PETITION APPENDIX
VOLUME II
PART II

TABLE OF APPENDICES

VOLUME I

VOLUME II

APPENDIX M

IN THE NINTH JUDICIAL CIRCUIT COURT OF ALABAMA
CHEROKEE COUNTY CIRCUIT COURT

KEITH GAVIN,	*	
	*	
Petitioner,	*	
	*	
v.	*	CC-98-61.60
	*	CC-98-62.60
STATE OF ALABAMA,	*	
	*	
Respondent.	*	

PETITIONER KEITH GAVIN'S MOTION FOR LEAVE TO AMEND HIS FIRST AMENDED RULE 32 PETITION AND TO FILE A SECOND AMENDED PETITION

Petitioner Keith Gavin respectfully submits this motion for leave to amend his first amended Rule 32 Petition, filed August 18, 2006, in order to conform to the evidence presented at the hearing in front of this Court on February 8, 2010, and to file a Second Amended Petition. Mr. Gavin's proposed Second Amended Petition is attached hereto as Exhibit A.[1]

ARGUMENT

Amendment to a Rule 32 petition "may be permitted at any stage of the proceedings prior to the entry of judgment." Ala. R. Crim. P. 32.7(b). "Leave to amend shall be freely granted." Ala. R. Crim. P. 32.7(d). In the absence of actual prejudice to the State or undue delay, leave must be granted. *See Ex parte Woods*, 957 So.2d 533, 536-37 (Ala. 2006); *Ex parte Jenkins*, 972 So.2d 159, 164 (Ala. 2005); *Ex parte Rhone*, 900 So.2d 455, 458 (Ala. 2004).

[1] The first Rule 32 petition in this case was filed with this Court on May 26, 2005. On June 20, 2005 the Court returned the petition for failure to follow the form prescribed by Alabama Rule of Civil Procedure 32.6(a). On July 19, 2005, Petitioner re-filed the Petition in accordance with the Court's order. On August 18, 2006 Petitioner filed a first amended Rule 32 petition. Petition now seeks leave to amend his first amended petition and to submit a second amended Rule 32 petition.

Amendment will not cause actual prejudice or undue delay in this case because the additional grounds to support Petitioner's ineffective assistance of counsel claim that Petitioner seeks to add to his petition have been apparent – and well known to the State – since no later than October 9, 2007, when Petitioner filed his Brief and Written Evidentiary Submissions in Support of Amended Petition for Relief from Judgment (hereafter "Brief") - which described in detail, with evidentiary support, each of these additional grounds. In addition, each of these additional grounds to support Petitioner's ineffective assistance of counsel claim was presented at the February 2010 hearing on Petitioner's Amended Petition. .

The proposed amendments are as follows:

1. Trial counsel could have retained and presented evidence from a police investigative practices expert to inform the jury of the irregularities in the state's investigation. Petitioner's first amended petition already alleges that trial counsel was deficient for failing to investigate and bring to light at trial the irregularities in the State's investigation of the crime. Amd. Petition at p. 12-21. This amendment simply makes clear that trial counsel's failure to present expert testimony on this subject constitutes ineffective assistance of counsel.

2. Trial counsel was deficient for misleading the court regarding the status of a mitigation investigation and for failing to request a continuance on the ground that counsel had not yet prepared a mitigation case. Petitioner's first amended petition already alleges that trial counsel refused to request a continuance after the Alabama Prison Project informed counsel that a continuance was necessary to conduct an adequate mitigation investigation. Amd. Petition at p. 33. This amendment makes clear that trial counsel's failure to request a continuance on the ground that he had not adequately prepared a mitigation case constitutes ineffective assistance of counsel.

3. Trial counsel was deficient for failing to present testimony from a mitigation expert during the penalty phase of Mr. Gavin's original trial. Petitioner's First Amended Petition includes an allegation that trial counsel was ineffective during the penalty phase of trial for failing to conduct an adequate mitigation investigation and for failing to present mitigation evidence in the sentencing phase of the trial. Amd. Petition at p. 28-38. The First Amended Petition also describes the evidence that such a mitigation expert could have and should have presented during the penalty phase of Mr. Gavin's trial. *See id.* at pp. 33-37. This amendment simply clarifies that trial counsel's failure to supervise adequately a mitigation expert and ensure that an adequate mitigation investigation had been conducted, and failure to present testimony from a mitigation expert in the penalty phase of the trial constitutes ineffective assistance of counsel.

4. Trial counsel was deficient for failing to retain an expert to review Mr. Gavin's prison records and for failing to call an expert to testify regarding the effect of institutionalization on Mr. Gavin's post-release behavior, and potential for positive future adjustment. Petitioner's first amended petition already includes an allegation that counsel was deficient for failing to make assessments and prepare testimony on the effect of Mr. Gavin's incarceration on his subsequent behavior, and for failing to present evidence that Mr. Gavin adjusted well to institutionalized life. Amd. Petition at p. 28-38. This amendment simply makes clear that trial counsel's failure to retain and call an expert on such topics in the sentencing phase of the trial constitutes ineffective assistance of counsel.

5. Trial counsel was ineffective in counseling Mr. Gavin not to testify in his own defense. This allegation was included in petition's brief in support of the first amended peti[illegible]

Brief. at p. 39-50. This amendment simply seeks to include this allegation in the operative petition.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that the Court grant his motion for leave to amend his Rule 32 petition.

Respectfully submitted,

By: _____

Stephen C. Jackson
MAYNARD, COOPER & GALE, P.C.
1901 Sixth Avenue North, Suite 2400
Birmingham, Alabama 35203
(205) 254-1037

Prentice H. Marshall, Jr.
Melanie E. Walker
Caroline L. Schiff
SIDLEY AUSTIN LLP
One South Dearborn Street
Chicago, Illinois 60603
(312) 853-7000

Dated: ~~March~~ Apr. 2, 2010

CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the above and foregoing on counsel of record in the above styled cause by ~~facsimile and~~ first class mail, this the 2 day of ~~March~~ April, 2010:

Pamela L. Casey
Office of the Attorney General
Capital Litigation Division
500 Dexter Avenue
Montgomery, Alabama 36130

Stephen C. Jackson

FILED
APR - 2 2010
CIRCUIT CLERK, CHEROKEE COUNTY, AL

IN THE CIRCUIT COURT OF CHEROKEE COUNTY, ALABAMA

KEITH GAVIN,	*	
	*	
Petitioner,	*	
	*	
v.	*	CC-98-61.60
	*	CC-98-62.60
STATE OF ALABAMA,	*	
	*	
Respondent.	*	

SECOND AMENDED PETITION FOR RELIEF FROM JUDGMENT PURSUANT TO RULE 32 OF THE ALABAMA RULES OF CRIMINAL PROCEDURE

Petitioner KEITH GAVIN, now incarcerated on death row at Holman State Prison in Atmore, Alabama, hereby submits this second amended petition to this Court pursuant to Rule 32 of the Alabama Rules of Criminal Procedure, for relief from his unconstitutionally obtained conviction and death sentence. Mr. Gavin seeks a ruling from this Court which would invalidate his conviction and death sentence. Mr. Gavin submits the following in support of his petition.[2]

MR. GAVIN WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL

1. The U.S. Supreme Court has interpreted the Sixth Amendment of the United States Constitution to stand for the proposition that "the right to counsel is the right to the effective assistance of counsel." *McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970). Counsel is adjudged "ineffective" where his performance was deficient (that is, fell below an objective standard of reasonableness) and those deficiencies in his performance in all probability

[2] Mr. Gavin hereby amends Addendum To Question 12.A. of his Petition filed July 19, 2005. Mr. Gavin does not amend any other sections of the July 19, 2005 Petition, which he hereby incorporates by reference.

prejudiced the outcome of the trial, making its result unreliable. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *see also Ex parte Baldwin*, 456 So.2d 129, 134 (Ala. 1984).

2. Effective representation of counsel consistent with the Sixth Amendment involves the independent duty to investigate the facts surrounding the case and to prepare for trial. *State v. Terry*, 601 So.2d 161 (Ala. Cr. App. 1991); *Dill v. State*, 484 So.2d 491, 497 (Ala. Cr. App. 1985). Counsel has an obligation to conduct a substantial investigation into each of the plausible lines of defense. *Ex Parte Womack*, 541 So.2d 47 (Ala. 1988). The adequacy of counsel's investigation turns on the complexity of the case and trial strategy. *Code v. Montgomery*, 799 F.2d 1481 (11th Cir. 1986). Failure to investigate the facts surrounding the case and failure to put on witnesses cannot be categorized as trial strategy. *Horton v. Zant*, 949 F.2d 1449 (11th Cir. 1991). Mr. Gavin's trial counsel's performance fell woefully short of the constitutional requirement in numerous respects, and unquestionably prejudiced Mr. Gavin.

I. Mr. Gavin Seeks To Support The Following Claims Both By Evidence Sought Or Obtained From The State Of Alabama And By Evidence Sought Or Obtained By Other Sources.

A. A. Trial Counsel's Investigation and Impeachment of the State's Key Witness, Dwayne Meeks, Was Ineffective.

Related allegations as they appear in the presently pending Petition:

> Trial counsel failed to adequately investigate the background, criminal history, and other impeachment evidence of the State's key witness, Dewayne Meeks. (Pet. at 10.)
>
> The State's central witness was Mr. Gavin's cousin, Dewayne Meeks. Trial counsel had an arsenal of information that should have been used to impeach Mr. Meeks' credibility. Nevertheless, counsel failed to conduct a rigorous or impeaching cross-examination. Since the crux of the defense case was that Mr. Meeks was the actual murderer, counsel's failure in this regard severely prejudiced Mr. Gavin's defense. (*Id.* at 13.)
>
> Trial counsel was ineffective in failing to adequately cross-examine DeWayne Meeks about the lack of opportunity Mr. Gavin would have had

> to steal Meeks' State-issued gun from Meeks' home, which was a critical component of the State's case. (*Id.* at 14.)
>
> Trial counsel was ineffective in failing to formulate a coherent theory of defense. Counsel suggested to the jury that someone else, possibly DeWayne Meeks, could have killed Mr. Clayton. Mr. Meeks was the only other person who could possibly have killed Mr. Clayton. Counsel's defense strategy could not make sense in the absence of rigorous, accusatory, impeaching cross-examination of Mr. Meeks. Counsel failed to conduct such rigorous cross-examination. (*Id.* at 15.)

Amended allegations:

1. Mr. Gavin's trial counsel was patently ineffective in failing adequately to investigate and impeach the State's key witness, Dwayne Meeks. There is no doubt that Dwayne Meeks' testimony was essential to the State's theory of the case against Mr. Gavin and his eventual conviction. The State's own file indicates that it had serious reservations about Mr. Meeks's credibility. *See* ¶ 5a, *infra*. Had the jury disbelieved Mr. Meeks, Mr. Gavin likely would have been acquitted.

2. Mr. Meeks is Mr. Gavin's first cousin, and transported Mr. Gavin from Chicago to Alabama in his Chevrolet Blazer twice in early 1998 (January 16-19 and March 5-6). Mr. Meeks (unlike Mr. Gavin) had numerous connections in Alabama, having spent much of his youth in Fort Payne and attended high school there. Mr. Meeks admits he was present at the scene of the murder, and his gun was used as the murder weapon. Mr. Meeks, in fact, was initially charged along with Mr. Gavin with the murder of William Clinton Clayton. Moreover, Mr. Meeks' admitted close proximity to William Clinton Clayton at the time of his killing makes if entirely plausible that Mr. Meeks, not Mr. Gavin, perpetrated the crime. Additionally, there were several glaring inconsistencies in Mr. Meeks' version of events and a number of unexplained details surrounding Mr. Meeks' visits to Alabama. Mr. Gavin's trial counsel, however, engaged in a rambling and incoherent cross-examination of Mr. Meeks that reveals a

startling lack of focus and preparation. The representation of Mr. Gavin with regard to his investigation and impeachment of Mr. Meeks failed both prongs of the *Strickland* test. Mr. Gavin should accordingly be granted a new trial.

3. Trial counsel's impeachment and investigation of Mr. Meeks was objectively deficient. While this Court's scrutiny of the effectiveness of Mr. Gavin's counsel must be "highly deferential," *Strickland*, 466 U.S. at 689, trial counsel has "a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary," *id.* at 691. Given Mr. Meeks' central role in the events on and immediately leading up to the evening of March 6, 1998, any reasonably competent counsel would understand that his ability to use the tools of investigation and impeachment to implicate Mr. Meeks would be essential to an effective defense of Mr. Gavin. However, Mr. Gavin's counsel failed completely in this endeavor.

4a. Mr. Gavin's counsel failed to conduct even a minimal investigation that would have enabled him to effectively cross-examine Mr. Meeks and/or impeach many of Mr. Meeks' Statements through other witnesses or documents. One area in which trial counsel's lack of a proper investigation was particularly glaring surrounds the murder weapon. As the Court will recall, the supposed murder weapon, a .40-caliber Glock, was not found in Mr. Gavin's possession at the time he was apprehended. At trial, Mr. Meeks testified under direct examination by the prosecution that the .40-caliber Glock used to shoot Mr. Clayton was not his personal weapon – rather, it had been issued to him for use in the course and in the scope of his employment as a work release officer for the Illinois Department of Corrections ("IDOC"):

Q. All right. Did you have any occasion to go to your house to look for any items?
A. Oh, okay, yeah. because at the time what happened was when I told them what happened and I said the gun he used was probably mine.
Q. What made you think the gun was probably yours?

A. Because he didn't have a gun.
Q. All right. Do you remember putting that gun in your truck that day?
A. No, I hadn't seen it in a couple of weeks.
Q. Let me ask you this. How long had you had that weapon?
A. It was brand new. I'd never shot it.
Q. And where did you get it?
A. Illinois Department of Corrections.
Q. So it was your --
A. Work.
Q. -- official weapon for your job?
A. Uh-huh.

(Tr. at 679, excerpts attached hereto as Ex. A.)

b. However, this testimony was false. It is contradicted by numerous prior statements and official documents, all of which were available to Mr. Gavin's counsel at the time of trial. These include:

- The incident report taken by the Will County, Illinois police officer when Mr. Meeks reported his gun stolen (introduced by the prosecution into evidence as State's Exhibit 6). (Attached hereto as Ex. B.) This refers to the Glock as Meeks' gun, and makes no mention of it being State-issued.

- The statement by Fort Payne Officer Tony Burch dated March 15, 1998 memorializing his conversation with Mr. Meeks of March 7, 1998. (Attached hereto as Ex. C.) Mr. Burch wrote that "Dewayne told me that he believed that Keith had used his .40 caliber Glock, because it was missing and he had access to it." (*Id.* at 4.)

- The written Statement of Mr. Meeks after his interview by investigators Danny Smith and Larry Wilson and Officer Burch on March 9, 1998. (Attached hereto as Ex. D.) "Dwayne said the gun that Keith had was his gun. He said he had come back and reported it stolen."

- The taped interview of Mr. Meeks by Mr. Smith and Mr. Wilson on April 6, 1998. (Attached hereto as Ex. E.) Mr. Meeks related telling his wife, Sharon: "I think that gun, I don't know where he got that gun at, it may be mine." (*Id.* at 3.)

- Mr. Meeks' employer, the Illinois Department of Corrections, investigated Mr. Meeks after the incident in Alabama, and while he was disciplined for several violations of department policy, the IDOC file never mentions that the gun was State property or issued to Mr. Meeks in the course of his employment.

- The IDOC file includes another statement, this one by Mr. Meeks' good friend Tom Arambasich, that refers to the murder weapon as "Meeks' gun." (*See* Arambasich Statement, attached hereto as Ex. F.)

- Furthermore, Mr. Meeks' personnel file with IDOC actually indicates that Mr. Meeks was not in a position to carry a State-issued firearm. It includes an interview with Donald W. Parenti, a Public Service Administrator with IDOC who appears to have been Mr. Meeks' supervisor. (Attached hereto as Ex. G.) Parenti stated that Mr. Meeks contacted him on March 7, 1998 regarding the March 6 incident. According to the report summarizing the investigation (attached hereto as Ex. H), "Parenti advised [the IDOC investigator] that the weapon used would not have been a Department owned weapon and that Meeks was not on the transport team." Parenti States that "only the transport team would need a valid FOID card for employment." (A FOID, or Firearm Owner's Identification card, is required of all who own or carry a gun in the State of Illinois.) (*See* Ex. G.)

- Most glaringly, the IDOC file is utterly silent as to whether Mr. Meeks ever claimed to IDOC – his employer and the supposed issuing party of the Glock – that an IDOC-issued gun had been used in the commission of a felony.

- Finally, when issued a subpoena for all documents or communications related to: (1) "the issuance of a weapon to Dwayne Meeks, in the course of his employment with you or otherwise . . . (2) whether Dwayne Meeks was required, directed or encouraged to obtain a Firearm's Owner Identification ("FOID") card in the course of his employment with you or otherwise . . . and (3) a .40 caliber Glock weapon with serial number CCN449US, including, but not limited to, the ownership or registration of that weapon by you or Dwayne Meeks," IDOC responded that no such documents could be found. (IDOC Response to Gavin subpoena, attached hereto as Ex. I.)

c. All of the IDOC documents described above were readily available through a subpoena of Mr. Meeks' personnel files and IDOC department policies. This should have been done by any competent attorney as part of a routine investigation of the most central witness to his client's defense and the weapon, belonging to that witness, that his client allegedly used to murder someone. Counsel's cross-examination of Mr. Meeks, however, consisted of the following:

Q. And you told us that you -- this is a brand new gun?
A. Uh-huh.
Q. Never been fired?
A. Not by me.

Q. How long had you been -- how long had it been since you had been issued that gun?
A. I don't remember. It was couple of months.
Q. You had it a couple of months?
A. Probably.
Q. You'd never fired it?
A. Never shot it.
Q. Where did you keep it?
A. In my drawer, top drawer, in the house. I took it to work sometime, but not all the time.
Q. Did you keep it locked?
A. No.
Q. How old is your son?
A. Three.
Q. He's walking, talking?
A. Uh-huh.
Q. Did he ever see your gun?
A. Oh, yeah.
Q. Does he know where you kept it?
A. No. I'm a bad father now, huh?
Q. Do you wear your gun in the course of the performance of your official duties?
A. Sometimes.
Q. How often?
A. Not very. We take prisoners back from the work release if they violate or whatever.

(Tr. at 720-21.)

d. Thus, rather than conducting a thorough investigation and actually finding evidence that could be used to impeach Mr. Meeks on this most essential of evidentiary matters – the murder weapon – Mr. Gavin's counsel merely repeated a portion of the prosecutor's direct examination and challenged Mr. Meeks' parenting skills. The State, in contrast, used this evidently false information regarding issuance and ownership of the gun to its own benefit, addressing it multiple times in its closing Statement. *See* Tr. at 1104 ("This is the same Glock that he (Meeks) testified he had just been assigned through his job as a corrections officer just a few months before. Same Glock he testified had never been fired until that night."); *id.* at 1110 (using Mr. Meeks' testimony that the gun was "brand new" to explain the lack of fingerprints on the gun). The response of Mr. Gavin's counsel could hardly be considered effective assistance.

e. In addition to the failure properly to investigate the murder weapon, there were a number of other areas where trial counsel's investigation of Mr. Meeks was either missing or non-existent. Interviews both in the prosecutor's files and counsel's investigation indicate that many of Mr. Meeks' family members were fearful of him, or suspected him of dealing in drugs or guns. Levaughn Carter, the mother of Mr. Meeks' daughter who lives in Fort Payne, described how Mr. Meeks asked her to send him a gun through the mail. However, as noted *infra*, at 31-34, Mr. Gavin's trial counsel failed to conduct, over the strenuous objections of the mitigation expert he had hired, any investigations of the family of Mr. Gavin and Mr. Meeks in Chicago. (*See* Oct. 19, 1999 letter from Lucia H. Penland to H. Bayne Smith, attached hereto as Ex. J.) The information that those family members could have provided about Mr. Meeks, which in fact they have provided other parties, would have been persuasive at not only at the sentencing phase of Mr. Gavin's trial, but also at the guilt phase.

5a. In addition to conducting a wholly inadequate investigation of Mr. Meeks, Mr. Gavin's trial counsel also failed to impeach Mr. Meeks on countless inaccuracies and inconsistencies in his testimony. Simply put, the record indicates that Mr. Meeks had serious credibility problems that even a marginally competent attorney could and should have exposed during cross-examination. Even the prosecutor's *own files* reveal doubts regarding Mr. Meeks' character and authenticity. See Prosecutor Notes, attached hereto as Ex. K (noting that Mr. Meeks' "[t]ime frames don't make much sense," that it "doesn't make sense that he would just drive around 'looking for this girl,'" and seeking an "explanation of how Gavin got his gun"). The list of disparities between Mr. Meeks' trial testimony and prior statements/documents includes:

- The aforementioned classification of the murder weapon as State-issued. Given the weight of the evidence cited above, this statement goes beyond a mere inconsistency to be considered clearly false testimony.

- While it had been proven by the time of trial that the murder weapon was Mr. Meeks' gun, and Mr. Meeks testified as such, in earlier statements Mr. Meeks stated that he did not know who might have taken his gun. (*See* Ex. B.) Mr. Gavin's attorney did in fact question Mr. Meeks about this at trial (tr. at. 722-24), but appeared to accept Mr. Meeks' explanations regarding "procedure" and did not raise the false Statement given to police in Illinois in his closing statement. This falsehood was particularly notable given the prosecutor's emphasis in his closing statement that the "first people he (Meeks) called when he got to Illinois was law enforcement." (Tr. at 1097.)

- At trial, Mr. Meeks stated that Mr. Gavin resided at "[h]is mother's house" in Chicago between the time he was released from prison and March 6, when they traveled to Alabama together. However, Mr. Meeks had earlier told investigators that "Keith Gavin was his cousin, and he had been letting him stay with them (he and his wife) since he got our <sic> of Prison to try and help him." (Ex. E.) Officer Burch's Statement further reports Mr. Meeks as saying that Keith "had been living with him for a few weeks," and that Dwayne "was the only one that would take Keith because he just got out of prison after serving 17 years for murder." (Ex. C, at 2.) Trial counsel failed to pursue this inconsistency, which could have shown that Mr. Meeks originally fabricated a story that Mr. Gavin was living with him in order to explain how Mr. Gavin allegedly gained access to the gun.

- Mr. Meeks testified at trial that at the scene of the crime, he saw Mr. Gavin open the door of the white Corporate Express van, and immediately fire at least two shots. (Tr. at 671.) However, Officer Burch States that Mr. Meeks told him he witnessed an argument between Mr. Gavin and Mr. Clayton, then saw Keith grab at Mr. Clayton's arm and Mr. Clayton pull away, then saw Mr. Gavin brandish a pistol and shoot the driver once. (Ex. C, at 3.)

- At trial, when asked the identity of the woman Mr. Meeks had taken Keith all the way from Illinois down to Chattanooga to meet, Mr. Meeks replied "I don't know her name." (Tr. at 710.) However, in his taped interview with Messrs. D. Smith and Wilson on April 6, 1998, when asked if he had found out the name of the girl, Mr. Meeks responded: "Cassandra is all I know. And I found that out about a week or two ago." (Ex. E, at 6.)

- Trial counsel also failed adequately to investigate and cross-examine Mr. Meeks regarding the woman Mr. Gavin was purportedly going to meet in Alabama. Trial counsel never tried to find the alleged woman, and therefore could not point out at trial that no such woman could be found. Trial counsel never made clear to the jury that Mr. Gavin – who had never been out of Illinois in his life prior to the January trip to Alabama with Mr. Meeks – only could have met this alleged

woman through Mr. Meeks. Accordingly, Mr. Meeks should have known her name. Trial counsel further failed to point out on cross-examination that Mr. Gavin, who was unfamiliar with the Fort Payne/Centre area, could not have given Mr. Meeks directions.

- On direct examination by the State, Mr. Meeks Stated that he never had a conversation with Mr. Gavin about his murder conviction, because "everybody in the family" knew about it. (Tr. at 649.) However, when Mr. Meeks applied for a position with IDOC in September 1992, the application asked: "Do you have any known relatives who are presently incarcerated within the Illinois Department of Corrections . . . ?" Mr. Meeks checked the box marked "No." (IDOC Application, attached hereto as Ex. L, at 2.)

b. When given the opportunity to discredit Mr. Meeks with this mountain of inconsistencies, Mr. Gavin's trial counsel failed. In doing so, he failed Mr. Gavin as well. Moreover, the inadequate investigation and impeachment of Mr. Meeks cannot be categorized as part of a trial strategy deserving of deference in these post-conviction proceedings. While it is true that "[t]here are countless ways to provide effective assistance in any given case," *Strickland*, 466 U.S. at 689, in this case, *any* effective strategy trial counsel could pursue had to include impeaching the credibility of Mr. Meeks, the State's key witness. *See Code v. Montgomery*, 799 F.2d 1481, 1483 (11th Cir. 1986) (finding trial counsel's assistance ineffective because there was "only one strategy," which trial counsel did not pursue); *Fortenberry v. Haley*, 297 F.3d 1213, 1226 (11th Cir. 2002) ("[I]n general, defense counsel renders ineffective assistance when it fails to investigate adequately the sole strategy for a defense or to prepare evidence to support that defense."). The performance of Mr. Gavin's counsel did not "fall[] within the wide range of reasonable professional assistance," nor could it be considered "sound trial strategy." *Ex parte Lawley*, 512 So.2d 1370, 1372 (Ala. 1987) (*quoting Strickland*, 466 U.S. at 689). Rather, the deficiencies in both investigating and impeaching the State's key witness, Dwayne Meeks, reveal a performance far below any objectively reasonable standard.

