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APPELLANT'S REQUEST FOR ORAL ARGUMENT

Appellant Cory J. Maye, by and through his counsel, respectfully requests that this Court hear oral argument on this appeal. As shown in his reply brief, the State's defense of the verdict rests heavily on mischaracterizations of certain isolated segments of the trial record. Given that conflicting characterizations of the trial record feature prominently in the written briefs, oral argument will ensure that this Court's decision rests on an accurate understanding of the record.

In addition, this appeal's posture is unusual, because Mr. Maye's appellate counsel, representing him on a *pro bono* basis, have discovered compelling new exculpatory forensic and testimonial evidence. Briefing and post-trial evidentiary hearings relating to this evidence and other issues have added over 1,500 pages to the appellate record, and oral argument will provide both appellant and appellee the opportunity to answer questions that may arise concerning the implications of these extensive post-trial proceedings.

Mr. Maye's case also implicates issues of significant public concern, including but not limited to the standards that govern the right of Mississippians to defend themselves in their own homes.

Finally, while the trial court set aside the death penalty that had been imposed, Mr. Maye remains sentenced to life in prison without the possibility of parole, which will forever separate him from his son and from the daughter whom he sought to protect on the night of the shooting.

In light of these stakes, a complex but compelling record below, newly discovered evidence, and questions implicating important rights of all Mississippi citizens, oral argument is necessary and appropriate to ensure that the Court has every opportunity to fully and fairly consider the arguments presented by both Mr. Maye and the State in this appeal.

ARGUMENT

On the night of December 26, 2001, Cory Maye defended himself, his infant daughter, and his home from an unknown intruder. The State can muster no evidence to support its argument in favor of a contrary inference that Mr. Maye knew he was shooting at a peace officer in the dark, so instead it seeks to justify the jury's verdict by mischaracterizing the evidentiary record. Similarly, in seeking to excuse fundamental legal errors at and prior to trial, the State overlooks or misstates controlling authority. Based on the factual record and governing law, Mr. Maye's conviction and sentence should be reversed.

I. THE EVIDENCE PRESENTED AT TRIAL WAS INSUFFICIENT AS A MATTER OF LAW TO SUSTAIN A CONVICTION

The "ample evidence" offered by the State to support the jury's verdict consists of unfounded assertions that Mr. Maye moved the blinds covering his front door window, that he heard police officers announce themselves, and that he turned a light on in the home. State Br. 4 and *passim*. The record contradicts the State's claims. Even when viewed in the light most favorable to the State, controlling caselaw establishes that the evidence at trial failed as a matter of law to establish Mr. Maye's guilt.[1]

A. No Evidence Exists That Mr. Maye Moved His Front Door Blinds

The State relies heavily on Officer Stephen Jones' testimony about the blinds on Mr. Maye's front door, but does not address the key retraction Jones made on cross-examination about what he observed. When asked on direct examination whether he had seen any movement

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[1] The sufficiency analysis presented applies in full to the lesser charges of depraved heart murder and culpably negligent homicide. The State asserts that the prosecution at trial did not press a theory of depraved heart murder as an alternative to capital murder. This assertion is incorrect, as discussed in section V of this brief. In any event, the State does not contest Mr. Maye's argument that in the absence of sufficient evidence to support the capital murder charge, there is likewise insufficient evidence to support the lesser charges of depraved heart murder and culpably negligent homicide. State Br. 13.

or activity within Mr. Maye's home, Officer Jones answered that "[t]he blinds opened, it appeared that somebody opened the blinds and looked out." T.249 (emphasis added). On cross-examination, however, Officer Jones clarified his prior testimony, denying that he saw anyone inside the home open the blinds and look out:

> Q. You looked in the window?
> A. When I was standing there --
> Q. Right here.
> A. -- when the blinds were cracked open, I noticed a light.
> Q. Are you telling the ladies and gentlemen of this jury that someone stood up and opened the blinds so that you could see inside?
> A. I'm not saying that, I'm saying that the blinds were open.
>
> * * *
>
> Q. So you stood here, looked inside this window without any blinds and you were able to see what?
> A. When we were trying to gain access, the blinds cracked open where I could see a light inside.
> Q. Okay. You saw a light inside.
> A. Yes.
> Q. Did you see anyone inside?
> A. No, I did not.
> Q. So you didn't know, as you all stood here, if there was anybody even inside that apartment, did you?
> A. No, we did not.
> Q. And more importantly, you did not know if Cory Maye was inside this apartment, did you?
> A. I did not know if anybody was in the apartment or not.

T.266-67 (emphasis added). No other witness testified that the blinds moved or that Mr. Maye looked out. Following Officer Jones' cross-examination, therefore, there was no evidence, much less ample evidence, that "someone cracked the blinds," State Br. 11, 14, 24, or "that Maye saw the uniformed officers through the blinds," as the State claims. *Id.* at 12.

B. No Evidence Exists That Mr. Maye Heard Or Could Have Heard Police Announcements

The State refers repeatedly to evidence of police announcements outside Mr. Maye's

home, but it never responds to his argument: evidence that police officers made announcements outside the home does not prove that Mr. Maye could or did hear them inside.[2] The evidence shows the opposite. Officer Darryl Graves testified that he heard no announcements after he entered the Smith home, thereby corroborating Mr. Maye's testimony and rebutting any potential inference that external announcements could be heard inside the home. Similarly, Officer Stephen Jones testified that Ron Jones made two rear announcements before the door was kicked in, T.252, but Officers T.C. and Darrell Cooley testified they heard no such announcements, even though both men were in a far better position than Mr. Maye to hear any such announcements that were purportedly made. T.307, 409, 430-431.

C. No Evidence Exists That A Light Was Switched On Inside Mr. Maye's Home

The evidence at trial showed that an interior light was on in or near Mr. Maye's bathroom while the police were attempting to enter the home. Officer Stephen Jones testified that when Officer Darrell Cooley kicked the front door, the blinds moved, allowing Jones to glimpse a light in the home that he had not previously seen because of coverings over the door and living room window. RE:II 350 and 359 (Trial Ex. 18 and 32). Jones never said he saw the light "come on," as the State suggests, and Officer Darryl Cooley testified four times that he only saw the light after Jones brought it to his attention. T.408, 409, 412-414.

Although when Officer Cooley was asked whether there was any indication that someone was inside the home, he replied: "When the light come on," T.423, this testimony was either a slip of the tongue, or represented his assumption that Jones had seen the light turn on. He never

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[2] The State attempts to fill this gap by claiming that there is evidence that the Smith family heard and responded to police announcements. The record contains no such evidence. None of the Smith home's occupants testified. Officer Darryl Graves' testimony that the Smith family heard an announcement was simply his assumption – later rebutted by Audrey Davis' affidavit that, although she heard the police arrive, she opened the door before the police could knock and announce themselves. R.1196.

testified that he himself witnessed the light turn on. Even assuming, contrary to the clear record, that someone turned a bathroom light on inside the home, this would not prove that Mr. Maye knew that police were present or that Ron Jones was a police officer.

D. The State Cannot Distinguish *Wheeler*

The State is unable to distinguish *Wheeler v. State*, 536 So. 2d 1341 (Miss. 1998). In *Wheeler*, there was no doubt the defendant knew the police were present: he had spoken directly to three officers (two in uniform) who told him to his face that they had a warrant for his arrest. *Id.* at 1342-43. The Court held that evidence Wheeler knew police were present was insufficient *as a matter of law* to establish his specific knowledge of the victim's status.

When the evidence in Mr. Maye's case is compared with that in *Wheeler*, there is less evidence on each and every point the Supreme Court found pertinent to its holding:

	Wheeler v. State	***Maye v. State***
Scene of Incident		
Time of Day	Afternoon	Late at night
Place	Outside - front porch of home	Darkened rear bedroom
Defendant's Knowledge of Police Presence at Scene		
Contact with police	Defendant spoke to three officers--two in full uniform – at his front door	No interaction before shooting between defendant and police
Knowledge of official business	Police told defendant they had a warrant for his arrest	• No evidence defendant heard external announcements • Officer inside adjoining home heard no external announcements
Defendant's Knowledge of Victim's Status as a Police Officer		
Evidence that defendant saw victim before shooting	A witness testified that defendant looked at victim before shooting, but "wavered" on cross-examination (536 So. 2d at 1343)	• State's trial exhibits prove potential exterior sight lines entirely blocked by full opaque window coverings (Trial Exhs. 1, 4. 5, 9, 11, 12, 13, 15, 16, 17, 18, 32; T.505:8-11; Maye Br. 7, 19, 34) • Mr. Maye told police on the night of the shooting that he did not know Jones was an officer, and testified to the same at trial (Maye Br. at 21)

Police insignia worn by victim	Plainclothes, with badge and holstered gun (536 So. 2d at 1344)	• No evidence of visible insignia on Jones' clothing, and no evidence of visible badge (T.721; T.728; T.760; T.791-95; Maye Br. 22)[3] • No evidence insignia were visible in the darkened bedroom (Maye Br. at 22)
Time for defendant to see victim	"[M]ere seconds" (536 So. 2d at 1344)	• Seconds (T.512-19) • No evidence Jones would have been identifiable as officer in darkened bedroom (Maye Br. at 22)

Wheeler cannot be distinguished from the facts of this case.[4]

E. The "*Weathersby* Rule" Applies

The State identifies no evidence that genuinely, materially contradicts Mr. Maye's depiction of events. Because the *Weathersby* rule (named for *Weathersby v. State*, 165 Miss. 207, 147 So. 481 (1933)) requires the jury to credit the defendant's version when there are no witnesses other than Mr. Maye, the State asserts that he was "not the only witness." State Br. 12. But the State admits that Officers Stephen Jones and Darrell Cooley "may not have actually seen Mr. Maye fire the fatal shot." *Id.* Despite the fact that neither officer saw the only event at issue – the shooting – the State asserts that their testimony of the "events leading up to" the shooting overcomes Mr. Maye's unrebutted testimony that he did not see or recognize Ron Jones as a po-

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[3] A post-trial proffer that included photos of Jones' clothing displayed on a mannequin confirms that viewed from the front, it would have been impossible to identify Jones as a police officer. RE II 330-338.

