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

MOTION FOR REHEARING

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INTRODUCTION

In affirming Curtis Flowers's conviction and sentence, this Court erroneously overlooked or misapprehended both Mississippi law and controlling federal constitutional precedent on several of the issues presented to it for review. Rehearing should be granted pursuant to Miss. R. App. P. 40 to rectify these clear departures from controlling law under the facts of this case.[1]

ARGUMENT

I. THIS COURT'S ENDORSEMENT OF THE PROSECUTION'S REPEATED - AND RECALCITRANT - MISREPRESENTATIONS OF THE RECORD EVIDENCE DURING CLOSING ARGUMENT RESTS ON ERRORS OF BOTH LAW AND FACT, AND, IF NOT CORRECTED, WILL ONLY ENCOURAGE SIMILAR MISCONDUCT IN THE FUTURE.

The prosecution's closing argument in this case featured four material misrepresentations of the facts, two of which were specifically found to require reversal in *Flowers v. State*, 842 So. 2d 531, 538 (2003) (*Flowers II*). In refusing to reach the same conclusion here, a majority of the Court inaccurately characterized three of the four misrepresentations as "supported by the evidence and/or … proper 'deductions and inferences' drawn from the facts," Slip Op. at ¶ 78, and compounded that mistake by evaluating their impact item-by-item, rather than cumulatively. Because an analysis free of these errors compels the conclusion that Flowers is entitled to reversal of his convictions, this Court should grant rehearing, modify its decision, and remand the case for a new trial.

The first instance of misconduct involves the prosecutor's misrepresentation of Sam

[1] In addition to the matters discussed in this motion, Appellant raised numerous other points of error in his appeal from his conviction and sentence. The Court's opinion (cited herein as "Slip Op., by paragraph) addresses them all. While maintaining that the conviction and/or death sentence in this case must be reversed for all the reasons previously asserted, Appellant only raises some of those errors in this Motion. In so limiting the Motion for Rehearing, Appellant in no way abandons his previous claims and arguments for purposes of further review of this Court's decision on direct appeal or in post-conviction or habeas corpus or other proceedings.

Jones's testimony concerning the timing of his arrival at the crime scene – the same misrepresentation that this Court condemned seven years earlier in *Flowers II*. This time around, the majority acknowledged that, contrary to the prosecutor's claim, Jones "did not testify that he arrived at Tardy Furniture at 10:00 a.m." But it found the discrepancy inconsequential on the grounds that "a reasonable inference could be drawn from the other evidence … that Jones may have arrived closer to 10:00," and that defense counsel's closing had accurately summarized the evidence. *Id.* at 73. Neither of these observations appropriately addresses the unfairness created by the prosecutor's claim.

To begin with, even if "other evidence" might have supported a "reasonable inference" that Jones's testimony was inaccurate (that evidence might just as easily have been disregarded given the unreliability of Porky Collins's identification and the credibility problems with Clemmie Fleming's claim), that possibility does not entitle a prosecutor to stand before a jury and misrepresent the record testimony. At most, the differences between Jones's account and those of Collins and Fleming can be said to have created a genuine issue of fact for the jury to resolve. Had the prosecutor acknowledged that issue and forthrightly offered the jurors a set of reasons to resolve it in favor of Collins and Fleming, Flowers would have no basis to complain. But he did not. Instead, he purported to recount Jones's testimony in a manner that simply eliminated the testimonial conflict, thereby cultivating among the jurors the materially false impression that the witnesses were unanimous in corroborating the State's timeline. That is not merely drawing a "reasonable inference;" instead, it is unilaterally changing the facts to eliminate a known strategic liability. It also cannot be correct that the mere fact of defense counsel's own, factually accurate argument to the jury neutralized the harm done by the prosecutor's false statement. If that were the rule, prosecutors would have free rein to fabricate evidence in closing argument, place the onus on defense counsel to correct their

misrepresentations, and rely on this Court to declare the misconduct "harmless." The problems with that arrangement are self-evident.

