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

REPLY BRIEF OF APPELLANT

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INTRODUCTION

Flowers has in good faith raised several important points of error that he believes this Court should remedy. After reviewing the Brief of Appellee, Flowers is concerned at the State's approach. Rather than joining with Flowers to present their respective positions on the merits of Flowers' claims, the State appears to wish largely to divert this Court's attention from even considering them. To this end, it asserts procedural bar on several of these claims. In its Summary of Argument, the State identifies "Issues II, III, IV, VII, X, XI, XII and XIII" as "procedurally barred in whole or in part." Aee. 12.[1] This list, however, is both over- and under-inclusive. The State's briefing on issues III, VII, and XII does not refer to procedural bar. Conversely, though it makes claims of procedural bar in its reply to Issues V and VI, it neglects to alert the Court to that fact in its Summary of Argument. Flowers will refute the claims of bar in the section of the Argument portion of this Brief that discusses the particular issue the State seeks to preclude this Court from considering.

However, the State's arguments supporting its claims of bar, as well as some of its merits responses, rely on significant mischaracterizations about the record. Hence, before addressing particular claims, Flowers will attempt to correct those mistaken representations about the record. Given the complexity of the record in this matter, Flowers will assume the mischaracterizations are not deliberate. They are more likely manifestations of the State's

[1] The State's Brief of Appellee is cited as "Aee." by page. Flowers' brief in chief is cited as "App." by Page. The State's default reference in its briefing to Flowers is "Appellant." Flowers, in accordance with Miss. R. App. P. 28(e), will refer to all parties by name, or by status in the trial court. The clerks papers are cited by page number as "C.P.," "1 Supp. C.P.," or "2 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. The transcript is cited by page number as "Tr.," "1 Supp. Tr.," or "2 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. Records from previous trials in which an appeal occurred are cited as "1997 Trial," "1999 Trial," or "2004 Trial" and to the C.P. or Tr. location in that record by page.

apparent belief that it is somehow inappropriate for the parties to ask each other or the Court to go "detail by detail" through the record in order to determine whether or not error requires reversal of the convictions and/or death sentences presently on appeal. App. 13.

Many of the State's inaccurate statements about the record go to matters first raised during earlier proceedings, but carried forward into the trial on appeal here. To keep the State's mistakes from confusing this Court, Flowers has prepared the following timeline (hereafter "Timeline"), with references to where material from prior proceedings relevant to errors claimed in the present appeal is before this Court in the instant appeal.

Date	**Event**	**Available At**
PROCEEDINGS RELATING TO THE FIRST FLOWERS TRIAL		
Oct. 13 -17, 1997	**FIRST FLOWERS TRIAL**(Lee County) (Bertha Tardy indictment only) **Conviction, Death Sentence, REVERSED**	Tr. 305-28, 458-63, R.E Tab. 6, 2 Supp. Tr. A2-A50, C.P. 1651-85, 1932-66. Record in Supreme Court No. 97-DP-01459-SCT (hereafter "1997 Trial") (available by judicial notice, *see In re Dunn*, 2011-CS-00255-SCT, 2013 WL 628646 (Miss. Feb. 21, 2013)); (cited at App. 34) *Flowers v. State*, 773 So.2d 309 (Miss. 2000)
PROCEEDINGS RELATING TO THE SECOND FLOWERS TRIAL		
Jan. 6, 1999	Pretrial Motion to Suppress Eyewitness ID	Tr. 3-170
Mar. 22-31, 1999	**SECOND FLOWERS TRIAL** (Harrison County) (Derrick Stewart indictment only) **Conviction, Death Sentence, REVERSED**	Tr. 305-28, 458-63, R.E Tab. 6, 2 Supp. Tr. A2-A50, C.P. 1651-85, 1932-66; Record in Supreme Court No. 99-DP-01369-SCT (hereafter "1999 Trial") (available by judicial notice); *Flowers v State*, 842 So.2d 531 (Miss. 2003)

Date	Event	Available At
Mar. 26, 1999	In-trial suppress statement motions	T. 171-216
PROCEEDINGS REVERSING THE FIRST AND SECOND FLOWERS CONVICTIONS		
Dec. 21, 2000	**Flowers I MSSC Reversal**	*Flowers v. State*, 773 So.2d 309 (Miss. 2000)
April 3, 2003	**Flowers II MSSC Reversal**	*Flowers v. State*, 842 So.2d 531 (Miss. 2003)
PROCEEDINGS RELATING TO THE THIRD FLOWERS TRIAL AND ITS REVERSAL		
Feb. 2-12, 2004	**THIRD FLOWERS TRIAL** (Montgomery County) (consolidated trial) **Conviction, Death Sentence, REVERSED**	Tr. 305-28, 458-63, R.E Tab. 6, 2 Supp. Tr. A2-A50, C.P. 1651-85, 1932-66; Record in Supreme Court No. 2004-DP-00738-SCT (here-after "2004 Trial")(available by judicial notice); *Flowers v. State*, 947 So.2d 910 (Miss. 2007) (Cited at App. Br, 16, 174, 186, 191)
Feb. 1, 2007	**Flowers III MSSC Reversal**	C.P. 1007-1186, *Flowers v. State*, 947 So.2d 910 (2007)
PROCEEDINGS RELATING TO THE FOURTH FLOWERS TRIAL (FIRST MISTRIAL)		
October 3, 2007	Pretrial Motions hearing	2 Supp. Tr. A2-A23
November 26, 2007	Announcements pertaining to decision of state not to seek death penalty	1 Supp. Tr. S1-S4, C.P. 1371-98, 1582-1611, 1928-31, Tr. 293-305, 463-66
November 29-Dec. 5, 2007	**FOURTH FLOWERS TRIAL** (Montgomery County) (consolidated) **Death Penalty not sought, mistrial**	2 Supp. Tr. A23-31; Tr. 219-283; C.P. 1473-1479

Date	Event	Available At
November 29, 2007	Jury Striking and selection	2 Supp. Tr. A23-31; 1 Supp. C.P. Vol. 10 p. s180 & CD Attachments
November 29, 2007	Melissa Shoene testimony	Tr. 219-283
Dec. 5, 2007	Hung jury, mistrial declared	C.P. 1473-1479
PROCEEDINGS RELATING TO THE FIFTH FLOWERS TRIAL (SECOND MISTRIAL)		
Sept. 12, 2008	Pretrial motion hearing	Tr. 285-343
Sept. 24-30, 2008	**FIFTH FLOWERS TRIAL** (Montgomery County) (consolidated) **DP reinstated, mistrial**	Tr. 285-343, 2 Supp. Tr. A34-A50, 1 Supp. Tr. S5, S9-S24.
Sept. 24, 2008	Jury cause challenges, striking and selection	2 Supp., Tr. A34-A50; 1 Supp. C.P. Vol. 10 p. s180-CD Attachments
Sept. 24, 2008	Accusations and arrest of Alt. Juror	1 Supp. Tr. S9-S14
Sept. 25, 2008	Further record on arrest of Alt. Juror	1 Supp. Tr. S15-16
Sept. 30, 2008	Hung jury, declaration of mistrial, arrest of juror.	1 Supp. Tr. S17-24, C.P. 1797
PROCEEDINGS RELATING TO THE SIXTH FLOWERS TRIAL (APPEAL PENDING)		
Sept. 14, 2009	Pretrial discovery tender conference	1 Supp. Tr. S5
April 20, 2010	Pretrial motions hearing	Tr. 355-476
June 1, 2010	Pretrial motions hearing	1 Supp. Tr. S25-S106
June 4-19, 2010.	**SIXTH FLOWERS TRIAL** (Montgomery County) (consolidated) **Conviction, Death Sentence**	Tr. 477 -3488

ARGUMENT

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.

The State's briefing with regard to Flowers' sufficiency of the evidence challenge is most notable for what it chooses to ignore: almost everything. Whereas Flowers' main brief sets forth a detailed analysis demonstrating both that the prosecution's theory made no sense and that its witnesses were objectively unbelievable, the State fails to engage on either front. It makes no attempt to rescue the prosecution's flimsy argument that Flowers was motivated to commit quadruple murder after getting himself fired from a low-wage, low-skill, short-lived job as a furniture store laborer; it offers nothing of substance to explain why Flowers would have set out across town to steal a gun he had no reason to expect to be there for the stealing; it has nothing at all to say about how one man, untrained in commando tactics, could have so efficiently carried out all four execution-style murders; it does not even try to reconcile the myriad contradictions and material inconsistencies in the varying tales told by its essential witnesses; and it has no answer for the fact that Doyle Simpson was, by any objective assessment of the trial evidence, a much more likely suspect than Flowers.

Rather than mounting an actual defense of the prosecution's demonstrably troubled case, the State appears to take the position that the mere presence of testimony facially supporting its allegations is sufficient to satisfy due process, regardless of the credibility or consistency of that testimony, or of the plausibility of the narrative its sources combine to generate. While the law governing sufficiency of the evidence claims is generous to the prosecution, it is not that generous. On the contrary, in any case presenting a sufficiency challenge, it is only the "*credible* evidence" that "must be accepted as true" by a reviewing court. *McClain v. State*, 625 So.2d 774,

778 (Miss. 1993) (emphasis added). That evidence, moreover, may be deemed constitutionally sufficient only "[i]f 'reasonable fair-minded men in the exercise of impartial judgment' could have concluded that the defendant was guilty beyond a reasonable doubt …." *Jenkins v. State*, ___So.3d___, 2013 WL 5858302, No. 2011–KA–01267–SCT, ¶ 21 (Miss. Oct. 31, 2013) (quoting *Bush v. State*, 895 So.2d 836, 843 (Miss.2005)). And where a judgment of conviction is "based upon circumstantial evidence," that judgment "must be supported by a much higher degree of proof" – proof strong and sound enough to "exclude the reasonable hypothesis that a third party, not [the defendant], was [the] assailant." *Hester v. State*, 463 So.2d 1087, 1093-94 (Miss. 1985).

These principles are important. Taken together they require, at a minimum, that this Court take account of both the logical and evidentiary defects in the prosecution's case that are apparent on the face of the record, and that it classify the evidence as "credible" or not with those defects in mind. They further require that the Court assess the constitutional sufficiency of the evidence against Flowers, not through the partisan eye of the prosecutor, but from the objective vantage point of a neutral decision maker willing and able to acknowledge the existence of reasonable doubt. Finally, they demand recognition of the commonsense truism that where the evidence pointing toward a third party is as strong as, or even stronger than, the proof against the defendant on trial, a determination that the defendant is guilty beyond a reasonable doubt is both logically and constitutionally impossible.

