2007-

Cory Jermaine Maye v. State of Mississippi
No. 2007-KA-02147-COA

CERTIFICATE OF INTERESTED PERSONS

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 Supreme Court and/or the Judges of the Court of Appeals may evaluate possible disqualification or recusal.

Appellant:

Cory J. Maye

The attorneys for Appellant are:

Robert E. Evans
Attorney at Law
P.O. Box 636
540 E. Broad Street
Monticello, MS 39654

Michael S. Labson
Benjamin J. Vernia
Abram J. Pafford
Jessica D. Gabel
Anna St. John
James P. Sullivan
COVINGTON & BURLING LLP
1201 Pennsylvania Ave. NW
Washington, DC 20004-2401

Robert E. Evans
by Abram Pafford
Robert E. Evans
Attorney of record for
Appellant Cory J. Maye

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INTRODUCTION

"Officer in Mississippi town shot to death while serving drug warrants; suspect in custody." This was the headline of a December 27, 2001, Associated Press article. Prentiss Police Officer Ron Jones, the son of the local police chief, had been shot during a drug raid, a suspect named Cory Maye was in custody, and the District Attorney planned to charge him with capital murder.[1] Most readers would have assumed that Mr. Maye had acted with criminal intent, rather than in lawful defense of himself and his infant daughter. This assumption was the foundation on which the State built its case.

That foundation now lies in ruins. The trial revealed that Mr. Maye had no prior criminal record or arrest record, and no motive to knowingly fire upon a law enforcement officer. Multiple scene photos taken by the State's investigators confirm to a virtual certainty that Mr. Maye had no way to see the armed officers who converged on his home in a late-night raid on the day after Christmas. Trial testimony of police officers on the scene revealed that even certain of the officers did not hear or comprehend the alleged police announcements that the State insists alerted Mr. Maye to their presence. The State's post-trial briefing conceded it lacked a legitimate scientific foundation for expert testimony it used to sway the jury. The purported "expert" pathologist who provided this testimony has been publicly discredited, and Mississippi no longer employs him to perform autopsies in criminal cases. Newly discovered forensic evidence strongly corroborates the testimony that Mr. Maye offered in his own defense.

The rationale for deference to the trial court's venue rulings has disappeared in light of the judge's admission that he believed he lacked authority to grant Mr. Maye's request to withdraw an initial waiver and stand trial in the county of the alleged offense. Any basis for

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[1] *Officer in Mississippi town shot to death while serving drug warrants; suspect in custody*, Associated Press, (Prentiss, MS), Dec. 27, 2001.

confidence in the jury's verdict has vanished, because the trial court wrongly refused critical jury instructions concerning the scope of lawful self-defense and the allocation of the burden of proof. The "official capacity" element of the capital murder charge, characterized by the State at trial as undisputed, has been undermined through post-trial testimony establishing that the warrant for Mr. Maye's home was procured through fraud. One source of this testimony is the informant whom the State had previously claimed it could not identify or locate, and his testimony concerning the information he gave to Ron Jones directly contradicts the claims made by Jones in his warrant application.

The trial record confirms that the State improperly exploited the jury's respect for Jones' status as a police officer, perhaps to distract from the State's inability to prove that Mr. Maye was aware of that status at the moment of the shooting. To the extent the State did purport to address the "knowledge" element of the capital murder charge, it did so by mischaracterizing the evidence. The inexperience and inadequate preparation of Mr. Maye's trial counsel rendered her ineffective in coming to Mr. Maye's aid. Indeed, the trial judge himself declared her ineffective with respect to the sentencing phase, and accordingly vacated Mr. Maye's death sentence.

Cases like this are the reason appellate courts exist. Mr. Maye's conviction and sentence cannot stand. The jury's flawed verdict must be vacated, and the case remanded with instructions to either dismiss all charges, or to grant Mr. Maye a new trial, in the correct venue, using lawful procedures, before a properly instructed jury. Anything less would be unjust.

STATEMENT OF ISSUES

I. Whether the evidence presented at trial was insufficient as a matter of law to sustain a conviction on the charged offenses.

II. Whether a new trial must be granted because the jury's verdict was against the weight of the evidence.

III. Whether the testimony of the State's forensic pathologist was admitted in error.

IV. Whether the circuit court erred in denying supplemental discovery of the credentials and practices of the State's expert witness.

V. Whether newly discovered forensic evidence necessitates a new trial.

VI. Whether the circuit court erroneously deprived the defendant of his right to be tried in Jefferson Davis County, as guaranteed by Article 3 § 26 of the Mississippi Constitution.

VII. Whether the circuit court erred in refusing defendant's requested jury instructions.

VIII. Whether the State procured a search warrant through fraud, mandating a new trial.

IX. Whether the circuit court should have granted a motion to suppress due to the lack of probable cause supporting the search warrant.

X. Whether prosecutorial misconduct demands reversal of the conviction.

XI. Whether the defendant received effective assistance of counsel as guaranteed by the Sixth Amendment of the U.S. Constitution.

XII. Whether the sentence constituted cruel or unusual punishment in violation of Article 3 § 28 of the Mississippi Constitution, or the Eighth Amendment of the U.S. Constitution.

STATEMENT OF THE CASE

Cory Maye was arrested and held without bond following the December 2001 late-night law enforcement raid on his home that resulted in the shooting death of Prentiss Police Officer Ron Jones. R.39–40. The State charged Mr. Maye with capital murder. R.39. At Mr. Maye's request, the court moved the venue from Jefferson Davis County to Lamar County. R.90–94; R. 108–09. Several months before trial, Mr. Maye moved to return the trial to Jefferson Davis County. R.215–17. The court purported to grant his motion, but instead held the trial, on January 23, 2004, in Marion County. R.220; T.85. Four days later, the jury convicted Mr. Maye of capital murder, and sentenced him to death. R.402–03; T.629. The court later set aside this sentence and re-sentenced Mr. Maye to life imprisonment without the possibility of parole. T.1071; R.1373–74. Mr. Maye timely appealed from the judgment of conviction and sentence imposed by the court and from its December 29, 2006 denial of his JNOV Motion. R.1451.

STATEMENT OF FACTS

On December 26, 2001, Officer Jones, a junior officer with the Prentiss Police Department, sought and obtained search warrants for both homes of a duplex on Mary Street. R.73–74; R.144–46. Jamie Smith lived then in the northern home (or left-hand, as viewed from the front). He had been under investigation for several months for drug-related offenses. R.144–46. Cory Maye lived in the other home (the southern, or right-hand one) with his girlfriend, and their 14-month old daughter, Ta'Corriana. He was 21 years old, a Mississippi resident with no prior criminal history, arrests, or outstanding warrants. T.482–85; T.496; T.486.

While Jones obtained his warrants, Mr. Maye took care of Ta'Corriana at home while his girlfriend worked. It was the day after Christmas, and the family's Christmas tree still stood in the corner of the living room. T.Exh. 32. A few hours later, a team of eight armed police officers had raided both homes, Jones was dead as the result of a single gunshot wound to the abdomen, and Mr. Maye was under arrest, soon to face charges of capital murder. T.487–91. Despite the tragedy of Jones' death, the available evidence shows that it was an accident— that Mr. Maye was simply trying to protect his child, his home, and himself from what he reasonably believed to be an unlawful and dangerous intruder.

I. THE EVENTS OF DECEMBER 26–27, 2001

A. Search Warrants Are Procured and Executed

At approximately 8:30 p.m. on December 26, 2001, Jones called Prentiss Municipal Court Judge Donald Kruger, and said that he had a search warrant he wished to present. T.6, 15. Jones drove to Judge Kruger's home and showed him virtually identical statements of "Underlying Facts and Circumstances" for two warrants. T.17. Jones' statements claimed he had "received information from various sources that controlled substances are being stored in and sold from two apartments located on Mary St." R.979, 984. He also claimed that he had an

informant who had been inside both homes within the past 24 hours and had seen marijuana there, and that Jones had surveilled the homes and witnessed large amounts of traffic at unusual hours. R.979, 984. Following a brief conversation, Judge Kruger signed each of the two virtually identical warrants. T.4–5.

Jones had called officers from several jurisdictions to help him execute the warrants. T.245–46. Eight officers convened at the Prentiss Police Department for a briefing by Jones and a Pearl River Basin Narcotics Task Force agent, who had been investigating Smith. *Id.* The officers traveled in two cars to Mary Street, and approached the duplex on foot in two teams. *Id.* Three walked to each front door, and one officer on each team went to the rear. Unbeknownst to the officers, Mr. Maye lived in the right-hand home. He had fallen asleep in his living room while his daughter slept on the bed in the bedroom at the rear of the house. T.486.

Several officers testified at trial concerning the search warrants' execution. T.245; T.286; T.311; T.404. Darrell Cooley and Stephen Jones testified that they (along with Ron Jones) approached the front door of Mr. Maye's home. T.253; T.407–10. Neither Cooley nor Jones claimed to have knocked on Mr. Maye's front door. Instead, Cooley testified that he tried the door knob but found it locked, and then attempted a few seconds later to kick open the door. T.418. Cooley and Jones testified that each of Cooley's three attempts to break down Mr. Maye's front door was preceded by an announcement in which Cooley said "Police" and either Stephen or Ron Jones announced "search warrant." *Id.*; T.249–54. When these attempts proved unsuccessful, Stephen and Ron Jones proceeded immediately to the rear of the house, where T.C. Cooley and Allday were standing near the three steps that led to the rear door of Mr. Maye's home, which opened directly into the only bedroom. T.249–59.

Stephen Jones and T.C. Cooley testified concerning the events that took place at the rear of the house. T.250–55; T.290–93. Neither officer indicated that anyone ever knocked on the

rear door of Mr. Maye's home. *Id.* Instead, Stephen Jones testified that Ron Jones checked the door to see if it was open, but found that it was locked. T.251–52. According to Stephen Jones, after Ron Jones checked the back door, he announced "search warrant, police, search warrant." T.252. T.C. Cooley, who was standing near the bottom of the rear steps when Ron Jones checked the rear door, testified at trial that he did not hear Ron Jones make any such announcement. T.307:11–29.

Stephen Jones and Ron Jones left the rear of house to return to the front, but shortly after they turned the rear corner, Allday kicked open the rear door leading into the bedroom of Mr. Maye's home, breaking the lock and chain which held it closed. T.253. Ron Jones immediately ran back around the rear corner of the house, up the rear stairs, and into the darkened bedroom. He was no more than five feet into the room when three shots were fired. T.253–54. The officers present at the rear door testified that the first and only announcement made after the door had been kicked open was a partial one, which Ron Jones made as he ran into Mr. Maye's bedroom, a split second before he was shot.

After the shots were fired, Ron Jones turned and came down the stairs, saying that he had been hit. T.292–93. Stephen Jones assisted him while T.C. Cooley shined his light into the bedroom, and ordered the occupant (Mr. Maye) to throw down his gun. T.293. After seeing that Mr. Maye had slid his gun across the floor, Cooley, assisted by another officer, entered the room and placed Mr. Maye under arrest.[2] T.293–94. Two subsequent successive searches of Mr.

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[2] Mr. Maye was taken into custody and gave a statement. R.194–209. He told two Mississippi Bureau of Investigation agents that he was asleep in his living room when a loud crash at the front door roused him. In fear, he ran down the hallway to the bedroom, retrieved his handgun from the top of his bed's high headboard, loaded it and lay on the floor at the foot of his bed. Mr. Maye said that he heard the back door of his bedroom kicked in, and that seconds later he fired several shots toward the door as someone charged up the stairs and into the bedroom. Trial Exh. 23 (audio recording of Dec. 27, 2001 interview). One agent authenticated an audiotape of the interview at trial, testifying that Mr. Maye "was very forthcoming," and appeared honest. T.361:6–14.

Maye's apartment (conducted pursuant to the original warrant, and a post-shooting warrant) recovered shell casings and a small amount (less than 1.2 grams) of marijuana. T.363–89; T.318–23. Evidence introduced at trial showed that when Mr. Maye surrendered his gun by sliding it across the floor, four rounds remained in the weapon. T.254; T.293; T.211; T.429. After the shooting, Ron Jones was taken to the Prentiss Hospital, where he died from injuries caused by a single gunshot wound to the lower left-hand side of his abdomen, directly below the portion of his torso that was covered by his bulletproof vest. T.257; T.439–40.

B. The Absence of Evidence to Support the State's Charges

The testimony and exhibits *introduced by the State* confirm that Mr. Maye had virtually no opportunity, from the inside of his apartment, to see the police officers who were attempting to gain entry in the late-night hours of December 26. With respect to the front entrance:

- Post-shooting scene photos and testimony of officers on the scene confirm that there were only two potential sight lines from the inside of the living room onto the front porch. Trial Exhs. 1, 5, 11, 12.
- One possible sight line was the living room window, but it was completely covered from the inside by a full set of blinds *and* a full-length opaque curtain that hung down between the blinds and the window. Trial Exh. 32.
- The other possible sight line was the window on the front door, but it too was completely covered from the inside by a set of dark red blinds that hung down over its full length. Trial Exh. 18.

With respect to the rear entrance:

- The rear exterior door that led directly into Mr. Maye's bedroom was solid wood. Trial Exhs. 4, 13, 15, 16.
- The only window in Mr. Maye's bedroom with a potential view of the back yard where the officers had taken up position was covered by a curtain as well as by the high headboard of the bed. Trial Exhs. 9, 13, 15; T.505:8–11.
- The bedroom window that faced the side yard was entirely covered with opaque foil that would have prevented anyone inside the bedroom from seeing out. Trial Exh. 17.

If Mr. Maye could not see the officers, he could have learned their identity only by hearing them announce themselves. The officers who testified regarding announcements at the front door were all situated outside of the house. T.248–50; T.405–09. Of course, testimony that late-night announcements were made outside Mr. Maye's home does not constitute proof that a person inside heard and comprehended them. Only one of the State's trial witnesses had been inside the duplex prior to the shooting. T.335: 5–23. Darryl Graves testified that as he approached Smith's home, he heard an officer on Mr. Maye's porch make an initial announcement. T.335:5–23. Graves testified unequivocally, however, that once he entered Smith's home, he no longer heard those officers' announcements. T.335:12–23; 342:13–343:17.

Testimony regarding announcements at the rear varied: Stephen Jones testified that Ron Jones said "search warrant, police, search warrant" near the rear steps that led into Mr. Maye's bedroom. T.253. T.C. Cooley, who was standing near Mr. Maye's rear steps throughout the entire raid, heard no such announcements, T.307:11–29, nor did Darrell Cooley, who had waited near the front porch when Stephen Jones and Ron Jones proceeded to the rear of the dwelling, T.409:19–29, 430:17–431:3. The only other evidence of verbal communication to the home's occupants was testimony concerning a partial statement made by Ron Jones at the moment he charged into Mr. Maye's darkened bedroom. T.292.

Considering the trial evidence in the light most favorable to the State, the only opportunity that Mr. Maye might have had to catch a glimpse of Jones would have been in the split second when Jones charged through the rear door and into the bedroom where Mr. Maye's infant daughter lay sleeping. While the State presented vague testimony from several witnesses concerning the clothing worn by unspecified officers, T.302; T.247–48, no witness testified specifically concerning Jones' clothing. The State's exhibits, however, did depict portions of

Jones' dark clothing, including his jacket and vest, which had been removed after the shooting and left on the ground outside the house.[3] Trial Exh. 17.

II. THE TRIAL TESTIMONY OF DR. STEVEN HAYNE

Dr. Steven Hayne, the coroner who performed an autopsy on Jones' body, testified as an expert witness for the State. R.448. Dr. Hayne's autopsy report (discussed during his direct testimony) found that Officer Jones died as a result of blood loss from a single gunshot wound to the lower left-hand portion of his abdomen. His report also recorded findings of the angle of the wound track through the soft tissue in Jones' abdomen. T.436:17–25. During cross-examination, Dr. Hayne acknowledged his ignorance of the variables relevant to determining Mr. Maye's position in relation to Jones at the moment of the shooting, including the distance between Jones and Mr. Maye when the shot was fired, the position and posture of Jones at the moment the bullet struck, and the elevation and angle of the gun barrel. T.441–47.

During redirect, in response to a series of leading questions, and despite Dr. Hayne's acknowleged ignorance of the pertinent variables, he opined upon the position and posture of Mr. Maye in relation to Officer Jones at the moment of the fatal shot. T.448–49. Mr. Maye's trial counsel objected repeatedly to this testimony. In the State's rebuttal argument, it brandished this testimony to discredit Mr. Maye, calling the testimony "a major thing," and arguing that it showed that Mr. Maye could not have fired from near the floor as he testified, but rather was "kneeling up or standing and trying to hit what he was aiming at." T.491–95.

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[3] Jones' clothing was admitted into evidence during the two-day post-trial hearing in September 2006. T.841. Photographs of this clothing, displayed on a mannequin, were submitted with a post-trial proffer and are included in the appellate record. *See* Vol. II RE at 330–38. The photos speak for themselves: Jones' clothing on the night of the raid consisted of dark combat fatigues, a dark jacket with no police insignia visible from the front, and a bulletproof vest that contained no markings other than an oval "Extreme Armor" logo in the center of the vest. *Id.*

After trial, Mr. Maye moved to set aside the verdict, identifying the admission of Dr. Hayne's speculative and unreliable testimony as a fundamental error. R.708–18. Mr. Maye also provided evidence from a newly-retained expert in forensic pathology, who confirmed that Dr. Hayne's trajectory testimony had no reliable scientific basis. R.708–14; R.665–71. Post-trial proceedings also revealed that Dr. Hayne misled the jury when he testified that he was "board certified" in forensic pathology, and that his autopsy of Officer Jones "was in compliance with the attorney general's ruling of this state as well as the national standards for the performance of an autopsy." *See* T.432–35. Mr. Maye's November 2007 proffer of evidence revealed that Dr. Hayne had not been certified by the American Board of Pathology (the only organization whose certifications Mississippi recognizes),[4] and that, in testimony in other cases, he has described his practice in terms which constitute gross noncompliance with national professional standards.[5] In the wake of increased press scrutiny of Dr. Hayne, the State recently announced that it would no longer retain him to perform autopsies. *See* "State Moves to Block Doctor," *The Clarion-Ledger*, Aug. 5, 2008, at 1A.

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[4] Dr. Hayne obtained his forensic "certification" from a mail-order organization that did not require a test and that was essentially a diploma mill. R.1377–78; 1419–20; 1426–35.

[5] Dr. Hayne has testified under oath to having performed approximately 1500 autopsies per year throughout most of his career in Mississippi. R.1379; 1426–35; 1437–42. Moreover, Dr. Hayne has stated under oath that during the same years in which he performed 1500 annual autopsies, he also testified in legal matters two to four times per week *and* spent approximately 50 to 55 hours a week working in a Mississippi hospital and an associated renal laboratory. R.1379; 1443–50.