6a. The failures in trial counsel's impeachment and investigation of Mr. Meeks are inexplicable, and prejudiced Mr. Gavin. Exacerbating the above deficiencies, and causing them to rise to the level of ineffective assistance of counsel, is how crucial a proper investigation and impeachment of Mr. Meeks was to Mr. Gavin's defense. Under *Strickland,* it is not enough for trial counsel's performance to merely be deficient; rather, the petitioner "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *A reasonable probability is a probability sufficient to undermine confidence in the outcome.*" 466 U.S. at 694 (emphasis added).

b. The central role that Dwayne Meeks played in the State's case and in the jury's verdict causes the inadequate investigation and impeachment of Mr. Meeks to undermine confidence in the outcome of Mr. Gavin's trial. The State had very little direct evidence against Mr. Gavin. The other eyewitness testimony was spotty at best, with the individuals at the scene describing the shooter as black, a characteristic which both Mr. Meeks and Mr. Gavin obviously share. Further, there was no physical evidence whatsoever to link Mr. Gavin to the crime. There were no fingerprints on the van or the murder weapon, no DNA evidence, and no incriminating evidence at all was found on Mr. Gavin when he was apprehended. The State, in the end, had to rest its case on Mr. Meeks' believability. When trial counsel failed properly to investigate and impeach Mr. Meeks, it solidified this key link in the State's case.

c. In fact, the prosecution used the failure of Mr. Gavin's trial counsel to bring Mr. Meeks' false statements to light as an essential element in its closing argument. Mr. O'Dell argued to the jury:

> What he (Meeks) told his friend, the law enforcement officer, what he told Danny Smith and Larry Wilson when they came up the very next day, what he told patrolman Burch in Fort Payne was exactly the same in every story. If it hadn't been, when

> they were cross-examining him with those statements, you would have heard it. Any variance, and you would have heard it. Because they would have tried to show he was telling a lie. That's pretty fascinating. A man could tell five different people over a several day <sic> and then eventually another month when they went back in April to get the taped statement, that in all those statements, ladies and gentlemen, Meeks' story was the same.

(Tr. at 1097.)

d. Of course, as detailed above, the prosecutor's argument was inaccurate. Mr. Meeks actually told several different stories to investigators and at trial. However, because Mr. Gavin's trial counsel failed to expose these misstatements and untruths, the jury could infer, as the State urged them to do, that Mr. Meeks was telling the truth. Because of this error, which was permitted to take root due to the ineffectiveness of Mr. Gavin's trial counsel, Mr. Gavin should be granted a new trial.

7. In support of this allegation, Mr. Gavin intends to rely on the trial transcript and the documents described in paragraphs 4(b) and 5(a) above. Mr. Gavin reasonably believes that all of this evidence existed at the time of the trial because of the dates on the documents. Counsel's investigation is on-going, and counsel reserves the right to support this claim with additional evidence that comes to its attention. Mr. Gavin also reserves the right to support this claim with any additional documents from the State's files that are found not to be privileged after the Court's *in camera* review.

B. B. Trial Counsel Was Ineffective In Failing To Investigate And To Bring To Light At Trial The Irregularities In The State's Investigation.

Related allegations as they appear in the presently pending Petition:

> In this case, trial counsel did not adequately investigate the case [or] adequately challenge the State's investigation and presentation of the case. (Pet. at 10.)
>
> Trial counsel failed to adequately investigate the physical evidence in this case. Counsel did not move to inspect the physical evidence until seven

> months after the incident. Trial counsel made no attempt to secure the van that contained exculpatory evidence. Trial counsel made not attempt to have the van that contained exculpatory evidence examined by an expert. (*Id.*)
>
> Trial counsel failed to conduct an adequate investigation of impeachment evidence of members of the Fort Payne Police Department. (*Id.*)
>
> Trial counsel was ineffective in its failure to challenge the State's investigation of the case and presentation of the evidence. There were a few key pieces of evidence in the State's case. Each of these key pieces of evidence was flimsy and could have been substantially undermined through cross-examination. Defense counsel failed to conduct rigorous or coherent cross-examinations. (*Id.* at 13.)
>
> Trial counsel was ineffective in its failure to question the investigating police officers about the details of the search they conducted in the wooded area where Mr. Gavin was arrested. Multiple police officers searched this area for evidence. Nevertheless, the gun did not appear until seven days after Mr. Gavin was arrested. Trial counsel should have exposed the fact that the investigating officers would have found the gun much sooner if it had, in fact, been there at the time of Mr. Gavin's arrest. (*Id.* at 14.)
>
> Amended allegations:
>
> 1. Trial counsel also was ineffective in failing to investigate or bring to light at trial, either through expert witnesses or through cross-examination, blatant deficiencies and abnormalities in the State's own investigation of Mr. Gavin's and Mr. Meeks' possible roles in the murder. Counsel's failure to do so is particularly egregious where, as here, the State failed to offer one single piece of physical evidence connecting Mr. Gavin to the murder, rather choosing to permit any potentially probative physical evidence to become tainted or to disappear. Counsel's failure to investigate the gross irregularities in the State's investigation and to bring them to the attention of the jury was extremely prejudicial to Mr. Gavin because, had the jury known of the State's failure to procure and protect evidence that bore directly on the identity of the murderer, it likely would have raised a reasonable doubt as to whether Mr. Gavin or Mr. Meeks was the shooter.

2. Undersigned counsel has retained two former police officers, Kenneth M. Webb, Sr. and Mel Duncan, to serve as experts on police procedures. Through these experts' review of the trial transcript, police records, and witness interviews, Messrs. Webb and Duncan have identified a number of deficiencies and abnormalities in the State's investigation. All of these issues should have been apparent to trial counsel based on a reasonable investigation. Trial counsel should have used this information to impeach the State's witnesses and evidence.

3a. The State failed to preserve the Corporate Express van – in which William Clinton Clayton was shot to death at close range – for defense counsel to subject to forensic testing. Instead – and incredibly – the State simply returned the van to its owner the first business day it could, on the Monday following the Friday evening murder. *See* Receipt for Property (Mar. 10, 1998), attached hereto as Ex. M. The van in this case *was the crime scene.* It is highly unusual for police to release such material evidence to a third party mere days after a capital crime. Yet trial counsel did not investigate the circumstances of the van's release, did not call to the jury's attention that defense counsel did not have an opportunity to test the van, and did not call to the jury's attention (either through one of its own witnesses or through cross-examination) that standard police procedures dictate that such evidence be preserved.

b. Trial counsel's failure to investigate whether the State's actions constituted investigatory malfeasance and failure to move for the immediate seizure and testing of the van constituted deficient investigation into the facts surrounding the murder. Specifically, if subsequent testing of the van by defense counsel had yielded forensic evidence of Dwayne Meeks' DNA, fingerprints, clothing, or some personal possession in the vehicle, such evidence would have demonstrated that Mr. Meeks' testimony was false, and that he was involved in the murder. Because Mr. Gavin's defense strategy was based in large part on Mr. Meeks'

involvement in the murder, counsel's failure to move to investigate forensic evidence in the van was prejudicial.

4. Mr. Meeks was given two days' notice that investigators from Alabama were traveling to Chicago to interview him. (*See* Report by Investigator Larry Wilson, attached hereto as Ex. N, at 9-10.) This is highly irregular, as it gave Mr. Meeks time to get his story straight, if not to destroy or alter evidence. Trial counsel either did not investigate the police department's investigation of Mr. Meeks, and therefore did not know of this time-gap, or was deficient in failing to bring it into evidence during trial.

5a. Once investigators arrived in Chicago, they failed to test or to preserve for testing the green Chevrolet Blazer that Mr. Meeks used to drive to Illinois and out of Alabama following the murder of Mr. Clayton. Mr. Meeks testified at trial that neither Danny Smith nor Larry Wilson asked him whether they could perform forensic testing on the Blazer or whether they could seize the vehicle and take it back to Alabama for evidence. (Tr. at 726.) Larry Wilson testified that the State did not even bother to impound or examine the interior of the Blazer. (Tr. at 903.) Indeed, the investigators did not even photograph the Blazer on their first trip to Chicago because there was "snow on the ground." (Taped interview of Dewayne Meeks, Ex. __ at 22.) The State's failure to seize and perform forensic testing on the Blazer allowed possibly relevant evidence to be removed or tainted. Trial counsel's failure to move for the seizure and testing of the Blazer in the absence of the State's testing constituted deficient investigation into the facts surrounding the murder.

b. Specifically, if the testing of the Blazer had yielded forensic evidence of the victim's blood in the vehicle, such evidence would have proven beyond a reasonable doubt that Mr. Meeks was involved in the murder, because no witness testified that Mr. Gavin got back into

the Blazer after the shooting. Further, if the testing of the Blazer had yielded forensic evidence of gunpowder in the front of the vehicle, such evidence would have suggested that the murder weapon had been recently fired before it was in the Blazer. The Blazer also could have contained evidence of contraband (drugs, weapons, cash) which might explain the reason for the otherwise inexplicable killing. Because Mr. Gavin's defense strategy was based in large part on Mr. Meeks' involvement in the murder, or possible motive for it, counsel's failure to investigate forensic evidence in the Blazer was inexcusable and prejudicial.[3]

6a. The State failed to test or preserve for testing the clothing that Mr. Meeks was wearing at the time of the murder. This failure was exacerbated when the State gave Mr. Meeks advance notice that investigators were coming to Chicago to interview him, providing both the opportunity and incentive for Mr. Meeks to alter or destroy any evidence on his clothing. Mr. Meeks testified at trial that he did not recall what clothing he was wearing at the time of the murder, although he did testify that he drove back to Illinois wearing the same clothing he was wearing at the time of the murder. (Tr. at 725.) Mr. Meeks also testified that he did not recall precisely what he did with the clothes following his return to Illinois, but that "I'm sure I just washed them." (*Id.*) He further testified that neither Danny Smith nor Larry Wilson, the officers who came to Illinois to interview him following the murder, asked him to identify and turn over into evidence the clothing he was wearing at the time of the murder. (*Id.*) Larry Wilson confirmed in his testimony that the State did not question Mr. Meeks about the identity or the current location of the clothing he was wearing at the time of the murder. (Tr. at 906.)

[3] Indeed, the undersigned counsel did locate the Blazer in question and did subject the Blazer to forensic examination with the permission of the current owners in Indiana, but failed to locate any physical evidence that could be subjected to forensic testing. A forensic expert retained by the undersigned counsel has indicated that the passage of time—over eight years by the time the forensic examination was conducted—likely destroyed or allowed for the removal or tainting of any physical evidence that might have existed in 1998.

b. The State's failure to procure the clothing worn at the time of the murder by one of the two murder suspects is at best inept and at worst highly suspect. The State did procure the clothing that was worn by Mr. Gavin at the time of murder and subject it to forensic testing, which failed to show any evidence connecting Mr. Gavin to the shooting. Accordingly, as the State was aware of both the need to procure and test physical evidence (including clothing) and how to conduct such physical testing, its failure to inquire into, identify, procure, or test the clothing of the only other suspect in this case raises serious questions concerning the propriety of the investigation.

c. The failure of Mr. Gavin's counsel to investigate the impropriety of the State's investigation into physical evidence concerning Meeks' role in the murder constitutes a deficiency in counsel's duty to investigate the facts surrounding the murder. A reasonable, sufficient investigation by counsel would have yielded evidence that such conduct is unusual – indeed, sloppy – police practice, which evidence could have been used at trial to impeach the testimony of State witnesses and to raise a reasonable doubt in the jury's mind that the State was prosecuting the right person. Counsel's deficiency was highly prejudicial to Mr. Gavin because it allowed the prosecution to present its case to the jury without any doubts being raised regarding its failure to investigate the other suspect in the case.

7a. The State failed to interview Mr. Meeks' wife, Sharon, when she was the only adult witness to Mr. Meeks' statements, actions, and state of mind both before and immediately following the murder, as well as before and during Mr. Meeks' decision to flee the scene of the crime and drive back to Illinois (despite being a member of law enforcement and professing his innocence). Larry Wilson testified at trial that the State did not attempt to interview Mrs. Meeks because "she was not with them" (presumably, meaning with Meeks and Gavin at the time of the

murder). (Tr. at 905.) He continued that "[w]e didn't feel that she would know anything about the shooting." (Tr. at 906.) The failure of the State to interview Sharon Meeks concerning her husband's actions and state of mind both before and immediately following the murder constituted gross impropriety in the murder investigation.

b. Not only did trial counsel fail to point out that the State failed to interview Mrs. Meeks, trial counsel also was deficient because he failed to interview her either. Counsel's failure to investigate this gross impropriety constituted deficient investigation into the facts surrounding the murder. A sufficient investigation by counsel would have yielded evidence and expert testimony that such State conduct is unusual police practice, which evidence could have been used at trial to impeach the testimony of State witnesses to raise a reasonable doubt in the jury's mind that the State was prosecuting the right person. Counsel's deficiency was highly prejudicial to Mr. Gavin because it allowed the prosecution to present its case to the jury without exposing its failure to investigate fully the actions and motives of the other suspect in the case.

8a. The discovery of Mr. Meeks' firearm, the supposed murder weapon – the one Meeks said was issued by an Illinois law enforcement agency, but for which there is no evidence to establish it – by a lone law enforcement officer seven days after the murder in areas that had been previously searched by both humans and dogs is, to say the least, unusual. Larry Wilson testified at trial that the officers at the scene at which Mr. Gavin was apprehended ("off Highway 48") conducted a search of the area to look for the murder weapon but did not locate it the evening of the murder. (Tr. at 895.) Officer Wilson also testified that neither he nor any other officer sealed off the area, as is customary policy during a murder investigation. (*Id.*) Seven days after the murder and the initial search – and two days after Officer Wilson met Mr. Meeks in Illinois – Officer Wilson reported that he recovered the murder weapon in that area off

Highway 48. It is unclear what prompted Officer Wilson to return to the that area off Highway 48, but the report indicates that he was alone at the time of recovery. *See* Alabama Uniform Incident/Offense Report, prepared and filed by Larry Wilson (Mar. 13, 1998), attached hereto as Ex. O. At trial, however, Officer Wilson testified that "[w]e found a .40 caliber Glock" (Tr. at 882), and that "[w]e took it, bagged it up, and took it to the lab. . . ." (Tr. at 883.)

b. The failure of Mr. Gavin's counsel to investigate – or at least inquire into during cross-examination of Larry Wilson – the irregularity concerning the recovery of the murder weapon constitutes a deficiency in counsel's duty to investigate the facts surrounding the murder. A reasonable, sufficient investigation by counsel would have yielded evidence that the manner by which the murder weapon was recovered was a highly unusual police practice, which evidence could have been used at trial to impeach the testimony of State witnesses and to raise a reasonable doubt in the jury's mind about the State's evidence on the murder weapon. In fact, the experts retained by the undersigned counsel have Stated that failure to seal the area and the unexplained return to the recovery area by a lone officer are highly unusual and potentially suspect police practice. Counsel's deficiency was highly prejudicial to Mr. Gavin because it allowed the prosecution to present its case to the jury without being questioning the impropriety concerning the handling and recovery of the murder weapon and surrounding areas.

9a. Both the State and Mr. Gavin's counsel failed to investigate other eyewitnesses to Mr. Meeks' and Mr. Gavin's trips from Illinois to Alabama, at least one of whom might have offered evidence refuting Mr. Meeks' testimony concerning the true purpose of his travels to Alabama. Specifically, an investigation into the facts surrounding Mr. Meeks' prior travels to Alabama would have yielded evidence that he and Mr. Gavin were accompanied by Mr. Meeks' niece, Erica Shoun Foster, on their first trip to Alabama in January, 1998. Although Meeks

testified at trial that nobody came to Alabama with him and Keith on the January 1998 trip (Tr. at 699), Ms. Foster would have testified that she did accompany them on the first trip.

b. Not only would such evidence have allowed counsel to impeach Mr. Meeks' credibility, it also could have led to additional evidence or the ability to conduct further investigation into the true purpose of Mr. Meeks' travels to Alabama. "In assessing the reasonableness of an attorney's investigation . . . a court must consider not only the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further." *Wiggins v. Smith*, 539 U.S. 510, 527 (2003). Here, evidence that there was at least one eyewitness to Mr. Meeks' and Mr. Gavin's January 1998 trip to Alabama is important, not only as impeachment evidence that would have been known to counsel at trial, but also because it would have led a reasonable attorney to investigate further the true nature of Mr. Meeks' business in Alabama.

10. As described in more detail below (*see* pp. 26-27, *infra*), the police did not take the usual and appropriate steps to obtain reliable Statements from the eyewitnesses. The police did not show any of the four witnesses to the shooting of Mr. Clayton a photographic or other line-up to have them try to identify the shooter. Nor did the police even interview Vickie Twilley, one of the eyewitnesses. Trial counsel neither brought this deficiency to light, nor, as also described below, did he use it in impeaching the eyewitness testimony. (*See* pp. 25-27 *infra*.)

11a. The State's investigation was tainted by the involvement of Tom Arambasich, a police officer from Will County, Illinois. After returning to Illinois after the shooting, Mr. Meeks called Mr. Arambasich. Mr. Arambasich was not merely a friend of Mr. Meeks': Mr. Arambasich was a father figure to Mr. Meeks and had let Mr. Meeks live with his family for

some time. Despite his obvious bias, the Alabama authorities asked Mr. Arambasich to interview Marty Tutor and Roy Smith regarding what Mr. Meeks told them about the incident on the date he returned from Alabama. In addition, in serious violation of normal investigative techniques and procedures, Mr. Arambasich was allowed to be present when Danny Smith and Larry Wilson interviewed Mr. Meeks at the Will County Sheriff's office in Illinois.

b. Trial counsel never investigated the involvement of Mr. Arambasich or his relationship to Dwayne Meeks, even though Larry Wilson's report plainly states that Mr. Arambasich was a friend of Mr. Meeks. (Ex. N, at 7.) Trial counsel did not cross-examine Danny Smith or Larry Wilson at all about Mr. Arambasich's involvement in the investigation.

12. Similarly, the State's investigation was tainted by the involvement of Tony Burch. Again, Larry Wilson's report plainly States that Mr. Burch is a friend of Mr. Meeks. (Ex. N, at 10.) Had trial counsel interviewed Mr. Burch, they would have learned that Burch and Meeks had been friends for several years prior to the incident, and that Mr. Burch had visited Mr. Meeks in Illinois. When he was visiting Mr. Meeks in Illinois, Mr. Burch met Mr. Arambasich. The day after the incident in Centre, Mr. Meeks and Mr. Arambasich called Mr. Burch from Illinois. During the conversation, Mr. Arambasich got on the phone and told Mr. Burch that "we" need to help "Dwayne [Meeks]." Despite his obvious bias, Mr. Burch traveled with Danny Smith to interview "Dwayne." Trial counsel never informed the jury that Mr. Meeks and Mr. Burch were friends, and never informed the jury that is contrary to proper police practice to have an officer who is personal friends with a suspect participate in an interview. It is even more improper when yet another common friend, also a member of law enforcement, tells the interviewing officer in advance that their suspect/friend needs "help."

13. The State's investigation was tainted by the involvement of Danny Smith. Mr. Smith was an alleged victim of attempted murder. Under police standards, an alleged victim of a crime should not be part of an investigative team. Trial counsel never informed the jury of this.

14. Because of the irregularities in the state's investigation in this case, trial counsel could have retained and presented evidence from a police investigative practices expert to inform the jury of the irregularities in the state's investigation, because this evidence was beyond an ordinary layperson's understanding. In the alternative, trial counsel could have called Dennis Scott, the forensic investigator retained by trial counsel, to testify during the guilt phase of the trial regarding irregularities in the state's investigation.

15. The irregularities in the State's investigation must be viewed as a whole. Trial counsel's failure to bring this evidence out at trial clearly prejudiced Mr. Gavin. Had the jury known of these problems in the investigation, it would have raised serious doubts as to whether the State apprehended the right man.

16. In support of this allegation, Mr. Gavin intends to rely on the trial transcript, expert testimony, and the documents described in paragraphs 3(a), 4, 5, and 11, and affidavits or testimony from other witnesses described above. Mr. Gavin reasonably believes that all of this evidence existed at the time of the trial because of the dates on the documents. Counsel's investigation is on-going, and counsel reserves the right to support this claim with additional evidence that comes to its attention.

C. C. Trial Counsel Was Ineffective In Failing To Move To Suppress Identification Evidence And In Failing To Effectively Cross-Examine The Identification Witnesses.

Related allegations as they appear in the presently pending Petition:

Trial counsel was ineffective in failing to adequately move to suppress identification evidence obtained in violation of Mr. Gavin's constitutional rights. The State's case relied heavily upon an out-of-court identification by Danny Smith. This identification was used to establish that the person

> that was driving the van with the victim's body inside was the same person that was arrested in the woods. The identification was made while Mr. Gavin was sitting in handcuffs in the back of a police car. As such, it was an impermissibly suggestive identification procedure that tainted and rendered unreliable Mr. Smith's subsequent in-court identification. Considering the monumental importance and striking unreliability of this piece of evidence, counsel was ineffective in failing to request a pre-trial suppression hearing to challenge the admissibility of this identification testimony. While there was some argument on a motion to suppress midway through the witness's testimony, counsel failed to request an evidentiary hearing or other factual inquiry about the circumstances of the identification procedure. Counsel failed to expose the unreliable nature and subsequent inadmissibility of an identification that was the linchpin of the State's case. (Pet. at 13)
>
> Trial counsel was ineffective in failing to adequately cross-examine the identification witnesses, Larry Twiley and Danny Smith. Neither of the identification witnesses ever provided a detailed description of Mr. Gavin that would distinguish him from DeWayne Meeks, the other black man at the scene of the crime. Neither Mr. Meeks or Mr. Gavin was ever placed in a line-up or photographic array. Both identification witnesses are white and live in Cherokee or Dekalb County. The population of Cherokee County is 93% white. The population of Dekalb County is 93% white. These identification witnesses saw a black man commit a crime and then, when presented with Mr. Gavin, a black handcuffed suspect (in the case of Danny Smith), and a black defendant (in the case of Mr. Twilley), they leaped to the conclusion that he was the murderer. Trial counsel was ineffective in failing to bring out the inability of these witnesses to make a cross-racial identification. (*Id.* at 14-15.)

Amended allegations:

1. "Identification testimony is at once the 'least reliable' form of evidence but 'among the most influential' to a jury." *Harris v. Senkowski*, 298 F. Supp. 2d 320, 336 (E.D.N.Y. 2004) (quoting *Kampshoff v. Smith*, 698 F.2d 581, 587 (2d Cir. 1983)). "[T]he experience of law and psychology has been that eyewitness testimony may sometimes be the least trustworthy means to identify the guilty." *Kampshoff*, 698 F.2d at 585-86. That is particularly true where – as here – the identification is cross-racial: "Cross-racial identification is much less likely to be accurate than same race identifications." *Arizona v. Youngblood*, 488 U.S. 51, 72 n.8 (1988) (Blackmun, J., dissenting) (*quoting* Rahaim & Brodsky, *Empirical Evidence*

versus Common Sense: Juror and Lawyer Knowledge of Eyewitness Accuracy, 7 Law and Psych. Rev. 1, 2 (1982)). *See also* Radha Natarajan, Note, *Racialized Memory and Reliability: Due Process Applied to Cross-Racial Eyewitness Identifications*, 78 N.Y.U. L. Rev. 1821 (2003) (surveying studies showing cross-racial identifications substantially more likely to be erroneous than same-race identifications due to the psychological phenomena of own-race bias).

2a. Courts routinely find defense counsel's performance deficient where counsel fails adequately to challenge identification evidence. *See Harris*, 298 F. Supp. 2d at 338-39 (collecting cases). In this case, the only eyewitness to the shooting of Mr. Clayton other than Mr. Meeks – who, for the reasons described above, should have been utterly lacking in credibility – was Larry Twilley.[4] Mr. Gavin's trial counsel was ineffective in failing to move to suppress Mr. Twilley's in-court identification of Mr. Gavin and in failing to challenge that identification during cross-examination. At trial, Mr. Twilley described the shooter as "a black guy, very little hair .... He wasn't real heavy, but he wasn't slim." R. 521. He then testified:

> Q: Is the man that you saw do the shooting that night, is he in the courtroom today?
>
> A: Right over there. (Indicating)
> Q: You're point to the man seated at the table?
> A: Yeah, because the hairline is what stood out the most.

(Tr. at 523.)

b. Trial counsel was ineffective in failing to move to exclude this in-court identification as a violation of Mr. Gavin's constitutional due process rights. In *Neil v. Biggers*, the Supreme Court established a two-step test to determine whether identification procedures are constitutional. The first step is to determine whether the procedures used were unduly

[4] The other witnesses at the scene, including Ronald Baker and Richard Henry, Jr., testified that they could not see the shooter. (Tr. at 536, 545.)

suggestive. If so, the second step is to determine whether, under the totality of the circumstances, the identification was reliable. 409 U.S. 188, 199 (1972). In determining whether an in-court identification is reliable, a court must consider: (1) the opportunity of the witness to view the criminal at the time of the crime; (2) the witness's degree of attention; (3) the accuracy of the witness's prior description of the criminal; (4) the level of certainty demonstrated by the witness at the confrontation; and (5) the length of time between the crime and the confrontation. *Id.* at 199-200. "[R]eliability is the linchpin in determining the admissibility of identification testimony." *Manson v. Brathwaite*, 432 U.S. 98, 114 (1977).

c. Mr. Twilley's in-court identification of Mr. Gavin fails on both prongs. The identification was made under circumstances that were "unnecessarily suggestive and conducive to irreparable mistaken identification." *Stovall v. Denno*, 388 U.S. 293, 302 (1967). At trial, Mr. Gavin was the sole black man seated at defense table between two white attorneys. Mr. Twilley has admitted that when he was asked if he saw the offender in court, "he looked over at the table with two white guys and a black guy and identified the black guy as the offender." Mr. Twilley also has admitted that "he knew that the person arrested was the right man because he heard on his scanner that the offender in the shooting had been caught." Put simply, Mr. Twilley assumed that the black defendant must have been the shooter.

d. The identification also was clearly unreliable. Mr. Twilley testified that he only saw the side of the face of the shooter, and only for a few seconds as the shooter turned around. (Tr. at 523.) Mr. Twilley's prior description of the shooter did not match Mr. Gavin, and was inconsistent with his description at trial. In his statement to police, Mr. Twilley vaguely described the shooter as a "black male," "slim, about 6 feet tall" and wearing "a red and black stripped boggin." (*See* Signed Statement of Larry Wilson 03/06/98, attached hereto as Ex. P.)

Mr. Gavin is only 5'8" tall. At trial, Mr. Twilley testified that the shooter "wasn't real heavy, but he wasn't slim." R. 521. Mr. Gavin weighed only 145 pounds at the time of the shooting. (*See* Alabama Uniform Arrest Report for Keith Edmunds, attached hereto as Ex. Q.) He is unquestionably slim. In his statement to the police Mr. Twilley stated that the shooter was wearing a toboggan. (Ex. P.) At trial, Mr. Twilley testified that when the shooter "come [sic] around the corner, he didn't have anything on his head." (Tr. at 529.) Mr. Twilley also did not demonstrate a high level of certainty in his identification. Rather, he weakly stated that he thought Mr. Gavin was the shooter because of his "hairline." (Tr. at 523.) Finally, there was a significant length of time between the incident and the identification. Mr. Twilley never identified Mr. Gavin prior to the trial. He never saw a photo-array or line-up. Rather, over eighteen months passed between the incident and Mr. Twilley's in-court identification.

e. The in-court identification was patently unreliable for an additional reason: Mr. Twilley's vague descriptions of the shooter – as 6 feet tall, not "real heavy" but "not slim," and as having a receding hairline – *are more descriptive of Mr. Meeks than Mr. Gavin. See* Alabama Uniform Arrest Report for Dwayne Meeks, attached hereto as Ex. R (stating that Meeks was 5'10' and weighed 240 pounds); *see also* Photograph of Dwayne Meeks taken by investigators, attached hereto as Ex. S.