[4] The State also misstates the standard of knowledge for capital murder, invoking dicta in *Stevenson v. State*, 733 So. 2d 177, 186 ¶ 32 (Miss. 1998) (quoting *Hansen v. State*, 592 So. 2d 114, 146 (Miss. 1991)), to suggest that it only had to prove that Mr. Maye "should have known" that Ron Jones was an officer. State Br. 9, 14. Neither defendant in *Stevenson* nor *Hansen* challenged his knowledge of the victim's status, so the Court's statement regarding scienter was dicta. In *Stevenson*, the defendant was a jail trusty who stabbed a jailer he had long known. 733 So. 2d at 179, ¶¶ 4, 6. In *Hansen*, the defendant killed a state trooper who, while driving a patrol car, had pulled the defendant over. 592 So. 2d at 120-21. The State's reading of the statute is also contrary to its plain language, to decisions of the Supreme Court (including *Wheeler*) that require actual knowledge to prove scienter, and to Mr. Maye's state and federal constitutional rights to have this criminal statute construed narrowly, and to be convicted only after proof beyond a reasonable doubt of every element of the offense. *See Coleman v. State*, 947 So. 2d 878, 881 (Miss. 2006); *Ervin v. State*, 434 So. 2d 1324, 1326 (Miss. 1983). Moreover, a "should have known" standard cannot change the underlying fact that there was no sufficient evidentiary basis for a jury to conclude that Mr. Maye saw or heard the police, or that he specifically knew Ron Jones was an officer.

lice officer when Jones charged into his darkened bedroom. *Wheeler* makes clear, however, that evidence of events "leading up" to an officer's death is insufficient to prove that the defendant knew the victim was a police officer. Those cases addressing *Weathersby* and such extraneous evidence have dealt with proof of direct interactions between defendant and victim. In *Johnson v. State*, for example, the Court focused on testimony that the victim had initiated seven encounters with the defendant in the hours before the killing, and that the victim's belligerence had led the defendant to call the police. 987 So. 2d 420, 423 ¶ 5 (Miss. 2008).

The State also argues that *Weathersby* does not apply because Mr. Maye admits to having fired at Officer Jones. But *Weathersby* itself, and most cases applying it, involve self-defense where there is no dispute as to who killed the decedent. *See Johnson*, 987 So. 2d at 425-26 ¶¶ 13-14. *Weathersby*, therefore, dictates a directed verdict given that no testimony or physical facts materially contradict Mr. Maye's account.

II. DR. HAYNE'S TRAJECTORY TESTIMONY WAS WRONGLY ADMITTED

The State fails to establish the reliability of Dr. Hayne's speculative expert testimony. The State insists that Hayne never testified concerning Mr. Maye's position and posture in relation to Officer Jones, asserts that Hayne could properly testify concerning that subject, and claims that Mr. Maye somehow "invited" this groundless testimony despite his repeated objections at trial. State Br. 15, 20-23. These contradictory explanations neither salvage Hayne's unscientific trajectory testimony, nor justify the State's use of it at trial.

First, Hayne acknowledged during cross-examination that he lacked a reliable scientific basis for the testimony which the State elicited from him on redirect. Dr. Hayne testified in five stages: (1) direct examination; (2) cross; (3) redirect; (4) re-cross; and (5) further redirect. Hayne's direct testimony "reported the external and internal findings from the autopsy," including the fact that the internal wound path "went downward approximately twenty degrees

and to the back between thirty and thirty-five degrees." State Br. 14. During cross, trial counsel established that Hayne's wound path findings *did not* provide a reliable basis for conclusions concerning the actual position and posture of Mr. Maye in relation to Officer Jones at the moment of the shooting. Maye Br. 32-33. Hayne conceded he did not know the predicate information necessary for such an analysis (Mr. Maye's height, the distance between the two men, the height and angle of the muzzle of the gun, and the position and posture of Officer Jones when struck), and he admitted that his findings were based solely on his autopsy inspection of the internal wound path. T.442:16-444:3. These questions were clearly intended to delimit the scope of Hayne's opinion and foreclose the jury from mistakenly drawing inferences from his direct testimony regarding Mr. Maye's position relative to Officer Jones. Indeed, Hayne admitted on cross-examination that he could not reliably opine on the actual position and posture of Maye in relation to Jones at the moment of the shooting. T.443:19-444:3.

Second, on redirect, Hayne's testimony improperly exceeded the limitations that he had acknowledged during cross. The State invited Hayne to testify beyond his own limited knowledge and speculate about the actual position and posture of Mr. Maye in relation to Officer Jones at the moment of the shooting. Trial counsel's three objections were overruled, and Hayne asserted that if Ron Jones were "in an upright position or even leaning slightly forward, I would expect the weapon to be in a relatively higher position than the entrance gunshot wound." *Id.* The State does not identify a scientific foundation for Hayne's assertion, and also fails to address the additional analysis in Mr. Maye's opening brief concerning the unreliable and speculative nature of Hayne's redirect testimony. Maye Br. 32-34. Instead, the State contends that Hayne's assertion as to what he would "expect" was based on a hypothetical.

Yet in addressing the purported "hypothetical," Hayne relied on the implausible assumption that Ron Jones was standing upright or merely "leaning slightly forward." This

assumption conflicts with the trial testimony, which indicated that the 6'2" Jones was "running up the steps" into Mr. Maye's apartment, and sought cover immediately after crossing the threshold into the darkened bedroom. T.292; T.253-254; T.512-519. Hayne also failed to address the variables which, moments before, he had agreed were indispensable. The indispensability of these variables is widely understood within the forensic community, and has not been questioned by the State.[5] Hayne thus offered speculative opinions on the actual positions of Mr. Maye and Officer Jones based on an incomplete hypothetical, and potentially misled the jury. Unsupported and speculative opinions (such as Hayne's here) that are unrelated to or contradicted by the actual evidence are inadmissible. *See, e.g.*, *Magnolia Hosp. v. Moore*, 320 So. 2d 793, 798 (Miss. 1975); *Washington v. Greenville Mfg. & Mach. Works*, 223 So. 2d 642, 644 (Miss. 1969).

Third, the State incorrectly suggests that Mr. Maye somehow invited Hayne's hypothetical testimony. Mr. Maye's counsel elicited Hayne's admissions concerning the limited scope of his knowledge and established that Hayne had no basis to offer the opinions later introduced based on the State's hypothetical. When the State disregarded those limits on redirect and asked for Hayne's opinion, trial counsel objected promptly and repeatedly, noting that Hayne had just admitted during cross that he had no reliable factual or scientific basis to offer such testimony. T:447-48. Questions establishing the lack of foundation for Hayne's opinions could not have "invited" the State to extract the precise opinions Hayne had admitted he could

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[5] Organs inside the body are not absolutely fixed in their position, and the "course taken by a bullet through some of these organs may have been slightly different in life than they [the organs] later appear in autopsy." Lucien C. Haag, SHOOTING INCIDENT RECONSTRUCTION 177-178 (Academic Press 2005). Thus, the varying strengths and densities of tissues and organs, coupled with the fact that a body when struck "may be in some twisted or bent position only to be straightened out later on the autopsy table" means that the descriptions and illustrations of gunshot wounds created during the autopsy do not accurately depict "the moment the gunshot wounds were sustained at the actual shooting scene." *Id.*

not reliably give. *Cf. Singleton v. State*, 518 So. 2d 653, 655 (Miss. 1988); *Alexander v. State*, 811 So. 2d 272, 282 ¶ 27 (Miss. Ct. App. 2001) (both cited at State Br. 20, and both addressing testimony elicited *by* defense counsel, rather than over defense counsel's repeated objections).

