No. ___________

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2023

JAMIE MILLS,

Petitioner,

v.

JOHN HAMM,
Commissioner of the
Alabama Department of Corrections,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS FOR
THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

****** Mr. Mills' execution is scheduled from 6:00 p.m. CST on May 30, 2024 until 6:00 a.m. CST on May 31, 2024. ******

CHARLOTTE R. MORRISON
COUNSEL OF RECORD
ANGELA L. SETZER
RANDALL S. SUSSKIND
122 Commerce Street
Montgomery, AL 36104
(334) 269-1803
cmorrison@eji.org
asetzer@eji.org
rsusskind@eji.org

May 29, 2024

Counsel for Petitioner

CAPITAL CASE

QUESTIONS PRESENTED

(1) Where two judges on the lower court panel found that "no reasonable jurist could conclude that the district court abused its discretion" in denying relief under Rule 60 of the Federal Rules of Civil Procedure, doc. 19, at 6-9, and one judge concurred in the result but found that Mr. Mills "has sufficiently alleged the denial of a constitutional right" and he "has met the threshold requirement to obtain a COA," doc. 19-1, at 15, 18, does the denial of a COA conflict with this Court's decision in Miller-El v. Cockrell, 537 U.S. 322, 336-38 (2003), requiring a COA to issue where "reasonable jurists could debate . . . the issues presented," and recognizing that "a claim can be debatable even though every jurist of reason might agree . . . that [the] petitioner will not prevail"?

(2) Whether reasonable jurists could debate whether a petitioner is entitled to Rule 60 relief where the State has concealed evidence supporting Mr. Mills' allegations of a plea agreement with its central witness for 17 years and evidence presented by both the petitioner and the State establish that the facts at issue were required to be disclosed and that the State had a duty to correct the false testimony at Mr. Mills' capital trial?

(3) Whether reasonable jurists could debate whether the lower courts' ruling violates this Court's decision in Banks v. Dretke, which makes clear that defendants do not bear the burden of ferreting out prosecutorial misconduct or failures to disclose critical evidence: "A rule thus declaring 'prosecutor may hide, defendant must seek,' is not tenable in a system constitutionally bound to accord defendants due process." 540 U.S. 668, 696 (2004)?

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioner is Jamie Mills. Respondent is John Hamm, Commissioner of Alabama Department of Corrections. No Party is a corporation.

RELATED PROCEEDINGS

State v. Mills, Marion County Circuit Court, No. CC-2004-402. Convicted on August 23, 2007; sentenced on September 14, 2007.

Mills v. State, Alabama Court of Criminal Appeals, No. CR-06-2246. Opinion remanding the case issued June 27, 2008; opinion on return to remand issued September 26, 2008; rehearing denied December 12, 2008.

Ex parte Mills, Alabama Supreme Court, No. 1080350. Opinion issued September 3, 2009; rehearing denied November 24, 2010.

Mills v. Alabama, United States Supreme Court, No. 10-10180. Petition for a writ of certiorari denied June 29, 2012.

Mills v. State, Marion County Circuit Court, No. CC-2004-402.60. Order dismissing majority of claims issued July 19, 2013; order dismissing remainder of claims issued January 14, 2014.

Mills v. State, Alabama Court of Criminal Appeals, No. CR-13-0724. Opinion issued December 11, 2015; rehearing denied February 26, 2016.

Ex parte Mills, Alabama Supreme Court, No. 1150588. Petition for a writ of certiorari denied May 20, 2016.

Mills v. Dunn, United States District Court for the Northern District of Alabama, No. 6:17-cv-00789-LSC. Opinion and order dismissing habeas petition issued November 30, 2020.

Mills v. Commissioner, Alabama Department of Corrections, United States Court of Appeals for the Eleventh Circuit, No. 21-11534. Order denying certificate of appealability issued August 12, 2021; order denying motion for reconsideration issued October 6, 2021.

Mills v. Hamm, United States Supreme Court, No. 21-7109. Petition for a writ of certiorari denied April 18, 2022.

Mills v. State, Alabama Supreme Court, No. 1080350. Order granting State's motion to authorize execution entered March 20, 2024.

Mills v. Dunn, United States District Court for the Northern District of Alabama, No. 6:17-cv-00789-LSC. Memorandum Opinion and Order denying Rule 60 Motion and denying Motion for Stay of Execution issued May 17, 2024; Order denying certificate of appealability issued May 21, 2024.

Mills v. Commissioner, Alabama Department of Corrections, United States Court of Appeals for the Eleventh Circuit, No. 24-11661. Order denying certificate of appealability and denying as moot motion to stay execution issued May 28, 2024.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Jamie Mills respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The Memorandum Opinion and Order of the United States District Court for the Northern District of Alabama denying Mr. Mills' Rule 60 Motion and denying Mr. Mills' motion for a stay of execution is attached as Appendix D. DE 48. The Order of the United States District Court for the Northern District of Alabama denying Mr. Mills a Certificate of Appealability is attached as Appendix E. DE 50. The Eleventh Circuit decision denying Mr. Mills a certificate of appealability, and denying as moot his motion for a stay of execution, is attached as Appendix A. Doc. 19-1.

STATEMENT OF JURISDICTION

The United States District Court for the Northern District of Alabama dismissed Mr. Mills' Rule 60 Motion and motion for a stay of execution on May 17, 2024, Mills v. Dunn, No. 6:17-CV-00789-LSC, 2024 WL 2252142, DE 48 (N.D. Ala. May 17, 2024), Appendix D, and denied his motion for a certificate of appealability on May 21, 2024, Order, Mills v. Dunn, 6:17-cv-00789-LSC, DE 50[1] (N.D. Ala. May

[1] "DE" citations are to entries on the docket for the District Court for the Northern District of Alabama in this case. "Doc." citations are to documents filed on the docket of the United States Court of Appeals for the Eleventh Circuit in this case.

21, 2024), Appendix E.[2] The United States Court of Appeals for the Eleventh Circuit denied Mr. Mills' motion for a certificate of appealability on May 28, 2024, Order, Mills v. Commissioner, Alabama Department of Corrections, No. 24-11661, Doc. 19-1 (11th Cir. May 28, 2024), Appendix A.

In federal habeas proceedings, federal courts have jurisdiction to consider Rule 60 motions that "attack[ ] not the substance of the federal court's resolution of a claim on the merits, but some defect in the integrity of the federal habeas proceedings." Gonzalez v. Crosby, 545 U.S. 524, 532 (2005). This Court has jurisdiction to consider the lower court's denial of a certificate of appealability. Hohn v. United States, 524 U.S. 236, 238 (1998). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Eighth Amendment to the United States Constitution provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. amend. VIII.

The Fourteenth Amendment to the United States Constitution provides, in relevant part: "No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1.