Dr. Hayne's workload violated recognized national standards in force at the time of his autopsy of Officer Jones. Under the accreditation standards of the National Association of Medical Examiners ("NAME"), no autopsy physician should perform more than 250 autopsies per year; a caseload in excess of 250 autopsies per year is considered a "Phase I" deficiency; a caseload in excess of 325 autopsies per year is considered a "Phase II" deficiency, and such a deficiency automatically bars NAME from certifying the practice of the pathologist in question. R.1391–93.

III. THE TRUTH ABOUT THE SEARCH WARRANTS

After Mr. Maye's indictment, his trial counsel moved to compel disclosure of the identity of the confidential informant described in Officer Jones' search warrant affidavits and application. R.69–74. The State and its witnesses denied knowledge of the informant's identity. R.881; T.473–74. In the summer of 2006, Mr. Maye's current counsel retained a private investigator, Terry Cox. R.946; R.1057. As set forth in greater detail in Section VI *supra*, Mr. Cox eventually identified Randall G. Gentry ("Randy") as the confidential informant. Despite initially telling Mr. Cox he would meet with Mr. Maye's attorneys, Gentry thereafter refused to do so. R.946–47. Instead, Gentry left a ranting racist message on the answering machine of Mr. Maye's current counsel. JNOV Exh. 3B; T.686.[6] Gentry subsequently telephoned the Lawrence County Sheriff, Joel Thames, and provided a videotaped interview, in which he acknowledged that he was indeed the confidential informant who provided information to Officer Jones on the night of the search and the shooting. T.642–45; R.997–1007.

Gentry told the investigators that he had purchased narcotics from Jamie Smith (Mr. Maye's neighbor) on December 26, 2001. T.644–67. However, in describing the events of

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6 The message was the following text:

> Yeah, this is Mr. Randy Gentry. Hey, I got to thinkin' about my friend. I got yo' message this morning, Bob. Y'all — y'all threaten me all you want to and everything. I don't like fuckin' niggers from jump street but call me or whatever and I'll — but the day I burn five cents on gas to help that fuckin' cocksucker Cory Maye get out of jail is going to be a hell of a damn day. But — uh — if you want to talk to me like a fuckin' white man, you talk. But don't threaten me on bullshit. Get your NAACP motherfuckers — I don't give a fuck — niggers, bro, fuck niggers! But I'll tell you what. That's a good friend of mine they killed, buddy. I'll — I'll tell you anything. I'll — I'll be honest with you as fuckin' gum street. But I don't like no motherfucker talkin' shit to me or about my friends. Alright, well look here. Call me today and look here. Y'all buy my fuckin' gas, the NAACP buy my fuckin' gas I'll come talk to y'all or whatever. But look here. I'm — I'm a poor-ass motherfucker too, bro. Call me. You got my fuckin' number. Don't piss me fuckin' off.

Id.

December 26 and relating the information he had provided to Officer Jones, Gentry's statement significantly and disturbingly diverged from Officer Jones' claims in his search warrant affidavits and application. In particular, contrary to the warrant application, Gentry stated that he had *never* set foot in Mr. Maye's apartment, he *did not* see a "large quantity of marijuana" in the apartment on December 26, and he *never told* Jones that he had been in Mr. Maye's apartment or seen drugs there on the day of the shooting. T.656; R.73; T.654; R.1009. Randy Gentry also revealed that his brother, Carroll Dean Gentry, had driven him to Mary Street to make the undercover drug purchase. R.647–49. The District Attorney's office videotaped Carroll Gentry's statement on September 1, 2006. R.689. Carroll Gentry confirmed his brother's contradictions of Jones' representations, and his statement cast even greater suspicion on Jones' basis for the warrants. Both brothers agreed that Randy Gentry knocked on Jamie Smith's door, was admitted, and emerged shortly thereafter. T.694; T.655. Randy Gentry, trying to inculpate Mr. Maye, asserted that Smith accompanied him out of the home, approached Mr. Maye's home, spoke to someone, and returned with cocaine that he sold to Gentry. T.654. Carroll Gentry, however, stated unequivocally that his brother left Smith's home alone, and walked directly to Carroll Gentry's truck; they then drove to meet Jones at the local airport. T.694–95.

After the shooting, the MBI obtained a search warrant for Mr. Maye's home, and gathered evidence relating to the shooting, but found no drugs. T.367–68; T.390–91; JNOV Exh. 13; T.367–69. The local officers, using the December 26 search warrant, then searched the home again, finding a small quantity of marijuana in the burnt-out butt of a cigar. The marijuana was admitted into evidence at trial. T.319:25-29. Accordingly, this evidence was the fruits of a search conducted pursuant to the warrant obtained by Officer Jones, obtained through statements now contradicted in fundamental respects by the testimony of multiple witnesses, including Jones' confidential informant. T.656; R.73.

* * *

The crumbling factual foundation of the State's charges against Mr. Maye is troubling enough in its own right. But the significance of the facts in any criminal trial ultimately depends on the jurors who find them, the law applied to them, the evidence available to establish them, the manner in which prosecutors are permitted to question witnesses and present argument, and the adequacy of the representation provided by counsel for the defendant. Key trial court errors — in selecting the venue, instructing the jurors concerning the operative law, determining the admissibility of evidence, and failing to regulate egregious misconduct by the prosecuting attorneys — proved too much to overcome. These errors effectively assured Mr. Maye's conviction in spite of his actual innocence and the profound weakness of the State's case.

SUMMARY OF ARGUMENT

The evidence which the State presented at trial failed to establish beyond a reasonable doubt that Mr. Maye actually knew that Ron Jones was a police officer at the time of the shooting. The evidence in the case fell far short of that which the Mississippi Supreme Court deemed to be legally insufficient in *Wheeler v. State*, 536 So. 2d 1341 (Miss. 1988). In this case, there was no evidence that Mr. Maye saw that the persons who had approached his home and were kicking his doors were police officers, and no evidence that he heard any announcements. In addition, as a materially uncontradicted, lone eyewitness to Officer Jones' shooting, Mr. Maye was entitled, under *Weathersby v. State*, 165 Miss. 207, 147 So. 481 (1933), to have the trial court credit his reasonable testimony that he believed that his home was under attack and that he and his daughter were in danger.

Because of the unique circumstances of this case—a homeowner confronted with forcible entry by a dark-clothed intruder late at night—the evidence likewise fails to support a conviction

under the lesser-included charges of simple murder and manslaughter. The jury's verdict is also contrary to the overwhelming weight of the evidence, and should be set aside.

Over Mr. Maye's objection, the State asked for, and obtained, the impromptu and scientifically baseless testimony of Dr. Steven Hayne concerning Mr. Maye's position and posture in relation to Officer Jones, as supposedly derived from the track of the fatal bullet within Jones' body. The trial court failed to conduct a hearing to establish the scientific basis for this evidence, as required under *Daubert v. Merrell Dow Pharm, Inc.*, 509 U.S. 579 (1993), and its Mississippi progeny. This speculative and unreliable testimony was the only evidence that purported to contradict Mr. Maye's statement that he was lying on the floor when Officer Jones ran into the bedroom where his daughter lay sleeping, and was highlighted by the State in its closing as a "major thing."

In preparation for post-trial motions, Mr. Maye's current counsel obtained expert opinions from a forensic pathologist and a shooting incident reconstructionist. The evidence they presented both debunks Dr. Hayne's baseless opinion concerning Mr. Maye's position, and corroborates Mr. Maye's testimony through the only piece of physical evidence to record indelibly the angle one of the bullets took from the muzzle of Mr. Maye's handgun: a piece of wooden frame which one of the bullets struck. This evidence satisfied the requirements of *Crawford v. State*, 867 So. 2d 196 (Miss. 2003), regarding novelty, due diligence, and weight.

The crime occurred in Jefferson Davis County, and Mr. Maye had a right under the Mississippi Constitution, Art. 3, § 26, to a trial "by an impartial jury of the county where the offense was committed." Although Mr. Maye initially moved to have the trial's venue changed, he subsequently and timely withdrew his waiver of his vicinage right. The trial court then erred when, believing that it did not have the discretion to return the case to Jefferson Davis County, it moved the trial to Marion County instead. Mr. Maye was entitled to withdraw his waiver of his

fundamental right to vicinage, the trial court easily could have accommodated his assertion of that right, and it was error to move the trial to a different county.

The trial court erred when it denied Mr. Maye's proposed jury instructions regarding the scope of lawful self-defense, the applicability of lesser-included offenses, and the proper application of the reasonable doubt standard. Each of the instructions was an accurate statement of the law, and by denying their use, the trial court prejudiced Mr. Maye's right to have a jury fairly consider his theory of the case. In addition, the trial court's remaining self-defense instructions not only shifted the burden of proving self-defense onto Mr. Maye, but also omitted necessary guidance concerning the full scope of lawful self-defense in Mississippi.

The search warrant which Officer Jones used to justify his invasion of Mr. Maye's privacy was procured through fraud; as a result, Officer Jones was acting outside of his "official capacity"— an element of the offense of capital murder— when he entered Mr. Maye's home. Mr. Maye's current counsel located the evidence to establish this misrepresentation after trial: three eyewitnesses to an undercover drug purchase at the home of Mr. Maye's duplex neighbor; one of whom was the confidential informant himself. This newly discovered testimony satisfies the requirements for a new trial based on evidence discovered post-trial, and contradicts key elements of probable cause for the search warrant; the untainted remainder was plainly insufficient to justify the warrant. In addition, the State violated Mr. Maye's due process rights by failing to investigate and disclose the identity of the confidential informant, which was known to city officials. Even without taking the newly discovered confidential informant evidence into account, the trial court erred by concluding that the search warrant was based on probable cause. The fruits of the search—a trivial quantity of marijuana in cigar butts—should have been suppressed.

Prosecutorial misconduct in this case deprived Mr. Maye of a fair trial and requires the reversal of his conviction. The prosecutors distracted, inflamed, and misled the jury. Mr. Maye did not receive effective assistance of counsel as guaranteed by the Sixth Amendment. Trial counsel failed to investigate evidence to corroborate Mr. Maye's version of events, and made many other critical errors. Finally, the sentence of life without parole was cruel or unusual under the Mississippi Constitution. The trial court imposed the second harshest penalty known to the law without giving individualized consideration to the circumstances of Mr. Maye's case.

ARGUMENT

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

One of a homeowner's worst fears, particularly a homeowner with a young child, is to be confronted by an armed intruder who has forcibly entered the home in the dead of night. Where a citizen with no prior arrest record, no outstanding arrest warrants, and no history of violence, reacted to such an intrusion by firing upon the intruder, there would ordinarily be no question that the citizen had exercised his lawful right to self-defense. Although that is what happened in this case, the State chose, without hesitation, to use the full weight of its prosecutorial power in an effort to convict Mr. Maye of capital murder. R.39; R.402–03.

From the State's perspective the critical fact was the identity of the intruder: the armed man who charged into Mr. Maye's darkened bedroom through the broken-down rear door was a police officer. But in its rush to avenge Ron Jones' tragic death, the State confronted a fundamental obstacle: there was no evidence that Mr. Maye had *known* that Jones was an officer prior to the shooting. The absence of evidence on this critical element of the capital murder charge did not deter the State from prosecuting Mr. Maye with vigor; it did, however, force the State to rely on a combination of prosecutorial bluster, mischaracterization of witness testimony,

unscientific and unreliable "expert" opinion, and exploitation of the errors and omissions of an untested and incompetent defense attorney. The State obtained a guilty verdict, but when the trial record is considered on its own merit, divorced from the questionable courtroom tactics and emotional appeals that swayed the jury, it is crystal clear that the State's evidence was insufficient as a matter of law to sustain a conviction on any of the charged offenses.

A. The Evidence Is Insufficient to Sustain a Conviction for Capital Murder

The capital murder charge required the State to prove beyond a reasonable doubt that the accused committed murder "by killing a peace officer . . . while such officer . . . is acting in his official capacity or by reason of an act performed in his official capacity, and with knowledge that the victim was a peace officer . . . ." *See* Miss. Code § 97-3-19(2)(a). It is, of course, impossible for a jury to learn through direct evidence what Mr. Maye knew, yet jurors are likely to be instinctively hostile toward a defendant who admits shooting a police officer. In light of this tension, a proper sufficiency analysis is essential to assure that the jury's verdict rests on actual evidence, rather than on rank speculation driven by the desire to recognize the community's loss in the wake of a young police officer's untimely death.

The Mississippi Supreme Court has provided a detailed roadmap for assessing whether the State proved beyond a reasonable doubt that Mr. Maye knew of Jones' status as a peace officer. The Court's decision in *Wheeler v. State*, 536 So. 2d 1341 (Miss. 1988), provides unique, on-point guidance. Its factual differences with this case only highlight the comparative weakness of the evidence against Mr. Maye. Yet despite the stronger evidence in *Wheeler*, the Supreme Court held that the evidence was *insufficient as a matter of law* to allow a reasonable juror to find beyond a reasonable doubt that the defendant had known his victim's status as a peace officer. In light of *Wheeler*, there is no room for doubt: Mr. Maye's motion for a directed

verdict should have been granted, and the jury's verdict of guilt cannot stand. *See* T.452–53 (motion for directed verdict); T.455 (denial of motion).

In *Wheeler*, a social worker and four officers attempted, in broad daylight, to arrest Noah Wheeler for child neglect. *See Wheeler*, 536 So. 2d at 1342. Upon arriving, Officer Jackie Dole Sherrill, wearing civilian clothes, but with her badge and holstered sidearm visible, went to the rear of the dwelling. The other three officers went to the front and spoke to Wheeler through his screen door, telling him they had a warrant for his arrest. Wheeler "responded with hostility," attacking the officers when they attempted to enter and arrest him. *Id.* During the struggle, Wheeler seized an officer's gun, firing two shots but hitting no one. Officer Sherrill came onto the front porch, and Wheeler fired a third shot that struck her in the chest, fatally wounding her. *Id.* Wheeler was convicted of capital murder and sentenced to die.

The Supreme Court reversed the conviction, finding insufficient evidence to support the jury's verdict. The Court noted that Wheeler had consistently denied seeing the officer before shooting, and observed that the evidence he had seen her was "to say the least, less than overwhelming." *Id.* at 1343. The Court noted that Wheeler had no clear opportunity to see Sherrill prior to the shooting, because she had gone to the rear of the house and was not among the officers who spoke with him. While an officer had testified that Wheeler was "looking right at [Sherrill]" when he fired, the Court rejected this an insufficient foundation for the verdict, noting that the officer admitted that "he did not know with certainty that Wheeler had seen her." *Id.* Although Officer Sherrill was wearing her badge and a holstered pistol, the Court emphasized that "there was no unequivocal testimony that Wheeler saw either item" prior to firing, and that even viewing the pistol would not have "supplied the necessary scienter," because police are not the only people who carry firearms. *Id.* The Court also held that "there is

certainly at least a reasonable doubt" that Wheeler saw and recognized Officer Sherrill's badge prior to firing. Based on its analysis, the Court reversed Wheeler's conviction for capital murder.

Compared to the evidence held insufficient as a matter of law in *Wheeler*, there is even less evidence that Mr. Maye acted "with knowledge that the victim was a peace officer." There is no question that Wheeler knew the police were present. *Id.* at 1342. The situation here is not remotely comparable: the police approached Mr. Maye's apartment in the dark and near midnight; there is no evidence that Mr. Maye was even awake when the police arrived; there is no evidence that he spoke to the police or interacted with them in any way prior to the shooting; and there is no evidence that he in fact heard any announcements (including Officer Jones' alleged partial announcement upon entering the bedroom). The first evidence that he communicated with the police in any way was that, upon hearing the *post-shooting* announcement, he told the police not to shoot and slid his still-loaded weapon across the floor.

1. <u>The absence of sight lines</u>

Perhaps the most troubling aspect of the case against Mr. Maye is this: the State obtained a capital murder conviction, but the evidence presented at trial establishes beyond dispute that Mr. Maye did not and could not have seen the police prior to the shooting. Mr. Maye cannot see through walls. In the front room of Mr. Maye's apartment, only two windows looked out to the front yard (one on the front door; one on the living room wall), and both were obstructed.[7] Trial Exhs. 1, 5, 11, 12. Unsurprisingly, given the full opaque coverings that blocked the only two

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[7] Photographic exhibits introduced by the State at trial established that Mr. Maye could not have seen the police through either of these windows. An interior photo of the living room window, taken by police investigators on the night of the raid, shows that the window was completely covered from the inside by both a full set of blinds *and* a full-length opaque curtain that hung down between the blinds and the window, Trial Exh. 32. An interior photo of the front door window, also taken by police investigators on the night of the raid, shows that the window was completely covered from the inside by a set of dark red blinds that hung down over the full length of the window, Trial Exh. 18.

possible sight lines, none of the State's trial witnesses testified that Mr. Maye looked out either front window between the arrival of the police and their forcible entry into his rear bedroom.

The State, lacking evidence that Mr. Maye saw the police officers at the front of his home, instead mischaracterized the shifting, confusing, and equivocal testimony of Officer Stephen Jones concerning a "movement at the blinds." T.249. In his direct examination, Officer Jones speculated that perhaps "somebody opened the blinds and looked out." *Id.* This testimony varied substantially from his pretrial testimony. T.262-63; T.35, 50. Yet even this newly-minted elaboration was short-lived, for he admitted on cross-examination that he did not see anyone inside. He then reverted to his earlier, more limited statement that "when we were trying to gain access [i.e., trying to break down the front door] the blinds cracked open where I could see a light inside." T.267–68. [8] The State's post-trial effort to preserve its conviction with this slender testimonial reed is especially troubling given the prosecutor's extraordinarily unfair, yet deceptively subtle mischaracterization of this evidence in his rebuttal statement.[9] The bottom line is that under *Wheeler*, Officer Jones' testimony does not offer a basis pursuant to which a reasonable juror could conclude beyond a reasonable doubt that Mr. Maye knew the police were

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[8] This testimony is even weaker than it sounds, given that it was not entirely clear which set of "blinds" Officer Jones was referring to. The prosecutor's direct examination gave rise to ambiguity, and on cross-examination Officer Jones initially indicated that he was testifying concerning the window to the right of the front door. T.264–65. Of course, unless Officer Jones possessed x-ray vision, he could not see the blinds on this window, because there was a large opaque curtain tacked between the blinds and window, covering the window almost in its entirety. *See* Trial Exh. 32. Only through leading questions on redirect was the prosecutor able to secure a "clarification" to the effect that Officer Jones' initial testimony was referring to the interior blinds attached to the front door. T.279–80.

