IN THE SUPREME COURT OF MISSISSIPPI

No. 2015-M-1138

MARLON LATODD HOWELL, Petitioner

VS.

STATE OF MISSISSIPPI, Respondent

ORAL ARGUMENT REQUESTED

BRIEF IN SUPPORT OF MOTION TO ORDER NEW TRIAL BASED ON NEWLY-DISCOVERED EVIDENCE; ALTERNATIVELY, MOTION FOR LEAVE TO FILE PETITION FOR POST-CONVICTION RELIEF BASED ON NEWLY-DISCOVERED EVIDENCE

William O. Richardson, *pro hac vice*
billy@therichardsonfirm.com
Matthew H. Richardson, *pro hac vice*
matt@therichardsonfirm.com
THE RICHARDSON FIRM, PLLC
4200 Morganton Road, Suite 150
Fayetteville, NC 28314-0060
Post Office Box 87530
Fayetteville, NC 28304-7530
(910) 488-5050 / Telephone
(910) 339-4373 / Facsimile

Jim Waide, MS Bar No. 6857
waide@waidelaw.com
Rachel Pierce Waide, MS Bar No. 100420
rpierce@waidelaw.com
WAIDE & ASSOCIATES, P.A.
332 North Spring Street
Tupelo, MS 38804-3955
Post Office Box 1357
Tupelo, MS 38802-1357
(662) 842-7324 / Telephone
(662) 842-8056 / Facsimile

W. Tucker Carrington, MS Bar No. 102761
wtc4@ms-ip.org
Will McIntosh, MS Bar No. 102835
will@ms-ip.org
MISSISSIPPI INNOCENCE PROJECT
University of Mississippi School of Law
Post Office Box 1848
University, MS 38677-1848
(662) 915-7471 / Telephone
(662) 915-5213 / Facsimile

ATTORNEYS FOR PETITIONER

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STATEMENT REGARDING ORAL ARGUMENT

No case could better warrant use of this Court's time at oral argument than this one. Marlon Howell now faces the death penalty, despite the fact that alibi witnesses have now come forward corroborating the defense he made at trial fourteen (14) years ago – that he was not with the two murderers who killed Hugh David Purnell.

Even before these alibi witnesses appeared, the State's case rested on shaky ground. The New Albany police chief fabricated his claim that Howell had lawyers present when eye-witness Rice identified him as the killer. Eye-witness Rice recanted his testimony and then reverted back to his original identification. The Attorney General of the State of Mississippi engaged in intimidation tactics against both Howell's lead counsel and a key witness, Pannell. Post-conviction hearing Judge Semac Richardson attacked the credibility of defense witness Pannell, but accepted as true the testimony of State's key witness Rice, even though both Rice and Pannell had given inconsistent statements.

Eye-witness Rice told the 911 operator at the time of the murder that there were only two persons present in the murderers' vehicle. This statement discredits the State's claim that Howell was present at the murder scene, and indicates that the actual murderers were the two plea-bargain beneficiaries, Lipsey and Ray.

In the face of the conviction, which is already suspect, two alibi witnesses, with nothing to gain, have now corroborated Howell's trial defense that he was not present at the time of the murder.

The State is on the verge of executing an innocent person.

STATEMENT OF THE ISSUES

1. Whether the State violated Howell's Mississippi Constitution, Section 14 and United States Constitution, Fourteenth Amendment due process rights by failing to disclose alibi evidence favorable to the defense.

2. Whether the due process clause of the Fourteenth Amendment to the United States Constitution requires a new trial when newly-discovered alibi witnesses swear that the accused was not present at the time of the murder, and where the State's case – even before discovery of the alibi witnesses – was suspect for many reasons, including the fact that key witnesses have made inconsistent statements and recantations concerning whether or not Howell was present at the murder scene.

STATEMENT OF THE CASE

This case is before the Court on death-row inmate Marlon Howell's (hereinafter "Howell") request for a new trial, or, alternatively, for an evidentiary hearing regarding whether there should be a new trial. The Motion is based on Howell's discovering new alibi witnesses.[1]

In May 2000, Howell and two co-defendants, Curtis Lipsey and Adam Ray, (hereinafter "Lipsey" and "Ray") were arrested for the capital murder of Hugh David Pernell (hereinafter "Pernell.") Pursuant to a plea bargain reducing his charge to manslaughter, Lipsey was a State's witnesses against Howell. T.T. 704-49.