3. Additionally, trial counsel's cross-examination of Mr. Twilley was constitutionally deficient. The only points that trial counsel made during the cross-examination were that the shooting "took less than three or four minutes" (according to all other eyewitness accounts, it took much less time than that) and that Mr. Twilley stated to police that the shooter was wearing a toboggan, but the thing that stood out to Mr. Twilley was the shooter's hairline. (Tr. at 528-29.) Trial counsel did not make any attempt to demonstrate the unreliability of Mr.

Twilley's identification or impeach Mr. Twilley with his prior inconsistent statements. Trial counsel did not point out that Mr. Twilley described the shooter as "not slim," when at the time of the incident, Mr. Gavin weighed only 145 pounds while Mr. Meeks weighed 240 pounds. Trial counsel did not inform the jury that Mr. Twilley originally vaguely described the shooter as a "black male [] slim, about 6 feet tall," and that Mr. Gavin is only 5'8" tall while Mr. Meeks is 5'10" tall. Trial counsel did not point out that Mr. Twilley never saw a photo array or line-up, but rather identified Mr. Gavin as the shooter for the first time when he was sitting at the defense table. Trial counsel did not establish that Mr. Twilley had never been shown a photo of Mr. Meeks or been asked to view a line-up including Mr. Meeks.

4. In addition, trial counsel failed to perform an adequate investigation, which would have allowed him to impeach Mr. Twilley's testimony regarding his ability to see the shooter. Although Mr. Twilley's police statement says that his wife, Vickie Twilley, was in the car with him at the time of the incident, neither the police or trial counsel ever interviewed Mrs. Twilley. Mrs. Twilley's testimony would have contradicted her husband's. She would have testified that visibility was poor at the time of the incident because it was raining hard, and that all she could see was that the shooter was black and wearing a *blue or black* toboggan.[5]

5. Counsel's ineffectiveness in failing to move to strike Mr. Twilley's in-court identification or to effectively cross-examine Mr. Twilley was unquestionably prejudicial. As noted above, identification testimony, although unreliable, is "among the most influential to a jury." *Harris, supra,* 298 F. Supp. 2d at 336 (internal quotation marks omitted). Although trial counsel insinuated during opening argument that the defense theory was that Dwayne Meeks was the real shooter, trial counsel utterly failed to follow through on that theory by showing that the

[5] Mr. Gavin's appellate counsel was ineffective in failing to challenge the admissibility of Mr. Twilley's in-court identification on appeal.

one independent witness to see the shooter gave a description that better described Mr. Meeks than Mr. Gavin. No reasonable trial strategy can justify this glaring oversight. *See Berryman v. Morton*, 100 F.3d 1089, 1102 (3d Cir. 1996) (holding that trial counsel's failure to cross-examine identification witness on prior inconsistent Statements was not based on a sound trial strategy and the prejudice to the defendant was "obvious"). Importantly, not a shred of physical evidence tied Mr. Gavin to the shooting of Mr. Clayton. Had trial counsel effectively countered Mr. Twilley's identification, there is a reasonable probability that the outcome would have been different. *See Griffin v. Warden, Maryland Correctional Adjustment Center*, 970 F.2d 1355, 1359 (4th Cir. 1992) (granting habeas petition: "Eyewitness identification evidence, uncorroborated by a fingerprint, gun, confession, or coconspirator testimony, is a thin thread to shackle a man for forty years."); *Blackburn v. Foltz*, 828 F.2d 1177, 1186 (6th Cir. 1987) (granting habeas petition where counsel failed to challenge identifying witness's testimony).[6]

6. In support of this claim, Mr. Gavin relies on the trial transcript and evidence obtained from the State, including the Alabama Uniform Arrest Reports for Mr. Gavin and Mr. Meeks and the signed statement of Larry Wilson dated 03/06/98. Mr. Gavin requests that the State produce any additional witness statements or interviews that have not yet been produced. In addition, Mr. Gavin intends to rely on expert and lay testimony. Mr. Gavin has a reasonable basis to believe that all of this evidence existed at the time of trial because of the dates on the documents currently in counsel's possession. Counsel's investigation is on-going, and counsel reserves the right to support this claim with additional evidence that comes to its attention.

[6] Mr. Gavin incorporates and realleges the allegations in his Petition filed July 15, 2006, regarding trial counsel's failure to move to suppress the identification testimony of Danny Smith on the grounds that Mr. Smith's out-of-court identification was obtained in violation of Mr. Gavin's constitutional rights.

D. D. Trial Counsel Was Ineffective During The Penalty Phase Of The Trial.

Related allegations as they appear in the presently pending Petition:

Counsel was ineffective in failing to adequately investigate the highly prejudicial and inflammatory "official statement of facts" that was introduced at trial regarding Mr. Gavin's prior conviction from Illinois. Although the court ordered the State to turn over the document in advance of trial, the State failed to do so. Counsel never brought the State's failure to comply to the attention of the court. The statement was not turned over until two days before the penalty phase. At that point defense merely argued that it could not challenge the statement because it had no access to the official record in Illinois. As soon as counsel was alerted to the existence of the document, counsel should have begun to investigate the facts regarding Mr. Gavin's prior conviction. Instead, this irrelevant and highly prejudicial document was submitted to the jury with no effective challenge. The introduction of this evidence unconstitutionally biased the jury against Gavin. (Pet. at 11.)

Counsel was ineffective during the penalty phase of the trial. It is constitutionally required that the trial court and jury consider "as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." Lockett v. Ohio, 438 U.S. 568, 604 (1978). This includes *any* evidence about the defendant's history and life that may be considered by the jury or judge as a mitigating factor. Woodson v. North Carolina, 428 U.S. 280 (1976). Thus, Mr. Gavin was entitled to have all aspects of his background, family life, medical history, school records, and any other life experience that may be considered mitigating evidence presented to the jury and judge at the penalty phase of his capital trial. Trial counsel failed to meet this requirement.

Counsel was ineffective in its failure to adequately investigate mitigating evidence from Mr. Gavin's relatives and other witnesses.

Counsel failed to procure necessary records documenting the mitigating circumstances in Mr. Gavin's life, including school records, health records, employment records, correctional records, and religious records of Mr. Gavin, his parents, and his siblings.

If counsel had conducted an adequate investigation of Mr. Gavin's background, counsel would have unearthed a wealth of mitigating evidence that would have convinced the jury to return a verdict of life.

Instead, counsel failed to present a single piece of evidence regarding mitigating circumstances in Mr. Gavin's background.

> Counsel called Mr. Gavin's mother as a witness at the penalty phase, but failed to ask her a single question about the mitigating circumstances in Mr. Gavin's background.
>
> Counsel was ineffective in failing to adequately speak with Mr. Gavin's mother and prepare her to testify about mitigating evidence. During Mr. Gavin's mother's testimony, trial counsel admitted, "I know that when you and I spoke yesterday, I didn't really have an opportunity to prep you for your testimony today...." (R. 1258.)
>
> Counsel called a Jehovah's Witness minister who first met Mr. Gavin after his arrest. Counsel failed to ask the minister any questions about the mitigating circumstances in Mr. Gavin's background.
>
> Counsel failed to present any evidence regarding Mr. Gavin's good behavior while he was incarcerated in Illinois. See Skipper v. South Carolina, 476 U.S. 1 (1986).
>
> Counsel failed to present any expert testimony relating to mitigating circumstances.
>
> Counsel failed to adequately challenge the State's aggravating circumstances and the evidence submitted in support of them. Had counsel adequately argued these claims, the jury likely would have given Mr. Gavin a lesser sentence. (*Id.* at 17.)

Amended allegations:

1. "The primary purpose of the penalty phase is to insure that the sentence is individualized by focusing on the particularized characteristics of the defendant." *Hardwick v. Crosby*, 320 F.3d 1127, 1162 (11th Cir. 2003) (internal quotation marks, alteration, and citation omitted). As the United States Supreme Court has recognized:

> [E]vidence about the defendant's background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional or mental problems, may be less culpable than defendants who have no such excuse.

Boyde v. California, 494 U.S. 370, 380 (1990). By failing to present such evidence to the jury, trial counsel's deficient performance prejudices a petitioner's ability to receive an individualized sentence, as guaranteed by the Sixth Amendment. *Hardwick*, 320 F.3d at 1162.[7]

2. Mr. Gavin's counsel's performance was clearly deficient during the penalty phase of the trial. Counsel presented mitigation evidence from only two witnesses: (1) S.J. Johnson, a Jehovah's Witness minister who had known Mr. Gavin for only 20 months, and (2) Annette Gavin, Mr. Gavin's mother. Counsel stated on the record that he had only talked to Mr. Johnson "the other day," and in fact got his name wrong when he called him to testify. (*See* Tr. at 1243.) The bulk of Mr. Johnson's testimony did not concern Mr. Gavin as an individual, but rather was a sermon on mercy in the Bible. (*See* Tr. 1250-53.) In his re-direct, counsel undermined any impact Mr. Johnson's discussion regarding mercy may have had on the jury by getting Mr. Johnson to agree that "[w]e no longer live under the scriptures of the Old Testament." (Tr. at 1256.)

3a. In his direct examination of Annette Gavin, counsel stated on the record, "I didn't really have an opportunity to prep you for your testimony today." (Tr. at 1258.) Counsel then asked Mrs. Gavin only three substantive questions. (*See* Tr. at 1258-59.) Mrs. Gavin's testimony could not have lasted more than five minutes. Counsel did not ask Mrs. Gavin any questions about Keith Gavin's childhood, upbringing, family, socio-economic status, or any other particularized facts that would have humanized Mr. Gavin for the jury.

---

[7] "The Sixth Amendment guarantees a criminal defendant the right of effective assistance of counsel during a capital sentencing hearing." *Hardwick*, 320 F.3d at 1162 (internal quotation marks and citation omitted). The two-part *Strickland* test is equally applicable to a capital sentencing proceeding: "[C]ounsel's role in the proceeding is comparable to counsel's role at trial – to ensure that the adversarial testing process works to produce a just result under the standards governing decision." *Id* (quoting *Strickland v. Washington*, 466 U.S. 668, 687 (1984)).

b. Trial counsel's utter lack of preparation and failure to ask Mrs. Gavin for more information about Mr. Gavin's upbringing is inexcusable. Trial counsel had a report of an interview with Annette Gavin from a mitigation expert in Chicago contacted by the Alabama Prison Project, which noted that all of Mr. Gavin's siblings had drug problems, four of them spent time in prison, and that Mr. Gavin grew up in the Chicago Housing Authority's ABLA Housing Project where he was surrounded by drugs, violence, and guns and where he faced tremendous peer pressure to have a gang affiliation. As just one example, a thirteen year-old neighbor of the Gavins' was "shot up real bad in gang violence." (*See* 10/13/99 Memorandum from John David Sturman & Associates to Lucia Penland, attached hereto as Ex. T.) Not a shred of this evidence was introduced at trial.

4. Such meager testimony – particularly from the defendant's own mother – was harmful rather than helpful. "Counsel presented no more than a hollow shell of the testimony necessary for a particularized consideration of relevant aspects of the character and record" of Mr. Gavin "before the imposition upon him of a sentence of death." *Collier v. Turpin*, 177 F.3d 1184, 1201-02 (11th Cir. 1999) (internal citation and quotation marks omitted). As in *Collier*, trial counsel's presentation here "tended to give the impression that the witnesses knew little or nothing about" Mr. Gavin. *Id.* at 1202 (counsel deficient where he failed to present mitigating evidence regarding petitioner's upbringing, family life, poverty, and other matters during sentencing phase). *See also Karis v. Calderon*, 283 F.3d 1117, 1135-36 (9th Cir. 2002) (counsel deficient where he presented mitigation evidence for only 48 minutes and did not ask petitioner's mother during her testimony about family history); *Hamblin v. Mitchell*, 354 F.3d 482, 491 (6th Cir. 2003) (counsel deficient where he did not prepare mitigation witness for her testimony and entire sentencing phase lasted less than 45 minutes).

5. The Alabama Prison Project, which was hired by Mr. Gavin's trial counsel, informed trial counsel that "[i]n order to present an effective, comprehensive, and adequate mitigation case, the following things must be done:

- Comprehensive records must be obtained.
- Additional interviews with family, friends, and fellow inmates should be conducted.
- Sociological information about the culture in which [Mr. Gavin] grew up should be obtained.
- Experts must be retained and provided information to make assessments and prepare testimony on the effect of his incarceration, and on the effect of his family and the neighborhood culture, including the amount of violence he was exposed to. This is essential in pulling together the information obtained and presenting its relevance to this case, and to explaining Mr. Gavin's behavior in a way that mitigates the offense.

(Ex. J.) Trial counsel never did any of these things. Indeed, counsel failed to meet most of its obligations to investigate mitigating evidence as set forth in the ABA Guidelines. *See Hamblin*, 354 F.3d at 487 & n.2 (describing counsel's duties under the ABA Guidelines and noting that the ABA standards "are the same type of longstanding norms referred to in *Strickland* in 1984 as 'prevailing professional norms'").

6. The Alabama Prison Project asked trial counsel to request a continuance so that they could prepare an adequate mitigation case. Trial counsel refused to do so, and the Alabama Prison Project was forced to withdraw from the case. (Ex. J.) In his reply to Ms. Penland, and in correspondence with this Court, trial counsel admitted that he had failed to prepare a mitigation case. *See* 10/20/99 Letter from H. Bayne Smith to Lucia H. Penland, attached hereto as Ex. U ("I am sorry we could not have had a more successful collaboration on Gavin"); 10/31/99 Letter from H. Bayne Smith to Judge David A. Rains, attached hereto as Ex. V (enclosing materials from Alabama Prison Project and noting, a week before trial, that it did not include "any useable

mitigation material"). Trial counsel's representations that counsel had not uncovered any useable mitigation material was misleading. At the time of the Mr. Smith's October 31, 1999 letter to the court, Mr. Smith had been informed that Mr. Gavin's family was cooperating with a mitigation investigator and that the investigator had uncovered potentially mitigating evidence that needed to be developed further. Trial counsel was deficient for failing to request a continuance on the ground that they had not yet prepared a mitigation case.

7. Counsel's inadequate performance during the sentencing phase of the trial prejudiced Mr. Gavin. Counsel's failure adequately to prepare Annette Gavin and to investigate other possible mitigation witnesses prevented counsel from presenting evidence regarding Mr. Gavin's family and socio-economic background. Mr. Gavin's mother – as well as several of Mr. Gavin's 10 surviving siblings who counsel did not interview or ask to testify – could have testified that Mr. Gavin grew up in poverty, living in public housing known as "doghouses." During Mr. Gavin's childhood, the projects were rife with crime and gang violence. When Mr. Gavin was young, there were riots in the housing project when Martin Luther King, Jr. was assassinated. When Mr. Gavin was as young as nine years old, he and his siblings, unsupervised by their parents, would sneak out of their home and witness violent gang initiations and petty crime. Mr. Gavin's older sister, Elaine, became involved in gangs at an early age and taught other girls how to "gang bang" and commit crimes. There were serious drug problems at Crane High School, which Mr. Gavin attended until he was 17.

8. Mr. Gavin's mother and siblings also could have testified that Mr. Gavin's father had a gambling habit, emotional problems and trouble keeping a job. Mr. Gavin's mother and father often fought over his father's gambling habits. Mr. Gavin's father served time in prison for robbery when Mr. Gavin was young, which had a strong impact on Mr. Gavin. The father

also whipped the children with belts and stitching cords. Mr. Gavin often would take the blame for his siblings' infractions so his father would beat him instead of his sisters or brothers.

9. Counsel also failed to investigate or elicit testimony regarding Mr. Gavin's close family ties. Mr. Gavin started work cleaning a laundromat to try to help support his 11 siblings when he was just 10 years old. He would bring all of his earnings home and give them to his mother. Mr. Gavin also tried to look out for his younger siblings. Geanetta Clark, Mr. Gavin's youngest sister, would have described Mr. Gavin as "like a father figure to her." Mr. Gavin always encouraged Geanetta to "do the right thing" and to stay in school. He also always asked about the well-being of her children. Geanetta was never interviewed by defense counsel and never asked to testify. Similarly, Elaine Gavin, who could have testified regarding, among other things, the drug and gang situation in the housing project in which she and Keith grew up, was never interviewed by counsel. Crystal Carter, Dwayne Meeks' daughter who lives in Fort Payne, would have testified on Mr. Gavin's behalf at the sentencing. Ms. Carter would have testified that she felt safe around Keith and that he encouraged her to "keep her head on straight."

10. Trial counsel was ineffective for failing to present testimony from a mitigation expert about Mr. Gavin's life history, and the external factors that shaped Mr. Gavin's life. A mitigation expert could have testified that Mr. Gavin was exposed to significant risk factors growing up that had a profound influence on his adult behavior. Mitigation expert testimony regarding risk factors is regularly presented at the sentencing phase of capital murder trials.

11a. Trial counsel also failed to investigate or present evidence of how Dwayne Meeks took advantage of Mr. Gavin's vulnerability when he was released from prison in Illinois. After serving 18 years in prison, Mr. Gavin was released with $50. He had no job and no prospects. He returned to live with his mother in Chicago. At that time, Mr. Gavin's younger sister Sharon,

who is mentally challenged, also was living with his mother, along with his younger sister Geanetta, her husband, and their 2 year old son. Annette Gavin's house was in disrepair, with live electrical wires exposed, evidencing her impoverished State. After his release, Mr. Gavin learned that his brother Sterling (who is now deceased) and his sister Elaine were struggling with cocaine and heroin addictions.

b. Geanetta and Annette would have testified that shortly after Mr. Gavin was released from prison, Dwayne Meeks suddenly started coming around the Gavin house. Zakeithiea Johnson, a cousin of both Mr. Gavin and Dwayne Meeks, would have testified that Mr. Meeks took Mr. Gavin out on New Years' Eve and paid for everything. Shortly thereafter, Mr. Meeks asked Mr. Gavin to accompany him to Alabama. Geanetta would have testified that Mr. Meeks took other relatives down to Alabama with him to do drug transactions. Their brother Sterling knew about Mr. Meeks' drug dealings. Sterling Gavin would not go with Mr. Meeks to Alabama because he did not trust him. Mr. Meeks offered to pay Mr. Gavin to "split the driving" to Alabama.

12. Additionally, trial counsel failed to present evidence regarding Mr. Gavin's incarceration. Counsel is obligated to investigate a client's correctional experience in preparing its mitigation case. *See Hamblin*, 354 F.3d 487 n.2. In this case, a cursory review of Mr. Gavin's department of corrections file shows that Mr. Gavin served just short of 18 years on a 34 year sentence based on day-for-day good conduct credit he earned. This evidence would have shown the jury that Mr. Gavin adjusted well to institutionalized life and would not pose a threat to others while incarcerated. Indeed, the opposite was true: Mr. Gavin was seriously wounded in a stabbing by gang members shortly into his prison sentence. Counsel's failure to present this evidence is inexcusable. Mr. Gavin's file from the Illinois Department of Corrections was

readily available to trial counsel. Indeed, the prosecutor had Mr. Gavin's IDOC file. *See Skipper v. South Carolina*, 476 U.S. 1 (1986) (evidence that a prisoner would not pose a future danger in the prison community if spared the death penalty and imprisoned for life must be considered potentially mitigating in a capital case); *Moore v. Johnson*, 194 F.3d 586, 618 (5th Cir. 1999) (counsel deficient for failing to argue defendant's early release from prison as a mitigation factor).

13. Trial counsel was deficient for failing to retain an expert to review Mr. Gavin's prison records and for failing to call an expert on the effects of institutionalization to testify during the sentencing phase of trial about the effect of seventeen years of incarceration in the Illinois Department of Corrections on Mr. Gavin's post-release behavior. An expert witness also could have testified that based on a review of Mr. Gavin's records, Mr. Gavin showed potential for future positive adjustment in prison. Testimony regarding the failure of the Illinois Department of Corrections to adequately prepare Mr. Gavin for release from prison could also have been presented. Expert testimony on such topics is widely recognized by courts as appropriate mitigation evidence. The Alabama Prison Project recommended that trial counsel retain Dr. Craig Haney, a nationally recognized expert on these matters. Trial counsel was deficient for failing to ever retain Dr. Haney or a similar expert, provide Dr. Haney with the information and access to Mr. Gavin necessary to form his opinions, and for failing to have Dr. Haney or a similar expert testify at trial.

14. Finally, trial counsel's deficient performance during the guilt phase of the trial also rendered his performance during the sentencing phase deficient. In Alabama, where a defendant was an accomplice in a capital offense committed by another person and his participation was relatively minor, that is a statutory mitigating factor that must be considered by

the jury. *See* Ala. Code 1975 §13A-5-51(4). By failing to investigate Mr. Meeks' role and motive in the crime, as set forth at pp. 3-22, *supra*, trial counsel also failed to present at the sentencing phase evidence that Mr. Gavin, even if convicted, was the less culpable participant.

15. There is a reasonable probability that this mitigation evidence would have changed the outcome in this case. When, as here, the same jury considered guilt and punishment, the question is whether the cumulative errors of counsel rendered the jury's findings, either as to guilt or punishment, unreliable. *Moore*, 194 F.3d at 619. In this case, counsel's failure to point out the deficiencies in the State's investigation, failure to investigate and effectively cross-examine Dwayne Meeks, failure to counter the State's identification evidence, and failure to present virtually any mitigation evidence regarding Mr. Gavin's family, background, and prior incarceration, fatally undermine the confidence in Mr. Gavin's death sentence. Notably, despite these glaring deficiencies, two jurors voted for life without parole instead of death. (Tr. at 1300.) Had just one additional juror found that the mitigating factors outweighed the aggravating factors, the jury would have had to recommend a sentence of life without parole.

16. Additionally, counsel was ineffective in failing adequately to investigate the highly prejudicial and inflammatory "official statement of facts" that was introduced at trial regarding Mr. Gavin's prior conviction from Illinois. Although the court ordered the State to turn over the document in advance of trial, the State failed to do so. Counsel never brought the State's failure to comply to the attention of the court. The Statement was not turned over until two days before the penalty phase. At that point defense merely argued that it could not challenge the statement because it had no access to the official record in Illinois. As soon as counsel was alerted to the existence of the document, counsel should have begun to investigate

the facts regarding Mr. Gavin's prior conviction. Instead, this irrelevant and highly prejudicial document was submitted to the jury with no effective challenge. The introduction of this evidence unconstitutionally biased the jury against Mr. Gavin.

17. In support of this claim, Mr. Gavin intends to rely on the trial transcript, documents from defense counsels' files, and the testimony of Messrs. Bayne Smith and John Ufford. In addition, Mr. Gavin intends to rely on expert testimony, affidavits or testimony from Mr. Gavin's family members and other witnesses, and Mr. Gavin's medical, educational, employment, and corrections records. Mr. Gavin reasonably believes that all of this evidence existed at the time of trial due to the dates on which the documents were prepared and interviews conducted by counsel. Counsel's investigation is on-going, and counsel reserves the right to support this claim with additional evidence that comes to its attention.

18. In support of this claim, Mr. Gavin also seeks discovery from the Alabama Department of Corrections. Specifically, Mr. Gavin requests all records related to him held by the Alabama Department of Corrections, including, but not limited to, medical records, psychological or psychiatric evaluations, and incident reports. On information and belief, the Alabama Department of Corrections keeps such records in the ordinary course of business. Therefore, although some such records may have been created after trial, some of these records would have existed at the time of trial because Mr. Gavin had been incarcerated for over a year before the trial began.

E. E. Counsel Was Ineffective In Failing To Move To Have Witnesses Kept Separated Prior To Their Testimony.

Amended allegations:

1. Trial counsel was ineffective in failing to move pursuant to Alabama Rule of Criminal Procedure 9.3(a) to prohibit witnesses from communicating with each other and under

Alabama Rule of Evidence 615 to have witnesses sequestered. *See* Ala. R. Crim. P. 9.3(a) (court, on its own motion or at the request of any party, may exclude witnesses from the courtroom and direct them not to communicate with each other, or with anyone other than the attorneys in the case, concerning any testimony until all witnesses have been released by the court); Ala. R. Evid. 615; *see also* Otinger v. State, 299 So.2d 333 (Ala. Cr. App. 1974) (trial court rarely should deny a request for sequestration of witnesses); *Gautney v. State*, 222 So.2d 175, 178 (Ala. 1969) (trial judge possesses the discretion to explicitly instruct witnesses not to talk with each other outside the courtroom). Given the stakes of a capital murder case, counsel's failure to request witness sequestration and ensure that witnesses were not placed in the same room before their testimony is inexcusable.

2. Moreover, counsel's failure to do so prejudiced Mr. Gavin. Larry Twilley, who was a witness for the State, was placed in a room outside of the courtroom with three other witnesses, Mr. and Mrs. Bob Duarte and a waitress from the Duarte's pizza shop, prior to his testimony. According to Mr. Twilley, he and Mr. Duarte discussed the shooting and what they saw. The witnesses' conversation was presumptively prejudicial to Mr. Gavin.

3. Ronald Baker, also a witness for the State, also has said that on the day of his testimony, he was put in a room with Richard Henry, Dewayne Meeks, and Mr. Meeks friend, Tom Arambasich, along with several other witnesses. According to Mr. Baker, Mr. Arambasich identified himself as a detective from Chicago who was a good friend of the person who was driving the vehicle in which the shooter was riding before the incident. Mr. Arambasich told Mr. Baker that the driver of the vehicle was a good person and a State of Illinois Correctional Officer who had won several awards in weight lifting. Mr. Arambasich further told Mr. Baker that the driver had nothing to do with the shooting and had no idea his cousin was going to shoot the victim. What is more, Mr. Arambasich told Mr. Baker full details of his version of events and Mr. Meeks' alleged lack of involvement. Mr. Baker was intimidated by Mr. Arambasich and believed

Mr. Arambasich was trying to persuade him to make statements favorable to the driver in this testimony.

3. Mr. Gavin intends to support this claim with expert testimony, and the testimony State witnesses. Counsel's investigation is on-going, and counsel reserves the right to support this claim with additional evidence that comes to its attention.