The majority's acceptance of the prosecutor's "had beef" argument – also a repeat of misconduct previously condemned in *Flowers II* – on the basis of several "facts" offered by the State also should not be sustained. Contrary to the majority's suggestion, none of the propositions it lists say anything about Flowers's *own* state of mind, which was undeniably the subject of the prosecutor's "had beef" remark. Instead, the circumstances recounted by the majority indicate that Flowers had been fired from very short-term employment at an entry level job, that Bertha Tardy had (quite justifiably) docked his pay to cover the damaged batteries, and that Chief Johnson had repeated conclusory hearsay to the effect that the Tardy family was "'concerned about their safety[.]" While those considerations might have supported a weak circumstantial argument that Flowers *could* have been aggrieved, they did not reasonably justify the prosecutor's factual declaration that Flowers *actually* "had beef" with the store, its owner, or its employees. The difference in strategic value between the two concepts is not insignificant, and given the reversal in *Flowers II*, it could not have been an accident when the prosecutor chose to risk claiming the latter even though the evidence could only support the former.

With regard to the argument concerning Porky Collins's statements, the majority again acknowledged that what the prosecutor said "was not an accurate representation" of the testimony, but again dismissed the misrepresentation as immaterial, this time because "the reality is that Collins did not identify Simpson. He said he could not be sure." Slip Op. ¶ 76. That is not at all a fair characterization of what was at stake. As the record as a whole plainly demonstrates, the "reality" at trial was that both the reliability of Collins's identification and the distinct possibility that Doyle Simpson, not Flowers, committed the crime were critical and contested questions for the *jury* to resolve on the basis of the evidence. The prosecutor distorted that

function by misrepresenting the facts, and in so doing gained the unearned, double advantage of bolstering the credibility of Collins's identification of Flowers and undercutting the evidence pointing toward Simpson. The majority's characterization of the prosecutor's argument as only "slightly inconsistent with the facts" is not defensible as a matter of fact; and its implicit endorsement of the prosecutor's improper tactic will only encourage similar misconduct in the future.[2]

While the majority's treatment of the facts concerning the individual instances of misconduct is troubling for the reasons outlined above, two further matters also deserve consideration on rehearing. The first is that the majority's analysis takes no account of the cumulative impact that the prosecutor's misrepresentations must have had on the jury. Each went to a critical issue which, if resolved against the State, could well have driven the jurors toward acquittal. Rather than acknowledging that truism, the majority was consistently at pains to justify the prosecution's actions, either by stretching to find evidentiary support for them, or by ignoring the context in which they occurred. That approach not only conflicts with the settled rule – applied in *Flowers II* itself – that misrepresentations of the type made here must be evaluated cumulatively; it also gives rise to a second, more far-reaching concern about incentivizing prosecutorial misconduct.

This is not only wrong in and of itself; it also represents significant retreat by this Court from its century-long practice of affirmatively discouraging such misconduct, reiterated in one of this Court's previous reversals of Mr. Flowers's convictions.

The fair way is the safe way, and the safe way is the best way in every criminal

[2] Because the majority did not offer an explanation for overlooking the prosecutor's concededly "incorrect," Slip Op. ¶ 77, description of the victims' positions at the crime scene, Flowers cannot offer substantive arguments on its rationale for doing so. Nevertheless, he maintains this misrepresentation, like the others, materially affected the jury's assessment of the issues at trial, and provided the State with an advantage to which it was not entitled.

> prosecution. The history of criminal jurisprudence and practice demonstrates, generally, that if everyone prosecuted for crime were fairly and fully conceded all to which he is entitled, and if all doubtful advantages to the state were declined, there would be secured as many convictions of the guilty, and such convictions would be succeeded by few or no reversals. *Johnson v. State*, 476 So. 2d 1195, 1215 (Miss.1985) (citing *Hill v. State*,72 Miss. 527, 534, 17 So. 375, 377 (1895)).

Flowers v. State, 842 So. 2d 531, 564 (Miss. 2003 (*Flowers II). See also Brown v. State*, 986 So. 2d 270, 276-77 (Miss. 2008) (vesting in the courts the *sua sponte* obligation to identify and remedy prosecutorial misconduct in closing arguments even without an objection from the defense) (citing *Gray v. State*, 487 So. 2d 1304, 1312 (Miss. 1986); *Griffin v. State*, 292 So. 2d 159, 163 (Miss. 1974)). The majority's retreat from this principle also constitutes a violation of Flowers's Fourteenth Amendment right to due process of law. *See Greer v. Miller*, 483 U.S.756, 765 (1987) ("[P]rosecutorial misconduct may so infec[t] the trial with unfairness as to make the resulting conviction a denial of due process.") (quoting *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974).[3]

