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

Sheri Lynn Johnson (*pro hac vice*)
Keir M. Weyble (*pro hac vice*)
Cornell Law School
158-B Myron Taylor Hall
Ithaca, NY 14853
(607) 255-3805 (phone)
(607) 255-7193 (fax)
slj8@cornell.edu
kw346@cornell.edu

Alison Steiner
Miss. Bar No. 7832
Office of the State Public Defender
Capital Defense Counsel Division
239 N. Lamar St. Suite 604
Jackson, MS 39201
(601) 576-2314 (phone)
(601) 576-2319 (fax)
astei@ospd.ms.gov

ATTORNEYS FOR APPELLANT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

MOTION FOR REHEARING

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

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 bare majority (5 to 4) 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 ¶ 80, and compounded that mistake by evaluating the impact of the misrepresentations 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. References to the trial transcript are to "Tr." by page.

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, 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. Slip Op. at ¶ 75. Neither of these observations adequately reflects the character or magnitude of the prosecutor's misrepresentation.

A. The prosecutor's false and misleading characterization of Sam Jones' testimony.

First, it is essential to recognize that Jones was the *State's own witness*; the prosecution called him to the stand, elicited his testimony that he arrived at the store before 9:30 a.m., and never sought to impeach him. *See* Miss. R. Evid. 607; *Carothers v. State*, 152 So.3d 277, 281 (Miss. 2014) (overruling *Wilkins v. State*, 603 So.2d 309, 322 (Miss.1992), and holding that, "in order to prevent abuse of Rule 607, impeachment of one's own witness should be only allowed when circumstances indicating good faith and the absence of subterfuge are present"). Instead, when Jones' testimony about the timing of his arrival at the store became inconvenient – both because it left a substantial hole in the timeline and because it was inconsistent with other State's witnesses – the prosecutor simply got up before the jury in closing argument and made it disappear, just as he had done in *Flowers II*. *See Flowers v. State*, 842 So. 2d 531, 555 (¶ 71) (Miss. 2003); Slip Op. at ¶ 202 (Waller, C.J., dissenting); *id.* at ¶¶ 207-212 (King, J., dissenting). That action was rightly recognized as reversible error in *Flowers II*, and – as four members of this Court have already found – its repetition in *Flowers VI* requires the same response.

In reaching the opposite conclusion, the majority observes that "a reasonable inference could be drawn from the other evidence … that Jones may have arrived closer to 10:00." Slip

Op. at ¶ 76. That may be correct, but the prosecution did not use its closing argument to forthrightly acknowledge the conflict in the evidence it presented and offer the jury a reasoned basis for resolving that conflict against Jones' account. Instead, the prosecutor's argument purported to *recount* Jones's testimony for the jury, but did so in a manner that erased the testimonial conflict and affirmatively misled the jurors to believe that the witnesses had unanimously supported the State's timeline all along. That is not merely drawing a "reasonable inference"; instead, it is unilaterally changing the facts to eliminate a difficult 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.

B. The prosecutor's baseless motive argument that Flowers "had beef" with the furniture store.

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, *see* Slip Op. at ¶ 76, says 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. *See* Slip Op. at ¶ 215 (King, J. dissenting) ("But the feelings and exceptions of Tardy's employees must be distinguished from Flowers's perception. The statements cited by the State do not establish that Flowers had ill will toward Tardy's 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.

C. The prosecutor's false statement that Porky Collins "said the guy ain't in there" when presented with the Doyle Simpson photo array.

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. at ¶ 78. That is a significant mischaracterization 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 while simultaneously 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.

D. The prosecutor's falsehoods about the location and distribution of the victims at the crime scene.

It is a truth universally acknowledged that the prosecutor misrepresented to the jury in his closing argument that "the bodies of all four victims [were discovered] laying in a pile, in a group right at the front counter in Tardy Furniture store." Tr. 3188. The State conceded it in its briefing, Brief of Appellee at 30, and the majority opinion agreed. Slip Op. at ¶79. It was also one of the acts of misconduct that persuaded the dissenters to conclude that prosecutorial misconduct had in fact deprived Curtis Flowers of a fair trial. *See* Slip Op. at ¶¶202-03 (Waller, C.J., dissenting).

As a consequence, this Court properly found that this error had, as a matter of plain error, occurred and therefore had to be assessed under the standards for prejudice attending any constitutional error. Slip Op. at ¶79 (citing *Conners v. State*, 92 So. 3d 676, 682 (Miss. 2012) (recognizing that "we can recognize obvious error which was not properly raised by the defendant ... and which affects a defendant's fundamental, substantive right")). But the majority's conclusion that no prejudice resulted overlooked or misapprehended both controlling law and the record.

