IN THE SUPREME COURT OF MISSISSIPPI

No. 2010-DP-01348-SCT

CURTIS GIOVANNI FLOWERS — APPELLANT

v.

STATE OF MISSISSIPPI — APPELLEE

Appeal from the Circuit Court of Montgomery County, Mississippi
Fifth Judicial District
No. 2003-0071-CR

BRIEF OF APPELLANT

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies pursuant to Mississippi Rules of Appellate Procedure 28(a)(1) that the following persons have an interest in the outcome of the case. These representations are made in order that the Justices of this Court may evaluate possible disqualification or recusal.

1. Appellant, Curtis Giovanni Flowers

2. Families of Bertha Tardy, Carmen Rigby, Derrick Stewart, and Robert Golden

3. Trial counsel for Appellant: Alison Steiner, André de Gruy, State Public Defender, Capital Defense Counsel Division,; Ray Charles Carter (formerly with SPD/CDCD, now with the office of the Hinds County Public Defender)

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7. Circuit Court Judge: Honorable Joseph H. Loper, Jr.

This the 18th day of June, 2013

Attorney for Curtis Giovanni Flowers

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STATEMENT OF THE CASE

Procedural History [1]

In 1997, a Montgomery County Grand Jury returned four indictments against Curtis Flowers, each bearing a separate charge number and each charging him with a single capital murder. C.P. 5 (Montgomery County Case No. 7447, capital murder of Bertha Tardy), 6 (Montgomery County Case No. 7448 , capital murder of Robert L. Golden), 7 (Montgomery County Case No. 7449, capital murder of Carmen Rigby), 8 (Case No. 7450, capital murder of Derrick Stewart). The State elected to proceed to trial, first, on the Bertha Tardy indictment, Case No. 7447, and obtained a conviction and death sentence. While the appeal was pending in that matter, it then proceeded to trial, and obtained a conviction and death sentence on the Derrick Stewart indictment Case No. 7450.

Both of these convictions were reversed by this Court for prosecutorial misconduct relating to, *inter alia*, introduction of evidence concerning the other separately indicted crimes in the trials of Flowers in the Stewart and Tardy matters. *Flowers v. State*, 773 So.2d 309, 321 (Miss. 2000) (*Flowers* I) (Tardy indictment), *Flowers v. State*, 842 So.2d 531, 538 (2003) (*Flowers II*) (Stewart indictment). Both cases were remanded to the Circuit Court of Montgomery County for further proceedings not inconsistent with the opinions.

Upon remand, the prosecution was renumbered as Montgomery County Circuit Court Case No. 2003-0071-CR, and all subsequent trials dealt with all four charged capital murders

[1] The clerks papers are cited by page number as "C.P.," or "1 Supp. C.P." Where the citation is to a document contained in CD attachments in the Clerk's papers, the citation is to the page where the CD is attached, and to the folder where the document is located and the filename of that document, and to the page within that document if necessary. The transcript is cited by page number as "Tr.," or "1 Supp. Tr." Exhibits are cited as Ex.S- or Ex.D- by number with further explanation at the point of citation. The Record Excerpts are cited as R.E. by tab number and, if necessary, to the page within the tab.

pursuant to an ore tenus statement by the trial court that it would enter an order consolidating them made prior to the first trial held after the remand. *See Flowers v. State*, No. 2004-DP-00738-SCT, Record on Appeal at Tr. p. 2, 15, R.E. Tab 9a. However, the record in this matter contains nothing to indicate that such an order was ever entered, or that that the State returned to the grand jury and obtained a multi-count indictment pursuant to Miss. Code Ann. § 99-7-2. It also contains no sworn waiver of the right to proceed by proper indictment by Flowers. See C.P. Table of Contents at –i-, R.E. Tab 1. [2] The case proceeded only on the basis of an Order Setting Cause for Trial, C.P. 1, R.E. Tab 2, in February 2004.

The February 2004 proceedings on No. 2003-0071-CR resulted in convictions and death sentences against Flowers for all four capital murders. Those convictions were likewise reversed by this Court for various forms of prosecutorial misconduct, including racial discrimination by the prosecution in use of its peremptory challenges, and remanded to the circuit court for a new trial. *Flowers v. State*, 947 So.2d 910, 937 (Miss. 2007) (*Flowers III*)

After that remand, two subsequent trials, the first (the fourth trial of Flowers on capital murder charges) in November 2007, in which the State did not seek the death penalty, and a second one in September 2008 (the fifth trial of Flowers) in which it did were held. Both resulted mistrials when the juries in both were unable to reach a verdict on culpability for the charged crimes. The instant appeal proceeds from the third proceeding in which the four charges were consolidated, the sixth trial of Flowers overall, in which the State was able to obtain

[2] The only statement elicited in connection with this matter from Mr. Flowers personally was an unsworn statement that he consented to and agreed to have the venue of any trial returned to Montgomery County. *See* Flowers v. State, No. 2004-DP-00738-SCT, Record on Appeal at Tr. p. 15. R.E. Tab 9a This Court takes judicial notice of its own files. *In re Dunn*, 2011-CS-00255-SCT at ¶11 n. 6, 2013 WL 628646 at *3 (Miss. Feb. 21, 2013) (not yet released for permanent publication).

verdicts of conviction and death sentences for all four charged capital murders. C.P. 2803, 2914-23, 2925-29. [3]

Flowers timely filed post-trial motions. C.P. 2931-44, 2953-89. Those were denied by the trial court. C.P. 3041-42. Flowers perfected his appeal to this Court in the time and manner required by the Mississippi Rules of Appellate Procedure. C.P. 3044-97, 3100, 3107.

Statement of relevant facts

The facts of the case, as depicted through the evidence presented by the parties at trial, are described in detail below in connection with Flowers' contention that the prosecution's proof was constitutionally insufficient. He will not burden the Court by repeating them here. In short, Flowers' sixth trial bore the essential hallmarks of the three proceedings whose outcomes were previously reversed by this Court: weak and unreliable evidence of guilt, and prosecutorial misconduct undertaken to overcome that weakness.

The evidence showed that four people were shot to death inside the Tardy Furniture Store in Winona, Mississippi, on July 16, 1996, and that the murder weapon was a .38 caliber handgun last known to have been owned and possessed by Doyle Simpson, a janitor at a local factory. Tr. 2331-32. Simpson, however, claimed the gun had been stolen from the glove box of his car on the morning of the killings. Tr. 2090. Law enforcement quickly accepted that story, and focused their attention instead on Flowers, who had briefly been employed at the furniture store, but had recently been let go after failing to report for work several days in a row. Tr. 2494-95.

No physical evidence ever linked Flowers to the crimes, but the prosecution presented a

[3] The trials whose outcomes were reversed in *Flowers I*, *II* and *III*, and the November 2007 mistrial were presided over by Hon. Clarence E. "CEM" Morgan, III, the more senior circuit judge for the 5th Circuit Court District. Following the November 2007 mistrial, the matter was reassigned to Hon. Joseph A. Loper, Jr., the other circuit judge for that district. C.P. 1492. Judge Loper has been the presiding judge in the remaining proceedings.

series of witnesses intended to show that he could have stolen Simpson's gun, and was in the vicinity of the furniture store on the morning of the murders. *See, e.g.*, Tr. 2224, 2377-78, Ex. S-115id. The prosecution supplemented that testimony by attempting to connect Flowers to an empty box that once contained shoes of a make and model that could have produced a bloody print observed at the crime scene, Tr. 2608-09, 2856, 2864, by showing that a single (and concededly non-probative) grain of gunshot residue had been found on his hand, Tr. 2615, 2630-32, and by presenting a jailhouse informant and self-confessed perjurer to claim Flowers had admitted guilt, Tr. 2416-70. The defense challenged all of this evidence, highlighting the material inconsistencies in the witnesses' accounts, *see* Argument I.D.1.a., *infra*, and the biases and sheer unreliability of the witnesses themselves, *see, e.g.*, Tr. 2048-62, 2224-25, 2235, 2416-70, 2820, 2844-4, *see also* Arguments I, and V, *infra*, demonstrating the absence of probative value in the shoe print and the lone particle of gunshot residue, Arguments I.D.3, V, *infra*, and raising substantial questions about law enforcement's premature exclusion of Simpson as a suspect. *See* Argument I.E.1, *infra.*

As with the prior proceedings, Flowers' sixth trial once again saw the prosecution resort to unlawful and unfair tactics to compensate for the weakness of its proof. For example, although this Court had previously condemned the State's use of rank misstatements of fact in closing argument, the prosecutors not only used the same strategy this time, but also misrepresented some of the very same facts once again. *See* Argument II, *infra*. Likewise, despite this Court's strong admonition in the decision reversing Flowers' convictions after the third trial, the State again engaged in purposeful race discrimination during jury selection, this time using a somewhat more sophisticated (but no less impermissible) approach than it had

before. *See* Argument IV.A., *infra.* The impact of these and other undue advantages enjoyed by the State was further exacerbated by the trial court, which refused to exclude non-probative, prejudicial evidence offered by the prosecution, *see* Tr. 2268-81, refused to admit defense evidence to rebut it, *see* Tr. 3122-23, and declined to provide the jury with instructions to which Flowers was entitled under state and federal law. Each of these errors, among others, is discussed in detail below.

SUMMARY OF THE ARGUMENT

At the threshold, the State's evidence implicating Flowers was so flimsy as to be constitutionally insufficient to sustain the convictions. Flowers motions for a directed verdict and peremptory instructions were therefore erroneously denied and his convictions must be reversed and rendered. (Argument I). Similarly, prosecution in this matter, or at least seeking a death sentence against Flowers, is in any event barred by considerations of double jeopardy and fundamental fairness due to the repeated attempts at prosecution and the misconduct committed by the prosecution during those attempts, and for other defects in the indictment and prosecution of this matter. (Arguments VII, X)

Even if the prosecution against Flowers is neither entirely barred, nor founded on insufficient evidence, the instant convictions must be reversed because the blatant re-commission by the prosecutor of the kind of misconduct that this Court has previously condemned deprived Flowers of a fundamentally fair trial. (Argument II). Indeed, this Court should reconsider its decision not to remand for development of the record on additional instances of misconduct that were not discovered until after this appeal was in process. (Argument XI).

That deprivation was exacerbated by multiple reversible evidentiary errors by the trial

court at the culpability phase of the trial. It erroneously denied Flower's motion to exclude, Collins as unreliable and tainted by unconstitutionally suggestive police conduct, the purported eyewitness identification of Flowers by State's witness Porky Collins. (Argument III) It also abused its discretion and violated the Mississippi Rules of Evidence in preventing Flowers from adducing expert testimony from a leading published scholar and researcher on the cognitive issues affecting the reliability of eyewitness identifications concerning relevant factors present in this case. (Argument IV). The trial court also reversibly erred in permitting a State ballistics expert to testify over Flowers' objections concerning a single particle of gunshot residue collected from Flowers in the Winona police department. (Argument V) This deprivation was also amplified by the failure of the trial court to properly instruct the jury at either the culpability or sentencing phases of the trial. (Arguments VII, VIII)

Indeed, the entire process by which Flowers was tried was defective. As a consequence, he was deprived of a fair trial before a properly constituted jury free from outside influence and bias. As was the case in *Flowers v. State*, 947 So.2d 910 (Miss. 2007), the jury selection process was unconstitutional due to racial discrimination by the prosecution in its exclusion of black jurors for pretextual reasons. The jury selected was imbued with racial discrimination that pervaded the entire prosecution of this matter, as well. The venire, and the jury seated from it, was also rife with pervasive bias and outside influence, including excessive law enforcement contact throughout the process, but the trial court erroneously failed to take any of the remedial actions requested by Flowers to ameliorate it. As a result of these things, the jury failed to attend to adequately deliberate guilt and further failed to undertake its sentencing responsibilities free from outside influences. (Argument VI).

Finally, the convictions and death sentences here were the product of cumulative error, were unconstitutionally imposed, and the sentence is disproportionate even if the conviction were warranted. (Arguments X, XII, XIII). For all of these reasons, the convictions against Flowers must be reversed.

ARGUMENT

Standard of Review

Capital murder convictions and death sentences are reviewed on direct appeal under a "heightened scrutiny" standard of review. *Fulgham v. State*, 46 So.3d 315, 322 (Miss. 2010) (reversing sentence), *Walker v. State*, 913 So.2d 198, 216 (Miss. 2005); *Balfour v. State*, 598 So.2d 731, 739 (Miss.1992) (citing *Smith (Grady) v. State*, 499 So.2d 750, 756 (Miss.1986) "[P]rocedural niceties give way to the search for substantial justice, all because death undeniably is different." *Hansen v. State*, 592 So.2d 114, 142 (Miss.1991).

Under this standard of review, this Court, *inter alia*, considers trial errors for their cumulative impact; applies the plain error rule with less stringency; relaxes enforcement of its contemporaneous objection rule; and resolves all genuine doubts in favor of the accused. In sum, what may be harmless error in a case with less at stake becomes reversible error when the penalty is death. *Fulgham*, 46 So.3d at 322. *See also Flowers v. State*, 773 So.2d 309, 317 (Miss. 2000), *Walker v. State*, 913 So.2d at 216 (citing *Irving v. State*, 361 So.2d 1360, 1363 (Miss. 1978), *Fisher v. State*, 481 So.2d 203, 211 (Miss.1985).

Moreover, as a matter of constitutional law, where constitutional error has occurred, and deprived a defendant of a fundamental right, prejudice must be presumed unless the State can demonstrate the error to be harmless beyond a reasonable doubt. *Smith v. State*, 986 So.2d 290,

300 (Miss. 2008) (citing *Arizona v. Fulminante,* 499 U.S. 279, 296 (1991), *Delaware v. Van Arsdall,* 475 U.S. 673, 674, (1986).

I. THE EVIDENCE PRESENTED AT FLOWERS' TRIAL WAS CONSTITUTIONALLY INSUFFICIENT TO SUPPORT A FINDING OF GUILT BEYOND A REASONABLE DOUBT, AS MANDATED BY THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, AND SECTION 14 OF THE MISSISSIPPI CONSTITUTION.

Flowers has been tried six times in connection with a notorious 1996 quadruple homicide at a family owned furniture store in the small Montgomery County town of Winona, Mississippi. After three reversals for prosecutorial misconduct[4] and two hung juries on the question of guilt or innocence, a jury of eleven locally drawn whites and one African-American convicted Flowers of capital murder and sentenced him to death. That verdict – reached after only 29 minutes of ostensible deliberation – cannot be sustained. For although the prosecution presented twenty-three witnesses in its cases in chief and rebuttal, the whole of their testimony was much less than the sum of its parts. There has never been any direct, physical, or forensic evidence connecting Flowers to the crime; the motive and methods ascribed to Flowers by the prosecution were implausible on their face; and the witnesses relied upon for patching together a circumstantial case for guilt were by turns objectively unbelievable, contradictory, or unable to provide anything of legitimate probative value.

The prosecution's evidence thus amounted to nothing more than a far-fetched tale that no

[4] *See Flowers v. State*, 773 So.2d 309, 321 (Miss. 2000) (*Flowers I*) (finding prosecutor employed "a trial tactic ... to continuously bring in unnecessary [and inadmissible] evidence" which was "egregious"); *id.* at 328-30 (finding prosecutor acted "in bad faith" during cross-examination of defense witness, and misled the jury using information not in evidence); *Flowers v. State*, 842 So.2d 531, 538 (2003) (*Flowers II*) (finding that prosecution again "employed a tactic or trial strategy of" presenting inadmissible, prejudicial evidence, and again "repeatedly argued facts not in evidence"); *Flowers v. State*, 947 So.2d 910, 937 (Miss. 2007) (*Flowers III*) (finding that prosecution's use of all fifteen of its peremptory strikes against African-Americans "evince[d] an effort by the State to exclude [them] from jury service" in violation of the Equal Protection Clause); *see also id.* at 935 ("The instant case presents us with as strong a *prima facie* case of racial discrimination as we have ever seen in the context of a *Batson* challenge ....").

fair-minded, rational, and impartial juror could believe, let alone certify as proof beyond a reasonable doubt that Flowers was guilty of capital murder.[5] Furthermore, at the same time it was failing to make a creditable case for Flowers' guilt, the prosecution's evidence revealed the distinctly stronger possibility that another man (or, more likely, two or more) had actually committed the crime. As set forth below, this combination compels a finding – long overdue in this case – that the evidence against Flowers did not, and cannot, support his convictions under Mississippi law and the United States Constitution.

A. Relevant legal principles.

"[T]he Due Process Clause of the Fourteenth Amendment protects a defendant in a criminal case against conviction 'except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.'" *Jackson v. Virginia*, 443 U.S. 307, 315 (1979), *quoting In re Winship*, 397 U.S. 358, 364 (1970); U.S. Const. amend. XIV *See also, e.g., Jefferson v. State*, 556 So.2d 1016, 1019 n.5 (Miss. 1989) (recognizing that Due Process Clause of Section 14 of Mississippi Constitution mandates proof beyond a reasonable doubt). As a general matter, "the relevant question" when assessing the constitutional sufficiency of the evidence supporting a conviction "is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson*, 443 U.S. at 319; *Wilson v. State*, 101 So.3d 1182, 1185 (Miss. App. 2012); *see also, e.g., Fisher v. State*, 481 So.2d 203, 212 (Miss. 1985)

[5] Flowers challenged the constitutional sufficiency of the evidence against him in each of his first two direct appeals, but this Court resolved those cases in his favor without reaching the issue. *See Flowers I*, 773 So.2d at 316 (listing insufficient evidence among "Issues" on appeal); *id.* at 317 ("Because of this Court's reversal for the aforementioned reasons, it is unnecessary to discuss the other assignments of error raised by Flowers."); *Flowers II*, 842 So.2d at 538 (similar).

("[A] valid ... capital murder conviction must be supported by evidence legally sufficient to support a conviction of both the murder and the underlying felony had either been charged alone."), Miss. Const. art.3 § 14

Proper application of this sufficiency inquiry requires adherence to several important principles. First, while the prosecution's evidence must ordinarily be afforded the benefit of the doubt, that benefit extends only to the "*credible* evidence consistent with [the defendant's] guilt," and to such "favorable inferences [as] may *reasonably* [be] drawn from the evidence." *McClain v. State*, 625 So.2d 774, 778 (Miss. 1993) (quoting *Spikes v. State*, 302 So.2d 250, 251 (Miss.1974), and *Wetz v. State*, 503 So.2d 803, 808 (Miss. 1987)) (emphases added). Additionally, the inquiry assumes the participation of "reasonable and fair-minded jurors," *id.*, and is therefore not designed to insulate verdicts rendered by artificially prosecution-oriented tribunals.

Finally – and of particular importance in a case like this one – "a guilty verdict based upon circumstantial evidence must be supported by a much higher degree of proof" than a verdict based on direct evidence of guilt. *Hester v. State*, 463 So.2d 1087, 1093 (Miss. 1985). As this Court explained more than sixty years ago,

> It is fundamental that convictions of crime cannot be sustained on proof which amounts to no more than a possibility or even when it amounts to a probability, but it must rise to the height which will exclude every reasonable doubt; that when in any essential respect the state relies on circumstantial evidence, it must be such as to exclude every other reasonable hypothesis than that the contention of the state is true, and that throughout the burden of proof is on the state. It is our duty here to maintain these principles.

Westbrook v. State, 32 So.2d 251, 252 (Miss. 1947) (quoted with approval in *Hester*, *supra*). Thus, where – as in this case – "[t]he web of circumstances established by the state does not

exclude the reasonable hypothesis that a third party, not [the defendant], was [the] assailant," the evidence is constitutionally insufficient as a matter of law. *Hester*, 463 So.2d at 1094.

B. Overview of the crime, the investigation, and the State's theory of the case.

On the morning of July 16, 1996, some person or persons entered the Tardy Furniture Store on Front Street in Winona, Mississippi, robbed it of approximately $389 in cash, and murdered the store's owner and three employees with multiple execution-style gunshots to their heads. The bullets used in the killings were later determined to have been fired from a .380 caliber handgun owned by a local man, Doyle Simpson, who had begun claiming the gun was stolen from the locked glove box of his dilapidated car within an hour of the murders. Investigators also observed a bloody shoe print near the shooting victims, which they later determined to have been consistent with a size 10½ FILA Grant Hill athletic shoe. No further probative physical evidence – *e.g.*, DNA, fingerprints, hairs, fibers, surveillance photography – was ever recovered from the scene.

The investigation began immediately and attracted the participation of a substantial number of personnel from multiple local and statewide law enforcement agencies.[6] Acting without centralized coordination,[7] the investigators received fragmentary information from an array of sources, opened and closed lines of inquiry without consultation amongst themselves, and documented little of what they learned, when they learned it, whom they learned it from, or

[6] *See* Tr. 1834 (Winona Police Department); Tr. 2475-76 (Mississippi Highway Patrol); Tr. 2080 (Montgomery County Sheriff's Office); Tr. 2870 (District Attorney's Office); Tr. 1918 (Mississippi Crime Laboratory)

[7] *See, e.g.*, Tr. 2577 (Jack Matthews, Mississippi Highway Patrol: "Well, I don't think anybody was the lead investigator in this case."); Tr. 3005 (Wayne Miller, Mississippi Highway Patrol: "We were assisting the chief of police."); Tr. 1862 (Winona Police Chief Johnny Hargrove: "That's why I said I called for help. They know more about it than I did.").

what they did in response to it.[8] As a result, there is no contemporaneous record of the progress or substance of the investigation, or of how much (or how little) the investigators knew at the times they made key decisions that would later prove to be highly consequential.

One such decision was the elimination of Doyle Simpson as a suspect. Although Simpson had wasted no time disseminating the improbable claim that a handgun capable of firing (and later determined to have *actually* fired) the bullets used in the killings had been stolen from his locked glove box – the proverbial "likely story" if ever there was one – he was excluded before nightfall on the day of the murders. According to investigators, this decision was made on the basis of interviews with some of Simpson's co-workers – whose names and statements were not recorded – who had reportedly vouched for his presence at the Angelica clothing factory at the time of the crime. As set forth in more detail *infra*, however, the facts supporting the decision to exclude Simpson as a suspect were materially incomplete, and the haste with which that decision was made led investigators away from information that was potentially critical, and unquestionably time-sensitive.

At the same time Doyle Simpson was being excluded, Curtis Flowers was being selected as the only suspect against whom significant investigative resources would ever be directed. In contrast to Simpson – who had admittedly possessed a handgun that could have fired the fatal shots, and had offered an inherently suspicious explanation for its disappearance – Flowers was made a target based exclusively on a report, received from the slain store owner's daughter, that he had recently been "let ... go" from an entry level position at the furniture store – a position he

[8] *See, e.g.*, Tr. 1863 (Winona Police Department "didn't have protocol" on generating reports in connection with criminal investigations); Tr. 2117 (Deputy Sheriff Bill Thornburg, who was among the first on scene at the furniture store, and the first officer to speak with Doyle Simpson, did not generate a report until February 24, 1997 – more than seven months after the fact); Tr. 2545 (no reports of witness interviews at Angelica); Tr. 2553 (no record of Porky Collins' initial statement).

had held for around one week – after damaging some golf cart batteries and then failing to show up for work. Tr. 2482; 2496; 2665; 2676. Acting on this tip, investigators tested Flowers' hands for gunshot residue and interviewed him twice within approximately 48 hours of the crime, but failed to develop information that could justify arresting or detaining him.

Six more months would pass before Flowers was formally charged, in January 1997, as the sole perpetrator of the four execution-style murders at the furniture store. During that long interval, the physical evidence against Flowers did not materially improve. While investigators did find a box in Flowers' girlfriend's house that once contained athletic shoes of the same popular make, model, and size range as the ones that reportedly made the bloody print at the crime scene, they never found the shoes themselves, or established that Flowers had ever owned or worn them. The investigation also failed to turn up any other direct evidence connecting Flowers to either the shootings or the alleged theft of the murder weapon, the presence of which in Doyle Simpson's glove box was – according to Simpson himself – unknown to Flowers on the day of the crime.

Instead, what drove the development of a case against Flowers was the announcement and broad advertisement, beginning on or about July 25, 1996, of a "$30,000 REWARD for information leading to the arrest and conviction of the person or persons responsible for the 4 murders that occurred on July 16, 1996 at TARDY'S FURNITURE COMPANY ...." Ex. D-1, R. E. Tab 8; *see also* Tr. 1888. According to one prosecution witness, the reward "was all the news and everywhere else." Tr. 2067. In the small town of Winona, it was also no secret that law enforcement had already shown a keen interest in Flowers as "the person ... responsible ...." *Id.*

Within days of the reward's publication, would-be claimants began coming forward.

Most offered stories of having spotted Flowers at various locations between his girlfriend's home, Doyle Simpson's car, and the furniture store; and one witness, Patricia Hallmon Sullivan Odom (hereinafter Sullivan), brought several key threads together by claiming to have seen Flowers on the morning of the crime, wearing FILA Grant Hill shoes, and walking first in the general direction of Doyle Simpson's car (the source of the murder weapon), and later in the general direction of the furniture store. Together with a jailhouse informant (Sullivan's brother, Odell Hallmon) who admitted lying under oath and a single particle of purported gunshot residue that even the prosecution was unwilling to call probative, this was the patchwork of evidence assembled against Flowers.

Using this evidence, the prosecution proceeded at trial under a theory that Flowers, motivated by his firing from a short-term, unskilled, entry level job, awoke on the morning of July 16, 1996 with murder on his mind, walked to Doyle Simpson's car to steal a gun he did not know was there, then walked across town to the furniture the store, robbed it, and single-handedly killed all four victims with precision gunshots to their heads. The question now before the Court is whether that theory and the proof offered to support it is legally sufficient under Mississippi law and the United States Constitution. Making that assessment requires an examination of the evidence from two vantage points: first, whether the prosecution's affirmative case for Flowers' guilt was plausible and supported by adequate proof; and second, whether it is possible on the existing record to "exclude the reasonable hypothesis that a third party, [i.e., Doyle Simpson], was [the] assailant[.]" *Hester*, 463 So.2d at 1094. As explained below, the answers to both inquiries must be no.

C. The prosecution's case against Flowers is implausible and cannot be credited as a matter of law.

The prosecution's trial presentation was built around – and was entirely dependent upon – a specific set of narrative elements: (1) that Flowers' firing from a low-paying, short-term job at the furniture store motivated him to murder four people; (2) that he acted on that motive by setting out to steal a gun he did not know was there to be stolen; and (3) that one person, acting alone, carried out all four murders in the manner reflected by the crime scene and the autopsy results. Each of these elements is implausible in its own right; taken together, they amount to a theory of the case that is simply too far-fetched to be accepted as proof beyond a reasonable doubt that Flowers is guilty of capital murder.

1. Flowers had no motive to even harm, let alone murder, anyone at the furniture store.

Although motive is not a necessary element of capital murder under Mississippi law, the weakness of the circumstantial evidence in this case left the prosecution with little choice but to take on the burden of trying to show Flowers was specifically and uniquely motivated to commit this otherwise inexplicable and unsolved crime. *See* Tr. 3189 (prosecution argument that Flowers was the "one" person who "had some reason, some motive, some anything to attack four people like this"). To that end, the prosecution contended that Flowers, a recent employee of the furniture store, had become disgruntled over being fired, and had returned to the store a week later to rob it and kill all who were present. Tr. 1818. The viability of that theory, however, depends upon at least two essential propositions: first, that Flowers was actually aggrieved by his firing; and second, that his reaction to the firing was strong enough – or, more accurately, *disproportionate* enough – to propel him to a murderous rage. Neither is supported by the evidence.

According to the uncontested facts presented at trial, Flowers worked as a basic laborer at the Tardy Furniture Store for a total of three and a half days; he started on Saturday, June 29, 1996, and worked that day, all day on July 1 and 2, and half a day on July 3 before stopping for the upcoming holiday. Tr. 2494-95. While working on July 3, Flowers accidentally damaged three batteries after failing to secure them to a truck for transportation. Tr. 2495. He reported the damage to the store's owner, and she advised him of the possibility that he would "have to pay for them out of [his] check" if they could not otherwise be replaced, Tr. 2495; despite the battery incident, however, the owner loaned Flowers thirty dollars before he left work on July 3, Tr. 2496-97. The store was closed for the July 4 holiday, and Flowers failed to show up for work during the next three business days. *See* Tr. 2496. When he telephoned the store the following Tuesday, July 9, to ask whether he should come in, the owner informed him that he no longer had a job and that his paycheck for the work performed during the previous week "was pretty much covered up with them batteries." Tr. 2496. "That was it." *Id.* While this loss of income might have suggested the possibility of some ensuing financial hardship for Flowers, the uncontested proof also showed that he had been receiving unemployment benefits in the amount of $119 per week both before and after his brief stint at the furniture store. Tr. 2500.

In addition to the circumstances of Flowers' employment and termination, the trial record is also noteworthy for what it does *not* contain. For example, there was no evidence from any witness that Flowers ever expressed anger at the furniture store, its owner, or its personnel.[9] Nor was there any evidence that Flowers even disagreed with, or was disappointed by, the owner's perfectly reasonable decision to let him go after he failed to appear for work three days in a row.

[9]As set forth in Argument II, *infra*, this lack of evidence did not stop the prosecution from asserting in closing argument that "investigators learned" Flowers "had a beef with the store." Tr. 3189.

Furthermore, the evidence showed no indication that Flowers had any history of violence, mental health problems, or criminal activity of any kind. In short, the uncontradicted information before the jury depicted a man who had spent his entire life as a law-abiding, stable, non-violent citizen, and who reacted to the loss of his job in a manner entirely consistent with that history.

On these facts, there is no basis from which to conclude that Flowers gave more than a moment's thought to the termination of his employment at the furniture store, let alone perceived it as inspiration for murder. His tenure at the store had been very short, the income derived from the job would have been largely offset by the unemployment benefits he was already receiving, and he had brought the end upon himself by failing to show up for work for three straight business days. There is likewise no basis from which to conclude that Flowers bore the store's owner or any of its employees any ill will. After all, Mrs. Tardy had not fired him on the spot for damaging the batteries; instead, she had graciously given him a thirty dollar advance and left him with the expectation that he could return to work following the July 4 holiday. His failure to do so would have given her cause to be angry with him, but it gave him no reason to be angry with her.

Given the absence of any actual evidence of disgruntlement on Flowers' part, the proposition that his firing drove him, not merely to anger, but to quadruple murder is nothing short of outlandish. Even if he had been a long-term employee substantially invested in his job, had been devastated by its loss, and had a history of psychological instability, a reaction like the one attributed to him by the prosecution would have been wildly disproportionate. None of those elements were present here, and the information that was before the jury supported only one reasonable inference: Flowers had no motive to commit the crimes, and the prosecution's

suggestion to the contrary simply made no sense.

2. Flowers did not know there was a gun concealed in Doyle Simpson's glove box, and had no reason to look there for a murder weapon.

The prosecution's theory also depended upon the proposition that Flowers left his girlfriend's home on the morning of the crimes bound for the Angelica clothing factory with a plan to steal the .380 pistol concealed in the glove box of Doyle Simpson's parked car and use it to commit a robbery and murders a few hours later. To be at all plausible, that proposition required some evidentiary basis for concluding that Flowers actually had reason to believe he would *find* the gun in Simpson's car. No such evidence was presented at trial (and none has ever existed). Instead, the only testimony relevant to that issue showed precisely the opposite. According to Simpson himself, he was not in the habit of keeping a firearm in the glove box of his car, Tr. 2356, and "there was no way that Curtis Flowers would have known that gun was in the car that particular morning." Tr. 2358. *See also id.* ("No. He, he didn't know it. ... He did not know it.").

The significance of the uncontradicted fact that Flowers "did not know" the gun was in Simpson's glove box cannot be overstated. If the prosecution's theory is to be credited, Flowers set out on the morning of July 16, 1996, not merely in search of a murder weapon *somewhere*, but with the intent to steal a *particular* weapon, from a concealed hiding spot, inside a *particular* car, parked in a lot located twelve minutes' walk from where he began. Tr. 2991. No sane person would embark on such an excursion absent a sound reason to believe the gun would actually be there for the taking, and the only relevant evidence put before the jury unequivocally

indicated that Flowers had no basis for such a belief.[10] It follows inescapably that if Flowers had no reason to walk across town to steal a gun from Simpson's car, then he *would* not have done so, and in fact *did* not do so. To the extent the jury may have determined otherwise – a dubious notion given the speed with which it delivered the guilt-or-innocence phase verdict – any such finding would have defied logic and common sense.

3. No single person, acting alone, could have carried out all four murders in the manner reflected by the crime scene and the autopsy results.

In addition to a motive he had no reason to harbor, and a gun theft that would have required clairvoyance to commit, the prosecution's theory – under which a single person committed all four murders, *see*, *e.g.*, Tr. 3186 – also credited Flowers with an aptitude for fast-moving, precision violence that exists only in highly choreographed, meticulously rehearsed Hollywood action movies. While the evidence in this case leaves many unanswered questions, the number of victims and the placement of the gunshots that killed them are fully understood, and it requires no specialized knowledge of criminal behavior to deduce that this was almost certainly *not* a one-man crime.

Four people were killed inside the furniture store; three were found within a few feet of

[10] If there had been evidence that any other cars or buildings along the alleged route from Flowers' girlfriend's house to Angelica had been burglarized, it might have been rational to conclude that Flowers was simply hunting randomly for a weapon with which to commit crime, and that his hunt only ended when he reached Simpson's glove box. The trial record, however, is devoid of any such evidence (or argument). Instead, the prosecution committed itself to the proposition that Flowers had only one destination in mind that morning, and the evidentiary bankruptcy of that commitment is fatal to its theory of the case. It might also be imagined – although the prosecution never argued it – that Flowers merely happened upon the gun while burglarizing Simpson's car, and only then devised a plan for the furniture store crime. That scenario, however, is equally implausible. According to the trial testimony, Simpson's car was dilapidated, *see* Tr. 1960, and there was no evidence to suggest anyone – including Flowers – would have expected it to contain anything of value. If Flowers had actually gone out in search of items worth stealing, he would surely have found better, more promising targets long before reaching Simpson's car in the Angelica parking lot.

each other near the front of the store, and the fourth was found some distance away from the others. *See* Ex S-39. All four were shot to death: store owner Bertha Tardy died from a single shot that entered her head slightly above and behind her right ear, Tr. 2011; store employee Carmen Rigby sustained a single shot to the back of her head, Tr. 2017; store employee Robert Golden was shot once in the left side of his head, and once on the top of his head, Tr. 2023; and store employee Derrick Stewart was mortally wounded with a single shot to the back of his head, Tr. 2031.

If this crime were truly the work of a lone gunman – as the prosecution's theory demanded – that person would have had to have been both extraordinarily skillful and uncommonly lucky. All four of the victims in this case were adults, and the record contains no suggestion that any of them lacked the mental capacity to have perceived a threat of grave bodily harm (especially once the shooting started), or the physical ability to have attempted to flee, or at least resist, a single armed assailant. Yet nothing about the crime scene evidence or the autopsy results suggests the shooter encountered any such difficulties. On the contrary, all four victims remained stationary enough to have been struck down, one at a time, with precision shots to their heads – shots so precisely delivered, in fact, that it took a mere five bullets to kill four people.

The prosecution did not offer the jury an explanation for how Flowers, acting alone, could have managed to control the location and movements of all four victims before and during the sequence of shots to their heads that killed them one by one. There was no evidence that Flowers possessed the requisite marksmanship skills, or that he had undergone any special training in methods for subduing a frightened group of people during an episode of homicidal gunfire. Absent such evidence, the prosecution's single-assailant theory is simply not believable.

On the contrary, it is far more likely that the murders were not the work of one person, but instead involved at least the shooter and one additional person. In that scenario – which was not considered because it did not mesh with the only suspect authorities ever pursued – it is far more likely that the victims could have been forced to remain still, or nearly so, by one assailant, while the other fired the fatal shots. As explained *infra*, law enforcement had such a two-man team under its nose on the day of the crime, but let them go without making any attempt to build a case against them.

In sum, the very foundations of the prosecution's theory were illogical and unbelievable. Based on the evidence presented at trial, Flowers had no motive to rob the furniture store and kill its occupants, he had no reason to believe he would find a gun to steal in Simpson's glove box (and no other reason to burglarize the car), and he had no means of single-handedly carrying out the four homicides in the manner reflected by the crime scene evidence. These central features of the case were selected, not because the objective evidence dictated them, but because they served – albeit poorly – the overriding imperative of creating *some* theory under which Flowers was the perpetrator. That is backwards, and it is no wonder that a prosecution conceived and executed in that manner would exhibit such obvious and fatal defects. As discussed below, the quality of the case against Flowers did not improve through the testimony of the prosecution's witnesses.

D. The prosecution's eyewitnesses were objectively unbelievable, and the meager forensic evidence it presented had no probative value.

Aside from the testimony of law enforcement officers describing their haphazard and largely undocumented investigation, the prosecution's trial case was comprised of (1) a series of

purported fact witnesses who claimed to have seen Flowers at, near, or between his girlfriend's home, the Angelica clothing factory, and the furniture store; (2) a jailhouse informant and admitted perjurer who claimed Flowers had confessed to him; and (3) testimony about the shoe print found at the scene of the crime, and the lone particle of alleged gunshot residue collected from Flowers' hand. As explained below, this evidence fell far short of establishing Flowers' guilt beyond a reasonable doubt.

1. The eyewitnesses.

With no hard evidence connecting Flowers to either the murder weapon or the scene of the crime, the prosecution was forced to evolve a scenario from which it could argue that he had at least been seen near, and moving between, both the car from which Doyle Simpson's gun was allegedly stolen, and the furniture store, and that these sightings had occurred in time for Flowers to have committed the crime. That scenario did not emerge at or near the time of the crime, and it was not rooted in any physical evidence or other tangible proof. Instead, it was knitted together in the weeks and months following the advertisement of a $30,000 reward, as a handful townspeople presented themselves (or, in a few cases, were recruited) as eyewitnesses to Flowers' travels on the morning of July 16, 1996, and were assimilated into the narrative. As it was eventually presented at trial, the story was that Flowers left the home of his girlfriend, Connie Moore, early on the morning of July 16, 1996, walked to the Angelica factory parking lot to steal the gun, walked back to Moore's house, left the house again a short time later, walked slowly and conspicuously to the furniture store, stood on the street outside the store arguing with another man, entered the store and committed a robbery and quadruple murder, and finally, fled on foot. *See* Tr. 3189-95.

In addition to the obvious "big picture" plausibility problems discussed *supra*, this story also suffered both for the timing of its contributors, and for the quality, consistency, and reliability of the accounts they gave. None of the witnesses came forward to tell what they claimed to know until well after the ubiquitous publication of the reward – by which time it was equally well known that Flowers was the person in whom law enforcement was interested – and some were directly approached by law enforcement weeks after the fact, and specifically (and suggestively) asked whether they had seen Flowers on the day of the crime. If the witnesses' failure to appear until they were drawn out by the lure of easy cash or the intimidation of police inquiry were not enough to discredit them, the irreconcilable differences among their claims, and the circumstances under which they were made, surely were.

a. Irreconcilable differences.

According to the prosecution's evidence at trial, James Edward Kennedy, Katherine Snow, Edward Lee McChristian, Patricia Hallmon Sullivan, Mary Jeanette Flemming, and Beneva Henry all claimed to have seen Flowers during his alleged walks between Moore's house, Doyle Simpson's car at Angelica, and the furniture store.[11] The relevant portions of their accounts are described in chronological order:

> **James Edward Kennedy** claimed he saw Flowers walking past his home at 635 South Applegate, Tr. 2288, toward Angelica at "7:15 that morning," Tr. 2290; Tr. 2289, wearing "white pants and a black sweater." Tr. 2293.
>
> **Katherine Snow** claimed she saw Flowers "leaning up against Doyle Simpson's car" in the Angelica parking lot, Tr. 2222, at "7:15," Tr. 2221, while wearing "[b]lack jeans [and a] white shirt," Tr. 2238.[12]

[11] Three other witnesses – Elaine Goldstein, Clemmie Fleming, and Porky Collins – also claimed to have seen Flowers that morning, but they did not give physical descriptions. All three are discussed in subsequent sections, *infra*.

[12] According to Doyle Simpson, Snow also reported that the person she had seen next to his car "was

Edward Lee McChristian[13] claimed he saw Flowers "[g]oing north" on Academy Street – *i.e.*, away from Angelica and toward Moore's house – "[b]etween 7:30 and 8:00," Tr. 2302; McChristian did not give a description of Flowers' clothing.

Patricia Hallmon Sullivan claimed she saw Flowers returning to Moore's house "about 7:30," and wearing "some black ... wind suit pants, and ... a white shirt. And ... the pants was unzipped at the leg," Tr. 2045-46. She also claimed to see Flowers leave Moore's house at "like 7:50 or 7:51," Tr. 2055, and gave no indication that he had changed clothes during the intervening 20 to 21 minutes.

Mary Jeannette Flemming claimed she saw Flowers walking toward downtown Winona at "[f]ive after nine," Tr. 2312, 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.").[14]

Beneva Henry[15] claimed she saw Flowers walking down the street in the direction of downtown Winona "between around 9:00 and 9:30 in the morning," Ex. S-128 at 1319; *see also id.* at 1320, and wearing "some shorts" that "were white," *id.* at 1322, but no hat, *id.* at 1324.

The credibility touchstone for any collection of eyewitness accounts is consistency, or at least the absence of irreconcilable inconsistency. By that critical measure, the stories told by these witnesses fail badly. First, of the five witnesses who described what Flowers was wearing

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wearing a cap." Tr. 2359. In her own testimony, however, Snow denied that the person she claimed to have seen was "wearing a cap." Tr. 2238.

[13] McChristian first spoke to investigators after being picked up by police without warning 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.

[14] Mary Jeannette Flemming did not speak with investigators until February, 1997 – approximately seven months after the crime. Like Edward Lee McChristian, she was picked up without warning by police, and specifically asked to recall whether she had seen Flowers on July 16, 1996. At the time she was interviewed, Flemming was well aware that Flowers was the suspect, and that a $30,000 reward had been offered. Tr. 2317-18.

[15] Beneva Henry was an elderly woman who died prior to Flowers' sixth trial and her testimony from a previous proceeding was read to the jury. *See* Tr. 2640. She did not speak with investigators until September 3, 1996, and, like McChristian and Flemming, they approached her asking whether she had seen Flowers more than six weeks earlier, on the morning of July 16.

when they claimed to have seen him, literally *none* were consistent. While both Kennedy and Snow claimed to have seen Flowers at exactly the same time, one had him in white pants and a black sweater, and the other had him in black jeans and a white shirt. Sullivan, who claimed to see Flowers fifteen minutes later, as he returned from the excursion allegedly witnessed by Kennedy and Snow, described him wearing black "wind suit" pants and a white shirt. And while it might otherwise be tempting to treat the difference between the "jeans" described by Snow and the "wind suit pants" described by Sullivan as inconsequential, Sullivan further specified that the wind suit "pants was unzipped at the leg." Wind suit pants have zippered legs; men's jeans do not. The two witnesses who later placed Flowers along a route toward downtown Winona were even more inconsistent. Whereas Mary Jeannette Flemming vehemently insisted she saw Flowers where "brown pants" (with a white shirt and gray jacket), Beneva Henry described him wearing "white shorts" at or very near the same time.[16]

The times at which the witnesses claimed to have seen Flowers further undermine their accounts. While Kennedy claimed his sighting occurred in front of 635 South Applegate at 7:15, Snow insisted she saw Flowers at Angelica – approximately six blocks away – at exactly the same time. McChristian's claim that Flowers passed his house on Academy Street between 7:30 and 8:00, presumably on his way from Angelica to Moore's house, cannot be squared with Sullivan's claim that she saw him arriving at Moore's house, some twelve blocks away from

[16] It is also noteworthy that when police took Flowers in for questioning around 1:30 p.m. on the day of the crime, he was wearing blue knee-length short pants and a "jersey-type blue shirt," Tr. 2487, which did not come close to matching any of the descriptions later given by the witnesses. Furthermore, a search of the house Flowers and Moore shared did not turn up any of the outfits he allegedly wore on July 16. Tr. 2858-59.