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[2] Pursuant to Supreme Court Rule 35.3, John Hamm is automatically substituted in his official capacity as the Commissioner of the Alabama Department of Corrections as the Respondent in this action, replacing the former Commissioner Jefferson Dunn.

28 U.S.C. § 2253(c)(2) provides in relevant part: "A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2).

STATEMENT OF THE CASE

In a lower court opinion that was divided in important aspects, the Eleventh Circuit misapplied the standard for a Certificate of Appealability ("COA"). Doc. 19-1, at 8, 10 (finding evidence submitted by Mr. Mills to be implausible and that "no reasonable jurist would question the denial on the merits"); see also Doc. 19-1, at 18 (Abudu, J., concurring) ("Mills has sufficiently alleged the denial of a constitutional right"); see also Id., at 15 (Abudu, J., concurring) ("Mills has met the threshold requirement to obtain a COA").

For seventeen years, Mr. Mills has maintained that the District Attorney made false statements at trial that the State offered nothing to its star witness, JoAnn Mills, in exchange for her testimony. At trial, the district attorney assured the judge that JoAnn testified without a "nudge, [or] a wink" or even a "suggest[ion]" of a plea (R1. 830) and told the jury JoAnn "[m]ade a promise? No. That's her choice. She presented us with she wanted to testify, and she did." (R1. 915.) The State continued to deny the existence of any agreement with JoAnn in exchange for her testimony throughout Mr. Mills' appeals and postconviction processes, including in his habeas corpus proceedings in the district court, preventing Mr. Mills from receiving merits-review of this claim.

Newly discovered evidence establishes that the District Attorney's statements

at trial, and the State's representations throughout the appeals and postconviction proceedings, were false. The declaration of Attorney Tony Glenn, who represented JoAnn Mills in her capital murder case, establishes that prior to Mr. Mills' capital trial, Mr. Glenn met with District Attorney Jack Bostick and the family of Vera and Floyd Hill and that during that meeting, he advocated for JoAnn by presenting her life history of mitigating evidence in an effort to obtain a deal that could spare her from the death penalty. DE 42-1. Mr. Glenn was successful: the District Attorney ultimately agreed to a **life with parole** sentence, instead of the death penalty, if she would testify truthfully at Mr. Mills' trial. DE 42-2. Mr. Glenn's affidavit is corroborated by his attorney fee declaration and by the fact that, consistent with the prosecution's plea deal with JoAnn, on September 24, 2007, just ten days after Jamie Mills was sentenced to death, the State dismissed Capital Murder charges against her and she pled to the lesser included offense of straight Murder. DE 42-2.

This new evidence means that District Attorney Jack Bostick falsely told the trial court that JoAnn testified without a "nudge, [or] a wink" or even a "suggest[ion]" of a plea. (R1. 830.) It also means that the testimony the District Attorney elicited from JoAnn Mills—that she did not "expect help from the district attorney's office" and that she understood as a result of her testimony that she would "get either life without parole or death by lethal injection" (R1. 721)—was false.

In response to Mr. Glenn's extraordinary affidavit, the State submitted its own affidavits, which establish that the District Attorney sought a plea deal on

JoAnn's behalf with the victims' family prior to her testimony at trial and that members of the District Attorney's staff met with JoAnn prior to her testimony, "*about* her testimony," and that the staff "*encouraged* her to testify." DE 44-1, 44-2 (emphasis added). As a result of these meetings, the District Attorney affirms that "Tony Glenn believed it would be in his client's best interest to testify against Jamie Mills." DE 44-1. At a minimum, the State's own affidavits establish that both JoAnn and the District Attorney's statements to the court, defense counsel, and the jury were false.

The district court and Eleventh Circuit below utterly failed to acknowledge this disturbing and egregious misconduct occurred in a death penalty case, Gregg v. Georgia, 428 U.S. 153, 187 (1976) ("There is no question that death as a punishment is unique in its severity and irrevocability. . . . When a defendant's life is at stake, the Court has been particularly sensitive to insure [sic] that every safeguard is observed") (internal citations omitted), and instead found that because the circumstances this case presents are so extraordinary, Mr. Glenn's affidavit is implausible: "[N[o reasonable jurist could conclude that the district court abused its discretion in assessing the plausibility of Glenn's affidavit" because it would mean "Glenn witnessed both Bostick and JoAnn repeatedly perjure themselves on August 22, 2007, yet said nothing." Doc. 19-1, at 8. The egregious misconduct of all the parties involved in concealing the plea agreement, however, is precisely why Mr. Mills' case constitutes the extraordinary circumstances entitled to relief under Rule 60. The lower courts' disregard for Tony Glenn's affidavit—as well as the State's

own affidavits and JoAnn's plea days later to a non-capital offense and a sentence of life **with parole**, both of which corroborate Mr. Mills' allegations—and the failure to address why JoAnn would have confessed to capital murder on the witness stand without a plea deal, constitutes an erroneous application of the COA standard.

A. FACTUAL BACKGROUND

The case against Mr. Mills at trial was primarily built on the testimony of a single witness: JoAnn Mills. Without her testimony, the State's case against Mr. Mills was consistent with Mr. Mills' theory of defense that he was framed by Benjie Howe who was arrested on the night of the offense with the victims' pills and a large amount of cash. (R1. 40-41, 876, 882.) The victims' belongings, a machete, hammer, and tire iron, and clothing with the victims' DNA were found in the trunk of the Mills' car (R1. 545-48), but the State conceded that the vehicle's trunk had no functioning lock and could be easily opened (R1. 538, 792), and that Benjie Howe, a "well known" drug "user/dealer" in Guin, Alabama, had been at the Mills' home numerous times in the weeks leading up to the crime (R1. 419, 422-23). In fact, the State's evidence established that Benjie had been at the Mills' home on the day of the murders both *before* and *after* the offense, giving him an opportunity to have put the evidence in the trunk. (R1. 375, 418-19, 422-25, 520-21, 708-09, 798-801, 881). Unidentified DNA profiles were found on the murder weapons but testing comparing Jamie Mills excluded him. (R1. 616, 626.) Testing was never directly conducted with respect to Benjie Howe. (R1. 617, 645.)