[9] The prosecutor argued that "when that light *came on*, Officer Cooley realized, well, there is somebody inside." T.579 (emphasis added). Not once, however, did Officer Jones testify that he saw a light "come on." Officer Darrell Cooley, moreover, testified that he did not notice an interior light until the light was brought to his attention by Officer Jones, which by definition means that he did not see the light "come on." T.412. Nor did Cooley *ever* testify that he "realized" someone was inside Mr. Maye's apartment. The prosecutor's mischaracterization had the effect, if not the intent, of suggesting to the jury that Mr. Maye had turned on an interior light after the police began attempting to break down his front door, but the evidence offers no support for this assertion.

even present at the front of the home, much less that Mr. Maye specifically recognized Ron Jones as a peace officer prior to firing his weapon. *See Wheeler*, 536 So. 2d at 1343.

Mr. Maye similarly could not see the police from his rear bedroom, because the only two windows there -- in the east and south walls -- were also blocked. (The rear door leading directly into the backyard had no windows.) Trial Exhs. 4, 13, 15, 16. The headboard of Mr. Maye's bed entirely blocked the eastern window (looking out onto the rear yard), which was also covered with a curtain. Trial Exhs. 9, 13, 15; T.505:8-11. The window in the south wall (looking onto the side yard) was completely covered from the inside by an opaque foil curtain or covering. Trial Exh. 17. No trial evidence even suggested that Mr. Maye saw through or around these obstacles to observe the police officers. T.252; T.290–91. No reasonable juror could conclude beyond a reasonable doubt that Mr. Maye saw and recognized the police officers at the rear of his home before the shooting, and the evidence summarized above demonstrates that it would have been impossible for him to have done so. Nor could a reasonable juror conclude beyond a reasonable doubt that Mr. Maye recognized Ron Jones as a police officer in the instant between when he charged from the dark backyard into the unlit bedroom, and when Mr. Maye pulled the trigger.

Mr. Maye testified that he did not see Officer Jones, but rather fired toward the door from behind his bed after hearing Jones charge into the bedroom. Even if Mr. Maye had caught a glimpse of Jones in the split-second before firing, there was less visual evidence than in *Wheeler* of the officer's status. The State's witnesses testified only vaguely that unspecified officers' clothing bore police insignia. Not a single witness, however, testified that Officer Jones' clothing, when viewed from the front, advertised his status. A witness offering such testimony would have been committing perjury. As shown by the testimony and physical evidence introduced at the September 2006 post-trial hearing, (and as seen on photographs of Officer

Jones' clothing displayed on a mannequin), no one viewing Officer Jones from the front could have promptly identified him as a police officer, because his clothing consisted of dark pants, a jacket with no frontal police insignia, and a bulletproof vest that bore no marking other than an "Extreme Armor" logo. T.721; T.728; T.760; T.791–95; Vol. II RE 330–38. This clothing, viewed on an intruder in a darkened room, would instead raise suspicions in the mind of a reasonable person precisely because it so obviously *lacked* visible law enforcement emblems.

Wheeler establishes that the jury had no legally sufficient evidentiary basis for concluding that Mr. Maye recognized Ron Jones as a police officer. The shooting in *Wheeler* occurred in broad daylight; yet even so, the Court held that a capital murder conviction could not hang on the slim thread of the testimony of a police officer who believed Wheeler was "looking right at" Sherrill before shooting, but could not testify confidently that Wheeler had actually recognized her as a police officer. *Id.* at 1343. The evidence against Mr. Maye was far weaker: the shooting in this case occurred late at night in a darkened room, and no one testified that Mr. Maye even saw Officer Jones, much less that he recognized him as a police officer. The fact that Officer Jones may have been wearing a holstered sidearm and a badge likewise cannot constitute sufficient support for the jury's verdict, as the Court explicitly addressed these factors in *Wheeler* and held them to be insufficient.[10] *Id.* at 1344.

2. <u>There is no evidence that Mr. Maye heard alleged police announcements</u>

Lacking any evidence that Mr. Maye saw the officers at his home, the State argued below that testimony that police officers announced their presence provides a basis for the jury's verdict. This argument flies in the face of both *Wheeler* and common sense, establishing at best a general knowledge of police presence. Under *Wheeler*, however, general knowledge of police

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[10] While Officer T.C. Cooley testified that Ron Jones wore a holstered sidearm, T.257:6–14, the trial record lacked any evidence or testimony that Jones wore a visible badge.

presence in the vicinity is not proof beyond a reasonable doubt that the defendant *knew* the shooting victim was a police officer before firing. *See Wheeler*, 536 So. 2d at 1343–44.[11] The testimony concerning certain police announcements did not, even considered in the light most favorable to the State, provide a sufficient basis for a reasonable juror to conclude beyond a reasonable doubt that Mr. Maye realized that it was the police who were attempting to break down his doors and enter his home. Though certain witnesses testified that announcements were made, no witness testified that Mr. Maye could and did hear and comprehend the alleged announcements. Indeed, the officers' testimony establishes beyond dispute that not merely reasonable doubt, but substantial doubt, exists whether Mr. Maye could have heard and comprehended the alleged announcements at issue.

The police who approached the front of Mr. Maye's home testified that they did not knock on the front door, but rather, after trying trying the handle and finding it locked, immediately tried to break the door down. T.249; T.407. Officers Darrell Cooley and Stephen Jones testified that prior to each of Cooley's three attempts to break down Mr. Maye's front door, Officer Cooley said "Police" and another officer said "search warrant." T.407–09. Officer

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[11] Mr. Maye's situation on the night of the shooting implicates one of the concerns that apparently informed the Supreme Court's analysis in *Wheeler*. *Wheeler* distinguished between knowledge of general police presence, and the capital murder statute's critical element requiring proof beyond a reasonable doubt of the defendant's specific knowledge that the person being shot at was a "peace officer." This distinction carries even greater force when considered in light of the precarious circumstances under which Mr. Maye fired his weapon.

The State's justification for its late-night armed raid (as embodied in Jones' warrant applications) was that the Mary Street address was the residence of Jamie Smith, "a known drug dealer," and was the site of suspected narcotics trafficking activity where suspected wrongdoers purportedly came and went at odd hours. In such an environment, *even if* Mr. Maye possessed generalized knowledge concerning police presence at the *front* of his home, he would have equal reason to fear that the person who had broken down his *back* door and charged into the bedroom was not an officer, but instead a dangerous intruder fleeing from the police. A homeowner in that situation would have only a split-second to act, with the stakes heightened by the presence of an infant child on the bed, mere feet from the advancing intruder. Under *Wheeler*, it is clear that the desire of the State or the jury to second-guess a defendant in this difficult scenario is a legally insufficient basis for a verdict of capital murder.

Darryl Graves testified that as he crossed the front yard and was approaching Jamie Smith's home, he heard an announcement made by the officers seeking to enter Mr. Maye's home. T.323. Graves also testified that once he entered Jamie Smith's home, however, he *could not* hear any subsequent announcements that may have been made. T.335; T.342–43.

On these facts, and under the framework applied in *Wheeler*, a reasonable juror lacked a legally sufficient foundation to conclude beyond a reasonable doubt that Mr. Maye heard and comprehended announcements purportedly made at his front door. Mr. Maye testified that he heard no announcements, and the only other evidence on the ability of someone inside the duplex to hear what was said on the outside was Officer Graves' testimony that he heard nothing once inside the home. T.335:12–23; 342:13–343:17. Graves acknowledged that in light of his own experience, he had no basis to say that Mr. Maye could hear and comprehend exterior announcements. T.342:13–343:17.

In *Wheeler*, an officer testified that the defendant was "looking right at" the victim when he shot her, but the officer admitted that he had doubts concerning whether the defendant had seen her. 536 So. 2d at 1343. The Court's conclusion that this testimony was legally insufficient to establish Wheeler's knowledge rested on the common sense premise that a juror's certitude cannot reasonably exceed that of the witness upon whose testimony the juror's verdict is based. The evidence here is even weaker than that in *Wheeler*, because no witness testified that Mr. Maye could or did hear and comprehend the alleged announcements, and the only witness similarly situated to Mr. Maye testified unequivocally that he did not. T.335; T.342–43.

Even leaving aside Graves' testimony, the police's failure to knock before attempting to break down Mr. Maye's front door independently confirms the absence of a legally sufficient foundation for the verdict. The late-night raid occurred the day after Christmas. The State introduced no physical or testimonial evidence at trial to rebut Mr. Maye's testimony that he was

asleep when the police arrived. The State's own witnesses acknowledged that the first purported announcement was immediately followed by Officer Cooley slamming into the front door to break it down. T.270–71; T.407–08. In light of this sequence, there was no evidence to rebut the reasonable inference that a homeowner, startled from sleep, would flee down the hallway toward the bedroom, *away from* the direction of any subsequent front-door announcements.[12] Any contrary jury finding could be founded only upon speculation, which is not a legally sufficient foundation for a verdict of guilt in *any* criminal case, much less one in which the defendant is charged with capital murder.

The evidence of alleged announcements at the rear door was likewise legally insufficient to establish Mr. Maye's knowledge of Jones' status as a police officer. No one testified that Ron Jones (or any other officer) bothered to knock on the rear door. Stephen Jones claimed to have heard Jones make two announcements near the closed door after finding it locked before Allday kicked it in. *Id.* These alleged announcements, however, were apparently inaudible to T.C. Cooley, who was standing at the base of the rear stairs only feet from Jones at the time. T.307:11–29. Darrell Cooley, who remained near the front porch, likewise heard no initial announcements at the rear. T.409:19–29; 430:17–431:3. If two officers outside the house, including one who was standing only a few feet from Jones, did not hear and comprehend any announcements, there is not only reasonable doubt, but substantial doubt, whether Mr. Maye

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[12] Indeed, one of the rationales for the long-standing "knock-and-announce" rule is that it avoids tragic situations in which a homeowner mistakes a police officer for an unlawful and potentially violent intruder. *See, e.g., Sabbath v. United States*, 391 U.S. 585, 589 (1968); *Miller v. United States*, 357 U.S. 301, 313–14 & n.12 (1958); *see also United States v. Valdez*, 302 F.3d 320, 321–22 (5th Cir. 2002). The failure of the police to knock in a peaceable fashion on Mr. Maye's door, and the decision instead to attempt immediate violent entry, suggests that the death of Officer Jones may be an example of the type of "mistaken identity" outcome that the knock-and-announce requirement is meant to prevent.

could or did hear them inside the house, separated from the officers by a wall, the closed rear door, and the base of the bed behind which he had taken shelter.

The only remaining communication was Jones' half-uttered announcement as he ran up the rear stairs and into Mr. Maye's darkened bedroom. T.253; T.309:6–9; T.292; T.409:19–27; 430:21–431:3. But this message was so quickly given and then interrupted by gunfire that even officers outside the home could not hear precisely what was said: Stephen Jones asserted that Ron Jones said "police, search warrant"; T.C. Cooley (standing at the base of the rear stairs) testified that Ron Jones said "Police, we have . . ."; Darrell Cooley, who was listening for activity in the rear from his post at the front, heard only the word "police" prior to hearing shots. T.253; T.292; T.430–31.

Considering all of the trial evidence, there is no way to conclude beyond a reasonable doubt that Mr. Maye, at any time *prior* to Officer Ron Jones' alleged partial announcement, believed the police were present. Thus, the jury, in considering the testimony regarding Jones' announcement, had to assess its efficacy from the perspective of a homeowner who had been awoken by the late night crash of someone attempting to break down his front door, fled to a darkened rear bedroom, retrieved a weapon, taken shelter at the base of a bed, and heard his rear door kicked in without any prior knock by those attempting to gain entry. In *Wheeler,* the Court emphasized that a shooting's factual context is of paramount importance in determining the legal sufficiency of the evidence relating to the defendant's knowledge. *See* 536 So. 2d at 1343–44. Here, given the factual context reasonably inferable from the evidentiary record at trial, no reasonable juror could have concluded beyond a reasonable doubt that Mr. Maye heard and

comprehended the significance of the alleged partial announcement in the split second between the partial announcement and the shooting.[13]

B. The "*Weathersby* Rule" Applies and Requires a Judgment of Acquittal

Mr. Maye was the only eyewitness to the shooting which took place in his bedroom on the night of December 26, 2001, and his story is both reasonable and materially uncontradicted at trial by physical evidence or testimony. Under the "*Weathersby* rule" (named after *Weathersby v. State*, 165 Miss. 207, 147 So. 481 (1933)), Mr. Maye was entitled to a directed verdict of acquittal. As the Supreme Court recently reaffirmed, the *Weathersby* rule "is alive and well and living in the courtrooms of this state." *Johnson v. State*, 987 So. 2d 420, 424 (Miss. 2008) (quoting *Heidel v. State*, 587 So. 2d 835, 839 (Miss. 1991)). Under the rule,

> where the defendant or the defendant's witnesses are the only eyewitnesses to the homicide, their version, if reasonable, *must be accepted as true*, unless substantially contradicted in material particulars by a credible witness or witnesses for the state, or by the physical facts or by the facts of common knowledge.

Weathersby, 165 Miss. at 207, 147 So. at 482 (emphasis added).

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[13] The equities of Mr. Maye's case for relief are particularly strong in light of the State's lack of any plausible motive for this alleged crime. In *Wheeler*, the defendant's statement provided motive and intent, in that Wheeler apparently believed God wanted him to kill "the white girl." 536 So. 2d 1344. The Court found this general intent to be insufficient to satisfy the specific statutory requirement that the accused act "with knowledge that the victim was a peace officer . . . ." Miss. Code § 97-3-19(2)(a). *Id.*

Again, Mr. Maye's case for relief is even stronger than Wheeler's, because Mr. Maye *never* stated that he intended to murder Jones. The State offered only the prosecutor's unsupported speculation to explain why Mr. Maye, a law-abiding citizen with no prior criminal record, would spontaneously and knowingly decide to kill a peace officer. Nor did the State offer any evidence to explain why he would fire three quick shots to knowingly kill one officer, only to promptly surrender himself and his weapon with four unfired rounds to the police. The logical and plausible explanation for this conduct is that it was the act of a frightened homeowner who genuinely and reasonably believed he was confronting an unlawful intruder. *Compare* R.577 (T.C. Cooley statement, describing Mr. Maye's prompt surrender and expression of sorrow), *with Tait v. State*, 669 So. 2d 85, 90 (Miss. 1996) (vacating murder conviction due to insufficient evidence and emphasizing that post-shooting conduct in which defendant immediately expressed sorrow was "consistent with an accident").

Whether Mr. Maye's version of events has been "contradicted in material particulars" can only be determined by reference to the matters which the statute (as authoritatively interpreted by the Supreme Court) make material to the prosecution. As discussed above, the State could satisfy its burden of proof regarding a key element of the charge— Mr. Maye's knowledge that the person running into his bedroom was a police officer— only through proof that he perceived Officer Jones' official status prior to pulling the trigger. Testimony that other officers issued announcements outside his home while his door was closed, or that they (but not Officer Jones) wore clothing with visible police insignia, is insufficient as a matter of law to establish Mr. Maye's particular knowledge of Officer Jones' status. *Wheeler*, 536 So. 2d at 1341–43.

There was likewise no admissible physical evidence to contradict Mr. Maye's testimony. The only items admitted at trial which relate to the bedroom are several photographs (including pictures of the doorframe, the scene generally, and the locations where other items were found), the bullet found in the wall next to the door, the handgun, and spent shell casings found on the floor. *See* Trial Exhs. 15, 18, 24–31, 33–40. None of this evidence, or the testimony concerning it at trial, contradicted Mr. Maye's testimony in any way, much less in a material one, and thus under *Weathersby* Mr. Maye was entitled to a directed verdict.

C. The Evidence Is Insufficient to Sustain a Conviction for Simple Murder

The evidence likewise fails to warrant Mr. Maye's conviction under Mississippi's simple murder statute. Miss. Code § 97-3-19 (1)(b). The law provides, in relevant part, that a killing, when not necessary for self-defense, shall be murder "[w]hen done in the commission of an act eminently dangerous to others and evincing a depraved heart, regardless of human life." *Id.* As set forth above, the evidence does not establish beyond a reasonable doubt that Mr. Maye was aware that the persons breaking down his door late at night were the police. This is of vital significance: on these facts, the *only* way in which a reasonable juror could conclude beyond a

reasonable doubt that Mr. Maye acted with a depraved heart would be to conclude that he *knew* he was firing at a peace officer. Just as the evidence fails to support a capital murder conviction, by definition it equally fails to support a conviction for simple murder.[14]

Mr. Maye believed either that he was shooting at an officer, or that he was shooting at an unauthorized intruder who had kicked open his bedroom door and charged inside, a few feet from where his 14-month old daughter lay sleeping. Firing at such an unauthorized intruder is a classic case of self-defense. The fact that Mr. Maye's split-second decision may have been erroneous does not render his conduct unlawful; the defendant's objectively reasonable perceptions at the time of the incident determine whether he acted in self-defense.[15]

Two other elements of Mississippi's self-defense jurisprudence further support Mr. Maye's entitlement to a judgment of acquittal on the charge of depraved heart murder. First, where a defendant relies on self-defense, the prosecution must prove the *absence* of self-defense beyond a reasonable doubt. *See Sloan v. State*, 368 So. 2d 228, 229 (Miss. 1979); *Pierce v. State*, 289 So. 2d 901, 902 (Miss. 1974). Because the State's failure to offer evidence that Mr. Maye knew he was firing at a police officer deprives it of the only analytical path by which a

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[14] Miss. Code § 97-3-15 sets forth the circumstances under which the killing of a human being shall be justifiable, which include "(e) When committed by any person in resisting any attempt unlawfully to kill such person or to commit any felony upon him, or upon or in any dwelling house in which such person shall be; (f) When committed in the lawful defense of one's own person or any other human being, where there shall be reasonable ground to apprehend a design to commit a felony or to do some great personal injury, and there shall be imminent danger of such design being accomplished."

[15] *See Johnson v. State*, 908 So. 2d 758, 764 (Miss. 2005) (reversing murder conviction based upon failure to give proper self-defense instruction, and emphasizing that if defendant has objectively reasonable apprehension that his life is in danger and acts on that apprehension, he has acted in self-defense); *Lee v. State*, 232 Miss. 717, 724, 100 So. 2d 358, 361 (1958) (reversing manslaughter conviction and entering judgment of acquittal for defendant who fired on pre-dawn intruder who had forcibly entered through back door of defendant's home, and stating "[t]he fact that the deceased was not armed is not essential in the determination of this case. The appellant had the right to anticipate the acts of the intruder and to act upon what then reasonably appeared to be necessary for the protection of his life.").

reasonable juror could conclude that Mr. Maye was not acting in self-defense, the State as a matter of law has failed to prove the absence of self-defense beyond a reasonable doubt.