McChristian's, at 7:30.[17] Sullivan's additional claim that Flowers then left Moore's house again at 7:50 or 7:51, presumably to head downtown to commit the crime, also raises significant questions about Flemming's and Henry's reports that they did not see him until after 9:00 a.m. Neither Flemming's nor Henry's houses were any further from Flowers' home base than was Angelica. Thus, if he was able to make the trip from Angelica to Moore's house in fifteen minutes – as Snow and Sullivan combined to claim – there is no rational explanation why it should have taken him at least *seventy-four* minutes to be spotted by Flemming and Henry. For that matter, it is also irrational to imagine that he lingered somewhere – out of the sight of any other witnesses – for approximately forty-five *additional* minutes before entering the furniture store and committing the crime.

If there is a legitimate explanation for the wild variations in these accounts, it was never offered at trial. Instead, the prosecution simply pressed ahead, purporting to prove the crucial facts of Flowers' alleged movements on the morning of the crime through a collection of tales that cannot, as a matter of logic or law, be credited; indeed, it is simply not possible to accept the testimony of any one of the eyewitnesses without also having to reject the stories of multiple others. Faced with such pervasive and irreconcilable conflicts, no fair or reasonable juror could possibly have accepted this evidence as proof beyond a reasonable doubt that Flowers actually made the walking trips ascribed to him. And without that indispensable component, the rest of the prosecution's already-fanciful theory falls apart completely.

b. Defects in the evidence acquired from key prosecution witnesses.

[17] The Academy Street sighting is also suspect because it placed Flowers on an unmistakably indirect route home from Angelica. If he were truly bent on committing robbery and murder – and attempting to get away with it – there is no conceivable reason why he would have taken such a roundabout stroll with the recently stolen firearm in his possession.

Of the prosecution's lengthy roster of "fact" witnesses, only a few supplied information that can be characterized as especially consequential to – and perhaps even dispositive of – the case against Flowers. Those witnesses were Patricia Hallmon Sullivan Odom, Katherine Snow, Clemmie Flemming, and Porky Collins. Together, they purported to place Flowers: coming and going from Moore's house on the morning of the crime while wearing shoes consistent with the prints found at the scene; next to Doyle Simpson's car in the Angelica parking lot; and outside the furniture store both before and after the murders. As discussed below, each of these witnesses were marred by characteristics that made them unworthy of belief by a rational jury.

i. Patricia Hallmon Sullivan Odom

Patricia Hallmon Sullivan Odom was the first of the eyewitnesses to tell her story to law enforcement, and she immediately cemented herself as literally the hub through which the prosecution's narrative would flow. On August 7, 1996 – three weeks after the murders, and two weeks after the reward went public – Sullivan approached local investigators and agreed to provide them with two pieces of information that became essential to the case against Flowers: first, that she had seen him walking toward Moore's house around 7:30 a.m., as if returning from an excursion in the direction of Angelica, and then leaving again at 7:50 or 7:51 a.m., as if heading out to commit the crime, *see* Tr. 2045-46; Tr. 2055; and second, that he was wearing FILA Grant Hill athletic shoes – *i.e.*, the type of shoe alleged to have made the bloody prints at the crime scene – at the time of these sightings, Tr. 2046. With these claims, Sullivan single-handedly provided the prosecution with the logistical framework necessary to place Doyle Simpson's gun in Flowers' possession, and to put Flowers on the move toward the furniture store

on the morning of the shootings; she also became the *only* witness to ever claim Flowers had been wearing FILA Grant Hill athletic shoes on the day of the crime.

Quite simply, Sullivan's story is too expedient to be believed. At the time she offered herself as a witness, law enforcement were desperate to make the improbable link between Flowers and Doyle Simpson's gun, and to associate him with FILA athletic shoes capable of having made the bloody shoe prints, which were the closest thing investigators had to physical evidence from a possible perpetrator.[18] By supplying those connections, Sullivan did not furnish investigators with any *new information*; instead, she gave them something that was both more valuable to their case and less difficult for her to supply: *confirmation* that they were pursuing the right suspect, and a mouthpiece willing to attest to a few basic "facts." To make that contribution – and to place herself at what must have looked like the head of the line for the $30,000 reward – Sullivan needed to do no more than claim she had seen Flowers, her next-door neighbor, out and about on the morning of the crime, and to say he had been wearing the particular brand of shoes for which the investigators were already actively looking.[19] This required no actual *knowledge* – only a bit of opportunism.[20]

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[18] According to Deputy Sheriff Thornburg, law enforcement knew by August 1, 1996 – six days before the initial interview with Sullivan – that they "were looking for FILA tennis shoes." Tr. 2103; *see also* Tr. 2101.

[19] Sullivan was already personally familiar with the Grant Hill model athletic shoe marketed by FILA, having purchased some for her own children. Tr. 2063. With that background knowledge, it would have been easy for her to name a known FILA shoe in response to the investigators' questions.

[20] Powerful proof of Sullivan's willingness to lie for personal gain emerged after the trial of this case, when it came to light that she had been under a multi-count federal indictment for income tax fraud at the time of her testimony, and had been convicted of those charges a few months later. Flowers moved this Court to remand the case to facilitate the development and litigation of a motion for a new trial asserting a claim under *Brady v. Maryland*, 373 U.S. 83 (1963). Although this Court declined to do so, elsewhere in this Brief Flowers seeks that this decision be revisited in light of an apparent intervening change in this Court's views on making such post- appeal is filed. *See* Argument XI, *infra.*

That Sullivan's account was derived from her knowledge of what the prosecution needed – as opposed to actual memories of real observations from the morning of July 16, 1996 – is borne out by the selectivity of the recollections she was able to muster at trial. On one hand, she displayed an uncanny ability to recall both the specific times she claimed to have seen Flowers ("7:30" and "7:50 or 7:51"), and the particular details of his attire ("some black ... wind suit pants, and ... a white shirt. And ... the pants was unzipped at the leg"; "white Fila's Grant Hill tennis shoes") on what should, at the time, have been just an ordinary, manifestly unmemorable summer morning. On the other hand, when asked to recount any other details she had observed about Flowers – *i.e.*, matters unconnected to the furtherance of the prosecution's case – Sullivan "wasn't paying attention that much," Tr. 2048, "wasn't counting," Tr. 2049, could not "remember," Tr. 2051, and "wasn't paying no attention," Tr. 2062. On the basis of this display, any reasonable juror would have discounted not only Sullivan's too-good-to-be-true testimony, but also the larger theory the prosecution had constructed around it.

ii. Katherine Snow

Katherine Snow was the only witness to place Flowers in close proximity to Doyle Simpson's car – and the allegedly stolen murder weapon – on the morning of the crime. Snow testified that she was an employee at Angelica on July 16, 1996, and that she saw Flowers "leaning up against" the "[d]river's" side of Doyle Simpson's car at 7:15 on the morning of July 16, 1996. Tr. 2221-23. Snow also claimed she had known Flowers "a good many years," and was therefore certain about the identity of the person she had seen. Tr. 2222. Despite her professed certitude, however, the circumstances of Snow's revelation of what she claimed to have seen render her account so suspicious as to compel rejection by an impartial decision-

maker.

Aside from the substance of her alleged sighting of Flowers, the dominant feature of Snow's testimony was the delay in her announcement of the identity of the person she said she had seen, and the reasons she proffered to explain that delay. According to Snow, she recognized Flowers the moment she saw him next to Simpson's car, and when she heard a short time later that a gun had been stolen from the car and murders had been committed, she "figured it was him." Tr. 2224. Despite this confidence that she had seen the perpetrator of a sensational quadruple murder, however, Snow did not tell either her co-workers or the police investigators who interviewed her multiple times beginning on the day of the crime that the person she saw was Flowers.[21] Tr. 2224-25; Tr. 2235. Instead, she told them only that she had seen someone, and that she could identify the person she saw. Tr. 2225. It was not until August 19, 1996 – more than a month after the crime, and several weeks after the reward had been advertised – that Snow purported to specifically identify Flowers from a photo lineup. C.P. 2237 (CD) (found in "Discovery Served" folder, located in document "Discovery received as of 3-22-2010.Vol 2.pp.500-1006" at page "Feb 2010 980").

Snow's explanation for her delay in revealing what she claimed to know was that she was

[21] As with many of the witnesses, investigators did not make a full or detailed record of their early interviews with Snow, *see* Tr. 2239; 2569, and it is therefore impossible to fully scrutinize her account. Nevertheless, even on the available information, Snow's story included important details that could not have been correct. As discussed *supra,* her description of Flowers' clothing did not match the descriptions given by any of the other witnesses. Additionally, while Snow described the man she claimed to have seen as "5'6"," Tr. 2237, it is uncontested that Flowers, with whom Snow claimed to be familiar, is approximately "5'10," Tr. 2359. The timing of Snow's alleged observations is also suspect. She not only claimed to have seen Flowers at the same time James Edward Kennedy saw him many blocks away, but she also testified that she saw Simpson "at the exit door[,] [w]hen the police and stuff was coming" "somewhere around 9:00, before 10:00." Tr. 2231. That could not have been anywhere close to correct, since Deputy Thornburg, who was the first to arrive at Angelica in response to the call about the alleged burglary of Simpson's car, could not have done so until at least 11:30 a.m. *See* Tr. 2476; 2481; 2087.

"scared" that identifying Flowers would endanger her family, *see, e.g.*, Tr. 2225; Tr. 2233, and that she simply "didn't want no part of it ...." Tr. 2236. Those excuses do not add up. Snow admitted she had never even "had a conversation" with Flowers, Tr. 2229, and that he did not know where she lived or who her family was, Tr. 2226. She also acknowledged that she made no effort to seek police protection for herself or her family, Tr. 2227; in fact, the trial record contains no indication that she even told law enforcement of her purported fears during either of her first two interviews.

Furthermore, and more fundamentally, if Snow had truly desired to stay out of it – due to fear or any other reason – she could easily have remained silent altogether. Instead, she not only announced that she had seen a man standing next to Simpson's car, she also told law enforcement that she *would be able to identify* that man. By saying that, Snow instantly guaranteed that she would be questioned again, and that she would be called upon to provide the identity of the person she claimed to fear so much. Anyone could have predicted that, and no one who wished to be left alone would have answered as she did. That Snow's stated concerns were not genuine was further confirmed by her conduct when presented with a photo lineup on August 19. While a person fearful of identifying a dangerous killer who remained at large (Flowers would not be arrested for five more months), or otherwise wishing to remain uninvolved, would simply have declined to select any of the photos, Snow's response was very different: she "immediately said, 'That's him,'" and then "she smiled." Tr. 2940. Neither the speed of her selection nor the apparent self-satisfaction she exhibited as she made it were consistent with the behavior to be expected from a reluctant witness

Whatever Snow's actual motivations might have been – perhaps reward money, sustained

attention, or a desire to protect Doyle Simpson – logic and common sense dictate that they were not as she claimed at trial. That much is plain from the face of the record, and no rational jury conducting an objective assessment of the prosecution's evidence could have credited her testimony, let alone counted it as reliable proof of Flowers' guilt beyond a reasonable doubt.

iii. Clemmie Flemming

Clemmie Flemming was the only witness who claimed to have seen Flowers fleeing the scene of the crime.[22] According to her trial testimony, Clemmie paid an acquaintance to drive her to the furniture store "a little after 10:00" on the morning of the crime so she could pay her overdue bill. Tr. 2367. When they reached the store, however, she changed her mind and instructed her driver to leave. Tr. 2368. Clemmie further claimed that as they were beginning to drive away from the furniture store, she spotted Flowers "running hard" and looking like "somebody was after him." Tr. 2370. After traveling some additional distance from the store, Clemmie claimed she spotted Flowers a second time, running "on the highway." Tr. 2370. Despite these two opportunities, however, she could not provide a description of Flowers' clothing, footwear, or any other visible features. Tr. 2377; Tr. 2378.

Of all of the prosecution's witnesses, Clemmie Flemming was among the least believable. Aside from the facial improbability of her story, the circumstances surrounding her appearance as a witness were highly suspicious. She waited *nine months* after the crime – and nearly three months after Flowers was charged – to offer herself to law enforcement as a witness, by which time the availability of a $30,000 reward had long since permeated the community. Tr. 2374. And with charges finally filed against Flowers, the window of opportunity to claim a

[22] In order to avoid confusion with Mary Jeannette Flemming, discussed *supra*, this section of the brief will refer to Clemmie Flemming simply as "Clemmie."

piece of that prize looked to be closing fast.

While these features alone would have been enough to cause a reasonable juror to discount Clemmie's account, any remaining shred of believability was eliminated when members of her own family gave sworn testimony that she was lying about what she claimed to have seen. Her own sister, Mary Ella, testified that she and Clemmie were together from 7:30 a.m. until 3:00 p.m. on the day of the crime, that they did not learn of the murders until noon, and that she and Clemmie were nowhere near the furniture store at the time Clemmie claimed to have seen Flowers. Tr. 2844-46. Additionally, Clemmie's cousin, Latarsha Blissett, testified that Clemmie had admitted to manufacturing her story about Flowers in an attempt to avoid having to pay for her furniture.[23] Tr. 2820. Blissett further explained that Clemmie had expressed concern that if she were to come clean about her lie, "they was going to take her kids, and she was going to go to jail. And she didn't want to lose her children." Tr. 2820. The import of this testimony is self-evident: no fair-minded juror could accept Clemmie Flemming's account as trustworthy proof that she had actually seen Flowers running from the scene of the crime.

iv. Porky Collins

Porky Collins, a local resident who had been out running errands on the morning of the crime, testified that he saw two black males standing near a car in front of the furniture store "somewhere around a little bit before 10:00 to a few minutes after 10:00." Ex. S-115id at PC Tr. 1610; PC Tr. 1606.[24] He noticed them because he "thought they was fixing to fight," Tr. 1606,

[23] In her own testimony, Clemmie claimed to have contacted the furniture store about her outstanding bill, and "they told [her] don't worry about it." Tr. 2380.

[24]Collins was deceased by the time of Flowers' sixth trial, and his testimony from a prior proceeding was read to the jury. Tr. 2395. That testimony is contained for purposes of the Record on Appeal in Ex. S-115id. It will be cited hereafter solely as "PC Tr." by page number., without the Exhibit number.

but managed to get only a "brief glimpse" of one of the men, PC Tr. 1640; *see also* PC Tr. 1649 ("I just for a split second, I got a glimpse."). Collins "had had a lot of problems" at that time, and was on "a lot of medication" that caused him to "have trouble remembering a lot of things ...." PC Tr. 1613.

Although Collins reported some of what he had seen to law enforcement within approximately two hours of the shootings,[25] *see* Tr. 2898-99, nearly six weeks would pass before he was asked to visually identify anyone. On August 24, 1996, Collins was brought to the police station to compare his memory of the "brief glimpse" he had acquired more than a month earlier to the contents of two photo lineups. Tr. 3014; Tr. 3017. The first lineup included a picture of Doyle Simpson, and the second one included a picture of Flowers. After reviewing the first array, Collins indicated that the photo of Simpson "looks like the person he'd seen." Tr. 3031. And after reviewing the second array, Collins responded to the photo of Flowers by saying, "I believe that's him, it looks like him."[26] Tr. 3032. It was only after a suggestive comment by the investigator conducting the lineup ("Do you know Curtis Flowers?" Tr. 3032), that Collins' equivocal reaction to Flowers' photo became unequivocal; and despite his professed certitude, Collins had difficulty positively identifying Flowers when he testified at the first trial. *See* Record on Appeal, Flowers v. State, No. 97-DP-01459-SCT, Record on Appeal at Tr. 435, R.E.

[25] Collins' trial testimony indicated that he had seen the two men next to a car that was "brown, beige, tan or ever what it is, it was real dirty, real filthy." PC Tr. 1639. As discussed *infra*, that description matched Doyle Simpson's car, but the prosecution's evidence at trial gave no indication that it was included in Collins' initial report to law enforcement on the day of the crime, *i.e.,* the day they hastily ruled out Simpson as a suspect.

[26] The administration of the photo lineup that included Flowers was also constitutionally defective in several respects. Those matters are address in Argument II, *infra*

Tab 9 b.[27]

On balance, Collins' testimony added nothing of significant probative value to the prosecution's case against Flowers. By his own admission, he did not get a good look at the person he saw next to the vehicle, and any rational jury would be obligated to account for that fact by heavily discounting the photo identification he purportedly made many weeks later. If anything, the rest of Collins' account – *i.e.*, that he saw *two* men, and that they were standing next to a car that looked like Doyle Simpson's – simultaneously undermined the prosecution's theory that the crime was committed by one person (Flowers), and supported the proposition that Simpson was not only the undisputed owner of the gun, but also the person who fired it inside the furniture store. Thus, like the other eyewitnesses, Collins was unable to supply the prosecution with evidence upon which an impartial juror could base a finding of guilt beyond a reasonable doubt.

2. Odell Hallmon, jailhouse informant and admitted perjurer.

Odell Hallmon's testimony for the prosecution was brief and simple. On direct examination, he asserted that he had been incarcerated with Flowers, Tr. 2415, that he had previously helped to discredit the account of his own sister, Patricia Hallmon Sullivan (discussed *supra*), Tr. 2415-16, and that Flowers had "admitted [to Hallmon] that he killed the people at Tardy Furniture," Tr. 2416. By so testifying, Hallmon became the only witness ever to maintain that Flowers had made *any* statement inculpating himself in the homicides.[28] He also

[27] This Court takes judicial notice of its own files. *In re Dunn*, 2011-CS-00255-SCT at ¶11 n. 6, 2013 WL 628646 at *3 (Miss. Feb. 21, 2013) (not yet released for permanent publication).

[28] In earlier trials, the prosecution relied on testimony from two other jailhouse informants, Frederick Veal and Maurice Hawkins, who each claimed to have heard Flowers confess. *See Flowers I*, 773 So.2d at 314. By the time of the trial at issue in this appeal, however, both had admitted their testimony was false. The

distinguished himself as arguably the most self-evidently untruthful person ever to swear the witness' oath in the six trials of Curtis Flowers.

As suggested in his direct testimony, Hallmon's route to a place on the prosecution's witness roster was both indirect and unusual. It began with his appearance as a defense witness at Flowers' second trial (which yielded a conviction later reversed for prosecutorial misconduct), where he testified that his sister, Patricia Hallmon Sullivan, had manufactured her eyewitness account of Flowers on the morning of the crime in an effort to obtain the reward money. *See, e.g.*, Tr. 2442-45. By this trial – Flowers' sixth – Hallmon had switched sides, insisting that his earlier testimony that his sister was a liar was itself a lie he had delivered under oath.

To explain his about-face, Hallmon reeled out a succession of explanations that only further diminished his already tattered credibility. According to Hallmon, he originally decided to "lie on" his own sister (whom he claimed to love "deeply," Tr. 2417-18) because Flowers "was the only one ... keeping [him] supplied with cigarettes," Tr. 2418, which was of paramount importance because he had "a bad nerve problem ... and smoking help[ed] [him]," Tr. 2427.[29] When that claim met with skepticism, he quickly added that Flowers – who was drawing $119 a week in unemployment benefits prior to his arrest – had also "promised [him] thousands of dollars, too." Tr. 2420; *see also* Tr. 2424 ("The only thing I had on my mind was cigarettes and a promise of money."); Tr. 2456-57 ("I was only thinking about where I was going to get my next cigarette – and the money that he offered me ....").

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prosecution thus had no choice but to find a new snitch willing to fabricate a confession from Flowers. They found their man in Odell Hallmon.

[29] *See also, e.g.*, Tr. 2421 ("Now, and you being somewhere where can't nobody smoke, and he the only one got a cigarette, man, play a mind game."); Tr. 2423 ("I told you I was a cigarette addict."); Tr. 2448 (Hallmon equating his need for cigarettes with others' need for food); Tr. 2449 ("I wasn't thinking about the lying or the consequences at the time. I'm thinking about my next cigarette.").

With regard to the reason for his change of heart, Hallmon's story again came in ascending steps. He first explained that his "family turned against [him] because [he] got up there and lied on him [sic]," Tr. 2419, and that he had come clean in an effort to return to their good graces, *see, e.g.*, Tr. 2450; Tr. 2471. Later, when confronted with the inescapable fact that he had, by his own account, been an opportunistic liar,[30] Hallmon stepped up his game once again, this time professing that, in fact, he was facing a "medical crisis," and had been converted to a life of honesty by the resulting imperative "to get [him]self 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," Hallmon somberly 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."[31] Tr. 2473.

As the foregoing summary suggests – and as the transcript of his testimony vividly exhibits – Odell Hallmon is not only unbelievable, he is also incapable of even *appearing* to be believable. From his willingness to give sworn testimony at one proceeding and then swear that testimony was a lie at the next proceeding, to his melodramatic assurances that first family bonds, then his own mortality, and finally the fear of God Himself had changed him at last, Hallmon established himself as a witness that no objective juror could rely upon.

3. Neither the shoe print nor the lone particle of gunshot residue had probative value.

[30] *See* Tr. 2461 (Q: "Mr. Hallmon, who are you more loyal to, your family member or friends?" A: "Man, that's a hard question. But now, it's according to the predicament on me. I'm more loyal to my family but I could be more loyal to a friend if ….").

[31] Hallmon gave this testimony in June, 2010, a full decade after he claimed to have been "diagnosed" in 2000. Tr. 2461. As of the preparation of this brief in May, 2013, the Mississippi Department of Corrections lists Hallmon as standing 6'0" tall and weighing 313 pounds. If his health were deteriorating as he claimed, the pace of his decline was, and continues to be, miraculously slow.

There has never been any hard "forensic" evidence pointing to Flowers as the robber and quadruple murderer in this case. Investigators recovered no DNA, fingerprints, or other scientific or trace evidence that could be linked to Flowers, and they found no bloody clothing or other material that even arguably connected him to the crime scene. To compensate for this conspicuous void, prosecutors tried to make the best of what little they had: a bloody shoe print of unknown origin observed inside the furniture store, and a single grain of gunshot residue allegedly collected from Flower's hand. As discussed below, neither of those morsels made any measurable contribution to the case for Flowers' guilt.

a. The shoe print failed to connect Flowers or anyone else to the crime.

The prosecution's theory at trial was that the bloody shoe print found at the crime scene was made by the killer, that Flowers could have made the shoe print, and that, therefore, Flowers must have been the killer. That logic seems sound enough at first glance, but the evidence offered to support it failed to make the connections upon which it depended.

According to the prosecution's evidence at trial, Porky Collins was the last person to see any of the furniture store victims unharmed; that occurred around 9:15 or 9:20 a.m. on the morning of July 16, 1996. *See* PC Tr. 1599-1603. The next person known to have encountered the victims – after they had all been shot – was Sam Jones, who testified that he arrived at the store and discovered the crime "between 9:15 and 9:30." SJ Tr. 8: 6-7.[32] Although Jones was their witness, the prosecution flatly misrepresented his account in closing argument, contending – contrary to the testimony – that "Mr. Sam Jones came into the store slightly after 10:00 on the

[32] Jones was deceased by the time of Flowers' sixth trial in 2010, and his testimony from an earlier proceeding was read to the jury. *See* Tr. 1895. That testimony is contained for purposes of the Record on Appeal in Ex. S-127id. It will be cited hereafter as "SJ Tr." by page number without further reference to the exhibit number.

morning of the 16th and discovered the bodies."[33] Tr. 3189. After Jones reported what he had seen, local police chief Johnny Hargrove became the first law enforcement officer to arrive on the scene at "10:20-something in the morning." Tr. 1834-35.

If 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; if, on the other hand, the prosecution's unilateral revision of Jones' testimony was correct, then the crime happened sometime during the forty-plus minutes between Collins' encounter with Carmen Rigby and Jones' discovery of the murders. Under either version, 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.[34] That one or more people might have done so is easy to imagine given that the furniture store was located in downtown Winona, and that all of the relevant times fell within the store's normal business hours.[35] *See* Tr. 2649. It is thus impossible to conclude – as the prosecution's theory demanded – that the bloody shoe print was made by the killer rather than an innocent visitor to the store.

While the shoe print's unknowable provenance alone is sufficient to negate the probative force the prosecution sought to attach to it, the evidence offered to show Flowers could have made the print was equally unpersuasive. According to Mississippi Crime Laboratory technician

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[33]The violation of Flowers' right to a fair trial brought about by this and other material misrepresentations of the evidence during the prosecution's closing argument is addressed in Argument II, *infra*.

[34]This possibility is consistent with the observations of Sam 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 re-entered the store with Chief Hargrove. SJ Tr. 22-24; 34.

[35] It is also easy to imagine that a person other than the killer might have been wearing FILA Grant Hill athletic shoes during such a visit to the store. As the trial evidence indicated, that particular model of shoe was quite popular, *see* Tr. 22100, and approximately 642,000 pair potentially capable of having left the print at the furniture had been sold. *See* Tr. 2620-24.

Joe Andrews, the bloody print was "consistent" with a "FILA Grant Hill size ten-and-a-half" athletic shoe. Tr. 2608-09. No such shoe was ever found in Flowers' possession, and the only witness to even place that model shoe on his feet on the day of the crime was his neighbor, the opportunistic and manifestly untrustworthy Patricia Hallmon Sullivan.[36] Given the reportedly distinctive appearance of FILA Grant Hills (*see* Tr. 2210 ("Those Grant Hill, they stood out.")), Sullivan's claim, if true, should have been corroborated by at least some of the purported eyewitnesses who said they saw Flowers on the morning of July 16. As discussed *supra*, that corroboration never appeared.

Aside from Sullivan's dubious account, the closest investigators ever came to linking Flowers to a pair of shoes capable of having made the bloody mark 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," Tr. 2106, from the home of Flowers' girlfriend, Connie Moore, *see* Tr. 2204-05. As Moore testified, however, the shoes that had once been contained in that box were purchased for her son, Marcus, who wore size 10½ at the time, and had since grown to size 12. Tr. 2856; 2864. That Flowers himself had no association with the box or its original contents was further supported by the Mississippi Department of Public Safety's determination that none of the latent fingerprints lifted from the box matched him. Tr. 2696. On this record, there was no basis from which an impartial jury could have concluded beyond a reasonable doubt either that Flowers was wearing FILA Grant Hill shoes on the day of the crime, or that he was the source of the bloody print at

[36] One other witness, Elaine Goldstein, also claimed to have seen Flowers wearing FILA Grant Hill shoes on a single occasion, months before – but *not* at or near the time of – the crime. Tr. 2208. Like Sullivan, her alleged memory for detail was implausibly selective. Although she claimed to have seen Flowers wearing the shoes only once, from a substantial distance, "a couple months before" the crime, and purported to describe them in minute detail, she was unable to recall any other information about his appearance on that or any other day during the eight years she claimed to have lived across the street from him. *See* Tr. 2208-12.

the furniture store.

b. The lone particle of gunshot residue had no probative value.

The only other piece of ostensible forensic evidence presented by the prosecution was testimony from crime lab technician Joe Andrews that a swab taken from Flowers' right hand approximately three and a half hours after the crime yielded one single particle of gunshot residue (GSR). Tr. 2615. This contributed nothing of probative value. During argument on a defense motion to suppress the GSR evidence,[37] the Assistant District Attorney acknowledged the evidence was being offered, not to "say definitively that [Flowers] fired a gun," but merely to "show" "that he was in the presence or the environment of gunshot residue ...." Tr. 2273. As technician Andrews later confirmed, the discovery of "that single particle d[id] not bring th[e] jury ... one step closer to knowing" whether Flowers had fired a gun, had been near someone else who had fired a gun, or had simply "handled an object that ha[d] gunshot residue on it." Tr. 2630. Andrews went on to make clear that Flower's trip to the police station on the afternoon of July 16 – which included a ride in a police car and time spent inside the building, *see* C.P. 2625-26 – would have provided ample opportunity for the single particle to have made its way onto Flowers' hand. Tr. 2630-32.

As the prosecution admitted, the GSR testimony said literally nothing about whether Flowers had actually fired a gun on the morning of July 16, 1996. On the contrary, as the prosecution's own witness confirmed, it was just as likely that he had acquired the lone particle through his encounter with police later that afternoon. Faced with such equivocal – or more accurately, meaningless – information, no reasonable juror could have relied upon the GSR

[37] The trial court's erroneous decision to admit the evidence is the subject of Argument V, *infra*.

testimony to conclude, beyond a reasonable doubt, that Flowers shot four people to death while robbing the furniture store.

* * *

As the foregoing discussion demonstrates, the case put on by the prosecution was long on witnesses, but those witnesses were short on consistent, credible, or probative evidence of Flowers' actual culpability. That the testimony failed to establish his guilt of four capital murders beyond a reasonable doubt was a function, not only of the quality of the proof the prosecution was able to muster, but also of the facial implausibility of the case theory around which that proof was constructed and organized. That theory never made any sense, and the prosecution's failure to meet the burden of proving it was therefore no surprise. As set forth below, there was a far stronger and more plausible case to be made against a different suspect: Doyle Simpson.

E. The evidence presented by the prosecution does not exclude the reasonable hypothesis that Doyle Simpson committed the robbery and murders.

Doyle Simpson may be the luckiest man in the recent history of Mississippi criminal justice. Despite being the undisputed owner and last known possessor of the gun used in a quadruple murder and robbery, and despite the absence of any reliable evidence of his or his gun's whereabouts at the time of the crime, Simpson found himself cleared of scrutiny literally within hours of the crime. That remarkable development had nothing to do with the existence of legitimate grounds for ruling him out as a suspect, and everything to do with the sheer incompetence of law enforcement's investigation, and the investigators' ignorance of critical facts at the time they decided to turn their attention elsewhere. As described below, information

that emerged later showed not only that the decision to clear Simpson was a grave mistake, but also that he, in fact, had ample opportunity to commit the crime, and access to at least one accomplice with whom to have done so. All of this information emerged at Flowers' trial, and was therefore available for the jury's consideration.

1. The quick decision to clear the Simpson.

Doyle Simpson worked a 6:30 to 10:30 a.m. shift as a janitor at the Angelica garment factory in Winona. Tr. 2331. On the day of the crime, he drove himself to work in his dirty and dilapidated brown Pontiac Phoenix, Tr. 2331; Tr. 1960; there was a .380 caliber automatic handgun stowed in the glove box, Tr. 2332. Doyle's brother, Emmett Simpson, also worked locally at a company called IBP, and was reportedly at work for at least some of the morning of July 16, 1996.[38] Tr. 2575-76.

Doyle initially came to the attention of investigators on the morning of the crime when Deputy Sheriff Bill Thornburg, who had already arrived at the furniture store and observed "some hulls," Tr. 2085, that he identified as ".380 caliber," Tr. 2086, received a call reporting an "auto burglary" across town at the Angelica shirt factory, Tr. 2087. Thornburg "got in [his] patrol car and drove to Angelica," Tr. 2087, inquired about the call, and was eventually told that the allegedly burglarized vehicle belonged to Doyle Simpson, Tr. 2088. After "wait[ing] probably ten or 15 minutes before [Doyle] drove up," Tr. 2088, Thornburg spoke to Doyle and learned of his claim that a .380 pistol had been stolen from inside the locked glove box of his car. Tr. 2090. Without documenting the sources or content of the information he had acquired, Thornburg "went back to the store and told them that the pistol had [sic] been stolen was a .380

[38] To avoid confusion, the Simpson brothers will be referred to by their first names, Doyle and Emmett, in this section of the brief.

caliber pistol." Tr. 2090.

At some point during the afternoon, some investigators returned to Angelica to inquire further into the alleged theft of the gun,[39] and Doyle's whereabouts earlier in the day. According to Jack Matthews, "a criminal investigator with the Mississippi Highway Patrol" who had been called to the investigation, Tr. 2475-76, interviews of some of Doyle's co-workers led law enforcement to believe he had been at work that morning, and therefore to "exclude[] him as a suspect." Tr. 2527.[40] Neither the precise timing of this inquiry, the identities of the participants in it, nor the content of the interviews can be verified because none of that information was documented.[41] Emmett was excluded under similar circumstances after unrecorded interviews with "his supervisors" – whose names Matthews did not document and could not remember – indicated that "[h]e was at work that day ...." Tr. 2556.

With both Simpson brothers seemingly accounted for, law enforcement effectively closed the investigative book on them before sunset on the day of the crime. As a result of that decision, investigators never swabbed Doyle's or Emmett's hands for gunshot residue (as they had already done with Flowers), never searched their homes for clothing, shoes, proceeds from the robbery, the murder weapon, or any other evidence, and made no attempt to determine whether any other witnesses had seen them moving around Winona at or around the time of

[39] Mississippi Crime Laboratory personnel also examined Doyle's car, but found nothing to confirm that a burglary had even occurred, or to identify the alleged handgun thief. Tr. 1961-64.

[40] *See also* Tr. 2527 ("[W]e were able to determine that [Doyle Simpson] was, in fact, working at Angelica that morning."); Tr. 2990 ("Q: You and other officers were able to completely eliminate Doyle Simpson and Emmett Simpson as suspects; is that correct? A: Yes, sir.").

[41] When Matthews testified to his version of these events, he was "relying on memory as best it can be summonsed [sic]" fourteen years after the fact. Tr. 2547. *see also, e.g.*, Tr. 2546 (Matthews acknowledging lack of documentation).

crimes. Tr. 2554; 2963.

2. What investigators *didn't* know before turning their attention away from Simpson.

The decision to clear Doyle Simpson and his brother Emmett so quickly was driven by law enforcement's ready acceptance of their alibis, and of Doyle's improbable and self-serving story that his gun had been stolen from the glove box of his car. In fact, neither brother's alibi was as airtight as investigators had originally assumed. Furthermore, there was also ample information, both forensic and testimonial, that pointed affirmatively to Doyle (perhaps with the assistance of Emmett) as the actual perpetrator of the furniture store robbery and homicides. Investigators knew none of it when they abandoned Doyle as a suspect.

According to the trial testimony, Doyle "had an alibi at the time of the crimes" because some number of unidentified co-workers had reported that "he was, in fact, working at Angelica that morning."[42] Tr. 2527. Missing from the testimony, however, is any sign that law enforcement knew of or accounted for the fact that Doyle was not a stationary worker whose presence could be continuously observed by any particular individuals. On the contrary, as Doyle himself confirmed at trial, his co-workers were accustomed to seeing him leave the Angelica building "four or five times" per shift, and the "morning [of the crime] was no different." Tr. 2347. Viewed in that light, the co-workers' reports that Doyle was "at work" established nothing more than that he had shown up that morning, and had been observed coming and going in ways that did not seem out of the ordinary. It did not, however, foreclose the possibility that one of his routine departures from the building might have been spent making

[42] As noted *supra*, there are no reports documenting either the identities of the witnesses to Doyle's supposed alibi or the substance of the accounts they provided to investigators. It is therefore impossible

the short drive to and from the furniture store.[43]

That Doyle might well have made that drive was reinforced by other important facts that emerged after his hasty elimination as a suspect. To begin with, the Mississippi Crime Laboratory confirmed that the bullets used to kill all four victims had been fired, not merely from a gun *similar* to Doyle's .380 automatic, but from the *very gun* he had reported stolen. And while the gun theft story was inherently suspicious right from the start, that suspicion should have been amplified in the mind of any sensible investigator when Doyle was caught lying about where he had acquired the weapon, *see, e.g.*, Tr. 2337; *see also* Tr. 2360 (Doyle acknowledging "it was several weeks before [he] admitted ... that that was a lie ...."), and then attempted to explain away that lie with another one.[44]

Doyle's evasion of scrutiny was also aided by law enforcement's incomplete knowledge of what Porky Collins thought he saw on the morning of the crime. According to Collins' trial testimony, he spoke to the District Attorney's investigator, John Johnson, at a makeshift headquarters inside the furniture store, Tr. 2898-99, where he reported having seen two black

[43] Emmett's alibi also had a substantial hole. While he was also reportedly "at work" at IBP that day, information emerged indicating that his presence there was not continuous. *See* Tr. 2113 (Emmett was observed by Deputy Sheriff Thornburg on the morning of July 16, "running" through Angelica parking lot and "perspiring pretty good"); Tr. 2114 (Emmett told Thornburg that Doyle accused him of stealing the gun, but Thornburg did not follow up); Tr. 2576 (referencing report that "Emmett left and went to Wal-Mart" on the morning of July 16); Tr. 2761 (Emmett was observed "virtually running" past the office doors at Angelica); Tr. 2782 (Trooper Williams: "I think he was having a little nip on the job.").

[44] Doyle claimed to have told the original lie "to protect Curtis [Flowers]," Tr. 2339, but no explanation has ever been offered for how a dishonest answer about the *source* of the gun could have assisted Flowers against an allegation that he had stolen it from Doyle's car. Moreover, Doyle acknowledged on cross-examination that at the time he lied about where he had acquired the gun, "he didn't have any reason to suspect Curtis [Flowers] of being involved [in a crime] at all ...." Tr. 2352. It thus appears that Doyle's stated rationale for telling the first lie was, in fact, a second lie. The real reason for his dishonesty about the source of the gun has never come to light.

males outside the store earlier that morning.[45] That initial report, however, omitted a crucial detail: that the men Collins had seen were standing next to a car that was "brown, beige, tan or ever what it is, it was real dirty, real filthy." PC Tr. 1639. Doyle's car fit that description to a tee, *see* Tr. 1960, and the prosecution's evidence at trial gave no indication that law enforcement knew anything about it when they excluded him as a suspect.

Finally, the likelihood that Doyle drove his car to the vicinity of the furniture store on the morning of the crime was also supported by both Collins and Doyle's own sister, Essa Ruth Campbell. As described *supra*, the first photo array shown to Collins included a picture of Doyle, whom Collins identified as "look[ing] like the person he'd seen" next to the brown car in front of the store. Tr. 3031. Campbell's testimony added that she was well acquainted with the appearance of Doyle's car, *see* Tr. 2799, and that she was "absolutely sure" she had seen that very car twice (traveling in different directions) between 9:30 and 10:00 a.m. on the morning of July 16, 1996, Tr. 2794; 2791.

3. The underdeveloped evidence against Doyle Simpson was at least as strong as the best case the prosecution could muster against Flowers.

Even after law enforcement abandoned the investigation of Doyle Simpson before it could begin, the evidence against him – most of which was developed *unintentionally* – is at least as powerful as the case the prosecution was able to marshal against Flowers after more than a decade of intense effort. For example:

- Simpson was the undisputed owner of the actual murder weapon, and there is no plausible theory under which Flowers could have or would have acquired it;

[45] Johnson did not document the substance of the information supplied by Collins on July 16, 1996, and it was not until March, 1997 – some eight months after the crime, and two months after Flowers' indictment – that any type of record was made of Collins' account. Tr. 2899-2901.

- Simpson had a vehicle capable of transporting him to and from the furniture store quickly enough to have allowed him to commit the crime during what would have seemed to his co-workers like just another routine absence from the factory floor;

- Simpson had ready access to an accomplice – his brother, Emmett – while Flowers would have had to commit what appears to have been at least a two-man crime by himself;

- Simpson's own sister reported seeing his distinctive looking car traveling to and from an unknown destination within the time window during which the prosecution believed the crime was committed, while no two of the alleged sightings of Flowers were consistent on even the most basic, easily observed and remembered details; and

- On balance, Porky Collins' description of what he saw – two black men, one of whom resembled Doyle Simpson, near a brown car – pointed more strongly toward Simpson and another man (perhaps his brother), than it did toward Flowers, who was never linked to either a second person or a brown car.

In sum, by any objective appraisal of the trial record, the circumstantial evidence presented by the prosecution was insufficient to convince "reasonable and fair-minded jurors" of Flowers' guilt beyond a reasonable doubt. *McClain*, 625 So.2d at 778; *see also Jackson*, 443 U.S. at 319 (evidence is constitutionally insufficient where no "rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt"); *Hester*, 463 So.2d at 1093 ("a guilty verdict based upon circumstantial evidence must be supported by a much higher degree of proof"). As explained *supra*, much of that evidence was facially incredible and contradictory, and the record as a whole fell far short of supporting the inferences urged by the prosecution – some of which would have remained outlandish even with more compelling evidence. *See McClain, supra*. Finally, and most importantly, it is not seriously disputable that "[t]he web of circumstances established by the state does not exclude the reasonable hypothesis that [Doyle Simpson], not [Flowers], was [the] assailant." *Hester*, 463 So.2d at 1094. Flowers is therefore entitled to a judgment that the prosecution – after six attempts – has failed to prove the

charges against him, and to an order barring further proceedings against him in connection with the events of July 16, 1996.

II. FLOWERS' RIGHT TO A FAIR TRIAL, AS GUARANTEED BY MISSISSIPPI LAW AND THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION, WAS VIOLATED WHEN THE PROSECUTION REPEATEDLY ARGUED MATERIAL FACTS NOT IN EVIDENCE DURING ITS GUILT-OR-INNOCENCE PHASE CLOSING ARGUMENT.

In *Flowers II* this Court held that "[t]he cumulative effect of the State's repeated instances of arguing facts not in evidence was to deny Flowers his right to a fair trial." *Flowers II*, 842 So.2d at 556. , While the message of that holding could not have been clearer, the State appears either to have learned nothing from it, or to have made a conscious decision to disregard it in pursuit of a conviction at all costs. As discussed below, the prosecutors at Flowers' sixth trial not only employed the same impermissible tactic that necessitated reversal seven years earlier, but in two instances they also repeated the *very same misrepresentations* that this Court had explicitly condemned in *Flowers II*.

A. Relevant legal principles.

Mississippi law governing prosecutorial misrepresentations in closing argument is well-settled, and was summarized by this Court in *Flowers II*:

> 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, and he may draw whatever deductions and inferences that seem proper to him from the facts.'' *Bell v. State*, 725 So.2d 836, 851 (Miss. 1998) (collecting authorities). Counsel ''cannot, however, state facts which are not in evidence, and which the court does not judicially know, in aid of his evidence. Neither can he appeal to the prejudices of men by injecting prejudices not contained in some source of the evidence.'' *Nelms & Blum Co. v. Fink*, 159 Miss. 372, 131 So. 817, 821 (1930). … ''In appropriate circumstances, prosecutorial misconduct has been the basis for reversal of a defendant's conviction and sentence.'' *Chase* [*v. State*], 645 So.2d [829,] 853 (Miss. 1994).

Flowers II, 842 So.2d at 554; *see also id.* (quoting *Dunaway v. State*, 551 So.2d 162, 163-64 (Miss. 1989)) ("Although ours is an adversary system, prosecuting attorneys must exercise

caution and discretion in making extreme statements in their arguments to the jury, if for no other reason than to save themselves, the defendant, the court and the jury the additional time, expense and effort involved in a retrial.").

The federal constitutional principles offended by a prosecutor's use of misrepresentation to induce a jury to rely upon a false impression of the evidence are likewise firmly established. As the Supreme Court observed in *Donnelly v. DeChristoforo*, 416 U.S. 637, 646-47 (1974), a prosecutor's "'consistent and repeated misrepresentation' of a dramatic exhibit in evidence may profoundly impress a jury and may have a significant impact on the jury's deliberations," thereby violating due process. *See also, e.g., Miller v. Pate*, 386 U.S. 1 (1967) (finding due process violation where prosecutor misrepresented material evidence).

While appellate review is ordinarily limited to matters preserved at trial, this Court has made clear that where, as here, the issue asserted on appeal concerns prosecutorial misconduct affecting a defendant's fundamental rights, the procedural bar arising from the absence of a contemporaneous objection can and should be overlooked. *See, e.g., Randall v. State*, 806 So. 2d 185, 210 (Miss. 2001) ("[I]n cases of prosecutorial misconduct, we have held 'this Court has not been constrained from considering the merits of the alleged prejudice by the fact that objections were made and sustained, or that no objections were made.'") (quoting *Mickell v. State*, 735 So. 2d 1031, 1035 (Miss. 1999)); *Payton v. State*, 785 So. 2d 267, 270 (Miss. 1999) ("[I]f the argument is so inflammatory that the trial judge should have objected on his own motion the point may be considered."). Moreover, it is especially appropriate to reach the merits of the issues presented here since they involve *repetitive* misconduct by the prosecution, committed after explicit admonition by this Court.