F. F. Counsel Was Ineffective In Failing To Adequately Cross-Examine Barbara Genovese.

G. Allegation:

1. Ms. Genovese testified that she heard Mr. Gavin make a comment implying that he, and not Dwayne Meeks, was the murderer. At the time that Ms. Genovese gave this testimony, Mr. Gavin had filed a lawsuit against her. Trial counsel failed to use the existence of the lawsuit to expose Ms. Genovese's bias against Mr. Gavin.

2. Mr. Gavin intends to support this claim with the court records of his civil suit against Ms. Genovese. Counsel's investigation is on-going, and counsel reserves the right to support this claim with additional evidence that comes to its attention.

H. G. Trial Counsel Was Ineffective In Counseling Mr. Gavin Not To Testify In His Own Defense.

1. Trial counsel was ineffective in counseling Mr. Gavin not to testify in his own defense. In this case, the only strategy for raising a reasonable doubt as to Mr. Gavin's guilt was to implicate Mr. Meeks. Because Mr. Gavin and Mr. Meeks were alone during the time period leading up to and during the shooting of Mr. Clayton, in order to rebut the State's version of events, as given by Mr. Meeks, it was imperative that Mr. Gavin testify to provide his version of the facts.

2. Mr. Gavin wanted to testify on his own behalf, but his attorneys counseled him against doing so. Mr. Gavin was scared and confused about not following his attorneys' advice.

Notably, Mr. Gavin sought to have his appointed counsel removed, but his motion was denied. (*See* Tr. at 293:4-302:16.).

3a. The best evidence that could be brought forward on that score was Mr. Gavin's own account of the events that transpired on March 8, 1998. Had Mr. Gavin testified at trial, he would have testified to the following:

> "When I was twenty years old, I was arrested on murder charges. I was sentenced at age twenty-one and I served seventeen years. While I was in prison, Dwayne Meeks, my cousin, was working at a different prison as a correctional officer. I heard rumors that he was bringing drugs into the prison so that the prison gangs could sell the drugs to other prisoners.
>
> I was paroled and released from prison on December 26, 1997. I hoped to find a job and create a better life, but I did not receive any assistance from the Department of Corrections or State of Illinois. When I was released, they had no programs to help me find a job. I was given only clothes to wear out of the prison and $50.
> When I was released from prison I returned to Chicago to live with my mother. At that time, my sister Sharon, who is mentally disabled, was living with my mother. My sister Geanetta, her husband, and three children also were living with my mother. I had to share a room and bed with my nephew, Lil' Keith, who was then 2 ½ years old.
>
> When I was released from prison, I was very upset to discover that several of my siblings had become addicted to cocaine and other drugs. I believe my sister Elaine and my brother Sterling were both doing cocaine. Sterling looked very bad.
>
> I was also very upset by the condition of my mother's home. It needed substantial repairs and was very messy and dirty. I wanted to do whatever I could to help my mother, both emotionally and financially. However, it was very difficult for me to find work given my prison record and the fact that the State of Illinois did not provide any employment counseling or other resources. It was also difficult for me to find work because I had spent my entire adult life in prison and it was difficult for me to adjust to life on the outside.
>
> After my release, a friend of mine, Troy Roberts, said that he would help me get a job at a welding company around 14th and Laramie in Chicago. On the day that we were supposed to meet outside of the welding company so Troy could introduce me to the foreman, Troy did not show up, so I filled out an application.
>
> On or around December 27, 1997, Dwayne Meeks came to my mother's house, where I was staying. I had not seen Dwayne for twenty years. Dwayne had only contacted me one time while I was in prison. About two years before I was released, he wrote me a letter saying that he and his wife were trying to get custody of my nephew Lil' Keith. I later learned that this was not true.
>
> On that first visit after my release, Dwayne told me that he was a corrections officer at a state prison, and bragged about how well he was doing.

Dwayne told me that he had been "dipping and diving here and again in the game." He said that he was selling cocaine to police officers and lawyers in Alabama and Illinois. He said that he had friends in the police departments in Fort Payne, Alabama and in Joliet, Illinois, who helped him out.

Dwayne offered to set me up selling drugs, but I said that I was not going to have anything to do with drugs or anybody that messed with drugs. Then he asked me if I wanted some money, and I said yes. We were sitting in my mother's driveway and he pulled out a thick wad of cash. He was showboating. Dwayne gave me some of the cash, about $50.

Dwayne asked me if I wanted to visit anyone and offered to take me around. Dwayne and I and my brother Sterling went to 14th and Troop to visit Ann Morris, my old girlfriend's mother. We left there and then we went to Joliet to visit some relatives, including Nate Matthews and his wife.

Dwayne took me and Sterling to see his house. He said he wanted to show me how he was living. We went to his house and stayed about 30 minutes and he introduced me to his wife, Sharon.

Over the following days, Dwayne took me to see more relatives and took me back to the neighborhood where I grew up again to see my old girlfriend's mother again and her sons. They were like family to me.

Dwayne offered to take me to a New Year's Eve party and said that I could bring Sterling.

When Dwayne came to pick me up on New Year's Eve, he told me that Sterling used to go down to Alabama with him to deal drugs but that Sterling did not like it. Then he asked me again if I was interested in dealing drugs or if I could find someone to "set up shop" down in Fort Payne. I told him that I did not know anybody. Dwayne told me that he had friends down in Fort Payne who would protect me if I went down there. He said that they were policemen. I told Dwayne that I was not going to sell drugs because my brother Sterling and my sister Elaine were messed up on drugs.

Before we went to the party, we picked up Sterling, our cousin Kiki Johnson, and Dwayne's sister, Anita Meeks.

Dwayne bought me ten bottles of champagne, each of which cost around $13. He also bought other drinks for the other people we were with.

We went to the party, which was held at Tom Arambasich's house. Tom was a police officer in Joliet, Illinois.

On January 2, Dwayne came to my mother's house to see me. He said that he and Sterling had a falling out the last time that they were down in Alabama. He said that Sterling thought Dwayne still owed him money. Dwayne said that he knew that Sterling respected me and would do whatever I asked him to do. Dwayne said, "Why don't you holler at him and see could he get himself a spot somewhere out here on the west side. I got a lot of heroin man I'm trying to get off and I got people waitin' on this money." I

told Dwayne that I would not encourage Sterling to do it. Dwayne said, "Come on cuz I need you on this one man. I got people I owe." I said that I would ask Sterling but that I would not encourage him.
I told Sterling that Dwayne had come by and asked me to ask Sterling to set up a heroin spot for Dwayne. I guess Sterling was desperate because he agreed to do it. I told Sterling that I would contact Dwayne and let him know that Sterling would do it for him, but I said I don't think you ought to mess with it. Before I had a chance to contact Dwayne, he came by the next day (January 3) in a work release correctional van. I said that I had talked to Sterling and that Sterling had agreed to do it. Dwayne had four girls in the van and asked if I wanted one of them. He said the girls were still strung out on drugs. I said no, I did not want one of them nasty girls.

A few weeks later, Dwayne told me that Sterling was not moving the heroin fast enough. He told me that he had Sterling give the heroin back to him. Dwayne told me that he was under a lot of financial pressure because of the mortgage on his house.

Dwayne asked if I would go to Alabama with him over the Martin Luther King, Jr. holiday weekend. I was not allowed to leave the state due to the conditions of my parole, but Dwayne assured me that because his wife worked for the Illinois Department of Corrections ("IDOC"), there would be no problem with me traveling out-of-state. Dwayne offered me $300, plus expenses, for helping him drive to Alabama. I agreed because all I had to do was drive. I wanted the money for repairs to my mother's house.

Dwayne and I made the trip along with Dwayne's niece, Nita, who was about seventeen years old at the time. Dwayne said that he wanted someone to travel with us so that if we got pulled over it would look like we were on a family trip.

We left Illinois on Friday night and arrived in Fort Payne, Alabama, the following day around noon. It is about an 11 hour drive from Chicago to Fort Payne. When we got to Forty Payne, we took Nita to her grandmother's house. (Nita's grandmother is also Dwayne's daughter's grandmother. Nita is the daughter of Dwayne's sister and Dwayne's first wife's brother.)

We then went to the home of a man who Dwayne introduced as his brother-in-law. Afterwards, we went to Dwayne's mother-in-law's house to use the phone. When we left there, we went to a hotel in Fort Payne and got a room.

That evening, we took Dwayne's daughter, his niece, and one of their cousins out to dinner. After dinner, we brought the kids back to Dwayne's mother-in-law's house. That night, we went to a house-party out in the country with Dwayne's brother-in-law. We were there until about 11:00 and then we went to a nightclub, where Dwayne and his brother-in-law met up with two white women. Dwayne left with one of the women. The brother-in-law was too drunk to drive, so I drove his car and he and the other white woman rode in the back seat. They had sex in the backseat while I was driving.
I did not meet or have sex with any women that night or any other night that I was in Alabama. I did not develop a relationship with any woman in Alabama at this or any other time.

In the morning, we went to Dwayne's in-laws' house to see them and Dwayne's daughter. After lunch, around 4:00 p.m., we left Dwayne's mother-in-law's house and drove to a town about forty-five minutes away. I had never been to Alabama before and I

am not familiar with that area. Dwayne grew up in Alabama and is very familiar with the area.
Dwayne drove to a gas station. At the gas station, we waited in the parking lot, a good distance from the pumps, for about thirty minutes. Eventually, two black men drove up, and Dwayne got out and spoke to them. Dwayne pulled a gray and black gym bag out of the back of his car. I saw one of the men dip his finger into a plastic bag full of white powder and taste it. The men took the package and walked away.

When Dwayne returned, he gave me a black sack of money and told me to count the 10- and 20-dollar bills. My count came to about $4000. While I was counting, Dwayne was counting the 5- and 50-dollar bills. Dwayne give me $300 and we returned to Fort Payne. We then drove back to Illinois and arrived there at 4:00 a.m. on Monday morning. Dwayne dropped me off at my mom's house.

During that first trip to Alabama, Dwayne boasted to me about his police friends and his connections in Fort Payne. He would go on about how they got his back and things of that nature.

During that first trip to Alabama, Dwayne also introduced me to Danny Smith, a police officer. Danny he pulled up next to us while we were sitting outside Dwayne's mother-in-law's house. Dwayne got out and went to sit in Danny's car for a few minutes.
After we returned from Alabama in January, I saw Dwayne off and on. Dwayne often took me out to eat. I had never before had anyone spend money on me like that.

Around this time Dwayne tried to solicit me to try to set up a heroin spot. He said that he knew that I just got out of the joint and that I did not want to mess with drugs and selling. He said that maybe I could holler at somebody and get them to set up a spot for the heroin he had. He said that he had just picked the heroin up from down south. I saw what appeared to be heroin in Dwayne's car in his garage. It was in a plastic bag.
On March 5, 1998, Dwayne called my mom's house and asked if I would drive to Alabama with him again. He said that he was going to Alabama to pick up a package and pick up some money from someone who owed him. He again offered me $300 and all expenses paid to help with the driving. That was a lot of money to me because I did not have any other source of income and was having trouble finding a job.

Dwayne said that the only person he could get to go with us on this trip was his wife, but he did not want to bring her. He asked me if I could find someone else to go with us, but I said no.

While I was packing a bag to get ready for the trip, my brother Sterling came to talk to me about Dwayne. Sterling told me to stop going down to Alabama with Dwayne. He said, "Dwayne is not what you think he is." Sterling said that he used to make trips to Alabama with Dwayne. I told Sterling that I was just going to help Dwayne drive, so everything would be alright.

Dwayne came to pick me up around 10:30 p.m. or 11:00 p.m. the night of March 5. When he arrived at my mother's house and asked if I was ready to go, I said that I was worried about leaving town again because I did not have approval from my parole officer. Dwayne said words to the effect that because he was a work release officer, and because his wife worked for a branch of the Illinois Department of Corrections, it was okay.

Dwayne's wife Sharon and their three year old son were in the car. We drove until 4:00 a.m. or 5:00 a.m., when we stopped at a hotel in Indiana, near the Kentucky border. Dwayne got a hotel room for his family and a separate hotel room for me. When I got in my hotel room, I immediately went to sleep. Just a few hours later, Dwayne knocked on my door and told me to get up because we were leaving again. We had breakfast at McDonald's and then drove to Chattanooga. We stopped for lunch along the way. When we arrived in Chattanooga, we stopped at a hotel. Dwayne again got a room for his family and a separate room for me. Dwayne's wife and son stayed at the hotel in Chattanooga, and Dwayne and I drove to Fort Payne.

On the way to Alabama, we were pulled over in Indiana by a state trooper. Dwayne flaunted his status as an employee of the IDOC to avoid a ticket.

We arrived in Fort Payne around 4:00 p.m. Dwayne drove the whole way. While he was driving, I asked him why he brought his wife on the trip if he had drugs in the car and was going to deal drugs. He said words to the effect, "It is like I told you before, you have to make it look like it's a family trip or a family outing. You couldn't get nobody to come, so I had to get somebody to camouflage our trip."

Once we got to Fort Payne, we went to a parking lot near a strip mall along the main street. The parking lot was across the street from a bank. Dwayne drove around to the other side of the parking lot near a pool hall or bowling alley and we sat there for about twenty minutes.

Dwayne got out and made a couple of calls from a pay phone. He returned and told me to get into the driver's seat and start the car. Dwayne got into the passenger's side. We sat for another fifteen to twenty minutes and then saw a white van across the street. Dwayne told me to follow the van. We turned left off of the main street in Fort Payne, and then followed the man to Centre. The drive took thirty or forty-five minutes. By the time we arrived in Centre, it was dark, and Dwayne's car had only one headlight. We reached an intersection and the driver of the van pulled over to the right and came to a complete stop. Dwayne indicated I should pull up beside the white van. Dwayne then pulled a black ski mask over his head and reached into the glove compartment. He pulled out a gun and jumped out of the car. He then opened the driver's side door of the van and said something to the driver. I could see that the driver responded to Dwayne, but I could not hear what they were saying. I had no idea what was going on. I heard a gunshot and saw Dwayne fire twice at the driver. The driver slumped over, and I saw Dwayne pushing the driver over to the passenger side of the van.

I was shocked and confused. The car in front of the van sped off and turned left. Dwayne's door was still open, but I panicked and drove off, turning right in front of the van. As I turned, the driver's side door of the van hit the passenger door of the car, and slammed the door shut. I looked in the rear view mirror and saw that the van was coming after me. I looked for signs heading north.

At this time, I was wearing earmuffs but no hat. I was also wearing an orange patterned sweater that Dwayne had given me and a pair of jeans from prison. Under the sweater I wore a tank top, and my shoes were low-top Route 66 work boots. Dwayne wore a red sweater that had the same design as mine, jeans, and sneakers. He wore a black skull cap on the drive down, but his son pulled it off at some point before we got to Chattanooga.

When he shot the driver, he was wearing a ski mask that he had pulled from somewhere in the car.

I continued driving down the same road. I was not familiar with the area and did not know where I was going. I saw that Dwayne was behind me in the white van. He started honking at me and flashing his lights. I pulled over by the side of the road and got out of the car, leaving the engine running and the door open. Dwayne got out of the van and came towards me and the Blazer. Dwayne kept saying to me, "Why you leave me like that?" I said, "What the hell is going on? What the fuck you do that for?"

When Dwayne got out of the white van, he had a gun in his left hand and he was carrying an unmarked black bag, like a satchel, in his right hand.

Dwayne told me to get into the passenger seat of the Blazer so he could drive. I started to walk around the back of the Blazer to get in the passenger side. Before I got half way around the Blazer, Dwayne got into the driver's seat of the Blazer and fired a shot into the air out of the driver's window. I was very startled and I ducked, not sure where Dwayne was shooting. Dwayne then drove off, leaving me there.

At this time, I saw that another car had pulled up and stopped behind the white van. I saw the driver open his door. The driver shouted after me, but I started running into the woods. I did not have a plan other than to get away from the area. Once I got into the woods, I kept running until I reached a creek. I saw the lights of police cars going past me. I tried to find my way out of the woods towards the road, and I heard voices saying they had seen me run into the woods. I ran back to the creek and stayed there. I was in the woods for about three and a half hours.

The police eventually surrounded me and someone shot at me. I put my hands in the air and said I was unarmed. I was then arrested.

I never discussed with Dwayne going to Alabama to meet girls. The story Dwayne told at the trial does not make any sense. I would not have to travel 1000 miles from Chicago to rural Alabama to meet girls. There are a lot of women in Chicago. There was never a woman in Alabama who said that she would pay Dwayne to drive me back down there. I have only been to Dwayne Meeks' house three times. Each time I sat in a T.V. room right off of the garage or in the kitchen. I never went upstairs to his bedroom. I never took a gun from his house.

I regret letting Dwayne Meeks into my life after I was released from prison. I believe that he took advantage of my vulnerability."

c. This testimony should have been presented to the jury in the guilt phase of Mr. Gavin's trial.

II. The Following Claim Does Not Require Evidence From Any Source Other Than The Trial Record.

I. A. Trial Counsel Was Ineffective In Failing to Prevent Evidence of Prior Conviction from Getting to the Jury in the Guilt Phase of the Trial.

Related allegations as they appear in the presently pending Petition:

Counsel failed to adequately object to inflammatory statements made by the State during opening and closing statements. (Pet. at 15.)

Amended allegations:

1. Throughout the presentation of its case, including during the guilt phase of the trial, the prosecution presented highly prejudicial evidence of Mr. Gavin's prior conviction to the jury. In referring to Mr. Gavin as the "convicted murdered from Chicago" numerous times and in offering the jury inflammatory evidence of the facts of the murder underlying Mr. Gavin's prior conviction, the State relied on Section 13A-5-40(a)(13) of the Code of the State of Alabama. That provision requires the State to prove as an element of the capital murder charge that a defendant had been convicted of another murder within the 20 years.

2. Although the State is authorized to introduce evidence of a defendant's prior conviction during the guilt phase of the trial, the defendant may offer to stipulate to the fact of prior conviction, thereby eliminating the risk that the prosecution will place prejudicial and inflammatory evidence of the murder underlying the prior conviction. Indeed, there is substantial precedent in Alabama criminal law for the defendant to offer to stipulate, the State to agree to such offers, and the court to rule that prejudicial evidence be excluded in favor of such stipulations. The failure of Mr. Gavin's counsel to offer to stipulate to his prior conviction, indeed his apparent failure even to realize that such offers were the norm, constitutes ineffective assistance of counsel.

3. For example, in *Ex Parte Peraita*, 897 So.2d 1227 (Ala. 2004), the defense moved to offer to stipulate to his being convicted of murder within the previous 20 years. Although the State rejected the defendant's offer, it counter-offered to stipulate as to each of the defendant's

six prior convictions, the underlying offense, the court in which the conviction was obtained, and the date of conviction. The defendant rejected the State's counter-offer, but the court limited the State's introduction of evidence to the court and date of the prior convictions, the sentence imposed, and evidence used to prove that the offense constituted murder. "At no time was the State permitted to offer evidence of any details of the offenses, such as the identity of the victims or the nature of the murders." *Id.* at 1233.

4. The *Peraita* court's rationale is based on Alabama Rule of Evidence 403, which states that "relevant evidence may be excluded from trial if its probative value is substantially outweighed by the danger of unfair prejudice. . . ." Ala. R. Evid. 403. In *Peraita*, the court concluded that evidence showing that the defendant is a "cold-blooded killer" and other evidence containing "substantive information" concerning the murders underlying the prior conviction would present significant danger of unfair prejudice that could be excluded from evidence presented during the guilt phase. *Peraita*, 897 So.2d at 1235.

5. In the present case, Mr. Gavin's counsel failed to move the Court to offer to stipulate as to the basic facts of Mr. Gavin's prior conviction. Because counsel failed to so move, the Court did not exclude highly prejudicial and inflammatory evidence and prosecutor statements concerning the details of the murder underlying Mr. Gavin's prior conviction. Counsel's failure to move to offer to stipulate constituted plainly deficient performance for a capital murder defense. Further, such deficiency was highly prejudicial to Mr. Gavin because it allowed the jury to hear unnecessarily inflammatory evidence, which evidence was at least reasonably likely to prejudice the jury in its vote on Mr. Gavin's innocence or guilt. Such prejudice is particularly apparent in a case like Mr. Gavin's where the evidence of guilt is very

weak -- *viz.*, predominantly the testimony of a single witness whose credibility was (or should have been) highly questionable).[8]

JUROR MISCONDUCT PREVENTED MR. GAVIN FROM GETTING A FAIR TRIAL[9]

Related allegations as they appear in the presently pending Petition:

> Jurors, in order to remain impartial, must be guarded in their deliberations from outside influences that may unlawfully affect the verdict. The introduction of extraneous information into the deliberations in Mr. Gavin's case violated his rights to due process and a fair trial. Turner v. Louisiana, 379 U.S. 466, 472-73 (1965); Remmer v. United States, 347 U.S. 227, 229 (1954) ("[T]he integrity of jury proceedings must not be jeopardized by unauthorized invasion."); Ex parte Reed, 547 So. 2d 596, 597 (Ala. 1989); Ex parte Troha, 462 So. 2d 953, 954 (Ala. 1984); Miles v. State, 75 So. 2d 479, 672 (Ala. 1954).

Amended allegations:

I. The Jury Engaged In Premature Penalty Deliberations In Violation Of Mr. Gavin's Sixth Amendment Rights.

1. "It is a generally accepted principle of trial administration that jurors must not engage in discussions of a case before they have heard both the evidence and the court's legal instructions and have begun formally deliberating as a collective body." *United States v. Resko*, 3 F.3d 684, 688 (3d Cir. 1993); *see also id.* at 689 (describing reasons for prohibition); *Phillips v. Moore*, No. Civ.A.02-2120 JLL, 2005 WL 2562972, at *13-14 (D.N.J. Oct. 12, 2005) (same);

---

[8] Trial counsel also was ineffective in failing to move for a change of venue despite extensive prejudicial publicity surrounding the case; in its failure to conduct an adequate voir dire, thereby depriving Mr. Gavin of a fair and impartial jury; in failing to submit a motion to prohibit the seating of jurors that were not life-qualified, *see Morgan v. Illinois*, 504 U.S. 719, 727 (1992); and in its failure to introduce completed juror questionnaires into the record. In addition, trial counsel and appellate counsel were ineffective in failing to preserve the issue of the constitutionality of the Alabama statute, as described *infra* at pp. 49-52.

[9] In its June 19, 2006 Order, this Court dismissed Mr. Gavin's juror misconduct claims for lack of specificity. The Order does not state that the dismissal was with prejudice. Leave to amend is to be freely granted under Rule 32. *See* Ala R. Crim. P. 32.7(d); *Wilson v. State*, 911 So. 2d 40, 44 (Ala. Cr. App. 2005). As such, Mr. Gavin respectfully requests that the Court consider his amended allegations on these claims.

Ramirez v. State, 922 So. 2d 386, 390 (Fla. App. Mar. 7, 2006) ("Deciding a case before hearing all the evidence is antithetical to a fair trial."). In accordance with this principle, the Court presiding over Mr. Gavin's trial repeatedly admonished the jurors not to discuss the case before it was submitted to the jury for decision.

2. However, counsel's post-conviction investigation in this case has revealed that the jurors voted on guilt *and sentencing* at the same time – that is, after the guilt determination was submitted to the jury on November 6, 1999, but before the sentencing phase even began on Monday, November 8, 1999. Terry Manley, the jury foreman, vividly recalled that, after discussing the evidence, the jury decided to vote by secret ballot. Before the secret ballots were distributed, juror Clifford Higgins spoke up. Mr. Higgins said that if the other jurors thought that he (Higgins) would vote differently because he was black and the defendant also was black, he wanted them to know that he was going to vote guilty and he was also going to vote for the death penalty. After that, each of the jurors wrote their votes down on a piece of paper, voting *both* for guilt and for sentence (death or life without parole). At that time, the vote was unanimous in favor of guilt and 10 to 2 in favor of the death penalty. Jurors Cheryl Beard and Belinda Martinez have confirmed that the jurors voted on both guilt and sentencing at the same time.

3. That the jury prematurely deliberated on sentencing and, indeed, committed to positions on sentencing prior to the sentencing phase of the trial clearly constitutes juror misconduct, particularly in a case where the evidence of guilt was weak. There are a number of reasons for the prohibition on premature deliberations in a criminal case, including, (1) "once a juror expresses his or her views in the presence of other jurors, he or she is likely to continue to adhere to that opinion and to pay greater attention to evidence presented that comports with that opinion"; (2) "because the court provides the jury with legal instructions only after all the

evidence has been presented, jurors who engage in premature deliberations do so without the benefit of the court's instructions on the reasonable doubt standard"; and (3) once a juror forms a premature conclusion about the case, the burden of proof effectively shifts to the defendant, who has "the burden of changing by evidence the opinion thus formed." *Resko*, 3 F.3d at 689. All of these reasons apply in this case. The jurors formed conclusions on sentencing before hearing any of the mitigating evidence and before receiving the legal instructions. After hearing the sentencing phase evidence, the jurors came back with the same 10-2 vote, demonstrating that they were set in their conclusions before they heard the sentencing phase evidence. This plainly prejudiced Mr. Gavin and violated his constitutional rights.

II. The Jury Engaged in Extra-Juror Communications In Violation Of Mr. Gavin's Sixth Amendment Rights.

1. Mr. Manley also recalls that on Sunday, November 7, 1999, while the jurors were at a hotel in Lake Guntersville, he and some other jurors played golf with the bailiff. It has long been recognized that *extra*-juror influences, such as communications with third parties, pose an even more serious threat to the fairness of a criminal proceeding than improper *intra*-jury communications because the extraneous information completely evades the safeguards of the judicial process. *Resko*, 3 F.3d at 690. To protect against such outside influences, the trial court had the jury sequestered in this case. These safeguards were thwarted by having the bailiff – who was not sequestered and who was privy to information withheld from the jurors – spend several hours with some jurors out of the eye and ear shot of others. Given the seriousness of extra-juror influences, Mr. Gavin is entitled to a presumption of prejudice and an evidentiary hearing to examine these witnesses on what was discussed during the golf outing.

PROSECUTORIAL MISCONDUCT PREVENTED
MR. GAVIN FROM GETTING A FAIR TRIAL

I. The State Withheld Exclupatory Information Favorable To The Defense Regarding Dewayne Meeks.

Related allegations as they appear in the presently pending Petition:

The State also withheld exculpatory information favorable to the defense regarding its investigation of, and relationship with, DeWayne Meeks.

Amended allegations:

1. As set forth above, documents within the prosecution's own files show that, contrary to Mr. Meeks' sworn testimony, the murder weapon was not issued to him in the course of his employment with the Illinois Department of Corrections, but rather was his personal weapon. (*See* pp. 5-6, *supra.*) The State either made these documents available to Mr. Gavin's trial counsel, in which case trial counsel was deficient in failing to use them to impeach Mr. Meeks' testimony, or the State failed to produce these documents to trial counsel in violation of its obligations under *Brady v. Maryland*, 373 U.S. 83 (1963).