In this case, Flowers has already demonstrated that the evidence presented in support of the essential components of the prosecution's case was anything but "credible." He has also shown that the combination of that unbelievable evidence and the implausible theories to which it was addressed made it impossible as a matter of law for any "reasonable," "fair-minded," or

"impartial" decision maker to find him "guilty beyond a reasonable doubt." And he has further reinforced that showing by detailing both the affirmative proof that Doyle Simpson was the more likely culprit, and the circumstances and investigative mistakes that blinded law enforcement to that proof while it remained available to be collected and developed. If the State had any substantive rebuttal to Flowers' comprehensive analysis, this Court's decisions gave it every reason to present that rebuttal in its brief. That the State has instead chosen to forego any attempt to rehabilitate its witness testimony, infuse some measure of logic into its case theory, or lessen the simmering suspicion against Simpson confirms that even with the unprecedented benefit of five previous trials through which to hone its case, the prosecution failed to create a record capable of supporting the judgment.

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

As set forth Flowers' main brief, the prosecution's guilt-or-innocence phase closing argument contained four misrepresentations of facts highly material to the issues submitted for the jury's resolution, two of which had previously been examined and condemned in this Court's decision reversing the convictions in *Flowers v. State*, 842 So.2d 531, 555-56 (Miss. 2003) (*Flowers II*). In its brief, the State contends that the first of these misrepresentations is procedurally barred for reasons that grossly distort both the record and Flowers' arguments, and that none of the four misrepresentations constitutes reversible error because each can be justified through some combination inadvertence and prosecutorial prerogative. As discussed below, nothing the State has said provides a basis either for application of a procedural bar or for a denial of relief on the merits.

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

Of the eight pages devoted to this issue in the State's brief, no fewer than five are spent advancing a procedural bar argument whose premise is obviously wrong, and attacking a theory of the merits that Flowers' brief does not even assert. In what remains, the State makes a feeble attempt to justify the prosecutor's recalcitrant misrepresentation of Sam Jones' testimony as merely a fair comment on the evidence, and offers an equally weak argument that the error was harmless. Flowers will address these contentions in turn.

1. There is no procedural bar to merits review.

The State's primary defense to this portion of Ground II is that Flowers' claim is barred as *res judicata* because it was not identified as error during his fifth trial in 2007, or raised as such in a direct appeal from that proceeding. *See* Aee. 17-18. In support of that defense the State goes on at some length criticizing Flowers for omitting portions of the 2007 transcript from the record on appeal in this case, and making sure to point out that "this Court" did not "find such error to have existed" in the appeal of the 2007 case. In its haste to portray Flowers and his counsel as both dilatory and devious, however, the State has overlooked one critical fact: the 2007 trial ended with a hung jury and a mistrial. As a result, there *was no direct appeal* from that proceeding, and therefore no opportunity for Flowers to have asserted *any* errors for this Court's review. Thus, the fundamental premise of the State's *res judicata* theory is dead wrong as a matter of basic historical fact, and is unworthy of serious consideration.[2]

Almost as an afterthought, the State also notes that Flowers did not raise a

[2]The State is also wrong when it asserts that Flowers placed Sam Jones' 2007 trial testimony into evidence at the 2010 trial, and that this testimony was "the only portion of Flowers' 2007 trial" that he made part of the record. As the trial transcript plainly shows, the prosecution offered Jones' testimony as part of its case in chief. *See* State's Exhibit S-127, Tr. 1984. Flowers did make several other portions of the 2007 proceeding part of the record in this case, *see* Timeline, *supra*, but Jones' testimony was not among them.

contemporaneous objection to the prosecutor's misrepresentation of Sam Jones' testimony at the 2010 trial from which this appeal is taken. Aee. 18. Flowers acknowledged that omission in his main brief,[3] but also explained that the circumstances of this case more than justify the exercise of this Court's well-established discretion to overlook the bar that would ordinarily arise from a failure to object. *See* App. 51-53. Although the State presents no argument to the contrary, it is worth emphasizing both that the error asserted here represents a precise repetition of prosecutorial misconduct that this Court squarely held to be reversible error in *Flowers II*, and that it gave the prosecution an unfair advantage on a key factual issue in the sharply contested guilt-or-innocence trial of a capital case. When coupled with the prosecution's history of cheating in three of the prior trials of this case, and its failure to convince a jury to convict in two others, the misconduct apparent from the record of Flowers' sixth trial easily qualifies for merits review. *See Flowers II*, 842 So.2d at 551 (employing plain error analysis); *see also, e.g., Ross v. State*, 954 So.2d 968, 1001-02, 1019 (Miss. 2007) (reversing conviction and sentence, and citing to both in reviewing improper and factually unsupported closing arguments); *Mickell v. Stat*e, 735 So.2d 1031, 1035 (Miss.1999) ("[I]n cases of prosecutorial misconduct we have held [that] this Court [is not] constrained from considering the merits of the alleged prejudice by the fact that ... no objections were made."); *Wood v. State*, 257 So.2d 193, 200 (Miss.1972) (finding that consideration of inappropriate cross-examination by the State was not barred by defendant's failure to object).

2. *The State's arguments on the merits are misdirected and wrong.*

According to the State, "the only relevant issues here on direct appeal are whether the

[3]Additionally, while the State appears not to have noticed, Flowers' main brief also acknowledges that the other instances of prosecutorial misrepresentation during closing argument addressed in this ground for relief were also unaccompanied by a contemporaneous objection, but are nevertheless worthy of appellate review. *See* App. 50

State erred in asking Jones if he actually arrived at Tardy at 10:00 instead of 9:15, and whether the State erred in stating, during closing argument, that Jones arrived at 10:00." Aee. 20. That is only half correct. While it is true that Flowers has challenged the prosecutor's distortion of Jones' testimony during closing argument, he has *not* argued that the prosecutor's attempt to have Jones change his story during direct examination constitutes a separate – or even a related – basis for reversal. *See* App. 51-54. Thus, the nearly two pages of briefing the State devotes to that non-issue is irrelevant and should be ignored to avoid confusion.[4]

With regard to the error actually raised in Flowers' brief, the State acknowledges that the prosecutor's statement that "Mr. Sam Jones came into the store slightly after 10:00 a.m.," Tr. 3189, "is not what Jones himself testified," Aee. 22. The State goes on to assert, however, that the prosecutor's statement is nevertheless "arguable based on both Jones' own testimony and the other evidence presented to the jury." *Id*. That is simply wrong. Jones' testimony about when he arrived at the store and the so-called "other evidence" to which the State refers were in plain and irreconcilable conflict. As the sponsor of the evidence on both sides of that conflict, the prosecution was not at liberty to misrepresent one side to benefit the other.

Furthermore, to suggest that the prosecution witnesses' inability to tell a consistent story somehow made the timing of Jones' arrival at the store a topic for legitimate debate ignores the fact that only one witness actually testified to that timing. That witness was Jones himself, and he said "between 9:15 and 9:30." State's Exhibit S-127 at 8. If the prosecution were uncomfortable with what Jones had said under oath, it could have either refrained from introducing his

[4]The State adds further confusion by alluding to Flowers' purported failure to include "Jones's 2003 testimony" and the "State's 2003 closing argument" as part of the record. Aee. at 20. That is problematic for at least two reasons. First, there was no "2003" testimony or argument, because none of Flowers' trials took place during that year. Additionally, if the State meant to refer to the record of the 2004 trial, that would make no sense either since neither Jones' testimony nor the prosecution's closing argument from that proceeding were supplied to the jury at the 2010 trial now under review.

testimony at all, or forthrightly told the jurors that Jones was not a reliable witness, and that they should disregard his account in favor of testimony from other witnesses. What it could not do, however, was mischaracterize Jones' testimony to obscure the conflict. Yet that is just what the prosecutor did, not through inadvertence (which should have been impossible given *Flowers II*), but in a naked and dishonest attempt to repair a damaging hole in the State's critically important timeline.

The State argues in the alternative that the prosecutor's misrepresentation of Jones' testimony was harmless because defense counsel's own closing argument had "reminded the jury that Jones had actually testified to arriving at Tardy's as early as 9:00 a.m.," and because the trial judge gave a generic "limiting instruction" informing the jurors that counsel's arguments "are not evidence." Aee. 23-24. What the State fails to acknowledge or explain, however, is that both of those things also occurred at the 1999 trial, yet this Court had no difficulty finding reversible error in the ensuing appeal. *See Flowers II*, 842 So.2d at 556.[5] Given that determination, the State's present suggestion that the prosecutor's *repetition* of the same misrepresentation – under circumstances where it unquestionably should have known better -- should now be excused as harmless cannot be accepted. On the contrary, the prosecution itself has twice judged Jones' testimony about the time of his arrival to be important enough to lie about in open court, and the State cannot distance itself from that judgment merely because the case is now on appeal.

[5]*See* 1999 Trial Tr. 2693 (Prosecutor's closing: "Now on that day Sam Jones told you that he got a call. He did not say he arrived at 9:30. He said he got a call from Ms. Tardy at 9:30, and he is estimating exactly …." Defense counsel: "Judge, I realize that is argument, but I do object. Mr. Jones said he got a call at 9 o'clock, and he arrived at 9:30. That was his testimony –"); 1999 Trial Tr. 2719 (Defense closing: "And Sam Jones said he came there at 9:30. That's what he said. … He said he was called at 9 o'clock, showed up at 9: 30."); 1999 C.P. 1250-51 (indicating that instruction quoted as "C-1" in the State's brief was also given, verbatim, at 1999 trial). These materials are available by judicial notice of the trial record in Supreme Court No. 99-DP-01369-SCT *See In re Dunn*, 2011-CS-00255-SCT, 2013 WL 628646 (Miss. Feb. 21, 2013) (not yet released for permanent publication).

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

When the prosecutor stood before the jury and asserted that Flowers was the "one" person who "had a beef with the store" – and, consequently, the only person with a motive to kill four people inside the store – he was making a representation about Flowers' subjective state of mind. As set forth in Flowers' main brief, however, the record developed at trial contained no testimony from any witness who claimed to have knowledge of Flowers' reaction to losing his job at the furniture store, and therefore provided the prosecutor with no factual basis from which to make his argument.

