**No. 24-11661**

**UNITED STATES COURT OF APPEALS**
**FOR THE ELEVENTH CIRCUIT**

**DEATH PENALTY CASE**

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JAMIE MILLS,

Petitioner-Appellant,

v.

JOHN HAMM,
Commissioner of the
Alabama Department of Corrections,

Respondent-Appellee.

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# MOTION FOR CERTIFICATE OF APPEALABILITY

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May 23, 2024

*Counsel for Mr. Mills*

**EXECUTION SCHEDULED FOR MAY 30, 2024 AT 6:00 P.M. CST**

## CERTIFICATE OF INTERESTED PERSONS

Undersigned counsel certifies the following persons may have an interest in the outcome of this case:

Bentley, John – former Marion County Circuit Court Judge;

Bostick, Jack – former District Attorney for Marion County;

Brasher, Andrew – former Solicitor General of Alabama;

Cashion, James C. – former Marion County District Court Judge;

Coogler, L. Scott – Chief United States District Judge;

Cook, Neal – Assistant District Attorney for Marion County;

Dickinson, Rodney – Attorney initially appointed to represent Petitioner-Appellant at trial;

Dunn, Jefferson S. – former Commissioner, Alabama Department of Corrections and former Respondent;

Govan, Thomas – Counsel for State on direct appeal and in state postconviction and federal habeas proceedings and Assistant Attorney General of Alabama;

Hamm, John – Commissioner, Alabama Department of Corrections and Respondent;

Hill, Floyd – Victim;

Hill, Vera – Victim;

Jackson, Jerry – Attorney initially appointed to represent Petitioner-Appellant at

trial;

King, Troy – Counsel for State on direct appeal and former Attorney General of Alabama;

Marshall, Steve – Attorney General of Alabama and Respondent;

Mathis, William – Trial counsel and counsel for Petitioner-Appellant at the Alabama Court of Criminal Appeals;

Maxymuk, Benjamin – Counsel for Petitioner-Appellant in direct appeal proceedings at the Alabama Supreme Court;

Miller, Kathryn – Counsel for Petitioner-Appellant in state postconviction proceedings;

Mills, Jamie – Petitioner-Appellant;

Mills, JoAnn – Codefendant;

Morrison, Charlotte – Counsel for Petitioner-Appellant in state postconviction and federal habeas proceedings;

Selden, John – Counsel for State in federal habeas proceedings and Assistant Attorney General of Alabama;

Setzer, Angela – Counsel for Petitioner-Appellant;

Simpson, Lauren – Assistant Attorney General of Alabama and counsel for Respondent;

Stevenson, Bryan – Counsel for Petitioner-Appellant in direct appeal proceedings;

Strange, Luther – former Attorney General of Alabama;

Susskind, Randall – Counsel for Petitioner-Appellant;

Vick, Paige – former Assistant District Attorney for Marion County;

Wiley, John – Trial counsel and counsel for Petitioner-Appellant at trial and on direct appeal.

## MOTION FOR CERTIFICATE OF APPEALABILITY

Pursuant to Rule 22(b) of the Federal Rules of Appellate Procedure, Rule 22-1 of the Eleventh Circuit Rules, Petitioner Jamie Mills respectfully requests that this Court issue a certificate of appealability ("COA") to review the district court's denial of his motion for relief from judgment pursuant Rule 60 of the Federal Rules of Civil Procedure. See Gonzalez v. Sec. for Dep't. of Corr., 366 F.3d 1253, 1263 (11th Cir. 2004) (en banc), overruled on other grounds by Gonzalez v. Crosby, 545 U.S. 524 (2005) (petitioner must obtain certificate of appealability for denial of Rule 60(b) motion related to § 2254 habeas corpus petition).

## INTRODUCTION

For seventeen years, Mr. Mills has maintained that the District Attorney had an undisclosed deal with the State's central witness, JoAnn Mills, in exchange for her sole eyewitness testimony. And for seventeen years, the State has denied the existence of any agreement with JoAnn.

Newly discovered evidence establishes that the District Attorney's statements at trial, and the State's representatives 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. Doc. 42-1. Mr. Glenn was successful: the District Attorney ultimately agreed to a life sentence, instead of the death penalty, if she would testify truthfully at Mr. Mills' trial. Doc. 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. Doc. 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.

Now that this new evidence has emerged, the District Attorney admits that the meeting occurred but that he believed it did not need to be disclosed—despite being asked repeatedly before, during, and after trial—because his investigator conducted the meeting and because a formal agreement was never signed. Any

reasonable prosecutor would have known that the State was required to disclose the fact that its star witness requested to meet regarding a potential plea, that the District Attorney ordered the witness be brought from the jail to meet with his investigator, and that the witness previewed her testimony at the meeting. The court-ordered discovery in this case included information that "would tend to show bias or tend to impeach the witness's testimony or would lead to impeaching information." (C1. 54.) Moreover, well-established U.S. Supreme Court precedent provides that a prosecutor may reach an agreement verbally and through a representative *not* authorized to enter into the agreement, and still be required to disclose. Giglio v. United States, 405 U.S. 150, 152 (1972) (requiring disclosure of inducement offered by assistant DA *without authority* to enter into plea agreement, even when inducement was not communicated to prosecuting attorney and was not in writing).

Because the State's false representations were unquestionably material to critical decisions made by the district court, including whether Mr. Mills was entitled to an evidentiary hearing, discovery, a certificate of appealability and, ultimately, to habeas corpus relief, Mr. Mills filed a motion pursuant to Rule 60 of the Federal Rules of Civil Procedure, seeking relief from the district court's November 30, 2020, order denying habeas corpus relief.

Mr. Mills filed his Rule 60 motion on April 5, 2024. See Doc. 42. The

district court denied Mr. Mills' Rule 60 motion and motion for a stay of execution on May 17, 2024, see doc. 48, and denied Mr. Mills' motion for a certificate of appealability on May 21, 2024. Doc. 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 for making knowingly false representations would render 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).

**Because the State seeks to execute Mr. Mills on May 30, 2024, there is a critical need for this Court to grant a certificate of appealability, address this fundamental violation of Mr. Mills' rights, and grant appropriate relief.**

## LEGAL STANDARD FOR CERTIFICATE OF APPEALABILITY

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). The United States Supreme 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." 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). The Court has also held that "a claim can be debatable even though every jurist of reason might agree, after the COA has been granted and the case has received full consideration, that petitioner will not prevail." Miller-El, 537 U.S. at 338.