B. The prosecution's misrepresentation of material facts.

As discussed in Argument I, *supra*, the State's case depended upon the reliability of its patchwork timeline of Flowers' movements on the morning of July 16, 1996, its flimsy motive theory, the jury's willingness to reject Doyle Simpson as a legitimate alternative 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. Each of these critical components had evidentiary problems that threatened to undermine the State's overriding objective of winning a conviction. To overcome those problems, the prosecution resorted to outright misrepresentations about the evidence that had (or had not) come from the witness stand.

1. The timing of Sam Jones' discovery of the crime.

Sam Jones was the person who discovered the bodies at the furniture store, and proper placement of that discovery within the chronological sequence alleged by the prosecution was essential to the success of its theory overall. On direct examination by the prosecution, Jones explained that he had received a phone call from the store's owner on the morning of the crime, and had traveled to the store shortly thereafter. With regard to the timing of these events, Jones testified as follows:

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.

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.

SJ Tr. 8. Shortly after this exchange, the prosecutor attempted to adjust Jones' account of when he had arrived, but was interrupted by an objection:

> Q: 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 counsel: Objection to leading, Your Honor.
>
> The Court: Overruled.

SJ Tr. 9. The remainder of Jones' testimony contains nothing to contradict his report that he had discovered the crime sometime between 9:15 and 9:30.

As suggested by the prosecutor's failed attempt to lead Jones to move the timing of his discovery "closer on up to 10 o'clock," evidence establishing that the murders had already occurred by 9:30 a.m. posed a serious problem for the State because it conflicted badly with the accounts later elicited from Porky Collins and Clemmie Flemming. Collins was the only witness to report seeing Flowers in the immediate vicinity of the front of the furniture store, presumably just *before* the crime, and Flemming was the only person who claimed to have seen 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 (Porky Collins' account); Tr. 2367-70 (Clemmie Flemming's account). The tension is self-evident: If Flowers had already committed a quadruple homicide by 9:30 a.m., what could he possibly have been doing hanging around immediately outside the crime scene more than half an hour later?

The State never offered a testimonial or evidentiary fix for the glaring discrepancy between Jones on one hand and the combination of Collins and Flemming on the other. Instead, the prosecution simply used its closing argument as an opportunity to *change* what Jones had said and hope no one would notice. After identifying the "timeline" as the first of a set of "connections" that would establish Flowers' guilt, Tr. 3188, the prosecutor purported to remind

the jurors of Jones' account:

> 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 a.m. Chief Hargrove was the first to arrive between 10:20 and 10:21 a.m. Hargrove is on the scene and locks down the crime scene.

Tr. 3189 (emphasis added). That, of course, is not what Jones said under oath. Instead, it constituted a highly material alteration of Jones' account in a direction that dishonestly resolved the otherwise problematic discrepancy with the stories told by Collins and Flemming.

This misrepresentation of a key piece of evidence critical to the prosecution's theory in a capital case would be disturbing enough if it had been inadvertent. Here, however, there is every reason to believe the prosecutor knew precisely what he was doing. To begin with, the evidentiary problem repaired through the misrepresentation was obvious, and any prosecutor paying attention to the evidence put before the jury would have been both conscious of its potential to damage the case, and anxious to find a solution. Additionally, the record indicates that the prosecutor had prepared "a marker board" itemizing the timeline – including the alteration of Jones' account – and used it as a demonstrative exhibit during argument. Tr. 3188-89. That reflects a measure of premeditation that simply cannot be explained away as an honest mistake.

Finally, and most importantly, the prosecutors at Flowers' second trial had already been caught and rebuked for attempting to cure the *very same* problem in Jones' testimony by resorting to the *very same* form of misconduct. This Court explained:

> The prosecutor argued Jones had testified that at 9:30 a.m., he received a call from Bertha Tardy to come to the store, while defense counsel asserted in his objection that Jones had testified that he received the call at 9:00 a.m. and arrived at the store at 9:30 a.m. After the trial judge ruled that the jury would recall the evidence and that ''[t]his is argument,'' the prosecutor fired the last shot by stating before the jury, ''[Jones] said he received a call around 9:30. I recall; I wrote it down.'' * * * After a thorough examination of the record, it is clear from

> Jones's testimony that he testified he arrived at Tardy's at 9:30. He never once stated he was called at 9:30 on the morning of July 16, but he did testify he arrived at the store around 9:30. On direct examination, the State never questioned Jones about a specific time. He only stated he received a call from Mrs. Tardy on the morning of July 16. On cross-examination, Jones was asked what time he arrived at Tardy's, and he answered that it was around 9:30.

Flowers II, 842 So.2d at 555-56. In *Flowers II*, this Court went on to hold that the State's closing argument misconduct violated Flowers' right to a fair trial. The prosecution's decision to repeat that same violation seven years later – in brazen disregard for this Court's judgment in *Flowers II*, and under circumstances that make clear it was no accident – demands the same outcome.

2. Flowers' nonexistent "beef with the store."

Just as its case depended upon a coherent timeline synchronizing Flowers' alleged movements with discovery of the crime, the prosecution also needed to offer the jury some reason to believe Flowers actually had a motive to commit the four murders at the furniture store. And just as it had in connection with the timeline, the prosecution also made trouble for itself in *Flowers II* by using its closing argument to misrepresent the evidence about Flowers' reaction to the termination of his employment at the furniture store. *See Flowers II*, 842 So.2d at 555 ("[T]he prosecutor argued to the jury that Campbell had testified that Flowers was mad because Mrs. Tardy had terminated his employment and was holding money out of his paycheck to cover the damaged batteries."), *and id.* at 556 ("After a thorough examination of the Campbell's testimony, it is clear Campbell never testified Flowers was upset at Mrs. Tardy."). This Court's admonition did not deter the prosecution from again distorting the testimony of Sam Jones (as described above), and it was equally ineffectual when it came to the State's desperate need to establish a motive.

At Flowers' sixth trial, no witness testified about Flowers' reaction, if any, to losing his

job at the furniture store. In fact, the closest any witness came to that subject was Mississippi Highway Patrol Investigator Jack Matthews, who said the slain store owner'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.[46] 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 to conclude – or even reasonably *infer* – that Flowers was angered or vengeful over his termination from the furniture store, the prosecutor stood before the jury in closing argument and portrayed Matthews' unadorned report of Flowers having been "let … go" as evidence of affirmative *hostility* between the defendant and his former short-term employer:

> 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, the investigators never "learned" any such thing. They were told only that Flowers had lost his job after failing to show up for work for three days – nothing more. The transformation of that simple historical fact into evidence of a "motive" or "beef with the store" was entirely the work of a prosecutor once again seeking to gain unfair advantage by manufacturing proof that did not exist – and doing so in defiance of this Court's decision in *Flowers II*.

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 Flowers, was

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

the actual perpetrator of the crime. After all, the bullets that killed the victims had been fired from his gun, and the story of that gun having been stolen by Flowers on the morning of the crime was both implausible and suspicious for a variety of reasons. *See* Argument I, *supra*. Given those considerations, the prosecution had a powerful interest in avoiding any testimony that would strengthen Simpson's profile as a suspect, and in seeing to it that the evidence presented against Flowers remained as unsullied as possible.

Perhaps more than any other witness, Porky Collins represented a confluence of these two interests; he had purported to identify Flowers (albeit under highly questionable circumstances, *see* Argument II, *infra*) as a man he had seen outside the furniture store, but portions of his account (*e.g.*, the presence of a dirty brown car on the street near the store, and of a second man who could have been Simpson's brother) had also pointed toward Simpson. From the prosecution's perspective, it was plain to see that the chances of success at trial would be maximized by achieving the combination of a strong and unequivocal eyewitness identification of Flowers by Collins, and a neutralization of the pieces of Collins' testimony that favored Simpson as the killer.

As with the Sam Jones problem discussed above, however, there was at least one element of the Collins evidence that the prosecution could not control. As a possible eyewitness to the killer (or killers) moments before the crime, 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 Simpson, and Collins responded to it by saying it "look[ed] like the person he'd seen," Tr. 3031; the second array featured a picture of Flowers, and Collins responded similarly, saying, "I believe that's him, it looks like him." Tr. 3032. For the prosecution, Collins' reaction to the photo arrays was a troublingly mixed bag: it was helpful to

the extent it pointed to Flowers, but it was also harmful to the extent it pointed to Simpson, which simultaneously diluted the probative value of the Flowers identification, and reinforced the suggestion that Simpson was the real killer.

The prosecution's solution to Collins' inconvenient and potentially damaging identification of both Simpson and Flowers in the sequential photo arrays was the same as its solution to the trouble with Sam Jones' account: with the testimony already in the record, the only recourse was to lie about it 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).

The dishonesty of this argument is obvious. According to the testimony, Collins said the photo of Simpson "look[ed] like the person he'd seen"; according to the prosecutor, however, Collins "said the guy ain't in there." The difference is neither subtle nor inconsequential. By misrepresenting the evidence of Collins' reaction to the photo array, the prosecutor not only dealt a powerful – and foul – blow to the defense theory that Doyle was a likely suspect, but also managed to artificially amplify the force of Collins' purported identification of Flowers. The resulting distortion of the evidentiary picture necessarily inured to the prosecution's benefit, and materially harmed Flowers' prospects for a fair trial and a reliable verdict.

4. The location and distribution of the victims at the crime scene.

The State's insistence that one person, acting alone, succeeded in committing four execution-style homicides with only five bullets was a stretch for the reasons explained in Argument I, *supra*. That would have been true regardless of precisely where within the store each victim had been found, but it was especially so given their actual placement at the scene. According to diagrams and notes prepared by Mississippi Crime Laboratory personnel, three of the victims were found roughly in a triangle, separated from each other by as much as nearly five feet, while the fourth victim appeared to have been found more than fifteen feet away from the others. *See* Ex. S-39; -40; -51.[47] Viewed logically, that arrangement meant one of two things: either a single assailant managed to place precision shots in all four victims despite their separation by distances ranging from moderate to substantial, or this crime was not the work of a lone gunman.

Having made no effort to develop other suspects (*e.g.*, the Simpson brothers), the prosecution was firmly committed to its single-assailant theory. The likelihood of jurors accepting that theory, however, depended upon the prosecution's ability to overcome the obvious barriers to its plausibility. Nothing could be done about the number of victims, or about the strikingly small number of bullets used to kill them; both were hard, easily-recalled empirical facts – and both strongly suggested that it would have been exceedingly difficult for one person to have committed the crime.

What the prosecution could – and did – do, however, was subtly but effectively mislead

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

the jury into believing that carrying out the four killings was not as physically demanding as it seemed. To do that, the prosecutor simply misrepresented the contents of the crime lab documents. Whereas those documents showed the separations described above, the prosecutor described the scene quite differently in closing argument. According to him, "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 simply not true, or even *close* to true.

Once again, the advantage gained by this mischaracterization was significant. Instead of requiring the jurors to endorse the idea that one person could possess the combination of skill and speed necessary to shoot four adults in their heads as they stood separated by the distances observed at the scene, the "pile" and "group" description made it easy to imagine that the killings could have been accomplished with little or no movement, and by an assailant with unexceptional marksmanship skills. While that served the prosecution's interest in securing a conviction, it did so at the expense of Flowers' right to a fair trial.

*** * ***

Alone or in combination, the misrepresentations described above prejudiced Flowers by materially distorting the jury's assessment of key issues upon which the outcome of the trial very likely turned. See Flowers II, 842 So.2d at 556 (holding that "[t]he cumulative effect of the State's repeated instances of arguing facts not in evidence was to deny Flowers his right to a fair trial"). By itself, that is sufficient to require reversal under this Court's cases and the rules laid down by the Supreme Court of the United States. The necessity of a remedy here, however, is even stronger because of the recalcitrance reflected by the prosecutors' misconduct. Under these circumstances, anything less than a reversal of Flowers' convictions would reward the State for defying this Court's directives, and for once again cheating its way to a guilty verdict and a death

sentence

III. THE IN- AND OUT- OF-COURT EYEWITNESS IDENTIFICATIONS OF FLOWERS BY PORKY COLLINS WERE CONSTITUTIONALLY UNRELIABLE AND THE TRIAL COURT ERRED IN OVERRULING FLOWERS' OBJECTION TO THEIR ADMISSION

While driving downtown on the morning of the murders, a sickly Charles "Porky" Collins saw two people having a conversation outside Tardy Furniture, glimpsing the face of only one of the two. Thirty-nine days later, police presented Collins with two photographic arrays. The first array contained a photo of Doyle Simpson, which Collins tentatively identified as the man he had seen. Nonetheless, the police showed Collins a second photo array, one which contained a picture of Curtis Flowers. That array was skewed in several ways toward Flowers; the other photos were all smaller, the other men were all both younger and lighter-skinned than Flowers, and none of the other men had features or hairstyles that resembled Flowers. In response to this array, Collins equivocally identified Flowers. Only after police responded to the second identification by asking Collins if he knew Curtis Flowers did Collins definitely choose the photo of Flowers as that of the person he saw outside the furniture store. Moreover, Collins was later unable to identify Flowers as that man.

As the Supreme Court has made clear, "reliability is the linchpin in determining the admissibility of identification testimony," *Manson v. Brathwaite*, 432 U.S. 98, 114 (1977), and when the "corrupting effect" of a suggestive procedure outweighs the "indicators of [the eyewitness's] ability to make an accurate identification," a court must suppress the identification. *Id*. at 115. After ignoring the law (by repeatedly declaring that reliability was not relevant) and misstating the facts, the trial court denied the defense's motion to suppress Collins' identification of Flowers. By the time of Flower's sixth trial, Collins was dead, and his testimony from a previous trial was read into the record.

A. Relevant facts.

1. Porky Collins' opportunity to observe.

Collins was 54 years old on the day of the crime, and he was not a healthy man. He was "tak[ing] a lot of medication at that time," and although "he couldn't hardly say" whether it affected his memory, Tr. 14, the medication – or some other impairment – rendered him unable to accomplish simple tasks in an efficient manner. That day, it took him multiple attempts just to pick up his clothes at the cleaners. Tr. 8-9. He did not enter the cleaners on his first trip, because when he got there, "there was a lot of cars parked around the cleaners, and [he couldn't] walk very far." Tr. 11. He would have gone to the cleaners after running other errands, but did not because he realized he had forgotten money for the clothes. Tr. 12-13.

On his next attempt, Collins was driving his vehicle toward Tardy Furniture when he saw two black males having a discussion near a car. Tr. 15-16. He "never would have noticed them if it hadn't have been for the motions they was making ... [and] one of them's hands .... It wasn't but one of them doing it." Tr. 16-17. Collins "only got a [single] glimpse of one man" whom he had never before seen, and he did not see the other's face. Tr. 16-18. Collins had no reason to suspect that the person he saw had done anything wrong. Tr. 18-19. After passing the two individuals, Collins still "didn't go back to the cleaners." Tr. 20. Instead, he doubled back because he "was going to look and see what was going on," but only saw the men from behind, walking away from the car. Tr. 19.

2. Porky Collins' initial description.

That same day at approximately 12:30 p.m., Collins provided a description to police. Tr. 101. Investigator John Johnson's notes indicated that Collins said he saw "a black male, medium complexion." Tr. 116. Nothing more. When he testified, Johnson asserted that Collins also

"described one man as having rounded features in his face ... [and] said one looked a little taller than the other." Tr. 117. At the hearing, however, Collins himself only recalled the man's complexion, and claimed that he worded his description of the man's complexion differently, saying that on the day of the murders he had described the two men as "having the complexion of Johnny Hargrove because he was sitting there," and did not "think [he] ever said anything about medium complexion." Tr. 21.

Collins never provided, nor did the police ever request, a description with details. Tr. 21; 114-17. Collins had contact with the District Attorney's Office on several additional occasions prior to August 24, but was not shown photographs or a line-up. Tr. 30.

3. The identification procedure.

Although police focused on Flowers immediately, they waited thirty-nine days to conduct any identification procedure.

a. The identification of another suspect.

When Collins saw the first array, which did not contain Flowers' photograph, he "remember[ed] saying one of them may have, looked like him." Tr. 28; 135. Specifically, he said that the face was the same shape, and "he has got more of a receding hairline."[48] Tr. 32. Collins also said, "it has got the same, looked like the same complexion. I think it looks like him." Tr. 47. (As was revealed at trial, the photo that Collins first picked out was that of Doyle Simpson. Tr. 3030-31.) Johnson then showed Collins the second array. Tr. 106.

b. Characteristics of the photos in the Flowers array.

The second array, reproduced below, included a close-up photograph of Curtis Flowers

[48]At trial, Wayne Miller, who constructed the photographic arrays, testified that Collins pointed to Doyle Simpson's picture in the first photographic array, and Collins indicated that his "hairline was like this" and he "appeared a little darker, but it looks like him. Face was also [the] same shape." Tr. 3030-31.

(in position number 4) surrounded by five photographs taken from greater distance. As Officer Johnson acknowledged, "Curtis Flowers look[ed] a little larger" than the others and "his head [was] definitely bigger." Tr. 72-73. Moreover, as the array below reflects, and as the trial court noted, the second array "consisted of six individuals, five of which [were] of lighter skin complexion than Mr. Flowers." Tr. 168. Most notably, Flowers' photograph had greater resolution than the other pictures, and his facial image had a brighter, more reflective quality due to sharper resolution, brighter flash, and the camera's proximity to his face; on even a casual glance, it jumps out at the observer.

c. Characteristics of the subjects.

In preparing the two photo arrays, which required a total of 12 photographs, police used only 15 to 20 photographs. Tr. 130. None of the photographs they selected depict individuals whose appearances resembled Flowers in any respect except race and gender. Flowers had a shaved head and receding hairline. Photographs 1, 3 and 5 showed men with longer hairstyles (one with dreadlocks and another with braids), and photographs 2 and 6, although they depict men with shorter hair, do not depict a receding hairline. All of the other photographs depict obviously younger men. None of the photographs include men with facial features similar to Flowers.

d. Police commentary.

Collins pointed to Flowers' photograph and, as he had with respect to Doyle Simpson's photo in the first array, again made an equivocal identification, saying "I believe that's him. It looks like him."[49] Tr. 106, 136. However, this time after hearing Collins' tentative statement, Officer Johnson asked, "Do you know Curtis Flowers?" Tr. 106. Collins denied knowing Flowers, and then immediately stated: "The picture that I picked out in that lineup right there was the man that I [saw] in front of Tardy Furniture Company that day."[50] Tr. 106.

e. Subsequent failure to identify Flowers.

When asked to identify Flowers at the first trial, Collins initially "told them that the man

[49]Collins later *claimed* he also said, "I am sure that's him." However, Officer Johnson's notes indicate that an unequivocal identification came only after Johnson asked, "Do you know Curtis Flowers?" C.P. 2160 CD at filename: "Exhibit F to Motion to Suppress Identification"

[50]When asked whether he knew Flowers, Collins stated, "I didn't know Curtis Flowers then. I don't know Curtis Flowers now," before he provided his unequivocal identification.

didn't have glasses on, and he looked a little darker." Tr. 47. After Flowers removed his glasses, Collins still could not positively identify him because the man he saw "looked a little darker." Tr. 47.

4. Hearing on Motion to Suppress Identification Testimony.

Prior to Flowers' second trial,[51] counsel filed a motion to suppress all out-of-court and in-court identifications made by Collins as the product of an unnecessarily suggestive procedure and as lacking sufficient indicia of reliability. C.P. 2147. Based on the standard announced by the Supreme Court of the United States in *Manson v. Brathwaite*, *supra*, and reiterated by this Court in *York v. State*, 413 So. 2d 1372 (Miss. 1982), the motion argued, *inter alia*, that allowing Collins' pretrial and in-court identifications would violate Flowers' due process rights under the federal and state constitutions.[52]

During the suppression hearing, the trial court on several occasions cut off inquiry into the reliability of the identification. When Flowers' attorney asked Johnson whether "one of the things ... important to identification is how soon the person sees the lineup after the incident," the court interrupted, saying "that is a jury question that you are asking for." Tr. 93. Later, Flowers' attorney asked a police investigator whether he had a photograph available early in the investigation, and the judge again stopped that line of questioning: "[T]he reliability of the identification ... is a jury question. [The] question [today is] whether or not there was an unconstitutional suggestive lineup and whether [police] did anything with Mr. Collins to

[51]The suppression hearing was held on January 6, 1999, and Flowers' second trial commenced on March 31, 1999. Porky Collins died on December 21, 2002, before this Court reversed Flowers' conviction from his second trial in 2003, and also before the trial court consolidated all his cases for trial in 2004.

[52]The pretrial motion cited Article 3 and Sections Fourteen, Twenty-three, Twenty-six, Twenty-Eight, and Twenty-Nine of the Mississippi Constitution. In addition, counsel argued that Rule 403 should preclude the identifications. Along with the Fourteenth Amendment, counsel also cited the Fifth, Sixth, and Eighth Amendments to the United States Constitution. C.P. 2147

influence him ....” Tr. 129-30. When Flower’s attorney asked whether Collins made a “positive identification,” the judge sustained an objection, remarking that “it’s not relevant to this hearing. It may be later.” Tr. 146.

The court denied Flowers’ motion to suppress the out-of-court identification. Tr. 169. R.E. Tab 6a. In the course of doing so, it made several factual findings plainly contradicted by the record. For example, although Collins initially described the person he saw as having a complexion similar to Johnny Hargrove, a shade Johnson characterized as medium, the judge said that “the description that was given to officers was one of *light complexion*.” Tr. 168. In ruling on Collins’ opportunity to view the suspect, the judge asserted that Collins “not only viewed him once; he rounded the corner and *viewed him twice.*” *Id.* Collins, however, testified unambiguously that he only saw the individual’s face on his first pass. Similarly, the judge found that Collins’ degree of attention was sufficient during the “second trip around,” when in fact he did not see the person’s face at all on the second trip. Tr. 169. Thirty-nine days elapsed between the crime and identification, but the judge found that the “length of time ... is [not] a factor in this particular case.” Tr. 169. And while the judge also claimed that Collins “immediately picked out this person when he saw the second lineup,” the evidence clearly established that Collins initially made an equivocal identification when he said, “I believe that’s him.” Tr. 169.

The trial court ruled the testimony concerning Collins’ pretrial and in-court identification of Flowers admissible, noting that there would “be opportunity for [Flowers] to [attack the witnesses’ reliability] at trial.” Tr. 169. In fact, while Collins did testify at Flowers’ second trial, he then died, preventing later juries from seeing Collins and evaluating his demeanor. Tr. 2395. After permitting the jury to hear Collins’ prior testimony at this, Flowers’ sixth trial,[53] the court

[53]Collins testified on March 24 and 25, 1999 in Flowers’ second trial.

instructed that "this testimony is just to be considered just like the testimony of a witness that you have actually seen live here in the courtroom." Tr. 2396.

B. Relevant legal principles.

An unnecessarily suggestive identification procedure that raises a substantial likelihood of irreparable misidentification violates due process. *Neil v. Biggers*, 409 U.S. 188, 198 (1972); *York v. State*, 413 So. 2d at 1380-81. "A lineup or series of photographs in which the accused ... is conspicuously singled out in some manner from the others, either from appearance or statements by an officer," suggests to a witness that the accused is the perpetrator. *York*, 413 So.2d at 1383 (citing *Foster v. California*, 394 U.S. 440 (1969); *Simmons v. United States*, 390 U.S. 377 (1968)Under some circumstances, a suggestive identification procedure may be necessary, *e.g.*, when the only eyewitness faces impending death or "the usual police station line-up ... was out of the question." *Stovall v. Denno*, 388 U.S. 293, 302 (1967); *compare Neil v. Biggers*, 409 U.S. at 194-95. In such exigent circumstances, due process is not violated by the introduction of an identification obtained through a suggestive procedure.

Because "reliability is the linchpin in determining the admissibility of identification testimony," *Manson v. Brathwaite*, 432 U.S. at 114, even an identification obtained through *unnecessarily* suggestive procedures need not be suppressed if the identification has sufficient indicia of reliability.[54] *Biggers*, 409 U.S. at 199-200. However, when the "corrupting effect" of unnecessarily suggestive procedures outweighs the "indicators of [the eyewitness's] ability to make an accurate identification," a court must suppress the identification. *Id.* at 115.[55]

[54]Once the trial court decides to admit identification testimony, evidence concerning suggestiveness and reliability is "for the jury to weigh." *Manson*, 432 U.S. at 116. In this case, however, the jury did not hear Collin's live testimony and thus could not evaluate his credibility as a witness, and therefore the "jury mill" lacked its "customary grist." *Id.*

[55]Reliability also determines the admissibility of an in-court identification after an irreparably suggestive

C. Argument.

> The confrontation compelled by the State between the accused and the victim or witnesses to a crime to elicit identification evidence is peculiarly riddled with innumerable dangers and variable factors which might seriously, even crucially, derogate from a fair trial. The vagaries of eyewitness identification are well-known; the annals of criminal law are rife with instances of mistaken identification.

Wade v. United States, 388 U.S. 218, 228 (1967). These words, written almost half a century ago, remain true today. Mistaken eyewitness identifications continue to be the leading cause of wrongful convictions.[56] The tools to eliminate, or at least reduce the number of, such errors lie first in the hands of the police,[57] and, if the police fail, in the hands of the trial court. Where an identification procedure unnecessarily and "conspicuously singled out" the accused in some fashion, the resulting identification must be suppressed unless the identification is reliable. *York*, 413 So.2d at 1383. Here, however, both the police and the trial court failed in miserably, and thereby permitted the jury to hear an identification that was unnecessarily suggestive in a host of ways, and completely lacking in reliability.

1. The identification procedure was suggestive.

Identification procedures are suggestive when they "conspicuously single[] out" the

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pretrial identification procedure. *York*, 413 So.2d at 1383. Here, however, there is no issue of the admissibility of the in-court identification, given that Collins could not positively identify Flowers in the courtroom at the second trial, and was deceased by the time of this, the sixth trial.

[56]Eyewitness misidentifications account for more than three quarters of all convictions overturned through DNA testing. *Understand the Causes: Eyewitness Misidentification*, The Innocence Project, http://www.innocenceproject.org/ (last visited April 29, 2013). For a review of the substantial empirical evidence concerning eyewitness misidentification, see *State v. Henderson*, 27 A.3d 872, 885–889 (N.J. 2011).

[57]In 2006, the International Association of Chiefs of Police published training guidelines that recognized that an eyewitness identification represents the least reliable "investigative procedure employed by police .... Erroneous identifications create more injustice and cause more suffering to innocent persons than perhaps any other aspect of police work." Int'l Ass'n of Chiefs of Police, Training Key No. 600, Eyewitness Identification 5 (2006).

accused "either from appearance or statements by an officer." *York*, 413 So.2d at 1383. "Suggestion can be created intentionally or unintentionally in many subtle ways." *Wade*, 388 U.S. at 229. When evaluating the suggestiveness of a pretrial identification, courts must consider the totality of the surrounding circumstances. *See York*, 413 So.2d at 1393. In this case, all of the circumstances, taken together, pointed toward the identification of Flowers.

a. Image size, resolution, and format.

Police presented Porky Collins with an array of photographs substantially different in image size, quality, and format. When the format of an array is the same, it can ameliorate other differences in appearance. *Dennis v. State*, 904 So.2d 1134, 1136 (Miss. Ct. App. 2004) (lineup did not conspicuously single out the defendant despite difference in size of the images because "all pictures in the lineup [had] the same format"); *Brownlee v. State*, 972 So.2d. 31, 35 (Miss. Ct. App. 2008) (finding no impermissible suggestiveness in part because the "the size of the image of each man was roughly equivalent"); *Conner v. State*, 26 So.3d 383, 387 (Miss. Ct. App. 2009) (minor differences may not be "so distinctive as to improperly distinguish" the accused when all pictures share the same format and the individuals have similar complexion). In contrast to the photo arrays in *Dennis*, *Brownlee*, and *Conner*, the presentation of Flowers' facial image was distinctive. Not only was it twice as large as the others in his photo array, but his photograph had substantially greater resolution. Due to the proximity of the camera to his face, the camera's flash, and the resolution of his photograph, his facial image also reflected more light than the others, drawing attention to his photograph like a signaling mirror.

b. Complexion.

When differences in image format cause the photograph of the accused to be singled out from the rest, complexion becomes an important factor for determining overall suggestiveness.

See, e.g., *Brownlee*, 972 So.2d. at 35 (finding no impermissible suggestiveness when a photographic lineup included men that "were of the same complexion, appeared to be of the same age group, and the size of the image of each man was roughly equivalent"); *Cochran v. State*, 913 So.2d 371, 377 (Miss. Ct. App. 2005) ("[T]he remaining suspects had equal or darker complexions than Michael"); *London v. State*, 80 So.3d 837, 840 (Miss. Ct. App. 2011) (six-person photographic lineup included individuals with "skin tones [that were] almost identical" to the accused); *Conner*, 26 So.3d at 387 (noting importance of similar complexion); *Dennis*, 904 So.2d at 1136 (although defendant's facial image was larger than the others in the array, the lineup did not conspicuously single out the defendant because "all pictures in the lineup [had] the same format," and "[m]oreover, the men in the photographs [had] similar complexion").

In this case, none of the five other men included in the Flowers photographic lineup had a complexion similar to his. Rather, Flowers has a substantially darker complexion, which made him especially distinctive against the white background, and which prevalent racial stereotypes would suggest made him the most likely to have committed a crime.[58] Moreover, complexion had a particularly strong potential for suggestiveness in this case, given the starring role it played in the witness's description. Collins admitted that, prior to the identification procedure, he provided only one descriptor beyond gender: complexion. Tr. 32. He focused on complexion a second time, when he tentatively identified Doyle Simpson from the first photo array, saying Simpson "looked like [he had] the same complexion. I think it looks like him." Tr. 47. Moreover, when shown the second photo array, Collins again relied upon complexion, this time

[58]It is instructive to note that people generally associate stereotypically Black features—including darker skin—with criminality. Jennifer L. Eberhart et al., *Looking Deathworthy: Perceived Stereotypicality of Black Defendants Predicts Capital-Sentencing Outcomes*, 17 Psychol. Sci. 383, 383 ("The more stereotypically Black a person's physical traits appear to be, the more criminal that person is perceived to be.").

making a tentative (contradictory) identification of Flowers: "[I]t has got the same, looked like the same complexion. I think it looks like him." Finally, at the first trial, when the prosecutor asked him to identify Flowers, Collins could not make a positive identification because Flowers "looked darker" than the man he saw outside Tardy's furniture store. Thus, all along, Collins relied heavily – indeed, judging by his own words, exclusively – on his recollection of the man's complexion. Under these circumstances, Flowers' distinctively darker complexion was powerfully suggestive.

c. Other physical characteristics.

Unlike the lineups in *Brownlee*, the photographic array presented to Collins did not contain individuals in the same age group as Flowers. Nor did the other individuals have similar hairstyles. While Flowers had a shaved head and a receding hairline, three of the six individuals depicted had longer hair (one with braids and one with dreadlocks), *compare Conner*, 26 So.3d at 387 ("All of the men pictured have almost shaven hair"), and of the two individuals with short hair, neither had a receding hairline as did Flowers. Finally, not one person in the photographic array had facial features similar to Flowers' features. Thus, all of the factors used to measure suggestiveness in *Dennis*, *Conner*, and *Brownlee* support the conclusion that the photographic array viewed by Collins was extremely suggestive.

d. Police comments.

Statements made by an officer can render a pretrial identification procedure unnecessarily suggestive. *York*, 413 So.2d at 1383. This Court has previously urged "law enforcement officers [to] refrain from *any possibly suggestive comments*." *McDowell v. State*, 807 So. 2d 413, 419 (Miss. 2001). Other courts have likewise recognized the impropriety of police comments during an identification. *See, e.g., Clark v. State*, 515 S.E.2d 155, 161 (Ga. 1999) ("An identification

procedure is impermissibly suggestive when it ... is the equivalent of the authorities telling the witness, 'This is our suspect.'"); *Simms v. State*, 537 S.E.2d 133, 136 (Ga. 2000) (identification was impermissibly suggestive where eyewitness initially gave an equivocal identification at a one-on-one show up, saying "it looks like him," to which police responded by saying they had enough evidence to arrest); *Graham v. State*, 614 S.E.2d 815 (Ga. 2005) ("pretrial identification is considered impermissibly suggestive" when officers tell a witness that "he has chosen the 'right' person").

Here, Porky Collins viewed the first photo array, stated that Doyle Simpson looked like the person he saw – and this tentative identification elicited no comment from Johnson. In contrast, when Collins made an equally equivocal identification of Flowers after viewing the second array, Johnson was not silent. Instead, his question, "Do you know Curtis Flowers?" confirmed that Collins had now made the "right" choice. Only then did Collins make his unequivocal identification, saying, "The picture that I picked out in that lineup right there was the man that I [saw] in front of Tardy Furniture Company that day."

Although Collins said he could not recall whether he knew Flowers was a suspect before the identification procedure, he likely did, given his admission that chatter about the crime began immediately in his small community. Moreover, even if Collins did not know that Flowers was a suspect, the question itself suggested that he had made the 'correct' choice, and indeed, prompted an immediate increase in his certainty.

2. No exigent circumstances justified suggestiveness.

A suggestive identification procedure may be necessary – and thus not inconsistent with due process – under exigent circumstances. *Stovall*, 388 U.S. at 302. For example, when an eyewitness faces impending death, and no one else could exonerate the suspect, an inherently

suggestive procedure may be warranted. *Id*. Similarly, when a serious felony has been committed and perpetrators remain at large, it may be "essential for the [police] swiftly to determine whether they were on the right track." *Simmons v. United States*, 390 U.S. 377, 385 (1968).

In this case, police confronted no exigent circumstances. Collins provided his initial description of the suspect on the day of the crime, but police waited more than a month to present the photographic lineup to Collins; thus, there can be no argument that police needed an immediate identification from Collins either to exonerate Flowers or to facilitate his capture. There was no obvious excuse for not conducting a corporeal lineup, which is "normally more accurate" than a photographic array, *Simmons*, 390 U.S. at 385 n.6, and absolutely no excuse for not locating more than the 15 or 20 photographs from which the two six-person arrays were assembled. With a wider selection, it certainly would have been possible to select photographs that were similar to Flowers in age, complexion, and hairstyle. Likewise, there was no excuse for not obtaining and displaying photographs which were similar in format. Finally, there was no conceivable reason that Johnson had to respond to a tentative identification by asking if Collins knew Flowers; if any proof is needed that this was not necessary, it lies in the fact that Johnson said nothing at all in response to Collins' identification of Doyle Simpson minutes earlier.

3. The identification was completely unreliable.

"[R]eliability is the linchpin in determining the admissibility of identification testimony." *Manson*, 432 U.S. at 114.

> Once it is determined that the identification procedure was impermissibly suggestive, the Court must determine whether the identification was nonetheless reliable. *Neil v. Biggers*, 409 U.S. 188, 199-200 (1972). *Biggers* sets forth the test for determining whether identification testimony is reliable despite the substantial likelihood of misidentification. The five *Biggers* factors are "the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of

> attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation." *Roche [v. State]*, 913 So.2d [306] at 311[(Miss. 2005)] (quoting *Biggers*, 409 U.S. at 199-200).

Christmas v. State, 10 So.3d 413, 419 (Miss. 2009). Here, all five of the *Biggers*/*Christmas* factors weigh against the reliability of Collins' identification.

a. Opportunity to view.

"[T]he dangers for the suspect are particularly grave when the witness' opportunity for observation was insubstantial, and thus his susceptibility to suggestion the greatest." *Wade*, 388 U.S. at 229. Collins had a minimal opportunity to view the suspect because he was not in "close proximity," "within a few feet" of the suspect, but was instead inside a car driving past the parking lot in which the suspect stood. *Christmas*, 10 So.3d at 419. Moreover, he did not view the suspect for a "significant period of time" as did the witness in *Christmas*, who saw the defendant for approximately three hours, *id*., but instead, by his own description, merely caught a glimpse of the suspect. The trial court justified its decision in part on the basis that Collins "not only viewed him once; he rounded the corner and viewed him twice," but Collins stated that he did not see either man's face at all on the second pass.

b. Degree of Attention.

Nor was Collins' degree of attention particularly keen. His attention was drawn by the man's gesturing, but nothing violent was occurring, and Collins did not suspect a crime. *Compare Biggers*, 409 U.S. at 200 ("She was no casual observer, but rather the victim of one of the most personally humiliating of all crimes."). According to the trial court, "when [Collins] made the second trip around ... his degree of attention was certainly such ... that answers the degree of attention question." However, Collins' testimony established that he did not see the suspect's face *at all* on his second pass, and therefore his degree of attention during the second

pass has no significance. Any of other distinguishing physical characteristics of the man – *e.g.*, size, weight, or deportment – even if observed on this pass would be irrelevant because the photo array made reference to such features impossible.

c. Time between crime and identification.

Police allowed 39 days to lapse between the crime and the identification, but the trial court said, "it [was not] a factor in this particular case." This delay is comparable to that in *Christmas*, where this Court determined that a 43-day lapse of time between the crime and the identification "weighed in favor of the defendant." *Christmas*, 10 So.3d at 419. Moreover, the identification at issue in *Christmas* was made by a healthy fourteen year old who viewed the suspect for a "significant period of time," *id.* at 416; the passage of time was likely to have an even more pronounced effect here given Collins' poor health, and his shorter opportunity to observe.

d. Initial description.

This Court corrected the *Christmas* trial court's characterization of the witness' description as accurate, pointing out that even though the defendant was, in fact, "tall, this very limited description is undeniably vague." *Id*. at 420. Like the witness in *Christmas*, Collins used only one physical characteristic to describe the person he saw – complexion. As this Court noted in *Christmas*, reliance on one characteristic is very different than the thorough description approved in *Biggers*, 409 U.S. at 200 ("[The] description to the police, which included the assailant's approximate age, height, weight, complexion, skin texture, build, and voice, might not have satisfied Proust but was more than ordinarily thorough."). Moreover, here the one characteristic cited in the description was *inaccurate*! When Collins saw Flowers at trial, despite the suggestiveness of seeing him in the defendant's chair, he could not positively identify him,

complaining that the man he saw "looked a little darker." Tr. 47.

e. Level of certainty during identification.

The witness in *Christmas* made his identification without hesitation. Here, however, Collins identified Flowers with certainty only *after* Johnson suggested he had made the correct choice by asking, "Do you know Curtis Flowers?" During the identification procedure, Collins made two tenuous identifications, one during each lineup. He first indicated that a person in the first lineup (Doyle Simpson) looked like the person he saw and had the same complexion.[59] When he saw the second array, he provided another equivocal identification, saying, "I believe that's him," contrary to the trial court's determination that he "immediately picked out [Flowers] when he saw the second lineup." Indeed, the only substantive difference between the identifications made during the first and second lineup came after Johnson's question.[60] Finally, even the unequivocality prompted by Johnson's question was fleeting; by the time of trial, Collins was unable to say with certainty that Flowers was the man he saw outside of Tardy's the morning of the murders. Thus, Collins' level of certainty, along with all of the other *Biggers* factors, weighs against finding his identification sufficiently reliable to outweigh the unnecessarily suggestive procedures.

D. Conclusion.

The photographic array which resulted in Collins' identification of Flowers as the man he saw outside Tardy Furniture Company was extraordinarily suggestive, and no exigent circumstances justified or explained this suggestiveness. Because Collins' identification also

[59]When discussing the *Biggers* factors, the trial court found irrelevant whether Collins "had any prior identification," but this was also clearly error.

[60]Collins' clear lack of certainty during the first trial provides further evidence that he also lacked certainty when he made his identification during the second array. Without an officer to confirm his choice, Collins could not provide an unequivocal identification because Flowers "looked a little darker" than the person he saw on the day of murders.

lacked every single indicator of reliability articulated by the Supreme Court, its admission violated the due process clause.

IV. THE TRIAL COURT'S EXCLUSION OF EXPERT TESTIMONY EXPLAINING THE DEFICIENCIES IN LAW ENFORCEMENT'S INVESTIGATION, AND THE DEFECTS IN THE COMPOSITION OF THE PHOTO LINEUPS SHOWN TO PORKY COLLINS, VIOLATED MISSISSIPPI LAW AND FLOWERS' RIGHT TO PRESENT A DEFENSE AS GUARANTEED BY THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

A. Expert testimony of Chief Robert Johnson on standard police practices and the purposes behind them

As reflected throughout the trial record, and elsewhere in this brief, the quality, comprehensiveness, and reliability of law enforcement's investigation of the furniture store murders was a substantial and hotly contested issue at trial. Notwithstanding admissions by witness after witness that the statements – and in some instances even the *names* – of important witnesses had not been documented in any way, the prosecution characterized the investigation as having been "huge in both its scope and … the time and the energy devoted to it." Tr. 3187. The prosecutor further maintained that he had never tried "a case that had so much evidence" or "so much investigation," Tr. 3241, and lauded law enforcement for having done "everything in the world," and having done "an excellent job of it," Tr. 3241; 3242. In fact, the prosecution even went so far as to mock the suggestion that a homicide investigation should be documented, likening the defense's contentions to that effect to criticizing the police for not "check[ing] to see if Elvis was still in his grave" in order to determine whether he, rather than Flowers, was the guilty party. Tr. 3242.

While the prosecution made light of the lack of documentation, the defense sought to establish that there were real, significant, and consequential holes in what law enforcement had assembled, and that those holes made it impossible to be confident in the conduct or outcome of the investigation. There were two prongs to the strategy. The first was to utilize cross-

examination of prosecution witnesses who had been at the center of the investigation to demonstrate how little had actually been contemporaneously recorded. *See*, *e.g.*, Tr. 1850-51 (Winona Police Chief Hargrove), 2116 -18 (Montgomery County Sheriff Thornburg), 2530-36 (MHP Investigator Jack Matthews). The second was to use the foundation laid through admissions by the State's witnesses, as well as evidence adduced from other law enforcement investigators called by the defense, *see, e.g.*, Tr. 2872-2977 (DA Investigator John Johnson), as a basis for expert testimony explaining both standard investigation practices, and the special considerations applicable to the conduct of a photo lineup. From this, defense counsel could have supplied the jury with an evidentiary basis for concluding not only that law enforcement's investigative efforts appeared substandard, but also that this deviation from settled practice is known to adversely affect the accuracy and completeness of a criminal investigation. As described below, however, the defense was prevented from carrying out this strategy when the trial court excluded the testimony of its expert witness.

1. The proffer of defense expert Robert Johnson

Defense counsel tendered retired police chief Robert Johnson as an expert witness in the fields of law enforcement, police practices, consulting, investigation, administration, communication, dispatching and training, with qualifications consisting of over "40 years of experience in the criminal justice field." Tr. 3051. Johnson was also the recipient of "one of the [police] department's highest awards for a homicide investigation," in recognition of his contributions to the field of criminal investigation. Tr. 3053. During his extensive career, Johnson "performed every role and responsibility and held just about every position in a police department, including a detective, sergeant, lieutenant, captain, deputy chief and police chief." Tr. 3051. In addition to holding a number of leadership positions within the police department,

Johnson also "attended hundreds of schools and seminars and conferences related to police work in general and more specific courses related to investigations and things of that nature." Tr. 3050- 3052. As Chief of Police in both Jackson, Mississippi, and Jackson, Michigan, Johnson Given was "directly involved in reviewing every homicide that occurred in the city of Jackson," including the "activities that surrounded the investigation of those homicides." Tr. 3053. Drawing on his education, training, and experience, much of Johnson's proffered testimony focused on generally accepted practices and procedures in police investigations.