A Union County jury convicted Howell of capital murder on March 12, 2001. This Court affirmed. *Howell v. State*, 860 So. 2d 704 (Miss. 2003) (*Howell I*). Howell filed a petition for post-conviction relief in 2005, based largely on key State's witnesses having recanted their trial testimony. Most notably, eye-witness, Charles Rice, had given defense counsel a statement retracting his identification of Howell. Indeed, almost all of the State's witnesses have now recanted their trial testimony to some degree, and then changed back to their original versions. *See* Statement of Case in Howell's Brief of Appellant in *Howell III*, and Howell's Petition for Rehearing in Cause No. 2013-CA-01027-S.Ct.

This Court ordered that Howell be granted an evidentiary hearing on certain issues, including the issue of the eye witness, Charles Rice, retracting his identification. *Howell v. State*, 989 So. 2d 372 (Miss. 2008) (*Howell II*). This Court appointed Special Judge Samac Richardson to conduct the

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[1] Citations to Marlon Howell's Motion to Order New Trial Based on Newly-Discovered Evidence; Alternatively, Motion for Leave to File Petition for Post-Conviction Relief Based on Newly-Discovered Evidence are hereinafter referred to as "Howell's Motion."

post-conviction evidentiary hearing.[2] Judge Richardson denied relief. *See* Opinion and Order, dated May 17, 2013, attached as Exhibit "A" to Howell's Motion. This Court affirmed in *Howell v. State*, 163 So. 3d 240 (Miss. 2014), r'hrg denied May 28, 2015 (*Howell III*). This Court, however, did not decide the merits of Howell's claim that newly-discovered evidence established his innocence. According to this Court's opinion in *Howell III*:

> The trial judge did not err in denying Howell's motion to supplement the record with the newly discovered evidence, which was not germane to the issues specified by the *Howell II* Court.

163 So. 3d at 263.

Because this Court has not addressed the merits of Howell's claim that he is entitled to a new trial based upon newly-discovered evidence, Howell brings the present Motion. This Motion is, of course, not barred by the prohibition against successive petitions, since it is based on newly-discovered evidence. MISS. CODE ANN. § 99-39-27(a).

FACTS

To decide whether ". . .newly-discovered evidence . . . will probably produce a different result. . . ,"[3] it is necessary to examine the weight of the evidence existing against Howell. A summary of this evidence follows.

On May 14, 2000, a Blue Mountain resident, Marlon Howell, was with Lee Brandon Shaw,

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[2] The Union County Circuit Judges recused themselves because the case involved the fact that the New Albany Police Chief claimed that Howell had an attorney present at the lineup when Rice identified Howell as the shooter. *See* Statement of the Case in Howell's Brief of Appellant in *Howell III*, Cause No. 2013-CA-01027-S.Ct. Though Judge Richardson found that Howell did not have an attorney, *Howell III* has now found that Howell was not entitled to an attorney at his lineup. *Howell v. State,* 163 So.3d 240, 263 (Miss. 2014). Thus, there is no reason for this case not to be remanded to Circuit Court Judge Howorth, or any other Union County Circuit Court Judge. The grounds for recusal that led to Judge Richardson's special appointment (the fact that New Albany Police Chief David Grisham falsely testified that Howell had an attorney at the lineup) is no longer at issue.

[3] *Meeks v. State*, 781 So. 2d 109, 112 (Miss. 2001) (quoting *Smith v. State*, 492 So. 2d 260, 263 (Miss. 1986).

Curtis Lipsey, and Adam Ray in New Albany and Tupelo, Mississippi. T.T. 630-31, 640.[4] They were driving around drinking and were intoxicated and using marijuana. *See* Affidavit of Curtis Lipsey, attached as Exhibit "B" to Howell's Motion. Lipsey, Ray, and Shaw are close friends. Howell was an outsider. *See* Affidavit of Terkecia Pannell, attached as Exhibit "C" to Howell's Motion.

The central factual dispute in this case is whether or not Howell had already gone home to Blue Mountain by the time the murder happened in New Albany.