The State's efforts to establish an alibi for Benjie Howe also backfired at trial. The State presented testimony from Benjie Howe's alibi witnesses, his cousins Thomas Green and Melissa Bishop. (R1. 866, 868.) However, Green and Bishop's testimony contradicted Benjie Howe on several key points. (R1. 864-66, 868-870.) Benjie Howe testified that he spent June 24, 2004, with Thomas Green, only leaving Green's house to go to Jamie and JoAnn's house around 7:00 p.m. "with two girls." (R1. 873-74, 877-78.) Melissa Bishop, however, testified that she picked Benjie up from Thomas Green's house sometime between noon and 3:00 p.m. that day, not 7:00 p.m. as Benjie testified. (R1. 868-69.) Thomas Green also admitted that he had told defense counsel previously that Benjie's trip with Melissa was in the afternoon, not in the evening. (R1. 865-66.) And while Benjie Howe testified two women were in the car, Melissa Bishop testified that only she and Benjie Howe were in the car. (R1. 868-69.) Benjie Howe's alibi witnesses also gave contradictory testimony about the length of time Benjie was gone from Thomas Green's home. While Melissa Bishop testified that they were gone for only a few minutes (R1. 868-69), Thomas Green testified that Benjie left with Melissa Bishop for several hours. (R1. 864-66.) Melissa testified that if her cousin Thomas stated they were "gone four hours" then "he'd be lying." (R1. 869-70.)

The State also presented the testimony of a neighbor who said that she saw a white car similar to the Mills' car driving by their house (R1. 428), but the Mills' car did not require a key to start (R1. 792) and Benjie Howe admitted to driving the car on previous occasions (R1. 881).

Mr. Mills chose to testify at trial. (R1. 785-827.) He testified that he did not know Vera or Floyd Hill or know where they live (R1. 792), that the hammer introduced into evidence was not his hammer (R1. 795), and that he did not kill Vera or Floyd Hill (R1. 811-12).

Other than the evidence found in the unlocked trunk, the only evidence connecting Mr. Mills to the crime was the third of three statements given by JoAnn Mills.[3] Because her third statement was unquestionably necessary to the prosecution's case, the State took steps to ensure (1) that she testified consistent with this third statement (the one implicating Jamie Mills) and (2) that the jury not be informed that she was testifying to gain favor with the State. Shortly before trial, JoAnn was provided with a copy of her third statement. (R1. 747.) Because the relative credibility of JoAnn and Jamie Mills was a central question of fact for the jury, the existence or non-existence of any inducement for JoAnn's testimony at trial was pivotal for both the State and defense counsel. District Attorney Bostick understood this and that is why his first questions during her direct examination at Mr. Mills' trial elicited her denial of any plea offer:

> Q: And are you doing this of your own free will?
>
> A: Yes, sir.
>
> Q: Have there been any deals or offers or anything like that

[3] In the two statements provided on June 25, 2004, JoAnn Mills denied any involvement in the murders, provided an alibi for Jamie Mills, and implicated Benjie Howe. JoAnn then provided a third statement on June 28, 2004, implicating Jamie Mills but JoAnn also told investigators that Benjie had been at her house <u>twice</u> on the day of the offense: once early in the morning to do meth and once in the evening to buy Lortab pills. (R1. 37, 58-60.)

made to you?

A: No, sir.

(R1. 685-86.) Defense counsel, who had sought evidence of any pleas or inducements prior to trial, also questioned her about the existence of a deal:

> Q: You're just up here admitting to capital murder without any hope of help from the district attorney's office?
>
> A: No, sir.
>
> Q: You do expect help from the district attorney's office?
>
> A: No, sir.
>
> Q: Has anybody told you that if you get up here and tell this story that the district attorney will have pity for you and let you plead to something besides murder?
>
> A: No, sir.
>
> Q: So you expect as a result of your testimony today to get either life without parole or death by lethal injection?
>
> A: Yes.

(R1. 720-21.)

Defense counsel asked the trial court for permission to question District Attorney Jack Bostick "on the record" about the existence of a plea offer or any inducement. Bostick responded: "There is not." (R1. 830.)

> DEFENSE: **Not a promise, not a maybe, not a nudge, not a wink,** because we think it stretches the bounds of credibility that her lawyer would let her testify as she did without such an Inducement.
>
> DA BOSTICK: There is none.
>
> DEFENSE: None?

DA BOSTICK:	Have not made her any promises, nothing.
DEFENSE:	Have you suggested that a promise might be made after she testifies truthfully?
DA BOSTICK:	No.
DEFENSE:	No inducement whatsoever?
DA BOSTICK:	No.

(R1. 830) (emphasis added).

JoAnn Mills' testimony—that there was no deal—was crucial to the prosecution. Without that testimony, the State could not have underscored, as it did throughout its guilt phase summation, that defense counsel had failed to impeach her:

> She was not tripped up on anything. Made a promise? No. That's her choice. She presented us with [sic] she wanted to testify, and she did. The judge will also tell you you can judge by the demeanor and the character of the witnesses. Look at the way JoAnn testified. Look at the way Jamie testified. JoAnn is up here visibly upset. Some of y'all got visibly upset listening to her testify. It was emotional. It was gut wrenching. . . .

(R1. 915.)

In deliberations, the primary question for the jury was whether or not to believe JoAnn Mills: If the jury found her to be credible, then Mr. Mills' testimony and defense counsel's arguments would have been undermined. On the other hand, if the jury had reason to question JoAnn's credibility, then the entire prosecution's case would have been called into question.

Without knowing that JoAnn had been given a plea deal by the State that

would save her life, the jury convicted Mr. Mills of capital murder on all three counts on August 23, 2007. (C1. 78-80.) On September 14, 2007, he was sentenced to death. (C1. 116.)

Ten days later, on September 24, 2007, the State dismissed capital murder charges against JoAnn Mills. DE 42-2.

After learning that the State dismissed capital murder charges against JoAnn Mills, only thirty days after confessing to capital murder in her testimony at Mr. Mills' trial, counsel for Mr. Mills filed a motion for a new trial arguing that this evidence was sufficient to establish the existence of a deal. (C1. 120-21.) Mr. Mills' motion for a new trial was denied without a hearing. (C1. 120.) Mr. Mills raised this issue throughout state postconviction and federal habeas corpus proceedings in the district court, asking prosecutors whether Jack Bostick and JoAnn Mills truthfully represented to the jury, defense counsel, and the trial court that there was no plea offer in exchange for JoAnn's testimony, and at each stage the State has asserted that there was no deal and that JoAnn and the District Attorney testified truthfully.

B. PROCEDURAL HISTORY

On March 7, 2024, Mr. Mills filed a motion with the Alabama Supreme Court in opposition to the State's motion to authorize an execution date, asking the Alabama Supreme Court to refrain from authorizing a date until this critical issue was resolved. See Response to the State of Alabama's Motion to Authorize Execution, Mills v. State, No. 1080350 (Ala. Mar. 7, 2024), attached as Appendix H. Despite this, on March 20, 2024, the Alabama Supreme Court granted the State's

motion and authorized the governor to set an execution date. See Order, Mills v. State, No. 1080350 (Ala. Mar. 20, 2024). On March 27, 2024, the Governor scheduled Mr. Mills' execution for a twelve hour period beginning on May 30, 2024. See DE 42-3.