Fourth, the State cannot plausibly excuse the trial court's error by dismissing Hayne's testimony as merely a passing reference based on an incomplete hypothetical. To the contrary, the State told the jury that this testimony was "a major thing."[6]

Finally, the State does not contest the detailed and specific evidence contained in Mr. Maye's post-trial proffer concerning Hayne's false testimony with respect to his qualifications and autopsy practices. Nor does the State deny the impact this evidence would have had on Hayne's credibility. Mr. Maye is entitled to a new trial as a result of Hayne's misrepresentations and the State's inaction. Maye Br. 37.

III. NEWLY-DISCOVERED FORENSIC EVIDENCE WARRANTS A NEW TRIAL

The three requirements for a new trial on the basis of newly-discovered evidence are novelty, due diligence, and weight. Maye Br. 38; *Crawford v. State*, 867 So. 2d 196, 203-04 ¶¶ 9-10 (Miss. 2003). The State implicitly concedes that Mr. Maye has met the novelty and due diligence requirements. In contesting that Mr. Maye has met the remaining requirement – weight – the State misconstrues the governing standard and the testimony of his forensic experts.

First, the State errs in claiming that Mr. Maye must establish that the new evidence is "almost certainly conclusive that it would cause a different result." State Br. 24 (citing *Clark v. State*, 875 So. 2d 1130, 1133 ¶ 12 (Miss. Ct. App. 2004)). The quoted language comes from a

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[6] The State cites a number of cases in which Hayne has testified about the position of a victim, but these cases did not involve assertions as here concerning the actual position and posture of the defendant in relation to the victim at the moment of the alleged homicide. Moreover, none of these cases involved instances in which Hayne offered a purely speculative opinion on redirect, after having previously conceded during cross-examination that he lacked a sufficient factual basis to opine reliably concerning the issue in question.

statute barring post-conviction claims older than three years. Miss. Code Ann. § 99-39-5(2). Mr. Maye is on direct appeal, and raised his claim for newly-discovered evidence in the Circuit Court even before it finalized his judgment of conviction. T.687. The "certainly conclusive" standard does not apply. Instead, the proper standard for assessing the weight of new evidence on direct appeal is whether it would probably change the result were a new trial granted. *Hunt v. State*, 877 So. 2d 503, 510 ¶ 34 (Miss. Ct. App. 2004). Because the State bears the burden of proving Mr. Maye's guilt beyond a reasonable doubt, evidence raising reasonable doubt would have caused a different result. The forensic testimony raises much more than reasonable doubt.

Mr. McCann's report and testimony established two critical facts. The first was that Mr. Maye fired his pistol along the trajectory line recreated by the laser probe inserted into the bullet hole in the door trim. T.639-42. The resulting endpoint of the trajectory was a rectangle on the floor corresponding precisely to where Mr. Maye testified he lay at the time of the shooting.[7] T. 733. The State makes no effort to rebut Mr. McCann's second point: that the bullet holes in Officer Jones' clothing also corroborate Mr. Maye's testimony that he was prone on the floor. Mr. McCann testified that the bullet holes (which were unexamined prior to trial) and the wound path angle could be readily explained by the natural, flexed position of Jones which would have resulted from running up the steps and into the room. T.643-52.

Dr. Daniel's critical testimony was simple and direct: "You cannot identify the location of the shooter if all the information you have is just the track of the bullet within the body." T.867. The State does not dispute the truth of this opinion, which takes into account the variable physics of human anatomy. Dr. Daniel also explained in detail the other variables needed to

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[7] In claiming that Mr. McCann's testimony was weakened by not knowing the precise position of the door trim, State Br. 25, the State ignores a police photograph confirming the position of the door immediately after the shooting. Tr. Exhs. 2, 15; RE 340, 347; T.788-90. In addition, Mr. McCann's outlined rectangle accounted for any realistic margin of error based on the looseness of the door trim. T.733-36.

form a reliable opinion concerning the full bullet path from start to finish, and noted that none of these variables had been properly considered by Hayne. T.866-873. In addition, Dr. Daniel testified that even if he assumed that Hayne's bullet track measurement was accurate, that track was entirely consistent with Mr. Maye's testimony that he lay on the floor and that the gun was at or near the top of the bed when he fired. T.870-877, 886-887.

The State cannot argue to a jury that Hayne's testimony was a "major thing," and later argue to the Court of Appeals that testimony rebutting Hayne's opinion would not produce a different result at trial. The experts' testimony rebuts an essential assertion of the State (that Officer Jones' wound was inconsistent with Mr. Maye's claimed location), and corroborates Mr. Maye's version of events. Evidence that rebuts the State's theory and corroborates the defendant's satisfies the weight requirement for a new trial. *Hunt*, 877 So. 2d at 513, ¶¶ 51-52 (granting a new trial though the case "was almost entirely a question of credibility").[8]

IV. MR. MAYE WAS DENIED HIS FUNDAMENTAL CONSTITUTIONAL RIGHT TO BE TRIED IN JEFFERSON DAVIS COUNTY

The State contends that Mr. Maye is "procedurally barred" from pursuing his vicinage right on appeal because he "never framed the issue as one of a withdrawal of a waiver of his constitutional right to be tried in Jefferson Davis county." State Br. 27. The record contradicts the State. Mr. Maye explicitly invoked Article 3 of the Mississippi Constitution in his motion to return his trial to Jefferson Davis County, R.215, and he correctly stated that "the defendant has the right to be tried in the county in which the crime occurred." R.216. Mr. Maye's motion also

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[8] The State also attempts to marginalize this new evidence by calling it "impeachment." The State is mistaken. Impeachment evidence is that which calls the veracity or credibility of a witness or document into question. *Lanier v. State*, 533 So. 2d 473, 487-88 (Miss. 1988); BLACK'S LAW DICTIONARY 4th Ed. at 886. The newly-discovered evidence, however, is substantive evidence regarding highly pertinent and disputed facts. It would have been admissible at trial whether Hayne had testified or not. It is not mere "impeachment" just because, by contradicting Hayne, it casts doubt on his testimony.

cited *Simon v. State*, 688 So. 2d 791 (Miss. 1997) ("*Simon II*"), in which the Supreme Court emphasized that a trial court must exercise "sound discretion" rather than "unfettered discretion" in assessing a defendant's motion to withdraw an initial waiver of his vicinage right. *Id.* at 804. Mr. Maye clearly invoked his constitutional vicinage right below, and is not barred here.[9]

The State does not dispute that a trial court cannot deny a defendant's attempt to withdraw the waiver of a constitutional right without providing sound justification. *See Stevens v. Marks*, 383 U.S. 234, 243–44 (1966). The record below contains no justification. The trial court stated that it was granting Mr. Maye's July 2003 motion, but transferred the case to Marion County without explanation, despite Maye's explicit request to return to Jefferson Davis County.

The State's assertion – that the trial court properly ignored Mr. Maye's request to return to Jefferson Davis County because it believed Maye could not receive a fair trial there – is a *post hoc* justification never offered by the trial court itself. The trial court stated in September 2006 that it had believed it lacked the authority to grant Mr. Maye's request to return to Jefferson Davis County, and so transferred the case to Marion County instead.[10] T.970:4–972:4. Neither in 2003, nor in either hearing on Mr. Maye's post-trial motions, did the trial court suggest that it located the trial in Marion County because it believed Mr. Maye could not receive a fair trial in Jefferson Davis County. In addition, any speculation by the trial court that Mr. Maye was better off having waived his vicinage right would have been put to rest when the State fought

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[9] The State cites *State v. Caldwell*, 492 So. 2d 575 (Miss. 1986), in claiming that "a defendant who waives his right to be tried in the county in which the offense occurs is not entitled to withdraw that waiver absent a reversal of his conviction and remand for a new trial." State Br. 29. The State misreads *Caldwell*. There, the Court cautioned that, absent a successful sentencing appeal, a defendant could not withdraw a vicinage waiver between the guilt and sentencing phases of trial. 492 So. 2d at 577. Mr. Maye requested a transfer well before his trial's guilt phase. *Caldwell*'s admonition does not apply.

[10] The State offers no answer to Mr. Maye's observation that the trial court's overly restrictive understanding of the scope of its own discretion was an error of law that warrants reversal. Maye Br. 43-44 & n.23.

aggressively to block Mr. Maye from returning to Jefferson Davis County, without trying to show either that a fair jury could not be impaneled there, or that the State would suffer unfair prejudice if Mr. Maye's request was granted. R.218, 229-31.

Moreover, even if the State correctly described the trial court's rationale, the balancing of Mr. Maye's vicinage right with his right to an impartial jury pool was a decision for Mr. Maye and his counsel, not the trial court. *See State v. Caldwell*, 492 So. 2d 575, 577 (Miss. 1986) (allowing defendant to withdraw vicinage waiver, where he believed that the adverse publicity had subsided); *see also United States v. Stratton*, 649 F.2d 1066, 1077 (5th Cir. 1981).