2. Suppression of evidence favorable to the accused is a due process violation where the evidence is material to either guilt or punishment. A defendant is entitled to exculpatory evidence in a criminal proceeding, including impeachment evidence. *Brady v. Maryland*, 373 U.S. 83 (1963); *see also United States v. Agurs*, 427 U.S. 97 (1976) (extending the *Brady* principle to the due process clause of the Fifth Amendment); *United States v. Bagley*, 473 U.S. 667 (1985); *Giglio v. United States*, 405 U.S. 150 (1972); *Ex parte Womack*, 541 So. 2d 47 (Ala. 1988). In the context of a capital proceeding, the State is under a heightened obligation to provide discovery to the defendant, as the possibility of a death sentence is a special circumstance that places an increased obligation on the State. *Ex parte Monk*, 557 So. 2d 832 (Ala. 1989).

3. *Brady* also encompasses evidence known to police investigators and thus requires prosecutors to learn of any evidence favorable to the defense which is known to others acting on the government's behalf. *Strickler v. Greene*, 527 U.S. 263 (1999). The State has an affirmative due process obligation to divulge information which is favorable to an accused and material on the issue of the credibility of a witness whose reliability may be determinative of guilt or innocence. *State v. Bowie*, 813 So.2d 377 (La. 2002). Evidence is "material" for purposes of a *Brady* violation if there is a reasonable probability that, had the evidence been disclosed to the defense, the result (*i.e.*, verdict) of the proceeding would have been different. The materiality inquiry is whether the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict. *See Strickler,* 527 U.S. at 280; *Banks v. Dretke*, 540 U.S. 668 (2004); see also *DiLosa v. Cain*, 279 F.3d 259, 264 (5th Cir. 2002) (test of materiality is not whether evidence was sufficient to create a reasonable possibility of acquittal but rather whether evidence undermined faith in conviction).

4. Given the above, if in fact the State withheld information regarding the ownership of Mr. Meeks' gun from defense counsel, it constituted prosecutorial misconduct and a *Brady* violation. The facts and circumstances surrounding the weapon used in Mr. Clayton's murder – whose gun it was, how was it obtained, when was it obtained, and who had fired it previously – was pivotal to Mr. Gavin's defense. The improper withholding of the evidence prevented Mr. Gavin's counsel from cross-examining this key State witness regarding the weapon and his motivation to mislead the court and the jury.[10] This clearly undermines Mr. Gavin's conviction, as the jury undoubtedly gave great weight to the testimony of Dwayne Meeks..

[10] Regardless of the impropriety of the State's withholding of evidence regarding the ownership of the gun, Mr. Gavin's counsel could and should have investigated the matter himself. His failure to do so and the corresponding effect on the outcome of the trial constituted ineffective assistance of counsel. (*See supra*, at pp. 2-8.)

5. Furthermore, as described (*supra* at pp. 4-5), the prosecutor used leading questions during direct examination to elicit testimony from Mr. Meeks that the gun allegedly used to shoot Mr. Clayton was issued to him by the Illinois Department of Corrections. Specifically, the prosecution asked if the weapon he suspected had been used to murder Mr. Clayton was his "official weapon for [his] job," to which Meeks responded affirmatively but falsely. (Tr. at 679.) That the prosecution thought it appropriate to ask this question is shocking. The prosecutor's own notes prepared in anticipation of trial State as follows: "Wilson had dispatcher run serial number on Glock … came back registered to Meeks." Ex. K, at 5. This note makes clear that the prosecutor knew that Mr. Meeks' gun was not issued by nor registered to the IDOC. Furthermore, a number of the officers carrying out the investigation were aware that the gun belonged to Mr. Meeks, not the State of Illinois. (*See* pp. 5-6, *supra*.)

6. Where the government has caused false testimony to be introduced into trial, a *Brady* claim may arise. *United States v. Askanazi*, 14 Fed.Appx. 538 (6th Cir. 2001). Furthermore, a new trial is appropriate based on the U.S. Supreme Court's opinion in *Giglio v. United States*, 405 U.S. 150 (1972), where "the prosecutor knowingly used perjured testimony, or failed to correct what he subsequently learned was false testimony." *United States v. Alzate*, 47 F.3d 1103, 1110 (11th Cir. 1995) (remanding for a new trial). "Where either of those events has happened, the falsehood is deemed to be material 'if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury.'" *Id.* (*quoting Agurs*, 427 U.S. at 103 (1976)); *accord Giglio*, 405 U.S. at 154 ("A new trial is required if the false testimony could . . . in any reasonable likelihood have affected the judgment of the jury . . .") (quotation omitted).

7. In this case, the prosecutor elicited false testimony from Mr. Meeks regarding the ownership of the gun, despite both his and the State's investigators' knowledge that the murder weapon was owned by Mr. Meeks, not the State of Illinois. Based on the key role that Mr. Meeks played in the prosecution's case, as well as the fact that the murder weapon was at issue in the false testimony, there is a reasonable likelihood that the false testimony could have affected the judgment of the jury. As such, the prosecutor's actions constitute violations of both *Brady* and *Giglio* and Mr. Gavin should be granted a new trial.

8. Mr. Gavin intends to support this claim with the information gathered from the State. In the Court's June 19, 2006 Order, the Court ordered the State to notify undersigned counsel and the Court whether it withheld any information related to Mr. Meeks under an assertion of privilege, and to provide any such withheld documents to the Court for *in camera* inspection. As of the date of this Amended Petition, undersigned counsel has no knowledge that the State has complied with the Court's Order. Counsel's investigation is on-going, and counsel reserves the right to support this claim with additional evidence that comes to its attention.

II. The State Improperly Influenced Witnesses.

1. The State also improperly influenced witnesses. According to State witness Henry Baker, the Deputy State Attorney told him that he wanted to see Mr. Gavin "burn for what he did." The same Deputy State Attorney provided Mr. Baker and his wife use of his personal home on a lake during their stay in town for the trial.

MR. GAVIN PLEADS THE FOLLOWING CLAIMS FOR PURPOSES OF PRESERVING THEM FOR APPEAL

I. THE STATE FAILED TO COMPLY WITH ITS DISCOVERY OBLIGATIONS UNDER *BRADY V. MARYLAND* IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

1. The legal authority on which Mr. Gavin relies in asserting this claim is set forth *supra* at pp. 45-46.

2. The State withheld exculpatory information favorable to the defense regarding the credentials of the State medical examiner, Mr. Pustilnik. At the time of the trial, Mr. Pustilnik was under investigation by the Department of Forensic Sciences for substandard work. The State's failure to provide Mr. Gavin with exculpatory and impeachment evidence in violation of his rights to due process and a fair trial protected by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

II. THE ALABAMA DEATH PENALTY STATUTE IS UNCONSTITUTIONAL ON ITS FACE AND AS APPLIED TO MR. GAVIN'S CASE.[11]

1. Section 13A-5-40(a) of the Code of the State of Alabama lists the following offense among the 18 offenses that are deemed capital offenses in Alabama:

> (13) Murder by a defendant who has been convicted of any other murder in the 20 years preceding the crime; provided that the murder which constitutes the capital crime shall be murder as defined in subsection (b) of this section; and provided further that the prior murder conviction referred to shall include murder in any degree as defined at the time and place of the prior conviction.

AL Code § 13A-5-40(a)(13).

J. A. Section 13A-5-40(a)(13) Is Unconstitutional on its Face.

1. Section 13A-5-40(a)(13) of the Alabama State Code is unconstitutional on its face because it contemplates the introduction in evidence during the guilt phase of a capital murder trial of information concerning prior conviction. The introduction of such information in evidence is highly prejudicial to a defendant during the guilt phase of his trial and therefore

[11] As noted *supra*, pp. 42 n.7, Mr. Gavin also alleges that his trial counsel was ineffective in failing to raise and preserve this argument.

prejudices his rights under the Sixth, Eight, and Fourteenth Amendments to the United States Constitution.

2. Section 13A-5-40(a) lists 18 possible additional factors that, together with a finding of murder as defined in § 13A-6(2)(a)(1), support conviction on a charge of capital murder. Seven of these additional factors (1, 2, 3, 4, 8, 9, and 12) relate to events that accompany the murder: kidnapping, robbery, rape, burglary, sexual abuse, arson, and aircraft hijacking. Five of these additional factors (5, 10, 11, 14 and 15) are concerned with the victim: a law officer on duty, two or more persons in one act or scheme, a public official, a subpoenaed witness, and a person less than 14 years of age. Four of these factors (7, 16, 17 and 18) are concerned with the nature of the murder: for hire, while firing into a dwelling from outside, of a victim in a vehicle, and from a vehicle. Only two (6 and 13) are concerned with the nature of the accused: while under a life sentence and a recidivist who has been convicted of murder within 20 years. Upon conviction under any of these provisions, a defendant may be sentenced only to life without parole or death.

3. Murder is not necessarily a capital offense under Alabama law. It is a Class A felony and could be punished by as little as 10 years in prison. §§ 13A-5-6(a)(1), 13A-6-2(c). However, for murder committed under aggravating circumstances, as defined in section 13A-5-49, punishment is limited either to death or to life without parole. § 13A-6-2(c). Murder under aggravating circumstances is thus just as much a capital offense as is murder encompassed by section 13A-5-40, i.e., it is "an offense for which a defendant," pursuant to section 13A-5-39(1), "shall be punished by a sentence of death or life imprisonment without parole."

4. Whether a person convicted of either a capital offense under section 13A-5-40 or of murder under aggravating circumstances receives a sentence of death or life without parole is

determined in the same manner: by consideration of aggravating circumstances listed in section 13A-5-49, and of mitigating circumstances listed in section 13A-5-51. Among the aggravating circumstances itemized in section 13A-5-49, subdivision (2) specifies "The defendant was previously convicted of another capital offense or a felony involving the use or threat of violence to the person." This aggravating factor was the factor presented to the jury by the prosecutor to justify Mr. Gavin's death sentence under subsection (13). (*See* Tr. at 1225.)

5. Had Alabama simply charged Mr. Gavin with murder under section 13A-6-2(a)(1), there would have been no occasion for the prosecution to present evidence of the prior conviction to the jury during the guilt phase of his trial. Had the jury convicted, the sentencing phase would have gone just as it did, with evidence of the prior conviction being admitted, and the sentencing options – death or life without parole – the same. The only difference between the two methods of proceeding is that the prejudicial information concerning Mr. Gavin's prior conviction, which was presented to the jury in the guilt phase of the trial under section 13A-5-40(a)(13), would not have been admitted during the guilt phase of a trial for murder under section 13A-6-2(a)(1).

6. The "prior murder" subsection of section 13A-5-40(a)(13), therefore, serves no legitimate purpose. Its only purpose and effect are to place before the jury, during the guilt phase of a trial, prejudicial evidence that has no bearing on the question of guilt. Accordingly, section 13A-5-40(a)(13) is unconstitutional on its face.

K. B. Section 13A-5-40(a)(13) Is Unconstitutional as Applied to Mr. Gavin's Trial.

1. Section 13A-5-40(a)(13) is also unconstitutional as applied to Mr. Gavin in this case because it allowed the introduction in evidence during the guilt phase of his trial of information concerning a prior conviction for murder. The information concerning his prior conviction was used by the prosecution in a highly prejudicial manner and violated Mr. Gavin's

rights to due process and a fair trial. Specifically, the prosecution went well beyond offering simple evidence of Mr. Gavin's prior conviction and instead peppered its case with repetitive, pejorative, and inflammatory descriptions of his prior conviction in a successful attempt to prejudice the jury in the murder indictment before it. The repetitive, pejorative, and inflammatory descriptions Stated and offered by the prosecution included the following:

- The prosecution's use of Mr. Gavin's prior conviction began with the indictment, which the prosecutor recounted to the jury in his opening Statement: "Count Two in the same indictment reads that Keith Edmund Gavin did intentionally cause the death of another person, William Clinton Clayton, Jr., by shooting him with a pistol *after having been convicted of a murder on, to-wit, June 9th, 1982, in the Circuit Court of Cook County, Illinois* . . . ." (Tr. at 490-491) (emphasis added).
- In the prosecution's opening and closing statements to the jury during the guilt phase of the trial, the prosecutor repeatedly referred to the prior conviction in terms calculated to prejudice the jury against Mr. Gavin, branding him " . . . a convicted murderer from Chicago" (tr. at 492) and stating that "he's a convicted murder out of Illinois, Chicago to be exact." (Tr. at 494.) The geographic reference underscores the prejudicial intent behind the prosecution's Statements.
- "Keith Edmund Gavin, the convicted killer from Chicago, . . ." (Tr. at 497.)
- The victim "Mr. Clayton put his hands in the air and the convicted murderer from Chicago shot him anyway." (Tr. at 497.)
- "He had seen this man kill Mr. Clayton and he knew that he had killed before and Mr. Meeks was afraid he would kill again." (Tr. at 499.)
- "A senseless, brutal slaying by a man with a history of murder." (Tr. at 503-04.)
- The prosecution's closing Statements made three more inflammatory references to the prior conviction, stating that Mr. Gavin was a "convicted murderer from Cook County, Illinois . . . ." (Tr. at 1092.)
- "Mr. Meeks . . . had just seen his cousin, a convicted murderer who had just been paroled in December, and this is March, shoot a man twice." (Tr. at 1096.)
- "A man who had committed a murder back on June 9th, 1982, been paroled in December, came down here . . . ." (Tr. at 1102.)

III. MR. GAVIN'S SIXTH AND FOURTEENTH AMENDMENT RIGHTS WERE VIOLATED WHEN THE TRIAL COURT REFUSED TO ALLOW MR. GAVIN TO PROCEED PRO SE.

1. Early in the pre-trial proceeding in this matter, Mr. Gavin recognized that appointed counsel was unwilling to represent him zealously. Mr. Gavin's concerns and counsel's failure to respond are documented in correspondence between Mr. Gavin and Bayne Smith. (*See* Letters from Keith Gavin to J. Ufford and H. Bayne Smith, attached hereto as Exhibit W.) Mr. Gavin expressed to the Court dissatisfaction with his appointed counsel, based on counsel's failure adequately to represent him. Before trial commenced, Mr. Gavin asked the trial court to dismiss his counsel and permit him to proceed *pro se.* That request was refused. A defendant in a criminal case has a right, grounded in the Sixth and Fourteenth Amendments, to proceed *pro se. Faretta v. California*, 422 U.S. 806 (1975). The Court's failure to permit Mr. Gavin to proceed pro se violated this right.

IV. MR. GAVIN'S FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS WERE VIOLATED WHEN HE WAS SENTENCED TO DEATH PURSUANT TO A STATUTORY SCHEME THAT IS UNCONSTITUTIONAL ON ITS FACE AND AS APPLIED TO THE CIRCUMSTANCES OF MR. GAVIN'S CASE.[12]

1. Mr. Gavin's sentence of death is unconstitutional because it was rendered pursuant to a judgment entered under the Alabama Death Penalty Statute, Ala. Code sec. 13A-5-39 et seq., which is unconstitutional on its face insofar as it does not afford a capital defendant the constitutional protection that he only be sentenced to death pursuant to a binding, unanimous jury verdict that the defendant shall be sentenced to death.

2. The advisory jury empanelled in Mr. Gavin's case did not unanimously conclude that the defendant should be sentenced to death. Two of the duly empanelled jurors concluded

[11] Mr. Gavin also alleges that his trial counsel was ineffective in failing to raise and preserve this argument.

that Mr. Gavin should not be sentenced to death. (Tr. at 1300.) The Alabama Death Penalty Statue is therefore unconstitutional as applied to Mr. Gavin insofar as he was sentenced to death pursuant to a statutory scheme which permits a defendant to be so sentenced even in the absence of a unanimous determination by a jury that the defendant shall be sentenced to death.

V. MR. GAVIN'S SIXTH AND FOURTEENTH AMENDMENT RIGHTS WERE VIOLATED WHEN THE STATE USED ITS PEREMPTORY CHALLENGES IN A RACIALLY DISCRIMINATORY MANNER.

1. The racial composition of Cherokee County is about five percent (5%) African-American. The racial composition of Mr. Gavin's petit jury venire similarly consisted of approximately five percent (5%) African-Americans. However, the State used fifteen percent (15%) – between two and three times the expected percentage – of its peremptory challenges against African-Americans.

2. The State did not provide a racially-neutral explanation for using two-to-three times the expected number of its peremptory challenges to exclude African-Americans. It gave no explanation at all. Mr. Gavin was denied a right to a jury of his peers, in violation of the U.S. Supreme Court's opinion in *Batson v. Kentucky*, 476 U.S. 79 (1986).

Wherefore, petitioner prays that the Court grant petitioner relief to which he may be entitled in this proceeding.

ATTORNEY'S VERIFICATION UNDER OATH
SUBJECT TO PENALTY FOR PERJURY

I swear (or affirm) under penalty of perjury that, upon information and belief, the foregoing is true and correct. Executed on April 1, 2010.
(Date)

Melanie E Walker
Signature of Petitioner's Attorney

SWORN AND SUBSCRIBED
before me on this the 1st
day of April, 2010.

"OFFICIAL SEAL"
Bobette L. Fine
Notary Public, State of Illinois
My Commission Expires Sept. 21, 2012

Notary Public

Name and address of attorney representing petitioner in this proceeding (if any):

Stephen C. Jackson
C. Andrew Kitchen
MAYNARD, COOPER & GALE, P.C.
2400 AmSouth/Harbert Plaza
1901 Sixth Avenue North
Birmingham, Alabama 35203
(205) 254-1000 (telephone)
(205) 254-1999 (facsimile)

Prentice H. Marshall, Jr.
Melanie E. Walker
Caroline L. Schiff
SIDLEY AUSTIN BROWN & WOOD LLP
10 South Dearborn Street
Chicago, Illinois 60603
(312) 853-7000 (telephone)
(312) 853-7036 (facsimile)

APPENDIX N

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
MIDDLE DIVISION

KEITH EDMUND GAVIN,	)	
	)	
Petitioner,	)	
	)	
v.	)	Case No. 4:16-cv-00273-KOB
	)	
JEFFERSON S. DUNN,	)	
Commissioner of the Alabama	)	
Department of Corrections,	)	
	)	
Respondent.	)	

VOLUME 11

State Court – Trial Transcript

LUTHER STRANGE
ALABAMA ATTORNEY GENERAL

AND

BETH JACKSON HUGHES
ALABAMA ASSISTANT ATTORNEY GENERAL

ADDRESS OF COUNSEL:

Office of the Alabama Attorney General
Capital Litigation Division
501 Washington Avenue
Montgomery, AL 36130
(334) 242-7392

case at 10 A.M. That's all. Thank you.

(4:28 P.M. The proceedings were concluded for the evening)

CENTRE, ALABAMA

NOVEMBER 8, 1999

(9:39 P.M. Jury not present)

THE COURT: Let the record show that we have reconvened outside the presence of the jury and Mr. Gavin has been found guilty by the jury of both counts of the indictment in case number 98-61 and guilty of the indictment or the charge in case number 98-62. The Court has not adjudged Mr. Gavin guilty in these cases and so at this time, Mr. Gavin, if you and your attorneys would please stand. In accordance with the verdict of the jury, this Court adjudges you guilty of the offense of Capital Murder under Count One of the indictment in case number CC-98-61, for the intentional murder -- for intentional murder committed during the commission of a robbery. This Court adjudges you guilty under Count Two of the indictment in case CC-98-61 in accordance with the verdict of the jury under Count Two for an intentional murder committed after having been previously been convicted of murder within 20

years before the commission of the murder in this case. The Court adjudges you guilty in case number 98-62 in accordance with the verdict of the jury of the offense of Attempted Murder in case number CC-98-62. The conviction in case number 98-62, of course, is a non-capital case and the District Attorney is advised that if the State wishes to invoke the Habitual Offender Act in that case, you should do so by giving notice within five days following the completion of the trial in progress.

MR. O'DELL: Yes, sir.

THE COURT: You may be seated. Now, the Court has received what has been marked by my court reporter as Court's exhibit number 7, and I would like to talk about that Court's exhibit number 7 for just a few minutes and explain the reason why I've asked that it be so marked. Under Title 13-5-45 the Court may admit that evidence which is probative and relevant to the determination of a sentence in this case and this includes hearsay evidence. The statute provides, however, that the defendant must be afforded a fair opportunity to rebut any hearsay statements. In keeping with this statute, the District Attorney furnished the

defendant's attorney and the Court a package of material on Saturday afternoon following the verdict. And this Court understands that this material includes matters about which the defendant's parole officer will be asked to testify. The District Attorney has furnished the Court a copy of that package to assist the Court in anticipating the issues which might be raised during the sentencing phase of this trial. I have had this package marked as Court's exhibit number 7. The record should show that the Court has not and will not consider any matter contained in that package unless it is otherwise properly brought before the Court. This recitation to the record is not intended to indicate that the District Attorney has done anything improper in advising the defendant's attorney and the Court of the contents of the parole officer's file. On the contrary, the District Attorney is required to provide that information to the defendant and has been helpful to the Court in doing so. Even though portions of the parole officer's file and testimony may not be admissible, there may be -- may not be admissible at this stage, there may be matters in this file, that is Court's exhibit

number 7, which would otherwise be appropriate for inclusion in the probation officer's pre-sentence investigation report to this Court. The District Attorney -- excuse me, the probation officer's pre-sentence investigation and report to the Court will be made for the purpose of determining a sentence, not only for the capital offense on which the defendant has been convicted in case number 98-61, but the non-capital offense for which the defendant has been convicted in case number 98-62. Nevertheless, this Court will not consider any part of Court's exhibit number 7 unless and until such matters contained in that exhibit are otherwise properly before the Court. The Court has been informed by the District Attorney that from this package the District Attorney seeks to have the parole officer -- I believe that's Mrs. Morris, is that her name?

MR. O'DELL: Yes, sir.

THE COURT: -- testify concerning the content of her file and the information contained therein concerning the facts and circumstances of the defendant's prior murder conviction. The Court has been furnished a copy of the portion of the -- the package, that is Court's exhibit number 7,

includes that information and the Court has indicated to the District Attorney that the last paragraph of that summary will not be allowed to be presented to the jury. Therefore, at the Court's instruction, that paragraph has been redacted, and if the probation or parole officer is otherwise able to establish the admissibility of this document, I expect the Court to allow her to testify with respect thereto and to have that document admitted during the sentencing phase of this case. Have I correctly stated the matters that we discussed this morning, Mr. Smith?

MR. SMITH: Yes, sir, I believe you have.

THE COURT: And, Mr. O'Dell, is my recitation to the record this morning a correct statement of the matters that we discussed?

MR. O'DELL: Yes, sir.

THE COURT: Even though I have indicated to the attorneys that if Ms. Morris can establish the admissibility or through her can establish the admissibility of this document or the contents of this document, that does not mean that Mr. Bayne Smith nor Mr. Ufford have waived any objection to it and, certainly, you may assert any objection which you wish to assert at the appropriate time

in the sentence hearing. But I have made a pre-determination that certainly the second paragraph of that document should not and is not admissible and not proper for consideration by the jury. Is there anything else that we need to talk about at this time before we move on? Anything from the State?

MR. O'DELL: No, sir.

THE COURT: Anything from the defendant?

MR. SMITH: No, sir.

THE COURT: My remarks to the jury when they come in, of course, will be pretty brief. I'm going to tell them that you both have an opportunity to make opening statements, as you did at the, I guess that was Saturday morning, wasn't it? I've lost track of time. And then following the presentation of evidence during the sentencing phase you will have an option to make your closing remarks followed by the Court's instructions and their deliberations. So, my remarks will be quite brief to them at this point. I noticed that Mr. Johnston just left the room.

MR. O'DELL: I wanted to make sure Ms. Morris had been brought over before you brought the jury over.

THE COURT: All right. Is there anything else we need to take up at this time?

(No audible response)

(9:53 A.M. Recess)

(10:00 A.M. Jury not present)

THE COURT: State ready?

MR. O'DELL: Yes, sir.

THE COURT: Defendant ready?

MR. SMITH: Yes, sir.

THE COURT: Bring in the jury.

(10:01 A.M. Jury present)

THE COURT: Well, good morning, ladies and gentlemen, and thank you for your promptness this morning, even though we started at 10 o'clock today instead of our regular hour, I know that you've come some distance this morning that you haven't been traveling in the other few days, so you probably had to get up early to get going this morning and I thank you for that and I'm glad to see you and I hope that yesterday was restful for you, we certainly tried to make the environment for you yesterday as restful as possible and I hope that you found it to be so. Y'all look bright-eyed.

We're at that stage of the case called the

sentencing phase of the trial, and this phase of the trial is conducted very much like the first phase of the case. The lawyers are going to make some opening remarks to you in just a few minutes and then there will be some evidence presented to you at this phase of the trial, at this stage of the case, and after we have received that evidence, then we will have some final remarks by the attorneys and I will again instruct you on some legal principles which are applicable to this stage of the case. Once I've given you that charge or those instructions as to the law, then you will deliberate this case and make a recommendation of a sentence in this case. So, with these instructions, is the State ready?

MR. O'DELL: Yes, Your Honor, we are.

THE COURT: Is the defendant ready?

MR. SMITH: Defendant is ready, Your Honor.

THE COURT: All right, you may make your opening statements.

MR. O'DELL: Good morning again. Today's activities or this phase of the trial against Mr. Keith Edmund Gavin from the State's standpoint will be considerably shorter because our burden of what we need to present to you at this time has

pretty much already been done in the sense that we have had a full trial of these matters, you have found the defendant guilty, and in the aggravating circumstances as the Judge will define for you at the conclusion of the argument and the presentation of evidence today, the State will have three aggravating factors which we would ask you to consider in deciding whether or not you are going to recommend a sentence of life without parole or the death penalty for this defendant. The first one that we would ask you to consider, we will submit to you, is that the defendant was previously convicted of another felony involving the use or threat of violence to a person. That, ladies and gentlemen, was brought do to you by way of Count Two of the indictment that Mr. Gavin was previously -- committed this murder after previously been convicted of murder within 20 years. The second aggravating factor we would present to you and submit to you at this phase was that the capital offense was committed by Mr. Gavin while he was engaged in the commission or during the commission of a robbery. That, ladies and gentlemen, was presented to you in the case in chief in Count One of the capital indictment

against Mr. Gavin. The third and final aggravating circumstance that the State would submit to you and be required to prove to you is that the capital offense was committed by a person under the sentence of imprisonment. In this case, we expect that the evidence will be from the parole officer that Mr. Gavin was released on parole on December the 27th, 1997, and was out on parole during the time that the commission of this offense happened. Restated, we expect the parole officer to tell you, to prove to you beyond a reasonable doubt, that he was on parole at the time that he killed Mr. Clayton. We further would expect the evidence to be that the parole officer would give you the details or summary of facts of his prior conviction. And, ladies and gentlemen, I believe that based on the evidence that you heard in the first phase, and based on the evidence of the testimony that you will hear from the parole officer in this phase, that you will find that the defendant in this case, Keith Edmund Gavin, and the facts of this case as they have been presented to you warrant and merit the most gravest of punishments, and that being the imposition and the sentence of punishment to the

electric chair. Thank you.