Second, Mississippi has long recognized that the right to self-defense is at its zenith in the home, where a citizen has the right to stand his ground and resist with force what is or reasonably appears to be an unlawful intruder. "[A] person is justified in taking life in defense of habitation where it is actually or apparently necessary to do so in order to repel another person who attempts to enter in a forcible or violent manner for the apparent purpose of committing a felony therein upon either person or property or of inflicting great bodily harm or of assaulting or offering personal violence to a person dwelling or being therein." *Cummings v. State*, 271 So. 2d 407, 409 (Miss. 1972) (quoting *Lee*, 232 Miss. at 724, 100 So. 2d at 361); *see also Bowen v. State*, 164 Miss. 225, 144 So. 230, 232 (1932). This principle confirms that absent proof that Mr. Maye knew it was an officer who was charging into his darkened bedroom, there is no basis to sustain a conviction for depraved heart murder.

D. The Evidence Is Insufficient to Sustain a Conviction for Culpably Negligent Homicide

The preceding analyses of capital and simple murder apply as well to culpably negligent homicide. Mr. Maye's presence in his home at night, and the forcible entry of a stranger into a darkened bedroom where Mr. Maye's infant daughter lay sleeping, clearly entitles him to a judgment of acquittal of culpably negligent homicide. *See, e.g.*, *Cummings*, 271 So. 2d at 408–09; *Lee*, 232 Miss. at 724, 100 So. 2d at 361. Whether Jones was actually an unauthorized entrant is immaterial; the focus is Mr. Maye's objectively reasonable perceptions. Mr. Maye was confronted with the apparent forcible entry of a violent late-night intruder, and forced to make a split-second decision. No reasonable juror could conclude beyond a reasonable doubt that his actions reflected culpable negligence as opposed to reasonable self-defense.

E. The Jury's Verdict Is Against the Overwhelming Weight of the Evidence

Because "a greater quantum of evidence favoring the state is necessary for the state to withstand a motion for a new trial, as distinguished from a motion for a j.n.o.v.," *Pharr*, 465 So. 2d at 302, and because the evidence is plainly insufficent as a matter of law to sustain the conviction, it follows that Mr. Maye is entitled to a new trial, at a minimum. The State offered no substantial evidence in support of its allegation that Mr. Maye knew that Jones was a police officer. In contrast, (a) Mr. Maye's own testimony; (b) the lack of a plausible motive for Mr. Maye to have spontaneously abandoned a clean prior record to kill a police officer; and (c) the evidence reflecting the absence of sight lines and establishing his inability to hear and comprehend any police announcements, taken together, weigh overwhelmingly in favor of the factual conclusion that Mr. Maye acted in self-defense rather than with malicious intent, a depraved heart, or culpable negligence. Accordingly, if the charges are not dismissed, the jury's verdict should nonetheless be rejected as against the weight of the evidence, and a new trial should be granted. *See* Miss. U.C.C.C.R. 10.05; *Clayton v. State*, 652 So. 2d 720, 726 (Miss. 1995); *Hux v. State*, 234 So. 2d 50, 51 (Miss. 1970).

II. DR. HAYNE'S TRAJECTORY TESTIMONY WAS ADMITTED IN ERROR

At trial, the State's desire to convict Mr. Maye collided with the reality that it lacked any evidence that Mr. Maye knew he was firing on a police officer. So the State chose a different approach: to use its pathologist Dr. Steven Hayne to smuggle in "expert" tesimony lacking any legitimate medical or scientific foundation. Over repeated defense objections, the State extracted speculative and unreliable testimony in which Hayne extrapolated from his autopsy observations of the apparent internal path of the fatal wound, to conclusions about the position and posture of Mr. Maye in relation to Officer Jones at the moment of the shooting. During its rebuttal, the

State argued to the jury that Hayne's baseless testimony was "a major thing," using it to compensate for the State's lack of proof of Mr. Maye's knowledge of Jones' status.

A. Expert Testimony Must Rest Upon A Reliable Foundation

Mississippi has adopted the federal courts' *Daubert* standard for assessing the admissibility of expert testimony. *Miss. Trans. Comm'n v. McLemore*, 863 So. 2d 31, 39–40 (Miss. 2003). Expert testimony must rest on a reliable foundation, and there must be a "valid scientific connection to the pertinent inquiry as a precondition to admissibility." *Id.* at 36 (quoting *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 592 (1993)). Expert testimony cannot be based on the expert's subjective beliefs or unsupported speculation. *Id.* The trial court should not admit opinion evidence that is "connected to existing data only by the *ipse dixit* of the expert," as "self-proclaimed accuracy by an expert [is] an insufficient measure of reliability." *Id.* at 38. An expert must also reach his conclusions with a reasonable degree of scientific certainty. *See West v. State*, 553 So. 2d 8, 21 (Miss. 1989).

B. Dr. Hayne's Trajectory Testimony Was Irrelevant and Unreliable

Dr. Hayne's trial testimony began unremarkably: he testified that he autopsied Officer Jones' body, and he stated his findings concerning the manner and cause of death. T.435:24–440:7. During cross-examination, Hayne said he knew about the shooting incident "only in general terms." T.446:8–25. He testified that he knew nothing of Mr. Maye's height, T.445:11–17; the distance between Mr. Maye and Jones at the moment of the shooting, T.441:18–27; the height and angle of the muzzle of the gun when fired, T:442:2–17; and the position and posture of Jones at the moment the bullet struck, T.441:27–442:1; T.442:26–444:3. Thus, Hayne's knowledge was limited to his visual inspection of the apparent internal wound path when Jones' body was laid flat on the autopsy table. T.442:16–443:26; T.448:25–449:4. Hayne

acknowledged that this limited data left him unable to draw firm conclusions concerning the position of Mr. Maye in relation to Jones at the moment of the shooting. T.443:19–444:3.

Despite Hayne's admitted lack of a factual foundation, the State used a series of leading yet misleading questions to prompt him to speculate on the positioning and posture of both Mr. Maye and Jones at the critical moment when the officer reached the top of the rear stairs and charged into Mr. Maye's darkened bedroom.[16] T.447:8–449:4. In essence, the prosecutor testified in this examination; Hayne merely parroted his concurrence. *Id.*

The State led Hayne to agree that the gun, when fired, was perhaps higher than the entrance wound. T.448:19–28. He *did not* state that he reached his conclusion to a reasonable (or indeed, any) degree of medical or scientific certainty. T.448:25–28. Nor could he; his vague answer concerning what he would "expect" rested on the unsupported and implausible assumption that Jones, in a potentially hazardous situation, and after charging up the rear stairs and into a darkened bedroom, had somehow quickly assumed an anatomically correct posture and was thus either "in an upright position" or merely leaning "slightly forward" when the bullet struck.[17] The trial court again refused to heed defense counsel's objections. T.448:19–24.

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[16] The prosecutor repeatedly conflated the path of the "wound track" in Jones' body, with the bullet's "trajectory," i.e., the path the bullet followed from the moment it left the barrel to the moment it came to rest. At times Dr. Hayne appeared to distinguish between these two concepts, but in other instances he improperly treated them as freely interchangeable. *See* T.436:17-22; T.438:6-22; T.439:2-5. Plainly, however, they are not: the "wound track" can be examined during an autopsy. But to ascertain a bullet's "trajectory," one must have fixed points of reference to which the trajectory corresponds, and an understanding of the three-dimensional spatial context in which the shot was fired, as well as an understanding of the positions of the gun, the shooter, and the victim, relative to each other and to fixed points of reference within the pertinent three-dimensional environment in which the shooting took place.

[17] The record squarely belies this assumption. Officer Stephen Jones testified that Ron Jones was "running up the steps" into Mr. Maye's residence, and T.C. Cooley testified that he believed Jones sought cover almost immediately after entering the bedroom. T.292; T.253-254; T.512-519. An expert witness may not assume facts unsupported by the evidence, or omit consideration of material undisputed facts to justify an opinion that lacks evidentiary support. *See, e.g., Magnolia Hospital v. Moore*, 320 So. 2d 793, 798 (Miss. 1975); *Washington v. Greenville Mfg. & Mach. Works*, 223 So. 2d 642, 644 (Miss. 1969).

Trial counsel's repeated objections should have been sustained. Hayne admitted on cross-examination that the data he considered was extremely limited in scope, and these limitations necessarily constrained the range of conclusions that he could draw with scientific or medical certainty. To extrapolate from an internal bullet wound track to the position and posture of the shooter, an expert would have to know (a) the distance between the shooter and the victim; (b) the angle and elevation of the muzzle of the gun in relation to the victim at the precise moment of the fatal shot;[18] and (c) most critically, the position and posture of the victim at the moment the bullet struck. A reliable scientific analysis would also have to account for (1) the imprecision in measuring the vertical and horizontal angle of an internal wound track through soft and malleable abdominal tissue; (2) the possibility that the bullet may have moved internally prior to the autopsy; and (3) the effect on the bullet's path of intervening objects (in this case, clothing and a can of chewing tobacco).

Given Hayne's ignorance of the critical facts and variables, his testimony concerning the alleged "trajectory" caused confusion and invited the jury to speculate impermissibly. It could not, with a reasonable (or any) degree of medical certainty, shed light on Mr. Maye's position and posture vis-à-vis Jones at the moment of the shooting. The trial court erred by refusing to sustain trial counsel's objections to this speculative and unreliable redirect testimony.[19] *See Edmonds v. State*, 955 So. 2d 787, 791–92 (Miss. 2007); *West*, 553 So. 2d at 21.

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[18] Contrary to the State's questions implying to Hayne that Mr. Maye's gun was on or near the floor because the shooter was "laying down flat," T.451:4-9, the only actual evidence concerning the height of the gun at the moment of the shooting came from Mr. Maye himself, who testified that he held the gun at or near the top of the bed when he fired. T.518:14-27.

[19] Dr. Hayne's testimony here was consistent with his demonstrated willingness to testify beyond the bounds of his own knowledge and expertise when opining in support of the party that retained his services. *See, e.g., Edmonds v. State*, 955 So. 2d 787, 791–92 (Miss. 2007); *Treasure Bay Corp. v. Ricard*, 967 So. 2d 1235, 1242 (Miss. 2007) ("Dr. Hayne's opinion that Dillmon was visibly intoxicated while at Treasure Bay is not based upon the facts and is therefore unreliable"); *Palmer v. Volkswagen of Am., Inc.*, 905 So. 2d 564, 587–88 (Miss. Ct. App. 2003) (affirming trial court's exclusion of Dr. Hayne's

When Mr. Maye identified the deficiencies in Hayne's speculative "trajectory" testimony post-trial, the State conceded that Hayne lacked a reliable medical or scientific basis for opining on Mr. Maye's position and posture in relation to Jones. R.848–50; R.902–05. The State then tried to avoid the consequences of this admission by claiming that Hayne's testimony had no real impact on the result of the trial. R.848–50. That assertion is absurd.

C. The Admission of Hayne's Trajectory Testimony Prejudiced Mr. Maye

The prejudice from the improper admission of Hayne's speculative and unreliable trajectory testimony is clear and undeniable. As demonstrated above, the State's evidence failed, as a matter of law, to support any verdict of murder. Given this deficiency, unreliable expert testimony that the State highlighted as casting doubt on Mr. Maye's account cannot be deemed harmless. *See Edmonds*, 955 So. 2d at 792 ("Here, Dr. Hayne's two-shooter testimony impermissibly (because it was not empirically proven) bolstered the State's theory of the case[.] The error was magnified when Dr. Hayne's testimony was the only evidence [other than a contested confession] to support the State's theory of the case"); *Daubert*, 509 U.S. at 594; *Foster v. State*, 508 So. 2d 1111, 1118 (Miss. 1987).

The prejudice is apparent from the State's rebuttal argument, which twice highlighted Hayne's unreliable trajectory testimony to urge that Mr. Maye must have known he was firing at a police officer. T.491:10–19; T.494:28–495:3. The State also cited Hayne's speculative trajectory testimony as its basis for arguing that Mr. Maye's testimony regarding the shooting was untruthful; indeed, the prosecutor himself argued that "this is a major thing." T.491:10–13. T.491:13–19. Because Hayne's scientifically baseless trajectory testimony prejudiced Mr. Maye, his conviction should be reversed. *West*, 553 So. 2d at 21.

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statement that "he would not expect to see a fatality in a 20 mile per hour crash," because this opinion "was arguably outside Dr. Hayne's field of expertise").

D. Hayne Lied Concerning His Qualifications and His Standards

As this Court is aware, Dr. Hayne's claim to be "board certified" in forensic pathology has been demonstrated false, and his claim that his practice complies with national standards has been belied by proof that it is, in fact, grossly non-compliant with national standards regarding the maximum annual number of autopsies that an individual pathologist can reasonably perform. The first judicial criticism, *Edmonds*, 955 So. 2d at 802 (Diaz, J., concurring), was only levied after the trial court had denied Mr. Maye's post-trial motion to set aside the verdict. Those concerns are particularly salient here, because the State bolstered Hayne's standing in the eyes of the jury through his claims that he was "board certified" in forensic pathology, and that he performed Jones' autopsy "in compliance with the attorney general's ruling of this state as well as the national standards for the performance of an autopsy." *See* T.432:19–23; T.435:17–23.

1. Hayne's false statements entitle Mr. Maye to a new trial

The Statement of Facts detail the misleading nature of Hayne's testimony regarding his purported certification and compliance with national standards. *See supra* SOF § II. Mr. Maye had the right to have the jury know that Hayne's only "certification" in forensic pathology, (to the extent one even exists), was issued by a disreputable certification mill rather than a qualified medical organization. *See Edmonds*, 955 So. 2d at 802; R.1344. The jury should also have learned of Hayne's admissions, sworn and unsworn, establishing that his autopsy of Jones was part of a practice whose staggering workload was grossly non-compliant with any recognized national standard. R.1379; 1426–35; 1437–42; *Edmonds*, 955 So. 2d at 802. Given Hayne's own admissions, his claim that he autopsied Jones in compliance with "the national standards for the performance of an autopsy" was undeniably false.

During December, 2001, Hayne's acknowledged autopsy caseload, coupled with his admitted additional workload, rendered *all* of his autopsies non-compliant with national

standards. It would be a miscarriage of justice to allow a conviction, secured through critical but false testimony, to stand. *See Edmonds*, 955 So. 2d at 792 (noting that "[j]uries are often in awe of expert witnesses because, when the expert witness is qualified by the court, they hear impressive lists of honors, education and experience," and cautioning that an expert's "stamp of approval" on a particular theory of the case "may unduly influence the jury").

2. The trial court erred in denying Mr. Maye's post-trial motion to compel discovery of *Brady* and *Giglio* evidence concerning Dr. Hayne

Mr. Maye was entitled to pretrial disclosure of all exculpatory evidence, including evidence to impeach prosecution witnesses such as Hayne. *Brady v. Maryland*, 373 U.S. 83, 87 (1963); *Manning v. State*, 929 So. 2d 885, 891 (Miss. 2006); *Little v. State*, 736 So. 2d 486, 489 (Miss. Ct. App. 1999); *see also* Miss. U.R.C.C.C.P.R. 9.04. The State's "failure to correct false testimony, or its presentation of evidence which creates a materially false impression of the evidence, violates due process." *Manning*, 929 So. 2d at 891. The State has an affirmative duty to apprise itself of evidence responsive to a defendant's Rule 9.04 discovery request, including impeachment evidence, and this duty is continuing in nature. *See Little*, 736 So. 2d at 490. The State's duty extends to information which it possesses, and which it may obtain from witnesses through diligent requests *See id.* at 489.

Remarkably, despite the public disclosures of problems with Hayne, *to this day* the State has made no effort to ascertain whether his testimony was inaccurate or potentially misleading. Burying its head in the sand is inconsistent with the State's affirmative duties under Rule 9.04, and the trial court reversibly erred in acquiescing in the State's failure to supplement discovery. *See id.* at 490 (citing *Galloway v. State*, 604 So. 2d 735, 739–40 (Miss. 1992); *Hickson v. State*, 697 So. 2d 391, 395 (Miss. 1997)). In November, 2007 Mr. Maye filed a post-trial motion seeking to compel discovery of *Brady* and *Giglio* evidence concerning Hayne. R.1338–71. The trial court denied this motion, without a written order, prior to Mr. Maye's re-sentencing.

T.1164–92. To the extent this Court would be aided by the availability of additional evidence relating to the issues surrounding Hayne's qualifications and autopsy practices, it should permit Mr. Maye to obtain the discovery that was wrongly denied by the trial court.

III. NEWLY-DISCOVERED FORENSIC EVIDENCE WARRANTS A NEW TRIAL

The post-trial discovery of persuasive scientific evidence corroborating Mr. Maye's testimony underscores the tragedy of the trial court's admission of Hayne's scientifically unsound testimony. Mr. Maye has presented, through forensic pathologist Dr. Jack Daniel, testimony that a pathologist cannot extrapolate the position of a shooter from the angle of a bullet's track through a victim's abdominal tissue. Larry McCann, a shooting incident reconstruction expert, offered post-trial testimony proving that Mr. Maye was, as he testified, lying on the floor at the foot of his bed when he fired. Corroborative evidence is especially important in a case of self-defense. *See Brown v. State*, 464 So. 2d 516, 518 (Miss. 1985). The evidence was material and, if presented, would likely have resulted in Mr. Maye's acquittal.

A. Three Requirements for a New Trial for Newly Discovered Evidence

Newly discovered evidence entitles a defendant to a new trial when: *first*, the evidence has been discovered since the close of trial ("novelty"); *second*, due diligence would not have uncovered the evidence prior to trial ("due diligence"); and *third*, there is a reasonable probability that the evidence will produce a different result or induce a new verdict if a new trial is granted because the evidence is material and not merely cumulative or impeaching ("weight"). *Crawford v. State*, 867 So. 2d 196, 203–04 ¶¶ 9–10 (Miss. 2003); *Meeks v. State*, 781 So. 2d 109, 112–13 ¶¶ 8–10 (Miss. 2001).

B. The Newly Discovered Forensic Evidence Meets These Requirements

The forensic evidence concerning the trajectory of the bullets which Mr. Maye fired easily meets all three of *Crawford's* criteria for granting a new trial.

Novelty: Dr. Daniel's testimony (criticizing Hayne's trajectory theory), and Mr. McCann's testimony (regarding the trajectory based on the door trim hole and Jones' clothing) was clearly "discovered" in 2006, more than two years after the January, 2004, trial. Mr. Maye's current counsel identified and employed both experts in 2006; both performed their analyses that same year. R.633-55, T.714-98 (Mr. McCann); R.665-86, T.853-936 (Dr. Daniel).