The State declares this reasoning "incorrect," and invites this Court to "[c]onsider" the testimony of two law enforcement officials, Johnson and Matthews. Aee. 25. By the State's own account of that testimony, however, neither official claimed any knowledge of what Flowers himself thought about having been fired, nor did either report that he had harbored anything resembling a "beef with the store." The State nevertheless maintains that the circumstances described by the officers – that "Bertha Tardy fired [Flowers], docked his pay, and held him responsible for an outstanding $30 IOU" – were "sufficient to suggest that Flowers did, in fact, have a 'beef' with the store." Aee. 25. No, they were not. While those circumstances might be interpreted to suggest that Mrs. Tardy had a "beef" with Flowers, they say nothing at all about what he thought of her or her employees, let alone that he was, in fact, so enraged as to be driven to commit quadruple murder. Given the complete absence of record evidence on that point, the prosecutor's argument to Flowers' 2010 jury – like the similar argument made to his 1999 jury – amounted to misconduct and requires reversal.[6]

[6] Unlike its argument concerning the prosecutor's misrepresentation of Jones' testimony, discussed above, the State has made no attempt to carry its burden of proving "beyond a reasonable doubt" that this or the two additional instances of closing argument misconduct "did not contribute to the verdict obtained."

C. Porky Collins' reaction to the photo array containing a picture of Doyle Simpson.

The State spends several pages describing the photo lineups shown to Porky Collins, touting Collins' *post hoc* certainty that he had correctly identified Flowers, and reproducing Collins' repeated assertions that he could not remember his own reactions to the lineup that included Doyle Simpson. Aee. 26-29. None of that matters. What does matter is that the prosecutor stood before the jury and purported to quote Collins as having said, "the guy ain't in there" in response to the first lineup. While the State makes the conclusory assertion that this comment was "entirely correct," and "an accurate comment on Collins' testimony," Aee. 30, it was neither. As the record plainly shows, Collins never uttered the words attributed to him by the prosecutor, or even anything resembling them. And Mississippi Highway Patrol Investigator Wayne Miller, who was present for the lineups and maintained notes of his observations, made clear that Collins' reaction to the first lineup was that the photograph of Doyle Simpson "looks like the person he'd seen[.]" Tr. 3031. The State has offered nothing that even begins to reconcile the quote fabricated by the prosecutor during closing argument with the actual evidence presented at trial, nor has it made any attempt to suggest that the prosecution did not benefit from the words it placed in Collins' mouth.

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

While the State concedes that the prosecutor was "incorrect" when he told the jury that "all four victims" were found together in front of the store counter, it appears to maintain that the three victims who were actually found in that area were, as the prosecutor claimed, "in a pile, in a group right at the front counter …." Aee. 30. To that end, the State baldly asserts that the

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Chapman v. California, 386 U.S. 18, 24 (1967). Having failed to address that issue, the State should be deemed to have conceded that the any misconduct found by this Court was, in fact, prejudicial (and therefore reversible) error.

prosecutor's "'pile' or 'group'" characterization was "a proper comment on the evidence," but never explains what that "evidence" actually was. *Id.* Flowers' brief does address the relevant evidence, and explains in clear terms that the prosecutor's description of the decedents' locations was factually wrong and misleading according to law enforcement's own photographs, sketches, and measurements. Thus, the State would have been better off to have broadened its concession to include the "pile" characterization.

The State goes on to contend that the prosecutor's misrepresentations did no harm because the parties did not explicitly debate the inferences to be drawn from the locations of the bodies. *See* Aee. 31. That misses the point. Any rational juror faced with the evidence and theories presented by the parties at Flowers' trial would have been compelled to consider whether the known facts from the crime scene – including the locations and arrangement of the decedents, and the nature of their wounds – were more consistent with the prosecution's theory that one man (Flowers) was responsible, or with the defense's theory that two men (the Simpson brothers) were also viable suspects. By misrepresenting key features of the scene, the prosecutor distorted that analysis in favor of itself, and in so doing artificially bolstered its otherwise preposterous assertion that Flowers, acting alone, committed the murders.

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

Were the State's description of the facts fair and accurate, Flowers would agree that admission of the identifications by Porky Collins was not constitutionally impermissible. But instead of arguing about the significance of the facts actually in the record, the State supplies disingenuous characterizations of some those facts, and omits others altogether. Below, Flowers points out the State's most misleading assertions with respect to this claim.

A. The description:

> "**Less than two hours after the murders Charles Collins gave a description to the police of the two individuals he saw arguing outside of Tardy Furniture."**

Aee. 35. True, Collins gave a "description," but according to the police officer's notes, that description was limited to race and gender, and, possibly, vaguely, complexion. Tr. 116. The officer later testified that Collins also said that one was taller than the other, but since even this subsequent account of what Collins said did not include an estimate of the height of either man, and since the State never named a second suspect, or even hypothesized whether Flowers was the shorter or taller of the two, this purported difference in height, if in fact reported, was of no value. With respect to complexion, the officer recalled that Collins said the men were of "medium" complexion – not a very discriminating term – and Collins himself did not recall saying even that, instead remembering that he had described the two men as "having the complexion of Johnny Hargrove because he was sitting there." Tr. 21. That was it. And as it turns out, Flowers does not have a "medium complexion," so the overlap between the description and the defendant is only race and gender, thus providing virtually no assurance of reliability.

B. The opportunity to observe.

> **"[I]t is evident that: (1) Collins had a time in which to view Appellant. He saw Appellant, from approximately thirty feet away, as he was slowly driving past the two men arguing outside Tardy Furniture**."

Aee. 38. In fact, Collins' opportunity to observe was not only limited by a large distance – 30 feet – and by the distraction of driving, but he was not initially attentive to them, and "never would have noticed them if it hadn't have been for the motions they was making ... [and] one of them's hands . . . ." Tr. 16-17. His belated attentiveness cannot be equated to that of the ordinary witness to a crime, because, at the time, Collins had no reason to suspect that the people he was observing were involved in criminal activity. Tr. 18-19. Most importantly, Collins saw the face of only one of the men, and admitted he "only got a glimpse" of a man he had never before seen. Tr. 16-18. Finally, although Collins doubled back to "look and see what was going on," on his second pass he only saw the men from behind, walking away from the car. Tr. 19.

C. The suggestiveness of the photo array.

> **"Thus, Flowers, as one of three darker skinned black males with a receding hairline and beard, did not stand out in terms of the general description Collins gave to the police – of a black male with a medium complexion."**

Aee. 36. This dismissive statement ignores the fact that suggestiveness is not determined solely by comparison to the witness's description; if it were, then the absence of any description at all would preclude a due process claim based on suggestiveness. Rather, the array must be examined for whether attention is drawn to the suspect's photo. Here, as described in detail in Flowers' opening brief, the array was skewed in several important ways: (1) the photo of Flowers was larger than the other photos, and the resolution was greater; (2) Flowers was older than the subjects; (3) Flowers was darker skinned than the other subjects; and (4) none of the other subjects had features or hairstyles that resembled those of Flowers. Even a quick look at the

array confirms the degree to which the observer's attention is drawn to Flowers' photo:

Thus, a witness with no real recollection of the person he saw near the crime scene – which is what Collins seemed to be, judging both from his paltry description of the man he had seen and his tentative identification of another person in the first lineup he was shown– would be drawn to the photo of Flowers

D. The certainty of the identification.

> **"After looking at the first photographic line-up in which Flowers was not depicted, Collins could not identify any of the individuals as being the man he saw outside Tardy Furniture. After looking at the second photographic lineup, in which Flowers' picture was included, Collins identified Flowers as being one of the men he saw outside the furniture store on the morning of the murders."**

Aee. 35. In fact, Collins identified Flowers with certainty only *after* the police officer suggested he had made the correct choice by asking, "Do you know Curtis Flowers?" Collins first indicated that a person in the first lineup -- Doyle Simpson, Tr. 3030-31, who, as Argument

I sets forth, is very likely the true perpetrator -- looked like the person he saw and had the same complexion. 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." Tr. 32. Collins also said, "it has got the same, looked like the same complexion. I think it looks like him." Tr. 47 The officer did not pursue this tentative identification, or comment upon it, but showed Collins the second array, one containing a picture of Flowers. Tr. 106.

Collins then 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."[7] Tr. 106, 136. Then in response to this tentative identification of the "right" person, the officer asked, "Do you know Curtis Flowers?" Tr. 106. Collins denied knowing Flowers, but 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." Tr. 106.

Finally, the certainty induced by the officer's question was contingent upon suggestiveness; 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. 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.[8]

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

[8] This equivocation persisted even when he testified under oath at the 1999 trial. There, the best Collins' could say even on direct examination, and even after Flowers had been asked at Collins' request to remove glasses Flowers was wearing in the courtroom, was that Flowers "looks a lot like" the man who Collins saw in front of Tardy's that morning. Ex.S-115 at pp. 1699-1700. *See also* 1997 Trial Tr. 435-36. Available by judicial notice of the record in Supreme Court No. 97-DP-01459-SCT. *See In Re Dunn, supra* n. 5.

Thus, Collins' level of certainty, along with all of the other reliability factors, weighs against finding his identification sufficiently reliable to outweigh the unnecessarily suggestive procedures.

E. The suggestiveness of the police statements.

> **"[T]he trial court (in 1999) held that there was no evidence to suggest that the police influenced Collins, who [sic] never attempted to have Collins select a particular suspect; never told Collins they had a suspect; and never told Collins any suspects were in the lineup itself**."

Aee. 38 n.7. While it is true that the trial court made this finding, as discussed above, the officer's course of conduct in fact was highly suggestive. *Perhaps* this was not an "attempt" to produce the identification in the sense that it was conscious, but whether it was conscious or subconscious or entirely coincidental is irrelevant; suggestiveness does not require bad faith.

F. The jury's opportunity to assess credibility.

> **"As to the particular issue of whether Collins' memory was made unreliable as a result of illness or old age. . . the jury alone determines the weight and worth of any conflicting testimony."**

Aee. 39. As a legal matter, this statement is only half right; while the jury does make credibility determinations, in the assessment of whether a suggestive identification is constitutionally precluded from jury consideration, facts that tend to support or impeach the reliability of that identification are relevant. Obviously, the fact that Collins was sick and forgetful, as Flowers' opening brief sets forth, is not dispositive of reliability, but it adds an additional source of unreliability to the overall calculation. Moreover, as a factual matter, a compelling reason for deference to jury determinations of credibility – the jury's opportunity to assess demeanor – was not present in this case because Collins had died by the time of trial, and so the jury never had that opportunity.