Mr. Mills then filed his Rule 60 motion on April 5, 2024 in the Northern District Court. See DE 42, attached as Appendix F. On April 8, 2024, the district court set a briefing schedule that provided until May 8 for the case to be fully briefed. See Order, Mills v. Hamm, Case No. 6:17-cv-00789-LSC, DE 43 (N.D. Ala. Apr. 8, 2024). Briefing was completed on April 16, 2024. See DE 44, DE 45. After a month passed with no action by the district court, Mr. Mills filed a motion for a stay of execution on May 16, 2024, DE 46, attached as Appendix G. The district court denied Mr. Mills' Rule 60 motion and motion for a stay of execution on May 17, 2024, DE 48, and denied Mr. Mills' motion for a certificate of appealability on May 21, 2024, DE 50. In denying relief, the district court concluded that the District Attorney cannot be held accountable for this misconduct because the burden was on Mr. Mills to know what the State hid all these years. Insulating prosecutors from accountability in this way renders virtually unenforceable a basic premise of our legal system that the prosecution will refrain from dishonest and illegal conduct. Berger v. United States, 295 U.S. 78, 88 (1935) ("Courts, litigants, and juries properly anticipate that 'obligations . . . plainly rest[ing] upon the prosecuting attorney, will be faithfully observed.").

Moreover, in making this finding, the district court ignored both the record in

this case—which establishes that Mr. Mills has diligently pursued this evidence, in asking the State to comply with state and federal requirements to reveal the existence of a prior plea deal with JoAnn Mills—and clearly established Supreme Court case law, which provides that defendants are not required to "scavenge for hints of undisclosed Brady material when the prosecution represents that all such material has been disclosed." Banks v. Dretke, 540 U.S. 668, 695 (2004).

Mr. Mills filed a timely notice of appeal on May 22, 2024. See DE 51. On May 23, 2024, Mr. Mills filed a motion for a certificate of appealability and a motion for a stay of execution with the Eleventh Circuit Court of Appeals, attached as Appendices B and C respectively. The State filed its response later that night, doc. 12, and Mr. Mills filed his reply brief the next day, on May 24, 2024, doc. 15. On May 28, 2024, the Eleventh Circuit denied Mr. Mills' motion for a certificate of appealability and denied as moot his motion for a stay of execution, doc. 19-1.

REASONS FOR GRANTING THE PETITION

The standard for a COA is very low. A court should issue one where "reasonable jurists would find the district court's assessment of the constitutional claims debatable. . . ." Slack v. McDaniel, 529 U.S. 473, 484 (2000). In the Rule 60 context, the COA question is "whether a reasonable jurist could conclude that the district court abused its discretion in declining to reopen the judgment." Buck v. Davis, 580 U.S. 100, 123 (2017). This Court has held that a petitioner is *not* required "to prove, before the issuance of a COA, that some jurists would grant the petition for habeas corpus" or grant the Rule 60 Motion. Miller-El v. Cockrell, 537

U.S. 322, 338 (2003); see also Buck, 580 U.S. at 115 (The "threshold question should be decided without full consideration of the factual or legal bases adduced in support of the claims.") (internal quotations and citations omitted).

Where judges on the Eleventh Circuit literally debate whether the district court abused its discretion in opening the case under Rule 60, it logically follows that reasonable *jurists* would debate whether Mr. Mills is entitled to a COA. See Doc. 19-1, at 18 (Abudu, J., concurring) ("Mills has sufficiently alleged the denial of a constitutional right"); see also Id., at 15 (Abudu, J., concurring) ("Mills has met the threshold requirement to obtain a COA").

This Court must vacate the Eleventh Circuit's denial of a COA, a denial that was based primarily on the court's failure to credit Tony Glenn's "remarkable" affidavit. Tharpe v. Sellers, 583 U.S. 33, 34 (2018) (vacating the Eleventh Circuit's denial of a COA where the court failed to credit an affidavit establishing the fact at issue, that a juror based their vote on the race of the defendant); see also id. ("Gattie's remarkable affidavit—which he never retracted—presents a strong factual basis for the argument that Tharpe's race affected Gattie's vote for a death verdict. At the very least, jurists of reason could debate whether Tharpe has shown by clear and convincing evidence that the state court's factual determination was wrong. The Eleventh Circuit erred when it concluded otherwise.").

I. REASONABLE JURISTS COULD DISAGREE WHETHER A MOTION TO SET ASIDE THE JUDGMENT PURSUANT TO RULE 60(B)(6) IS PROPER WHERE NEW EVIDENCE ESTABLISHES THAT THE STATE KNOWINGLY PRESENTED FALSE TESTIMONY TO OBTAIN A CAPITAL MURDER CONVICTION AND CONTINUED TO RELY ON

THIS FALSE EVIDENCE TO PRECLUDE FEDERAL HABEAS CORPUS REVIEW.

The Supreme Court adopted Rule 60 to "accomplish justice" and to avoid "undermining the public's confidence in the judicial process." Liljeberg v. Health Servs. Acquisition Corp., 486 U.S. 847, 864 (1988) (quoting Klapprott v. United States, 335 U.S. 601, 614–15 (1949)). Allowing the State to execute Mr. Mills without any process or accountability for its knowingly false statements "injures not just the defendant, but the law as an institution, . . . the community at large, and . . . the democratic ideal reflected in the processes of our courts." Buck, 580 U.S. at 124 (quoting Rose v. Mitchell, 443 U.S. 545, 556 (1979)) (finding Rule 60(b) relief appropriate where race was a factor in the original judgment and state's interest in finality deserves little weight when proceedings violate the Constitution).

This Court's precedent establishes that determining which provision of Rule 60 governs a motion to reopen judgment requires analysis of the entirety of the factual allegations. In Klapprott, a case involving a motion to reopen a four-year-old default naturalization judgment where the petition alleged a number of reasons for the delay in challenging the default judgment, this Court recognized that Rule 60(b)(6) was the appropriate governing provision, not Rule 60(b)(1), and recognized that relief was warranted even though excusable neglect could arguably apply. Klapprott, 335 U.S. at 614. The Court found that the factual allegations were exceptional enough to establish that this was not mere "neglect." Id.

> It is contended that the one-year limitation bars petitioner on the premise that the petition to set aside the judgment showed, at most, nothing but 'excusable neglect.' And of course, the one year limitation

> would control if no more than 'neglect' was disclosed by the petition. In that event the petitioner could not avail himself of the broad 'any other reason' clause of 60(b). But petitioner's allegations set up an extraordinary situation which cannot fairly or logically be classified as mere 'neglect' on his part. The undenied facts set out in the petition reveal far more than a failure to defend the denaturalization charges due to inadvertence, indifference, or careless disregard of consequences.