As this Court recognized in *Gillett v. State*, in order to show a constitutional error to be harmless, the State must establish "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." 148 So. 3d 260, 266 (Miss. 2014) (quoting *Chapman v. California*, 386 U.S. 18, 23-24 (1967) and concluding that it had earlier departed from this standard). To meet this burden, the State must show that the evidence supporting the verdict obtained was "overwhelming and largely uncontroverted." *Clark v. State,* 891 So. 2d 136, 141 (Miss. 2004). Only where the subject matter of the error was "ancillary to the overwhelming

evidence of [defendant's] guilt" may the error be deemed harmless. *Moffett v. State*, 49 So. 3d 1073, 1100 (Miss. 2010).

But the State's closing argument on this point was anything but "ancillary." It went to the core of the State's theory that Flowers, and Flowers alone, committed the quadruple murder. And if one thing is clear in the instant matter, it is that the evidence of guilt supporting Flowers's convictions and sentences, is not, and never has been, "overwhelming" or "uncontroverted." With the exception of inherently unreliable "snitch" testimony by a self-admitted liar, the case against Flowers has always been entirely circumstantial, and has never had any reliable forensic corroboration in the form of either fingerprint or DNA evidence. The contradictions in the testimony upon which the State relied to establish the incriminating circumstances are legion, both between witnesses and within particular witness's testimony. As a result, this Court has, at least heretofore, been inclined to find any misconduct by the prosecutor involving facts not in evidence to be prejudicial. *See, e.g.* Slip Op. at ¶7 (citing *Flowers II*), *Flowers I* at 326-30 (reversing because of prosecutorial plain error in using facts not in evidence in both cross-examination and closing argument).

The majority's conclusion in the instant matter that the prosecutor's misconduct in arguing facts affirmatively contrary to the record has somehow suddenly become non-prejudicial cannot stand. It rests on overlooking the constitutional requirement that makes it the State's burden to establish lack of prejudice, not that of the defendant to establish its existence. This in turn requires this Court to fully "scrutinize the effect the [constitutional error] had on the . . . process." *Gillett*, 148 So.3d at 266 (expressly reversing on post-conviction review the finding of harmless error made on direct appeal because "we . . . conclude that we did not apply the correct standard of review" in arriving at that finding). The majority opinion makes the same mistake as this Court recognized it made on the direct appeal in *Gillett.* Flowers should not have

to wait for post-conviction review to correct it.

Moreover, the record fails to support the only factual basis cited by the majority for concluding that there was no prejudice in the acknowledged misconduct: "Flowers did not present the "two-man crime" theory to the jury." Slip Op. at ¶79. In arriving at this conclusion the majority overlooked that Flowers expressly both opened and closed with the assertion that the crime was likely committed by two men, Doyle Simpson and his brother Emmit, and argued the circumstances that made them more likely suspects in the crime than Flowers. Tr. 1826, 3324, 2221-32. This Court overlooked this important fact when it concluded, improperly, that reliance by the State on facts not in evidence to argue its contrary theory was not prejudicial.

While the majority's treatment of the facts concerning each of the foregoing individual instances of misconduct is erroneous and troubling for the reasons discussed 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 repeatedly seeks 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 signals a 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

> 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)).[2]

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 again. Yet instead of reproaching them for their audacity and disregard for this Court's own prior holdings, the majority's opinion answers their recalcitrance with generosity, tolerance, and accommodation. Unless that message is fundamentally modified on rehearing, prosecutors will

[2] 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). That principle is also embodied in the rules governing professional conduct adopted by this Court. *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").

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. *See* Slip Op. (Waller, C.J., dissenting) ("Applying heightened scrutiny, I find plain error in the prosecution's mischaracterizations, particularly given our admonishments in *Flowers II*."); *id.* at ¶ 206 (King, J., dissenting) (""The Majority in today's case, by endorsing the prosecutor's misstatements – the same misstatements which warranted reversal in *Flowers II* – takes Mississippi one step closer to having misrepresentation of the facts presented at trial commonplace in our trial courts.").

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,
CURTIS GIOVANNI FLOWERS, Appellant
By: s/Alison Steiner, MB No. 7832

Sheri Lynn Johnson (*pro hac vice*) slj8@cornell.edu
Keir M. Weyble (*pro hac vice*) kw346@cornell.edu
Cornell Law School, 158-B Myron Taylor Hall
Ithaca, NY 14853
(607) 255-3805 (phone) (607) 255-7193 (fax)

Alison Steiner, MB # 7832 astei@ospd.ms.gov
Office of the State Public Defender, Capital Defense Counsel Division
239 N. Lamar St. Suite 604
Jackson, MS 39201
(601) 576-2314 (phone) (601) 576-2319 (fax)

Attorneys for Appellant

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 Brad A. Smith, Esq. and Jason Davis, Esq., Office of the 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 18th day of December, 2017.

s/Alison Steiner, MB No. 7832
Attorney for Appellant