## JAMIE MILLS IS ENTITLED TO A COA

In Mr. Mills' case, a reasonable jurist would conclude that the district court abused its discretion in denying Rule 60 relief by (1) applying the incorrect legal standard in contravention of Banks v. Dretke and its progeny; (2) concluding that Attorney Tony Glenn's affidavit is "mere impeachment evidence" and not "material evidence" by applying the incorrect legal standard and relying on incorrect factual findings; and (3) reaching the incorrect conclusion that Mr. Mills is required to produce *additional* documentary evidence of a plea deal, beyond the lawyer's affidavit, in contravention of Brady v. Maryland and its progeny.

### I. Newly Discovered Evidence Demonstrates That The State Withheld Evidence That Its Principal Witness, Joann Mills, Met With Prosecutors Before Trial And Testified Pursuant To An Agreement To Dismiss Capital Murder Charges Against Her In Exchange For Her Testimony.

This is a case primarily built on the testimony of a single witness: JoAnn Mills. Without her testimony, the State's case against Mr. Mills was very weak because the State's physical evidence 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, 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 Mr. Mills' car did not require a key to start (R1. 792) and Benjie admitted to driving the car on previous occasions (R1. 881).

Other than the evidence found in the unlocked car trunk, the only evidence connecting Mr. Mills to the crime was the third of three statements given by JoAnn Mills implicating Jamie Mills.[1] 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.

[1] 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 twice 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.)

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 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 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.)

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 her 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.

(R1. 830).

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 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.)

During closing arguments, both the prosecution and the defense discussed the forensic evidence, the alleged role of methamphetamine in the crime, the possible role of Benjie Howe in the crime, and the possibility that the evidence in the Mills' car trunk was staged or planted. (See R1. 887–920.) But 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. Doc. 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. (C. 120-21.) Mr. Mills' motion for a new trial was denied without a hearing. (C. 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.

As the declaration submitted to the district court reveals, newly discovered evidence establishes that the District Attorney's statements at trial, and the State's representatives throughout the appeals and postconviction proceedings, were false. Attorney Glenn's affidavit establishes that prior to Mr. Mills' capital trial, Mr. Glenn had several conversations with District Attorney Jack Bostick about a plea agreement in exchange for JoAnn Mills' testimony at Jamie Mills' trial and that the District Attorney agreed to a life sentence, instead of the death penalty or life without parole, if she would testify truthfully at Mr. Mills' trial. See Doc. 42-1.

This 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.

Now that this new evidence has emerged, the District Attorney admits that the meeting occurred but that he believed it did not need to be disclosed—despite being asked repeatedly before, during, and after trial—because his investigator conducted the meeting and because a formal agreement was never signed. Any reasonable prosecutor would have known that the State was required to disclose the fact that its star witness requested to meet regarding a potential plea, that the District Attorney ordered the witness be brought from the jail to meet with his investigator, and that the witness previewed her testimony at the meeting. The court-ordered discovery in this case included information that "would tend to show bias or tend to impeach the witness's testimony or would lead to impeaching information." (C1. 54.) Moreover, well-established U.S. Supreme Court precedent provides that a prosecutor may reach an agreement verbally and through a representative *not* authorized to enter into the agreement, and still be required to disclose. Giglio v. United States, 405 U.S. 150, 152 (1972) (requiring disclosure of inducement offered by assistant DA *without authority* to enter into plea agreement,

even when inducement was not communicated to prosecuting attorney and was not in writing).

## II. Reasonable Jurists Could Debate Whether the District Court Erred in Finding Mr. Mills Had Not Made the Showing Required to Reopen His Case Pursuant to Rule 60(b)(6).

In finding that this new evidence did not justify reopening Mr. Mills' case, the district court found that **(1)** Mr. Mills did not make a showing of "extraordinary circumstances" justifying relief; **(2)** he did not present sufficient evidence of a plea deal; and **(3)** his claim is untimely because he "could have produced [evidence of the State's misconduct] years ago." Doc. 48, at 22. At a minimum, it is debatable that the district court was wrong on each of these points. Miller-El, 537 U.S. at 348 ("The COA inquiry asks only if the District Court's decision was debatable.").

### A. Mr. Mills' Case Presents "Extraordinary Circumstances."

Attorney Glenn's affidavit establishes that the District Attorney met with JoAnn to discuss a plea deal and her expected testimony against Mr. Mills. The District Attorney admits that the meeting occurred but that he believed it did not need to be disclosed—despite being asked repeatedly before, during, and after trial—because his investigator conducted the meeting and because a formal agreement was never signed. The district court found that this misconduct was not sufficiently "extraordinary" because the misconduct was, essentially, *too*

extraordinary:

> Finally, the Court must note that if Glenn's affidavit is to be believed, then Glenn sat in court on August 22, 2007, and watched both JoAnn and District Attorney Bostick repeatedly perjure themselves, yet said nothing to the Court.

Doc. 48, at 21. This finding turns the legal standard on its head. Mr. Mills' allegation is that the failure to tell the judge and jury that there was a plea agreement with JoAnn Mills was fundamental to the prosecution's case, and that the lawyers who were part of the agreement committed extraordinary misconduct. Yet the district court seems to hold that because "saying nothing to the court" would, in fact, be extraordinary, it must not be credible. The court's finding—that the extraordinary nature of the alleged misconduct made it more likely that it did not happen—is circular and is not a legitimate basis for dismissing the Rule 60 motion in this case.

At a minimum, a COA is warranted because reasonable jurists could disagree with the district court's conclusions. The factors presented by Mr. Mills constitute a situation that is at least debatably extraordinary. Miller-El, 537 U.S. at 348 ("The COA inquiry asks only if the District Court's decision was debatable."). Mr. Mills has demonstrated that leaving the prior judgment against him intact risks a profound injustice in his case. Mr. Mills faces execution pursuant to a jury verdict whose reliability is undermined by the State's false representations that JoAnn was

offered nothing in exchange for her testimony. As the District Attorney told the jury, this case came down to a he said/she said:

> You've got two people, a husband and a wife, that say -- both say we were together all day long. One says they went looking at houses and bought cigarettes. The other one says they participated in a horrible, horrible double murder. You can't put those two together. . . . Somebody's got to be telling a story.