For all of the foregoing reasons, contrary to the State's airbrushed portrayal of the

underlying facts, the photographic array which produced Porky Collins' identification of Flowers was extraordinarily and unnecessarily suggestive. Because Collins' identification also lacked every single indicator of reliability articulated by the Supreme Court, its admission violated the Due Process Clause of the Fourteenth Amendment.

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.

The State's arguments with respect to this issue were largely anticipated and addressed in Flowers' main brief, and he will not burden the Court by repeating what has already been said. Instead, this reply can be confined to two simple points. First, the State goes on at length seeking to justify the exclusion of Johnson's testimony on the ground that it was not based in science. *See, e.g.*, Aee. 46 ("there was no basis, scientific or technical, against which the jury could consider" Johnson's testimony); Aee. 55 (Johnson's opinions were "not quantifiable such that they constitute a minimum accepted standard," "not peer reviewed, published, tested or mandatory," and "not universally followed"); *id.* (noting jurors' inability to "compare[] [Johnson's opinions] to other 'expert' opinions"). As this Court has made clear, however, the State's insistence that expertise derived from experience, with or without a foundation in laboratory science or peer-reviewed journals, has no basis in the settled admissibility analysis required by Rule 702. *See, e.g.*, *Bishop v. State*, 982 So.2d 371, 381 (Miss. 2008) (upholding trial court's determination that "child therapy" expert's "testimony was reliable, based on her experience as a child therapist since 1980, her treatment of hundreds of children who had been sexually abused, and her qualification as an expert on prior occasions"). As the trial record and

Flowers' main brief demonstrate, Johnson's background in the field of criminal investigation easily satisfied the criteria reflected in the *Bishop* analysis. If satisfaction of those criteria is sufficient to establish the admissibility of a prosecution expert, the same ought to be true for a defense expert like Johnson.

The State's emphasis on the "discretionary" nature of the admissibility decision highlights one other important consideration. While it is true that trial courts must exercise discretion in determining the admissibility of expert opinion testimony under Rule 702, it is also true that an error of law constitutes an abuse of discretion. *See, e.g.*, *Kirk v. Pope*, 973 So.2d 981, 986 (Miss. 2007) ("a court abuses its discretion when it makes an error of law"). In this case, as demonstrated in the main brief and underscored by the State's repetition of the same mistake, the trial court committed a plain error of law by myopically insisting that because Johnson's opinions were not, by their nature, susceptible to "empirical[] test[ing]," they were inadmissible. By artificially confining its analysis in this way, the trial court deprived Flowers of the benefit of the "great deal of flexibility" inherent in Rule 702, and erroneously prevented him from offering relevant, non-cumulative evidence that would have supported the case theory advanced by his counsel and submitted for the jury's consideration.

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

1. This claim is not procedurally barred

The State's assertion that this claim is procedurally barred rests on several mischaracterizations of the record. The State opens its argument by incorrectly asserting that the prosecution sought the death penalty in the trial held in 2007 (the fourth trial, first mistrial), when Flowers voluntarily withdrew his request that Dr. Neuschatz testify, and did not do so in the trial held in 2008 (the fifth trial, second mistrial). Aee. 58. In fact, the 2007 trial is the trial in

which the death penalty was not sought, which is the reason Flowers' withdrew his request for a ruling on the admissibility of this testimony at that time. *See* Timeline, *supra* at p. 3, 1 Supp. Tr. S1-S4. When the State elected to again seek the death penalty in the 2008, trial and did so again in the 2010 trial that is the subject of this appeal, and Flowers reasserted his motion that Dr. Neuschatz's testimony be allowed. Tr. 293-305, 463-66.[9]

The State's related claim that Flowers somehow failed to present his claim sufficiently in the trial court to permit review is also directly contradicted by the record. Aee. 62-63. The motion to permit Dr. Neuschatz's expert testimony contained all that was necessary for the trial court to understand and rule upon the claim that this testimony was relevant and reliable within the meaning of Miss. R. Evid. 702. It was supported with Dr. Neuschatz 's CV, setting forth his professional credentials in his field, along with a specific affidavit concerning the science on which he was relying, and relating that to the testimony about the eyewitness identification made by Charles "Porky" Collins that was actually received into testimony in the 2010 trial. The Motion also clearly raised the issue in exactly the same terms as Flowers argues it in this Court. C.P. 1371-98, 1582-1611. In arguing the issue, one of first impression, Flowers cited to the only Mississippi appellate decision (a persuasive, but not binding precedent from the Court of Appeals) addressing the question before it, distinguished that decision, and put forth alternative persuasive precedent from a neighboring state whose reasoning he requested the trial court to adopt. *Id.* The trial court then explicitly ruled on the question in connection with both the 2008 and 2010 trials. Tr. 293-305, 463-66.

If the State is asserting that Flowers is to be precluded from asking this Court to review

[9] The trial court expressly acknowledged the continuing viability of any objections, including this one, on which it ruled during the pretrial hearings in advance of the 2008 mistrial, and adopted its prior rulings on all such claims. Tr. 466.

that ruling for having failed to cite persuasive precedent that had not yet come down when the issue was presented to the trial court, that would of course have been factually impossible. *See, e.g.*, *Perry v. New Hampshire*, --- U.S. ----, ----, 132 S. Ct. 716 (2012), *Tillman v. State*, 354 S.W.3d 425 (Tex. Crim. App. 2011), *State v. Henderson*, 27 A.3d 872 (N.J. 2011). It is also simply unsupported as a matter of law. This Court requires only two things to preserve an evidentiary question for review. First, the question must be presented to the trial court on the same grounds as it is presented in this Court on appeal. *Smith v. State*, 986 So. 2d 290, 295 (Miss. 2008) (citing *Ross v. State*, 954 So.2d at 987). Second, the party seeking review must have actually obtained a ruling on that question from the trial court for this Court to review. *See Arrington v. State*, 77 So. 3d 542, 546 (Miss. Ct. App. 2011) (citing *Alexander v. Daniel*, 904 So.2d 172, 183 (Miss. 2005). Both were done here. The question of whether Dr. Neuschatz's testimony was improperly excluded is thus properly before this Court for review.

2. Dr. Neuschatz's testimony was relevant, reliable and admissible to assist the jury in evaluating the reliability of Porky Collins' in and out of court identification of Flowers.

The State offers nothing to dispute the substance of Flowers' discussion of the general acceptance of the psychological methods and research undergirding the testimony proffered by in Dr. Neuschatz's affidavit. Nor does it attempt to dispute the growing acceptance of that testimony in jurisdictions that use the same kind of Rule 702/*Daubert* analysis of the admissibility of such evidence. Flowers' brief in chief, and his briefing in Section 1, *supra*, also fully anticipate the State's substantive objections to the sufficiency or relevancy of Dr. Neuschatz's proffered testimony.

Instead, the State asserts that Dr. Neuschatz's testimony is "nothing more than a repeated attempt to attack the admissibility of the lineup itself." It then suggests that his proffered

testimony about how the nature of that lineup could have contributed to the reliability of Collins' identification is inadmissible because the trial court had already ruled that evidence concerning the lineup was not so suggestive as to warrant its complete exclusion from evidence. Aee. 64-65. This argument is not well taken.

The present error arises because the jury *did* hear testimony from an eyewitnesses purporting to identify Flowers in front of the Tardy Store at a time the State's theory requires the crime to have occurred, and because that eyewitness was in fact subjected to pretrial photo identification procedures that fell short of established standards for ameliorating suggestibility from such procedures. C.P. 1381-83. This is not the same question as whether it fell so far short of those standards as to preclude its admissibility altogether. Flowers addresses that question in Argument III, *supra*. *Neil v. Biggers*, 409 U.S. 188, 198 (1972) and *York v. State*, 413 So. 2d 1372, 1380-81 (Miss. 1982) control the response to that question. There, the inquiry is expressly conclusion focused: Do the totality of the circumstances, guided by the existence or non-existence of the "*Biggers* factors," establish as a matter of fact that the identification was *almost certainly wrong*? *See Biggers* 409 U.S. at 199-200), *York*, 413 So. 2d at 1383. If the answer to that question is yes, then there is no reason for the jury to hear the evidence at all.

By contrast, the admissibility of Dr. Neuschatz's testimony is governed by the very different standards of Miss. R. Evid. 702 and *Miss. Transp. Comm'n. v. McLemore*, 863 So. 2d 31 (Miss. 2003). "[T]he focus of [the Rule 702] analysis must be *solely* on principles and methodology, not on the conclusions they generate." *Id.* at 36-37 (quoting *Daubert v. Merrell-Dow Pharmaceuticals*, 509 U.S. 579 595 (1993). The question under Rule 702 is only whether the expert testimony would offer the jury information that it could bring to bear in making its independent assessment on the reliability of the identifications made in this case. This is clearly

something that may be presented by way of expert testimony. *Branch v. State*, 998 So. 2d 411, 415 (Miss. 2008). *See also Hobgood v. State*, 926 So. 2d 847, 854 (Miss. 2006). *See also Tillman v. State*, 354 S.W.3d 425, 443 (Tex. Crim. App. 2011) (finding expert testimony like that proffered in the instant case admissible under *Daubert* standards like those employed in Mississippi because "[by] increasing the jurors' awareness of biasing factors in eyewitness identification . . . [such] testimony could have aided the jury *by either validating or calling into question their own inclinations*.") (emphasis supplied).[10]

The State's arguments also appear to suggest that a *Biggers/York* admissibility determination absolutely precludes the jury from weighing the credibility or reliability of the evidence of identification it has heard, or from receiving relevant and reliable expert testimony to assist it in doing so. Adoption of those arguments would clearly transgress the Sixth and Fourteenth Amendments. *See Apprendi v. New Jersey*, 530 U.S. 466, 477 (2000) ("Taken together, these rights indisputably entitle a criminal defendant to "a jury determination that he is guilty of every element of the crime with which he is charged, beyond a reasonable doubt." (quoting *United States v. Gaudin*, 515 U.S. 506, 510 (1995)). This Court should decline the State's invitation to join it on this unconstitutional path.

