if the victim was white); Samuel R. Sommers & Pheobe C. Ellsworth, *White Juror Bias: An Investigation of Prejudice Against Black Defendants in the American Courtroom*, 7 Psychol., Pub. Pol'y, & L. 201 (Mar. 2001); Theodore Eisenberg, Stephen P. Garvey & Martin T. Wells, *Forecasting Life and Death: Juror Race, Religion, and Attitude Toward the Death Penalty*, 30 J. Legal Stud. 277, 279 (June 2001) (examining juror interviews in South Carolina and finding that black jurors were much less likely to vote for death than whites in first vote of penalty deliberations); William J. Bowers, Marla Sandys & Thomas W. Brewer, *Crossing Racial Boundaries: A Closer Look at the Roots of Racial Bias in Capital Sentencing when the Defendant is Black and the Victim is White*, 53 Depaul L. Rev. 1497, 1499-1500 (Summer 2004).

The cumulative effect of these phenomena is that death-qualified juries are more prone to convict than juries that have not been death-qualified, particularly if the defendant is black and the jury is majority white. This fact is not lost on prosecutors, some of whom have acknowledged that they pursue death qualification when under pressure to secure a conviction. Richard Salgado, *Tribunals Organized to Convict: Searching for a Lesser Evil in the Capital Juror Death-Qualification Process in United States v. Green*, 2005 B.Y.U. L. Rev. 519, 532 ("[R]esearchers have suggested that prosecutors sometimes seek the death penalty in cases unlikely to receive that degree of punishment merely in the hopes of impaneling a death-qualified jury, thus enhancing their likelihood of prevailing in the guilt phase of the trial."); Tina Rosenberg, *The Deadliest D.A.*, NY Times (July 16, 1995) at 5, http://www.nytimes.com/1995/07/16/magazine/the-deadliest-da.html?pagewanted=5 (quoting a former homicide prosecutor as saying that, "[e]veryone who's ever prosecuted a murder case wants a death-qualified jury"). This very case shows that is so. District Attorney Evans opted

to try Mr. Flowers non-capitally in his fourth trial. But after that trial ended in a mistrial when the jury was unable to reach a verdict, Evans reversed course back to trying Flowers capitally—no doubt because his chances of securing a conviction would be higher with a death-qualified jury.

For all of these reasons, trial counsel's failure to present evidence of Mr. Flowers' intellectual disability to the Court prior to trial was enormously prejudicial, and Mr. Flowers deserves a new trial.

2. There Is A Reasonable Probability That The Jury Would Not Have Sentenced Mr. Flowers To Death If Trial Counsel Had Presented Evidence Of His Intellectual Disability.

Counsel have a duty to conduct a thorough investigation into possible mitigating evidence, consider all viable theories, and develop evidence to support those theories. *See Davis v. State*, 87 So. 3d 465, 472-73 (Miss. 2012); *Hill v. Lockhart*, 28 F.3d 832, 837 (8th Cir. 1994) ("'Given the severity of the potential sentence and the reality that the life of [the defendant] was at stake,' we believe that it was the duty of [petitioner's] lawyers to collect as much information as possible about [petitioner] for use at the penalty phase of his state court trial.") (citation omitted).

Here, counsel's failure to marshal a wealth of readily available records and testimonial evidence that would have established Mr. Flowers' intellectual disability rendered their performance deficient. *See Neal v. Puckett*, 286 F.3d 230, 240 (5th Cir. 2002) (en banc) (counsel's performance is deficient if he failed to gather readily available information that would have cost no more than a few phone calls or postage stamps); *Jermyn v. Horn*, 266 F.3d 257, 312 (3d Cir. 2001) (affirming finding of ineffective assistance where trial counsel failed to present a body of available but under-investigated mitigating evidence).

There is "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694; *see also Williams v. Taylor*, 529 U.S. 362, 391 (2000). To reach this conclusion, the Court need only determine that "at least one juror could reasonably have determined that because of [Petitioner's] reduced moral culpability, death was not an appropriate sentence." *Neal*, 286 F.3d at 241; *see also Wiggins v. Smith*, 539 U.S. 510, 513 (2003) (had defense counsel presented available mitigating evidence, "there is a reasonable probability that at least one juror would have struck a different balance."); *Emerson v. Gramley*, 91 F.3d 898, 907 (7th Cir. 1996) (noting that counsel had to convince only one of twelve jurors to refuse to go along with a death sentence).

Here, had defense counsel adequately investigated Mr. Flowers' intellectual disability and presented it to the jury, there is a reasonable chance that at least one juror would have voted for a life sentence. Mitigation evidence of intellectual disability is "exactly the sort of evidence that garners the most sympathy from jurors." *Smith v. Mullin*, 379 F.3d 919, 942 (10th Cir. 2004) (discussing the power of mitigation evidence of intellectual disability and mental illness); *see also Glenn v. Tate*, 71 F.3d 1204, 1211 (6th Cir. 1996) (citing empirical evidence of juror sympathy to claims of "organic brain problems"); *Brewer v. Aiken*, 935 F.2d 850, 862 (7th Cir. 1991) (Easterbrook, J., concurring) (same); *Van Tran v. State*, 66 S.W.3d 790, 802-03 (Tenn. 2001):

> The Capital Juror Project, a South Carolina jury study which this Court has relied upon . . . found that jurors in capital cases attached 'significant mitigating potential' to evidence that the defendant was [intellectually disabled]. . . . In fact, '[e]vidence that the defendant was [intellectually disabled] was almost as powerful as lingering doubt over his guilt,' with nearly 75 percent of the jurors

> surveyed noting that evidence of [intellectual disability] would make them less likely to vote for death (internal citations omitted).[62]

Trial counsel's failure to develop and present evidence of Mr. Flowers' intellectual disability was particularly prejudicial in light of the fact that their investigation apparently revealed little other compelling mitigating evidence to present on Mr. Flowers' behalf. Indeed, after 13 years of investigation and four prior capital trials, the mitigation case at Mr. Flowers' sixth trial spanned less than 90 pages of the more than 3,500-page trial transcript, and was limited to testimony from several family and community members who testified generally that Curtis was a good person and a good singer, a prison minister who testified that Curtis had taken some religious classes while in prison, and an expert who opined that Mr. Flowers was unlikely to be a future danger if the jury sentenced him to life. *See* Tr. 3274-3361.[63]

Moreover, even if the jury would not have found unanimously that Mr. Flowers was intellectually disabled, trial counsel's deficient performance still was prejudicial because one or more jurors may well have decided that Mr. Flowers' diminished intellectual capacity was sufficiently mitigating to warrant a life sentence. *Williams*, 529 U.S. at 396 (counsel were

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[62] *See also* Stephen P. Garvey, *Aggravation and Mitigation in Capital Cases: What Do Jurors Think?,* 98 Colum. L. Rev.. 1538, 1538-39, 1559 (1998) (finding evidence of intellectual disability and mental illness to be the most persuasive mitigation evidence); Samuel P. Gross, *Update: American Public Opinion on the Death Penalty—It's Getting Personal,* 83 Cornell L. Rev. 1448, 1468–69 (1998) (finding intellectual disability to be "much more" mitigating than other potential factors).

[63] In its entirety, the defense's mitigation case included the testimony of: Nelson Forrest, a pastor who sang with Mr. Flowers at church who discussed Mr. Flowers' singing voice, Tr. 3275-77; Jimmy Lewis Forrest, a second cousin of Mr. Flowers who also discussed Mr. Flowers singing at church, Tr. 3278-80; Reverend Billy Little, a minister who preaches to prisoners who testified that Mr. Flowers had taken religious courses during his time in prison, Tr. 3283-91; Crystal Ghoston, Mr. Flowers' 16-year old daughter who learned that Mr. Flowers was her father when she was 14, who testified that she loved her father, Tr. 3298-3300; Kenyatta Knight, the mother of Crystal Ghoston, Tr. 3301-04; Lola and Archie Flowers, Mr. Flowers' parents, who testified that Curtis was a good person and a beautiful gospel singer, Tr. 3334-41, 3347-3361; and James E. Aiken, a prison consultant who provided expert testimony regarding Mr. Flowers' low propensity for future dangerousness, Tr. 3305-33.

ineffective for failing to present evidence that the defendant was "borderline [intellectually disabled]"); *id.* at 398 ("Mitigating evidence unrelated to [death-eligibility] may alter the jury's selection of penalty, even if it does not undermine or rebut the prosecution's death-eligibility case"); *Brownlee v. Haley*, 306 F.3d 1043, 1055 (11th Cir. 2002) (finding counsel ineffective for failing to present evidence of borderline intellectual disability because an individual "right on the edge" of intellectual disability suffers some of the same limitations . . . as those persons described by the Supreme Court in *Atkins*). In other words, one or more jurors may have concluded that Mr. Flowers is not intellectually disabled, and thus still "eligible" for the death penalty, but nevertheless concluded, due to the closeness of the question or some remaining doubt about whether he is intellectually disabled, that death was not an appropriate punishment.

3. There Is A Reasonable Probability That The Jury Would Not Have Convicted Mr. Flowers If Trial Counsel Had Presented Evidence Of His Intellectual Disability.

Moreover, had trial counsel investigated and developed evidence relating to Mr. Flowers' intellectual disability, they could have presented some of this evidence during the guilt-or-innocence phase of trial to demonstrate that, in light of his limited intellectual abilities and history of low functioning, Mr. Flowers was not capable of pulling off a highly efficient, execution-style quadruple homicide—let alone doing so all by himself, as was the State's theory. That virtually everyone who knew Mr. Flowers as a child and young adult described him as unable to complete complex tasks and highly accident prone, and that family members and friends were afraid to go hunting with him because he could not shoot a gun, Ex. 39 (Goff Aff.) ¶ 15, all would have been highly probative on this issue. It is hard to imagine this crime being committed by any single person, but it is entirely implausible to think that someone like Mr. Flowers could have done it.

Defense counsel also could have presented evidence of Mr. Flowers' intellectual disability to help rebut the State's focus on inconsistencies in statements Mr. Flowers gave to law enforcement shortly after the murders. *See, e.g.*, Tr. 1818 (during opening statement, Mr. Evans stated: "We'll show you that [Mr. Flowers] was interviewed about this crime. He g[a]ve inconsistent statements about where he was, what times he did things . . ."). Numerous courts, including the U.S. Supreme Court, have recognized the enhanced propensity of intellectually disabled defendants to give inconsistent statements, including even false confessions. *See Atkins*, 536 U.S. at 320-21 (explaining that intellectually disabled defendants are more likely to give false confessions, and also "are typically poor witnesses"); *United States v. Preston*, 751 F.3d 1008, 1026-27 (9th Cir. 2014) (discussing ways in which evidence of intellectual disability can go to guilt-or-innocence, including explaining false confessions); *Singletary v. Fischer*, 365 F. Supp. 2d 328, 336-37 (E.D.N.Y. 2005) (collecting evidence showing that persons who are intellectually disabled are more likely to give false confessions); Brandon L. Garrett, *Judging Innocence*, 108 Colum. L. Rev. 55, 88–89 (2008) (finding that of the thirty-one cases of wrongful convictions in which a false confession was given, 35% of those defendants are intellectually disabled); Steven A. Drizin & Richard A. Leo, *The Problem of False Confessions in the Post–DNA World*, 82 N.C. L. Rev. 891, 899, 920, 971 (2008) (finding at least twenty-eight cases, or approximately 22%, of a false confession data set of 125 cases that involve intellectually disabled defendants).

Trial counsel's failure to present the substantial and readily available body of evidence of Mr. Flowers' intellectual disability was constitutionally deficient, and Mr. Flowers deserves a new trial or, at the very least, a new sentencing hearing.[64]

B. Counsel Were Ineffective For Failing To Counter Expert Ballistics And Shoeprint Evidence.

1. Failure To Counter Ballistics Evidence.

Trial counsel's failure to rebut the State's ballistics expert's testimony rendered their performance constitutionally deficient and prejudiced Mr. Flowers. First, the prosecution's contention that Doyle Simpson's never-recovered gun was used to commit the murders was central to its case against Flowers. To prove this critical fact, the State relied on the testimony of ballistics examiner David Balash, who relied on toolmark examination analysis to conclude that the bullets recovered from the crime scene were a "100 percent match" with bullets that law enforcement dug out of a fencepost in Doyle Simpon's backyard. As discussed *supra* in Ground A, Section B, Mr. Balash's analysis and testimony were wholly unreliable. The toolmark examination on which he relied has been roundly discredited as junk science. *See, e.g.*, Ex. 19 (Tobin Aff.) ¶ 4. And not only was Mr. Balash's "100 percent certain" conclusion that all five bullets were fired from the same weapon based on unscientific speculation, it impermissibly implied a zero percent chance of error. *See* Ex. 18 (Spiegelman Aff.) ¶ 7. Mr. Balash's testimony that gunshot residue (GSR) was found on Mr. Flowers' hand was also impermissible. Ex. 19 (Tobin Aff.) ¶ 47 ("[I]nterpretation of the presence of GSR is

[64] To be sure, Petitioner now seeks a hearing under *Atkins* to establish that he is not death-eligible. But such a hearing would not cure the prejudice Mr. Flowers incurred due to defense counsel's failure to seek this determination prior to trial. That is because, as described herein, trial counsel's failure to do so not only resulted in the imposition of an unconstitutional sentence, but also substantially prejudiced Petitioner with respect to the jury's decision in the guilt-or-innocence phase.

problematic and a major basis by which the FBI no longer offers GSR analysis as a forensic service."). Indeed, GSR particles can be found in any number of law enforcement equipment articles and are easily transferrable. *See id.* For that reason, the FBI has stopped providing that service. *Id.*

The jury never heard any of these facts. They should have. Effective trial counsel would have engaged an expert to testify to these developments in the ballistics field and to discredit the supposed match between the bullets found at the crime scene and those recovered from Doyle Simpson's fencepost. Trial counsel also should have engaged an expert to testify to the unreliability of GSR analysis and the reasons for its demise. Trial counsel's failure to do so was not the product of strategy, Ex. 15 (Carter Aff.) ¶ 6, but rather a fundamental under-appreciation of the importance of the State's ballistics evidence.