(R1. 911.) JoAnn's testimony that there was no agreement 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:

> [Defense counsel] got on her statement, and the only thing he got her confused on, the only thing, was when they put the stuff in the blue bag. When did the garbage bag come into play? That was it. She was not tripped up on anything. **Made a promise? No. That's her choice**. She presented us with 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 . . . JoAnn didn't need that statement. She was there. She saw it. You looked at those pictures. She didn't look at a single picture up there on the stand, and she nailed it. She went through that crime scene. She took you through everything and didn't miss a thing. Again, they tripped her up on a garbage bag at their house, or tried to, and that was it. She shucked it down, as the saying goes. She told y'all exactly what happened. . .

(R1. 915-17 (emphasis added).)

Mr. Mills' Rule 60(b)(6) claim centers around the fundamental unfairness to Mr. Mills in never receiving process on a meritorious claim, a claim he was unable

to provide supporting evidence for because the State at all stages was affirmatively withholding and misrepresenting the evidence, and the fundamental unfairness of facing execution by the State of Alabama who improperly procured his conviction and sentence. Moreover, the State did not correct these false statements in federal habeas corpus proceedings, as it is obligated to do, Napue v. Illinois, 360 U.S. 264, 269 (1959),[2] and instead urged the district court to rely on these false statements—and the district court did in fact rely on these statements—in denying Mr. Mills process and review of his claim. Mr. Mills asked for, and the district court denied, discovery, an evidentiary hearing, habeas corpus relief, and a certificate of appealability.

The State's extraordinary misconduct rendered the trial, appellate, and postconviction proceedings against Mr. Mills "fundamentally unfair," United States v. Agurs, 427 U.S. 97, 103 (1976) ("[A] conviction obtained by the knowing use of perjured testimony is fundamentally unfair, and must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury."), and undermines the reliability of the verdict and appeals in this case.

> [I]f a state has contrived a conviction through the pretense of a trial which in truth is but used as a means of depriving a defendant of liberty through a deliberate deception of court and jury by the presentation of testimony known to be perjured. Such a contrivance by

[2] See also Alcorta v. State of Tex., 355 U.S. 28, 32 (1957) (petitioner entitled to habeas corpus relief where witness at trial lied regarding relationship with victim and prosecutor willfully failed to correct misrepresentation).

> a state to procure the conviction and imprisonment of a defendant is as inconsistent with the rudimentary demands of justice as is the obtaining of a like result by intimidation.

Mooney v. Holohan, 294 U.S. 103, 112 (1935). Reliability is critical in any criminal proceeding where someone's liberty is at stake but in a death penalty case where the life of the accused hangs in the balance, there is a heightened obligation to address allegations of serious state misconduct that reveal fundamental violations of the law. Ford v. Wainwright, 477 U.S. 399, 411 (1986) (citing Woodson v. North Carolina, 428 U.S. 280, 305 (1976)) ("In capital proceedings generally, this Court has demanded that factfinding procedures aspire to a heightened standard of reliability. . . This special concern is a natural consequence of the knowledge that execution is the most irremediable and unfathomable of penalties; that death is different.").

Mr. Mills is entitled to relief under Rule 60(b)(6) due to the "extraordinary circumstances" his case presents. Buck, 580 U.S. at 123, 128 (finding petitioner to be entitled to relief pursuant to Rule 60(b)(6) where use of race undermined integrity of the proceedings and "poison[ed] public confidence in the judicial process") (internal quotations and citations omitted); see also Bucklon v. Sec'y, Fla. Dep't of Corr., 606 F. App'x 490, 493 (11th Cir. 2015) (finding petitioner established "extraordinary circumstances" necessary for relief under Rule 60(b)(6)

where intervening decision established error in how federal court interpreted its own procedural rules).

The State's assertions in federal habeas proceedings that JoAnn in fact did not receive a plea deal in exchange for her testimony and that the District Attorney did not knowingly deceive the trial court and the jury,[3] as well as the district court's reliance on those false assertions,[4] constitutes "a defect in the integrity of the habeas proceedings," and requires relief from the district court's prior judgment. Gonzalez, 545 U.S. at 532 (federal courts have jurisdiction to consider Rule 60(b) motions in federal habeas proceedings where the motion "attacks, 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"); Williams v. Chatman, 510 F.3d 1290, 1295 (11th Cir. 2007) (finding claim that district court should have granted

[3] The State has never corrected these false statements and in fact urged the district court to rely on them. Answer to Pet. for Writ of Habeas Corpus, ¶ 215, Mills v. Dunn, No. 6:17-CV-00789-LSC (N.D. Ala. Nov. 16, 2017); Resp't Br. on the Merits, 95-96, Mills v. Dunn, No. 6:17-CV-00789-LSC (N.D. Ala. Nov. 16, 2017).

[4] The district court relied on the District Attorney's knowingly false statements in resolving this issue and declining to grant merits review: "The prosecutor stated that the State had not made any promises to JoAnn; that the State had not suggested that a promise might be made after she testified truthfully; and that there was not any inducement whatsoever for JoAnn's testimony . . . Mills still fails to allege what specific evidence or arguments his trial counsel could have presented . . . to show that JoAnn lied on the stand and was in fact testifying against Mills in exchange for a lesser sentence." Mills v. Dunn, No. 6:17-CV-00789-LSC, 2020 WL 7038594, at *60, 78 (N.D. Ala. Nov. 30, 2020).

additional briefing to be a proper Rule 60(b) motion because it attacks a "defect in the integrity of the federal habeas proceedings") (internal citations omitted).

Rule 60(b)(6) is intended to prevent this unnecessary "risk of injustice" and "risk of undermining the public's confidence in the judicial process." Liljeberg, 486 U.S. at 864; see also Buck, 580 U.S. at 123. The district court's dismissal of Mr. Mills' Brady, Giglio, and Napue claim, and decision not to grant merits-based review, was based on the State's fraudulent assertions in its habeas petition and the District Attorney's knowingly false statements at trial, that no understanding existed with JoAnn Mills prior to her testimony. Mills, 2020 WL 7038594, at *77-78. To allow such a ruling to stand "injures not just [Mr. Mills], 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)) (internal quotations omitted).