Due Diligence: Because the expert reports which the State disclosed prior to trial failed to describe the trajectory testimony which the State elicited at trial, trial counsel was not obliged by due diligence to retain an expert to measure and analyze the doorframe bullet hole. Neither the autopsy report nor any other document disclosed before trial referred to the trajectory of the bullet which passed through the doorframe, and although the autopsy report described the bullet's track— *i.e.*, the path it took within Officer Jones' body, it did not disclose that Hayne would testify about the bullet's trajectory, *i.e.*, its flight prior to striking Jones.

Due diligence asks whether the evidence could have been discovered *before the trial began*, but the State surprised Mr. Maye and his trial counsel with its unprecedented (and scientifically baseless) theory *during trial. See Crawford*, 867 So. 2d at 203–04 ¶ 9. Mr. Maye's trial counsel was not required to predict before trial that the State would proffer undisclosed expert testimony that the bullet track in Jones' body demonstrated that Mr. Mayes was standing when he shot; thus the failure to discover contrary forensic evidence prior to trial cannot be held against Mr. Maye. This expert evidence was also not practically discoverable until Mr. Maye's current counsel took over his defense.[20] Current counsel, not trial counsel, retained Dr. Daniel and Mr. McCann. *See Howard v. State*, 945 So. 2d 326, 350 ¶ 49 (Miss. 2006) (noting,

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[20] Should the Court find that due diligence would have uncovered the forensic evidence, this merely supports the conclusion that trial counsel provided ineffective pretrial representation. *See infra* § IX.

regarding a petitioner's proffered expert affidavit, that the evidence was not "reasonably discoverable" until the the retention of new counsel). *Id.*

Weight: As demonstrated, *supra* § II.B, Hayne's surprise trajectory testimony was the keystone of the State's effort to contradict Mr. Maye's version of the shooting. The forensic evidence amassed since trial rebutting Hayne's impromptu opinion readily satisfies the requirement that, if introduced at a new trial, it will probably result in Mr. Maye's acquittal. *Crawford*, 867 So. 2d at 203–04 ¶¶ 9–10. The new evidence is non-cumulative, and would also be admissible and probative at a *Daubert* hearing on Hayne's trajectory theory. Dr. Daniel's and Mr. McCann's testimony, if admitted at a new trial, debunks the State's theory that a wound track is probative of the shooter's posture and location, and that Mr. Maye was standing. At a new trial, the exclusion of Hayne's testimony would be catastrophic for the State, which, lacking any evidence of Mr. Maye's knowledge of Jones' status, was unable at trial to contradict Mr. Maye's testimony and statements.

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

"In all criminal prosecutions the accused shall have a right to . . . a speedy and public trial by an impartial jury of the county where the offense was committed . . . ." MISS. CONST. art. III, § 26. Mr. Maye is entitled to a new trial because of the circuit court's erroneous refusal of Mr. Maye's request to withdraw his initial motion for change of venue and reassert his fundamental constitutional right to be tried in Jefferson Davis County.

The raid on Mr. Maye's home that led to the tragic death of Officer Jones took place in Jefferson Davis County. On February 18, 2003, Mr. Maye's trial counsel moved for a change of venue, citing concerns arising from the fact that Jones was the son of the Prentiss Chief of Police. R.90–91. In contrast to the vigor with which it contested Mr. Maye's other pretrial motions, the State responded to the venue motion by submitting a one-page "Response and

Agreement" on February 24, 2003, in which it agreed to a change of venue "in the interest of justice." R.106. Noting that the State did not object, the trial court granted Mr. Maye's motion, and later issued an order shifting the case to Lamar County, setting the case for trial on September 29, 2003. R.108–11. In July 2003, more than two months in advance of the scheduled trial, Mr. Maye moved the trial court to reconsider its order and return the trial to Jefferson Davis County. R.215–17. This motion specifically invoked Mr. Maye's right to be tried in the county in which the alleged crime occurred. R.216. The State opposed Mr. Maye's request, but it *did not* address the legal standards that govern a defendant's retraction of an initial waiver of a constitutional right, and it *did not* argue that it would be prejudiced or even inconvenienced by Mr. Maye's request to be tried in Jefferson Davis County. R.218; 229–31. Instead, it simply asserted, "The Defendant moved for a change of venue and waived trial in Jefferson Davis County he can not [sic] now go back." R.231.

On September 26, 2003, the trial court ruled on Mr. Maye's motion to return the trial to Jefferson Davis County. The court's Order stated that "the defendant's Motion to Reconsider Order Granting Change of Venue is well taken and the same is hereby granted." R.221. Yet after "granting" Mr. Maye's motion in the first paragraph, the second paragraph of the Order *did not* return the trial to Jefferson Davis County, but instead changed venue to Marion County. *Id.* The court's rationale did not emerge until a post-trial hearing in September 2006, at which the trial judge candidly admitted that at the time he "granted" Mr. Maye's motion, he incorrectly believed that, following Mr. Maye's initial request for a change of venue, he had no legal authority to later return the trial to Jefferson Davis County. T.970:4–972:4.

The trial court abused its discretion by denying Mr. Maye's request. The U.S. Supreme Court has recognized that a defendant ought to be allowed to withdraw a prior waiver of a constitutional right when there is no proper justification for refusing his request. *Stevens v.*

Marks, 383 U.S. 234, 243–44 & n.10 (1966). The Supreme Court of Mississippi takes the requirement of proper venue "very seriously," *Fairchild v. State*, 459 So. 2d 793, 799 (Miss. 1984), and has held that a defendant may withdraw an earlier waiver of venue and reassert his constitutional rights following a reversal of an initial conviction. *State v. Caldwell*, 492 So. 2d 575, 577 (Miss. 1986). The *Caldwell* court analogized a defendant's venue rights to a defendant's right to trial by jury. *See id.* This analogy is instructive. The right to trial by jury may be waived, but Mississippi, like most other states, mandates that a defendant be allowed prior to trial to retract such a waiver, unless there is a sound reason to prohibit the retraction. *See Newton v. State*, 211 Miss. 644, 52 So. 2d 488, 489 (1951).[21] Venue rights and jury trial rights are of equivalent status. *Caldwell*, 492 So. 2d at 577. Accordingly, Mr. Maye should have been permitted to reassert his fundamental right to be tried in Jefferson Davis County, absent a showing by the State of good cause for prohibiting this result.

The State cannot identify a sound basis for denying Mr. Maye's request to withdraw his initial waiver and be tried in Jefferson Davis County. Below, the State invoked *Simon v. State*, 688 So. 2d 791 (Miss. 1997) (*Simon II*). This reliance was misplaced. The defendant in *Simon II* obtained a change of venue to DeSoto County, and then, one week before trial, moved for a second, "conditional" change of venue, in which he sought either transfer to a county with less publicity and a more favorable racial makeup, or else to return to Quitman County, where the alleged crime had occurred. *Simon II*, 688 So. 2d at 801–03. The *Simon II* court held that under the particular circumstances of that case, the trial court did not abuse its discretion by denying this last-minute "conditional" motion. *Id.* at 803–04. The *Simon II* court emphasized that

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[21] For other states, *see, e.g.*, *Commonwealth v. Wright*, 524 A.2d 970, 971–72 (Pa. Super. Ct. 1987); *Cason v. State*, 505 A.2d 919, 927 (Md. Ct. Spec. App. 1986); *State v. Grimsley*, 444 N.E.2d 1071, 1073–74 (Ohio Ct. App. 1982); *State v. Catanese*, 385 So. 2d 235, 236–37 (La. 1980); *Thomas v. Commonwealth*, 238 S.E.2d 834, 834–36 (Va. 1977).

resolution of the venue issue was committed to the trial judge's "sound discretion," as opposed to his "unfettered discretion," *id.* at 804, an observation that would have been superfluous had Simon's initial motion for change of venue constituted an irrevocable waiver that could not be withdrawn. Unlike the defendant in *Simon II*, there is no evidence that Mr. Maye gamed the system by changing venue and then waiting until the eve of trial to file a second, "conditional" motion that created ambiguity concerning his actual position. Mr. Maye unequivocally requested that "this Honorable Court reconsider its Order and return this matter for trial to Jefferson Davis County." R.216-17. This request was made two months in advance of the scheduled trial date, further distinguishing Mr. Maye's request from the last-minute maneuvering in *Simon II*.

The State has offered no account of how the sound exercise of discretion could have led to denial of Mr. Maye's request. That no unfair prejudice to the State would have arisen from the granting of Mr. Maye's request is confirmed by the fact that the court *did* again change venue, but in so doing improperly disregarded Mr. Maye's express wish to be tried in Jefferson Davis County, instead transferring the case to Marion County. This unsought transfer, in the face of Mr. Maye's explicit request to have the case returned for trial to Jefferson Davis County, violated Mr. Maye's fundamental constitutional rights.[22] The error is particularly clear in light of the trial judge's September 2006 statement suggesting that when he made his decision, he did not believe he had the discretion to return the trial to Jefferson Davis County, and so transferred the case to Marion County instead. T.970:4–972:4. The trial court's understanding of the scope of its lawful discretion was plainly incorrect, and it abused its discretion when it failed to grant Mr. Maye's request to return the trial to Jefferson Davis County. *See Bell v. City of Bay St. Louis*,

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[22] *See United States v. Stratton*, 649 F.2d 1066, 1077 (5th Cir. 1981) ("It is for the defendant [] to determine whether adverse pretrial publicity is so pervasive that [he] should waive his [venue] right . . . The court does not have the option of waiving this right on behalf of the defendant and transferring venue, even if the trial judge sincerely believes that such action would be for defendant's own good.").

467 So. 2d 657, 661 (Miss. 1985) (reversible error for abuse of discretion where trial court's ruling is based on a misapprehension of the law).[23]

V. THE TRIAL COURT WRONGLY REFUSED CRITICAL JURY INSTRUCTIONS

Lawful self-defense within one's home is a subject of considerable interest to lay jurors, who may hold preconceived notions about what the law does or does not allow. Thus, self-defense jury instructions must be "technically correct," *Gooch v. State*, 199 Miss. 280, 24 So. 2d 736 (1946), and must describe the full scope of lawful self-defense, so that the jury may fairly evaluate the defendant's conduct. *Id.*; *Hodge v. State*, 6 So. 2d 123, 192 Miss. 322, 325–26 (1942); *Ingram v. State*, 62 Miss. 142, 144–45 (1884). The trial court failed to do so here. It refused critical self-defense instructions sought by Mr. Maye, and in plain error exacerbated this mistake by failing to instruct the jury that the State bore the burden of proof on the issue of self-defense. The trial court also erred by giving a depraved heart murder instruction, while wrongly refusing a corresponding limiting instruction reminding the jury that if Mr. Maye did not know that Jones was a police officer, he could not be guilty of any crime greater than manslaughter.

Mississippi's justifiable homicide statute, Miss. Code § 97-3-15, sets forth the circumstances under which the killing of a human being shall be justifiable, which include:

> (e) When committed by any person in resisting any attempt unlawfully to kill such person or to commit any felony upon him, or upon or in any dwelling house in which such person shall be; (f) When committed in the lawful defense of one's own person or any other human being, where there shall be reasonable ground to apprehend a design to commit a felony or to do some great personal injury, and there shall be imminent danger of such design being accomplished.

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[23] *Cf. United States v. Cunningham*, 429 F.3d 673, 679 (7th Cir. 2005) (noting that failure to exercise discretion is predicate for finding abuse of discretion); *State v. Rogers*, 969 So. 2d 707, 712 (La. Ct. App. 2007) ("[T]he trial court's erroneous conclusion that it had no discretion constituted an abuse of discretion"); *People v. Queen*, 310 N.E.2d 166, 169 (Ill. 1974) ("There is error where a trial court refuses to exercise discretion in the erroneous belief that it has no discretion as to the question presented.").

In attempting to fulfill its duty to instruct the jury concerning proper application of this statute, the trial court provided only two pertinent instructions. Instruction 5, *see* R.381, stated:

> The Court instructs the jury that if you find from the evidence in this case that on December 26, 2001 Cory J. Maye did shoot and kill Ron Jones; but that such shooting was in necessary self-defense, as defined by other instructions of the Court; then your duty under the law is to find Cory J. Maye not guilty of the murder of Ron Jones.

Instruction 6, *see* R.382, stated:

> The Court instructs the jury that to make a killing justifiable on the grounds of self defense, the danger to the defendant must be either actual, present and urgent, or the defendant must have reasonable grounds to believe that the victim intended to kill the defendant or to do him some great bodily harm, and in addition to this, he must have reasonable grounds to believe that there is imminent danger of such act being accomplished. It is for the jury to determine the reasonableness of the grounds upon which the defendant acts. If you, the jury, unanimously find that the defendant acted in self-defense, then it is your sworn duty to return a verdict in favor of the defendant.

A. The Trial Court Wrongly Refused Instructions D-8 and D-9

The trial court wrongly refused a critical instruction concerning the proper scope of lawful self-defense. The absence of this instruction left the jury with an inaccurate and unfairly prejudicial understanding of the law that was to govern their deliberations concerning Mr. Maye's fate. Instruction D-9 sought by Mr. Maye states:

> The Court instructs the jury that Cory J. Maye was not under an obligation to wait for serious bodily harm upon him and his daughter from Ron Jones before Cory J. Maye took action to defend himself and his daughter from an attack. If you find from the evidence that Cory J. Maye took action to defend himself and his daughter without knowing for certain that Ron Jones was about to cause him and his daughter serious bodily harm, and further that it was reasonably apparent to a reasonable person of average prudence that Cory J. Maye and his daughter were in danger of serious bodily harm, then you must find Cory J. Maye not guilty of the murder of Ron Jones. It is for the jury to determine the reasonableness of the ground upon which Cory J. Maye acted.

R 373. This instruction was discussed with approval in *Johnson v. State*, 749 So. 2d 369 (Miss. 1999), and in the context of the evidentiary record and the other jury instructions used in Mr. Maye's case, the trial court was obliged to give this same instruction here.

This instruction was needed to define the scope of the doctrine of self-defense in the context of the evidence presented at Mr. Maye's trial. In particular, Instruction D-9 encompasses

the bedrock principle that a homeowner faced with forcible entry from what he reasonably believes to be an unlawful intruder has no duty to retreat, and instead may stand his ground and protect the sanctity of his home and the safety of those in it. *See Cummings*, 271 So. 2d at 409; *Lee*, 232 Miss. at 724, 100 So. 2d at 361; *Bowen*, 164 Miss. 225, 144 So. at 231–32; *see also Haynes v. State*, 451 So. 2d 227, 229 (Miss. 1984). The trial court's refusal to give a self-defense instruction encompassing this principle was unfair and highly prejudicial. The State, through its questioning and arguments, aggressively advanced the position that Mr. Maye's account was inconsistent with lawful self-defense (and thus not credible), because he failed to either lay his body passively over his daughter and wait for harm to befall them both, or retreat to a bathroom or closet to hide. T505:18–506:11; T506:21–507:20; T512:14–515:2. There was no justification for the trial court's refusal to grant the D-9 instruction, which would have allowed the jury to discern the legal error reflected in the State's position, and would have aided the jury in properly assessing Mr. Maye's credibility and the reasonableness of his actions.

The D-9 instruction also captured the concept of defense of others, which is explicitly sanctioned under Mississippi's justifiable homicide statute, but wholly absent from Instructions 5 and 6 quoted above. Excluding this concept from the self-defense instructions was prejudicial to Mr. Maye, because a hotly contested issue at trial was whether Mr. Maye acted to protect his infant daughter, and the State tried repeatedly to cast doubt on Mr. Maye's overall credibility by characterizing his actions as inconsistent with his stated desire to protect his child. T505:18–506:11; T506:21–507:20; T512:14–515:2; T540:17–541:17; T571:27–573:15; T584:12–585:12.

The D-9 instruction would also have lessened the prejudice caused by the trial court's failure to instruct the jury concerning the relationship between the State's burden of proof and the doctrine of self-defense. The State bore the burden of proving beyond a reasonable doubt that Mr. Maye did not act in self-defense. *See Johnson*, 749 So. 2d at 374; *Heidel*, 587 So. 2d at

843. But in Mr. Maye's case, *the trial court never bothered to tell that to the jury. Johnson* emphasized 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 in relation to each charged offense that the State must prove the defendant "was not acting in self-defense." 749 So. 2d at 374. Here, the elements instruction used by the trial court (Instruction No. 7) did not mention self-defense.[24] R.383–84. The trial court committed plain error by failing to instruct the jury concerning the state's burden with respect to the issue of self-defense,[25] and compounded this error by refusing Instruction D-9.

Finally, Instruction D-9 should have been granted because it at least partially decoupled the concept of self-defense from the requirement that the defendant act to prevent "great bodily harm." The latter requirement is one way of establishing self-defense, but it is not the only way. Unfortunately, the trial court's refusal to grant Instruction D-9 left the jury with self-defense instructions that improperly shrunk the scope of the defense, and were thus in direct conflict with Mississippi common law and Mississippi's justifiable homicide statute. Under Mississippi law, a homeowner can use force in response to forcible entry by what reasonably appears to be an unlawful intruder who may commit a felony against property or person, *even if* the anticipated felony is not one that would result in "great bodily harm." *See, e.g., Cummings*, 271 So. 2d at 409; *Hodge*, 6 So. 2d at 192; Miss. Code § 97-3-15(e)–(f). The trial court committed plain error

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[24] The *Johnson* court identified a specific alternate instruction that could potentially serve as an "imperfect" substitute for a proper elements instruction, *id.* at 375, but the trial court did not give this alternate instruction.

[25] *Berry v. State*, 728 So. 2d 568, 571 ¶¶ 6, 9 (Miss. 1999) (instruction relieving State of burden of proof on charged element was reversible plain error); *McMullen v. State*, 291 So. 2d 537, 541 (Miss. 1974) (plain error where instruction improperly hindered defendant's ability to argue self-defense); *Barrett v. State*, 253 So. 2d 806, 809–10 (Miss. 1971) (reversible plain error where trial court failed to give correct and complete instructions concerning State's burden of proof).

by giving the same incomplete self-defense instruction rejected in *Hodge*, 6 So. 2d at 192, and the resulting prejudice was compounded by the improper refusal of Instruction D-9.