Shortly after 5:00 a.m. on May 15, 2000, Pernell was delivering newspapers in New Albany. According to eye witness Charles Rice, an individual riding in an Oldsmobile exited the passenger's side of the car, walked up to Pernell's window, and shot him. T.T. 553-54. The murderer then got back into the car, and the car left the scene. *Id.* at 555.

Rice dialed 911 at 5:15 a.m. to report the shooting. Rice's statement to 911 was that there were only two (2) men in the Oldsmobile, the driver and the shooter, who was on the passenger's side. *See* Transcript of 911 call, attached as Exhibit "D" to Howell's Motion. If Rice's statement to 911 is true, the State's theory that Lipsey, Ray, and Howell were in the car together when the murder occurred cannot be true.[5]

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[4] Citations to the Trial Transcript are reported as follows: T.T. [page number(s)].

[5] At the trial, Brandon Shaw claimed that Lipsey, Ray, and Howell had come to his home following the shooting. In support of his first request for an evidentiary hearing, however, Howell provided the affidavit of Terkecia Pannell, who swore that she was at the Shaw home, and only Lipsey and Ray came there. *See* Affidavit of Terkecia Pannell, attached as Exhibit "C" to Howell's Motion. According to Pannell's affidavit, Ray had a gun, and Lipsey and Ray were acting scared, saying, "We shot a white guy." Pannell heard Lipsey tell Ray to take the gun and hide it because it was evidence. At the evidentiary hearing, Judge Richardson found Pannell's testimony to be hearsay, and not credible. However, Pannell's testimony had been given immediately following Attorney General Jim Hood's intimidating and threatening her. *See* H.T. 683-685. Further, Judge Richardson's disbelieving Pannell because of her inconsistent statements is hard to reconcile with his believing Rice despite Rice's inconsistent statements. It is pertinent to note that Rice is a white male, and Pannell is an African-American female.

The police initially questioned Lipsey and Ray, who incriminated Howell as the shooter. T.T. 488. New Albany Police Chief David Grisham conducted a police lineup on May 16, 2000. The lineup included Howell. Rice identified Howell as the shooter. T.T.103-04.[6] Subsequently, Rice stated in an affidavit given to defense counsel's investigator that ". . . I wish to recant my identification and testimony of Marlon Howell as the shooter/killer." *See* Affidavit of Charles Rice, attached as Exhibit "E" to Howell's Motion.

At the evidentiary hearing ordered in *Howell II*, Rice reverted to his original identification. Special Judge Richardson found that despite Rice's earlier recantation, the original identification that Howell was the shooter was reliable, claiming that Rice "was testifying to the truth of the matter." H.T. 712-13, fn6. At the evidentiary hearing, Judge Richardson cut off Howell's cross-examination of Rice[7] by stating,"He's (Rice) has already admitted that he (Rice) lied. How much credibility do you need to go into?" H.T. 379.[8]

Judge Richardson vehemently attacked the credibility of defense witness, Pannell, who swore that she had been frightened away from the first trial by an unidentified police officer, and swore that Howell had not been with Lipsey and Ray when they returned to the home of her boyfriend, Shaw, after the murder. *See* Affidavit of Terkecia, attached as Exhibit "C" to Howell's Motion.

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[6] It is now established that the police chief's testimony that Howell had a lawyer at the lineup is false. H.T. 29-30, 62-63. *Howell III*, however, held that no lawyer was required at the lineup. Thus, the police chief's lying about a lawyer's being present at the lineup relates only to the reliability of the lineup and the credibility of the police chief.

[7] Besides Rice's repeated change of his stories, his statement to 911, that only two persons were in the car, defense counsel has learned that Rice obviously received less than an Honorable discharge from the military. *See*, Exhibit "I" (Rice's military records received pursuant to Freedom of Information Act.)

[8] The above rendition is an abbreviated statement of the evidence. For a detailed version of the facts indicating the many times State's witnesses have retracted their statements, see the factual statement and the underlying record citations in *Howell III*, Cause No. 2013-CA-1027-SCT.

Howell's only proof at trial that he was not at the scene of the murder came from his father and his sister, who testified that Howell had arrived home in Blue Mountain, early that morning around 3:00 a.m., approximately two (2) hours before the murder. T.T. 922-24. Given the fact that Howell had no independent witnesses that he was not at the scene of the murder, it was not surprising that he was convicted by the jury, based on Rice's positive eye witness identification.