Here, as in Buck, the district court failed to appreciate the serious nature of the constitutional violation at issue and instead placed blame on defense counsel. Buck, 580 U.S. at 121-24 (rejecting Fifth Circuit's portrayal of racial bias at issue as "de minimis" and rejecting finding that defense counsel's role in error requires no relief). The Court in Buck found that to fail to grant relief where a serious constitutional error is at issue ignores the harm to the defendant as well as the injury to "the law as an institution." Id. at 124 (citations omitted). Such errors are

"precisely among those [ ] identified as supporting relief under Rule 60(b)(6)." Id.

The newly discovered evidence of the District Attorney's egregious misconduct raises serious questions about the integrity of the review process in the district court. The extraordinary constitutional violation is grounds for Rule 60(b) relief. "Rule 60(b) vests wide discretion in courts," Buck, 580 U.S. at 123, and "provides courts with authority 'adequate to enable them to vacate judgments whenever such action is appropriate to accomplish justice,'" Liljeberg, 486 U.S. at 864 (quoting Klapprott v. United States, 335 U.S. 601, 614-15 (1949) in discussion of Rule 60(b)(6)); see also Gonzalez, 545 U.S. at 538 (Rule 60(b) motion appropriate if it challenges "the District Court's failure to reach the merits . . . and can [ ] be ruled upon by the District Court without precertification").

B. Evidence That There Was a Plea Agreement Amounts to More Than "Mere Impeachment Evidence."

The district court concluded that the evidence of a plea agreement "is mere impeachment evidence and would not have changed the result of Mills' trial" because "even if Glenn were correct and JoAnn had perjured herself as to the existence of a pretrial plea agreement, that would not constitute evidence that she lied as to the rest of her testimony" and because "JoAnn's testimony was but one part of the overwhelming evidence against Mills." Doc. 48, at 16.

The district court's finding that evidence that the District Attorney elicited false testimony from JoAnn is not material to the case against Mr. Mills runs

contrary to well-established Supreme Court and Eleventh Circuit case law and seeks to minimize an essential premise of our trial system—that a prosecutor can be trusted to seek truth and justice, not a conviction at any cost. See, e.g., Giglio v. United States, 405 U.S. 150, 154 (1972) (quoting Napue, 360 U.S. at 269) ("When the 'reliability of a given witness may well be determinative of guilt or innocence,' nondisclosure of evidence affecting credibility falls within this general rule."); Guzman v. Sec'y, Dep't of Corr., 663 F.3d 1336, 1350 (11th Cir. 2011); Brown v. Wainwright, 785 F.2d 1457, 1464 (11th Cir. 1986); see also Mooney, 294 U.S. at 112 ("[I]f a state has contrived a conviction through the pretense of a trial which in truth is but used as a means of depriving a defendant of liberty through a deliberate deception of court and jury by the presentation of testimony known to be perjured. Such a contrivance . . . is as inconsistent with the rudimentary demands of justice as is the obtaining of a like result by intimidation.").

Not only did the District Attorney elicit JoAnn's false testimony that she was not testifying in exchange for 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 was not in evidence and even

though in this prior statement, JoAnn did not implicate Jamie Mills, but instead implicated Benjie Howe (R1. 44, 92-93, 375).

The prosecutor's repeated presentation of this false evidence demonstrates 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, 663 F.3d at 1350 (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, 785 F.2d at 1464 ("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.").

In addition, the district court's conclusion that the State's misconduct is harmless because the evidence against Mr. Mills was "overwhelming" is clearly erroneous. Every court, including the district court, has recognized the centrality of JoAnn Mills' testimony to the conviction in this case. See Mills, 2020 WL 7038594, at *17 (district court finding that "overwhelming evidence" against Mr. Mills came from JoAnn's testimony: "JoAnn gave eyewitness testimony

inculpating Mills, both four days after the murders to law enforcement, and again at trial, and her testimony both times was consistent.").[5]

Without JoAnn's testimony the prosecution could not have proven its case against Mr. Mills beyond a reasonable doubt. This is because there was a real question about whether Benjie Howe was the person who committed the crime in this case. Benjie was arrested and charged with the murders in this case. He was found with the victims' pills and a large amount of cash. (R1. 40-41, 874, 882.) While the State found the murder weapons, clothing, and victims' belongings in the trunk of the Mills' car, there was undisputed evidence that anyone could have opened the trunk (R1. 46, 538, 792) and that Benjie had just as much access to it on the day of the offense as Mr. Mills (R1. 58, 874, 877), as well as testimony that Benjie was at the Mills' home twice on the day of the offense—both before and after the murders (R1. 37, 58-60).

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[5] See also, e.g., C1. 127-29 (Sentencing order extensively citing JoAnn Mills' testimony in the statement of facts)); Ex parte Mills, 62 So. 3d 574, 599 (Ala. 2010) ("JoAnn's testimony was **crucial evidence** in the State's case against Mills") (emphasis added); see also Mills v. State, 62 So. 3d 553, 559-60 (Ala. Crim. App. 2008) (extensively citing JoAnn Mills' testimony in the statement of facts); Mills v. Dunn, No. 6:17-cv-00789-LSC, 2020 WL 7038594 (N.D. Ala. Nov. 30, 2020) (reciting Court of Criminal Appeals' statement of facts that heavily relies on JoAnn's testimony); Br. of the Appellee, 39, Mills v. State, CR-130724 (Ala. Crim. App. Dec. 8, 2014) (State's brief to the Court of Criminal Appeals in Rule 32 proceedings citing JoAnn's testimony that "she witnessed Mills, not Howe, commit the murders" as primary evidence that "overwhelmingly established" Mr. Mills' guilt).

JoAnn Mills inculpated Benjie, not Jamie, in her first two statements and only inculpated Jamie in her third statement. (R1. 44, 57, 747, 837-39.) As the District Attorney told the jury in closing argument, this case came down to a he said/she said and "somebody's got to be telling a story." (R1. 911.) JoAnn's testimony was critical to, if not dispositive of, the State's case.

It is also undisputed that the trunk of the Mills' car can be popped open with a finger and that Benjie Howe was familiar with and had used the car on several occasions. (R1. 538, 792). When officers found the weapons and evidence from the Hills' home in the trunk, 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 ("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).

Mr. Mills was excluded from the DNA evidence found on the murder weapons (R1. 616, 626) Benjie Howe's DNA, however, was never directly compared to these profiles. (R1. 617, 645.)