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

1. There is no prospective bar resulting from this claim

The State's claim of bar here is rather peculiar. It does not dispute that this Court may

[10] The State cavils, on these grounds, at Dr. Neuschatz's mention in his affidavit of the *York* suggestiveness standards. Aee. 64. To the extent that the mere mention before the jury of that standard were deemed an inadmissible opinion on admissibility, *per se*, the solution would be to grant an *in limine* or contemporaneous objections to his offering opinions outside of his expertise. That does not warrant preclusion of testimony within his expertise about how the cognitive difficulties the lineup procedures created adversely affected the reliability of Collins' identification. *See Edmonds v. State*, 955 So.2d 787 (Miss. 2007).

decide the question actually presented to it. Rather, apparently anticipating the reversal by this Court of the present conviction and sentence and remand for yet another trial, it proposes some sort of permanent, lifetime bar of Flowers ever challenging the admissibility of testimony about this single particle of gunshot residue under Rule 702. Aee. 66. Rule 702 decisions are very fact specific. They depend crucially on the state of ever-changing scientific research on a subject matter, as well as the testimony offered in support of or opposition to its Rule 702 relevancy or reliability in any particular trial. *Mississippi Transp. Comm'n v. McLemore,* 863 So. 2d 31, 37 (Miss. 2003) (noting that courts may "neither rule out, nor rule in, for all cases and for all time the applicability of the factors mentioned in *Daubert* " because "[t]oo much depends upon the particular circumstances of the particular case at issue.") (quoting *Kumho Tire v. Carmichael,* 526 U.S. 137, 151 (1999)). The fact that Flowers deemed the record at this particular trial to warrant review only of the trial court's Miss. R. Evid. 403 error does not and cannot bind him from seeking to exclude such testimony if the record in a subsequent proceeding is different. To the extent that the State is prospectively asserting a post-conviction review *res judicata* claim in advance, it is certainly premature in doing so.

2. The State's arguments on the merits are equally unfounded

The State spends most of briefing on this issue insisting that the testimony describing the lone particle of alleged gunshot residue collected from Flowers' hand had "significant" probative value as circumstantial proof of Flowers' guilt, or somehow, as corroboration for the yarn spun by the pathologically unbelievable Odell Hallmon. *See* Aee. 67-68 ("The State used that evidence to prove Appellant committed the Tardy Furniture murders."). As described in Flowers' main brief, however, that is a far cry from the prosecution's portrayal of the gunshot residue testimony during the argument over its admissibility, where the evidence was billed as going

only to the seemingly innocuous (though contextually irrelevant) proposition that Flowers had been "in the presence or the environment of gunshot residue." Tr. 2273. While defense counsel knew better, the trial court was taken in, and the prosecution proceeded to use the testimony for the very purpose it had previously foresworn by confusing and misleading the jurors into believing a lone particle of residue constituted proof that Flowers had fired the murder weapon.

Rather than own up to this classic bait-and-switch, the State insists that no harm was done because, after all, the evidence was subjected to adversarial testing and the jurors were free to make up their own minds. *See* Aee. 70; *see also id.* at 66 (suggesting Flowers sees "no place in a criminal trial for a jury to weigh the evidence …."). That, of course, overlooks the fundamental principle that juror discretion has its limits, which is why Rule 403 exists in the first place. If it were truly the case that all evidence, no matter how remote, tangential, or likely to confuse or mislead, should simply be submitted for the jury's consideration, there would be no need for a rule tasking trial judges with the gatekeeping function. Furthermore, the enthusiasm for free-wheeling admissibility exhibited by the State with respect to its own gunshot residue testimony stands in sharp contrast to its position on Flowers' attempt to present Chief Robert Johnson as a qualified expert capable of offering informed, insightful, and relevant information about law enforcement's shoddy investigation and the ways in which it compromised the truth-finding function. If that testimony was too lacking concrete certainty and susceptibility to objective analysis to be worthy of admission, the same should have been true for the lone particle of gunshot residue. As it happened, however, the trial court's exercise of its gatekeeping function varied in relation to the proponent of the evidence. That was inconsistent with Rule 403 and with fundamental principles of due process.

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

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

The State's "response" to Flowers' allegation of race discrimination in the exercise of the peremptory challenge is remarkable in its nonresponsiveness. Four pages are squandered on contesting the determination of a prima facie case that – given the totality of the circumstances -- is overwhelming, and the remainder of the State's submission boils down to a recitation of the law and a repetition of the race neutral reasons proffered at trial. Flowers, however, has not argued that those reasons are facially discriminatory, but that they are pretextual. Consequently, this is not a step two case at all, but a step three case, in which the question is whether the stated reasons should be believed. *Flowers v. State*, 947 So.2d 910, 917 (Miss 2007) (*Flowers III*). Here, a host of factors impeaches the credibility of the stated reasons, none of which are acknowledged in the State's brief. Those reasons, fully set forth in Flowers' opening brief, are summarized below.

1. The proximate history of racial discrimination in jury selection.

The State's submission on this issue does not even mention a factor that any reasonable determination of credibility would weigh heavily: the history of prior discrimination. Prosecutor Doug Evans not only violated his constitutional obligation of race neutrality in jury selection on another occasion, he lied to the court about his motivation, and he did so in an earlier trial of this very same case. This Court reversed Flowers III (after reversing I and II for other forms of prosecutorial misconduct) because it found "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. In

Miller-El v. *Dretke* the Supreme Court noted "a final body of evidence that confirms [the conclusion of racial discrimination," was 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. 231, 263 (2005). Here, the prior history should be accorded far more weight than in *Miller El*, for the prior discrimination was not merely office practice, but chosen -- *and lied about* – by the very prosecutor whose conduct now is being challenged. Doug Evans has neither expressed remorse, nor given anyone any reason to believe he has mended his ways. [11]

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

Of course the State has a right to choose whether or not to proceed capitally. But the fact that it has this right does not mean that whether and when it chooses to exercise this right is immune from examination, just as in Texas, where the parties have a right to a "jury shuffle," the resort to that procedure must be examined for a "first clue to the prosecutors' intentions. . .", *Miller El*, 545 U.S. at 253. Here, the State thrice proceeded capitally, twice proceeded *noncapitally*, and finally, in the face of hung juries, the first sharply split on racial lines, elected to proceed capitally again. This vacillation makes it clear that something other than the aggravated or unaggravated nature of the crime drove the decision to seek death. Because it would be obvious to any prosecutor that a capital prosecution would produce a less diverse jury than would noncapital proceedings and that a capital prosecution offers more opportunities to

[11] Indeed, one reason that this Court did not address any claims of intentional discrimination by the prosecutor in jury selection in the 1999 trial was because the trial judge had already done so. Judge Morgan, who presided over the 1997, 1999 and 2007 trials before stepping aside, ruled during jury selection in the 1999 trial that the prosecutor had offered pretextual reasons for striking two black venire members and reversed the State's strike of one of those two as entirely racially discriminatory, making that individual the only black juror seated for the 1999 trial. C.P. 1160-63 (citing 1999 Trial Tr. 1347-48; 1363-64). *See generally* C.P. 1651-85 (describing a pattern of similar efforts throughout the life of the litigation.)

discriminate than does a noncapital prosecution, the "shuffle" back to a capital trial is suggestive of racial motivation.

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

The State argues that a prima facie case was not established because "the number of strikes, standing alone, was insufficient to support a prima facie finding of discrimination." Aee. 73. It does not, however, consider that the numbers do not stand alone. The prima facie case is supported by the history of the case, as discussed above, and it is further strengthened by the fact that this an interracial capital offense, a circumstance which the Supreme Court has acknowledged is particularly likely to evoke racial stereotypes, hostility, and discrimination. *Turner v. Murray*, 476 U.S. 28, 35 (1986). Moreover, the same number of strikes would be less probative were the venire composition different; here, the original venire was composed of 42 percent African American jurors, and after for-cause challenges, 28 percent remained, Tr. 1733-1734, but after Evans exercised his peremptory challenges, the jury was only 8 percent African American. Thus, it was not only in absolute terms a large number of strikes against African Americans, but a grossly disproportionate exercise of those strikes. *Pitchford v. State,* 45 So.3d 216, 224-25 and n. 9 (Miss. 2010), *McFarland v. State*, 707 So.2d 166, 171 (Miss. 1997). Finally, as described in the opening brief, the timing and circumstances under which Evans accepted the single African American juror suggest an attempt to use a token black juror as insulation against detection of subsequent discrimination. The State's brief fails to address any of these additional components of the prima facie case, all of which were apparent to the trial court, and all of which render it unusually strong.

4. Disparate questioning.

The rate of disparate questioning in this case is quite extreme., The five struck African-

American jurors were each asked 10 or more questions by the State during individual voir dire, but no white juror was asked more than 6, and the average number of questions asked of white jurors was *2*. Most notably, nine white jurors were asked *no* questions by the prosecution on individual voir dire. The State addresses this indicator of discrimination in a footnote, simply declaring that that "the white jurors Flowers identifies each stated that they would have no problem following the law and were able to impose either death or life." This statement either misunderstands the probative value of disparate questioning, or attempts to mislead. Flowers first compared the questioning of *all* of the white jurors with that of *all* of the black jurors. Even if the fewer questions asked of the token black juror are averaged in, the average is different by a magnitude of four, which is surprising, to say the least, and not addressed by the State. Moreover, the State's brief also fails to explain particular instances of disparate questioning, such as the prosecutor's disinterest in white jurors who knew defense witnesses as compared to its interest in African American jurors who had such relationships.

5. Disparate treatment.

Flowers' opening brief sets forth in substantial detail a comparison of struck black jurors with accepted white jurors. *See Miller-El*, 545 U.S. at 241 ("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 .") The State responds by listing largely superficial differences between the struck African American jurors and the accepted white jurors, summarizing its argument by stating, "Thus problematic with Appellant's approach [sic] is that the jurors struck by the State were unique in their characteristics." Of course they were. If all it took to defeat a *Batson* claim were the citation of a characteristic that a black juror possessed that a white juror did not – or combination of

characteristics – there would be no way to ferret out discrimination. Any prosecutor (or defense counsel) worth his or her salt can list characteristics unique to an individual. Not surprisingly, the Supreme Court has rejected such an approach, which would render *Batson* meaningless:

> None of our cases announces a rule that no comparison is probative unless the situation of the individuals compared is identical in all respects, and there is no reason to accept one. Nothing in the combination of Fields's statements about rehabilitation and his brother's history discredits our grounds for inferring that these purported reasons were pretextual. A *per se* rule that a defendant cannot win a *Batson* claim unless there is an exactly identical white juror would leave *Batson* inoperable; potential jurors are not products of a set of cookie cutters.