Mississippi courts have found similar failures by trial counsel to support reversals of convictions. *See, e.g.*, *Howard v. State*, 945 So. 2d 326, 352 (Miss. 2006) (finding that trial counsel's failure to obtain bite mark expert to rebut the State's expert constituted deficient performance). Likewise, the United States Supreme Court recently vacated an Alabama prisoner's conviction upon finding that the failure to retain an adequate ballistics expert constituted ineffective assistance of counsel. *See Hinton v. Alabama*, 134 S.Ct 1081 (2014). In that case, the State's ballistics expert testified that six bullets recovered from three different crime scenes were all fired from the same weapon. *Id.* at 1083. The defense retained an under-qualified ballistics expert because they wrongly assumed that there was not enough funding to retain a more qualified expert. *Id.* at 1084. The Supreme Court held that "trial attorney's failure to request additional funding in order to replace an expert he knew to be

inadequate because he mistakenly believed that he had received all he could get under Alabama law constituted deficient performance." *Id*. at 1088.

What happened here is worse. In *Hinton*, trial counsel retained an expert who was insufficiently qualified; here, defense counsel retained no expert at all. Instead, they relied on State Crime Lab analyst Steve Byrd, without assuring he was prepared to counter the State's ballistics evidence. Indeed, defense counsel failed even to provide Mr. Byrd with a copy of Mr. Balash's report and prior testimony. Tr. 2738. *See Caro v. Woodford*, 280 F.3d 1247, 1254 (9th Cir. 2002) (finding counsel ineffective for failing to ensure expert had relevant materials). So when it came time for Byrd to testify, he was forced to concede that he had not read Mr. Balash's report and therefore could not criticize it. Tr. 2738. Then, on cross examination, Mr. Byrd went on to partially corroborate Mr. Balash's testimony by testifying—as he did in *Flowers I* and *II*— that the bullet found inside the mattress at the scene of the crime,[65] was fired from the same weapon that fired the bullets found at Doyle Simpson's house. Tr. 2740.

Because of defense counsel's errors, the jury heard only what the State wanted it to hear: uncontested ballistics testimony tying Mr. Flowers to the crime. This prejudiced Mr. Flowers's defense; the State's ballistics-related theory was a central component of a weak circumstantial case, with little physical evidence to substantiate it. And we know the State's "toolmark" evidence was wrong; as described in Ground A, Section B, *supra*, the FBI and DOJ have both said just that. Had trial counsel successfully rebutted Mr. Balash's testimony, and demonstrated that there was no way to know whether the shots fired at Tardy Furniture on July 16 came from Doyle Simpson's gun, there is a reasonable probability that the result would have been different.

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[65] The bullet found in the mattress was recovered by the State's investigators almost one month after the crime. Tr. 2522-26.

2. Failure To Counter Shoeprint Evidence.

Likewise, trial counsel's failure to challenge the State's shoeprint expert's testimony with expert testimony of their own was ineffective and prejudiced Flowers' defense. At trial, the State's trace evidence examination expert, Joe Andrews, offered his analysis of a bloody footwear impression found at Tardy Furniture on the morning of July 16. Andrews testified that he examined photographs of shoeprint impressions from the scene of the crime, a pair of Nike flight tennis shoes belonging to Flowers, and a set of outsoles that would have been consistent with the Fila shoes originally packaged in an empty shoe box found at Mr. Flowers' girlfriend Connie Moore's home following the murders.[66] Tr. 2596-2603. In response to questioning by the State regarding whether the bloody shoeprint impressions left at Tardy Furniture were left by the "same type [of] shoe that would have been purchased" in the Fila shoe box recovered from Moore's home, Andrews responded that the impressions were "consistent in design and size with" a size 10 1/2 Fila Grant Hill shoe. Tr. 2611. Although Mr. Andrews did not say it, the prosecutor turned his "consistent with" testimony into a certainty, arguing during closing that the bloody shoeprint found at Tardy's was made by a size 10 1/2 Fila Grant Hill shoe:

> Let's talk about those shoes . . . Of all the shoes in the world, they were able to say that is a Fila Grant Hill IT Mid. . . . Fila Grant Hill, second edition, men's high top. That's a lot of individual characteristics to be able to tell about a shoe. ***What else could they tell? They could tell what size it was. It was size 10 1/2.*** So you have got a special kind of shoe of a certain size.

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[66] In any case, the evidence linking Mr. Flowers to that empty shoebox found in Ms. Moore's home was sparse. Aside from Patricia Sullivan-Odom's dubious account, the closest investigators ever came to linking Mr. Flowers to the shoe that left the bloody print at Tardy's was their seizure of an empty shoe box labeled "MS Grant Hill No. 2 mid FILA, red, navy and blue, size ten and a half," from Ms. Moore's home. *See* Tr. 2106. But, as Ms. Moore testified, the shoes that had once been contained in that box were purchased for her son, Marcus, who wore size 10 1/2 at the time, and had since grown to size 12. Tr. 2856, 2864. That Mr. Flowers had no connection to the box or the shoes once contained in it was further supported by the Mississippi Department of Public Safety's determination that none of the latent fingerprints lifted from the box matched Mr. Flowers. Tr. 2696.

Tr. 3196 (emphasis added).

Mr. Andrews' testimony was inaccurate and misleading, especially as argued at closing. Trial counsel could have shown that the shoeprint impressions from the crime scene could have been made by a wide range of shoe sizes—specifically, they could have been made by a shoe anywhere from a size 8 1/2 to 11. Ex. 2 (Wilcox Aff) ¶ 5. This is not a subtle difference. The supposed evidence that a bloody shoeprint found at the crime scene was, without a doubt, made by a size 10 1/2 Fila Grant Hill shoe, and that it just so happens that a size 10 1/2 Fila Grant Hill shoebox was found at Flowers' girlfriend's house is exactly the sort of "perfect fit" evidence that could unduly influence a jury. That is no doubt what the State hoped would happen. As Assistant District Attorney Hill implored during closing argument:

> [W]hen the first time they went to Curtis' house to look around . . . there in the bedroom in a chest of drawers is a shoe box. ***Can you imagine what kind of shoe box of all the shoe boxes in the world, what kind was it?*** Fila Grant Hill. Ladies shoes? No. ***Size 9 1/2? No. Size 10 1/2.*** There is the box. Right there in Curtis' bedroom in his apartment in his chest of drawers. There is the shoe box right there. What does it say? ***10 1/2 Grant Hill Fila shoes***. Men's.")

Tr. 3196-97 (emphases added). And because the shoeprint evidence was "scientific" evidence testified to by an expert, there is a substantial likelihood that the jury automatically gave it significant weight. *See* Ground A, Section B. Defense counsel knew or should have known of this obvious risk, and taken steps to counteract it.

Moreover, Mr. Andrews testified that Fila produced 221,189 size 10 1/2 Fila shoes with outsoles matching the shoes originally packaged in the shoe box retrieved from Connie Moore's home. Tr. 2620. He further explained that 221,393 size 10 Fila shoes were sold and 200,199 size 11 Fila shoes were sold. Tr. 2620. In total, Fila sold nearly 2 million pairs of shoes with

the particular style of outsole design that the State relied on as evidence tying Mr. Flowers to the crime. *Id.* As evidenced by Mr. Andrews' testimony regarding just the number of size 10, 10 1/2, and 11 Fila shoes produced, it is clear that the number of shoes produced ranging from size 8 1/2 to size 11 is significantly greater than 221,189. Accordingly, whereas Mr. Andrew's testimony left the jury with the impression that there existed only 221,189 pairs of shoes that could have made the partial shoeprint impression found at the crime scene, the truth was that there actually were several million pairs of shoes that could have made that impression. Had defense counsel hired an independent expert to check Mr. Andrews' analysis, they would have known all of this and could have both presented this strong rebuttal evidence to the jury and much more effectively cross-examined Mr. Andrews. Their failure to do so rendered their performance deficient.

In light of the dearth of physical evidence available in Mr. Flowers' case, the information contained in shoeprint expert Alicia Wilcox's report emphasizes the prejudice that flowed from trial counsel's failure on this score. Because no physical evidence connected Mr. Flowers to the crime scene—none of his fingerprints, hair, blood, or other DNA was found at the scene—the State had no choice but to build its case against Flowers around circumstantial evidence, unproven theories, and unreliable witness testimony. However, the State was confident it could explain away its lack of physical evidence because of one supposedly critical fact—Mr. Flowers wore size 10 1/2 shoes. The State reiterated this point several times throughout the trial and underscored the argument in its closing arguments:

> [Mr. Flowers' neighbor, Ms. Elaine Gholston], knows [Mr. Flowers] has a pair of Grant Hill Fila tennis shoes because she has seen him wearing them. Okay…we will take note of the importance of that in a few minutes.

Tr. 3190.

> Let's talk about those shoes. First of all, from the photographs, they were able to determine some things. They were able to tell what kind of shoes . . . What else could they tell? They could tell what size it was. It was a size 10 1/2. So you have got a special kind of shoe of a certain size.

Tr. 3196.

> [L]et's talk some more about the shoes. When Officer Johnson spoke with [Mr. Flowers] he asked him, determined the first day what size shoes do you wear? 10 1/2. He had 10 1/2's on his feet. About a day or two later when they had contact with him again they took those shoes off his feet. And they are a size 10 ½. They searched his house and they took a second pair of 10 1/2's. Curtis wore a size 10 1/2. That's for sure. Because he had them on his feet, and he said he wore 10 1/2's. So that puts the shoes on his feet. What did they say? If the shoe fits.

Tr. 3197.

Without evidence challenging Mr. Andrews' testimony, the jury was left with the distinct and misleading impression that the shoeprint was made by a size 10 1/2 Fila Grant Hill tennis shoe, the same size shoe Mr. Flowers allegedly wore. This was obviously damaging to the defense. A juror might not be so inclined to believe the State's "the shoe fit" theory if expert testimony was provided to show that the shoe print could have been made by a shoe as small as a size 8. Yet, Mr. Flowers' trial counsel never even considered consulting or hiring an expert to rebut Andrews' testimony. *See* Ex. 14 (Steiner Aff.) ¶ 8; Ex. 15 (Carter Aff.) ¶ 5 . This failure was not the product of strategic decision-making; counsel just did not think to do so. *Id.* This error rendered trial counsel's performance ineffective, and demands that Mr. Flowers' convictions be reversed. *See Thomas v. Clements*, 789 F.3d 760, 768 (7th Cir. 2015) (defense counsel ineffective for failing to consult expert to rebut State's expert testimony where counsel admitted "his failure to reach out to an expert was not a conscious decision—he just did not think to do so.").

C. Counsel's Failure To Investigate Third Party Suspects Was Ineffective.

Petitioner submits that even through the exercise of due diligence, trial counsel could not have been expected to unearth evidence that the State suppressed and lied about. As explained in Grounds A, B, and C, *supra*, the State suppressed its investigation of third party suspects Marcus Presley, LaSamuel Gamble, and Steven McKenzie and the material evidence that flowed from that investigation. In light of the State's repeated representations to defense counsel and the Court that no such evidence existed, trial counsel's failure to investigate these leads was reasonable. If, however, the court concludes that trial counsel should have ascertained these facts, then Mr. Flowers is entitled to relief due to counsel's ineffectiveness in failing to do so.

Trial counsel's failure to investigate and turn up evidence regarding alternative suspects was highly prejudicial. Had counsel conducted such an investigation, they would have discovered a veritable treasure trove of information relating to third party suspects Marcus Presley and LaSamuel Gamble, two men from the Birmingham, Alabama area who spent the summer of 1996 committing a string of robbery-murders closely resembling the Tardy murders. Specifically, as detailed in Ground A, *supra*, defense counsel would have learned that Presley and Gamble committed their robbery-murders execution style and in broad daylight; that their weapon of choice was a .380 handgun; that the .380 used in the Birmingham area murders jammed repeatedly, like the gun used in the Tardy murders; that LaSamuel Gamble wore Fila shoes during at least one of these murders; and that Gamble and accomplice Steven McKenzie went to Mississippi in July 1996 carrying a .380 handgun, and later returned to Birmingham with cash.

This evidence would have been admissible at trial. Courts generally permit presentation of third party perpetrator evidence where a defendant can show that there is some "reasonable

possibility that a person other than the defendant committed the charged offense." *Melendez v. United States*, 26 A.3d 234, 240 (D.C. 2011) (quoting *Winfield v. United States*, 676 A.2d 1, 5 (D.C.1996)); *see also Krider v. Conover*, 497 F. App'x 818, 820-821 (10th Cir. 2012) (third party perpetrator evidence must be more than "speculative" to be admissible) (citing *State v. Adams*, 280 Kan. 494, 505 (2005)); *Gore v. State*, 119 P.3d 1268, 1276 (Okla. Crim. App. 2005) (a defendant may put forth third-party perpetrator evidence "so long as there is some quantum of evidence, which is more than mere suspicion and innuendo, that connects the third party to the commission of the crime"). Third-party evidence need not prove a defendant's innocence to be admissible; instead, the focus is on whether the evidence would "tend to create a reasonable doubt that the defendant committed the offense." *McCullough v. United States*, 827 A.2d 48, 55 (D.C. 2003) (emphasis removed) (internal citation omitted); *see also People v. Prince*, 156 P.3d 1015, 1061 (Cal. 2007) (third-party culpability evidence is admissible if it is "capable of raising a reasonable doubt of [the] defendant's guilt") (internal quotation marks and citations omitted) (alteration in original); *State v. Grant*, 799 A.2d 1144, 1148 (Conn. Super. Ct. 2002) ("Evidence implicating a third person in a crime can consequently fall short of establishing probable cause of the guilt of that person and, nonetheless, establish a reasonable doubt as to the guilt of the accused").