Finally, Benjie's "alibi" witnesses, Thomas Green and Melissa Bishop were unable to vouch for him. 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. (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.) She also testified that they were gone for only a few minutes. (R1. 868-69.) Thomas Green, however, testified Melissa and Benjie were gone for several hours. (R1. 864-66.) In direct conflict with this "alibi," Melissa testified that if Thomas stated they were "gone four hours" then "he'd be lying." (R1. 869-70.)

Because the State also did not provide a time of death for Floyd Hill, the Hills could have been killed or attacked much earlier in the day and not around 6:00 p.m., as the State attempted to establish at trial. (R1. 740). If the crime occurred earlier in the day, Benjie Howe and JoAnn Mills would have no alibi. JoAnn was not with Jamie Mills, who testified that he slept until late on June 24th, waking sometime after lunch, and then spent the rest of the day with JoAnn. (R1. 795-96.) And Benjie was not with his two "alibi" witnesses in the first half of the day either: Neither Thomas Green nor Melissa Bishop established what time they first saw Benjie on June 24th. Their testimony was inconsistent regarding Benjie's whereabouts in either the afternoon or the evening, and provided no account for his

activities on the morning of the 24th.

The State primarily tried to establish the timing of the murders through JoAnn's testimony, but her account was also inconsistent. She testified that she, Mr. Mills, and the Hills went outside to look at the yard sale items at the Hills' home "[s]omewhere close to" 6:00 p.m., but then stated, "I'm not sure" about the time. (R1. 740.) She also testified that she did not know how long they were in the Hills' home or how long they were talking. (R1. 696.) JoAnn also testified that it was "dusky dark" when they went outside (R1. 697) but later stated it was not "dark dark," (R1. 739) and that it was raining. (R1. 697). Benjie testified that it was not raining (R1. 877) and Thomas Green testified that it was "sunny" that day (R1. 867).[6]

Testimony from the victims' family similarly raised questions about time. The Hills' granddaughter, Angela Jones, testified that her mother had called her around 6:30 p.m. on June 24, 2004, because her mother was "worried" that she "couldn't get in touch" with her parents. (R1. 388.) After receiving the call from her mother, Ms. Jones drove by her grandparents' house at about 8:05 p.m. (R1. 389.) When no one answered the door when she knocked, she called 911 for a welfare check. (R1. 392.) No evidence was presented as to how long Ms. Jones's

[6] Further, contrary to JoAnn's testimony that the murder of the Hills took place around 6:00 p.m., Benjie testified that Mr. Mills called him around 6:00 p.m., or maybe as early as 5:00 p.m., to say that he had some Lortabs for Benjie to pick up that he had obtained from the Hills. (R1. 879.)

mother had been trying to get in contact with the Hills, just that as of 6:30 p.m., their daughter was concerned enough to call Ms. Jones because "she couldn't get in touch with them." (R1. 388.)

During Mr. Mills' testimony, he stated that after he woke up that afternoon he and Joann were together until they went to his dad's home. (R1. 821.) From the timeline established at trial, the Hills could have been killed earlier that day while Mr. Mills was sleeping and while he would have no knowledge of where JoAnn was, or if she or Benjie had access to his car. During this time, JoAnn admitted to using methamphetamines (R1. 690) and in her June 28, 2004 statement, stated Benjie was over early that morning using methamphetamines with them. (R1. 58.)

During closing arguments, both the prosecution and the defense discussed the forensic evidence, the alleged role of methamphetamine in the crime, the possible role of Benjie Howe in the crime, and the possibility that the evidence in Mr. Mills' car trunk was staged or planted. (See R1. 887–920.) But 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.

Therefore, contrary to the district court's finding, doc. 48, at 16, JoAnn's

testimony was "crucial" to, if not dispositive of, the State's case. Mills, 62 So. 3d at 599. Her testimony was the key piece of evidence that specifically connected Mr. Mills to this crime—otherwise, the evidence equally incriminated JoAnn herself or Benjie Howe. In the face of DNA testing excluding Jamie Mills, and the State's refusal to directly test the DNA against Benjie Howe, Benjie Howe in fact remains the most credible suspect.

Without JoAnn's testimony, the Court is left with evidence that Benjie Howe had equal access to the Mills' unlocked trunk (R1. 422-25, 538, 792, 798-801, 881); that Mr. Mills was excluded as a contributor to the unidentified DNA found on the handles of the murder weapons (R1. 616, 626); that the State never directly compared this DNA to Benjie Howe's DNA profile (R1. 617, 645); that Benjie Howe and JoAnn Mills do not have alibis for critical periods of June 24 (R1. 795-96, 865-70); that the State did not establish *when* the Hills were killed; that JoAnn's testimony against Mr. Mills was obtained only after she was told capital murder charges would be dismissed if she testified against Mr. Mills, doc. 42-2; and most critically, that the State prosecutor intentionally deceived not only defense counsel, but also the jury and the courts (R1. 829-30).

Evidence that JoAnn Mills did in fact receive a plea deal in exchange for her story, *prior* to her testimony, doc. 42-1, that JoAnn Mills affirmatively lied about the existence of such a deal (R1. 685-86, 720-23), and most critically, that the State

prosecutor himself knowingly made false statements to the jury, defense counsel, and the courts about the existence of a deal (R1. 829-30), undoubtedly creates a probability of a different result at trial. Granting a COA on the question of whether Mr. Mills should be permitted to reopen his case would prevent a "grave miscarriage of justice." United States v. Beggerly, 524 U.S. 38, 47 (1998). On the other hand, affirming the district court decision would reward the State's exceptional misconduct—misconduct that has prevented Mr. Mills from ever receiving merits review of this issue—and undermine the integrity of Mr. Mills' conviction and death sentence. Giglio, 405 U.S. at 153 ("deliberate deception of a court and jurors by the presentation of known false evidence is incompatible with 'rudimentary demands of justice.'") (quoting Mooney, 294 U.S. at 112).

Given the centrality of JoAnn's testimony to Mr. Mills' conviction and denial of habeas review, there is a "reasonable likelihood" that this new evidence would affect the judgment of the jury. Agurs, 427 U.S. at 103; Giglio, 405 U.S. at 154 (requiring reversal where "the 'reliability of a given witness may well be determinative of guilt or innocence,' nondisclosure of evidence affecting credibility") (citations omitted).