Id. at 613.

In Liljeberg, this Court held that Rule 60(b)(6), not one of the provisions in (1)-(5), was the proper ground for relief where a party discovered new evidence that a trial judge erroneously, but unintentionally, failed to follow a federal statute requiring recusal at the time of trial. Liljeberg, 486 U.S. at 863-64. The Court "conclude[d] that the basis for relief in this case is extraordinary and that the motion was thus proper under clause (6)" and emphasized that "this is not a case involving neglect or lack of due diligence by respondent. Any such neglect is rather chargeable to [the] judge". Id. at 863 n.11. Just as the Court reasoned that Rule 60(b)(6) applies in a case where the court, not the litigant, is responsible for the error, Rule 60(b)(6) applies in this case, where the State, not Mr. Mills, is responsible for intentionally concealing the evidence.

In the Eleventh Circuit opinion below, the majority, without addressing the factual allegations, found that because Mr. Mills' motion relied on newly discovered evidence, Mr. Mills' motion could not fall under Rule 60(b)(6).

Judge Abudu, however, after reviewing the factual allegations, found that:

> The questions that the varying accounts between the district attorney, JoAnn, and Glenn's version of events present, including why JoAnn's attorney would sign an affidavit against his client's interests that could

> jeopardize his own legal career, are issues the Court need not address at this COA stage. Those factual issues should be resolved by the district court after an evidentiary hearing. Instead, at this phase in Mills' death penalty case, we look to the record evidence only to determine whether a reasonable jurist could debate whether the district court abused its discretion in denying Mills' Rule 60(b)(6) motion on the grounds that "extraordinary circumstances" did not warrant relief. **Mills has sufficiently alleged the denial of a constitutional right**—the right to have impeachment evidence disclosed to him and the right to ensure his trial is not infected with perjured testimony. Brady, 373 U.S. at 87; Napue, 360 U.S. at 269. Mills also has demonstrated that, without relief, there exists a "risk of injustice" and "risk of undermining the public's confidence in the judicial process." Buck, 580 U.S. at 123. This is especially true given that Mills has maintained his innocence.

Doc. 19-1, at 18 (Abudu, J., concurring) (emphasis added).

Judge Abudu is correct, and a review of the factual allegations demonstrates Mr. Mills is entitled to process under Rule 60(b)(6). Mr. Mills alleged that:

1. **JoAnn Mills falsely testified that she was "up here admitting to capital murder without any hope of help from the district attorney's office."** (R1. 721.) This was not true, as District Attorney Bostick now essentially admits in his affidavit, because he knew JoAnn wanted a deal in exchange for testifying. Because he'd met with Ms. Mills' attorney, Tony Glenn, about a potential plea and had his investigator talk with her about her proffered testimony, it is simply not true that she did not have "any hope" that the district attorney might help her. DE 44-1.

2. **DA Bostick knew JoAnn Mills falsely testified and failed to correct it.** Even if an agreement was not formalized and signed, DA Bostick knew it was not true that she was testifying without any hope for a plea, but he failed to correct

this. If Mr. Mills' Rule 60 motion ended with these allegations, perhaps Mr. Mills' claim would only sound as "newly discovered evidence" under Rule 60(b)(2). But he went on to allege truly exceptional facts.

3. **DA Bostick not only failed to correct the false testimony, he corroborated this misrepresentation in front of the court**. (R1. 829-30) ("Mr. Wiley: Not a promise, not a maybe, not a nudge, not a wink, because we think it stretches the bounds of credibility that her lawyer would let her testify as she did without such an inducement. Mr. Bostick: There is none. Mr. Wiley: None? Mr. Bostick: Have not made any promises, nothing. Mr. Wiley: Have you suggested that a promise might be made after she testifies truthfully? Mr. Bostick: No.").

4. **DA Bostick then <u>capitalized</u> on JoAnn Mills' false testimony in front of the jury.** Not only did the District Attorney elicit JoAnn's false testimony that she was not testifying in exchange for any hope of leniency, the District Attorney himself affirmatively told the jury there was no deal: "Made a promise? No. That's her choice. She presented us with [sic] she wanted to testify, and she did." (R1. 915.) The District Attorney then vouched for JoAnn's credibility by claiming that she "t[old] the same story" and "didn't vary a whole lot" from her previous statement to police, (R1. 916) even though this prior statement the District Attorney referenced was not in evidence and even though in this statement, JoAnn did not implicate Jamie Mills, but instead implicated Benjie Howe (R1. 44, 92-93, 375).[4] The prosecutor's repeated presentation of this false evidence demonstrates

[4] When officers arrived at the Mills' home, JoAnn's first statements were that she was worried about what Benjie Howe had put in their trunk. (R1. 92-93 ("her main concern was that Benjie Howe had put something in the trunk of the car"); R1. 375

that evidence of a plea deal with JoAnn in exchange for her testimony was much more than impeachment evidence and was instead central to the State's ability to make a case against Jamie Mills: "The fact that the lead detective and the lead witness twice denied the existence of the payment is at least a tacit admission that it was perceived to have relevance to a reasonable fact finder viewing the credibility of this witness." Guzman v. Sec'y, Dep't of Corr., 663 F.3d 1336, 1350 (11th Cir. 2011) (quoting Guzman v. Sec'y, Dep't of Corr., 698 F. Supp. 2d 1317, 1332 (M.D. Fla. 2010)). The evidence provides "substantial and specific evidence of [JoAnn's] motivation to lie against [Mr. Mills]." Id.; see also Brown v. Wainwright, 785 F.2d 1457, 1464 (11th Cir. 1986) ("This case does not involve mere nondisclosure of impeaching evidence but knowing introduction of false testimony and exploitation of that testimony in argument to the jury.").

But this still is not the entirety of Mr. Mills' claim. Mr. Mills further alleges that:

5. **Throughout the entirety of Mr. Mills' appeals and postconviction processes, the lower courts denied Mr. Mills merits review on his Brady, Napue, and Giglio claims based on the District Attorney's knowingly false representations that JoAnn Mills was not testifying in exchange for leniency.** Judge Abudu relied on these factual allegations in finding that Mr. Mills'

("Benjie Howe came by here last night . . . he's left stolen stuff before. You know, I don't want to get in trouble for something Benjie Howe has done."); R1. 728.). Only after a weekend in jail, and after officers lied to JoAnn and told her that Mr. Mills' DNA was found at the scene (R1. 841) and threatened that she would never see her children again (R1. 843-44), did JoAnn implicate Mr. Mills (R1. 44, 56-59, 747, 837-39).

case presented "extraordinary circumstances": "The district court, when it denied Mills' initial 28 U.S.C. § 2254 petition, also relied on the State's averments. This Court then denied Mills a COA to appeal the § 2254 petition's denial, meaning this Court has yet to hear Mills' case on the merits." Doc. 19-1, at 15.