The evidence connecting the Alabama suspects to the Tardy murders easily clears this low bar. Far from mere suspicion or innuendo, the evidence connecting Presley and Gamble to the Tardy murders is plentiful, tangible, and specific. The *modus operandi* of both sets of crimes was nearly identical: execution style murders in which the victims were killed with one or two bullets to the head, during the course of robberies, in broad daylight. Ex. 6 (Presley Tr.) 1166, 1364, 1575-77, 1605-12. The gun that Presley and Gamble used during their spree of

robbery-murders was a .380. Like the gun used to commit the Tardy murders, it had a habit of jamming, requiring the user to manually clear the gun, ejecting live rounds to be left behind. *See* Tr. 2150-51 (describing that the weapon used in the Tardy murders jammed, requiring it to be manually cleared, which ejected live ammunition onto the floor); Ex. 6 (Presley Tr.) 1140-41, 1364; Ex. 5 (Gamble Tr.) 1148-49, 1199, 1201, 1883, 1965-66, 1975. LaSamuel Gamble was wearing Fila shoes at the time he committed the murders for which he was convicted. Ex. 5 (Gamble Trial Tr.) 1955 ("Mr. Gamble: . . . The Filas, those are my olds shoes, you know what I'm saying? Those shoes I had on during the robbery."). And Marcus Presley has now sworn an affidavit in which he attests that between July 10 and July 17, 1996, LaSamuel Gamble, along with co-defendant Steven McKenzie, went to Mississippi for several days. Ex. 8 (Presley Aff.) ¶¶ 4, 7-8. Gamble was carrying the .380 handgun when he left for Mississippi, and when he returned to Alabama, he "had money on him that he did not have before he went to Mississippi," and told Presley that he "saw a few licks while they were in Mississippi. By licks he meant places to rob." *Id.* ¶¶ 9-10.

Had this evidence been presented, there is a reasonable probability that it would have created enough reasonable doubt to result in a different verdict. *See, e.g.*, *Ex Parte Sifuentes*, No. AP-75,815, 2008 WL 151087, at *1 (Tex. Crim. App. Jan. 16, 2008) (granting state post-conviction relief based in part on trial court's failure to investigate alternative suspects, finding that "had an adequate investigation been conducted, there is a reasonable probability that the evidence that would have been discovered and presented at trial would have created a reasonable doubt in the minds of the jurors and resulted in a different verdict").

Defense counsel's failure to investigate and present this information at trial was not the product of strategic decision-making. Trial counsel simply neglected to pursue any

investigation relating to Gamble and Presley,[67] and neglected to give critical thought to many aspects of the case, or to rethink strategy in between trials. Ex. 14 (Steiner Aff.) ¶¶ 6, 12; Ex. 15 (Carter Aff.) ¶ 11. Trial counsel's only effort to identify another perpetrator was to point to Doyle Simpson. That was not a strategic decision, but the result of failure to learn the facts about the Alabama murderers. It thus was unreasonable. *See, e.g.*, *Ross*, 954 So. 2d at 1006 ("'[S]trategic choices made after less than complete investigation will not pass muster as an excuse when a full investigation would have revealed a large body of [helpful] evidence.'") (quoting *Dickerson v. Bagley*, 453 F.3d 690, 696–97 (6th Cir. 2006)); *id.* ("It is not reasonable to refuse to investigate when the investigator does not know the relevant facts the investigation will uncover."); *Horton v. Zant*, 941 F.2d 1449, 1462 (11th Cir. 1991) ("[O]ur case law rejects the notion that a 'strategic' decision can be reasonable when the attorney has failed to investigate his options and make a reasonable choice between them."); *Turpin v. Helmeci*, 518 S.E.2d 887 (Ga. 1999) ("[T]he right to reasonably effective counsel is violated when the omissions charged to trial counsel resulted from inadequate preparation rather than from unwise choices of trial tactics and strategy.") (citations omitted).

D. Trial Counsel Were Ineffective For Failing To Investigate And Present Evidence Relating To Flowers' Lack Of Future Dangerousness And Adaptability to Prison.

In addition, trial counsel were ineffective for failing to investigate and present the full body of available mitigating evidence regarding Mr. Flowers' lack of future dangerousness and adaptability to prison. *See, e.g.*, *Rompilla v. Beard*, 545 U.S. 374, 380-81 (2005) (defense counsel must provide effective representation in presenting mitigation case to jury); *Davis v.*

[67] As explained in Grounds B and C, *supra*, this failure on trial counsel's part was largely the result of the State's several and repeated *Brady* violations. But to the extent the Court finds that this does not excuse defense counsel's failure to investigate, Flowers is entitled to relief on this ineffective assistance claim.

State, 87 So. 3d 465, 469 (Miss. 2012) (capital defendants are entitled to effective representation both at the guilt phase and the penalty phase).

At the time of his sixth trial, Mr. Flowers had been incarcerated continuously for nearly 13 years, mostly on death row. *See, e.g.*, Ex. 43 (MS DOC Offender Summary Report (Feb. 26, 2016)) (noting entry Date of 10/17/1997). During that time, Mr. Flowers had, remarkably, not incurred even a single minor infraction. *See, e.g.*, Ex. 44 at 1 (MS DOC Male Inmate Reclassification Score Sheets (June 28, 2010)) (noting no Institutional Disciplinary Reports). Thus, unlike most capital defendants, Mr. Flowers' lengthy history of excellent prison conduct supplied defense counsel with a wealth of useful and specific evidence to put before the jury during sentencing.

Petitioner had a right under *Lockett v. Ohio*, 438 U.S. 586 (1978), and *Skipper v. South Carolina*, 476 U.S. 1 (1986), to present this evidence to the jury. *See Hansen v. State*, 592 So. 2d 114, 147 (Miss. 1991). And defense counsel had a corresponding obligation to investigate and present such evidence. *Rompilla*, 545 U.S. at 380-81. Trial counsel's failure to do so severely prejudiced Mr. Flowers; had defense counsel convinced the jury that Mr. Flowers was a "model prisoner" who had adapted extremely well to prison, there is a reasonable probability that at least one of those jurors would have voted to spare his life. *See Wiggins*, 539 U.S. at 513; *Emerson*, 91 F.3d at 907.

Mitigation evidence includes "any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." *Eddings v. Oklahoma*, 455 U.S. 104, 110 (1982) (quoting *Lockett*, 438 U.S. at 604). Evidence of good behavior in prison is classic mitigation evidence. *Skipper*, 476 U.S. 1.

Likewise, evidence that a defendant is not "a future danger to society" is also mitigation evidence. *Davis*, 87 So. 3d at 470 (citing *Williams*, 529 U.S. at 370-71).

Had trial counsel conducted an adequate investigation, they would have had at their disposal substantial mitigation evidence relating to both of these factors. According to Mississippi Department of Corrections staff, Mr. Flowers is a "model prisoner." Ex. 45 (Benjamin Lewis Aff. (Mar. 16, 2016)) ¶ 4.[68] At the time of his sixth trial he had not incurred even a single disciplinary infraction during his almost 13 years in prison. See, e.g., Ex. 44 at 1 (MS DOC Reclassification Score Sheet). And since his sixth trial, he still has incurred only a single minor infraction, for lending another inmate a pen. See, e.g., *id*. at 2 (MS DOC Male Inmate Reclassification Score Sheet (Oct. 2, 2015)) (noting one RVR on 7-7-10); Ex. 14 (Steiner Aff.) ¶ 18; Ex. 15(Carter Aff.) ¶ 18. Mr. Flowers' prison records also indicate that, on multiple occasions, he was classified with the best possible ratings (zero) for multiple categories, including: history of institutional violence; severity of prior felony convictions; escape history; and severity of most recent serious disciplinary reports. See, e.g., Ex. 44 at 3-5 (MS DOC Inmate Reclassification Score Sheets (Apr. 27, 2005; May 15, 2006; Nov. 17, 2006).

Had trial counsel conducted a thorough investigation, they also would have discovered, and been able to present to the jury, evidence that guards allowed Mr. Flowers to leave custody to eat supper with his family in the period leading up to a prior trial. *See* Ex. 46 (Archie Flowers Aff. (Mar. 15, 2016)) ¶¶ 3-7; Ex. 47 (Lola Flowers Aff. (Mar. 15, 2016)) ¶¶ 3-7. That is uniquely compelling evidence of a lack of future dangerousness. It is highly unusual that law

[68] Counsel for Mr. Flowers was informed by Ms. Cotton, Petitioner's Mississippi Department of Corrections Case Manager, that she regards Mr. Flowers as a "model prisoner." Ms. Cotton also stated that Mississippi Department of Corrections rules prevent her for providing an Affidavit to this effect. *Id*. ¶¶ 4-5

enforcement would permit a purported quadruple murderer this sort of freedom. And it shows, in the professional opinion of the law enforcement personnel entrusted with his incarceration, that Mr. Flowers was well-behaved and trustworthy. According to law enforcement personnel, therefore, Mr. Flowers was not a flight risk and did not pose a danger to society even while on trial for his life. Yet, trial counsel failed to present any of this evidence to the jury, or even inquire about the topic with his family. *See* Ex. 46 (Archie Flowers Aff.) ¶ 7; Ex. 47 (Lola Flowers Aff.) ¶ 7;

Although trial counsel generally are "presumed to have rendered adequate assistance," *Strickland*, 466 U.S. at 690, that presumption does not apply where trial counsel fail to conduct an adequate investigation. *See Rompilla*, 545 U.S. at 395. Such a failure to investigate cannot be excused on tactical grounds as "[i]t takes no deep legal analysis to conclude that an attorney who never seeks out or interviews important witnesses and who fails to request vital information was not engaging in trial strategy." *Davis*, 87 So. 3d at 469; *see also Williams*, 529 U.S. at 396 (counsel's failure to conduct an adequate mitigation investigation cannot be justified on tactical grounds).

Here, the record makes clear that trial counsel's failure to present this evidence was not strategic. Trial counsel adopted a strategy of attempting to demonstrate that Mr. Flowers was not a future danger. Specifically, they made an effort to show the jury that Mr. Flowers posed no risk of future dangerousness by presenting the testimony of James Aiken, an expert in future dangerousness. Tr. at 3296, 3305-33. Trial counsel therefore obviously understood the importance of showing that Mr. Flowers was not a danger to society and made the strategic decision to attempt to do so. Trial counsel simply failed to follow through on their chosen strategy, and thus provided ineffective assistance. *See Leatherwood v. State*, 473 So. 2d 964,

970 (Miss. 1985) (finding ineffective assistance when defense counsel "chooses a defense and then does not follow through on his chosen strategy"). Moreover, trial counsel had the power to subpoena pertinent documents from the Department of Corrections and to subpoena testimony from Department of Corrections' employees. *See, e.g.*, Miss. Const. art 3, § 26; *Patton v. State*, 109 So. 3d 66, 79 (Miss. 2012) (recognizing the right to call witnesses with relevant and material testimony). They simply failed to take advantage of this right.

This failure prejudiced Mr. Flowers because the jurors tasked with deciding if he should be granted mercy were not made aware of the full picture of his character. Defense counsel's error was particularly harmful because the mitigation evidence that trial counsel failed to present came from records and employees of the Department of Corrections, and thus would have been uniquely compelling. These witnesses "would have had no particular reason to be favorably predisposed towards one of their chargees" resulting in the jury giving such evidence "much greater weight." *Davis*, 87 So. 3d at 472 (internal quotation marks omitted) ("*Skipper* clearly stands for the proposition that testimony from disinterested prison personnel about an inmate's conduct is highly probative").

Because of trial counsel's failures, the jury that sentenced Mr. Flowers to death never learned that Mr. Flowers was a model inmate, well-adjusted to prison, or that he was regarded as so lacking in future dangerousness by the State that he was permitted to *leave custody* for supper with his parents. Had the jury been presented with the entire picture, there is at least a reasonable probability that at least one juror would have voted to spare his life. This requires that Mr. Flowers' death sentences be reversed. *See id*. at 471-72 (finding that, where trial counsel provided ineffective assistance of counsel by failing to put on an adequate mitigation case, "the decision in *Skipper* leads to the inescapable conclusion that [Petitioner's] death sentence must be

reversed"); *Rompilla*, 545 U.S. at 393 (where the potential mitigation case "bears no relation to the few naked pleas for mercy actually put before the jury," prejudice results even if "it is possible that a jury could have heard it all and still have decided on the death penalty").

E. Trial Counsel Were Ineffective In Failing To Object To Prosecutorial Misconduct During The State's Closing Argument.

Trial counsel also were ineffective for failing to object to the State's repeated mischaracterizations of the evidence during closing argument.