C. Tony Glenn's Affidavit is Corroborated by Additional Evidence which Justifies Reopening Mr. Mills' Case.

Reasonable jurists could debate whether the district court's finding of no "proof of a *Brady* violation," doc. 48, at 21, was contrary to both the factual record

and controlling precedent. First, reasonable jurists could debate whether the "only 'evidence'" that Mr. Mills offered in support of his claim was Mr. Glenn's "2024 affidavit which references his September 2017 attorney fee declaration." Doc. 48, at 17-18; see also Doc. 48, at 15 ("Mills has produced no documentary evidence of a plea deal prior to Mills' trial. He has merely produced Glenn's affidavit, in which he makes vague references to entries in his fee declaration.").

Attorney Glenn affirmed under penalty of perjury that he and the District Attorney "agreed that if JoAnn testified truthfully, he would not pursue the capital charge and would agree to a plea of murder." Doc. 42-1. The district court cites the affidavits of District Attorney Jack Bostick and Investigator Ted Smith's affidavits, Doc. 44-1, 44-2, to rebut Mr. Glenn's assertion that there was an agreement. See Doc. 48, at 10-11, 15. But in fact, these two affidavits actually corroborate Mr. Glenn's affidavit in a significant way by establishing that a representative from the District Attorney's office, Investigator Smith, met with JoAnn and that he "encouraged [JoAnn] to testify for the State in the case of Jamie Mills." Doc. 44-2; see also Doc. 44-1.

When taken together, the three affidavits establish the following: that Tony Glenn reached an agreement with the District Attorney's office that if JoAnn testified truthfully, she would not be subject to capital charges, doc. 42-1; that District Attorney Bostick pursued a plea deal on JoAnn's behalf with the victims'

family prior to her testimony, doc. 44-1; that while District Attorney Bostick states he did not personally extend an offer to JoAnn, Ted Smith "talked to JoAnn Mills about her testimony," doc. 44-1; that "investigators knew [they] were not allowed to negotiate any sort of deal," which was "strictly the purview of the prosecutors," doc. 44-1; but that nonetheless Ted Smith "encouraged [JoAnn] to testify for the State in the case of Jamie Mills," doc. 44-2; that District Attorney Bostick was aware of this meeting but failed to disclose it, doc. 44-1; and that "Tony Glenn believed it would be in his client's best interest to testify against Jamie Mills," doc. 44-1. Additionally, JoAnn Mills' plea to life *with* parole just days after Mr. Mills' sentencing corroborates Mr. Glenn's affidavit and is evidence of an agreement with the State. Doc. 42-2.

And, to the extent that the district court characterized Mr. Glenn's affidavit as containing "vague references to entries in his fee declaration," doc. 48, at 15,[7] it is certainly debatable whether the court's reading of the affidavit is unreasonable. On its face, Tony Glenn's affidavit is evidence that a plea understanding was reached prior to JoAnn's testimony. This evidence is made all the more credible by the position it places Mr. Glenn in. As the district court points out "if Glenn's affidavit is to be believed, then Glenn sat in court on August 22, 2007, and watched

[7] Mr. Glenn asserts that he had multiple meetings with the District Attorney prior to JoAnn's testimony. He states those meetings are recorded in his attached fee sheet. Doc. 42-1. These references are straightforward and concrete.

both JoAnn and District Attorney Bostick repeatedly perjure themselves, yet said nothing to the Court." Doc. 48, at 21. This emphasizes both the exceptional nature of the situation warranting relief under Rule 60(b)(6) and the reason why Mr. Glenn would not have come forward with this information earlier—it is in fact *incredible* that Mr. Glenn would make these assertions if they were not true.

Moreover, even if this Court were to discount the corroborating value of evidence of multiple meetings held before trial and JoAnn Mills' subsequent plea to a parolable sentence, despite being charged with capital murder at the time of her testimony, it is certainly debatable among jurists of reason as to whether the district court's finding—that Mr. Glenn's affidavit is insufficient to establish a Brady violation for purposes of reopening his case pursuant to Rule 60—conflicts with well-established Eleventh Circuit and U.S. Supreme Court precedent providing that the State may reach an agreement verbally and through a representative *not* authorized to enter into the agreement, and still be required to disclose. Giglio, 405 U.S. at 152, 154-55 (requiring disclosure of inducement offered by assistant DA *without authority* to enter into plea agreement, even when inducement was not communicated to prosecuting attorney and was not in writing); see also Guzman v. Sec'y, Dep't of Corr., 663 F.3d 1336, 1349 (11th Cir. 2011) (requiring disclosure of monetary reward made to State's critical witness by detective, even where detective "could not recall if [this benefit] was disclosed to

the trial prosecutor"); Brown v. Wainwright, 785 F.2d 1457, 1461 (11th Cir. 1986) (requiring disclosure of offer of "favorable consideration" if key witness testified against petitioner).

The district court also relies on several scrivener's errors in Mr. Glenn's fee affidavit to undermine the entire integrity of Mr. Glenn's affirmation. Doc. 48, at 18-20. No one, however, contests that Mr. Glenn was present at Mr. Mills' trial when JoAnn testified on August 22, 2007. See, e.g., Doc. 48, at 3; Doc. 47, at 4. Clearly, Mr. Glenn erroneously listed the dates of JoAnn's testimony at Mr. Mills' trial as 09/11/07 and 09/12/07 instead of 08/21/07 and 08/22/07. Although JoAnn only offered testimony on August 22, 2007 (R1. 685-777), Mr. Glenn and JoAnn were prepared for her to potentially testify the day prior, on August 21. Additionally, the verdict in Mr. Mills' case indisputably took place on 08/23/07 but again, Mr. Glenn's discussion with JoAnn about the verdict was inadvertently listed as taking place on 09/13/07 in his fee affidavit. Scrivener's errors do not destroy a document's credibility, in fact the State often argues that scrivener's errors in important documents, such as indictments, do not affect the document's reliability or purpose. See, e.g., United States v. Wall, 285 F. App'x 675, 684 (11th Cir. 2008) (finding "a scrivener's error in the indictment is not grounds for reversal").