6. **The State dismissed JoAnn's capital murder charges just 10 days after Mr. Mills was sentenced to death—and after she admitted to capital murder on the witness stand—and allowed her to plead to a life with parole sentence**. DE 42-2.

At a minimum, it is debatable that the district court wrongly decided that these factual allegations did not support a finding of "extraordinary circumstances. Miller-El, 537 U.S. at 348 ("The COA inquiry asks only if the District Court's decision was debatable.").

Mr. Mills' case presents the extraordinary circumstance in which a petitioner continues to attempt to establish the State's deception despite no requirement that he do so, in an effort to finally receive federal review of his claim. This is precisely the type of diligence that makes this case "extraordinary." Gonzalez, 545 U.S. at 537. In the course of this litigation, the State has confirmed that meetings and plea negotiations took place and that as a result, Tony Glenn believed it to be in his client's best interest to testify. DE 44-1.

Providing relief in this case will "not produce injustice in other cases" but to the contrary, "may prevent a substantive injustice in some future case by encouraging" prosecutors and State attorneys to undertake their oath to pursue

truth and justice, as opposed to upholding a conviction at any cost. Liljeberg, 486 U.S. at 868 ("providing relief in cases such as this [pursuant to Rule 60(b)(6)] will not produce injustice in other cases; to the contrary, the Court of Appeals' willingness to enforce § 455 may prevent a substantive injustice in some future case by encouraging a judge or litigant to more carefully examine possible grounds for disqualification and to promptly disclose them when discovered"); see also Buck, 580 U.S. at 126 (quoting Gonzalez, 545 U.S., at 529) ("[T]he 'whole purpose' of Rule 60(b) 'is to make an exception to finality.'"). Based on the evidence before this Court and the lower courts, reasonable jurists would debate that Mr. Mills has presented sufficiently extraordinary circumstances and is entitled to a COA and relief from the district court's prior judgment under Rule 60(b)(6).

II. REASONABLE JURISTS COULD DISAGREE WHETHER THE LOWER COURTS' RULING THAT MR. MILLS' RULE 60 MOTION WAS "UNTIMELY" VIOLATES THIS COURT'S DECISION IN BANKS V. DRETKE.

The lower court's finding that "no reasonable jurist would think that Mills's motion for Rule 60(b)(6) relief was timely," doc.19-1, at 10, ignores both the record in this case—which establishes that Mr. Mills has diligently pursued this evidence, in asking the State to comply with state and federal requirements to reveal the existence of a prior plea deal with JoAnn Mills—and clearly established Supreme Court case law, which provides that defendants are not required to "scavenge for hints of undisclosed Brady material when the prosecution represents that all such material has been disclosed." Banks v. Dretke, 540 U.S. 668, 695 (2004). The lower court's ruling is also manifestly debatable, as demonstrated by Judge Abudu's

concurrence: "Thus, 'prosecutor[s] may [not] hide,' nor must a petitioner 'seek' out, the existence of *Brady* materials." Doc. 19-1, at 14 (quoting Banks, 540 U.S. at 696); see also id., at 18 ("Mills has sufficiently alleged the denial of a constitutional right—the right to have impeachment evidence disclosed to him and the right to ensure his trial is not infected with perjured testimony.").

For seventeen years, counsel for Mr. Mills has been asking prosecutors in this case whether Jack Bostick and JoAnn Mills truthfully represented to the jury, defense counsel, this Court and the appellate courts that there was no plea offer in exchange for JoAnn's testimony. And for seventeen years, the State has continued to assert that no such evidence exists, denying Mr. Mills any opportunity for process on this important issue.

Since his arrest, Mr. Mills has made fifteen distinct requests for information about a plea offer, and each time the State failed to disclose this information as it is constitutionally obligated to do:

1. In a pre-trial motion filed July 14, 2004, defense counsel requested disclosure of any deals, promises or inducements given to witnesses. (C1. 19-25.)

2. In a second pre-trial motion filed February 2, 2007, defense counsel again requested disclosure of any deals, promises or inducements given to witnesses. (C1. 59-61.)

3. At trial, defense counsel questioned JoAnn Mills at length about the existence of any deal. (R1. 720-23) ("Q. You're just up here admitting to capital murder without any hope of help from the district attorney's office? A. No sir. Q. You do expect help from the district attorney's office? A. No, sir. Q. Has anybody told you that if you get up here and tell this story that the district attorney will have pity on you and let you plead to something besides murder? A. No, sir. Q. So you expect as a result of your testimony today to get either life without parole or

death by lethal injection? A. Yes. Q. Is that what you expect? A. Possibly.")

4. At trial, defense counsel asked the trial court to allow him to question District Attorney Jack Bostick on the record about any inducements (R1. 829-30) (Mr. Wiley: We want to ask you -- or ask Judge to direct him to assure us, him being Jack [District Attorney Bostick], that there is no inducement for JoAnn's testimony. Mr. Bostick: There is not. Mr. Wiley: Not a promise, not a maybe, not a nudge, not a wink, because we think it stretches the bounds of credibility that her lawyer would let her testify as she did without such an inducement. Mr. Bostick: There is none. Mr. Wiley: None? Mr. Bostick: Have not made any promises, nothing. Mr. Wiley: Have you suggested that a promise might be made after she testifies truthfully? Mr. Bostick: No. Mr. Wiley: No inducement whatsoever? Mr. Bostick: No.)

5. On October 2, 2007, Mr. Mills filed a motion for a new trial, arguing that the State's dismissal of capital murder charges and JoAnn's plea to murder just days after Mr. Mills was sentenced to death was evidence that JoAnn had an agreement with the State. (C1. 120-21.)

6. In 2008, Mr. Mills raised this issue on appeal to the Alabama Court of Criminal Appeals, arguing that the State failed to disclose a "deal, arrangement or understanding" with JoAnn Mills "in spite of having been ordered to do so by the Court" and in spite of its obligations under State and Federal law. (Appellant's Br. 13-14, Mills v. State, CR-06-2256 (Ala. Crim. App. Feb. 1, 2008).)

7. In 2009, Mr. Mills raised this issue again in his Petition for Writ of Certiorari to the Alabama Supreme Court. (Pet. for Writ of Cert., 117-18, Mills v. State, No. 1080350 (Ala. Feb. 6, 2009).)

8. In 2011, Mr. Mills raised this Brady issue in his Rule 32 Petition. (Pet. for Relief from Judgment Pursuant to Rule 32, ¶¶ 177-181, Mills v. State, CC-2004-402.60 (Marion Cty. Circ. Ct. Nov. 21, 2011).)