The principles governing prosecutorial misrepresentations are well-settled under both Mississippi law and the federal Constitution. The purpose of a closing argument is to fairly sum up the evidence. *Rodgers v. State*, 796 So. 2d 1022, 1027 (Miss. 2001). "[The prosecutor] may comment upon any facts introduced into evidence. He may draw whatever deductions seem to him proper from the facts . . . ." *Bell v. State*, 725 So. 2d 836, 851 (Miss. 1998) (collecting authorities). But the prosecutor—obviously—cannot "state facts which are not in evidence." *Nelms & Blum Co. v. Fink*, 131 So. 817, 821 (1930); *see also Miller v. Pate*, 386 U.S. 1 (1967) (finding due process violation where prosecutor misrepresented material evidence); *Flowers II*, 842 So. 2d at 556 (holding "cumulative effect of the State's repeated instances of arguing facts not in evidence [denied] Flowers his right to a fair trial"); *Dunaway v. State*, 551 So. 2d 162, 163 (Miss. 1989) ("[P]rosecuting attorneys must exercise caution and discretion in making extreme statements in their arguments to the jury, if for no other reason than to save . . . the additional time, expense and effort involved in a retrial.") (citation omitted). Here, the State made repeated, significant misrepresentations of material facts during closing argument. These mischaracterizations glossed over serious flaws and filled otherwise irreconcilable gaps in the prosecution's theory of the case against Mr. Flowers. Defense counsel failed to object to any of

these misrepresentations during closing argument. This failure violated Mr. Flowers' right to effective assistance of counsel. *See, e.g., Zapata v. Vasquez*, 788 F.3d 1106 (9th Cir. 2015); *Hodge v. Hurley*, 426 F.3d 368 (6th Cir. 2005).

As discussed at length throughout this Petition, the prosecution's case against Petitioner depended in large part upon the reliability of its patchwork timeline of Mr. Flowers' movements on the morning of July 16, its flimsy motive theory, the jury's willingness to reject Doyle Simpson as a legitimate alternate perpetrator, and the jury's acceptance of the improbable proposition that one person could have committed all four homicides in the manner reflected at the crime scene and in the autopsy results. There were evidentiary problems with each of these critical components that threatened to undermine the State's case. So the State did what it had to do to win its case: mischaracterize the evidence during closing argument to fix these problems and fill these gaps.

1. <u>The Timing Of Sam Jones' Discovery Of The Crime.</u>

Sam Jones discovered the bodies at the furniture store, and the timing of that discovery within the chronological sequence alleged by the State was essential to the prosecution's theory of the case. On direct examination by the prosecution, Mr. Jones testified that Bertha Tardy had called him "a little after 9:00" on the morning of the crime, and he had traveled to the store shortly thereafter. SJ Tr. 8. He was unequivocal on this point:

A. Yes. She called me around, it was a little after 9:00.
Q: Called you a little after 9:00.
A: A little after 9:00.

Id. Mr. Jones was also certain that he had arrived at the store before 9:30 a.m.:

Q: All right, and what did you do after she called?
A: I got to the store; it was before—it was right at, between 9:15 and 9:30.
Q: Okay.

A: I will put it like that. It wasn't 9:30.

Id.

Because this account of the timeline did not square with other eyewitness accounts,[69] the prosecutor immediately attempted to adjust Mr. Jones' account of when he had arrived:

> [Prosecution]: Okay. And I think — I might have misled you a little bit. It was, ***when you got to the store, that was going to be closer on up to 10 o'clock, wasn't it?***
> [Defense]: Object[ion] to leading, Your Honor.
> The Court: Overruled.

SJ Tr. 9. Nothing in the rest of Mr. Jones' testimony contradicted his initial sworn statement that he had discovered the crime sometime between 9:15 and 9:30. Nor did the State offer any other testimonial or evidentiary fix for the glaring discrepancy between Mr. Jones' testimony and that of Porky Collins and Clemmie Flemming, both of whom testified that they had seen Mr. Flowers outside of Tardy's after 10:00 a.m. on July 16. Instead, the prosecution simply seized on the opportunity during closing argument to change what Mr. Jones had said. After identifying the "timeline" as the first of a set of "connections" that would establish Mr. Flowers' guilt, Tr. 3188, the prosecutor purported to remind the jurors of Mr. Jones' account:

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[69] Evidence establishing that the murders had already occurred by 9:30 a.m. posed two significant problems for the State. First, it conflicted badly with the accounts later elicited from Porky Collins and Clemmie Flemming. Mr. Collins was the only witness to report seeing Mr. Flowers in the immediate vicinity of the furniture store, presumably just *before* the crime, and Ms. Flemming was the only person who claimed to have seen Mr. Flowers running away from the store, presumably just *after* the crime—and both claimed to have made their sightings *shortly after* 10:00 a.m. *See* PC Tr. 1606-10; Tr. 2367-70 (Clemmie Flemming's account). The tension is self-evident: If Mr. Flowers had committed a quadruple homicide by 9:30 am., why would he be standing outside the crime scene more than half an hour later?

Additionally, if Sam Jones' account was correct, then the crime scene was unattended and unmonitored for at least fifty minutes between his discovery of the murder and the arrival of Chief Hargrove. Even if the prosecution's unilateral revision of Mr. Jones' testimony was correct, there was ample time for unknown people *other than the killer* to enter the unlocked door of the furniture store, step in the blood on the floor, and leave undetected. This possibility is consistent with the observations of Mr. Jones, who testified that he did not see a shoe print at the time he entered the store and discovered the victims, but did see a print when he later reentered the store with Chief Hargrove. SJ Tr. 22-24; 34.

> Mr. Sam Jones came into the store ***slightly after 10:00*** on the morning of the 16th and discovered the bodies. The 911 dispatched, dispatched the MedStat ambulance crew at 10:20 am. Chief Hargrove was the first to arrive between 10:20 and 10:21 am. Hargrove is on the scene and locks down the crime scene.

Tr. 3189 (emphasis added). That, of course, is not what Mr. Jones testified. This was a material alteration of Mr. Jones' account in a direction that dishonestly resolved the otherwise problematic discrepancy with the stories told by Mr. Collins and Mr. Flemming. Nevertheless, defense counsel failed to object.

2. Mr. Flowers' Nonexistent "Beef" With The Store.

The prosecution also needed to offer the jury some reason to believe that Mr. Flowers, a gospel singer with no criminal record, had a motive to commit the quadruple homicide at Tardy Furniture. But not a single witness at Mr. Flowers' trial offered anything useful to the State on this score. The closest any witness came was Mississippi Highway Patrol Investigator Jack Matthews, who said that Bertha Tardy's daughter, Roxanne Ballard, had told him "about one incident where they had recently let an employee go by the name of Curtis Flowers." Tr. 2482.[70] According to the District Attorney's investigator, John Johnson, this did not result in any "fights," "cuss outs[,] big arguments . . . [or] threats to anybody[.]" Tr. 2923.

Notwithstanding the absence of any record evidence from which the jury could conclude—or even reasonably *infer*—that Mr. Flowers was angry or vengeful over his termination from the furniture store, the prosecutor stood before the jury in closing argument and characterized Jack Matthews' unremarkable testimony of Mr. Flowers having been "let . . . go" as evidence of *hostility* between the defendant and his former short-term employer:

[70] Other testimony would later indicate that the "incident" Ballard related to Investigator Matthews concerned Mr. Flowers having accidentally damaged the golf cart batteries, *see* Tr. 2665, and that, despite the battery incident, the store owner loaned Mr. Flowers thirty dollars before he left work, Tr. 2496-97.

> The investigators learned pretty quickly when they were asked who in the world could have had some reason, ***some motive, some anything to attack four people like this. Have you had anybody that's had a beef with the store? Just one***.

Tr. 3189 (emphasis added). According to the testimony, however, investigators never "learned" any such thing. All they were told is that Mr. Flowers had lost his job after failing to show up for work for three days—nothing more. In the face of this material misrepresentation to the jury about the critical element of motive, trial counsel again stayed silent.

3. Porky Collins' Reaction To The Photo Array Containing A Picture Of Doyle Simpson.

One of the central disputes at trial was whether Doyle Simpson, rather than Mr. Flowers, was the actual perpetrator of the crime. The prosecution therefore had a strong interest in avoiding testimony that would strengthen Mr. Simpson's profile as a suspect while at the same time preserving any evidence that pointed to Mr. Flowers' guilt. Porky Collins' testimony served both of these interests; he had purported to identify Mr. Flowers as a man he had seen outside the furniture store, but portions of his account (e.g., the presence of a dirty two-toned brown car, like Doyle Simpson's, on the street near the store, and his identification of a second man outside of the store) had also pointed toward Simpson. From the prosecution's perspective, therefore, the chances of success at trial would be maximized by achieving the combination of a strong and unequivocal eyewitness identification of Mr. Flowers by Mr. Collins, while simultaneously neutralizing the parts of Porky Collins' testimony that favored Doyle Simpson as the killer.

But as with Sam Jones' testimony, there was at least one element of Mr. Collins' story beyond the prosecution's control. Several weeks after the murders, Mr. Collins was shown two photo arrays and asked if he recognized any of the individuals as the man he had seen outside of the furniture store. The first array included a picture of Doyle Simpson, and Mr. Collins

selected it, saying it "look[ed] like the person he'd seen," Tr. 3031. Unhappy with that result, investigators showed Mr. Collins a second array omitting Mr. Simpson and adding Mr. Flowers, to which Mr. Collins responded, "I believe that's him, it looks like him." Tr. 3032. For the prosecution, Porky Collins' reaction to the photo arrays was a troublingly mixed bag: by pointing to both Curtis Flowers and Doyle Simpson, it simultaneously diluted the probative value of the Flowers identification, and reinforced the suggestion that Mr. Simpson was the real killer.

The prosecution's solution to this conundrum was the same as its solution to the trouble with Sam Jones' account: misstate the facts in closing argument. And that is exactly what the prosecutor did:

> Here are two line-ups. These line-ups were shown to Porky at the same setting. First was this one that has Doyle Simpson's picture on it. Because later on when they did this line-up, they already knew that the gun came out of Doyle's car. And so they gave this thing to Porky first and said is the guy that you saw in front of Tardy's in this group. ***Now, if he was going to make a misidentification, ladies and gentlemen, that would have been the perfect time for him to pick one of these guys and say yeah, there he is right there. But you know what? Porky did not misidentify anybody. He said the guy ain't in there.*** . . . Porky was offered a prime chance to mess up. The perfect chance to make a mistake. He almost—It didn't develop out the way it, but it was almost like a trick. ***You know, see if he is in there. No, he is not. Is he in this second group? Yeah. That's him right there. So that's pretty strong identification, isn't it?***

Tr. 3193-94 (emphases added). Again, the prosecutor lied. And again, trial counsel failed to object.

4. <u>The Location And Distribution Of The Victims At The Crime Scene.</u>

Regardless of where each victim had been found in the store, the State's insistence that one person, acting alone, committed four execution-style killings with five bullets was already a stretch. But the actual location of each victim at the crime scene made this theory even more implausible. According to diagrams and notes prepared by Mississippi Crime Laboratory

personnel, three of the victims were separated from each other by approximately five feet, while the fourth victim was found more than fifteen feet away from the others. *See* Trial Ex. S-39; -40; -51, *Flowers VI*.[71] That arrangement meant either that a single assailant managed to place precision shots in all four unrestrained victims despite their separation by substantial distances, or that this crime was not the work of a single assailant.

The likelihood of jurors accepting the State's lone gunman theory depended upon the prosecution's ability to overcome the obvious common sense barriers to its plausibility. Nothing could be done about the number of victims or the small number of bullets used to kill them; both of which undermined the lone gunman theory. What the prosecution could—and did—do, however, was subtly but effectively mislead the jury into believing that carrying out the four killings was not as physically demanding as it seemed. To do so, the prosecutor simply misrepresented the contents of the crime lab documents. Whereas those documents showed the separations described above, according to the prosecutor at closing argument, "all four victims [were] basically laying in a pile, in a group right at the front counter in Tardy Furniture store." Tr. 3188. That was not true, or even close to true. Once again, trial counsel made no objection.

* * * * *

By not objecting to these misrepresentations during closing argument, trial counsel utterly failed to function as the counsel guaranteed Mr. Flowers by the Sixth Amendment. *See*, e.g. *Hodge*, 426 F.3d at 385-87 (finding trial counsel ineffective where they failed to object to

[71] The diagrams admitted as State's Exhibits 39 and 51 were not drawn to scale, but it is possible to deduce the approximate distances separating the victims by viewing them in combination with the partial measurements recorded in State's Exhibit 40. The fact that the victims were separated by considerable distances is also confirmed by the crime scene photographs. *See* C.P. 2237 CD in folder name: "Photos from

prosecutor's misrepresentations of evidence during closing). While the misrepresentations described above would have been too subtle for the jury to see through (and that was exactly the point), they should have been obvious to defense counsel. That conclusion is underscored when one considers that trial counsel were already on notice of the State's willingness to misrepresent critical facts during closing argument to explain away evidentiary gaps. Indeed, one of Mr. Flowers' prior convictions was overturned on the basis of this very same kind of misconduct, ***relating to some of the very same facts*** misrepresented during closing arguments in Petitioner's most recent trial.

In *Flowers II*, the prosecution argued that Sam Jones received the call from Bertha Tardy at 9:30 a.m. and arrived at the store close to 10:00 a.m.: "[Jones] said he received a call around 9:30. I recall; I wrote it down. It took him 15 to 20 minutes to get there." *Flowers II* Tr. 2693. That is nearly identical to what the prosecution argued in Flowers' most recent trial: "Mr. Sam Jones came into the store slightly after 10:00 on the morning of the 16th and discovered the bodies." Tr. 3189. This also is untrue; in both cases, Mr. Jones testified that Bertha Tardy had called him and he had arrived at the store sometime before or around 9:30. *Flowers II* Tr. 1584; SJ Tr. 7-8.