Additionally, given the clear transposition of numbers in Mr. Glenn's

affidavit, all of the plea discussions with the district attorney take place prior to JoAnn's testimony at trial. See Doc. 42-1. The meetings that take place after the verdict are regarding "entry of plea" and "ramifications of plea," as opposed to ongoing negotiations. Doc. 42-1. The district court also emphasizes that "Glenn's fee declaration nowhere states explicitly that District Attorney Bostick proposed this plea offer or that discussions were actually fruitful for Glenn and JoAnn." Doc. 48, at 20. There is no requirement, however, that the District Attorney be the person who offers the agreement or that there be notations about the agreement in writing. Giglio, 405 U.S. at 152, 154-55. Tony Glenn's affidavit is the explicit evidence that an understanding was reached prior to JoAnn's testimony at Mr. Mills' trial. Doc. 42-1. This evidence is corroborated both by the quick dismissal of capital charges against JoAnn after her testimony and the exposure to capital charges JoAnn's testimony gave her. It is again incredible that Tony Glenn would allow JoAnn to testify as she did without at least some informal understanding that she would not be subject to capital charges. The district court's failure to give Tony Glenn's affidavit adequate weight, without a hearing or any serious inquiry, was an abuse of discretion.

In Tharpe v. Sellers, the U.S. Supreme Court vacated 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. 583 U.S. 33, 34

(2018); see also Miller-El, 537 U.S. at 341 (finding denial of COA to be in error where "District Court did not give full consideration to the substantial evidence petitioner put forth" and "[i]nstead, accepted without question the [lower] court's evaluation" of the facts at issue). The Court found that based on the affidavit presented, "reasonable jurists" could disagree as to the prejudice to the defendant. Id. Likewise here, reasonable jurists could certainly find that Tony Glenn's affidavit establishes the existence of a plea deal, even in light of the State's affidavits, and that Mr. Mills was prejudiced by this. The district court's wholesale dismissal of the affidavit was in error. See Miller-El, 537 U.S. at 348 ("The COA inquiry asks only if the District Court's decision was debatable.").

D. Mr. Mills' Motion Is Timely.

Rule 60 requires that the Plaintiff bring a Rule 60(b)(6) motion within a "reasonable time." Liljeberg, 486 U.S. at 863, 869 (finding motion brought in reasonable time where "the entire delay is attributable to Judge Collins' inexcusable failure to disqualify himself"). The district court found that Mr. Mills did not bring this motion within a "reasonable time" because he could have acquired Tony Glenn's affidavit earlier. Doc. 48, at 21-22. In making this finding, the district court 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 the 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); see also Moore v. Sec'y, Fla. Dep't of Corr., 762 F. App'x 610, 623 (11th Cir. 2019) (finding abuse of discretion in denying Rule 60(b)(6) motion where district court relied on an incorrect application of case law).

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, the district 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 the district 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 the district 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 district court found that Mr. Mills had a duty to make Mr. Glenn disclose the State's misconduct at an earlier time—to essentially hold the State to its prosecutorial oath—and that any delay must be held against Mr. Mills. (Doc. 48, at 22 ("Mills' counsel never spoke to him about Mills' case or JoAnn's testimony until February 23, 2024, nearly a month after the State moved for Mills' execution to be set.").) Mr. Mills, however, is definitively not required to "scavenge" for misconduct in the face of

representations from the State that "all such material has been disclosed." Banks, 540 U.S. at 695-96 ("A rule thus declaring 'prosecutor may hide, defendant must seek,' is not tenable in a system constitutionally bound to accord defendants due process."). Mr. Mills has continually attempted to uncover the existence of JoAnn's plea deal but, much like the district court, relied on the State's continued denials that "any such deal existed." (Doc. 44, at 24.)

In Banks, the State argued (as the State does here) that Banks failed to establish good cause, or 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). The Supreme 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.

The Eleventh Circuit has followed this precedent in Rule 60 proceedings, finding the fact that the petitioner eventually gained access to withheld evidence 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 State's argument—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.

## III. Reasonable Jurists Could Debate Whether the District Court Erred in Finding Mr. Mills Is Not Entitled to Relief Pursuant to Rule 60(b)(2).

Rule 60(b)(2) permits relief from a final judgment, order, or proceeding based on "newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b) . . . ." Fed . R. Civ. P. 60(b)(2). To be entitled to relief under Rule 60(b)(2), the movant must demonstrate the new evidence was discovered after the judgment was entered and that he exercised due diligence in discovering that evidence, that the evidence is material and not merely cumulative or impeaching, and that the evidence was

likely to produce a different result. In re Glob. Energies, LLC, 763 F.3d 1341, 1347 (11th Cir. 2014).

The district court applied the wrong legal standard in concluding that Mr. Mills "did not exercise reasonable diligence in discovering his new evidence." Doc. 48, at 14. Mr. Mills was not required to "scavenge for hints of undisclosed Brady material when the prosecution represents that all such material has been disclosed." Banks, 540 U.S. at 695. The fact that Mr. Mills eventually gained access to withheld evidence through other means, did not "diminish [his] due diligence." In re Glob. Energies, LLC, 763 F.3d at 1349.

Accordingly, the district court's conclusion—that Mr. Mills has failed to exercise reasonable diligence for failing to uncover evidence in the face of definitive assurances from the State that no such evidence exists—is an abuse of discretion. Mr. Mills exercised due diligence in discovering this evidence. 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, the district court and the appellate courts that there was no plea offer in exchange for JoAnn's testimony. Because the State denied the existence of this evidence under oath, and continued to rely on this denial throughout the appeals process, this evidence was not known to Mr. Mills or his counsel prior to February 23, 2024, when Tony Glenn revealed to undersigned counsel that he had a plea

agreement in place when JoAnn Mills testified against Jamie Mills. In re Glob. Energies, LLC, 763 F.3d at 1348 (plaintiff entitled to relief from judgment on the basis of discovery of new evidence that involuntary bankruptcy filing was done in bad faith); 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).

The Eleventh Circuit has addressed this scenario in the Rule 60(b)(2) context, in which "a sworn officer of the court" obstructed access to evidence. In re Glob. Energies, LLC, 763 F.3d at 1348. There, the Court found the fact that the petitioner eventually gained access to the evidence through other means, did not "diminish [his] due diligence." Id. at 1349 ("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 Banks v. Dretke, 540 U.S. 668, 693 (2004) ("[B]ecause the State persisted in hiding Farr's informant status and misleadingly represented that it had complied in full with its Brady disclosure obligations, Banks had cause for failing to investigate, in state postconviction proceedings, Farr's connections to

Deputy Sheriff Huff.").