Given the history of this case, in which three prior convictions were reversed due to misconduct, some of which was replicated here, the message sent by the majority is counterproductive at best. *See Flowers II*, at 538. *See also Flowers v. State,* 947 So. 2d 910 (Miss. 2007) (*Flowers III*), reversing for *Batson* misconduct by prosecutor and cumulative error including prosecutorial misconduct); *Flowers v. State*, 773 So. 2d 309, 317 (Miss. 2000) (*Flowers I*) (reversing for prosecutorial misconduct in introducing irrelevant evidence of other crimes and for improper cross-examination on facts not in evidence). The prosecution in this case not only committed misconduct again; it committed some of the very *same* misconduct

[3] This principle is also a bedrock principle of the rules adopted by this Court governing professional conduct. *See* Miss. R. Prof. Conduct 3.8 comment (prosecutors are not merely advocates for conviction of the accused, but have "specific obligations to see that the defendant is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence").

again. Yet instead of reproaching them for their audacity and disregard for this Court's own prior holdings in the prosecution of Mr. Flowers, the majority opinion answered their recalcitrance with generosity, tolerance, and accommodation.

Unless that message is fundamentally modified on rehearing, prosecutors will be right to assume that misrepresenting the evidence in a closing argument no longer constitutes a reversible transgression of Mississippi's rules of fair play.

II. THIS COURT'S EXCLUSION OF EXPERT PSYCHOLOGICAL TESTIMONY ON EYEWITNESS IDENTIFICATION IN THIS DEATH PENALTY MATTER HAS CONSTRUED MISS. R. EVID. 702 IN A MANNER THAT VIOLATES NOT ONLY THIS COURT'S EXISTING PRECEDENT BUT ALSO THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION.

As this Court acknowledges, the sole "direct" evidence of guilt in this matter is testimony about a purported admission of guilt by Flowers to a jailhouse informant of exceedingly questionable credibility. State v. Flowers, No. 2010-DP-01348-SCT (Miss. Nov. 13, 2014) (hereafter "Slip. Op.) at ¶¶ 57-58.[4] In all other respects, this Court acknowledges, the State's proof relied upon circumstantial evidence purporting to establish Flowers's proximity to places where the State's theory of the case required him to be at times when that theory said he should have been there. *Id.* at ¶¶ 10-12, 47.

One of the most significant pieces of this circumstantial proof was testimony from one Charles "Porky" Collins – an elderly white man, and a stranger to Flowers – that he saw a black man he identified in a police photo lineup as Curtis Flowers "outside of Tardy Furniture" immediately prior to the time the State's theory said the crimes occurred. At trial, Collins and the

[4] There is no doubt that the record demonstrates that this particular witness, Odell Hollman, had extraordinary credibility issues – he was, at the very least, a self-admitted perjurer in this particular case – something that neither the trial court nor this Court disputed. Rather, this Court ruled as a matter of law that even this extraordinary credibility issue did not preclude treating this testimony as "direct" evidence. Slip Op. at ¶¶130-32. Flowers respectfully submits that this Court's legal conclusion in this regard also represents a significant misapprehension of and departure from controlling law and a violation of the due process clause. However, pursuant to the reservation of claims and arguments set forth in n. 1, above, this position will not be argued further here.

officers who conducted the photo lineup testified to that out-of-court identification. Collins repeated his identification of the defendant in court, as well. *Id.* at ¶¶ 18-24. Flowers pretrial motions to exclude both the in- and out-of-court identification of him by Collins – who was the only witness whose testimony placed Flowers at the crime scene immediately prior to the time the State's theory contended the crime occurred – were denied. C.P. 2147-58, Tr. 169.[5] In light of this ruling, Flowers defended against the testimony of both the in- and out-of-court identifications of Flowers by Collins by attempting to show that it was mistaken because of the circumstances of the original observation and because it was the product of an improperly suggestive pretrial photo identification procedure administered to him by police.