The State has no basis to attack Mr. Maye's motivation for reasserting his constitutional right. Citing *Simon II*, the State argues that "a criminal defendant who moves for a change of venue is not entitled to a second change of venue back to the county where the crime occurred simply because he is unhappy with the racial composition of the transferee county." State Br. 28. This misses the point: Mr. Maye was entitled to a trial in Jefferson Davis County because Article 3 § 26 of the Mississippi Constitution says so, regardless of his motivation. Moreover, contrary to the State's implication in its discussion of *Simon II* and *Marcello v. United States*, 423 F.3d 993 (5th Cir. 1970), there is no indication that Mr. Maye and his trial counsel were attempting to manipulate or abuse the judicial process by seeking to reassert Mr. Maye's fundamental vicinage right.[11]

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[11]Mr. Maye's opening brief accurately distinguished *Simon II*, and the State offers no meaningful response. Maye Br. 42-43. *Marcello* is even more easily distinguished. The defendant there was not a young father with no criminal record, but rather the head of a significant New Orleans organized crime family. 423 F.2d at 997. The Fifth Circuit noted that Marcello was "no novice to litigation, criminal, civil and administrative" and listed many of the cases to which he had been a party. *Id.* at 1005 & n.16. Marcello was also represented by counsel "of exceptional competence," and the Court found clear indications that he had purposefully attempted to abuse the trial process via his last-minute maneuvering and tactical posturing with respect to venue. *Id.* at 1005-06.

V. THE COURT WRONGLY REFUSED CRITICAL JURY INSTRUCTIONS

At trial, the State repeatedly attacked Mr. Maye's self-defense argument. Plain errors in the trial court's self-defense jury instructions prejudiced Mr. Maye's defense.

A. Self-Defense And The Burden of Proof

The trial court never instructed the jury concerning the relationship between the reasonable doubt standard and Mr. Maye's claim of self-defense. Specifically, despite the fact that the core of his case was self-defense, the jury was never clearly instructed that the State, rather than Mr. Maye, bore the burden of proof on that issue, and was never instructed as to the measure of proof required for the State to carry its burden.

The State now argues that the jury was adequately instructed on the State's burden because instruction D-2 explained that the State must prove each element of the crime beyond a reasonable doubt, and instructions D-4 and D-5 discussed self-defense. State Br. 34.[12] But D-2 refers only to the elements of the crime. R.378. The elements instruction (Inst. No. 7) did not mention self-defense, nor did it specify that the absence of self-defense was an "element" on which the State bore the burden of proof beyond a reasonable doubt. R.383-84.

The trial court committed the exact error identified by the Supreme Court in *Johnson v. State*, 749 So. 2d 369 (Miss. 1999). There, the Court held that "[w]hen self-defense becomes an issue, the instruction setting forth the elements of the crime should specifically place the burden of proof upon the State" by noting that the State must prove the defendant "was not acting in self-defense." *Id.* at 374. This approach, coupled with an instruction that the State must prove each element beyond a reasonable doubt, ensures that the jury (a) knows who bears the burden of

[12] Mr. Maye's brief referred to the number of each self-defense instruction as given, while the State's brief references the number as tendered. Thus, D-4 and D-5 as tendered became Instructions 5 and 6 as given. For ease of reference, Mr. Maye will adopt the State's approach and refer to D-4 and D-5.

proof on the issue of self-defense, and (b) knows the required measure of proof is proof beyond a reasonable doubt.[13] In contrast, the instructions here provided no clear guidance on either critical question.

The State also argues that Mr. Maye did not specifically request an instruction on this key issue, and thus was not entitled to it. State Br. 34-35. In the cases the State cites (*Booze* and *Wansley*), the trial court's instructional failure did not relieve the State of its burden of proof on an element of the crime, as it did here. The State does not address the long line of cases establishing that it is plain error for the trial court to give improper or incomplete instructions on the State's burden of proof. Maye Br. 27 n.25. In light of the Supreme Court's clear guidance in *Johnson*, the trial court's error on an issue affecting Mr. Maye's fundamental Constitutional rights constitutes reversible plain error.

B. Mr. Maye's Right To Defend His Infant Daughter

The State concedes the trial court's failure to instruct the jury on Mr. Maye's right to use force in defense of another, and it does not dispute that requested instruction D-9 would have filled this gap (as would D-8). The State argues the evidence did not warrant such an instruction because "the only contested issue at trial was whether or not Maye knew Officer Jones was a police officer." State Br. 38. This assertion overlooks Mr. Maye's theory of the case – one which has been consistent since the moment of the shooting – and the evidence that supported it.

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[13] *Johnson* affirmed the conviction because it found that the trial court's error with respect to the elements instruction was adequately cured by the "imperfect" substitute of a broad reasonable doubt instruction. The pertinent instruction in *Johnson* went beyond the "elements" of the crime, and instructed the jury that if there arose "a reasonable doubt of the existence of a *single material fact* upon which the guilt of the Defendant depends, then it is the law" that the defendant be given the benefit of the doubt and acquitted. 749 So. 2d at 375 (emphasis added). The Court reasoned that this "imperfect" approach "on balance provided the guidance necessary that if there was any reasonable doubt about a determination the jury was to make, Johnson was to be found not guilty." *Id.* The State cannot make this claim here, because the D-2 instruction given in Mr. Maye's case was considerably narrower than the one in *Johnson*, and referred only to the State's burden of proof with respect to each "element" of the charged crime. R.378.

Mississippi's justifiable homicide statute explicitly sanctions defense of another. Miss. Code § 97-3-15(e)-(f). Mr. Maye testified that his fear on the night of the shooting and his actions in response to that fear were driven by his desire to protect his infant daughter. T.489-490. The State argued that Mr. Maye's actions were not an appropriate means of defending his daughter even against an unknown intruder, and it used this argument to suggest that Mr. Maye knew he was facing a police officer.[14] Without instructions D-8 and D-9, the instructions which were given implicitly ratified the State's assertions, effectively removing Mr. Maye's right to defend his daughter from the jury's consideration, and foreclosing it from finding that he was acting in "defense of others."[15]

C. Mr. Maye's Right To Stand His Ground And Defend His Home

The refusal of D-9 also prejudiced Mr. Maye by leaving the jury with self-defense instructions that omitted any reference to Mr. Maye's right to stand his ground and defend the sanctity of his home. As at trial, the State argues that Mr. Maye was not entitled to a "no duty to retreat" instruction. State Br. 38. The record contradicts the State's position. The undisputed evidence was that a door into Mr. Maye's bedroom was kicked open in the middle of the night,

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[14] T.505:18–506:11; T.506:21–507:20; T.512:14–515:2; T.540:17–541:17; T.571:27–573:15; T.584:12–585:12.

[15] The cases cited by the State on this issue actually offer strong support for Mr. Maye's position. In *Guster, Sheppard*, and *Calhoun*, the appellate courts reversed convictions after finding that the trial court had failed to specifically incorporate the concept of "defense of others" into the self-defense instructions. *Guster v. State*, 758 So. 2d 1086, 1089-90 (Miss. Ct. App. 2000); *Sheppard v. State*, 777 So. 2d 659, 662-63 (Miss. 2001); *Calhoun v. State*, 526 So. 2d 531, 533 (Miss. 1988). Indeed, *Guster* held that this requirement is so fundamental that it was plain error for the trial court *not* to have reformed a proffered self-defense instruction to capture it. 758 So. 2d at 1089-90. None of these cases suggests that the source of the threat to another person must be different from the source of the threat to the defendant. Moreover, even under the State's own standard, Mr. Maye was entitled to a "defense of others" instruction. A 14-month old is physically vulnerable in a way that an adult is not, and an infant's tendency to scramble away or cry out in distress makes it difficult for a threatened homeowner to pursue alternative options such as retreating or attempting to hide. Thus, the presence of a vulnerable infant changes the self-defense calculus, and Mr. Maye was entitled by law to self-defense instructions that reflected this fact.

and seconds later a 6'2", 230-pound man, clad head to toe in dark clothing, charged into the darkened room, mere feet from Mr. Maye's infant daughter. A knife or gun can be drawn in a split second, and even a single blow of a closed fist from a man of Jones' size could have been fatal to a 14-month old child. There was no duty to retreat in this situation, and the trial court should have used instruction D-9 to instruct the jury accordingly.[16]

D. The Trial Court Wrongly Refused To Limit The Scope Of Its Depraved Heart Murder Instruction

The State claims that Mr. Maye's requested D-15 instruction improperly "singled out" a portion of the evidence. D-15 did not address a mere "portion of the evidence," but rather the "knowledge" element of the capital murder charge and the scope of the depraved heart murder charge. Under *Pittman v. State*, 297 So. 2d 888, 893 (Miss. 1974), which the State fails to distinguish, and in light of the evidentiary record developed at trial, the trial court was required to instruct the jury that a failure of proof on the knowledge element would also render inapplicable the depraved heart murder charge. Maye Br. 48-49.