The district court also found that Mr. Mills' claim for relief under Rule 60(b)(2) is untimely because it was not brought within a year. Doc. 48, at 14. However, because Mr. Mills' alleges facts that establish fraud on the court, Mr. Mills' claim was not limited by the one year rule. Rule 60 specifically provides that the "rule does not limit" a federal court's power to "entertain an independent action to relieve a party from a judgment, order, or proceeding" or to "set aside a judgment for fraud on the court." Fed. R. Civ. P. 60(d)(1), (3); see also Galatolo v. United States, 394 F. App'x 670, 671 (11th Cir. 2010) ("no limitations period diminishes a court's power to: (1) entertain an independent action to relieve a party from a judgment, order, or proceeding; [or] ... (3) set aside a judgment for fraud on the court.") (internal citations and quotations omitted).

## IV. Reasonable Jurists Could Debate Whether the District Court Erred in Finding Mr. Mills Claim to Relief under Rule 60(b)(3) Is Untimely and Without Merit.

The District Attorney made false statements under oath and on the record in this case. The State did not correct these false statements in federal habeas corpus proceedings, as it is obligated to do, Napue v. Illinois, 360 U.S. 264, 269 (1959), and instead urged the district court to rely on these false statements—and the district court did in fact rely on these statements—in denying Mr. Mills process and review of his claim. Mr. Mills asked for, and the district court denied, discovery, an

evidentiary hearing, habeas corpus relief, and a certificate of appealability. Concealing evidence about the plea deal that was central to Mr. Mills' habeas corpus petition is the kind of "fraud" contemplated by Rule 60 because it improperly influenced the district court's decisions related to this issue and prevented the court from performing an impartial review of the claim in this case. Relief is warranted pursuant to Rule 60 because to allow the State to proceed with an execution predicated on a false representation about a critical question of fact for the jury and the district court—JoAnn's reliability—would be a miscarriage of justice.

Rule 60(b)(3) protects against this miscarriage of justice by permitting a court to set aside a judgment due to "fraud . . . by an opposing party." The district court applied the wrong legal standard in finding that Mr. Mills' claim is untimely. The Court applied the one year period of Rule 60(c)(1) to find that Mr. Mills' claim is untimely. Doc. 48, at 17. However, because Mr. Mills alleges facts that establish fraud on the court, Rule 60(c)(1) does not apply to bar review of his claim. In cases of fraud on the court, Rule 60 "does not limit a court's power to" either "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 commentary to Rule 60 notes that Rule 60(d) reflects the inherent power to vacate a judgment obtained by fraud on the court that the Supreme Court espoused in

Hazel-Atlas. Fed. R. Civ. P. 60 advisory committee's note, 1946 Amendment (referencing Hazel-Atlas Glass Co. v. Hartford-Empire Co., 322 U.S. 238 (1944)) ("the rule expressly does not limit the power of the court, when fraud has been perpetrated upon it, to give relief under the saving clause").

Relief is warranted pursuant to Rule 60(b)(3) because new evidence establishes that the District Attorney committed egregious misconduct by lying to the court, the jury, and defense counsel, about the existence of a plea deal. The State continued to rely on this false evidence in arguing that Mr. Mills is due no process on his claims in federal court. The State's representation in its response to Mr. Mills' § 2254 petition that no evidence of a deal exists; failure to correct the false representations on the record; and use of those false representations in asking the district court to find that Mr. Mills is entitled to no process on his claim, are evidence of fraudulent deception. Waddell v. Hendry Cnty. Sheriff's Off., 329 F.3d 1300, 1309 (11th Cir. 2003) (citing Frederick v. Kirby Tankships, Inc., 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").

The State, through District Attorney Bostick, made knowingly false statements to the trial court, the jury, and defense counsel, about a critical question of fact at trial. The State has not corrected these deceptive statements and has

continued to repeat them in the district court. Fraud has been committed on the district court by the State's knowing endorsement of the District Attorney's intentional deception. Zakrzewski, 490 F.3d at 1267 (quoting Travelers Indem. Co. v. Gore, 761 F.2d 1549, 1551 (11th Cir. 1985)) ("'Fraud upon the court' . . . embrace[s] . . . fraud perpetrated by officers of the court so that the judicial machinery cannot perform in the usual manner its impartial task of adjudging cases that are presented for adjudication.'").

The district court also found that Mr. Mills' claim for relief under Rule 60(b)(3) is untimely because it was not brought "within a year." However, because Mr. Mills' alleges facts that establish fraud on the court, Mr. Mills' claim was not limited by the one year rule. Rule 60 specifically provides that the "rule does not limit" a federal court's power to "entertain an independent action to relieve a party from a judgment, order, or proceeding" or to "set aside a judgment for fraud on the court." Fed. R. Civ. P. 60(d)(1), (3); see also Galatolo v. United States, 394 F. App'x 670, 671 (11th Cir. 2010) ("no limitations period diminishes a court's power to: (1) entertain an independent action to relieve a party from a judgment, order, or proceeding; [or] ... (3) set aside a judgment for fraud on the court.") (internal citations and quotations omitted).

The district court's conclusions—that Mr. Mills is not entitled to relief under 60(b)(3) and that his claim is untimely—constitute an abuse of discretion. Rule

60(d) relief must be available in a case such as Mr. Mills in which, not only an attorney is implicated, but a State prosecutor is responsible. Berber v. Wells Fargo, NA, No. 20-13222, 2021 WL 3661204, at *3 (11th Cir. Aug. 18, 2021). The fraud "denied Petitioner of his right to due process and his right to full and fair access to [the district court], and it subsequently led to the denial of Petitioner's habeas petition[,]" as well as denial of his ability to obtain discovery or an evidentiary hearing. Zakrzewski, 490 F.3d at 1266-67 (remanding to district court for proceedings to determine if the petitioner had met the requirements for fraud on the court).

## V. CONCLUSION.

For these reasons, Petitioner Jamie Mills respectfully requests from this Court a certificate of appealability for this critical issue, discussed herein.

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume litigation of Fed R. App. P. 32(a)(7)(B), made applicable by Eleventh Circuit Rule 22-2, because it contains 12,723 words, excluding parts of the brief exempted by Fed. R. App. P. 32(f). This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using 14-point Times New Roman font.

/s/ Charlotte R. Morrison
CHARLOTTE R. MORRISON

**CERTIFICATE OF SERVICE**

I hereby certify that on May 23, 2024, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to: **Lauren Simpson**.

/s/ Charlotte R. Morrison
CHARLOTTE R. MORRISON