The excluded testimony of Dr. Jeffrey Neuschatz, proffered under oath by way of affidavit, was the principal evidence Flowers sought to offer in furtherance of his defense to this testimony. Had Dr. Neuschatz been permitted to testify in accordance with his affidavit, he would have provided the jury an explanation – not otherwise put forth by other witnesses or through cross-examination – of *why* both of Collins's identifications of Flowers were likely unreliable despite the fact that Collins himself may not have been deliberately lying. It would have put before the jury evidence of psychological factors that scientific research had established likely affected the reliability and accuracy of both the in- and out-of-court identifications even

[5] A minor, but necessary, correction to the opinion of the Court that must also be made on rehearing is to the factually incorrect finding that "Flowers does not claim that Collins's in-court identification was tainted by the alleged suggestiveness of the out-of-court identification." Slip Op. at ¶ 24. In fact, Flowers actually did seek to exclude both the in- and out-of-court identifications on the basis of, *inter alia*, the undue suggestiveness of the pretrial identification process. *See, e.g.,* C.P. 2150-52, 2155-58, Tr.155-56. The trial court expressly decided that issue by ruling that both the in- and out-of-court identifications were admissible *because* they were not unduly suggestive. Tr. 168-70. Flowers's brief in chief likewise raises this claim. *See, e.g.,* Brief of Appellant at 60 (captioning the argument as "The *in- and out-of court* eyewitness identifications . . . were constitutionally unreliable and the trial court erred in overruling Flowers' objection to *their* admission" and alluding in the argument expressly to the "corrupting effect of a suggestive procedure"); 67-73 (extensive discussion of suggestiveness as a basis for error in admitting any testimony regarding Collins's identification of Flowers). Even if this Court does not revisit its affirmance of the trial court's rulings in this regard, it should nonetheless affirm them as they were actually made, not as this Court has mistakenly characterized them.

though Collins himself truly believed he was accurately recounting what he saw.

Flowers respectfully submits that this Court's decision to exclude that testimony is founded on having overlooked or misapprehended the undisputed facts of record, Mississippi's established Rule 702 precedent, and applicable constitutional law. The dissenting opinion on this issue addresses the first two of these of these misapprehensions. Slip Op. at ¶¶ 172-93 (Dickinson, P.J., dissenting). Flowers respectfully submits that, for the reasons set forth in the dissent as supplemented by this Motion, this Court should reconsider its factual and Rule 702 rulings and adopt the reasoning of the dissent on those points. [6]

However, assuming that this Court elects not to revisit these rulings, it must nonetheless reverse the exclusion of Dr. Neuschatz's testimony because its holding in this case construes Rule 702 in a manner that impinges upon Flowers's constitutional rights to present a defense. That interpretation must therefore give way to the dictates of the United States Constitution. *See Holmes v. South Carolina*, 547 U.S. 319, 324 (2006); *Chambers v. Mississippi*, 410 U.S. 284, 302 (1973).

A. <u>This Court's decision violates the Sixth, Eighth and Fourteenth Amendments of the United States Constitution, and the corresponding provisions of the Mississippi Constitution providing for a fundamentally fair trial at which the accused has a full and fair opportunity to defend himself.</u>

Flowers's bedrock right to due process rests on federal constitutional foundations. Few

[6] The Court's chief factual misapprehensions go to supporting its finding that Neuschatz's testimony would not have "helpful to the jury" because Collins's testimony was not "critical" because other witnesses and cross-examination provided the same information. Slip Op. at ¶45, 47. The dissenting opinion shows them to be simply contrary to the undisputed evidence of record. *Id.* at ¶¶ 176-77, 191-92. In addition to the factual errors pointed out by the dissent, Flowers also notes here that the testimony of even the most disinterested of the other witnesses was at the very least internally inconsistent with the versions given by other equally disinterested witnesses purporting to observe the same things; and many were impeached and even directly contradicted by other witnesses. *See* Brief of Appellant at 23-33. The dissenting opinion also sets forth far better than Flowers could hope to do the reasons why the instant ruling departs from this Court's long-established Rule 702 jurisprudence. Slip Op. at ¶¶ 172-75, 178-90, 193.

rights are more fundamental than that of an accused to present witnesses in his own defense. *Chambers v. Mississippi*, 410 U.S. 284, 302 (1973).

> Whether rooted directly in the Due Process Clause of the Fourteenth Amendment, *Chambers v. Mississippi, supra*, or in the Compulsory Process or Confrontation clauses of the Sixth Amendment, *Washington v. Texas*, 388 U.S. 14, 23 (1967); *Davis v. Alaska,* 415 U.S. 308 (1974), the Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.'

Crane v. Kentucky, 476 U.S. 683 (1986) (quoting *California v. Trombetta*, 467 U.S. 479, 485 (1984)). *See also* Slip Op. at ¶ 171 (Dickinson, P.J., dissenting).