MR. SMITH: Good morning again. I see from the look on your faces that the gravity of what you're about to undertake today has probably just about hit home and I'm sure that you can see from my face that it certainly hit home to me. I suspect there is a line or two this morning that wasn't there this time a week ago, and I've been told already this morning that the south-bound train looks like it made its way across my eyes. Very difficult to be standing right here today. Before I tell you what you're going to hear from the defendant this morning by way of mitigation, I just want to say that I appreciate the hard work you have done in this case and hard work lying ahead of you, and I think I asked you earlier in the week during the jury selection process to, well, I think I kind of warned you that there might be a time or two that I would get a little excited about the case and hope that you wouldn't hold that against my client. I know that in the course of my closing argument the other day I got real excited, and I know that you know that that was simply an effort on my part to use every bit of evidence I had at my disposal to persuade

you as to the defendant's view of the facts and my view of the facts. I think you probably understand that that was my job. I just hope you charge that to me and not to my client. In the next few minutes you're going to hear from a couple of folks who have come to know Keith very well, at least I hope you are. One is his mother who has come down here from Chicago and the other is a local gentleman, Mr. Johnson, who is an Elder of the Kingdom Hall of Jehovah's Witnesses here in Centre, and he's come to know Keith pretty well in the last few months and he will come to tell you a little bit about Keith Gavin, and then you will have an opportunity to determine for yourself what is to be your recommendation as to whether he will live or die. Thank you.

THE COURT: You may call your first witness.

MR. O'DELL: The State calls Ms. Morris.

THE COURT: Ms. Morris, even though you were sworn earlier this in this trial, a few days ago, I think you need to be under oath since we've started the second phase of the trial. If you'll raise your right hand for that purpose.

SEVERIA MORRIS

Being duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. O'DELL:

Q If you would, state your name again for the record, please, ma'am.

A My name is Severia Morris.

Q And Ms. Morris, once again, how are you employed?

A I am a parole supervisor with the Illinois Department of Corrections.

Q And I believe you testified previously that one of the parolees that you had under your control was, in fact, Keith Edmund Gavin?

A That's correct, yes, sir.

Q I would ask you if you would, please, ma'am, to look at your record and tell us what Mr. Gavin's status was when he was paroled and whether or not he was still on parole on March the 6th, 1998?

A He was released from our parenting institution at East Moline, Illinois, on 12-28-97, and he is presently still on status. His projected discharge date is 12-28 of 2000.

Q But at the time this murder took place on March the 6th, 1998, Mr. Keith Edmund Gavin was still under a sentence of imprisonment by virtue of the parole that he was on.

A That's correct.

Q Ms. Morris, let me ask you this. In furtherance of your responsibilities, do you keep an updated and full file on all the parolees that are under your supervision?
A Yes, sir.
Q And do you have such a file in this case?
A Yes, I do.
Q And I'll ask you as part of that responsibility, if your file contains what is referred to as an official statement of facts dealing with Mr. Gavin's first conviction, the one that he was convicted on June the 9th, 1982?
A Yes, sir.
Q Would you produce that for me, please, ma'am.

THE COURT: Excuse me just a minute. You know, it might be more appropriate if it had the next number in sequence. Now that I think about it, I think I'll ask you to number that as the next in sequence, whatever that may be.

Q Ms. Morris, let me ask you a few questions about this document that you have produced, statement of facts from your parole file; is that correct?
A Yes.
Q And is this kept in the usual course of business? Is this a record that's kept in the usual course

of business in your file?
A Yes, it is.
Q Do such statements of facts, are they required in all your parole files?
A Yes, sir.
Q If you would, is it a regular practice of business to keep these records in your parole files?
A That's correct.
Q And could you tell me, it purports to have been signed by Michelle Jordan, Assistant State's Attorney. Is it your usual practice in your parole division for such statements of fact to be submitted as a part of the parole record?
A Yes, it is.
Q And could you tell us when this official statement of facts would have become a part of your official business record there, please, ma'am?
A That report either arrived with the subject at the time of his -- at the time of him returning to our facility or within a 60 day period of after we got him.
Q I believe it has an indictment number. Have you checked that indictment number against the conviction number that you have?
A Yes, sir.

Q And is it the same?
A It is the same number.
MR. O'DELL: We would offer State's exhibit number 42 at this time, Judge.
MR. SMITH: May I ask a question or two, Judge?
THE COURT: You certainly may.

VOIR DIRE EXAMINATION

BY MR. SMITH:

Q Ms. Morris, you have no personal familiarity with the facts contained in that document; is that correct?
A That's correct.
Q You had no access to the information, source of information, from which that document was prepared; is that correct?
A Ask that question again, please.
Q You had no -- You never reviewed a record of trial or anything from which that document was prepared; is that correct?
A That's correct.
Q That document was prepared by a District Attorney; is that correct?
A That's correct.
Q You don't work for or with a District Attorney

that was responsible for the preparation of that document; is that correct?

A That is correct.

Q And you said it arrived either with the parolee or within 60 days thereafter. How do you know that?

A That is the basic procedure. Very seldom, it's always an exception to a rule, but very seldom that happens. Normally when we receive a subject from Cook County Jail, this type of report, the statement of facts, arrives with him at the receiving center or within a 60 day period.

Q But you don't know when this particular document arrived and came to be in Keith Gavin's records; is that correct?

A No, I do not.

Q In fact, it could have arrived before or after, so, I mean, it could have come in the mail as far as you know?

A It could have.

Q You just don't know; isn't that true?

A No, I don't.

MR. SMITH: Judge, we're going to object to the document for not only for the failure of the State to establish the Business Record Exception, but also for the previous matters we have

discussed concerning this document, the fact it is a hearsay document and does not fall within the Business Records Exception. The fact that the defense has not had the opportunity to properly rebut this document, we did not have access to the record of trial which is the only official source of facts from which that document could have been prepared, that we were given investigation only and not the official record of trial in determination of the facts. This document contains conclusions which were made by a person, obviously a District Attorney, who has a substantial vested interest in establishing these documents and the facts therein, and that the admission of this document is pursuant to the statute of the Alabama Code with regard to the admission of aggravating matter and the Code indicates, as does the case law, that all aggravating matters are to be -- the admission of all aggravating matters are to be received pursuit to statute only, and that all statutes in a case of this nature to be construed strictly in favor of the defendant and against the proponent and State. And we suggest that the statute should be interpreted in such a fashion that this document

should not be received. For all those above reasons we would object to the admission of the document.

THE COURT: Could you go back with the witness for me please, sir, and establish the predicate for the Business Records Exception to the hearsay rule.

DIRECT EXAMINATION RESUMED

BY MR. O'DELL:

Q Ms. Morris, is this writing or this record that you've identified as being an official statement of fact, is it a record that's made in the ordinary course of business with your department?

A Yes, it is. It's made with the state attorney's office.

Q And it is provided for your parole files on a regular and routine basis as part of your ordinary course of business?

A Yes, it is.

Q And you have told us the method that is used that the state's attorney's office prepares it and it is submitted to your department and for placement in your file in the regular course of business; is that correct?

A That's correct.

Q And was it a regular practice of business to make this kind of a record by the state's attorney for admission to your parole file?
A That's correct.
Q And I believe you have testified that the time frame that this record was presented or would have been presented was either at the time that the defendant was put into the institution, accompanied him into his records at that time or within 60 days?
A That's correct.
Q Okay.

THE COURT: The objection is overruled.

MR. UFFORD: Judge, we have another objection.

THE COURT: I'm sorry, sir. Excuse me, I'm sorry.

MR. UFFORD: Object to its relevance. Judge, the aggravating circumstances, I believe that the State has alluded to regarding a capital offense committed while a person was under sentence of imprisonment or parole has not been -- has been presented to the jury at this point. We must say that that's the only reason we could see why it would be brought in, it's already been

established. The other aggravating circumstances that have been discussed today are -- perhaps it must be what the District Attorney is attempting to bring out. And we see no relevance to what is going any further with this witness along these lines. If they're trying to prove one of these other aggravating circumstances, we can only presume that they're trying to prove something about the defendant being previously convicted of another capital offence or perhaps use of threat or violence in the statute which is required. A prior offense regarding involving the use of threat or violence to the person. The State has already proven beyond a reasonable doubt that, according to this jury, that a previous offense involving the use of threat or violence to the person has been committed, that being murder. The indictment charges intentional murder during robbery. The indictment charges intentional murder after previous murder conviction, felony murder conviction. Both of those have been found by the jury and this jury is charged to find that beyond a reasonable doubt. That has been done, Judge. If I may have just a moment. I would point out that Section 13A-5-45(e) of the Alabama

Code says that, I'll read, at the sentence hearing the State shall have the burden of proving beyond a reasonable doubt the existence of any aggravating circumstance provided, however, any aggravating circumstance which the verdict convicting the defendant establishes was proven beyond a reasonable doubt at trial shall be considered as proven beyond a reasonable doubt for purposes of the sentence hearing. Judge, I contend that has been done. What they are trying to do is just add evidence, bringing something in that's more prejudicial than probative at this point.

MR. SMITH: Judge, we would also assert for the record that the admission of this document would violate Mr. Gavin's rights under the 6th, 8th and 14th Amendments of the Constitution, due process violation.

THE COURT: The objections are overruled, the witness may answer.

(Whereupon, State's exhibit number 42 admitted into evidence at this time)

Q Ms. Morris, if you would, please read for the jury the statement of facts as appear in that business record, please.

THE COURT: Excuse me, the question is the bailiff has approached me about witnesses in the courtroom. Are there witnesses in the courtroom?

MR. SMITH: Yes, sir, Mrs. Gavin and also another witness is here.

THE COURT: What is the State's position about those witnesses remaining in the courtroom?

MR. O'DELL: Judge, I have no problem with them remaining.

THE COURT: Thank you very much, they may remain. Thank you.

Q All right, Ms. Morris, if you would, please read what that statement of fact says.

A Keith Gavin, indictment number 812719, official statement of facts. Defendant and victim were attending a party at 1351 South Troop Street when they got into a verbal argument. Defendant forced victim out of the party at gunpoint.

MR. SMITH: Excuse me, Judge. I would object to the witness reading the document, the document has been admitted. It speaks for itself. The jury will have an opportunity to review it at the appropriate time. I should object to the recitation of the document, I suppose, to her...

THE COURT: Sustained.

MR. O'DELL: That's all I have of this witness at this time, Your Honor.

CROSS EXAMINATION

BY MR. SMITH:

Q Ms. Morris, you stated that this document came into your possession by virtue of your office as Mr. Gavin's parole officer; is that correct?

A That's correct.

Q You're the custodian of his records?

A Yes, I am.

Q You have no independent recollection of actually having any conversation with Mr. Gavin as his parole officer; is that correct?

A I'm not his parole officer, I'm his parole supervisor.

Q I'm sorry, supervisor. So you have not had, to the best of your recollection, any personal interaction with Mr. Gavin; that's the case, is it not?

A That's correct.

Q How many parole officers do you supervise?

A I supervise 18 parole agents.

Q And how many parolees, roughly, do these 18 parole agents have each, approximately, if you know?

A I have 5400 parolees. I would say a little over

500.

Q Do you know who Mr. Gavin's parole officer is or was?

A Yes, sir.

Q How often -- Is that a he or a she?

A That's a she.

Q How often have you spoken with her about Mr. Gavin's case?

A I would say at least on four different occasions.

Q How many of those were after you had been made aware that you were coming down here to testify in Mr. Gavin's case?

A I would say two.

Q So, prior to being aware of the fact that you're going to be a witness in Mr. Gavin's case, he was one of 5400 parolees, and you had spoken with his -- you've had no personal interaction with him, you've spoken with his parole officer on two occasions; is that correct?

A That's about right.

MR. SMITH: That's all I have, Judge.

MR. O'DELL: Judge at this time we would offer, ask to publish this letter and allow each juror an opportunity to review it.

THE COURT: I don't want their reading of that

at this point to interfere with their attention to any other witnesses that might testify, so I'm going to ask you to withhold publishing it to the jury at this time.

MR. O'DELL: Well, Judge, other than making a motion that the -- under 13A-5-45(c), that all the prior evidence that was presented at the original trial be admissible for this purpose and for the consideration of the jury, we make such motion at this time.

THE COURT: And it is so admitted.

MR. O'DELL: And with that, the State would now close its case in this phase and I will ask that that be published at this time.

THE COURT: You may.

MR. O'DELL: We would ask that Ms. Morris be excused.

THE COURT: Are there any other questions?

MR. SMITH: No, sir.

THE COURT: Thank you very much, ma'am, you may come down. I do want to make sure that the jurors' attention to any witnesses that the defendant calls is not distracted by that exhibit circulating among them.

MR. O'DELL: Judge, the State would point out

that that was the reason we attempted to have her read it for that purpose, but we understand the need for them to have the original document, obviously.

THE COURT: Well, certainly, they'll have it with them when they deliberate the case.

MR. O'DELL: Yes, sir.

THE COURT: I'm going to ask, let me have you lay that back up there on the rail and let's see what the defendant has to offer at this time.

MR. SMITH: Defendant calls Mr. S.C. Johnson.

S.J. JOHNSON

Being duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. SMITH:

Q Good morning, Mr. Johnson.

A Morning.

Q Did I get those initials right?

A S.J.

Q S.J., thank you, sir. I don't have my notes with me from where we talked the other day and I wasn't sure about that, so thank you, and I apologize for the correction. Mr. Johnson, do you know Keith Gavin?

A Yes, sir.

Q How do you know him?
A I met Keith shortly after he was arrested, about 20 months ago. I'm a minister and we got word that Keith would like someone from our church to come up and talk with him.
Q What church do you attend?
A The local Kingdom Hall of Jehovah's Witnesses here in Centre.
Q And what's your understanding regarding how that contact was made to the Kingdom Hall?
A Keith got in touch with the officials, Sheriff Wynn's department, and asked that someone from Kingdom Hall be contacted, and so another brother and I went up to the jail and Sheriff Wynn and his staff allowed us to make contact with Mr. Gavin.
Q How frequently would you say over the last 20 months would you say that you have personally been in contact with Keith?
A Well, with the exception of some weeks when I missed, we had it set up on a weekly basis. There were a few weeks that I missed going, I tried to have another brother to go up in my place, but for the most part I attended weekly on that.
Q On an average, how long would you spend with him

on a weekly basis?

A About an hour.

Q What sorts of things, without getting into any kind of privileged information, obviously, you know, in your capacity as a minister, what sort of things did you discuss with Keith?

A I primarily tried to keep it on the spiritual level. In fact, I even asked him not to divulge anything about the details of the case he was being charged with.

Q Right, and I wanted to emphasize that as well. You told me when we spoke in preparation for your testimony --

A Uh-huh.

Q -- that you specifically did not ever discuss any of the facts of the case with which he is charged and has now been convicted.

A Right.

Q So, what types of things did you talk about?

A Basically Bible subjects. When I first met Keith he sort of gave the impression that he was somewhat puzzled or angry, maybe. He was real guarded, that is, he didn't seem to trust a lot of people, including myself, and I have to admit that I was a little leery as I went up there. All I

knew about him was here's this guy been charged with murder and arrested and I was a little cautious as I approached the situation, and there was a little tension to begin with, but as the weeks went on we both relaxed somewhat, he began to open up and we began to have some intimate conversations and he more or less began to tell me how he felt about things in general, not this case specifically, just his life. In fact, he seemed to have an attitude that he was blaming everybody except Keith Gavin. He even appeared to be blaming God for some of the things that happened. He made statements about why did God allow him to get into various situations, bad company, and end up in his life just being a mess, quote.

Q Uh-huh.

A And I tried to reason with Keith, I said, well, Keith, God is really not to blame for anything that we might do personally. God gives us free will with free moral agents and we have a choice in the decisions that we make. Now, being a minister I pointed out that the Bible has certain requirements, God has outlined certain requirements for us in the Bible, and it is up to us as to whether we adhere to those requirements

or we chose some other course. At the same time we're going to have to suffer whatever consequences for what actions we take. And we had conversations along that line and eventually I think that Keith began to get the point because in the conversations that I had with him after that, he stopped blaming others so much and he began to see where he should take some responsibility, and he particularly stopped blaming God for the things that had happened to him.

Q Do you think on some level he has come to accept responsibility for the consequences of his actions?

A Well, just judging from the conversations that I've had with him and some seeming attitude changes, I feel that he has. In fact, I'll just give you one example. There were a couple of occasions up at the jail where Keith felt that he was being mistreated or whatever, and he began to give the jailers and the deputies a hard time. And they, of course, had to take some disciplinary action. And so I talked with him, I said, look, Keith, you're in a bad situation, whether you're innocent or guilty of what you've been charged with, you're still going to have to stay in this

jail house until this matter is resolved. So the course of wisdom would be to cooperate with these officials and be obedient to them, and I said along that line you said you want to be a Christian and you want to do what God requires of us, and one of the things that God requires of us is to be obedient to those in authority over us. In fact, I showed him the scripture there in Romans 13.1 where it tells us to be in submission to the higher powers to those in authority over us. And as time went on Keith, once again, I think he began to heed the counsel because after the next week I went up and I had the occasion to talk to two of the deputies and I asked how Keith was doing and they said Keith's whole attitude had started to change. He had humbled himself, and from that point on as far as I know they didn't have any more disciplinary problems with him. And he told me that he really would like to do God's will and that he was sincerely trying to make changes in his life. And so that's what I encouraged him along those lines. I know it's difficult, us being imperfect humans, but we have to put forth the effort, and he, to the best of my knowledge, seemed to be trying to do that.

Q Do you have a sense for Keith's intellectual capacity?

A When I first met Keith he struck me as being a very intelligent young man.

Q Now, he's 39 years old at this point, and this jury really only has two options, one, to sentence him to death and the other to sentence him to life without parole.

A Uh-huh.

Q What would you say is his potential for -- to be an influence for good in his environment if he is given the opportunity to serve out his life in prison without parole?

A Well, in answering that question I want to qualify, first of all, that I don't want to give the impression that I can read a person's heart. I'm a minister, but the Bible shows that only God and Jesus Christ can do that, but just based on my experience with Keith and things that I've observed and what seem to be some attitude changes, I feel that if Keith is given an opportunity to continue to live, he has the potential to cultivate a deeper relationship with God and I feel that there is hope for Keith if he's given time and opportunity.

Q Would that be your recommendation to this jury here today?

A Well, it certainly would. In fact, as a minister I once again try to look at things from God's standpoint. I've been here in Cherokee County for about 10 years now, I came up from Anniston, and I found in my experience, we do door-to-door ministries and we talk with a variety of people, and most of the people I've talked with in this community are God-fearing, they seem to be, people. They have a lot of respect for the Bible, and so I feel that they are good people here in Cherokee County, including the selection of the jurors here, and most of them have read the Bible, and I'm sure those of us who read the Bible, we can look back at the Old Testament and it does stipulate that under certain conditions the death penalty was administered and God said an eye for an eye, tooth for a tooth, soul for a soul. And so in some cases, the death penalty was carried out. I would like to point out, however, that that wasn't always the case. Now, the Bible says that God is a God of justice, but he's also a God of mercy. And in certain situations where it was appropriate, he extended that mercy. In one case

in point I was thinking about when I was thinking about Keith's situation and what I would relate to the Court here, King David -- most of us who read the Bible, we are familiar with King David and his sin with Bath-sheba. Now, we think about he committed adultery with Bath-sheba, that was a capital offense, he could be put to death for that. But not only did David commit adultery, which was a capital offense, but he also was a party to murder because he arranged to have Bath-sheba's husband, Uriah, put to death. And so he was really guilty of two capital offenses which could have got him the death penalty. In that particular occasion, for God's own reasons, he saw something good in King David and he allowed mercy to overrule just straight out cold justice in that particular case and David was allowed to live. Now, that didn't mean that David was exempted from punishment, he was punished. In fact, for the rest of his life, the Bible say that David had to suffer the consequences of those actions that he committed. So God didn't just let him off the hook as it were, but he suffered, but at the same time mercy was extended in that case. So looking at it from that standpoint, there are

occasions even today where mercy might override just cold justice.

Q You know, it's interesting you make two references there, Brother Johnson, that I think are joined. One, as you said, is that as a minister you don't have a looking glass into anyone's heart.

A Right.

Q And I guess what you're telling us is that the only entity that can see into a person's heart is God.

A That's correct.

Q And if I remember my Old Testament correctly, I think there is a passage in there where it says that God looked into David's heart.

A Right. Right. Yeah.

Q And granted mercy.

A Yes.

MR. SMITH: I thank you very much, Mr. Johnson. Mr. O'Dell will probably have some questions. Yes, sir, something else you want to say?

A May I just make one other statement.

Q Please do, sir. Take your time.

A In Mr. Gavin's case, he didn't testify here, but in our conversations he did on one occasion

mention his concern for the Clayton family. He mentioned the fact that he was sure they were feeling grief and they would like to see justice and truth come out in this case, and I feel the same way. I can sympathize with the Clayton family. In fact, Mrs. Clayton herself made a very fine gesture at the last session that we had in this court, and I think she's a very fine and gracious woman, and I just wanted to extend my sincere sympathy to the Clayton family. And if I may once again in the capacity of a minister, I know that no words can stop the grief that you're feeling right now. Whenever we lose someone that's dear to us, it's going to hurt, and nothing I can say today or any other day that's going to stop the grief completely. But as a minister, I would like to point out that the Bible gives hope for the dead. It speaks about a resurrection. In fact, if you read the book of Revelations, Chapter 21 and Verse 4, it speaks of a time where there won't be any more death, not only death from violence, but there won't be any more death from sickness or any other source. So we have a hope to look forward to, and I want you to keep that in mind, Mrs. Clayton, and may God be with you.

MR. SMITH: Mr. O'Dell may have some questions for you, Mr. Johnson, but, Judge, could I ask at this point that we take a brief recess or perhaps we could just approach you.

MR. O'DELL: Judge, I only have one question for Mr. Johnson.

MR. SMITH: May we approach then, Judge?

THE COURT: You certainly may.

(Sidebar conference on the record)

MR. SMITH: Judge, obviously, the comment about Mr. Gavin's failing to testify was unsolicited, it was not responsive to my question, and, in fact, there was no question on the table at that point. And Mr. O'Dell has indicated he's only going to ask one question.

MR. O'DELL: It won't be about that.

MR. SMITH: Okay, that was my question. It was just a Motion in Limine about any fact about his failure to testify.

MR. O'DELL: I see no reason to delve into that issue at this point.

(In open court)

MR. SMITH: That's all the questions I have, Mr. Johnson. Answer Mr. O'Dell's questions.

CROSS EXAMINATION

BY MR. O'DELL:

Q Just one question.

A Yes, sir.

Q You alluded to the facts and circumstances surrounding David. In reference to your comment that there were cases where it was appropriate that God administered mercy as opposed to justice.

A Right.

Q As the people deserved. And there were a great many more occasions in scripture.

A Oh, yes.

Q Where He went on and administered justice as it was called for; isn't that correct?

A Oh, yes.

Q And, in fact, in David's case, he was responsible for the death of one man, wasn't he?

A At least, yes.

Q And in this case we have two innocent men who have died at the hands of Keith Edmund Gavin, don't we?

A Well, let me backtrack that just a little bit. You said two men, he was responsible for the death of two men, but he was also responsible for another life and that was of his unborn child -- rather the child was born and God said the child would die. So two lives was really involved

there, one was a man and one was a child.

Q In this case Mr. Gavin was responsible for the death of two innocent men, wasn't he?

A That's what the Court found.

MR. O'DELL: That's all.

MR. SMITH: Just one more question, Mr. Johnson. I'm sorry.

RE-DIRECT EXAMINATION

BY MR. SMITH:

Q We had a lot of discussion about David and the Old Testament.

A Yes, sir.

Q We no longer live under the scriptures of the Old Testament, do we, Mr. Johnson?

A That is correct. I didn't mention it, I alluded to the Old Testament because many do feel that that law, an eye for an eye, a tooth for a tooth, soul for a soul, should still apply. Of course, as Christians, and I'm a Christian, other people in the courtroom, I'm sure, are, too, and as Christians we live under the law of Christ, and Christ's example was the law of love and mercy, and so we can look at it from that standpoint today.

MR. SMITH: Thank you very much.

RE-CROSS EXAMINATION

BY MR. O'DELL:

Q And justice still today?

A Justice can't be left out, that's for sure.

Q And, in fact, there were a great many examples in the New Testament wherein the old law, the Mosaic Code and the Genesis 16 dealing with murder were reincorporated or reaccepted in Christ's time, too, wasn't it?

A Under the law of Christ there is no Mosaic law stipulated you should be put to death. Don't get me wrong, I'm not arguing with the Court about the decision for death or whatever.

Q It's just --

A What I'm simply saying in the Bible and as a minister I've observed that there are occasions, even in the Old Testament where that law was in effect. It's no longer in effect today for Christians, but even when it was in effect, there were occasions where God did temper his justice with mercy. In fact, he always balances his qualities of justice as well as love and mercy.

MR. O'DELL: I understand. Thank you.

THE COURT: Thank you, sir.

MR. SMITH: Defense would call Mrs. Annette

Gavin.

ANNETTE GAVIN

Being duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. SMITH:

Q Mrs. Gavin, state your full name for the Court, please.

A Annette Gavin.

Q Where do you live, ma'am?

A Chicago, Illinois.

Q And you're related to Keith Gavin, are you not?

A Yes, that's my son.

Q How many children do you have in all, Mrs. Gavin?

A 11 living children. He's the second from eldest.

Q Mrs. Gavin, I know that when you and I spoke yesterday, I didn't really have an opportunity to prep you for your testimony today, but I know that you would like to address the Court and the jury about your feelings about Keith and the options that the jury has with regard to punishment. Would you tell us what your thoughts are in that regard, please, ma'am.