The State contends that this error was irrelevant because "Maye was not convicted of depraved heart murder." State Br. 40. But the District Attorney – under the guise of arguing depraved heart murder – argued that Mr. Maye was the type of person who would act outside the

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[16] The State does not dispute that under subsections (e) and (f) of the justifiable homicide statute, Mr. Maye was entitled to have his jury instructed that a homeowner has the right to use force to prevent a threatened felony even in the absence of possible "great bodily harm." Maye Br. 47-48. The State merely questions whether D-9 "would have relayed that concept to the jury." State Br. 39-40. However, D-9's reference to "reasonably apparent . . . danger" would have at least have given a basis within the instructions to argue that the presence of an apparent unlawful intruder who might commit a felony gave rise to sufficient perception of "danger" to warrant Mr. Maye's action. D-9, in conformance with the "dwelling house" provision of Miss. Code § 97-3-15(e), also omitted the "imminence" requirement found in instruction D-5. D-9 thus more accurately described the scope of lawful self-defense when compared to instruction D-5, and Mr. Maye was prejudiced by the trial court's refusal to give it. Moreover, any lack of completeness in D-9 could have been cured through reformation by the trial court, and such reformation is mandatory when self-defense is raised. *See Guster*, 758 So. 2d at 1089-90.

bounds of the law by using unjustified force against an unknown intruder. Maye Br. 46, 50. The State's jury argument misstated Mississippi law concerning a homeowner's right to self-defense. After drawing this false line concerning what the law does and does not demand of a homeowner, the State then repeatedly argued that the conduct to which Mr. Maye admitted violated the law. Maye Br. 49-50; T505:18–506:11; T506:21–507:20; T512:14–515:2; T561:10-23. Having argued that Mr. Maye was a murderer even if he did not know that Jones was a police officer, the State used this mischaracterization to undermine Maye's exculpatory testimony on the "knowledge" element of the capital murder charge. All this was possible because, absent instruction D-15, the jury was not instructed that a failure of proof on the knowledge element of capital murder would also negate the depraved heart murder charge.

VI. THE SEARCH WARRANT WAS PROCURED THROUGH FRAUD AND A NEW TRIAL MUST BE GRANTED

The State tacitly concedes virtually all of Mr. Maye's argument regarding the confidential informant evidence:

- That Officer Jones' "official capacity" was an element of the capital murder charge under Miss. Code. Ann. § 97-3-19(2)(b);
- That if Officer Jones lied to obtain the warrant, then he was acting outside his official capacity when he executed it;
- That the Gentry brothers' and Audrey Davis' testimony is inconsistent with Jones' statement in the "underlying facts and circumstances" that the confidential informant entered Mr. Maye's home; and
- That this evidence satisfies the novelty and due diligence requirements for newly-discovered evidence.

In conceding that Officer Jones' entry into Mr. Maye's home with a warrant he knew was invalid would be *ultra vires*, exempting him from the protection the capital murder law accords officers acting within their official capacity, the State contends only that the evidence does not establish

that Jones procured the warrant through fraud. State Br. 45-46. The record proves otherwise.[17]

It is inadequate for the State to hypothesize the existence of other informants who could have provided Officer Jones with the information in his search warrant applications, or to claim that the evidence died with Jones. The evidence establishes that Randy Gentry was the confidential informant. First, every witness who spoke to Jones prior to the search testified that he claimed to have a single confidential informant.[18] Second, the timing and content of Jones' warrant application effectively rules out any other confidential informant. There is no dispute that Randy Gentry, at Ron Jones' direction, made a drug purchase from Jamie Smith (Mr. Maye's neighbor) on the evening of December 26, 2001. Judge Krueger testified that Jones called him before 9:00 p.m. to arrange to present the search warrant application.

For the State's speculation to be correct, a jury would have to conclude beyond a reasonable doubt – and in the absence of any evidence – either: (a) that Jones had a prior informant but chose to employ Gentry; or (b) that in the hour or two between Gentry's visit and his call to Judge Krueger, Jones located, tasked, and debriefed another informant.[19] The jury would then

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[17] As discussed, *supra* § III, Mr. Maye's burden in satisfying the weight requirement is merely to show that the newly-discovered evidence probably would have raised reasonable doubt regarding an element of the crime he was charged with committing. The State cites *Franks v. Delaware*, 438 U.S. 154 (1978), which sets out the procedure for taking an officer's bad faith into account in the context of a motion to suppress. Mr. Maye's new evidence was not required to satisfy *Franks*' preponderance standard before its likely impact on a jury could be considered; the State exaggerates, therefore, when it suggests that he had to "establish" Officer Jones' bad faith. State Br. 45.

[18] *See* T.20:1-5 (Judge Krueger: "a reliable person"); R.574-75 (Prentiss Police Dispatcher Pete Stevens: Jones bragged about "his confidential informant"); T.415 (Officer Darrell Cooley: Jones said that he had "a CI").

[19] Mr. Maye has also established that the State failed to investigate and disclose evidence that establishes his innocence of an element of the offense. Although an informant is typically not a material witness to an alleged crime, *Peters v. State*, 971 So. 2d 1289, 1292 ¶¶ 7-8 (Miss. Ct. App. 2008), evidence regarding the basis for probable cause for a search is admissible if it bears on an element of the offense charged – here, Officer Jones' official capacity. *Nicholson v. State,* 761 So. 2d 924, 930 (Miss. Ct. App. 2000). The State cannot excuse its failure to identify the informant. Mr. Maye has established that the practice in (continued...)

have to believe, despite the scant probable cause in his warrant applications, and despite the timeliness of Gentry's purchase and information, that Jones chose to describe Gentry merely as a "various source." A reasonable juror would instead conclude that Officer Jones had but one confidential informant and, thus, that he lacked probable cause to search Mr. Maye's home.

VII. THE TRIAL COURT SHOULD HAVE GRANTED MR. MAYE'S MOTION TO SUPPRESS BECAUSE THE WARRANT LACKED PROBABLE CAUSE

After asserting that the truth regarding Officer Jones' procurement of the search warrants is unknowable because it "died with Officer Ron Jones," State Br. at 45, the State contradicts itself two pages later, asserting that "[t]here can be no question" that Jones had probable cause to believe that drugs were being sold from Mr. Maye's home. *Id.* at 47. The State cannot have its cake and eat it, too – particularly when doing so contradicts the testimony of every witness regarding Jones' investigation and the procurement of his warrants.

First, the State offers no response to Mr. Maye's argument that, even setting aside the newly-discovered confidential informant evidence, Officer Jones' warrant applications on their face raised profound doubts concerning probable cause. Maye Br. 63-65. Under the most generous interpretation of the evidence, Officer Jones presented duplicate, generic "underlying facts and circumstances" for search warrants for two separate residences. Neither package of documents bore any particularity regarding the home whose search it authorized.[20] The newly-discovered confidential informant evidence confirms what was apparent from the face of the warrant applications: that there was no reason to suspect the "persons unknown" of anything

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Prentiss was for city employees to compensate informants, T.666-667, yet the State offers no explanation for its failure to produce or examine these payment records.

[20] Contrary to the State's summary of facts, there was no search warrant "for the left side of the duplex" or one for "the unit on the right side of the duplex." State Br. 2. There was a warrant used on the left side, and another used on the right side, but the evidence is undisputed that when the search warrants (and their respective affidavits and underlying facts and circumstances) were presented to Judge Krueger, they bore nothing to identify their respective premises. R.163.

other than being neighbors of the genuine investigative target.

Second, and contrary to the State's position, the introduction of the unlawfully seized evidence affected Mr. Maye's substantial rights. State Br. 47. "[T]he danger of unfair prejudice from the admission of drug-related evidence . . . [is] great, because a drug offense is the kind of crime for which the jury may feel the defendant should be punished, regardless of his guilt as to the charged offense." *United States v. Sumlin*, 489 F.3d 683, 692 (5th Cir. 2007) (citation omitted). The State used the marijuana found in Mr. Maye's home to draw an explicit parallel between Mr. Maye and Jamie Smith (in whose home cocaine residue and drug dealing paraphernalia had been discovered). T.317-19, 563-64. The State then told the jury that Mr. Maye killed Officer Jones out of fear that the marijuana would be discovered. T.584.

The State could never have obtained a conviction without offering the jury a reason for why a father with no prior criminal record, asleep at home with his infant daughter, would commit the heinous crime of knowingly killing a police officer. In enabling the State to supply an otherwise missing motive (however implausible), the introduction of the illegally-seized marijuana evidence had a profound impact on the outcome of this case

VIII. PROSECUTORIAL MISCONDUCT AT TRIAL DEMANDS REVERSAL

Mr. Maye's opening brief identified multiple instances in which the District Attorneys in closing argument inexcusably mischaracterized the evidence. There are several critical misstatements the State does not even attempt to defend, including the repeated assertions that officers knocked on Mr. Maye's front and rear doors, and the assertion that Darryl Graves heard exterior announcements from within the Smith apartment. The State cites to transcript pages (some of which are not even part of the trial record) to justify the District Attorneys' repeated claims that officers "saw a light come on," but the State's reliance on this claim has been rebutted above. The cited pages likewise contain no support for the District Attorney's demonstrably

false claim that Jones' dark clothing, lacking any visible frontal insignia, should somehow have alerted Mr. Maye to Jones' status. The State also tries to avoid the implications of the misconduct below by claiming Mr. Maye is "procedurally barred," State Br. 46, but the State ignores the on-point "plain error" cases cited by Mr. Maye, as well as the argument that any failure to object to the District Attorneys' repeated misstatements of the evidence confirms that Mr. Maye suffered from ineffective assistance of counsel while on trial for his life.[21] Maye Br. 66 & n.44.