Miller El, 545 U.S. at 247 n.6.[12]

6. Mischaracterization of the record.

The State's brief also fails to address substantial and repeated mischaracterizations of the record set forth in Flowers' opening brief. Such mischaracterizations are an indicator of racial pretext. *Flowers III*, 947 So.2d at 917.

Finally, the State treats all of these indicia of racial motivation as though one of them must, standing alone, demonstrate the presence of racial discrimination. That is not the law. When taken together, as both Supreme Court and this Court's precedents require, the evidence of racial motivation in this case would be compelling to any reasonable factfinder.

B. The jury failed to adequately deliberate because it was influenced by racial bias in violation of the Due Process and Equal Protection Clauses of the Fourteenth Amendment

Flowers claims here that the nearly all-white jury resulting from the State's peremptory dismissal choices engaged in insuffcient deliberation, and that the insuffciency was generated by racial bias that arose from the racially charged publicity surrounding this prosecution, including, most egregiously, the mistrials in 2007 and 2008. *See* App. 121-23. The State's brief dismisses

[12] The State's brief also fails to address the trial court's curtailment of defense counsel's opportunity to rebut and investigate the State's purportedly race neutral reasons for striking Juror Wright.

this as simply another insufficient deliberation claim which can be dismissed with the generality that there is no specific time necessary for adequate deliberation. Aee. 107-09. Flowers does not dispute the applicability of that generality to most cases. However, he sets forth in his opening brief the unique circumstances of this case that (as this Court has recognized can occasionally occur, *Maury v. State*, 68 Miss. 605, 9 So. 445 (1891)) render short deliberations obviously inadequate, given the glaring problems with the State's case. App. 125.

That the publicity was racially charged cannot be seriously questioned, and the State makes no attempt to do so in its briefing. Moreover, the nature of that coverage following the 2008 mistrial was amplified by unfortunate comments in the courtroom when the trial judge was charging and arresting an African-American juror -- reportedly the sole holdout juror – for alleged perjury at the conclusion of that proceeding. Those charges were *nolle prossed* when an independent prosecuting authority reviewed them. T. 454-55. Nonetheless, there was much to encourage the media's racial sensationalism when a black man being arrested for a serious crime was chastised from the bench in terms evoking, perhaps unconsciously, painful and discredited racial stereotypes. *See* 1 Supp. Tr. s22.[13]

When that was, as it was here, entwined with volatile and entirely baseless accusations that Flowers and his family were implicated in jury tampering, as well as an exhortation to the prosecutor to find a way to move the case away from the most racially diverse county in which Flowers had ever been tried,[14] the media could not help but participate in the frenzy. *See* 1 Supp.

[13] After reiterating its personal certainty (ultimately determined to be unfounded) that the juror had lied during voir dire, the trial court then said, "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."

[14] Montgomery County in the 2010 census was 45.9% African-American. Lee County and Harrison County, the venues in which the trials had previously been held, are both under 30% in that census. See http://quickfacts.census.gov/qfd/states/28/28097.html.

Tr. s22-s24, T. 454-55.

The State scoffs rather than answering the claim as presented to this Court, choosing instead literally to ignore it. *See* Aee. 97 (acknowledging a seemingly "glib and disrespectful" analysis of Flowers' claims); 94-95 (jumping from section heading "VI.A" to section heading "VI.C.").

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

Much of the State's argument on this point proceeds from its failure to distinguish between this claim and the racial bias claim made in the preceding section, from which it is both legally and factually distinct.[15] The instant claim of error rests on the existence of pervasive fact-specific bias in the jury and the qualified venire from which it was selected. This bias derived from a high level of friendship with the decedents or their families, and to a lesser extent, opinions on Flowers' guilt, in both the jury and the panel from which it was struck. Unlike in the preceding section, the source of that kind of pervasive bias is not the concern. Rather, the error lies in the trial court's failure to ameliorate it. Those failures included declining to grant cause dismissals of several of the venire members for implied bias, ignoring biasing contacts between the venire, and later the jury, and law enforcement officers, and in failing to quash the venire because these things remained rife in the jury when the final panel from which the jury was struck remained. Because of the trial court's failures a tainted jury was seated and was improperly permitted to decide Flowers' fate.

[15] Because of this, large portions of the State's briefing ostensibly on this claim are entirely inapposite to it. As is discussed above, State's extensive discussion of the brief deliberations in the culpability phase, and its discussion of the coverage of events at prior trials, is apposite primarily to the racial bias claim. Aee. at 95, 107-09, 110-11, 115 n.33.

1. Neither this claim nor the claim of racial bias addressed in Section IV.B is procedurally barred.

The State here claims that neither this question, nor the question in Section IV.B. can be considered by this Court because the fairness of the tribunal – in this case, the jury – was waived by Flowers and that therefore need not be corrected on review. Aee. 97-116. In addition to being without any factual basis in the record, this claim is founded on a frightening disregard for the fundamental premises upon which our system of justice rests. Those premises establish that trial before an unfair jury is fundamental error that cannot be tolerated.

> [E]rrors that call into question the integrity of the jury's deliberations may harm the system as a whole. In that sense, they may be said to "seriously affect the fairness, integrity or public reputation of judicial proceedings."

United States v. Olano, 507 U.S. 725, 743-44 (1993) (quoting *United States v. Atkinson*, 297 U.S. 157, 160, (1936). *See also Groppi v. Wisconsin*, 400 U.S. 505, 509 (1971) ("[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) (emphasis supplied); *In re Oliver*, 333 U.S. 257, 278 (1948) (It is the law of the land' that no man's life, liberty or property be forfeited as a punishment until there has been a charge fairly made and fairly tried in a public tribunal). This Court takes a similar view.

> Respect for the sanctity of an impartial trial requires that courts guard against even the appearance of unfairness for "public confidence in the fairness of jury trials is essential to the existence of our legal system. Whatever tends to threaten public confidence in the fairness of jury trials, tends to threaten one of our sacred legal institutions." *Lee v. State*, 226 Miss. 276, 83 So.2d 818 (1955).

Mhoon v. State, 464 So. 2d 77, 81 (Miss. 1985) (superseded by statute on other grounds, *see Bevill v. State*, 556 So.2d 699, 713 (Miss.1990)). Consequently, this Court also recognizes that

> [t]he circuit judge has an absolute duty . . . to see that the jury selected to try any case is fair, impartial and competent. "Trial judges must scrupulously guard the impartiality of the jury and take corrective measures to insure an unbiased jury."

Haggerty v. Foster, 838 So. 2d 948, 957 (Miss. 2002) (quoting *Brown v. Blackwood*, 697 So.2d 763, 769 (Miss.1997).

To the extent that the State asserts bar with respect to Flowers claim that the verdict was the product of racial bias as is discussed in Section B. above, racial discrimination is regarded as a particularly problematic kind of discrimination, which must be eradicated with particular care.

> The Fourteenth Amendment's mandate that race discrimination be eliminated from all official acts and proceedings of the State is most compelling in the judicial system. *Rose v. Mitchell*, 443 U.S. [545,] 555 [(1979)]. . . . The courts are under an *affirmative duty* to enforce the strong . . . constitutional policies embodied in that prohibition. *See Peters v. Kiff*, 407 U.S. [493,] 507 [(1972)] (WHITE, J., concurring in judgment); *see also id*., at 505 (opinion of MARSHALL, J.).

Powers, 499 U.S. 400, 415-16 (1991) (emphasis supplied; internal quotation marks and string cites omitted).

There is certainly no factual support for the State's bizarre claim that Flowers had waived his fundamental right to fairness because he "admits a Montgomery County jury will never be fair," and by implication, had never in the past been fair either. Aee. 99. To the contrary, there is much in the record to suggest that the extensive pervasive implied bias in the venire from acquaintance or prior opinion that was revealed by the voir dire in the case *sub judice* had not been established by the voir dire process in previous trials held Montgomery County. [16]

[16] In the first trial to occur in Montgomery County, in 2004, it was the *Batson* violation by the prosecutor, compounded by non-jury related errors, not any claim of bias or prejudgment by the jury, that tainted the proceedings. *See Flowers III*, 947 So. 2d at 940 (Cobb, J. concurring). There is nothing to indicate that any such claim would have been warranted as to the second trial held there in 2007 at which the death penalty was not sought. 1 Supp. Tr. S1-S4, 2 Supp. Tr. A23-31. Similarly, when the death penalty was re-sought in the 2008 and 2010 trials, Flowers did raise, and lose, claims seeking to limit the prosecution's ability to re-offend under *Batson* as it had previously done in the 2004 trial, none was premised on pervasive general bias regarding this particular case in any previous venire drawn in Montgomery County. They were founded on the need to contain the discrimination and misconduct in the office of the prosecutor for the Fifth Circuit Court District when it was attempting to seek a death sentence against Flowers. *See, e.g.,* C.P. 1644-85, 1928-66, Tr. 285-91, 305-18, 458-63, 466, R.E. Tabs 6b, 6d, 6e, 6h.

Moreover, when this problem arose for the first time, Flowers did everything in his power to preserve this claim consistently with exercising his right to be tried in the venue where the crime occurred. Those efforts culminated in the motion to quash that is at issue here when all other efforts at obtaining a fair jury had been rebuffed. Tr. 1283-91, 1624-40, 1713-24, 1731, 1741-47 1748-55. The State's claim of bar and waiver on this point is thus completely without foundation.

2. The State's assertions on the merits of this claim are without factual or legal basis.

The State offers no significant challenge to the facts relied upon by Flowers that show extensive acquaintance with the decedent's families and pre-existing opinions of Flowers' guilt, remaining in the venire from which the jury was actually struck and in the jury seated as a consequence. *See* App. 131-38 and nn. 92-98, 100-02 and Appendix A to Brief of Appellant. Also, for the most part Flowers anticipated the State's arguments that relate to this claim in his brief in chief, and will rely on his arguments there.