While states are free to prescribe reasonable rules of evidence restricting the admission of evidence, such restrictions unconstitutionally abridge a defendant's meaningful opportunity to present a complete defense where they "infring[e] upon a weighty interest of the accused and are arbitrary or disproportionate to the purposes they are designed to serve." *Holmes v. South Carolina*, 547 U.S. 319, 324 (2006) (quoting *United States v. Scheffer*, 523 U.S. 303, 308 (1998)) (internal quotation marks omitted). *See also Rock v. Arkansas,* 483 U.S. 44, 58 (1987); *Washington v. Texas,* 388 U.S. 14, 22-23 (1967). A rule is arbitrary where it excludes important defense evidence but does not serve any legitimate interest. *Holmes, supra,* at 325, or "so infuses the trial with unfairness as to deny due process of law." *Estelle v. McGuire*, 502 U.S. 62, 75 (1991); *Lisenba v. California*, 314 U.S. 219, 228 (1941).

This general principle is based on the fundamental proposition that the Fifth and Fourteenth Amendments guarantee every criminal defendant a fundamentally "fair trial, understood as a trial resulting in a verdict worthy of confidence," *Kyles v. Whitley*, 514 U.S. 419, 434 (1995), or one "whose result is reliable," *Strickland v. Washington*, 466 U.S. 668, 687-89 (1984). *Accord, e.g., Chambers*, *supra*, 410 U.S. at 302. A reliable verdict in a criminal case must be the product of a fair adversarial proceeding, *Strickland*, *supra*, at 696, 700, and based solely on the state's lawful evidence proved beyond a reasonable doubt, not on extraneous

considerations. *See, e.g., Taylor v. Kentucky,* 436 U.S. 478*,* 488 (1978). *Accord Kentucky v. Whorton*, 441 U.S. 786, 788-90 (1979) (*per curium*); *Beck v. Alabama,* 447 U.S. 625, 642-43 (1980); *Bruton v. United States*, 391 U.S. 123, 131, n. 6 (1968).

Due to the severity and irrevocable nature of the death penalty, "the Eighth Amendment requires a greater degree of accuracy and fact-finding than would be true in a noncapital case" in all phases of a capital trial. *Gilmore v. Taylor*, 508 U.S. 333, 342 (1993). *Accord Woodson v. North Carolina*, 428 U.S. 280, 305 (1976); *Beck, supra*, 447 U.S. at 637-638; *Johnson v. Mississippi*, 486 U.S. 578, 584-90 (1988). In other words, the heightened degree of reliability demanded in capital cases affords additional protections against inaccurate or constitutionally unreliable verdicts above and beyond the basic due process protections applicable in all criminal cases*. See, e.g., Sawyer v. Smith*, 497 U.S. 227, 235, 243-44 (1990)*; Beck v. Alabama, supra*, at 627, 636, 638, 642; *Turner v. Murray*, 476 U.S. 28, 36-37 (1986); *Caldwell v. Mississippi*, 472 U.S. 320, 325-26, 328-30, 340-42 (1985).

Hence, because the instant matter is a death penalty matter, the risk of arbitrariness in the exclusion of Dr. Neuschatz's testimony must be assessed with heightened scrutiny and evaluated accordingly. *Fulgham v. State*, 46 So. 3d 315, 322 (Miss. 2010). The exceedingly narrow "fit" requirements adopted by this Court in the instant matter cannot pass muster under this kind of scrutiny. This is particularly so when compared to this Court's willingness to admit expert testimony offered by the State in criminal cases that is highly disputed in the professional community from which the expert draws his expert credentialing, *Howard,* 853 So. 2d at 795, or without any peer-reviewed or error-rate tested scientific verification; *Branch v. State,* 998 So. 2d 411, 415 (Miss. 2008); *Hobgood v. State,* 926 So. 2d 847, 854 (Miss. 2006). It also appears exceedingly arbitrary to exclude expert defense testimony in a criminal case solely because there is other evidence that supports the testimony sought to be impeached by the scientific testimony,

even though no such restrictions apply in civil matters. *Hubbard ex rel. Hubbard v. McDonald's Corp*., 41 So. 3d at 674-78; *Burnwatt*, 47 So. 3d at 116. Indeed, in *Holmes v. South Carolina*, the Supreme Court found a state evidentiary rule relying on comparative weights to violated the due process right to present a defense. *Holmes*, 547 U.S. at 324.