The trial court also erred by refusing Mr. Maye's requested D-8 instruction. D-8 would have reminded the jury that its assessment of the reasonableness of Mr. Maye's actions was to be guided by the circumstances as they reasonably appeared to Mr. Maye on the night of the shooting. R.372; T.549. Rejection of a non-duplicative instruction that properly states the law and reflects the defendant's theory of the case is reversible error. *See Hester v. State*, 602 So. 2d 869, 872 (Miss. 1992); *Murphy v. State*, 566 So. 2d 1201, 1207 (Miss. 1990). The requested D-8 instruction was important, because "[w]hat constitutes 'reasonable' action may seem quite different to someone facing a possible assailant than to someone analyzing the question at leisure." *Carswell v. Borough of Homestead*, 381 F.3d 235, 244 (3d Cir. 2004). The D-8 instruction, like D-9 above, would also have helped to dilute the prejudice caused by the trial court's failure to instruct the jury of the State's burden with regard to self-defense.

B. The Trial Court Wrongly Refused Instruction D-15

The trial court, over defense objection, wrongly refused to grant Instruction D-15, T.550:4–551:1, which states: "The Court instructs the jury that you cannot find Cory J. Maye guilty of any crime greater than manslaughter where the evidence is uncontradicted that at the time of the shooting, Cory Maye did not know Ron Jones was a police officer." R 374. Instruction 7 given to the jury included a paragraph addressing depraved heart murder. The pertinent language stated that Mr. Maye could be guilty of murder if he "did willfully, unlawfully, feloniously, without authority of law shoot a firearm in the direction of a human being ... an act eminently dangerous and evincing a depraved heart, regardless of human life, and with or without the premeditated design to effect the death of any particular individual, did kill and murder Ronald W. Jones." R.383–84. Instruction D-15 would have limited the reach of

the depraved heart murder charge embodied in the trial court's instructions by clarifying that conviction was improper if Mr. Maye did not know prior to shooting that Jones was an officer.

Mr. Maye contends that the evidence here would compel acquittal on all charges if the State could not prove beyond a reasonable doubt that Mr. Maye knew Ron Jones was a police officer. But leaving aside the insufficiency of the State's evidence, it is also true that proving the elements of depraved heart murder would have presented the State with a much higher hurdle when compared to proving a manslaughter charge based upon alleged culpable negligence. R.386 (Instruction No. 9). Mr. Maye was in his home, where he had a right to stand his ground. *See Cummings*, 271 So. 2d at 409. He had to make a split-second decision once his rear door was kicked open and the intruder charged into his darkened room. The stakes were heightened by the presence of his infant child. Mr. Maye surrendered his loaded weapon and expressed immediate regret once he realized he had fired on a police officer. These facts are fundamentally inconsistent with depraved heart murder, which requires a degree of recklessness from which malice or "deliberate design" may be inferred.[26] Mr. Maye was therefore entitled to Instruction D-15, which would have ruled out a verdict of depraved heart murder if the jury concluded that the State had not proven that Mr. Maye knew Jones was a police officer. *See Pittman v. State*, 297 So. 2d 888, 893 (Miss. 1974) (where there are facts which, if believed by the jury, would make a homicide justifiable or reduce it to manslaughter, the jury instructions "should be qualified to take these facts into consideration").

The trial court's refusal to grant Instruction D-15 prejudiced Mr. Maye by improperly bolstering the State's unfair attempt to raise the bar in the eyes of the jury concerning what the

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[26] *Windham v. State*, 520 So. 2d 123, 126 (Miss. 1987) ("[I]t is a contradiction in terms to state that a 'deliberate design' can be formed at the very moment of the fatal act"); *Tait*, 669 So. 2d at 90 (vacating murder conviction, noting prompt post-shooting expression of sorrow "consistent with an accident").

law requires of a homeowner confronted with forcible late-night entry by what reasonably appears to be an unlawful intruder. The State repeatedly stressed this theme, implying that Mr. Maye had a duty to either retreat, hide, lay passively over his daughter, or call out and alert potentially violent intruders to his location. In its closing, the State made its position explicit. Referring to Mr. Maye's testimony, the prosecutor said, "*If you take everything he said as being true*, he's at least guilty of murder." T.561:13–14. In light of the evidence presented at trial, this assertion was entirely inconsistent with Mississippi law concerning a homeowner's right to defend himself, his loved ones, and his dwelling. But by refusing Instruction D-15, and then including a depraved heart murder instruction in the instructions given to the jury, the trial court effectively ratified the prosecutor's misstatement. This ratification could have led the jury mistakenly to believe that Mr. Maye had effectively confessed to murderous conduct during his testimony. Jurors adopting this tainted view might experience a corresponding reluctance to credit Mr. Maye's exculpatory testimony. Thus, the net result of the trial court's error was to unfairly increase the chance that the jury would convict Mr. Maye of capital murder.

C. The Trial Court Wrongly Refused Instruction D-3

The trial court further erred by denying Mr. Maye's requested Instruction D-3, which stated that a mere probability of guilt was not the same as guilt beyond a reasonable doubt. R.369; T.551:4–27. Given the weakness of the State's case and the deficiencies in the trial court's self-defense instructions, the trial court was obligated to clarify the manner in which the reasonable doubt standard is applied. Explanation of the difference between the reasonable doubt standard and lower standards of proof can provide indispensable guidance for jurors. *See, e.g.*, *Victor v. Nebraska*, 511 U.S. 1, 5 (1994); *Lett v. State*, 902 So. 2d 630, 639 (Miss. Ct. App. 2005) (King, C.J., concurring). Instruction D-3, which correctly noted the critical difference

between a mere likelihood of guilt and guilt beyond a reasonable doubt, should have been granted. The trial court's refusal to do so was reversible error.[27] *See Hester*, 602 So. 2d at 872.

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

In August 2006, current counsel for Mr. Maye identified, located, and obtained the testimony of two key witnesses: Randy Gentry, Jones' informant on the night of the shooting, and his brother, Carroll Gentry, who drove Randy to the home and to meetings with Jones before and after Randy's undercover visit. This newly discovered evidence establishes that Jones' application for a warrant to search Mr. Maye's home was fatally defective because he fraudulently misstated indispensable elements of probable cause. Consequently, Jones acted outside his "official capacity" when he entered Mr. Maye's home. This evidence entitles Mr. Maye to a new trial and a new evidentiary hearing on his motion to suppress.

A. The Confidential Informant Was Identified After Trial

On the evening he was killed, Jones prepared search warrant applications: affidavits, unsigned warrants, and descriptions of underlying facts and circumstances for both of the Mary Street homes. T.5:22–7:23; Supp. Exhs. 1 & 2. The documents contained virtually identical descriptions of the place to be searched, and did not identify the street address for either home.[28] Neither application identified the home to which it pertained.[29] Around 9:00 p.m., Jones met Prentiss Municipal Court Judge Donald Kruger at his home to present the warrants. T.6:9–19;

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[27] Mr. Maye of course acknowledges the majority opinion in *Lett*, as well as this Court's opinion in *Vaden v. State*, 965 So. 2d 1072 (Miss. Ct. App. 2007), but Mr. Maye also wishes to preserve his right, if necessary, to seek further relief on this issue from the Mississippi Supreme Court.

[28] *Compare* Supp. Exh. 1 *with* Supp. Exh. 2. One set referred to the occupants of the premises as "Person(s) Unknown," the other to "Jamie Smith and/or Person Unknown." *Id.* The "underlying facts and circumstances" for the warrants appear to be copies of the same document.

[29] After Judge Kruger signed the warrants, but prior to their return, an unknown person wrote "Apt. #1" and "Apt. #2" on each warrant. Neither side of the duplex bears a house number. T.20:26-21:22.; Trial Exh. 1 (photograph of duplex).

17:12–29. Judge Kruger spoke with Jones for ten to fifteen minutes, then signed the warrants. T.18:22–19:3; T.7:16–8:9. Until 2006, this was all Mr. Maye knew of the warrants' issuance.

Mr. Maye's current counsel suspected that a seven-digit number ("8473043") written in ink on the Jones' left palm was a telephone number belonging to his informant. JNOV Exh. 29 (autopsy photograph). Records from 2001 establish that the number belonged to Randy Gentry, and current counsel hired an investigator, Terry Cox, to find and interview him. T.702:7–704:3. After tracking several leads, Mr. Cox succeeded in August 2006. T.704:4–707:2. Randy told Mr. Cox that he was Jones' informant on the evening of December 26, 2001. T.707:3–709:21; T.672:11–20. Despite agreeing to talk to Mr. Maye's counsel, Gentry evaded efforts to contact him and left a racist tirade on the answering machine of Mr. Maye's attorney. T.709:22–711:11; T.672:21–674:6; *supra SOF* § III. Randy and his brother Carroll later provided videotaped statements and testified both in a deposition and at a hearing before the trial court. JNOV Exh. 1 (video statements); T.639–86 (Randy's testimony); T.689–701 (Carroll's testimony).

Randy testified unequivocally that he was Jones' informant. T.644:14–23; JNOV Exh. 1 at 03:30–03:38. He said that on December 26, 2001, he was riding with his brother Carroll. T.647:9–648:8; T.690:13–21; JNOV Exh. 1 at 10:24–11:05. They drove to Jones' home, where Randy received instructions and money from Jones for the undercover purchase. Randy said he was unable to buy drugs on the first visit to the home on Mary Street. T.653:8–29; JNOV Exh. 1 at 05:56–07:24. On the second attempt, he met Jamie Smith, who knocked on Mr. Maye's door.[30] T.654:4–26; JNOV Exh. 1 at 07:30–07:40, 14:18–14:29. Randy claimed that Smith spoke briefly with someone at the door, then returned to give Randy his crack cocaine. T.654:4–

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[30] Although Randy implicated Mr. Maye, he admitted bias against Mr. Maye and in favor of the State: he agreed that he had left the racist voicemail, that he sometimes referred to black people as "niggers," and that he called Mr. Maye a "cocksucker." T.684:20–686:4. He also stated that he served often as a paid informant, and that Jones was his friend. T.674:7–25; JNOV Exh. 1 at 16:28–16:45. He thus had racial, financial, and personal reasons to lie about Mr. Maye.

26; JNOV Exh. 1 at 07:40–08:06. Randy said that his brother drove him to the Prentiss airport, where he met with Jones and described the purchase. T.665:12–666:26; JNOV Exh. 1 at 08:38–09:52. Jones told Randy to visit Prentiss City Hall the next day to collect his $25 fee for the evening's work. T.666:27–667:4; JNOV Exh. 1 at 08:38–09:52.

Carroll's testimony corroborated the visit to the *Smith* home but exculpated Mr. Maye. He agreed that they drove to Jones' home, and that his brother met Jones there. T.692:12–15. They drove to Mary Street, and Carroll said his brother walked to the left-hand (Smith's) door, knocked, and entered. T.692:16–694:23; JNOV Exh. 1 at 20:41–23:07. He emerged minutes later, got in the car, and the brothers drove to the airport, where Randy met Jones. T.694:24–695:5; JNOV Exh. 1 at 23:07–23:14. T.695:26–27; JNOV Exh. 1 at 25:51–26:18.

The Gentry brothers' testimony directly contradicts the probable cause for the warrants Jones presented to Judge Kruger on December 26, 2001. Under *either* brother's version of events, the applications falsely averred that Randy entered Mr. Maye's home. The brothers' testimony also shows that Jones probably sought the "person(s) unknown" warrant for Mr. Maye's home to cover up his failure or inability to determine which home in the duplex belonged to his intended target, Jamie Smith. Audrey Davis, who lived with Jamie Smith in the left-hand side of the Mary Street duplex, corroborates this conclusion. Davis, whom current counsel's private investigators located in Hayward, California, swore in an affidavit that on the day of the search, she lived in the duplex with Smith, her children, and a youth named Jimmy Harris. Smith and Randy Gentry were acquaintances, she said, and Gentry came to her home that day. R.1196-97. She unequivocally stated that Smith did not go to Cory Maye's home during Gentry's visit. *Id.* Thus, the testimony of Randy Gentry and two eyewitnesses establishes that he was Jones' previously unknown informant, and that Jones misrepresented key facts to Judge Kruger to obtain the warrant he used to justify his forcible entry into Mr. Maye's home.

B. The Confidential Informant Evidence Entitles Mr. Maye to a New Trial

In denying Mr. Maye's motion for a new trial for this newly discovered evidence, the trial court misconstrued applicable law and ignored Mr. Maye's evidence.[31] The post-trial record rebuts the trial court's statement that there was "no evidence" that Jones misrepresented his probable cause for searching Mr. Maye's home. The trial court did not disparage the testimony of the three new eyewitnesses; nor did it try to reconcile that testimony with Jones' search warrant representations. Instead, it ignored the new evidence entirely, and disregarded controlling authority limiting the official capacity of police officers in Mississippi, as well as binding precedent limiting an officer's "good faith" reliance on a magistrate-approved warrant to circumstances in which the officer is innocent of misrepresentation, or in which the *bona fide* remainder of the application provides sufficient probable cause.

Although a trial court's decision whether newly discovered evidence warrants a new trial is ordinarily entitled to deference, this Court is obligated to review the trial court's findings *de novo* where, as here, the trial court has misapplied the law and overlooked substantial evidence. *Pickle v. State*, 791 So. 2d 204, 206 ¶ 10 (Miss. 2001). Because the trial court failed to meaningfully address the confidential informant evidence, it never turned to the three criteria for a new trial under *Crawford*, 867 So. 2d at 203–04 ¶¶ 9–10. The Court need not defer to the trial court's failure to assess the evidence, but must review it *de novo*. The Gentry brothers' and Davis' evidence readily satisfies each of the three *Crawford* requirements.

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[31] In its Order, *see* R.1245, the trial court stated (in its entirety, as to this issue): "The defendant vehemently asserted at both hearings that Officer Jones was proceeding under a defective or invalid search warrant, thereby depriving Jones of his lawful authority. After thorough inquiry by this Court at the December 13th hearing, the Court finds defendant's argument to be without merit. The Court finds that even if the warrant was defectively obtained Jones was still cloaked in his official authority, since there was no evidence the warrant was obtained in bad faith. The defendant appears to argue that a defective warrant and a warrant obtained in bad faith are synonymous, but this Court finds otherwise."

Novelty: Mr. Maye did not know that Randy was the confidential informant until Mr. Cox located and interviewed him in August 2006, more than thirty months after Mr. Maye's trial had ended. Carroll's name and witness status were entirely unknown prior to his videotaped statement in September 2006. Audrey Davis did not testify at any prior hearing. The testimony of all three satisfies the novelty requirement. *Crawford*, 867 So. 2d at 203–04 ¶ 9.

Due Diligence: Determining that Randy was Jones' informant took extraordinary efforts, and Mr. Maye should not suffer for the failure to discover him prior to trial. The sole clue to Randy's role was the number written on Jones' hand. Except for the number of digits, it bore no indication that it was a telephone number, much less that its owner was a critical witness.[32] Trial counsel obtained Randy's name from telephone records and speculated that he might have been Jones' informant. *See* R.976 (memorandum to file); R.977–78 (affidavit of current counsel). But a State employee diverted her, after telling her Randy was the informant, saying either that Randy was not the informant, or that the informant's identity died with Jones. *See* R.977–78 ¶ 6.

Mr. Maye's case is directly analogous to *Hunt v. State*, 877 So. 2d 503, 513–14 ¶¶ 53–58 (Miss. Ct. App. 2004), which found the due diligence requirement satisfied. Hunt, who had been convicted of rape, argued that the testimony of a woman named Pitts was newly discovered although the victim and her husband had named Pitts at trial. This Court agreed that Hunt was entitled to a new trial, because Pitts' significance could not have been known before trial:

> Nothing in [the victim and her husband's] explanation of a relationship with Pitts suggests that she would have had meaningful evidence regarding these events. Pitts indicated that neither the prosecution nor the defense talked to her at the time of the first

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[32] The State's own efforts to locate the informant support this conclusion. The District Attorney's investigators told Randy and Carroll at their August 2006, videotaped statements that the State had been ignorant of their role. JNOV Exh. 1. Even the District Attorney, despite superior investigative resources, did not discover this evidence prior to trial. Agents of the State other than the District Attorney, however, knew of Randy's role as the confidential informant, as discussed *infra* § VI.C, and the State's failure to disclose this information to Mr. Maye's trial counsel form an independent ground for granting a new trial.

proceedings. She told the victim that she would not testify that a rape occurred. The record indicates that a detective agency hired by Hunt's mother after trial located Pitts.

Id. at 513 ¶ 54.[33] Mr. Maye's case for due diligence is even stronger. As in *Hunt*, nothing suggested that Randy "would have had meaningful evidence regarding these events," or that he was "reasonably plausible" as a witness. *Id.* at 513 ¶¶ 54, 56. That the number on Jones' palm was traceable to Randy did not reveal his role in the Mary Street raid. Indeed, unlike Pitts, Gentry *was, in fact,* a "mystery person" whom due diligence would not have identified.[34]

Weight: The final test under *Crawford* is whether the evidence is likely to produce a different result, or induce a different verdict at a new trial. 867 So. 2d at 203–04. As discussed in the sections that follow, admission of the confidential informant evidence would necessarily have resulted in a different verdict, and therefore satisfies the weight requirement.[35]

1. The Confidential Informant Evidence Negates An Element of the Offense

The capital murder statute requires the State to prove beyond a reasonable doubt that Mr. Maye knew Jones was a police officer, and that Jones was acting in his "official capacity" when he was killed.[36] A citizen may be unable to distinguish a residential search from a home

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[33] This Court disagreed with the dissent's argument that due diligence would have uncovered the Pitts information. *Id.* at 513 ¶¶ 55–56 ("The dissent does find fault, though, with the industry exhibited by Pitts' original counsel . . . Pitts was a name heard at trial. She was not a mystery person never encountered during the original proceedings. Yet it is also evident that according to Pitts, the victim and the man she later married insisted that Pitts was an irrelevancy . . . Our issue is diligence. Diligence is not measured in retrospect. Few are the witnesses who were completely undiscoverable at the time of the original conviction.") (emphases added).

[34] The due diligence case is even stronger for Carroll's testimony, because his name and role were completely unknown until Randy mentioned his brother in his videotaped statement on August 30, 2006. Prior to trial, no statement, telephone number, or note of any kind linked Carroll to Jones' investigation.

[35] The materiality and non-cumulativeness of the confidential informant evidence is buttressed by the fact that Jones' official capacity was not substantially disputed at trial. T.554:3–9; T.239:17–21.

[36] The statute under which Mr. Maye was charged and convicted provides: "The killing of a human being without the authority of law by any means or in any manner shall be capital murder in the following cases: (a) Murder which is perpetrated by killing a peace officer . . . while such officer . . . is acting in his official capacity or by reason of an act performed in his official capacity, and with knowledge that the

invasion, so the law requires the State to show that the officer-victim acted within his legal authority, and that the defendant knew of his official status. In *Jones v. State*, the defendant killed an officer who returned to his home after executing a search warrant. 170 Miss. 581, 155 So. 430, 431 (1934). The Supreme Court reversed the conviction, holding the officer's entry unlawful:

> [T]he deceased constable had no right to enter the dwelling house at the time he was killed. As stated, the search warrant was void, and the search had been made, and it did not authorize the deceased to enter the said dwelling house without permission. [. . .] The appellant was in his home, and no person or officer had a right to enter except in strict accordance with the law. No matter how humble, a man's house is his castle, and no one can enter without his consent, except in strict accordance with the law.