9. In 2011, Mr. Mills requested an evidentiary hearing on his Brady/Napue, ineffective assistance of counsel, and juror misconduct claims. (Id., ¶ 194.) The trial court granted the request for a hearing on the juror misconduct claims, but summarily dismissed the Brady/Napue claim and the ineffective assistance of counsel claims without a hearing. (Order, Mills v. State, CC-2004-402.60 (Marion Cty. Circ. Ct. July 19, 2013).)

10. In 2014, Mr. Mills filed a motion to reconsider the trial court's order denying his Rule 32 petition specifically requesting that the court allow him to present evidence in support of the Brady/Napue and ineffective assistance of counsel claims at an evidentiary hearing. (Mot. to Reconsider Order Denying Rule 32 Pet., Mills v. State, CC-2004-402.60 (Marion Cty. Circ. Ct. Feb. 12, 2014).) The trial court summarily denied the motion. (Order, Mills v. State, CC-2004-402.60 (Marion Cty. Circ. Ct. Feb. 13, 2014).)

11. In 2014, Mr. Mills appealed the lower court's dismissal of the Brady claim to the Court of Criminal Appeals. (Appellant's Br. 90-91, Mills v. State, CR-130724 (Ala. Crim. App. Oct. 28, 2014).)

12. In 2016, Mr. Mills filed a petition for writ of certiorari to the Alabama Supreme Court raising the State's failure to disclose this evidence in violation of Brady. (Pet. for Writ of Certiorari, 66-67, Mills v. State, No. 1150588 (Ala. Mar. 11, 2016).)

13. In 2017, Mr. Mills filed a Petition for Writ of Habeas Corpus with this Court. (Pet. for Writ of Habeas Corpus, ¶¶ 200-04, Mills v. Dunn, No. 6:17-CV-00789-LSC (N.D. Ala. May 12, 2017) ("Mr. Mills alleges that JoAnn Mills received an undisclosed deal in return for her testimony and guilty plea. The State did not provide such information to the defense, despite trial counsel's request for such information.") The State told the Court that there is no evidence to support this claim other than Mr. Mills' "pure speculation." (Resp't Br. on the Merits, 96, Mills v. Dunn, No. 6:17-CV-00789-LSC (N.D. Ala. Nov. 16, 2017).)

14. In 2018, Mr. Mills filed a motion asking this Court for an evidentiary hearing on this claim arguing that the State "failed to disclose that its key witness, JoAnn Mills, received an undisclosed deal in return for her testimony and guilty plea, that the State was aware that JoAnn gave perjured testimony and that the State failed to report it to the court in violation of Napue v. Illinois, 360 U.S. 264, 269 (1959) and Brady v. Maryland, 373 U.S. 83, 87 (1963)" and that because "Mr. Mills was diligent in seeking an evidentiary hearing in state court, and his allegations, taken as true, entitle him to habeas relief, he is entitled to a federal evidentiary hearing." (Req. for an Evidentiary Hr'g, Mills v. Dunn, No. 6:17-CV-00789-LSC (N.D. Ala. April 3, 2018).)

15. In 2024, Mr. Mills filed a Second Rule 32 Petition alleging that newly discovered evidence establishes that the District Attorney had promised JoAnn leniency in exchange for her testimony; that he illegally concealed this evidence from defense counsel; that he made

> false representations to the Court during trial that no such evidence existed; that he permitted JoAnn Mills to falsely testify that she did not have a deal; and that the State has continued to rely on this falsehood, instead of disclosing the agreement as it is required to do, for seventeen years. (Pet. for Relief from Judgment Pursuant to Rule 32, Mills v. State, CC-2004-402.61 (Marion Cty. Circ. Ct. Mar. 4, 2024).)

Despite Mr. Mills' continued and persistent efforts, the lower court found that "no reasonable jurist would think that Mills's motion for Rule 60(b)(6) relief was timely." Doc. 19-1, at 10. This finding ignores Banks v. Dretke. In Banks, the State argued (as the State does here) that Banks failed to establish diligence because he did not attempt to locate and interview possible witnesses to establish his claim that the prosecution suppressed evidence that Farr, a key state witness, was a paid informant, specifically that Banks failed "to attempt to locate Farr and ascertain his true status, or to interview the investigating officers, such as Deputy Huff, to ascertain Farr's status." Banks, 540 U.S. at 695 (internal quotations omitted). This Court's rejection of this argument was unequivocal: "Our decisions lend no support to the notion that defendants must scavenge for hints of undisclosed Brady material when the prosecution represents that all such material has been disclosed." Id.[5]

The Eleventh Circuit has followed this precedent in Rule 60 proceedings, finding the fact that the petitioner eventually gained access to withheld evidence

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[5] This Court has granted a stay of execution pending disposition of a petition for writ of certiorari in a case implicating Banks v. Dretke. See Glossip v. Oklahoma, United States Supreme Court, Case Nos. 22-6500, 22-7466, 22A941. This Court should stay and hold Mr. Mills' case in abeyance pending resolution of this case. California v. Velasquez., 445 U.S. 1301 (1980) (granting stay where "issues presented [in separate pending case] are sufficiently related to the issues" presented by death penalty case); see also Mobley v. Head, 306 F.3d 1096, 1097 (11th Cir. 2002) (staying case that raises "same issue" in case pending before the U.S. Supreme Court).

through other means, did not "diminish [his] due diligence." In re Glob. Energies, LLC, 763 F.3d 1341, 1349 (11th Cir. 2014) ("the parties, who had the evidence that Wortley needed to substantiate his claims, blocked his access to it and deliberately prevented him from finding it. Wortley eventually obtained the emails from a different attorney as part of another lawsuit, but that does not diminish Wortley's due diligence or his adversaries' apparent malfeasance in the litigation that led to this appeal"); see also Liljeberg, 486 U.S. at 869 (finding that although delay would typically foreclose relief, "in this case the entire delay is attributable to Judge Collins' inexcusable failure to disqualify himself" and therefore, the delay cannot be held against the petitioner). Accordingly, the lower court's finding —that Mr. Mills has failed to bring this motion within a reasonable time because he failed to uncover evidence in the face of definitive assurances from the State that no such evidence exists—must be rejected.

It cannot be that the State may conceal critical evidence throughout all stages of capital proceedings—trial, appeals, state and federal postconviction—and then rely on procedural hurdles and arguments of delay to prevent Mr. Mills from obtaining any process on this claim. *The State* has delayed a substantive review of this issue, not Mr. Mills. Ramirez v. Collier, 595 U.S. 411, 434–35 (2022) (quoting Gildersleeve v. New Mexico Mining Co., 161 U.S. 573, 578 (1896)) ("Respondents argue that Ramirez inequitably delayed this litigation by filing suit just four weeks before his scheduled execution. But this is not a case in which a litigant 'slept upon his rights.' . . . To the contrary, **Ramirez had sought to vindicate his rights for**

months. . . respondents can hardly complain about the inequities of delay when their own actions were a significant contributing factor.") (emphasis added).