A Basically as being one of, being a Jehovah Witness. Also, Keith was always exposed to that life somewhat because I came, you know, came into

contact with that, with it, when he started to grow up, so that's some part of his foundation. So basically what was just said, I really feel the same way, that knowing how he views things, that he really has the ability to live as he should live because he has taken up that course, you know, because he had to, he had to see it, he sees it now. And so if he's given the opportunity, he could help others. He could really be a great source of help to others and to our Creator.

Q As the second living of 12 children, what would you tell the jury about Keith's family values?

A He's always family and for families, you know, he is for families. He got his view as he's always felt a concern for other people. That's been his view all his life, since he was very young, by what was fair. He loves justice, he really does.

Q Are you asking this Court to spare his life?

A Yes. Yes. Because, you know, who among us, you know, could make that decision, you know.

MR. SMITH: Mrs. Gavin, that's all the questions I have. Answer any questions Mr. O'Dell might have for you.

MR. O'DELL: State has no questions of this witness, Your Honor.

THE COURT: Thank you, Mrs. Gavin.

MR. SMITH: Judge, the defense has no further evidence to present.

THE COURT: We'll take a recess, ladies and gentlemen, for a few minutes. We'll try to reconvene in 15 minutes. Thank you very much. Don't talk about the case and do not allow it to be discussed.

(10:53 A.M. Jury excused)

(11:08 A.M. Jury not present)

THE COURT: Is the State ready?

MR. O'DELL: Yes, sir.

THE COURT: Is the defendant ready?

MR. SMITH: Yes, sir.

THE COURT: Bring in the jury.

(11:09 A.M. Jury present)

THE COURT: Thank you very much, please be seated. State ready to argue?

MR. O'DELL: Yes, sir, we are.

THE COURT: Defendant ready?

MR. SMITH: Defendant is ready.

THE COURT: You may argue your case.

MR. O'DELL: Well, here we are. During the voir dire questioning we knew this moment would come. And I think I recall in my opening

statement in one of the panels that we had there was a discussion about heavy lifting, and I made the comment in the opening that you wouldn't be required to do any heavy lifting, but you would certainly be required to shoulder a heavy burden. And my job today is not to tell you that you shouldn't feel that way. I feel that way. I believe each and every one of you as well as all of us involved in this case on both sides realize that asking a group of 12 individuals to decide the state of another human being is a tough burden, and to go even further to ask these 12 individuals to look deep in their hearts after weighing the aggravating and mitigating circumstances as the Judge will instruct you, and then ask you to sentence Mr. Gavin to death is a very compelling thing for me to have to do, but not nearly as compelling as it is for you to reach that decision. I would like to tell you this, that in 23 years of practicing law, I do not believe that I've ever seen a jury be as attentive to a case as you have been in this one, and so I'm not going to belabor the evidence that was at trial in going over the pre-aggravating circumstances that I told you about in my opening.

You know the testimony that you heard concerning the murder during robbery and you found beyond a reasonable doubt that he had committed that offense, and that is one of the aggravating factors that you can and should consider in making your determination. You also under Count Two found that he had been previously convicted of another violent felony within the last 20 years, that being murder back on June the 9th, 1982. And then the third one was capital offense was committed by a person under the sentence of imprisonment, and I expect that the Judge will charge you that someone under a sentence of parole qualifies as being under a sentence of imprisonment. But with respect to the element of the violence, I would like to read for you at this time State's exhibit number 42 which gives us an insight into the circumstances surrounding the first murder conviction, the one that you heard about during the trial. It goes as follows. The facts in this indictment are briefly as follows: Defendant and victim were attending a party at 1351 South Troop Street when they got into a verbal argument. Defendant forced victim out of the party at gunpoint. He lead victim down the

street while hitting him and poking him with a gun. Victim begged for his life as defendant lead him to a secluded area behind a building located at 1416 South Blue Island. Defendant then pulled the gun out and shot the victim between the eyes. Victim died as a result of this gunshot wound which penetrated his brain. Three bullet fragments were recovered from the victim's skull. The defendant was arrested a short time later at 1432 South Blue Island where he was sleeping. I believe I'm just going to leave that with you for a few moments, let Mr. Smith address you, and then I'll be back after he completes his argument.

MR. SMITH: As Mr. O'Dell has already indicated, this will be my last opportunity to speak with you officially about the decision you have yet to make in this case, or anything about this case. And before I do that I just want to say in my 23 years of practicing law I've never faced a jury that made me feel more at ease or more confident of my ability to speak my mind and my feelings freely, and I thank you for that. By your verdict here on Saturday you have determined and I must accept that Keith Edmund Gavin will die in the prison system of the State of Alabama.

What now remains is for you to determine to the extent that God and the State of Alabama allow you to do so, how he will die. In earlier sessions of this court, Judge Rains has told you that there are only two choices that you can make at this point: Life in prison without any possibility of parole, and death by electrocution. It's the only means of capital punishment the State of Alabama has available to it at this time. Each of you, in your voir dire questions and the questionnaire and also in the verbal questioning we did as you sat in this box, has told the Judge that you could consider either of those two punishments. You've already heard Mr. O'Dell tell you and will hear him tell you again, probably in greater detail and with greater fervor, why the State of Alabama in the person of Mr. O'Dell believes that you should choose death for Keith Edmund Gavin. As I stand here before you, this is my last opportunity to urge you to choose life. Not life walking the streets as you and I do, but life in prison without any possibility of parole for the rest of his natural life. Before you retire to deliberate, Judge Rains will give you some guidelines as to how you exercise that

advisory decision that you will make, but at this point it is up to you to make that decision and advise the Judge of your feelings. All I can really do at this point is give you some things to think about as you wrestle with that choice. I made no secret at the outset of this case and throughout the trial of this case that I considered the investigation to be somewhat less than perfect. That is now irrelevant because you have determined that Keith Gavin is guilty of the offenses with which he was charged, and now the only thing that remains is for you to consider how he is to be punished. When I first accepted the task of representing Keith Gavin and I learned that he was a black man from Chicago, Illinois, and that he had a prior murder conviction, my reaction, quite simply, was, oh, my God, how can a man like that ever get a fair trial in Cherokee County, Alabama? I believe that you have given Mr. Gavin a fair trial. I believe that when you retire shortly to consider your advisory verdict you will give him every consideration that you gave him during the guilt/innocence phase. When I stood up here before you on Wednesday morning -- or when I stood here Monday morning and looked out

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
MIDDLE DIVISION

KEITH EDMUND GAVIN,	)	
	)	
Petitioner,	)	
	)	
v.	)	Case No. 4:16-cv-00273-KOB
	)	
JEFFERSON S. DUNN,	)	
Commissioner of the Alabama	)	
Department of Corrections,	)	
	)	
Respondent.	)	

VOLUME 12

State Court – Trial Transcript

LUTHER STRANGE
ALABAMA ATTORNEY GENERAL

AND

BETH JACKSON HUGHES
ALABAMA ASSISTANT ATTORNEY GENERAL

ADDRESS OF COUNSEL:

Office of the Alabama Attorney General
Capital Litigation Division
501 Washington Avenue
Montgomery, AL 36130
(334) 242-7392

CR-99-1127

COURT OF CRIMINAL APPEALS NO. CR-00-0133

APPEAL TO ALABAMA COURT OF CRIMINAL APPEALS

FROM

CIRCUIT COURT OF CHEROKEE COUNTY, ALABAMA

CIRCUIT COURT NO. CC-98-61 & CC-98-62

CIRCUIT JUDGE DAVID A. RAINS

Type of Conviction / Order Appealed From: CC-98-61 JURY VERDICT / GUILTY OF CAPITAL MURDER
CC-98-62 JURY VERDICT / GUILTY OF ATTEMPTED MURDER

Sentence Imposed: CC-98-61 DEATH CC-98-62 LIFE

Defendant Indigent: [X] YES [ ] NO

KEITH EDMUND GAVIN
NAME OF APPELLANT

Stephen P. Bussman 256-845-7900
(Appellant's Attorney) (Telephone No.)
P. O. Box 680925
(Address)
Fort Payne, Alabama 35967
(City) (State) (Zip Code)

V.

STATE OF ALABAMA
NAME OF APPELLEE

(State represented by Attorney General)
NOTE: If municipal appeal, indicate above, and enter name and address of municipal attorney below.

(For Court of Criminal Appeals Use Only)

Appellant's Attorney:

Steven G. Noles 256-845-0716
P. O. Box 680883
Fort Payne, Alabama 35967

Volume 12

in this assembled crowd, you know, you were a faceless mass to me. You're no longer faceless. I've looked into each one of your faces over the last four or five days, I heard the words that you said during the voir dire, and I believe that you have given Keith Gavin a fair trial. I suspect that most lawyers, Mr. O'Dell and I were alluding to this briefly before trial today, I suspect that most lawyers when they decide to go to law school and those who either by choice or by circumstance end up going into the practice of criminal law probably envision themselves making this eloquent closing argument, just going to sway the jury to their side of the case. Or we see ourselves like Perry Mason or Ben Matlock or Ally McBeal, well maybe not Ally McBeal. But we see ourselves as that brilliant attorney conducting this scathing cross-examination that causes the witness to collapse on the stand and confess to the crime. And they see themselves as persuasive and triumphant. I suspect that few attorneys, when they go to law school and get that decree in hand, envision themselves at this moment as I stand here today, when all the piercing cross-examination and the eloquent argument has been unveiling and you

stand before a jury simply pleading for a client's life. Feeling utterly helpless and inadequate. This is not something we aspire to. Keith Gavin did not aspire to this moment, either, I assure you of that. I can assure you that when he came, when he left Chicago, Illinois, headed for Cherokee County, Alabama, and in Mr. Meeks' Blazer, he never envisioned on that day in March, 1998, that he would be sitting here 20 months later facing the jury that would decide whether he lived or died. You heard what Mr. Johnson said from the witness stand and I assure you, if Keith Gavin could restore life to William Clinton Clayton, he would do that. But he cannot. And neither can I and neither can you. All we can really do at this point is move forward. When you undertook to serve on this jury, you promised all of us that you could consider both authorized punishments, the penalty of death and the penalty of life without parole. As you consider these things, there are several things I would like for you to think about. You've heard in great detail about the circumstances of this crime, and like Mr. O'Dell, there is no point in rehashing that at this point. And you've also heard about another

conviction, another murder, that he has in his record. I cannot and will not ask you to ignore either of those things, but I can ask you to realize that those two stark, terrible moments represent the worse moments of Keith Gavin's life. Probably no more than 10 minutes total. In those 10 minutes he committed two unforgivable acts. He murdered two men across the span of 18 years. I'm not asking you to forgive him for that, but I am asking you not to take another life as an act of revenge for those acts. Those two acts do not represent the sum total of Keith Gavin's life nor even the majority of it. They represent just what they are. A few brief moments of anger that were expressed in a terrible way. And I'm not going to and don't mean to minimize the suffering of either individual whose lives were taken by Keith Gavin, it was a terrible act, both times. But they were not the sum total of his whole life. You've also heard some of the rest of his 39 years, both before and after March the 6th, 1998, and I hope you will take into consideration those years as well. You've seen and heard from Keith's family, his mother and sister have been here part of this week, and his mother told you about his 11

brothers and sisters. They represent the rest of his 39 years spent as a son and a brother. There is probably nothing more predictable than a mother who comes into court and begs a jury to spare her son's life. But I don't know of anything that I can say that's any more eloquent than that. You've heard from Brother Johnson who told you that 20 months ago, shortly after Keith's arrest, Keith asked for contact with his church. And Brother Johnson told how he has on a regular weekly basis visited Keith for all of this time. He told how Keith has struggled to come to terms with what happened in this case and how he has come to accept responsibility for his actions. I wish I had more time, better words, more eloquence, to help you get to know Keith as these people know him and as I have come to know him over these last 20 months so that I might conclude or persuade you to conclude that justice in this case does not necessarily demand that Keith Gavin die for his crimes. I talked to you about Keith and that's really all I'm going to say about Keith. But I would be remiss if I did not talk to you briefly about death. Each of you has said that you can and will consider the death penalty

in this case. I just want to make a few points about that. None of us is infallible. If you've read at all over the course of your life you have undoubtedly read of cases where innocent people have been proven years after the fact to be innocent, convicted murderers sentenced under sentence of death. I'm not suggesting that you've made a mistake in your determination, but I'm suggesting that we are all human, and that brings to mind a second point and that is irrevocability. Death and the carrying out of the death penalty is as final as it gets. Little gallows humor in yesterday's newspaper, I know you weren't allowed to see the newspaper. After I saw the comics I'm glad you didn't. There were a couple there that didn't strike me particularly well at the moment, but one of them was the Wizard of Id that can't, and they botch an execution and the King says who was that that just fell through the trap? And someone says it is the golf pro and you hear this tee-hee-hee-hee from the floor from below the trap, and the King says take a mulligan. I showed that to my wife and she says what's a mulligan? I said it's a do-over. You didn't do it right the first time so you get a do-over. Unless you're

the Wizard of Id, you don't get a do-over with the death penalty. There is no correcting any mistake that might have been made by anybody. Last night and the wee hours of this morning I sat in my office searching through all of my collected material from my 23 years of law practice. Just looking for something, anything, one some last shred of persuasive evidence or argument that I might place before you. I came across a couple of things, but nothing that seemed really appropriate, so I really have nothing of that nature to share with you. A third thing I do want to talk about, though, with regard to the death penalty in general and with electrocution specifically. There are more examples than I could tell you of botched electrocutions and I seriously considered whether I should come in here today and dramatically read to you Justice Brennon's descent in a 1984 case regarding the application of the death penalty by electrocution. I elected not to do that. It's a highly emotional, extremely discomforting recitation of what happens when someone is electrocuted. I could have done that, maybe I should have done that, to bring home to you what it is to suffer

death by electrocution. I'm not going to do that. But you should think seriously about what it must be like to suffer that fate. And to know for years before that that it's coming. I don't say that to compare it to the deaths of the two men that Keith Gavin caused in this case, but merely so that you can contemplate what it must be like. A Civil War General, and I honestly don't recall whether it was General Lee or General Jackson, but I think was one of the two and I think perhaps it was General Jackson as he stood on a bridge line looking over one of the confederate victories in which the union soldiers were being slaughtered by the dozens and hundreds and thousands, made the observation that it is a good thing that war is so terrible, else we should become too fond of it. And I think in today's atmosphere of the war on crime and law and order and all of the cliche's that we hear about crime in America, I think it is a good thing that electrocution is so terrible, else we would become too fond of it. Just a couple of last words I want to leave you with to think about. One, I alluded to when Mr. Johnson was on the stand and the other he alluded to. One is redemption and one is mercy. None of us can

grant redemption to Keith Edmund Gavin, that is a matter between him and his God. Ultimately, the decision as to mercy is God's also, but temporarily, here on this earth, that is an opportunity that you will have to grant him mercy. With everything that is in me, with every power of persuasion, every word of eloquence I can muster, I urge you to grant him the mercy of allowing him to live out his life in the prison system of the State of Alabama without parole. I thank you.

MR. O'DELL: During the last seven days that we've been together, as Mr. Johnston and I would drive into our office across the alleyway here we were treated to one of God's greatest gifts to us, and that being the magnificence of a sunrise. And this morning it occurred to me that perhaps that's the last moment that Mr. Clayton got to share with his wife, with his bride of nearly 37 years. On June the 6th, 1998, as you recall the testimony, Mr. and Mrs. Clayton had breakfast for the last time. I hope that that memory will last her the rest of her lifetime. Because that's all she's got. And it occurred to me that he will never, ever be able to see another sunrise on this earth, and maybe the brilliance and maybe the

magnificence of a sunrise or a sunset will be forever lost on his widow. And yesterday I must confess I didn't have time nor the inclination to read the comics. I took a walk up the mountain behind my house with my 14-year-old daughter because I didn't want to be alone, and I wanted to sort my thoughts because it is a tragic thing to have to ask a jury to sentence a man to death. It is a heavy burden. But it is a burden in this case that I feel is most appropriately fulfilled by such a recommendation by this jury. Mr. Johnson gave very eloquent and very compelling testimony, but I believe it was compelling on the side of death. He said we have a choice in the decisions we make. That's what he told Keith Edmund Gavin. But Reginald, the victim in this case from 1982, he didn't have a choice. Did he? When the defendant lead him into the secluded area behind the building and pulled out the gun and shot the victim between the eyes. While the victim begged for his life. And Mr. Bill Clayton didn't have much of a choice either, did he? When just a matter of feet on the other side of this wall, as you recall the testimony, with a .40 caliber Glock pistol thrust into his face. He

shook his head and put his hands up in surrender. His form of begging for mercy. And he was shown none. Mr. Johnson told you that we also have to suffer the consequences of the acts we take. In the last 19 years, two innocent men have had to suffer the consequences of the acts of this defendant. Two who had no choice and were shown no measure of mercy. Both of the witnesses that you had testify on behalf of the defendant in this phase of the trial begged or asked for the life of Mr. Gavin to be spared. Mr. Johnson even solicited or threw out some comments there that Mr. Gavin had made to him directed towards the Clayton family. He was sorry that they were going through this. But let me remind you how hollow those words are. I am sorry that Mrs. Clayton is going through this. And I am certain every one of you are sorry that she and her family are doing this. But that's different from saying I'm sorry I did it. And that I'm sorry that I killed your husband, Mrs. Clayton. But Mr. Johnson never said to you that Mr. Gavin ever said he was sorry to him for killing Mr. Clayton. Nor did his mother. His mother who said I'm asking you to spare his life. Much like the first victim begged for his

life and much like Bill Clayton must have begged for his. She said there is, my son has a concern always had a concern for other people. Well, he has a strange way of showing it as he kills them in a cold-blooded and remorsefulness fashion. Mr. Johnson said there were cases in the Bible where it was appropriate to God to administer mercy. The Mosaic Code was no longer when Jesus came. But recall the words of Jesus when he said I came not to abrogate the law, but to fulfill it. And much of the old law was re-incorporated into the new law. And I submit to you that a man forfeiting his life after taking the life of another was just one such law that continues to this day. And I didn't mean to be facetious when I asked him if David had only taken one life or been responsible for the death of one man. I did that for a purpose because in today's society, there's always this talk about three strikes and you're out. How many strikes, ladies and gentlemen, do we give a man when those strikes constitute the murder of human beings? Is one too many? Well, apparently not, he was sentenced to 34 years and served about 17 years of that in the penitentiary. Will two be too many? I submit to

you it is. It is. Mercy versus justice. We all, when we have done wrong, seek mercy over justice. And, you know, this is a difficult time for all of us, but again particularly for you. Because if it is your conviction that two cruel and heartless murders are enough, and if you find that the aggravating circumstances that you have heard throughout this trial and during this phase is enough, then you will have to vote your heart. This is not a matter of revenge. The State seeks no revenge on Keith Edmund Gavin for the first or the second murder. This is not a matter of vengeance on behalf of the State of Alabama. For vengeance is not ours. What this is is a matter of justice. Justice that must be done in this courtroom with this jury at this time once and for all. And I submit to you one final time as you reflect upon the death circumstances of Bill Clayton, and when you think about the man back in 1982 who was led down the street while Mr. Gavin was hitting him and poking him with the gun, while you think about this man who let his victim beg for his life as he lead him to a secluded area behind a building and then pulled out a gun and shot him between the eyes and then a short time

later was arrested asleep in another location, I believe and I submit to you that the courage that it takes, the strength that it takes, the conviction that it takes to sentence a man to death resides in your hearts today in a righteous and justice position. And I submit to you that sentencing Mr. Gavin to death is the right and just thing for you to do. Thank you.

THE COURT: I've tried to decide about how to time the sequencing of things today knowing we were going to start a little late this morning and anticipating that we might end up at or close to the noon hour before the charge was given, and I'm going to go ahead and let you go to lunch before I give you these instructions. And the reason that I want to do that is that I want you to have those instructions right before you begin your deliberations. So, since it's so close to the noon hour now, rather than give them to you and then you go to lunch, I think it would be better for us to take a recess and come back and let me instruct you after you've had the noon recess. It's about a quarter till, I'm going to ask Dorothy to see if we can have you back at 1 o'clock, I would like to try to get started back

at 1. We will certainly all be here, the lawyers, participants in the case will be here at 1 o'clock, and if you're after 1, then we'll understand that, but let's try to get started back at 1. Ladies and gentlemen, continuing with that admonition to not discuss the case and do not allow it to be discussed in your presence, we are in recess until 1 o'clock.

(11:47 A.M. Jury excused)

MR. SMITH: Judge, before we go off the record there are a couple of things we need to take up on the record.

THE COURT: Yes, sir.

MR. SMITH: There are just a couple of exceptions we would take to the prosecutor's argument. We would take issue with the expression of Mr. O'Dell's personal opinions in this case.

THE COURT: I'm sorry, say again.

MR. SMITH: We would take issue with his expressions of personal opinion. I believe that's improper on the part of the prosecutor. We would take issue with his comments to the jury that Mr. Johnson talked about Mr. Gavin's expressions of concern for the fact that the victims were going through this, but that he never said I am sorry, I

did it. We would take issue with that as an improper comment on his failure to testify, and most importantly, we would take exception to his comments regarding victim impact, the last sunrise that Mr. Clayton spent with his bride, his wife. I believe that that is an inappropriate comment on victim impact violation of the Supreme Court case of pain and its progeny as expressed by Alabama case law. Those would be our objections at this time.

THE COURT: Those objections are noted and overruled. Thank you very much.

(11:50 A.M. Recess for noon hour)

(1:07 P.M. Jury not present)

THE COURT: State ready?

MR. O'DELL: State doesn't have anything left to do, but we're ready. We wanted to tell the Court that we understood that the jurors would be having lunch at Bay Springs today so we were in line, had ordered our food at the Barbecue And More place when Dorothy came in with the jurors. We then had them put our orders to go and went out to the car and drove around to the drive-thru window, but we wanted the Court and Mr. Smith to know that. We had no conversation, no contact

with them, but as soon as we knew they were there to leave, we left.

THE COURT: Well, in fact, they had planned to go to Bay Springs today and she was on the phone trying to make those arrangements and learned they're closed today at Bay Springs, so that's the reason she changed her plan and she certainly didn't know where you were going to be, but it sounds like you handled it appropriately and I appreciate you doing that.

MR. O'DELL: We just wanted that in in case Mr. Smith said we had lunch at the same place, we just wanted you to know.

MR. SMITH: We have no reason to suspect anything amiss, Judge.

THE COURT: Thank you so much. Is everybody ready?

MR. O'DELL: Yes, sir, we're ready.

MR. SMITH: Yes, sir.

(1:08 P.M. Jury present)

THE COURT: Please be seated. Ladies and gentlemen, it is my duty to again instruct you or to charge you as to the law. In charging you, I want to remind you of the instructions that I gave you Saturday concerning the basic law, in defining

the term reasonable doubt as well as your duties and functions as jurors. If anyone of you feels it necessary, I will re-charge you as to each and every one of those principles of law. I will not charge you as to the principles of law of the capital offenses charged in the indictments because that question at this point is settled due to the fact that by your verdicts you have found this defendant guilty of a capital offense. Now, because I am giving instructions to you does not mean that you are to assume as true any question of fact referred to in these instructions. Indeed, it is left to you to determine what the facts are and what the recommended sentence should be. The law of this state provides that the punishment for the capital offense for which you have convicted this defendant is either death by electrocution or life imprisonment without eligibility for parole. Life imprisonment without parole means life imprisonment without parole. It is the law of this state that if you sentence the defendant to life imprisonment, he will never be paroled. The law also provides that whether death or life imprisonment without parole should be imposed upon the defendant depends on whether any

aggravating circumstances exist, and, if so, whether the aggravating circumstances outweigh the mitigating circumstances.

An aggravating circumstance is a circumstance specified by law which indicates or tends to indicate that the defendant should be sentenced to death. A mitigating circumstance is any circumstance that indicates or tends to indicate that the defendant should be sentenced to life imprisonment without parole instead of death. The issue at this sentence hearing concerns circumstances of aggravation and circumstances of mitigation that you should consider and weigh against each other in deciding what the proper punishment is in this case. In making your recommendation concerning what the punishment should be, you must determine whether any aggravating circumstances exist, and if so, you must determine whether any mitigating circumstance or circumstances exist. In making your determination concerning the existence of aggravating and mitigating circumstances, you should consider the evidence presented at this sentence hearing. You should also consider any evidence that was presented during the guilt phase

of the trial that is relevant to the existence of any aggravating or mitigating circumstance. The law of this state provides a list of aggravating circumstances which may be considered by the jury in recommending punishment if the jury is convinced beyond a reasonable doubt from the evidence that one or any of such aggravating circumstances exists in this case. The same definitions that I gave you on Saturday concerning reasonable doubt apply to this matter, also. If the jury is not convinced beyond a reasonable doubt based upon the evidence that one or more such aggravating circumstances exists, then the jury must recommend that the defendant's punishment be life imprisonment without parole regardless of whether there are any mitigating circumstances in the case. Of the list of aggravating circumstances provided by law, there are three circumstances which you may consider in this case if you are convinced beyond a reasonable doubt based on the evidence that such circumstances do exist. The fact that I instruct you on such aggravating circumstances or define them for you does not mean that the circumstances or any other aggravating circumstances have been

proven beyond a reasonable doubt in this matter. Whether any aggravating circumstances which I instruct you on or define for you have been proved beyond a reasonable doubt based on the evidence is for you, the jury, alone to determine. The aggravating circumstances which you may consider in this case, if you find from the evidence that they may have been proven beyond a reasonable doubt, are as follows: Number one, the capital offense was committed by a person under sentence of imprisonment. Under sentence of imprisonment means while serving a term of imprisonment, while under a suspended sentence, while on probation or parole, or while on work release, furlough, escape, or any other type of release or freedom while or after serving a term of imprisonment other than unconditional release and freedom after expiration of term of sentence. Two, the defendant was previously convicted of another felony involving the use of violence to the person. Three, the capital offense was committed while the defendant was engaged in or was an accomplice in the commission of, or an attempt to commit or flight after committing or attempting to commit robbery. Now, as I've stated to you

before, the burden of proof is on the State to convince each of you beyond a reasonable doubt as to the existence of any aggravating circumstances considered by you in determining what punishment to be recommended in this case. This means that before you can even consider recommending that the defendant's punishment be death, each and every one of you must be convinced beyond a reasonable doubt based on the evidence that at least one or more of the aggravating circumstances exist. In deciding whether the State has proven beyond a reasonable doubt the existence of any given aggravating circumstance, you should bear in mind the definition I gave you as to reasonable doubt. The evidence upon which a reasonable doubt about an aggravating circumstance may be based is both the evidence you heard in the guilt stage of the trial and the evidence you have heard in this sentence hearing. The defendant does not have to disprove anything about an aggravating circumstance. The burden is wholly upon the State to prove such a circumstance beyond a reasonable doubt. A reasonable doubt about an aggravating circumstance may arise from all of the evidence, from any part of the evidence, or from a lack or

failure of the evidence. You may not consider an aggravating circumstance other than the three aggravating circumstances on which I have instructed you. And you may not consider an aggravating circumstance unless you are convinced by the evidence beyond a reasonable doubt of the existence of that aggravating circumstance in this case. If you should find that no aggravating circumstance has been proven beyond a reasonable doubt to exist in this case, then you must return a verdict recommending that the defendant's punishment be life imprisonment without parole. In that event, you need not concern yourself with the mitigating circumstances in this case. If you find beyond a reasonable doubt that one or more of the aggravating circumstances on which I instructed you does exist in this case, then you must proceed to consider and determine the mitigating circumstances.