B. The Constitution also prevents this Court from adopting evidentiary rules that are at odds with the standards of the profession whose expertise is being relied upon, especially where those standards have been recognized by the United States Supreme Court.

This Court's decision in the instant matter overlooked the U.S. Supreme Court's recent decision in *Hall v. Florida*, --- U.S. ---, ---, 134 S. Ct. 1986 (2014). *Hall* addressed the IQ score cutoff level adopted by Florida for purposes of determining whether a capital accused can establish intellectual disability for the purpose of pursuing relief under *Atkins v. Virginia*, 536 U.S. 304 (2002). In *Hall*, the Court held that Florida acted unconstitutionally in adopting a decisional rule that disregarded a long established tenet of psychological testing. Instead of recognizing that the results of IQ testing must take into account standard errors of measurement in establishing the individual's actual IQ score or range of scores, Florida adopted a fixed numerical cutoff that failed to account for this. In so doing, it excluded persons who likely did have IQ scores within the intellectually disabled range that precluded their receiving a death sentence. *Id.* at 1996. The Court held that Florida's substitution of its own fixed IQ measurement for the adjusted one required by the psychologists and psychiatrists whose standards had been approved by the Court in *Atkins* was constitutionally unacceptable. *Id.* at 2000. This, the Court observed, was of particular importance where the death penalty is at issue.

> The death penalty is the gravest sentence our society may impose. Persons facing that most severe sanction must have a fair opportunity to show that the Constitution prohibits their execution. Florida's law contravenes our Nation's commitment to dignity and its duty to teach human decency as the mark of a civilized world. The States are laboratories for experimentation, but those experiments may not deny the basic dignity the Constitution protects.

Hall, 134 S. Ct. at 2001. Just as the United States Constitution protects intellectually disabled individuals from being punished with a death sentence, so, too, the United States Constitution "protects a defendant against a conviction based on evidence of questionable reliability . . . by affording the defendant means to persuade the jury that the evidence should be discounted as unworthy of credit." *Perry v. New Hampshire*, --- U.S. ---, ---, 132 S. Ct. 716, 723 (2012).

This Court's decision in the instant matter took its role as a "laborator[y] for experimentation" under Rule 702 to the point where it denied Flowers the "basic dignity the Constitution protects" with respect to his Sixth and Fourteenth Amendment protections against conviction based on unreliable evidence. *Hall,* 134 S. Ct. at 2001; *Perry*, 132 S. Ct. at 732. In this, this Court, like the Florida Supreme Court in *Hall*, improperly employed "unfettered discretion to define the full scope of the constitutional protection" in a way that falls short of what the Constitution itself requires. *Hall*, 134 S. Ct. at 1998. Despite the disclaimer that "we do not hold that such expert testimony is *per se* inadmissible," Slip. Op. ¶ 47, it is difficult to discern what conditions would support the admissibility of such evidence in Mississippi under an accurate reading of the record in the instant matter. *See* n. 6, above, and accompanying text. Hence, as it stands this Court's opinion creates a legal rule that cannot pass muster under either Mississippi law or the United States Constitution.

In contrast to its requirements for the acceptance of other kinds of expert testimony under this state's *Daubert*-based Rule 702, this Court in upholding the exclusion of this testimony cites the failure to introduce into evidence the peer-reviewed, error-rate tested research studies upon which the expert relied. It does this even though the trial court did not order that they be introduced, and the State made no contention that they should be. Slip Op. at ¶ 43. This is a clear departure from the language of Rule 705 of the Mississippi Rules of Evidence. That rule expressly requires this only if the trial court has ordered it, something the trial court did not do in

this case. Miss. R. Evid. 705. It is also a departure from this Court's prior jurisprudence that did not require this *even where* the admissibility turned on the reliability of that research. *See Watts v. Radiator Specialty Co*., 990 So. 2d 143, 146–48 (Miss. 2008). This must, at the very least, be revisited as a matter of Mississippi jurisprudence for the reasons set forth in the dissenting opinion in this matter. *See* Slip. Op. at ¶¶ 181-83 and nn. 15-18.