While Johnson was prepared to testify that the police investigation that followed the Tardy Furniture Store murders was deficient in many respects, defense counsel proposed to focus the testimony on the "protocols and procedures … that should occur in any [police] investigation." Tr. 3059. The purpose of this approach was to avoid merely rehashing the investigative errors brought out on cross-examination of the State's witnesses, and to instead provide the jury with an accurate yardstick by which to measure the investigation that had been done, and to use that assessment when analyzing the reliability of the prosecution's case. *See, e.g.*, Tr. 3077.

In keeping with that approach, Johnson highlighted the investigation's major flaws – a lack of leadership and proper documentation, and potential spoliation of crime scene evidence. *See* Tr. 3068. He noted that no one had taken (or been assigned) direct responsibility for the investigation, and that this resulted in law enforcement's failure to generate or maintain anything resembling a complete or centralized case file. *See* Tr. 3068 (lack of leadership and centralized management led to "lack of communication and reporting" between all parties involved in investigation); Tr. 3072, 3069 (noting lack of lack investigative documentation or detailed crime scene log); Tr. 3069 (explaining that only report generated in connection with investigation was

"kept by the crime scene investigator who arrived at the scene, you know, hours later"); Tr. 3072 (observing that "a recurring theme throughout this [investigation] is the lack of reports, not just submission forms but the lack of reports giving background to what occurred in this investigation. That confuses everything."). He also explained that, failing to investigate other potential suspects, law enforcement may have overlooked key pieces of evidence. Tr. 3072. According Johnson, the investigation was "incomplete and not yet adequate to have fully eliminated all possible suspects or gained all possible information." Tr. 3088.

Johnson was also prepared to testify that the photo array provided to Porky Collins was unduly suggestive, both because of the types of photos used, and because of the physical characteristics of the filler photos.[61] Tr. 3086; 3085. Johnson further explained that investigators failed to conduct the standard interview with Collins prior to administering the photo array, Tr. 3084, and that this left them without information essential for "put[ting] the photo array together," Tr. 3080.

2. The State's motion to exclude Johnson's testimony

Despite his credentials as an expert witness, the State moved to exclude Johnson's testimony on the ground that his opinion was "based on his own speculation as to what could have been different." Tr. 3108. The State argued that "the specifics of conduct" of the investigating officers and "whether they wrote a report or not, [wa]s not subject to attack by an expert," Tr. 3110, and that Johnson's "theories" about how and why the investigation went wrong could not be "empirically tested," and were therefore "not reliable under the *Daubert* standard," Tr. 3108; 3110. The State also contended that allowing the proffered testimony would violate "Rule 608 for impermissibly bolstering or attacking the credibility of witnesses." Tr.

[61] The unreliability of the Collins identification is addressed in Arguments III and IV.B., *supra.*

3110; 3111. Finally, the prosecution asserted that Johnson's testimony would "invad[e] seriously on the province of the jury." Tr. 3110

Defense counsel countered the State's objections by arguing that Johnson's "overall opinions" were "not an improper invasion of the province of the jury," and that such testimony did in fact fall "within the realm of a proper *Daubert* qualified expert testimony." Tr. 3116. In fact, Johnson himself had been qualified as an expert in "police procedures, [and as] a law enforcement security and safety expert" in both state and federal court. Tr. 3066; 3066.

The trial court sided with the State and declared Johnson's proffered testimony inadmissible. In so ruling, the court held that Johnson's testimony "fail[ed] to meet the reliability standards required under Rule 702," Tr. 3122, R.E. Tab 6k, and that, "even if the proper testimony met the reliability standards of Rule 702 it would be cumulative in nature and would not assist the jury." Tr. 3123. Finally, the Court maintained that "expert testimony of the photo line-up would be cumulative in nature and would be of no assistance to the jury." Tr. 3123.

3. Relevant legal principles

Modeled after the Federal Rule of Evidence, Mississippi Rule of Evidence 702 allows trial judges to admit expert testimony "if scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue." Miss. R. Evid. 702 (2003). *Miss. Transp. Comm'n. v. McLemore*, 863 So.2d 31 (Miss. 2003). To testify under this provision, the witness must be "qualified as an expert by knowledge, skill, experience, training, or education," and his or her testimony must be: (1) based on sufficient facts or data; (2) a product of reliable principles and methods; and (3) the expert witness must have applied such principles and methods reliably to the facts of the case. *Id.*

The reliability requirements for expert testimony codified in Mississippi Rule of

Evidence 702 are drawn from *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 580 (1993) (holding that trial judge "must make a preliminary assessment of whether the testimony's underlying reasoning or methodology is scientifically valid and properly can be applied to the facts at issue"), and *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 141 (1999), which required the Court to decide how *Daubert* applies to the testimony of engineers and other experts who are not scientists..

In *Kumho Tire*, the Court held that "a trial court may consider one or more of the more specific factors that *Daubert* mentioned when doing so will help determine that testimony's reliability." *Id*. However, even before *Kumho Tire*, *Daubert* itself "made clear that its list of factors was meant to be helpful, not definitive. Indeed, those factors do not necessarily apply even in every instance in which the reliability of scientific testimony is challenged." *Id*. at 151. Furthermore, the Court emphasized that "the test of reliability is 'flexible' and [that] *Daubert*'s list of specific factors neither necessarily nor exclusively appl[y] to all experts or in every case." *Id*. at 141. Additionally, in *Kumho Tire* the Court also recognized that any knowledge – whether scientific, technical, or otherwise specialized – "might become the subject of expert testimony." *Id*. at 147; *see also id.* at 147-48 (explaining that *Daubert* referred to "scientific knowledge" only "because that [wa]s the nature of the expertise" at issue).

With regard to the value and utility of expert testimony, the Court observed that "experts of all kinds tie observations to conclusions through the use of what Judge Learned Hand called 'general truths derived from … specialized experience.'" *Id*. at 148 (quoting Hand, *Historical and Practical Considerations Regarding Expert Testimony*, 15 Harv. L.Rev. 40, 54 (1901)); *see also id.* at 149 (recognizing that the subject matter of "expert[] testimony will often rest 'upon an experience confessedly foreign in kind to [the jury's] own.'" Importantly, the Court made clear

that an expert witness' testimony can be admissible even when it "is based purely on experience." *Id*. at 151. At bottom, so long as the trial court retains the ability to question whether the expert's "preparation is of a kind that others in the field would recognize as acceptable," that testimony is admissible, i*d*. at 151, and may include "opinions, including those that are not based on firsthand knowledge or observation," *id.* at 148. This Court's own cases are in accord. *See, e.g.*, *Brooks v. State*, 748 So.2d 736, 739 (Miss. 1999) (holding that expert odontology testimony was admissible even though "there are no established guidelines in evaluating bite-mark evidence"); *Worthy v. McNair*, 37 So.3d 609, 614 (Miss. 2010) (holding that Mississippi Rules of Evidence "grant wide latitude for experts to give opinions even when opinions are not based on the expert's firsthand knowledge or observations").

This Court explored the parameters of "reliability" articulated in both *Daubert* and *Kumho Tire* in *Edmonds v. State*, 955 So.2d 787 (Miss. 2007). There the Court explained that "many factors will bear on the inquiry" of reliability, and that the concept of reliability does not adhere to a "definitive checklist or test" in making a determination of reliability. *Id*. at 801. Instead, "learned trial judges will properly determine, on a case-by-case basis, whether an expert may testify to certain matters if the proper procedures are followed by the parties seeking admission of such expert's testimony." *Brooks, supra*.

The use of expert testimony regarding proper police practices is now regularly entertained by courts. The Mississippi Court of Appeals has held that various areas of police investigative work meet the requirement of reliability. *See Alqasim v. Capitol City Hotel Investors*, 989 So.2d 488, 493 (Miss. Ct. App. 2008) (allowing into evidence an affidavit by a security expert and former police commander that made "general statements and broad conclusions"). Furthermore, in *Edmonds*, this Court held that it would "allow a great deal of

flexibility in the standard" for the testimony of both child sex abuse experts and odontologists. *Edmonds*, 955 So.2d at 802; *see also Worthy* , 37 So.3d at 614 (citing *Poole v. Avara*, 908 So.2d 716, 722 (Miss. 2005)) (noting the "liberal thrust of the rules" post-*Daubert*, and observing that the "general approach" of the modern-day rules is to "relax the traditional barriers to opinion testimony").

Expert testimony concerning eyewitness identification procedures has also been permitted under the assumption that the average juror is likely to be unfamiliar with both the protocol for composing a photo lineup, and the dangers of suggestion inherent in photo lineups. *See People v. Kurylczyk*, 505 N.W.2d 538, 531-32 (Mich. 1993) (allowing the defense to present expert testimony regarding the nature of eyewitness identifications and the likelihood of erroneous identification). Furthermore, various agencies have established specific guidelines for composing photo lineups.[62]

While trial courts are vested with discretion to apply the rules of admissibility, the exercise of that discretion "must also insure the constitutional right of the accused to present a full defense in his or her case." *Ross v. State*, 954 So.2d 968, 996 (Miss. 2007); *see also*, *e.g.*, *Holmes v. South Carolina*, 547 U.S. 319, 324 (2006) (quoting *Crane v. Kentucky*, 476 U.S. 683, 690 (1986)) ("Whether rooted directly in the Due Process Clause of the Fourteenth Amendment or in the Compulsory Process or Confrontation clauses of the Sixth Amendment, the Constitution guarantees criminal defendants a meaningful opportunity to present a complete defense."). Moreover, "the trial court's role as gatekeeper is not intended as a replacement for the adversary system." *Mississippi Transp. Com'n v. McLemore*, 863 So.2d 31, 39 (Miss. 2003. Thus, while

[62]*See also Reevaluating Lineups: Why Witnesses Make Mistakes And How to Reduce The Chance of a Misidentification*, http://www.innocenceproject.org/docs/Eyewitness_ID_ Report.pdf; *Police Lineups: Making Eyewitness Identification More Reliable*, http://www.nij.gov/journals/258/police-lineups.html.

there is no formula that regiments the elements necessary for a full defense, this Court has expressed a preference against outright exclusion, and in favor of "vigorous cross-examination, presentations of contrary evidence, and careful instruction on the burden of proof [as] the traditional and appropriate means of attacking shaky but admissible evidence." *McLemore*, 863 So.2d at 36.

4. Argument

In excluding Johnson's testimony in this case, the trial court perceived a need to "make…determination[s] as to whether the [proffered] testimony is reliable." Tr. 3120:7-9. It then set forth the factors to be considered in that assessment:

> The factors include whether the theory or technique can be and has been tested, whether it has been the subject of peer review and publication, whether with respect to a particular technique there is a high known or potential rate of error, whether there are standards controlling the techniques operation and whether the theory or technique enjoys general acceptance within a relevant scientific community.

Tr. 3120:7-17. Although these factors are certainly instructive, they are by no means the *sine qua non* of reliable expert testimony. In fact, this Court has allowed "a great deal of flexibility" in the subject matter of expert testimony, as evidenced by *Edmonds*, *supra*, which upheld admission of testimony from experts on child sex abuse and odontology, the latter of which had never even been required to meet any of the *Daubert* factors. Therefore, according to well-established precedent from the Supreme Court and this Court, the prosecution's argument that "Chief Johnson's theories cannot be empirically tested," was insufficient to justify exclusion. Tr. 3110: 17-18.[63]

[63]The trial court also relied, in part on *Ross v. State*, 954 So.2d 968 (Miss. 2007). There, the trial court excluded the testimony of a defense expert on police investigatory techniques on the ground that the expert's "proffer failed to establish the reliability of his testimony under *Daubert* and *McLemore*." *Id.* at 997. As defense counsel explained, however, *Ross* is easily distinguishable from this case since there,

The trial court further criticized the defense proffer on the ground that, although Johnson "stated that there were commonly accepted investigative standards throughout most of the country … he never articulated what they [we]re." Tr.3121:6-8. The trial transcript shows otherwise. First, Johnson pointed to the existence of investigative practices and procedures that have been developed by the U.S. Justice Department and National Institute of Justice, Tr. 3060: 27-29; 3062: 10-11, and explained that although these procedures "may not be categorized," they are both "developed on the basis of practical experience of officers doing … investigative work," and are "pretty much practiced across the country." Tr. 3062:24:-27; 21-23. That should have been sufficient under *Kumho Tire*, which authorizes expert testimony "based purely on experience" so long as the subject matter of the testimony rests "upon an experience confessedly foreign in kind" to the finder of fact's own experience. *Kumho Tire*, 526 U.S. at 149, 151. The matters about which Johnson proposed to testify were plainly "beyond the common knowledge of a random adult," and his testimony would have assisted the finder of fact in contextualizing the investigative deficiencies brought out during cross-examination of the State's witnesses, and in evaluating the quality of the homicide investigation at issue. Tr. 3120:19-24.

By refusing to admit Johnson's testimony on the grounds described above, the trial court both misapplied the Rules of Evidence and violated Flowers' right to present a defense. The testimony was plainly admissible under Rule 702 and this Court's cases, and the information it was intended to convey constituted an essential, non-cumulative component of the defense case at trial. Without the proof of standard police practices and the purposes behind them, defense counsel had no record-based answer for the prosecution's grandiose praise of the shoddy investigation conducted by law enforcement. Likewise, having been provided with nothing

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unlike here, there was "no testimony establishing … what the discipline he was going to testify about was." Tr. 3112: 3-5.

against which to measure the prosecution's claims, the jury was poorly equipped to assess the quality of the investigative work for itself. In a case so heavily dependent upon the fading memories and questionable judgments of police investigators, the omission of such valuable and probative material was necessarily prejudicial.

B. Expert Testimony of Dr. Jeffrey Neuschatz on factors affecting accuracy of eyewitness identifications

For similar reasons, it was reversible error for the trial court to decline to permit the defendant to elicit expert testimony from University of Alabama-Huntsville psychology professor Dr. Jeffrey Neuschatz, a Ph.D. in cognitive psychology. C.P. 1598. Dr. Neuschatz is recognized in his profession as a leading published scholar and researcher on the cognitive issues affecting the reliability of eyewitness identifications. *See* Brief of *Amicus Curiae* Mississippi Psychological Association at 2. Corrothers v. State, Mississippi Supreme Court No. 2010-DP-00410 (filed by permission of the Court by Orders of April 5, 2013 and April 23, 2013)). At the time his testimony was proffered, Dr. Neuschatz been qualified as an expert on eyewitness memory in the federal courts, the military courts, and the courts of four other states. C.P. 1588, 1599-1608. His testimony would have addressed factors relevant to the jury's assessment of the reliability of the eyewitness testimony of, particularly, Porky Collins. Flowers sought by way of motion in limine to have the trial court accept Dr. Neuschatz as an expert witness on these matters. C.P. 1371-98, 1582-1611. The trial court declined to do so. T. 303-05, R.E. Tab 6c, ruling renewed T. 463, R.E. Tab 6i.[64]

[64] In November 2007, Flowers first sought, by way of motion supported by the affidavit of Dr. Neuschatz setting forth his credentials, the basis for the science on which he would be relying, and a summary of the areas in which he would testify that were relevant in the instant matter, C.P. 1371-98, to have the trial court (then being presided over by Hon. Clarence E. Morgan, III) permit Dr. Neuschatz to testify as an expert on eyewitness identification , When the State elected not to seek the death penalty at that time, the motion was withdrawn. After the November 2007 trial ended in a hung jury mistrial, and the case was reassigned to Hon. Joseph H. Loper, Jr., the State reinstated the death penalty in the subsequent trial held

Citing relevant scholarship, Dr. Neuschatz's affidavit proffer set forth a general explanation of the discipline and the scientific research undergirding the study of the cognitive psychological factors that could affect the accuracy of eyewitness identifications, including the exposure time and circumstances, whether the identification was cross-racial, and particularly where there has been photo identification procedures conducted without safeguards generally recognized as law enforcement best practices. C.P. 1589-93.

Dr. Neuschatz then proffered under oath his "Analysis of the Identification of Curtis Flowers." C.P. 1494-96. He discussed, and based on the facts of record offered his expert opinion regarding the adverse effect the environment, limited view and short time of exposure in the initial viewing, likely had on the accuracy of the identification by Porky Collins. T. 1595-96. He also discussed, and based on the facts of record offered his opinion regarding the adverse effects on accuracy the failures by police to follow best practice photo identification procedures that would have had on both Collins and Snow photo lineup and subsequent in-court identifications, and the conditions that would tend to rendered Collins' testimony, at least, unduly influenced by what was learned from the improper photo identification procedures and not from actual memory. C.P. 1594-96.

Finally, Dr. Neuschatz also specifically addressed the scientific scholarship concerning jurors' often mistaken perceptions regarding the power and accuracy of eyewitness identification testimony and the ineffectiveness of the traditional courtroom methods of instructing jurors,

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in September 2008. Flowers renewed his motion at that time. C.P. 1582-1611. It was heard on the merits and denied by Judge Loper. Tr. 293-305. After the September 2008 proceedings also resulted in a hung jury mistrial, Flowers once again renewed his request to have Dr. Neuschatz testify as an expert in eyewitness identification. C.P. 1928-31. That was called up prior to the June 2010 trial, and the trial court adopted its September 2008 denial. C.P. 1928-31, Tr. 463-66.

including cross-examination, judicial instructions, and attorney statements regarding the facts. C.P. 1596.

The State offered no testimony or evidence disputing Dr. Neuschatz's credentials, or the reliability and scientific validity of the discipline and research upon which he was relying, or disputing any of the facts upon which Dr. Neuschatz based his testimony arising out of this professional credentials and the science he was employing. It made no legal challenge to the proposition that expert testimony on this point failed to meet the reliability side of the Rule 702 equation. Other than attempting to distinguish the instant matter from the legal principles relied upon by Flowers by "puffing" the imaginary reliability of its corroborating evidence of guilt, *see* Argument I, *supra.,* the State offered nothing to support its opposition to Dr. Neuschatz testifying as an expert, including making no challenge at all to Dr. Neuschatz's uncontradicted testimony, highly relevant to the relevance side of the Rule 702 equation. T. 296-300. This failure completely undercut the trial court's *only* grounds for finding the testimony inadmissible, i.e. that cross-examination, argument and judicial instruction were sufficient to ensure proper juror understanding of the accuracy and weight of eyewitness identification testimony under the circumstances of the case. T. 305.

Although the trial court correctly articulated the "relevance and reliability" standards established for the admission of expert testimony under Rule 702 it in made no findings that Dr. Neuschatz's credentials were in any way insufficient to meet either the threshold "expert by skill, experience, training or education" hurdle of Rule 702. Tr. 293-305. It made only generalized findings calling into the scientific discipline in which Dr. Neuschatz was skilled, experienced, trained and educated doubt under *Daubert.* Tr. 304. Those findings, however, are factually unsupported since Dr. Neuschatz' affidavit testimony addressing the validity of that science

under the *Daubert* factors is entirely uncontradicted. C.P. 1589-96. Hence, notwithstanding its conclusory statements, the trial court's findings of *Daubert* insufficiency are simply insufficient to support its conclusion that that this testimony failed to meet all required elements of the reliability side of Rule 702. As is discussed more fully below, this was also error as a matter of law.

The trial court's main emphasis was upon the relevance side of the Rule 702 equation, *i.e.* whether the expert testimony "will assist trier of fact to understand the evidence and determine the fact in issue." T. 300-01. [65] As is also discussed more fully below, light of both the actual proffered testimony of Dr. Neuschatz, and the abundant scholarly and legal authority supporting the admissibility of such testimony in general, the trial court got this wrong as a matter of law as well. Its conclusion that the testimony was inadmissible was also, given the undisputed evidence of the affidavit proffer, an abuse of discretion. *See e.g. Fulgham v. State*, 46 So.3d 315, 335-36 (Miss. 2010) (reversing sentence); *Hubbard ex rel. Hubbard v. McDonald's Corp*., 41 So.3d 670, 678 (Miss. 2010) (granting interlocutory relief from exclusion of testimony from plaintiff's expert witness).

1. The relevant scientific research, and developing law on eyewitness identification testimony

In 1967, the United States Supreme Court recognized that "the vagaries of eyewitness identification are well-known**;** the annals of criminal law are rife with instances of mistaken

[65] The trial courts' conclusion that eyewitness identification testimony was not admissible in the instant matter under Rule 702 was based only on the trial court's statement that it "not believe an expert on witness identification would assist the jury in the least bit in this case." T. 305. In arriving at that conclusion it relied upon two things: First, that the witnesses, particularly Mr. Collins, the one stranger witness, had been subjected to extensive cross examination and second that what Dr. Neuschatz would be testifying to "are such common sense things that that certainly wouldn't assist a jury in anyway." Tr. 305. This is the same rationale that the trial court subsequently used to prevent Chief Johnson from addressing the photo line-up as an expert in law enforcement practice. T. 3123.

identification." Wade v. United States, 388 U.S. 218, 228 (1967). During the intervening years, psychological research has confirmed the continuing empirical existence of mistaken eyewitness identification, and provided scientifically valid explanations for the deficiencies in human perception and memory that create those observed "vagaries" and mistaken identifications, as well. *See, e.g.*, Gary Wells & Elizabeth Loftus, *Eyewitness Memory for People and Events*, Chapter 25 in *Handbook of Psychology*, Volume 11, Forensic Psychology 617 at 620-29 (R.K. Otto and & I.B. Weiner, eds., 2013) (containing a comprehensive survey of the empirical studies of continuing misidentifications as well as of the experimental research conducted over the years on eyewitness memory and its effect on eyewitness identification testimony, with extensive bibliography). [66]

This body of research has, in turn, been relied upon by legal scholars and the courts in answering questions regarding identification testimony in general and the admissibility of expert testimony as an aid to jurors understanding its strengths and limitations. Although this Court has not yet weighed in on this questions, it agrees that where it is facing a legal question of first impression, or a novel factual situation to which existing law must be applied, this Court has held that "the jurisprudence from other jurisdictions proves useful." *Ross v. State*, 954 So.2d 968, 1005 (Miss. 2007).[67]

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[66] *See, similarly*, Elizabeth F. Loftus, *Eyewitness Testimony* (1979), Catharine Easterly, & Elizabeth F. Loftus, *Beyond the Ken? Testing Jurors' Understanding of Eyewitness Reliability Evidence*, 46 Jurimetrics 177, 188-190 (Winter 2006); Steven Penrod, Elizabeth Loftus & John Winkler, *The Reliability of Eyewitness Testimony: A Psychological Perspective*, in *The Psychology of the Courtroom* 119, 154-55 (Norbert L. Kerr & Robert M. Bray eds., 1982); K. Deffenbacher & E. Loftus, *Do Jurors Share a Common Understanding Concerning Eyewitness Behavior*?, 6 Law and Human Behavior 15 (1982), *See also* Gary L. Wells et al., *Eyewitness Evidence: Improving Its Probative Value*, 7 Psychol. Sci. Pub. Int. 45, 47–49 (2006) (containing history of psychological research of eyewitness testimony).

[67] The only Mississippi appellate case on this point is a court of appeals decision from before the 2003 Rule 702 amendments. *White v. State*, 847 So.2d 886, 893 (Miss. Ct. App. 2002). It relies on the now-discredited *Frye* standards for admission of expert testimony, it is thus of limited usefulness here.

That jurisprudence overwhelmingly supports the admission of the evidence proposed here. *See, e.g., State v. Copeland*, 226 S.W.3d 287, 298-304 (Tenn. 2007) (relying on the "literally hundreds of articles in scholarly, legal, and scientific journals on the subject of eyewitness testimony" to overrule prior precedent presumptively excluding such testimony and reversing capital murder conviction where eyewitness expert psychologist testimony was excluded by trial court); *Tillman v. State*, 354 S.W. 3d 425, 435-443 (Tx.Crim.App. 2011) (reversing intermediate appellate court's affirmance of conviction, and finding abuse of discretion by trial court in excluding testimony by expert psychologist under Texas evidentiary rule identical to Rule 702), S*tate v. Henderson*, 27 A.3d 872 (N.J. 2011) (applying principles to evaluating photo-identification procedures for undue suggestiveness and their possible taint on in- and out-of-court suspect identification by eyewitnesses, with extensive discussion of the scientific research and literature cited by Dr. Neuschatz in this Court), *State v. Clopten*, 223 P.3d 1103, 1109 (Utah, 2009) (explicitly repudiating any presumption against the admissibility of such testimony in light of, *inter alia*, the seminal Loftus research cited by Dr. Neuschatz in his proffered affidavit testimony. C.P. 1589). *See also United States v. Smithers*, 212 F.3d 306, 315 (6th Cir. 2000).

The United States Supreme Court has likewise recognized the scientific basis for, and the admissibility of, expert testimony to aid jurors in understanding and assessing the reliability of eyewitness identification evidence in the cases they are deciding, *Perry v. New Hampshire*, --- U.S. ----, ----, 132 S. Ct. 716, 729 (2012). In *Perry*, the Court relied on the fact that such testimony would be admissible as one of its bases for concluding that eyewitness identification conducted under suggestive circumstances not created by police could be admitted over due process objections of the defendant.

> In appropriate cases . . . defendants [can] present expert testimony on the hazards of eyewitness identification evidence. *See, e.g., State v. Clopten*, 2009 UT 84, A33, 223 P.3d 1103, 1112 ("We expect . . . that in cases involving eyewitness identification of strangers or near-strangers, trial courts will *routinely* admit expert testimony [on the dangers of such evidence].").

132 S. Ct at 729 (emphasis supplied). As the *Perry* Court notes, where the police have themselves participated in creating the suggestive circumstances, as the photo identification process did in the instant matter, the due process clause requires safeguards in addition to this one, as well. *Id.* at 720 (citing *Simmons v. United States*, 390 U.S. 377, 384 (1968)).

The extensive psychological and social scientific research that these and other courts have come to agree is properly admitted where appropriate has focused on two things: First, it addresses the psychological and memory processes by which potential witnesses can be expected to perceive and remember who they have seen. Second, it has looked at the ways in which jurors receive and understand what they are hearing from these witnesses.[68]

The first branch of this work, the research into witness cognitive and memory issues relating to eyewitness identification has established beyond dispute that even where eyewitnesses have no conscious intent, motivation or desire to misidentify the perpetrator of a crime they have witnessed, there are known circumstances that tend to increase the likelihood of exactly such misidentification, many of which exist in the current matter.

At the threshold, the brevity of his exposure and other conditions surrounding Porky

[68]The first branch of this research is, generally, the basis for the relevant substantive information that expert testimony in this field can impart to a jury that is faced with a case where eyewitness identification testimony affected by these cognitive processes affecting accuracy is the primary proof of the identity of the perpetrator. *See Clopten,* 223 P.3d at 1117, *Copeland*, 226 S.W. 3d at 303. The second branch of this research establishes why, contrary to the assumptions of the trial court in the instant matter, jurors do not, in fact, have the equipment to adequately assess the weight and reliability of eyewitness testimony without expert assistance, that it is information that is not otherwise within the cognizance of the lay person, or can supplement lay understanding, and is therefore both relevant and admissible. *Clopten*, 223 P.3d at 1113, *Tillman,* 354 S.W. 3d at 441-42.

Collins at the time he saw whomever he saw near Tardy's that morning were not at all conducive to actually remembering and identifying over three weeks later whom he saw, and actually contained within them conditions that might cause him to affirmatively falsely transfer a bystander's identity to that of a possible wrongdoer. C.P 1591, 1595-96. *See State v. Copeland*, 226 S.W.3d at 302. *See* also Argument I, *supra.* Also the fact that this was a cross-racial identification substantially increases the likelihood of making a mistaken identification because it has been established by the research that people cannot specifically identify people who are of another race with as much accuracy as they identify people of their own race. C.P. 1592-93, 1596.[69]

Most importantly, however, Collins (as well as Katherine Snow) was subjected to photo lineups that were conducted in ways that did not ameliorate suggestiveness, and which also almost certainly created affirmative suggestion, at least to Collins, who was otherwise unacquainted with Flowers, from either repeated exposure or post identification feedback from police. *See* Argument II, supra. [70] The failure to conduct the lineup in accordance with the recommended best practices created in light of the psychological research not only affected the reliability of the out-of-court identification, but also the reliability of the in-court identification

[69] The scientific and legal scholarship on the unreliability of cross-racial identification is well established and not in substantial dispute in the profession. *See, e.g.*, Peter J. Cohen, *How Shall They Be Known? Daubert v. Merrell Dow Pharmaceuticals and Eyewitness Identification*, 16 Pace L.Rev. 237, 244, n. 1 (1996);, Gary L. Wells & Elizabeth A. Olson, *Eyewitness Testimony*, 2003 Ann. Rev. Psychol. 277, 280-81; Stephanie J. Platz & Harmon M. Hosch, *Cross–Racial/Ethnic Eyewitness Identification: A Field Study*, 18 J. Applied Soc. Psychol. 972 (1988). *See also* Christian A. Meissner & John C. Brigham, *Thirty Years of Investigating the Own–Race Bias in Memory for Faces: A Meta–Analytic Review*, 7 *Psychol. Pub. Pol'y & Law* 3, 21 (2001) (meta-analysis of thirty-nine studies and nearly 5,000 identifications).

[70] *See also, e.g.* Roy S. Malpass et al., *Lineup Construction and Lineup Fairness*, chapter in 2 *The Handbook of Eyewitness Psychology: Memory for People*, at 155, 156 (R.C.L. Lindsay et al. eds., 2007), Kassin et al., *On the "General Acceptance" of Eyewitness Testimony Research: A New Survey of the Experts*, 56 Am. Psychologist 405, 407 (2001))

made by, at least, Collins as well. C.P. 194-95. *See, e.g.,* S*tate v. Henderson*, 27 A.3d at 878. [71]

The second branch of this work, the social science and psychological research over the past 30 years into juror perception and assessment of eyewitness testimony, is equally significant to this Court's analysis of the admissibility of Dr. Neuschatz's testimony here. This research has been as rigorous as that into the factors affecting the memory and perceptions of eyewitnesses, and has established through scientifically reproducible methods that lay people who are called upon to assess the reliability of eyewitness identification testimony "are generally unaware of the deficiencies in memory and cognition" that can affect that reliability. *Clopten*, 223 P.2d at 1108 (also noting that, as a consequence, juries often, though not always justifiably "give great weight to eyewitness identifications"). [72]

Because of this research, courts have expressly rejected conclusions by trial courts like the one on which the trial court's ruling in the instant case was based as an abuse of discretion and legal error. They have rejected the assumption, like that employed by the trial judge in the instant matter jurors' ability to observe eyewitness testimony in the courtroom in the crucible of cross-examination is sufficient to allow them to draw valid conclusions as to its reliability

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[71] In. *Henderson*, the New Jersey Court noted that this research was employed by the New Jersey Office of the Attorney General and the New Jersey Department of Law and Public Safety in 2001 when it created and adopted the state's *Attorney General Guidelines for Preparing and Conducting Photo and Live Lineup Identification Procedures* (2001) (hereafter "N.J. Attorney General Guidelines"). Texas has also moved in this direction. *See Tillman*, 354 S.W.3d at 442 (discussing the scientific literature, and noting that in response to the concerns it raised, "the Texas Legislature has recently passed a new statute to address the improvement and standardization of photograph and live lineup identification procedures. Tex.Code.Crim. Proc. art. 38.20 (enacted by Acts 82nd Leg., ch. 219 (H.B.215), § 1, effective September 1, 2011.").

[72]*See, e.g.*, Brian L. Cutler et al., *Juror Sensitivity to Eyewitness Identification Evidence*, 14 Law & Hum. Behav. 185, 190 (1990) (concluding that jurors were insensitive to many factors that influence eyewitness memory and give disproportionate weight to the confidence of the witness). *See also*, Loftus, *Eyewitness Testimony, supra*, at 9, 19; Easterly, & Loftus, *Beyond the Ken?, supra* at188-190; Roger B. Handberg, *Expert Testimony on Eyewitness Identification: A New Pair of Glasses for the Jury*, 32 Am.Crim. L.Rev. 1013 (1995); K. Deffenbacher & E. Loftus, *Do Jurors Share a Common Understanding Concerning Eyewitness Behavior*?, 6 Law and Human Behavior 15 (1982).

without expert assistance T. 305, 3123. *See, e.g., Clopten*, 223 P.3d at 1109 (concluding that the research clearly established that '[t]he most troubling dilemma regarding eyewitnesses stems from the possibility that an inaccurate identification may be just as convincing to a jury as an accurate one" and that therefore "juries will often benefit from assistance as they sort reliable testimony from unreliable testimony").

The Texas Court of Criminal Appeals decision in *Tillman* is also particularly useful on this point. It addressed this question in depth under their own *Daubert*-based criteria for admission of expert testimony. 354 S.W. 3d at 435-443 441. The *Tillman* court found it to be an abuse of discretion to conclude that testimony from a psychologist-expert on eyewitness identification would not "assist the trier of fact." *Id*. at 442. Instead, the *Tillman* court explained,

> a trial court need not exclude expert testimony when the general subject matter is within the comprehension of the average juror, as long as the witness has some specialized knowledge on the topic that will 'assist' the jury. Thus, the question under Rule 702 is not whether the jurors know something about this subject, but whether the expert can expand their understanding in a relevant way. . . .
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> . . . .Therefore, *while jurors might have their own notions about the reliability of eyewitness identification, that does not mean they would not be aided by the studies and findings of a trained psychologist on the issue.* Additional explanation of eyewitness-identification theories may help guide the jury in its understanding of the standards in the area.

Id. at 441-42 (citations and internal quotation marks omitted) (emphasis supplied).

Mississippi likewise recognizes that expert testimony under Rule 702 is not excludable simply because it embraces something within the province of the jury's understanding or decision-making.

> There is no invalidity to an expert witness's testimony even if the answer is in effect also a legal conclusion, if what underlies that conclusion is within the witness's specialized area of expertise. Another evidentiary rule provides that "[t]estimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." M.R.E. 704 The comment to the rule states that an "opinion is no longer

> objectionable solely on grounds that it 'invades the province of the jury.' " M.R.E. 704 cmt.

Mississippi Baptist Found., Inc. v. Estate of Matthews, 791 So.2d 213, 218 (Miss. 2001) (quoting *McBeath v. State*, 739 So.2d 451, 454 (Miss. Ct. App. 1999)). This particularly includes testimony giving the jury specialized information concerning indicia by which credibility of victim-witnesses may be assessed, and even an opinion on that credibility itself. *Branch v. State,* 998 So.2d 411, 415 (Miss. 2008) (finding that such testimony does not improperly invade the province of the jury as long as it does not offer an opinion of the *veracity* of a particular witness). *See also Hobgood v. State,* 926 So.2d 847, 854 (Miss. 2006).

Because the record is undisputed that Dr. Neuschatz's testimony meets all the criteria of Rule 702, and is reliable and relevant within the meaning of Mississippi's interpretation of that rule, it was error for the trial court to exclude it. *See, e.g., Clopten,* 223 P.3d at 1115-18; *Tillman,* 354 S.W. 3d at 429-30; *Copeland,* 226 S.W.3d at 302. Because that error clearly left the jury without the equipment to reliably assess the accuracy of the purported eyewitness identifications made of Flowers, and because the evidence supporting Flowers' guilt was otherwise at best flimsy, and at worst affirmatively unreliable, this requires reversal.

2. The exclusion of Neuschatz's testimony was prejudicial and requires reversal of the conviction

The same reasons as make the excluded testimony relevant, establish that the erroneous exclusion was prejudicial to Flowers, especially under the heightened scrutiny given cases where a conviction that has resulted in a death sentence is being reviewed. What may be harmless error in a case with less at stake becomes reversible error when the penalty is death. *Fulgham*, 46 So.3d at 322. *See also Flowers v. State*, 773 So.2d 309, 317 (Miss. 2000); *Walker v. State*, 913

So.2d at 216 (citing *Irving v. State*, 361 So.2d 1360, 1363 (Miss. 1978); *Fisher v. State*, 481 So.2d 203, 211 (Miss.1985).

There is no doubt that the State relied heavily on, particularly the Snow and Collins eyewitness identifications in obtaining its conviction of Flowers – there was simply no other significant or reliable evidence putting him anywhere near either the scene of the crime or the weapon purportedly used in it. *See,e.g.,* Arguments V, VIII, *infra*. Even if that evidence is not so insufficient to require reversal for sufficiency of the evidence, as is sought in Argument I, it clearly, does not rise to the "overwhelming evidence of guilt" that would permit finding the erroneous exclusion of the expert testimony harmless. *Brown v. State*, 995 So.2d 698, 704 (Miss. 2008). *See State v. Clopten*, 223 P.3d 1103, 1118 (Utah, 2009) ("Given the circumstances present in this case . . . trial court's decision to exclude eyewitness expert testimony was an abuse of discretion that cannot be considered harmless.") *See also Tillman v. State*, 354 S.W. 3d 425, 435-443 (Tx.Crim.App. 2011) (reversing where such evidence was determined to be relevant and reliable and therefore erroneously excluded).

When the heightened death penalty standards are applied, the failure to give the jury the full spectrum of evidence from which it could effectively weigh and assess the accuracy of the eyewitness identification is clearly not harmless. *Fulgham,* 46 So.3d at 337. *See also State v. Copeland,* 226 S.W.3d 287, 304 (Tenn. 2007) (stating, in capital murder prosecution in which death was sought "[u]nder these circumstances, we cannot say that the erroneous exclusion of [the expert eyewitness identification] testimony was harmless").

Further, Flowers' right to present the testimony and witnesses necessary to his defense is a fundamental constitutional right. *Holmes v. South Carolina* 547 U.S. 319 (2006); *Crane v. Kentucky,* 476 U.S. 683 (1986); *California v. Trombetta,* 467 U.S. 479, 485 (1984); *Chambers v.*

Mississippi, 410 U.S. 284, 302 (1973) (all recognizing the right to present a defense as "fundamental"). To the extent that the testimony of these witnesses also served as *de facto* victim impact evidence influencing the sentencing decision, the Eighth and Fourteenth Amendment protections accorded persons being considered for the ultimate penalty are also implicated. *Fulgham*, 46 So.3d at 337. *See also Wilcher v. State*, 697 So.2d 1123, 1133 (Miss.1997) (*citing Mills v. Maryland*, 486 U.S. 367, 375, (1988) (quoting *Eddings v. Oklahoma*, 455 U.S. 104, 117, (1982).

Hence, prejudice must be presumed unless the State can demonstrate the error to be harmless beyond a reasonable doubt. *Smith v. State*, 986 So.2d 290, 300 (Miss. 2008) (citing *Arizona v. Fulminante*, 499 U.S. 279, 296 (1991); *Delaware v. Van Arsdall*, 475 U.S. 673, 674, (1986) That certainly cannot be done in the instant circumstances.

For all of the foregoing reasons, Flowers respectfully submits that this Court should find the trial court's exclusion of expert testimony from Dr. Jeffery Neuschatz to been a prejudicial abuse of discretion and an error of law, and reverse Flowers conviction and death sentence, and remand this case for a new trial.

V. THE TRIAL COURT ERRED IN REFUSING TO EXCLUDE PROSECUTION TESTIMONY THAT A SINGLE PARTICLE OF GUNSHOT RESIDUE HAD BEEN DETECTED ON FLOWERS' HAND.

A. Relevant background.

During the early afternoon of July 16, 1996, Flowers was picked up at home by two law enforcement officers and transported to the Winona Police Department building in a Highway Patrol vehicle. C.P. 2625-26. Around 1:30 p.m. that afternoon – *i.e.*, some three hours after initial reports of the quadruple homicide at the furniture store – Jack Matthews of the Mississippi Highway Patrol and John Johnson of the District Attorney's office interviewed Flowers inside a room at the police department facility. Tr. 2482; 2541. Prior to that interview, both Matthews

and Johnson were present at the scene of the shootings, and Matthews had handled or assisted in the recovery of several items of evidence, including a spent shell casing. *See, e.g.*, C.P 2610-17; Tr. 2283; 2896. Before commencing the interview, Flowers signed an acknowledgement of rights form, presumably with a police department pen. Tr. 2485.

During the interview, Matthews asked Flowers to submit to a gunshot residue test, and Flowers agreed. Tr. 2489. Matthews, who had no training in the science or collection of gunshot residue, Tr. 2561– 2562then took samples from two locations on each of Flowers' hands. Tr.. 2490-91. Those samples were later analyzed by Joe Andrews of the Mississippi State Crime Laboratory, who located one unique particle of gunshot primer residue in the swab taken from Flowers' right hand. Tr. 2615.

On June 7, 2010, the defense filed a pretrial motion to exclude the gunshot residue evidence and related testimony pursuant to Miss. R. Evid. 403 and 702. *See* C.P. 2556-58; Tr. 2268-71. Defense counsel contended both that the lone particle of residue detected in this case could not support a scientifically valid inference that Flowers had fired a gun, such that opinion testimony to that effect would violate Rule 702, Tr. 2269-70, and that allowing the prosecution to present expert testimony to promote that dubious inference would create an impermissible risk of prejudice to Flowers under Rule 403, *see* Tr. 2270-71; 2278. Counsel also emphasized the corollary (and self-evident) point that promotion of the inference that Flowers had fired a gun was the only conceivable "purpose for which this [gunshot residue evidence] comes in." Tr. 2271.

The prosecution responded, in relevant part, by conceding that it could not be said "definitively that [Flowers] fired a gun," but argued that the evidence it proposed to present could be used to support a finding "that he was in the presence or the environment of gunshot

residue." Tr. 2273. Without suggesting how that proposition, standing alone, could be of any service to the State's lone-gunman theory, the prosecutor quickly assured the court that the modest presence-or-environment point was all the State "would show in this case." Tr. 2273: 11-14.

The trial court accepted the prosecution's arguments and assurances, and admitted the gunshot residue testimony. Tr. 2281. R.E. Tab 6j. The court explained that the expert testimony satisfied Rule 702 because it was being offered merely to support an inference that Flowers had been in the presence of gunshot residue. Tr. 2279: 20-23 ("[N]othing that I read that I have noted that had been admitted that said that anybody from the State is going to come in and make a statement that Mr. Flowers fired a firearm."); Tr. 2280: 5-6 ("The science is there that it is gunshot residue. How it got there is not a scientific question."). Additionally – but without elaboration – the court declared that there was no "403 problem," and that "there is probative evidence here." Tr. 2280. Finally, the trial court observed that the proposed testimony in this case compared favorably with *State v. Simmons*, in which admission of gunshot residue evidence was upheld, and speculated that, if this Court "had had any problems with gunshot residue, [it] would have recognized that as plain error" in one of Flowers' previous direct appeals. Tr. 2281.[73]

Later in the trial, the prosecution called Joe Andrews, who testified that he was "100 percent certain that there was gunshot residue on the back of the right hand of Curtis Flowers

[73] Flowers is at a bit of a loss to respond to the trial court's citation of "State v. Simmons" in this context. In his written motion to exclude gunshot residue testimony, Flowers had cited *Simmons v. State*, 722 So.2d 666, 673 (Miss.1998) in a quotation from *Edmonds v. State*, 955 So.2d 787, 792 (Miss. 2007) for the proposition that expert testimony if improperly admitted is particularly susceptible to causing undue prejudice due to the weight juries tend to give such testimony. That case, however, involves no gunshot residue testimony. That trial court's speculation that this Court's silence on this issue in its prior reversals of Flowers' convictions, in which this Court addressed only the issues upon which it was reversing ,is also perplexing. This Court has, in fact, not addressed the issue of the admissibility or reliability for Rule 403 purposes of gunshot residue testing recently, in any event. It has certainly not addressed the scientific and legal developments on the reliability of the inferences that can be drawn from such evidence reflected in Flowers' motion to exclude the testimony in his case. *See* C.P. 2561-92.

…." Tr. 2616. On cross-examination, however, Andrews acknowledged that the presence of gunshot residue on a person's hand was not necessarily indicative of that person having fired a gun, but could instead result from having "been in close proximity to a discharged weapon," or from having "handled an object that has gunshot residue on it." Tr. 2630. In keeping with that uncertainly, Andrews further admitted that the identification of "that single particle [from the Flowers sample] does not bring this jury … one step closer to knowing [how] that gunshot residue particle got on Mr. Flowers' hand[.]" Tr. 2630.