The law of this state provides a list of some of the mitigating circumstances which you may consider. But that list is not a complete list of the mitigating circumstances you may consider. I will now read to you a list of some of the mitigating circumstances that you may consider.

These include, one, the defendant has no significant history of prior criminal activity. Two, the capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance. Three, the victim was a participant in the defendant's conduct or consented to the act. Four, the defendant was an accomplice in the capital offense committed by another person and his participation was relatively minor. Five, the defendant acted under extreme duress or under the substantial domination of another person. Six, the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired. A person's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law is not the same as his ability to know right from wrong generally or to know what he is doing at a given time, or to know what he is doing is wrong. A person may, indeed, know that doing the act that constitutes a capital offense is wrong and still not appreciate its wrongfulness because he does not fully comprehend or is not fully sensible to what he is doing or how wrong it

is. Further, for this mitigating circumstance to exist, the defendant's capacity to appreciate does not have to have been totally obliterated. It is enough that it was substantially lessened or substantially diminished. Finally, this mitigating circumstance would exist even if the defendant did appreciate the criminality of his conduct if his capacity to conform to the law was substantially impaired since a person may appreciate that his actions are wrong and still lack the capacity to refrain from doing them. And, seven, the age of the defendant at the time of the crime.

A mitigating circumstance does not have to be included in the list that I have read to you to be considered by you. In addition to the mitigating circumstances previously specified, mitigating circumstances shall include any aspect of the defendant's character or record or any of the circumstances of the offense that the defendant offers as a basis for a sentence of life imprisonment without parole instead of death. A mitigating circumstance considered by you should be based on the evidence you have heard. When the factual existence of an offered mitigating

circumstance is in dispute, the State shall have the burden of proving the factual existence of that circumstance by a preponderance of the evidence. The burden of disproving it by a preponderance of the evidence means that you are to consider that the mitigating circumstance does exist unless, taking the evidence as a whole, it is more likely than not that the mitigating circumstance does not exist. Therefore, if there is a factual dispute over the existence of a mitigating circumstance, then you should find and consider that mitigating circumstance unless you find that the evidence is such that it is more likely than not that that mitigating circumstance does not exist. Only an aggravating circumstance must be proven beyond a reasonable doubt. And as I have stated to you many times, the burden is on the State of Alabama to convince you from the evidence beyond a reasonable doubt that such an aggravating circumstance did exist. In order to consider an aggravating circumstance, it is necessary that the jury unanimously agree upon its existence. All 12 jurors must be convinced beyond a reasonable doubt that an aggravating circumstance exists in order for any of you to

consider that aggravating circumstance in determining what the sentence should be. However, it is not necessary for there to be unanimous agreement on the existence of a mitigating circumstance before you can consider it in setting punishment. If you, as an individual juror, find under the law as I have given it to you that a mitigating circumstance exists, then you can individually consider it and weigh it against any aggravating circumstances, regardless of whether any other jurors agree with you about the existence of that mitigating circumstance. There must be unanimous agreement on the existence of a particular aggravating circumstance before it can be considered by any juror. There need not be unanimous agreement on the existence of any particular mitigating circumstance before it can be considered. In reaching your finding concerning the aggravating and mitigating circumstances in this case, and in determining what to recommend that the punishment in this case should be, you must avoid any influence of passion, prejudice, or any other arbitrary factor. Your deliberation and verdict should be based upon the evidence you have seen and heard and the law

on which I have instructed you. There is no room for the influence of passion, prejudice or any other arbitrary factors. While it is your duty to follow the instructions which the Court has given you, no statement, question, ruling, remark, or other expression that I have made at any time during this trial, either during the guilt phase or during this sentence hearing, is intended to indicate any opinion of what the facts are or what the punishment should be. It is your responsibility to determine the facts and recommend the punishment, and in doing so you should not be influenced in any way by what you might imagine to be my views on such subject. The process of weighing aggravating and mitigating circumstances against each other in order to determine the proper punishment is not a mechanical process. Your weighing of the circumstances against each other should not consist of merely adding up the number of aggravating circumstances and comparing that number to the total number of mitigating circumstances. The law of this state recognizes that it is possible in at least some situations that one or a few aggravating circumstances might

outweigh a larger number of mitigating circumstances. The law of this state also recognizes that it is possible in at least some situations that a large number of aggravating circumstances might be outweighed by one or a few mitigating circumstances. In other words, the law contemplates that different circumstances may be given different weights or values in determining the sentence in any case. And you, the jury, are to decide what weight or value is to be given to a particular circumstance in determining the sentence in light of all the other circumstances in this case. You must do that in the process of weighing the aggravating circumstances against the mitigating circumstances.

In order to bring back a verdict recommending the punishment of death, at least 10 of your number must vote for death. In other words, a verdict of death must be either unanimous or 11 for death and one for life without parole or 10 for death and two for life without parole. Any number less than 10 cannot recommend the death penalty. In order to bring back a verdict recommending a sentence of life imprisonment without parole, there must be a concurrence of at

least seven of your number for that sentence. In other words, in order for a verdict to be returned recommending imprisonment for life without parole, it must be either unanimous or 11 for life without parole and one for death, or 10 for life without parole and two for death, or nine for life without parole and three for death, or eight for life without parole and four for death, or seven for life without parole and five for death. Any number less than seven cannot recommend life without parole. The fact that the determination of whether 10 or more of you can agree to recommend a sentence of death, or seven or more of you can agree to recommend a sentence of life imprisonment without parole can be reached by a single ballot should not influence you to act hastedly or without due regard to the gravity of these proceedings. You should hear and consider the views of your fellow jurors. Before you vote, you should carefully weigh, sift, and consider the evidence, and all of it, realizing that a human life is at stake, and you should bring to bear your best judgment on the sole issue which is before you. That issue is whether the defendant should be sentenced to life imprisonment without

parole or death. In addition to the recommendation of either death or life imprisonment without parole, your verdict form must contain the numerical vote, not who voted in which way, but the actual count. And so now, ladies and gentlemen, if after a full and fair consideration of all the evidence in this case, you are convinced beyond a reasonable doubt that at least one aggravating circumstance does exist, and that the aggravating circumstance or circumstances outweigh the mitigating circumstances, your verdict would be, "We, the jury, recommend the defendant, Keith Edmund Gavin, be punished by death and the vote is as follows: Blank for death, blank for life without parole." Signed by the foreperson. If, however, after a full and fair consideration of all the evidence in this case, you determine that the mitigating circumstances outweigh any aggravating circumstances that exist, or you are not convinced beyond a reasonable doubt that at least one aggravating circumstance does exist, your verdict would be to recommend punishment of life imprisonment without parole, and the form of that verdict would be, "We, the jury, recommend that

the defendant, Keith Edmund Gavin, be punished by life imprisonment without parole. The vote is as follows: Blank life without parole, blank death." Signed by the foreperson. And, of course, again, you would enter the numerical number in the space provided indicating the number voting for life without parole and the number voting for death.

Now, ladies and gentlemen, that completes my instructions to you. The case is ready to be submitted for your consideration. When you go back to the jury room, you will have the same foreman who served in the prior proceedings. That person will direct you in your deliberations. I think it would be wise if I gave the lawyers an opportunity to take up certain matters with me before you actually begin your deliberations, and so, when you go back in just a few minutes, I don't want you to begin discussing this just yet. Let me take up those last few minute matters with the lawyers, and once I've done that and the case is ready to be submitted for your decision, the bailiff will come to you and bring these suggested verdict forms at that time and also, I believe, there is one exhibit that has been admitted during the sentencing phase. So, if you would at this

time, please, retire to the jury room and don't yet begin discussing the case.

(1:37 P.M. Jury excused)

THE COURT: Any exceptions or objections to the Court's charge? Any from the defendant?

MR. SMITH: None from the defendant, Judge.

MR. O'DELL: None from the State.

THE COURT: All right, the case will be submitted. The bailiff will take the suggested verdict forms and the exhibit of proof. Thank you. The court reporter has asked me whether the exhibits offered during the guilt phase of the trial should be taken back to the jury room. What is the position of the parties with respect to that question?

MR. O'DELL: Judge, the State would feel that that was appropriate in light of the fact that we moved to have all the evidence that they considered in the guilt phase admissible and you did that, you granted that motion, so...

THE COURT: What is your position about it?

MR. SMITH: We would object, Judge. I would honestly need a chance to look at the law. I had not considered --

THE COURT: I'm not going to send the exhibits

back to the jury.

MR. O'DELL: The State was about to respond, also, that in light of the fact that they would really be considering only those items which would be relevant to the consideration of aggravating circumstances. To be on the safe side, the State would withdraw the request to have all those items presented to them.

THE COURT: Yeah, I think that's the very reason why they should not go back at this time, so, they will not be sent back to the jury room. Thank you. You may tell the jury the case is submitted.

(1:40 P.M. Jury deliberations begun)

(2:55 P.M. Jury not present)

THE COURT: Ladies and gentlemen, it's been reported to me there is a sentence recommendation from the jury. I'll have them come in and take a seat and they will hand their verdict across from the bailiff to the Clerk and the Clerk will read it. Again, I want to ask that there not be any expression, verbal or otherwise, of approval or disapproval of the jury's recommendation. If you feel that you cannot follow these instructions, I'm going to ask that you go ahead and leave the

courtroom at this time. I want absolute silence in the courtroom during and after the jury's decision has been announced, then they will retire from the courtroom, as will I, at that time and I will set a sentence hearing in this case if there is a, well, I will set a sentence hearing probably on December the 6th. That date is a little bit uncertain, I haven't had an opportunity yet to talk to the probation officer about the amount of time that he's going to need in order to make a report to me, but there will be sentence hearing set and December 6th is my target for that right now. So, is the State ready?

MR. O'DELL: Yes, sir.

THE COURT: Defendant ready?

MR. SMITH: Yes, sir.

(2:57 P.M. Jury present)

THE COURT: Please be seated. Has the jury reached a decision, Mr. Manley?

MR. MANLEY: We have, Your Honor.

THE COURT: All right, would you hand it across to the bailiff, please. I'll ask the Clerk to read it.

THE CLERK: Okay, State of Alabama versus Keith Edmund Gavin in the Cherokee County Circuit

MR. O'DELL: Judge, we have Grand Jury the week before that, so if it could be set after that, if it's not going to be December the 6th, if you could make it later than December 6th.

THE COURT: All right. Thank you very much. We stand concluded.

(3:00 P.M. The proceedings were concluded at this time)

CENTRE, ALABAMA

JANUARY 5, 2000

(1:40 P.M.)

THE COURT: The record should show that Mr. Keith Edmund Gavin appears before the Court at this time for sentencing. He appears with his attorneys, Mr. Baine Smith and Mr. John Ufford. Will the defendant and his counsel please rise. In case number CC-98-62, Mr. Gavin, you have been found guilty of the offense of Attempted Murder and you have been adjudged guilty of that offense. The Court hereby sentences you for the offense of Attempted Murder to life in the state penitentiary. The sentence in this case shall run consecutively to the sentence to be imposed in case number 98-61. In case 98-61 the defendant, Keith Edmund Gavin, was charged in a two count

indictment. Count One charged the defendant with Capital Murder for the intentional killing of William Clinton Clayton, Jr., during the commission of Robbery in the First Degree. Count Two charges him with Capital Murder for the intentional killing of William Clinton Clayton, Jr., after the defendant had been previously convicted of another murder within 20 years preceding the murder of William Clinton Clayton, Jr.

On November 6, 1999, the jury returned a verdict finding the defendant guilty of Capital Murder under both counts of the indictment. In accordance with the verdict of the jury, the defendant has been adjudged by the Court guilty of Capital Murder under both counts of the indictment.

A separate sentence hearing was conducted before the same jury pursuant to Title 13A-5-46 of the Code of Alabama, and on a vote of 10 to two the jury recommended that the defendant be sentenced to death. The Court ordered and received a written pre-sentence investigation report and conducted an additional sentence hearing pursuit to Title 13A-5-47 of the Code of

Alabama. At the sentence hearing the State, through the District Attorney, urged the Court to follow the jury recommendation and fix the defendant's punishment at death. The defendant, through his attorneys, argued that the Court should fix the defendant's punishment at life imprisonment without parole. The defendant was asked whether he had anything to say why the sentence should not be pronounced. The defendant has said nothing, in bar or preclusion, of sentence.

Findings of fact summarizing the crime and the defendant's participation in it: William Clinton Clayton, Jr., was a contract courier for Corporate Express Delivery Systems, Incorporated. Although his routine typically involved the use of his private automobile to provide courier services, on March 6, 1998, he drove a Corporate Express van because his personal vehicle was having mechanical problems. As Mr. Clayton sat in the driver's seat of this marked van at the curb near the entrance of Regions Bank in Centre, Cherokee County, Alabama, the defendant approached him from the street, opened the driver's door, and shot Mr. Clayton twice. One of the bullets passed through

his heart and both lungs, the other through his hip. He died of multiple gunshot wounds. The reason for the defendant's presence at the place and at that time was recounted by the defendant's companion on this occasion, Mr. Gerald Meeks. Meeks and the defendant are cousins, and both were residing in Chicago, Illinois, early in 1998. Meeks worked for the Illinois Department of Corrections, and the defendant had been recently paroled after serving approximately 17 years of a 34-year sentence imposed by the Circuit Court of Cook County, Illinois, for murder. Meeks grew up in Fort Payne, Alabama, and had other relatives and friends residing in this area. Meeks brought the defendant to Fort Payne in February, 1998, for a "change of scenery" and to go "whoring". Meeks testified that following the February visit to Alabama, the defendant wanted to return in March to find a woman whom he had met the month before. Meeks agreed to drive the defendant to Chattanooga, Tennessee, where Meeks charged two motel rooms on his credit card and from which said location Meeks and the defendant were to conduct the search for the woman. If she was located, the defendant intended to remain in this area and

Meeks planned to return to Chicago after being reimbursed by the woman for the motel and other expenses. In addition to the defendant, Meeks was accompanied to Chattanooga by his wife and child where they remained while the efforts to locate the woman proceeded. Meeks and the defendant went to Fort Payne and from there to Centre, Alabama, at the corner where Mr. Clayton sat in his courier van.

There was tension between Meeks and the defendant because of the expenses which Meeks had incurred for this trip and because of Meeks' concern that he would not be reimbursed if the woman could not be located. Nevertheless, when the defendant exited the car at the intersection of Regions Bank, Meeks thought the defendant was going to ask for directions. Instead, the defendant shot and killed William Clinton Clayton, Jr. Meeks fled from the scene in his car. The defendant pushed the mortally wounded courier aside and followed Meeks in the Corporate Express van. When the defendant stopped in response to a blue light, he exited the van. When Officer Danny Smith exited his pursuit vehicle, the defendant took aim at short range and attempted to kill the

officer by firing two shots at him. The defendant fled into the nearby woods. Following a four-hour manhunt, the defendant was apprehended standing waist deep in a creek where he was detected by search dogs.

Findings concerning the existence or non-existence of aggravating circumstances: The law required the trial Court to enter specific findings concerning the existence or non-existence of each aggravating circumstance enumerated by statute. This Court finds that the following three aggravating circumstances were proven beyond a reasonable doubt. Number one, the capital offense was committed while the defendant was under a sentence of imprisonment. The term under sentence of imprisonment is defined by Title 13A-5-39(7) as "while serving a term of imprisonment, while under a suspended sentence, while on probation or parole, or while on work release, furole, escape, or any other type of release or freedom while or after serving a term of imprisonment other than unconditional release and freedom after expiration of the term of sentence." The defendant was convicted of murder in the Circuit Court of Cook County, Illinois, on

June 9, 1992, and he was sentenced to 34 years in prison. The defendant was paroled on December 28, 1997, and was still on parole at the time of the murder on March 6, 1998. At the time of the murder of William Clinton Clayton, Jr., on March 6, 1998, the defendant was under a sentence of imprisonment as that term is defined by Alabama law.

Number two, the defendant was previously convicted of another felony involving the use of violence to the person. The defendant was convicted of Murder in the Circuit Court of Cook County, Illinois, on June 9, 1992.

Number three, the capital offense was committed while the defendant was engaged in or was an accomplice in the commission of or an attempt to commit or flight after committing or attempting to commit Robbery. Count one of the indictment charged the defendant with intentional murder in the course of committing a theft of a 1996 Ford van belonging to Corporate Express Delivery Systems, Incorporated, by the use of force against the driver, William Clinton Clayton, Jr. The defendant took Meeks' .40 caliber Glock pistol, either from Meeks' residence or from Meeks'

vehicle, without the consent or permission of Meeks. According to Meeks, the defendant secreted the weapon until the defendant used it to kill William Clinton Clayton, Jr., and took the vehicle which Mr. Clayton was driving. The capital crime of intentional killing of another during the commission of robbery is a single offense consisting of two elements. The intentional killing of Mr. Clayton and the theft of the vehicle were part of a continuous chain of events. Therefore, the capital offense was committed while the defendant was engaged in the commission of or attempt to commit robbery.

Findings concerning the existence or non-existence of mitigating circumstances: In compliance with the statutory requirement that the trial Court enter specific findings concerning the existence or non-existence of each mitigating circumstance enumerated by statute, the Court finds that none of the following mitigating circumstance exists in this case. One, that the defendant had no significant history of prior criminal activity. The defendant was convicted of Burglary in Cook County, Illinois, on October 25th, 1979. He was also convicted of Murder on

June 9, 1982, in Cook County, Illinois. The pre-sentence report indicates that the defendant has been charged or implicated in other criminal activity, but there is no record of conviction for any offense other than the prior crime of Murder and Burglary as stated above. To the extent that the pre-sentence report suggests any other criminal activity, same is not considered an aggravating circumstance, and has not been weighed as such by the Court. This Court finds that there is no support for this mitigating circumstance.

Number two, that the capital offense was committed while the defendant was under the influence of extreme mental or emotional disturbance. During the few hours leading up to the murder of Mr. Clayton, Meeks had apparently insisted on being reimbursed for his expenses in bringing the defendant to Alabama. These demands did not invoke extreme mental or emotional disturbance, although this may explain the defendant's motive for the robbery. The defendant is an intelligent person, capable of making independent choices. There was no plea of mental disease or defect and at no time did the defendant seek to have a mental evaluation for the purpose

of asserting such a defense. This Court finds that there is no support for this mitigating circumstance.

Number three, that the victim was a participant in the defendant's conduct or consented to it. This Court finds that there is no support for this mitigating circumstance.

Number four, that the defendant was an accomplice in the capital offense committed by another and his participation was relatively minor. The defendant was identified by an eye witness as the person who committed the offense in question. Likewise, Meeks reported to the -- excuse me. Likewise, Meeks reported that the defendant committed the murder and robbery of Mr. Clayton. Nevertheless, Meeks was indicted along with the defendant. The State subsequently dismissed the charge against Meeks who thereafter testified against the defendant on behalf of the State. There is no direct evidence that the State's dismissal was a quid pro quo for Meeks' testimony, but throughout the trial the defendant's attorneys attempted to impeach Meeks' credibility by proving that he was originally charged in the case and that by virtue of the

dismissal of those charges he was thereby motivated to testify falsely against the defendant. The defendant's attorneys also challenged the forensic evidence in an effort to try to implicate Meeks as the guilty party. For example, the defendant argued that the driver would have been covered with the victim's blood, but no blood was found on the defendant or on his clothes even by DNA examination. In addition, there was no evidence of the defendant's fingerprints in or on the courier van. The defendant also argued that even though he was arrested standing waist deep in a creek, he was not submersed long enough to completely cleanse blood from his clothes, and that if he had been submerged long enough to have that effect, he would have died from hypothermia.

The defendant was identified by Officer Danny Smith who viewed the defendant at a distance of only a few feet when the defendant exited the stolen van, fired at Officer Smith and escaped into the woods. A toboggan matching the description reported by witnesses was found near the site where the defendant was apprehended and Meeks' gun was later found near where the

defendant entered the woods as he escaped from Officer Smith. The ballistics analysis established that the shell casings ejected by the weapon fired at Officer Smith were identical to the shell casings found in the street at the site where Mr. Clayton was shot and that the casings from both sites were fired by the weapon found in the woods near where the defendant was apprehended.

In summary, the defendant attempted to implicate Meeks as the killer by a combination of the challenges to the forensic evidence, coupled with his challenge of Meeks' credibility. The defendant emphasized the undisputed fact that Meeks drove the defendant to the scene of the crime and that Meeks' pistol was the murder weapon. The evidence of the defendant's guilt is, however, overwhelming. There is no basis on which to conclude that the defendant was merely an accomplice with minor participation in the crime. This Court finds that there is no support for this mitigating circumstance.

Number five, that the defendant acted under extreme duress or under the substantial domination of another person. This Court finds that there is

no support for this mitigating circumstance.

Number six, that the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired. This Court finds that there is no support for this mitigating circumstance.

Number seven, the age of the defendant at the time of the crime. At the time of the commission of the offense on March 6, 1998, the defendant was 37 years of age. The age of the defendant is not a mitigating circumstance.

In addition to the mitigating circumstances specified by the statute, and the findings of this Court relating thereto as set out hereinabove, mitigating circumstances include any aspect of the defendant's character or record, and any of the circumstances of the offense that the defendant offers as a basis for a sentence of life imprisonment without parole instead of death, and any other relevant mitigating circumstance which the defendant offers as a basis for a sentence of life imprisonment without parole instead of death. As a supplement to the probation officer's written report, the defendant has provided a memorandum

from sentencing consultant John David Sturman & Associates of Chicago, Illinois, the whole of which said memorandum has been considered by this Court. In that memorandum, the defendant's mother is reported to have described the defendant's life as influenced by or subject to a combination of drugs and gang violence while living in a Chicago housing project. The defendant's mother also testified at the sentence hearing conducted before the jury. The defendant's attorney has advised the Court, however, that the defendant denies ever having a drug problem. At the sentence hearing conducted before the jury, the Court heard testimony of Reverend A.J. Johnson who spoke eloquently on behalf of the defendant as a result of his frequent meetings with the defendant over the many months of the defendant's incarceration. Reverend Johnson opines that the defendant has concern and sympathy for the victim's family, and that the defendant is capable of a closer relationship with God. This Court has considered all matters presented by the defendant, but this Court does not find any support for any non-statutory mitigating circumstance.

Conclusion: This Court has carefully

considered the aggravating circumstances which have been proven to the satisfaction of the Court beyond a reasonable doubt. There are no mitigating circumstances. The aggravating circumstances, therefore, outweigh the mitigating circumstances. This Court has also carefully considered the jury recommendation that the defendant be sentenced to death. It is, hereby ordered, adjudged and decreed that the defendant shall be punished by death. The sentence of death shall be consecutive to the sentence imposed in case number 98-62 in the Circuit Court of Cherokee County, Alabama. The Sheriff shall remove the defendant to the custody of the Alabama Department of Corrections where, in strict accordance with the law, the defendant shall be put to death. In accordance with the Alabama Rules of Court, the Supreme Court of Alabama shall set an execution date and the Supreme Court Order fixing the execution date shall constitute the execution warrant.

Even though every case in which the death penalty is imposed is subject to automatic review by the Alabama Court of Criminal Appeals and the Alabama Supreme Court, the defendant is hereby

advised of the right to appeal. If the defendant wishes to appeal, he must do so by giving notice of appeal within 42 days from the date of this Order. If the defendant is an indigent and cannot afford a lawyer to represent him on appeal, the Court will appoint a lawyer for him and provide a free transcript of all proceedings in this case. This Court having been previously -- this Court having previously determined that the defendant is indigent, the Court hereby appoints Mr. Stephen P. Bussman, 212 Alabama Avenue South, Post Office Box 925, Fort Payne, Alabama, 35967, phone number 256 845-7900, to represent the defendant on appeal. The defendant will receive credit for the time during which he has been incarcerated on the present charge. Done this 5th day of January, 2000. Signed David A. Rains, Circuit Judge.

In case number 98-62, the Court also appoints Mr. Bussman to represent the defendant on appeal. You are further advised that in that case, if you wish to file an appeal, you must do so by giving notice of appeal within 42 days from this date. You will receive credit for the time during which you have been incarcerated on this charge. We stand adjourned.

(The proceedings were concluded at this time)

(2:35 P.M. Hearing resumed)

THE COURT: I have asked that Mr. Gavin and his counsel be returned to the courtroom along with the District Attorney. In pronouncing the sentence in this case, I referred to the witness Meeks as Gerald Meeks. The witness is Mr. Dewayne Meeks and, therefore, I wanted to make sure that even though I misspoke the name during the sentencing, that the record clearly states and clearly shows at this time that the person referred to as Mr. Meeks is Mr. Dewayne Meeks who was the witness during the trial of this case. The written Order will be corrected to show the name of Dewayne Meeks instead of Gerald Meeks. I apologize to you for that error on my part. Anything else that we need to take up at this time? Anything from the State?

MR. O'DELL: No, sir.

THE COURT: Anything from the defendant?

MR. SMITH: No, sir.

MR. UFFORD: Nothing further, Judge.

THE COURT: Thank you, gentlemen.

(The proceedings were concluded

at this time)

MAY 25, 2000

CENTRE, ALABAMA

APPEARANCES:

FOR THE STATE:

Hon. Michael E. O'Dell, District Attorney

Hon. Robert F. Johnston, Assistant District Attorney

FOR THE DEFENDANT:

Hon. Stephen P. Bussman, Attorney at Law

Hon. Steve Noles, Attorney at Law

Fort Payne, Alabama

THE COURT: This is the cases of State of Alabama versus Keith Edmund Gavin, cases CC-98-61 and CC-98-62. The defendant is not present for these hearings, the Court has not entered an Order for him to be transported for the purpose of this hearing this morning. Those present are District Attorney Mike O'Dell, the Deputy District Attorney, Robert F. Johnston, the defendant's appellate counsel, Stephen P. Bussman and Steven B. Noles, and also present is Mr. John H. Ufford, whose objection to a subpoena has caused us to