IX. MR. MAYE RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL PRIOR TO AND DURING HIS TRIAL

Trial counsel's performance seriously undermined confidence in the guilty verdict. Counsel failed to investigate basic aspects of the case, retain experts, and take elementary steps to prepare for trial. The resulting defense lacked any coherent strategy. Trial counsel's specific failures were not tactical decisions, but symptoms of an overall inability to provide Mr. Maye with a constitutionally adequate defense. The trial court recognized that counsel was ineffective at sentencing. The record demonstrates that she was equally ineffective during the guilt phase. But for her deficient representation, Mr. Maye very likely would not be imprisoned today.

A. Trial Counsel Failed To Investigate And To Retain Crucial Experts

The State argues that trial counsel's failure to retain expert witnesses to rebut Dr. Hayne's testimony is harmless because the post-conviction defense experts "reached the same conclusion" that Hayne reached at trial. State Br. 47. As previously explained, *supra* § III, Dr. Daniel and Mr. McCann contradicted Hayne's testimony, and directly corroborated Mr. Maye's post-arrest statement and his trial testimony. *See supra* § III. Trial counsel's failure to consult

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[21] As for the prejudice prong of the test, *Spicer v. State* held that this court can only affirm a conviction if it is "clear beyond a reasonable doubt, that absent the prosecutor's comments, the jury could have found the defendant guilty. This goes beyond a finding of sufficient evidence to sustain a conviction." 921 So. 2d 292, 318 ¶ 55 (Miss. 2006) (citations omitted).

with experts amounts to ineffective assistance of counsel. *See Driscoll v. Delo*, 71 F.3d 701, 709 (8th Cir. 1995); *Troedel v. Wainwright*, 667 F. Supp. 1456, 1461 (S.D. Fla. 1986), *aff'd*, 828 F.2d 670 (11th Cir. 1987).[22] Trial counsel's failure to investigate the scientific evidence and seek expert assistance cannot be classified as a tactical decision.[23]

B. Trial Counsel's Material Omissions Reflected A Constitutionally Inadequate Defense

The State does not contest the multiple omissions identified in Mr. Maye's opening brief, which collectively reflect trial counsel's failure to develop two obvious components of Mr. Maye's defense: that he did not know Ron Jones was a police officer and that he acted in self-defense. Maye Br. 69-71. Additionally, trial counsel failed to appreciate the necessity of a specific instruction on the burden of proof with respect to self-defense. Trial counsel was deficient for failing to raise these issues. *Fiore v. White*, 531 U.S. 225, 228-29 (2001).

Corroboration as to the defendant's state of mind in a self-defense case "is critical." *Brown v. State*, 464 So. 2d 516, 518 (Miss. 1985). "Common sense and any lawyer who has defended a case of this nature will tell you that this is undeniably true." *Id.* Trial counsel made no effort to corroborate Mr. Maye's post-shooting statement, although the post-trial record reflects a wide range of actual and potential photographic, documentary, and forensic evidence that strongly supported him.

It was inexcusable for trial counsel to neglect potentially compelling corroboration in

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[22] *See Lindstadt v. Keane*, 239 F.3d 191, 201-02 (2d Cir. 2001) (rejecting argument that defense counsel's cross-examination of an expert was sufficient); *Spencer* v. *Donnelly*, 193 F. Supp. 2d 718, 734 (W.D.N.Y. 2002) (finding counsel's performance deficient despite cross-examination of expert, and noting that "at a minimum, the use of a child psychologist or similar expert would have been most useful and helpful to trial counsel in preparing for the cross-examination of [the state's expert]").

[23] *See United States v. Tucker*, 716 F.2d 576, 581 (9th Cir. 1983) (finding that the need to retain an expert was "obvious"); *Troedel*, 667 F. Supp. at 1461 (finding counsel deficient for failure to consult an expert, depose witnesses, and conduct an independent investigation despite the fact that "counsel himself had no special knowledge in the field").

favor of her unsupported theory of a vast conspiracy among the prosecution witnesses, and then to rest her case on a mere cross-examination of those witnesses. Instead of recognizing obvious defenses in Mr. Maye's post-shooting statement and the evidence available before trial, trial counsel focused on a theory (that the State had fabricated one of the search warrants) that had been rebutted in the hearing on Mr. Maye's motion to suppress. Her adherence to this theory had dire consequences at trial, where her entire case-in-chief consisted of re-examining a hostile witness (Agent Darryl Graves, T.460-467), and presenting Mr. Maye, with whom she spent less than forty minutes of preparation time, none of it focused on questions he might be asked by the District Attorney. This incoherent defense was not constitutionally effective representation.

X. THE CIRCUIT COURT'S IMPOSITION OF A SENTENCE OF LIFE WITHOUT PAROLE WAS UNCONSTITUTIONAL

The State argues that Mr. Maye's constitutional challenge to the sentence of life without parole is "procedurally barred." State Br. 48. But *Edwards v. State*, 800 So. 2d 454 (Miss. 2001), is inapposite because the Court in that case rejected the defendant's proffered statistical evidence, which was outside the trial record. In Mr. Maye's case, by contrast, the existing trial record already contains both elements upon which he bases his argument: that he was sentenced to life without parole; and that the trial court imposed this sentence without individualized consideration, pursuant to statutes that provided no alternative. State Br. 3.[24] Accordingly, this Court should consider Mr. Maye's constitutional argument and determine whether individualized consideration is a necessary antecedent to a sentence of life without parole.

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[24] In such circumstances, the Supreme Court has considered the fundamental constitutional issues urged on appeal. As noted in *Brooks v. State*, "Constitutional rights in serious criminal cases rise above mere rules of procedure. Errors affecting fundamental rights are exceptions to the rule that questions not raised in the trial court cannot be raised for the first time on appeal." 46 So. 2d 94, 97 (Miss. 1950).

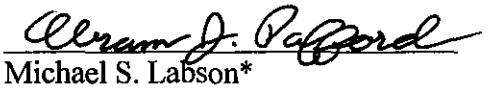
The State also argues that the trial court's compliance with sentencing statutes places its sentence beyond reproach, State Br. 48, but the very question raised by Mr. Maye's challenge is whether adherence to those statutes is unconstitutional.

CONCLUSION

Mr. Maye's conviction should be reversed, and all charges dismissed. In the alternative, the case should be remanded for a new trial, or, at a minimum, for resentencing.

DATED: February 23, 2009

Respectfully submitted,



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CERTIFICATE OF SERVICE

I, the undersigned attorney at law, do hereby certify that I have, this date, mailed to the following individuals, by U.S. mail with adequate first class prepaid postage, a true and correct copy of the above and foregoing Reply Brief of the Appellant:

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IN THE COURT OF APPEALS FOR THE STATE OF MISSISSIPPI

CASE NO. 2008-CA-01114

PHYLLIS MINTER — APPELLANT

VERSUS

JOHN C. MINTER — APPELLEE

APPELLEE'S BRIEF

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IN THE COURT OF APPEALS FOR THE STATE OF MISSISSIPPI

CASE NO. 2008-CA-01114

PHYLLIS MINTER — APPELLANT

VERSUS

JOHN C. MINTER — APPELLEE

CERTIFICATE OF INTERESTED PARTIES

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the justices of the Mississippi Court of Appeals may evaluate possible disqualification or recusal.

1. Hon. Johnny L. Williams, Lamar County Chancellor
2. Leonard Brown Melvin, III, Esq., attorney for Appellant
3. T. Michael Reed, Esq., trial attorney for John C. Minter
4. Alexander Ignatiev, Esq., attorney for Appellee

Alexander Ignatiev, Esq.
Attorney for Appellee John C. Minter

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STATEMENT OF THE ISSUES

I. The learned chancellor did not not err as a matter of law in applying the rule in *Riley v. Doerner*.

II. The chancellor properly found that there was a material change in circumstances that adversely affected the best interests of the minor child.

STATEMENT OF THE CASE

This matter arises from the Final Judgment of the Chancery Court of Lamar County award John C. Minter ("John") the permanent physical care and custody of the minor child John Clayborn Minter ("Clay"). Phyllis Minter ("Phyllis") timely appealed that judgment.

NATURE OF THE CASE AND COURSE OF PROCEEDINGS

John and Phyllis married on February 21, 1998, and were married when Clay was born on July 13, 1999. They divorced August 22, 2000, on grounds of irreconcilable differences, and agreed to share legal custody while vesting primary physical custody in Phyllis, with normal visitation for John.