Also in *Flowers II*, District Attorney Evans argued that Flowers had a beef with the store: "Curtis Flowers was mad. You notice in your statement when Jack Matthews read it at least four or five different times in there. He talked about how he had been terminated, how he had been let go." *Flowers II* Tr. 2759. Again, that is nearly identical to what the prosecution argued in Mr. Flowers' most recent trial. Tr. 3189. And again, it was unsupported by what the evidence actually showed. In *Flowers II*, however, trial counsel properly objected to the prosecution's

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Envelopes #2,3,4 and B & W shoeprint," Photos 0000068A; 0000111A; 0000174A; 0000210A

misrepresentations, and the Mississippi Supreme Court found that the prosecutor's conduct was so egregious that it required reversal of Petitioner's conviction. Here, however, trial counsel failed to object, which the Court noted when it denied Petitioner's claim on appeal. *Flowers v. State*, 158 So. 3d at 1046; Tr. 3189.

Nor can counsel's failure to object be chalked up to strategic decision-making. Instead, counsel simply failed to recognize and protest the very same distortions that led to a reversal by the Mississippi Supreme Court in *Flowers II*. Ex. 14 (Steiner Aff.) ¶ 19 ("[T]here was no strategy involved in [the] failure . . . to object to several improper statements by the prosecution . . .we just were not paying enough attention."); Ex. 15 (Carter Aff.) ¶ 21. Given the fact that counsel was on notice of the prosecution's willingness to make these types of mischaracterizations, that a proper objection on this *very same issue* in *Flowers II* had resulted in a reversal of conviction, and that counsel admits there was no strategic decision to stay silent, the failure to object here fell below the objective standard of reasonableness required by *Strickland*.

This failure prejudiced Mr. Flowers in two crucial ways. First, counsel's failure to object allowed admission of misrepresented, material evidence into the record, thereby "painting an incorrect picture for the jury of the events surrounding . . . the murders." *Flowers v. State*, 158 So. 3d at 1085 (Dickinson, J., Dissenting). As described above, the prosecution tainted the jury's perception of the evidence in four key ways: (i) glossing over evidence establishing that the murders had already occurred by 9:30 a.m., evidence that called into serious doubt the timeline articulated by the prosecution, and the eyewitness testimony of Porky Collins and Clemmie Flemming; (ii) manufacturing a motive for Mr. Flowers to commit the murders; (iii) bolstering Porky Collins' shaky and equivocal eyewitness identification of Curtis Flowers by explaining away the fact that he had also picked Doyle Simpson out of a photo array; and (iv)

presenting an inaccurate description of the victims which made it easy for the jury to believe an assailant with unexceptional marksmanship skills could have committed the killings, instead of requiring the jurors to buy into the State's actual theory—that one person could possess the combination of skill and speed necessary to shoot four unrestrained adults in the head as they stood separated by the distances observed at the scene. A proper objection to the prosecution's mischaracterizations of these crucial evidentiary points would have made clear to the jury that they were not to consider this improper evidence, and would have highlighted the severe flaws in the State's theory of guilt. Indeed, had trial counsel properly and timely objected to these falsehoods during closing argument, there is a reasonable probability that the result of the trial would have been different.

Second, by not contemporaneously objecting to the prosecution's mischaracterization of facts during closing arguments, trial counsel failed to properly preserve the issue for appeal. When counsel contemporaneously objects during closing argument, appellate courts review the trial court's ruling on that objection for abuse of discretion. *See Netherland v. State*, 909 So. 2d 716, 718-19 (Miss. 2005) *reh'g denied* (Sept. 15, 2015) (applying abuse of discretion standard to trial court's ruling on objection to closing statements). On the other hand, "the failure to object to the prosecution's statements in closing argument [generally] constitutes a procedural bar." *Flowers*, 158 So. 3d at 1043 (internal quotation and citation omitted). While the Mississippi Supreme Court nevertheless exercised its discretion to review Mr. Flowers' challenge to the prosecution's statements on appeal, it did so under the more burdensome plain error analysis. *See id.* at 1046 ("Flowers failed to object to the statements during closing, therefore, we apply the plain error doctrine on appeal."). To reverse under plain error analysis, the error "must have resulted in a manifest miscarriage of justice or seriously affected the fairness, integrity, or public

reputation of the judicial proceedings." *Id.* at 1043 (internal brackets and citation omitted). Although Mr. Flowers submits the errors here satisfied that standard—and although three Justices would have granted Mr. Flowers relief even under that heightened standard, *Flowers*, 158 So. at 1087-88 (King, J., dissenting)—this claim would have been analyzed under the less stringent abuse of discretion standard had trial counsel contemporaneously objected. And had Mr. Flowers' claim been analyzed for abuse of discretion, there is a reasonable probability that the result would have been different.

F. Trial Counsel's Failure To Impeach Key State Witnesses With Readily Available Evidence Was Ineffective.

Trial counsel were also ineffective for failing to present the witness who would have most effectively impeached star State witnesses Clemmie Flemming. Ms. Flemming's testimony was devastating to Mr. Flowers' defense. She testified that on the morning of July 16, 1996, she hired Roy Harris to drive her to Tardy Furniture so she could pay off her furniture bill. Tr. 2367-68. According to Ms. Flemming, when they arrived at the store, she decided not to go inside because she was not feeling well—a convenient explanation for why no one saw her near Tardy's that morning. *Id.* Rather than park in front of Tardy's, Roy Harris turned his car onto the road running alongside Tardy Furniture, at which point, Ms. Flemming says, she saw Curtis Flowers "running hard" like "somebody was after him," about 90 feet away from the store. Tr. 2368-70. Ms. Flemming testified that she had known Mr. Flowers most of her life, and that when she saw him running, she said to Roy Harris, "there go Curtis." Tr. 2369. Ms. Flemming was certain it was Curtis she had seen running. *Id.*

This testimony was critical to the State's case. The State acknowledged as much during closing argument:

> Then you have Clemmie Fleming. What about Clemmie? ***And this is huge***. She said she saw Curtis running hard at the back of the store . . . She knows him. No mistake. Doesn't have to pick him out of a line-up. She knows him. Knew him on sight. Recognized him instantly.

Tr. 3194 (emphasis added). Clemmie Flemming was the only eyewitness who testified to having seen Mr. Flowers near Tardy Furniture immediately after the murders. And her testimony as an eyewitness was more compelling than that of Porky Collins, who did not know Mr. Flowers, was shifting and equivocal when shown a photo array, and had difficulty identifying Mr. Flowers in the courtroom at his first trial. Tr. 3032; *Flowers I* Tr. 435. Indeed, Ms. Flemming's testimony that she saw Mr. Flowers running away from Tardy's on the morning of July 16 was arguably the most damning eyewitness testimony presented at trial. What could be more suggestive of guilt than a suspect sprinting away from the scene of a crime?

But Ms. Flemming's testimony was patently false. She was not with Roy Harris on the morning of July 16. Ex. 3 (Harris Aff.) ¶ 3. And if defense counsel had presented Mr. Harris as a witness, he would have testified to that fact. *Id.* ¶ 5 (stating that trial counsel never contacted him and that he would have been willing to testify if they had). Another witness not called to testify at trial, Frederick Woods, corroborates that Ms Flemming lied during her testimony. He swears in an affidavit that, sometime between 2000-2002, "I asked Clemmie if she had actually seen Curtis Flowers running from the area of Tardy's on the day of the murders. Clemmie told me that she had not, and that she made up the story to get the reward money." Ex. 4 (Woods Aff.) ¶¶ 2-3. Mr. Woods also attests that, if defense counsel had asked him to testify at trial, he would have shared this information with the jury. *Id.* ¶ 4.

There was no excuse for trial counsel's failure to present this readily available evidence. Defense counsel undoubtedly knew of Roy Harris and what the substance of his testimony would be. Among the few details of Ms. Flemming's story that remained consistent across the six trials was her testimony that she was with Mr. Harris on the morning of July 16 when she supposedly saw Mr. Flowers running away from Tardy's. *See* Tr. 2367-68; *Flowers V* Tr. 419-21; *Flowers IV* Tr. 214-16; *Flowers III* Tr. 1396-97; *Flowers II* Tr. 1842; *Flowers I* Tr. 552. And Mr. Harris himself testified for the defense on three prior occasions,[72] including during *Flowers III*, when Ray Charles Carter was lead defense counsel. *Flowers III* Tr. 1761-73. Mr. Harris' prior testimony was that, although he saw a man running near Tardy Furniture on the morning of July 16, Clemmie Flemming was not with him at the time and the man he saw running was not Curtis Flowers. *See, e.g., Flowers III* Tr. 1762-65; *Flowers II* Tr. 2301-02, 2305; Ex. 3 (Harris Aff.) ¶ 2. Mr. Harris further testified that he had driven Ms. Flemming on July 16, but it was not until more than an hour after he had seen the man running, while he was alone, and they did not drive to Tardy Furniture together. *See, e.g., Flowers II* Tr. 2302-03; Ex. 3 (Harris Aff.) ¶¶ 3-4 .

Defense counsel had no strategic reason for failing to present Mr. Harris as a witness, and their failure to do so therefore cannot be insulated from scrutiny on that basis. Ex. 14 (Steiner

[72] That the three trials in which Mr. Harris previously testified resulted in convictions is inapposite to the question of whether his testimony would have been material or compelling to the jury. All three of those convictions were the product of prosecutorial misconduct. *See Flowers III*, 947 So. 2d 910 (Miss. 2007) (reversing convictions upon finding multiple *Batson* violations); *Flowers v. State*, 842 So. 2d 531 (Miss. 2003) (*Flowers II*) (reversing conviction on prosecutorial misconduct grounds upon finding that (i) the State's strategy of continuously referring to killing of other furniture store employees violated Flowers' right to fair trial; (ii) the State improperly attempted to impeach three defense witnesses' testimony without factual basis; (iii) the prosecutor's closing argument lacked evidentiary foundation); *Flowers v. State*, 773 So. 2d 309 (Miss. 2000) (*Flowers I*) (reversing conviction on prosecutorial misconduct grounds where State attempted to impeach a witness without factual basis and introduced improper argument).

Aff.) ¶ 11; Ex. 15 (Carter Aff.) ¶ 9. Indeed, although the decision whether to call a particular witness is ordinarily "the epitome of a strategic decision" of the sort courts will rarely disturb, that is true only where the decision is made after thorough investigation, and only if the decision is actually made for a strategic purpose. *See Small v. Florida Dep't of Corr.*, 470 F. App'x 808, 812 (11th Cir. 2012). Here it was not. Trial counsel simply failed to do their job. Ex. 14 (Steiner Aff.) ¶ 11; Ex. 15 (Carter Aff.) ¶ 9. And given that trial counsel clearly intended to discredit Clemmie Flemming, "counsel['s] failure to offer all evidence they had" to do so "was inexcusable." *Woodward v. State*, 635 So. 2d 805, 810 (Miss. 1993); *Anderson v. Butler*, 858 F.2d 16 (1st Cir. 1988) (counsel ineffective for failing to follow through on stated strategy of calling expert witness to testify); *see also Eldridge v. Atkins*, 665 F.2d 228, 236 n.5 (8th Cir. 1981), *cert. denied*, 456 U.S. 910 (1982) ("[Counsel's] 'strategy' not to use [certain witnesses] was not so much trial strategy as it was an accommodation to his own inadequate trial preparation. . . . although it may have been a trial decision of counsel not to pursue [certain] testimony it was counsel's lack of preparation which went a long way in inducing him to make it"). Trial counsel's failure to use readily available information to pursue a stated strategy rendered their performance deficient.

That failure prejudiced the outcome of Mr. Flowers' trial. Had defense counsel successfully discredited Clemmie Fleming's damaging testimony that she had seen Mr. Flowers running away from Tardy's around 10:00 a.m. on July 16, there is a reasonable probability that the results of the proceeding would have been different. And Roy Harris was the missing link in defense counsel's attempt to fully discredit Ms. Flemming. Although several other witnesses testified that Clemmie Flemming's testimony was fabricated, there is no question that the testimony of the person with whom Flemming claims to have been at the relevant time would

have influenced the jury's perception of the credibility of her story, concocted after the reward offer was publicized. Defense counsel's failure to present this readily available testimony was ineffective. *See, e.g.*, *Steinkuehler v. Meschner*, 176 F.3d 441 (8th Cir. 1999) (failure to cross-examine critical State witness with readily available information was ineffective assistance); *State v. Dillard*, 998 S.W.2d 750 (Ark. 1999) (counsel was ineffective for failing to subpoena and secure testimony of two defense witnesses); *Pauling v. State*, 503 S.E.2d 468 (S.C. 1998) (failure to call key defense witness was ineffective assistance).

G. Trial Counsel Were Ineffective For Failing to Investigate Or Present Evidence Of The .380 Found And Turned Over To Law Enforcement In 2001.

In 2001, Annie Armstrong was living at 106 Knox Street in Winona, Mississippi, just a few blocks away from where Tardy Furniture was located. Ex. 48 (Annie Armstrong Aff. (Mar. 9, 2016)) ¶ 2. Her son, Jeffery, was living with her at the time. *Id.* In October of that year, Jeffery's dog went underneath the house and was barking. When Ms. Armstrong and Jeffery went outside to try to get the dog to come out, they noticed that he seemed to be digging for something. *Id.* ¶ 3. Ms. Armstrong went underneath the house and saw that the dog had dug up a rusty gun, which she and Jeffery later determined was a .380. *Id.* Jeffery placed the gun in a shed behind the house and, a few days later, several Mississippi law enforcement officers came to the house, and the Armstrongs turned the gun over to them. *Id.* ¶¶ 4-5.