At the time of Howell's post-conviction hearing, Lasonja Gambles, formerly a resident of Blue Mountain, Mississippi, but presently a resident of South Carolina, was reading articles on the *Northeast Mississippi Daily Journal*'s website. While on the newspaper's website, Gambles noted that Howell's case was back in court. Gambles posted on the newspaper's Facebook page that she had evidence indicating Howell's innocence.

Howell's attorneys sent an investigator to Gambles' home in South Carolina. In her affidavit, given to defense counsel's investigator on April 18, 2013, Gambles swore that it was impossible for Howell to have killed Pernell because she had given Howell a ride home from New Albany to his home in Blue Mountain, hours before Pernell was shot. Gambles asserted that she met Howell at the B Quick convenience store in New Albany sometime between 1:30 a.m. and 3:00 a.m. Gambles said that Howell was "very, very upset" when she picked him up because "Kurt [sic] [Lipsey] and Adam [Ray] were acting crazy" and were "going to hurt someone." *See* Affidavit of Lasonja Gambles, attached as Exhibit "F" to Howell's Motion. Gambles stated that she dropped Howell off "way way before 5:00 a.m." when it was still "very very dark." *Id.* When he arrived at his parents' house in Blue Mountain, his father answered the door and thanked Gambles for picking Howell up. Gambles told defense counsel's investigator, unequivocally, that Howell could not have killed Pernell as he was with her and at home. According to Gambles, she did not previously testify or give

a statement to police about giving Howell a ride home because a police officer ordered her not to get involved in the case. *Id.* Gambles' mother, Constance Garner, also gave a recorded statement at the request of Howell's defense counsel. *See* Recorded Statement of Constance Garner, attached as Exhibit "G" to Howell's Motion. According to Garner, Howell called her home phone number around "1 or 2 in the morning." *Id.* Garner answered the call, and Howell asked to speak to Gambles. *Id.* Garner heard Howell tell Gambles that he needed someone to pick him up in New Albany. *Id.* With her parents' permission, Gambles left the house to retrieve Howell and returned sometime between 3:00 a.m. and 4:00 a.m. *Id.* Upon her arrival at her parents' house, Gambles told Garner that she had dropped off Howell at "his mother's and father's house." *See* Affidavit of Lasonja Gambles, attached as Exhibit "F" to Howell's Motion, and Recorded Statement of Constance Garner, attached as Exhibit "G" to Howell's Motion.

ARGUMENT

THE STATE VIOLATED HOWELL'S MISSISSIPPI CONSTITUTION, SECTION 14 AND HIS UNITED STATES CONSTITUTION FOURTEENTH AMENDMENT DUE PROCESS RIGHTS TO A FAIR TRIAL, SINCE IT FAILED TO DISCLOSE THE EXISTENCE OF ALIBI WITNESSES. MISSISSIPPI CONSTITUTION, SECTION 14, AND UNITED STATES CONSTITUTION, AMENDMENT 14 DUE PROCESS REQUIRE A NEW TRIAL, SINCE THE STATE'S CASE WAS SUSPECT EVEN BEFORE THE NEWLY-DISCOVERED EVIDENCE.

In *Brady v. Maryland*, 373 U.S. 83 (1963), the Supreme Court mandated that a prosecutor must disclose material evidence in order to avoid "an unfair trial to the accused." *Brady,* 373 U.S. at 87. A *Brady* violation occurs when a prosecutor fails to disclose favorable evidence to the defendant, regardless of whether the prosecutor made the omission inadvertently or in bad faith. *Id.* Furthermore, a broad scope of knowledge is imputed to the prosecutor, who must disclose any

favorable evidence known to the prosecutor or any other member of the prosecution team. *Youngblood v. West Virginia*, 547 U.S. 867, 869-70 (2006). In *Box v. State*, 437 So. 2d 19, 25 n. 4 (Miss. 1983), this Court described the prosecution team as follows:

> The State, in the present context, is a team consisting of the attorney, *the law enforcement officers of the jurisdiction in which the case is brought*, all other cooperating law enforcement officials – municipal, county, state or federal, the prosecution witnesses, and any other persons cooperating in the investigation and prosecution of the case. What is known or available to anyone or more is deemed known by or available to the State. All are collectively "the State" for present purposes. (Emphasis added).