John petitioned the Chancery Court of Lamar County for modification of custody on the basis of a material change in circumstances on May 10, 2005. The learned chancellor awarded temporary custody to John on December 9, 2005, and Phyllis eventually filed a counter-petition on February 4, 2007, seeking to modify John's visitation and child support obligations. The trial began on June 20, 2007, and continued on October 30, 2007, with the temporary custody arrangement persisting in the interim. The Court requested the parties to submit proposed findings of fact and conclusions of law after receiving the transcript of the hearing. John submitted his proposed findings and conclusions on Feburary 19, 2008, and Phyllis submitted hers on February 25, 2008. John submitted his rebuttal on Feburary 29, 2008. The Court entered its judgment on May 29, 2008, and further clarified the judgment on June 23, 2008. Phyllis appealed on June 25, 2008.

STATEMENT OF FACTS

John and Phyllis were divorced on August 22, 2000. R. 23-29. The divorce was obtained upon the basis of irreconcilable differences. *Id.* Following the parties' divorce, custody of the minor child C. M. was vested in Phyllis Minter ("Phyllis"), with liberal visitation afforded to John C. Minter ("John"). R. 27, 29. Because of C. M.'s youth and the proximity of the parties, the original order for custody permitted visitation by John to begin on alternate Thursdays, and last through Sunday. R. 27.

At the time of the divorce, Phyllis was living in Louisiana. T. 8. Approximately one year after the divorce, she lost her job and moved to Louisiana to reside with her parents, and to provide care for her ailing father. T. 8-9. Phyllis retained primary custody, and the parties adjusted custody when C.M. began attending pre-kindergarten education, where John would pick up C.M. every third weekend beginning on Fridays. T. 84-5. There had not been any serious issues concerning custody of C.M. until 2005, when John petitioned the Chancery Court of Lamar County for custody in response to C.M.'s having to repeat kindergarten due to 35 absences in one year, and was granted temporary custody of C.M. T. 85. During that time, the parties complied with court orders in connection with custody and visitation.

The Court appointed Dr. John Patrick Galloway, Ph.D., a licensed marriage and family counselor, sociologist, and social worker, to evaluate C.M.'s health and well-being and to make a recommendation to this Court concerning custody of C.M. R. 45-6. Because of Phyllis's economic difficulties, the Court ordered that John be responsible for paying all of Dr. Galloway's fees for evaluating C.M.'s custody arrangement. T. 195. Dr.

Galloway was appointed by the chancellor on August 15, 2005, and met five times with John; he met one time with Phyllis. T. 186, 189. Three times when Dr. Galloway met with John C.M. was present; when Dr. Galloway met with Phyllis, C.M. was not present. T. 187-8. Dr. Galloway's initial report to the trial court, made on October 31, 2005, indicated that he believed that C.M. should be in John's custody. See Exhibit 8. Dr. Galloway testified that because of the father-son bond between C.M. and John, and the difficulties Phyllis was experiencing in her life, that C.M. would best be in John's custody. T. 192-3. Dr. Galloway opined that Phyllis was insufficiently self-reliant to provide proper parenting to C.M., because he observed her blaming other people for the difficulties in her life, unable to make plans for the future, and relying overmuch on her family and her environment for support. T. 192.

The chancellor heard testimony from John Minter, Phyllis Minter, Jill Tryner, Jaci Marix, Gloria Deville, Eliot Levin, and Connie Chisholm. John testified that he became concerned when C.M. was recommended to repeat kindergarten on the basis of 35 unexcused absences from class at New Hope Christian Academy. *See* Exhibit 7, New Hope School Records; T. 85, 145. John testified about his relationship with C.M., and described a daily routine wherein John drove C.M. to school, picked him up from school, accompanied him to extracurricular activities including karate and soccer, and in general provided a strongly nurturing environment. *See* Exhibits 3 and 4, Taekwondo Certificate and Soccer Pictures; T. 92. John arranged for C.M. to receive speech therapy through the Petal schools on a two-day per week basis. T. 353. John testified that he now believes that the Petal school speech therapy program was not effective, and he pledged to enroll

C.M. in a different therapy program. T. 355.

Phyllis testified that she was concerned about an apparent increase in C.M.'s speech difficulties and stuttering since the award of temporary custody to John. T. 75. She testified about her life and work, and discussed her visit to Dr. Galloway's office in New Orleans. T. 85, 50. She also testified about going to counseling with Eliot Levin, whom she has seen with C.M. four times in the pendency of the trial. T. 287. She testified that she has obtained placement for C.M. in a speech therapy program at the Louisiana State University in Baton Rouge, approximately one-half hour from where she lives, but that the program is a weekday program, and C.M. will not have access to that program if he remains in John's custody. T. 286. Phyllis admitted that she had had a suspended driver's license since 2001, and this was only cured after the first day of hearing in this matter, June 20, 2007. *See* Exhibit 6, Driver's License Printout, and Exhibit 19, Driver's License Photocopy; T.45-7..

Jill Tryner is C.M.'s first grade teacher, who testified about C.M.'s grades and classroom performance in the Petal school system. T. 145-6. Her testimony indicated that C.M. has made enormous strides in his studies, and has benefited academically from living with John. He is among the top students in his class, consistently completes all of his homework, leads his class in reading comprehension, and has been referred to the school's gifted program. T. 146-148. He also received a most cooperative student award from his teacher. *See* Exhibit 14, Petal School Records; T. 148. Tryner also testified that John is significantly involved with C.M.'s education, and has provided strong support at home for the work C.M. performs at school. T. 150.

Jaci Marix is the assistant director of Tonya's Child Care in Gonzalez, Louisiana. T. 212. She is Phyllis's supervisor, and testified about Phyllis's interaction with the children at the day care center. T. 214. She testified that Phyllis is responsible for the care of eight children between the ages of one year and sixteen months, and that she cares for the same children all day. T. 216. She also testified that in her opinion if a child had to repeat kindergarten because of 35 unexcused absences, she would be concerned about the quality of the parenting. T. 220-1.

Gloria Deville is the sister of Phyllis Minter. T. 226. She testified that she and their brother, Chad Deville, live within five or six miles of Phyllis, and that for a period of time Phyllis, C.M., and J. lived with her. T. 228. During that time she testified that C.M. missed school because of his visitation with his father, as John picked C.M. up on alternate Thursday nights and sometimes would not return him in time for school on Mondays. T. 231. She later testified that she could not be certain that this occurred every time that John had scheduled visitation. T. 248. She also testified that C.M. stuttered, and that during the temporary custody arrangement, in her opinion the stuttering has worsened. T. 238-9. She also testified that C.M. begins throwing upon on Sundays when he is preparing to return to John's custody. T. 235. Sometimes she picks up C.M. from John's custody on Fridays for visitation, because of Phyllis's employment. *Id.*

Eliot Levin was tendered by Phyllis as an expert. *See* Exhibit 22, Curriculum Vitae of Eliot Levin. He was asked by Phyllis to assist her and C.M. with what Phyllis perceived as C.M.'s emotional difficulties in connection with the custody and visitation in

this matter. T. 317-8. Levin was asked by Phyllis's counsel to review Dr. Galloway's recommendations and evaluation of the custody arrangement. T. 319. He testified that he met with Phyllis for four or five hours, and one to one and one-half hours with C.M. T. 323 He opined that Dr. Galloway did not make a sufficiently thorough examination of the parties and C.M., and additional resources to make a legitimate custody evaluation. T. 321-3. He testified that he believes that C.M.'s stuttering is treatable, and is largely caused by stressors involved in the custody arrangement and the fact that C.M.'s parents live far apart. T. 324. Levin did not meet with Mr. Minter, and did not review Dr. Galloway's trial testimony. T. 329.

Connie Chisholm, John's mother, testified about the family care and support network that John has in and around Hattiesburg. T. 346-8. She also testified that when C.M. began school, John voluntarily limited his visitation, picking up C.M. on alternate Fridays instead of Thursdays. T. 347-8. She testified that John made two trips every time he had C.M. for visitation. T. 348. She testified that since C.M. has been enrolled in the Petal schools he has been receiving weekly speech therapy, and that when C.M. is agitated or stressed his stuttering becomes more severe. T. 349.

The Court found that a material change of circumstances had occurred that adversely affected the well-being of the minor child, and assessed the *Albright* factors as follows: The chancellor found the following factors to be neutral: Age, Health, and Sex of the Child; Parenting skills; Employment; Physical and Mental Health of the Parents; Emotional Ties; and Moral Fitness. The chancellor found that Continuity of Care narrowly favored John, and that the factors of Willingness and Capacity to Provide

Primary Care; Home, School, and Community Record of the Child; and Other Relevant Factors, favored John. The chancellor did not find that any of the factors favored Phyllis. The Court found that upon consideration of the *Albright* factors, John should have primary custody of C.M., and that Phyllis should have regular visitation.