Despite the assurances given during argument on the defense's motion to exclude, the prosecution made all it could out of Andrews' equivocal testimony in closing:

> Let's talk about gunshot residue. Curtis had gunshot primer residue on his hand. That's a substance that is unique in the world. … And at the end of the [time] envelope where you might think the gunshot residue was all gone, what did Curtis have on his hand, top of his right hand, right there. What is that? That is the most likely place that you are going to find it if you find it at the end of three and a half to four hours. It's going to be right there. Gunshot residue.

Tr. 3200–01.

B. The gunshot residue testimony should have been excluded under Rule 403.

Rule 403 permits the exclusion of evidence whose "probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury …." Where prejudice ensues, reversal is required. *Stewart v. State,* 662 So. 2d 553, 562 (Miss. 1995). When the evidence at issue takes the form of expert testimony, which is well-recognized to be especially powerful and difficult for lay jurors to assess, a trial court must take extra care to ensure that the jury is not confused or misled into accepting an unsupported proposition which illegitimately benefits the sponsor of the evidence. *See, e.g., Foster v. State,* 508 So. 2d 1111, 1117 (Miss. 1987) (holding that Miss. R. Evid 403 required exclusion of knife claimed by the

prosecution to have been the murder weapon where only forensic testimony was that it "could have" caused the fatal wound), *Ford v. State*, 975 So.2d 859, 867 (Miss. 2008) (reaffirming continuing validity of Foster), *See also Edmonds v. State*, 955 So.2d 787, 792 (Miss. 2007) (reversing due to prejudicial effect of admission of testimony outside expert's expertise) . *See also, e.g.*, Jack B. Weinstein, *Rule 702 Of The Federal Rules Of Evidence Is Sound; It Should Not Be Amended*, 138 F.R.D. 631, 632 (1991).

The admission and use of the gunshot residue evidence in this case is a textbook illustration of the dangers Rule 403 was designed to avoid. To convict Flowers, the prosecution needed to convince the jury that he personally fired the weapon that killed four people inside the furniture store. The lone grain of residue reportedly found on his hand, however, supplied precisely nothing from which that proposition could be judged to be any more or less likely to be true. The prosecution admitted as much during its argument in opposition to the defense motion to suppress, and the prosecution's expert, Joe Andrews, made the same admission before the jury. Absent even that minimal measure or probative value, there simply was no legitimate use to which the gunshot residue testimony could be put.

As defense counsel had anticipated in her argument for exclusion, the real purpose for the prosecution's presentation of the gunshot residue evidence was to invite the jury to draw the very inference it was concededly unable to support, *i.e.*, that Flowers had personally fired the murder weapon. Despite the prosecution's assurances during argument on the exclusion motion, its closing argument left no doubt about the conclusions the jury was urged to draw. Using explicit references to the "unique" chemical makeup of gunshot residue, and the allegation that the grain was collected from "the top of [Flowers'] right hand," and emphasizing the swabs had been taken "at the end of the [time] envelope," the prosecutor unmistakably sought to mislead the

jurors into believing they had actually heard proof that Flowers had fired a gun.

To the extent the jury reached that conclusion, it necessarily did so, not on the basis of evidence with real probative value (there was none), but on the basis of confusion and distortion of testimony it never should have heard. The prejudice to Flowers was obvious, as the prosecution was permitted to argue the existence of proof of a fact crucial to its case when no such proof existed. That would be inappropriate in any case, but it was particularly unfair in this one given the weakness of the case against Flowers overall. Simply put, the trial court's decision to admit the gunshot residue evidence gave the prosecution a powerful windfall to which it had no legitimate claim, and did so in a case where every scrap of ostensibly incriminating information was important. That windfall was prohibited by Rule 403, and the trial court's failure to prevent it requires reversal of Flowers' convictions.

VI. THE JURY SELECTION PROCESS AND THE COMPOSITION OF THE VENIRE AND OF THE JURY SEATED VIOLATED FLOWERS'S FUNDAMENTAL CONSTITUTIONAL RIGHTS PROTECTED BY THE SIXTH AND FOURTEENTH AMENDMENT RIGHTS

A. The prosecutor violated the Equal Protection Clause of the Fourteenth Amendment when he struck five African American jurors after utilizing disparate questioning and citing pretextual reasons.

After this Court reversed *Flowers I* and *II* for other forms of prosecutorial misconduct, District Attorney Doug Evans' jury selection tactics compelled it to reverse Flowers' third conviction due to "as strong a *prima facie* case of racial discrimination as we have ever seen in the context of a *Batson* challenge." *Flowers III*, 947 So.2d at 935. From this Court's opinion in *Flowers III*, Evans should have learned the constitutional mandate of racial neutrality. He did not. I nstead, he learned the limited lesson he wanted to learn: how to avoid the most obvious markers of racial motivation. In Flowers' sixth trial, Evans accepted the first African American juror who survived for-cause challenges – and struck the remaining five. This time he asked

enough questions and gave enough reasons for each juror he struck that it is not *immediately* obvious which of his reasons were pretextual and the trial court, which declined to accord Flowers a recess and a copy of the daily transcript which the trial court was using, Tr. 1768-69, refused the *Batson* challenges as a consequence. Tr. 1756-1779, 3252-54, R.E. Tab 7b. [74] Closer examination, however, shows greater cunning, but the same purposeful discrimination on the basis of race. Evans' questioning of African American jurors was grossly disparate from his questioning of white jurors; Evans' responses to similar *voir dire* answers varied with the juror's race; and at several points Evans mischaracterized the responses of African American jurors. Taken with his history of blatant discrimination in this same case, this evidence compels the conclusion that Evans defied the ruling of this Court, as well as the commands of the Equal Protection Clause of the Fourteenth Amendment.

1. Relevant legal principles.

The Equal Protection Clause of the Fourteenth Amendment limits the State's privilege to strike individual jurors through peremptory challenges, compelling prosecutors to abjure racial discrimination in the exercise of the challenge. *Batson v. Kentucky*, 476 U.S. 79, 89 (1986). Each juror must be evaluated on his or her own merits, rather than upon stereotypes, and if even a single juror is struck based upon race, the Fourteenth Amendment is violated. *Id.* at 95.

In lodging a *Batson* claim, the party objecting to the peremptory strike "must first make a *prima facie* showing that race was the criteria for the exercise of the peremptory strike." *Flowers III*, 947 So.2d at 917 (citing *Batson*, 476 U.S. at 96-97). Once a *prima facie* case of discrimination under *Batson* has been established, the party exercising the peremptory challenge has the burden to articulate a race-neutral explanation for excluding that potential juror. *Flowers*

[74] The entire jury striking process, not merely the rulings on the *Batson* issue is set forth as Tab 7b to the Record Excerpts. Hereafter, specific references to those pages will be only to " Tr.".

III, 947 So.2d at 917 (citing *McFarland v. State*, 707 So.2d 166, 171 (Miss. 1997)). Finally, the trial court must determine whether the race neutral explanation "is merely a pretext for racial discrimination." *Flowers III*, 947 So.2d at 917.

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, 476 (2008) (citing *Miller-El v. Dretke*, 545 U.S. 231, 239 (2005) (*Miller-El II*); *Flowers III*, 947 So. 2d at 937 (quoting *Miller-El II*, 545 U.S. at 273 (Breyer, J., concurring)) ("Because racially-motivated jury selection is still prevalent twenty years after *Batson* was handed down and because this case evinces an effort by the State to exclude African-Americans from jury service, we agree that it is 'necessary to reconsider *Batson*'s test and the peremptory challenge system as a whole.'"). 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 also probative, *Miller-El II*, 545 U.S. at 263, as are "contrasting *voir dire* questions posed respectively to black and nonblack panel members, *id*. at 255, "the 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)).

2. Argument

"[T]the very integrity of the courts is jeopardized when a prosecutor's discrimination "invites cynicism respecting the jury's neutrality," and undermines public confidence in

adjudication. *Miller-El II*, 545 U.S. at 238 (citing *Georgia v. McCollum*, 505 U.S. 42, 49 (1992); *Edmonson v. Leesville Concrete Co*., 500 U.S. 614, 628, (1991); *Batson*, 476 U.S. at 87)). Consequently, for more than a century the Supreme Court "has reaffirmed that racial discrimination by the State in jury selection offends the Equal Protection Clause." *McCollum*, 505 U.S. at 44; *see also Strauder v. West Virginia*,100 U.S. 303, 308, 310 (1880)*; Norris v. Alabama*, 294 U.S. 587, 596 (1935); *Batson*, 476 U.S. at 84; *Powers, v. Ohio*, 499 U.S. 400, 404 (1991). This Court, too, has committed itself to eliminating racial discrimination in jury selection. *See, e.g., Flowers III*, *supra*; *Manning*, *supra*.

"The rub has been the practical difficulty of ferreting out discrimination in selections discretionary by nature, and choices subject to myriad legitimate influences, whatever the race of the individuals on the panel from which jurors are selected." *Miller-El II*, 545 U.S. at 238. That practical difficulty is great when discrimination is subconscious, but it is even greater when a prosecutor consciously attempts to avoid detection of his discriminatory motive. *Flowers III*, 947 So.2d at 937) (quoting *Howell v. State*, 860 So.2d 704, 766 (Miss.2003) (Graves, J., dissenting)) ("While the *Batson* test was developed to eradicate racially discriminatory practices in selecting a jury, prosecuting and defending attorneys alike have manipulated *Batson* to a point that in many instances the *voir dire* process has devolved into 'an exercise in finding race neutral reasons to justify racially motivated strikes.'"). Here, however, despite Evans' manipulation, a close examination of "all of the circumstances that bear upon the issue of racial animosity," *Snyder*, 552 U.S. at 476, unveils the same discriminatory purpose this Court identified and condemned in *Flowers III*.

a. The very proximate history of discrimination.

In *Miller-El II*, the Supreme Court noted "a final body of evidence that confirms th[e]

conclusion [of racial discrimination]" – the fact that prior "to the time this case was tried prosecutors in the Dallas County office had followed a specific policy of systematically excluding blacks from juries ...." 545 U.S. at 263. Here, it was not only the same office that had engaged in discrimination in jury selection, but the same prosecutor; it was not only the same prosecutor, but the very same case. In *Flowers III*, the State exercised all twelve of its peremptory challenges against African Americans. *Flowers III*, 947 So.2d at 916. This Court found two clear *Batson* violations, and in addition, three more highly suspicious strikes where, in each case, the State offered multiple reasons for the strikes, some of which were contradicted by the record, but also offered other reasons that Flowers could not rebut. *Flowers III*, 947 So.2d at 936 ("While there was sufficient evidence to uphold the individual strikes of Golden, Reed, and Alexander Robinson under a 'clearly erroneous' or 'against the overwhelming weight of the evidence' standard, these strikes are also suspect, as an undertone of disparate treatment exists in the State's *voir dire* of these individuals.").

b. The non-capital/capital jury "shuffle."

In *Miller-El II*, the Supreme Court noted that "the first clue to the prosecutors' intentions, distinct from the peremptory challenges themselves, is their resort during *voir dire* to a procedure known in Texas as the jury shuffle." 545 U.S. at 253. The jury shuffle is peculiar to Texas, but in this case, the prosecutor's decision to try Flowers VI as a capital case was an analogous "first clue to the prosecutor's intentions."

It would be obvious to any prosecutor that even with a racially neutral exercise of the peremptory challenge, a capital prosecution would produce a less diverse jury than would noncapital proceedings.[75] It would be equally obvious that a capital prosecution offers more

[75]It is no secret that African American support for the death penalty is much weaker than is support

opportunities to discriminate than does a noncapital prosecution, simply because *voir dire* is more extensive, and consequently, will produce more pretextual reasons for those seeking pretextual justifications. This is not to say that every decision to seek death provides evidence of racial discrimination. On the contrary, ordinarily it might be assumed that case characteristics channel the decision to seek death.

What is extraordinary here is that the prosecutor apparently made his decisions regarding seeking death on other factors. He proceeded *noncapitally* (after three capital trials) in Flowers IV, in which five black jurors served. Then, in the face of a hung jury in Flowers IV, apparently sharply split on racial lines, the State resumed proceeding capitally. In the next trial, Flowers V, perhaps still chastened by the Court's reversal in *Flowers III*, *see* Tr. 313, the prosecutor continued to be more race neutral than he had been in his exercise of peremptory strikes in the three earlier reversals, see C.P. 1674, 1685. In Flowers V, the State accepted four blacks for jury service (one as an alternate), one of whom served as foreman of the jury. 1 Supp. C.P. 1a-46a. That trial also resulted in a jury that hung on guilt, with the only identified holdout juror being one of the blacks selected. 1 Supp. Tr. s-18 – s-25, Tr. 453. Then came the instant matter, the sixth attempt at convicting Flowers. In this prosecution, the prosecutor again sought death and the jury was examined and qualified accordingly. However, when final jury selection began, he was still faced with an array that despite that death qualification and the prosecutor's

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among whites. *See*, *e.g.*, *Poll: Most Americans Support Death Penalty for Tsarnaev*, http://www.upi.com/Top_News/US/, 2013/05/01/Poll-Most-Americans-support-death-penalty-for-Tsarnaev/UPI-11971367413323, May 1, 2013 (recent poll showed 63 percent of white respondents but only 37 percent of African Americans asked said they support the death penalty for people convicted of murder); Pew Research Center, *Continued Majority Support for Death Penalty*, http://www.people-press.org/2012/01/06/continued-majority-support-for-death-penalty, Jan. 6, 2012 (68 percent of whites and 40 percent of African Americans support the death penalty). While some persons who oppose the death penalty would not be excludable under *Witherspoon v. Illinois*, 391 U.S. 510 (1968), it is predictable that the process of death qualification disproportionately diminishes potential African American jurors.

aggressive differential individual questioning still presented six blacks to him in its first 25 members. Tr. 1755-58., Appendix A to Brief at pp. 1-4. [76] The prosecutor then returned to his old ways of racially aggressive peremptory striking which had gotten him the all-, or nearly all-, white juries that had convicted Flowers in the past, C.P. 1674, 1685. Unsurprisingly, the result was the same: a nearly all-white jury that, when he also misrepresented the facts to them and had the advantage of other errors by the trial court, returned the conviction and sentence now on appeal.

Thus, this is not the usual situation where it was the aggravated or unaggravated nature of the crime that drove the decision to seek death. Rather, under these circumstances, the "shuffle" back to seeking death after initially electing not to do so after the third reversal is suggestive of racial motivation, and that the prosecutor's return to an aggressive practice of striking all or nearly all black jurors presented to it in this trial – which the trial court agreed was sufficient to make a prima facie case and require it to justify the conduct Tr. 1759 -- was the product of that motivation.

c. The strength of the *prima facie* case.

The original venire was composed of 42 percent African American jurors, and after for-cause challenges, 28 percent remained. Tr. 1733; 1734. Evans accepted the first African American juror, Alexander Robinson, Jr., but even this decision was suggestive of racial bias; the State's treatment of Robinson suggests it was attempting to insulate subsequent challenges by accepting a token black juror. The *voir dire* was brief. Moreover, although Robinson raised his

[76] Appendix A (hereafter App. A) sets forth the racial self- identification from the juror questionnaire of each prospective juror who remained after preliminary juror qualification and was therefore subjected to further voir dire, with citation to the record page where such designation was made. Questionnaires and therefore racial self-designations are missing for only two qualified prospective venire members (No.'s 140 and 154), neither of whom was reached during final jury selection. App. A at p. 8.

hand during group *voir dire* to indicate he knew Archie Flowers, Jr., the brother of Curtis, he was not further questioned by the State on this relationship. Tr. 927. In contrast, when Evans offered race-neutral reasons for striking African-American juror Dianne Copper, he pointed to the fact Copper indicated she knew Archie Flowers, Jr. Tr. 1406, Tr. 1143. This is suspicious, even though standing alone, it proves little.

The State then struck all of the remaining five African American potential jurors: Diane Copper, Carolyn Wright, Tashia Cunningham, Edith Burnside, and Flancie Jones. Tr. 1755-58 (Indeed, looked at another way, the State struck all of the African American *women* potentially available for selection as jurors.) 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" the *Batson* inquiry. *Flowers III*, 947 So.2d at 935 (citing *Sewell v. State*, 721 So.2d 129, 136 (Miss. 1998)) (internal quotations omitted).

d. Disparate questioning.

"[C]ontrasting *voir dire* questions posed respectively to black and nonblack panel members" are probative of purposeful discrimination, *Miller-El*, 545 U.S. at 255, and in this case, the *voir dire* of African American and white jurors was starkly different. All five of the struck African-American jurors were asked 10 or more questions by the State during individual *voir dire*. However, the white juror who was asked the *most* questions by the prosecution was Linda Martin, who was asked only six questions – and the average number of questions asked of white jurors was *two*. Indeed, 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.

More particularly, four of the white jurors who were tendered by the State without a

single question – Larry Blaylock, Harold Waller, Marcus Fielder, and Bobby Lester – were jurors who had volunteered that they had relationships with defense witnesses. In contrast, the State inquired into those relationships when questioning African American jurors. *See, e.g.*, Tr. 1406-07 (inquiring into the witnesses Diane Copper knew, one-by-one). Indeed, when an apparently acceptable African American juror was in the box, the State asked highly leading questions, plainly hoping to provide an excuse for a strike.[77] As discussed below, the State relied heavily upon such relationships in justifying strikes against African American jurors.[78] Where, as here, "the 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." *Miller-El*

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[77]Diane Copper stated she previously worked at Shoe World at the same time Cora Flowers was employed there, Tr. 772, and Evans attempted to lead her into saying that the relationship was a close one:

> EVANS: How long did you work with Cora?
> COPPER: I can't remember the exact – probably about a year or something like that.
> EVANS: Okay. Were y'all pretty close?
> COPPER: It was more like a working relationship, you know.
> EVANS: Did you ever visit with each other?
> COPPER: No, sir.

Tr. 973. Later, Evans again tried to lead Copper into admitting that her relationships with defense witnesses "would be something that would be entering into your mind if you were on the jury, wouldn't it?" Tr. 1407. In contrast, the State accepted without any inquiry similar assurances of relationships being purely "working" when white jurors Pamela Chesteen and Bobby Lester volunteered them during the trial court's *voir dire*. Tr. 986; 799.

[78]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 made inquiry of other jurors concerning their proximity to the Flowers residence. 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. 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. 9721. Nonetheless, the next day, the State asked several more questions about Copper's residence. Tr. 1405.

v. Cockerell 537 U.S 322, 344 (2003) (*Miller El-I*)

e. Acceptance of white jurors sharing the stated reason for a strike.

> More powerful than these bare statistics, however, are side-by-side comparisons of some black venire panelists who were struck and white panelists allowed to serve. 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 State's treatment of jurors who knew defense witnesses varied markedly depending on the race of the juror.

One of the reasons given for the State's strike of Carolyn Wright was that she knew "almost every defense witness in this case." Tr. 1763.[79] The State also cited relationships with "many defense witnesses" as a reason justifying its strike of Dianne Copper.[80] Tr. 1793. However, it was totally unconcerned with such relationships when white jurors reported them; Pamela Chesteen, Harold Waller, and Bobby Lester were all tendered by the State despite numerous relationships with defense witnesses.[81]

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[79]Wright specifically and unequivocally stated she could put aside her connections to all of these people. Tr. 1161. Moreover, she also knew several prosecution witnesses, including Porky Collins and former sheriff Bill Thornburg.

[80]Copper stated she was working with Archie, Sr., at Wal-Mart, Tr. 770, but that that she did not "know him personally," Tr. 781, and that being his coworker would not affect her in any way, Tr. 1406. Copper also stated she had previously worked with Cora Flowers at Shoe World, but that it was for less than a year and it was more of a "working relationship." Tr. 973. Moreover, she also reported a possible pro-prosecution bias: her husband had worked at Tardy's Furniture. Tr. 1030.

[81]The State also cited connections to the defense as among its justifications for the strikes of Edith Burnside and Tashia Cunningham, and 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; 1028. 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 sanguine enough 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

White juror Pamela Chesteen was tendered by the State despite having admitted she knew numerous defense witnesses: 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 Van Horn, Nelson Forrest, and Rev. Jimmy Lewis Forrest. Tr. 792; 793; 932; 933; 935; 920. When the judged asked whether she could set aside her relationships with Flowers' family, she could only state, "I'll do my best." Tr. 793. Nevertheless, Evans tendered Chesteen as a juror – without asking her any questions about these relationships; indeed his only question of her related to her understanding bifurcated trials. Tr. 1169.

White juror Harold Waller was tendered by the State despite his acknowledgement of relationships with 17 witnesses. Tr. 1201. Waller indicated he had known Derrick Stewart and knew Liz Van Horn, 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 Woords, and Carmen Rigby. Tr. 862; 905; 906; 910; 912; 913; 915; 916; 918; 920; 924; 932; 1043. 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

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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. 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 fairness and 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; 1329. On cross-examination, defense counsel asked Carpenter if 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. 1782.

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. [82]

f. Mischaracterizations of the record

One of the five indicia of racial pretext in the *Batson* context is the lack of record support for the prosecution's stated reason for striking a juror. *Flowers III*, 947 So.2d at 917. Here, the State mischaracterized the record with respect to several jurors, sometimes with respect to multiple characteristics.

i. Mischaracterizations regarding Carolyn Wright.

First, the prosecution cited Wright's relationships with "almost every defense witness" in the case. Tr. 1763. This statement, as discussed above, is revealed to be pretextual by the State's disparate treatment of white jurors who knew defense witnesses, and it is also a half-truth, because Wright also knew a plethora of prosecution witnesses; in fact, Wright acknowledged she knew more prosecution witnesses (19) than defense witnesses (17).[83]

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[82]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 exercising a peremptory strike against 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 stated her opposition to the death penalty in the questionnaire was a lie, admitting, "I guess I'd say anything to get off" being on the jury. Tr. 1364. While Jones' lie on her questionnaire 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* Huggins was questioned about having been summoned for Flowers' 2008 trial, and after several questions, Huggins admitted he had been summoned, then apologized, stating he is a generally honest person. Tr. 1649; 1728. While Huggins and Jones lied about different things on their juror questionnaires, both lies are relevant to the proceedings at hand, and "a *per se* rule that a defendant cannot win a *Batson* claim unless there is an exactly identical Caucasian 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.

[83]The full list of acquaintance relationships Wright had with the defense totals seventeen, as follows: Archie Flowers, Sr., Connie Moore, Cora Flowers Tyson, the Flowers family, Denise Kendle, Emmitt

The prosecution also cited Wright's alleged relationship with Sherita Baskin (Flowers' sister) as one of its reasons for exercising a peremptory strike against Wright, Tr. 1763 and this is unambiguously false. 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.[84] The State said Tardy Furniture "had to garnish her wages because of" the lawsuit. Tr. 1763. This was an exaggeration. Wright made no mention of *garnished wages* when questioned about the litigation. Tr. 965. Wright readily admitted Tardy Furniture had sued her and that she had paid it off, but nothing was asked or admitted about garnished wages. Tr. 967. Wright also testified she had nothing against the Tardys 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 dishonesty. Given that this trial was for a quadruple homicide – and only one of the victims was a Tardy – it defies credibility that the State would actually fear that a juror would be biased toward acquittal on the basis of prior

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Simpson, Frances Hayes, Hazel Jones, Kittery Jones, Larry Smith, Liz Vanhorn, Mary 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, Mary Jeanette Fleming, Porky Collins, Vera Latham, Vernon Peeples, Vincent Small, and unspecified members of law enforcement.

[84]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.

litigation over an unpaid bill with Tardy's Furniture.[85]

ii. Mischaracterization regarding Flancie Jones.

In justifying its strike of 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 (emphasis added). In fact, before having been told of the relationship, she "didn't even know" about it. Tr. 989. Moreover, there is no significant relationship between the two: Jones's 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's sister).

iii. Mischaracterizations regarding Dianne Copper.

The prosecution claimed as one of its reasons for striking Copper 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 "yes, sir, it's possible," to which Evans responded, "Okay. Thank you, ma'am." Tr. 973. No doubt he *was* grateful for her willingness to consider the "possibility" of bias. But while Copper conceded these factors could affect her, she

[85]The State also cited a lawsuit with Tardy's 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. After Burnside was asked for clarification on the question, she acknowledged that she had been sued. Tr. 968.

herself never articulated or "stated" that she "*leaned toward favoring*" either side of the case. Rather, the exchange in one in which Evans attempted to get her to agree to several *possible* sources of bias went like this:

> EVANS: How long did you work with Cora?
>
> COPPER: I can't remember the exact – probably about a year or something like that.
>
> EVANS: Okay. Were y'all pretty close?
>
> COPPER: It was more like a working relationship, you know.
>
> EVANS: Did you ever visit with each other?
>
> COPPER: No, sir.
>
> EVANS: Okay. But you did work with two of his family members, and you lived within a couple of blocks of the Flowers' residence. You do not think that any of that would affect you?
>
> COPPER: I don't think so.
>
> EVANS: But I need you to -- like the judge said, we need you to be positive. Could that affect your thinking in the case?
>
> COPPER: It could.
>
> EVANS: Okay. Do you think that that may cause you to lean toward the defendant in the case?
>
> COPPER: Yes, sir, it's possible.
>
> EVANS: Okay. Thank you, ma' am.

If there is any doubt that Cooper herself was actually biased, as opposed to being led to consider what was "possible," what she next volunteered made it abundantly clear that she was not in fact harboring bias in favor of Flowers:

> COPPER: Can I mention something else?
>
> EVANS: Yes, ma'am.

COPPER: My husband used to work down there at Tardy, too, but it was I don't remember what year, but it was right before the incident happened.

EVANS: What's your husband's name?

COPPER: John Copper.

EVANS: Okay.

COPPER: He just helped deliver.

EVANS: Okay. Do you know about how long before?

COPPER: How long?

EVANS: How long he worked there before the murders?

COPPER: No.

EVANS: Would it have been --

COPPER: Probably -- maybe late '80s or '90s, early --

EVANS: Okay. So it had been several years before; is that right?

COPPER: Yes, sir.

…

EVANS: All right ... Thank you, ma'am.

Thus, 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 Tardys, 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 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.[86]

3. Conclusion

Racial motivation permeates Evans' *voir dire* and his exercise of the peremptory challenges in this case. The specific history of discrimination by this prosecutor in an earlier trial of this case, the strength of the *prima facie* case, the decision to try the case capitally after two noncapital trials, the dramatically disparate questioning, the racially determined different response to similar juror characteristics, and the mischaracterizations of the record, taken together, compel the conclusion that Doug Evans has discriminated again. At least with respect to Dianne Copper and Carolyn Wright, for whom no convincing reasons for their strikes were provided, and multiple indicators of pretext were present, Evans violated the Equal Protection

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[86]The prosecutor's later inquiry of 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, 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.

Clause of the Fourteenth Amendment.

B. The jury did not adequately deliberate because it was influenced by racial bias in violation of the Due Process and Equal Protection Clauses of the Fourteenth Amendment.

In an extraordinarily weak and almost entirely circumstantial case, the jury deliberated only 29 minutes on guilt. Tr. 3244. The explanation for the brevity of their discussions lies in the heavy weight of racial division and fear that this case stirred in Winona, and that the prosecutor added to at every opportunity in the course of the six trials that further divided this small community. Lack of adequate deliberation violates the Due Process Clause of the Fourteenth Amendment, and when driven by racial bias, also violates the Equal Protection Clause. Flowers immediately sought a mistrial on this basis, which was denied by the trial court Tr. 3248-49. That denial was an abuse of discretion and, once again, prejudicially deprived Flowers of his fundamental rights to fair trial before a jury untainted by Fourteenth Amendment violations.

1. Relevant facts

Long before the beginning of Flowers' sixth trial, the Tardy Furniture murders case had become a fulcrum of racial division in the community of Winona. That prosecutor Doug Evans believed that African-American and white residents would see the case differently is demonstrated by his egregious racial discrimination in jury selection in Flowers' third trial, discrimination that this Court condemned as establishing "as strong a *prima facie* case of racial discrimination as we have ever seen in the context of a *Batson* challenge." *Flowers III*, 947 So.2d at 935. Then came a hung jury in 2007's non-death seeking Flowers IV, by all reports sharply split on racial lines. *See* Emanuella Grinberg, "One crime, six trials and a 30-minute guilty verdict", CNN, June 18, 2010 *Available at*

http://www.cnn.com/2010/CRIME/06/18/mississippi.curtis.flowers/index.html (reporting on the Flowers VI verdict, but also discussing the 7-5 racially based split in the 2007 mistrial).

During Flowers' fifth trial, three African-American jurors served on the jury, and one African-American was selected as an alternate. 1 Supp. C.P. 1a-46a. When that jury also hung, the only identified holdout juror was one of the African-American jurors. 1 Supp. Tr. s-18 – s-25, Tr. 453. *See also* Shaila Dewan, "Study Finds Blacks Blocked From Southern Juries" The New York Times, June 1, 2010. [87]

Racial tensions escalated further when the trial judge ordered the arrest for perjury of two sworn jurors, both of whom were African-American. Tr. 453. The first arrest was of alternate juror Mary Annette Purnell. Purnell was removed and arrested shortly after testimony began for failing to disclose she had had contact with Flowers while he was in jail awaiting trial. Purnell admitted the contact, and ultimately pleaded guilty to the crime of perjury. 1 Supp. Tr. s-14 – s-15, Tr. 454.

The second arrest was made after the 2008 mistrial was declared. 1 Supp. Tr. s-19-s-24. That arrest was of Juror James Bibbs, who was one of the holdout jurors (possibly the only one). Bibbs was reported by a fellow juror for having told the jury that he was present at a neighboring business during the time police were investigating the case and that he never saw police at that business. Unlike Purnell, Bibbs denied having failed to honestly answer any *voir dire* questions directed at him, a denial then trial judge rejected. and persisted in rejecting even after the prosecution against Bibbs was dismissed. *See* 1 Supp. Tr. at s-20 –s-22, Tr. 455-56. [88] District

[87] Reporting, *inter alia*, that "At a retrial, in which prosecutors did not seek the death penalty, the jury of seven whites and five blacks was split along racial lines, resulting in a hung jury. At the second retrial, prosecutors sought the death penalty, which eliminated more blacks from the pool of qualified jurors. The jury, nine whites and three blacks, hung again when one black member declined to convict."

[88] THE COURT: "... I mean this is absolutely ridiculous that I have jurors come into this Court and lie to

Attorney Evans obtained an indictment from the Montgomery County Grand jury against both Bibbs and Purnell, but the Attorney General (who took over the prosecutions after Evans recused himself) *nolle prossed* the indictment against juror Bibbs. Tr. 454-55.

The trial judge subsequently directed the District Attorney to urge legislative action to permit the court or the State to secure a venue change over the objection of the defendant, 1 Supp. Tr. s-22-23, something this Court has recently, and definitively, reiterated is not permissible. *Maye v. State*, 49 So. 3d 1124, 1133 (Miss. 2010); *State v. Caldwell*, 492 So.2d 575, 577 (Miss.1986). These efforts were reported in the popular press along with everything else about this case and were part of the pervasive knowledge of the case that it was undisputed pervaded the jury venire summonsed for the instant trial. *See* Section C., *infra.* They were also the basis for unsuccessful requests that the trial court recuse itself from further participation in the Flowers matter, as it had properly done in the Bibbs and Purnell prosecutions.[89] Whatever the merits of Flowers' recusal motion, however, the fact that the judge had ordered the arrest of two African-American jurors during the previous trial was something of which prospective members of the 2010 *venire* – black and white – were well aware as part of the general information in circulation about the prior trials. *See, e.g.* "Ex-juror Purnell pleads guilty in perjury case," The Winona Times, Nov. 20, 2009 (noting that Purnell received two 10 year sentences); Monica Land, "Sixth trial set in Winona murders, " The (Grenada) Daily Star, Sept.

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this Court in order to get on a jury. And that is exactly what you have done, Mr. Bibbs. And you can stand there and you can grin and you can shake your head all you want, but you know and I know that that is exactly what has happened. First Supp. Tr. s-22.

[89] The recusal was sought because of suggestions made by the trial court in 2008 that Flowers and/or his family were implicated in at least the Purnell perjury. 1 Supp. Tr. 1 Supp. Tr. s-22. C.P. 1811-16. Tr. 452-57. Those motions were all denied. C.P. 1842-46, 1847 (order of this Court affirming denial of recusal motion made in 2008), Tr. 452-57 (ruling of trial court denying its own recusal on renewal in 2010 because it agreed that it now believed that there was no evidence of Flower's involvement in the Purnell matter and it had not prejudged the guilt of Flowers itself notwithstanding an earlier statement that may have suggested that. Tr. 448).

22, 2009(discussing, *inter alia,* charges brought against Bibbs and Purnell following 2008 mistrial); "Perjury charge dropped against juror in murder trial," WLBT –TV, Oct. 9 2009, *available at* http://www.msnewsnow.com/global/story.asp?s=11290653; "Perjury trial date set for November 16," Northeast Mississippi Daily Journal, October, 2009, *available at* http://djournal.com/view/insideolemisssports_full/3528055/article-Perjury-trial-date-set-for-Nov--16.

Ultimately, after jury selection was over, only one African-American was selected to serve on Flowers' sixth jury. That jury heard evidence from 35 witnesses, including experts, in a trial that lasted more than a week, but deliberated just 29 minutes before reaching a verdict of guilty. Tr. 3244.

2. Relevant legal principles and argument

The right to a jury trial is assured by the Sixth Amendment, but Due Process requires more than the mere impaneling of a jury. *Groppi v. Wisconsin*, 400 U.S. 505, 509 (1971). Where outside influences or bias are endemic in the environment of the trial, the defendant's due process right to have "the jury's verdict be based on evidence received in open court, not from outside sources," is abrogated. *Sheppard v. Maxwell*, 384 U.S. 333, 351 (1966); *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 improper, inadmissible information.").

Disproportionately short deliberations suggest a failure to deliberate. *See Maury v. State*, 68 Miss. 605, 9 So. 445 (1891). Although this Court's "case law is well settled that short deliberations do not automatically evidence bias or prejudice," *Ekornes-Duncan v. Rankin Medical Center*, 808 So. 2d 955, 962 (Miss. 2002), in this case, the surrounding circumstances make bias the only reasonable explanation for the brevity of the deliberations.

This is not an instance where short deliberations can be explained on the basis that "[t]he jury issue ... was simple and concise." *Smith v. State*, 569 So.2d 1203, 1205 (Miss.1990); *see also Gray v. State*, 728 So.2d 36, 63 (Miss.1998) ("not[ing] that this case was not overly complex"). As explained in Argument I, *supra*, the State's case started with an implausible theory of motive and opportunity, proceeded through a host of witnesses who contradicted each other in multiple and important ways, concluded without providing any significant physical evidence, and failed to eliminate an alternative suspect against whom there was substantial evidence.

Nor is this a case where "no other tangible evidence" supports an inference of "the bias and passion of the jury." *Gray*, 728 So.2d at 62. Rather, as discussed above, the racial overtones of the case were both palpable and salient to the jury. Where, as here, deliberation is influenced by race, the Equal Protection Clause of the Fourteenth Amendment is violated. *See McCleskey v. Kemp*, 481 U.S. 279, 293 (1987) ("[T]o prevail under the Equal Protection Clause, [a defendant] must prove that the decisionmakers in his case acted with discriminatory purpose.").

3. Conclusion

Because of the extraordinarily weak and conflicting evidence in this case, there is no benign explanation for deliberations of only 29 minutes; in light of the racially charged history of Flowers' six trials, a history largely shaped by the prosecutor in this case, the brevity of those deliberations establishes racial discrimination violating the Equal Protection Clause of the Fourteenth Amendment, and external influence violating the Due Process Clause.

C. Pervasive bias in the venire infected the fairness of the proceedings, and requires reversal and remand for a new trial

1. Controlling legal principles

Curtis Flowers, like any criminal accused, has a Sixth and Fourteenth Amendment right

to be tried in a fundamentally fair proceeding. Where a fundamentally fair proceeding is denied him, reversal is required. *Flowers v. State,* 773 So. 2d 309 (Miss. 2000), *Flowers v. State*, 842 So. 2d 531 (Miss. 2003), *Flowers v. State*, 947 So. 2d 910 (Miss. 2007).

One of the bedrock requirements of fundamental fairness is the criminal accused's right that the venire summonsed and the jurors selected from that venire to try him, and the general environment surrounding the trial itself, be free from bias, prejudice and other outside influences.

> [T]he right to jury trial 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. A fair trial in a fair tribunal is a basic requirement of due process. . . . This is true, regardless of the heinousness of the crime charged, the apparent guilt of the offender or the station in life which he occupies. It was so written into our law as early as 1807 by Chief Justice Marshall in 1 Burr's Trial 416 * * *.

Groppi v. Wisconsin, 400 U.S. 505, 509 (1971) (internal quotation marks and citations omitted)

Where such outside influences are persuasive and endemic in the environment of the trial, that, in and of itself, interferes with the defendant's right to have "the jury's verdict be based on evidence received in open court, not from outside sources." *Sheppard v. Maxwell*, 384 U.S. 333, 351 (1966), *Hickson v. State,* 707 So. 2d 536, 544 (Miss. 1997) ("it is absolutely imperative that the jury be unbiased, impartial, and not swayed by the consideration of improper, inadmissible information."). *See also Irvin v. Dowd*, 366 U.S. 717, 728, (1961), *Fisher v. State*, 481 So. 2d 203 (Miss. 1985). If such information is available to the jury, it cannot be presumed that they did not consider it. *Dunn v. U.S.*, 307 F.2d 883, 886 (5th Cir.1962) ("If you throw a skunk into the jury box, you can't instruct the jury not to smell it") (internal quotation marks omitted)

Mere assurances by venire members that they are, despite what they already know or believe, capable of setting those things aside and relying solely on the evidence are insufficient.

> Long before *Sheppard* and *Irvin*, this Court had recognized that the mere impaneling of twelve jurors who deny any bias or prejudice and swear to try the

> case on the law and the evidence is not sufficient to afford one criminally accused of his right to a fair trial . . . . A fair trial means more than that. It means, in addition to the right to be tried by such individual jurors, the right to be tried in an atmosphere in which public opinion is not saturated with bias and hatred and prejudice against the defendant; where jurors do not have to overcome that atmosphere, nor the later silent condemnation of their fellow citizens if they acquit the accused.

Fisher v. State, 481 So. 2d 203, 222-23 (Miss. 1985) (quoting *Seals v. State*, 208 Miss. 236, 44 So. 2d 61 (1950) (internal quotation markings and citations omitted).

Hence, even where prospective jurors with relationships or opinions that could affect their impartiality deny any bias or prejudice arising from those things, and swear to try the case on the law and the evidence, the concept of implied bias can nonetheless disqualify them from serving. *Taylor v. State*, 656 So. 2d 104, 111 (Miss. 1995) (holding that courts have an obligation "to ensure that every defendant receives a fair trial free of implied bias."). The more biasing factors, or other behaviors indicative of bias, a venire member is laboring under, the more the Sixth Amendment requires that he or she be removed for implied bias notwithstanding any professions of ability to be fair. *See, e.g., Williams v. Netherland*, 181 F. Supp. 2d 604, 616 (E.D. Va. 2002), *judgment aff'd*, 39 Fed. Appx. 830 (4th Cir. 2002) (citing *Smith* v. *Phillips*, 455 U.S. 209, 222 (1982) (O'Connor, J., concurring) and concluding that "the fact that [the juror] was—however unwittingly—laboring under multiple sources of bias plainly calls into question her partiality and warrants an implication of bias.")

If the potentially biasing characteristic affects even a large minority of the venire and results in persons with it being empanelled as jurors, the trial cannot be said to have occurred before a fair tribunal as required by the Sixth Amendment. *Mhoon v. State*, 464 So.2d 77, 80 (Miss.1985) (*superseded by statute on other grounds*, *see Bevill v. State*, 556 So.2d 699, 713 (Miss.1990)) (reversing capital murder and death sentence imposed where 12 of 39 venire

members from which final jury was selected were law enforcement officers, and six were empanelled to try the case). *See also Smith v. Phillips*, 455 U.S. at 228 (O'Connor, J., concurring) (noting that because the Sixth Amendment right to a fair trial before a fair jury is so fundamental that "the [United States Supreme] Court has required inquiry into prejudice even when there was no evidence that a particular juror was biased; has regarded the absence of a balanced perspective, and not simply the existence of bias against defendant, as a cognizable form of prejudice; [and] has not always required a particularized showing of prejudice.")

Certainly, where the factors that create that implied bias are pervasive in the community or in the venire drawn from it, no fair jury can be drawn at all. *Irvin v. Dowd*, 366 U.S. at 722, *Sheppard,* 384 U.S. at 351, *Fisher*, 481 So. 2d at 222-23. The Constitution prohibits trying a defendant in an environment

> where, because of prejudicial publicity or for some other reason, the community from which the jury is to be drawn may already by permeated with hostility toward the defendant. The problem is an ancient one. Mr. Justice Holmes stated no more than a commonplace when, two generations ago, he noted that "(a)ny judge who has sat with juries knows that, in spite of forms, they are extremely likely to be impregnated by the environing atmosphere."

Groppi, 400 U.S. at 509-10.

While a change of venue is one way in which these unfairnesses may be ameliorated, *Fisher*, 481 So.2d at 222-23, *Hickson* 707 So. 2d at 544, it is not the only way. Where a venire may have been subjected to improper contact with law enforcement personnel or other biasing forces, quashing the venire is an appropriate remedy. *Davis v. State,* 743 So. 2d 326, 341 (Miss. 1999) (granting an evidentiary PCR hearing on whether such occurred in that case, and acknowledging that quashing the venire would have been warranted if it did). Both the U.S. Supreme Court and this Court have also long agreed that another "way to try to meet the problem (of an enflamed community) is to grant a continuance of the trial in the hope that in the course of

time the fires of prejudice will cool") *Groppi*, 400 U.S. at 510, *DeLaBeckwith v. State*, 707 So.2d 547 (Miss. 1997) (approving, over speedy trial objection, new trial 26 years after events in question when a fair and impartial jury panel achievable). *See also Nebraska Press Ass'n v. Stuart*, 427 U.S. 539 (1976).

Moreover, while quashing – or not quashing – a venire is ordinarily left to the trial court's discretion, that discretion is bounded by the Constitution. A criminal defendant also has a fundamental constitutional right to be tried in the state and district in which the crime of which he is accused was committed, *Maye v. State*, 49 So. 3d 1124, 1133 (Miss. 2010), *State v. Caldwell*, 492 So.2d 575, 577 (Miss.1986). He cannot, *as a matter of constitutional principle*, be made to choose between that that constitutional right, and his equally powerful constitutional right to a fair and impartial jury. *See Brooks v. Tennessee,* 406 U.S. 605, 610-13 (1972) (applying principle that defendant may not be required to choose between constitutional protections to overturning state evidentiary rule that required defendants to irrevocably sacrifice either their right to silence or their right to testify at the threshold of their case).

Curtis Flowers sought throughout the trial in this matter to have the trial court address in various ways the improper matters that appeared to be pervading the courtroom and infecting the fairness of the proceedings against him. Tr. 1283-91 (challenge to excessive law enforcement interaction with venire members), 1624-40, 1713-24, 1731, 1741-47 (individual cause challenges), 1748-55, 3255-56 (making, and reiterating, a request to quash the existing venire and summonsing of a new one due to pervasive acquaintance and prior opinions being acknowledged by the venire members during voire dire), 3249, 3255-64, 3413-15 (challenge and mistrial motions due to contact between sequestered jurors about to begin deliberation process and Mississippi Highway Patrol officers. The trial court erroneously rebuffed all those efforts.

2. Application of these principles to the instant matter

a. Failure of trial court to remedy pervasive bias in the venire either by excusing venire members with multiple sources of implied bias for cause, or by quashing the venire

The most damaging of these errors was the trial court's failure to grant Flowers' requests to ameliorate the pervasive and biasing acquaintance with relevant parties and pre-existing opinions on guilt or innocence in the venire and ultimately in the jury empanelled to try Flowers.