This holding also violates *Hall* by imposing an unnecessary and irrational burden on the introduction of this particular kind of scientific testimony that runs afoul of the Constitution by departing from well-established scientific standards for this field. *See Commonwealth. v. Gomes*, --- N.E.3d ----, ---- (Mass. 2014) No. SJC-11537, 2015 WL 159372, at *7 (Mass. Jan. 12, 2015) (concluding that "there are various principles regarding eyewitness identification for which there is a near consensus in the relevant scientific community"). *See also, e.g., State v. Copeland*, 226 S.W.3d 287, 298-302 (Tenn. 2007). *See similarly State v. DuBray,* 317 Mont. 377, 77 P.3d 247, 255 (2003) ("It shall be an abuse of discretion for a district court to disallow expert testimony on eyewitness testimony when no substantial corroborating evidence exists."); *State v. Henderson*, 208 N.J. 208, 27 A.3d 872 (2011) (affirmatively requiring certain procedures to be followed in order to render eyewitness identifications by photo lineup admissible); Slip. Op. at ¶ 175, n.13 (citing cases). This is, therefore, exactly the kind of unconstitutional replacement of scientific conventions with irrational and unnecessary rules that *Hall* condemns as depriving a defendant of his Eighth and Fourteenth Amendment rights when facing the ultimate punishment. *See* 134 S. Ct. at 2001 (concluding that Florida's adoption of an unscientifically approved standard that precludes any claim of *Atkins*-level retardation even where science would suggest the defendant might be retarded is unconstitutional because "the law requires that he have the opportunity to present evidence" in support of his contentions).

The constitutional arbitrariness of the holding on this point in the instant case is amplified

by the fact that the United States Supreme Court has recognized the validity of the research in this field and the presumptive admissibility of expert testimony concerning it in most jurisdictions. *Perry,* 132 S. Ct. at 722, 729 (recognizing that expert testimony is available to explain this fact to juries when the identification occurred under such circumstances even in the absence of a constitutional right to have those circumstances controlled).

Perry recognizes the validity of this research as it relates to an undisputed aspect of the eyewitness identifications in this matter: The fact that both eyewitnesses who testified were subjected to pretrial photo identification processes that did not employ available recognized safeguards against suggestiveness. *Id.* at 729. *See also State v. Henderson*, 208 N.J. 208, 27 A.3d 872 (2011) (requiring that police conducting out-of-court identification procedures in New Jersey follow the safeguards against suggestibility identified by Dr. Neuschatz in his testimony in the instant matter), *Gomes*, 2015 WL 159372, at * 5-12 (prospectively adopting New Jersey model jury instruction propounded in *Henderson*, and endorsing, pursuant to *Perry*, the use of expert testimony to explain eyewitness reliability questions to juries). The only distinction from *Perry* is that the identification procedures were conducted by law enforcement, so the circumstances that did not control for suggestiveness *are* subject to constitutional scrutiny. However, that only amplifies the right of a defendant to present evidence challenging the reliability of any identifications that may be insufficiently suggestive to be excluded altogether. It certainly makes the right to make that challenge one of constitutional proportion. This Court must therefore revisit this question on rehearing, reverse the conviction, and remand this matter for a new trial.

CONCLUSION

For the foregoing reasons, and for all the reasons cited as error in his principal briefing, and by the dissenting opinions, Flowers respectfully submits that the decision of this Court affirming his

conviction of capital murder and sentence of death is unsupported by controlling law, violates the United States Constitution, and is contrary to the record. He respectfully urges this Court to grant rehearing, and upon rehearing reverse the conviction and/or sentence and remand this matter to the trial court for a new trial.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have this day filed by means of the electronic case filing system the foregoing Motion for Rehearing pursuant to Mississippi Rule of Appellate Procedure 25 by which immediate notification to all ECF participants in this cause is made, including Melanie Dotson Thomas, Esq., Special Assistant Attorney General, P. O. Box 220, Jackson, MS 39205-0220, counsel for the State, and by U.S. Mail, postage prepaid, on the following persons believed by me not to be ECF participants.

Hon. Joseph H. Loper, Jr. Presiding Judge P.O. Box 615 Ackerman, MS 39735	Doug Evans, Esq., District Attorney P.O. Box 1262 Grenada, MS 38902	Curtis Flowers, Appellant Unit 29-J Mississippi State Penitentiary Parchman, MS 38738

This the 15th day of January, 2015.

s/Alison Steiner, MB No. 7832
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