SUMMARY OF THE ARGUMENT

The chancellor's findings of fact are reviewed for manifest error, and shall not be changed by this Court unless they are unsupported by substantial evidence. The chancellor's conclusions of law are reviewed *de novo.* Phyllis argues that the trial court applied an inappropriate standard lessening the burden faced by John in modifying custody. In fact, the Court merely properly considered John's betterment of his living conditions in contrast with the unsettled nature of Phyllis's life, and determined that there had been a material change in circumstances to the detriment of the minor child justifying a modification of child custody. The Court then examined the *Albright* factors, and determined that a majority of the factors were neutral, and the remainder of the factors favored John, with none of the factors favoring Phyllis.

The decision of the chancellor is supported by substantial evidence, and did not constitute an abuse of discretion. Accordingly, this Court must affirm the judgment of the Chancellor, even if this Court would have made a different decision.

ARGUMENT

This Court has a limited authority to review the judgment of the chancellor in child custody cases; on issues of fact, the decision of the chancellor may only be overturned for manifest error. *In re: Custody of M.A.G.*, 859 So. 2D 1001, 1004 (¶8) (Miss. 2003). A chancellor's conclusions of law are reviewed *de novo*; however, where a chancellor has applied the correct rule of law properly to facts supported by substantial evidence, this Court may not reverse the chancellor's decision. *Id.*

The chancery court may only modify child custody when it finds that a material change in circumstances has occurred that adversely affects the child. At trial, John had the burden of demonstrating that a material change in circumstances had occurred that adversely impacted Clay's welfare and that custody should be changed in the best interest of the child. *Giannaris v. Giannaris*, 960 So. 2D 462 (Miss. 2007), *Quadrini v. Quadrini*, 964 So. 2D 576, 581 (¶20) (Miss. Ct. App. 2007). The polestar consideration is always the best interests of the child. *Brekeen v. Brekeen*, 880 So. 2D 280, 283 (¶5) (Miss. 2004).

I. The learned chancellor did not not err as a matter of law in applying the rule in *Riley v. Doerner*.

The conclusions of law reached by a chancellor are reviewed *de novo*. *In re: Custody of M.A.G.*, 859 So. 2D 1001, 1004 (¶8) (Miss. 2003). Phyllis takes issue with the Court's application of the rule in *Riley v. Doerner*. However, the learned chancellor properly applied the rule to determine whether a material change in circumstances occurred, because the rule specifically contemplates the equities for the child's benefit.

Phyllis is also in error, because the Chancellor did not rely on the rule in *Riley* alone, but rather the Chancellor incorporated the definitions contained in *Riley*, which permit a consideration of the non-custodial parent's improvement in their ability to care for the child only after a finding that there has been a material change in circumstances adverse to the child. *Riley v. Doerner*, 677 So. 2D 740, 745 (Miss. 1996). The chancellor specifically noted that the non-custodial parent still was subject to the traditional three-part test: a substantial change in circumstances of the custodial parent since the divorce; that the substantial change adversely impacted the welfare of the child; and the necessity of modification for the child's best interest. *Pierce v. Chandler*, 855 So. 2D 455, 457 (Miss. 2003).

In *Riley v. Doerner*, the mother was originally awarded primary physical custody. 677 So. 2D at 742. However, the mother's lifestyle spiraled into a negative and devastating descent into moral decay, including drug use, cohabitation with numerous unmarried men, and drug use by her new husband. Id. Meanwhile, the father had gotten married, owned a home, and both he and his wife were gainfully employed. *Id.* Accordingly, the chancellor modified custody, finding that a material change in circumstances had occurred to the detriment of the minor child, and the Supreme Court affirmed that decision, finding that "when the environment provided by the custodial parent is found to be adverse to the child's best interest, *and* that the circumstances of the non-custodial parent have changed such that he or she is able to provide an environment more suitable than that of the custodial parent, the chancellor may modify custody accordingly." *Id.* at 744.

The Supreme Court went on to hold

> that where a child living in a custodial environment clearly adverse to the child's best interest, somehow appears to remain unscarred by his or her surroundings, the chancellor is not precluded from removing the child for placement in a healthier environment. Evidence that the home of the custodial parent is the site of dangerous and illegal behavior, such as drug use, may be sufficient to justify a modification of custody, even without a specific finding that such environment has adversely affected the child's welfare. A child's resilience and ability to cope with difficult circumstances should not serve to shackle the child to an unhealthy home, especially when a healthier one beckons.
>
> *Id.*

Similarly, in this case, Phyllis had her driver's license suspended, C.M. was required to repeat kindergarten due to missing school, and Phyllis maintained a peripatetic, unsettled and morally suspect lifestyle, including having a child out of wedlock. Meanwhile, John had purchased a home, become gainfully self-employed, and generally improved his life, including making current his child support obligations after being unemployed for a time.

Riley does not abandon the standard of a material change in circumstances; rather, it appreciates and incorporates a situation where not only an adverse change occurs for the custodial parent, but also where the non-custodial parent improves his life to the point that he is better able to care for the child.

II. The chancellor properly found that there was a material change in circumstances that adversely affected the best interests of the minor child.

The chancellor's findings of fact shall remain undisturbed by this Court unless they display manifest error or are unsupported by substantial evidence. *In re: Custody of M.A.G.*, 859 So. 2D 1001, 1004 (¶8) (Miss. 2003). In this case, Phyllis takes issue

chiefly with the court's findings of fact in connection with the so-called *Albright* factors.

The chancellor found the following factors to be neutral: Age, Health, and Sex of the Child; Parenting skills; Employment; Physical and Mental Health of the Parents; Emotional Ties; and Moral Fitness. The chancellor found that Continuity of Care narrowly favored John, and that the factors of Willingness and Capacity to Provide Primary Care; Home, School, and Community Record of the Child; and Other Relevant Factors, favored John. The chancellor did not find that any of the factors favored Phyllis.

The chancellor focused on several issues concerning C.M.'s parents, and in particular regarding Phyllis. The chancellor was primarily concerned with stability issues in Phyllis's life; even though she was gainfully employed, she still required the assistance of both government aid and family to provide basic necessities of living for C.M. The Court noted that Phyllis had lived in five differenct residences in four different cities in Louisiana. The court also considered that since John has had temporary custody of C.M., he had settled in Hattiesburg, and set up a highly structured schedule for C.M., including taking him to school, picking him up from school, helping him with his homework, and participating in extensive extracurricular activities. The court also considered that C.M. had completed the first grade and had been recommended for the Petal School District's gifted program.

The Court noted that John has owned his own home in Petal and been self-employed for three years, while Phyllis has only recently become settled in a mobile home with her younger son, Jacob, and was still relying on food stamps and family assistance. The Court did not make a determination regarding who was responsible for

C.M.'s extensive absences from kindergarten, which resulted in his being held back one year.

The Court, weighing all of the extensive testimony and the numerous trial exhibits, determined that the best interests of C.M. would be served by placing him in the primary physical custody of his father, John. This decision is supported by substantial evidence, and this Court cannot substitute its judgment on the facts for the judgment of the chancellor, even if it would have reached a different decision as the finder of fact. *In re: Estate of McQueen*, 918 So. 2D 864, 867 (¶11) (Miss. Ct. App. 2005).

CONCLUSION

The Chancery Court of Forrest County, Mississippi found that, pursuant to the rule in *Riley v. Doerner*, there had been a material change in circumstances adverse to the interest of C.M. while in the primary physical custody of Phyllis. The Court additionally found that John's life had improved significantly, so that the best interests of C.M. were served by granting John primary physical custody of C.M. Phyllis has argued that the Chancellor applied the wrong standard of law to assess whether custody should be modified. This is plainly not the case. The circumstances in this case are similar to those in *Riley v. Doerner*, and the Court was correct to apply the rule in that case here.

Phyllis also asks this Court to substitute its own judgment for that of the learned Chancellor. The Chancellor in this case heard from two expert witnesses, and six fact witnesses, over two days of trial. The trial record contains 22 exhibits. The facts are best weighed by the Chancellor, who was able to hear and see all of the witnesses, and weigh the evidence in the trial setting. Even if this Court would have ruled differently had it been the finder of fact, that is not sufficient justification to upset the judgment of the trial court.

IN THE COURT OF APPEALS FOR THE STATE OF MISSISSIPPI

CASE NO. 2008-CA-01114

PHYLLIS MINTER — APPELLANT

VERSUS

JOHN C. MINTER — APPELLEE

CERTIFICATE OF SERVICE

I, Alexander Ignatiev, attorney for Appellant, do hereby certify that I have this day mailed for filing, via United States mail, postage prepaid, the original and four (4) copies of the foregoing Brief of the Appellant to the Clerk of the Supreme Court of Mississippi, Ms. Betty Sephton, Post Office Box 249, Jackson, Mississippi, 39205-0249.

THIS the 2d day of January, A.D. 2009.

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PHYLLIS MINTER — APPELLANT

VERSUS

JOHN C. MINTER — APPELLEE

CERTIFICATE OF SERVICE

I, Alexander Ignatiev, attorney for Appellant, do hereby certify that I have this day mailed, via United States mail, postage prepaid, a copy of the foregoing Brief of the Appellee to the following:

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ALEXANDER IGNATIEV