The undisputed record evidence establishes that seventy-five percent of the total qualified venire, sixty-three percent of the venire members actually tendered for acceptance or rejection as jurors, and forty percent of the persons empanelled as jurors or alternates (six of 15) were personally acquainted with either the defendant or one or more of the decedents or their families and/or had actual opinions as to guilt or innocence formed prior the trial in this case. *See* Appendix A to Brief of Appellant. [90]

The sheer pervasiveness of this bias, in combination with the fact people who were acquainted with Mr. Flowers or his family acknowledged an inability to be fair jurors as a result of their acquaintance at a much higher rate than people acquainted with the decedents and their families did, meant that the venire that was tendered for final jury selection disproportionately represented people who were acquainted with only one or more of the decedents or their families. Likewise, because of their disproportion in the jurors tendered, five of the six acquainted persons who were actually empanelled to serve were acquainted with decedents but not with Flowers (Jurors 4, 5 and 12 and seated Alternates 1 and 2). Only one (Juror 2) was

[90] Rather than attempting to make specific record citations in the brief itself, Flowers has prepared Appendix A, which compiles the information relevant to this point of argument. The Appendix contains citations to the place in the record where the information about any particular juror set forth in the Appendix is located. The Appendices will be referred to as "App. A" column name where the data is found. Where the data used is on fewer than all of the pages of the appendix, there is also a cite the page number(s) within the appendix where that data appears.

acquainted only with Flowers. None were acquainted with both. *See* App. A at pp. 1-4 "Acquaintance" & "Final Jury Selection" columns.

More particularly, at the conclusion of initial juror qualification, a total of 156 venire members passed threshold qualifications to be voir dired and considered as jurors in Flowers' trial. Tr. 693-94. App. A. Virtually all of these 156 prospective jurors acknowledged having some prior knowledge of the case. However, in addition to that generalized knowledge, the subsequent voir dire revealed that 115 of those 156 persons - or 73% of the qualified venire – were specifically questioned about self-acknowledged personal acquaintance (or closer connection) with either one or more of the decedents or their families (50 people, hereafter "decedent acquaintances") or with Flowers or his family (47 people, hereafter "Flowers acquaintances"), or with both (18 people, hereafter "acquaintances of both"). [91]

In addition to their acquaintance status, 23 of these people – 16 of the 50 decedent acquaintances, two of the 47 Flowers acquaintances and five of the 18 acquaintances of both – acknowledged during questioning having pre-existing opinions about the guilt or innocence of Mr. Flowers either as a consequence of that acquaintance or for some other reason. There were also three additional venire members who, while professing no acquaintance with either Flowers or the victims or their families, also acknowledged having pre-existing opinions on guilt/innocence. There were thus 118 qualified venire members – over three fourths of the venire – who admitted either actual acquaintance with one or more parties or their families or to having

[91]*See* Appendix A, "Acquaintance" column (decedent acquaintances designated as "V," Flowers acquaintances designated as "F," and acquaintances of both designated as "B".) Those persons who simply raised their hands to acknowledge some prior familiarity with Flowers and/or the decedents and/or their families and answered a general question claiming it would not affect them but were not further examined by the court or either party on that issue are not included in these calculations because there is no indication that this was considered by the Court or the parties as anything different than the general knowledge of the case that was effectively universal in the venire.

pre-existing opinions on guilt or innocence, or both. [92]

Of the 118 acquainted and/or opinionated venire members 70 acknowledged at some point in their voir dire that either the acquaintance or the opinion would render them unable to serve as an impartial juror. These jurors were excused for cause for self-admitted unfairness as a result of the acquaintance. Tr. 835-57, 896-99, 946-51, 1618. The remaining 48 of these acquainted and/or opinionated venire members claimed that despite their prior opinions and/or their personal acquaintance with the decedents, Flowers and/or their families they could nonetheless be fair jurors. With only two exceptions, none of these individuals was excused for cause related to the acquaintance or opinion.[93]

Because the persons acknowledging that that their pre-existing acquaintances or opinions would affect their impartiality were disproportionately those with even distant connections to Flowers or his family, this by itself resulted in a substantial skewing of the venire to contain persons with acquaintance with decedents and their families, rather than with Flowers and his.[94]

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[92] Acquainted persons with opinions are noted on App. A, in the "Acquaintance" column by whom they are acquainted with and in "Opinion on G /I" column, (blank entry means no opinion acknowledged, number means opinion acknowledged at that transcript page). Opinionated persons without acquaintance are shown on App. A at pp. 2-4 (designated in the Acquaintance column with the word "None," and in the Opinion column with the page number(s) where the opinion is acknowledged).

[93] Persons who acknowledged bias are shown in App. A, in the "Bias from opinion or acquaintance?" column with a "Y." Persons who failed to acknowledge bias are shown in App. A, in the "Bias from opinion or acquaintance?" column with an "N." The only two prospective jurors excused who failed to acknowledge bias are shown in App. A at pp. 3, 4 in the "Challenged for Cause" column with the entry "D ### Granted. Apart from those two, however, the trial court took the juror assurances of fairness at their word and refused the challenges. *Id.* at pp. 2-5 ("D ### Refused").

[94] Those who acknowledged bias broke out as follows: 25 of the 50 (50%) decedent acquaintances 32 of the 47 (68%) Flowers acquaintances, 11 of the 18 (61%) acquaintances of both, and two of the three (67%) persons with opinions but not acquainted with anyone. Those who failed to acknowledge bias broke out as follows: 25 of the 50 (50%) decedent acquaintances, 15 of the 47 (32%) Flowers acquaintances, 7 of the 18 (39%) acquaintances of both, and one of the three (33%) of the opinionated, but unacquainted persons. The entry in the "Challenged for Cause" column for such persons is "A[agreed] ### Granted" or, "S[tate] ### Granted."

The final cause excusals for reasons other than self-acknowledged bias due to acquaintance or opinion (including of 13 of the 48 individuals who claimed fairness despite acquaintance or opinion for reasons other than their acquaintance or opinion) reduced the remaining pool of venire members to 56, but did nothing to redress this imbalance. [95] Hence, the 56 venire members who remained available at the end of the cause striking process to be considered for final jury selection was also disproportionately filled with persons acquainted with decedents.[96]

The first 32 of these remaining veniremembers were actually reached during the jury selection process. Tr. 1756-1803. Twenty of the 32 person persons (63%) actually reached during final jury selection were people who had acknowledged either a prior opinion on guilt or innocence or an acquaintance, or both, again disproportionately composed of people acquainted with decedents.[97] In the end, six acquainted persons – one Flowers acquaintance who had not formed an opinion as to guilt or innocence (Venire member 8 Alexander Robinson, seated as Juror 2) and five decedent acquaintances (Venire members 18 Lilly Laney – Juror 3, 22 Larry Blaylock – Juror 5, 63 James Hargrove – Juror 12, 68 Julia Ray – Alt. 1, and 75 Linda Martin –

[95] *See* App. A. at 1-6. Persons struck for cause other than acquaintance or opinion are designated as "AO ### Granted" or "W ### Granted" in the Challenged for Cause column).

[96] A total of thirty five of these 56 (63%) venire members had acknowledged either a prior opinion on guilt or innocence or an acquaintance, or both broken out as follows: 18 decedent only acquaintances (five with acknowledged prior opinions on guilt or innocence), 11 Flowers only acquaintances (one with such an opinion), four acquaintances of both (one with such an opinion), and 23 people with acquaintances with neither (one with such an opinion). In each instance, those 56 people are designated by either a blank column entry or "Refused" following "D#" or S# in the "Challenged for Cause" column).

[97] Of the veniremembers actually tendered 11 were decedent-only acquaintances (two with acknowledged prior opinions on guilt or innocence), five were flowers only acquaintances (none with such an opinion), three were acquainted with both (one with such an opinion) and 13 acquainted with neither (one with such an opinion. App A. pp. 1-3, "Acquaintance," "Opinion" and "Final Jury Selection" columns. App. B. p.1, "Final Jury Selection" column.

Alt. 2) – were empanelled as jurors or alternates.[98]

Flowers attempted to forestall this outcome in two ways, but the trial court erroneously refused to implement either solution proposed. Reversal of Flowers' conviction is required as a consequence.

i. Failure to eliminate individual venire members for implied bias

First, Flowers made individual cause challenges for implied or actual bias arising out of opinion or acquaintance to 15 venire members who professed impartiality, but who acknowledged having two or more of the following biasing factors that have been found by this Court, or courts in other jurisdictions, to require excusal for cause despite professed impartiality. App A., "Challenged for Cause" column entries "D ### Refused" or "D ### Granted"; Tr. 1624-40, 1713-24, 1731, 1741-47:

1) Was closely connected with one or more of the decedents and their families. *See, e.g. Clark v. U.S.*, 289 U.S. 1, 11 (1933), *Stokes v. Delcambre*, 710 F.2d 1120, 13 Fed. R. Evid. Serv. 1527 (5th Cir. 1983) (challenge for cause of juror who had relationship of 20 years' duration with defendant sustained); *State v. Esposito*, 613 A.2d 242 (Conn. 1992), *Sholler v. Com.*, 969 S.W.2d 706 (Ky. 1998), *Montgomery v. Com.*, 819 S.W.2d 713 (Ky. 1991), *Com. v. Johnson*, 445 A.2d 509, 512 (Pa. Super. Ct. 1982), *Williams v. Com.*, 415 S.E.2d 856 (Va. Ct. App. 1992) (error to deny challenge to juror who gave eulogy at victim's funeral; juror who had worked alongside victim for three or four months; juror who, having read of "horrible" death which befell victim, had formed an impression regarding defendant's guilt; and juror so closely associated with defendant's family that it would have "bothered" him to sit on the case); and/or

[98] See App A. "Final jury selection" column at pp. 1-3. Though the Alternates did not deliberate either guilt or sentence, they were sequestered with the jurors and hence had the opportunity to contribute to the atmosphere of implied bias that surrounded the jury, which was in any event somewhat less than strictly monitored for compliance with the Judge's instructions on contact with outsiders. Tr. 3260 (testimony by bailiff acknowledging contact between jurors and highway patrol officers in his presence on at least one occasion, and suggesting that such contact had gone on other occasions as long as the conversation was not about the case per se) . Ms. Martin, Alternate 2, was sequestered with the jurors from June 10 to June 12, when she was excused due to a family illness, Tr. 2096. A second decedent acquainted juror, Ms. Ray, seated as Alternate Juror 1, remained sequestered with the others until she and the other remaining alternate juror were excused when the jury retired to deliberate guilt/innocence on June 18. Tr. 3243.

2) Had a pre-formed opinion on guilt that would require evidence from the defense to be. *See Banyard v. State*, 47 So. 3d 676, 684 (Miss. 2010) ("The prosecution always has the burden of proving the guilt of the accused beyond a reasonable doubt, accused never has the burden of satisfying the jury of his innocence, or to disprove facts necessary to establish the offense charged.") *See also Murphy v. Florida*, 421 U.S. 794, 800 (1975) ([T]he juror's assurances that he is equal to this task cannot be dispositive of the accused's rights, and it remains open to the defendant to demonstrate the actual existence of such an opinion in the mind of the juror as will raise the presumption of partiality");[99] and/or

3) Only became certain about ability to be fair until rehabilitated with questions by court or prosecution. *Williams,* 415 S.E.2d at 860 ("[A]nswers to leading questions by the trial court or the Commonwealth Attorney do not per se remove the taint resulting from expressed impression of guilt or bias."); and/or

4) Had knowledge of the case based upon attendance or participation at other trials. *See Lee v. State,* 103 So. 233, 235 (Miss. 1925) ("Capital cases in which wide interest is taken often fill the courtrooms with spectators strongly biased both for and against the defendants. They are more inclined to attend such trials than the unbiased and unprejudiced. The latter prefer to remain away to attend to the ordinary affairs of life."); and/or

5) Had affirmatively done research to find out about the case. *See id. See also, generally, Fuselier v. State*, 468 So.2d 45, 53 (Miss. 1985) (citing *Coker v. State,* 27 So.2d 898, 900 (Miss.1946) for the principle that "the solution of jury issues must be safeguarded so that the verdict may be confidently regarded as the product of the law and the evidence uninfluenced by any extraneous pressure"); and/or

6) Knew that previous trials had resulted in convictions that had been overturned. *See, e.g., Leonard v. United States,* 378 U.S. 544 (1964) (per curiam) (holding that prospective jurors who had heard the trial court announce the defendant's guilty verdict in the first trial should be automatically disqualified from sitting on a second trial on similar charges); and/or

7) Had engaged in excessive interaction with law enforcement officers at the courthouse or otherwise had extensive law enforcement or prosecution connections. *See Taylor v. State*, 656 So. 2d 104, 111 (Miss. 1995). *Davis,* 743 So. 2d at 341, *Mhoon,* 464 So.2d 7 at 80. *See also Turner v. Louisiana,* 379 U.S. 466 (1965) (jury could not try a

[99] Though by statute, merely having such an opinion, by itself, does not disqualify a juror if it arises from general knowledge of the case and the prospective juror agrees to set it aside, Miss. Code Ann. § 13-5-79, where the disclaimer of that opinion is the product of "assent to persuasive suggestions" during voir dire by the court or prosecution, *Williams,* 415 S.E.2d at 860, and/or is accompanied by other indicia of bias it can nonetheless be a basis to disqualify the juror. *See Smith v. Phillips,* 455 U.S. at 221–222 (O'Connor, J., concurring) ("Determining whether a juror is biased or has prejudged a case is difficult, partly because the juror may have an interest in concealing his own bias and partly because the juror may be unaware of it").

case after it had been placed in protective custody of deputy sheriffs who had been the principal prosecution witnesses, even though jurors might not have been influenced by the association); and/or

8) Had been concealing or evasive about matters relevant to knowledge or bias. *United States v. Scott*, 854 F.2d 697 (5th Cir. 1988) (presuming bias of jury foreman who concealed relationship to brother in law enforcement); See *also Smith v. Phillips*, 455 U.S. at 221–222 (O'Connor, J., concurring) ("Determining whether a juror is biased or has prejudged a case is difficult, partly because the juror may have an interest in concealing his own bias and partly because the juror may be unaware of it").

Notwithstanding the existence of two or more of these biasing factors in the 13 jurors so challenged, only two of the cause challenges were granted. [100] In all other instances, the trial court erroneously refused to strike the challenged jurors for cause. [101]

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[100] The only two prospective jurors challenged by Flowers for implied bias despite their failure to acknowledge it were venire member108, a decedent acquaintance who had claimed impartiality despite having a prior opinion and also having been the best friend of, and an honorary pallbearer for, one of the decedents (Tr. 1637) and venire member 80, who began crying when being questioned about her feelings for the decedents with whom she was acquainted (Tr. 1634) App. A at pp. 5, 6. ("D ### Granted).

[101] The information on the 11 venire members whose defense challenges were refused follows:
Venire member 17 Pamela Chasteen: Factor 1), 2) & 3) (high school friend with a victim Tr.792-94, acknowledged having an opinion, that could only be set aside "if proven" otherwise, but rehabilitated by leading questions from trial judge. Tr. 1169), App. A at p. 2. Cause challenge denied at Tr. 1743-44. Peremptory strike D-2, Tr. 1757

Venire member 40 Charles Davis: Factors 2) & 6) (has an opinion from "just the history of the case" and knowledge that the prior guilty verdict was overturned Tr. 1233-35), App. A at p. 3. Cause challenge denied at Tr. 1744-46. Peremptory Strike D-4, Tr.1757

Venire member 50 Bobby Lester: Factors 1), 2) & 3) (related by marriage to a victim and has spent a lot of time with that family, Tr. 787-88, and has been friends with the widower of another for years, Tr. 1045-47. Has an opinion as to guilt or innocence that would have to be proven otherwise, 1343-45; initially suggested this might affect him, 787-88, but was rehabilitated by suggestions from trial judge and prosecution. Tr. 787-88, 1045-57, 1336), App. A at p. 3. Cause challenge denied at Tr. 1624. Peremptory Strike D-6, Tr. 1760-61.

Venire Member 51 Burrell Huggins: Factors 4) and 8) (had been summonsed as venire member in prior proceeding and subjected to voir dire and his wife was friends with a decedent family member, but had failed to disclose either thing during general or first round of individual voir dire in which questions concerning these matters were asked. Tr. 1726-29), App. A at p. 3. Cause challenge denied at Tr. 1713, 1731.Peremptory Strike D-7, Tr. 1762

Venire Member 54 Patricia Box: Factors 1) & 4) (neighbors with one decedent, friends with two others and still had feelings of sadness when thought about loss of one of them, summonsed and subjected to

Under the cases cited above, and the specific factual circumstances set forth in the footnote appended to this paragraph, this was error and an abuse of discretion as to each of the

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voir dire in prior trial), App. A. at p. 3. Cause challenge denied at Tr. 1626. Peremptory Strike D-8, Tr. 1762

Venire member 67 Timothy Amason: Factors 1), 6) & 7) (attends church with decedent family members, aware that multiple prior trials have been held and convictions reversed, conversed with deputies doing court security work outside of courthouse. Tr. 1284-86, 1438-42), App. A at p. 4, Cause challenge denied at Tr. 1627-28. Peremptory Strike D-Alt 1, Tr. 1798

Venire member 69 Billy Carpenter: Factors 1) & 7) (knew teenaged decedent for several years from coaching baseball, and attended his funeral; conversed with deputies doing court security work outside of courthouse. Tr. 1056-68, 1284-86, 1455-57) App. A at p. 4Cause challenge denied at Tr. 1629-30. Peremptory Strike D- Alt 2, Tr. 1798-99.

Venire member 72 Julian Beatrice Colbert: Factors 1), 2), 4), 6) & 8) (knew several decedent family members, was high school friends with one and taught several decedent family children, husband coached one decedent and several family children; attended two prior trials, one in which conviction obtained and reversed, a second a resulting in mistrial Tr. 802-03, 813, 823 1467-69), App. A at p. 4. Cause challenge denied at Tr. 1631. Peremptory Strike D- Alt 3, Tr. 1799.

Venire member 75 Linda Martin: 1), 2) & 3) (attended church with one of the decedents, knows another; has an opinion on guilt that she did not "think" would affect her, though she could "lean one way;" was only certain that could put this aside after judge rehabilitation. 803-04, 1060, 1477. App. A at p. 4. Cause challenge denied at Tr. 1631. Seated due to exhaustion of defense peremptories on earlier challenged venire members. Tr. 1798-1801.

Venire member 107 William Golding 1), 2) & 3) (husband of decedent is "friend" and minister of music at his church, has opinion that he "feels could be changed" and only "believes" that he could set that aside, though he became more certain after prosecution leading rehabilitation Tr. 1063-1064, 1559-64) App. A at p. 6. Cause challenge denied at Tr. 1636.

Venire member 111 S. Brooks Jones 1), 7) (knew and was "fond of" teenaged decedent, brother-in-law of DA's victim impact coordinator who worked with victims in instant matter, spoke with law enforcement officers doing security outside courtroom 1066-1067, 1585, 1587-89-App. A at p. 6. Cause challenge denied at Tr. 1639

Venire member 121 Michael Austin 1), 2) & 6) (one decedent was mother of good friends, wife discussed loss of mother with one of them, attended the visitation of teenage victim who played sports with veniremembers son, knew whole family of a third victim, and had formed an opinion from what he learned from the prior trials 807, 828, 868, 1066-1067, 1556-59) App. A at p. 7. Cause challenge denied at Tr. 1717.

Venire member 124 Martha Britt: 1), 2), 4) (sings with widower of decedent, attended prior trials, has an opinion that could be changed by evidence, T. 807-08, 829, 1070-73, 1673-76) App. A at p. 7. Cause challenge denied at Tr. 1717.

challenged jurors who was not excused for cause. *See Taylor*, 656 So. 2d at 111 (finding reversible error in failure to exclude for cause even a single impliedly biased juror). As a consequence, Flowers was required to expend, or reserve in case the prosecution retained sufficient strikes to "strike down" to reach them, peremptory challenges on all such venire members who were tendered, or who could have been tendered. Tr. 1757-99. Because one of the venire members whose challenge was denied, venire member 75, Linda Martin, was actually empanelled as an alternate juror after Flowers peremptory challenges were exhausted on two preceding tendered jurors whom he had also unsuccessfully challenged for cause, this is error cannot be deemed waived or otherwise barred from consideration on appeal. App. A at p. 3, Tr. 1798-1801. *See Adkins v. Sanders*, 871 So. 2d 732 (Miss. 2004), *Berry v. State*, 575 So.2d 1 (Miss. 1990).

ii. Failure to quash the venire

Even if none of the denials of these challenges, standing alone, were sufficient to warrant reversal, the erroneous denial of Flowers' second effort to rectify the bias problem does. Prior to commencing the final jury striking and selection process—which involved the possibility that all thirteen of the unsuccessfully challenged venire members listed in the foregoing note could be tendered for Flowers's acceptance during jury selection[102] – Flowers made an unsuccessful motion to quash the venire as a whole due to pervasive implied bias, and to discharge him until a

[102] The court was empaneling a total of 15 jurors – 12 regular jurors and 3 alternates. Because each party also had up to 15 peremptory challenges available (12 for the regular jurors, 3 for the alternates), up to 45 venire members could be required if the parties had both elected to exercise all their peremptory challenges. The 45th remaining venire member at this point was venire member 126. All of the venire members whose multiple factors of implied bias challenges were unsuccessful had venire numbers of 124 or lower and therefore remained. The trial court also refused the defendant's alternative motion to reshuffle the entire remaining venire of 56, which could have diluted somewhat the concentration of these veniremembers in the part of the venire that could have been reached. Tr. 1746-48. Although in the end, jury selection went through only 32 venire members, 9 who were multiple implied bias challenges, and two others who had unsuccessfully been challenged for cause by Flowers for other reasons, Tr. 1755-1802, this was not something that could have been known before the process was complete.

fair venire could be found in the district in which he was legally entitled to be tried. Tr. 1748-55, 3255-56, R.E. Tab 7a. The trial court's denial of that motion was both legally erroneous and, under the totality of the circumstances that must always be specifically addressed when examining implied bias claims, a factually unsupported abuse of discretion, as well.

> The inquiry is necessarily case specific. In selecting a jury, a trial court must take measures adapted to the intensity, pervasiveness, and character of the pretrial publicity and community animus. Reviewing courts, meanwhile, must assess whether the trial court's procedures sufficed under the circumstances to keep the jury free from disqualifying bias.

Skilling v. United States, --- U.S. ---, ---, 130 S. Ct. 2896, 2949 (2010) (citing *Murphy v. Florida*, 421 U.S. at 799 for the general totality of the circumstances assessment to be made in determining whether a fair trial was achieved).

The legal basis for the trial court's denial of this motion – the assertion that quashing the venire was not an acceptable remedy for the identified problem, Tr. 1749-52 – ignored long established law in both this Court and the United States Supreme Court that prescribes exactly that remedy if sought by the defendant. *See Groppi*, 400 U.S. at 510 ("one way to try to meet the problem (of an enflamed community) is to grant a continuance of the trial in the hope that in the course of time the fires of prejudice will cool"), *Davis*, 743 So. 2d at 341, *DeLaBeckwith*, 707 So.2d 547.

The trial court's factual finding that any disproportionately large concentration of persons with multiple biasing factors likely to go against Flowers resulted from the fact that a larger number or proportion of the venire were acquainted with Flowers or his family than with decedents and theirs was factually incorrect. Tr. 1750. All told, a *greater* number of people, 61, were acquainted with the decedents and their families (50 exclusively, 11 acquainted with Flowers or his family also), whereas only 56 were acquainted with Flowers and his (47

exclusively, 11 acquainted with decedents and their families also). However, in the end, *fewer* of the decedent/both acquaintances self-disqualified due to that acquaintance than the 32 who did so due to being Flowers/both acquaintances.[103] As this was the only particularized finding the trial made to support its ultimate conclusion that it would not find that bias was pervasive in the venire, and because the totality of the circumstances also revealed pervasive bias infiltrating the community and the courtroom, it was an abuse of discretion to deny this motion. See *Davis*, 743 So. 2d at 341.

Hence, even without turning to the abundant further evidence of additional biasing factors and events, the denial of the motion to quash was reversible error

b. Failure of trial court to remedy additional biasing factors and events surrounding the trial

In addition to the disproportionate presence in the venire, and ultimately in the jury selected, of people who were acquainted with the decedents and their families, and particularly of opinionated people acquainted with only the decedents or their families, the record contains evidence of other matters suggesting a general predilection in the courtroom and in the venire in favor of the prosecution.

First, as the trial court acknowledged, there was extensive law enforcement presence, both uniformed and plain clothed, in and around the courthouse throughout the proceedings, during the six days it took to complete jury selection to deal with the logistics of large summonsed venire and thereafter to deal with general court security in light of the large number of spectators attending the trial. Tr. 1285-91, 3263. This, standing alone, may not have been

[103] See App. A, "Bias from opinion or Acquaintance" column. This disproportionate exclusion of people acquainted with Flowers also had the effect disproportionately excluding black prospective jurors from the venire, and may actually have been itself the product of other racial issues that also infected the trial, see Sections A. and B. of this Argument VI, *supra*.

problematic.[104] However, there is also evidence of at least two occasions of improper interaction between prospective jurors and jurors and law enforcement suggestive of identification by the veniremembers and jurors with law enforcement and therefore of a lack of the requisite impartiality in the venire and the jury. Tr. 1283-91, 3249, 3256-64, 3413. Flowers attempts have the trial court rectify these problems were likewise rebuffed. *Id.*

During the multi-day juror qualification voir dire process, several venire members were observed in the parking lot speaking with law enforcement officers. When this happened prior to the empanelment of the jury, the trial court erroneously rebuffed Flowers request that it explore the problem by questioning the law officers and venire members involved which it could have remedied by dismissing any prospective jurors who had engaged in improper contact. *See, e.g. Puckett v. State*, 737 So. 2d 322, 331 (Miss. 1999). Tr. 1285-86, 1290-91. Subsequently, testimony from spectators, confirmed in part by the jury bailiff, established at least once incident of improper contact between ostensibly sequestered jurors and one or two state highway patrol officers and the possibility that, despite the sequestration, such contact may have been permitted previously so long as the case itself was not discussed. Tr. 3249, 3255-64. This contact took place while the jury was deliberating culpability. *Id.* However, despite being requested to do so

[104] Flowers assumes *per arguendo* that this presence alone was not so unnecessary or aggressive as to meet the criteria for reversal in and of itself, especially since the decedents in the instant matter were not law enforcement officers. *Balfour v. State*, 598 So. 2d 731, 756 (Miss. 1992). However, the record is not entirely devoid of evidence that it might have been. Flowers proffered, but was not allowed to actually present, testimony that this extensive security extended beyond the environs of the courthouse and that at least one spectator, a law student intern with the office representing Flowers, had been stopped coming into Winona from the Interstate highway and questioned by Montgomery County Deputy about her reasons for being in Winona. Without having questioned the intern, or making any attempt to question any of the Montgomery County security actually present at the court house when the intern stated that she had not been able to obtain the officer's identity due to his instructions to her not to look at him, the trial court, at the prosecutor's urging, ruled that the testimony was false and took no further action to investigate these allegations. Tr. 1283-84, 1286-1289. Given the fact that a great deal of the defense was premised on questioning the reliability of the police investigation this case may have been more susceptible to the kind of coercion a large police presence like that discussed in *Balfour* than the typical non-law enforcement victim prosecution.

the trial court likewise declined to examine the jurors or make any effort to ascertain the identity of the officers present when the bailiff could not identify them by name. Tr. 3249, 3255-64. This interaction was also preserved by Flowers through a mistrial motion at time it occurred, renewed as to the sentencing phase thereafter. Tr. 3249, 3264, 3413

Finally, there is substantial evidence that these outside influences – both the jurors own pre-existing biases and opinions, and the improper contacts with law enforcement – actually were operating during the trial. As is discussed in Argument VI. B., although the culpability phase proceedings involved testimony to the jury of 35 witnesses, several of whom were experts, and took over a week to present, the jury arrived at its guilty verdict in less than 35 minutes. Tr. 3247. This in and of itself is sufficient to call the fairness of the proceedings into question. *See Maury v. State,* 68 Miss. 605, 9 So. 445 (1891) (disproportionately short deliberation relative to the amount of material presented suggests failure to deliberate)

At the sentencing phase, the jury, which was already discussing how to get quickly picked up after proceedings concluded even before it testimony had commenced, Tr. 3248, 3255, insisted on proceeding into the night without even taking a break to wait for the pizza ordered for them to arrive, and restlessly interrupted an important mitigation witness when they learned it had arrived. Tr. 3341-47. Indeed, even the trial court acknowledged that, if left to themselves, the jury was so pressing to reach a penalty phase verdict and get home that it "would have been up here 'til two or three o' clock this morning to be finished" had the trial court not decided to defer instruction and deliberation to the next morning due to other circumstances. Tr. 3415.[105]

[105] Flowers objected that this effort was too little, too late given restlessness of the jury demonstrated by the premature request by at least one of its members, even before culpability phase deliberations were completed, regarding arrangements to return home. Tr. 3413-16. The trial court's dismissal of that objection and refusal mistrial motion as to sentence that accompanied it is a further basis for reversal on the legal principles set forth here.

Especially when a death is a possible sentence, the jury considering sentencing must have before it, and actually be able to give effect to, all relevant mitigation testimony and evidence that the accused attempts to put before them. *Abdul-Kabir v. Quarterman*, 550 U.S. 233, 264 (2007). *See also Smith v. Texas*, 550 U.S. 297, 315-16 (2007), *Tennard v. Dretke*, 542 U.S. 274, 285 (2004), *Penry v. Johnson*, 532 U.S. 782, 797 (2001) (all recognizing the virtually unlimited mitigating evidence relating to the defendant and his circumstances that may be considered by the jury, and the importance of each juror having sufficient guidance to make his or her individual reasoned moral response in sentencing); *Fulgham v. State*, 46 So.3d 315 (Miss. 2010) (reversing sentence because of error in depriving sentencing jury of witness who could advise jury of mitigating information arising out of defendant's personal history). The deliberative process on sentence certainly cannot be found to have been fair where the jury has been distracted from that task by other matters, including their own impatience to conclude proceedings. *See Holland v. State*, 587 So. 2d 848 (Miss. 1991) (reversing sentence where jury began prematurely deliberating sentence even though trial judge directed them to cease such deliberations and then properly instructed them on sentencing criteria). *See also Arledge v. McFatter*, 605 So. 2d 781, 783 (Miss. 1992) (error for trial judge to fail to advise jury that a response to their note was forthcoming, when, after 45 minutes, due to impatience, jury entered verdict before receiving response).

Under the applicable totality of the circumstances analysis applied to ensuring that a criminal accused is accorded this most central of fundamental rights – a fair trial before a fair jury – these additional events simply amplify that this right was not achieved in this case, and that Flowers' conviction and sentence must therefore be reversed. *Sheppard v. Maxwell*, 384 U.S. 333, 351 (1966), *Irvin v. Dowd*, 366 U.S. 717, 728, (1961), *Davis v. State*, 743 So. 2d 326,

341 (Miss. 1999), *Fisher v. State*, 481 So. 2d 203 (Miss. 1985).

VII. THE STATE'S SIX ATTEMPTS TO CONVICT FLOWERS OF THE SAME OFFENSE VIOLATED THE DOUBLE JEOPARDY CLAUSE OF THE FIFTH AMENDMENT AND THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT

Flowers was tried six times for the same quadruple homicide.[106] Undersigned counsel have diligently searched, and have not located even one other capital case that has been tried six times.[107] The constitutional protections guaranteed to a citizen who has been accused of a capital crime and who has been tried over and over implicate the Double Jeopardy Clause, the Due Process Clause, and general concepts of fundamental fairness. [108] Courts throughout the country have determined that in certain instances the right of the government to continue its resolve to convict the accused citizen must yield to the defendant's rights and the public's interests in the fair administration of justice. At least in this case, where three of the trials were reversed for prosecutorial misconduct, the sixth trial violated double jeopardy and due process constitutional constraints.

A. Relevant legal principles.

The Double Jeopardy Clause of the Fifth Amendment doctrine prohibits the state from putting any person "twice ... in jeopardy of life or limb," thus protecting individuals from "the hazards of trial more than once for an alleged offense." G*reen v. United States*, 355 U.S. 184, 187 (1957). Justice Black summarized the rationale behind the prohibition:

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[106]In formal terms, *Flowers I* and *II* differed from Flowers' third, fourth, fifth and sixth trials in that the last four were trials for all four murders, while the first two were trials for only a single murder. However, as discussed *infra*, and as held by this Court in *Flowers I* and *II*, the state in substance was trying Flowers for all four murders in the first two trials as well.

[107]The closest case is that of Curtis Kyles, who was tried five times by the State of Louisiana; after a mistrial in the fifth trial, the State gave up, and decided not to try Kyles a sixth time. *See* J. Gill, *Murder Trial's Inglorious End*, The New Orleans Times-Picayune, February 20, 1998, B7; s*ee also Kyles v. Whitley*, 514 U.S 419 (1995) (granting federal habeas corpus relief from conviction returned at Kyles' second trial due to prosecutorial misconduct).

[108] Flowers preserved this issue by motion to have this prosecution barred on the grounds of Due Process and Double Jeopardy prior to the instant trial. C.P. 1889. The was called up for pretrial hearing and denied by the trial court. Tr. 444-54, R.E. Tab 6 g.

> The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.

Id.

Nonetheless, "[a] defendant's valued right to have his trial completed by a particular tribunal must in some instances be subordinated to the public's interest in fair trials." *Wade v. Hunter*, 336 U.S. 684, 689 (1949). The Supreme Court has stopped short of "a mechanical rule prohibiting retrial whenever circumstances compel the discharge of a jury." *United States v. Jorn*, 400 U.S. 470, 480 (1971). When a mistrial has been declared due to a hung jury, double jeopardy is not violated by retrial. *United States v. Perez*, 22 U.S. (9 Wheat.) 579 (1824). The Court has also stopped short of the other extreme, an unlimited privilege of retrial following mistrial. Thus, for example,

> The Double Jeopardy Clause does protect a defendant against governmental actions intended to provoke mistrial requests and thereby subject defendants to the substantial burdens imposed by multiple prosecutions. It bars trial where 'bad-faith conduct by judge or prosecutor,' ... threatens the 'harassment of an accused by successive prosecutions or declaration of a mistrial so as to afford the prosecution a more favorable opportunity to convict' the defendant.

United States v. Dinitz, 434 U.S. 600, 611 (1976).

B. Argument.

The Double Jeopardy Clause provides protection against the overwhelming resources and power of the state. Thus, while retrial is not per se precluded by a mistrial, *Perez* "did not hold that this right of the state to retry a defendant when the jury could not agree on a verdict could not be abused." *Preston v. Blackledge*, 332 F.Supp. 681, 685 (E.D.N.C. 1971). Because "repeated efforts to convict an individual for an alleged offense enhance the possibility that even though innocent he may be found guilty..., [a]t some point such pursuit must end." *Iowa v. White*, 209 N.W. 2d 15, 16 (Iowa 1973) (finding that a third trial, however, was permissible);

see also, United States v. Gunter, 546 F.2d 861, 866 (10th Cir. 1976) (citing cases) ("[t]here indeed may be a breaking point" where the Double Jeopardy Clause bars another retrial). Here, where the state has tried an individual *six* times for the same offense – and was determined to have engaged in wrong-doing in three of those trials – the "enhance[ment of] the possibility that even though innocent he may be found guilty," *Green*, 355 U.S. at 187, is greater than the Double Jeopardy Clause permits.

Even in the absence of prosecutorial misconduct, lower courts have found that repeated retrials violate the Double Jeopardy Clause. In *Preston*, a federal habeas court reversed both defendants' convictions for armed robbery, holding that fifth retrial of the petitioners violated the "prohibition against being twice put in jeopardy." *Id*. at 688. That court reasoned:

> While this court is aware of the need for the proper administration of justice and recognizes and agrees with the principles set forth in *Perez* that there can be a retrial of an accused after a jury has failed to reach a verdict, it does not support the *Perez* principle to the point at which it has been expounded in this particular instance. There is no doubt that such a practice is oppressive, that it creates undue anxiety and insecurity, and that it enhances the possibility that an innocent man may be found guilty.... to try the petitioners five times is far beyond the allowed exceptions set forth in *Perez*, and also exceeds the limitations on the right to retry an accused subsequently set forth by our Supreme Court.

332 F.Supp at 687-688. Likewise, a Michigan appellate court held that after two previous hung juries, "the public's interest in retrial does not outweigh defendant's right to due process and fundamental fairness." *People v. Sierb*, 555 N.W.2d 728 (Mich.Ct.App. 1996) (reversing conviction); s*ee also United States v. Castellanos*, 349 F.Supp. 720 (E.D.N.Y. 1972) (dismissing indictment after two mistrials); *State v. Moriwake*, 65 Haw. 47, 57-58, 647 P.2d 705 (1982) (refusing to allow retrial after two deadlocked juries); *State v. Abbati*, 99 N.J. 418, 436, 493 A.2d 513 (1985) (refusing to allow retrial after two deadlocked juries); *State v. Witt*, 572 S.W.2d 913, 917 (Tenn.1978) (refusing to allow retrial after three deadlocked juries).

Moreover, although the enhancement of the likelihood that an innocent man will be convicted is the primary reason that this Court should find that the *six* times Flowers was placed

in jeopardy violate the Double Jeopardy Clause, an additional reason lies in the State's misconduct in three of these trials. That clause bars retrial in the face of deliberate prosecutorial misconduct designed to provoke a mistrial. *Oregon v. Kennedy*, 456 U.S. 667 (1982). Here, although the misconduct in *Flowers I, II,* and *III* was not designed to provoke a mistrial, in all three instances it was designed to illegally enhance the prosecution's chances of conviction. In *Flowers I* and *Flowers II*, the State elected to try the murders singly – clearly to enhance the number of opportunities it would have to obtain a conviction. While it could have legally elected to prosecute them all individually, what it could not legally do was present the aggregated evidence of all four homicides four different times. In *Flowers III*, the State again sought unfair enhancement of its opportunity to convict, that time by engaging in blatant racial discrimination in selection of the jurors who would determine Flowers' guilt. *Flowers III*, 947 So.2d at 935 (reversing Flowers' third conviction due to "as strong a *prima facie* case of racial discrimination as we have ever seen in the context of a *Batson* challenge"). Thus, the State's misconduct in three of Flowers' trials also weighs against the legitimacy of its sixth trial of Flowers for the same crimes.

C. Conclusion.

Considering both the extraordinary number of gauntlets Flowers has been forced to run, and the State's misconduct, the risk of wrongful conviction posed by this sixth trial was one that cannot be squared with either the Double Jeopardy or the Due Process Clause. This Court should reverse his conviction under those clauses, barring retrial. In the alternative, should this Court reverse Flowers' conviction on other grounds, it should bar a seventh trial on Double Jeopardy grounds.

VIII. THE TRIAL COURT REVERSIBLY ERRED IN REFUSING FLOWERS' REQUESTED CIRCUMSTANTIAL EVIDENCE INSTRUCTIONS AT THE CULPABILITY PHASE

As the trial court and the State acknowledged during the culpability phase instruction conference, Tr. 3150-53, the *only* direct evidence supporting guilt in this matter is the jailhouse

informant testimony of Odell Hallmon. Hallmon is, however, a self-admitted liar who has changed his version of events several times and could not even explain consistently the reasons for doing so. *See* Argument I, D. 2. *supra*. . He is, in addition, an habitual criminal with an abysmal behavior record in prison who has – throughout nearly two decades of off and on incarceration, C.P. 2517 (CD) (containing Hallmon's MDOC files from 1994 through 2010) – had a great need of hustling any way he could to improve his conditions of confinement and opportunistically supported whoever he felt at the moment could best assist him in doing so. [109]

Hallmon is, indeed the archetypal prisoner who makes possible what this Court has condemned as the

> unholy alliance between con-artist convicts who want to get out of their own cases, law enforcement who [are] running a training ground for snitches over at the county jail, and the prosecutors who are taking what appears to be the easy route, rather than really putting their cases together with solid evidence.

McNeal v. State, 551 So. 2d 151, 158 n.2 (Miss. 1989). Where, as here, such "snitch" testimony is from a particularly unreliable and well established "con-artist convict" it is necessary, but not

[109] Hallmon admitted that he was at the time of this trial still serving time for possession of controlled substances which he had been convicted of in 2005, and had two prior convictions -- one for aggravated assault, one for felon in possession of a firearm. Tr. 2414. He also admitted that he was on "lockdown" at the State penitentiary at the time he received the purported admission from Flowers concerning the Tardy Furniture murders. Tr. 2416-19, 2425. Though he claimed he had not done anything in prison to justify that lockdown, there is ample record support establishing that claim to be yet another one of the untruths Hallmon told under oath in this case. *See, e.g.* C.P. 2517 (CD) at filename "1993 Incarceration Records Part 2" at .pdf pages 1-65 (itemizing numerous disciplinary actions during his first incarceration, the incarceration during which his only contact with Flowers took place), *Id.* at filename "2003 Incarceration Records Part 3" at .pdf pages 35-183 (itemizing over 25 disciplinary actions during the period after his probation on earlier charges was revoked, after which he changed his testimony regarding what he learned during that period of contact changed from exculpatory of Flowers in 1999 to supportive of the State in February 2004, November 2007, September 2008 and finally in June 2010). Indeed, the litany of such charges is long, and apparently associated closely, at least during the 2004 trials and later with his willingness to testify for the State. See C.P. 2517 (CD) at filename "Odell Hallmon MDOC 2005 Incarceration Records Part 2" at .pdf pages 81-90, R.E. Tab 10 (itemizing nearly four dozen such offenses between July 2003 and May 25, 2010). It also appears from Hallmon's prison records that his willingness to provide testimony in the instant case in the event of retrial was conveyed to the MDOC, along with other information about Hallmon's pending criminal matters, in 2005 when he was transferred there on his controlled substance conviction. C.P. 2517 (CD) (filename "Odell Hallmon MDOC 2005 Incarceration Records Part 1" at .pdf pages 25-27, R.E. Tab 10

sufficient, that the jury receive an instruction regarding its untrustworthiness. *Moore v. State,* 787 So. 2d 1282 (Miss. 2001). Rather, as the Court in *McNeal* goes on to say, "[i]t is doubtful that such testimony should be considered as direct evidence which would prevent the granting of a circumstantial evidence instruction." 551 So. 2d at 158 n. 2.

In keeping with this, Flowers requested culpability phase jury instructions, D-6 C.P. 2720 ("Sandstrom" instruction), D-7 C.P. 2722 (standard circumstantial instruction), and D-8, C.P. 2723 (two-theory instruction) all of which sought to have the jury instructed on the circumstantial evidence burden of proof and objected to the State's instruction because it did not do so. Tr. 3140, 3149-53. The trial court refused all of the instructions and the jury received no circumstantial evidence instruction or any instruction on how to deal with circumstantial evidence at all. This was an abuse of discretion and reversible error. *McInnis v. State,* 61 So. 3d 872, 876 (Miss. 2011).

Flowers does not dispute that had testimony like Hallmon's come from an even marginally reliable witness it would have surmounted the exceedingly low threshold required for refusing a circumstantial evidence instruction. *Stringfellow v. State*, 595 So. 2d 1320 (Miss.1992) ("The rule in Mississippi is that a circumstantial evidence instruction should be given only when the prosecution can produce neither eyewitnesses or a confession to the offense charged."). However, Hallmon's credibility was so palpably non-existent that his testimony simply could not, standing alone, rise to the level of sufficient direct evidence to support denial of these instructions. *McNeal*, 551 So. 2d at 158 n. 2. Since this left Flowers with no instruction at all on circumstantial evidence, which was the only evidence otherwise available, and was itself for many reasons egregiously contradictory and unreliable as well, *see, e.g.*, Arguments I, III, and V *supra*, his conviction must be reversed. *McInnis,* 61 So. 3d at 876.