Defense counsel knew all of this, at least as of 2006—prior to Mr. Flowers' fourth, fifth, and sixth trials. In fact, Jeffery Armstrong gave a written statement to defense investigator Mike Wilson on August 18, 2006, which included all of the information to which Ms. Armstrong has now attested. *See* Ex. 49 (Statement of Jeffery Armstrong (Aug. 18, 2006)). Additionally, Jeffery Armstrong told defense investigators that he had seen Police Chief Johnny Hargrove at

Wal-Mart several weeks after turning the gun over, and that he asked Mr. Hargrove whether they had confirmed whether the gun he'd found was used in the Tardy murders. According to Mr. Armstrong, Mr. Hargrove replied that they did not need to do testing of the newly found gun, because they knew they had the right man. *Id.*

Trial counsel did not pursue any further investigation of this information. Their failure to follow up was not the product of strategy, *see* Ex. 15 (Carter Aff.) ¶ 12, and rendered their performance deficient. Counsel cannot simply overlook or ignore key pieces of information that could be beneficial to their client. *See Wilson v. State*, 81 So. 3d 1067, 1075 (Miss. 2012) ("'[A]t a minimum, counsel has a duty to interview potential witnesses and to make independent investigation of the facts and circumstances of the case.'") (quoting *Ferguson*, 507 So. 2d at 96); *Seidel v. Merkle*, 146 F.3d 750, 756 (9th Cir. 1998) ("Counsel's disregard for conspicuous pieces of evidence that pointed to a potentially fruitful trial strategy cannot be described as anything short of defective representation"). Likewise, when counsel makes choices of which witnesses to use or not to use, those choices must be based on counsel's proper investigation. No such proper investigation happened here.

Trial counsel's failure to follow up on this promising investigatory lead prejudiced Mr. Flowers. Given that the murder weapon was never recovered, the fact that a .380 gun was found several years after the murders approximately a quarter mile away from Tardy Furniture, and that the gun was rusty, suggesting it had been buried for some time, was highly probative. Indeed, the prosecution's contention that Curtis Flowers had used Doyle Simpson's gun to commit the murders was central to their theory of the case. If the gun found by the Armstrongs in 2001 had been tested and it was proven either (i) to be the murder weapon, but not Doyle Simpson's gun, or (ii) Doyle Simpson's gun, but not the murder weapon, that could have dealt a

fatal blow to one of the State's most important pieces of evidence.

Moreover, one of defense counsel's chosen strategies during Mr. Flowers' sixth trial was to demonstrate that the State's investigation into the Tardy murders was shoddy, incomplete, and unprofessional. Indeed, this was the primary focus of defense counsel's opening statement:

> Ladies and gentlemen, we will show you that this investigation was terribly flawed. That it was incomplete. And remains incomplete. . . . [W]e would show you that the investigators engaged in what I call tunnel vision and confirmation bias. . . . Ladies and gentleman, you will hear that this was a leaderless investigation . . . You get chaos. You get confusion. That's what we had in this investigation. . . . And we intend to call someone who's going to tell you that the investigation in this case, lead [sic] by Mr. Evans and his top assistant, failed to conform to even the minimum standards in the profession for the documentation required to support any effective investigation of a homicide or major felony . . .

Tr. 1822-24, 1828-29. Further, defense counsel proffered the testimony of an expert witness, Robert Johnson, who would have testified as to the shoddiness of the State's investigation. *See*, *e.g.*, Tr. 3087-3091, 3103-3107 (proffer of Robert Johnson). Although the Court ultimately disallowed Mr. Johnson's testimony (after initially granting defense counsel's motion in limine to admit Mr. Johnson as an expert witness), Tr. 3108, Tr. 3122, the fact remains that one of defense counsel's primary strategic objectives at trial was to prove the inadequacy of the State's investigation. Testimony that a gun that could have been the murder weapon was found and turned over to law enforcement, but never tested or disclosed to defense counsel, would have greatly strengthened this line of attack against the State's case. But because defense counsel failed to pursue any further investigation of this lead, the jury never heard it.

Trial counsel's failure to investigate and present this evidence was constitutionally deficient and requires that Mr. Flowers be granted a new trial. *See Woodward*, 635 So. 2d at 810 (trial counsel's "failure to offer all evidence they had" in furtherance of a stated strategy is

ineffective); *Leatherwood v. State*, 473 So. 2d at 970.

H. Trial Counsel Were Ineffective For Failing To Seek Sequestration Of The Venire Or A Mistrial Following The Venire's Improper Discussions.

In Ground F, Mr. Flowers explained that he was denied his right to a fair trial due to irregularities with the jurors, including impermissible interactions with witnesses and improper, premature discussions about the case. Petitioner also discussed why the facts supporting this claim were not available to trial counsel. If this Court believes that these facts were reasonably discoverable, however, then trial counsel were also ineffective in failing to request sequestration of the venire from the public and/or seeking a mistrial ruling after the prospective jurors' inappropriate conversations came to light.

"Because jurors are presumed to be impartial and indifferent, counsel is expected to take affirmative action if he or she feels that the jury deciding the defendant's fate is or will be biased." *Riley v. Cockrell*, 215 F. Supp. 2d 765, 781 (E.D. Tex. 2002) (indicating that counsel's failure to take such affirmative action "would establish a claim for ineffective assistance of counsel"); *see also People v. Tyburski*, 518 N.W.2d 441, 459 (Mich. 1994) (Boyle, J., concurring) (explaining that the revelation of influencing information during non-sequestered *voir dire* could "cause the entire process to be aborted" or give rise to an ineffective assistance of counsel claim).

In this case, reasonable counsel would have taken corrective action to sequester venire members from the public and each other. This was not a typical trial: it was, in fact, the *sixth* for Mr. Flowers on the same gruesome set of crimes, which were well-known in the Montgomery County community. The special venire for this trial drew six hundred individuals, many of whom were asked to remain together in a courthouse hallway during the individual *voir dire*

questioning. Some members of the venire knew numerous trial witnesses (including members of the victims' families) and spoke with them in the hallway during *voir dire*. Ex. 37 (Mayes Aff.) ¶ 8.

With this trial environment in mind, defense counsel should have sought early sequestration of individual venire members. Indeed, Mr. Flowers' lead trial counsel has acknowledged that:

> [m]uch of the *voir dire* process at the sixth trial was conducted in a 'group' format . . . . Many of the white potential jurors had reached a predetermined view on Mr. Flowers' guilt. There was palpable pressure from the local white community to convict Mr. Flowers. ***We should have sought individual voir dire*** and we should have also moved the case from Montgomery County.

Ex. 15 (Carter Aff.) ¶ 19 (emphasis added). At the very least, however, counsel should have moved for a mistrial when it became apparent that certain venire members were (a) discussing the case among themselves, (b) speaking with trial witnesses, particularly members of the victims' families, (c) announcing their pre-formed opinions regarding Mr. Flowers' guilt, and (d) making racist remarks that intimidated prospective jurors and may have compelled black members of the venire to remove themselves from the jury pool.

There is a reasonable probability that the result of Mr. Flowers' trial would have been different, but for these professional errors of counsel. It is hard to imagine that venire members' public discussions of Mr. Flowers' presumed guilt did not influence the seated jurors. In addition, as the *Pridgeon* court emphasized, there is a strong possibility that prospective jurors may have "developed some subtle emotional inclination" disfavoring Mr. Flowers after interacting with prosecution witnesses outside of court. 462 F.2d at 1095. This is particularly true with respect to Bennie Rigby and other victims' family members. And it is possible that racist remarks made by some prospective jurors—coupled with the history of persecution of

African-Americans who had served on juries in prior *Flowers* trials, *see* Ground D, *supra*—compelled some black members of the venire to "self-strike" off of the jury, which interfered with Mr. Flowers' right to be tried by a meaningfully representative pool of his peers. *See id.* Effective counsel would have challenged these issues promptly in furtherance of a different result.

I. Trial Counsel's Failure To Pursue Pre-Trial DNA Testing Was Ineffective.

Remarkably limited DNA testing was performed on the evidence recovered from the crime scene. As a result, the State possesses evidence recovered from the Tardy crime scene that has never been tested for DNA, including four blood-stained $10 and $20 bills.[73] The State also possesses evidence, such as the victims' clothing, that requires additional testing with advanced modern testing tools and techniques. Ex. 50 (MS. Crime Lab: Evidence Submission Forms (Crime Lab Case No. J96-3536-01C)).[74] Trial counsel failed to demand or perform sufficient DNA testing on these materials. This failure was deficient and it prejudiced Mr. Flowers.

The available evidence is potentially exculpatory as DNA testing would result in one of two outcomes, both of which are beneficial to Mr. Flowers. DNA testing would either identify DNA from the true perpetrators of the murders or it would reinforce the absence of Mr. Flowers' DNA which would further buttress his long-stated protestation of innocence. Unlike cases in which the defendant admitted being at a crime scene but claimed not to have been involved in the

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[73] *See* Ex. 50 (MS. Crime Lab Evidence Submission Forms (Crime Lab Case No. J96-3536-01C)) at Ex. Nos. 51-54 (two $10 bills and two $20 bills, respectively) recovered from the crime scene and tested for blood stains (*see id.* requesting "Serology- Examine Exhibits #51 through #54 for Blood stains"); blood was identified per Ex. 51 (MS. Crime Lab Serology Worksheets for Exs. 51-54 (Aug. 24, 1996)).

[74] For example, Ex. 50 (MS. Crime Lab. Evidence Submission Forms) Nos. 62-64 at 19-21 (clothing belonging to the victims) and No. 67 at 23 (part of a mattress removed from the crime scene).

crimes, Mr. Flowers has always maintained that he was not at Tardy Furniture at the time of the murders. *See, e.g.*, *LaFevers v. Gibson*, 182 F.3d 705, 722 (10th Cir. 1999); *Grayson v. State*, 879 So. 2d 1008, 1017 n.3 (Miss. 2004). The State's single shooter theory requires that Mr. Flowers alone carried out the four homicides. Yet, the DNA testing performed prior to Mr. Flowers' trials demonstrated that Mr. Flowers' DNA was not connected with the bodies of the victims. *See* Ex. 52 (Letter from Deborah Haller to Anne Montgomery of GenTest Lab. (Sept. 3, 1996)) (requesting DNA testing on items of Mr. Flowers' clothing); Ex. 53 (Letter from Dana Johnson to Connie Brown of GenTest Lab. (Oct. 22, 1996)) (enclosing known blood samples from the victims); Ex. 54 (GenTest Lab., Inc. DNA test results (Dec. 26, 1996)) at page 6 ¶ 6 (finding that the genetic profile produced from Mr. Flowers' clothing is "not consistent with the reference blood of the victims"). Additional DNA testing promises to be exculpatory as the absence of Mr. Flowers' DNA at the crime scene and/or the presence of any other person's DNA on or around the victims' bodies would prove Mr. Flowers' innocence.

Notwithstanding the importance of DNA testing to innocence claims, such as Mr. Flowers', trial counsel failed to secure DNA testing of all physical evidence prior to the sixth trial, despite such testing being readily available and despite advances in DNA technology since the time of the original DNA tests. Trial counsel's performance was deficient because counsel's representation fell below the prevailing standard of reasonableness of capital trial counsel, who ordinarily pursue DNA testing in the context of innocence claims as compelling as Mr. Flowers'. *See, e.g.*, *Bagwell v. State*, 763 S.E.2d 630, 634 (S.C. Ct. App. 2014), *reh'g denied* (Oct. 21, 2014), *cert. denied* (Feb. 27, 2015) (trial counsel's failure to conduct DNA testing prior to trial was ineffective assistance of counsel).

Indeed, there was no reason to avoid seeking the testing as Mr. Flowers had been cleared of matching the DNA profiles recovered from the victims' vicinity. Trial counsel's failure to secure additional DNA testing cannot have been—and was not—motivated by sound trial strategy. *See* Ex. 15 (Carter Aff.) ¶ 8 (admitting that there was no strategic reason not to seek additional DNA testing prior to trial, and that counsel "just never thought to pursue it"); Ex. 14 (Steiner Aff.) ¶ 10 (same). The State was unable to argue at trial that there was one iota of DNA evidence connecting Mr. Flowers to the murders. Therefore, trial counsel knew there was a very low probability of the results of additional DNA testing placing Mr. Flowers at the crime scene at the time of the murders. However, trial counsel failed to demand or perform full DNA testing prior to Petitioner's trial.

Petitioner intends to request that all physical evidence held by the State be made available for DNA testing now, pursuant to MS Code § 99-39-5. But the critical point here is that trial counsel failed to do that before the sixth trial. That failure prejudiced Mr. Flowers because additional DNA testing would have provided additional support for Mr. Flowers' innocence. Full DNA testing would have resulted in one of two beneficial outcomes for Mr. Flowers: either the identification of the true assailants; or more extensive DNA results showing no trace of his presence, further buttressing Mr. Flowers' innocence claim. The absence of this helpful evidence, which would have been particularly compelling to a jury, was due to trial counsel's deficient performance and it resulted in Mr. Flowers' innocence claim being placed before the fact finder without the full, available support. That failure and resulting prejudice mandate reversal and a new trial.

GROUND H

MR. FLOWERS' SIXTH AMENDMENT CONFRONTATION RIGHT WAS VIOLATED WHEN THE COURT PERMITTED WITNESS TESTIMONY FROM PRIOR TRIALS TO BE READ INTO THE RECORD.