Id. Requiring the State to prove that Jones was acting in his official capacity and not *ultra vires* recognizes that the State's interest in an enhanced penalty only extends to officers who respect the rights of Mississippians in their most intensely private area: their homes.

The testimony of the Gentry brothers and Audrey Davis establishes that Jones misrepresented key elements of his alleged probable cause. Jones used identical "underlying facts and circumstances" for both warrants:[37]

> I, Ronald W. Jones, P5, do hereby state under oath that I have received information from various sources that controlled substances are being stored in and sold from two apartments located on Mary St.
>
> A C.I. [confidential informant] personally known to me to have given true and reliable information in the past which has led to at least one arrest, went to said residence within past twenty-four hours and saw a large quantity of Marijuana being stored in both apartments located on Mary St.
>
> I, Ronald W. Jones, also state under oath that I, personally surveillanced said apartment's and witnessed a large amount of traffic at unusual hours traveling to and from said apartments.

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victim was a peace officer . . . ." Miss. Code. § 97-3-19(2)(a) (emphasis added). *See Hansen v. State*, 592 So. 2d 114, 146 (Miss. 1991); *see also* R.383–84 (Guilt Phase Jury Instruction No. 7).

[37] Identical typographical errors (*e.g.*, the title " UNGERLYING [sic] FACTS AND CIRCUMSTANCES"; a period rather than a comma following his name in the third paragraph) and defects on the documents (*e.g.*, the light marks to the right of the final word of the second line), show that Jones probably used copies of the same document for both search warrants. *Cf.* R.143; R.147.

> Said apartments is being occupied by Jamie Smith a known drug dealer and persons unknown. I therefore believe that other controlled substances are being stored in and sold from said apartments by Jamie Smith and/or person(s) unknown.

His statement presents five grounds for probable cause to believe that evidence of a crime could be found in both Mary Street homes on December 26, 2001, *see* Supp. Exhs. 1 & 2; R.169–71:

> 1) That "various sources" had provided information "that controlled substances are being stored in and sold from" the homes;
>
> 2) That a confidential informant who had "given true and reliable information in the past which has led to at least one arrest":
>
> a) "[W]ent to said residence within the past twenty-four hours"; and
>
> b) "[S]aw a large quantity of Marijuana being stored in both apartments"
>
> 3) That Officer Jones had conducted surveillance and witnessed "a large amount of traffic at unusual hours traveling to and from said apartments."

Even assuming that Randy implicated Mr. Maye truthfully, these "underlying facts and circumstances" clearly misrepresent the evidence Jones received from his informant. Randy's own testimony contradicts both of the substantive claims Jones made about the visit: that Randy was in Mr. Maye's home (items 2(a) & 2(b)); and that he saw a large quantity of marijuana there (item 2(b)). To the contrary, Randy unequivocally stated on three occasions (his videotaped statement, deposition, and hearing testimony) that he *never* went into Mr. Maye's home, and that his object was to purchase crack cocaine, not marijuana. As described above, the other new witnesses, Carroll and Davis, further refute the "underlying facts and circumstances," while discrediting Randy's clumsy effort to inculpate Mr. Maye.

Given these material discrepancies, the conclusion is inescapable that Jones misrepresented the facts of his investigation to Judge Kruger in order to obtain the search warrant he used to enter Mr. Maye's home. Jones' misrepresentations strip the warrant of any validity. Thus the warrant did not sanction his intrusion into Mr. Maye's home, and he lost the protection of the enhanced penalty that Mississippi's capital murder statute accords to officers who act in their official capacity. From its origins in the common law, a key function of the

search warrant has been to immunize its bearer from liability for what would otherwise be a criminal or tortious act. *See Creech v. United States*, 97 F.2d 390, 391 (5th Cir. 1938) ("The office of the [search warrant] is to authorize and make lawful that which legally could not have been done without its issuance."); Malcolm Thorburn, *Justification, Powers, and Authority*, 117 YALE L.J. 1070, 1083 & n. 24 (2008). Without this sovereign grant of immunity, an officer searching premises would be subject to indictment or civil suit for trespass; one seizing items would be subject to actions for theft or replevin; thus, a warrant implicitly recognizes that even officers must obey the law.[38] Because officers' "official capacity" is so limited, only the State's sanction can render lawful presumptively illegal acts such as searching and seizing a citizen's property or person.

Courts construing murder statutes similar to Mississippi's have held that the law only protects officers acting in good faith. In Connecticut, for example, capital murder includes "Murder of a member of the Division of State Police . . . or of any local police department, . . . while such victim was acting within the scope of such victim's duties." Conn. Gen. Stat. § 53a–54b. In *State v. Reynolds*, 836 A.2d 224, 259 n.21 (Conn. 2003), the Connecticut Supreme Court stated that an officer's lack of good faith defeats a critical element of the capital murder charge: "[P]roof that an officer was acting in good faith is essential inasmuch as an officer who is not acting in good faith cannot, by definition, be acting within the scope of his duties."

There can be no serious dispute that if Jones possessed a search warrant he knew was invalid because he misled Judge Kruger, he had no lawful authority to violate Mr. Maye's home.

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[38] Mississippi cases acknowledge that officers can outrun the immunity which the law otherwise provides. *See Yarborough v. Harper*, 25 Miss. 112, 113–14 (1852) (finding against deputy in replevin suit, where deputy possessing writ of execution seized animals from the wrong person); *Kirk v. Crumb*, 836 So. 2d 741, 746–47 (Miss. Ct. App. 2004) (denying immunity to deputy in a Mississippi Tort Claims Act case, where deputy forced an arrested casino patron to submit to being photographed by the casino in violation of criminal laws); *see also Gilbert v. Crosby*, 160 Miss. 711, 135 So. 201 (1931).

In such circumstances, Jones not only violated Mr. Maye's constitutional right to be free of unreasonable searches, he also acted *ultra vires* and violated Mississippi's civil and criminal law of trespass. Jones entered Mr. Maye's home with the search warrant Judge Kruger signed, but he did so under mere *colore officii*, bearing the semblance but not the substance of legal sanction.

2. The Confidential Informant Evidence Defeats Probable Cause

The procedure for determining the sufficiency of Officer Jones' search warrant application in light of his misrepresentations is well-established: the false statements must be set aside, and the remaining statements are assessed to determine if they provide probable cause. *See Franks v. Delaware*, 438 U.S. 154, 155–56 (1978); *Busick v. State*, 906 So. 2d 846, 853–54 ¶ 11 (Miss. 2005). After removing the key basis of probable cause — the confidential informant's purported entry into and observation of narcotics within Mr. Maye's home — the remaining evidence was patently inadequate to establish probable cause for the issuance of the warrant. The remainder consists of Jones' learning "from various sources" that narcotics were being stored in and sold from the homes (item 1, *supra*); and his personal surveillance, including the alleged observation of "a large amount of traffic at unusual hours" to and from the homes (item 3, *supra*). Under the totality of circumstances, these factors fall short. *Illinois v. Gates*, 462 U.S. 213, 237–38, (1983); *Lee v. State*, 435 So. 2d 674, 676 (Miss. 1983).

Jones' "various sources" statement provided Judge Kruger with no basis for believing them to be credible or reliable. *State v. Woods*, 866 So. 2d 422, 426–27 ¶¶ 13–16 (Miss. 2003); *Spinelli v. United States*, 393 U.S. 410, 425 (1969) (White, J., concurring); *see also Gates*, 462 U.S. at 230 (finding veracity, reliability, and basis of knowledge to be "highly relevant" in assessing probable cause under totality-of-circumstances test). In fact, there is nothing in Jones' statement to indicate that his "various sources" were even actual witnesses to the activity they allege, instead of mere purveyors of rumor or innuendo. Jones' application provides no

particularity regarding the nature of the alleged "controlled substances" or where they were kept, nor does it provide any basis for assessing the timeliness of his information. Such meager evidence cannot justify a search warrant. *Stringer v. State*, 491 So. 2d 837, 845 (Miss. 1986).

Jones' assertion that he personally surveilled the homes is similarly perfunctory and lacking in necessary detail, and does not establish probable cause. His description of "large amounts of traffic" at unspecified "unusual hours" is not probative of any crime. *Pipkin v. State*, 592 So. 2d 947, 951 (Miss. 1991). And he fails to describe the "unusual hours" he performed the surveillance, the number of persons observed, or how recently he performed his investigation.

When this information is considered in the absence of the confidential informant misrepresentations, it falls far short of establishing probable cause under the Fourth Amendment. Because Jones himself misrepresented his investigation, the warrant was utterly invalid and certain evidence introduced at trial should have been suppressed. *Pipkin*, 492 So. 2d at 591; *Franks*, 438 U.S. at 171–72. This amounts to a second reason to conclude that the evidence is likely to produce a different result, or induce a different verdict at a new trial

C. The State Denied Due Process By Withholding the Informant's Identity

The District Attorney's investigators expressed ignorance of Randy's role in Jones' pre-search investigation, but Mr. Maye's evidence establishes that other agents of the State possessed knowledge of that role or diverted Mr. Maye's investigator from discovering it prior to trial. Mr. Maye was entitled to learn before trial of all exculpatory information, including the identity of witnesses whose testimony might contradict the State's case.[39] MISS. CONST. art. III, § 14; U.S.

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[39] Mr. Maye's trial counsel requested the identity of Jones' confidential informant, but received nothing from the State. She filed a broad discovery request more than a year before trial, R.46–47, and a specific motion to divulge the informant's name. R.69–72. After the District Attorney failed to appear at a hearing noticed for the motion, he wrote trial counsel, promising to provide other discovery, but claiming: "At this point, it is my understanding that no one but Ron Jones knew who the informant was." R.83. The court may have believed this mooted Mr. Maye's motion; there is no record of its disposition.

CONST. amend. XIV; *King v. State*, 656 So. 2d 1168, 1174 (Miss. 1995); *Brady v. Maryland*, 373 U.S. 83, 87 (1963). However well-intentioned, the State's withholding of evidence can violate due process, requiring a new trial. *United States v. Giglio*, 450 U.S. 150, 153–54 (1972).

Randy Gentry's testimony establishes that the City of Prentiss paid him $25 for his work as an informant. T.666:27–667:4; JNOV Exh. 1 at 08:38–09:52. Mr. Maye has never received payment records, and the public records law prohibits him from accessing them. *See* Miss. Code §§ 25-61-12(2)(a), 25-61-3(f)(ii). Moreover, the State never provided Mr. Maye with any records of Jones' pre-search investigation. It is inconceivable that an officer could hire an informant, purchase drugs, and prepare and submit two search warrant applications without creating a record more substantial than a seven-digit number written on the palm of his hand.

On November 2, 2007, the trial court disregarded Mr. Maye's pending motion for supplemental discovery and entered a judgment of conviction. *See* R.1338–72 (motion); R.1373–74 (order of conviction).[40] This denial foreclosed Mr. Maye's ability to establish more fully the extent of the State's failure to disclose evidence. In light of the substantial questions which the confidential informant evidence raised concerning the State's compliance with its discovery obligations, the trial court's denial of further discovery was clearly erroneous.

Finally, Mr. Maye's pretrial investigator informed current counsel that he did not follow up on the telephone number lead because a State employee who initially told him that Gentry was the informant, later told him either that Gentry was not, or that the informant's identity had died with Jones. R.977–78 (affidavit of current counsel); *see also* R.881 (statements regarding discovery of identity of the informant in State's "Response to Emergency Motion for

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[40] The trial court likewise disregarded the defendant's 2006 "Emergency Motion for Supplemental Discovery" which requested this same information. That motion does not appear in the trial record, but the State's response to it does. R.881-83.

Supplemental Discovery"). The State violated Mr. Maye's due process rights by misleading Mr. Maye's investigator, even if it did so in good faith. *Giglio*, 405 U.S. at 153–54.

The newly discovered evidence regarding the informant paints a picture of a State disinterested in determining what truly happened prior to the execution of the Mary Street search warrants. The search warrants' patent defects make clear why the State was reluctant to examine Jones' investigation: because the circumstances suggested that he had obtained the search warrant through fraud. Deliberate ignorance, however, is no excuse for the State's failure to provide Mr. Maye with all available exculpatory and impeachment evidence. Instead, the State has "a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police." *Howell v. State*, 2008 WL 3931398 (Miss. Aug. 28, 2008) (quoting *Kyles v. Whiteley*, 514 U.S. 419, 437 (1995)). The record amply establishes the State's failure to investigate and disclose this exculpatory information to Mr. Maye.

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

The search warrant used to justify the late-night intrusion into Mr. Maye's bedroom was so facially defective that, even disregarding the evidence of Jones' misrepresentations to Judge Kruger, Jones had no basis to rely on it. *White v. State*, 842 So. 2d 565, 571 ¶ 15 (Miss. 2003). The fruits of the search should have been suppressed at trial. *Franks*, 438 U.S. at 155–56.

The search warrant applications should have raised red flags because of their paucity of probable cause and their lack of specificity regarding the home to which each warrant pertained. Jones' justification for his search warrants mirrors a statement the Supreme Court condemned as mere " 'pattern words' without the whole cloth of detail and certainty" in *Pipkin v. State*, 592 So.

2d 947, 950 (Miss. 1991).[41] The highly unusual nature of Jones' dual yet nonspecific search warrant applications should have alerted both Jones and Judge Kruger that his investigation was faulty and inadequate. The search warrant applications present a unique set of features which, collectively, cast substantial doubt that probable cause supported their issuance:

> a) Officer Jones used the same statement to support applications for search warrants for separate apartments in the same physical structure;
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> b) Each application lacked any indication of the apartment to which it pertained; and
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> c) The residents of Mr. Maye's apartment were described as "person(s) unknown" despite the confidential informant's knowledge of Jamie Smith's name.

The search warrants must be assessed under the totality of the circumstances. *Gates*, 462 U.S. at 230. In this case, those circumstances include the suspicious coincidence of both warrants for separate homes being sought under essentially identical allegations of probable cause and with no way for the executing officers to determine, from the warrants or the documents used to obtain them, which warrant pertained to which dwelling at the duplex. These circumstances plainly suggest what we now know to be the case: that the warrants are, in essence, a single warrant for a multi-unit dwelling, defective because of the lack of particularity.[42] Although Jones obtained two physical search warrants and executed both, neither was sufficiently particular standing alone, and their concurrence, rather than solving their individual deficits, would raise suspicions in any reasonable magistrate that Jones sought them *because he was unable to identify the home to which his evidence pertained.* Jones and Judge Kruger failed to discharge their respective Constitutional duties to ascertain probable cause, with

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[41] In *Pipkin*, the underlying facts included a confidential informant's alleged knowledge that drugs would be delivered to the premises and observation of marijuana within the preceding twenty-four hours.

[42] *See, e.g., Maryland v. Garrison,* 480 U.S. 79, 85–86 (1987) (holding search of second apartment unlawful where warrant was issued on belief that dwelling contained only one apartment); *Jones v. State*, 192 S.E.2d 171, 173 (Ga. App. 1972) (holding warrant for first floor of a dwelling at a named street address insufficiently particular, given that facts indicated that it was a multiple dwelling with two front doors).

tragic results. When asked whether he had questioned Jones about his alleged personal surveillance of the home on Mary Street, Judge Kruger acknowledged that he had not, and instead relied on his practice of admonishing rookie police officers.[43] The Constitution requires more of magistrates than a general warning to law enforcement officers who might bring a search warrant to them; it requires nothing less than an examination of the facts and circumstances of each application, and an assessment whether the officer possesses probable cause for that particular search. *Pipkin*, 592 So. 2d at 949. Judge Kruger's testimony established that he failed to conduct this inquiry.

VIII. PROSECUTORIAL MISCONDUCT AT TRIAL DEMANDS REVERSAL

The questions now raised concerning whether Ron Jones acted in his "official capacity" when executing the search warrant are troubling on their face, but they become even more so in light of the State's trial strategy. At every turn, the State sought to remind the jury of the indispensable societal role of law enforcement officers, and it did so in a manner designed to evoke from the jury an emotional reaction based on Jones' status, rather than a deliberative assessment of whether the State had proven that Mr. Maye knew of that status at the moment of the shooting. These repeated efforts to inflame the jury amounted to prosecutorial misconduct, which was exacerbated by the fact that when the State did purport, in its closing argument, to focus on the "knowledge" of the element the capital murder charge, it engaged in serial mischaracterization of the trial testimony on that issue. Prosecutorial misconduct requires reversal if "the cumulative effect of all the [prosecution's] actions" is to show that the "defendant

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[43] T.24:24–25:8 ("Q. Okay. He also indicated in these facts and circumstances, Mr. Kruger, that he personally surveillanced the apartment. Did you all discuss his personal surveillance, when it took place, how long it lasted? A. He said that they had been by there, that's true. I didn't exactly — no, I didn't go into detail about it. *I might add that I talk about search warrants before court sometimes as far as people bringing things to me in the middle of the night and try to get me to sign them. I said, 'This is what I expect and this is what I want. And if you don't have it right, don't bother calling me and coming over here.'* ") (emphasis added).

was not afforded a fundamentally fair trial." *Griffin v. State*, 557 So. 2d 542, 553 (Miss. 1990). "[T]he test to determine if an improper argument by a prosecutor requires reversal is whether the natural and probable effect of the prosecuting attorney's improper argument created unjust prejudice against the accused resulting in a decision influenced by prejudice." *Dunaway v. State*, 551 So. 2d 162, 163 (Miss. 1989) (citation omitted).[44]

A. The State Distracted the Jury with Inflammatory and Irrelevant Remarks

To secure a capital murder conviction, the State was obliged to prove beyond a reasonable doubt that Mr. Maye committed murder "with knowledge that the victim was a peace officer." Miss. Code § 97-3-19(2)(a). The State lacked sufficient evidence to prove this crucial aspect of its case, so it instead distracted the jury with inflammatory and irrelevant remarks. This behavior unfairly deprived Mr. Maye of his right "to be tried in a proceeding which is conducted by the prosecutor with dignity and propriety." *Griffin*, 557 So. 2d at 553.