Failure to properly instruct the jury on the proper burden of proof warranted in a particular case violates an accused's Sixth Amendment right to jury trial, *Sullivan v. Louisiana*, 508 U.S. 275, 276 (1993). It also violates his Fourteenth Amendment right to due process and proper instruction on his theory of defense. *Banyard v. State*, 47 So.3d 676, 687 (Miss. 2010). *See also Boyde v. California*, 494 U.S. 370, 379, (1990) (citing *Mills v. Maryland*, 486 U.S. 367 (1988); *Holmes v. South Carolina* 547 U.S. 319 (2006); *Crane v. Kentucky*, 476 U.S. 683 (1986); *California v. Trombetta*, 467 U.S. 479, 485 (1984); *Chambers v. Mississippi*, 410 U.S. 284, 302 (1973), (all recognizing the right to present a defense as "fundamental").

Moreover, even if the *Stringfellow* threshold were crossed with the Hallmon testimony, the Fourteenth Amendment requires that where the state is relying on inferences and presumptions arising out of even non-circumstantial evidence, the jury not be permitted to make more than one leap from what is proven beyond a reasonable doubt to what is inferred. *Sandstrom v. Montana*, 442 US 510 (1979) . Hence it was, even in that event, reversible constitutional error to deny D-6.

The court below erred in failing to grant any of Flowers's instructions properly setting forth the legal standard to be followed by the jury in considering a case based on circumstantial evidence. Given how marginal the evidence supporting conviction was, this error cannot be said to be harmless. Reversal of the conviction is therefore required on this ground, too.

IX. THE TRIAL COURT REVERSIBLY ERRED IN ITS PENALTY PHASE INSTRUCTIONS TO THE JURY

A. The trial court erred in refusing Flowers' requested instruction D-34 advising the jury of what would happen in the event they were unable to agree unanimously on sentencing.

Flowers sought and the trial court refused to grant a sentencing instruction informing the jury that the black letter law of the statute required that a sentence of life in prison without parole

be imposed in the event that the jury could not agree upon sentence. Miss. Code Ann. § 99-19-103. Instruction D-34, C.P. 2842, Tr. 3407. This was error. [110] This error was compounded, and indeed even if not error initially, became reversible error when, after the jury expressly asked the trial court to instruct it on exactly that point, it again declined Flowers' request to give that instruction. Tr. 3479-80. C.P. 2924

The jury was instructed in the State's omnibus instructions that one possible verdict it could return was "We the jury are unable to agree unanimously on punishment." C.P. 2810, 2814, 2818, 2822. There is nothing in the instructions, however, that explains to the jury what the legal consequence of such a decision would be. Leaving such opportunity for speculation when it is possible to be definitive is reversible error if the Defendant has sought to have the more definitive instruction given. *Simmons v. South Carolina*, 512 U.S. 154 (1994), *Rubenstein v. State*, 941 So.2d 735 (Miss. 2006).

It is not sufficient that counsel may argue that if there is no agreement the judge is required by law to enter a sentence of life in prison without parole. "[A]rguments of counsel generally carry less weight with a jury than do instructions from the court. The former are usually billed in advance to the jury as matters of argument, not evidence,[111] and are likely viewed as the statements of advocates; the latter, we have often recognized, are viewed as definitive and binding statements of the law." *Boyde v. California*, 494 U.S. 370, 384 (1990).

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[110] Instruction D-34 stated as follows:

> The Court instructs the jury that if you cannot, within a reasonable time, agree as to punishment, the Court will dismiss you and impose a sentence of imprisonment for life without the benefit of parole.

Flowers also objected to the omnibus sentencing instructions given by the court because they failed to instruct on this point. Tr. 3374.

[111] The court's general instructions in the instant matter in fact expressly did instruct the jury, in advance, exactly to that effect. Tr. 3172

Just as both this Court and the United States Supreme Court recognize that when a judge says something, the jury is sensitive to it, so, too, the judge's silence on matters of law can likewise "carr[y]with it the imprimatur of authority and rises almost to the level of a jury instruction" that if what the lawyer was saying were the law, the court would have told you that. *Collins v. State*, 701 So.2d 791, 795 (Miss.1997). *See also Bollenbach v. U.S.*, 326 U.S. 607, 612 (1946), (noting that "jurors are ever watchful of the words that fall from [the judge]. Particularly in a criminal trial, the judge's last word is apt to be the decisive word.").

On this point, the absence of such an instruction was particularly harmful. First, the jury actually had a question on that point during deliberations, and Flowers expressly reiterated his request that this instruction be given. Tr. 3479-80. C.P. 2924. All jurors know that ordinarily a hung jury means that another trial before another jury, will be required. In the unique world of capital sentencing procedures in weighing states like Mississippi, however, that is not the case. Disagreement among the jurors results, *as a matter of law*, in the trial court being required to enter a sentence of life in prison without parole. Miss. Code Ann. § 99-19-103. In *Simmons*, the Court relied on similar misapprehensions that were likely in jurors' minds about what a "life" sentence actually meant in terms of eligibility for future release to require that jurors be instructed on that if their sentence would meet the requisites of the Eighth Amendment. 512 U.S. at 169. So, too, here, because our statute particularly requires this counterintuitive outcome, the jury must be apprised of it by the court in its instructions to them on the law if any sentence they render is to pass Eighth Amendment muster. *Id.*

To the extent that this Court and the United States Supreme Court have heretofore approved refusal of similar instructions, Flowers respectfully submits that those decisions are distinguishable from the instant matter due to omissions and errors in the omnibus sentencing

instruction noted elsewhere in this Brief. *See, e.g., Jones v. United States*, 527 U.S. 373, 381 (1999) (stating that under federal two-step sentencing process – separate and sequential determinations of eligibility for the death penalty, followed by consideration of factors to determine imposition – Eighth Amendment did not require such an instruction). *Jones*, in any event, has never been cited by this Court in support if its decisions finding refusal of this instruction under Mississippi's single step, integrated weighing process.

In all instances this Court has relied simply on the fact that in the particular cases, the instructions as a whole conveyed the proper meaning to refuse this instruction *See, e.g., Edwards v. State*, 737 So.2d 275, 316 (Miss. 1999) (basing its ruling on principle that "jury instructions are not to be read unto themselves, but with the jury charge as a whole").

In the instant case, that is not true. The other instructions gave guidance to the jury as a whole only on how to determine whether to impose a unanimous life sentence or a unanimous death sentence, specifically referring to one or the other of those unanimous sentences in each instruction. C.P. 2807-2833, 2830 By contrast, other than giving it a form to report their disagreement, C.P. 2810, 2814, 2818, 2822, nothing in the existing charge tells the jury why, if it disagrees it must formally write and sign a verdict to that effect or explaining to the jury what the consequences of that disagreement are dictated by law to be. Because in the instant matter the jury actually inquired about this, it is clear that the instructions as a whole did not properly or fully instruct it and that reversal is required as a consequence.

> The giving of an erroneous instruction containing reversible error cannot be cured by the giving of an inconsistent and correct instruction.... A material error in an instruction, complete in itself, is not cured by a correct statement of law in another instruction

Banyard v. State, 47 So. 3d 676, 684 (Miss. 2010) (discussing conflicting instructions, one of which shifted burden to defense to establish beyond a reasonable guilt that defendant was not

guilty of greater crime)

Finally, as a matter of law, Defendant respectfully submits that to the extent that existing precedent does permit a sentencing jury to labor under these kinds of misapprehensions, it has been called into question by the U.S. Supreme Court's superseding decisions which give capitally convicted defendants an Eighth Amendment right to have each individual juror given specific and accurate guidance on arriving at that juror's individual sentencing decision regarding the defendant. *Abdul-Kabir v. Quarterman*, 550 U.S. 233, 264 (2007) and *Smith v. Texas*, 550 U.S. 297, 315-16 (2007).

B. The trial court erred in failing to give D-12 and D-33 where the evidence of the existence two of the three aggravating circumstances on which the jury was instructed was entirely circumstantial.

Flowers sought instructions D-12 and D-33 because the only basis it would have for finding the existence of either the "great danger to many persons" or "avoiding arrest" aggravators was entirely inferential. As the trial court acknowledged, it instructed on the former on a theory that the evidence could support a jury inference that each decedent was killed as he or she entered the store,[112] and on the latter on the basis of the mere fact that everyone present was actually killed. Tr. 3381-82. The trial court also saw these aggravators as rebuttal to any a residual doubt argument Flowers might make. *Id*. [113]

It is beyond cavil that in a criminal proceeding the State has the burden of proof to establish each element of the crime charged beyond a reasonable doubt. If in doing so, the State relies exclusively on circumstantial evidence to establish guilt, the jury must be instructed

[112] While, for the reason cited by the trial court, the evidence could arguably support an inference that one of the four decedents entered the store only shortly before she was shot, that was not the theory that the State had argued at the culpability phase. Indeed, as is discussed in Argument II, *supra*, the State had already relied largely a theory of the crime based on facts that were not in evidence at all.

[113] Though the trial court declined to instruct the jury on residual doubt (D-32, C.P. 2846) it did expressly rule that that theory could be argued if the defense elected to do so. Tr. 3405-06.

accordingly, both as a matter of state law, and as part of an accused's Sixth and Fourteenth Amendment rights to a fair jury trial. *Stringfellow v. State*, 595 So. 2d 1320, 1322 (Miss. 1992).

The proper instruction must tell the jury that in order to convict, the jury must be convinced beyond a reasonable doubt *and to the exclusion of every other reasonable hypothesis* other than that of guilt. The jury must also be instructed that where a fact or circumstance is susceptible to two interpretations, the jury must accept the theory most favorable to the defense. *Parker v. State,* 606 So. 2d 1132 (Miss. 1992) (two-theory instruction must be given); *Jones v. State*, 727 So. 2d 922 (Miss. 2001) (both two-theory and traditional circumstantial evidence instruction must be given).

The only basis cited by the trial court for refusing the instructions offered by Flowers was that it had never seen a circumstantial evidence instruction at a sentencing phase. Tr. 3392-93. This was constitutional error. Fundamental principles of procedural fairness safeguarded by the Due Process clause of the Fourteenth Amendment apply with no less force at the penalty phase than at the culpability phase. *Presnell v. Georgia*, 439 U.S. 14, 16 (1978).

The United States Supreme Court has also made it clear that the Sixth Amendment treats the jury's consideration and findings of facts relevant to imposition of a death sentence identically to facts relevant to deciding guilt or innocence of the underlying crime. *v. Arizona*, 536 U.S. 584 (2002). Similarly to its obligations at the culpability phase to prove guilt beyond a reasonable doubt, in a capital sentencing proceeding the State has an obligation to prove - and the jury must find – any aggravating circumstances on which the death sentence relies beyond a reasonable doubt. Miss. Code Ann. § 99-19-101(5). *See also* C.P. 2809, 2813, 2817, 2821 (sentencing instructions given in the instant matter, stating that "You must unanimously find, beyond a reasonable doubt, that one or more of the preceding aggravating circumstance exists in

this case to return the death penalty.")

Hence, in order to have it properly assess the exclusively circumstantial evidence supporting two of the aggravating circumstances it was being asked to consider in its sentencing deliberations in the instant matter, Flowers was entitled to have the jury receive the same kind of instruction as it would have received concerning circumstantial evidence of guilt. Though this is a question of first impression in this Court, the courts in states that have considered this issue make no distinction. *See, e.g. State v. Keen*, 31 S.W.3d 196, 218 (Tenn. 2000), *In re Adoption of 2012 Revisions to Oklahoma Unif. Jury Instructions-Criminal* (Second Ed.), 287 P.3d 990 (2012), comment (citing *Snow v. State*, 876 P.2d 291, 299 (Ok. Ct. Crim.App. 1994) and adopting jury instructions reflecting principle that "when circumstantial evidence is used to support an aggravating circumstance, the circumstantial evidence must rule out all other reasonable hypotheses."

C. The trial court improperly instructed the jury on the aggravating factors it could consider in sentencing

Over Flowers objections, the Court instructed the jury on three aggravating factors provided for in § 99-19-101(5):

> (1) That the defendant knowingly created a great risk of death to many persons, § 101(5)(c) ("danger to many people" aggravator);
>
> (2) That the capital offense was committed for pecuniary gain while the defendant was engaged in the commission of a robbery, § 101(5)(d) & (f) ("robbery and pecuniary gain" aggravator); and
>
> (3) That the capital offense was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody. § 101(5)(e) ("avoiding arrest" aggravator).

The jury found, and based its death sentence upon finding the existence all three of them. C.P.

2808, 2812, 2816, 2820. [114] The defendant objected to the granting of any of these instructions during the sentencing jury instruction conference, but his objections were overruled. Tr. 3378-82. He also, by way of pretrial motions, raised double jeopardy, prosecutorial vindictiveness and general due process objections applicable any death penalty instruction sought by the State. C.P. 1644-85, 1889, 1928, 1932-66, Tr. 285-91, 305-18, 444-54, 458-63, 466.

Defendant objected to all of these aggravators as, *inter alia,* unsupported by the facts. A instruction premised on legally insufficient evidence violates an accused's Sixth Amendment and Fourteenth Amendment right to jury trial. *United States v. Marter*, 48 F.3d 564, 572-73 (1st Cir. 1995) (relying on *Sullivan v. Louisiana*, 508 U.S. 275 (1993)) (Sixth Amendment right to jury trial requires correct instruction on elements of offense); *Tarpley v. Estelle*, 703 F.2d 157, 160-61 (5th Cir. 1983). It also unconstitutionally fails to fulfill the Eighth Amendment requirement that any sentencing aggravator must "genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder." *Zant v. Stephens*, 462 U.S. 862, 877 (1983). It was error therefore to grant these aggravating circumstances in the instant matter.

1. The trial court erred in allowing the jury to consider the aggravating factors of robbery and pecuniary gain.

Defense counsel objected to this aggravating factor – which is actually an amalgam of two separate statutory aggravators – but the trial court overruled the objection. Tr. 3379-81. This was error. This Court has long prohibited instructing a jury on these two aggravators separately. *Willie v. State*, 585 So. 2d 660, 681 (Miss. 1991); *Jenkins v. State*, 607 So. 2d 1171, 1182 (Miss. 1992). While it has permitted this amalgam instruction in this or other matters Flowers respectfully submits that it should revisit its reasoning in those cases, and for the reasons set

[114]The jury was given a separate instruction for each victim.

forth here, find this instruction to have been erroneously given.

Whether listed separately in the instruction or in combination, these are separate aggravating circumstances. *See* Miss. Code § 99-19-101(5)(d) and (f). In Mississippi, a jury may only consider statutory aggravating circumstances in support of a death sentence. *See Coleman v. State*, 378 So. 2d 640, 648 (Miss. 1979). Consequently, the jury charge must track the statute.

This Court has held that when the "robbery" aggravating circumstance is submitted to the jury, the "pecuniary gain" aggravating circumstance may not be submitted to the jury. *Willie*, 585 So. 2d at 681; *Jenkins*, 607 So. 2d at 1182. The rationale for this holding is that when both aggravating circumstances are submitted to the jury, the robbery and the motive for the robbery are both weighed, essentially giving the motive for the robbery double weight in the jury's decision. This holding is of federal constitutional significance where, as here, the "robbery" aggravator wholly subsumes the pecuniary gain aggravator. *Jones v. United States*, 527 U.S. 373, 399 (1999).

Prior to this Court's decision in *Willie,* the State was strictly limited in when it could submit the "pecuniary" gain circumstance where the "robbery" aggravator was also submitted: "Our Court should closely scrutinize these two aggravating circumstances in the future, and omit using pecuniary gain, except in clearly, applicable circumstances. One aggravating circumstance is sufficient." *Ladner v. State*, 584 So. 2d 743, 763 (Miss. 1991). The Court explained that the pecuniary gain circumstance could be submitted only when supported by evidence beyond the fact of a robbery: "For instance, A pays B $1,000 to kill C, who has a wallet full of money. B robs C and kills him. There are two aggravating circumstances, i.e., robbery and pecuniary gain." *Id.*

Clearly under *Ladner*, this Court limits the submission of the "pecuniary gain" aggravator to murder-for-hire situations and does not allow its submission in a robbery scenario. This is consistent with the holding of several federal courts of appeal, including the Fifth Circuit..

> We agree with our sister circuits that the "offense committed" language in § 3592(c)(8) refers to murder, not the underlying felony, so that application of the pecuniary gain aggravating factor "is limited to situations where 'pecuniary gain' is expected 'to follow as a direct result of the [murder].'"

United States v. Allen, 357 F.3d 745, 750 (8th Cir. 2004) (citing *United States v. Bernard*, 299 F.3d 467, 483 (5th Cir. 2002)).[115]

Because part of the jury's sentencing charge instructed it that the procedure it was to follow "is not a mere counting process of a certain number of aggravating circumstances versus mitigating circumstances," C.P. 2824, it cannot be said that the effect the aggravating circumstances had on the jury's deliberation was different in the form they received than had the two aggravating circumstances been listed separately.

To the extent the jury relied on the "robbery" aggravator alone, this, too, was constitutional error. This aggravator is improperly submitted in a robbery/felony-murder case. In the past, this Court has rejected a claim that the use of the underlying felony as an aggravating circumstance is unconstitutional. *See generally Evans v. State*, 725 So. 2d 613 (Miss. 1998). These holdings are based on an erroneous application of *Lowenfield v. Phelps*, 484 U.S. 231 (1988). *See Stringer v. Black*, 503 U.S. 222 (1992) (*Lowenfield* inapplicable to Mississippi because Mississippi is a "weighing state"). These holdings must now be reevaluated in light off

[115]The language in the federal death penalty statute is nearly identical to the Mississippi statute. *Compare* 18 U.S.C. § 3592(c)(8) ("Pecuniary gain. – The defendant committed the offense as consideration for the receipt, or in the expectation of the receipt, of anything of pecuniary value") *with* Miss. Code § 99-19-101(5)(f) ("The capital offense was committed for pecuniary gain.").

Apprendi v. New Jersey, 530 U.S. 466 (2000) and *Ring v. Arizona*, 536 U.S. 584 (2002.

The *Ring* Court's conclusion that Arizona law provided for a maximum punishment of life on conviction of capital murder was based on the recognition that the Arizona scheme requires the finding of at least one statutory aggravating circumstance beyond a reasonable doubt before death may be imposed. Mississippi's scheme is, in relevant respects, comparable and must be interpreted in the same way.

Under the Mississippi statute, unless there is a sentencing hearing as mandated in Miss. Code § 99-19-101, the maximum penalty for capital murder is life imprisonment. *See Pham v. State*, 716 So. 2d 1100, 1103-04 (Miss. 1998). If a sentencing hearing is conducted and the jury fails to find at least one aggravating factor and a *mens rea* element, pursuant to Miss. Code § 99-19-101(5) and (7) respectively, the statutory maximum is life. *See Berry v. State*, 703 So. 2d 269, 284-85 (Miss. 1997); *White v. State*, 532 So. 2d 1207, 1219-20 (Miss. 1988), *See also State v. Clark*, 851 So. 2d 1055, 1085 (La. 2003) (*Ring* impacts invalid aggravation . . . in a state which requires the jury to weigh aggravation against mitigation") For these reasons, Flowers is entitled to a new trial.

2. The trial court erred in allowing the jury to consider the aggravating factor of avoiding arrest

In earlier proceedings, Flowers challenged the State's entitlement to have any jury that convicted him consider the aggravating circumstance that the capital murder was committed for purposes of avoiding arrest. Miss. Code Ann. 99-19-101(5)(e). *See* C.P. 342. That question was never addressed on appeal in Flowers prosecution, however, because no jury considering sentence in this matter had ever previously received such an instruction. *See Flowers I* at 315, *Flowers II* at 537, Flowers v. State, No. 2004-DP-00738-SCT, Record on Appeal at Tr. 1934-36, R.E. Tab 9a. (rejecting State's right to have the jury instructed on this aggravating

circumstance).[116] Flowers preserved his objections to giving this instruction for purposes of this appeal by objecting to the inclusion of that aggravating circumstance in the omnibus sentencing instruction on each count, and in his pretrial motions concerning, particularly, prosecutorial vindictiveness. Tr. 3379-81, C.P. 1644-50, 1928, Tr. 285-91, 458-59, 466 (citing, *inter alia*, *North Carolina v. Pearce*, 395 U.S. 711 (1969)).

As the trial court acknowledged in its erroneous overruling of the objection at the instruction conference, the evidence on this point was only the mere fact that he had actually killed the people the jury had convicted him of killing. Tr. 3380. Beyond that, there was no evidence whatsoever to support this aggravating circumstance. As a matter of federal constitutional law, when there is insufficient evidence to support an aggravating circumstance, the sentencing jury should not be instructed on that aggravating circumstance. *Jackson v. Virginia*, 443 U.S. 307, 314-15 (1979); *Wingo v. Blackburn*, 786 F.2d 645, 644 (5th Cir. 1986) (relying on *Jackson*, 443 U.S. at 313) ("[t]o satisfy the due process requirement of the Fourteenth Amendment, the evidence as viewed most favorably to the prosecution must warrant the conclusion that a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt"). This Court has also recognized that principle. *See, e.g. Leatherwood v. State*, 435 So. 2d 645, 651 (Miss. 1983), *Porter v. State*, 732 So. 2d 899, 905-06 (Miss. 1999) (*relying on Ivy v. State*, 589 So. 2d 1263, 1266 (Miss. 1991)); *Taylor v. State*, 672 So. 2d 1246, 1275 (Miss. 1996).[117]

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[116] This Court takes judicial notice of its own files. *In re Dunn*, 2011-CS-00255-SCT at ¶11 n. 6, 2013 WL 628646 at *3 (Miss. Feb. 21, 2013) (not yet released for permanent publication). There is nothing in the record in the instant appeal to indicate that the State served any jury instructions or gave any notice for purposes of the instant matter that it was going ask again for this instruction in the instant proceeding prior to their being filed on the day the jury was instructed as to sentencing. C.P. 2740-50.

[117] Other states do so as well. *See, e.g. Consalvo v. State*, 697 So. 2d 805, 819 (Fla. 1996) (statements of the obvious – for example, that the victim of any criminal act is a witness against the perpetrator of that

Alternatively, if this evidence is deemed by this Court to be legally sufficient under the statute to warrant an instruction on the "avoiding arrest" aggravator, then that definition is unconstitutionally overbroad because it can be satisfied merely on a showing – present in virtually all cases where the decedent(s) and perpetrator(s) are the only persons there when the killing occurred– that the defendant desired not to be caught. *See Godfrey v. Georgia*, 446 US 420, 427 (1980) (citations omitted) (aggravating circumstances must "provide a 'meaningful basis for distinguishing the few cases in which [the death penalty] is imposed from the many cases in which it is not"); *Lewis v. Jeffers*, 497 U.S. 764, 774 (1990) ("[a] State's definitions of its aggravating circumstances . . . play a significant role in channeling the sentencer's discretion"); *see also* James Higgins, Comment, *Avoiding Furman: The Unconstitutionality of Mississippi's Killing to Avoid Arrest Aggravator*, 39 U.S.F. L. Rev. 175 (2004).

Flowers respectfully submits that, after properly revisiting its prior holdings to the contrary, this Court should conclude that this aggravating circumstance should not have been considered by the jury.

3. The trial court erred in allowing the jury to consider the aggravating factors of danger to many people

This Court has heretofore held that, assuming the evidence was that there were multiple victims of a single crime, use of this aggravating circumstance would be acceptable at sentencing if the four matters were tried together. *Cf. Flowers v. State*, 773 So.2d 309, 325 (Miss. 2000) *(Flowers I)* , *Flowers v. State*, 842 So.2d 531, 560-62 (2003) (*Flowers II*). Flowers respectfully submits that for the reasons set forth in this section, it should revisit this issue and decide it

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act – are insufficient to support the avoiding arrest aggravator); *State v. Jones*, 917 P.2d 200, 217 (Ariz. 1996); *State v. Branam*, 855 S.W.2d 563, 570 (Tenn. 1993) ("faced with such an obvious paucity of evidence to establish [the aggravator of avoiding arrest]," the trial court erred when it submitted the aggravator to the jury); *Davis v. State*, 477 N.E.2d 889, 897 (Ind. 1985) (aggravating circumstances must be proven rather than insinuated).

differently now.

First, there is no statutory basis to distinguish intent with respect to a single victim from intent with respect to multiple victims for sentencing purposes. Though it could have done so, Mississippi has elected not to make multiple victim homicides capital murder solely because of the number of victims involved. Miss. Code Ann. § 97-3-19(2). The clear import of the sentencing provisions is to ensure that someone who commits a capital murder of his victims does not do so in a manner that actually endangers bystanders or others not part of the *res gestae* of the capital murder. Indeed, this Court has recognized, the risk must knowingly be to someone *other than* the intended victim. *Porter v. State* 732 So.2d 899, 906 (Miss.1999). There is nothing in the facts of the instant matter to suggest that the person who shot the four people whose deaths were the basis for Flowers' conviction had any intent, or knowledge from which he could have known there was a risk, to harm anyone other than the victims he was robbing.

Second, though this Court – and, at least in connection with non-weighing capital sentencing schemes, the U.S. Supreme Court – have heretofore held otherwise,[118] the Eighth Amendment, too, precludes this kind of instruction. At least in a weighing state like Mississippi, to allow the same conduct that is an essential element of the underlying crime to also aggravate that crime for sentencing purposes is, for the reasons discussed in connection with the duplicative nature of the "robbery for pecuniary gain" instruction, *supra*, and in using the undergirding capitalizer as an aggravator discussed in Argument XI D.2, *infra.* Flowers respectfully submits that, after properly revisiting its prior holdings to the contrary, this Court should conclude that this aggravating circumstance should not have been considered by the jury.

[118] See *Lowenfield v. Phelps*, 484 U.S. 231 (1988). *But see also Stringer v. Black*, 503 U.S. 222 (1992) (*Lowenfield* inapplicable to Mississippi because Mississippi is a "weighing state")

4. Even if only one of the aggravating circumstances instructed upon is found to be invalid, the Sixth Amendment requires that Flowers be accorded a new sentencing proceeding before a jury

As is set forth in each of the arguments *supra,* Flowers seeks that his sentence be vacated as to each of the errors raised concerning the aggravating factors upon which his sentencing jury was instructed. If, as he respectfully submits it should, this Court finds all of these aggravators to be legally or factually insufficient, the death sentence must be vacated altogether and a life sentence imposed. Death cannot be re-imposed under those circumstances. State and federal double jeopardy protections prevent the State from getting a "second chance" to re-prove sentencing matters where the proof at trial was found on appeal to be legally or factually insufficient to support the sentence. *Arizona v. Rumsey,* 467 U.S. 203, 211 (1984) (the failure to find any aggravating circumstance constitutes an "acquittal" on the death penalty and jeopardy attaches where no aggravating circumstance is found); *Cox v. State*, 586 So.2d 761, 768 (Miss. 1991) (holding that "[f]ailing in its attempt on the first trial, Miss. Const. art. 3, § 22 bars the State from perfecting its evidence through successive attempts"), *Dycus v. State*, 440 So.2d 246, 258 (Miss. 1983). *See also Burks v. United States,* 437 U.S. 1, 17 (1978); *Tibbs v. Florida*, 457 U.S. 31, 41 (1982) (both holding Sixth Amendment double jeopardy provisions require same result).

However, in the event that this Court determines any one of these aggravators to be invalid but does not invalidate them all, the Sixth Amendment requires that it remand this matter for a new sentencing hearing rather than attempting to reweigh of find harmless error pursuant to Miss. Code Ann. § 99-19-105 (3)(d). *See Gillett v. State*, 56 So.3d 469 (Miss. 2010) (engaging *sua sponte* in appellate reweighing and harmless error analysis, though requested by neither

Gillett nor the State to do so). [119]

The Sixth Amendment jurisprudence of the United States Supreme Court in the wake of *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and *Ring v. Arizona*, 536 U.S. 584 (2002) is in direct conflict with *Clemons v. Mississippi*, 494 U.S. 744 (1990) on one point at least. To the extent that *Clemons* and other pre-*Apprendi* jurisprudence such as *Stringer v. Black*, 503 U.S. 222 (1992), hold that there is no Sixth Amendment impediment to appellate reweighing or harmless error analysis, they are no longer good law. Since *Clemons* and *Stringer* were what Mississippi relied upon for constitutional "permission" to allow appellate reweighing and harmless error under § 99-19-105 (3)(d), that statute is unconstitutional on its face, and as applied if even a single aggravating circumstance is found by this Court to be erroneously considered by the sentencing jury.

D. The trial court improperly failed to give D-38 and D-39 instructing the jury on its ability to consider mercy in its sentencing decision when it also instructed the jury that it could enter a death sentence even if it did not find the aggravating circumstances outweighed the mitigating ones.

Sentencing Instructions 3, 4, 5 and 6 each direct the jury that if it finds one or more of the aggravating circumstances on which it has been instructed exists beyond a reasonable doubt "then you must consider whether there are mitigating circumstances which outweigh the aggravating circumstances" and goes on to instruct the jury that it "may" impose a death sentence if it finds that the mitigators do not outweigh the aggravators. C.P. 2809, 2813, 2817,

[119] Flowers acknowledges that as in *Gillett*, this Court has not been requested by him to actually employ § 99-19-105 (3)(d) in the event that it finds merit in some but not all of Flowers' claimed errors regarding the aggravating factors, nor, as of now, has this Court made any such finding or indicated that it will be invoking this statute if it does. Hence, Flowers is mindful that presenting this question for resolution here arguably conflicts with this Court's prohibition on rendering advisory opinions where a contingency that would make the question relevant has not yet come to pass. *See Tallahatchie Gen. Hosp. v. Howe*, 49 So.3d 86, 93 (Miss. 2010) ("the parties seek an advisory opinion in the event that Edwards refiles suit. But this Court does not issue advisory opinions"). He does so only out of an abundance of caution and respectfully apologizes to the Court for doing so if this is, indeed, an untimely argument.

2821. The instruction does not expressly inform the jury that it may give a life sentence *even if* it finds that the mitigating circumstances do not outweigh the aggravators. The defendant therefore requested two instructions doing so. D-38, C.P. 2835 and D-39, C.P. 2833. The trial court denied them both. Tr. 3408-09. This was error in light of the United States Supreme Court's intervening decision in *Kansas v. Marsh*, 548 U.S. 163, 176 n.3 (2006).

Though it has held that "[c]learly, it is appropriate for the defense to ask for mercy or sympathy in the sentencing phase.," *King v. State*, 784 So. 2d 884, 890 (Miss. 2001), this Court has not required the giving of the mercy instruction that the Supreme Court found to be crucial to the constitutionality of the Kansas sentencing scheme. *Chamberlin v. State*, 989 So.2d 320, 342 (Miss. 2008). *See also Manning v. State*, 765 So.2d 516 (Miss. 2000) and its progeny. That conclusion makes the clarification that the mere finding of less weighty mitigation does not require a death sentence all the more important. D-38 and 39 do not "nullify" the weighing process at all, which is the problem *Manning* and *Chamberlin* identify as the reason for not permitting a mercy instruction, they simply clarify what legal options are available to it once it has done the weighing.

Moreover, instructing the jury that it *may* consider mercy in arriving at its ultimate sentencing decisions does no more to marginalize or "nullify" the weighing process than does telling it that it *may* impose death if the weighing process results in neither aggravation or mitigation decisively having the upper hand. Either way, the outcome of the penalty phase turns on something other than a discernible difference in the relative weights of the aggravating and mitigating circumstances. There is no doubt that it is equally permissible under the "may" language of the statute (and of the weighing instruction given in the instant matter) to award such a tie to the accused. If it is acceptable for the jury to be instructed *by the court* that it may

break such a tie in favor of the State, it can hardly be forbidden for *the court* to instruct the jury on the basis, mercy, upon which it may break such a tie in favor of the defendant. Indeed, though this Court has held otherwise, the Supreme Court in *Marsh* suggested this is a constitutionally necessary corollary to the statutory ability of the jury to give a "tie" between aggravators and mitigators to the State, on which the jury in the instant matter was expressly instructed. C.P. 2809, 2813, 2817, 2821. *Marsh*, 548 U.S. at 176 n.3.

Finally, sentencing statute itself specifically permits the jurors to make the finding these instructions instructs them about, Miss. Code Ann. § 99-19-101(2)(d), as do the United States and Mississippi Constitutions. *Graham v. Collins*, 506 U.S. 461, 468 (1993)(*relying on Woodson v. North Carolina*, 428 U.S.280, 304-05 (1976)); *Lockett v. Ohio*, 438 U.S. 586, 605 (1978). *Pruett v. Thigpen*, 665 F.Supp. 1254, 1277-78 (N.D. Miss. 1986); *Manning v. State*, 726 So. 2d 1152 (Miss. 1998). It was therefore error for the Court to give Sentencing Instructions 3, 4, 5 and 6 without also giving D-38 and/or D-39

E. The trial court erred in failing to give instruction D-4, properly informing the jury that there is a "presumption of life" attending the sentencing process

The trial court also erred in refusing instruction D-4, C.P. 2908 Tr. 3387. This instruction informed the jury of the constitutional and statutory presumption of life applicable to capital sentencing. [120]

[120] D-4, C.P. 2908, read as follows:

> You are to begin your deliberations with the presumption that there are no aggravating circumstances that would warrant a sentence of death, and the presumption that the appropriate punishment in his case would be life imprisonment. These presumptions remain with Mr. Flowers throughout the sentencing hearing and can only be overcome if the prosecution convinces each one of you, beyond a reasonable doubt, that death is the only appropriate punishment.

The Due Process Clause of the Fourteenth Amendment precludes a state from depriving an individual of "life, liberty or property, without due process of law," and vests an accused with a presumption of innocence which attends him until overcome by the State's carrying its burden of proof to establish guilt reasonable doubt to justify depriving him of his *liberty*. *See Banyard v. State*, 47 So. 3d 676, 684 (Miss. 2010) ("The prosecution always has the burden of proving the guilt of the accused beyond a reasonable doubt, accused never has the burden of satisfying the jury of his innocence, or to disprove facts necessary to establish the offense charged.") Similarly, in order to protect a defendant from the deprivation of *life* without due process of law the Due Process Clause likewise requires a presumption at the outset of a capital sentencing trial that a death sentence is inappropriate. *See In re Winship*, 397 U.S.358, 372 (1970) (Harlan, J. concurring) (society views the conviction of an innocent person as far worse than the acquittal of a guilty person). Because the factual findings necessary to imposition of a death sentence must be made by a jury, violation of the burden of proof and presumption of innocence strictures of *Winship* also constitutes a violation of a criminal accused's Sixth Amendment rights, as well. *Ring v. Arizona*, 536 U.S. 584 (2002).

Flowers therefore had a Due Process and Sixth Amendment right to a presumption that life was the appropriate sentence at penalty analogous to the presumption of innocence afforded by due process at the guilt phase.[121] The prosecution has the burden of overcoming the presumption

[121]*Taylor v. Kentucky*, 436 U.S. 478, 486 n.13 (1978) (explaining the value of the presumption of innocence as a protection of a defendant's entitlement to conviction only by proof beyond a reasonable doubt). "Just as the presumption of innocence requires the jurors to lay aside consideration of arrest and indictment, the presumption of life would require the jurors to lay aside consideration of conviction that leads to the conclusion that death is the only, or even the probably, appropriate penalty." Damien P. DeLaney, *Better to Let Ten Guilty Men Live: The Presumption of Life – A Principle to Govern Capital Sentencing*, 14 Cap. Def. J. 283, 289 (2002). "The same dictates of text and policy that ensure that a criminal defendant may be deprived of his or her liberty only after the prosecution has overcome the presumption of innocence at trial apply with equal, if not greater, force to require that the prosecution overcome the presumption of life in a capital sentencing proceeding before a defendant can be put to death." Beth S. Brinkmann, *The Presumption of Life: A Starting Point for a Due Process Analysis of Capital Sentencing*, 94 Yale L.J. 351, 360 (1984).

"beyond a reasonable doubt." *Winship,* 397 U.S. at 364; see *Holland v. State,* 587 So.2d 848, 874 (Miss. 1991); see *Olsen v. State*, 67 P.3d 536, 590 (Wyo. 2003).

The prosecution has the burden of proof at capital sentencing. *Tuilaepa v. California,* 512 U.S. 967, 971-72 (1994). This burden is eviscerated where the burden is effectively shifted and the defendant is forced to prove himself ineligible for death. The Supreme Court has acknowledged that it is appropriate to compel "the jury to determine whether the prosecution has 'proved its case'" at capital sentencing, in other words, to explicitly place upon the prosecution the burden of persuasion. *Bullington v. Missouri,* 451 U.S. 430, 444 (1981*). See also Arizona v. Rumsey*, 467 U.S. 203, 209-11 (1984).

In *Bullington*, the Court noted the importance of the prosecution's burden of proof beyond a reasonable doubt in the sentencing phase, which mandates the extension of guilt trial rights to the sentencing phase. 451 U.S. at 446. The Court in *Apprendi v. New Jersey,* 530 U.S. 466, at 490 (2000), held that the reasonable doubt rule applies to facts increasing the range of punishment at sentencing. This requires the prosecution to prove its entitlement to the penalty it seeks.

Flowers was denied Due Process in that he was given the burden at penalty because the jury was not given an instruction stating that they were to presume a life sentence and that giving a life sentence regardless of the weight of aggravating and mitigating circumstances was in their discretion. Thus, a presumption of death existed at the outset of sentencing, and the burdens of proof and persuasion rested on Flowers at sentencing to prove that he was should not be sentenced to death. Further, the protections under the "heightened reliability mandate of the Eighth Amendment, including the need for individualized sentencing, merge into the due process protections required at capital sentencing." *Zant v. Stephens*, 462 U.S. 862, 884 (1982).

The ultimate decision to impose death is a decision that is made separate from and subsequent to the decision that aggravators outweigh mitigators. *Manning v. State*, 726 So.2d 1152, 1197 (Miss. 1998). This *is* what Miss. Code Ann. 99-19-101(2)(d) means in using the verb "should." Even after the jury has (a) found an *Enmund* factor; (b) found an aggravator and (c) found that aggravation outweighs mitigation, the jury must then take another step. The jury may sentence to death if (d): "[b]ased on these considerations, [it decides] whether the defendant should be sentenced to life imprisonment, life imprisonment without eligibility for parole, or death." Thus, an instruction informing the jury that the decision to sentence Flowers to death must be separate from and subsequent to all other decisions made in Subdivision (2) of Miss. Code Ann. 99-19-101 is therefore *required* by law and must be given if requested by defense counsel.[122] *Jones v. State*, 798 So.2d 1241, 1254 (Miss. 2001). *See also Smith v. Mack Trucks Inc.*, 819 So.2d 1258, 1266 (Miss. 2002). *See generally Ill. Cent. RR. Co. v. Hawkins*, 830 So.2d 1162, 1173-74 (Miss. 2002).

Because Flowers was denied this instruction, he was denied due process of law, and the protections of the Mississippi capital sentencing statute necessary to ensure it, and his sentence must be vacated.

X. THE CONVICTIONS AND DEATH SENTENCES IN THIS MATTER WERE OBTAINED IN VIOLATION OF THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND THEIR COUNTERPARTS IN THE MISSISSIPPI CONSTITUTION

A. The trial court constitutionally erroneously allowed Flowers to be tried at all, and even if trial were permitted, erroneously permitted the State to seek the death penalty upon his conviction.

[122]In addition, the failure to give it would implicate the due process clause of the Fourteenth Amendment. *Stewart v. State*, 662 So.2d 552, 557 (Miss. 1995) (*citing Hicks v. Ohio*, 447 U.S. 343, 346 (1980)). *See also Klimas v. Mabry*, 599 F.2d 842, 848 (8th Cir. 1979) *rev'd on other grounds* 448 U.S. 444 (1980); *People v. Shaw*, 713 N.E.2d 1161, 1182 (Ill. 1998); *cf. Board of Pardons v. Allen*, 482 U.S. 369, 373-78 (1987); *Daniels v. Williams*, 474 U.S. 327, 331-32 (1986).

Prior to the June 2010 trial in this matter that resulted in the convictions and sentences on appeal here, Flowers filed or renewed motions challenging the right of the State to seek for the sixth time, after three prior attempts to do so had been rejected by this Court and two others by lawfully constituted juries, to preclude imposition of a death sentence on any conviction so obtained. The trial court denied them all. These motions were as follows:

Motion	**Argued**	**Ruling**
Bar Death Penalty Based on Prosecutor Misconduct C.P. 1644-50, 1928	Tr. 285-91, 458-59	Tr. 291, 466, R.E. Tab 6b
Bar Prosecution Peremptories or Preclude Death Penalty C.P. 1651-74	Tr. 305-14	Tr. 314, 466, R.E. Tab 6d
Preclude Death Qualification or Preclude Death Penalty C.P. 1675-85	Tr. 315-18	Tr. 318, 466, R.E. Tab 6e
Supplemental Preclude Death Penalty Procedures C.P. 1932-66	Tr. 458-63	Tr. 463, R.E. Tab 6h
Bar Trials on Untried Cases for Speedy Trial Violation C.P. 226, 371, 477	Tr. 336-37	Tr. 337-38, R.E Tab 6f

On the basis of the facts of this case as described in Argument I, *supra*, and the facts and legal authorities cited in the motions themselves, and in Arguments II, VI and VII, which are all incorporated into this point of error by reference, Flowers respectfully submits that these denials were reversible constitutional error and that this Court should do what the trial court failed to do by reversing and rendering the convictions on the Rigby and Golden cases as obtained in violation of Flowers Speedy Trial rights. It should, in any event, reverse all the convictions because they were obtained from a jury that, due to prosecutorial vindictiveness and the other reasons stated in the above cited motions, was improperly death qualified and permitted to consider the death penalty upon conviction and remand the case for a new trial on without the

right of the State to seek a death sentence. In the alternative, it should, at the very least, vacate the death sentences and remand for imposition of a sentence other than death on each conviction.

B. The convictions and sentences are not the product of any properly returned multi-count indictment, or order consolidating the previous single count indictments for trial, or sworn statement waiving indictment, and therefore fail to pass state or federal constitutional muster

The only charging documents appearing in the extensive record on appeal in this matter are four single-count indictments each charging a separate crime of capital murder as to each of four decedents. C.P. 5 (Montgomery County Case No. 7447, capital murder of Bertha Tardy), 6 (Montgomery County Case No. 7448 , capital murder of Robert L. Golden), 7 (Montgomery County Case No. 7449, capital murder of Carmen Rigby), 8 (Case No. 7450, capital murder of Derrick Stewart). R.E. Tab 2. The convictions on appeal, however, were obtained in a single consolidated proceeding, despite the fact that the record in this matter contains no formal order consolidating the separate indictments for trial or any multi-count grand jury indictment pursuant to Miss. Code Ann. § 99-7-2. Moreover, although there is an announcement in a predecessor proceeding presided over by a different judge that the consolidated proceeding was being conducted by agreement, there is also no sworn waiver by Flowers of the right to proceed by proper and sufficient multi-count indictment of a grand jury in this record, nor is there any indication that the State made any attempt to renew the agreed consolidation prior to the instant trial as the parties were ordered to do with respect to anything that had been decided by the earlier judge. Tr. 466. *See also* C.P. Table of Contents at –i-.[123]

[123] Prior to the first consolidated trial in 2004, the trial court stated *ore tenus* that he would enter an order of consolidation, but no such order was ever entered. Flowers v. State, No. 2004-DP-00738-SCT, Record on Appeal at Tr. p. 2, 15, R.E. Tab 9a. The only order entered in the wake of that announcement was an Order Setting Cause for Trial that made no reference to consolidation. C.P. 1, R.E. Tab 1 The only statement elicited in connection with this matter from Flowers personally was an unsworn statement that he consented to and agreed to have the venue of any trial returned to Montgomery County. *See* Flowers v. State, No. 2004-DP-00738-SCT, at Tr. p. 15., R.E. Tab 9a. This Court takes judicial notice of its own

The Mississippi Constitution vests in every person accused of a felony, the absolute right to be charged by a sufficient indictment returned by a properly constituted grand jury, a right which cannot be waived except by sworn statement made by the accused himself.