"The Sixth Amendment to the United States Constitution provides that '[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.'" *Goforth v. State*, 70 So. 3d 174, 183 (Miss. 2011) (citing U.S. const. amend. VI).[75] The "central concern" of an accused's confrontation right is "to ensure the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing in the context of an adversary proceeding before the trier of fact." *Maryland v. Craig*, 497 U.S. 836, 845 (1990); *see also Goforth*, 70 So. 3d at 187 ("The goal of the Confrontation Clause is to assess the reliability of evidence by testing it in the crucible of cross-examination.") (citing *Crawford*, 541 U.S. at 60). That safety mechanism failed here.

At Mr. Flowers' trial, the prior trial testimony of Porky Collins, a key prosecution witness who died prior to Flowers' sixth trial, was read aloud to the jury and into the record. Ordinarily, this would not have violated Petitioner's Sixth Amendment rights because Petitioner was afforded an opportunity to cross-examine Mr. Collins in the prior trial. *See generally Crawford*, 541 U.S. at 57. But the circumstances of this case are far from ordinary. The egregious misconduct that has pervaded the State's prosecution of Curtis Flowers since its inception, much of which only came to light in the months after Mr. Flowers' conviction was affirmed on appeal,

[75] The Supreme Court has held that this bedrock procedural guarantee applies to both federal and state prosecutions. *Pointer v. Texas*, 380 U.S. 400, 406 (1965); *see also Crawford v. Washington*, 541 U.S. 36, 42 (2004). Moreover, Article 3, § 26 of the Mississippi Constitution mirrors the Confrontation Clause in the United States Constitution.

rendered that earlier cross-examination inadequate to protect Mr. Flowers' constitutional right to confrontation. For this and myriad other reasons, Petitioner's trial was fundamentally unfair and his conviction must be reversed.

This claim is properly raised on post-conviction review because the evidence showing the prosecution's suppression of evidence was not discovered until after Mr. Flowers' trial concluded. As a result, Mr. Flowers' Confrontation Clause claim was not raised, or capable of being raised, at trial or on appeal. M.R.A.P. 22(b); *see also* Miss. Code. Ann. § 99-39-3(2).

The purpose of affording criminal defendants the right to confrontation is widely acknowledged: cross-examination enables the defendant to "test the credibility of the witness and the reliability of his preferred testimony." *United States v. Richardson*, 781 F.3d 237, 243 (5th Cir. 2015) *cert. denied*, 136 S. Ct. 159 (2015). And because the Constitution mandates the meaningful opportunity to cross examine, no other procedural protection will do. *Crawford*, 541 U.S. at 68-69 ("Where testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation."). To satisfy this right, criminal defendants must be afforded an "adequate" opportunity for cross-examination. *Richardson*, 781 F.3d at 243. Cross examination may be found inadequate where a "new and significantly material line of cross-examination" is uncovered "that was not at least touched upon in the first trial." *Mancusi v. Stubbs*, 408 U.S. 204, 215 (1972).

That exactly describes what happened in Mr. Flowers' case. As described in detail in Grounds A, B, and C, Mr. Flowers has uncovered substantial new evidence that the State improperly and unconstitutionally suppressed, and which the jury never heard. Thus, although Mr. Flowers' prior trial attorneys had an opportunity to cross-examine Collins, they were

effectively denied an *adequate* opportunity to do so by the State's suppression of material evidence regarding third party suspects. Had trial counsel been privy to this information, as they should have been, it is highly likely that they would have pursued different and more effective lines of cross-examination.

Specifically, the State suppressed evidence regarding alternative suspects Presley, Gamble, and McKenzie, denying Mr. Flowers the opportunity to adequately cross-examine Mr. Collins regarding the events that took place the day of the crime. Mr. Collins testified that he caught a brief glimpse of two black men arguing outside of Tardy Furniture on the morning of July 16. As one of only two witnesses whose account specifically placed Mr. Flowers at Tardy's, Mr. Collins' testimony was critical to the State's case. Defense counsel's cross-examination of Mr. Collins focused on the facts relating to his eyewitness identification—specifically, his need for glasses, medications he was taking which caused memory problems, his fuzzy recollection of the appearances of the two men he saw, and his later shifting and equivocal identification during a photo array. *See* PC Tr. 1610-1703.

Had the State disclosed its investigation of the Alabama murderers, the defense could have questioned Mr. Collins about whether specific characteristics of the two men he saw matched those of Presley, Gamble, or McKenzie. But without knowledge of that investigation, trial counsel were limited to distinguishing, in the abstract, physical characteristics of the men Mr. Collins saw from the physical characteristics of Flowers. Mr. Collins's testimony that he saw two men arguing in front of Tardy Furniture is more consistent with a theory involving Gamble and McKenzie, or Gamble and Presley, than a lone gunman theory involving only Mr. Flowers. If the State had disclosed its investigation, the defense could have developed that point. As it was, they could not.

The State's suppression of this evidence denied Mr. Flowers the right to the meaningful cross-examination to which he was constitutionally entitled. In *Goforth*, 70 So. 3d at 182-83, for example, one of the State's key eyewitnesses who had given a written statement to police implicating the defendant was later in a car accident which resulted in significant and unrecoverable memory loss. The defendant argued that the witness' memory loss precluded her from effectively cross-examining the witness at trial about the prior written statement, and therefore that her right to confrontation was violated. *Id.*. The Mississippi Supreme Court agreed, finding that the demands of the Confrontation Clause are not satisfied every time the declarant is "physically present and subject to cross-examination[.]" *Id.* at 185. Instead, the touchstone is the opportunity to "***meaningfully*** confront and cross-examine the witness against him[.]" *Id.* at 183 (emphasis in original). Just as the witness' memory loss in *Goforth* precluded the defendant in that case from having an opportunity to subject his testimony to the crucible of cross-examination, so too did the State's suppression of relevant evidence in Flowers' case.

This violation of Mr. Flowers' Confrontation Clause rights was far from harmless. "Harmless errors are those 'which in the setting of a particular case are so unimportant and insignificant that they may, consistent with the Federal Constitution, be deemed harmless, not requiring the automatic reversal of the conviction.'" *Conners v. State,* 92 So. 3d 676, 684 (Miss. 2012) (quoting *Chapman v. California,* 386 U.S. 18, 22 (1967)). In determining whether an error is harmless, courts consider "the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case." *Delaware v.*

Van Arsdall, 475 U.S. 673, 684 (1986). Porky Collins was among the State's most crucial witnesses. Because defense counsel was shielded from information that would have allowed them to subject his testimony to meaningful cross-examination, there can be no assurance that Mr. Collins' testimony was reliable. *See Crawford*, 541 U.S. at 61 ("[T]he Clause's ultimate goal is to ensure reliability of evidence").

GROUND I

MISSISSIPPI'S DEATH PENALTY IS UNCONSTITUTIONAL.

The Eighth Amendment to the United States Constitution, applicable to the States through the Fourteenth Amendment, *Robinson v. California*, 370 U.S. 660, 666-67 (1962), forbids the "inflict[ion]" of "cruel and unusual punishments." U.S. Const. amend. VIII. Mississippi's Constitution echoes that prohibition. Miss. Const. art. III, § 28 (forbidding "cruel or unusual punishment"). The determination of which punishments fit those forbidden criteria is made "not by the standards that prevailed in 1685 when Lord Jeffreys presided over the 'Bloody Assizes' or when the Bill of Rights was adopted, but rather by those that currently prevail." *Atkins*, 536 U.S. at 311. To that end, courts consider "the evolving standards of decency that mark the progress of a maturing society" to determine "which punishments are so disproportionate as to be 'cruel and unusual.'" *Roper*, 543 U.S. at 561 (quoting *Trop v. Dulles*, 356 U.S. 86, 100-01 (1958) (plurality opinion)). Thus, the Clause forbidding cruel and unusual punishment "may acquire meaning as public opinion becomes enlightened by a humane justice." *Weems v. United States*, 217 U.S. 349, 378 (1910); *see also Furman v. Georgia*, 408 U.S. 238, 429-30 (1972) (Powell, J., dissenting); *Trop*, 356 U.S. at 100-01 (plurality opinion).

The Supreme Court's blessing of capital punishment in 1976 was conditional. It depended upon "society's endorsement of the death penalty for murder," *Gregg v. Georgia*, 428

U.S. 153, 179 (1976) (joint opinion of Stewart, Powell, and Stevens, JJ.), and the punishment's "comport[ment] with the basic concept of human dignity at the core of the [Eighth] Amendment," *id.* at 182. The last forty years have completely eroded those twin factual premises. *See Glossip v. Gross*, 135 S. Ct. 2726, 2762 (2015) (Breyer, J., dissenting).

First, support for the death penalty in American society has waned dramatically in recent years: When *Gregg* was decided, thirty-five states had enacted new statutes that provided for the death penalty. 428 U.S. at 179-80. But since 1976, nine states and the District of Columbia have joined the ten that already had abolished the death penalty altogether, bringing the total to nineteen.[76] Death Penalty Info. Ctr., *States With and Without the Death Penalty*, http://www.deathpenaltyinfo.org/states-and-without-death-penalty (last visited Mar. 14, 2016). Of the remaining states, six[77] have not executed anyone in more than a decade. Josh Sanburn, *Which State Will Be Next to Abolish the Death Penalty?*, TIME (May 28, 2015), http://time.com/3900156/nebraska-death-penalty-repeal/. Governors in four states[78] have declared that they will not sign death warrants during their terms in light of the "uneven way the punishment is carried out." Maria L. La Ganga, *Death penalty is sought against James Holmes, but governor stands in the way*, L.A. Times (July 22, 2015), http://www.latimes.com/nation/la-na-death-penalty-governors-20150722-story.html. Moreover, only six states carried out executions in 2015[79], and only four states[80] have carried out an

[76] They are: Connecticut (2012), Illinois (2011), Maryland (2013), Massachusetts (1984), Nebraska (2015), New Jersey (2007), New Mexico (2009), New York (2007), Rhode Island (1984), and the District of Columbia (1981).

[77] Colorado, Kansas, New Hampshire, Oregon, Pennsylvania, and Wyoming.

[78] Colorado, Oregon, Washington, and Pennsylvania.

[79] Georgia, Florida, Missouri, Oklahoma, Texas, and Virginia. Death Penalty Info. Ctr., *Execution List 2015*, http://www.deathpenaltyinfo.org/execution-list-2015 (last visited Mar. 14, 2016).

execution this year. Mississippi, for its part, has executed only 21 people in the 40 years since it reinstated the death penalty, and has not executed anyone since 2012. *See* Death Penalty Info. Ctr., *Executions by State and Year*, http://www.deathpenaltyinfo.org/node/5741#MS (last visited Mar. 14, 2016).

Second, the current administration of the death penalty renders it incompatible with the "basic concept of human dignity at the core of the [Eighth] Amendment," that the Supreme Court emphasized in *Gregg*. 428 U.S. at 182. To start, data regarding the imposition of the death penalty in Mississippi and around the country demonstrate that it is arbitrarily imposed, particularly along racial lines. In Mississippi, more than 56 percent of offenders currently on Death Row are non-white, Death Penalty Info. Ctr., *National Statistics on the Death Penalty and Race*, (Mar. 11, 2016), http://www.deathpenaltyinfo.org/race-death-row-inmates-executed-1976 (hereinafter "DPIC: *Race Statistics*"), notwithstanding the fact that far less than half of the State's population (42.7 percent) is non-white, *see* United States Census Bureau, *Quick Facts: Mississippi*, http://quickfacts.census.gov/qfd/states/28000.html (last visited Mar. 14, 2016). These data are reflective of the disturbing composition of the nationwide death row population, where over 57 percent of offenders are non-white, *see* DPIC: *Race Statistics*, even though only 38 percent of the national population is non-white. United States Census Bureau, *Quick Facts: United States*, http://quickfacts.census.gov/qfd/states/00000.html. And—startlingly—while just 13 percent of the national population is African-American, *id.*, nearly 42 percent of death row inmates in the United States are African-American. *See* DPIC: *Race Statistics*.

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[80] Alabama, Florida, Georgia, and Texas. Death Penalty Info. Ctr., *Execution List 2016*, http://www.deathpenaltyinfo.org/execution-list-2016 (last visited Mar. 14, 2016).

Third, Mississippi's death penalty scheme is plagued by excessive delays and death-sentenced inmates are housed in unduly restrictive and inhumane conditions. Mr. Flowers has been on Death Row for over 19 years, well above even the lengthy 12-15 year delay that Mississippi death row inmates face on average. Death Penalty Info. Ctr., *Time on Death Row: 'The Faces of Mississippi's Death Row*, http://www.deathpenaltyinfo.org/time-death-row-faces-mississippis-death-row (last visited Mar. 14, 2016) (hereinafter "DPIC, *Time on Death Row*"). These delays far outstrip the sentence applied by the jury, which issued a sentence of death, not death plus 19 years in solitary confinement. *Lackey v. Texas,* 514 U.S. 1045 (1995) (Stevens, J., dissenting from denial of certiorari). And while conditions on all death rows are severe, the conditions of Mississippi's death row unit at the State Penitentiary at Parchman are particularly draconian. Mississippi death row inmates typically spend 23 hours a day in solitary confinement. DPIC, *Time on Death Row*. Prisoners at Parchman have been subjected to extreme heat[81], insect infestations, malfunctioning plumbing and exposure to human excrement, and a lack of access to medical care and clean water. *See* Winter & Hanlon, *supra* note 87, at 2, 5.