However, the State has advanced the novel position that seeking a change of venue is a necessary prerequisite to challenging any particular venire or jury for pervasive bias under either the Constitution, or Mississippi law. *See* Aee. 115 ("Flowers cannot rely on *Groppi* [*v. v. Wisconsin*, 400 U.S. 505 (1971)], [*Irvin v.*] *Dowd*, [366 U.S. 717 (1961)] *Fisher* [*v. State*, 481 So. 2d 203 (Miss. 1985)] or *Sheppard* [*v. Maxwell*, 384 U.S. 333 (1966)] to seek relief, because he did not seek a change of venue."). That position has no support in the law. The right to a fair jury has never been conditioned in that fashion. Contrary to the State's dismissal of the fundamental issue of a fair tribunal as merely a "spurious" problem of Flowers' own making, Aee. 97, the record clearly shows that trial court error resulted in the seating of a biased jury. It also shows that Flowers was repeatedly rebuffed when he attempted to avert that error by methods constitutionally available to him other than seeking a change of venue.

This Court recognizes that verdicts tainted by extraneous influence or bias, passion and prejudice must be set aside if challenged in "numerous contexts," including those where there was no request for a change of venue. *Fuselier v. State*, 468 So. 2d 45, 53 (Miss. 1985) (reversing for numerous errors, including jury taint, despite no request for change of venue of venue). In fact, there was no such request in many of the cases from this Court relied upon by Flowers in support of his claims. This includes a case where the claim was, like the one here, based upon pervasively biasing characteristics of the venire that found their way into the jury. *Mhoon*, 464 So. 2d at 80-82.[17] *See also Davis v. State*, 743 So. 2d 326, 341 (Miss. 1999) (granting hearing on post-conviction issue relating to jury taint despite finding no ineffectiveness in trial counsel's failure to seek change of venue), *Taylor v. State*, 656 So. 2d 104, 111 (Miss. 1995) (reversing for unfair jury due to failure to strike a juror because of implied bias), *Lee v. State*, 138 Miss. 474, 103 So. 233, 235 (1925) (finding inherent bias in a special venire selected by the Sheriff from "those found in and about the courthouse" notwithstanding no request for change of venue by the defendant).

Similarly, the U.S. Supreme Court does not restrict the right to challenge the fairness of the jury in this fashion. *Groppi*, *Sheppard* and *Irvin* all reached that Court because requested changes of venue were denied or statutorily precluded. However, they do not limit protecting the right to a fair trial only to cases where that was sought. The State mistakes the Supreme Court's statement that in some cases a change of venue is the only constitutionally *sufficient* means if sought by a defendant to ensure a fair jury, *see Groppi*, 400 U.S. at 510 (citing *Rideau v.*

[17] In *Mhoon*, the trial court had earlier granted a change of venue away from the county where the crime occurred to the county from which the venire with the biasing characteristics was drawn. Defendant made no motion for a change of venue away from the new county, however, This Court reversed his conviction because of the biasing characteristics without any suggestion that Mhoon should instead have sought a second change of venue to ameliorate the bias in the venire drawn from the new county.

Louisiana, 373 U.S. 723 (1963)), for a statement that it is in all instances constitutionally *necessary* for the defendant to seek only that relief.

As the Court in *Groppi* acknowledges, though there are advantages and disadvantages to every option, continuing the matter and waiting for the availability of a less pervasively biased venire or employing more stringent cause standards to ensure "the exclusion of prospective jurors infected with the prejudice of the community from which they come" are also available tools in a defendant's toolbox. *Id.* The due process prohibition against forcing defendants to choose between the exercise of competing constitutional rights is expressly based on the right of the defendant and his counsel to make tactical choices about exercise or waiver of competing rights, including which ones will be exercised. *Brooks v. Tennessee,* 406 U.S. 605, 610-11(1972) (holding that Constitution protects a defendant's right to "make that choice in the unfettered exercise of his own will."). It is the fact that the State is deciding things about when and how those choices must be made that is the Constitutional problem. To adopt the State's position that the *only* remedy for a venire pervaded with bias is waiver of the right to be tried in the county where the crime charged occurred clearly transgresses Flowers "unfettered exercise of his own will" in deciding whether that right, or some other such as speedy trial, is what he is willing to waive in order to obtain a fair trial. *Id. See also Maye v. State*, 49 So. 3d 1124, 1133 (Miss. 2010), *State v. Caldwell*, 492 So.2d 575, 577 (Miss. 1986) (vesting absolute right in defendant to make decision about seeking, or rescinding previously sought, venue change). This is certainly the case where, as here, Flowers has actually sought to have the court employ other means to ensure a fair jury after the voir dire revealed pervasive opinions on guilt and personal acquaintance in the pool of otherwise qualified jurors from which a final jury selection would be made.

Vigorous scrutiny and removal of prospective jurors for implied bias is particularly important in keeping the "prejudice in the community from which they come" out of the jury room. *Murphy v. Florida*, 421 U.S. 794, 800 (1975). *See also Smith* v. *Phillips*, 455 U.S. 209, 222 (1982) (O'Connor, J., concurring) and concluding in a case where a change 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."). Flowers' attempts to have the trial court employ that method were rebuffed, and the fact that it was is one of the things upon which this claim of error is based. Indeed, it is the reason that Flowers then sought to quash the venire, and invoke the "continue and wait" option, in lieu of seating a necessarily biased jury from it. Tr. 1748-55, 3255-56. [18]

In his brief in chief, Flowers anticipated the State's contention that there was not, in fact, pervasive bias in the panel from which the jury was struck, or in the jury itself. He will rely upon his arguments in that brief in support of those claims.

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. The State does not – and cannot – dispute that the repeated retrial of a citizen accused of a capital crime implicates the values underlying the Double Jeopardy Clause, the Due Process Clause, and general concepts of fundamental fairness. Its brief on this issue is devoted to establishing that retrial upon reversal

[18] As is set forth in his brief in chief, only two of 13 prospective jurors challenged by Flowers for implied bias were excused by the Court. All of the remaining ones were within the 45-person pool that would have been required had the state and the defense each exhausted all of their peremptory strikes. One such person was actually seated as an alternate after Flowers' peremptory strikes were exhausted. Aee. at 136-38, nn. 100-02. Flowers was also rebuffed when he sought, in the fashion approved by this Court, to have the trial court identify and cull from the venire prospective jurors who had inappropriate interactions with law enforcement during the days-long jury qualification and selection process. *See* Tr. 1285-86, 1290-91, *Puckett v. State*, 737 So. 2d 322, 331 (Miss. 1999).

or upon mistrial is not barred by any constitutional provision, a proposition with which Flowers does not disagree. The question raised by this case is whether there comes some point when enough is enough, and the state's interest in conviction must yield to the defendant's interest in avoiding "embarrassment, expense and ordeal and . . . a continuing state of anxiety and insecurity, as well as [the] enhance[ed] possibility that even though innocent he may be found guilty." G*reen v. United States*, 355 U.S. 184, 187 (1957). A capital trial in which the defendant is put in jeopardy a sixth time for the same offense – particularly where three of the previous trials were reversed for prosecutorial misconduct – is more gauntlets than any person should have to run. The State has cited no case in the entire country in which a man has been forced to face the superior resources of the state a sixth time with his life on the line. This Court should find a violation of the Double Jeopardy and Due Process Clauses in the extraordinary burden imposed by that sixth trial, or in the alternative, if it reverses upon other grounds, prohibit a seventh trial on constitutional and supervisory grounds.

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

Flowers does not, as the State appears to argue, contend that *McNeal v. State*, 551 So. 2d 151, 158 n.2 (Miss. 1989) requires that all jailhouse informant testimony be categorically found so insufficient as to require circumstantial evidence instructions whenever it is the only evidence of a "confession" by a defendant. Flowers' claim is that under the facts of record in this particular case, the testimony of Odell "Cookie" Hallmon, is so extremely, extraordinarily, perhaps even uniquely, unreliable as to deserve no credibility at all.

This is not merely because Hallmon, like any other inmate, has aspirations to use his cooperation with the prosecution to his own advantage even in the absence of any promise of direct benefit in exchange. *See Moore v. State*, 787 So. 2d 1282, 1287 (Miss. 2001), *Sherrell v. State*, 622 So.2d 1233, 1236 (Miss.1993) (recognizing this fact and requiring cautionary

instructions even in absence of evidence). It is also not merely because he is a self-admitted liar about facts of relevance to this particular case, Tr. 2417-20, 2442-45. It is also because Hallmon has repeatedly demonstrated a character of extreme criminality and manipulative dishonesty in every aspect of his life as an incarcerated person. *Compare* Tr. 2416-19, 2425 (professing absence of any conduct justifying the disciplinary lockdown during which he came into contact with Flowerswhile incarcerated) with incarceration records establishing multiple offenses justifying such a lockdown, C.P. 2517 (CD) at filename "1993 Incarceration Records Part 2" at .pdf pages 1-65. *See also* App. 35-37, 147-148 and n. 109.

It is particularly significant that several of Hallmon's dozens of disciplinary write-ups following his flip-flop in the 2004 trial from defense witness to state witness were for offenses could have also been prosecuted criminally. *See* R.E. Tab 10 at "Incident Report." On several occasions, Hallmon was written up for possession of "major contraband," (drugs, weapons and/or cellphone components) that could have been the basis for felony indictment. *See* Miss. Code Ann. § 47–5–193 (version in effect in 2008 and thereafter found valid in *Hicks v. State*, 121 So. 3d 960, 962 (Miss. Ct. App. 2013)). On three occasions, in August of 2008 (shortly before his testimony in the 2008 trial), and again in July and November of 2009 (in the 12 months preceding his June 2010 testimony in the trial *sub judice*) Hallmon's offenses were reported to Central Security, which is the initial step in treating the offenses not merely administratively, but criminally as well. R.E. Tab 10 at "Incident Report Pages 5, 6, and 7 of 10." The MDOC had been made fully aware of his cooperation in the instant matter as early as 2005. *See* C.P. 2517 (CD) "Odell Hallmon MDOC 2005 Incarceration Records Part 1" at .pdf pages 25-27, reproduced at R.E. Tab 10. Even if MDOC's decision to forbear from prosecuting Hallmon was not done at the explicit request of the State in this case, he was still within the time

when he could have been indicted for those offenses when he testified in 2010. That was a powerful incentive not to burn any bridges with the prosecutor in connection with his testimony in the trial *sub judice*.[19]

Under these circumstances, it was an abuse of discretion for the trial court not to submit this case to the jury with one or more requested circumstantial evidence instructions. The failure to do so significantly impaired Flowers' due process right to present a defense, and requires reversal as a consequence. *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").