A prosecutor is, therefore, responsible for discovering and disclosing favorable evidence known to other prosecutors, the police, or prosecution witnesses. *Giglio v. United States*, 405 U.S. 150 (1972); *United States v. Antone*, 603 F.2d 566 (5th Cir. 1979). "[T]he constitutional duty [to disclose] is triggered by the potential impact of favorable but undisclosed evidence," rather than by the request or diligence of the defendant. *Kyles v. Whitley*, 514 U.S. 419, 434 (1995); *see also, Bagley v. United States*, 473 U.S. 667, 682-83 (1985).

A *Brady* violation has three (3) components. First, there must be evidence that is favorable to the defense. *Strickler v. Greene*, 527 U.S. 263, 281-82 (1999). "Favorable evidence includes that which is either directly exculpatory or items which can be used for impeachment purposes." *Manning v. State*, 929 So. 2d 885, 891 (Miss. 2006). Second, the State must have willfully or inadvertently failed to produce the evidence. *Strickler*, 527 U.S. at 282. Third, the suppression must have prejudiced the defendant. *Id.*

In fact, Howell's alibi evidence does exist, and prosecutors had reason to know of her existence the entire time. According to Gambles, she met Howell at the B Quick convenience store

in New Albany sometime between 1:30 a.m. and 3:00 a.m. Gambles said that Howell was "very, very upset" when she picked him up because "Kurt [sic] [Lipsey] and Adam [Ray] were acting crazy" and were "going to hurt someone." *See* Affidavit of Lasonja Gambles, attached as Exhibit "F" to Howell's Motion After she picked Howell up at the B Quick, she drove him back to his parents' house in Blue Mountain. *Id.* Gambles stated that she dropped Howell off "way way before 5:00 a.m." when it was still "very very dark." *Id.* When Howell arrived at his parents' house, his father answered the door and thanked Gambles for picking Howell up. *Id.* Gambles told Howell's counsel unequivocally that ". . . Marlon could not have killed Mr. [Pernell] because he was with me and at home." *Id.*

Gambles' mother, Constance Garner, has also provided exculpatory testimony in Howell's defense. According to Garner, Howell called her home phone number around "1:00 or 2:00 in the morning." *See* Recorded Statement of Constance Garner, attached as Exhibit "G" to Howell's Motion. Garner answered the call, but Howell asked to speak to Gambles. *Id.* Garner heard Howell tell Gambles that he needed someone to pick him up in New Albany. *Id.* With her parents' permission, Gambles left the house to retrieve Howell and returned sometime between 3:00 a.m. and 4:00 a.m. in the morning. *Id.* Upon her arrival at her parents' house, Gambles told Garner that she had dropped off Howell at his mother's and father's house. *Id.*

The second element of a *Brady* violation is the willful or inadvertent failure of the prosecution to disclose evidence favorable to the defendant. *Strickler v. Greene*, 527 U.S. 263 (1999); *Giglio v. United States*, 405 U.S. 150 (1972) (whether the nondisclosure was a result of negligence or design, it is the responsibility of the prosecutor.) There can be no serious debate that Gambles' existence and statement to police are subject to *Brady*. According to Gambles, she did not

previously testify because a police officer "scared me so I didn't get involved." *See* Affidavit of Lasonja Gambles, attached as Exhibit "F" to Howell's Motion.

The State never produced any information about Gambles' existence to defense counsel. Whether the prosecution was affirmatively aware that a law enforcement officer had told Gambles not to get involved is not dispositive; such information is known to the prosecution by virtue of the fact that law enforcement officers are members of the prosecution team under *Box v. State*, 473 So. 2d 19, 25 n. 4 (Miss. 1983). In other words, because Gambles approached law enforcement as Howell's alibi witness, prosecutors were under a duty to disclose her identity and the nature of her statement to Howell's defense counsel.