> [n]o person shall, for any indictable offense, be proceeded against criminally by information, except . . . where a defendant represented by counsel by sworn statement waives indictment.

Miss. Const. art. 3, § 27. This right is also guaranteed by U.S. Const. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right ... to be informed of the nature and cause of the accusation."); Miss. Const. art. 3, § 26 (1890) ("In all criminal prosecutions the accused shall have the right ... to demand the nature and cause of the accusation.").

By statute, Mississippi provides that separate crimes may, if sufficiently related, proceed under a multi-count indictment. Miss. Code Ann. § 99-7-2. However, where that procedure is not followed, the State must establish that the consolidated prosecution occurred with the proper waiver by the accused of his right to be tried on only a single indictment. Hence, without a sworn waiver, felony conviction based on any other means of charging without such sworn waiver is invalid. *State v. Berryhill*, 703 So. 2d 250, 254 (Miss. 1997). *See also Woods v. State,* 200 Miss. 527, 27 So.2d 895, 896–897 (1946) ("from the earliest colonial days in this country it has been the settled rule that a formal accusation is an essential condition precedent to a valid prosecution for a criminal offense."). "The question of whether an indictment is fatally defective is an issue of law and deserves a relatively broad standard of review by the Court." *Tucker v. State*, 47 So. 3d 135, 137 (Miss. 2010).

Certainly, a prosecutor has no power to alter the indictment simply by unilaterally assigning a single cause number to four separate prior proceedings, and electing to proceed in

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files. *In re Dunn*, 2011-CS-00255-SCT at ¶11 n. 6, 2013 WL 628646 at *3 (Miss. Feb. 21, 2013) (not yet released for permanent publication).

consolidated manner with a death penalty prosecution where the record reflects neither the requisite sworn waiver, or new action by a grand jury.

> a prosecutor has no power to alter the substance of an indictment, either through amendment or variance of the proof at trial without the concurrence of the grand jury. *41 Am.Jur.2d Indictments and Informations* § 168-69 (1995). *See also, e.g., Quick v. State*, 569 So.2d 1197 (Miss.1990).

Berryhill, 703 So. 2d at 258.

Flowers did not, at any point, affirmatively object to proceeding in a consolidated fashion. However, where the indictment is substantively insufficient, or fails to state the essential elements of the offense charged, its sufficiency be challenged for the first time on appeal even if raised in the trial court. *Spicer v. State*, 921 So.2d 292, 319 (Miss. 2006). *See also Berryhill*, 703 So. 2d at 254 (stating that "this Court has squarely held that challenges to the substantive sufficiency of an indictment are not waivable."). Moreover, because the failure to either obtain a multi-count indictment against Flowers or obtain a proper sworn waiver of that right from him affected Flowers's fundamental rights, this can be reviewed as a matter of plain error. *Thomas v. State*, 14 So. 3d 812, 816 (Miss. Ct. App. 2009) (citing *Patrick v. State*, 754 So.2d 1194, 1195-96 (Miss. 2000).

For the foregoing reasons, Flowers respectfully submits that his convictions and sentences should be reversed for this reason as well.

C. The trial court erroneously permitted the State to adduce improper victim impact testimony during the sentencing phase and the sentence, at least, must be vacated as a consequence.

Flowers objected by way of pretrial motion to the introduction of victim impact testimony in the instant matter, including in the penalty phase. C.P. 159-60, 418-19, 1220-25, 2137. The trial court heard and denied that motion motions. Tr. 324-26, 466. During the penalty phase of the trial the State adduced victim impact testimony from four victim impact witnesses.

Tr. 3267-3275. This was constitutional error.

The United States Supreme Court has held that the Eighth Amendment does not erect a *per se* bar against introduction of victim impact testimony. *Payne v. Tennessee*, 501 U.S. 808, 827 (1991)., As he did in the trial court, however, Flowers respectfully submits that in the instant matter, there was no basis for the admission of such evidence under this Court's precedent concerning the scope of that evidence.

This court has held that victim-impact evidence is admissible at the penalty phase only if it develops the case and is related to a statutory aggravator. *Randall v. State*, 806 So.2d 185, 218 (Miss. 2001) (holding that "[t]he state may only introduce evidence that is relevant and necessary to establish the existence of aggravating factors"); *Berry v. State*, 703 So.2d 269, 275 (1997) (stating that victim impact evidence, even at when introduced only at sentencing, is limited to "that which is relevant to statutory aggravating circumstances under [Miss. Code Ann.] § 99-19-101(5)" *Hansen v. State*, 592 So.2d 114, 146 (Miss. 1991. [124]

The State elected to claim only three of the statutory aggravating circumstances provided for in § 99-19-101(5):

> (1) the defendant knowingly created a great risk of death to many persons, § 101(5)(c),
>
> (2) the capital offense was committed the capital offense was committed for pecuniary gain while the defendant was engaged in the commission of a robbery. § 101(5)(d) & (f)
>
> (3) the capital offense was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody. § 101(5)(e).

None of the victim impact testimony addressed (nor could it have addressed, since none

[124] Mississippi is not alone in construing victim impact testimony in this fashion. *See, e.g., Lambert v. State*, 675 N.E.2d 1060, 1064 (Ind. 1996) ("Without our determination today that Indiana's statutory death penalty aggravators are the only aggravating circumstances available when considering whether death or a term of years is the appropriate sentence, the admissibility of the victim impact evidence hinges upon its relevance to the death penalty statute's aggravating and mitigating circumstance.").

of these witnesses had any first-hand knowledge of the facts of the crime) any of these aggravating circumstances, directly or indirectly. Hence, in the instant matter, the victim impact testimony adduced at the penalty phase failed to meet this Court's requirement that "[t]he state may only introduce evidence that is relevant and necessary to establish the existence of aggravating factors." *Randall*, 806 So.2d at 218; *Berry*, 703 So.2d at 275. Its admission under those circumstances served only to "incite" the jury and encourage it to rely on matters that it was not entitled to rely upon in reaching a sentencing decision. *Branch v. State*, 882 So.2d 36, 67(Miss. 2004). [125]

Further, Flowers respectfully submits that notwithstanding the U.S. Supreme Court's decision in *Payne* and this Court's jurisprudence in its wake that insofar as it overruled the *per se* bar to all victim impact testimony erected by *Booth v. Maryland*, 482 U.S. 496, 508 (1987), *Payne* is inconsistent with the requirements of the Eighth Amendment for capital sentencing.

As the Supreme Court itself has noted, in the years since *Payne* permitted victim impact testimony, the evolving standards for imposition of the death penalty under the Eighth Amendment have all been toward narrowing rather than broadening the use of the death penalty, and overruling precedent inconsistent with that principle. *See, e.g., Kennedy v. Louisiana*, 554 U.S. 407, 441 (2008); *Roper v. Simmons*, 543 U.S. 551, 568 (2005); *Atkins v. Virginia*, 536 U.S. 304 (2002) (abrogating *Penry v. Lynaugh*, 492 U.S. 302 (1989)). Indeed, in the years since *Payne*, several former death penalty states – including New Jersey, Illinois, New Mexico and Connecticut – have abolished the death penalty altogether. Hence, under these Eighth Amendment principles, Flowers respectfully submits that *Payne* ought to be and likely will be revisited and abrogated by the Supreme Court.

[125] Nor was this testimony relevant to rebut any of the mitigating testimony Flowers adduced, which related to Flowers' own history, family life and character. Tr. 3275-2261.

In light of this, Flowers respectfully urges this Court to return to the more cautious approach to victim impact testimony that it employed prior to *Payne.* It should instead follow its holdings in *Balfour v. State*, 598 So.2d 731, 747-48 (Miss. 1992), and *Coleman v. State*, 378 So.2d 640, 648 (Miss. 1979), that because victim impact is not a statutory aggravating circumstance, it is inadmissible.[126] *See also Hansen v. State*, 592 So.2d 114 (Miss. 1991) *post-conviction relief granted on other grounds,* 649 So.2d 1256 (Miss. 1994)

D. It was unconstitutional to seek the death penalty in this matter under the indictment as returned and the Mississippi death penalty statute as written.

Flowers challenged the indictment on which he was tried and convicted here on the basis of the unconstitutionality of the means by which it charged Flowers, and of the Mississippi death penalty statute. C.P. 433, 438. The trial court denied those challenges. Flowers v. State, No. 2004-DP-00738-SCT, Record on Appeal at Tr. 53, R.E. Tab 9a. [127] Those issues, though preserved by pretrial motions relating to this indictment, were never decided by this court on Flowers' prior appeal in this matter. *Flowers v. State*, 947 So. 2d 910, 916-17 (Miss. 2007). Flowers renewed those challenges by way of Motion prior to the proceedings from which the instant appeal proceeds. C.P. 1928-31.[128]

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[126] *Payne* makes it clear that victim impact is not and cannot be an aggravating circumstance under any sentencing scheme, but rather is simply to allow the jury to see the effect of the crime on the loved ones of the victim. *Conner v. State*, 632 So.2d 1239, 1276 (Miss. 1993). *See also Cargle v. State*, 909 P.2d 806, 835 (Okla. Crim. App. 1995) ("the prosecutor uses [aggravating circumstance] in an attempt to convince the jury the defendant is an appropriate candidate for the death penalty; [victim impact testimony] is used to show the jury the victim deserved life."). Only *statutory* aggravating circumstances may be considered by the jury under our statute, which does not permit consideration of non-statutory aggravators for purposes imposing a death sentence remains the law.

[127] This Court takes judicial notice of its own files. *In re Dunn*, 2011-CS-00255-SCT at ¶11 n. 6, 2013 WL 628646 at *3 (Miss. Feb. 21, 2013) (not yet released for permanent publication).

[128] Although the trial court purported to decline to adopt the prior rulings of its predecessor judge, Tr. 466, in this instance, its failure to do so deprived Flowers of his Sixth Amendment rights, incorporated into the appeal process by the Fourteenth Amendment, to have this Court review these properly preserved issues

1. The trial court erred by not granting the motion to demur or quash or dismiss indictment for failure to allege an aggravating circumstance and/or mens rea requirement.

Under the Due Process Clause of the Fifth Amendment, the notice and jury trial guarantees of the Sixth Amendment, and the corresponding guarantees of the Mississippi State Constitution, any fact, other than a prior conviction, increasing the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt. *Apprendi v. New Jersey*, 530 U.S. 466, 476 (2000). Other than a prior conviction, any fact that increases the maximum penalty for a crime is any fact that exposes the defendant to a punishment exceeding the maximum he could receive if punished according to the facts reflected in the jury verdict. *Apprendi*, 530 U.S. at 482; *see Blakely v. Washington*, 124 S. Ct. 2531, 2536-37 (2004).

As a matter of Mississippi law, without a sentencing hearing as promulgated at Miss. Code § 99-19-101, the maximum penalty for capital murder is life imprisonment. *Pham v. State*, 716 So.2d. 1100, 1103-04 (Miss. 1998); *Brown v. State*, 682 So. 2d 340, 355 (Miss. 1996). If a sentencing hearing is conducted and the jury fails to find at least one aggravating factor and/or a mens rea element, pursuant to Miss. Code §99-19-101 (5) and (7) respectively, the statutory maximum is life imprisonment. *See Berry v. State*, 703 So. 2d 269, 284-85 (Miss. 1997).

A sentence of death is different from any other sentence. *Ring v. Arizona*, 536 U.S. 584, 605-06 (2002). As a matter of federal, constitutional law, a death sentence is more excessive than a sentence of life imprisonment. *Id.* at 609. "The right to trial by jury guaranteed by the

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on the appeal provided for by Mississippi law. *Evitts v. Lucey*, 469 U.S. 387, 393-94 (1985). These questions are therefore properly before this Court for review. *Goff v. State*, 14 So. 3d 625, 640 (Miss. 2009)(pretrial proceedings were sufficient to preserve the issue for appeal). If an indictment fails to state the essential elements of the offense charged, it maybe challenged for the first time on appeal even if not preserved by way of motion to quash. *Spicer v. State*, 921 So.2d 292, 319 (Miss.2006).

Sixth Amendment would be senselessly diminished if it encompassed the fact-finding necessary to increase a defendant's sentence by two years, but not the fact-finding necessary to put him to death. We hold that the Sixth Amendment applies to both." *Id.*

In light of the above, as a Mississippi jury's finding of an aggravating circumstance and a mens rea element increases the penalty over the statutory maximum, the Due Process Clause of the Fifth Amendment, the notice and jury trial guarantees of the Sixth Amendment, the sweep of the Fourteenth Amendment and the corresponding provisions of our state constitution are acutely implicated. *Apprendi*, 530 U.S. at 476; see *Ring*, supra

The State may not avoid these constitutional requirements by classifying any factor that operates as an element of a crime as a mere "sentencing factor." The "look" of the statute - that is, the construction of the statute or, perhaps, the legislative denomination of the statute - is not dispositive of the question as to whether the item at issue is an element of the offense or a sentencing factor. *Jones v. United States*, 526 U.S. 227, 232-33 (1999); *Apprendi*, 530 U.S. at 476 (New Jersey's placement of word "enhancer" within the criminal code's sentencing provision did not render the "enhancer" a non-essential element of the offense). Any fact that elevates punishment above the maximum is considered an "element of an aggravated offense." *Harris v. United States*, 536 U.S. 545, 557-58 (2002).

"It has long been the law of this land that an accused person has a constitutional right to be informed of the nature and material elements of the accusation filed against him. All the authorities are to the effect that an indictment, to be sufficient upon which a conviction may stand, must set forth the constituent elements of a criminal offense. Each and every material fact and essential ingredient of the offense must be with precision and certainty set forth." *Burchfield v. State*, 277 So. 2d 623, 625 (Miss. 1973).

This Court has held that the indictment in a death penalty case need not include aggravating circumstances. *Williams v. State*, 445 So. 2d 798, 804 (Miss. 1984). The reasoning in Williams must be reconsidered in light of *Apprendi* and *Ring*. The similarities between the Arizona and Mississippi schemes and the clear holdings of the United States Supreme Court render *Williams* constitutionally invalid. Further the opinion in *Williams* focused on notice. The post-*Apprendi* issues are broader. Their focus is on whether the essential roles of the grand and petit juries have been denigrated by permitting the state to avoid charging and/or proving all elements of the offense. This distinguishes *Williams*, permitting this Court to bar the death penalty in this case without addressing *Williams*.

The prosecution must include in the indictment any aggravating factors which it intends to prove at the sentencing phase of the trial, where those factors are related to the commission of the crime and are not judicially noticed facts. *Apprendi*, 530 U.S. at 488; *United States v. Robinson*, 367 F.3d 278, 284 (5th Cir. 2004); *United States v. Higgs*, 353 F.3d 281, 295-298 (4th Cir. 2003); *United States v. Lentz*, 225 F.Supp.2d 672, 680 (E.D.Va. 2002) (in light of the *Jones* requirement that any fact increasing the maximum penalty for a crime must be charged in an indictment, "it appears to be a foregone conclusion that aggravating factors that are essential to the imposition of the death penalty must appear in the indictment"); *but see Simmons v. State*, 869 So. 2d 995 (Miss. 2004).

Where a state elects to prosecute by Grand Jury indictment, the indictment and the Grand Jury procedures underlying the indictment must comport with Fourteenth Amendment concerns. *Rose v. Mitchell*, 443 U.S. 545, 557, n. 7 (1979). Defendants charged with felonies in Mississippi have a state constitutional right to trial by indictment. *State v. Berryhill*, 703 So. 2d 250, 252 (Miss. 1997). Furthermore, Miss. Code Ann. § 13-7-35(a) provides: "In order to return

a "True Bill" of indictment, twelve (12) or more state grand jurors must find that probable cause exists for the indictment and vote in favor of the indictment." *See Jefferson v. State*, 556 So. 2d 1016, 1018-19 (Miss. 1989). More particularly, as a matter of state constitutional law, to return a licit indictment, at least twelve grand jurors must agree probable cause exists that the defendant committed each and every element of the offense for which the defendant has been indicted. *See Berryhill*, 703 So. 2d at 254 (quoting the trial court which opined: "if it were as simple as allowing the District Attorney or the office of the District Attorney to advise of the crime then there would be no need for grand juries"). Because the indictments against Mr. Flowers are constitutionally insufficient, he is entitled to have the Court reverse his convictions and death sentences.

2. The trial court erred in denying the motion to declare Miss. Code Ann. § 97-3-19(2) (e) unconstitutional, or to preclude the prosecution from relying on Miss. Code Ann. § 99-19-101(5)(d) as an aggravating circumstance at defendant's capital trial.

Under Mississippi law, persons convicted of killing a human being with "deliberate design" or by committing "an act eminently dangerous to others and evincing a depraved heart" are guilty only of simple murder and are ineligible for the death penalty, *see* Miss. Code Ann. § 97-3-19(1). On the other hand, persons convicted of felony murder *simpliciter* automatically are guilty of capital murder and eligible for the death penalty. *See, e.g., Jones v. State*, 381 So. 2d 983, 989 (Miss. 1980); *see* Miss. Code Ann. § 97-3-19(2) (e) and (f). Furthermore, the underlying felony is a statutory aggravating circumstance that juries are instructed to weigh against mitigating circumstances in determining whether the defendant receives a death sentence. *See* Miss. Code Ann. § 99-19-101(5) (d).

This function of the Mississippi capital sentencing scheme does not furnish a principled means of distinguishing defendants eligible for the death penalty. In *Furman v. Georgia*, 408

U.S. 238 (1972), the Court held that, even when capital punishment is proportionate for a defendant's crime, the Eighth and Fourteenth Amendments prohibit its arbitrary and capricious imposition. In subsequent cases, the Court has held that the death penalty may be imposed constitutionally only if "the sentencing body's discretion [is] suitably directed and limited" so as to avoid arbitrary and capricious executions. *Gregg v. Georgia*, 428 U.S. 153, 187 (1976). This limiting function is achieved through aggravating circumstances. As the Court has stated, "statutory aggravating circumstances play a constitutionally necessary function at the stage of legislative definition: they circumscribe the class of persons eligible for the death penalty." *Zant v. Stephens*, 462 U.S. 862, 878 (1983).

Aggravating circumstances perform this constitutionally necessary function by "provid[ing] a 'meaningful basis for distinguishing the few cases in which [the death penalty] is imposed from the many cases in which it is not.'" *Godfrey v. Georgia*, 446 U.S. 420, 427-428 (1980) (brackets in original) (quotations omitted). *See also Arave v. Creech*, 507 U.S. 463, 479 (1993). Thus, the Court has repeatedly held that it is not enough that a statutory sentencing scheme achieve a numerical "narrowing" of the pool of death-eligible murderers, for even the most obviously capricious criterion would achieve numerical narrowing. Rather, a capital sentencing scheme must include "substantively rational" criteria. *Zant*, 462 U.S. at 879, 877; *see also Godfrey v. Georgia*, 446 U.S. 420, 433 n.16 (1980); *Richard v. Lewis*, 506 U.S. 40, 46 (1992) (aggravating circumstances must "furnish principled guidance for the choice between death and a lesser penalty"); *Lowenfield v. Phelps*, 484 U.S. 231, 244 (1988) (aggravating circumstances "must 'genuinely' narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder," though concluding that duplication need not in all cases result in

unconstitutionality).

As applied in felony murder cases, Mississippi's capital punishment statute does not satisfy these commands. *But see Grayson v. State*, 806 So. 2d 241 (Miss. 2001). It cannot be tenably denied that there is no rational or historical basis for treating simple felony murderers as *more culpable* than premeditated murderers for purposes of capital punishment. *See, e.g., Middlebrooks v. Tennessee*, 840 S.W.2d 317, 345 (Tenn. 1992), *cert. granted,* 507 U.S. 1028 (1993), *and cert. dismissed as improvidently granted* 510 U.S. 124 (1993); *see also State v. Cherry*, 298 N.C. 86, 113, 257 S.E.2d 551, 567 (1979) ("highly incongruous" to treat simple felony murderer as more culpable than simple intentional murderer).

The United States Supreme Court has held that in a weighing state such as Mississippi every aggravating circumstance found by the jury must furnish a principled means of distinguishing defendants who receive the death penalty. *Stringer v. Black*, 503 U.S. 234-35 (1992). The Court has also ruled that a finding of intentional murder does not furnish a principled means of distinguishing death-eligible defendants, and has specifically held that a State may not treat "every unjustified, intentional taking of human life" as an aggravating circumstance. *Maynard v. Cartwright*, 486 U.S. 356, 364 (1988). Given that a finding of intentional murder does not furnish a principled means of distinguishing defendants who receive the death penalty, it cannot be tenably denied that a finding of felony murder also does not. Again, there is no rational or historical basis for treating felony murder as more culpable than intentional murder. For these reasons, this Court should declare Miss. Code § 97-3-19(2)(e) unconstitutional and reverse Mr. Flowers' death sentence.

XI. THIS COURT SHOULD SET ASIDE ITS PRIOR ORDER DENYING FLOWERS'S MOTION FOR REMAND AND LEAVE TO FILE SUPPLEMENTAL MOTION FOR NEW TRIAL

Heretofore, Flowers filed, and this Court denied, a Motion for Remand and Leave To File

Supplemental Motion for New Trial. Motion filed May 1, 2012, Order denying remand entered June 20, 2012

Flowers request for a remand was based on evidence that indicated that the prosecution failed to disclose highly material information affecting the credibility of one of its most important witnesses in violation of the trial court's orders regarding disclosure of criminal histories of witnesses and *Kyles v. Whitley*, 514 U.S. 419 (1995) and *Brady v. Maryland*, 373 U.S. 83 (1963), and that that omission was material and prejudicial. He sought the remand to permit consideration of that information and its legal import now rather than later, on the grounds that such consideration would best serve the interests of accuracy, fairness, and judicial economy.

In the time since the denial of that remand, this Court has elected, under not entirely dissimilar circumstances, to remand a case for the purpose of supplementing the record in a case pending on direct appeal even after the matter had been argued and submitted. *See* Keller v. State, 2010-DP-00425 (*En Banc* Order, February 15, 2013). In light of this Court's apparent recognition in the Keller *En Banc* Order that the interests of accuracy, fairness and judicial economy do warrant remand for those purposes, Flowers respectfully submits that this Court should set aside its prior Order declining to remand the instant matter and order the remand for the reasons set forth in the Motion for Remand heretofore filed by him in this matter. He incorporates the contents of his previous Motion to Remand herein by reference in support of this point of argument.

XII. THE DEATH SENTENCE IN THIS MATTER IS CONSTITUTIONALLY AND STATUTORILY DISPROPORTIONATE

This Court has repeatedly emphasized that the mandatory appellate review of death sentences must be qualitatively different from the scrutiny used in other type cases. *Irving v. State,*

361 So.2d 1360, 1363 (Miss. 1978). This review goes beyond simply evaluating the defendant's assignments of error. Miss. Code § 99-19-105(3)(c) and (5) require this Court to review the record in the instant case and to compare it with the death sentences imposed in the other capital punishment cases decided by the Court since *Jackson v. State*, 337 So.2d 1242 (Miss. 1976). This is a case where this Court's proportionality review must be mindful of all of the circumstances that were ignored by the trial court, the prosecution and, at its behest, the jury, in rendering a death sentence against a man as to whose moral and legal culpability the evidence presents genuine questions.

For a sentence of death to be affirmed, the Court must conclude "after a review of the cases coming before this Court, and comparing them to the present case, [that] the punishment of death is not too great when the aggravating and mitigating circumstances are weighed against each other." *Nixon v. State*, 533 So.2d 1078, 1102 (Miss. 1987) (proportionality review takes into consideration both the crime and the defendant). This type of review provides a measure of confidence that "the penalty is neither wanton, freakish, excessive, nor disproportionate." *Gray v. State*, 472 So.2d 409, 423 (Miss. 1985), and that it is limited as the Eighth Amendment requires to those offenders who commit "a narrow category of the most serious crimes" and whose extreme culpability makes them "the most deserving of execution." *Roper v. Simmons*, 543 U.S. 551 (2005).

The evidence here is so flimsy that it cannot be said that this is one of those narrow category of cases that Eighth Amendment contemplates punishing with the ultimate penalty. Nor under these circumstances can it be said that even if the verdict of guilt is not subject to reversal, someone whose "extreme culpability" is so certain that he is "the most deserving of execution." *Id.*

XIII. THE CUMULATIVE EFFECT OF THE ERRORS IN THE TRIAL COURT MANDATES REVERSAL OF THE VERDICT OF GUILT AND/OR THE SENTENCE OF DEATH ENTERED PURSUANT TO IT

This Court has a long time adherence to the cumulative error doctrine, particularly in capital case. *Flowers III*, 947 So.2d at 940 (Cobb, P. J. concurring). Under this doctrine, even if any one error is not sufficient to require reversal, the cumulative effect of them does mandate such an action. *Walker v. State*, 913 So.2d 198, 216 (Miss. 2005), *Jenkins v. State*, 607 So.2d 1171, 1183 (Miss. 1992), *Griffin v. State*, 557 So.2d 542, 553 (Miss. 1990) ("if reversal were not mandated by the State's discovery violations, we would reverse this matter based upon the accumulated errors of the prosecution").

As the foregoing litany of errors makes clear, the factual and legal arguments concerning which are incorporated into this assignment of error by reference, this is one of those cases where, even if there are doubts about the harm of any one error in isolation, the cumulative error doctrine requires reversal. *Flowers III,* 947 So.2d at 940 (Cobb, P.J. concurring), *Griffin,* 557 So.2d at 553. Corrothers respectfully submits that the instant matter contains cumulative error warranting reversal of the conviction and sentence, and seeks that relief from this Court.

CONCLUSION

For the foregoing reasons, as well as such other reasons as may appear to the Court on a full review of the record and its statutorily mandated proportionality review Curtis Giovanni Flowers respectfully requests this Court reverse the conviction and death sentence.

Respectfully submitted,

CURTIS GIOVANNI FLOWERS,
Appellant

By: _____
Attorney for Appellant

CERTIFICATE OF SERVICE

The undersigned attorney for Curtis Flowers hereby certifies that I have delivered a copy of the above and foregoing BRIEF OF APPELLANT to the following persons via U.S. Mail, postage prepaid:

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SO CERTIFIED, this the 18th day of June, 2013.

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APPENDIX A TO BRIEF OF APPELLANT

Qualified Venire Members

Venire #[1]	Name [2]	Acquaintance [3]	Opinon on G/I [4]	Bias from opinion or acquaintance? [5]	Challenged for Cause [6]	Final jury selection [7]
1	Sandra Hamilton 1b				D 1741-43 Refused	**D-1 1757**
2	Christy Harris 7b				W 1260 Granted	
3	Susan O'Quinn 10b					**Juror 1 1803-04**
4	Patricia Johnson 19b	B 760-61, 786-87, 817-18		Y 760-61, 786-87	A 835-57 Granted	
5	Carol Griffin 25b	B 761, 790, 819, 985-86, 1035-37	1133	Y 985-86	W 1261 Granted	
6	Glenn Trotter 28b	F 761-62, 985-85, 1013-25		Y 984-85, 1013-15, 1143	S 1261 Granted	
7	Jacks Sykes 31b	B 762, 790-91	809-10	Y 790-91, 809-10	A 835-57 Granted	
8	Alexander Robinson 37b	F 986		N 986		Juror 2 1756

[1] The boxes containing the venire number of the 38 venire members who claimed neither an opinion on guilt or innocence nor any personal acquaintance with decedents, Flowers their families are **boldfaced**. Those of the 118 venire members who acknowledged acquaintanceship and/or an opinion on guilt or innocence are not.

[2] The boxes containing the names of venire members who self-identified as black or African-American on their juror questionnaires are shaded. Those containing the names of venire members who self identified as white or did not self identify are clear. The numbers following each venire member's name is the page number in the First Supplemental Clerks Papers Volumes 2-8 (1 Supp. C.P.) where that self-identification is set forth.

[3] If a venire member aknowledged acquaintanceship, it is noted in this column and designated as being with Mr. Flowers or his family only ("F") or with decedent(s) or their family(ies) only ("V"), with with both ("B,"), followed by the page(s) from the trial transcript (Tr.) where response given. Otherwise, there is no entry

[4] If a venire member acknowledged an opinion on guilt/innocence the transcript page(s) is/are noted. Otherwise there is no entry.

[5] All venire members who identified themselves as acquainted (or closer) or who volunteered that they had an opinion were asked if they could be fair and impartial despite the acquaintance and/or if they could set the opinion aside. Their responses are noted as yes ("Y") or no ("N") followed by transcript page(s) where response(s) given.

[6] If no challenge for cause was made by any party, there is no entry. Agreed excusals for acquaintanceship or bias are denoted with "A," Agreed excusals for other non death qualification reasons are denoted with "AO." Excusals for death qualification reasons are denoted as "W." Challenges not agreed to by both parties are noted as having been made by the State (S) or the Defendant (D). All entries also include the page range where the agreed excusals were made, and the specific pages where non-agreed challenges were disposed of, and the outcome. ("Granted" or Refused").

[7] If the venire member was not tendered for consideration in final jury selection, there is no entry. If the venire member was tendered for consideration in final jury selection, the outcome of that tender is noted, with transcript page where that is confirmed. (Juror # or Alt-# if selected in either capacity, D-# or S-# D-Alt# or S-Alt# if peremptorily struck by a party. If the tendered venire member was neither acquainted nor opinionated, this box is **boldfaced.** Otherwise, it is unshaded.

Venire #[1]	Name [2]	Acquaintance [3]	Opinon on G/I [4]	Bias from opinion or acquaintance? [5]	Challenged for Cause [6]	Final jury selection [7]
9	Diana Mills 40b	V 791		Y 791	A 835-57 Granted	
10	Patricia Jeffcoat 43b	V 792		Y 792	A 835-67 Granted	
11	Melba Rogers 64b	F 762-63		N 762-63 but yes for other	AO 946-51 Granted	
12	Janelle Johnson 67b					**Juror 3 1803-04**
13	Michael Woods 73b	B 763-64, 819	706	Y 763-64, 819	A 835-67 Granted	
14	Carolyn Wright 76b	F 781-82		N 781-82		S-1 1756
15	Gloria Forrest 85b	B 764-65, 891-92		Y 891-92	A 896-99 Granted	
16	Charles Curry 91b	F 765-66		Y 765-66	A 946-51 Granted	
17	Pamela Chasteen 94b	B 986-87, 1037-39	1169	N 986-87	D 1743-44 Refused	D-2 1757
18	Lilly Laney 97b	V 794, 1039-41		N 794		Juror 4 1756
19	Merrian Eldridge 100b	V 819-20		Y 819-20	A 835-57 Granted	
20	Rana Davis 109b	V 794-95, 820	794-95	Y 794-95, 820	A 835-57 Granted	
21	Larry Sims 115b	F 748-49		Y 748-49	A 835-57 Granted	
22	Larry Blaylock 118b	V 1041-42, 1194		N 1041-42		Juror 5 1756
23	Anthony Russell 139b	F 749-50		Y 749-50	A 835-57 Granted	
24	Malinda Kirkwood 151b	F 766-67		Y 766-67	A 835-57 Granted	
25	Suzanne Winstead 154b					**Juror 6 1803-04**
26	Jennifer Chatham 157b					**Juror 7 1803-04**
27	Judy Briggs 170b	V 820-21	820-21	Y 820-21	A 835-57 Granted	
28	Terri Vance 176b	V 796		Y 796	A 835-57 Granted	
29	Harold Waller 185b	V 821-22, 862, 1042-44		N 1042-44		D-3 1758
30	Jeffrey Whitfield 191b					**Juror 8 1802-04**
31	Votrice Flowers 194b	F 750-51		Y 750-51	A 835-57 Granted	
32	Terecca Biggers 197b	V 796-97, 810-11		Y 810-11	A 835-57 Granted	
33	Jessie Lee Crawford 200b	F 751-52,		Y 751-52, 1213	W 1262 Granted	

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34	John Eskridge 206b	B 1215-17		N 1220	W1262 Granted	
35	Amy Costilow 212b	B 880-81,	880-81	Y 881	A 896-99 Granted	
36	Arthur Knight 221b	B 752, 811		Y 752, 811	A 835-57 Granted	
37	Julia Campbell 227b	F 752-53		Y 752-53	A 835-57 Granted	
38	Barron Davis 230b					**Juror 9 1802-03**
39	James Green 236b	V 863		Y 863	A 896-99 Granted	
40	Charles Davis 239b		1232	N 940, 1230	D 1744-46 Refused	D-4 1760
41	Margaret Givens 242b	B 769-70, 812-13		N 769-7 812-13	S 1262 Granted	
42	Marcus Fielder 245b					**Juror 10 1802-03**
43	Rita Young 258b	F 767-68		Y 767-68	A 835-57 Granted	
44	Tashia Cunningham 254b	F 987-88		N 987-88		S-2 1758
45	Edith Burnside 260b	B 768-69, 797-98		N 797-98, 127-38		S-3 1758
46	James Daniels 272b	B 753-54, 812		Y 753-54, 812	A 835-57 Granted	
47	Bobbi Davis 275b				D 1644-45 Refused	**D-5 1760-61**
48	Paula Bates 278b				W 1620 -21, 1713 Granted	
49	Johnny Slaughter 281b				A 897 Granted	
50	Bobby Lester 311b	V 787-88, 798-800, 822, 862, 1045-57	1343-45	N 798-800, 822, 863	D 1624 Refused	D-6 1761
51	Burrell Huggins 317b				D 1713, 1731 Refused	**D-7 1762**
52	Henry Campbell 320b	F 754		Y 754	A 835-57 Granted	
53	Flancie Jones 323b	F 754-55, 967-68, 989-91		N 754-55, 967-68, 989-91		S-4 1761
54	Patricia Box 326b	V 800, 863-64, 1050-53		N 800, 863-64, 1050-53	D 1626 Refused	D-8 1762
55	Christina Bartlett 332b	V 717-18		N 822	AO 857 Granted	
56	Sue Austin 344b				AO 946-49 Granted	

Venire #[1]	Name [2]	Acquaintance [3]	Opinon on G/I [4]	Bias from opinion or acquaintance? [5]	Challenged for Cause [6]	Final jury selection [7]
57	Steven Scott 347b				W 1617-18 Granted	
58	Emily Branch 359b					**Juror 11 1802-03**
59	Julia Nail 365b	V 801, 1053		N 801		S-5 1762
60	Dorwin Kenney 368b				AO 895-903 Granted	
61	Chad McIntyre 371b	V 823	718-19	Y 718-19	A 835-57 Granted	
62	Dian Copper 374b	F 770-71, 970-74, 1029-30		N 770-71, 970-74, 1029-30	S 1619 Refused 1714	S-6 1762
63	James Hargrove 377b	V 1415-18		N 1418		Juror 12 1762
64	Margaret Lindsey 383b				A 895-903 Granted	
65	Juanita Woods 401b				W 1618 Granted	
66	Patsy Winham 410b	V 823		Y 823	A 835-57 Granted	
67	Timothy Glen Amason 417b	B 801-02, 1053-56		N 801-02, 937	D 1627-28 Refused	D-Alt 1 1798
68	Julia Ray 423b	V 802, 1445		N 802, 1445		Alternate 1 1798-99
69	Billy Carpenter 426b	V 864, 1056-58, 1455		N 864, 1056-58	D 1628-30 Refused	D-Alt 2 1798-99
70	Annie Carodine 432b	F 772, 886		Y 886, 772	A 896-99 Granted	
71	Barbara Stewart 438b	F 772		Y 772	A 835-57 Granted	
72	Julian Beatrice Colbert 444b	V 802-03, 813, 823, 864-65, 1058-60, 1470		N 802-03, 813, 823, 864-65, 1058-60	D 1631 Refused	D-Alt 3 1798-99
73	Richard Varnes 447b	F 720-21, 772-73	720-21	Y 720-21, 772-73	A 835-57 Granted	
74	Ellis Doyle 450b	F 773-74		Y 773-74	A 835-57 Granted	
75	Linda Martin 459b	V 833-34, 1029, 1060	1472	N 833-34, 1029, 1060, 1472	D 1631-33 Refused	Alternate 2 1800-01
76	Richard King 465b		1016-17, 1481	Y 1481	W 1641 Granted	
77	Ronald Hammond 468b	V 804		Y 804	A 835-57 Granted	
78	Beverly Williams 474b					**Alternate 3**
79	Paula McCaulla 483b	V 804-05		Y 804	A 835-57 Granted	

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80	Brenda Simmons 486b	B 783-84, 805, 865, 1060-61		N 783-84, 805, 865,1060-61	D 1634 Granted	
81	Rebecca Hodges 489b	V 722, 805-06, 824		N 722 but yes for other	AO 847 Granted	
82	Kenneth Thomkins 492b	V 824		Y 824	A 835-57 Granted	
83	Sandra Robertson 501b	V 866-67, 876		Y 866-67, 876	A 896-99 Granted	
84	Phillip Cross 504b	B 723, 773-74, 824		Y 824	A 835-57 Granted	
85	Mary Seals 507b	F 782-83		Y 782-83	A 835-57 Granted	
86	Carlean Green 513b	B 755, 814		Y 755	A 835-57 Granted	
87	Beverly Locke 516b				AO 1725 Granted	
88	Alphonso Hayes 522b	F 755-56		Y 755-56	A 835-57 Granted	
89	Regina Tomkins 534b				AO 743-44 Granted	
90	Lynell Forrest 537b	B 774-75, 815		Y 774-75, 815	A 835-57 Granted	
91	Jimmy Hamilton 513b	V 813-14, 1061-62		N 813-14, 1061-62		
92	Mary Crowley 561b				W 1618 Granted	
93	Marjorie Pearson 570b				AO 1635 Granted	
94	Melissa Acy 573b	B 806, 824-25, 865-66, 944, 992-93, 1062-63, 15281729		N 806, 824-25, 865-66, 944, 992-93, 1062-63, 1729		
95	Leslie Crawford 582b	F 775, 993-95. 1030-32, 1074		Y 1030-32	A 1698 Granted	
96	Jessica Winters 585b				AO 1268 Granted	
97	Brandon Flowers 588b	F 756		Y 756	A 835-57 Granted	
98	Willie Robinson 600b					

Venire #[1]	Name [2]	Acquaintance [3]	Opinon on G/I [4]	Bias from opinion or acquaintance? [5]	Challenged for Cause [6]	Final jury selection [7]
99	Revell Suggs 609b	F775-76		Y 775-76	A 835-57 Granted	
100	Stanley Rodgers 621b	V 825-25	825-26	Y 825-26	A 835-57 Granted	
101	Michael Parker 624b	V 806-07	906-07	Y 806-07	A 835-57 Granted	
102	Paul Bays 630b	F 776-77		Y 776-77	A 835-57 Granted	
103	Mary Ella Jones 645b					
104	Dicey Davis 648b				AO 895-903 Granted	
105	Anthony Howard 657b				AO 895-903 Granted	
106	Jennifer Swindoll 666b		1006-07, 1558	Y 1006-07	A 1618 Granted	
107	William Golding 675b	V 826, 1063-64	1559	N 826, 1559	D 1635-36 Refused	
108	Matthew Surrell 696b	V 826, 867, 878, 1064-66	1064-66	N 26, 867, 878, 1064-66	D 1636-37 Granted	
109	Eddie Flowers 699b	F 756		Y 756	A 835-57 Granted	
110	Mamie Robinson 705b	F 996		N 996		
111	S. Brooks Jones 714b	V 827, 867		N 827, 867	D 1637-39 Refused	
112	L.D. Daniels 720b	F 777-78		Y 777-78	A 835-57 Granted	
113	Syrhonda Magee 726b	F 756-57		Y 756-57	A 835-57 Granted	
114	Diann Kilpatrick 747b	F 778-79		Y 778-79	A 835-57 Granted	
115	Polly Smith 753b	F 784		N 919-20	W 946-51 Granted	
116	Cynthia Powell 762b	F 779-80		Y 779-80	A 835-57 Granted	
117	Cristy Vail 765b	V 788		Y 788	A 835-57 Granted	
118	Antonio Golden 777b	V 1596	959, 1597	N 1597	W1618 Granted	
119	Alisha King 780b	V 827-28, 867-68		N 827-28, 267-68		
120	Steven Bennett 783b	F 730-32		N 730-32	D 1639-40 Refused	

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Venire #[1]	Name [2]	Acquaintance [3]	Opinon on G/I [4]	Bias from opinion or acquaintance? [5]	Challenged for Cause [6]	Final jury selection [7]
121	Michael Austin 789b	V 807, 828, 868, 1068-70, 1655-60	1652	N 807, 828, 868, 1068-70, 1652 1655-60	D 1719-20 Refused	
122	Madonna Woods 804b	V 828-29	828-29	Y 828-29	A 835-57 Granted	
123	Sheila Sledge Hodges 810b					
124	Martha Britt 813b	V 807-08, 829, 1070-73	1674, 1683	N 807-08, 829, 1070-73, 1674	D 1719-20 Refused	
125	Richard Robinson 819b				S 1714-15 Refused	
126	Curtis Britt 828b				D 1720-24 Refused	
127	Don Campbell 843b	F 996-98		N 996-98, 1017-18	W 1714 Granted	
128	Herman Moore 846b	F 998-99		N 998-99, 1018-20		
129	Elizabeth Eldridge 849b	V 808, 829-30		N 808, 829-30, but yes for other	AO 835-57 Granted	
130	Billy Gene Eskridge 858b [8]					
131	LaTonya Campbell 861b	F 779-80		Y 779-80	A 896-99 Granted	
132	Marvin Bridges 864b	V 833		N 833		
133	Hattie Sanders 867b	F 780		Y 780	A 835-57 Granted	
134	Katherine Henson 876b	V 815-16		Y 815-16	A 835-57 Granted	
135	Jennie Montana 879b					
136	Jimmy Allen 891b	F 983-84	1007-09	N 983-84, 1007-09		
137	Joel Robertson 900b	V 816-17, 830, 868-69		N 816-17, 830, 868-69		

[8] Juror 130 is noted to have raised his hand in response to knowing some possible witnesses. T. 904-19. However, because no voir dire questions were ever addressed to him personally he is not identified by name anywhere in the transcript. His identity is, however, disclosed in his juror questionnaire at 1 Supp. C.P. 858b.

Venire #[1]	Name [2]	Acquaintance [3]	Opinon on G/I [4]	Bias from opinion or acquaintance? [5]	Challenged for Cause [6]	Final jury selection [7]
138	Martha McKey 906b				S 949 Deferred (never ruled upon)	
139	Spencer Briggs 915b	V 830-31		N 736-37 but yes for other	AO 835-57 Granted	
140	Shaunta Sutton [race unknown]]	F 757-58		Y 757-58	A 835-57 Granted	
141	Tammie Bruce 921b	V 808-09	808-09	Y 808-9	A 835-57 Granted	
142	Glenda Evans 924b	V 831-32	831-32	Y 831-32	A 835-57 Granted	
143	Sherrie Vollbracht 942b	V 809, 832		Y 832	A 835-57 Granted	
144	Theo Ware Forrest 945b	F 780-81		Y 780-81	A 835-57 Granted	
145	Jennifer Ingram 948b	V 832-33		Y 832-33	A 835-57 Granted	
146	Harold Carpenter 951b	V 789		Y 789	A 835-57 Granted	
147	Maxine Ringold 957b	F 999-1000		N 999-1000		
148	Latoya Fleming 969b	F 1000-02		N 1000-02		
149	David Holiday 972b					
150	Stacy Black 975b	F 758		Y 758	A 835-57 Granted	
151	Angela Rainey 984b	V 833	833	Y 833	A 835-57 Granted	
152	Linda Davis 987b					
153	Najala Cage 771b				AO 857 Granted	
154	Contrilla Alexander [race unknown]	F 758-59		N 758-59 but yes for other	AO 946-51 Granted	
155	Toccara Woods 553b	F 759		Y 759	A 835-57 Granted	
156	Laurence McCloude 209b	F 759-60		Y 759-60	A 835-57 Granted	