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

A. It was error to refusal Flowers' requested Sentencing Instruction D-34, especially when the jury expressly sought guidance from the court on the very question on which the instruction correctly stated the controlling law

The State's response to this claim of error says only that there is, as Flowers acknowledged in his brief in chief, precedent from this Court that permitted refusal of similar instructions in cases where the jury had not asked for guidance on the question, and where the other instructions did provide sufficient information, including specifically the information about what happens if the jury cannot unanimously agree to either sentence. *See, e.g. Keller v. State*, -- So. 3d. -, 2010-DP-00425-SCT at ¶ 54, (Miss. Feb. 6, 2014) (not yet released for publication). In

[19] Indeed, this seems to have paid off for Hallmon rather handsomely. Had he been indicted and convicted of any of these offenses, he would have faced up to fifteen years of additional incarceration per offense. Miss. Code Ann. § 47-5-195. Instead, notwithstanding his terrible disciplinary record and the fact that his release date for his most recent crime of conviction was December of 2015, he was actually released to Earned Release Supervision in Carroll County, located within the Fifth Circuit Court District served by the same district attorney prosecuting this matter, on October 28, 2013. *See* http://www.mdoc.state.ms.us/Inmate Details.asp?PassedId=82261

the instant matter, by contrast, the jury specifically sent out a note during sentencing deliberations asking, "If we cannot agree unanimously, who will make the ultimate decision?" C.P. 2924. There is a statute that expressly responds to that question. Miss. Code Ann. § 99-19-103. Flowers properly reiterated, and the trial court declined, his request that his proposed instruction setting that statutory truth forth be given in response to that question. Tr. 3479-80. Leaving the jury uninstructed on this point when clarification is possible and when the jury could arrive at a conclusion that was inconsistent with the law requires reversal of the sentence of death imposed in the absence of the instruction. *See Simmons v. South Carolina*, 512 U.S. 154 (1994), *Rubenstein v. State*, 941 So.2d 735 (Miss. 2006).

B. Flowers other refused sentencing instructions were also erroneously denied

Flowers anticipated the State's arguments on these points in his brief in chief, and therefore will not burden this Court by repeating them here.

C. The court gave improper instructions on aggravating factors

On this point as well, Flowers fully anticipated the State's claims in his brief in chief, and relied on that briefing in lieu of further response here.

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.

1. These claims are fully preserved for decision in this Court

As the State acknowledges, the legal and factual circumstances that undergird these claims are argued extensively in connection with the errors discussed at length in Arguments I, II, VI and VII of his brief in chief, and are expressly incorporated into this section of Flowers

Brief in Chief in lieu of unnecessary repetition. Aee. 145. The State also grudgingly admits that there is considerable argument and authority on these points in the pleadings below which are also incorporated by reference. *Id.* at n. 47. It makes no claim that the citations in Flower's briefing on this point are insufficient to identify those incorporated arguments.

The State's claim that this is not sufficient to properly present these questions to this Court for review is once again founded on mischaracterizations of the record that once corrected eliminate both the factual and legal basis for the claim. The State asserts hearings on all these motions were "conducted two trials ago, by Flowers' former attorneys." Aee. 145, n. 47. Both of these assertions are untrue.[20] All but one of the motions seeking relief from the death penalty for prosecutorial vindictiveness and racial discrimination in jury selection were made and heard in connection with the 2008 mistrial ("one trial ago" to use the State's terminology), C.P. 1644-85, Tr. 285-91, 305-18. One of them was actually specifically reheard in full during the pretrial motion hearings conducted in April of 2010. T. 459-59. The remaining such motion (Supplemental Motion to Preclude Death Penalty Procedures, C.P. 1032-66) was filed and heard only in connection with the trial that resulted in the conviction and sentence on appeal hear. T. 458-63. All were disposed of by the same trial judge who presided over the 2008 and 2010 proceedings, and who expressly incorporated all of his rulings made during 2008 pretrial motion hearings for purposes of the 2010 trial record. T. 466. The speedy trial motion was first made earlier, but was expressly renewed, argued and ruled upon during the 2008 pretrial proceedings and readopted for purposes of the 2010 proceedings, as well. Tr. 336-38., 466.

[20] The State never explains why the identity of Flowers' trial counsel is in any way material its claim of bar on these issues. However, it is yet another mischaracterization of the record, and needs to be corrected. Flowers was represented by the same trial counsel in all proceedings held in Montgomery County after the 2003 remand by *Flowers II*. That includes all proceedings in which these motions were raised. Timeline, *supra* at pp. 3-4. *See also* C.P. 226, 371, 477, 1651-85, 1928-66.

Hence, to the extent that when the motions were heard could be relevant, the State's facts on when that happened are simply wrong. The issues were presented to the trial court for consideration on the same grounds as they are presented here by reference, and the trial court ruled on them. They are fully preserved for review as a consequence, and the legal and factual basis supporting reversal for them is before this Court as well. *Ross v. State*, 954 So.2d at 987.

The State offers no arguments on the merits of these claims that were not fully anticipated in the material incorporated by reference into Flowers' brief in chief. Flowers therefore has no need to argue anything not already before this Court, and will not burden it by re-stating what is contained in those materials. Further, Flowers' brief in chief also anticipated the State's responses to the claims set forth in Sections B., C. and D. of this Argument X. He will not repeat those arguments here.

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

If the State had not characterized its own argument on this point of error as one of procedural bar, Flowers would likely not have recognized it as such. Flowers does not dispute that there is no record in the trial court about his claims that the State that 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). The whole point of the Remand Motion was to permit those claims to be presented to the trial court in the first instance and disposed of on this appeal. This Court denied that motion. Flowers submits that the *Keller* order warrants reconsidering that denial. The fact that the State takes a different view from Flowers on whether the *Keller* remand order signals a change in the legal landscape on that issue sufficient to support that reconsideration is a merits question which is properly before this

Court, not one of bar.

On the merits, Flowers respectfully submits that, as is set forth in the dissenting opinions in both the remand order and in the final opinion disposing of the remanded question on the basis of the remand, *Keller* does represent a dramatic change in this Court's jurisprudence on record supplementation. *See Keller v. State*, --- So. 3d ---, --- (Miss. 2014), No. 2010-DP-00425-SCT at ¶184 (Feb. 6, 2014) (not yet released for publication), (Kitchens, J., dissenting and characterizing the remand as "a complete departure from regular appellate sense and procedure.") *See also Keller v. State*, 2010-DP-00425-SCT, 2013 WL 6916594 (Kitchens, J., dissenting from unpublished Remand Order, Miss. Feb. 14, 2013 and stating that by ordering the remand, this Court "[a]bandon[ed] decades of well-established practice which historically has never allowed, let alone required, litigants and trial judges to journey back into the very entrails of a criminal trial and 'add to or subtract from' the record.")

The State's attempt to distinguish this matter and *Keller* on their facts is also misplaced. It claims that *Keller* trial court had already considered the question the remand addressed, but that the trial court in the case *sub judice* had not. That is simply not what the record on appeal as it presently exists shows. In March 2010, Flowers renewed the motions seeking this disclosure. C.P. 1868-79, 1828-32. In response to that request, the trial court renewed its orders that the State provide updates of all such disclosures including the requirement that the State provide NCIC criminal histories on all of its witness. Tr. 436-37, 439, 466. However, at a time when Patricia Hallmon was facing a federal prosecution that had never previously been disclosed, the prosecutor made material misrepresentations to the trial court and the defense affirmatively concealing this fact; instead, it falsely informed both that it had fully complied with all pre-existing and current disclosure and discovery requirements. Tr. 436-37, 439, 466. This Court

therefore has both the inherent power and, in the wake of *Keller,* the precedential basis, to revisit its earlier decision not to remand for the purpose of developing this issue. Flowers respectfully requests that it do so.

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

The State makes no response to Flowers' Eight Amendment proportionality claim. Flowers anticipated the State's state law claims on this point in his brief in chief. He therefore rests on his in his brief in chief on both points.

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

The State claims that Flowers is barred from seeking review on cumulative error because he did not raise that claim in the trial court. Aee. 171. Arguably, he did do this, at least implicitly, in his extensive post-trial motion seeking relief from the verdict on all of the errors claimed, and which the trial court denied. C.P. 2931-44, 2953-89, 2999- 3041, R.E. Tab 5.

More importantly, there is no requirement that this claim be passed upon by the trial court in any event. Cumulative error is the means by which an *appellate court* reviews its *own* findings of error. It then considers whether, notwithstanding the fact that each error might not be reversible in and of itself, may combine with other otherwise harmless errors found by the appellate court to warrant reversal because the combined effect of those errors deprived the defendant of fundamental constitutional rights.

> What we wish to clarify here today is that upon appellate review of cases in which *we* find harmless error or any error which is not specifically found to be reversible in and of itself, *we* shall have the discretion to determine, on a case-by-case basis, as to whether such error or errors, although not reversible when standing alone, may when considered *cumulatively require reversal* because of the resulting cumulative prejudicial effect.

Byrom v. State, 863 So. 2d 836, 847 (Miss. 2003) (emphasis added). *See also Flowers v. State*,

947 So. 2d 910, 940 (Miss. 2007) (Cobb, J., concurring), *Ross v. State*, 954 So. 2d 968, 1018 (Miss. 2007) (relying on *Byrom*, 863 So. 2d at 847).[21] Because there are numerous errors in the instant matter, their cumulative effect must be considered, and should result in reversal of the conviction and sentence here. *See Flowers III*, 947 So.2d at 941 (Cobb, J., concurring on basis of cumulative error) *Griffin v. State*, 557 So.2d 542, 553 (Miss. 1990).

CONCLUSION

For the foregoing reasons, and those set forth in his Brief in Chief, 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 that this Court reverse the convictions and death sentences in the matter *sub judice.*

Respectfully submitted,

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[21] To the extent that earlier cases had suggested otherwise, *see, e.g., Gibson v. State*, 731 So. 2d 1087 (Miss. 1998), *Byrom* expressly clarified that such review was something the appellate court, at least in death penalty matters, reserved the right to do with respect to the cumulative effect any errors that it had itself reviewed and found to exist. 863 So. 2d at 847.

CERTIFICATE OF SERVICE

I hereby certify that I have this day filed by means of the electronic case filing system the foregoing Reply Brief of Appellant pursuant to Mississippi Rule of Appellate Procedure 25 by which immediate notification to all ECF participants in this cause is made, and by U.S. Mail, postage prepaid, on the following persons believed by me not to be ECF participants.

Hon. Joseph H. Loper, Jr.
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This the 18th day of February, 2014.

s/ Alison Steiner, MB No. 7832
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