To find prejudice under *Brady*, it is necessary to find that the jury would have decided differently in the light of the undisclosed evidence. *Kyles v. Whitley*, 514 U.S. 419 (1995). It is sufficient that there be "a reasonable probability of a different result" as to either guilt or penalty. *Id.* Prejudice exists "when the State's evidentiary suppression undermines confidence in the outcome of the trial. *Id.*

Gambles is an impartial witness, having nothing to gain by coming forward. T.T. 334-35, 340-42, 683-87.[9] Gambles' testimony is exculpatory. It proves Howell's alibi, which otherwise was incomplete. Gambles' sworn statement proves that Howell was not with Lipsey and Ray, as they claim, at the time of the crime. It proves that Howell is innocent, and it proves the killers are the plea-bargain beneficiaries, Lipsey and Ray. In the light of this evidence, a jury would not convict

[9] Of course, Gambles may be threatened by the Attorney General, just as was defense counsel Richardson, H.T. 684-85, and defense witness Pannell, T.T. 334-35, 340-42, 683-87. The Attorney General's threats probably influenced both the performance of defense counsel and the testimony of Pannell. *See*, H.T. 334-35, 340-42, 683-85. It is a Fourteenth Amendment violation for a prosecutor to threaten and intimidate witnesses and defense counsel.

Howell of murder, and there would, therefore, be "a reasonable probability of a different result." *Id.*

At trial, any claim of alibi was supported by only Howell's father and sister. Now, the disinterested witness, Gambles, has sworn that a law enforcement officer had frightened her to the extent that she did not want to get involved.[10]

A policeman's turning away an alibi witness with crucial evidence denies a defendant's due process right to produce evidence of his innocence. *Chambers v. Mississippi*, 410 U.S. 284 (1973) is analogous. In *Chambers*, Mississippi's hearsay rule prohibited a defendant from calling a witness who had heard a third party confess to the crime at issue. The United States Supreme Court held that a denial of the right to produce such important evidence is a denial of due process. The United States Supreme Court said:

> The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations. The right . . . to call witnesses in one's own behalf [has] long been recognized as essential to due process.

Chambers, 410 U.S. at 294.

"Few rights are more fundamental than that of an accused to present witnesses in his own defense." *Id.* at 302.

Just as surely as a rule of evidence which keeps the defendant from producing evidence indicating innocence is a denial of due process, a law enforcement officer's keeping a witness from producing important evidence is also a denial of due process.

In any event, executing a person who is innocent is arbitrary governmental action denying

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[10] At trial, New Albany Police Chief Grisham claimed that at the time of his arrest, Howell stated that he was not at the murder scene, but was with "a whore in Corinth." Of course, in light of the now-known fact that Chief Grisham lied about Howell's having a lawyer at the lineup, H.T. 29-30, 62-63, a new jury is unlikely to believe any testimony by Chief Grisham.

substantive due process under the Fourteenth Amendment. Howell is actually innocent.

CONCLUSION

The newly-discovered witness testimony that Howell was elsewhere at the time of the murder establishes his innocence. The only issue is whether a jury would believe the alibi witnesses over the State's recanting and impeached witnesses.

Pursuant to the remand in *Howell II*, Judge Richardson found the State's original testimony – not the recantations – to be believable, and this Court upheld that factual determination in *Howell III*. Nevertheless, a jury, having learned that State's witnesses have recanted their trial testimony as false and given statements indicating Howell's innocence, might find otherwise if coupled with the newly-discovered evidence. *See* Affidavit of Terkecia Pannell, attached as Exhibit "C" to Howell's Motion; Affidavit of Charles Rice, attached as Exhibit "E" to Howell's Motion; Affidavit of Curtis Lipsey, attached as Exhibit "B" to Howell's Motion; and Affidavit of Adam Ray, attached as Exhibit "H" to Howell's Motion.

Although Judge Richardson accepts as true the State's witnesses' original testimony, despite their recantations and inconsistent statements, and despite eye-witness Rice's original statement that there were only two witnesses in the vehicle transporting the murderers, a jury of twelve citizens would probably have a different opinion if they heard from the newly-discovered alibi witnesses. The newly-discovered alibi witnesses have nothing to gain other than scorn, derision, and potential threats by the Attorney General. On the other hand, the State's co-conspirator witness, Lipsey, had his life to gain by falsely claiming that Howell, and not himself and Ray, was the murderer.