The State repeatedly called attention to Jones' special status as a police officer, implying to the jury that Mr. Maye should be punished regardless of what he knew when the shooting occurred. The District Attorney stated in his closing argument that the proceedings were really a trial about Officer Jones, who had performed his job out of a sense of duty rather than a desire for pecuniary gain, and who had stood as "a thin blue line between us and the forces of criminality." T.588:25–589:29. The District Attorney also remarked, during cross-examination of Mr. Maye and in the State's closing argument, that other police officers could have gotten

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[44] Trial counsel's failure to object in certain instances to the prosecutor's improper tactics cannot excuse the trial court's abdication of its responsibility to ensure a fair and impartial trial. *See, e.g., Butler v. State*, 608 So. 2d 314, 318 (Miss. 1992); *Whigham v. State*, 46 So. 2d 94, 96-97 (Miss. 1992) (finding "plain error" based on trial court's failure to prevent improper prosecutorial statements in closing argument); *Griffin*, 557 So. 2d at 553 (same). Trial counsel's failure to object to the State's improper tactics and statements also confirms that Mr. Maye suffered from ineffective assistance of counsel at trial.

away with killing Mr. Maye at the scene in retaliation for shooting Officer Jones.[45] These inflammatory comments, essentially an implicit approval of lynching, suggested to the jury that a defendant's mental state is irrelevant to his culpability when a police officer has been killed. The prosecutor's tactics improperly diverted the jury from fairly assessing the lack of evidence to support the charges against Mr. Maye.

B. The State Repeatedy Mischaracterized Evidence in Its Closing Argument

During the closing argument, when the State could no longer ignore the "knowledge" element of the capital murder charge, it proceeded to mislead the jury. "Prosecutors are limited to arguing facts introduced in evidence, deductions and conclusions that may be reasonably drawn therefrom, and application of law to facts." *Holland v. State*, 705 So. 2d 307, 343 ¶ 137 (Miss. 1997) (citing *Ivy v. State*, 589 So. 2d 1263, 1266 (Miss. 1991)).

The State utterly ignored this limitation. In closing arguments the prosecutors unleashed a string of mischaracterizations stunning in quantity and scope. The District Attorney made the unsupported statement that someone turned on a light inside Mr. Maye's home after the police announced their presence. T.579:20–27. Despite physical evidence to the contrary, he also stated that Ron Jones' clothing made him readily recognizable as a police officer. T.580:20–28; 587:10–12. The Assistant District Attorney declared that Mr. Maye knew he was shooting at a police officer, T.558:20–21, and then made a lengthy series of unsupported and innaccurate

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[45] T.516:29–517:8 ("But as a practical matter, if they'd really wanted to do something to you, they could've killed you in that room and no one would've ever known there was anything other than you shot an officer and they returned fire."); T.586:14–22 ("Training and professionalism is being an officer with the Prentiss and Bassfield Police Departments and seeing your commander, your best friend, coworker murdered and shot down and not letting your emotions go and shooting the person that did that. And if they had, no one would've ever known that. It would've just been a police shooting, a return fire, and he'd have been dead.").

statements in support of this claim.[46] The State resorted to this misconduct because it could not point to actual evidence supporting the proposition that Mr. Maye knew he was firing on a police officer. "The purpose of a closing argument is to fairly sum up the evidence." *Rogers v. State*, 796 So. 2d 1022, 1027 ¶ 15 (Miss. 2001). Reversal is appropriate because the State used its closing argument to make up, rather than sum up, the "evidence" on which to base a conviction.

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

In a criminal prosecution, the accused enjoys the right "to have the assistance of counsel for his defense." U.S. CONST. amend. VI. This right to counsel is indispensable to a fair trial, for it is through counsel that the accused exercises any other rights he may possess. *See United States v. Cronic*, 466 U.S. 648, 654 (1984). To prevail on a claim of ineffective assistance of counsel, a defendant must satisfy the two-step framework of *Strickland v. Washington*, which demands a showing that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms, and that this deficiency caused prejudice. *See* 466 U.S. 668, 687–88, 694 (1984); *see also Walker v. State*, 863 So. 2d 1, 12 ¶ 20 (Miss. 2003) (citing *Strickland*). Ms. Cooper has already failed the *Strickland* standard once in this case, with the circuit court concluding that she provided ineffective assistance during the sentencing phase of Mr. Maye's trial. T.593–626. Her performance was equally ineffective during earlier phases of the trial.

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[46] *See* T.559:3–4 (stating that officers yelled "police, search warrant" before kicking in the back door of Mr. Maye's home); T.563:13–14 (stating that Darryl Graves heard announcement of "police" from the other apartment); T.563:16–17 (stating that officers "saw a light come on" inside Mr. Maye's home); T.563:18–20 (stating that officers knocked on the back door of Mr. Maye's home); T.563:20–22 (stating that Darrell Cooley heard the knocks on the back door while standing by the front door); T.563:27–564:1 (stating that officers knocked on the front door of Mr. Maye's apartment); T.564:1–2 (stating that a light came on inside Mr. Maye's home after officers knocked on the front door); T.564:2–3 (stating that officers knocked on the back door of Mr. Maye's home).

A. Trial Counsel's Failure to Investigate Deprived the Defense of Evidence to Corroborate Mr. Maye's Self-Defense Argument

"Because the key to the defense of self-defense is the defendant's state of mind at the time of the incident and, because a defendant's testimony is often viewed with great suspicion, corroboration as to the defendant's state of mind is critical. Common sense and any lawyer who has defended a case of this nature will tell you that this is undeniably true." *Brown*, 464 So. 2d at 518. Reasonable pretrial investigation is a prerequisite to providing effective assistance. *Nealy v. Cabana*, 764 F.2d 1173, 1177 (5th Cir. 1985). Ms. Cooper's slipshold investigation overlooked or ignored vital sources of corroborative evidence, rendering her performance ineffective under *Strickland*'s two-step framework.[47] This failure prejudiced Mr. Maye, because there is a reasonable probability that presentation of additional corroborative evidence would have convinced the jury to acquit. *See Brown*, 464 So.2d at 518; *see also McNeal v. State*, 951 So. 2d 615, 620 ¶ 16 (Miss. Ct. App. 2007).

1. Trial counsel failed to take advantage of the preliminary hearing

At the preliminary hearing, Ms. Cooper failed to call relevant witnesses, including a number of officers present at Mr. Maye's home on the night of the shooting. Mr. Maye's prior attorney had moved for the issuance of subpoenas for all officers present on the night of the shooting. R.563–69. Inexcusably, Ms. Cooper failed to use these subpoenas, and called no

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[47] *See, e.g., Bryant v. Scott*, 28 F.3d 1411, 1418–19 (5th Cir. 1994) (holding counsel's failure to interview eyewitnesses constitutionally deficient); *Payton v. State*, 708 So. 2d 559, 561 ¶ 8 (Miss. 1998) (noting that "pretrial investigation is of utmost importance"); *Triplett v. State*, 666 So. 2d 1356, 1361 (Miss. 1995) (declaring that "a basic defense . . . required complete investigation to ascertain every material fact about this case," as well as "learning the names of, and interviewing every possible eyewitness, and getting statements from each").

witnesses, thus losing a key opportunity to capture fresh testimony that would have aided her preparation and facilitated impeachment of hostile witnesses at trial.[48]

2. Trial counsel ignored available exculpatory evidence

Trial counsel had ample time to pursue potential exculpatory evidence, but did not do so. For example, she apparently neglected to review a key file containing handwritten, signed statements from each of the surviving officers at the scene, as well as from other witnesses. R.571–587.[49] Had she made use of these fruitful statements, trial counsel could have impeached the following witnesses' testimony at trial:

- Officer Stephen Jones' testimony that he saw the "blinds" move and a light on in the Maye home. (*Compare* T.159:3–4, *with* R.574–75 (omitting same)).
- Officer Stephen Jones' testimony that he heard Officer Ron Jones call "police, search warrant." (*Compare* T.162:24–27, *with* R.574–75 (stating "he called out Police Dept.")).
- Officer Stephen Jones' testimony that an announcement was made at the rear of the home before Officer Ron Jones entered through that door. (*Compare* T.161:25–162:4, *with* R.574–75 (omitting same)).

Trial counsel also could have used the statements in the file to call the following witnesses, who would have provided additional corroboration of Mr. Maye's defense:

- Officer Phillip Allday, who could have testified that the Maye home was dark and confirmed that no announcement was made at the rear of the home prior to Officer Ron Jones' entry into the bedroom. R.585–86.
- Officers Mike Brown, Allen Allday, and Chief Earl Bullock, who could have confirmed that from within the Smith home, they did not hear announcements directed toward the Maye home, and did not know that Officer Ron Jones was shot until hearing an announcement on their police radios. R.580–82; 583–84; 587.

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[48] Ms. Cooper also failed to have the preliminary hearing transcribed, and apparently neglected to preserve an audiotape recording of the event.

[49] With the exception of a single reference at trial to Officer Terrence Cooley's statement, *see* T.at 207:6–9, there is no evidence that Ms. Cooper reviewed or utilized the statements.

Trial counsel's failure to emphasize these inconsistencies to the jury, or to even attempt to develop and explore them, prejudiced Mr. Maye by depriving him of evidence in support of his testimony that he neither saw nor heard anything to indicate police presence at his home.

Trial counsel also failed to use other available corroborative evidence. In particular, she did not introduce frontal photographs of Officer Jones' clothing: a uniform consisting almost entirely of dark fabric. Only Officer Jones' shoulder patches remotely signaled his status as a police officer, but they would not have been visible to Mr. Maye. Thus, proper photographs of Jones' clothing could have corroborated Mr. Maye's testimony that he was unable to identify Ron Jones as a police officer at the instant Jones charged into the darkened bedroom. R.649.

3. Trial counsel failed to retain necessary experts

Law enforcement personnel on the premises the night of December 26, 2001 did not conduct a careful examination of the bullet hole in the door trim for trajectory information. R 633–42. Ms. Cooper neglected to secure an expert to conduct a shooting scene reconstruction, which would have corroborated Mr. Maye's explanation that he fired from a prone position while taking cover behind his bed. Without its own forensic pathologist, the defense was in no position to challenge the State's so-called expert, Dr. Hayne, whose testimony the State used to suggest, incorrectly, that Mr. Maye was standing and aiming at the time of the shooting. Testimony of experts to refute the State's theory of how the crime occurred would have been pivotal to Mr. Maye's defense, and trial counsel was ineffective in failing to obtain it.[50]

4. Trial counsel failed to prepare Mr. Maye to testify

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50 *See Jones v. Thigpen*, 788 F.2d 1101, 1103 (5th Cir. 1986) (failure to obtain expert to support defense was professionally unreasonable and prejudicial); *Knott v. Mabry*, 671 F.2d 1208, 1212–13 (8th Cir. 1982) ("It may be vital in affording effective representation to a defendant in a criminal case for counsel to elicit expert testimony rebutting the state's expert testimony"); *Troedel v. Wainwright*, 667 F. Supp. 1456, 1461 (S.D. Fla. 1986) (counsel's failure to consult forensics expert fell outside the scope of reasonably professional assistance).

Ms. Cooper failed to prepare her client to testify and undergo cross-examination. As Mr. Maye described in an affidavit, Ms. Cooper's "preparation" consisted of a perfunctory meeting during a lunch break. R.631. She did not review the questions she would ask him on direct examination, and did not discuss the questions he could expect from the District Attorney. *Id.*

B. Trial Counsel Lacked the Necessary Skill to Provide Effective Assistance

Ms. Cooper's failure to develop corroborative evidence left her with a more difficult case and less room for error at trial. She was not up to the challenge she created for herself and her client. For example, she failed to make *Batson* challenges despite the State's highly suspicious use of strikes that disproportionately challenged racial minorities and women. Strikes based on invidious racial or gender discrimination are prohibited. *See Batson v. Kentucky*, 476 U.S. 79, 100 (1986); *J.E.B. v. Alabama*, 511 U.S. 127, 146 (1994); *see also* MISS. CONST. art. III, §§ 14, 26; *McGee v. State*, 953 So. 2d 241, 246 (Miss. Ct. App. 2005). Ms. Cooper's inexcusable failure to contest such strikes in order to protect Mr. Maye's right to a fair trial was ineffective assistance of counsel.[51] *See Triplett v. State*, 666 So.2d 1356, 1362-63 (Miss. 1995); *Ex parte Yelder*, 575 So.2d 137, 137-39 (Ala. 1991). Ms. Cooper also failed adequately to prepare for *voir dire*, relied on the assistance of an attorney whose own competence was open to question, and improperly ignored her client's attempt to assist in his own defense in connection with the jury selection process. T. 111:16-24; R. 630-31.

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[51] Ms. Cooper should have objected to the prosecutor's use of preemptory challenges to strike African-American and female jurors from the panel. Six of the State's nine peremptory strikes were African-Americans: Hazel Lenoir, Lillie McNair, Yoshekia Rawls, Roberta Jefferson, Betty Carney, and Bernice Harris. None of those women responded to a single question during voir dire, leaving nothing in the record to rebut the inference that the prosecutor struck them because of their race. In addition, the State used eight of its nine peremptory challenges to strike women, only one of whom responded to voir dire questions. Based on the record, then, Mr. Maye likely could have made out a prima facie case of purposeful discrimination on the basis of either race or gender.

Trial counsel's failure to protect Mr. Maye's right to a jury selection process free of racial or gender-related prejudice was mirrored by her failure to prevent the State from influencing the jury using misstatements of law and improper question and argument. For example:

- Trial counsel failed to object when the District Attorney asked Darryl Graves to speculate as to why the occupants on Jamie Smith's side opened the door when police arrived. Graves opined that "they heard police, they saw who they were" when there is no evidence that Graves had personal knowledge of this fact. T.256.
- Trial counsel failed to inquire about Dr. Hayne's background, credentials, and qualifications — all crucial facts of which the jury should have been made aware. Furthermore, trial counsel did not object to Hayne being tendered as an expert witness. T.341–46.
- Trial counsel failed to object when the District Attorney asked leading questions designed to invite unsupported speculation by Officer Darryl Graves concerning the failure to recover the "large quantity of marijuana" referenced in the search warrant procured by Ron Jones. T.471:8-13.

These failures and many others allowed the State to use improper and misleading questioning in order to distract the jury from the substantive weakness of the case against Mr. Maye.

C. Trial Counsel's Closing Argument Lacked Coherent Structure or Content

Ms. Cooper's closing argument reflected an inexcusable lack of preparation and organization. She failed to focus the jury on the undisputed photographic evidence establishing that various window coverings made it impossible for Mr. Maye to see the officers converging on his home. In connection with testimony concerning alleged rear-door announcements, she neglected entirely the key point that even if announcements were made, the fact that neither T.C. nor Darrell Cooley could hear the alleged announcements created reasonable doubt concerning whether they could have been heard and comprehended by Mr. Maye. Despite her prior objections, she did not address Dr. Hayne's improper testimony, a failure the prosecutor ruthlessly exploited in rebuttal. Finally, she ignored other holes in the State's proof, including the failure to introduce a single photo taken from the perspective of someone lying in Mr.

Maye's position at the foot of the bed, and the failure to establish that a person encountering Ron Jones in a darkened room would be able to instantly identify him as a police officer despite the lack of visible insignia on his clothing. These failures allowed the State to successfully substitute prosecutorial bluster for evidence at a critical phase of the trial.

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

State law provides two sentencing options in a capital murder case: life without parole or death. *Flowers v. State*, 842 So. 2d 531, 556–57 ¶ 77 (Miss. 2003). As explained in *Byrom v. State*, 927 So. 2d 709, 724 ¶¶ 45–47 (Miss. 2006), sentencing statutes provide a third option of life with the possibility of parole, Miss. Code § 97-3-21; *id.* § 99-19-101, but parole statutes eliminate that possibility, *id.* § 47-7-3(1)(f). The circuit court sentenced Mr. Maye to life without parole after the District Attorney elected not to pursue the death penalty. The court imposed "the second most severe [sentence] known to the law," *Harmelin v. Michigan*, 501 U.S. 957, 996 (1991), without giving individualized consideration to the circumstances of this case. This sentence violated Mr. Maye's constitutional right against cruel or unusual punishment. MISS. CONST. art. III, § 28; *see also* U.S. CONST. amend VIII.

A mandatory sentence of life without parole is "[c]ruel or unusual" in that it arbitrarily subjects defendants with different degrees of culpability to the same harsh punishment. Even if Mr. Maye's conviction of capital murder is allowed to stand, its circumstances are strikingly different than those presented in other Mississippi cases arising under the same subsection of the capital murder statute. R.931-32. The trial court's failure to assess these differences before imposing its sentence reflects an arbitrary and unconstitutional punishment. This Court should interpret Article 3 § 28 of the Mississippi Constitution to require an individualized sentencing determination prior to a sentence of life without parole. The Mississippi courts already conduct a

similar review in death penalty cases, and Mississippi should exercise the same care before imposing its second harshest punishment.

CONCLUSION

Under any fair analysis, Mr. Maye's conviction should be reversed, and his case remanded with instructions either to dismiss the charges or grant a new trial. If such relief is not granted, then in the alternative Mr. Maye's sentence should be vacated, and the case remanded for resentencing in accordance with the procedures required by the Mississippi Constitution.

DATED: October 28, 2008

Respectfully submitted,

Robert E. Evans, [redacted]
P.O. Box 636
E. Broad Street
Monticello, MS 39654
(601) 587-0615 (telephone)
(601) 587-0623 (facsimile)

Michael S. Labson*
Benjamin J. Vernia*
Abram J. Pafford*
Jessica Gabel*
Anna St. John*
James P. Sullivan
Covington & Burling LLP
1201 Pennsylvania Avenue, NW
Washington, DC 20004
(202) 662-6000 (telephone)
(202) 662-6291 (facsimile)
* -- Admitted *pro hac vice*
Attorneys for Appellant
Cory J. Maye

CERTIFICATE OF SERVICE

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

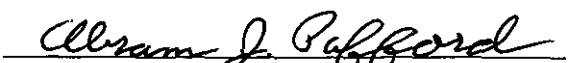
Betty W. Sephton
Clerk of Appellate Courts
P.O. Box 249
Jackson, MS 39205-0249

Hon. Jim Hood
MS Attorney General
ATTN: Criminal Litigation
P.O. Box 220
Jackson, MS 39205-0220

Hon. Prentiss G. Harrell
Circuit Court Judge
P.O. Box 488
Purvis, MS 39475

Haldon J. Kittrell
District Attorney
500 Courthouse Square, Suite 3
Columbia, MS 39429

SO CERTIFIED on this, the 29th of October, 2008.



ABRAM J. PAFFORD
COVINGTON & BURLING LLP
1201 Pennsylvania Avenue, NW
Washington, DC 20004-2401
(202) 662-5339 (telephone)
(202) 778-5339 (facsimile)
apafford@cov.com