Mr. Mills requests that he be finally granted process as to this long-pursued claim and that this Court hold the State to its duty to pursue truth and justice, over the finality of an unsound conviction. Giglio v. United States, 405 U.S. 150, 153 (1972); see also United States v. Bagley, 473 U.S. 667, 680 (1985); United States v. Agurs, 427 U.S. 92, 103 (1976); Berger v. United States, 295 U.S. 78, 87-88 (1935); Mooney v. Holohan, 294 U.S. 103, 112 (1935).

III. REASONABLE JURISTS COULD DEBATE WHETHER MR. MILLS IS ENTITLED TO RELIEF DUE TO FRAUD ON THE COURT.

Reasonable jurists could debate whether Mr. Mills is entitled to relief from the district court's prior judgment due to fraud on the court under Rule 60 which explicitly reserves the court's power to "entertain an independent action to relieve a party from a judgment" or to "set aside a judgment for fraud on the court." Fed. R. Civ. P. 60(b)(3), (d)(1), (d)(3).

The court below concluded that "[n]o reasonable jurist could conclude that the district court abused its discretion in ruling that Mills failed to establish that it is highly probable that the State hatched an unconscionable scheme." Doc. 19-1, at 8. The court cited the errors in Tony Glenn's fee declaration and the implausibility of Mr. Glenn's affidavit, but the debatability of this finding is demonstrated by Judge Abudu's analysis:

> In denying Mills' claim, the district court found it impossible to believe that the district attorney and JoAnn would have perjured themselves when questioned about whether a plea deal existed to decrease JoAnn's sentence in exchange for her testimony identifying Mills as the killer, and that JoAnn's defense attorney would not have objected or otherwise informed the court of the malfeasance. Yet, Mills produced Glenn's affidavit attesting under oath that such a plea deal in advance of her testimony indeed did exist, and he provided the general date and participants of the alleged plea deal meeting.
>
> The questions that the varying accounts between the district attorney, JoAnn, and Glenn's version of events present, including why JoAnn's attorney would sign an affidavit against his client's interests that could jeopardize his own legal career, are issues the Court need not address at this COA stage. Those factual issues should be resolved by the district court after an evidentiary hearing. Instead, at this phase in Mills' death penalty case, we look to the record evidence only to determine whether a reasonable jurist could debate whether the district court abused its discretion in denying Mills' Rule 60(b)(6) motion on the grounds that "extraordinary circumstances" did not warrant relief. **Mills has sufficiently alleged the denial of a constitutional right**—the right to have impeachment evidence disclosed to him and the right to ensure his trial is not infected with perjured testimony. *Brady*, 373 U.S. at 87; *Napue*, 360 U.S. at 269.

Doc. 19-1, at 17-18 (Abudu, J., concurring) (emphasis added).

The record at trial establishes that JoAnn Mills was asked whether she expected "any help from the district attorney's office" in "admitting to capital murder" on the stand at Mr. Mills' trial. (R1. 720-21.) JoAnn unequivocally answered "no." Id. Likewise, District Attorney Bostick affirmed "no" to the trial court, defense counsel, and the jury when asked whether he "suggested that a promise might be made after [JoAnn] testifies truthfully[.]" (R1. 830.) The State's own affidavits, however, establish that the District Attorney sought a plea deal on JoAnn's behalf with the victims' family prior to her testimony at trial and that members of the District Attorney's staff met with JoAnn prior to her testimony,

"*about* her testimony," and that the staff "*encouraged* her to testify." DE 44-1, 44-2 (emphasis added). As a result of these meetings, the District Attorney affirms that "Tony Glenn believed it would be in his client's best interest to testify against Jamie Mills." DE 44-1. At a minimum, the State's own affidavits establish that both JoAnn and the District Attorney's statements to the court, defense counsel, and the jury <u>were false</u>.

As a result of the District Attorney's fraud, and the State's continued misrepresentations throughout the appeals and postconviction process, Mr. Mills has been entirely prevented from receiving any review or process on this claim. <u>Zakrzewski v. McDonough</u>, 490 F.3d 1264, 1267 (11th Cir. 2007) (fraud on the court applies when a party's fraudulent conduct interferences with the court's "impartial task of adjudging cases.") (citations omitted); <u>Waddell v. Hendry Cnty. Sheriff's Off.</u>, 329 F.3d 1300, 1309 (11th Cir. 2003) (citing <u>Frederick v. Kirby Tankships, Inc.</u>, 205 F.3d 1277, 1287 (11th Cir. 2000)) (Rule 60(b)(3) warranted where moving party establishes that adverse party's misconduct "prevented them from fully presenting his case").

Reasonable jurists could more than debate that this constitutes a "direct assault on the integrity of the judicial process" and meets the standard, which the Eleventh Circuit finds "'embrace[s] only that species of fraud' that officers of the court 'perpetrate[ ]' against 'the judicial machinery' and that 'defile[s] the court itself.'" Doc. 19-1, at 7 (quoting <u>Travelers Indem. Co. v. Gore</u>, 761 F.2d 1549, 1551 (11th Cir. 1985)).

At trial, and throughout the appeals and postconviction processes, the State has had a duty to correct this fraud and had a duty to disclose this evidence. Giglio v. United States, 405 U.S. 150, 152, 154-55 (1972); Napue v. Illinois, 360 U.S. 264, 269 (1959); see also Banks v. Dretke, 540 U.S. 668, 695-96 (2004). The district court in Mr. Mills' habeas proceedings relied on this continued fraud in denying any process as to this claim. Mills v. Dunn, No. 6:17-CV-00789-LSC, 2020 WL 7038594, at *60, 79 (N.D. Ala. Nov. 30, 2020). Despite the State' duty, the Eleventh Circuit erroneously finds "no reasonable jurist could conclude that the district court abused its discretion in assessing the *plausibility* of Glenn's affidavit" because to believe that would mean that "Glenn witnessed both Bostick and JoAnn repeatedly perjure themselves . . . yet said nothing." Doc. 19-1, at 8 (emphasis in original). Yet this is the crux of such a claim as this, that an unconscionable scheme or plan existed, which constitutes fraud on the court—such circumstances are in and of themselves extraordinary.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

/s/Charlotte R. Morrison
CHARLOTTE R. MORRISON
COUNSEL OF RECORD
ANGELA L. SETZER
RANDALL S. SUSSKIND
122 Commerce Street
Montgomery, AL 36104
(334) 269-1803
cmorrison@eji.org
asetzer@eji.org

rsusskind@eji.org

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Counsel for Petitioner