It is inappropriate under the unique facts of this case to brush aside Howell's claim of innocence on the grounds that Judge Richardson believes the most-recent version of the State's

witnesses, and disbelieves recent statements of defense witnesses. This credibility issue should be sent to a jury. "It is assumed that twelve men know more of the common affairs of life than does one man , that they can draw wiser and safer conclusions from admitted facts thus occurring than can a single judge." *Sioux City & P.R. Co. v. Stout*, 84 U.S. 657, 664 (1873).

"Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge. . . ." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). A new trial before a jury, rather than a remand for fact finding before a judge, is the procedure more likely to produce the truth.[11]

Of course, Howell does not ask for an acquittal from this Court. He asks only that a jury hear all of the relevant evidence, including the fact that key witnesses for the State have recanted their testimony, only then to retract their recantation, and including the fact that impartial alibi witnesses now swear that Howell is innocent. Granting a new trial in this case is very little inconvenience to the State, compared to the very life of Howell. Expense to the State for a new trial is minimal, since all of Howell's attorneys believing that he is innocent, are representing him *pro bono*. A new trial will reflect this Court's "awareness of the uniqueness and finality of the death penalty." *Williams v. State*, 445 So. 2d 798, 810 (Miss. 1984).

This Court "applies heightened scrutiny when reviewing capital murder convictions where death penalty has been imposed." *Dickerson v. State*, ___ So. 3d ___, 2015 WL 3814618 *1. In this case, where key State's witnesses have all recanted and where new impartial witnesses claim Howell's innocence, this Court should apply that heightened scrutiny, which it uses in direct appeals,

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[11] This Court can either remand for an evidentiary hearing or order a new trial. See, MISS. CODE ANN. § 99-39-13 through 99-39-23.

and give Howell a chance to be tried by jurors who have heard all of the relevant evidence. The due process right to fundamental fairness before taking a person's life demands no less.

RESPECTFULLY SUBMITTED, this the 28th day of July, 2015.

MARLON LATODD HOWELL, Petitioner

By: _____

Jim Waide, MS Bar No. 6857
waide@waidelaw.com
Rachel Pierce Waide, MS Bar No. 100420
rpierce@waidelaw.com
WAIDE & ASSOCIATES, P.A.
332 North Spring Street
Tupelo, MS 38804-3955
Post Office Box 1357
Tupelo, MS 38802-1357
(662) 842-7324 / Telephone
(662) 842-8056 / Facsimile
William O. Richardson, *pro hac vice*
billy@therichardsonfirm.com
Matthew H. Richardson, *pro hac vice*
matt@therichardsonfirm.com
THE RICHARDSON FIRM, PLLC
4200 Morganton Road, Suite 150
Fayetteville, NC 28314-0060
Post Office Box 87530
Fayetteville, NC 28304-7530
(910) 488-5050 / Telephone
(910) 339-4373 / Facsimile
W. Tucker Carrington, MS Bar No. 102761
wtc4@ms-ip.org
Will McIntosh, MS Bar No. 102835
will@ms-ip.org
MISSISSIPPI INNOCENCE PROJECT
University of Mississippi School of Law
Post Office Box 1848
University, MS 38677-1848
(662) 915-7471 / Telephone
(662) 915-5213 / Facsimile

ATTORNEYS FOR PETITIONER

CERTIFICATE OF SERVICE

This will certify that undersigned counsel for Petitioner Marlon Latodd Howell has this day filed the above and foregoing with the Clerk of the Court, utilizing this Court's electronic case data filing system (CM/ECF), which sent notification of such filing to the following:

James M. Hood, III, Attorney General
Office of the Mississippi Attorney General
Post Office Box 220
Jackson, MS 39205-0220
jhood@ago.state.ms.us

Jason Lewis Davis, Esquire
Office of the Mississippi Attorney General
Civil Litigation Division
Post Office Box 220
Jackson, MS 39205-0220
jdavi@ago.state.ms.us
jmcca@ago.state.ms.us
jasonlewisdavis@comcast.net

John Robertson Henry, Jr., Esquire
Office of the Mississippi Attorney General
Civil Litigation Division
Post Office Box 220
Jackson, MS 39205-0220
jhenr@ago.state.ms.us
ssimo@ago.state.ms.us
kgrav@ago.state.ms.us

SO CERTIFIED, this the 28th day of July, 2015.

Jim Waide