The history of inhumane conditions at Parchman Farm is long and well-documented. Parchman originated as a plantation prison during the Jim Crow era under Governor James K. Vardaman, also known as the "White Chief." Vardaman believed that a prison farm, "like an efficient slave plantation," was needed to provide African-Americans with "proper discipline, strong work habits, and respect for white authority." David M. Oshinsky, "*Worse Than*

[81] The temperatures in some cells have had heat indexes measured in excess of 130 degrees Fahrenheit. *See* Margaret Winter & Stephen Hanlon, *Parchman Farm Blues: Pushing for Prison Reforms at Mississippi State Penitentiary*, Am. Civil Liberties Union 5 (2008), https://www.aclu.org/sites/default/files/images/asset_upload_file829_41138.pdf.

Slavery": Parchman Farm and the Ordeal of Jim Crow Justice, 110 (The Free Press, ed. 1996). The farm originally consisted of fifteen work camps, with organizational structures eerily similar to the slave plantations of the antebellum South. *Id.* In the 1972 case *Gates v. Collier,* a federal judge noted the particularly harsh conditions for African-American prisoners at Parchman:

> The policy and practice at Parchman has been and is to maintain a system of prison facilities segregated by race, and by which the black inmates are subjected to disparate and unequal treatment. Approximately twice the number of blacks are required to live in the same amount of dormitory space as white inmates. Inmates are assigned to the 12 major residential camps on the basis of race. Inmates are assigned to work details according to race. Blacks have not been afforded the same vocational training opportunities as have the white inmates … Black inmates in some instances have been subjected to greater punishment or more severe discipline than have white inmates for similar infractions of penitentiary rules. Historically, Parchman employees have been only of the white race and not until recent months have any blacks been employed as civilian personnel.

349 F. Supp. 881, 887 (N.D. Miss. 1972)

After reviewing a litany of unsanitary conditions and gross abuses, the court concluded that the "deprivation of basic human needs for housing, food, and medical care is not merely unnecessarily cruel and unusual, but is calculated to retard, if not prevent, the process of a prisoner's rehabilitation." *Id.* at 894.

Yet, even after the reforms precipitated by the *Collier* decision, conditions at Parchman remained constitutionally inadequate and extreme, even when compared to other death rows. In 2003, a federal court found that the conditions on Mississippi's death row—including malfunctioning toilets that spilled human waste into cells, excessive heat, mosquito infestations, and a failure to properly treat prisoners suffering from mental illness—violated "minimal standards of decency, health and well-being." *Russell v. Johnson*, No. 1:02-CV-261, 2003 WL 22208029, at *8 (N.D. Miss. May 21, 2003); *see also* American Civil Liberties Union, *Appeals Court Affirms that Mississippi Death Row Conditions are Unconstitutional*, (June 30, 2014),

https://www.aclu.org/news/appeals-court-affirms-mississippi-death-row-conditions-are-unconstitutional. And even following further reforms to the death row unit at Parchman following this suit, significant concerns remain. Last October, the Health Department issued a boil-water alert for the prison after a sample revealed the presence of coliform bacteria, and the prison has consistently struggled with water sanitation issues. Jerry Mitchell, *Aging infrastructure plagues Parchman*, Clarion-Ledger (Oct. 5, 2015), http://www.clarionledger.com/story/news/2015/10/03/aging-infrastructure-parchman/73213288/. Several prisoners reported getting sick from the water, suffering from cramps, diarrhea, rashes, and vomiting. *Id*. Indeed, the Mississippi Department of Finance and Administration recently concluded in a study that $38 million is needed over the next five years to address the conditions at state prisons, including the death row unit at Parchman. *Id.*

The harsh conditions at Parchman do not relate only to physical problems with the prison. Psychiatrists have described the conditions at Parchman as "toxic," and have found that they cause inmates to suffer auditory hallucinations, panic attacks, and other psychiatric symptoms. DPIC, *Time on Death Row*. More generally, the harms induced by prolonged solitary confinement are "well documented." *Glossip,* 135 S. Ct. at 2765 (Breyer, J., dissenting) (citing Craig Haney, *Mental Health Issues in Long-Term Solitary and "Supermax" Confinement*, 49 Crime & Delinquency 124, 130 (2003) (cataloguing studies finding that solitary confinement can cause prisoners to experience "anxiety, panic, rage, loss of control, paranoia, hallucinations, and self-mutilations," among many other symptoms)); Stuart Grassian, *Psychiatric Effects of Solitary Confinement*, 22 Wash U. J. L. & Pol'y 325, 331 (2006) ("[E]ven a few days of solitary confinement will predictably shift the [brain's] electroencephalogram (EEG) pattern toward an abnormal pattern characteristic of stupor and delirium")). *See also Davis v. Ayala*, 135 S. Ct.

2187, 2208-09 (2015) (Kennedy, J., concurring) (decrying the use of solitary confinement in American prisons, and noting that "[t]he human toll wrought by extended terms of isolation long has been understood, and questioned, by writers and commentators.").

But it is not just the fact of solitary confinement or inhumane conditions that makes the death row environment particularly egregious: "The dehumanizing effect of solitary confinement is aggravated by uncertainty as to whether a death sentence will in fact be carried out." *Glossip,* 135 S. Ct. at 2765 (Breyer, J., dissenting) (citing *In re Medley,* 134 U.S. 160, 167-68 (1890) (describing the cruelty of awaiting a death sentence even for four weeks)). And inmates in Mississippi and elsewhere have come within days or even hours of execution before later being exonerated. In 2013, Willie Manning was just four hours away from being executed when the Mississippi Supreme Court stayed the execution.[82] *Glossip,* 135 S. Ct. at 2766 (Breyer, J., dissenting).

These lengthy delays undermine the penological purpose of the death penalty by disaggregating the sentence's imposition from its execution. *See Thompson v. McNeil,* 129 S. Ct. 1299, 1300 (2009) (Stevens, J., respecting denial of certiorari) ("[D]elaying an execution does not further public purposes of retribution and deterrence but only diminishes whatever possible benefit society might receive from petitioner's death."). Punishment without penological purpose is necessarily cruel and unusual. *Kennedy v. Louisiana,* 554 U.S. 407, 441 (2008)

[82] Manning's conviction and death sentence was based primarily on the testimony of an FBI expert who said a hair sample and ballistics evidence linked Manning to the crime, two forensic practices which the DOJ and FBI now acknowledge are highly unreliable and deeply flawed. To date, 74 convictions that have been overturned involved the hair analysis used to convict and sentence Manning to death. *See* Kate Briquelet, *Willie Jerome Manning spends two decades in prison over faulty hair science: On Death Row for the Wrong Hair*, Miss. Innocence J., (Apr. 27, 2015), http://innocenceproject.olemiss.edu/willie-jerome-manning-spends-two-decades-in-prison-over-faulty-hair-science/

(citing *Gregg*, 428 U.S. at 173, 183, 187); *Atkins*, 536 U.S. at 319; *Enmund v. Florida*, 458 U.S. 782, 798 (1982).

Fourth, the potential for grave inaccuracies in death penalty convictions also renders the imposition of Mississippi's death penalty unconstitutionally "cruel." The Supreme Court has emphasized the "qualitative difference" between the death penalty and other forms of punishment due to the finality of death. *Glossip*, 135 S. Ct. at 2756 (Breyer, J., dissenting) (citing *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) (plurality opinion)). Such a distinction creates a "corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case." *Woodson*, 428 U.S. at 305.

The lack of accuracy in past capital convictions—both in Mississippi and across the country—fails to meet this constitutional demand for heightened reliability. Indeed, the Supreme Court has described the number of exonerations in death penalty cases as "disturbing." *Atkins*, 536 U.S. at 320 n. 25. According to some estimates, 156 people have been exonerated in capital cases since the early 1970s. Death Penalty Info. Ctr., *Innocence and the Death Penalty*, http://www.deathpenaltyinfo.org/innocence-and-death-penalty (last visited Mar. 14, 2016) (hereinafter "DPIC, *Innocence & the Death Penalty*"). In 2015 alone, six death row inmates were exonerated, including one in Mississippi. Death Penalty Info. Ctr., *Innocence: List of Those Freed From Death Row*, http://www.deathpenaltyinfo.org/innocence-list-those-freed-death-row (last visited Mar. 14, 2016). Overall, researchers estimate that the rate of false convictions among death sentences in the United States is roughly 4%. Samuel Gross et al., *Rate of false conviction of criminal defendants who are sentenced to death*, 111 PNAS 7230, 7230–35 (2014) (study of all death

sentences from 1973 through 2004 indicating that 4.1% of those sentenced to death are in fact innocent).

Three recent Mississippi cases highlight the potential for inaccuracy in capital cases. In 2015, the state dropped charges against death row inmate Willie Manning after this court found that egregious misconduct infected his trial and reversed his conviction. *Glossip,* 135 S. Ct. at 2766 (Breyer, J., dissenting). Specifically, the Court found that the State withheld material evidence from the defense and a key witness recanted his testimony. Death Penalty Info. Ctr., *Charges Dropped Against Willie Manning; Becomes 153rd Death Row Exoneree*, http://www.deathpenaltyinfo.org/node/6129 (last visited Mar. 14, 2016); *Glossip,* 135 S. Ct. at 2766 (Breyer, J., dissenting). One year earlier, the Mississippi Supreme Court reversed the conviction and death sentence of Michelle Byrom, citing numerous problems with her case. Specifically, Byrom's attorney's never presented mitigating evidence during the sentencing phase, and the jury in her case was never told that her son, Junior, had confessed to the killing. Jerry Mitchell, *Almost executed by Mississippi, Michelle Byrom free*, Clarion-Ledger, (Dec. 2, 2015,), http://www.clarionledger.com/story/journeytojustice/2015/06/26/michelle-byrom-goes-free-friday/29316079/. Byrom eventually agreed to an *Alford* plea and was released from state prison. *Id.* Likewise, in 2008, Kennedy Brewer was exonerated after spending seven years on death row and an additional eight years in jail awaiting trial. Brewer's conviction had been overturned in 2001 after DNA tests proved he did not commit the crime, but he remained in jail for five more years as prosecutors sought a new trial. Brewer was the first person in Mississippi exonerated through post-conviction DNA testing. Nat'l Registry of Exonerations, *Kennedy Brewer*, http://www.law.umich.edu/special/exoneration/pages/casedetail.aspx?caseid=3047 (last updated Aug. 11, 2015). In total, four people have been exonerated after capital murder

convictions in Mississippi. DPIC, *Innocence & the Death Penalty*.

Two Supreme Court Justices have recently called for review of the constitutionality of the death penalty, concluding that it "now likely constitutes a legally prohibited 'cruel and unusual punishmen[t]." *Glossip,* 135 S. Ct. at 2756 (Breyer, J., dissenting) (quoting U.S. Const. amend. VIII). Connecticut's Supreme Court recently came to the same conclusion. *See State v. Santiago*, 122 A.3d 1 (Conn. 2015). In Massachusetts, a federal judge is reviewing a challenge to the constitutionality of the federal death penalty. *Judge Accepts Challenge of Law in Death Penalty Case,* NECN.COM, (Feb. 10, 2016), http://www.necn.com/news/new-england/Judge-Accepts-Challenge-of-Law-in-Death-Penalty-Case-368336481.html. And most recently, an Alabama judge ruled a portion of the state's death penalty unconstitutional. *Portion of AL's death penalty ruled unconstitutional*, WSFA.COM, (Mar. 3, 2016), http://www.wsfa.com/story/31377781/judge-rules-als-death-penalty-scheme-unconstitutional?sf21922551=1.

It is time for the Court to reevaluate the constitutionality of Mississippi's death penalty in light of the overwhelming constitutional concerns that Justices of the United States Supreme Court and other courts have recently voiced.

GROUND J

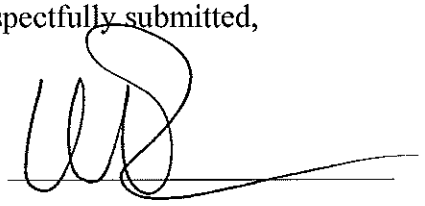
PETITIONER WAS DENIED HIS RIGHTS GUARANTEED BY THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ANALOGOUS PROVISIONS OF THE MISSISSIPPI CONSTITUTION DUE TO THE CUMULATIVE EFFECT OF ALL OF THE ERRORS IN HIS TRIAL.

The errors and misconduct which infected Flowers' trial must be "considered collectively, not item-by-item," when assessing the prejudice they caused. *Kyles*, 514 U.S. at 436; *Williams*, 529 U.S. at 397. This Court, therefore, must consider the cumulative prejudice of these errors, not just the prejudice based on each individual instance of prosecutorial misconduct and/or inadequate representation. In other words, even if the Court does not find that any single deficiency, taken in isolation, resulted in prejudice, the cumulative effect of these errors and misconduct denied Mr. Flowers a fundamentally fair trial and demands that his convictions and sentences be reversed. *See Randall*, 806 So. 2d at 217 ("When all errors are taken together, the combined prejudicial effect requires reversal.") (citing *Williams*, 445 So. 2d at 810); *see also Gonzales v. McKune*, 247 F.3d 1066, 1078 (10th Cir. 2001) ("we can see no basis in law for affirming a trial outcome that would likely have changed in light of a combination of *Strickland* and *Brady* errors, even though neither test would individually support a [P]etitioner's claim for habeas relief").

CONCLUSION

Wherefore, premises considered, the Court should find that Petitioner is entitled to post-conviction relief and reverse his convictions or, at a minimum, his death sentence. At a minimum, Petitioner requests that the Court grant him an evidentiary hearing on the issues.

Respectfully submitted,

By: 

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CERTIFICATE OF SERVICE

The undersigned attorney for Curtis Giovanni Flowers hereby certifies that he has caused the foregoing to be served on counsel for respondent via the Court's e-filing system.

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